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**SUMMARIES**

**Criminal Law**

Denial of motion for finding of factual innocence is appealable order (Ross, J.)

*People v. Caldwell*

C.A. 1st; November 15, 2018; A148828

The First Appellate District affirmed a trial court order. In the published portion of its opinion, the court held that a defendant has the right to appeal the denial of a motion for a Penal Code §1488.55 finding of factual innocence.

In 1991, a jury found Maurice Caldwell guilty of murder. Some two decades later, a trial court granted Caldwell’s petition for a writ of habeas corpus on the sole ground that he received ineffective assistance of counsel. He was released from custody in March 2011. In 2015, Caldwell moved for a finding of factual innocence.

The trial court denied the motion. Caldwell appealed. The People opposed, arguing that the trial court’s order was not appealable.

The court of appeal affirmed, holding that a trial court order denying a factual innocence motion is appealable under §1237(b). Under §1237(b), a criminal defendant may appeal “from any order made after judgment, affecting the substantial rights of the party.” Here, after being imprisoned for more than twenty years due to the ineffectiveness of his assigned counsel, Caldwell was pursuing a “substantial right” by asking the court to reconsider his factual innocence claim. He accordingly had the right to appeal the trial court’s order.

**Employment Litigation**

Employees’ voluntary use of company vehicle to travel to and from work did not entitle them to compensation for travel time (Duarte, J.)

*Hernandez v. Pacific Bell Telephone Company*

C.A. 3rd; November 15, 2018; C084350

The Third Appellate District affirmed a judgment. The court held that employees who voluntarily participated in a program that allowed them to take a company vehicle home at night were not entitled to compensation for their travel time.

Pacific Bell Telephone Company employees Israel Hernandez and Larry Sharp worked as home video and internet customer service technicians in PacBell’s Home Dispatch Program (HDP). Participants in the program drive a company vehicle, containing tools and equipment, and are allowed to take the vehicle home at night. Technicians must be at the first worksite by 8:00 a.m. and are not paid for any time before 8:00 spent driving from their homes to the first worksite. They are generally also not paid for the time spent driving home with the equipment and tools after their last appointment. Hernandez and Sharp filed a putative class action lawsuit against PacBell, asserting wage and hour claims based on PacBell’s failure to compensate its HDP employees for (1) their time spent traveling to and from their first and last jobs each day with the company tools and equipment, and (2) the time required to safeguard the equipment and tools.

The trial court granted summary judgment in favor of PacBell.

The court of appeal affirmed, holding that the employees were not entitled to compensation for their travel time or the time spent safeguarding the company tools and equipment. First, because participation in the HDP was not compulsory, employees had the option of using their own vehicles to travel back and forth to the PacBell garage every day. They could thus not be deemed to be under PacBell’s control when they were driving to and from their first and last jobs each day. Time spent traveling on transportation that an employer provides but does not require its employees to use is not compensable as “hours worked.” Further, simply transporting tools and equipment during commute time is not compensable work where no effort or extra time is required to effectuate the transport.

**Immigration Law**

Statutory phrase “crime involving moral turpitude” not unconstitutionally vague (Grabber, J.)

*Martinez-de Ryan v. Whitaker*

9th Cir.; July 17, 2018; 15-70759

The court of appeals denied a petition for review of an order of the Board of Immigration Appeals (BIA). The court held that the statutory phrase “crime involving moral turpitude” is not unconstitutionally vague.


The court of appeals denied Martinez’s petition, holding that both Ninth Circuit and Supreme Court precedent com-
pelled the conclusion that the challenged statutory phrase is not unconstitutionally vague. In *Jordan v. De George*, 341 U.S. 223 (1951), the Supreme Court considered a vagueness challenge to the phrase “crime of moral turpitude” and concluded that the phrase was not so vague or meaningless as to be a deprivation of due process. The Ninth Circuit followed suit in *Tseung Chu v. Cornell*, 247 F.2d 929 (9th Cir. 1957), holding that the phrase “crime involving moral turpitude” was not unconstitutionally vague. Finding itself bound by *Jordan* and *Tseung Chu*, the court rejected Martinez’ challenge. The court found further that Martinez’ crime of bribery under §666(a)(2) was categorically a crime involving moral turpitude. Conviction under §666(a)(2) requires a finding that the perpetrator “corruptly” gave, offered, or agreed to give something of value to someone with the intent to influence or reward an agent of any of several enumerated types of agency or organization. Because §666(a)(2) requires proof of corrupt intent, it categorically qualifies as a crime involving moral turpitude.

### Personal Injury

No abuse of discretion in trial court’s decision to disallow mini-opening statements during voir dire (Johnson, Acting P.J.)

**Alcazar v. Los Angeles Unified School District**

C.A. 2nd; October 16, 2018; B281383

The Second Appellate District affirmed a judgment. The court held that the trial court acted within its discretion in disallowing mini-opening statements by counsel during voir dire so as to limit the quantity of case-specific facts presented to the jury at that stage of the proceedings.

While at school and allegedly unsupervised, 13-year old Edgar Alcazar climbed a tree, fell, and suffered severe and permanent injury. He sued the school district for negligence and related causes of action. The case was tried to a jury. Before the start of voir dire, the court granted the parties’ joint request to give mini-opening statements to the venire. Juror No. 3 came forward following voir dire and stated that because of the information that came out during the parties’ statements, he did not believe that he could be fair to Edgar, who, in the juror’s mind, was not willing to take responsibility for his own actions. The court excused Juror No. 3 and, based on the juror’s comments, made the decision not to allow counsel to give mini-opening statements to subsequent venires. The court instead read the parties’ agreed-upon statement of the case. It also continued to allow counsel to question the jurors. The jury that was ultimately selected rendered a verdict in favor of the school district.

Alcazar appealed, challenging the court’s refusal to allow mini-opening statements to the second and third venires.

The court of appeal affirmed, finding no abuse of discretion. Although Code Civ. Proc. §222.5 expressly allows for a “brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process,” it also expressly provides that the “scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge’s sound discretion.” The Supreme Court has repeatedly affirmed that it is not the function of voir dire “to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.” In light of Juror No. 3’s statement that his ability to be impartial had been irrevocably compromised by the detailed nature of the parties’ mini-opening statements, the trial court acted within its sound discretion on limiting the amount of case-specific facts the parties could put before the prospective jurors, either through mini-opening statements and/or their questioning.
FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 10859

ROCIO AURORA MARTINEZ-DE RYAN, Petitioner,

v.

MATTHEW WHITAKER, Acting Attorney General, Respondent.

No. 15-70759
United States Court of Appeals for the Ninth Circuit
Agency No. A096-025-359
On Petition for Review of an Order of the Board of Immigration Appeals
Submitted July 9, 2018* San Francisco, California
Filed July 17, 2018
Amended November 16, 2018

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

** The Honorable Ivan L.R. Lemelle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

COUNSEL

K. Alexandra Monaco, The Monaco Law Group Ltd., Las Vegas, Nevada; Kari E. Hong, Boston College Law School, Newton, Massachusetts; for Petitioner.

Allison Frayer, Trial Attorney; Melissa Neiman-Keltin and Aimee J. Carmichael, Senior Litigation Counsel; John W. Blakeley, Assistant Director; Joseph H. Hunt, Assistant Attorney General; Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.


Jennifer Lee Koh, Immigration Clinic, Western State College of Law, Irvine, California; Evangeline G. Abriel, Santa Clara University School of Law, Santa Clara, California; for Amici Curiae American Immigration Lawyers Association, Florence Immigrant and Refugee Rights Project, Immigrant Legal Resource Center, National Immigration Project of the National Lawyers Guild, and U.C. Davis Immigration Clinic.

ORDER

The opinion filed on July 17, 2018, and published at 895 F.3d 1191, is amended by the opinion filed concurrently with this order.

With these amendments, the panel has voted to deny Petitioner’s petition for panel rehearing. Judge Graber has voted to deny Petitioner’s petition for rehearing en banc, and Judges Tallman and Lemelle have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Petitioner’s petition for panel rehearing and rehearing en banc is DENIED. No further petitions for panel rehearing or rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge:

Petitioner Rocio Aurora Martinez-de Ryan is a native and citizen of Mexico who entered the United States without being inspected and admitted or paroled. She timely seeks review of a decision issued by the Board of Immigration Appeals (“BIA”), which affirmed an immigration judge’s decision precluding her application for cancellation of removal and ordering her removed from the United States. She argues (A) that her federal bribery conviction does not constitute a crime involving moral turpitude and (B) that the statutory phrase “crime involving moral turpitude,” 8 U.S.C. § 1182(a)(2)(A)(i)(I), is unconstitutionally vague. We disagree.

Petitioner entered the United States some time before 1999. A few years later, she provided cash payments to an employee at the Nevada Department of Motor Vehicles to influence and reward the employee for issuing identification documents to non-citizens illegally present in the United States. As a result, in 2010, Petitioner pleaded guilty to one count of bribery, in violation of 18 U.S.C. § 666(a)(2), for which the maximum penalty is 10 years’ imprisonment.

Shortly thereafter, Petitioner received a Notice to Appear, charging her with inadmissibility under § 1182(a)(2)(A)(i). Through counsel, Petitioner conceded inadmissibility but sought cancellation of removal. An immigration judge ruled that Petitioner’s bribery conviction constituted a crime of moral turpitude, rendering her ineligible for cancellation of removal. The BIA agreed, and this petition for review followed.

...
A. Bribery under § 666(a)(2) is Categorically a Crime Involving Moral Turpitude.

“To determine whether a crime is categorically one of moral turpitude, we examine whether the full range of conduct encompassed by the criminal statute constitutes a crime of moral turpitude.” Latter-Singh v. Holder, 668 F.3d 1156, 1159 (9th Cir. 2012) (internal quotation marks omitted). “[O] ne test ‘to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind.”’ Id. at 1161 (quoting In re Ajami, 22 I. & N. Dec. 949, 950 (B.I.A. 1999)).

Section 666(a)(2) provides that whoever

corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more [has committed a crime].

(Emphasis added.) Along with other circuits, we have held that “§ 666 contains . . . a corrupt intent requirement.” United States v. Garrido, 713 F.3d 985, 1001 (9th Cir. 2013) (internal quotation marks omitted). “An act is done ‘corruptly’ if it is performed voluntarily, deliberately, and dishonestly, for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by an unlawful method or means.” United States v. McNair, 605 F.3d 1152, 1193 (11th Cir. 2010); see Garrido, 713 F.3d at 1001–02 (citing McNair with approval).

Because § 666(a)(2) requires proof of a “corrupt mind,” Latter-Singh, 668 F.3d at 1161, we hold that a bribery conviction under § 666(a)(2) categorically qualifies as a crime involving moral turpitude. Our holding comports with de
crime.

B. The Statute is Not Unconstitutionally Vague.

In Jordan v. De George, 341 U.S. 223 (1951), the Supreme Court considered a vagueness challenge to the phrase “crime of moral turpitude.” The non-citizen in that case had been convicted of conspiracy to defraud the United States of taxes and was, for that reason, ordered deported on the ground that he stood convicted of a “crime involving moral turpitude.” Id. at 223–26. In view of the “grave nature of deportation,” the Court considered the statute under the usual criteria pertaining to the void-for-vagueness doctrine. Id. at 231. The Court held on the merits that the phrase in question was not so vague or meaningless as to be a deprivation of due process. Id. at 229–32.

We followed suit in Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957). Similarly, there, the non-citizen was convicted of willful tax evasion. Id. at 931–32. His conviction occurred before his latest entry into the United States, and the relevant statute, 8 U.S.C. § 1182(a) (Section 212(a) of the Immigration and Nationality Act of 1952), provided that an alien convicted of a “crime involving moral turpitude” was inadmissible. Relying on the Supreme Court’s then-re
cent decision in Jordan, we held that the phrase in question was not unconstitutionally vague. Tseung Chu, 247 F.2d at 938–39.

The government first argues that the void-for-vagueness doctrine does not apply at all to any ground of inadmissibility, relying on Boutilier v. INS, 387 U.S. 118 (1967). As a three-judge panel, we are bound by Tseung Chu’s consider
eration of the merits of this issue notwithstanding the fact that the petitioner in that case was inadmissible, rather than deportable. Because we do not read Boutilier quite as broadly as the government does, we do not think that it is “clearly irre
concileable” with Tseung Chu in this regard. Miller v. Gammie, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc).

Although some of the Boutilier opinion’s wording is broad, the crux of the decision is that the petitioner was “not being deported for conduct engaged in after his entry into the United States, but rather for characteristics he possessed at the time of his entry.” 387 U.S. at 123. “A standard applicable solely to time of entry could hardly be vague as to post-entry conduct.” Id. at 124. Moreover, the petitioner was excluded by reason of a status or condition (“psychopathic personality”), rather than by reason of a discrete criminal act. Id. at 118. And finally, although the Court asserted that the “constitutional requirement of fair warning has no applica
tility to standards . . . for admission of aliens to the United States,” id. at 123, the Court went on to decide on the merits that the pivotal phrase was, in fact, clear, id. at 123–24. Here, by contrast, Petitioner engaged in the conduct at issue after the time of entry, and the conduct in question was a criminal act, rather than a status or condition. Accordingly, we are not

1. Perhaps because bribery is so commonly understood to involve moral turpitude, petitioners in other cases have declined to challenge the proposition. E.g., Mendez-Mendez v. Mukasey, 525 F.3d 828, 831–32 (9th Cir. 2008); Cart v. Ashcroft, 395 F.3d 1081, 1083 n.3 (9th Cir. 2005).
persuaded that Boutilier forecloses consideration of whether a crime committed by a non-citizen constitutes a “crime of moral turpitude” so as to render her inadmissible. We also note that at least one other circuit has continued, after Boutilier, to analyze on the merits a void-for-vagueness challenge to the phrase “moral turpitude,” brought by a non-citizen who was found to be inadmissible. Lagunas-Salgado v. Holder, 584 F.3d 707, 710–11 (7th Cir. 2009); Ali v. Mukasey, 521 F.3d 737, 739 (7th Cir. 2008).

The Supreme Court’s recent decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018), extending to the immigration context its earlier opinion in Johnson v. United States, 135 S. Ct. 2551 (2015), does not eviscerate our holding in Tseung Chu, such that we should overrule it. Miller, 335 F.3d at 899–900. First, we are obliged to follow on-point Supreme Court precedent—here, Jordan—even if later Supreme Court cases cast some doubt on its general reasoning. Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (per curiam). Second, Johnson and Dimaya interpret statutory “residual” clauses whose wording does not include the phrase “moral turpitude” and which are not tethered to recognized common law principles. In the circumstances, we remain bound by Jordan and Tseung Chu.  

Petition DENIED.

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2. At least three of our sister circuits have held, in cases post-dating Johnson, that the Supreme Court’s holding in Jordan remains good law: the phrase “crime involving moral turpitude” is not constitutionally vague. Moreno v. Att’y General, 887 F.3d 160, 165–66 (3d Cir. 2018); Boggala v. Sessions, 866 F.3d 563, 569–70 (4th Cir. 2017), cert. denied, 138 S. Ct. 1296 (2018); Dominguez-Pulido v. Lynch, 821 F.3d 837, 842–43 (7th Cir. 2016).
FACTUAL AND PROCEDURAL BACKGROUND

A. The murder and investigation

On June 30, 1990, at approximately 2:30 a.m., Judy Acosta was murdered, and his friend, Domingo Bobila, was injured when they were shot during a drug deal in the Alemany Housing Project in San Francisco. Acosta and Bobila drove to the 900 block of Ellsworth Street with their friends Eric Aguirre and Dominador Viray. Having spent the evening drinking beer, the men decided to buy crack cocaine in the Alemany projects, an area known for drug sales and violent crime. During the drug buy, a drug seller punched Bobila in the face. Marritte Funches then shot Acosta several times in the chest at close range with a handgun. The People presented evidence—which Caldwell disputes—that Caldwell arrived and fired a shotgun at Acosta and Bobila. As they were hit by the shotgun pellets, Bobila pulled Acosta into the car and drove to a nearby gas station where Acosta died from multiple gunshot and shotgun wounds.

Initially, Caldwell told police that, having heard five to six gunshots, he ran to the scene, arriving after the shooting ended. He later said that he arrived on the scene and saw Henry Martin carrying the shotgun. In support of his habeas petition, Caldwell submitted a declaration stating that he saw Martin firing the shotgun. During a deposition in his civil rights case, Caldwell retracted that statement and said that he did not see Martin firing.

San Francisco Police Department Inspectors Arthur Gerrans and James Crowley responded to the gas station, investigated the murder scene, and spoke with witnesses, many of whom were unresponsive; no one identified the suspects. During a police interview in the hospital, Bobila described the dealers as young black men and thought he could identify them from their photographs. The inspectors questioned the two passengers, Aguirre and Viray, who corroborated Bobila’s version of the events. Aguirre described one of the suspects as a black male, with a Jheri-curl hairstyle, and five feet, four to six inches tall, which matched Caldwell’s appearance at the time.

On July 12, 1990, San Francisco Police Captain Diarmuid Philpott received an anonymous tip—which he provided to Gerrans and Crowley—to “check out” Maurice Caldwell because he’s “been shooting off guns in the projects.” The police canvassed the area and Gerrans interviewed Mary Cobbs. During a taped interview inside her apartment, Cobbs told Gerrans that on the night of the murder, awakened by gunshots, she looked out her window, and she saw a shirtless, light-skinned black male, aged 21-25, five feet, four inches tall, weighing 150 pounds, wearing dark sweat pants, firing a shotgun at the departing victims’ car. Cobbs’s description of the shotgun shooter matched that given by Bobila and fit Caldwell’s appearance at the time. Her description of admit-
ted handgun shooter Funches also matched his appearance at the time of the murder. Cobbs said she did not think the shooters were from the area.

On July 18, 1990, Caldwell told the inspectors that he was not present at the murder scene, that he had been inside at “Debbie’s house” during the shooting, and that the victims’ car was driving away when he came outside.

On July 26, 1990, Cobbs positively identified Caldwell during a photographic lineup. She told the inspectors that she “heard they call him Twan” and that twice the previous week Caldwell had threatened her, saying: “Bitch, we gonna’ fuck you and your family up if you talk to the police.”

On July 27, 1990, during a photographic lineup, Bobila selected Caldwell’s photograph as the person he thought he was talking to during the drug deal and who punched him in the face, although he was not “100% sure.”

On September 21, 1990, Caldwell was arrested for the murder of Acosta and attempted murder of Bobila. During an interview with police that same day, Caldwell said that he was at his aunt’s house with a woman named Tina during the murder and that he ran outside after the shooting ended. He claimed not to know his aunt’s last name or her address. Caldwell also refused to provide Tina’s last name.

After the arrest, police conducted a live lineup attended by Cobbs, Bobila, Aguirre, and Viray. Cobbs identified Caldwell as the shotgun shooter; Bobila and Aguirre each put a question mark next to Caldwell on the lineup card; and Viray did not identify Caldwell. At trial, Bobila testified that he identified Caldwell during the lineup as the person whose photograph he had selected from the photographic lineup.

The inspectors interviewed Caldwell’s aunt, Deborah Rodriguez, who told them that she spoke to Caldwell while he was in jail. She said Caldwell was at her house the night of the murder and that, after a few gunshots, he ran out of her house without a shirt on. Jacqueline Williams, Rodriguez’s friend who was at her house the night of the murder, said that Caldwell was upstairs with a woman named Linda and that he ran out of the apartment shirtless.

On October 17, 1990, Caldwell’s trial attorney provided the inspectors with Caldwell’s version of the events: Funches had the handgun, Erick Brown punched Bobila, and Martin had the shotgun. The inspectors showed Cobbs, Bobila, Aguirre, and Viray three different photo spreads that variously included photographs of Funches, Brown, and Martin; they could not identify anyone in the photo spreads.

The inspectors searched unsuccessfully for Funches, Brown, and Martin. Martin did not fit the witnesses’ description of the shotgun shooter.

B. The criminal case

On December 3, 1990, the court conducted the preliminary hearing, at which Cobbs and Bobila testified. Caldwell’s trial counsel cross-examined Cobbs extensively. He attempted to impeach Cobbs’s testimony both with her statements to the police and with questions about statements she allegedly made to a neighbor, Dorothy Wiggins—a witness he anticipated calling. Caldwell was held to answer on the charges. On December 14, 1990, the San Francisco District Attorney charged Caldwell with murder (Count 1; § 187), attempted first degree murder (Count 2; §§ 664/187), and felony discharge of a firearm at an occupied vehicle (Count 3; § 246). As to each count, the information alleged that Caldwell used a firearm to inflict great bodily injury on the victims (§ 12022.5, subd. (b)), and that the offenses were serious felonies (§ 1192.7, subd. (e)(8)). Aguirre also testified that Caldwell resembled one of the people present at the shooting.

Caldwell testified that she was positive Caldwell was the shotgun shooter. She clearly saw Caldwell, without a shirt on, holding the shotgun; a street light illuminated the area; there were no obstructions; and she recognized him from his presence in the area before the shooting. Cobbs testified that the interview with Gerrans in her apartment was interrupted by a knock on the door (by Sergeant Crenshaw), and the only person she saw outside was another police officer.3 (See People v. Maurice A. Caldwell (Aug. 27, 1992, A053626) [nonpub. opn.].) Cobbs also testified about Caldwell’s threats to her and her family.

Caldwell’s defense was that the shotgun did not cause Acosta’s death and that he was not present during the murder. Rodriguez testified that Caldwell ran out of her apartment after the initial shots wearing a T-shirt and that he did not have a shotgun. Alice Carruthers testified that she observed Funches fire a handgun at the victims and that she heard more shots as she ran home. Betty Jean Tyler testified that at the time of the shooting, Caldwell had been living in her apartment at 949 Ellsworth, next door to Cobbs’s apartment. Caldwell did not testify, and he did not challenge Cobbs’s identification at trial.

On March 20, 1991, the jury found Caldwell guilty of second degree murder, attempted murder, and discharging a weapon at an occupied vehicle and found two of the personal-use-of-a-firearm enhancement allegations to be true. This court affirmed Caldwell’s conviction.

C. The habeas proceedings

In 2009, Caldwell filed a petition for writ of habeas corpus alleging his imprisonment was unlawful because: 1) newly discovered evidence undermined the People’s case; 2) he was convicted on false testimony; 3) he was denied effective as-

3. Caldwell claims that Cobbs’s identification of him was tainted by the police bringing him to Cobbs’s door during the interview. During trial, Cobbs testified on direct examination that the only person who came to the door while speaking to Gerrans was another officer which was consistent with her preliminary hearing testimony. At trial, Gerrans confirmed that when Sergeant Crenshaw knocked on the door he was alone. At oral argument, counsel contended that Caldwell was denied the opportunity to question Cobbs about that event, but the record is clear that she was cross-examined about it during the preliminary hearing and counsel could have revisited the issue at trial but apparently chose not to do so.
sistance of counsel; 4) these cumulative errors denied him due process; and 5) he is actually innocent.

In support of his habeas petition, Caldwell submitted: (1) a declaration from his trial counsel, Craig Martin, stating that he did not hire investigators to work on the case; (2) his own declaration stating that he observed Henry Martin fire the shotgun; (3) Marritte Funche’s 4th declaration stating that he shot the handgun, that one of his “homeboys” fired the shotgun, that Caldwell was not present, and that one of the victims advanced on him with a knife before Funche shot him; (4) Demetrius Jones’s declaration stating that Caldwell was not present, Funche shot the handgun, and Henry Martin fired the shotgun; (5) Marcus Mendez’s declaration that when he looked out of his mother’s apartment after shots were fired, he saw Caldwell running towards the group with nothing in his hands; and (6) Maurice Tolliver’s declaration describing the shooting.

Tolliver stated that he observed at close range the entire incident from the arrival of the victims’ car through its speedy departure. Tolliver observed the drug sale, the argument between the Filipino buyer and the seller, and Funche shooting the “Filipino guy” with a handgun. “After [Funche] started shooting, [Martin], who had stayed at the side of the building, started shooting a larger gun that he held with two hands.” Funche continued shooting as the victims tried to escape. “As the guys in the car were trying to do a u-turn to get out of there, [Martin] passed the gun that he had been firing to a taller guy who went toward the corner of the building by Ellsworth and shot at the car some more as they were trying to leave.

The trial court granted Caldwell’s petition for a writ of habeas corpus on the sole ground that he received ineffective assistance of counsel.

The San Francisco District Attorney refiled the murder case against Caldwell. Because Cobbs died in 1998, the People moved to admit her trial testimony. The defense objected and the trial court excluded her testimony because the People could not locate the diagram Cobbs used to describe the incident; the trial court did not find Cobbs’s testimony unreliable. As a result of the court’s evidentiary ruling, the People were unable to proceed with the trial, and moved to dismiss the case. Caldwell was released from custody on March 28, 2011.

D. The federal case and Victim Compensation Board claim

On April 16, 2012, Caldwell filed a federal lawsuit against the City and County of San Francisco and various San Francisco police officers involved in the murder investigation (federal case). During the federal case, Caldwell developed evidence that he submitted in support of his factual innocence motion, including: (1) Tina McCullum’s 2013 declaration stating that she was with Caldwell the night of the murder, and that after Caldwell left the bedroom, no more shots were fired; (2) Caldwell’s 2013 declaration in support of his section 4900 claim for compensation stating that he saw Martin at the scene of the murder holding a shotgun; (3) Caldwell’s habeas counsel’s 2013 declaration 5 that, if given immunity, Martin would provide a statement that Caldwell was not present at the shooting and—from her observation of Cobbs’s apartment—Cobbs could not have seen the events about which she testified at trial; and (4) various deposition excerpts, articles, and items from the original investigative file.

On March 21, 2013, Caldwell filed a section 4900 claim with the California State Victim’s Compensation and Government Claims Board (now Victim’s Compensation Board (Board)) (claim).

On March 2, 2016, in the federal case the district court granted the defendants’ motion for summary judgment. Caldwell appealed that ruling to the Ninth Circuit Court of Appeals, which affirmed in part, reversed in part, and remanded the matter to the district court. 6 (Caldwell v. City and County of San Francisco (2018) 889 F.3d 1105, 1120.)

E. Factual innocence motion

Caldwell filed a motion for finding of factual innocence on August 3, 2015, and supplemented the evidence submitted in support of the habeas petition with evidence developed during the federal case, including declarations and deposition testimony from additional witnesses and Caldwell. In his 2009 habeas petition, Caldwell declared that, upon arriving at the scene of the shooting, “I saw Henry Martin standing at the corner of the 947 Ellsworth Street building in which Mary Cobbs lived, firing a shotgun. I could not see what he was shooting at. I saw him fire one shot and then take off running down Ellsworth Street.” In his 2013 declaration supporting his section 4900 petition, Caldwell stated, “I saw Henry Martin running away with a shotgun.” Asked about the discrepancy during his 2015 federal case deposition, Caldwell acknowledged that the statement in his 2009 declaration was false and that he did not see Martin shoot the shotgun.

In a detailed discussion of the evidence, the court noted the inconsistencies among the trial testimony, habeas declarations and federal case evidence. The court “thoroughly reviewed the materials presented by both sides,” was “not convinced by a preponderance of the evidence that [Caldwell]

4. Funche was convicted of murder and is serving a life sentence in Nevada.

5. The declaration was submitted in support of Caldwell’s section 4900 claim.

6. The Ninth Circuit’s decision has no bearing on our analysis here. The court found that summary judgment on Caldwell’s action under 42 U.S.C. § 1983 was improper because there were genuine issues of material fact concerning Caldwell’s claims that Sergeant Crenshaw fabricated evidence against him. (Caldwell v. City and County of San Francisco, supra, 889 F.3d at pp. 1112–1118.) Under the standard of review governing motions for summary judgment, the Ninth Circuit made no findings of fact and did not consider the issue of Caldwell’s innocence under a preponderance of the evidence standard.
is innocent” and, on May 31, 2016, denied “the motion for a finding of innocence pursuant to Penal Code section 1485.55, subdivision (b).” On July 12, 2016, Caldwell timely filed his notice of appeal.

The California Victim Compensation Board postponed its decision on Caldwell’s claim pending our deciding the appeal.7

DISCUSSION

I. THE ORDER IS APPEALABLE.

The People contend we must dismiss this appeal because an order denying a factual innocence motion is not appealable. They cite People v. Loper (2015) 60 Cal.4th 1155, 1159 for the proposition that a party may only appeal where that right is express in the statute. They reason that the absence of a specific appeal mechanism in section 1485.55 evidences the Legislature’s intent that an order denying relief not be appealable. (In re Anthony (2015) 236 Cal.App.4th 204, 215 (Anthony)) [a section 1485.55 order is not appealable by the People.] The People urge us to read the legislative intent as inimical to allowing defendants to appeal: “[T]he legislative intent behind section 1485.55 . . . was “to streamline and clarify the process for compensating exonerees.” (Citation.) In addition, the changes were intended to . . . make the system . . . less expensive by saving taxpayer money spent on years of costly litigation where innocence has already been proven.” (People v. Etheridge (2015) 241 Cal.App.4th 800, 807 (Etheridge).)” The People warn of “[c]ostly litigation” resulting from affording Caldwell appellate rights and argue that an exonerated defendant can ask the Victim Compensation Board to decide his innocence.

Caldwell disagrees, distinguishing the broad appellate rights section 1237, subdivision (b) affords defendants from the constraints imposed on the People by section 1238, subdivision (a)(5), on which Anthony was decided. Finding no authority on point, Caldwell relies on Etheridge, where the court decided the merits of defendant’s appeal from denial of his section 1488.55, subdivision (b) motion without specifically holding that the order was appealable. Because an appellate court is “duty bound” to consider appealability before deciding a case, Caldwell argues that the Etheridge court must necessarily have determined sub silentio that an order denying section 1485.55 relief is appealable.

We agree that Anthony is inapposite. That section 1238, subdivision (a)(5) does not authorize the People’s appeal (from an order granting defendant’s factual innocence motion) does not inform our decision on a defendant’s appeal under section 1237, subdivision (b). (Anthony, supra, 236 Cal.App.4th at p. 206.) “The prosecution’s right to appeal in a criminal case is strictly limited by statute. [Citation.] Longstanding authority requires adherence to these limits even though “the People may thereby suffer a wrong without a remedy.” [Citation.] The circumstances allowing a People’s appeal are enumerated in section 1238.” (Anthony, supra, 236 Cal.App.4th at p. 211, quoting People v. Chacon (2007) 40 Cal.4th 558, 564.) “Courts are precluded from so interpreting section 1238 as to expand the People’s right of appeal into areas other than those clearly specified by the Legislature.” (Ibid.) In contrast, a criminal defendant may appeal “[f]rom any order made after judgment, affecting the substantial rights of the party.” (§ 1237, subd. (b).)

We agree with Caldwell that, mindful of its jurisdictional duties, the Etheridge court necessarily determined that the order was appealable before deciding the merits. (Olson v. Cory (1983) 35 Cal.3d 390, 398; Baker v. Castaldi (2015) 235 Cal.App.4th 218, 222 (“It is the duty of an Appellate Court on its own motion to dismiss an appeal from an order which is not appealable.”).) We also agree with the Etheridge court’s implicit conclusion that the trial court’s denial of his motion “affect[ed] Etheridge’s substantial rights.” (§ 1237, subd. (b).)

Lacking controlling authority as to the appealability of section 1488.55 orders, we look to our high court’s application of section 1237, subdivision (b) to statutes which do not expressly afford defendants appellate rights. The Supreme Court regularly allows defendants to appeal notwithstanding the absence of a specific appellate mechanism in the statute under which they seek relief and liberally interprets section 1237, subdivision (b)’s requirement that the challenged order must affect the defendant’s substantial rights. “[A] postjudgment order ‘affecting the substantial rights of the party’ (§ 1237, subd. (b)) does not turn on whether that party’s claim is meritorious, but instead on the nature of the claim and the court’s ruling thereto.” (Teal v. Superior Court (2014) 60 Cal.4th 595, 600, italics added [orders under section 1170.126 and the Three Strikes Reform Act of 2012 “create a substantial right to be resentenced” and are appealable]; cf. People v. Mena (2012) 54 Cal.4th 146, 152–153 [order denying lineup motion affected “‘substantial right of the defendant,’” allowing appeal]; People v. Gamache (2010) 48 Cal.4th 347, 375, fn. 13 [“[s]ection 1259 permits appellate review of claimed errors to the extent they ‘affected the substantial rights of the defendant’” (italics added)]; People v. Totari (2002) 28 Cal.4th 876, 887 [an order denying an immigrant defendant’s section 1016.5 motion to vacate the judgment is appealable under section 1237, subdivision (b)].

Imprisoned for more than twenty years due to the ineffectiveness of his assigned counsel, Caldwell is pursuing a “substantial right” by asking us to reconsider his factual innocence claim. The possibility of obtaining monetary relief in the pending Board claim does not diminish the importance to Caldwell of appellate review of the trial court’s decision. We conclude that a defendant may appeal denial of a factual innocence motion pursuant to section 1237, subdivision (b).

7. We take judicial notice of In the Matter of the Claim of Maurice Caldwell, Notice of Decision, Victim Compensation Board of the State of California (Board), Claim No. 13-ECO-01 (Oct. 25, 2017). (Evid. Code, § 451.)
**DISPOSITION**

The order denying Caldwell’s factual innocence motion is affirmed.

Ross, J.*

We concur: Siggins, P.J., Jenkins, J.

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

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**EDGAR A. ALCAZAR, a Minor, etc., Plaintiff and Appellant,**

**v.**

**LOS ANGELES UNIFIED SCHOOL DISTRICT,** Defendant and Respondent.

No. B281383
In The Court of Appeal of the State of California
Second Appellate District
Division One
(Los Angeles County Super. Ct. No. BC534724)
APPEAL from a judgment of the Superior Court of Los Angeles County, David L. Minning, Judge. Affirmed.
Filed October 16, 2018
Certified for Publication November 15, 2018

**COUNSEL**

Hurrell Ctrall, Thomas C. Hurrell and Melinda Ctrall for Defendant and Respondent.

**ORDER CERTIFYING FOR PUBLICATION**

THE COURT:

The opinion in the above-entitled matter filed on October 16, 2018, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

JOHNSON, Acting P. J., BENDIX, J., CURREY, J.*

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

**OPINION**

Edgar A. Alcazar (Edgar), a minor, allegedly suffered severe and permanent injuries when he fell from the branch of a tree located on the campus of his middle school. By and through his guardian ad litem, Edgar sued the Los Angeles Unified School District (LAUSD). A jury found in favor of LAUSD on all of Edgar’s claims.

On appeal, Edgar advances two arguments for why he is entitled to a new trial; both arguments relate to the jury selection process, which ultimately involved three venires. First, Edgar argues that the trial court erred when, following the
first venire, it refused to allow counsel to make mini-opening statements to the second and third venires and prohibited counsel from referring to the specific facts of the case during the balance of voir dire. Second, Edgar contends that the trial court erred by refusing to remove two jurors for cause.

We are not persuaded by either of Edgar’s arguments. Accordingly, we affirm the judgment.

BACKGROUND

On May 7, 2013, shortly after lunch began at Edgar’s middle school, the principal received a radio call that “something had happened.”

A minute or two after receiving the call, the principal arrived at the scene and found Edgar, who was 13 years old at the time, lying on his back on a pedestrian walkway next to a concrete planter box that held a crepe myrtle tree. Lying next to Edgar was a broken branch from that tree. The branch was approximately 2 inches in diameter at its thickest point and approximately six to eight feet long. Prior to the incident, school staff had seen Edgar swinging “like Tarzan” from that very same branch and had warned him not to do so as it was “unsafe.”

When the principal found him, Edgar had his eyes open and was conscious, but was saying little. The principal summoned paramedics, who transported Edgar to a nearby hospital where he was treated for a skull fracture and a concussion or a mild traumatic brain injury.

Six months later, in January 2014, Edgar sued LAUSD for negligence and premises liability, alleging that he had “sustained severe and permanent injuries when he climbed and then fell from the subject tree.” By the time of trial in November 2016, Edgar asserted three separate claims against LAUSD: negligence; a violation of Education Code section 44807; and, pursuant to Government Code section 835, a claim for a dangerous condition on public property.

I. THE JURY SELECTION PROCESS

Initially, the trial court suggested that the parties limit their questioning to 1.5 hours per side. Although LAUSD’s counsel was amenable to such a time limit, Edgar’s counsel demurred, explaining that, due to the complexity of a personal injury action against a school district, especially one where the alleged special damages exceeded $15 million, he would need more than an hour and a half to examine prospective jurors. The trial court stated that it understood the concerns of Edgar’s counsel and did not place any time limits on voir dire.

A. The trial court’s limits on voir dire

On November 1, 2016, before the start of voir dire, the parties jointly requested leave to give mini-opening statements to the venire. The trial court acceded to the parties’ request and limited each side’s mini-opening to three minutes.

On November 3, 2016, the first day of voir dire, the trial court began by reading a short, stipulated statement of the case to the prospective jurors setting out the parties’ basic contentions. Immediately thereafter, the trial court allowed counsel for each party to give a mini-opening statement.

In his mini-opening statement, Edgar’s counsel, among other things, discussed the following: Edgar’s age; his learning disabilities; his reputation as a “class clown”; LAUSD’s knowledge that children at Edgar’s school, including Edgar, were swinging on tree branches; Edgar’s theories of liability: LAUSD’s failure to provide a safe environment by not cutting down the branch and by not properly supervising the children; and Edgar’s alleged damages, including “millions of dollars” of future medical care.

In his mini-opening statement, LAUSD’s counsel discussed, among other things, the following: Edgar’s height and weight (five feet 11 inches tall, 176 pounds); his learning disabilities and also his ability to distinguish right from wrong; the school’s repeated warnings to Edgar not to swing on tree branches and his refusal to follow those directions; the school’s supervision of children during lunch recess; and Edgar’s alleged injuries.

At the close of the first day of voir dire, the trial court dismissed for cause three prospective jurors who Edgar claimed would be unfair to his case and dismissed one juror who LAUSD claimed would be unfair to its case. The trial court took under advisement the dismissal of a fifth member of the venire, prospective juror No. 3.

On the morning of November 4, 2016, prospective juror No. 3 asked to speak to the court. After the trial court granted his request, prospective juror No. 3 advised that, based upon the “details” that came out in the parties’ presentation[s], he could not be fair to Edgar. Based on the information in the parties’ mini-opening statements, prospective juror No. 3 concluded, “Wow, this kid didn’t take responsibility for his own actions. He did something he was told not to do.” Prospective juror No. 3 stated further that he believed “it was a mistake to put out that much detail about [the case] because it already gave [him] reason to be against [Edgar].” The trial court dismissed prospective juror No. 3 for cause.

In light of the comments made by prospective juror No. 3, and in light of concerns that the trial court had about Edgar’s counsel preconditioning the prospective jurors—concerns that the trial court shared with counsel before interviewing

1. The agreed-upon statement of the case provided as follows: “This matter arises out of an incident that [occurred] on May 7, 2013, at [the middle school]. [Edgar] contends [that] he was left unsupervised and fell from a tree located on campus during school hours thereby causing severe injuries. [Edgar] contends that [LAUSD] is liable because it knew or should have known that children were climbing trees unsupervised and did nothing to prevent students from doing so. [¶] [LAUSD] contends that [Edgar] was enrolled in the Special Day Class wherein he was properly supervised at all pertinent times. [LAUSD] further contends that the incident was the result of [Edgar’s] carelessness and that [LAUSD] did not cause the incident. [¶] [Edgar] seeks damages for past and future medical bills, future pain and suffering, and future loss of earning and earning capacity. [LAUSD] disputes liability and the extent and scope of [Edgar’s] claimed injuries and damages.”
prospective juror No. 3—the trial court concluded that the parties would not be allowed to give mini-opening statements to any future panels of prospective jurors; instead, the court would simply read the parties’ agreed-upon statement of the case. In addition, the trial court instructed the parties that during voir dire “there will be no mentioning of facts specific to this case.” The court explained that while general questions about school safety, for example, were permissible, questions based on facts specific to the case at bar were not.

To the second venire on November 4 and to the third venire on November 7, the trial court read the parties’ joint statement of the case, but did not allow the parties to give mini-opening statements. In addition, on November 4, the trial court, using the language of CACI No. 106, instructed the prospective jurors that statements by counsel, including statements made during voir dire, were not evidence.

During his questioning of the second and third venires, Edgar’s counsel referenced a number of case-specific facts and issues that were either not mentioned in the joint statement of the case or only alluded to; those facts and issues included the following: Edgar’s age at the time of the incident; Edgar’s status as a special needs student at a regular school; whether a 13-year old could look at a tree limb and appreciate that the branch would not hold his weight; whether a 13-year-old could be at fault for hurting himself; whether a tree should be cut/trimmed for safety reasons; whether a school should supervise children who are 13 years or older; whether a school district has an obligation to do more than tell a 13-year-old not to do something that is risky or unsafe; whether telling a student not to swing on a tree limb was sufficient to deter the student from repeating that behavior in the future; whether a school should tell parents about their child’s potentially dangerous behavior while at school; whether a school should supervise children in the same way as their parents; and whether any of the prospective jurors had suffered a traumatic brain injury or had any experience with someone who had suffered an injury.

In addition, Edgar’s counsel questioned the second and third venires on a number of legal concepts. For example, Edgar’s counsel discussed with the prospective jurors the concept of comparative negligence, asking repeatedly if they could keep an open mind if Edgar admitted that he was partially at fault. Edgar’s counsel also explored with the prospective jurors whether they could award Edgar “a lot of money” for his alleged damages, including compensation for pain and suffering. On a related note, Edgar’s counsel inquired if the prospective jurors would cap Edgar’s damages or award him reduced damages because the defendant was a school district.

B. Juror M: challenged for cause

One of the members of the initial venire was Juror M. During voir dire on November 3, Juror M volunteered that she thought LAUSD could not “be held responsible for a kid being a kid.” Juror M explained further that, Edgar “was told multiple times, [but] he did it nonetheless. And kids will be kids, they’ll do whatever they want.” When pressed by Edgar’s counsel on whether she could keep an “open mind,” Juror M responded as follows: “Sure, I guess; but then again it would have been another issue . . . .” When asked by Edgar’s counsel if she could be fair to Edgar, she replied, “No. [¶] . . . [¶] I wouldn’t be fair.”

When asked by LAUSD’s counsel if she could try to be fair and analyze the evidence as it came across the witness stand, Juror M said, “Yes.” Further, when asked if she was going to give Edgar a “fair shake,” Juror M said, “I’ll try, yes.” And, when asked if she would obey the law as instructed by the court, Juror M replied, “Yes.”

On the following day, November 4, Edgar’s counsel again inquired as to Juror M’s ability to be fair given Edgar’s damages claim. Juror M responded that Edgar’s claim for damages was “very excessive.” Juror M admitted further that, because she was already thinking that the damages claim was excessive, she was effectively telling Edgar’s counsel that she “probably can’t be fair.” However, Juror M also told Edgar’s counsel that she would try to be fair and that she “would have to see the evidence.”

In response to probing by LAUSD’s counsel, Juror M stated that she would be able to be fair and keep an open mind, listen to the testimony and then make a decision. In addition, Juror M re-affirmed that she would follow the law as instructed.

Later that day, the trial court denied Edgar’s challenge to Juror M for cause. Ultimately, Juror M served on the jury.

C. Juror S: challenged for cause

Juror S joined the panel of prospective jurors on November 4, the second day of voir dire. When Edgar’s counsel asked Juror S if he had any strong feelings about the case, he replied that he needed to “hear more about the case.” When asked if he had any strong feelings that would make him unfair to Edgar, Juror S responded, “No.” When pressed by Edgar’s counsel, Juror S stated that he would keep an open mind even if Edgar admitted to being partially responsible for his injury. Juror S stated further that it would not be hard for him to keep an open mind about the school’s alleged role in causing or contributing to Edgar’s injury. However, Juror S expressed some hesitation on the issue of compensating Edgar for his injury: “Well, the kid, they already know the rules. That’s his own responsibility because they already know about the rules.” When Edgar’s counsel attempted to explore Juror S’s answers regarding Edgar’s knowledge about the school’s safety rules, Juror S became in his own words “nervous,” responding to questions by stating, “I don’t understand,” and “I don’t know what to say,” and ultimately reversing himself, stating that he could not keep an open mind because he was nervous. After Juror S said that he was nervous, the trial court suggested that the parties turn their questioning to another prospective juror, which they did.
Later that day, the trial court denied Edgar’s challenge to Juror S for cause. Ultimately, Juror S served on the jury.

On November 7, 2016, while voir dire was still proceeding, Edgar moved for a mistrial, arguing that the trial court should have granted certain of his challenges for cause, including his challenges to Jurors M and S. On November 9, 2016, LAUSD filed its written opposition to the motion. On November 10, 2016, after voir dire had ended and testimony had begun, the trial court denied the motion.

II. THE TRIAL

At trial, Edgar conceded that he was “partially responsible” for his injuries, but argued nonetheless that LAUSD failed to follow its own safety plans and rules and that its negligence caused his injuries. In its defense, LAUSD argued that there was a detailed safety plan in place, the school and its staff followed that plan, and Edgar’s learning disabilities did not interfere with his ability to distinguish right from wrong—that is, Edgar, having been previously warned about the danger of swinging from tree branches, knowingly chose to engage in risky behavior and no reasonable amount of supervision could have prevented the accident.

On December 5, 2016, after less than two hours of deliberation, the jury returned a verdict in favor of LAUSD. On each claim, the jury’s vote was 11 to 1. On January 3, 2017, the trial court entered judgment in LAUSD’s favor. Edgar timely appealed.

DISCUSSION

I. THE PROHIBITION ON ADDITIONAL MINI-OPENING STATEMENTS AND CASE-SPECIFIC FACTS

On appeal, Edgar argues the trial court’s order after the first day of voir dire prohibiting additional mini-opening statements and discussion of case-specific facts “cannot be squared with the purpose of [Code of Civil Procedure] section 222.5, or with its terms. It was clear error.” As discussed below, we disagree.

A. Standards of review

“The interpretation of governing statutes is decided de novo by the appellate court.” (Gaytan v. Workers’ Comp. Appeals Bd. (2003) 109 Cal.App.4th 200, 214.) “When we construe a statute, our ‘fundamental task . . .’ ‘is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.’ ” (Hartnett v. San Diego County Office of Education (2017) 18 Cal.App.5th 510, 522.)

B. The evolution of section 222.5

1. Original enactment

In September 1990, the Legislature enacted section 222.5 of the Code of Civil Procedure as part of a broader effort to revise and extend indefinitely the Trial Court Delay Reduction Act of 1986. (Office of Local Gov. Affairs, analysis of Assem. Bill No. 3820 (Sept. 10, 1990), p. 1.) “In order to further reduce delays in criminal court actions, the Trial Court Delay Reduction Act provide[d] judges with more authority to control voir dire examination.” (Ibid. at p. 3.) Section 222.5 was designed to extend that authority to control voir dire to civil court actions. (Ibid.)

To obtain that end, section 222.5 provided that, following the trial judge’s examination of the venire, “counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause.” (Italics added.) Section 222.5 provided further that “the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case.” (Italics added.) Although the statute gave counsel the right to examine the venire, section 222.5 made clear that any such examination was subject to the trial court’s discretion: “The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge’s sound discretion.” (Italics added.) As originally enacted, section 222.5 did not provide that counsel for the parties could make short opening statements to the venire.

2. 2011 amendment

In September 2011, the Legislature amended section 222.5. (Stats. 2011, ch. 409 (Assem. Bill No. 1403), § 1.) As originally introduced in March 2011, Assembly Bill No. 1403 would, among other things, “require the trial judge to permit liberal and probing examination calculated to discover bias or prejudice.” (Assem. Bill No. 1403 (2011–2012 Reg. Sess.) as introduced Mar. 7, 2011, p. 1, italics added.) Specifically, Assembly Bill No. 1403 proposed amending the section 222.5 as follows: “During any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case.” (Id. at p. 2.) However, by June 2011, that mandatory language had been stricken from the proposed amendment in both the Assembly and in the Senate. (See Assem. & Sen. Amend. to Assem. Bill No. 1403 (2011–2012 Reg. Sess.) May 10, 2011 & June 23, 2011, p. 3.) The more permissive “should” language was retained in the final version of the amendment.

In early September 2011, the Senate introduced several amendments to the proposed legislation including the fol-
The trial judge should allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process. ([¶] The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge’s sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. . . . [¶] . . . For purposes of this section, an ‘improper question’ is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law.” (Italics added.)

C. No abuse of discretion

Our Supreme Court has repeatedly affirmed that “it is not a function of the examination of prospective jurors to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law.” [Citation.] Therefore, a question may be excluded if it appears to be intended solely to accomplish such improper purpose.” (People v. Williams (1981) 29 Cal.3d 392, 408, fn. omitted, italics added; see People v. Carter (2005) 36 Cal.4th 1114, 1178, citing People v. Williams with approval.) The law is “clear that ‘[i]t is not a proper object of voir dire to obtain a juror’s advisory opinion based upon a preview of the evidence.’ ” (People v. Butler (2009) 46 Cal.4th 847, 860.) Rather, a proper inquiry must be ‟directed to whether, without knowing the specifics of the case, the juror has an ‘open mind’” on the issues presented. (Id. at p. 859, italics added.)

Here, in order to minimize the risk of improper questioning by counsel for either party, but especially to reduce the likelihood that counsel for Edgar might engage in preconditioning, the trial court decided to limit the amount of case-specific facts the parties could put before the prospective jurors either through mini-opening statements and/or their questioning. This decision, as the relevant version of section 222.5 makes plain, was an act within the sound discretion of the trial court—a discretion that the Legislature in 2011 was intent on preserving. That version of section 222.5 expressly provides that the “scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge’s sound discretion.” (Italics added.) Moreover, that version of section 222.5 did not require the trial court to allow the parties to make several or even one
brief opening statement or to reveal detailed facts about the case that supported the parties’ contending theories.

The trial court’s decision was not only within its discretion, but it was also grounded in fact. The decision was based on the court’s independent observations of the first day of voir dire. We “afford deference to the trial court’s factual determinations” which are based on firsthand observations not available to us on appeal. (See generally People v. Barnwell (2007) 41 Cal.4th 1038, 1053.)

The trial court’s decision was also supported by the independent statements of prospective juror No. 3, who felt that his ability to be impartial had been irrevocably compromised by the detailed nature of the parties’ mini-opening statements. We defer to the trial court when it has had the opportunity to hear a witness speak and observe his or her demeanor. (In re Lawley (2008) 42 Cal.4th 1231, 1241.)

Finally, following its order, the trial court allowed Edgar’s counsel considerable leeway with respect to what facts did and did not constitute case-specific facts. Edgar’s counsel was permitted to question the second and third venires on a wide range of facts germane to the case, including Edgar’s age, his status as a special needs student at a regular school, a 13-year-old’s ability to evaluate the risk of injury from swinging on a particular tree limb, school supervision of 13-year-olds, traumatic brain injuries, the principles of comparative negligence as applied to this case, and compensation for Edgar’s alleged pain and suffering. In other words, the trial court did not impose or enforce a complete ban on case-specific facts; rather, it imposed what it determined to be necessary but limited restraints on counsel’s examination of the prospective jurors. As a result, any potential prejudice to Edgar arising from the order denying additional mini-opening statements was mitigated by the liberality with which trial court allowed his counsel to question the second and third venires.

In short, on the record before us, we cannot conclude that the trial court’s decision was beyond the bounds of reason. (People v. Benavides, supra, 35 Cal.4th at p. 88.) Consistent with the terms of and the legislative intent behind the statute, the trial court permitted liberal and probing examination of the prospective jurors within reasonable limits.

II. THE DENIAL OF “CAUSE” CHALLENGES TO JURORS M AND S

A. Standard of review

A prospective juror may be challenged for cause when the juror has actual bias, “the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.” (§ 225, subd. (b)(1)(C).)

California courts have long recognized that “a juror is not disqualified by reason of general bias entertained against a class of actions, when it appears from his testimony that he can lay aside that prejudice, and, uninfluenced by it, try the cause at issue solely upon the evidence and the instructions of the court as to the law.” (Fitts v. Southern Pacific Co. (1906) 149 Cal. 310, 314.)

“In general, the qualification of jurors challenged for cause are ‘matters within the wide discretion of the trial court, seldom disturbed on appeal.’” (People v. Kaurish (1990) 52 Cal.3d 648, 675.) “[A] trial court’s rulings on motions to exclude for cause are afforded deference on appeal, for ‘appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person’s responses (noting, among other things, the person’s tone of voice, apparent level of confidence, and demeanor), glean valuable information that simply does not appear on the record.’” (People v. Avila (2006) 38 Cal.4th 491, 529.)

People v. Weaver (2001) 26 Cal.4th 876, is illustrative. In that case, two venirepersons, when questioned by defense counsel expressed the general belief that the death penalty was the appropriate penalty for all murders. (Id. at pp. 909-910, 911-913.) However, both prospective jurors subsequently modified their views when questioned by the prosecutor, stating that if chosen they would follow the law as instructed by the trial court. (Id. at pp. 912-913.) In reaching its decision that the trial court did not abuse its discretion in denying the defendant’s challenges to those prospective jurors, our Supreme Court stated, “A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror’s responses in deciding whether to remove the juror for cause. . . . [W]here equivocal or conflicting responses are elicited regarding a prospective juror’s ability to [apply the law], the trial court’s determination as to his true state of mind is binding on an appellate court.” (Id. at p. 910.)

Similarly, in People v. Crittenden (1994) 9 Cal.4th 83, our Supreme Court held that the trial court did not err in denying challenges for cause to two venirepersons who expressed strong views in favor of the death penalty but who also later stated that they would follow the law. (Id. at p. 123.) Although both prospective jurors expressed conflicting views, “[n]either juror expressed views indicative of an unalterable preference in favor of the death penalty, such that their protestations that they would follow the law would not ‘rehabilitate’ them.” (Ibid., italics added.) The court further noted, “because both jurors provided conflicting responses relating to their views concerning the death penalty, as indicated above, the trial court’s determinations as to their state of mind, based in part upon their demeanor, are binding upon this court.” (Ibid.)
B. No abuse of discretion in denying challenges

Here, the trial court did not abuse its considerable discretion when it denied Edgar’s “for cause” challenges to Jurors M and S. Although both jurors made conflicting statements about their ability to remain impartial, neither juror “expressed views indicative of an unalterable preference” in favor of LAUSD. (People v. Crittenden, supra, 9 Cal.4th at p. 123.) Instead, both Jurors M and S expressly stated that they could keep an open mind. Accordingly, we hold that the trial court did not abuse its discretion by denying Edgar’s “for cause” challenges to Jurors M and S. 5

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

JOHNSON, Acting P. J.

We concur: BENDIX, J., CURREY, J.*

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

5. In his opening brief, Edgar also contended that the trial court erred by denying a challenge for cause to a third prospective juror, Juror D. However, prospective Juror D did not serve on the jury, because the parties agreed to dismiss her for hardship. Our Supreme Court has instructed that a trial court’s erroneous denial of a “for-cause” challenge cannot constitute reversible error unless the challenged juror ultimately serves on the jury. (See People v. Black (2014) 58 Cal.4th 912, 920; People v. Yeoman (2003) 31 Cal.4th 93, 114; see also People v. Baldwin (2010) 189 Cal.App.4th 991, 1000-1001 ["the only for-cause challenges that are relevant on appeal are challenges made to sitting jurors"]) In his reply brief, Edgar attempts to remedy the loss of his argument about prospective Juror D by arguing for the first time that the trial court erred by denying his “for cause” challenge to prospective Juror K, who ultimately sat on the jury. We refuse to consider Edgar’s argument regarding Juror K, because any “ ‘such consideration would deprive [LAUSD] of an opportunity to counter the argument.’ ” (Reichardt v. Hoffman (1997) 52 Cal.App.4th 754, 764.) “ ‘Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.’ ” (Neighbors v. Buzz Oates Enterprises (1990) 217 Cal.App.3d 325, 335, fn. 8.) Here, Edgar has not shown good cause for why he failed to include his argument about Juror K in his opening brief. In fact, he has not offered any explanation beyond inadvertence.

COUNSEL

Righetti Glugoski, Matthew Righetti and John Glugoski for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Thomas R. Kaufman, Paul Berkowitz; Mayer Brown, Donald M. Falk; AT&T Services and Laurie E. Barnes for Defendant and Respondent.


OPINION

Plaintiffs are class representatives of current and former employees of defendant Pacific Bell Telephone Company who install and repair video and internet services in customers’ homes. They appeal a judgment in favor of defendant following cross-motions for summary judgment or summary adjudication. Plaintiffs sought compensation for the time they spent traveling in an employer-provided vehicle—loaded with equipment and tools—between their homes and a customer’s residence (the worksite) under an optional and voluntary Home Dispatch Program.

The trial court, like federal courts that have considered the question under California law, concluded the travel time is not compensable.

We agree and affirm. First, the Home Dispatch Program is not compulsory; because the plaintiffs here were not required to use the company vehicle to commute to work, they were not under the control of the employer. Further, simply transporting tools and equipment during commute time is not compensable work where no effort or extra time is required to effectuate the transport.

Cite as 18 C.D.O.S. 10872

ISREAL HERNANDEZ et al., Plaintiffs and Appellants,
v.
PACIFIC BELL TELEPHONE COMPANY, Defendant and Respondent.

No. C084350
In The Court of Appeal of the State of California
Third Appellate District
(Sacramento)
(Super. Ct. No. 34-2013-00153842-CU-0E-GDS)
APPEAL from a judgment of the Superior Court of Sacramento County, Kevin R. Culhane, Judge. Affirmed.
Filed November 15, 2018
FACTUAL AND PROCEDURAL BACKGROUND

Pacific Bell provides U-verse services in California. U-verse allows customers to obtain video and high-speed internet services in their homes. Premises technicians (technicians), who are paid on an hourly basis, install and repair U-verse products at the customers’ homes. Technicians may not use their own vehicles while on the job; instead, they must use a company vehicle. They must take with them in the company vehicles all necessary equipment and tools to perform their job. The scheduled workday begins at 8:00 a.m. and lasts eight hours.

Before 2009 all technicians picked up company vehicles loaded with the equipment and tools necessary for U-verse installation and repair at a Pacific Bell garage. The workday began at the garage; technicians were paid for the time elapsed between pick up of the company vehicle at the garage and arrival at the first worksite. They were also paid for the time spent driving back to the garage from the final worksite at the end of the day.

In 2009 Pacific Bell began the Home Dispatch Program (HDP), which allowed technicians to take a company vehicle home each night instead of returning all vehicles to the Pacific Bell garage. Participation in the HDP is optional. Under the program, technicians drive the company vehicles, containing tools and equipment, to and from home each day. Technicians must be at the first worksite by 8:00 a.m. and they are not paid for any time before 8:00 spent driving from their homes to the first worksite. As a general rule, they are not paid for the time spent driving home with the equipment and tools after their last appointment. Technicians in the HDP make one visit a week to the Pacific Bell garage to load the equipment and tools needed for the week. They are paid for this driving and loading time. They may not leave equipment and tools at a worksite or at the Pacific Bell garage; they must take it home with the company vehicle. Technicians who elect not to participate in the HDP are compensated for time spent traveling to and from the Pacific Bell garage, as was the norm before the HDP was available.

Israel Hernandez and Larry Michael Sharp brought a class action, on behalf of all Pacific Bell premises technicians. The complaint alleged plaintiffs and the class were not paid for all the time they were under Pacific Bell’s control, because they were not paid for the time they were transporting equipment and tools in a company vehicle to and from the first and last jobs and for the time required to safeguard the equipment and tools. The complaint stated three causes of action--failure to pay the minimum wage, failure to pay wages timely, and unfair business practices--all based on the failure to pay for the transporting time. The court certified the class except for the safeguarding equipment claim.

The parties filed cross motions for summary judgment or summary adjudication on the class claims. They stipulated to undisputed facts about the HDP, as set forth ante. Plaintiffs offered additional facts, including some about the HDP. Under the HDP, technicians could use the company vehicle only for company business, and only authorized persons could ride in or drive it. Technicians could not stop on the way to or from a customer’s house to run errands or drop off or pick up children from school. They could not talk on a cell phone while driving, even before it was against the law to do so.

Plaintiffs also requested judicial notice of various advice letters of the Labor Department Division of Labor Standards Enforcement (DLSE) and the trial court granted the request. In particular, one DLSE opinion letter responded to a question about whether certain commute time was compensable. (Cal. Dept. Industrial Relations, DLSE Counsel H. Thomas Cadell, advice letter, “Travel Time Pay for Employee with Alternative Worksites” (Apr. 22, 2003) (Cadell letter).) The employee in question resided in Bakersfield, had alternate worksites in Bakersfield and Palmdale, and did not transport any significant materials between worksites. The employer asked if the commute to Palmdale was compensable time. (Id. at p. 1.) In discussing the factors to consider, the response noted that if the travel involved the employee’s being required to deliver any equipment, goods, or materials for the employer, the travel time would be compensable. (Id. at p. 3.) Pacific Bell argued that commuting in an employer-provided vehicle was compensable under California law only if such commuting was mandated, whereas participation in the HDP was optional and voluntary. It further argued the remaining class claims were derivative of the first and therefore also failed. Plaintiffs argued that where employees transport the employer’s equipment and tools, what is ordinarily commute time becomes compensable work time.

The trial court granted Pacific Bell’s motion for summary judgment and denied plaintiffs’ motion. In a subsequent order, the court modified its ruling to grant only summary adjudication on the class claims as the individual claims remained. The parties stipulated to dismiss the individual claims. The court entered judgment for Pacific Bell.

Plaintiffs appeal. 1

DISCUSSION

I

Hours Worked

Plaintiffs contend the time a Pacific Bell technician who participates in the HDP spends traveling from that technician’s home to a worksite in a company vehicle, carrying equipment and tools, and the time traveling home from the final appointment at the end of the workday is compensable “hours worked.”

1. Pacific Bell had previously moved for summary judgment. The trial court denied the motion because it did not address the claim for safeguarding equipment.

2. On appeal we also consider the amici curiae brief of Employers Group and California Employment Law Council, filed in support of Pacific Bell.
The Industrial Welfare Commission (IWC) “is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California.” (Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 561.) The IWC has promulgated 15 industry and occupational wage orders covering certain industries and occupations. (Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575, 581 (Morillion.) Although neither party specifies the wage order at issue here, all 15 of the industry and occupational wage orders contain the same definition of “hours worked.” (Ibid.) Wage Order No. 4-2001 appears to be the applicable wage order as it covers professional, technical, clerical, mechanical, and similar occupations. (Cal. Code Regs., tit. 8, § 11040.) It defines “hours worked” to mean “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” (Id., subd. (2)(G).) An employer must pay employees for all hours worked. (Morillion, at p. 578.)

The two phrases of the definition—“time during which an employee is subject to the control of an employer” and “time the employee is suffered or permitted to work, whether or not required to do so”—establish independent factors that each define “hours worked.” (Morillion, supra, 22 Cal.4th at p. 582.) “Thus, an employee who is subject to an employer’s control does not have to be working during that time to be compensated under [the applicable wage order].” (Ibid.) The time an employee is “suffered or permitted to work, whether or not required to do so,” includes time the employee is working but not under the employer’s control, such as unauthorized overtime, provided the employer has knowledge of it. (Id. at pp. 584-585.)

Plaintiffs contend the travel time between home and the customer’s residence meets both of these tests. Because the facts are not in dispute, this is a question of law we review de novo. (Building Industry Association of the Bay Area v. City of San Ramon (2016) 4 Cal.App.5th 62, 73.)

II

The Control Test

Plaintiffs contend that under the circumstances seen here, the travel time to and from the technician’s home and worksite satisfies the control test. Plaintiffs focus on the numerous restrictions placed on technicians under the HDP. Under the HDP, technicians can use the company vehicle only for company business and only authorized persons can ride in or drive the vehicle. Technicians must drive directly between home and the worksite; they are not permitted to stop along the way to run errands or drop off or pick up children from school or talk on a cell phone while driving.

Plaintiffs contend this level of control is similar to that found sufficient to satisfy the control test in Morillion, supra, 22 Cal.4th 575. There, Royal, the employer of agricultural employees, “required [them] to meet for work each day at specified parking lots or assembly areas. After [the employees] met at these departure points, Royal transported them, in buses that Royal provided and paid for, to the fields where [the employees] actually worked. At the end of each day, Royal transported [the employees] back to the departure points on its buses. Royal’s rules prohibited employees from using their own transportation to get to and from the fields.” (Id. at p. 579.) If an employee drove to the fields rather than riding Royal’s bus, the employee would be warned the first time and sent home with loss of a day’s pay the second time. (Id. at p. 579, fn. 1.)

The issue before the Supreme Court was whether the time the employees spent traveling on Royal’s buses constituted “hours worked” under the governing IWC wage order. (Morillion, supra, 22 Cal.4th at p. 578.) That wage order defined “hours worked” as set forth ante: the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so. Our high court rejected an argument that to constitute “hours worked” the time must be spent actually working. Instead, the court held that as long as the employee is “subject to the control of an employer,” the time is considered compensable “hours worked.” (Id. at pp. 582-584.)

The Morillion court then considered whether the employees were under the control of Royal while on the bus. (Morillion, supra, 22 Cal.4th at p. 586.) Although the employees could read or sleep on the bus, they could not use the time for their own purposes; they “were foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to the fields by their own transportation.” (Ibid.) For example, “during the bus ride [the employees] could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car.” (Ibid.)

The Supreme Court concluded, “When an employer requires its employees to meet at designated places to take its buses to work and prohibits them from taking their own transportation, these employees are ‘subject to the control of an employer,’ and their time spent traveling on the buses is compensable as ‘hours worked.’ ” (Morillion, supra, 22 Cal.4th at p. 586.) “[W]e find that plaintiffs’ compulsory travel time, which includes the time they spent waiting for Royal’s buses to begin transporting them, was compensable. Royal required plaintiffs to meet at the departure points at a certain time to ride its buses to work, and it prohibited them from using their own cars, subjecting them to verbal warnings and lost wages if they did so. By ‘direct[ing]’ and ‘command[ing]’ plaintiffs to travel between the designated departure points and the fields on its buses, Royal ‘control[led]’ them within the meaning of ‘hours worked.’ ” (Id. at p. 587.)

The court was clear to “emphasize that employers do not risk paying employees for their travel time merely by providing them transportation. Time employees spend traveling on transportation that an employer provides but does not re-
quire its employees to use may not be compensable as ‘hours worked.’ [Citation.] Instead, by requiring employees to take certain transportation to a work site, employers thereby subject those employees to [their] control by determining when, where, and how they are to travel. Under the definition of ‘hours worked,’ that travel time is compensable.” (Morillion, supra, 22 Cal.4th at p. 588.)

The court then considered federal labor law, including both the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) and the Portal-to-Portal Act of 1947 (29 U.S.C. § 251 et seq.). (Morillion, supra, 22 Cal.4th at p. 588.) It concluded that federal labor law “differs substantially” from state law and should be given no deference in interpreting California wage orders. (Ibid.) Nonetheless, the court noted that the Fifth Circuit’s opinion in Vega v. Gasper (5th Cir. 1994) 36 F.3d 417 was consistent with its holding. (Morillion, at p. 589 & fn. 5.) In Vega, farm laborers furnished their own transportation to pick up points where the employer would then meet them and bring them, by a bus he provided, to the fields. The employees in Vega, however, “were not required to use [defendant’s] buses to get to work in the morning. They chose . . . how to get to and from work. Not all of [defendant’s] field workers rode his buses.” (Vega, at p. 425.) Our Supreme Court found “the fact that the Vega employees were free to choose--rather than required--to ride their employer’s buses to and from work [to be] a dispositive, distinguishing fact.” (Morillion, at p. 589, fn. 5.)

The rule of Morillion applies only where use of the employer-provided transportation is compulsory. This limited application is illustrated by Overton v. Walt Disney Co. (2006) 136 Cal.App.4th 263. There, the employer provided an off-site parking lot and free shuttle bus for employees assigned to certain work sites. Plaintiff sought compensation for the time spent waiting for and riding the shuttle. The appellate court held that time was not compensable. “[T]he key factor is whether Disney required its employees who were assigned parking in the [off-site] lot to park there and take the shuttle. Quite obviously, Disney did not.” (Id. at p. 271.)

An employee could use alternative forms of transportation, such as walking or biking the one-mile distance from the off-site parking lot, being dropped off at the employee entrance by family or a friend, or taking a vanpool (which were given preferential, closer parking), instead of riding the employer-provided shuttle. (Id. at p. 267.) “There is no indication that Disney employees were required to drive to work; nor is there any indication Disney employees understood that driving to work was mandatory. In fact, alternative forms of transportation were encouraged, and 10 percent of Disney employees took advantage of them.” (Id. at pp. 271-272.)

Federal cases applying California law are in accord. In Alcantar v. Hobart Serv. (9th Cir. 2015) 800 F.3d 1047, an employee sought compensation for time spent driving an employer-provided truck to and from home, claiming he was subject to the employer’s control within the definition of “hours worked” because he could not attend to personal errands while driving that vehicle. The Ninth Circuit reversed a summary judgment in favor of the employer because there was a genuine dispute of fact as to whether there existed a de facto requirement that employees commute in their employer’s vehicle. There was a factual dispute because the employer provided insufficient parking space to securely store the vehicles at its facility and held employees liable for the loss of any of the equipment kept in those vehicles. (Id. at p. 1055.) The appellate court announced that to prevail at trial, the plaintiff “must prove not only that Hobart’s restrictions on him during his commute in Hobart’s vehicle are such that he is under Hobart’s control, but also that, despite Hobart’s profession that use of its vehicles is voluntary, employees are, as a practical matter, required to commute in Hobart’s vehicles.” (Id. at pp. 1054-1055.)

A home-start program, similar to the HDP here, was at issue in Novoa v. Charter Communications, LLC (E.D. Cal. 2015) 100 F.Supp.3d 1013. The district court granted summary adjudication in favor of the employee’s claim for commute time compensation because the employee “was given the option to either use his own vehicle to commute to one of Defendant’s facilities to retrieve a company vehicle or keep a company vehicle at home each night.” (Citation.) As a result of Plaintiff’s election to keep a company vehicle at his home he was required to comply with Defendant’s Vehicle Policy. Despite the restrictions that Defendant placed on Plaintiff’s use of the company vehicle, its use to commute directly to the first job assignment was voluntary. Thus, the use of the vehicle to commute to and from home was not compensable.” (Id. at p. 1021.) “Plaintiff has directed this Court to no case, and the Court’s research has yielded no case, where an employee has been found to be subject to an employer’s control where the plaintiff voluntarily elected to commute in the employer’s vehicle.” (Ibid.)

Plaintiffs here rely on Rutti v. Lojack Corp. (9th Cir. 2010) 596 F.3d 1046 to argue they were under control of Pacific Bell during the disputed commute time. In Rutti, the Ninth Circuit found the employee’s commute time was compensable under California law because “Rutti was required to drive the company vehicle, could not stop off for personal errands, could not take passengers, was required to drive the vehicle directly from home to his job and back, and could not use his cell phone while driving except that he had to keep his phone on to answer calls from the company dispatcher. In addition, Lojack’s computerized scheduling system dictated Rutti’s first assignment of the day and the order in which he was to complete the day’s jobs. There is simply no denying that Rutti was under Lojack’s control while driving the Lojack vehicle en route to the first Lojack job of the day and on his way home at the end of the day.” (Id. at pp. 1061-1062.) The distinguishing fact in Rutti is that the Lojack employee was required to use the company vehicle; here, plaintiffs were not.

Plaintiffs distort Pacific Bell’s argument that commute time under the HDP is not compensable because participa-
tion in the program is voluntary, arguing that they “cannot think of any situation since the abolition of slavery” where work is performed without agreement to do so, reasoning that all work is voluntary. They assert an employee may not volunteer to work without pay. But plaintiffs fail to address—or even acknowledge—authority to the contrary. They do not address the cases such as Overton, Alcantar, and Novoa in which the courts found commute time in an employer-provided vehicle is not compensable when the employee is not required to use that transportation. Nor do they address the emphasis in Morillion on the compulsory nature of the transportation by bus or the court’s observation “that employers do not risk paying employees for their travel time merely by providing them transportation. Time employees spend traveling on transportation that an employer provides but does not require its employees to use may not be compensable as ‘hours worked.’” (Morillion, supra, 22 Cal.4th at p. 588.) Commute time under the HDP is not compensable as “hours worked” under the control test.

III

The Suffer or Permit to Work Test

Plaintiffs contend the disputed commute time is also compensable as “hours worked” under the “suffered or permitted to work” definition. They argue they were working while driving to and from home because they were transporting tools and equipment that were necessary for them to do their job. At oral argument they emphasized their theory that transporting equipment was distinguishable from merely transporting tools, as in their case some of the equipment (e.g., modems, cable boxes, and DVRs) was slated for delivery to the jobsite rather than merely designated for use at the site and meant to remain in the vehicles before and after use.

The phrase “suffered or permitted to work, whether or not required to do so” encompasses a meaning distinct from merely ‘working.’” (Morillion, supra, 22 Cal.4th at p. 584.) Our high court explained an employee is “suffered or permitted to work” when the employee is working, but not subject to the employer’s control, such as unauthorized overtime when an employee voluntarily continues to work at the end of a shift with the employer’s knowledge. (Ibid.)

In Taylor v. Cox Communns. Cal., LLC (C.D. Cal. 2017) 283 F.Supp.3d 881 [appeal filed Jan. 12, 2018], the district court considered whether commute time under an optional home start program, almost identical to the HDP here, was compensable. The Taylor defendants argued plaintiffs’ position had been rejected by courts applying federal law. (Id. at p. 889.) Recognizing that California and federal law differ, the district court turned to California law, but found the result was the same as under federal law. (Id. at pp. 889-890.) Applying Morillion, the court concluded “the standard of ‘suffered or permitted to work’ is met when an employee is engaged in certain tasks or exertion that a manager would recognize as work. Mere transportation of tools, which does not add time or exertion to a commute, does not meet this standard.” (Id. at p. 890.) We agree with this construction of the “suffer or permit to work” test.

Plaintiffs object to what they see as importing the federal “overt exertion” rule into California law. They contend this rule comes from the case Reich v. New York City Transit Auth. (2nd Cir. 1995) 45 F.3d 646. In Reich, the Second Circuit held commute time by police officers in the canine unit with their dogs was not compensable to the extent it did not involve either exertion or extra time. (Id. at pp. 651-652.)

Plaintiffs contend our Supreme Court rejected the “overt exertion” requirement in Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257. In Augustus, the court held state law prohibits on-duty and on-call rest periods because during required rest periods, “employers must relieve their employees of all duties and relinquish any control over how employees spend their break time.” (Id. at p. 260.) But Augustus does not support plaintiffs’ position as it relied on the employer’s control over the employee rather than the “suffer or permit to work” component. Indeed, the Augustus court defined “rest” as the “cessation of work, exertion, or activity” (id. at p. 265), thus suggesting a connection between work and exertion. We find nothing in Augustus that is inconsistent with Taylor.

In arguing that transporting equipment and tools in the Pacific Bell vehicle to customers’ homes under the HDP constitutes “hours worked,” plaintiffs rely on the Cadell letter of April 22, 2003, that the trial court judicially noticed. The letter stated: “[I]f the travel involved the employee being required to deliver any equipment, goods or materials for the employer, the travel, no matter how extended, would be compensable.” The Cadell letter addressed whether an employee who alternated between two different worksites in Bakersfield and Palmdale was entitled to compensation for the time spent traveling to the more distant worksite. The letter did not explain what constituted delivery of equipment within its analysis, nor did it detail whether the delivery of equipment would include an employee using a company vehicle stocked with equipment pursuant to a voluntary commute program like the HDP. While the quoted language of the letter is broad, read in context it does not indicate any and all transportation of tools or equipment is compensable time. For example, the letter also says a finish carpenter would not expect to be paid for the time he commutes to a jobsite. However, it appears to us that a finish carpenter would likely carry tools on his commute in order to adequately perform his job once reaching a worksite. Further, here the record reflects that the parties stipulated that “[t]echs on HDP are to be at the first customer appointment of the day at 8 a.m., and

3. Although plaintiffs’ counsel here was counsel for the plaintiff in Taylor, the plaintiffs’ briefing does not mention the case.
4. Plaintiffs appear to argue that since the laws differ, the result must also differ. But plaintiffs fail to show how the Taylor court’s analysis of Morillion is incorrect.
they begin to be paid at 8 a.m. They are not paid for the time before 8 a.m. that they spend driving to the first appointment with tools and equipment.” (Italics added.) This stipulation fairly permits us to infer that plaintiffs here are paid for delivery and installation of any transported products beginning when they arrive at the jobsite, despite plaintiffs’ suggestion at oral argument that they may be actually delivering equipment (rather than merely transporting tools and equipment to and from jobsites) without being paid to do so.

While DLSE advice letters are not subject to the rulemaking procedures of the Administrative Procedure Act, and thus have less force than regulations, courts follow them when they are persuasive. (Morillion, supra, 22 Cal.4th at p. 584.) They are, however, not entitled to any deference and we adopt the DLSE’s interpretation only if we independently determine that it is correct. (Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal.4th 554, 563.) We do not find the “tangential and conclusory” statement in the advice letter persuasive on the question before us. (See Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal.App.4th 1, 25.)

Plaintiffs next rely on two workers compensation cases, Joyner v. Workmen’s Compensation Appeals Board (1968) 266 Cal.App.2d 470 and Lane v. Industrial Acc. Com. (1958) 164 Cal.App.2d 523. These cases held that where an employee is injured in a traffic accident on his commute home, while carrying equipment for his job, the employer relationship continued such that the employee’s injuries were compensable and not subject to the coming and going rule. (Joyner, at p. 476; Lane, at p. 527.) These cases address a different issue than the one before us and therefore we find them inapposite. Further, we note that in both of these cases, the employee was not being paid by his employer for his commute time when the accident happened. (Ibid.)

Finally, plaintiffs rely on federal cases construing the Portal-to-Portal Act, even though that act contains an exemption for travel time missing from California law. (Morillion, supra, 22 Cal.4th at p. 590.) In D A & S Oil Well Servicing, Inc. v. Mitchell (10th Cir. 1958) 262 F.2d 552, the question was whether the time an employee spent driving a truck mounted with heavy, specialized equipment (30,000-pound pulling and swabbing units and 109-gallon tanks of butane gas) to the jobsite was compensable. The federal appellate court answered in the affirmative. “We hold that the driving of the trucks on which the units are mounted, and the driving of the pickups when used to transport necessary equipment, constitute activities which are an ‘integral and indispensable’ part of the principal activities of the employees doing the driving, and such services are therefore compensable.” (Id. at p. 555.) In Crenshaw v. Quarles Drilling Corp. (10th Cir. 1986) 798 F.2d 1345, 1350, disapproved on another point in McLaughlin v. Richland Shoe Co. (1988) 486 U.S. 128, the court followed D A & S and found the time the employee spent traveling to job sites with a truck of specialized equipment to service drilling rigs was subject to overtime compensation. Here, plaintiffs argue that because premises techni-cians carry equipment and tools necessary to perform their jobs when they get to the worksites, their travel time should be compensable.

We are not persuaded. The cases cited by plaintiffs here do not involve mere commuting with necessary tools in tow; instead they involve the delivery of heavy, specialized equipment to the jobsite. The latter requires a far greater effort. Although here certain items may be slated for delivery at the end of the commute (and the corresponding beginning of the workday), as we have explained, here it also appears plaintiffs are indeed paid for the acts of delivering and installing the equipment. Further, carrying the items necessary to establish service in the situation seen here is simply not a comparable effort. There is a significant difference between transporting heavy equipment for servicing oil wells and the incidental transporting of equipment and tools seen here. We agree with this observation by a federal district court: “To the extent that some of these cases state broadly that travel time is compensable if employees are transporting equipment without which their jobs could not be done, e.g., Crenshaw, 798 F.2d at 1350, I read these statements as implying that the transportation involves some degree of effort. Otherwise, as observed earlier, the commutes of police officers who carry guns, or indeed, employees who carry badges, would always be compensable.” (Dooley v. Liberty Mut. Ins. Co. (D. Mass.2004) 307 F.Supp.2d 234, 248-249.) As Pacific Bell argues, if carrying equipment necessary for the job were always compensable, every employee who carries a briefcase of work documents or an electronic device to access work emails to and from work would need to be compensated for commute time.5

Commute time under the HDP is not compensable as “hours worked” under the “suffer or permit to work” test. The trial court did not err in granting summary judgment to Pacific Bell.

DISPOSITION

The judgment is affirmed. Pacific Bell shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

Duarte, J.

We concur: Butz, Acting P. J., Murray, J.

5. We note that loading the truck with tools and equipment at the Pacific Bell garage is compensable time under the HDP.
MARTY LAT et al., Plaintiffs and Appellants,
v.
FARMERS NEW WORLD LIFE INSURANCE COMPANY, Defendant and Respondent.

No. B282008
In The Court of Appeal of the State of California
Second Appellate District
(Los Angeles County Super. Ct. No. BC528211)
Filed November 15, 2018

ORDER MODIFYING THE OPINION (NO CHANGE IN THE JUDGMENT) AND DENYING RESPONDENT’S PETITION FOR REHEARING

THE COURT:

The opinion filed in the above-entitled matter on October 16, 2018 is modified.

1. On page 2, the entire first sentence of the opinion is deleted and replaced with the following sentence:

In 1993, Maria Carada purchased a life insurance policy from Farmers New World Life Insurance Company (Farmers) and named her sons Marty and Mikel Lat (collectively the Lats) as beneficiaries.

2. On page 8, the second sentence of the first full paragraph (that begins “There is no dispute” and ends “notice of her disability.”) is deleted and replaced with the following sentence:

Farmers, in its motion for summary judgment, did not challenge the Lats’ allegations that Carada was totally disabled while the policy was in force.

3. On page 14, the first full paragraph on that page is deleted and replaced with the following four paragraphs:

These cases are inapplicable to Carada’s policy because the Rider is analogous to occurrence-based policies, to which the notice prejudice rule has been applied. Like occurrence policies that provide “ ‘coverage for any acts or omissions that arise during the policy period even though the claim is made after the policy has expired’ ” (Pacific Employers Ins. Co. v. Superior Court, supra, 221 Cal.App.3d at p. 1356), the Rider provides a benefit—Farmers’ waiver of deductions— for an act— Carada’s disability—that arises during the policy period even though the claim for the waiver of deductions is made after the Rider and the policy have expired. Applying the notice prejudice rule in this instance would not, therefore, transform a claims made and reported policy into an occurrence policy or, as in Slater, effectively rewrite the contract between the parties. (Slater, supra, 227 Cal.App.3d at p. 1423.) Rather, applying the rule here would serve its purpose of preventing an insurance company from shielding itself from its “ ‘contractual obligations’ through ‘a technical escape-hatch.’ ” (Carrington, supra, 289 F.3d at p. 647.)

Farmers also relies on Venoco, Inc. v. Gulf Underwriters Ins. Co. (2009) 175 Cal.App.4th 750 (Venoco). In that case, the insured oil company had a liability policy that generally excluded coverage for liability arising from pollution or contamination. (Id. at p. 757.) The oil company, however, negotiated for a “pollution buy-back provision,” which provided for coverage of an accidental occurrence that “ became known to the [oil company] within [seven] days after its commencement and was reported to [the insurance company] within 60 days thereafter.” (Id. at pp. 756-758, italics omitted.) Six years after the policy expired, the oil company made a claim for coverage based upon alleged contamination that occurred during the policy term. (Id. at p. 758.) The Court of Appeal rejected the oil company’s argument that the notice prejudice rule applied to its late notice of claim. (Id. at pp. 760-761.) The notice prejudice rule, the court explained, does not apply to a policy that provides “special coverage for a particular type of claim [that] is conditioned on express compliance with a reporting requirement.” (Id. at p. 760.) This exception to the notice prejudice rule applied to the pollution buy-back provision because the policy provides “for expanded liability coverage that the insurer usually does not cover. The insurer makes an exception and extends special coverage conditioned on compliance with a reporting requirement and other conditions.” (Ibid.)

We do not necessarily agree with the Venoco court’s reasoning, which, in any case, does not apply here. Unlike the special coverage in Venoco for a particular, liability-expanding claim that the insurance company usually does not cover, the Rider to Carada’s policy appears to be a standard policy rider that the insurance company will ordinarily provide for an additional premium. (See 5 Couch on Insurance, supra, § 75:16 [“The parties to the contract of insurance may ordinarily specify in the contract that nonpayment of premiums shall be excused by the insured’s sickness, incapacity, or disability” (fn. omitted)].) Venoco’s narrow exception to the notice prejudice rule, therefore, does not apply here.
Farmers also contends that the Rider “is nothing more than an alternative means of satisfying premium obligations, of paying premiums” and, just as one may not revive a policy by paying a premium after the policy has lapsed, Carada’s policy cannot be revived “by showing that she could have satisfied the Rider prior to the lapse.” This, as well as other arguments asserted by Farmers, assumes that Carada’s policy had lapsed and could not thereafter be revived by late notice of her disability or otherwise. The problem with this argument is that the policy had ostensibly lapsed because Farmers denied Carada the Rider’s deduction waiver benefit; if Carada was entitled to that benefit, the policy should not have lapsed. As discussed above, whether Carada was entitled to that benefit depends in part upon whether Farmers was prejudiced by the late notice of her disability.

These modifications do not constitute a change in the judgment.

The petition for rehearing filed by respondent Farmers New World Life Insurance Company on October 31, 2018 is denied.

CERTIFIED FOR PUBLICATION.

ROTHSCHILD, P. J., JOHNSON, J., BENDIX, J.