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SUMMARIES

Criminal Appeals

Reversal of prior conviction does not moot habeas claims when petitioner remains in custody facing retrial (Fisher, J.)

**Dominguez v. Kernan**

9th Cir.; October 23, 2018; 18-55209

The court of appeals vacated a district court judgment dismissing a habeas petition and remanded. The court held that so long as petitioner’s state prosecution remains pending, his double jeopardy claim is not moot.

Florencio Dominguez was charged with murder. His trial ended in a hung jury. The trial court dismissed the case under Cal. Penal Code §1385. The state filed a new complaint, charging Dominguez with murder and conspiracy to commit murder. Dominguez filed a demurrer, arguing the second prosecution violated his rights under the Double Jeopardy Clause and California law. The trial court overruled the demurrer, and Dominguez was tried and convicted. Dominguez then filed a federal habeas petition under 28 U.S.C. §2254, again asserting a claim of double jeopardy. While that petition was pending, the state trial court vacated Dominguez’ convictions under *Brady v. Maryland*, 373 U.S. 83 (1963). The state elected to retry him on the charge of conspiracy to commit murder. Dominguez was placed in pretrial custody, where he remains.

Citing the state court’s decision vacating the earlier convictions, the district court dismissed Dominguez’ federal habeas petition as moot.

The court of appeals vacated the judgment of dismissal and remanded, holding that Dominguez’ petition is not moot. It continues to present a live controversy because he remains in custody, continues to claim he is in custody unconstitutionally, and continues to present precisely the same legal claim that he presented when his petition was filed—that the state’s second prosecution of him, which remains ongoing, violates his federal constitutional right not to be twice placed in jeopardy for the same offense. Because he no longer stands convicted of any crime, however, Dominguez is no longer required to proceed under §2254. Section 2254 limits the general grant of habeas authority under 28 U.S.C. §2241 by placing additional obstacles in the path of a person seeking habeas relief while “in custody pursuant to the judgment of a State court.” Where a petitioner is not challenging custody attributable to a state court judgment, his custody does not bear a presumption of validity. Section 2254 therefore does not apply, and Dominguez is free to seek habeas relief under §2241(a) and (c)(3) instead. Further, he is not required to dismiss his pending petition and file a new petition under §2241. Just as a court may convert a §2241 petition to a §2254 petition when a pretrial detainee is convicted while a petition is pending, the district court here has the authority to convert Dominguez’ §2254 petition into a §2241 petition based on the fact that his convictions were vacated while his petition was pending and he has become a pretrial detainee.

Criminal Law

Expert testimony not required to establish significance of field sobriety test results (Levy, Acting P.J.)

**People v. Randolph**

C.A. 5th; October 23, 2018; F075085

The Fifth Appellate District reversed an order of dismissal and remanded. The court held that the trial court erred in ruling that the expert testimony was required to establish the significance of defendant’s performance on a horizontal gaze nystagmus (HGN) test administered by officers in the field.

In 2014, Eddie Randolph was stopped by two California Highway Patrol officers for suspected driving under the influence of alcohol (DUI). The officers performed field sobriety tests, including an HGN test. When Randolph failed to pass the tests, he was arrested. He was charged with one count of misdemeanor DUI in violation of Veh. Code §23152(a). It was further alleged Randolph had refused an officer’s request to submit to chemical testing, in violation of §23577. The case was assigned for trial. Before a jury was empanelled, the trial court expressed concern that the testimony of the arresting officers, without supporting expert testimony, would be insufficient to prove the prosecution’s case. The court dismissed the case under Penal Code §1385.

The People appealed, arguing the trial court abused its discretion in dismissing the case.

The court of appeal reversed, holding that the trial court erred in dismissing the case. Under *People v. Joehnk* (1995) 35 Cal.App.4th 1488, an officer may testify to the significance of a defendant’s performance on an HGN test without separate expert testimony. In rejecting the officers’ proposed testimony, the trial court here erroneously relied on *People v. Williams* (1992) 3 Cal.App.4th 1326, which was decided prior to Joehnk and is no longer good law. The court reversed the order of dismissal and remanded for further proceedings.

Criminal Law

2015 warrant allowing seizure of IP addresses outside magistrate judge’s district exceeded judge’s authority (O’Scannlain, J.)

**United States v. Henderson**

2015 warrant allowing seizure of IP addresses outside magistrate judge’s district exceeded judge’s authority (O’Scannlain, J.)
Family Law

Record supported denial of relative’s request for placement of dependent minors (Huffman, J.)
In this child pornography case, we must decide whether evidence that was obtained pursuant to a warrant that authorized a search of computers located outside the issuing magistrate judge’s district must be suppressed.

I

A

In 2014, the Federal Bureau of Investigation (“FBI”) began investigating the internet website upf45jv3bziuctml.on-ion, “Playpen,” which was used to send and to receive child pornography. Playpen operated on an anonymous network known as “The Onion Router” or “Tor.” To use Tor, the user must download and install the network software on his computer. Tor then allows the user to visit any website without revealing the IP address, geographic location, or other identifying information of the user’s computer by using a network of relay computers.

Tor also allows users to access “hidden services,” which are websites that are accessible only through the Tor network and are not accessible publicly. A hidden-service website hosted on the Tor network does not reveal its location; a Tor user can access the hidden-service website without knowing the location of its server and without its knowing the user’s location.

Playpen operated as a hidden-service website and required users to log in with a username and password to access its discussion forums, private messaging services, and images of child pornography. After determining that Playpen was hosted on servers located in Lenoir, North Carolina, the FBI obtained and executed a valid search warrant in the Western District of North Carolina in January 2015, and seized the Playpen servers. The FBI removed the servers to its facility in Newington, Virginia. Because Tor conceals its users’ locations and IP addresses, additional investigation was required to identify Playpen users. The FBI then operated the Playpen website from a government-controlled server in Newington in the Eastern District of Virginia, from which it obtained a valid court order authorizing it to intercept electronic communications sent and received by the site’s administrators and users.

The FBI later obtained a warrant from a United States magistrate judge in the Eastern District of Virginia on February 20, 2015, authorizing searches for thirty days using what is known as a Network Investigative Technique (“NIT”).

1. An IP address is a “unique numerical address” assigned to every computer and can serve as its identifying characteristic. United States v. Forrester, 512 F.3d 500, 510 n.5 (9th Cir. 2008) (citation omitted).
Specifically, such “NIT warrant” authorized the search of all “activating” computers—that is, those of any website visitor, wherever located, who logged into Playpen with a username and password. The NIT technology is computer code consisting of a set of instructions. When a person logged into the Playpen site, the NIT caused instructions to be sent to his computer, which in turn caused the computer to respond to the government-controlled server with seven pieces of identifying information, including its IP address. The NIT mechanism allowed the FBI, while controlling the website from within the Eastern District of Virginia, to discover identifying information about activating computers, even though Playpen operated on the Tor network.

On March 1, 2015, a person logged into Playpen under the username “askjeff.” The NIT instructions were sent to askjeff’s computer, which revealed its IP address through its response to the government-controlled server. The computer response also revealed that askjeff had been actively logged into Playpen for more than thirty-two hours since September 2014 and had accessed child pornography. The FBI traced the IP address to an internet service provider (“ISP”), Comcast Corporation, which was served with an administrative subpoena requesting information about the user assigned to the IP address. The IP address turned out to be associated with a computer at the San Mateo, California, home of Bryan Henderson’s grandmother, with whom Henderson lived. A local federal magistrate judge in the Northern District of California issued a warrant to search the home, where the FBI then discovered thousands of images and hundreds of videos depicting child pornography on Henderson’s computer and hard drives.

Henderson was indicted in the Northern District of California on charges of receipt and possession of child pornography, in violation of 18 U.S.C. § 2252(a)(2), (a)(4)(B), and (b)(2).

Henderson moved to suppress all evidence, including the evidence seized at his grandmother’s home in California, obtained pursuant to the “NIT warrant” issued by the Eastern District of Virginia. The district court denied Henderson’s motion to suppress.

II

Henderson argues that the motion to suppress should have been granted because the NIT warrant was issued in violation of Federal Rule of Criminal Procedure 41(b), which authorizes magistrate judges to issue warrants subject to certain requirements. To prevail on his argument, Henderson must show both that the NIT warrant did violate Rule 41(b) and that suppression is the appropriate remedy for such violation.

A

Henderson urges that no provision within Rule 41(b) authorizes a magistrate judge to issue the NIT warrant to search computers located outside of her district.

In general, Rule 41(b) permits “a magistrate judge with authority in the district … to issue a warrant to search for and seize a person or property located within the district.” Fed. R. Crim. P. 41(b)(1) (emphasis added). Judge Orrick concluded that the NIT warrant indeed violated Rule 41(b), because it was obtained in the Eastern District of Virginia, yet it authorized a search of computers located outside of that district. The government does not dispute that the NIT warrant exceeded the general territorial scope identified in Rule 41(b)(1) by authorizing a search of an “activating computer” in California.

However, the government counters that the NIT warrant was nonetheless authorized under Rule 41(b)(4)’s specific provision for tracking devices, which permits “a magistrate judge with authority in the district … to issue a warrant to install within the district a tracking device … to track the movement of a person or property located within the district, outside the district, or both.” Fed. R. Crim. P. 41(b)(4). Rule 41 defines a “tracking device” as “an electronic or mechanical device which permits the tracking of the movement of a person or object.” Fed. R. Crim. P. 41(a)(2)(E); 18 U.S.C. § 3117(b).

The government contends that Henderson’s computer made a “virtual trip” to the government server in the Eastern District of Virginia, which resulted in the seizure of the Playpen servers, or the warrant issued in the Northern District of California, which led to the search of Henderson’s home and computer, is invalid. Nor does he challenge the validity of the court order authorizing the FBI to intercept electronic communications through the Playpen website.

B

Henderson then pled guilty to receipt of child pornography, but expressly reserved the right to appeal the district court’s denial of his motion to suppress. Henderson was sentenced to sixty months in prison and a ten-year term of supervised release.

Henderson timely appealed, challenging the denial of his motion to suppress.

2. The warrant stated: “This warrant authorizes the use of a network investigative technique (“NIT”) to be deployed on the computer server … operating the Tor network child pornography website referred to herein as the TARGET WEBSITE, … which will be located at a government facility in the Eastern District of Virginia.” The warrant further provided that, through the NIT, the government may obtain information, including IP address, from all “activating computers”— “those of any user or administrator who logs into the TARGET WEBSITE by entering a username and password.”

3. Henderson challenges only the warrant issued by the Eastern District of Virginia on February 20, 2015, authorizing the use of the NIT. He does not argue that the warrant issued in the Western District of North Carolina, which resulted in the seizure of the Playpen servers, or the warrant issued in the Northern District of California, which led to the search of Henderson’s home and computer, is invalid. Nor does the government concede that a “search” occurred when the NIT was deployed to users’ computers and returned their identifying information. As two of our sister circuits have before us, we agree. See United States v. Werdene, 883 F.3d 204, 213 n.7 (3d Cir. 2018) (“The District Court wrongly concluded that … Werdene had no reasonable expectation of privacy in his IP address.”); United States v. Horton, 863 F.3d 1041, 1047 (8th Cir. 2017) (noting that a defendant “has a reasonable expectation of privacy in the contents of his personal computer” and concluding that “the execution of the NIT in this case required a warrant”).
District of Virginia when he logged into the Playpen website. According to the government, his computer then “brought” the NIT instructions, along with the usual Playpen website content, back with it from the government server to his computer’s physical location in California. The NIT instructions then caused identifying location information to be transmitted back to the government, just like a beeper or other tracking device would.

We are not persuaded by the government’s assertions. The NIT instructions did not actually “track the movement of a person or property,” as required by the tracking-device provision. Fed. R. Crim. P. 41(b)(4). Rather, the NIT mechanism was simply a set of computer instructions that forced activating computers, regardless of their location, to send certain information to the government-controlled server in Virginia. Users’ computers did not physically travel to Virginia, and the information they relayed did not reveal the physical location of any person or property, unlike a beeper attached to a vehicle. The “seized information (mainly the IP address) assisted the FBI in identifying a user, [but] it provided no information as to the computer’s or user’s precise and contemporaneous physical location.” United States v. Werdene, 883 F.3d 204, 212 (3d Cir. 2018). Indeed, the only two federal courts of appeals to consider the question have rejected the government’s very argument. As the Eighth Circuit has recognized, “the plain language of Rule 41 and the statutory definition of ‘tracking device’ do not … support so broad a reading as to encompass the mechanism of the NIT used in this case.” United States v. Horton, 863 F.3d 1041, 1048 (8th Cir. 2017) (internal quotation marks omitted); accord. Werdene, 883 F.3d at 211–12.

Interestingly, Rule 41(b) was amended on December 1, 2016—after the issuance of the NIT warrant here—to authorize magistrate judges to issue warrants to search computers located outside their district if “the district where the media or information is located has been concealed through technological means.” Fed. R. Crim. P. 41(b)(6). As our sister circuits have recognized, such amendment plainly seems to “authorize[] warrants such as the NIT warrant here.” Werdene, 883 F.3d at 206 n.2; see also Horton, 863 F.3d at 1047 n.2 (noting that Rule “41(b)(6) was added to provide an additional exception to the magistrate’s jurisdictional limitation by allowing warrants for programs like the NIT”). The fact that Rule 41 was amended to authorize specifically these sorts of warrants further supports the notion that Rule 41(b) did not previously do so.

In sum, the NIT mechanism is not a “tracking device” within the meaning of Federal Rule of Criminal Procedure 41(b)(4), and the government does not argue that any other provision in Rule 41(b) applies. We are satisfied that the NIT warrant violated Rule 41(b) by authorizing a search outside of the issuing magistrate judge’s territorial authority.

But does a warrant issued in violation of Rule 41(b) compel suppression of evidence? Not necessarily.

Only certain Rule 41 violations justify suppression. The suppression of evidence is “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than as a personal constitutional right of the party aggrieved.” United States v. McLamb, 880 F.3d 685, 690 (4th Cir. 2018) (quoting United States v. Leon, 468 U.S. 897, 906 (1984)). To determine whether suppression is justified, we must first decide whether the Rule 41(b) violation is a “fundamental error[]” or a “mere technical error[].” United States v. Negrete-Gonzales, 966 F.2d 1277, 1283 (9th Cir. 1992). Fundamental errors are those that “result in … constitutional violations,” and they generally do require suppression, “unless the officers can show objective good faith reliance as required by” the good faith exception to the exclusionary rule under the Fourth Amendment. Id. By contrast, non-fundamental, merely technical errors require suppression only if the defendant can show either that (1) he was prejudiced by the error, or (2) there is evidence of “deliberate disregard of the rule.” Id. We need not consider these additional factors if we determine that the Rule 41 violation was indeed fundamental.

Henderson contends that the violation here was fundamental. Specifically, he argues that the NIT warrant violated the Fourth Amendment because, by issuing the warrant in violation of Rule 41(b), the magistrate judge acted beyond her constitutional authority. The government disagrees, characterizing Rule 41(b) as merely a technical “venue provision” that does not implicate the scope of a magistrate judge’s underlying authority or the Fourth Amendment.

We agree with Henderson that Rule 41(b) is not merely a technical venue rule, but rather is essential to the magistrate judge’s authority to act in this case. Federal magistrate judges “are creatures of statute.” NLRB v. A-Plus Roofing, Inc., 39 F.3d 1410, 1415 (9th Cir. 1994). The Federal Magistrates Act, 28 U.S.C. § 636, defines the scope of a magistrate judge’s authority, imposing jurisdictional limitations on the power of magistrate judges that cannot be augmented by the courts. See A-Plus Roofing, Inc., 39 F.3d at 1415; cf. United States v. Krueger, 809 F.3d 1109, 1122 (10th Cir. 2015) (Gorsuch, J., concurring) (“Section 636(a’s) territorial restrictions are jurisdictional limitations on the power of magistrate judges.”).

Relevant here, § 636 authorizes magistrate judges to exercise “all powers and duties conferred or imposed” by the Federal Rules of Criminal Procedure. 28 U.S.C. § 636(a)(1). In turn, Rule 41(b) has been asserted as the sole source of the magistrate judge’s purported authority to issue the NIT warrant in this case. But, as we have explained, in issuing such warrant, the magistrate judge in fact exceeded the bounds of the authority conferred on magistrate judges under Rule
Thus, such rule plainly does not in fact confer on the magistrate judge the authority to issue a warrant like the NIT warrant. Without any other source of law that purports to authorize the action of the magistrate judge here, the magistrate judge therefore exceeded the scope of her authority and her jurisdiction as defined under § 636.5

2

Having concluded that the magistrate judge issued a warrant in excess of her jurisdictional authority to do so, we next must determine whether conducting a search pursuant to such a warrant violates the Fourth Amendment. See Negrete-

Gonzales, 966 F.2d at 1283 (noting that fundamental Rule 41 violations are those that result in constitutional violations).

The Fourth Amendment to the U.S. Constitution guarantees:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. This guarantee “must provide at a minimum the degree of protection it afforded when it was adopted.” United States v. Jones, 565 U.S. 400, 411 (2012); see also Atwater v. City of Lago Vista, 532 U.S. 318, 326 (2001) (“In reading the Amendment, we are guided by the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.”) (internal quotation marks omitted)). Thus, we must look to the original public meaning of the Fourth Amendment.

At the time of the framing, it was understood that “[w]hen a warrant is received by [an] officer, he is bound to execute it,” only “so far as the jurisdiction of the magistrate and himself extends.” 4 William Blackstone, Commentaries *291 (cited by Krueger, 809 F.3d at 1123 n.4). And, “[a]cts done beyond, or without jurisdiction,” according to Blackstone, “are utter nullities.” Samuel Warren, Blackstone’s Commentaries, Systematically Abridged and Adapted 542 (2d. ed. 1856). Sir Matthew Hale likewise wrote that a warrant is valid only “within the jurisdiction of the justice granting or backing the same.” 2 Matthew Hale, Historia Placitorum Coronae 110 n.6 (1736). Thomas Cooley later recognized the same principle in his canonical treatise on American constitutional law: in order for a reasonable search or seizure to be made, “a warrant must issue; and this implies … a court or magistrate empowered by the law to grant it.” Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 210 (1880) (cited by Krueger, 809 F.3d at 1124).

Contemporary courts have agreed. In United States v. Krueger, for example, the Tenth Circuit considered a territorially deficient warrant issued by a magistrate judge in the District of Kansas that authorized a search of a home and car in Oklahoma. 809 F.3d at 1111. The court held that the warrant violated Rule 41, but left open the question of whether such violation also contravened the Fourth Amendment. Id. at 1114–15. Then-Judge Gorsuch concurred separately and argued that such a warrant did violate the Fourth Amendment. He wrote, “When interpreting the Fourth Amendment we start by looking to its original public meaning… . The principle animating the common law at the time of the Fourth Amendment’s framing was clear … [and] [m]ore recent precedent follows this long historical tradition.” Id. at 1123–24 (Gorsuch, J., concurring). After examining both the historical tradition and recent precedent, then-Judge Gorsuch concluded:

[Looking to the common law at the time of the framing it becomes quickly obvious that a warrant issued for a search or seizure beyond the territorial jurisdiction of a magistrate’s powers under positive law was treated as no warrant at all—as ultra vires and void ab initio …—as null and void without regard to potential questions of ‘harmlessness.’

809 F.3d at 1123. Therefore, “a warrant may travel only so far as the power of its issuing official.” Id. at 1124.

Two other circuits have considered this question in relation to the same Eastern District of Virginia NIT warrant at issue here, and each adopted the approach of then-Judge Gorsuch in Krueger. Both circuits concluded that the Rule 41 violation is a fundamental, constitutional error.6 In Werdene,
the Third Circuit determined that the NIT warrant was “void ab initio because it violated § 636(a)’s jurisdictional limitations and was not authorized by any positive law.” 883 F.3d at 214. Citing then-Judge Gorsuch’s observation in Krueger that, at the time of the framing, such a warrant “was treated as no warrant at all,” the court held that the violation was therefore “of constitutional magnitude.” Id. (citing Krueger, 809 F.3d at 1123 (Gorsuch, J., concurring)). Similarly, in Horton, the Eighth Circuit agreed that the NIT warrant was “invalid at its inception and therefore the constitutional equivalent of a warrantless search.” Horton, 863 F.3d at 1049. Therefore, the Eighth Circuit concluded, “the NIT warrant was void ab initio, rising to the level of a constitutional infirmity.” Id.

The weight of authority is clear: a warrant purportedly authorizing a search beyond the jurisdiction of the issuing magistrate judge is void under the Fourth Amendment. We agree with our sister circuits’ analysis and conclude that the Rule 41 violation was a fundamental, constitutional error.

C

Even though the Rule 41 violation was a fundamental, constitutional error, suppression of evidence obtained in violation of the Fourth Amendment is still not appropriate if, as it asserts, the government acted in good faith. See Negrete-Gonzales, 966 F.2d at 1283.

Indeed, whether to suppress evidence under the exclusionary rule is a separate question from whether a Fourth Amendment violation has occurred. See Herring v. United States, 555 U.S. 135, 140 (2009); Leon, 468 U.S. at 906. The exclusionary rule applies only when “police conduct is sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” Herring, 555 U.S. at 144. The exclusionary rule does not apply “when law enforcement officers have acted in objective good faith or their transgressions have been minor,” because “the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.” Leon, 468 U.S. at 908. Of crucial importance here, suppression of evidence is not appropriate “if the police acted ‘in objectively reasonable reliance’ on the subsequently invalidated search warrant.” Herring, 555 U.S. at 142 (quoting Leon, 468 U.S. at 922). The reasonableness of the executing officers’ reliance on the warrant and whether there is “appreciable deterrence” sufficient to justify the costs of suppression here must be taken into account. Herring, 555 U.S. at 141 (quoting Leon, 468 U.S. at 909).

I

Henderson contends that the good faith exception to the exclusionary rule should not apply here.

First, Henderson urges that the good faith exception does not apply to warrantless searches, and therefore does not apply to searches pursuant to warrants that are void ab initio because they are effectively warrantless. We find no support for such a sweeping assertion.

We have held that the good faith exception “may apply to both technical and fundamental errors” under Rule 41. Negrete-Gonzales, 966 F.2d at 1283. And “our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all the circumstances.” Herring, 555 U.S. at 145 (internal quotation marks omitted).

In focusing on the notion of a warrantless search, Henderson asks the wrong question. Application of the good faith exception does not depend on the existence of a warrant, but on the executing officers’ objectively reasonable belief that there was a valid warrant. “The exclusionary rule was crafted to curb police rather than judicial misconduct.” Herring, 555 U.S. at 142. For example, the Supreme Court has applied the good faith exception where a clerk mistakenly told an officer that an arrest warrant that had been recalled was still outstanding, id. at 137–38, and where officers have relied on a computer entry that mistakenly showed that an arrest warrant existed, Arizona v. Evans, 514 U.S. 1, 15–16 (1995). Contrary to Henderson’s argument, the exception therefore may preclude suppression of evidence obtained during searches executed even when no warrant in fact existed—if the officers’ reliance on the supposed warrants was objectively reasonable.

If the exception may apply in cases where an officer relied on a valid warrant which had been revoked or a warrant which never existed, may the exception apply where the officer relied on a warrant subsequently recognized as void due to the issuing judge’s jurisdictional violation? As the Third Circuit has explained, “the good faith exception applies to warrants that are void ab initio because ‘the issuing magistrate’s lack of authority has no impact on police misconduct.’” Werdene, 883 F.3d at 216–17 (quoting United States v. Master, 614 F.3d 236, 242 (6th Cir. 2010)). The Eighth Circuit likewise holds that “relevant Supreme Court precedent leads … to a similar conclusion: that the Leon exception can apply to warrants void ab initio like this one.” Horton, 863 F.3d at 1050. The exclusionary rule applies only when suppression of the evidence can meaningfully deter sufficiently deliberate police conduct, Herring, 555 U.S. at 144, and “[p]enalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.” Horton, 863 F.3d at 1050 (quoting Leon, 468 U.S. at 921) (alteration in original). Therefore, application of the good faith exception is permitted where a warrant is void because of a magistrate judge’s jurisdictional violation, so long as the executing officers had an objectively reasonable belief that the warrant was valid. We are unconvinced by Henderson’s argument otherwise, and we are satisfied that

McClellan, 880 F.3d 685 (4th Cir. 2018); United States v. Levin, 874 F.3d 316 (1st Cir. 2017); United States v. Workman, 863 F.3d 1313 (10th Cir. 2017).
the good faith exception may apply to warrants that are void
ab initio.

Henderson next argues that, even if the exception does
apply to warrants that are void ab initio, it should not apply
here because the government acted in bad faith. Further, Hen-
derson argues that suppression of the evidence would deter
similarly improper conduct in the future.

Prior to the Rule 41(b)(6) addition, the Federal Rules of
Criminal Procedure did not directly address a NIT-type of
warrant. At the time the government applied for the NIT war-
rant, “the legality of [the] investigative technique [was] un-
clear.” McLamb, 880 F.3d at 691. In fact, although every cir-
cuit court that has addressed the question has found that the
NIT warrant violated Rule 41, “a number of district courts
have ruled [it] to be facially valid.” Horton, 863 F.3d at 1052.
Henderson’s argument that the government acted in bad faith
in seeking the warrant is not compelling.

Furthermore, there is no evidence that the officers execut-
ing the NIT warrant acted in bad faith. “To the extent that
a mistake was made in issuing the warrant, it was made by
the magistrate judge, not by the executing officers.” United
States v. Levin, 874 F.3d 316, 323 (1st Cir. 2017). Hender-
sen correctly notes that officers’ reliance on a warrant is not
objectively reasonable when the warrant is “so facially defi-
cient—i.e., in failing to particularize the place to be searched
or the things to be seized—that the executing officers cannot
reasonably presume it to be valid.” Leon, 468 U.S. at 923;
accord. United States v. Luong, 470 F.3d 898, 902 (9th Cir.
2006). However, the NIT warrant sufficiently described the
“place” to be searched—any “activating computer”—and
specified the seven pieces of identifying information—in-
cluding the computer’s IP address—that would be seized,
and presented no other facial deficiency that rendered the
officers’ reliance unreasonable. Again, one is left to wonder
how an executing agent ought to have known that the NIT
warrant was void when several district courts have found
the very same warrant to be valid. We agree with our sister
circuits that have concluded that “[t]he warrant was … far
from facially deficient.” Werdene, 883 F.3d at 217; accord.
McLamb, 880 F.3d at 691; Levin, 874 F.3d at 323; Horton,
863 F.3d at 1052; United States v. Workman, 863 F.3d 1313,
1317–18 (10th Cir. 2017).

Further, suppression of the evidence against Henderson
is unlikely to deter future violations of this specific kind, be-
cause the conduct at issue is now authorized by Rule 41(b)
(6), after the December 2016 amendment. The exclusionary
“rule’s sole purpose, we have repeatedly held, is to deter fu-
ture Fourth Amendment violations,” Davis v. United States,
564 U.S. 229, 236–237 (2011), and we see no reason to deter
officers from reasonably relying on a type of warrant that
could have been valid at the time it was executed—and now
would be.

“[A] warrant issued by a magistrate normally suffices to
establish that a law enforcement officer has acted in good
faith in conducting the search.” Leon, 468 U.S. at 922 (inter-
nal quotation marks omitted). The NIT warrant is not facially
deficient and there is no specific evidence that the officers
did not act in good faith. We are satisfied that the NIT war-
rant falls squarely within the Leon good faith exception: the
executing officers exercised objectively reasonable reliance
on the NIT warrant, and “the marginal or nonexistent ben-
efits produced by suppressing evidence … cannot justify the
substantial costs of exclusion.” Id. Indeed, the five circuits
that have addressed motions to suppress evidence obtained
pursuant to the NIT warrant have denied suppression on the
basis of the good faith exception. See Werdene, 883 F.3d at
218–19; McLamb, 880 F.3d at 690–91; Levin, 874 F.3d at
324; Horton, 863 F.3d at 1051– 52; Workman, 863 F.3d at
1319–21.

We agree with our sister circuits, and hold that the good
faith exception applies to bar suppression of evidence ob-
tained against Henderson pursuant to the NIT warrant.

III

The judgment of the district court is AFFIRMED.
FLORENCIO JOSE DOMINGUEZ, Petitioner-Appellant,
v. SCOTT KERNAN, Secretary of the California Department of Corrections and Rehabilitation, Respondent-Appellee.

No. 18-55209
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:14-cv-02890-BAS-RBB
Appeal from the United States District Court for the Southern District of California
Cynthia A. Bashant, District Judge, Presiding
Argued and Submitted June 8, 2018
Pasadena, California
Filed October 23, 2018
Opinion by Judge Fisher


COUNSEL
Matthew J. Speredelozzi (argued) and Patrick Morgan Ford, San Diego, California, for Petitioner-Appellant.
Kevin Vienna (argued), Deputy Attorney General; Daniel Rogers, Supervising Deputy Attorney General; Julie L. Garland, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, San Diego, California; for Respondent-Appellee.

OPINION

FISHER, Circuit Judge:

Florencio Dominguez was charged with murder. After his trial ended in a hung jury, the trial court dismissed the case under California Penal Code § 1385. The state filed a new complaint, charging Dominguez with murder and conspiracy to commit murder. Dominguez filed a demurrer, arguing the second prosecution violated his rights under the Double Jeopardy Clause and California law, but the trial court overruled his demurrer, and Dominguez was tried and convicted. Dominguez then asserted his double jeopardy claim in a federal habeas petition under 28 U.S.C. § 2241. While that petition was pending, the state trial court vacated Dominguez’s convictions under California Penal Code § 1385(a) (“The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.”).

Dominguez was charged with murder in 2010 (San Diego County Superior Court No. SCD225579). His trial resulted in a hung jury, and the state trial court dismissed the case under California Penal Code § 1385. The state refiled the criminal complaint (San Diego County Superior Court No. SCD230596), charging Dominguez again with murder and adding a new charge for conspiracy to commit murder. See Brady v. Maryland, 373 U.S. 83 (1963), and the state has elected to retry him on the charge of conspiracy to commit murder. The state placed Dominguez in pretrial custody, where he remains. Citing the state court’s decision vacating the earlier convictions, the district court dismissed Dominguez’s federal habeas petition as moot. Dominguez appeals.

We hold Dominguez’s petition is not moot. It continues to present a live controversy because he remains in custody, continues to claim he is in custody in violation of the Constitution of the United States and continues to present precisely the same legal claim that he presented when his petition was filed – that the state’s second prosecution of him, which remains ongoing, violates his federal constitutional right not to be twice placed in jeopardy for the same offense.

We hold, however, that Dominguez is no longer required to proceed under § 2241. Section 2254 limits the general grant of habeas authority under 28 U.S.C. § 2241 by placing additional obstacles in the path of a person seeking habeas relief when he is “in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2254(a). Where a petitioner is not challenging custody attributable to a state court judgment, his custody does not bear a presumption of validity. Section 2254 therefore does not apply, and he is free to seek habeas relief under § 2241(a) and (c)(3) instead.

Finally, we hold that, to proceed under § 2241, Dominguez is not required to dismiss his § 2254 petition and file a new petition under § 2241. Just as a court may convert a § 2241 petition to a § 2245 petition when a pretrial detainee is convicted while a petition is pending, we hold that a court has the authority to convert a § 2254 petition into a § 2241 petition when a petitioner’s convictions are vacated during the pendency of the petition and the petitioner has become a pretrial detainee.

We vacate the judgment and remand for proceedings consistent with this opinion.

BACKGROUND

Dominguez was charged with murder in 2010 (San Diego County Superior Court No. SCD225579). His trial resulted in a hung jury, and the state trial court dismissed the case under California Penal Code § 1385. The state refiled the criminal complaint (San Diego County Superior Court No. SCD230596), charging Dominguez again with murder and adding a new charge for conspiracy to commit murder. See 1. See Cal. Penal Code § 1385(a) (“The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.”).

The trial court dismissed the case on the ground that the prosecution had failed to establish Dominguez had pulled the trigger: “There may come a time in the future when someone else comes forward to say [it was] either the defendant or someone else. Because the defendant, if he didn't pull the trigger, he knows who did. He's standing right there. It may be somebody else, but based on the current state of the evidence, that can’t be proven. And so at this point the matter is dismissed without prejudice.”

1. See Cal. Penal Code § 1385(a) (“The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.”).
The second prosecution proceeded to trial, and Dominguez was convicted on both charges. Dominguez appealed the convictions, arguing again that the second prosecution violated double jeopardy. In a reasoned decision, the California Court of Appeal denied relief, disagreeing with Dominguez’s contention that the 2010 dismissal constituted a finding of insufficient evidence. See People v. Dominguez, No. D060019, 2013 WL 3362112, at *8–10 (Cal. Ct. App. July 5, 2013). The California Supreme Court denied review.

Dominguez then filed a federal habeas petition under 28 U.S.C. § 2254, renewing his double jeopardy challenge to the second prosecution. Dominguez argued “the second trial was barred under the Fifth Amendment” and asked the district court to “remand the case back to trial court directing it to grant [his] demurrer on Double Jeopardy grounds.” A federal magistrate judge recommended the district court grant the writ, agreeing with Dominguez that the 2010 dismissal operated as an acquittal, and concluding that the California Court of Appeal’s decision to the contrary was both an unreasonable application of Supreme Court precedent under § 2254(d)(1) and based on an unreasonable determination of the facts under § 2254(d)(2).

Before the district court could rule on the magistrate judge’s recommendation, a state trial court granted Dominguez post-conviction relief on an independent ground, vacating his murder and conspiracy convictions under Brady v. Maryland, 373 U.S. 83 (1963). The trial court vacated the judgment and ordered the state to either retry Dominguez or release him. The state has elected to retry Dominguez, but it is proceeding solely on the conspiracy charge. Dominguez remains in state custody pending trial.

When the district court learned of the state court’s decision vacating the convictions, it ordered the parties “to show cause as to why [the federal petition] should not be dismissed as moot.” The state urged the court to dismiss the petition, arguing that, “[b]ecause Dominguez is no longer in custody for the murder conviction, he received the relief he sought in this Court.” Dominguez opposed dismissal, arguing his petition continued to present a live controversy because he “remains in custody facing retrial” and the retrial would “violate double jeopardy on the exact same grounds Dominguez claims in this [petition].”

In a January 2018 order, the district court agreed with the state and concluded Dominguez’s petition was moot:

Dominguez filed this petition under 28 U.S.C. § 2254 to challenge his conviction for first-degree murder and conspiracy to commit murder. But the state court has since vacated this conviction. In doing so, it extinguished Dominguez’s two claims under § 2254. His claim that . . . his second prosecution violated the Double Jeopardy Clause . . . does not present a live controversy. He is no longer in custody pursuant to the conviction procured by the second prosecution. Moreover, unlike cases where petitioners have completed their sentences but are still permitted to challenge their convictions because the convictions cause collateral consequences, there is no conviction here for Dominguez to seek to set aside. At this point, opining on the constitutional condition of Dominguez’s second prosecution would be advisory. Therefore, the two claims raised in Dominguez’s § 2254 petition are moot.

The court also declined to treat Dominguez’s petition as a “pre-trial custody petition” under 28 U.S.C. § 2241, explaining that doing so would require the court to address three undeveloped issues: Younger abstention; exhaustion; and the merits of Dominguez’s double jeopardy claim. The court

2. See Cal. Penal Code § 654(a) (“An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”).

3. In Brady, the Supreme Court held that a state trial court’s dismissal under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”.

4. Unlike Dominguez’s first and second trials, which occurred in two distinct cases, his second trial and his pending third trial are part of a single prosecution in a single case, San Diego County Superior Court No. SCD230596.

5. Younger v. Harris, 401 U.S. 37 (1971), requires federal courts to abstain from interfering with pending state criminal proceedings. A colorable claim that a state prosecution will violate the Double Jeopardy Clause, however, presents an exception to Younger: “Because full vindication of the right necessarily requires intervention before trial, federal courts will entertain pretrial habeas petitions that raise a colorable claim of double jeopardy.” Mannes v. Gillespie, 967 F.2d 1310, 1312 (9th Cir. 1992). Because Dominguez has presented a colorable double jeopardy claim, we hold Younger abstention does not apply.

With respect to exhaustion, there is no dispute that Dominguez presented a double jeopardy challenge to his second prosecution at all three levels of the California courts, but the state maintains Dominguez challenged solely his re-prosecution for murder, not his prosecution for conspiracy to commit murder, the sole remaining charge. Dominguez contends he adequately exhausted this claim.
dismissed Dominguez’s petition as moot and declined to issue a certificate of appealability.

Dominguez timely appealed, and we issued a certificate of appealability “with respect to … whether the district court erred by dismissing the petition as moot, including whether the petition should be construed as a petition under 28 U.S.C. § 2241.”

**STANDARD OF REVIEW**

“We review de novo the district court’s dismissal of a habeas petition on the ground of mootness.” Zegarra-Gomez v. INS, 314 F.3d 1124, 1126 (9th Cir. 2003).

**DISCUSSION**

A. Dominguez’s Petition Is Not Moot

“[A] case ‘becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.’” Chafin v. Chafin, 568 U.S. 165, 172 (2013) (quoting Knox v. Serv. Emps. Int’l Union, Local 1000, 567 U.S. 298, 307 (2012)). “As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” Id. (quoting Knox, 567 U.S. at 307–08).

Here, Dominguez’s petition continues to present a live controversy, and it remains possible for the district court to grant him effectual relief.8 In his federal habeas petition, Dominguez argues his second prosecution is barred by double jeopardy and asks the district court to “remand the case back to trial court directing it to grant [his] demurrer on Double Jeopardy grounds.” Dominguez’s second prosecution is ongoing, and he continues to argue his second prosecution violates the Double Jeopardy Clause because his first trial ended in an acquittal. Were the district court to grant Dominguez the relief he seeks, he would no longer be subject to prosecution in state court.

The district court concluded Dominguez’s petition was moot, but it did so because it viewed the petition as challenging only “his conviction for first-degree murder and conspiracy to commit murder.” The court reasoned, “Because his conviction has been vacated, his two claims targeting it under § 2254 are moot.” To the extent Dominguez’s petition challenges those convictions, the petition is indeed moot, because those convictions have been vacated, and no collateral consequences flow from them. See Spencer v. Kemna, 523 U.S. 1, 7–8 (1998); Carafas v. LaVallee, 391 U.S. 234, 237–38 (1968).

The district court erred, however, by construing Dominguez’s petition as a challenge solely – or even primarily – to his convictions rather than to his second prosecution generally. Properly understood, Dominguez’s petition continues to present a live controversy because he is still in custody, he continues to challenge his prosecution on the same ground and his prosecution is ongoing. The vacatur of Dominguez’s convictions changes the procedural posture of the case but does not render the petition moot.7

In Shute v. Texas, 117 F.3d 233, 236 (5th Cir. 1997), for example, the petitioner filed a federal petition challenging his second indictment on double jeopardy grounds. While his petition was pending, the second indictment was dismissed for technical reasons, and the state secured a third indictment. See id. The Fifth Circuit rejected the suggestion that dismissal of the second indictment rendered the petition moot:

In federal court, Shute sought a writ of habeas corpus on double jeopardy grounds. This entailed two requests: (1) an order of release from custody and (2) an injunction against state prosecution… .

… .

7. Dominguez’s double jeopardy rights are not diminished by the fact that he is now a pretrial detainee rather than a convicted prisoner. As the Supreme Court has long recognized, “the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.” Abney v. United States, 431 U.S. 651, 660–61 (1977). If this right is not vindicated before trial, a vitally important aspect of the guarantee is forever lost. As the Court explained in Abney, because it “focus[es] on the ‘risk’ of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced … to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense.” Id. at 661. “Obviously, these aspects of the guarantee’s protections would be lost if the accused were forced to ‘run the gauntlet’ a second time before [the prosecution could be challenged]; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit.” Id. at 662. Here, Dominguez is a pretrial detainee, facing trial on what may amount to the same charges the state pursued in his first two trials. His double jeopardy claim therefore is not moot.
Once the state secured the Third Indictment, both forms of requested relief were live again. Shute still wanted release from custody and still wanted an injunction against prosecution. Although any state prosecution would be under a different indictment from the one attacked before the district court, this cannot make a difference. If the district court had granted the injunction against state prosecution under the Second Indictment, prosecution under the Third Indictment would be barred as well. Otherwise, the state always could defeat a federal double jeopardy habeas ruling by dismissing an indictment and immediately securing an identical one.

Shute’s request for … relief from custody … remains a live controversy as long as he is imprisoned.

Id. at 237.

Similarly, in Warnick v. Booher, 425 F.3d 842, 843 (10th Cir. 2005), the petitioner filed a federal habeas petition challenging the loss of 155 good-time credits as a violation of double jeopardy. While the petition was pending, the prison restored the 155 credits but subtracted another 53 credits. The Tenth Circuit held the claim was moot as to the 155 credits but that the case continued to present a live controversy as to the loss of 53 credits, noting that the petitioner’s objection to the loss of 53 credits was based on the same theory that “the subtraction of any credits after his rehbill date violates double-jeopardy principles.” Id. at 846. The petitioner therefore was not required to pursue a new habeas petition. See id.

We hold Dominguez’s § 2254 petition is not moot. The district court erred by ruling otherwise.8

B. Dominguez Is No Longer Required to Proceed Under § 2254

Apart from the issue of mootness, we granted a certificate of appealability on “whether the petition should be construed as a petition under 28 U.S.C. § 2241.” We hold that it should be.

Section 2241 establishes the general authority of the federal courts to issue habeas relief. It provides that “[w]hile in custody, any person may apply for a federal court to issue a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that the judgment was rendered without jurisdiction, or that the person is entitled to have the cause of action determined and the sentence executed in the State court, or that the person is a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under color of any foreign state, or under color thereof, the validity and effect of which depend upon the law of the nation; or
(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.

Id. § 2241(c) (emphasis added).
Section 2254, in turn, states:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Id. § 2254(a).

Section 2254 has been understood as limiting the authority granted by § 2241 rather than supplementing it. As the Supreme Court has explained, “[o]ur authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to a person in custody pursuant to the judgment of a State court.” Felker v. Turpin, 518 U.S. 651, 662 (1996) (quoting 28 U.S.C. § 2254(a)); see also White v. Lambert, 370 F.3d 1002, 1006 (9th Cir. 2004) (“In contrast to section 2255, section 2254 does not create an alternative to the habeas corpus remedy provided in section 2241; rather, it imposes limitations on this remedy.”) (quoting Eric Johnson, An Analysis of the Antiterrorism and Effective Death Penalty Act in Relation to State Administrative Orders: the State Court Judgment as the Genesis of Custody, 29 New Eng. J. on Crim. & Civ. Confinement 153, 168 (2003))), overruled on other grounds by Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010) (en banc); Greenawalt v. Stewart, 105 F.3d 1287, 1287 (9th Cir. 1997) (“The Supreme Court has instructed us that the authority of
the federal courts to grant habeas relief to state prisoners under § 2241 is limited by 28 U.S.C. § 2254.

Thus, “a prisoner proceeding under § 2254 is subject to obstacles a prisoner proceeding under § 2241 is not.” Bryan R. Means, Postconviction Remedies § 5:2 (2018). Section 2254, for example, provides that “an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a) (emphasis added). It further provides that “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that … the applicant has exhausted the remedies available in the courts of the State.” Id. § 2254(b)(1).9 Section 2244, moreover, provides that “[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court,” id. § 2244(d)(1), and it places a limit on “second or successive” § 2254 petitions, see id. § 2244(b). Perhaps most significantly, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides that “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court” may not be granted unless the state court’s adjudication of that claim “resulted in a decision that was contrary to, or involved an unreasonable application of,” Supreme Court precedent or “resulted in a decision that was based on an unreasonable determination of the facts.” Id. § 2254(d).

Congress placed these additional limits on petitions under § 2254 because a state court judgment “carries a heightened presumption of legitimacy.” Johnson, supra, at 171–72. Because a state court judgment “is presumptively legitimate,” moreover, so too is custody attributable to that judgment. See id. at 172. Congress therefore concluded “it was acceptable to place obstacles in the paths of prisoners” who are challenging custody attributable to a state court judgment. See id.

Because § 2254 limits the general grant of habeas relief under § 2241, it “is the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the petitioner is not challenging his underlying state court conviction.” White, 370 F.3d at 1009–10. “By contrast, the general grant of habeas authority in § 2241 is available for challenges by a state prisoner who is not in custody pursuant to a state court judgment – for example, a defendant in pre-trial detention or awaiting extradition.” Id. at 1006.10

Here, Dominguez properly brought his double jeopardy claim under § 2254 when he filed his petition. At that time, he was in custody pursuant to a state court judgment and was challenging his custody attributable to that judgment. We are persuaded, however, that Dominguez is no longer required to proceed under § 2254. We reach this conclusion for two independent yet related reasons.

First, as noted, a petitioner who is “in custody pursuant to the judgment of a State court” is subject to additional limitations because the judgment, and the custody attributable to that judgment, carry a heightened presumption of legitimacy. Here, Dominguez’s judgment has been vacated. He is not in custody pursuant to a judgment of a state court. He is a pretrial detainee, and his detention bears no presumption of validity. He should, therefore, be placed on an equal footing with other pretrial detainees, who may avail themselves of habeas relief under § 2241(a) and (c)(3) without regard to the additional requirements imposed on petitions under § 2254. See Stow, 389 F.3d at 888.

Second, § 2254 applies to prisoners challenging “custody pursuant to the judgment of a State court,” and Dominguez is no longer challenging such a judgment; he is now a pretrial detainee.

Section 2254(a) “deploy[s] the term ‘in custody’ twice.” Bailey v. Hill, 599 F.3d 976, 978 (9th Cir. 2010). It states that “a district court shall entertain an application for a writ of habeas corpus in behalf of a person [1] in custody pursuant to the judgment of a State court only on the ground that he is [2] in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a) (emphasis added).

As to the first use of the word custody, we have held that a person is “in custody pursuant to the judgment of a State court” when “the source of the petitioner’s custody” is a state court judgment – i.e., when “the prisoner’s custody is attributable, at least in part,” to such a judgment. White, 370 F.3d at 1007–08 (quoting Johnson, supra, at 162).

With respect to the second use of the word custody, we have not yet addressed whether it too must be “pursuant to the judgment of a State court” – i.e., whether there must be a nexus between the judgment of a State court and the “custody” the petitioner contends is “in violation of the Constitution or laws or treaties of the United States.” Rulemakers, courts and commentators, however, have all assumed that this nexus is required.

The Rules Governing 2254 Cases, for example, state:

These rules govern a petition for a writ of habeas corpus filed in a United States district court under 28 U.S.C. § 2254 by:

(1) a person in custody under a state-court judgment who seeks a determination that the custody violates the Constitution, laws, or treaties of the United States; and

(2) a person in custody under a state-court or federal-court judgment who seeks a determination that future

9. Even in cases brought under § 2241, exhaustion is required. See Laing v. Ashcroft, 370 F.3d 994, 997 (9th Cir. 2004). This exhaustion requirement, however, is judicially created, not statutory.

10. A pretrial double jeopardy challenge, for instance, “is properly brought under § 2241.” Stow v. Murashige, 389 F.3d 880, 886 (9th Cir. 2004).
custody under a state-court judgment would violate the Constitution, laws, or treaties of the United States.

Rule 1, Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C.A. foll. § 2254 (emphasis added). A leading habeas treatise likewise states:

To invoke habeas corpus review by a federal court, the petitioner must satisfy two jurisdictional requirements – (1) the status requirement that the petition be “in behalf of a person in custody pursuant to the judgment of a State court”; and (2) the substance requirement that the petition challenge the legality of that custody on the ground that it is “in violation of the Constitution or laws or treaties of the United States.”

1 Hertz & Liebman, supra, § 8.1 (footnote omitted) (emphasis added). As the Seventh Circuit noted in Walker v. O’Brien, 216 F.3d 626 (7th Cir. 2000), “§ 2254 [is] the exclusive vehicle for prisoners in custody pursuant to a state court judgment who wish to challenge anything affecting that custody.” Id. at 633 (emphasis added).

In light of the language, history and purpose of § 2254, we conclude § 2254 requires a nexus between “the judgment of a State court” and the “custody” the petitioner contends is “in violation of the Constitution or laws or treaties of the United States.” The custody the petitioner challenges must be “attributable, at least in part, to a judgment of a State court.” White, 370 F.3d at 1007–08 (quoting Johnson, supra, at 162).

This does not mean that a § 2254 petition must present a challenge to the underlying state court judgment. “[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody,” Preiser v. Rodriguez, 411 U.S. 475, 484 (1973), not necessarily a challenge to a judgment. Section 2254, therefore, applies not only to challenges to a conviction or sentence but also to challenges to the “execution of a custodial sentence.” Bailey, 599 F.3d at 982; see, e.g., Preiser; 411 U.S. at 476–77 (§ 2254 challenge to the loss of good-time credits); Spencer, 523 U.S. at 7 (§ 2254 challenge to the revocation of parole); White, 370 F.3d at 1005 (§ 2254 challenge to an administrative decision transferring the petitioner from one prison to another). What matters is that the custody complained of is attributable in some way to the underlying state court judgment.

Here, there is no nexus between Dominguez’s now vacated judgment and the custody he contends violates the Double Jeopardy Clause. Because his pretrial detention is not attributable in any way to a state court judgment, his double jeopardy claim does not fall under § 2254.11

In sum, we hold Dominguez is no longer required to proceed under § 2254. He is no longer “in custody pursuant to the judgment of a State court,” and the custody he is challenging is not attributable in any way to a state court judgment. Dominguez, therefore, is free to proceed under § 2241(a) and (c)(3), without satisfying the additional requirements applicable to § 2254 petitions.

C. Dominguez’s Petition May Be Converted to § 2241

Dominguez, moreover, is not required to dismiss his § 2254 petition and file a new petition under § 2241.

Courts and commentators have recognized that, “[i]f the petition is filed by a pre-trial detainee under § 2241 who is subsequently convicted, the federal court may convert the § 2241 petition to a § 2254 petition.” Means, Postconviction Remedies, supra, § 5:2 (citing Yellowbear v. Wyoming Att’y Gen., 525 F.3d 921, 924 (10th Cir. 2008); Jackson v. Coalter, 337 F.3d 74, 79 (1st Cir. 2003)). We now hold that the same rationale applies where, as here, the opposite situation arises. Where a petition is filed by a post-conviction detainee under § 2254 and the conviction subsequently is vacated, the federal court has the authority – at the petitioner’s request or with the petitioner’s consent – to convert the § 2254 petition to a § 2241 petition. Cf. Stow, 389 F.3d at 885 (holding the petitioner’s pretrial double jeopardy challenge, filed under § 2254, should be treated as a petition under § 2241).

D. Remaining Issues

The district court cited two additional potential obstacles to Dominguez’s double jeopardy claim: (1) whether Dominguez has adequately exhausted the claim; and (2) whether the Double Jeopardy Clause bars his prosecution on a charge of conspiracy to commit murder when his previous acquittal applied, if at all, solely to the charge of murder. As the district court noted, these additional issues were not adequately developed, and the district court did not reach them. We leave them for the district court to address in the first instance.

11. We recognize the Supreme Court has held that the “in custody” requirement of § 2254(a) must be satisfied only at the time the petition is filed. See Spencer, 523 U.S. at 7 (“Spencer was incarcerated by reason of the parole revocation at the time the petition was filed, which is all the ‘in custody’ provision of 28 U.S.C. § 2254 requires.”); Maleng v. Cook, 490 U.S. 488, 490–91 (1989) (per curiam) (“We have interpreted the statutory language as requiring that the habeas petitioner be ‘in custody’ under the conviction or sentence under attack at the time his petition is filed.”). Carafas, 391 U.S. at 238 (“[W]e conclude that under the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application.”). These cases, however, stand for the limited proposition that, when a petitioner is in custody at the time the petition is filed, “the federal court may pass on the merits of the petition even though the prisoner is unconditionally released before the petition is acted upon, provided that the petitioner still suffers collateral consequences from the conviction.” 17B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4262 (3d ed. 2018). We are not aware of any authority suggesting that a petitioner must continue to proceed under § 2254, rather than § 2241, when the custody he currently is challenging is not attributable in any way to a judgment, and hence bears no presumption of legitimacy.
CONCLUSION

We hold Dominguez’s federal habeas petition continues to present a live controversy challenging his ongoing second prosecution as a violation of the Double Jeopardy Clause. We further hold Dominguez is no longer required to proceed under § 2254. Finally, we hold a district court has the authority to convert a § 2254 petition into a § 2241 petition where the petitioner’s circumstances change during the pendency of the proceedings. We vacate the judgment of the district court and remand for proceedings consistent with this opinion.

Because Dominguez’s detention is no longer attributable to a state court judgment, proceeding under § 2254 is no longer appropriate. On remand, the district court shall, either upon Dominguez’s request or at the court’s initiation but with Dominguez’s consent, convert the petition to one arising under § 2241. If Dominguez elects not to convert the petition, the district court shall dismiss the petition without prejudice.

Costs of appeal are awarded to Dominguez.

VACATED AND REMANDED.
California Courts of Appeal

Cite as 18 C.D.O.S. 10311

In re MARIA Q. et al., Persons Coming Under the Juvenile Court Law.
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent,
v.
Y.M. et al., Defendants and Appellants.

No. D073296
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. NJ14478)
APPEAL from a judgment of the Superior Court of San Diego County, Michael J. Imhoff, Commissioner. Affirmed. Filed October 23, 2018

COUNSEL
Richard L. Knight, under appointment by the Court of Appeal, for Defendant and Appellant Y.M.
Marisa L.D. Conroy, under appointment by the Court of Appeal, for Defendant and Appellant V.C.
Thomas E. Montgomery, County Counsel, John Philips, Chief Deputy and Jesica Fellman, Deputy County Counsel, for Plaintiff and Respondent San Diego County Health and Human Services Agency.
Gary S. Plavnick for Respondent N.Z.

OPINION

This appeal concerns whether the relative placement preference under Welfare & Institutions Code section 361.3 applies to a relative’s request for placement after the juvenile court has held a section 366.26 hearing and the child remains in foster care pursuant to section 366.26, subdivision (b)(7). Before we set out the arguments, we briefly describe the unusual procedural posture of this case.

Y.M. has four children who are dependents of the juvenile court: two daughters, Maria Q. and J.M., and two sons, W.Q. and J.Q. Maria and J.M. (the girls) were placed together in the foster care home of the Z.’s in August 2013, where they remained throughout the proceedings. W.Q. and J.Q. (the boys) had several foster care placements. Y.M. identified Aunt as a possible placement for the children in May 2014. The juvenile court terminated reunification services in December 2014. Various issues substantially delayed the section 366.26 hearing, which was not heard until July 2016.

Shortly before the section 366.26 hearing, issues arose concerning the viability of the Z.’s foster care license and their ability to adopt the girls. In view of the boys’ lack of stability and the uncertainty about the Z.’s ability to adopt the girls, the juvenile court continued the children’s placement in foster care with the goal of finding a permanency plan including adoption, guardianship, placement with a fit and willing relative, or return home.

In August 2017, V.C., the children’s maternal great-aunt (Aunt), filed a section 388 petition asking the juvenile court to place the children in her care. The Agency supported Aunt’s petition for the girls’ placement but opposed placement of the boys, whose foster care parents wanted to adopt them. At a bifurcated hearing, the juvenile court declined to apply the relative placement preference under section 361.3, found that it was not in Maria’s and J.M.’s best interests to be placed with Aunt, and continued their section 366.26 hearing. The court summarily denied Aunt’s petition for placement of W.Q. and J.Q. In January 2018, at a second section 366.26 hearing, the juvenile court terminated parental rights to W.Q. and J.Q. and designated their foster parents as their prospective adoptive parents.

Y.M. and Aunt (together, Appellants) appeal the denial of Aunt’s section 388 petition for placement of the children. They join in each other’s arguments. Appellants rely on In re Isabella G. (2016) 246 Cal.App.4th 708 (Isabella G.), in which this court held that when a relative made a timely request for placement of a dependent child and the social services agency did not properly respond to that request, the relative placement preference applies after reunification services have been terminated. Appellants argue the juvenile court erred when it applied a “generalized” best interest of the child standard under section 388 instead of evaluating the placement under the factors listed in section 361.3, subdivision (a). They further contend if the orders denying placement are reversed, this court must also reverse the orders terminating parental rights.

In supplemental briefing, Appellants argue the juvenile court erred when it proceeded under section 388 instead of

1. Unspecified statutory references are to the Welfare and Institutions Code.

2. Y.M. makes this argument conditionally with respect to Maria and J.M., noting that a section 366.26 hearing scheduled for January 2018 had not yet been held at the time the briefs were filed.

On August 1, 2018, Respondent N.Z., the girls’ foster father, asked this court to take judicial notice of July 9, 2018 juvenile court orders terminating parental rights to Maria and J.M., and designating the Z.’s as the girls’ prospective adoptive parents. In view of the arguments raised on appeal, we grant the request for judicial notice of the minute orders filed on July 9, 2018 in Maria’s and J.M.’s cases.

We deny N.Z.’s opposed request for judicial notice, filed June 8, 2018, entitled “Motion to Augment/Supplement Record on Review with Post Judgment Evidence of Changed Circumstances.”

3. In view of the different procedural postures of Isabella G., supra, 246 Cal.App.4th 708 and this case, we asked the parties to file simultaneous letter briefs addressing the following issues: ‘In view of Welfare and Institutions Code sections 366.26, subdivision (b)(6) and 366.3, subdivisions (h)(1) and (i), do sections 361.3 and/or 388 apply
holding a post-permanency review hearing under 366.3 to
determine whether continued foster care was appropriate for
the children and to evaluate Aunt’s request for relative place-
ment under section 361.3. Appellants contend the procedural
errors deprived them of their rights to a full and fair hearing
under the appropriate statute, and prejudicially violated their
due process rights.

Respondent Agency argues Appellants have forfeited any
argument regarding the application of section 361.3 to Aunt’s
request for placement. The Agency submits when a child is
in post-permanency foster care, sections 366.3 and 366.26
govern the juvenile court’s consideration of relative place-
ment, and section 361.3 does not apply.

Minors W.Q. and J.Q. join in the Agency’s arguments, and
further state that even if the juvenile court was required to
proceed under sections 366.26 and 366.3, any error in pro-
cceeding under section 388 in their cases was harmless in
view of the legislative preference for adoption over relative
placement.

Minors Maria and J.M. contend section 361.3 applies to
a relative’s request for placement of a child who is in a per-
manency plan of long-term foster care. They argue although
the relative preference under section 361.3 still applies, it is
subject to a mandatory preference for adoption by qualified
current relative or foster caregivers. (§ 366.26, subd. (k)(1).)

Respondent N.Z., Maria’s and J.M.’s foster father, asserts
the juvenile court applied the correct legal standard to Aunt’s
request for placement of the girls and did not abuse its discre-
tion in continuing the girls’ placement in foster care.

In this issue of first impression, we conclude that the di-
rective under section 361.3 to give preferential consideration
to a relative seeking placement does not apply to relatives
seeking placement of a child in continued foster care pursu-
ant to section 366.26, subdivision (b)(7). A placement re-
quest by a relative after a permanency hearing is essentially
a request to modify the child’s permanency plan and must be
heard under the statutory framework of sections 366.26 and
366.3. The Legislature favors a permanency plan of perma-
nent placement with a fit and willing relative only if a child is
in continued foster care and the preferred plans of adoption
or guardianship are not available for the child. (§ 366.26,
subs. (b) & (c)(1)(A).) In assessing a relative’s request to
permanently care for a child, the juvenile court is required to
consider the agency’s assessment report, which must include
all of the factors specified in section 361.3, subdivision (a)
and section 361.4. (§§ 366.26, subd. (b), 366.3, subd. (i).)

We further hold that when a relative of a dependent child
files a section 388 petition requesting permanent placement
of a child in continued foster care, the juvenile court should
determine whether the petition makes a prima facie showing
that the relative is fit and willing to care for the child and
if so, set a post-permanency review hearing under section
366.3. At that hearing, the court is required to consider all
available permanency plan options for the child. The court
must set a section 366.26 hearing unless it determines that
holding a section 366.26 hearing is not in the best interest
of the child, as defined in section 366.3, subdivision (h)(1).
The procedures specified in section 366.26 are the exclusive
procedures for selecting a permanency plan for a dependent
child. (§ 366.26, subd. (a).)

Notwithstanding the procedural problems in this case, we
conclude that any error in hearing the matter under section
388 was harmless. Because a permanency plan of adoption
by W.Q.’s and J.Q.’s current caregivers was available, the ju-
venile court did not have any authority to order a different
permanency plan. With respect to Maria and J.M., although
the juvenile court declined to formally consider the relative
placement factors under section 361.3, the record shows the
juvenile court applied those factors in determining the chil-
dren’s best interests and did not make a “generalized” best
interest finding. The juvenile court’s findings are amply sup-
ported by the record. We therefore affirm the orders denying
Aunt’s request for placement of the children.

FACTUAL AND PROCEDURAL
BACKGROUND

In June 2011, Maria, W.Q., and J.Q., then ages four, three,
and two years old, respectively, were removed from their par-
ents’ home due to inadequate supervision, parental substance
abuse, domestic violence and physical abuse. In September
2012, the children were returned to the care of their mother,
Y.M., under a family maintenance plan.4

In August 2013, the Agency substantiated reports that
Y.M. was physically abusing the children and her boyfriend
was sexually abusing six-year-old Maria. The Agency de-
tained the children, including newborn J.M., in protective
custody, and placed Maria and J.M. with the Z’s. The boys
were placed together in another foster care home.

Maria had small moon-shaped scars across her chest
where her mother had pinched her with her fingernails. Ma-
ria said Y.M.’s boyfriend would touch her private parts until
they were hurting and bleeding, and her mother knew and did
not help her. The boyfriend forced W.Q. and J.Q. to watch
pornography with him. Maria, W.Q. and J.Q. reported that
Y.M. hit them with a belt and other objects.

Maria said she was afraid of Y.M. In November 2013, she
urinated on herself when she realized her mother was on the
telephone. Maria was diagnosed with posttraumatic stress
disorder (PTSD). She had thoughts of suicide and self-harm.
In later reports, the social worker said Maria’s feelings of
safety were increasing in the Z’s home. Maria insisted she

4. The circumstances of the children’s fathers are not relevant to
the issues raised in this appeal.
did not want to see her mother and the court later suspended visitation.

As an infant, J.M. appeared to develop normally. At one year of age, she started to display unusually aggressive behaviors and intense tantrums. At age three, J.M. was diagnosed with pervasive developmental disorder and autism spectrum disorder. She was a client of the San Diego Regional Center and received in-home applied behavioral services (ABS).

W.Q. and J.Q. were assessed with adjustment disorders. They were physically aggressive, especially with each other. J.Q. was described as excessively active, impulsive, hot tempered, and aggressive. He acted out sexually, which led to the suspension of visitation between the two sets of siblings.

The Agency assessed a maternal aunt for placement but she did not receive a favorable home evaluation. Several months later, in May 2014, Y.M. identified Aunt as a possible placement for the children. A social worker later testified the record did not indicate, and she did not know, whether the previous social worker followed up on Y.M.’s information that Aunt was a possible placement for the children.

In August 2014, the juvenile court granted the Z.’s application for de facto parent status for Maria and J.M.

The juvenile court terminated reunification services in December 2014. The Agency reported that Maria and J.M. were attached to the Z.’s and had developed a strong bond with them.

In a report prepared for a section 366.26 hearing scheduled for April 2015, the social worker reported that the Z.’s were interested in adopting Maria and J.M. The Agency did not identify any potential adoptive placements for the boys. The section 366.26 hearing was not held until July 2016.

In September 2015, a physician diagnosed Maria with anxiety, intermittent irritability, insomnia and avoidance symptoms. The physician noted that Maria had been in therapy for two years with minimal improvement and prescribed psychotropic medication for her.

In June 2016, the boys’ foster parents called the police after J.Q. threatened to kill W.Q. and the foster family, which was one in a series of crises that had been precipitated by J.Q.’s behaviors. J.Q. was placed with new foster parents (Caregivers). In November 2016, after J.Q.’s behaviors stabilized, W.Q. was placed with Caregivers.

The children’s maternal grandmother (Grandmother) requested placement of the children. The Agency did not consider Grandmother for placement because she had a child welfare history. The social worker asked Y.M. and Grandmother for names, addresses, and other information of any other maternal and paternal relatives who could be considered for placement, but Y.M. and Grandmother did not respond to the social worker’s request.

In July 2016, in view of the children’s mental and behavioral health issues and the uncertainties of their current placements, the juvenile court ordered permanency plans of long-term foster care for the children. The same day, Y.M. filed a section 388 petition asking the court to place the children with Grandmother. In February 2017, the juvenile court determined it was not in the children’s best interests to be placed with Grandmother, and set a new section 366.26 on behalf of W.Q. and J.Q.

In March 2017, at a post-permanency plan review hearing, the Agency asked the juvenile court to set a new section 366.26 hearing on behalf of Maria and J.M. The social worker said the girls’ foster mother, M.Z., was steadfast in her commitment to provide a permanent home to them.

In May 2017, Aunt contacted the social worker asking for placement of the children. The social worker submitted a referral to the Agency for an assessment of Aunt’s home. On August 1, 2017, Aunt filed a section 388 petition asking for visitation with, and custody of, the children. The juvenile court held a prima facie hearing on Aunt’s section 388 petition. Aunt said she had learned the children were in foster care four years earlier. She had requested placement of the children in 2015 but a social worker told her that Grandmother’s request for placement had priority and Aunt would need to wait to be considered for placement until Grandmother’s application had been processed.

The social worker, noting the Z.’s faced the possible revocation of their foster care license and could not offer permanency to the girls within a reasonable time, recommended the juvenile court place Maria and J.M. with Aunt. The social worker was also concerned about the Z.’s lack of consistency in securing mental health services for Maria and ABS services for J.M. The Agency opposed Aunt’s request for placement of W.Q. and J.Q. because their foster parents wanted to adopt them. In addition, due to the children’s issues, the two sets of siblings could not be placed together.

The juvenile court granted Aunt a hearing on her section 388 petition for Maria’s and J.M.’s placement. The court raised the issue whether Aunt’s petition should be decided under the recent case Isabella G., supra, 246 Cal.App.4th 708 or under section 388. The court asked Aunt to clarify whether she was trying to proceed under Isabella G., and said if she did not make an affirmative showing that the case applied, the court would proceed under section 388.

A hearing on Aunt’s section 388 petition was held on November 29, December 21 and 22, 2017. The social worker reported that a state administrative review of the Z.’s foster care license might not be resolved for six to 12 months. In May or June 2016, the Agency had investigated an allegation against the foster father from years earlier and found it to be inconclusive. Nevertheless, the licensing board was seeking to revoke the Z.’s foster care license. That issue needed to be resolved before the Agency could even start the Z.’s adoptive home study.

The social worker said Aunt had a strong family and community support system and had identified services to meet the girls’ needs. Her home was approved for placement, she had completed specialized classes for caring for traumatized children, and she was willing to adopt the girls and ensure they received all necessary mental health services.
In testimony, the social worker acknowledged that Maria and J.M. had lived with the Z.’s for more than four years and called M.Z. “mama.” Maria felt safe with the Z.’s and wanted to stay with them. However, the Z.’s did not follow through with Maria’s mental health services and J.M.’s services to treat autism. While the Z.’s always met the girls’ basic needs, they were unable or unwilling to meet their needs for therapeutic services. The social worker said her decision to support Aunt’s petition for placement of the girls was not an easy one. Maria would have difficulty transitioning from the Z.’s home. Nevertheless, in assessing Maria’s and J.M.’s long-term interests, the social worker believed the children’s natural family could provide permanency to the girls.

Y.M.’s attorney asked the social worker about Aunt’s earlier contacts with the Agency. The social worker acknowledged Y.M. had asked the Agency to evaluate Aunt’s home for placement in 2014. The juvenile court asked whether Y.M. was proceeding on an “Isabella G. type of theory” and, if so, whether section 361.3 applied to a post-permanency request for placement. Y.M. responded that under an Isabella G. theory, the relative placement preference would apply until parental rights were terminated. Other parties disagreed. The juvenile court said Y.M. was free to pursue questioning but advised the court’s decision was unlikely to turn on that issue.

On further questioning, the social worker verified that on May 9, 2014, Y.M. informed the social worker that Aunt was interested in caring for the children. The social worker did not know whether the Agency had investigated any relatives, including Aunt, for placement at that time.

Aunt said Y.M. and Maria had lived with her intermittently until Maria was three years old. Aunt first talked to the social worker about the children’s placement in 2014 or 2015, but the social worker told her that Grandmother had priority for placement. Aunt submitted a placement application to the Agency in April 2017. She completed the classes the Agency required and educated herself about autism. Aunt believed that Maria needed extensive therapy to overcome her trauma. Maria and J.M. were at an age where they could adapt to a new home, knowing their future would be safe and secure. Aunt wanted to care for the girls because she loved them and saw them as her daughters.

Maria testified she had lived with her foster parents for about four years and called them “mom” and “dad.” Her two older sisters helped her with her homework. Maria’s foster father, N.Z., was not living in the home right now. She missed him very much. No one in the foster home had ever hurt her or touched her inappropriately.

Maria said therapy was “weird” because she did not want to talk about what had happened to her. She saw a counselor at school. She was happy. Therapy wasted her time. Maria remembered taking medication but it did not make her feel better. Maria did not want to visit Aunt but they forced her to go. She did not want to live with Aunt. Maria had lived with the Z.’s longer than she had lived anywhere. She said her foster parents were “like my family now.” Her sister had lived with them her entire life and they were “like her real parents to her.” Maria said Aunt had had four years to express an interest in her and J.M., and now she just wanted to come and take them.

Foster mother M.Z. testified that Maria, J.M., and her two daughters, ages 13 and 17, lived in the home. Her husband had been out of the home for several months because of an allegation he had sexually abused a relative in 1999. There were no criminal charges against her husband. M.Z. did not believe the allegation was true but was willing to live separately from her husband for whatever time was necessary to keep the girls in her care. She was as attached and committed to Maria and J.M. as she was to her own daughters.

M.Z. said that after several years, Maria refused to continue therapy but acquiesced to seeing a counselor at school. Maria refused to take medication, saying it made her feel bad and she “had her rights.” There were no current medication recommendations for Maria. M.Z. said she was not happy with J.M.’s ABS program and explained why. She met with the provider without being able to resolve her concerns and did not continue with that program. M.Z. found a different ABS program. J.M. recently had her first session in that program.

The children’s court appointed special advocate (CASA) recommended against moving the girls from the foster home. Maria and J.M. trusted the Z.’s and had a strong bond with them. The CASA believed any transition from their home would be traumatic for the girls. Maria was a shy 10 year old with a “stubborn streak.” She still showed signs of trauma. J.M. was a beautiful four year old who had made progress with language and behavior at home and at preschool. Maria and J.M.’s attorney/guardian ad litem also opposed their placement with Aunt.

The juvenile court found that Aunt truly cared about the girls and had carried her burden to show a change in circumstances. The court said M.Z. should not have allowed Maria to unilaterally discontinue psychotropic medication and was lucky Maria did not suffer any harm as a result. The court credited M.Z.’s explanations for the reasons she did not continue with J.M.’s ABS program and Maria’s therapy, but faulted her for not reaching out to the social worker and other professionals to avoid a lapse in services.

With respect to the children’s best interests, the court found that Maria and J.M. were an attached sibling group and should not be separated. Maria had been “unbelievably traumatized” by the maternal family. She did not have any current attachment to Aunt. Maria was very anxious about the uncertainty of her permanent placement and was irritated because the adults were not listening to her. The court said it shared the Agency’s concerns about the viability of a permanent placement with the Z.’s, but without therapeutic input it could not conclude it would be in Maria’s best interests to place her with Aunt against her wishes. The court denied
Aunt’s petition for Maria’s and J.M.’s placement and continued their section 366.26 hearing.

The juvenile court proceeded with an initial hearing on Aunt’s 388 petition for placement of W.Q. and J.Q. The court found that Aunt did not make a prima facie showing that a change in placement was in the boys’ best interests. W.Q. and J.Q. had significant emotional and behavioral issues and now felt safe and secure with Caregivers. The court summarily denied Aunt’s petition and set a section 366.26 hearing for W.Q. and J.Q.

On January 2, 2018, the court terminated parental rights to the boys and designated Caregivers as their prospective adoptive parents. On July 9, 2018, the court terminated parental rights to the girls and designated the Z.’s as their prospective adoptive parents.

DISCUSSION

I

FORFEITURE

The Agency argues Appellants have forfeited the issue whether section 361.3 applies by failing to object to the juvenile court’s decision to proceed under section 388. “A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court. [Citations.] Forfeiture … applies in juvenile dependency litigation and is intended to prevent a party from standing by silently until the conclusion of the proceedings.” (In re Dakota H. (2005) 132 Cal.App.4th 212, 221222 (Dakota H.).)

The Agency points out Y.M. and Aunt did not respond to the juvenile court’s initial request for further briefing of the issue and did not argue the court should assess the case under section 361.3 during closing argument. The Agency acknowledges that at the contested hearing, Y.M. tried to establish Aunt came forward for placement early in the case and the Agency did not respond to her request, which arguably would have allowed the court to assess the placement request under section 361.3. (See Isabella G., supra, 246 Cal.App.4th at p. 712 [when a relative makes a timely request for placement of the child, and the agency does not complete a relative home assessment as required by law, the relative requesting placement is entitled to a hearing under section 361.3, even if reunification services have been terminated].)

The record shows the juvenile court raised the issue of whether section 361.3 applied under Isabella G., supra, 246 Cal.App.4th 708 and Y.M. pursued the issue in questioning Aunt. Y.M. argued that under Isabella G., section 361.3 applies until parental rights are terminated. The court asked the other parties about their position on the issue. County counsel, minors’ counsel, and the Z.’s attorney argued section 361.3 did not apply. The issue was sufficiently addressed by the juvenile court during the proceedings to avoid a claim of forfeiture on appeal.5 (Cf. Dakota H., supra, 132 Cal.App.4th at pp. 221–222.)

II

STANDARD OF REVIEW

The issue whether the relative placement preference under section 361.3 applies when a child remains in foster care after a section 366.26 hearing is a question of law, which we review de novo. (People v. Figueroa (1999) 68 Cal.App.4th 1409, 1413 [interpretation and applicability of a statute is a question of law].) Under settled rules of statutory construction, we ascertain the Legislature’s intent to effectuate the law’s purpose. In so doing, we look to the words of the statute and give the words their usual and ordinary meaning. The plain meaning of the statute controls our interpretation. (In re Jose S. (2017) 12 Cal.App.5th 1107, 1113.) In view of the complexity of the dependency statutory scheme, a single provision “‘cannot properly be understood except in the context of the entire dependency process of which it is part.’” (In re Nolan W. (2009) 45 Cal.4th 1217, 1235, quoting Cynthia D. v. Superior Court (1993) 5 Cal.4th 242, 253.)

III

RELEVANT LEGAL PRINCIPLES

“The best interest of the child is the fundamental goal of the juvenile dependency system, underlying the three primary goals of child safety, family preservation, and timely permanency and stability.” (In re William B. (2008) 163 Cal.App.4th 1220, 1227 (William B.).) The Legislature “command[s] that relatives be assessed and considered favorably, subject to the juvenile court’s consideration of the suitability of the relative’s home and the best interests of the child.” (In re Stephanie M. (1994) 7 Cal.4th 295, 320 (Stephanie M.).) This directive applies throughout a child’s dependency proceedings but is governed by different standards depending on whether the issue arises during the reunification period, in the interim between termination of reunification services and a section 366.26 hearing, or after a permanency plan has been selected for a child.

At the outset of the case and during the reunification period, the agency and juvenile court are required to give “preferential consideration” to a relative’s request for placement, which means “the relative seeking placement shall be the first placement to be considered and investigated.” (§ 361.3, subd. (c)(1); Cesar V. v. Superior Court (2001) 91 Cal.App.4th 1023, 1032 (Cesar V.).) Within 30 days from the child’s detention in protective custody, the social worker is required to conduct an investigation to identify and locate all grandparents, adult siblings, and other adult relatives of the child.

5. To the extent, if any, the issue was forfeited by Aunt’s failure to respond to the juvenile court’s request to affirmatively show that Isabella G., supra, 246 Cal.App.4th 708 applied, we exercise our discretion to review the issue on the merits, which poses a question of law. (In re Julian H. (2016) 3 Cal.App.5th 1084, 1089; see In re S.B. (2004) 32 Cal.4th 1287, 1293-1294.)
and provide information about the child’s status to suitable relatives, and must “contact the relatives given preferential consideration for placement to determine if they desire the child to be placed with them.” (§§ 309, subd. (e)(1), 361.3, subd. (a)(8)(B)).

In assessing any relatives who would like the child to be placed in their care, the Agency and the juvenile court are required to consider the factors described in section 361.3, subdivision (a), and any other factors the juvenile court may deem relevant to the child’s particular circumstances. The first and foremost of these factors is “[t]he best interest of the child, including special physical, psychological, educational, medical, or emotional needs.” (§ 361.3, subd. (a)(1); see William B., supra, 163 Cal.App.4th at p. 1227.)

“Appellate court decisions have consistently held that the relative placement preference applies at least through the family reunification period. [Citations.] During the reunification period, the preference applies regardless of whether a new placement is required or is otherwise being considered by the dependency court.” (In re Joseph T. (2008) 163 Cal. App.4th 787, 795 (Joseph T.); In re Sarah S. (1996) 43 Cal. App.4th 274, 285.) If a new placement is required during the reunification period, the child welfare agency has an independent, affirmative duty to seek out relatives who would qualify for the relative placement preference. (Joseph T., supra, at p. 796, fn. 4.) Joseph T. did not resolve the question whether the preference for relative placement applies after reunification services have been terminated. (In re R.T. (2015) 232 Cal. App.4th 1284, 1300.)

6. At the time of the dependency court proceedings at issue in this case, the Legislature defined relatives entitled to preferential consideration as “an adult who is a grandparent, aunt, uncle or sibling.” (§ 361.3, subd. (c)(2), Stats. 2012, ch. 845, § 7, eff. Jan. 1, 2013.) The Legislature deleted this language from section 361.3, subdivision (c)(2), effective January 1, 2018. The statute no longer limits preferential placement consideration to a grandparent, aunt, uncle or adult sibling. Instead, any adult who is related to the child by blood, adoption or affinity within the fifth degree of kinship is entitled to preferential consideration. (§ 361.3, subd. (c)(2), Stats. 2017, ch. 732, § 47.)

Other factors include, in pertinent part: “… [¶] (2) The wishes of the parent, the relative, and child, if appropriate. [¶] (3) The provisions of … the Family Code regarding relative placement. (4) Placement of siblings and half-siblings in the same home … [¶] (5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect. [¶] (6) The nature and duration of the relationship between the child and the relative, and the relative’s desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful. [¶] (7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the child. [¶] (D) Protect the child from his or her parents. [¶] … [¶] (F) Facilitate visitation with the child’s other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H) Provide legal permanency for the child if reunification fails. [¶] … [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8)(A) The safety of the relative’s home.” (§ 361.3.)

This court addressed the issue of post-reunification relative placement in Isabella G. There, the child’s paternal and maternal grandparents and great-grandparents asked to be considered for placement prior to the dispositional hearing and continued to request placement. The Agency misinformed the relatives about placement policies and did not conduct the assessments required under section 361.3. (Isabella G., supra, 246 Cal.App.4th at pp. 722-723.) This court held that the relative placement preference applies after the reunification period where the relative has come forward seeking placement of the child during the reunification period and the agency has ignored the relative’s request for placement. (Id. at p. 723.)

Isabella G., supra, 246 Cal.App.4th 708 did not address whether the relative placement preference applies after the court has held a permanency plan hearing under section 366.26. To resolve this issue, we first examine the statutory scheme governing the selection and implementation of a dependent child’s permanency plan.

At a section 366.26 permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child. (In re Anthony B. (2015) 239 Cal.App.4th 389, 394-395.) Under section 366.26, subdivision (a), “[t]he procedures specified in this section are the exclusive procedures for conducting these hearings.”

To provide stable, permanent homes for dependent children, section 366.26, subdivision (b) requires the juvenile court to make findings and orders in the following order of preference: (1) termination of parental rights and placement for adoption; (2) tribal customary adoption; (3) legal guardianship by a relative with whom the child is currently residing; (4) identification of adoption or tribal customary adoption as the permanent placement goal and continuation of efforts to locate an appropriate adoptive family for the child within a period not to exceed 180 days; (5) appointment of a nonrelative legal guardian; (6) permanent placement with a fit and willing relative; and (7) continued foster care. (§ 366.26, subd. (b).) “Only if adoption is not possible, or if there are countervailing circumstances, or if it is not in the child’s best interests are other, less permanent plans, such as guardianship or long-term foster care considered.” (In re Autumn H. (1994) 27 Cal.App.4th 567, 574 (Autumn H.).)

After the selection of a permanency plan, the juvenile court is required to hold periodic review hearings at least every six months under section 366.3 (post-permanency review). (§ 366.3, subd. (d).) At a post-permanency review for a child in continued foster care, the juvenile court is required to consider all permanency planning options for the child including, as relevant here, whether the child should be placed

8. During the proceedings in this case, the Legislature modified section 366.26 to add a plan of permanent placement with a fit and willing relative, effective January 1, 2016. (Stats. 2015, ch. 425, § 13.) At the same time, it amended language permitting the juvenile court to order that the child be placed in long-term foster care “to order that the child remain in foster care, subject to the conditions described in section 366.26, subdivision (c)(4)).” (Ibid.; italics added.)
for adoption, appointed a legal guardian, or placed with a fit
and willing relative. (§ 366.3, subd. (h)(1).) The Legislature
directs the juvenile court to order that a hearing be held
pursuant to section 366.26 unless the court determines by clear
and convincing evidence there is a compelling reason that
holding a section 366.26 hearing is not in the child’s best
interest. (§ 366.3, subd. (h)(1).)

If the child is not placed for adoption, the juvenile court
must find whether the agency has made diligent efforts to
locate an appropriate relative and direct the agency to do so
if it has not. The court is also required to determine whether
each relative whose name has been submitted to the agency
as a possible caregiver has been evaluated as an appropriate
placement source. If not, the court must direct the agency to
do so. (Cal. Rules of Ct.,5 rule 5.740(a)(6) & (b)(3).)

When the juvenile court orders that a hearing be held
pursuant to section 366.26, the court is required to direct
the agency to prepare an assessment as detailed in section
366.21, subdivision (i), or section 366.22, subdivision (b).12
(§ 366.3, subd. (i).) The assessment must include an evalu-
ation of the child’s medical, developmental, scholastic, men-
tal and emotional status, and a review of the amount of and
nature of any contact between the child and members of the
child’s extended family. (§ 366.22, subd. (c)(C)(i).) If a pro-
posed legal guardian is a relative of the child, the assessment
must also include, but is not limited to, a consideration of all
of the factors specified in section 361.3, subdivision (a) and
section 361.4. (§§ 366.21, subd. (i), 366.22, subd. (c)(1)(D).)

To summarize, when a dependent child has been removed
from his or her home, the Legislature expresses a clear pre-
fERENCE for placement with a relative, if the home is appropri-
ate and the placement is in the child’s best interest. (Stepha-
nie M., supra, 7 Cal.4th at p. 320.) The relative placement
preference under section 361.3 applies throughout the reuni-
fiication period. (R.T., supra, 232 Cal.App.4th at p. 1300.) In
addition, section 361.3 applies after the reunification period
where the relative has made a timely request for placement
during the reunification period and the child welfare agency
has not met its statutory obligations to consider and investi-
gate the relative seeking placement.51 (Isabella G., supra, 246
Cal.App.4th at p. 723.)

We now turn to the question whether section 361.3 applies
where a relative requests placement of a child who remains in
foster care after a section 366.26 hearing. This appears to be an
issue of first impression. Our discussion takes place in the
context of the juvenile court’s finding that Maria, W.Q., J.Q.
and J.M. were not proper subjects for adoption and there was
no one willing to accept legal guardianship, and the order that

the children remain in foster care with the goal of finding a
permanency plan, including placement with a fit and willing
relative.

IV ANALYSIS

A

The Juvenile Court Must Follow the
Preferred Permanency Plan Order under
Section 366.26; However, in Considering
Whether to Select a Permanency Plan with
a Relative, the Juvenile Court Considers
the Relative Placement Factors Listed in
Section 361.3

Aunt contends the relative placement preference under
section 361.3 applies to a dependent child who remains in
foster care following a section 366.26 hearing. Maria and
J.M. agree the section 361.3 preference applies but point out
that relative placement is subject to the mandatory preference
for adoption by the child’s caregivers. The Agency, N.Z., and
W.Q. and J.Q. by implication, assert section 361.3 does not
control a relative’s request for post-permanency placement,
which is governed instead by sections 366.26 and 366.3. Y.M.
agrees sections 366.26 and 366.3 govern a post-permanency
request by the child’s relative for placement but asserts the
juvenile court applies section 361.3 to determine whether the
placement is in the child’s best interest.

The juvenile court is required to select a permanency plan
for the child according to the legislative preferences detailed
in section 366.26, subdivision (b). (See also § 366.3, subd.
(h).) Permanent placement with a relative is a permanency
plan option. (§ 366.26, subd. (b)(6); see rule 5.740(a)(6)
& (b)(3) [directing the juvenile court to order the agency
to make diligent effort to identify and locate relatives as a
placement source for a child in continued foster care].) Nev-
evertheless, it is axiomatic that adoption, then guardianship,
are the preferred permanency plans. (Autumn H., supra, 27
Cal.App.4th at p. 574; see also § 366.26, subd. (b)(4).) Thus,
permanent placement with a fit and willing relative is favored
only over continued foster care and is disfavored if any other
permanency plan is available. (§ 366.26, subd. (b).)

In view of the statutory preferences established by the
Legislature to select a child’s permanency plan (§ 366.26,
subd. (b)), the directive in section 361.3, subdivision (a) to
give “preferential consideration … to a request by a relative
of the child for placement of the child with the relative” does
not apply. (§ 366.3, subd. (h).) Our conclusion is supported
by the Legislature’s express directive that preferential con-
sideration under section 361.3 be given to relatives in the
event the adoption of a previously dependent child was dis-
rupted, set aside, or voluntarily relinquished. (§ 361.3, subd.
(f)(2).) “[I]f a statute ‘referring to one subject contains a criti-
cal word or phrase, omission of that word or phrase from a
similar statute on the same subject generally shows a differ-
ent legislative intent.’ “ (In re Rudy L. (1994) 29 Cal.App.4th 1007, 1011; Gikas v. Zolin (1993) 6 Cal.4th 841, 852 [the expression of one excludes the other].) Had the Legislature wanted the juvenile court to give preferential consideration under section 361.3 to a relative seeking a less favored permanency plan, it would have said so.

Notwithstanding the inapplicability of the relative placement preference at a permanency plan hearing, the juvenile court, in assessing a relative’s request to provide permanent care for a child, must consider the factors listed in section 361.3, subdivision (a)(1)-(8) at any permanency plan hearing. The Legislature directs the juvenile court to review the agency’s assessment report (§ 366.26, subd. (b)), which must include an evaluation of the child’s medical, developmental, scholastic, mental, and emotional status. (§ 366.3, subd. (i).) Further, “if a proposed legal guardian is a relative of the minor, the assessment shall also consider, but need not be limited to, all of the factors specified in subdivision (a) of Section 361.3 and Section 361.4.” (§§ 366.21, subd. (i), 366.22, subd. (c)(D); italics added.)

We are aware that on its face, this provision applies to relatives who are proposed legal guardians of the child. The dependency statutory scheme is complex, made more so by revisions to sections 366.26 and 366.3, effective January 1, 2016. (Stats. 2015, ch. 425, §§ 13 & 14.) A request where the agency did not properly consider that relative’s request for placement during the reunification period and a request for guardianship by a relative at a subsequent hearing under section 388. (Rule 5.740(b)(5); In re J.F. (2011) 196 Cal.App.4th 321, 330-331.) A party may choose to make this request under section 366.3 instead of submitting a petition under section 388 to avoid “a shrouding of the burden inherent therein of pleading and proving change of circumstances.” (San Diego County Dept. of Social Services v. Superior Court (1996) 13 Cal.4th 882, 889-890.) However, absent any other procedural mechanism, a relative seeking modification of an order continuing a child in foster care must file a section 388 motion.

To make a prima facie showing of changed circumstances sufficient to merit a possible modification of an order continuing a child in foster care, the relative must meet a threshold showing that she is fit and willing to permanently care for the child. For a child in continued foster care, a showing “the best interests of the child may be promoted by the proposed change of order” is inherent in the statutory scheme. (See §§ 366.26, subd. (b), 366.3, subd. (h)(1)). Thus, generally, the presumption favoring permanent placement with a fit and willing relative over continued foster care should suffice to make a prima facie showing of best interests under section 388.

If the petitioner meets the prima facie requirements under section 388, the juvenile court should proceed under section 366.3, subdivision (d) (governing post-permanency review hearings for a child in foster care). The juvenile court is required to consider all permanency planning options for the child. The court must set a section 366.26 hearing unless it determines that holding a section 366.26 hearing is not in the child’s best interest.12 Only upon that determination may the

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12. A compelling reason for determining that a hearing held pursuant to section 366.26 is not in the best interest of the child exists where the child is being returned to the home of the parent, the child is not a proper subject for adoption, no one is willing to accept legal
juvenile court order that the child remain in foster care without holding a hearing pursuant to section 366.26. (§ 366.3, subd. (b)(1).)

If the juvenile court orders a hearing under section 366.26, it must direct the agency to prepare an assessment report. If the issue of guardianship or permanent placement with a relative is at issue, the assessment must include, but need not be limited to, the relative placement factors specified in section 361.3, subdivision (a). (§§ 366.21, subd. (i), 366.22, subd. (b).) At the section 366.26 hearing, the juvenile court is required to read and consider the assessment report, receive other evidence and then make its findings and orders according to the preferences listed in section 366.26, subdivision (b). If the juvenile court selects a permanency plan other than permanent placement with a fit and willing relative or continues the child in foster care, it shall also deny the relative’s section 388 petition.

**V**

ANY ERROR WAS HARMLESS

The juvenile court did not assess Aunt’s section 388 petition for placement as a request to modify the prior order continuing the children’s placement in foster care and to select a new permanency plan for the children. Accordingly, the juvenile court proceeded solely under section 368. We nevertheless conclude that any error was harmless.

In W.Q.’s and J.Q.’s cases, if the juvenile court had ordered a new section 366.26 hearing (or had included Aunt’s petition in the already scheduled section 366.26 hearing), the first question presented would have been whether the children were adoptable. (§ 366.26, subd. (c)(1).) In view of the Caregiver’s wish to adopt the boys, and Aunt’s willingness to consider doing so as well, the court would have freed the boys for adoption. Having selected the preferred permanency plan of adoption, the juvenile court would not have had any authority to order a lesser preferred permanency plan and need not have heard evidence on Aunt’s request for permanent placement (or guardianship). Thus, the summary denial of Aunt’s section 388 petition was harmless. It is not reasonably probable that a result more favorable to Appellants would have been reached in the absence of the error in proceeding under section 388. (See People v. Watson (1956) 46 Cal.2d 818, 836.) We further conclude that error, if any, in not allowing Aunt to present evidence on the issue of the boys’ placement with her was harmless beyond a reasonable doubt. (See In re

**Justice P.** (2004) 123 Cal.App.4th 181, 193.) The juvenile court was required, as a matter of law, to select adoption as the boys’ permanency plans. (§ 366.26.)

In Maria’s and J.M.’s cases, the juvenile court correctly refused to apply the relative placement preference under section 361.3. The record belies Appellants’ assertion the juvenile court incorrectly proceeded under a “generalized” best interest standard of the child pursuant to section 388. Although the juvenile court did not formally consider the section 361.3 factors, the juvenile court’s remarks indicate it conducted a multi-factorial assessment of Maria’s and J.M.’s best interests. Thus, the juvenile court considered the girls’ special physical, psychological and emotional needs (see § 361.3, subd. (a)(1)); Maria’s wishes as well as those of Y.M. and Aunt (see § 361.3, subd. (a)(2)); placement of the siblings in the same home (see § 361.3, subd. (a)(4)); the suitability of Aunt’s home (see § 361.3, subd. (a)(5)); the nature and duration of the girls’ relationship with Aunt (see § 361.3, subd. (a)(6)); and Aunt’s ability to properly care for the girls and provide legal permanence for the children (see § 361.3, subd. (a)(7)). In addition to those non-exclusive factors, the juvenile court also considered the girls’ bonds to each other, and their bonds to their foster family, including Maria’s attachment to her older foster sisters.

There is ample evidence to support the reasonable inference that J.M., who was placed with the Z.’s before she was three weeks old, viewed the Z.’s as her parents and that removal from their care would be seriously detrimental, if not traumatic, for her. The juvenile court’s finding that Maria and J.M. were a bonded sibling group that should not be separated is similarly supported. The record contains ample evidence to support the court’s conclusion that Aunt truly cared about Maria and J.M., and that her home was appropriate for placement, but that Maria had been traumatized by her maternal family and did not have any current attachment to Aunt. The court resolved concerns about the Z.’s ability to provide for Maria’s therapeutic needs and J.M.’s special needs in the Z.’s favor. Thus the record supports the juvenile court’s finding that removing Maria against her wishes from the Z.’s care was not in her best interest, even in view of the uncertainties about the Z.’s ability to provide a permanent placement at the time of the hearing.

The statutory scheme does not require the juvenile court to select a permanency plan of placement with a fit and willing relative where “removal [from the current caregiver] would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the caregiver.” (Cf. § 366.26, subd. (c)(4)(B)(ii).) Maria and J.M. have now lived with the Z.’s for more than five years and the record supports the conclusion that they are a bonded, loving family. We conclude that the outcome of the hearing on Aunt’s request for Maria’s and J.M.’s placement would not have been different had the court held a new section 366.26 hearing, and explicitly considered the factors listed in section 361.3. The record supports the finding that permanent place-
ment with Aunt was not the appropriate permanency plan for the girls at that time. Error in proceeding under section 388 was harmless. (People v. Watson, supra, 46 Cal.2d at p. 836.)

**DISPOSITION**

The findings and orders are affirmed.

HUFFMAN, J.

WE CONCUR: McCONNELL, P. J., BENKE, J.

Cite as 18 C.D.O.S. 10320


No. F075085

In The Court of Appeal of the State of California Fifth Appellate District

APPEAL from an order of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

Filed October 23, 2018

**COUNSEL**

Lisa A. Smittcamp, District Attorney, Traci Fritzler, Chief Deputy District Attorney, and Douglas O. Treisman, Deputy District Attorney, for Plaintiff and Appellant.

Edgar Eugene Page for Defendant and Respondent.

**OPINION**

**INTRODUCTION**

In 2014, respondent Eddie Randolph was arrested by two California Highway Patrol (CHP) officers under suspicion of driving under the influence (DUI) of alcohol. Later that year, appellant Fresno County District Attorney’s Office filed a criminal complaint charging him with one count of misdemeanor DUI in violation of Vehicle Code section 23152, subdivision (a). Under this statute, “[i]t is unlawful for a person who is under the influence of any alcoholic beverage to drive a vehicle.”

It was further alleged respondent had refused an officer’s request to submit to chemical testing in violation of Vehicle Code section 23577.

In July 2015, the case was assigned for trial. Before a jury was empaneled, the trial court expressed concern that, without an expert witness, the prosecution would be unable

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1. A charge under Vehicle Code section 23152, subdivision (a), “requires proof that the defendant’s ability to drive safely was impaired because he had consumed alcohol.” (People v. McNeal (2009) 46 Cal.4th 1183, 1188.)

2. Unlike in Vehicle Code section 23152, subdivision (b), a conviction under this charge does not require proof of a specific percentage of blood-alcohol content. (Veh. Code, § 23152, subds. (a) & (b).) The term “under the influence” used in the Vehicle Code means the alcohol “must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties.” (People v. McNeal, supra, 46 Cal.4th at p. 1193.)

3. “The Vehicle Code requires all drivers who are lawfully arrested for DUI to submit to chemical testing of the blood or breath to determine the alcohol content of their blood.” (People v. McNeal, supra, 46 Cal.4th at p. 1188.)
to prove the required elements beyond a reasonable doubt based solely on the testimony of the arresting officers. The prosecutor attempted to qualify her two officers as experts on alcohol. Following a hearing pursuant to Evidence Code section 402, the trial court refused to recognize the officers as experts. The court then dismissed the case pursuant to Penal Code section 1385.4

Appellant contends the trial court abused its discretion in dismissing this matter. We agree. The court failed to apply People v. Joehnk (1995) 35 Cal.App.4th 1488 (Joehnk) and relied incorrectly on People v. Williams (1992) 3 Cal. App.4th 1326 (Williams). Williams no longer represents the law regarding an officer’s testimony about a defendant’s performance on a nystagmus test. We will reverse the order of dismissal and remand this matter for further proceedings.

BACKGROUND

I. THE RELEVANT COMMENTS DURING THE HEARING ON MOTIONS IN LIMINE.

On July 16, 2015, the case was assigned for jury trial. On that day, the trial court met with the parties and discussed in limine motions. The court had “considerable confusion” about the case because “an arrest tag” in the file showed a blood-alcohol content of “0.13,” but there was no indication of a preliminary alcohol screening (PAS) test administered to respondent. The prosecutor explained that the blood-alcohol content came from an arresting officer who estimated it “based on the objective symptoms and field sobriety tests.”

The court expressed concern that the officer would be unable to lay a foundation for that evidence and the prosecution did not have a designated expert witness. The court did not know how the prosecutor expected “to get in an opinion that [respondent] was under the influence and unable to safely operate a motor vehicle, cause [sic] you’re not gonna [sic] get it from your CHP officers. I know people come in here all the time thinking officers can opine somebody’s under the influence, but they can’t, not in my courtroom; not in any courtroom I’m familiar with. So you may have to run out and find yourself [an expert], but I’m not gonna [sic] allow … any lay witness to testify he failed the nystagmus test, so I concluded he was over .08 or approximated him at .13 or any such testimony because they don’t have a foundation for it.”

The trial court made the following statements.

“An officer with the CHP can testify to how a gaze nystagmus test is given, what clues he’s looking for, but conclusions to be drawn from those don’t come from him, it comes from some expert who can tell us about correlation studies, why the gaze nystagmus test tells us about people under the influence, what other common causes might result in somebody showing those symptoms, why a certain number of symptoms gives some assurance that, in fact, they have nystagmus as opposed to some other condition. None of that’s gonna [sic] come from your CHP officer, so I don’t know how you plan to prove it otherwise, but you’re not gonna [sic] get it in through them.”

The court ordered the parties to be present on July 20, 2015, for jury selection and trial.

II. THE HEARING PURSUANT TO EVIDENCE CODE SECTION 402.

On July 20, 2015, before jury selection began, a hearing occurred pursuant to Evidence Code section 402. The prosecutor asked for this hearing to qualify the two arresting officers, Walters and Hernandez, as experts. The prosecutor confirmed her belief that these officers had sufficient training and education on the effects of alcohol on a person, and they could testify as experts on whether, based on a given set of facts, a person is or is not driving in an unsafe manner.

We summarize the facts from the hearing. Both Walters and Hernandez had undergone the standard academy training that all CHP officers experience. They were both experienced patrol officers and each had conducted thousands of DUI investigations. Both had training and experience using field sobriety tests, including horizontal gaze nystagmus (HGN) tests, on drivers who were suspected to be under the influence of alcohol. They explained how the field sobriety tests worked and the clues they are trained to observe when discerning if a suspect is under the influence of alcohol. However, neither officer had any formal scientific or medical training. After extensive questioning from both counsel and the trial court, the court ruled that neither officer was qualified as an expert on the effects of alcohol on a person and its impact on operating a motor vehicle.7

III. THE TRIAL COURT’S RULING.

Following the Evidence Code section 402 hearing, the following exchange occurred:

4. All future statutory references are to the Penal Code unless otherwise noted.
5. “‘Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotatory. [Citation.] An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN. [Citation.] Some investigators believe alcohol intoxication increases the frequency and amplitude of HGN and causes HGN to occur at a smaller angle of deviation from the forward direction. [Citation.]’ [Citation.]” (Williams, supra, 3 Cal.App.4th at p. 1330.)
6. “A PAS device is a breath-testing instrument used to determine either the presence or concentration of alcohol in a person’s blood. Such device may be used by police, but is not required, in order to make a preliminary determination of sobriety prior to arrest. [Citation.]” (People v. Bury (1996) 41 Cal.App.4th 1194, 1198.) “A PAS test is differentiated from mandated chemical testing of a suspect’s blood-alcohol level (BAL) after a lawful arrest under the implied consent law. [Citations.]” (Ibid.)
7. In raising this appeal, appellant does not contend the officers should have been designated as experts pursuant to Evidence Code section 801, subdivisions (a) and (b).
“THE COURT: All right. We’re back in session in People vs. Randolph. Both counsel are present. [Respondent] is present.

“All right. I’ve heard from your two CHP witnesses in [an Evidence Code section 402] hearing, and as I understand it, the People’s intent is to call those two witnesses and those two witnesses only to prove their case?

“[THE PROSECUTOR]: Yes, Your Honor. The People have [respondent’s] poor driving, his poor performance on the field sobriety tests and the presumption, and we are prepared to move forward.

“THE COURT: All right. Well, let’s make a record of what your offer of proof is on that. And let me just start with your trial brief and see if there’s an agreement that this summarizes the observations that the officers have related in the report.

“You have the officer describing that the white Kia traveling westbound on Herndon was weaving within its lane, and at one point the left side tires crossed over the broken white lane lines.

“Officers then stopped the vehicle and performed their evidentiary tests or their field sobriety tests, after contacting him noting the standard symptoms of DUI intoxication and moderate odor emitting from within the vehicle,[8] his eyes red and watery and his speech slow and slurred, his movements clumsy. When asked if he consumed alcohol that evening, he stated he had one beer around 6:00 p.m. at the rodeo, slept eight hours the night before and ate nachos at 6:00 p.m.

“Then the officer gave the field sobriety tests. According to the officer then, [respondent] displayed six of the six scientifically validated clues and the horizontal gaze nystagmus test. During the finger count, he failed to touch his fingers to the tip of his thumb on his final attempt and completed three sets before stopping the tests. He counted one, two, three, four; five, four, three, two, one; one, two[;] three, four; four, three, two, one; and one, two, three, four; four, three, two, one.

“During the instruction phase of the walk-and-turn, [respondent] could not keep his balance. Once the test began, he missed heel to toe and stepped off the line on his first nine steps, made an improper spinning turn and missed heel to toe and stepped off on his second set of nine steps, and totally displayed four of the eight clues in the walk-and-turn.

8. In his brief, respondent argues that there was no evidence of any odor of alcohol emitting from him, only from within his vehicle.

“During the [Romberg] balance test, [respondent] displayed eyelid tremors, swayed two to three inches from front to back, and estimated 30 seconds after 15 seconds had elapsed.

“During the finger-to-nose test, [respondent] missed the tip of his nose on five of the six attempts and raised his left hand when instructed to raise his right hand on two consecutive attempts, and then he declined to take the— refused to take the preliminary alcohol screening test and refused to give a breath or blood sample as required under the law.”

The prosecutor agreed this represented the substance of her case. Defense counsel interjected that dash cam evidence also existed. According to defense counsel, the video does not show any “bad driving” and respondent did not cross over the centerline. The prosecutor disagreed with this representation.

The trial court presumed that the video would show “some level of weaving and arguably a striking of the centerline, which is what the officers will testify was their observation, whether it’s specifically clear on the [video] or not.” According to the court, the issue was whether, if all of this evidence was presented “without any expert opinion testimony to validate the science of this HGN test to establish that there is some substantial correlation between performance on that and the other field sobriety tests and one’s level of alcohol, and without an expert then to view all of the evidence that you present and give an expert opinion based on the totality of those circumstances that the person was or was not under the influence, without that, the question is, does that evidence rise to a level that is sufficient to prove the case beyond a reasonable doubt.”

The court cited Williams, supra, 3 Cal.App.4th 1326 and Joehnk, supra, 35 Cal.App.4th 1488. The trial court noted that, in Williams, the appellate court had excluded an officer’s opinion based on the result of HGN testing because the officer did not understand the science behind the test. According to Williams, HGN test results were admissible if linked to qualified expert testimony.

Later, the court stated:

“It’s a rebuttable presumption. Certainly there’s lots of explanations for it, but independent of any evidence that the defense might produce, I do not believe this case can be proven beyond a reasonable doubt without some expert to tell us that that driving pattern combined with that performance on those tests reflects a person who beyond a reasonable doubt—I mean, obviously it doesn’t need to be his opinion in those words, but there has to be an opinion on which the jurors could find beyond a reasonable doubt that that person is unable to operate a motor vehicle safely, and I don’t believe that can be proven without an expert. I see no sense in bringing up 45 people and wasting their day, wasting the time
of 12 other jurors for another day or two if, in fact, that’s all the evidence you’re going to present and I’m then going to grant [a motion under section] 1118.1. 

“So for that reason, in the interest of justice, I’m dismissing under [section] 1385. That’s the final ruling and you have the right to appeal.”

The trial court later clarified its ruling. The dismissal under section 1385 “is based on the interest of justice, that it would not be in the interest of justice to empanel a jury and present that case when the Court has already expressed the view that [sic] that, as a matter of law, would be insufficient to support a guilty verdict, and that’s the basis for the dismissal.”

IV. THE APPEAL TO THE APPELLATE DIVISION OF THE SUPERIOR COURT.

Following the dismissal of this matter, appellant filed a timely appeal with the Fresno County Superior Court, Appellate Division. On December 27, 2016, the lower court affirmed the dismissal in a split opinion. The majority agreed that the prosecution’s proffered trial evidence was insufficient as a matter of law to sustain a DUI conviction. The majority felt it did not need to address whether the trial court “misinterpreted” Williams and Joehnk because, regardless of the lower court’s stated reasons, its ruling was correct. According to the majority, although “it would be proper” for an officer to testify regarding a suspect’s performance on field sobriety tests and the results of any HGN testing, it would be improper for the officer to testify on the correlation between those results and the suspect’s level of alcohol impairment and ability to operate a motor vehicle safely. The majority believed the trial court “carefully examined both officers before concluding the officers lacked sufficient training or experience to expertly opine whether or not a driver could safely operate a motor vehicle based on a level of alcohol consumption. While the testimony of the CHP officers would have been admissible, the lack of any expert testimony demonstrating the correlation between respondent’s HGN testing and field sobriety tests with his level of intoxication and ability to safely operate a motor vehicle demonstrates that it would have been proper for the trial court to enter a judgment of acquittal on its own motion pursuant to section 1118.1 after the foregoing evidence was presented to the jury.” Without expert testimony, no evidence would link the officers’ observations and the results of respondent’s field sobriety and HGN tests “to a finding that his level of impairment rendered him ‘no longer able to drive a motor vehicle with the caution of a sober person, using ordinary care, under similar circumstances.’ [Citations.]” The majority found People v. Torres (2009) 173 Cal.App.4th 977 (Torres) “instructive” and it also cited People v. Davis (1969) 270 Cal. App.2d 197 (Davis). 

The majority noted that the prosecution in this matter, even after the trial court raised its concerns regarding the sufficiency of the evidence, made no request for additional time to obtain a qualified expert. The majority found no abuse of discretion when the trial court dismissed the case before trial pursuant to section 1385.

In contrast, the dissenting opinion contended that the trial court “misapplied” Williams and Joehnk. The dissent believed that, based on a reading of Joehnk and People v. Leathy (1994) 8 Cal.4th 587 (Leathy), officers could opine about a suspect’s intoxication based on the results of HGN, other field sobriety tests, and other observations. Because a specific blood-alcohol content was not required for a conviction in this matter, the trial court “erred when it refused to permit the law enforcement officer to testify that it was his opinion, based on the results of the HGN test and all of the other field sobriety tests he administered, together with all of his other observations, that [respondent] was under the influence of alcohol when he drove a vehicle.”

On January 25, 2017, the superior court granted an application for certification for review with this court. The lower court found “that the case raises an important question of law, namely whether the arresting police officer can testify as to the significance of a defendant’s performance on [an HGN] test in intoxicated driving cases, or whether the prosecution needs to provide separate expert testimony on this issue. There is currently some uncertainty in the law on this question, and thus certification to the Court of Appeal would help to secure uniformity of decision.” This appeal followed.

DISCUSSION

When a case is certified for transfer to an appellate court to settle important and recurring questions of law, the appellate court has the same power as the superior court’s appellate division to review any matter and make orders. (People v. Linn (2015) 241 Cal.App.4th 46, 56.) Thus, we review this matter as if the parties directly appealed to us following the trial court’s ruling. (Ibid.)

We begin our analysis by addressing the issue which the appellate division of the superior court certified for review.

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9. In relevant part, this statute states a trial court “on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.” (§ 1118.1.)

10. In both Torres and Davis, the respective appellate courts reversed DUI convictions where it was undisputed the respective defendants had ingested drugs but there was no evidence of unsafe driving. (Torres, supra, 173 Cal.App.4th at p. 983; Davis, supra, 270 Cal. App.2d at p. 199.) We review and analyze Torres and Davis in greater detail later in this opinion.
I. AN OFFICER MAY TESTIFY AS TO THE SIGNIFICANCE OF A DEFENDANT’S PERFORMANCE ON AN HGN TEST WITHOUT SEPARATE EXPERT TESTIMONY.

In certifying this issue for review, the appellate division of the superior court requested that we resolve whether an arresting police officer can testify as to the significance of a defendant’s performance on an HGN test in DUI cases or whether the prosecution needs to provide separate expert testimony on this issue. We agree with appellant that this issue was resolved in Leahy, supra, 8 Cal.4th 587 and Joehnk, supra, 35 Cal.App.4th 1488.

In Leahy, our high court held that the HGN test is a “‘new scientific technique’” that had to meet People v. Kelly (1976) 17 Cal.3d 24 (Kelly).11 (Leahy, supra, 8 Cal.4th at p. 607.) The Supreme Court provided language that is crucial to resolution of our present issue. “Once it has been shown that HGN testing is generally accepted in the scientific community, no reason exists why police officers should be deemed unqualified to administer and report the results of those tests. Thus, in future cases, once the Kelly standard has been met, as reflected by a published appellate precedent, the prosecution will not be required to submit expert testimony to confirm a police officer’s evaluation of an HGN test. Of course, nothing would prevent the defendant from challenging that evaluation with expert testimony of his own.” (Id. at p. 611.)

Following Leahy, the Fourth District Court of Appeal held that a police officer could use findings from HGN testing as a basis for an opinion that the defendant was driving under the influence of alcohol. (Joehnk, supra, 35 Cal.App.4th at p. 1492.) Joehnk concluded that the HGN test satisfied Kelly. (Joehnk, supra, at pp. 1504-1505.) The appellate court noted there was “no claim HGN testing alone can determine whether a suspect is under the influence of alcohol nor determine a blood-alcohol level. Such testing is a component of a three-part field sobriety test which itself is only part of an officer’s total observations of a suspect and is only one basis for an officer’s opinion concerning intoxication. Neither is it claimed that HGN is caused only by alcohol intoxication. The proponents of the technique readily concede nystagmus can be caused by a number of conditions and toxins.” (Id. at p. 1504.) However, Joehnk held that HGN testing was accepted by a typical cross-section of the relevant, qualified scientific community. This test was “a useful tool when combined with other tests and observations in reaching an opinion whether a defendant was intoxicated.” (Id. at pp. 1507-1508, fn. omitted.)

The defendant in Joehnk had argued that, even assuming HGN testing satisfies Kelly, an officer without scientific qualifications could not form opinions concerning intoxication based on nystagmus findings. (Joehnk, supra, 35 Cal.App.4th at p. 1508.) Joehnk rejected this claim. Quoting from Leahy, supra, 8 Cal.4th at p. 611, Joehnk reiterated that, once HGN testing is accepted in the scientific community, the prosecution is not required to submit expert testimony to confirm a police officer’s evaluation of that test. “Of course, nothing would prevent the defendant from challenging that evaluation with expert testimony of his own.” (Joehnk, supra, 35 Cal.App.4th at p. 1508.)

In this matter, when read together, Leahy and Joehnk establish that an officer, with adequate training and experience in performing the nystagmus test, as in this case, without additional expert testimony, may now testify as to the significance of a defendant’s performance on an HGN test. (Leahy, supra, 8 Cal.4th at p. 611; Joehnk, supra, 35 Cal.App.4th at pp. 1492, 1508.) Although there is no claim that HGN testing alone can determine whether a suspect is under the influence of alcohol (nor determine a blood-alcohol level), this testing is part of an officer’s total observations of a suspect. This is one basis for an officer’s opinion concerning intoxication. (Joehnk, supra, at p. 1504.)

II. WE DISAPPROVE OF CERTAIN LANGUAGE FROM WILLIAMS.

Williams, supra, 3 Cal.App.4th 1326, was decided prior to Leahy and Joehnk. In Williams, this court had held that results from an HGN test were improperly admitted in a DUI trial.12 (Id. at pp. 1329-1330.) We decided Williams before HGN was deemed accepted under Kelly. (Williams, supra, at pp. 1335-1336.)

In Williams, a pretrial hearing occurred pursuant to Evidence Code section 402. The arresting officer had explained his experience and training, including his 10 hours of classroom time and an eight-hour lab learning about nystagmus. (Williams, supra, 3 Cal.App.4th at p. 1330.) The officer had performed the test about 250 times in the field, but he had no scientific training regarding how alcohol might affect the human body. “He had no understanding of how nystagmus occurs after ingestion of alcohol, but he had some experiences in which nystagmus resulted from other causes such as head injuries, illness, or medication.” (Ibid.) Following the Evidence Code section 402 hearing, the trial court had ruled, in part, that the officer could give an opinion that the

11. In Kelly, the California Supreme Court established the following three-pronged test for determining the admissibility of evidence based on a new scientific technique: (1) reliability of the method must be shown by demonstrating the technique has gained general acceptance in the scientific community; (2) the witness must be qualified as an expert before giving an opinion on the subject; and (3) correct scientific procedures must be followed in the particular case. (Kelly, supra, 17 Cal.3d at p. 30; see Leahy, supra, 8 Cal.4th at p. 591 [reaffirming Kelly as the standard in California].) The test applies only to new scientific techniques, and was formulated to protect the jury from new, novel or experimental scientific techniques that convey a misleading aura of scientific certainty. (People v. Stoll (1989) 49 Cal.3d 1136, 1155-1156.)

12. In the unpublished portion of the opinion, Williams reversed the defendant’s conviction of DUI under Vehicle Code sections 23152 and 23175. (Williams, supra, 3 Cal.App.4th at p. 1329.) To assist the parties on remand, Williams elected to analyze whether the evidence regarding the HGN test was properly admitted. (Id. at pp. 1329-1330.)
defendant had consumed alcohol based on all the officer’s observations, including administration of an HGN test. The trial court determined that the officer offered lay, rather than expert, opinion. (Williams, at p. 1332.) On appeal, however, this court disagreed.

Williams noted that lay witnesses could give an opinion regarding another person’s “state of intoxication when based on the witness’s personal observations of such commonly recognizable signs as an odor of alcohol, slurring of speech, unsteadiness, and the like. [Citations.]” (Williams, supra, 3 Cal.App.4th at p. 1332.) If based solely on these factors, the officer could have provided a lay opinion that the defendant was under the influence of alcohol. (Ibid.) However, the HGN test is different from other field sobriety tests because it is “an assertion of scientific legitimacy” and not based on common knowledge. (Id. at p. 1333.) As such, Williams disagreed that the officer’s opinion, “to the extent it relied on the HGN testing,” was a mere lay opinion. (Ibid.) The Williams court assumed that the arresting officer’s “training and experience qualified him as an expert to administer the nystagmus test and observe signs of nystagmus.” (Ibid.) Nevertheless, to the extent it was based on the nystagmus test, the officer’s opinion that the defendant was under the influence of alcohol rested on scientific premises well beyond his knowledge, training, or education. “Without some understanding of the processes by which alcohol ingestion produces nystagmus, how strong the correlation is, how other possible causes might be masked, what margin of error has been shown in statistical surveys, and a host of other relevant factors, [the officer’s] opinion on causation, notwithstanding his ability to recognize the symptom, was unfounded. It should have been excluded.” (Id. at p. 1334.) Williams further held that an officer’s “testimony concerning how he gave the HGN test to [the defendant] and what he observed during the test may be admissible if it is linked to testimony of a qualified expert who can give a meaningful explanation of the test results to the jury. Without some connection to qualified expert testimony, however, [the officer’s] description of the test and his observations of nystagmus are irrelevant.” (Williams, supra, 3 Cal.App.4th at pp. 1334-1335.)

III. The Trial Court Abused Its Discretion In Dismissing This Matter.

In the “furtherance of justice,” a trial court may dismiss an action either upon its own motion or upon the application of the prosecuting attorney. (§ 1385, subd. (a).) We review a trial court’s ruling under section 1385 for abuse of discretion. (People v. Williams (1998) 17 Cal.4th 148, 158.)

A. The trial court failed to apply Joehnk and it incorrectly relied on Williams.

Our Supreme Court has instructed that all discretionary authority is contextual so we must consider the legal principles and policies that should have guided the trial court’s actions when reviewing whether an abuse of discretion occurred. (People v. Carmony (2004) 33 Cal.4th 367, 377.) A court’s discretion is not unlimited and “must be exercised within the confines of the applicable legal principles.” (Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747, 773; accord, David v. Hernandez (2014) 226 Cal.App.4th 578, 592.) If a decision is influenced by an erroneous understanding of applicable law, then a trial court has not properly exercised its discretion. (David v. Hernandez, supra, 226 Cal.App.4th at p. 592.)

Appellant argues that Joehnk is the “applicable law” in this case and Williams has been superseded. According to appellant, the trial court abused its discretion in failing to apply Joehnk. In contrast, respondent contends the trial court did not abuse it discretion. According to respondent, the officers had “limited qualifications” which the trial court “correctly weighed” when dismissing this action. The officers were not qualified to testify as DUI experts. Further, respondent claims the officers’ testimony, without more, did not satisfy the burden of proof required to prove all elements of DUI. Finally, respondent argues that Williams was never superseded, it is still good law, its holding applies here, and the trial court properly applied it in this matter.

We agree with appellant and reject respondent’s arguments. In dismissing this matter, the trial court relied, at least in part, on the now outdated language from Williams that an officer’s testimony concerning how he or she gave the HGN test, and what was observed, was admissible only if “linked to testimony of a qualified expert who can give a meaningful explanation of the test results to the jury.” (Williams, supra, 3 Cal.App.4th at p. 1334.) Under Joehnk, however, and because HGN testing now satisfies the Kelly formulation, a police officer can use findings from HGN testing as a basis for an opinion that the defendant was driving under the influence of alcohol. (Joehnk, supra, 35 Cal.App.4th at p. 1492.) Joehnk and Leahy make clear that the prosecution is not “required to submit expert testimony to confirm a police officer’s evaluation of an HGN test. Of course, nothing would prevent the defendant from challenging that evaluation with
expert testimony of his own.”” (Joehnk, supra, at p. 1508, quoting Leahy, supra, 8 Cal.4th at p. 611.)

The trial court relied on Williams and failed to apply Joehnk. The court’s decision was influenced by an erroneous understanding of applicable law. As such, this was not an informed decision and an abuse of discretion occurred.

B. Davis And Torres do not support the trial court’s dismissal.

In resolving this issue below, the majority from the appellate division of the superior court relied on Torres, supra, 173 Cal.App.4th 977, and Davis, supra, 270 Cal.App.2d 197. In affirming the trial court’s dismissal, the majority agreed that the prosecution’s proffered trial evidence was insufficient as a matter of law to sustain a DUI conviction. The majority felt it did not need to address whether the trial court “misinterpreted” Williams and Joehnk because, regardless of the court’s stated reasons, its ruling was correct. We disagree. We summarize Davis and Torres.


In Davis, the defendant was convicted of driving under the influence of a narcotic drug under former Vehicle Code section 23105. (Davis, supra, 270 Cal.App.2d at p. 197.) A police officer saw the defendant stop a car at the end of a dead-end street and two males exited, leaving the car doors open. The defendant walked briskly in one direction and his companion went in a different direction across a vacant lot. Both persons glanced furtively at the police car. (Id. at p. 198.) The officer, a narcotics expert, pursued and detained the defendant. The officer noticed the defendant’s pupils were constricted in dim light. The officer examined the defendant and found the defendant’s pupils had little reaction to light and the defendant’s arms had nonprofessional puncture wounds, some of which were very recent. A short time later, a physician examined the defendant with the same findings. The physician concluded the defendant was under the influence of an opiate. (Ibid.) Nonetheless, aside from constricted pupils, the defendant appeared normal. There was nothing unusual or irregular about his walk, his speech was normal, he was cooperative, his coordination was good, and he did “‘okay’” on the Romberg exam. In addition, his driving had not been erratic or unusual. (Id. at pp. 198-199.)

On appeal, the Davis court reversed the trial court’s order denying a new trial. (Davis, supra, 270 Cal.App.2d at p. 200.) According to the appellate court, the defect was not the lack of proof regarding use of a narcotic. Instead, it was “the total lack of any evidence that defendant’s ability to drive was impaired. There was neither expert opinion nor the observation of anyone that defendant lacked the alertness, judgment and coordination which are needed to operate a motor vehicle in a prudent and cautious manner.” (Ibid.)


In Torres, the appellate court reversed a conviction of driving while under the influence of methamphetamine in violation of former Vehicle Code section 23152, subdivision (a). (Torres, supra, 173 Cal.App.4th at p. 979.) A narcotics detective saw the defendant leave a house which was being surveilled. The defendant drove away in a truck, which the detective followed. The detective radioed to other officers and, shortly afterwards, a police officer pulled the defendant over for failing to stop the truck at the limit line of an intersection. Before initiating the traffic stop, the officer had followed the truck for about a half a block. The defendant “did not ‘blow through’ the intersection, he did not lock up the truck’s brakes and come to a screeching halt, and he was not involved in any near-miss accidents with other vehicles. He simply did not bring the truck to a complete stop until after half the truck had passed the limit line.” (Id. at pp. 979-980.) The defendant cooperated with the officer during the stop. The defendant appeared jittery, his face twitched, and he stuttered. The officer did not perform a drug recognition evaluation of the defendant. (Id. at p. 980.)

After observing the traffic stop, the narcotics detective approached the defendant. He found the defendant “nervous and a bit agitated.” (Torres, supra, 173 Cal.App.4th at p. 980.) The defendant’s “demeanor fluctuated between remorsefulness, indifference, and paranoia. He was sweating profusely, his muscles were rigid, and he could not stand still. He appeared sleepy, but his eyes were wide open and watery. He also appeared unkempt, had bad breath, and had a chemical odor.” (Ibid.) The defendant was arrested and transported to the police station. He admitted he had last used methamphetamine two days earlier. (Ibid.) The narcotics detective examined him and found an elevated pulse. The defendant’s pupils “were more dilated than normal, with signs of slow contraction (slow reaction to light) and rebound dilation (pupil resistance to constriction in light).” (Ibid.)

After an evidentiary hearing, the trial court determined that the narcotics detective was qualified to testify as an expert on the recognition of a person under the influence of methamphetamine. (Torres, supra, 173 Cal.App.4th at p. 980.) Based on the examination and the symptoms he observed, the detective opined that the defendant had used methamphetamine on the day of his arrest and was in the middle of the euphoria stage when he was arrested. (Ibid.) During the examination, the detective had obtained a urine sample from the defendant. The results were consistent with

13. At the time of the Torres opinion, Vehicle Code section 23152 made it “unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.” (Former Veh. Code, § 23152, subd. (a).) Effective 2013, this statute was amended. (Stats. 2012, ch. 753, § 2.) Under the current version, subdivision (a) of the statute deals with driving a vehicle under the influence of alcoholic beverages, while subdivisions (f) and (g) deal with driving a vehicle under the influence of any drug, and the combined influence of alcohol and drugs, respectively.
the detective’s observations of the defendant’s symptoms. “In his opinion, the results indicated a high level of methamphetamine intoxication.” (Ibid.)

At trial, the narcotics detective explained how methamphetamine intoxication can affect judgment, can cause trouble focusing, and can cause muscle rigidity. (Torres, supra, 173 Cal.App.4th at p. 981.) However, the detective did not conduct any field sobriety tests or other tests to measure the defendant’s balance, coordination, concentration, or divided attention. (Ibid.)

A toxicologist testified about the results of the defendant’s urine sample. The sample contained methamphetamine levels “‘on the higher end,’” but that testing did not reveal how recently the drug use occurred or how “‘under the influence’” the defendant had been. (Torres, supra, 173 Cal.App.4th at p. 981.) The toxicologist explained that driving is a divided attention task and requires a person to focus on multiple things at once. To determine whether a person is under the influence of methamphetamine for driving purposes, the toxicologist needed “to see field sobriety tests such as the Romberg exam, which assesses time perception, and any other tests that assess the person’s balance, coordination, ability to follow instructions, and ability to focus on multiple tasks at once.” (Id. at p. 982.)

The defendant testified he had smoked methamphetamine on the morning of his arrest. He said he was not feeling the effects of the drug when he was stopped. He admitted he had been untruthful when he told the detective he had last used the drug two days before his arrest. He also admitted two prior convictions for petty theft crimes. (Torres, supra, 173 Cal.App.4th at p. 982.)

In reversing the defendant’s conviction, the Torres court noted that, to be guilty of driving while under the influence of drugs, the drugs must have affected the defendant’s nervous system, the brain, or muscles “‘as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. [Citations.]’” (Citations.]” (Torres, supra, 173 Cal.App.4th at p. 983, italics in original.) “It is not enough that the drug could impair an individual’s driving ability or that the person is under the influence to a detectable degree. Rather, the drug must actually impair the individual’s driving ability. [Citation.]” (Ibid.)

The appellate court agreed that substantial evidence existed that the defendant was under the influence of methamphetamine when he was arrested. There was substantial evidence that use of this drug can impair a person’s judgment, focus, and psychomotor skills in ways that might make the person an unsafe driver. (Torres, supra, 173 Cal.App.4th at p. 983.) However, there was no evidence that the defendant’s drug use “actually impaired his driving ability on the night of his arrest.” (Ibid.) Neither the arresting officer nor the narcotics detective testified that the defendant drove erratically. The defendant was arrested for failing to stop at the limit line, which the toxicologist testified was “not sufficient to establish a person is under the influence for driving purposes.” (Ibid.) The symptoms of fidgetiness, sweatiness, and a high pulse rate do not make a person an unsafe driver. Although the toxicologist testified that dilated pupils from methamphetamine use might cause momentary blindness during driving, there is no evidence the defendant experienced such blindness. (Ibid.)

The Torres court determined that its situation was analogous to Davis, supra, 270 Cal.App.2d 197. (Torres, supra, 173 Cal.App.4th at p. 983.) Torres held there was insufficient evidence to support the defendant’s conviction. (Id. at p. 984.)

3. Davis and Torres are inapplicable in this situation.

We disagree that Davis and Torres support the trial court’s dismissal.

In Davis, the defect was not the lack of proof that the defendant had used a narcotic. Instead, it was “the total lack of any evidence that defendant’s ability to drive was impaired. There was neither expert opinion nor the observation of anyone that defendant lacked the alertness, judgment and coordination which are needed to operate a motor vehicle in a prudent and cautious manner.” (Davis, supra, 270 Cal.App.2d at p. 200.) Aside from constituted pupils, the defendant had appeared normal. There was nothing unusual or irregular about his walk, his speech was normal, he was cooperative, his coordination was good, and he did “‘okay’” on the Romberg exam. In addition, his driving had not been erratic or unusual. (Id. at pp. 198-199.)

In Torres, the defendant did not undergo field sobriety tests or other tests to measure his balance, coordination, concentration, or divided attention. (Torres, supra, 173 Cal.App.4th at p. 981.) Although it was undisputed the defendant had ingested a drug, there was no evidence of erratic driving. (Id. at p. 983.) There was no evidence the drug use “actually impaired his driving ability on the night of his arrest.” (Ibid.)

In contrast to Davis and Torres, this record strongly suggests that respondent was unable to drive a vehicle safely due to alcohol intoxication. Although it is disputed, some evidence suggests that respondent’s vehicle was weaving within its lane and, at one point, its left side tires crossed over the broken white lane lines.14 After contacting respondent, the officers described his eyes as “red and watery” and his movements “clumsy.” Respondent had slurred speech. A moderate odor of alcohol emitted from his vehicle. He admitted hav-

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14. Respondent argues that the video from the police car did not indicate swerving of his vehicle, which we must presume when reviewing the record in the light most favorable to the judgment. However, even when this disputed evidence is viewed favorably for respondent, other evidence in the trial court’s offer of proof suggests that respondent was under the influence of an alcoholic beverage and his mental or physical abilities were so impaired that he was no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances. (See CALCRIM No. 2110 [defining driving under the influence].)
ing one beer that evening. According to an arresting officer, respondent displayed six of the six scientifically validated clues for intoxication. During the Romberg balance test, respondent “swayed two to three inches from front to back, and estimated 30 seconds after 15 seconds had elapsed.” During the instruction phase of the walk-and-turn test, respondent could not keep his balance. Once that test began, he displayed four of the eight clues. He missed heel to toe and stepped off the line on his first nine steps. He made an improper spinning turn and missed heel to toe. He stepped off on his second set of nine steps. During the finger count, he failed to touch his fingers to the tip of his thumb on his final attempt, and he completed three sets before stopping the tests. Respondent did not count correctly.

The CHP officers observed respondent driving. The officers could testify at trial whether he drove in a manner that suggested his inability to operate the vehicle safely. Respondent underwent field sobriety tests, including HGN, to measure his balance, coordination, concentration and divided attention. Based on these tests, the officers could opine that respondent was driving under the influence of alcohol. (Joehnk, supra, 35 Cal.App.4th at pp. 1492, 1507-1508.)

A “generic” DUI charge under Vehicle Code section 23152, subdivision (a), requires “proof that the defendant was actually impaired by his drinking.” (People v. McNeal, supra, 46 Cal.4th at p. 1193.) This record contains evidence that suggests respondent was intoxicated, which impaired his driving ability. Both Torres and Davis are distinguishable. Neither of these opinions supports the trial court’s dismissal in this matter.

C. We reject respondent’s remaining arguments.

Respondent argues that the trial court did not abuse its discretion because the anticipated testimony from the arresting officers was allegedly insufficient to support a conviction under Vehicle Code section 23152, subdivision (a). He also contends that permitting the arresting officers to opine about his alleged intoxication will impermissibly reduce the prosecution’s burden of proof. We reject these claims.

This record contains disputed issues of fact and credibility determinations that must be resolved. Upon remand, and if this matter goes to trial, the jurors will be “the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses.” (§ 1127.) The defense will have an opportunity to cross-examine the officers, probe the foundation of their beliefs, and question their opinions. The defense may introduce evidence disputing whether respondent was under the influence of alcohol. The defense may also introduce evidence refuting whether respondent was unable to drive a vehicle with the caution of a sober person. It will be up to the trier of fact to determine whether respondent was under the influence of alcohol and unable to operate his motor vehicle safely.

Moreover, we are confident a jury will be instructed that the prosecution bears the burden of proof beyond a reasonable doubt regarding the elements of each charge. (See CALCRIM No. 220.) Likewise, we are confident a jury will be instructed on how to judge witness credibility (See CALCRIM No. 226) and the jurors will be informed that they may “disregard all or any part of an opinion that [they] find unbelievable, unreasonable, or unsupported by the evidence.” (CALCRIM No. 333.) The defense will have an opportunity to argue to the jurors how they should view the evidence and what inferences should be drawn from the record. (E.g., In re Avena (1996) 12 Cal.4th 694, 760 [“closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial”].)

Finally, the prosecution alleged that respondent refused to submit to chemical testing in violation of Vehicle Code section 23577. A jury may be instructed, in relevant part, that, if the officer asked respondent to submit to a chemical test “and explained the test’s nature to [respondent], then [respondent’s] conduct may show [he] was aware of [his] guilt.” (CALCRIM No. 2130.) It will be up to the jury to conclude whether respondent refused to submit to such a test, and to decide the “meaning and importance of the refusal. However, evidence that [respondent] refused to submit to a chemical test cannot prove guilt by itself.” (Ibid.)

Based on this record, the trial court abused its discretion in dismissing this matter before trial pursuant to section 1385. Accordingly, we reverse the order of dismissal and remand this matter for further proceedings.

DISPOSITION

The order dismissing this case is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

LEVY, Acting P.J.

WE CONCUR: FRANSON, J., PEÑA, J.
ORDER MODIFYING OPINION; NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on September 28, 2018, be modified as follows:

1. On page 1, the second sentence of the first paragraph, “Bunzl contends the judgment must be reversed because the FTB should have excluded income from Bunzl’s LLC’s in calculating its California tax liability under UDITPA,” is modified to read as follows:

   Bunzl contends the judgment must be reversed because the FTB should have excluded property, payroll, and sales factors from Bunzl’s LLC’s in calculating its California tax liability under UDITPA.

2. On page 6, the second and third sentences of the first full paragraph, beginning “In doing so, Bunzl excluded the income of its single member LLC’s” and ending “thereby reducing the amount of Bunzl’s income that was apportionable to California,” are modified to read as follows:

   In doing so, Bunzl excluded the property, payroll, and sales factors of its single member LLC’s from the numerator of the apportionment formula on the basis that it had already paid California a tax and fee for those LLC’s under section 18633.5. Excluding the property, payroll, and sales factors of the six single member LLC’s from the numerator of the apportionment formula drastically decreased the overall apportionment ratio, thereby reducing the amount of Bunzl’s income that was apportionable to California.

3. On page 6, the first and second sentences of the last full paragraph, beginning “The FTB rejected Bunzl’s approach” and ending “boosted Bunzl’s California income tax liability under UDITPA to slightly more than $1.4 million,” are modified to read as follows:

   The FTB rejected Bunzl’s approach and found that the property, payroll, and sales factors of the six single member LLC’s should have been included in the numerator of the UDITPA apportionment formula. Including the property, payroll, and sales factors of the six LLC’s in the numerator of the apportionment formula boosted Bunzl’s California income tax liability under UDITPA to slightly more than $1.4 million.

4. On page 7, the second sentence of the second full paragraph, beginning “Bunzl’s argument appears to be twofold” and ending “could be included in the apportionment formula,” is modified to read as follows:

   Bunzl’s argument appears to be twofold: (1) because its LLC’s paid the requisite fees and taxes under section 18633.5, the LLC’s property, payroll, and sales factors should have been excluded from UDITPA’s apportionment formula; and (2) because the owners of the LLC’s did not do any business in California apart from the LLC’s, they had no property, payroll, and sales factors attributable to California that could be included in the apportionment formula.

5. On page 7, the first sentence of the third full paragraph, “Bunzl first argues that section 18633.5 constitutes an ‘alternative’ taxation scheme that allows an otherwise disregarded single member LLC to be taxed for all purposes as a separate, stand-alone entity, so that its income is removed from the apportionment formula of UDITPA, even if it is part of a unitary business,” is modified to read as follows:

   Bunzl first argues that section 18633.5 constitutes an “alternative” taxation scheme that allows an otherwise disregarded single member LLC to be taxed for all purposes as a separate, stand-alone entity, so that the LLC’s property, payroll, and sales factors are removed from the apportionment formula of UDITPA, even if it is part of a unitary business.

There is no change in the judgment.

Jenkins, J., Acting P. J.