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AP

No. 52362-1-II

Court Of Appeals Of The State Of Washington  
Division II

State Of Washington,  
Respondent,

v.

Michael Palmer,  
Appellant.

Statement Of  
Additional  
Authorities (RAP 10.8)

I, Michael Palmer, the Appellant, hereby submit the following additional authorities which are listed in and support the arguments made in my Statement Of Additional Grounds:

1. Berge v US, 879 FSupp2d 98, Civil Action No 10-0373 (RBW) (DC Cir 2012) which is used to support the autism characteristics listed in Statement Of Exceptional case sections C.3-C.4.
2. Leibel v City of Buckeye, 364 FSupp3d 1027, no CV18-01743

- PHX-DWL (9th Cir 2019) which is used to support autistic characteristics in Statement Of Exceptional Case section C.4.
3. State v Roman, COA 44325 (July 8, 2014) reported at 182 Wn App 1019 (2014) which is used in Ground 2 § 2.19 to support damage caused by strangulation and the doubt due to lack of such damage.
  4. Little v Soto, Case No. CV-17-4655-AB (JEM) (CD Cal. Feb. 20, 2019) which is used at the same location and the same manner as 3, State v Roman.
  5. State v Perez, COA 48117-1-II (Dec 20, 2016) which is used in Ground 2 section 2.33 to show that the prosecutor in my case, Erin Riley (Jany), was engaged in similar misconduct or Brady violations and misleading the court and her conduct was unethical.
  6. US v Govey, 284 F Supp 3d 1054 (2018) which is used in: Ground 2 section 2.26 to show what "a reasonable competent prosecutor" would have done concerning material evidence; Ground 4 section 4.12 to show that failure to meet discovery obligations denies the right to speedy trial and mandates dismissal; and Ground 2 section 2.32 to show that failure to meet discovery obligations denies the defendant the rights to: speedy trial, compulsory process, confrontation, and effective counsel and dismissal with prejudice is the only viable remedy.
  7. US v Aileman, 165 FRD 571 (9th Cir 1996) which is used in: Ground 3 section 3.7 to show that de facto preventative detention makes the rights to:

speedy trial, the presumption of innocence, and freedom from excessive bail "all empty pronouncements full of sound and fury but signifying nothing," and Ground 4 section 4.36 to show that pretrial detention impairs the ability to prepare and makes the right to a speedy trial an empty pronouncement.

Dated this 14th day of June, 2020 in Monroe, Washington.

By Michael Palmer  
Michael Palmer, pro se,  
the Appellant.

Berge v US

879 FSupp2d 98 (DC Cir 2012)

**879 F.Supp.2d 98 (2012)**  
**Kenneth BERGE, et al., Plaintiffs,**  
v.  
**UNITED STATES of America, et al., Defendants.**  
Civil Action No. 10-0373 (RBW).  
**United States District Court, District of Columbia.**  
July 26, 2012.

99\*99 Brendan H. Frey, Brian M. Saxe, David M. Honigman, Gerard V. Mantese, Mantese Honigman Rossman and Williamson, P.C., Troy, MI, John J. Conway, John J. Conway, PC, Royal Oak, MI, Thomas Winfried Mitchell, Scott Michael Perry, Klores Perry Mitchell, PC, Bruce J. Klores, Washington, DC, for Plaintiffs.

Adam D. Kirschner, U.S. Department of Justice, Washington, DC, for Defendants.

**MEMORANDUM OPINION**

REGGIE B. WALTON, District Judge.

The named plaintiffs, Kenneth Berge and Dawn Berge, on behalf of themselves and all other individuals similarly situated,<sup>[1]</sup> filed Plaintiffs' First Amended [sic] 100\*100 Class Action Complaint ("Am. Compl.") on December 13, 2010, against the following defendants: the United States of America, the United States Department of Defense (the "DoD" or "Agency"), the TRICARE Management Activity (the "TMA"),<sup>[2]</sup> and Robert M. Gates, then United States Secretary of Defense.<sup>[3]</sup> The First Amended [sic] Complaint, brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2006), challenges the TMA's position "that ABA [Applied Behavioral Analysis] therapy is a covered benefit only under [a supplemental program for active duty members] and is not a covered benefit pursuant to the TRICARE Basic health benefits program," which covers both active duty and retired members of the United States Armed Services. Am. Compl. ¶ 168; 10 U.S.C. § 1086; *see also* Defendants' Memorandum in Support of Their Cross-Motion For Summary Judgment and In Opposition to Plaintiffs' Motion for Summary Judgment ("Defs.' Mem.") at 1. This case is now before the Court on the parties' cross-motions for summary judgment. *See* Plaintiffs' Renewed Motion for Summary Judgment ("Pls.' Renewed Mot."); Defendants' Motion for Summary Judgment ("Defs.' Mot.").<sup>[4]</sup> For the following reasons, the Court will grant the plaintiffs' motion for summary judgment and deny the defendants' cross-motion for summary judgment.

**I. Background**

**A. The Class Plaintiffs**

The class plaintiffs are active duty and retired uniformed service members of the United States Armed Services and their dependent children who have been diagnosed with some form of autism, and who, at some point, have had payment reimbursement requests refused for the ABA intervention provided to these children.<sup>[5]</sup> Am. Compl. ¶¶ 1-11. As beneficiaries of the DoD's health care system ("TRICARE," *id.* ¶ 40, also known as "CHAMPUS," *id.* ¶ 96),<sup>[6]</sup> the plaintiffs assert that "TRICARE wrongfully refuses to provide 101\*101 coverage pursuant to the TRICARE Basic [P]rogram for ABA therapy," *id.* ¶ 41.

**B. Statutory and Regulatory Framework**

Congress enacted Section 1079 of Title 10 of the United States Code in order to "assure that medical care is available for dependents ... of members [and "former members"] of the uniformed services." 10 U.S.C. § 1079 (2006). The statute instructs the Secretary of Defense, "after consulting with other administering [Agency] Secretaries," to contract "for medical care for those persons under such insurance, medical service, or health plans as he considers appropriate." *Id.* In accordance with this mandate, the DoD adopted a regulation to implement the statute. *See generally* 32 C.F.R. § 199 (2011).

The TRICARE Basic Program, which, as noted earlier, is a health benefits program for current and retired members of the United States Armed Services, "is similar to private insurance programs, and is designed to provide financial assistance to... beneficiaries for certain prescribed medical care obtained from civilian sources." *Id.* § 199.4(a). In addition to paying for medical services for active and retired military members, the Basic Program also provides coverage for the members' dependents, including spouses, *id.* § 199.3(b)(2)(i), and children, *id.* § 199.3(b)(2)(ii). The TMA is the component of the DoD that administers the Basic Program.<sup>[2]</sup> Defs.' Mem. at 4.

Under the Basic Program, the term "medical" refers "to the diagnosis and treatment of illness, injury, pregnancy, and mental disorders by trained and licensed or certified health professionals." 32 C.F.R. § 199.2(b). The Basic Program defines "mental disorder" as "a nervous or mental condition that involves a clinically significant behavioral or psychological syndrome or pattern that is associated with a painful symptom, such as distress, and that impairs a patient's ability to function in one or more major life activities." *Id.*

Central to this case is the limitation imposed under the Basic Program authorizing payment for only "medically or psychologically necessary" treatments. *See id.* §§ 199.4(a)(1)(i), 199.4(g)(1). "Medically or psychologically necessary" is defined by the TRICARE regulation as "[t]he frequency, extent, and types of medical services or supplies which represent appropriate medical care and that are generally accepted by qualified professionals to be reasonable and adequate for the diagnosis and treatment of illness, injury, pregnancy, and mental disorders." *Id.* § 199.2(b).

For services to qualify as "[a]ppropriate medical care," they must satisfy the following requirements:

- (i) Services performed in connection with the diagnosis or treatment of ... [a] mental disorder ... which are in keeping with the generally accepted norms for medical practice in the United States;
- (ii) The authorized individual professional provider rendering the medical care is qualified to perform such medical services... and[;]
- (iii) The services are furnished economically.

*Id.*

In addition to requiring that covered treatments be medically or psychologically necessary, the Basic Program expressly excludes coverage for certain forms of medical treatments and procedures. Specifically, 102\*102 the TRICARE regulation provides that "[a]ny drug, device, or medical treatment or procedure, the safety and efficacy of which have not been established,... is unprove[n] and cannot be cost-shared by [the Basic Program]." *Id.* § 199.4(g)(15). Under the Basic Program

(i) [a] drug, device, or medical treatment or procedure is unproven:

...

(C) Unless reliable evidence shows that any medical treatment or procedure has been the subject of well-controlled studies of clinically meaningful endpoints, which have determined its maximum tolerated dose, its toxicity, its safety, and its efficacy as compared with standard means of treatment or diagnosis.

...

(D) If reliable evidence shows that the consensus among experts regarding the medical treatment or procedure is that further studies or clinical trials are necessary to determine its maximum tolerated doses, its toxicity, its safety, or its effectiveness as compared with the standard means of treatment or diagnosis....

*Id.* § 199.4(g)(15)(i). Under this standard, only "reliable evidence" can be considered in determining whether a medical treatment or procedure is unproven, and therefore excluded from Basic Program coverage. *Id.*

In compliance with this regulation, the TMA must determine whether a certain treatment or procedure satisfies the reliable evidence standard before deciding to approve or deny it. *See id.* § 199.4(g)(15)(i)(C). The DoD regulation further provides that

the term reliable evidence means only:

- (i) Well controlled studies of clinically meaningful endpoints, published in refereed medical literature.
- (ii) Published formal technology assessments.
- (iii) The published reports of national professional medical associations.
- (iv) Published national medical policy organization positions; and
- (v) The published reports of national expert opinion organizations.

*Id.* § 199.2(b). Moreover, "[t]he hierarchy of reliable evidence of proven medical effectiveness, established by [the above-listed categories], is the order of the relative weight to be given to any particular source." *Id.* "Specifically not included in the meaning of reliable evidence are reports, articles, or statements by providers or groups of providers containing only abstracts, anecdotal evidence or personal professional opinions." *Id.* Finally, "the fact that a provider or a number of providers have elected to adopt a ... medical treatment or procedure as their personal treatment or procedure of choice" is not considered a reliable indicator of the effectiveness of a treatment. *Id.*

In addition to the Basic Program, the DoD administers the TRICARE Extended Care Health Option ("ECHO") program, which "is essentially a supplemental program to the TRICARE Basic Program." *Id.* § 199.5(a)(1). The ECHO program "provide[s] an additional financial resource for an integrated set of services and supplies designed to assist in the reduction of the disabling effects of the ECHO-eligible dependent's qualifying condition." *Id.* § 199.5(a)(2). The ECHO program is limited to dependents of active duty personnel who have a qualifying condition. *See* 10 U.S.C. § 1079(d)(3) (2006). Although the ECHO program does not require that the medical treatment be medically or psychologically necessary to be covered, *see id.* § 1079(e)(7) (granting the Secretary of Defense discretion to provide coverage under the ECHO program even if the treatment is not medically or psychologically necessary), it does exclude unproven drugs, devices, 103\*103 and medical treatments in the same manner as the Basic Program, *see* 32 C.F.R. § 199.5(d)(12) (excluding from ECHO coverage unproven "[d]rugs, devices, medical treatments, diagnostic, and therapeutic procedures for which the safety and efficacy have not been established in accordance with [the relevant provisions of the Basic Program]").

### **C. Factual and Procedural Background**

Autism "is a complex developmental disability, which adversely affects, among other things, verbal and nonverbal communication and social interactions, a child's educational performance, and the overall ability of a person who suffers from the condition to function in society." Pls.' Mem. at 49; *see also* Administrative Record ("A.R."), Volume (Vol.) III, Tab 8-2-13, (NIMH,<sup>[8]</sup> Autism Spectrum Disorders Pervasive Development Disorders (2008) ("NIMH: Development Disorders")) at 477-78. Common symptoms exhibited by individuals with autism include "impaired social interaction, impaired communication abilities, ... decreased motor skills, tantrums,... and unusual responses to sensory experiences." Pls.' Mem. at 49; *see also* A.R., Vol. III, Tab 8-2-13 (NIMH: Development Disorders) at 477. In 2007, the United States Marine Corps "count[ed] 784 active duty family members (of all ages) with a diagnosis of [autism] enrolled in its" Exceptional Family Member Program. A.R., Vol. III, Tab 8-2-7 (2007 Report and Plan on Services to Military Dependand Children with Autism ("DoD 2007 Report")) at 411. The plaintiffs allege, without directing the Court to any support, that "[t]he Department of Defense estimates that 1 in every 88 members of the armed services has a dependent with [autism]." Am. Compl. ¶ 31.

Although there is no cure for autism, ABA therapy has emerged as an intervention that can help children cope with the disorder. A.R., Vol. III, Tab 8-2-13 (NIMH: Development Disorders) at 491. ABA therapy is "a systemized process of collecting data on a child's behaviors and using a variety of behavioral conditioning techniques to teach and reinforce desired behaviors while extinguishing harmful or undesired behaviors." Pls.' Mem. at 1; *see also* A.R., Vol. I, Tab 4

(Hayes Report Dated October 25, 2010 ("2010 Hayes Directory")) at 55. "ABA therapy is an intensive, extremely detailed and enormously nuanced psychosocial, behavioral intervention ... [and] is, therefore, expensive." Am. Compl. ¶ 32; *see also* A.R., Vol. I, Tab 4 (2010 Hayes Directory) at 55. "Effective ABA treatment requires 25-40 hours per week of services, usually over a period of years." Am. Compl. ¶ 33; *see also* A.R., Vol. I, Tab 4 (2010 Hayes Directory) at 55.

The named plaintiffs of the class in this case are the parents of Z.B., "a minor child [who has been diagnosed] with autism." Am. Compl. ¶ 40. "On April 11, 2007, ... [Z.B.'s p]ediatrician ... diagnosed [the then] two-year old ... with Autistic Disorder Infantile, Full Syndrome." Plaintiffs' Statement of Points and Authorities in Support of Motion for Class Certification ("Pls.' Mem. to Certify") at 10. The day after Z.B.'s diagnosis, his mother "contacted TRICARE's Managed Care Support Contractor for the Southeast Region, Value Options" and was informed that because Z.B.'s father had retired from active service with the United States Air Force, Z.B. was eligible only to receive benefits under the Basic Program, and not the ECHO program. *Id.* at 11. Because Z.B. was ineligible for ECHO benefits, the family was informed "that Z.B. [was] ineligible for benefits related to ABA services." *Id.* Thereafter, Z.B.'s parents continually ~~104\*104~~ sought to obtain reimbursement for Z.B.'s ABA intervention services but their requests were repeatedly denied. *Id.* at 11-12. For example, in one denial letter the parents were given the following explanation:

After careful reconsideration of this case, including all additional information, the second physician reviewer agrees with the Outpatient Psychiatric initial denial. Based upon the opinion expressed by the second physician reviewer, the initial denial is upheld.

This determination was based on:

The sponsor of the beneficiary is not on active duty. ABA therapy cannot be authorized unless the beneficiary is enrolled in the ECHO program. A requirement for participation in the ECHO program is that the sponsor be on active duty. In this case, the sponsor is retired and therefore the beneficiary is not eligible for the ECHO program. The requested ABA therapy services cannot be authorized.

Pls.' Mem., Exhibit ("Ex.") 11 (June 18, 2007 Z.B. Denial Letter) at 3.<sup>[9]</sup>

On March 5, 2010, the plaintiffs filed this action in this Court under the APA, challenging the June 18, 2007 decision by the TMA denying coverage for Z.B.'s ABA therapy, which, as noted, was based on the conclusion that the plaintiffs did not qualify for ABA therapy reimbursement because they were not eligible to participate in the ECHO program. Defs.' Mem. at 9. "On June 22, 2010[,] the [Agency] moved to dismiss [this action] for lack of a final agency action, or, in the alternative, moved to stay the proceedings until a final decision... was issued." *Id.* The Agency argued that the June 18, 2007 decision was not final because the TMA reopened the decision to consider whether ABA therapy is covered under the Basic Program. *Id.* (arguing that "[a]n initial determination for a claim for reimbursement under TRICARE is final unless ... the initial determination is reopened") (internal quotation marks and citation omitted). Agreeing with the Agency that there had been no final agency action, the Court allowed the Agency additional time to review the plaintiffs' request for benefits but declined to dismiss this case.

Ultimately, "[o]n October 29, 2010, the Chief of TRICARE Appeals issued a formal review decision denying reimbursement to [the] plaintiffs for ABA therapy under the TRICARE Basic Program for their dependent's [autism]." *Id.* at 11. As a result of that decision, the Court ordered the plaintiffs to file an amended complaint challenging the October 29, 2010 decision. *See* Order, Nov. 19, 2010 (Dkt. # 71), at 1 (ordering the Agency to produce the complete administrative record and ordering the plaintiffs to file an amended complaint). On December 13, 2010, the plaintiffs filed their amended complaint, alleging that the "denial of coverage pursuant to the TRICARE Basic [P]rogram is arbitrary, capricious, and contrary to law and regulation." Am. Compl. ¶ 169.

Following the defendants' submission of the administrative record, the plaintiffs filed their motion for summary judgment on December 17, 2010. *See generally* Pls.' Renewed Mot. In their motion, the plaintiffs argue that: (1) the DoD's policy denying ABA therapy under the Basic Program is not entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), Pls.' Mem. at 7; (2) ABA therapy satisfies the definition of medical care under the Basic Program, *id.* ~~105\*105~~ at 31-32; (3) ABA therapy is medically or

psychologically necessary under the Basic Program, *id.* at 38; and for these reasons the Court should conclude that the October 29, 2010 decision denying the plaintiffs coverage for ABA is contrary to law, *id.* at 75.

In response, the Agency filed a cross-motion for summary judgment, along with a memorandum in opposition to the plaintiffs' motion. *See generally* Defs.' Mot. The Agency argues that: (1) under *Chevron*, the Court should accord deference to the DoD's decision, Defs.' Mem. at 14-15; (2) ABA therapy is an educational intervention rather than medical care under the Basic Program, *id.* at 30-31; (3) even if ABA therapy qualifies as medical care, it is not proven medical care under the Basic Program, *id.* at 34; and, therefore, the Court should conclude that the October 29, 2010 decision "was based upon a rational connection to the" administrative record, *id.* at 39.

## II. Standard of Review

"Because this case involves a challenge to a final administrative action, the Court's review is limited to the administrative record." *Muwekma Ohlone Tribe v. Kempthorne*, 452 F.Supp.2d 105, 113 (D.D.C. 2006) (Walton, J.) (quoting *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 105 (D.D.C.1995)). Furthermore, "summary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and consistent with the APA standard of review." *Loma Linda Univ. Med. Ctr. v. Sebelius*, 684 F.Supp.2d 42, 52 (D.D.C.2010) (citing *Stuttering Found. of Am. v. Springer*, 498 F.Supp.2d 203, 207 (D.D.C.2007)); *see also* *Richards v. INS*, 554 F.2d 1173, 1177 & n. 28 (D.C.Cir.1977). However, due to the "limited role of [a] court in reviewing the administrative record," the typical summary judgment standard set forth in Rule 56(c) is not applicable. *Stuttering*, 498 F.Supp.2d at 207 (citation omitted). Rather, "[u]nder the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, [and] the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.* (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir.1985)).

The APA entitles a person who has suffered "legal wrong because of agency action, or [who has been] adversely affected or aggrieved by agency action," to judicial review. 5 U.S.C. § 702 (2006). Under the APA, a final agency decision must be set aside by a court if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). "The arbitrary and capricious standard of the APA is a narrow standard of review." *Millican v. United States*, 744 F.Supp.2d 296, 302 (D.D.C. 2010) (internal quotation marks and citation omitted). In *Motor Vehicle Manufacturers Ass'n of U.S. v. State Farm Mutual Automobile Insurance Co.*, the Supreme Court explained the scope of a court's APA "arbitrary and capricious" review as follows:

[A] court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, [a court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which 106\*106 Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks and citations omitted); *see also* *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C.Cir.1999) ("Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action."). In conducting this review, considerable deference must generally be accorded to the agency. *See* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Accordingly, "there is a presumption in favor of the validity of administrative action." *Bristol-Myers Squibb Co. v. Shalala*, 923 F.Supp. 212, 216 (D.D.C.1996) (quoting *Ethicon, Inc. v. FDA*, 762 F.Supp. 382, 386 (D.D.C.1991)). Thus, so long as the agency explains "why it chose to do what it did," *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C.Cir.2001) (internal quotation marks and citation omitted), and the court can "reasonably ... discern[]" the agency's path, it must uphold the agency's decision, *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C.Cir.1993) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)). In making the determination of whether the agency's action should be upheld, courts review the administrative record as it existed at the time the agency made its

decision. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985). Finally, "the burden of showing that agency action violates the APA falls on the plaintiff[s]." *Banner Health v. Sebelius*, 715 F.Supp.2d 142, 153 (D.D.C.2010) (Walton, J.).

As the Supreme Court has made clear, when a court assesses an agency's interpretation of "the statute which it administers," it must apply *Chevron's* two-step framework. *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. At *Chevron* step one, the reviewing court must first attempt to determine whether "the intent of Congress is clear." See *id.* If "Congress has directly spoken to the precise question at issue," the reviewing court must be faithful to the clear congressional intent. *Id.* Thus, if Congress has "unambiguously foreclosed the agency's statutory interpretation[,] the agency's interpretation must be rejected. *Catawba Cnty. v. EPA*, 571 F.3d 20, 35 (D.C.Cir.2009). However, if the reviewing court finds that "statutory ambiguity has left the agency with a range of possibilities and that the agency's interpretation falls within that range, then the agency will have survived *Chevron* step one." *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C.Cir.2011). At *Chevron* step two, a reviewing court must defer to an agency's interpretation of a statute, but only if the agency engaged in "reasoned decision[.]making," which has been recognized to include "well-known factors almost in the nature of a checklist... [.] such as consideration of meaningful alternatives, a reasoned explication of the choice made, demonstrating a reasonable connection between the facts found and the option selected," that along with other "like" factors "are all in the nature of reasonableness-checking." *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1451 (D.C.Cir.1988) (internal quotation marks and citation omitted). Considering only the rationales the agency furnished as the basis for its decision, courts must also "determine whether [the agency's] interpretation is 'rationally related to the goals' of the statute." *Barrington*, 636 F.3d at 660 (quoting *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999)).

### III. Legal Analysis

#### A. Is Deference Owed to the Agency Decision (*Chevron* Step One)?

As an initial matter, the Court must address the plaintiffs' arguments that the DoD's decision to deny reimbursement for Z.B.'s ABA therapy is not entitled to *Chevron* deference. The plaintiffs make five arguments in support of this position: (1) The Agency's policy of excluding ABA therapy from coverage under the military health benefits statute because it "is [not] medically or psychologically necessary, and appropriate medical care for [Autism Spectrum Disorder ("ASD")] that has been proven safe and effective in accordance with the reliable evidence standard as required by TRICARE regulations..." A.R., Vol. I, Tab 1 (Formal Review Decision) at 7 (footnotes omitted)<sup>[10]</sup> is not entitled to deference because the statute "is unambiguous in light of its plain meaning, its legislative history, its internal [TRICARE] structure, the regulations promulgated under it, and the canons of [legislative] construction," Pls.' Mem. at 7; (2) the Agency "[h]as [t]aken [i]nconsistent [p]ositions [r]egarding ABA [t]herapy, [i]ncluding [s]hifting [i]ts [p]osition [p]ost-[h]oc [i]n [r]esponse to [the current] [l]itigation," *id.* at 9; (3) no deference is deserved "[b]ecause [m]ultiple [a]gencies [a]dminister the Military Health Benefits [s]tatute," *id.* at 15; (4) "[b]ecause the Military Health Benefits [s]tatute [s]trips the [Agency] of [a]ll [d]iscretion to [e]liminate or [r]educe [n]ecessary [h]ealth [c]are," *id.* at 17, "the Court [s]hould [n]ot [d]efer to" the Agency's decision in this case because it "[e]liminates a [h]ealth [c]are [b]enefit," *id.*; and (5) "[u]nder the '[m]ajor [q]uestion' [e]xception to *Chevron*, an [a]gency [i]s [n]ot [e]ntitled to [d]eference when, as in the [i]nstant [c]ase, the Agency [v]iolates a [s]tatute's [c]ore [p]urposes, [w]hich [a]re [m]atters of [g]reat [m]oral, [e]conomic and/or [p]olitical [c]onsequence," *id.* at 21. In the alternative, the plaintiffs contend that "[e]ven if [s]ome [d]eference [a]pplie[s], ... [the Agency]'s [p]olicy [sh]ould [r]eceive the [m]ost [m]inimal [d]eference [b]ecause [i]t was [i]nformally [a]dopted." *Id.* at 8. The Court will address the plaintiff's primary argument, the unambiguousness of the Military Health Benefits Statute, below.

#### 1. The Unambiguousness of the Military Health Benefits Statute

The plaintiffs first argue that the Agency's policy is not entitled to deference because the governing statute is unambiguous. *Id.* at 7-8. They contend "[i]t is crystal clear that Congress did not intend to exclude (as 'not medically or psychologically necessary' and not 'medical/health care') a medically and psychologically necessary, intensive, and enormously effective therapy like ABA, which is designed, supervised, and performed by highly trained and skilled professionals." *Id.* at 7. Based on their view that the statute is unambiguous, the plaintiffs reason that the Court has no choice but to "'give effect to Congress's unambiguously expressed intent'" that ABA therapy must be provided to the

dependents of members of the armed forces. *Id.* (quoting *Beverly Health & Rehab. Servs. v. Nat'l Labor Relations Bd.*, 317 F.3d 316, 321 (D.C.Cir.2003) (internal quotation marks and citation omitted)).

The Agency counters that "[t]he military health benefits statute does not unambiguously require ABA therapy to be covered under the TRICARE Basic Program," Defs.' Mem. at 14; rather, the Agency emphasizes that the statute states that 108\*108 therapies that are not "medically or psychologically necessary" are excluded from coverage under the statute. *Id.* at 14-15 (quoting *Barnhart v. Walton*, 535 U.S. 212, 218, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002) (stating that "[a] Court is to defer to the Secretary's judgment unless the statutory text 'unambiguously forbids' his view or his interpretation 'exceeds the bounds of the permissible' for other reasons")). The Agency asserts that because the statute does not expressly mandate coverage of ABA therapy, it is within the Agency's discretion to determine whether ABA therapy is in fact "medically or psychologically necessary" health care. *Id.* at 14-15. The Agency states that in interpreting what is "medically necessary," it "is restricted by the regulatory 'reliable evidence' standard." *Id.* at 25. The Agency contends that after an exhaustive administrative review of the reliable evidence contained in the administrative record regarding the efficacy of ABA therapy, it reasonably concluded that ABA therapy (1) does not meet the definition of medical care, but rather is an "educational intervention" aimed at modifying behavior, and (2) is not "proven" medical care. *Id.* at 19, 21, 31. The Agency claims that the reliable evidence showed that ABA's function is to modify social behavior rather than treat the underlying illness of autism spectrum disorder, thus precluding ABA therapy from satisfying the definition of the term "medical," which is defined as pertaining to "the diagnosis and treatment of illness." *Id.* at 31-32. Moreover, the Agency asserts that "a review of [reliable] medical literature [demonstrates] that there is not a consensus on the efficacy of ABA as a medical treatment for ASD at this time." *Id.* at 35. Furthermore, the Agency argues that its conclusions are based on a "reasonable construction" of its regulation and that it is owed "substantial deference" in interpreting its own regulation. *Id.* at 15.

The plaintiffs reply that only after the Court "draw[s] on all of 'the traditional tools of statutory construction,'" is it permitted to conclude that the statute is unambiguous. *See* Plaintiffs' Reply Memorandum in Support of Their Renewed Motion for Summary Judgment and Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment ("Pls.' Reply") at 12. Moreover, the plaintiffs note that "[c]ourts, in their *Chevron* [s]tep [o]ne analysis, do not interpret statutory phrases in isolation, because the meaning or ambiguity of certain words or phrases may only become evident when placed in context." *Id.* (internal quotation marks and citation omitted). The plaintiffs insist that the Agency commits a fundamental error by simply assuming that it is entitled to *Chevron* deference "without employing any of the traditional tools of statutory interpretation" or refuting any of the plaintiffs' arguments based on those tools. *Id.* at 13 (internal quotation marks omitted). The plaintiffs further argue that because the Agency has never "provided an interpretation of its most fundamentally applicable regulations," the Agency's position that it is entitled to "substantial deference" because it is "interpreting its own regulations" is baseless. *Id.* at 2-3.

The Agency counters, arguing that it has interpreted the relevant regulation and notes that it did include an explanation for its conclusion that ABA therapy is not medically or psychologically necessary health care, or in the alternative, that it is "unproven" care, in its Formal Review Decision, which is supported by an administrative record totaling more than 3,000 pages. Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Defs.' Reply") at 5-7.

109\*109 The initial issue presented by the parties is whether the Agency's conclusion that ABA therapy is not *medically or psychologically necessary medical care* is entitled to deference by the Court. As noted earlier, where a court concludes that a statute is unambiguous, the court must reject an agency's interpretation if it is inconsistent with clearly expressed congressional intent. *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Ambiguity can be determined by asking "whether Congress has delegated authority to an agency by leaving a statutory gap for the agency to fill," *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 707 (D.C.Cir. 2008); *see also Chevron*, 467 U.S. at 843, 104 S.Ct. 2778 ("The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (internal citation omitted), and the Court "owe[s] the Agency no deference on the existence of ambiguity." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468 (D.C.Cir.2005).

The District of Columbia Circuit has consistently required that, absent an explicit delegation of authority to an agency, there must be an implicit delegation of authority to the agency for *Chevron* deference to be accorded by the Circuit to an

agency interpretation. See, e.g., *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 645 (D.C.Cir.1998) ("[Chevron] deference comes into play ... if the reviewing court finds an implicit delegation of authority to the agency."); *City of Kansas City, Mo. v. Dep't of Housing & Urban Dev.*, 923 F.2d 188, 192-93 (D.C.Cir.1991) ("[I]mplicit delegation of interpretive authority," in absence of explicit delegation, is required for *Chevron* deference to apply). Furthermore, where Congress has delegated to an agency the authority to administer a program, a court should take special care not to encroach on that agency's implementation of the program, particularly in regards to the promulgation of program regulations. See *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."). In conducting the *Chevron* step one analysis, a court's inquiry is not limited to the statutory text, but rather a court "must examine the meaning of certain words or phrases in context and ... exhaust the traditional tools of statutory construction, including examining the statute's legislative history to shed new light on congressional intent." *Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C.Cir.2008) (internal quotation marks and citation omitted). With this precedent as its guide, the Court turns to the parties' arguments regarding the clarity or ambiguity of the military health benefits statute and the scope of its delegation of authority to the Agency.

As noted above, the plaintiffs argue that the Agency's position is not entitled to deference because the statute unambiguously requires coverage of ABA therapy under the Basic Program. Pls.' Mem. at 8. The Agency counters that the military health benefits statute does not unambiguously mandate ABA therapy coverage under the TRICARE Basic Program; rather, the statute provides a general guarantee of coverage unless the care is not "medically or psychologically necessary." Defs.' Mem. at 14.

The relevant statutory text at issue is 10 U.S.C. § 1079(a), which states:

110\*110 To assure that medical care is available for dependents ... of members of the uniformed services ... the Secretary of Defense ... shall contract ... for medical care for those persons.... The types of health care authorized under this section shall be the same as those provided under section 1076 of this title,<sup>[111]</sup> except... [a]ny service or supply which is not medically or psychologically necessary to prevent, diagnose, or treat a mental or physical illness, injury, or bodily malfunction....

See 10 U.S.C. § 1071 ("The purpose of this chapter is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain *former members* of those services, and for their dependents.") (emphasis added). Because the Agency is correct in stating that the statute does not explicitly mandate coverage for ABA therapy, but instead contains a general guarantee of health care-related coverage unless the care is "not medically or psychologically necessary," see 10 U.S.C. § 1079(a), the question the Court must resolve is whether Congress intended to delegate authority to the Agency to interpret the phrase "not medically or psychologically necessary," and thus allow it to determine which services fall under this exclusion. See *National Mining Ass'n*, 512 F.3d at 707 ("*Chevron* analysis begins with asking whether Congress has delegated authority to an agency by leaving a statutory gap for the [A]gency to fill.>").

The Court must begin its inquiry by examining the plain language of the statute. See *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 267 (D.C.Cir.2001) ("*Chevron* step one analysis begins with the statute's text...."). The specific words selected by Congress in a statute may be instructive in assessing whether it intended to delegate interpretive authority of the terms in question through the adoption of regulations. See *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) ("The existence of alternative dictionary definitions of the word 'required,' each making some sense under the statute, itself indicates that the statute is open to interpretation.") (internal citation omitted). Here, 10 U.S.C. § 1079 does not define what the phrase "not medically or psychologically necessary" care entails, nor does it provide definitions of these terms. The very ambiguity of these terms indicates Congress's intent to delegate authority to the Agency to interpret them.

In *National Mining Ass'n*, the District of Columbia Circuit evaluated whether the 111\*111 phrase "valid existing rights" in the Surface Mining Control and Reclamation Act<sup>[12]</sup> was ambiguous. 512 F.3d at 704. The Secretary of the Interior interpreted the phrase narrowly, requiring mining operators seeking to mine coal on federal land to satisfy two stringent conditions. *Id.* at 705. Satisfaction of these requirements had the effect of essentially foreclosing surface mining operations on federal lands designated as sensitive areas. *Id.* The plaintiff argued that the Agency's interpretation of the

phrase was too narrow and shielded more land from surface mining than Congress intended. *Id.* at 706. The District of Columbia Circuit began its analysis by concluding that the term "valid existing rights" was ambiguous, observing that "[t]he [plaintiff], reaching for its dictionary, notes that the word 'right' could be taken to mean 'property right[,] ... [b]ut according to the same dictionary on which the [plaintiff] relies, this is not the only meaning the word will bear." *Id.* at 708. Given the ambiguity of the word "rights," the Circuit reasoned that it was "hard for [it] to conclude that" "Congress ha[d] directly spoken to the precise question at issue." *Id.* (internal citation omitted); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ("[W]here a statute's plain terms admit of two or more reasonable ordinary usages, the [Agency's] choice of one of them is entitled to deference."); *AFL-CIO v. FEC*, 333 F.3d 168, 174 (D.C.Cir.2003) ("[T]he fact that the provision can support two plausible interpretations renders it ambiguous for purposes of *Chevron* analysis.").

Here, to determine whether the terms — medically, psychologically, necessary, and medical — are ambiguous and subject to multiple definitions, the Court consults the same source considered by the Circuit in *National Mining Ass'n*: dictionaries. 512 F.3d at 707; *see also AKM LLC v. Sec'y of Labor, Dept. of Labor*, 675 F.3d 752, 755 (D.C.Cir.2012); *Nat'l R.R. Passenger Corp.*, 503 U.S. at 418, 112 S.Ct. 1394. Based on its review of dictionary definitions of each term, the Court finds that the phrase "not medically or psychologically necessary" suffers from ambiguity in the same manner that the phrase "valid existing rights" did in *National Mining Ass'n*.<sup>113</sup>

In *National Mining Ass'n*, the "major source of ... ambiguity [was] the word 'rights.'" 512 F.3d at 708. The Circuit noted that, among other definitions, a "right" could mean "an interest or title in an object of property" or a "legally enforceable claim that another will do or will not do a given act." *Id.* (internal quotation marks and citations omitted). Moreover, a "right" can "do service more generally," standing for "[s]omething that is due to a person by just claim, legal guarantee, or moral principle." *Id.*

The word "medically" is a derivative of and has the same meaning as the word "medical." Similar to the definition of the word "right" in *National Mining Ass'n*, "medical" and "necessary" both have multiple definitions and are thus subject to the same ambiguity, which is magnified when the words are interpreted together as a phrase. "Medical" can mean "relating to, or concerned with physicians or the practice of medicine" or "requiring or devoted to medical treatment," *Medical Definition*, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/medically>, while "necessary" can 112\*112 mean "of an inevitable nature," "absolutely needed," "compulsory," or "determined or produced by the previous condition of things," *Necessary Definition*, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/necessary>. For example, the stark difference between a treatment that is "determined or produced by the previous condition of things" and a treatment that is "compulsory" illustrates this ambiguity. *Id.* It is therefore uncertain whether a treatment must be compulsory, or merely "determined ... by the previous condition of things" in order for it to be covered under the Basic Program. *Id.* Both words lend themselves to multiple interpretations, thus "render[ing the words] ambiguous for purposes of *Chevron* analysis." *Nat'l Mining Ass'n*, 512 F.3d at 708 (internal quotations marks and citation omitted). Especially in the context of the circumstances underlying the dispute in this case, either definition could lead to different conclusions that fall within "a range of possibilities" under the statute. *Barrington*, 636 F.3d at 660.

Moreover, when viewing the two terms collectively as a phrase, the determination of which forms of medical or psychological care are necessary is also subject to interpretation, particularly here, where Congress left each of the terms, and the phrase itself, undefined. In the absence of such definitions, this Court, like the Circuit in *National Mining Ass'n*, 512 F.3d at 708, cannot conclude that Congress has directly answered the question of what types of health care are not medically or psychologically necessary.

With the adoption of the Dependents' Medical Care Act statute, Congress created a military health care system to "provid[e] an improved and uniform program of medical and dental care for members of the uniformed services and their dependents." Pub.L. No. 84-569, 70 Stat 250 (1956). The authority to implement this health care program was, moreover, delegated to the Secretary of Defense by Congress. *See* 10 U.S.C. § 1079(a) ("[T]he Secretary of Defense, after consulting with the other administering Secretaries, shall contract, under the authority of this section, for medical care for those persons under such insurance, medical service, or health plans as he considers appropriate."); *see also* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 711, 124 Stat. 4137, 4246 (2011) ("[T]he Secretary of Defense shall have responsibility for administering the TRICARE program and making any decision

affecting such program."). Because Congress specifically delegated authority to the DoD to implement and make decisions affecting the military's health care program, this Court must take care to avoid infringing on the Agency's authority. See *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974); see also *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer....").

In their Renewed Motion for Summary Judgment, the plaintiffs argue that the DoD's interpretation of the types of services that are not medically or psychologically necessary is owed no deference by the Court because "[t]he statute here is unambiguous in light of its plain meaning, legislative history, its internal structure, the regulations promulgated under it, and the canons of construction." Pls.' Mem. at 7. Specifically, the plaintiffs posit that "[i]t is crystal clear that Congress did not intend to exclude ... a medically and psychologically necessary, intensive, and enormously effective therapy like ABA, which is designed, supervised, and performed by highly trained and skilled professionals." *Id.* The plaintiffs note that the congressionally 113\*113 declared purpose of the statute is to "create and maintain high morale in the uniformed services by providing an improved program of medical ... care," *id.* at 26 (citing 10 U.S.C. § 1071), and argue that the Agency's "conclusion that ABA therapy is excluded from Basic coverage[] as 'not medically or psychologically necessary'... is not in harmony with the 'design of the statute as a whole and ... its object and policy,'" *id.* at 27. However, in arguing that the Agency's ABA therapy exclusion is contrary to the core purposes of the military health benefits statute, the plaintiffs erroneously conflate the *Chevron* step one and *Chevron* step two analyses. As noted above, the key inquiry in *Chevron* step one is whether the statute is ambiguous and whether Congress delegated authority to the Agency to fill those statutory ambiguities. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("Deference under *Chevron* [step one] to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."). Only after a court determines that deference is warranted due to statutory ambiguity or silence will a court proceed to *Chevron* step two to assess whether an agency's interpretation of a statute is contrary to its core purpose. *Am. Bankers Ass'n*, 271 F.3d at 267 ("Only if we find the statute either silent or ambiguous with respect to 'the precise question at issue' do we proceed to *Chevron*'s second step, asking 'whether the agency's answer is based on a permissible construction of the statute.'") (quoting *Chevron*, 467 U.S. at 842-44, 104 S.Ct. 2778). Therefore, the question of whether the statute's core purpose of providing improved health care to military families conflicts with the Agency's construction of the statutory language, as the plaintiffs argue, is irrelevant for purposes of *Chevron* step one, and is only appropriate for the Court's consideration under *Chevron* step two.

In summary, with regard to *Chevron* step one, the Court concludes that the disputed language of the statute is ambiguous because it is subject to more than one definition. Moreover, the statutory language expressly delegates sole authority to the Agency to implement and make decisions with respect to the Basic Program. See 10 U.S.C. § 1079(a); see also § 711, 124 Stat. at 4246. Congress's delegation of authority to the Agency to administer the TRICARE health care program, coupled with Congress's use of undefined and ambiguous language, i.e., the phrase "not medically or psychologically necessary," is persuasive evidence that Congress left a gap in the statutory language for the Agency to fill. See *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 330 (D.C.Cir.2011) ("The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."). Accordingly, because the phrase "medically or psychologically necessary" introduces ambiguity into the statute, the Court will advance to step two of the *Chevron* analysis, and will defer to the Agency's conclusion if reasonable and permissible under the statute.<sup>[14]</sup>

#### 114\*114 B. Is The Agency's Interpretation Arbitrary and Capricious or Contrary to Law (Chevron Step Two)?

The Court, having determined "that statutory ambiguity has left the [A]gency with a range of possibilities and that the [A]gency's interpretation falls *within* that range, ... the [A]gency ... ha[s] survived *Chevron* step one," and the Court must now proceed to *Chevron* step two. *Barrington*, 636 F.3d at 660. "At [this second step of the] *Chevron* [analysis, the Court must] defer to the agency's permissible interpretation, *but only if* the agency has offered a reasoned explanation for why it chose th[e] interpretation," *id.* (emphasis added), that explanation "is rationally related to the goals of the statute," *id.* at 665 (internal quotation marks and citation omitted), and there has not been "a clear error of judgment," *New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F.Supp.2d 103, 113 (D.D.C.2010). Furthermore, "unlike [the review at] *Chevron* step one[,] ... at this stage [the standard of review] is highly deferential" to the agency. *Barrington*, 636 F.3d at 665 (internal quotation marks and citation omitted).

## 1. *Arbitrary and Capricious Analysis*

At *Chevron* step two, the Court may not disturb an agency rule unless it is "arbitrary or capricious in substance, or manifestly contrary to the statute." *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 242, 124 S.Ct. 1741, 158 L.Ed.2d 450 (2004). In reviewing a case under the arbitrary and capricious standard of review, a court "must consider whether the [Agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (internal quotation marks and citation omitted). At a minimum, the Agency decision must have been based on a consideration of the relevant data and the "explanation of the basis for its decision must include 'a rational connection between the facts found and the choice made.'" *Bowen v. Am. Hosp. 115\*115 Ass'n*, 476 U.S. 610, 626, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986) (internal citation omitted). An agency action will

[n]ormally ... be arbitrary and capricious if the agency has *relied on factors which Congress has not intended it to consider*, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43, 103 S.Ct. 2856 (emphasis added); see also *BellSouth Corp.*, 162 F.3d at 1222 ("Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action."). As noted, the "requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result." *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C.Cir.1993).

### ***a. Did The Agency Rely On Relevant Factors, Or Did It Rely On Factors Its Regulations Did Not Intend To Be Considered, or Did It Fail To Consider An Important Aspect Of The Problem?***

The Agency asserts that its "assessment that ABA [is] not 'medically or psychologically necessary' was based on a consideration of the relevant factors needed to make such a decision and was a rational decision given the record before it." Defs.' Mem. at 21-22. On the other hand, the plaintiffs assert the following:

In its October 2010 denial decision, [the] DoD simply concluded that 'ABA is an educational intervention and does not meet the TRICARE definition of medical care,' without actually exploring and applying the statutory and regulatory definitions of 'medical' and 'health care.' Instead of utilizing all of the language contained in the statutory and regulatory definitions for 'medical' and 'health care,' [the] DoD just sought out sources that used variations of three key words: 'education,' 'teach,' and 'instruction.' [The] DoD then declared, without any analysis, that ABA therapy is 'educational,' and, therefore, it cannot be 'medical.'" At the outset, [the] DoD did acknowledge the broad and liberal definition of 'medical' — but then refused to apply it.

Pls.' Mem. at 32-33.

As noted in Part III.A.1 of this opinion, *supra* at 19, 10 U.S.C. § 1071 authorizes a "uniform program[, TRICARE, for] medical [benefits] ... for members and certain former members of [the Uniformed Services], and for their dependents." Specifically, the "[TRICARE program] is authorized at Sections 1079, 1086, and 1091 [of Title 10] to contract with civilian providers for the health care program benefits authorized under Section 1077." A.R., Vol. I, Tab 1 (Formal Review Decision) at 22.<sup>[15]</sup>

Under the TRICARE statute, medical care is available to dependents under Section 1079(a), which provides:

To ensure that medical care is available for dependents, ... the Secretary of Defense, after consulting with the other administering Secretaries, shall contract, under the authority of this section, for medical care for those persons under such insurance, medical service, or 116\*116 health plans as he considers appropriate. The types of health care authorized under this section shall be the same as those provided under section 1076.

10 U.S.C. § 1079(a). Section 1076 of the statute provides that the medical care to which a dependent is entitled shall be the same as that prescribed under Section 1077, which states:

(a) Only the following types of health care may be provided under section 1076 of this title:

- (1) Hospitalization.
- (2) Outpatient care.
- (3) Drugs.
- (4) Treatment of medical and surgical conditions.
- (5) Treatment of nervous, mental, and chronic conditions.
- (6) Treatment of contagious diseases.
- (7) Physical examinations, including eye examinations, and immunizations.
- (8) Maternity and infant care, including well-baby care that includes one screening of an infant for the level of lead in the blood of the infant.
- (9) Diagnostic tests and services, including laboratory and X-ray examinations.
- (10) Dental care.
- (11) Ambulance service and home calls when medically necessary.
- (12) Durable equipment, which may be provided on a loan basis.
- (13) Primary and preventive health care services for women (as defined in section 1074d(b) of this title).
- (14) Preventive health care screening for colon or prostate cancer, at the intervals and using the screening methods prescribed under section 1074d(a)(2) of this title.
- (15) Prosthetic devices, as determined by the Secretary of Defense to be necessary because of significant conditions resulting from trauma, congenital anomalies, or disease.
- (16) A hearing aid, but only for a dependent of a member of the uniformed services on active duty and only if the dependent has a profound hearing loss, as determined under standards prescribed in regulations by the Secretary of Defense in consultation with the administering Secretaries.
- (17) Any rehabilitative therapy to improve, restore, or maintain function, or to minimize or prevent deterioration of function, of a patient when prescribed by a physician.

10 U.S.C. § 1077(a)(1-17).

The plaintiffs assert that "[t]he treatment of autism by ABA therapy falls within at least three categories of 'health care' or 'mental health care' that are provided as TRICARE Basic [P]rogram benefits" under the statute: "[t]he treatment of a 'medical condition,' pursuant to 10 U.S.C. 1077(a)(4); [t]he treatment of a 'nervous, mental, and chronic condition,' pursuant to 10 U.S.C. 1077(a)(5); and [a] 'rehabilitative therapy' to improve, restore, or maintain function, or to minimize or prevent deterioration of function, of the patient when prescribed by a physician,' pursuant to 10 U.S.C. 1077(a)(17)." Pls.' Mem. at 31. On the other hand, the Agency states that "[b]ased on the[] definition[] and reliable evidence, [the] DoD concluded that ABA did not meet the definition of medical care, but rather found ABA to be an educational intervention aimed at modifying social behavior." Defs.' Mem. at 31. The plaintiffs maintain that despite the DoD's exclusive reliance on the "reliable evidence standard" as the basis for assessing what coverage is available under the Basic Program, the regulatory definitions of "medically or psychologically necessary" are "only tangentially related" to the reliable evidence standard. Pls.' Mem. at 43-44. <sup>117</sup>\*<sup>117</sup> Rather, the plaintiffs contend that "[a]s provided in 32 C.F.R. 199.2(b), the 'general acceptance' standard is what first and foremost defines whether a treatment is 'medically or psychologically necessary' for purposes of the military health benefits statute." *Id.* at 44. They further contend that "the regulatory

definitions of [what is] 'medically or psychologically necessary' and 'medical [care]' do not even rely on the 'reliable evidence' standard, but rather rely on common-sense notions of 'general acceptance' and 'pertaining' to a mental disorder." Pls.' Reply at 7. The Court agrees with the plaintiffs.

Pursuant to 32 C.F.R. §§ 199.2 and 199.4(g)(15), "[t]he TMA Deputy Director tasked the Chief [of the Medical Benefits and Reimbursement Branch ('MB & RB')] to determine whether ABA satisfies the... criteria for medically or psychologically necessary treatment, and appropriate medical care." A.R., Vol. I, Tab 1 (Formal Review Decision) at 9. The MB & RB Chief "concluded, in pertinent part, that:... ABA is not medically or psychologically necessary and appropriate medical care for ASD and that the reliable evidence reviewed indicates that ABA is an educational intervention and does not meet the TRICARE definition of medical care." *Id.* at 9-10. In conducting this assessment, the MB & RB Chief undertook "an in depth review of the reliable evidence, such as medical literature and technology assessments, along with all documentation submitted by the Beneficiary." *Id.* at 9. The assessment was then forwarded to the TMA Director, who concurred with the findings of the MB & RB Chief based on the evidence that had been reviewed and "a report by Hayes, Inc. (Hayes), a nationally recognized health technology assessment entity." *Id.* at 10. Specifically, "the Director of TMA reached the conclusion that ABA is not ... covered under the Basic Program because it is (1) an 'educational intervention' rather than 'medical' care as contemplated by the [A]gency's regulations, and, alternatively, (2) not 'proven' medical care even if considered to be medical care." Defs.' Mem. at 26-27.

The plaintiffs argue that the Agency's explanation is insufficient because it fails to "meaningfully address[] its own regulations defining 'medically or psychologically necessary' or 'medical,'" but instead, "focuses selectively on the 'reliable evidence' regulation." Pls.' Reply at 7. Moreover, as noted earlier, the plaintiffs opine that "the regulatory definitions of 'medically or psychologically necessary' and 'medical' do not even rely on the 'reliable evidence' standard, but rather rely on common-sense notions of 'general acceptance' and 'pertaining' to a mental disorder." *Id.*

As an initial matter, the Court agrees with the plaintiffs that the Agency has failed to meaningfully address its own regulations and instead has concentrated on factors that the regulations do not contemplate in its determination of whether ABA is "medically and psychologically necessary" "medical care." The Basic Program covers "medically necessary services and supplies required in the diagnosis and treatment of illness or injury, including maternity care and well-baby care." 32 C.F.R. § 199.4(a)(1)(i). Furthermore, the term "medical" is defined as

[t]he generally used term which pertains to the diagnosis and treatment of illness, injury, pregnancy, and mental disorders by trained and licensed or certified health professionals. For purposes of CHAMPUS, the term "medical" should be understood to include "medical, psychological, surgical, and obstetrical," unless it is specifically stated that a more restrictive meaning is intended.

32 C.F.R. § 199.2(b). Finally, the term "medically or psychologically necessary" is defined as follows:

118\*118 The frequency, extent, and types of medical services or supplies which represent appropriate medical care and that are *generally accepted by qualified professionals to be reasonable and adequate for the diagnosis and treatment of illness, injury, pregnancy, and mental disorders* or that are reasonable and adequate for well-baby care.

*Id.* (emphasis added). The regulation's definitions of "medical care" and "medically and psychologically necessary" make no reference to the reliable evidence standard. The reliable evidence standard only becomes a required consideration when the Agency is considering whether a treatment is proven or unproven. *See id.* § 199.4(g)(15) (stating, in relevant part, that "[a]ny drug, device, or medical treatment or procedure, the safety and efficacy of which have not been established, as described in this paragraph (g)(15), is unproved and cannot be cost-shared by CHAMPUS except as authorized under paragraph 199.4(e)(26) of this part. A ... medical treatment or procedure is unproven... [u]nless *reliable evidence* shows that [it] has been the subject of well-controlled studies of clinically meaningful endpoints, which have determined its maximum tolerated dose, its toxicity, its safety, and its efficacy as compared with standard means of treatment or diagnosis") (emphasis added). Consequently, because the Agency erroneously reviewed whether ABA therapy is medically or psychologically necessary medical care under the "reliable evidence" standard, which is not required by the regulation and is therefore inconsistent with it, *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (stating that an "agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation[;]... [i]n other words, [a court] must defer to the [agency's] interpretation

unless an alternative reading is compelled by the regulation's plain language") (internal citation omitted); Lake Pilots Ass'n v. U.S. Coast Guard, 257 F.Supp.2d 148, 174 (D.D.C.2003) (finding the defendant acted arbitrarily and capriciously by failing to adhere to its own regulations), the Agency's decision was not based on consideration of the "relevant factors," Motor Vehicle Mfrs. Ass'n of U.S., 463 U.S. at 43, 103 S.Ct. 2856. Accordingly, in this regard the Agency has acted arbitrarily and capriciously and not in accordance with its own regulation.

**b. Was the Agency's Decision Rationally Related to the Choice Made Considering the Objectives of the Statute?**

Alternatively, even if the Agency could demonstrate that it considered the relevant factors in reaching its determination that ABA therapy is not medically or psychologically necessary medical care, summary judgment in favor of the Agency would still be inappropriate because it has not articulated a satisfactory explanation as to how its decision is "rationally related" to the choice it has made in light of the statute's purpose, which is to "provid[e] an improved and uniform program of medical and dental care for members of the uniformed services and their dependents." Dependents' Medical Care Act, Pub.L. No. 84-569, 70 Stat. 250 (1956). Congress intended to achieve this objective by implementing a program that would "discharge a moral obligation to the uniformed services, and ... provide military personnel with medical benefits comparable to those extended to federal civilian employees." Barnett v. Weinberger, 818 F.2d 953, 965-66 (D.C.Cir.1987).

At the second step of the *Chevron* analysis, courts must assess whether the Agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., 119\*119 463 U.S. at 43, 103 S.Ct. 2856 (internal quotation marks and citation omitted). The District of Columbia Circuit has stated that the "satisfactory explanation" prong includes an assessment of "whether the [Agency] has reasonably explained how the permissible interpretation it chose is rationally related to the goals of the statute." Barrington, 636 F.3d at 665 (internal quotation marks and citation omitted). Despite the "highly deferential" standard owed to the Agency, *id.*, the Court cannot find that the Agency has satisfied *Chevron* step two based on these considerations either.

The Agency argues that its conclusion that "ABA is [n]ot [c]overed [u]nder the TRICARE Basic Program was [b]ased on a [r]ational [c]onnection to the [f]acts [b]efore [i]t." Def.'s Mem. at 29. First, it represents that its determination that ABA is an educational intervention, as opposed to medical treatment, was based on consideration of its own regulation defining the terms "medical" and "medically and psychologically necessary," *id.* at 30 (citing 32 C.F.R. § 199.2(b)), as well as a "comprehensive review" of the relevant medical literature, which it concluded "showed ABA's function is to modify social behavior rather than treat the underlying illness of ASD," *id.* at 32-34 (citing, A.R., Vol. I, Tab 1 (Formal Review Decision) at 25-30). The plaintiffs seem to argue in response that the Agency has not shown how its definitional regulation is rationally connected to its determination that ABA is not medically or psychologically necessary, in light of the Agency's failure to "explain how it ... conclude[d] that ABA therapy does not fit within this regulatory definition." Pls.' Reply at 3. Focusing on the regulation defining "medically and psychologically necessary," the plaintiffs assert that the Agency "has never even endeavored to discuss what 'general acceptance' is or who 'qualified professionals' are, let alone whether ABA meets these very reachable standards." *Id.* Turning to the Agency's definition of "medical," the plaintiffs contend that the Agency "needed to explain exactly how ABA therapy does not 'pertain to the treatment of a mental disorder'" to rationally conclude that it is not medically necessary. *Id.* at 6. The plaintiffs also maintain that Congress did not intend to exclude ABA coverage from the Basic Program. Pls.' Mem. at 30. Thus, the issue presented to the Court is whether the Agency's decision comports with the evidence that was before it.

An agency's interpretation of a statute and its own regulations "ultimately prevails, if at all, only by virtue of the persuasive power it exerts." Barnett, 818 F.2d at 964. If an agency fails to provide a "satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made," Banner Health, 715 F.Supp.2d at 153 (internal quotation marks and citation omitted), the Court should not "stand aside and rubber-stamp... affirmance of [the] decision[] [if it] deem[s] the decision] inconsistent with a statutory mandate or [it] frustrates the congressional policy underlying a statute," Barnett, 818 F.2d at 964, (internal quotation marks and citation omitted). And here, a close examination of the objectives of the TRICARE statute, as well as the disorder and the therapy at issue, undermine the Agency's decision.

**(i) The Purpose of the CHAMPUS/TRICARE Statute**

"The CHAMPUS statute and regulations were enacted to 'create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents....'" *Britell v. United States*, 372 F.3d 1370, 1379 (Fed.Cir.2004) (quoting 10 U.S.C. § 1071). With the enactment of the statute, <sup>120\*120</sup> Congress intended to "discharge a moral obligation to the uniformed services, and to provide military personnel with medical benefits comparable to those extended to federal civilian employees." *Barnett*, 818 F.2d at 965-66. The statute accordingly made healthcare for beneficiaries "an earned entitlement in gratitude for service to their country and as a means of enhancing and making more attractive service in the armed forces of the United States." *McGee v. Funderburg*, 17 F.3d 1122, 1124-25 (8th Cir.1994).

The program fulfills this objective by "supplement[ing] the military's system of direct care for members of the armed services," *Wilson v. CHAMPUS*, 65 F.3d 361, 363 (4th Cir.1995), with "financial assistance to beneficiaries of health care services rendered by civilian health care facilities when such services are not available in military health care facilities," *Green Hosp. v. United States*, 23 Cl.Ct. 393, 395 (Cl.Ct.1991). "CHAMPUS is not an insurance program where the insurer guarantees indemnification in return for a premium. Rather, CHAMPUS is funded by annual Congressional appropriations." *Smith v. CHAMPUS*, 97 F.3d 950, 952 (7th Cir.1996). "[I]t is an 'at risk' program, meaning that unlike traditional health insurance programs, where beneficiaries usually know whether a treatment is covered beforehand, CHAMPUS beneficiaries typically receive medical care first and then submit a claim to CHAMPUS officials for an after-the-fact ruling on coverage." *Id.*

"The truly outstanding feature of the Dependents' Medical Care Act ... is that it converted the provision of military-dependent medical care from a mere act of grace to a full-fledged matter of right." *Barnett*, 818 F.2d at 957. "[T]o assure that medical care is available for spouses and children of members of the uniformed services who are on active duty for a period of more than 30 days, the Act commands the Secretary of Defense ... to 'contract for medical care for those persons under such insurance, medical service, or health plans as he considers appropriate.'" *Id.* at 957-58 (quoting 10 U.S.C. § 1079(a)).

"While access to statutorily-authorized military-dependent medical care is a legal entitlement, Congress has imposed limitations on the types of care that CHAMPUS can supply...." *Id.* at 958. In particular, "[a]ny service ... which is not medically or psychologically necessary to prevent, diagnose, or treat a mental or physical illness ... as assessed or diagnosed by a physician [or] clinical psychologist ... may not be provided...." 10 U.S.C. § 1079(a)(13). However, a "broad-gauged reading of the statutory exclusion[s] [would be] antithetical to the general statutory purpose, for the prime objective of the Dependents' Medical Care Act was enhancement, not reduction, of the benefits to be accorded to military personnel and their dependents." *Barnett*, 818 F.2d at 963.

The DoD "has no registry specifically for beneficiaries with ASD; [thus,] ... the prevalence of autism within the Military Health System is [not] known." A.R., Vol. III, Tab 8-2-7 (DoD 2007 Report) at 6. Despite this uncertainty, in 2007, "the Marine Corps count[ed] 784 active duty family members of all ages with a diagnosis of ASD." *Id.* In their amended complaint, the plaintiffs allege that the number of children of "active-duty military personnel [who] have been diagnosed with ASD ... [is] 13,243 of [an] estimated [total of] 1.2 million children." Am. Compl. ¶ 120.

**(a) Autism Defined<sup>1161</sup>**

As discussed earlier, autism is classified as a Pervasive Developmental Disorder <sup>121\*121</sup> and is a neurobiological disorder that is "characterized by severe and pervasive impairment in several areas of development[, such as] reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests, and activities." Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 69 (4th ed., text rev. 2000); see 34 C.F.R. § 300.8(c)(1)(i). Detectable at a very early age, autism affects the development and function of the brain resulting in "lifelong emotional, behavioral, social, and communication" difficulties. Brian Pace, *Autistic Disorder*, 285 JAMA 1798 (2001) ("Pace").<sup>1171</sup> Children affected by this neurobiological disorder "do not always experience the same symptoms" and their "symptoms also depend on the severity of the disorder." *Id.* Thus, autism has a range of severity, resulting in some autistic individuals being able to live independent lifestyles, while others are entirely incapable of supporting and providing for themselves. *Id.*

The number of individuals diagnosed with autism has increased in recent years. A.R., Vol. III, Tab 8-2-13 (NIMH: Development Disorders) at 475. Professionals who have been certified to properly conduct a diagnostic assessment are equipped to determine if a child has autism before the child is two years old. Nat'l Research Council, *Educating Children With Autism* 3 (Catherine Lord & James P. McGee eds., 2001). When diagnosing autism, such professionals assess the behavioral symptoms produced by the disorder. Am. Psychiatric Ass'n, *supra*, at 75. Three characteristics are commonly associated with autism: (1) "an inability to engage in reciprocal social interaction," (2) "both verbal and non-verbal communication difficulties," and (3) a "restricted imagination and a predilection for rigid routines." F.J. O'Callaghan, Editorial, *Autism: what is it and where does it come from?*, 95 QJM 263 (2002).<sup>1181</sup>

The first category is manifested by autistic children encountering social challenges that restrict their ability to interact socially with others. A.R., Vol. III, Tab 8-2-13 (NIMH: Development Disorders) at 479-80. According to the NIMH, autistic children "appear to have tuned the world out and are in their own worlds, not paying attention to others or engaging in normal social interactions." *Cnty. Sch. Bd. of Henrico Cnty. v. R.T.*, 433 F.Supp.2d 657, 666 (E.D.Va.2006) (citing Nat'l Insts. of Mental Health, *Autism* 3). Thus, affected children "avoid physical contact such as hugging and cuddling[, and] may also have difficulty interpreting the meaning of gestures and facial expressions such as smiling or winking." Pace, *supra*, 285 JAMA at 1798. Additionally, these children "avoid[] eye contact and display[] little of the interested curiosity and explanatory 122\*122 play seen in normal infants and young children." O'Callaghan, *supra*, 95 QJM at 263.

As to the second category, autistic children possess language and communication barriers that prevent them from "grasp[ing] the point of communication." *Id.* There are two components to this particular behavioral symptom: speaking and understanding. *See id.* In regard to the speaking component, "it has been estimated that half of [the] individuals affected by autism will remain mute throughout their lives." Pace, *supra*, at 1798. If autistic children are able to speak, they "may experience delays in language development or only repeat what they have heard." *Id.* When speaking, children with autism have challenges controlling the pitch, tone, and volume of their speech. O'Callaghan, *supra*, at 263. Also, affected children usually will have a "defect in understanding spoken speech [that] may be almost total, or may be subtle and merely take the form of literal interpretation of language." *Id.*

Lastly, individuals with autism typically display repetitive behavior, obsession with routine, and sensory problems. Pace, *supra*, at 1798. The repetitive behavior can be manifested by constant rocking or repetition of the same bodily movement. *Id.* Affected individuals normally develop "an obsessive need for a routine." O'Callaghan, *supra*, at 263. Thus, any deviation from the "usual pattern of life," such as "a book out of place in a bookcase or an altered route home from school," can cause minor outrage or temper tantrums. *Id.* In addition, in most cases of autism, individuals portray signs of restricted imagination and have sensory problems to the degree that "certain sounds can be overwhelming." *Id.*; *see also* Pace, *supra*, at 1798.

These three types of manifestations are the common behavioral symptoms that lead to a diagnosis of autism. Am. Psychiatric Ass'n, *supra*, at 69. An early recognition of these characteristics or symptoms of autism can lead to an early diagnosis. *See generally* Nat'l Research Council, *supra*, at 195. And an early diagnosis is critical to the overall success of addressing autism, because it allows education and behavioral modification efforts to commence. *Id.*

#### **(b) Mitigating the Impact of Autism**

Even though there is no available cure for autism, various forms of intervention have been developed to mitigate its symptoms and effects. Pace, *supra*, at 1798. These interventions are categorized in four different methods: (1) early intervention programs, (2) specialized education, (3) family support, and (4) medication. *Id.* Through early intervention programs, professionals provide educational and behavior training services that are designed to enhance the development of language and social skills. *Id.* These educational programs can take on a more specialized form, in which they focus on the individual's particular needs in order to "maximize the potential of each individual." *Id.* The success of these programs is bolstered by additional support from the family. *Id.* Normally, family members work with teachers and therapists to enable them to continue the training efforts in the child's home. *Id.* Such participation by the family becomes a constant support system for autistic individuals and the professionals who work with them. *Id.* Finally, certain symptoms can be treated with the use of medication, but medications do not alleviate the targeted symptom, they merely minimize the frequency and effects of that symptom. *See id.*

As the Agency's own report to Congress notes, "[w]ithin the field of autism, there are many approaches to intervention that are widely disseminated but little researched." A.R. Vol. III, Tab 8-2-7 (DoD 2007 Report) at 411. "Some approaches 123\*123 have been greeted with great enthusiasm initially, but have relatively quickly faded out of general use...." *Id.* "Other approaches have withstood the test of time across sites and the children and families they serve...." *Id.* "Education, both directly of children, and of parents and teachers, is currently *the primary form of treatment* for autism." *Id.* (emphasis added). These forms of intervention have come to be recognized as the most successful means of helping autistic individuals live more independent lives. See Patricia Howlin, *The Effectiveness of Interventions for Children with Autism*, 69 J. Neural Transmission, Supplement, 101, 101 (2005). And, many of these interventions focus on educational and behavioral trainings aimed at decreasing the effects of autism. *Id.* As noted earlier, one of these interventions is ABA therapy.

### (c) ABA Therapy

ABA therapy is the "application of behavioral principles to shape behaviors and teach new skills in an individual." A.R., Vol. III, Tab 8-2-7 (DoD 2007 Report) at 8. As a continuous chain of discrete "lessons one-on-one with a student taught with very clear beginnings and endings, repeated over and over, with positive reinforcement[.]" *Gill v. Columbia 93 Sch. Dist.*, No. 98-4192-CV-C-66BAECF, 1999 WL 33486649, at \*5 (W.D.Mo. June 9, 1999) (describing ABA therapy "used by O. Ivar Lovaas, Ph.D., at the University of California-Los Angeles"), ABA therapy focuses on "the use of rewards or reinforcement to encourage desired behaviours and the elimination or reduction of unwanted behaviours by removing their positive consequences by means of 'time out,' 'extinction,' or punishment," Kostas Francis, *Autism Interventions: A Critical Update*, 47 Developmental Med. & Child Neurology 493, 495 (2005). ABA therapy is designed to help autistic children "in any skill area that is delayed and, at the same time, ... [allow for] grow[th in their] areas of strength," A.R., Vol. III, Tab 8-2-13 (NIMH: Development Disorders) at 493, along with maintaining those "newly learned skills" "to improve socially significant behavior to a meaningful degree," A.R., Vol. III, Tab 8-2-7 (DoD 2007 Report) at 412-13.

ABA therapy is a specialized intervention administered by a "professional with advanced formal training in behavioral analysis." *McHenry v. PacificSource Health Plans*, 679 F.Supp.2d 1226, 1232 (D.Or.2010). To be nationally certified, the Behavior Analyst Certification Board requires that an analyst have "a masters degree and several hundred hours of graduate level instruction or mentored or supervised experience with another" board certified behavioral analyst. *Id.* (citing Behavior Analyst Certification Bd., *Standards for Board Certified Behavior Analyst*, <http://www.bacb.com/index.php?page=158> (last visited July 12, 2012)). In administering ABA therapy, the intervention program starts with numerous hours of individualized instruction in the child's home and ends with several hours of instruction in more socialized settings, such as a school environment with the opportunity to interact with peers. *C.M. ex rel. J.M. v. Bd. of Educ. of Henderson Cnty.*, 85 F.Supp.2d 574, 585 (W.D.N.C.1999) (citing the testimony of Dr. Jacqueline Wynn, Director of the Lovass Institute).

ABA therapy is an economically "costly" program, and can be physically and emotionally demanding on the family of a child diagnosed with autism. *McHenry*, 679 F.Supp.2d at 1232. The family members of an affected child become a core component of the intervention because they must invest a substantial amount of time at home reinforcing the therapy so that the "gains made by the child with his therapist are not lost." *C.M. ex rel. J.M.*, 85 F.Supp.2d at 585. Thus, the parents are 124\*124 "expected to help ... generalize the skills learned during therapy to the everyday world." *Id.* Although costly, ABA therapy has been proven to be effective and generally beneficial to children diagnosed with Pervasive Developmental Disorders. See *McHenry*, 679 F.Supp.2d at 1232. Most important, if initiated at an early age, autistic children may see greater improvement, mitigating the symptoms of autism. A.R., Vol. III, Tab 8-2-13 (NIMH: Development Disorders) at 485, 490, 501.

### (ii). The Applicability of the TRICARE Statute to Autism

As noted previously, the purpose of the TRICARE Basic Program is to "create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents." *Britell*, 372 F.3d at 1379 (quoting 10 U.S.C. § 1071). Congress specifically endeavored to create a program to "discharge a moral obligation to the uniformed services, and to provide military personnel with medical benefits comparable to those extended to federal civilian employees." *Barnett*, 818 F.2d at 965-66. Most important, the statute's Basic Program covers "medically necessary services and supplies required in the

diagnosis and treatment of illness or injury." 32 C.F.R. § 199.4(a)(1)(i). The term "medical" "pertains to the diagnosis and treatment of illness, injury, pregnancy, and *mental disorders* by trained and licensed or certified health professionals." 32 C.F.R. § 199.2(b) (emphasis added). The Basic Program defines the term "mental disorder" as "a nervous or mental condition that involves a clinically significant behavioral or psychological syndrome or pattern that is associated with a painful symptom, such as distress, and that impairs a patient's ability to function in one or more major life activities." *Id.* This definition seemingly encompasses autism, which is classified as a Pervasive Developmental Disorder that is neurobiological and "characterized by severe and pervasive impairment in several areas of development[, such as] reciprocal social interaction skills, communication skills, or the presence of stereotyped behavior, interests, and activities." Am. Psychiatric Ass'n, *supra*, at 69. The defendants do not dispute that autism is a covered "mental disorder"; they instead argue that ABA therapy as a treatment intervention for autism is not a medically necessary service, focusing their attention on the fact that the treatment has a learning component. *See* A.R., Vol. I, Tab 1 (Formal Review Decision) at 27 ("We conclude ... that regardless of how the intervention is oriented, that is, behaviorally such as ABA, or developmentally, ... the over-arching methodology of the intervention is an educational process ....") (footnote omitted). But, this reality cannot be dispositive of whether ABA therapy is merely an educational intervention and not a form of treatment for autism because, as a mental disorder that often devastates individuals' ability to conform their behavior to social constructs, *see* A.R., Vol. III, Tab 8-2-13 (NIMH: Development Disorders) at 477, it is only logical that the treatment for autism would include education as part of the behavioral modification effort. In other words, the educational component of ABA therapy does not automatically foreclose it as medical treatment. Therefore, the Court must conclude that the Agency's rationale based on this proposition was arbitrary and capricious.

***c. Is ABA Therapy "Unproven" "Medical Care," Even If It Qualifies as "Medical Care"?***

As noted earlier in this opinion, in accordance with its statutory mandate, the Agency has adopted a regulation for the administration of the TRICARE military 125\*125 health benefits program. *See* 32 C.F.R. § 199. The TRICARE Basic Program is described in 32 C.F.R. § 199.4(a), which provides that the "Basic Program is similar to private insurance programs, and is designed to provide financial assistance to [TRICARE] beneficiaries for certain prescribed medical care obtained from civilian sources." Statutorily excluded from coverage is "[a]ny service or supply which is not medically or psychologically necessary to prevent, diagnose, or treat a mental or physical illness, injury, or bodily malfunction." 10 U.S.C. § 1079(a)(13). The Agency, through its regulation, defines the term "medically or psychologically necessary" care as "[t]he frequency, extent, and types of medical services ... which ... are generally accepted by qualified professionals to be reasonable and adequate for the diagnosis and treatment of illness, injury... and *mental disorders*." 32 C.F.R. § 199.2(b) (emphasis added). Furthermore, medical care cannot be covered if it is unproven, as set forth in the following subsections of the regulation:

A drug, device, or medical treatment or procedure is unproven ... [u]nless reliable evidence shows that any medical treatment or procedure has been the subject of well-controlled studies of clinically meaningful endpoints, which have determined its ... *safety, and its efficacy as compared with standard means of treatment or diagnosis, [or] if reliable evidence shows that the consensus among experts regarding the medical treatment or procedure is that further studies or clinical trials are necessary to determine ... its safety, or its effectiveness as compared with the standard means of treatment or diagnosis.*

32 C.F.R. § 199.4(g)(15) (emphasis added).

[R]eliable evidence means only: (i) [w]ell controlled studies of clinically meaningful endpoints, published in refereed medical literature[;] (ii) [p]ublished formal technology assessments[;] (iii) [t]he published reports of national professional medical associations[;] (iv) [p]ublished national medical policy organization positions; and (v) [t]he published reports of national expert opinion organizations.

32 C.F.R. § 199.2.

In addition to the Basic Program, Congress established ECHO, an extended benefits program that is available only to active duty members and their dependents, which is also administered by the Agency. *See* 10 U.S.C. § 1079(d). The purpose of ECHO is "to provide an additional financial resource for an integrated set of services and supplies designed to assist in the reduction of the disabling effect of the ECHO-eligible dependent's qualifying condition." 32 C.F.R. §

199.5(a)(2). Care provided under ECHO is not limited to medical care, and the Agency has discretion to provide coverage for services determined by the Agency to be appropriate, "notwithstanding the limitations in subsection (a)(13)" that "[a]ny service or supply which is not medically or psychologically necessary ... may not be provided." See 10 U.S.C. § 1079(e)(7) ("Extended benefits for eligible dependents under subsection (d) may include ... [s]uch other services and supplies as determined appropriate by the Secretary, notwithstanding the limitations in subsection (a)(13)."). The Agency is therefore at liberty to reimburse active military service members for ABA therapy provided to their dependents without determining whether it was medically or psychologically necessary, whereas it cannot do so in the case of non-active duty service members.

This leaves the Court to determine whether the plaintiffs' reimbursement requests were properly denied on the basis that ABA therapy is unproven. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of 126\*126 the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43, 103 S.Ct. 2856. The agency must nevertheless examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). In reviewing the explanation for a decision provided by an agency, the Court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974) (internal citation omitted). Normally, courts will find agency action

arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43, 103 S.Ct. 2856.

With this legal authority as its guide, the Court must resolve two questions in order to determine whether the Agency's determination that ABA therapy is unproven is arbitrary and capricious. First, the Court must examine whether the Agency's determination was based on a consideration of all the relevant factors. See *Bowman Transp. Inc.*, 419 U.S. at 285, 95 S.Ct. 438. Second, the Court must determine whether there is a "rational connection" between the Agency's determination that ABA therapy is unproven and the facts it considered in making that determination. See *Burlington Truck Lines, Inc.*, 371 U.S. at 168, 83 S.Ct. 239. Based on the information contained in the record and for the reasons set forth below, the Court must conclude that the Agency's determination that ABA therapy is unproven was arbitrary and capricious, contrary to law, or otherwise not in accordance with the law.

***(i) Did the Agency Fail to Articulate a Satisfactory Explanation Due to its Reliance Solely on the Sources Referenced in its Final Formal Review Decision?***

The plaintiffs argue that the Agency erroneously "dismissed ... as not reliable," and therefore failed to give appropriate consideration to several studies they submitted to the Agency which identify ABA therapy as an effective treatment modality for ASD, all of which they contend comport with the Agency's reliable evidence standard. See Pls.' Mem. at 50-51 (stating that the Agency did not consider the following sources as reliable and therefore they were not accorded proper consideration in the Agency's decision: (1) an article with recommendations from the Association for Science in Autism Treatment ("ASAT"), (2) a report entitled "Mental Health: A Report of the Surgeon General," (3) a letter from autism experts to the United States Armed Services Committee dated September 19, 2008, and (4) a letter from autism organizations to Secretary Gates dated May 19, 2008. Moreover, the plaintiffs assert that this error is particularly egregious because these sources are reliable sources under the Agency's own regulatory standard. *Id.* at 38-40.

The Agency counters the plaintiffs' arguments, representing that it based its final formal review decision on the following sources:

(1) the applicable sections of Title 10 [U.S.C.] Chapter 55 ...; (2) 32 C.F.R. Part 199 ...; (3) policy manuals, instructions, procedures, and other guidelines issued by the Assistant Secretary 127\*127 of Defense for Health Affairs (ASD/HA), the

TMA Director, or their designees...; (4) the record on appeal; (5) additional information and argument presented by the Beneficiary; (6) the technical assessment issued by the TMA Deputy Chief Medical Officer; (7) the TRICARE benefit determination approved by the TMA Director on October 19, 2010; and (8) the October 25, 2010, Hayes, Inc. technology assessment, [entitled] *Intensive Behavioral Intervention for Autism*.

A.R., Vol. I, Tab 1 (Formal Review Decision) at 2-3.

Although the Director of the TMA stated that he reviewed materials submitted by the plaintiff, *id.*, he offers no specific insight regarding his consideration of those materials, nor does he explain why it was determined that some of the materials submitted to the Agency failed to satisfy its reliable evidence standard, *id.* at 11; see *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (finding that an agency must "examine the relevant data and articulate a satisfactory explanation for its action") (quoting *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 30, 103 S.Ct. 2856); *Burlington Truck Lines*, 371 U.S. at 167-68, 83 S.Ct. 239 (declining to defer to an agency that provided "no findings and no analysis ... to justify [its] choice," and stating that an agency decision "must be rational and based upon conscious choice" and that the agency must "disclose the basis of its order" after "mak[ing] findings that support its decision, ... [that are] supported by substantial evidence") (internal quotation marks and citation omitted). In fact, in the Agency's opposition to the plaintiffs' motion for summary judgment, the Agency only references its failure to consider a provider's assertion that additional hours of therapy were needed for a patient as unsupported because "specifically not included in the meaning of reliable evidence are reports, articles, or statements by providers or groups of providers containing only abstracts, anecdotal evidence or personal professional opinions." Defs.' Reply at 16 (citing 32 C.F.R. § 199.2); see also Defs.' Mem. at 25-27. Because the Agency has failed to provide information on why certain materials were excluded as not reliable, other than citing to the regulation's definition and an explanation as to why a specific pediatrician/professional opinion was excluded, the Court is unable to "reasonably ... discern the [A]gency's path," *General Chem. Corp. v. United States*, 817 F.2d 844, 854 (D.C.Cir.1987) (internal quotation marks and citation omitted), which caused it to conclude on the one hand that certain materials in the Administrative Record were unreliable, while crediting other sources as reliable.

In its memorandum in support of its summary judgment motion, the Agency simply declares that its adjudication of the plaintiffs' case was based on the sources listed above, which it contends shows that it considered all of the relevant factors. See Def.'s Mem. at 23 ("This adjudication, based on the technical assessment and benefit determination reviewed in light of the medical literature and [the A]gency's regulations, constitutes a consideration by DoD of the relevant factors for assessing whether ABA is covered under the TRICARE Basic Program."). However, the Agency has failed to articulate why the sources submitted by the plaintiffs, for example, the United States Surgeon General's report entitled "Mental Health: A Report of the Surgeon General" (June 2, 2010), A.R., Vol. III, Tab 8-2-16 ("June 2010 Report of Surgeon General"), do not constitute reliable evidence under 32 C.F.R. § 199.2, which as noted earlier provides, in relevant part:

[r]eliable evidence means only (i) [w]ell controlled studies of clinically meaningful ~~128~~\*128 endpoints, published in refereed medical literature[;] (ii) [p]ublished formal technology assessments[;] (iii) [t]he published reports of national professional medical associations[;] (iv) [p]ublished national medical policy organization positions; and (v) [t]he published reports of national expert opinion organizations.

32 C.F.R. § 199.2. Specifically, the Agency has failed to explain why the plaintiffs' submissions do not constitute "published national medical policy organization positions," or "published reports of national expert opinion organizations." See *id.* Without a "satisfactory explanation for its action[;] including a rational connection between the facts found and the choice made," this Court must deem the Agency's action arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43, 103 S.Ct. 2856; see 5 U.S.C. § 706(2).

**(ii) Is the Agency's Reliance on *Smith v. Office of Civilian Health & Medical Program of Uniformed Services Misplaced?***

The Agency attempts to draw parallels between this case and *Smith v. Office of Civilian Health & Medical Program of Uniformed Servs.*, 97 F.3d 950 (7th Cir. 1996), as support for the position that its "determination that ABA is not proven medical care" and that this decision is "not arbitrary or capricious or a violation of [its] regulations." Def.'s Mem. at 34-35.

In *Smith*, the Seventh Circuit held that the DoD's determination that a therapy for breast cancer was experimental was not arbitrary or capricious or a violation of DoD's regulations because the medical value of the treatment was "hotly disputed among medical professionals." 97 F.3d at 961. The Agency notes that the Seventh Circuit's decision in *Smith* was "prophetic," as the therapy at issue eventually proved ineffective and arguably shortened the life of thousands of women who had received the treatment prior to learning of its ineffectiveness. See Def.'s Mem. at 35 ("By the time the studies were published conclusively showing that the procedure was ineffective, more than 30,000 women had already received the treatment, which often shortened their lives and added to their suffering, at a total cost of approximately \$3 billion.") (quoting Peter D. Jacobson and Stefanie A. Doebler, *We Were All Sold a Bill of Goods: Litigating the Science of Breast Cancer Treatment*, 52 Wayne L. Rev. 43, 45 (2006)). The plaintiffs reply that the *Smith* court's holding was premised on its finding that the treatment at issue was the subject of "widespread disagreement among qualified medical experts," and the "widespread controversy and hot dispute that existed in *Smith* simply does not exist here." Pls.' Reply at 21-22 ("[E]very single statement favoring agency deference that [the defendant] quotes from *Smith* was conditioned on the *Smith* court's finding that the treatment at issue was extremely controversial.").

For two reasons, this Court is not persuaded that *Smith* supports the Agency's determination that ABA therapy is unproven. First, as the plaintiffs aptly point out, the level of dispute and controversy over the breast cancer treatment at issue in *Smith* stands in stark contrast to the many members of the medical community's favorable assessment of ABA therapy. Compare, e.g., *Smith*, 97 F.3d at 961 (noting that "studies [concerning the treatment at issue] demonstrate[d], as did the] entire controversy, that the medical value of [the treatment] ... [was] *hotly disputed* among medical professionals" (emphasis added)), with A.R., Vol. I, Tab 4 (2010 Hayes Directory) at 55 ("The treatment of autistic children has undergone substantial change in the past 20 years, with behavior modification [referred to as IBI or ABA] replacing psychotherapy as the dominant and preferred treatment modality" (emphasis added)), and A.R., Vol. III, Tab 8-2-16 129\*129 (June 2010 Report of Surgeon General) at 525 ("Thirty years of research demonstrated the efficacy of applied behavioral methods in reducing inappropriate behavior and in increasing communication, learning, and appropriate social behavior."). In fact, the *Smith* court went so far as to conclude that the treatment at issue there was still experimental. 97 F.3d at 961 ("We are still left with the fact that on the record before us there is no convincing evidence that [the treatment] has moved beyond the experimental stage....").

Here, there is no evidence that ABA therapy is the subject of such acrimonious debate within the medical community, as was the case in *Smith*; rather, there appears to be a general consensus that ABA therapy does indeed improve the functioning of children with ASD. See A.R., Vol. IV, Tab 11 (Focal Educational and Behavioral Interventions for the Treatment of Autism Spectrum Disorders (ASDs) From the ECRI Institute. Health Technology Assessment Information Service (2009) ("2009 ECRI Report")) at 572 ("[ABA therapy] was recommended by several guidelines groups."). While medical professionals in *Smith* disagreed as to the core medical value of the breast cancer therapy at issue as compared to more established treatments, 97 F.3d at 961, the studies concerning ABA therapy that were before the Agency in this case merely reflect that some in the medical community caution that even widely accepted treatments of autism, such as ABA therapy, not be viewed too optimistically, see *id.* ("[O]ne [study] cautioned against presenting the [program] as an intervention that will lead to normal functioning ... and others specifically stated that although this treatment did demonstrate a trend towards positive outcomes, there was not enough evidence to support adopting a single autism treatment program as the gold standard."). Unlike the therapy at issue in *Smith*, ABA therapy is characterized by the technology assessments relied upon by the Agency as "the dominant and preferred treatment modality,"<sup>129</sup> A.R., Vol. I, Tab 4 (2010 Hayes Directory) at 55, which has provided concrete positive results for many autistic children, see, e.g., *id.* at 93 ("The findings ... suggest that high intervention intensity positively predicts improvement both in IQ and adaptive behavior composite scores."); see also A.R., Vol. IV, Tab 10, (Comprehensive Educational and Behavioral Interventions for the Treatment of Autism Spectrum Disorders From the ECRI Institute. Health Technology Assessment Information Service (2008) ("2008 ECRI Report")) at 387 ("In general, ... [ABA therapy] appears to improve intellectual functioning and adaptive behavior for some children with ASD."). The primary concern that the technology assessments appear to raise with respect to the efficacy of ABA therapy is the lack of consensus among medical professionals as to what *intensity* of intervention will result in autistic children realizing the maximum benefits from ABA therapy. See A.R., Vol. I, Tab 4 (2010 Hayes Directory) at 93 ("[A]dditional research is necessary to establish *optimal parameters* for treatment intensity." (emphasis added)); see also A.R. Vol. IV, Tab 13 (Intensive Behavioral Intervention Therapy for Autism From Hayes, Inc. ("2008 Hayes Directory")) at 785 ("[T]he number of hours of [ABA] therapy required to produce *optimal* gains has not been established" (emphasis added)). Moreover, none of the technology assessments 130\*130 found ABA therapy ineffective, see, e.g., A.R., Vol. I, Tab 4 (2010 Hayes Directory) at 53 ("[ABA]

therapy generally improves visual-spatial skills and language skills relative to eclectic treatment [interventions developed specifically for children with] autism."), or identified other modes of treatments more effective in treating autism.

Moreover, there is no evidence that ABA therapy carries any risk of harmful side effects, whereas in *Smith* there was considerable debate about the risks associated with the breast cancer treatment at issue in that case. 97 F.3d at 961. It appears the Agency, in citing *Smith*, would have this Court believe that its determination that ABA therapy is unproven rests, at least partially, on its concern that ABA therapy may prove to be harmful to autistic children. *See generally* Def.'s Mem. at 34-35, *see also* A.R., Vol. I, Tab 1 (Formal Review Decision) at 8 (in explaining its decision, the Agency placed particular emphasis on 32 C.F.R. § 199.4(g)(15)(C)-(D), which states that a medical treatment is unproven where "*further studies or clinical trials are necessary to determine ... its safety.*"). There is simply no evidence in the record to support the apparent suggestion that ABA therapy may prove to be harmful to autistic children. The Court therefore dismisses *Smith* as inapplicable here.

**(iii) Is the Defendant's Coverage of ABA Therapy Under ECHO, But Not Under the Basic Program, Arbitrary and Capricious, Contrary to Law, or Otherwise Not in Accordance With Law?**

The plaintiffs argue that by providing coverage for ABA therapy under ECHO, the Agency has necessarily made a determination that ABA therapy is "safe" and "effective," Pls.' Reply at 7, because all services covered under the ECHO program, whether medical or therapeutic, are subject to the same efficacy requirements as those covered under the Basic Program, *see* Pls.' Mem. at 46-47; *see also* Pls.' Reply at 24 ("[T]he ECHO regulation that adopts by reference the 'proven' standard under the Basic Program, applies not only to 'medical care' but also to 'therapeutic services.'"). The Agency counters, arguing that although it is true that ECHO requires both medical and therapeutic treatments to satisfy the same reliable evidence standard as required under the Basic Program, the Agency "has great discretion in providing coverage under ECHO for other forms of treatment that can assist in the alleviation of a disabling condition." Defs.' Reply at 14; *see also* 10 U.S.C. § 1079(e)(7) ("Extended benefits for eligible dependents under subsection (d) may include ... other services and supplies as determined appropriate by the [defendant], notwithstanding the limitations in subsection (a)(13).").

Since, as noted earlier, the Agency is correct in stating that Congress has granted it discretion to provide coverage for treatments under the ECHO program that are "not medically or psychologically necessary," *see* 10 U.S.C. § 1079, the issue for the Court to address is whether the Agency's decision to cover ABA therapy under the ECHO program without extending such coverage under the Basic program is nonetheless arbitrary and capricious, contrary to law, or otherwise not in accordance with the law.

The Agency's decision to provide, on the one hand, ECHO coverage for ABA therapy, while on the other hand, to withhold coverage under the Basic Program, is obviously contradictory because if the Agency concluded that ABA therapy is unproven, the Agency should not cover ABA therapy under either the ECHO or the Basic Program, because both programs are governed by the same "reliable evidence" standard. The Court understands, and 131\*131 agrees with, the Agency's position that it has discretion to provide coverage for ABA therapy under the ECHO program, while withholding coverage under the Basic program. *See* 10 U.S.C. § 1079(e)(7). However, there is no apparent rational justification for the Agency's decision to exercise that discretion and provide coverage under one program but not the other *in this case*, because the applicable ECHO regulation, 32 C.F.R. § 199.5(d)(12), is governed by the same limitation as the Basic Program that precludes coverage for unproven "[d]rugs, devices, medical treatments, diagnostic, and therapeutic procedures for which the safety and efficacy have not been established in accordance with [32 C.F.R.] § 199.4 — [the relevant provision of the Basic Program]." Specifically, the ECHO Program regulation states:

(i) [a] drug, device, or medical treatment or procedure is unproven:

...

(C) Unless *reliable evidence* shows that any medical treatment or procedure has been the subject of well-controlled studies of clinically meaningful endpoints, which have determined its maximum tolerated dose, its toxicity, its safety, and its efficacy as compared with standard means of treatment or diagnosis.

...

(D) If *reliable evidence* shows that the consensus among experts regarding the medical treatment or procedure is that further studies or clinical trials are necessary to determine its maximum tolerated doses, its toxicity, its safety, or its effectiveness as compared with the standard means of treatment or diagnosis...

*Id.* § 199.4(g)(15)(i) (emphasis added). Added to the Court's concerns about the inconsistent position the DoD has taken is the fact that the Agency itself has stated that "healthcare services" requiring ABA intervention were approved as "medically necessary ... covered benefits" pursuant to the above regulation in a patient coverage determination in 2008. Plaintiffs' Motion for Summary Judgment to Set Aside, As Contrary to Law, Defendants' Policy That Applied Behavioral Analysis (ABA) Therapy Is "Special Education" Rather Than Health Care, Ex. 11 at 1. The regulation used as support for that decision relies on the same regulatory framework used to deny the same treatment to Z.B. under the Basic Program.

Also troubling is that the Agency's decision appears to run counter to several of its justifications for determining that ABA therapy is unproven care. Again, the Agency cites the Seventh Circuit's decision in *Smith* as support for its position, suggesting that its conclusion that ABA therapy is unproven was, as just noted, at least partially based on its concern that ABA therapy may have unknown and harmful side effects, and thus requires additional research to establish its safety. The Agency cannot rationally base its denial of ABA therapy coverage under the Basic Program on a concern that ABA therapy may be harmful to autistic children, while at the same time providing ABA therapy coverage under the ECHO program. Even under the most deferential review, the Court cannot comprehend a rational connection between the Agency's decision to exercise its discretionary authority under Section 1079(e)(7) of Title 10 of the U.S. Code to provide coverage for ABA therapy under ECHO, while refusing to provide coverage for ABA therapy under the Basic Program based on safety concerns.

Furthermore, even if the Court could agree with the Agency's position that ABA therapy does not satisfy its standard for what constitutes proven care, the Agency has conceded that there is considerable evidence in the medical community demonstrating <sup>132</sup>\*<sup>132</sup> that ABA therapy is effective in treating some children with autism. *See* A.R., Vol. III, Tab 8-2-7 (DoD 2007 Report) at 408 ("ABA ... is one of the best studied interventions. Time-limited, focused ABA methods have been shown to reduce or eliminate specific problem behaviors and teach new skills to individuals with autism."). One of the Court's primary tasks under *Chevron* step two is to determine whether the Agency considered the relevant facts before it and provided a satisfactory explanation for its decision. *See Kristin Brooks Hope Ctr. v. FCC*, 626 F.3d 586, 588 (D.C. Cir. 2010) ("[O]ur primary task is to ensure that the agency has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal quotation marks and citation omitted). While the Agency has provided an explanation for why it is not legally *obligated* to provide coverage under the Basic Program while providing coverage under ECHO, it has failed to provide a *satisfactory explanation for why* it has chosen not to extend coverage of ABA therapy under the Basic Program. The generally positive assessment of ABA therapy by the medical community coupled with the military health benefit statute's purpose of improving the "morale" of those who have served the country through military service, *see* 10 U.S.C. § 1071, are both relevant factors that the Agency failed to give due consideration in declining to extend coverage for ABA therapy under the Basic Program, while choosing to extend coverage under the ECHO program.

In light of the facts before it and the state of the law — the views of the medical community concerning the effectiveness of ABA therapy, Congress' express purpose for enacting the military health benefits statute, the Supreme Court's and the District of Columbia Circuit's jurisprudence requiring that statutes conferring benefits to Armed Service members be construed in favor of the beneficiaries, and the complete lack of evidence that ABA therapy may have harmful side effects — the Agency's decision to enforce its stringent regulatory standards to withhold ABA therapy coverage under the Basic Program, while exercising its statutorily-granted discretion to extend ABA therapy coverage under ECHO, seems highly suspect. The Court is left to speculate why the Agency chose to create this two prong regulatory scheme in light of the Agency's failure to provide a reasoned explanation for it. This deficiency alone is sufficient to render the Agency's decision to extend ABA therapy coverage to the ECHO program, without also extending coverage to the Basic Program, arbitrary and capricious. *See Barrington*, 636 F.3d at 660 ("At *Chevron* [s]tep [t]wo we defer to the agency's permissible interpretation, but only if the agency has offered a reasoned explanation for why it chose that interpretation."). Accordingly, the Court finds that the Agency's decision to deny coverage for ABA therapy under the Basic Program is arbitrary and capricious and not in accordance with the law.

**(iv) Did the Defendants Give Proper Consideration to the Purpose of the Military Health Benefits Statute In Determining That ABA Therapy is Not Proven Care?**

The Agency's determination that ABA therapy is unproven and thus not covered under the Basic Program is even more troubling when considered in context with the stated purpose for the military health benefits statute's adoption. See 10 U.S.C. § 1071 ("The purpose of this chapter is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical... care...."). The plaintiffs argue that any competing interpretations of the military <sup>133\*</sup>133 health benefits statute must be construed in favor of the military families served by the statute. See Pls.' Mem. at 29 ("[A] court confronted with competing interpretations of the military health benefits statute [must] press a heavy interpretive thumb down on the side of the scale that favors military families and those who have sacrificed for the nation."). As support for their position, the plaintiffs rely on *Barnett v. Weinberger*, 818 F.2d 953 (D.C.Cir.1987), where the Circuit rejected the Agency's interpretation of a "custodial care" exclusion under the military health benefits statute as overly broad because it deprived military families of care to which they were entitled. See *id.* at 963. ("[T]he regulations' broad-gauged reading of the statutory exclusion is antithetical to the general statutory purpose, for the prime objective of the [Military] Dependents' Medical Care Act was enhancement, not reduction, of the benefits accorded to military personnel and their dependents."<sup>1201</sup>)

It is well-established that laws conferring benefits to members of the Armed Services must be construed generously in favor of the nation's military service members. See, e.g., *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n. 9, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991) ("[Provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.") (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946)); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 193-96, 100 S.Ct. 2100, 65 L.Ed.2d 53 (1980) (construing the Vietnam Era Veterans' Readjustment Assistance Act "liberally for the benefit of the returning veteran," and evaluating the underlying issue in the case in light of this principle as well as others). The purpose of the military health benefits statute, illuminated by the statutory language, is certainly another relevant factor the Agency should have considered in implementing the military benefits program. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43, 103 S.Ct. 2856 ("Normally, an agency rule would be arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem...."). Although this factor alone may be inconclusive, when considered in conjunction with the other factors considered by the Agency in making its determination that ABA therapy is unproven, it is questionable whether there was a rational connection between the determination about ABA therapy reimbursement and the purpose of the statute. The Agency's determination would be more convincing if the efficacy of ABA therapy was seriously at issue, as was the situation in *Smith*; however, all of the reliable evidence considered by the Agency in making its determination contains some evidence of ABA therapy's effectiveness, and at least one technical assessment relied on by the Agency describes ABA therapy as the standard medical approach for treating autism. See A.R., Vol. I, Tab 4 (2010 Hayes Directory) at 55 (ABA is "the dominant and preferred treatment modality" for addressing autism). The Agency's findings in its final decision fail to address the language of the military health benefits statute, which clearly articulates the purpose <sup>134\*</sup>134 for creating the benefits program; thus, the Court is unable to discern whether the Agency even considered Congress's declared purpose for creating the program when reaching its determination that ABA therapy is unproven care. See *Household Credit Servs.*, 541 U.S. at 242, 124 S.Ct. 1741 (explaining that as part of the *Chevron* step two inquiry, a court may not disturb an agency decision unless it is "arbitrary or capricious in substance, or manifestly contrary to the statute") (emphasis added); see also *Barrington*, 636 F.3d at 660 (noting that at *Chevron* step two, a court must "defer to the [A]gency's permissible interpretation, but only if the [A]gency has offered a reasoned explanation for why it chose that interpretation," and if that explanation "is rationally related to the goals of the statute") (emphasis added) (internal quotation marks and citation omitted). It is therefore difficult for the Court to conclude that the Agency has provided a "satisfactory explanation for its action including a rational connection between the facts found and the choices made." See *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C.Cir.2011).

**(v) Did the Defendants Ignore Their Own Regulations In Declaring ABA Therapy "Unproven"?**

The Agency has not demonstrated a rational connection between its conclusion that ABA therapy is unproven and the relevant factors it considered in its Formal Review Decision. As discussed above, the sources the Agency considered in making its determination that ABA therapy is unproven do not suggest that ABA therapy is ineffective. On the contrary, each of the technology assessments relied upon by the Agency indicates that ABA therapy has been shown effective in treating some children with autism. See, e.g., A.R., Vol. I, Tab 4, 2010 (Hayes Report) at 53 ("[I]n general, the findings

show that [ABA] therapy significantly raises IQ scores and increases the proportion of children in regular classroom settings."); A.R., Vol. IV, Tab 10 (2008 ECRI Report) at 322 ("After one year of treatment, children with ASD who receive [ABA therapy] score higher on tests of IQ."); A.R., Vol. IV, Tab 12 (Special Report: Early Intensive Behavioral Intervention Based on Applied Behavioral Analysis among Children with Autism Spectrum Disorders From the BlueCross BlueShield Association ("BCBS TEC Report")) at 720 (acknowledging that "ABA is among the most commonly cited and best-researched intervention for ... children [with autism]"). While acknowledging these findings, the Agency seizes on language in these reports indicating that further research is needed to establish the efficacy of ABA therapy. See Defs.' Reply at 21 ("These `technology assessments' found that the efficacy of ABA as a `proven' `medical' modality is not well-supported in the literature but rather additional research and better controlled studies [are] needed."). It is true, according to the Agency's own regulation, that a treatment is "not proven" if "reliable evidence shows that the consensus among experts regarding the medical treatment or procedure is that further studies or clinical trials are necessary to determine... its *safety, or its effectiveness as compared with the standard means of treatment or diagnosis.*" 32 C.F.R. § 199.4(g)(i)(D) (emphasis added). However, the Court has identified several problems with the Agency's application of this regulation to the facts of this case.

First, none of the sources considered by the Agency in making its determination questions either the safety or the efficacy of ABA therapy. As discussed above, none of these assessments has provided any evidence that ABA therapy has negative side effects or that it may be harmful to children with autism. Second, each assessment includes several sources that 135\*135 satisfy the Agency's reliable evidence standard and demonstrate ABA therapy's effectiveness in treating some children with autism. Third, the Agency has not identified any forms of treatment superior to ABA therapy in terms of effectiveness in treating autism, nor has it identified any other autism treatment as the standard for the treatment of autism against which ABA therapy's efficacy can be compared pursuant to its regulation. See 32 C.F.R. § 199.4 ("A ... medical treatment is unproven ... [u]nless reliable evidence shows that any medical treatment or procedure has been the subject of well-controlled studies ..., which have determined its ... safety, and its efficacy *as compared with the standard means of treatment or diagnosis.*" (emphasis added)). Because 32 C.F.R. § 199.4 specifically provides that a medical treatment's efficacy is properly determined in the context of how it compares to "standard means of treatment or diagnosis," it is significant that the Agency has not identified any treatment more effective for treating autism than ABA therapy. See *id.* In fact, the assessments cited by the Agency suggest that behavioral modification therapy is the closest intervention medical professionals have identified as the standard means for treating autism. A.R., Vol. I, Tab 4 (2010 Hayes Directory) at 55 (ABA is "the dominant and preferred treatment modality" for autism). Therefore, this Court is left to wonder what forms of autism treatment would satisfy the Agency's regulatory requirement of being proven when the very sources the Agency relies upon to declare ABA therapy unproven cannot identify one form of treatment that is more effective than ABA therapy. Since the Agency has failed to articulate a reasoned explanation for its determination that ABA therapy is unproven, particularly in light of evidence before it suggesting the contrary, the Court must conclude that the Agency's determination is arbitrary and capricious. See Barrington, 636 F.3d at 660 ("At *Chevron* step two we defer to the agency's permissible interpretation, but only if the agency has offered a reasoned explanation for why it chose that interpretation.").

#### IV. Conclusion

In APA cases, "a district court reviewing a final agency action does not perform its normal role but instead sits as an appellate tribunal." Palisades Gen. Hosp. Inc. v. Leavitt, 426 F.3d 400, 403 (D.C.Cir.2005) (internal quotation marks and citation omitted). "Thus, under settled principles of administrative law," once the Court has determined that the Agency "made an error," the case should "be remanded to the [A]gency for further action." *Id.* Although most of the Court's concerns could potentially be cured by affording the Agency further opportunity to explain its actions, the Agency's policy that ABA treatment is proven for the purpose of the ECHO program, but not for the Basic Program, cannot. Accordingly, because of this finding, "remand to the [A]gency for further review is an unnecessary formality." Fed. Election Comm'n v. Legi-Tech, Inc., 75 F.3d 704, 709 (D.C.Cir.1996); see also Cissell Mfg. Co. v. U.S. Dep't of Labor, 101 F.3d 1132, 1140 (6th Cir.1996) (Stevens, J., dissenting) ("Just as ... [case law] indicate[s] that remand is the usual remedy, the[re is] ... also ... [a] sole exception recognized ...: a matter need not be remanded where ... agency error renders a remand an unnecessary formality.") The distinct circumstances of this case demonstrate that the Agency has already had ample opportunities<sup>[21]</sup> to take corrective 136\*136 action regarding the inconsistency between allowing coverage under ECHO while denying it under the Basic Program, despite being fully aware of the fact that the two programs are constrained by the same "unproven" standard and the Agency "failed to avail itself of this opportunity." *Id.* at 1141.

Because the Agency's denial of ABA therapy coverage under the Basic Program is arbitrary and capricious, the Agency must therefore be enjoined from denying qualified beneficiaries coverage on the ground that ABA therapy is not a covered benefit under the TRICARE Basic Program. Thus, the Court will remand this case back to the Agency with instructions that ABA therapy coverage be provided to Basic Program beneficiaries who otherwise qualify for reimbursement and such reimbursement be provided in compliance with the applicable TRICARE guidelines for the expenses incurred by qualified beneficiaries to acquire ABA therapy for their children.<sup>[22]</sup> Accordingly, for the foregoing reasons, the plaintiffs' motion for summary judgment is granted and the defendants' cross-motion for summary judgment is denied.

SO ORDERED this 26th day of July, 2012.<sup>[23]</sup>

[1] The Court preliminarily granted class certification under Federal Rule of Civil Procedure 23(b)(2) to the following class: "All individuals with autism who are TRICARE Basic [P]rogram beneficiaries, and their parents and guardians, and who currently or in the future seek TRICARE Basic [P]rogram coverage for [Applied Behavior Analysis] therapy." Order at 1, *Berge v. United States*, No. 10-0373 (D.D.C. March 4, 2011). Class certification was preliminarily granted pending the Court's resolution of the cross-motions for summary judgment that are the subject of this Opinion.

[2] TMA is the field activity within the Department of Defense that administers the TRICARE Basic Program. Defendants' Memorandum In Support of Their Motion to Dismiss Or, In the Alternative, to Hold This Action In Abeyance at 2.

[3] The Court has substituted Leon E. Panetta, the current United States Secretary of Defense, for former Secretary Gates pursuant to Federal Rule of Civil Procedure 25(d).

[4] In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) Plaintiffs' Class Action Complaint and Demand for Jury Trial ("Compl."); (2) Plaintiffs' Statement of Points and Authorities in Support of Motion for Class Certification ("Pls.' Mem. to Certify"); (3) Statement of Points and Authorities in Support of Plaintiffs' Renewed Motion for Summary Judgment ("Pls.' Mem."); (4) Plaintiffs' Reply Memorandum in Support of Their Renewed Motion for Summary Judgment and Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment ("Pls.' Reply"); (5) Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Defs.' Reply"); and (6) Defendants' Memorandum In Support of Their Motion to Dismiss Or, In the Alternative, to Hold This Action In Abeyance.

[5] Autism is a developmental disorder and will be described in fuller detail later in this opinion.

[6] The "Basic Program will pay for medically necessary services and supplies required in the diagnosis and treatment of illness or injury." 32 C.F.R. § 199.4(a)(1)(i). As the defendants point out, many of the regulations and case law interpreting those regulations still refer to the Program as "CHAMPUS," as opposed to TRICARE. The "Basic Program" under TRICARE is available to, among others, retired service members and the dependents of both active duty and retired service members, while TRICARE's Extended Health Care Option ("ECHO") is available only to active duty service members and their dependents. *See* 32 C.F.R. § 199.4-.5.

[7] Although the TMA is the DoD component responsible for managing the Basic Program, the plaintiffs make a number of arguments in their motion directed at the DoD, rather than the TMA. The Court will specifically reference both of these defendants throughout this opinion where appropriate.

[8] NIMH is the acronym for the National Institutes of Mental Health.

[9] Some of the exhibits submitted by the parties are not numbered. Therefore, the Court has taken the liberty of assigning them numbers consistent with the order in which they appear on the Court's electronic filing system.

[10] The page numbers cited are those assigned to the Administrative Record by the Agency.

[11] Section 1076(e)(3) of Title 10 of the United States Code states, in relevant part, that "[m]edical and dental care furnished to a dependent ... shall be limited to the health care prescribed by section 1077 of this title." Section 1077 lists the following categories of care: hospitalization; outpatient care; drugs; treatment of medical and surgical conditions; treatment of nervous, mental, and chronic conditions; treatment of contagious diseases; physical examinations, including eye examinations, and immunizations; maternity and infant care, including well-baby care that includes one screening of an infant for the level of lead in the blood of the infant; diagnostic tests and services, including laboratory and X-ray examinations; dental care; ambulance service and home calls when medically necessary; durable equipment, which may be provided on a loan basis; primary and preventive health care services for women; preventive health care screening for colon or prostate cancer; prosthetic devices, as determined by the Secretary of Defense to be necessary because of significant conditions resulting from trauma, congenital anomalies, or disease; a hearing aid; any rehabilitative therapy to improve, restore, or maintain function, or to minimize or prevent deterioration of function, of a patient when prescribed by a physician. *See* 10 U.S.C. § 1077(a)(1)-(17).

[12] 30 U.S.C. §§ 1201, 1272(e) (2006).

[13] Although the term psychologically does not suffer from the same ambiguities and multiple definitions as the other terms, the Court must construe the phrase "medically or psychologically necessary" as a whole in assessing its ambiguity.

[14] The plaintiffs offer five additional arguments as to why the Agency does not deserve deference under *Chevron* step one. The Court need not consider the argument that the statutory language explicitly strips the Agency of its discretion because the Court has already found the statutory language to be ambiguous. In addition, the plaintiffs' argument that the Agency does not deserve deference because it lacks exclusive administrative authority over the military health benefits statute is unpersuasive because Congress delegated to the Secretary of Defense sole "responsibility for *administering the [Basic P]rogram and making any decision affecting such program.*" 10 U.S.C. § 1073(a)(2) (emphasis added). Furthermore, the plaintiffs argue that whether ABA therapy is covered under the Basic Program is of such importance that Congress would have addressed it in the statute, and, as such, it falls under the "major question" exception to the *Chevron* analysis. However, the Court finds that whether ABA therapy is covered does not present such an "extraordinary case[]" so as to render it subject to the exception. *See Brown & Williamson, 529 U.S. at 123, 120 S.Ct. 1291.* The plaintiffs' argument that the Agency adopted its policy regarding ABA therapy coverage through "informal policymaking," and not a "formal adjudication," Pls.' Mem. at 9, is irrelevant because the Supreme Court has stated that "the fact that [an] Agency ... reach[es an] interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due," *Barnhart, 535 U.S. at 221, 122 S.Ct. 1265* (internal citation omitted), and, as stated above, the military health benefits statute expressly granted sole authority to the Secretary of Defense to "administer[] the [Basic P]rogram and mak[e] any decision affecting such program," 10 U.S.C. § 1073(a)(2) (emphasis added). The plaintiffs' remaining argument, that the Agency's exclusion policy has been inconsistent, Pls.' Mem. at 9, is not a proper argument for determining whether the Agency is owed deference because inconsistency is a factor considered under the *Chevron* step two "arbitrary and capricious" analysis, and has no bearing on whether an agency is owed deference under *Chevron* step one, *see Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs., 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)* ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice....").

[15] As stated above, although Article 10 of the United States Code provides the statutory authorization for providing services under the Basic Program, "Title 32 Part 199 of the Code of Federal Regulations (32 C.F.R. 199) prescribes the guidelines and policies for the administration of the [Basic] Program." A.R., Vol. I, Tab 1 (Formal Review Decision) at 22 (footnote omitted).

[16] Although some of the sources cited in this section of the opinion are not part of the administrative record, the Court may consider sources that are not part of the administrative record in order to gain an understanding of the disorder of autism and the medical terms used in reference to it. *See O'Sullivan v. Metropolitan Life Ins. Co., 114 F.Supp.2d 303, 310 (D.N.J.2000)* (stating that in an administrative agency review case, although a court is limited to evidence within the administrative record, where appropriate, a court may look outside the record to gain understanding of the medical terms or procedures concerning the claim before the court); *see also Vega v. Nat'l Life Ins. Servs., Inc., 188 F.3d 287, 299 (5th*

Cir.1999) (same). Here, the Court has consulted sources outside the administrative record to better understand and describe the disorder of autism.

[17] JAMA is the acronym for the Journal of the American Medical Association.

[18] The QJM, a International Journal of Medicine, is a medical journal "focus[ing] on internal medicine and publish[ing] peer-reviewed articles which promote medical science and practice." QJM, [http://www.oxfordjournals.org/our\\_journals/qjmedj/about.html](http://www.oxfordjournals.org/our_journals/qjmedj/about.html) (2012).

[19] Technology assessments, when referred to in this opinion, relate to the various studies that were reviewed by the Agency in rendering its decision on whether ABA is a covered treatment under the Basic Program. A number of reports and studies reviewed by the Agency assessed ABA treatment to ascertain its level of effectiveness.

[20] The defendants do not address *Barnett* in the context of this argument. They reference it only in addressing whether ABA therapy is "medically or psychologically necessary." *See* Def.'s Mem. at 16, n. 12. In that discussion, the defendants attempt to distinguish *Barnett* from this case by arguing that the dispute in *Barnett* was not whether a certain therapy was medically necessary, as in this case, but rather whether the scope of the statutory exclusion for custodial care extended to care that was already deemed medically necessary. *Id.*

[21] As noted in Part I.C of this opinion, *supra* at 9, the Court stayed these proceedings while the TMA reconsidered whether ABA therapy is covered under the Basic Program; the TMA ultimately issued a formal review decision denying reimbursement for ABA therapy, thus preserving the same inconsistency.

[22] In an earlier footnote, the Court noted that the plaintiffs were preliminarily granted class certification; however, now that the Court has thoroughly familiarized itself with the claims of the class, with the issuance of this opinion, the Court will grant the plaintiffs permanent class action certification pursuant to Federal Rule of Civil Procedure 23(b)(2).

[23] The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

Leibel v City of Buckeye  
364 FSupp3d 1027 (9th Cir 2019)

Kevin LEIBEL, et al., Plaintiffs,  
v.  
CITY OF BUCKEYE, et al., Defendants.

No. CV-18-01743-PHX-DWL.

United States District Court, D. Arizona.

Signed January 30, 2019.

1033\*1033 Kevin Lee Burns, Burns Nickerson & Taylor, Phoenix, AZ, Nicolas O. Jimenez, Timothy Allen Scott, Law Offices of Timothy A. Scott, San Diego, CA, for Plaintiffs.

James M. Jellison, Jellison Law Offices PLLC, Carefree, AZ, for Defendants.

## ORDER

Dominic W. Lanza, United States District Judge.

Pending before the Court is Defendants' motion to dismiss under Rule 12(b)(6). (Doc. 16.) As explained below, the motion will be granted in part and denied in part.<sup>[1]</sup>

## BACKGROUND

### A. The Incident

The complaint was filed on June 6, 2018 (Doc. 1) and re-filed on June 7, 2018 at the direction of the Court (Doc. 7).<sup>[2]</sup> The following summary assumes the truth of all allegations contained therein.

On July 19, 2017, C.L.—a 14-year-old boy with autism spectrum disorder—was playing at a public park in Buckeye, Arizona. (Doc. 7 ¶¶ 1, 13, 16, 17.) C.L. was "stimming" with a piece of string. (*Id.* ¶ 21.) "Stimming," or "self-stimulatory behavior," is the repetition of physical movements and sounds or the repetitive movement of objects. (*Id.* ¶ 22.) Stimming is common in individuals with developmental disabilities, as it provides a sense of calm and helps them cope with their surroundings. (*Id.* ¶¶ 22, 23.) It is a well-known and common symptom of autism. (*Id.* ¶ 24.)

Defendant David Grossman ("Officer Grossman")—a police officer and drug recognition expert employed by the Buckeye Police Department—approached C.L. after seeing C.L. stimming. (*Id.* ¶¶ 9, 20, 25, 27, 29.) Officer Grossman claims that he mistook C.L.'s stimming for illegal drug use. (*Id.* ¶ 25.) Officer Grossman asked C.L. what he was doing. (*Id.* ¶ 33.) C.L. responded, "Me? Good." (*Id.* ¶ 34.) Grossman again asked C.L. what he was doing. (*Id.* ¶ 35.) C.L. answered, "I'm stimming." (*Id.* ¶ 36.) Officer Grossman responded, "What?" (*Id.* ¶ 37.) C.L. then stated, "I stim with this," as he held up a piece of string for Officer Grossman to see. (*Id.* ¶ 38.) Officer Grossman responded, "What is that?" and commanded C.L. to "stop walking away from me." (*Id.* ¶ 39.)

C.L. stopped walking and answered, "It's a string," and again held the string up for Officer Grossman to see. (*Id.* ¶ 40.) Officer Grossman then responded, "Ok. So why are you bouncing around that way," and asked C.L. if "he had any ID on him." (*Id.* ¶ 41.) C.L. answered, "No" and turned to leave. (*Id.* ¶ 49.) Officer Grossman immediately grabbed C.L.'s right wrist and began bending C.L.'s right arm behind C.L.'s back, telling him: "Don't go anywhere." (*Id.* ¶ 50.) Officer Grossman then grabbed both of C.L.'s arms, forced them behind C.L.'s back, and began to handcuff him. (*Id.* ¶ 51.) C.L. began screaming and tried to move away from Officer Grossman. (*Id.* ¶ 52.)

C.L.'s reaction was predictable, given that people with autism often have hypersensitivity to sounds or touch, a condition known as tactory or sensory defensiveness. (*Id.* ¶ 53.) Even a slight touch can cause those with autism to suffer great anxiety, discomfort, and even physical pain. (*Id.*)

Officer Grossman then slammed C.L. against a tree, wrestled him to the ground, and pinned C.L. with his full body weight. <sup>1034</sup>\*<sup>1034</sup> (*Id.* ¶ 56.) C.L. continued to scream, repeatedly saying to himself, "I'm ok, I'm ok." (*Id.* ¶ 57.) C.L. then told Officer Grossman, "I need help," and "I can't breathe." (*Id.* ¶ 58.) Officer Grossman asked, "Why are you acting like this, C.L.?" (*Id.* ¶ 59.)

At this point, C.L.'s caregiver, Ms. Craglow, arrived at the park after running errands and informed Officer Grossman that C.L. is autistic. (*Id.* ¶ 60.) Initially, Officer Grossman ignored the statement and told Ms. Craglow that C.L. was "doing something with his hands." (*Id.* ¶ 61.) Ms. Craglow explained, "He's stimming," to which Officer Grossman responded "Yeah. I don't know what that is." (*Id.* ¶¶ 61, 62.) Ms. Craglow further explained, "It's when you have autism. It's his nerves." (*Id.* ¶ 63.) Officer Grossman uttered, "Uh huh, okay," and, despite the explanation, continued to pin C.L. to the ground with his full body weight. (*Id.* ¶ 64.) Ms. Craglow then informed Officer Grossman that C.L.'s hand was "turning white." (*Id.* ¶ 67.) Officer Grossman continued to hold down C.L. forcefully. (*Id.* ¶ 68.)

When another officer arrived on the scene, Officer Grossman allowed C.L. to get off the ground and sit with Ms. Craglow. (*Id.* ¶¶ 70, 71.) Officer Grossman told the other officer that he had detained C.L. because C.L. "started backing away from me while I was identifying him and trying to figure out what was in his hand." (*Id.* ¶ 71.)

C.L. suffered significant injuries resulting from his encounter with Officer Grossman. (*Id.* ¶ 73.) He suffered scratches, cuts, and bruises to his face, back, and arms and a serious ankle injury that has required numerous draining procedures with a heavy gauge needle as well as a surgical intervention. (*Id.* ¶¶ 74, 75.) C.L. also suffered emotional damage. (*Id.* ¶¶ 77-80.)

## **B. Post-Incident Conduct**

Following the incident, C.L.'s parents filed a complaint against Officer Grossman with the Buckeye Police Department ("BPD"). (*Id.* ¶ 83.) In response, the BPD admitted that Officer Grossman "has not been trained in handling special needs people or mentally ill persons." (*Id.* ¶ 84.) Nevertheless, the BPD concluded that Officer Grossman "acted within the law and did not abuse his power as a sworn officer and was not negligent as an officer during this incident." (*Id.* ¶ 85.)

In a press conference following the incident, the BPD justified Officer Grossman's actions as those of "an officer who encountered a subject who was displaying behavior that he believed may have been of a subject who was under the influence of an inhalant." (*Id.* ¶ 86.) In that same press conference, the BPD stated that Officer Grossman's actions were justified because Officer Grossman "had reasonable suspicion" to "detain the juvenile" and "the juvenile began to walk away." (*Id.*) The BPD made those statements despite knowing that C.L. had twice showed Officer Grossman the piece of string in his hand and had informed Officer Grossman that he was "stimming." (*Id.*)

The BPD didn't discipline Officer Grossman despite his track record of past misconduct. (*Id.* ¶¶ 87-89.) Officer Grossman had been disciplined at least four times in the seven years preceding the incident, including for illegally arresting a suspect, filing false reports, failing to act, and abandoning his duty as a police officer. (*Id.* ¶¶ 89-94.) In addition to those events, the BPD also knew that Officer Grossman had in the past (1) deployed excessive force without legal justification, (2) seized "brass knuckles" despite them not being illegal, (3) written defective police reports, and (4) engaged in reckless driving. (*Id.* ¶¶ 95-99.)

<sup>1035</sup>\*<sup>1035</sup> Officer Grossman's supervisors—Lieutenant Charles Arlak ("Lieutenant Arlak") and Chief of Police Larry Hall ("Chief Hall")—have enabled Officer Grossman's illegal behavior by actively protecting him and minimizing and covering up his illegal behavior. (*Id.* ¶ 101.) Lieutenant Arlak is Officer Grossman's brother-in-law and is a close friend of Chief Hall. (*Id.* ¶ 102.) Certain BPD officers have overheard Lieutenant Arlak saying that he needs to "protect" Officer Grossman because of repeated illegal conduct. (*Id.* ¶ 104.) Lieutenant Arlak has also ordered other members of the BPD to "quit targeting" Officer Grossman. (*Id.* ¶ 105.) Chief Hall has "targeted" supervisors who have attempted to discipline

Officer Grossman for past illegal conduct. (*Id.* ¶ 109.) Additionally, Chief Hall ordered the BPD to defend Officer Grossman in press conferences, such as the one occurring after the incident with C.L. (*Id.* ¶ 140.) BPD employees have voiced their concerns to Buckeye City Manager Roger Klingler, but nothing has been done to address the conduct of Officer Grossman, Lieutenant Arlak, or Chief Hall. (*Id.* ¶¶ 112, 113.)

### C. The Complaint

The complaint names four defendants: the City of Buckeye ("City"), Officer Grossman, Lieutenant Arlak, and Chief Hall (collectively, "Defendants"). (Doc. 7.)<sup>13</sup> Officer Grossman, Lieutenant Arlak, and Chief Hall are named in their individual and official capacities. The complaint alleges nine causes of action. Causes I through IV arise under 42 U.S.C. § 1983 and/or *Monell*: (I) false arrest; (II) use of excessive force; (III) failure to train and/or supervise; and (IV) ratification of unconstitutional conduct. Causes V and VI arise under the Americans with Disabilities Act for (V) wrongful arrest and (VI) failure to accommodate. Causes VII through IX arise under state law: (VII) battery; (VIII) negligence; and (IX) negligent training and supervision.

On June 21, 2018, the Court appointed C.L.'s parents, Kevin and Danielle Leibel, as his guardians ad litem. (Doc. 10.)

On August 9, 2018, Defendants moved to dismiss for failure to state a claim under Rule 12(b)(6). (Doc. 16.)

## DISCUSSION

### A. Legal Standard

"[T]o survive a motion to dismiss, a party must allege 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *In re Fitness Holdings Int'l, Inc.*, 714 F.3d 1141, 1144 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). "[A]ll well-pleaded allegations of material fact in the complaint are accepted as true and are construed in the light most favorable to the non-moving party." *Id.* at 1144-45 (citation omitted). However, the court need not accept legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 679-80, 129 S.Ct. 1937. The court also may dismiss due to "a lack of a cognizable legal theory." *Mollett v. Netflix, Inc.*, 795 F.3d 1062, 1065 (9th Cir. 2015) (citation omitted).

### 1036\*1036 B. Analysis

Defendants argue that each Defendant named in his individual capacity is entitled to qualified immunity for claims arising under § 1983. Specifically, Defendants argue Officer Grossman is entitled to qualified immunity on Cause I (False Arrest) and Cause II (Use of Excessive Force) and Lieutenant Arlak and Chief Hall are entitled to qualified immunity on Cause III (Failure to Train and/or Supervise) and Cause IV (Ratification of Unconstitutional Conduct).

Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (citation omitted). It should, thus, be resolved "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011).

### 1. Federal Claims

#### *Cause I: False Arrest*

Defendants argue Officer Grossman is entitled to qualified immunity on Cause I because his actions, as alleged in the complaint, "do not violate the Fourth Amendment, much less clearly established constitutional law." (Doc. 16 at 5-8.)

First, Defendants contend the facts as pleaded don't show that Officer Grossman arrested C.L. Instead, Defendants argue, Officer Grossman engaged in a lawful investigatory stop, supported by reasonable suspicion, which wasn't converted into an arrest when Officer Grossman restrained C.L. after he attempted to flee. (*Id.*)

C.L. responds that he was arrested by Officer Grossman because "[a]n arrest is complete when the suspect's liberty of movement is interrupted and restricted by the police." (Doc. 21 at 4-6.) Additionally, C.L. claims his arrest was unsupported by probable cause, because after showing Officer Grossman he had a string in his hand, "a reasonably prudent person would have perceived that C.L. was disabled, and likewise would have known that C.L. was not holding drugs or contraband in his hand." (*Id.*) Finally, C.L. argues that Officer Grossman isn't entitled to qualified immunity because "[i]t is well established that 'an arrest without probable cause violates the Fourth Amendment and gives rise to a claim for damages under § 1983.'" (*Id.*)

The Court finds that the facts alleged in the complaint, construed in the light most favorable to C.L., demonstrate that Officer Grossman arrested C.L. without probable cause and thus violated C.L.'s clearly-established constitutional rights. Thus, Officer Grossman is not entitled to qualified immunity on Cause I at this early stage of litigation.

First, C.L. states a plausible claim that Officer Grossman converted the initial investigatory stop into an arrest. Whether an investigatory stop becomes an arrest is a fact-specific inquiry that turns upon "the totality of the circumstances." *United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014). First, the Court considers "'the intrusiveness of the stop, *i.e.*, the aggressiveness of the police methods and how much the plaintiff's liberty was restricted.'" *Id.* (citation omitted). When conducting this inquiry, the Court must "'review the situation from the perspective of the person seized,' assessing whether 'a reasonable innocent person in these circumstances would ... have felt free to leave after brief questioning.'" *Id.* (citation omitted). Second, the Court considers 1037\*1037 "'the justification for the use of such tactics, *i.e.*, whether the officer had sufficient basis to fear for his safety to warrant the intrusiveness of the action taken.'" *Id.* (citation omitted). Because these inquiries are fact-specific, they are "often left to the determination of a jury." *Green v. City and Cty. of San Francisco*, 751 F.3d 1039, 1047 (9th Cir. 2014).

A reasonable jury could conclude, based on the facts alleged, that Officer Grossman arrested C.L. First, the intrusiveness of the stop cuts in favor of an arrest finding. C.L. alleges that Officer Grossman "grabbed [C.L.]'s right wrist and began bending [C.L.]'s right arm behind [C.L.]'s back, telling him: 'Don't go anywhere.'" (Doc. 7 ¶ 50.) Officer Grossman then "grab[bed] both of [C.L.]'s arms, forced them behind [C.L.]'s back, and began to handcuff [C.L.]" (*Id.* ¶ 51.) Officer Grossman then "slammed [C.L.] against a nearby tree and wrestled him to the ground, pinning [C.L.] down with his full body weight." (*Id.* ¶ 56.) Officer Grossman "remained on top of [C.L.], continuing to pin him down with his full body weight" until another officer arrived. (*Id.* ¶¶ 64, 70.) This was at least a moderately significant restriction of C.L.'s liberty, and a reasonable innocent person wouldn't have felt free to leave under the circumstances. *Cf. United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982) ("[H]andcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention and is not part of a typical *Terry* stop.").

Second, the lack of justification for this level of force also cuts in favor of an arrest finding. This is not a case where Officer Grossman had reason to believe C.L. was armed and dangerous or had just committed a violent crime. *Compare Edwards*, 761 F.3d at 982 (citation omitted) ("[W]here the police have information that the suspect is currently armed or the stop closely follows a violent crime ... holding a suspect at gunpoint, requiring him to go to his knees or lie down on the ground, and/or handcuffing him will not amount to an arrest."). To the contrary, Officer Grossman initiated the encounter simply because he suspected C.L. might be under the influence of drugs. Moreover, before any force was employed, C.L. explained to Officer Grossman that he was stinging with a piece of string and showed the string to Officer Grossman. (Doc. 7 ¶¶ 36-40.) Because, as alleged, Officer Grossman saw that C.L. was not holding drugs or contraband in his hands, C.L. has plausibly alleged that Officer Grossman lacked probable cause to arrest him. Therefore, at this stage of litigation, Officer Grossman is not entitled to qualified immunity because it is clearly established that "an arrest without probable cause violates the Fourth Amendment." *Borunda v. Richmond*, 885 F.2d 1384, 1391 (9th Cir. 1988).

## ***Cause II: Excessive Force***

Defendants argue that Officer Grossman is entitled to qualified immunity on Cause II: Excessive Force. (Doc. 16 at 5-9.) Defendants contend that Officer Grossman's "use of force occurred only after C.L. attempted to leave the site of the investigation and, even then, was limited to the force necessary to maintain his physical presence at the scene, and overcome his flight and resistance." (Doc. 16 at 9.) Defendants thus argue the use of force was "neither unconstitutional, nor a violation of clearly established law." (*Id.*)

C.L. argues that Officer "Grossman's use of force was not 'objectively reasonable in light of the facts and circumstances confronting him'" and that, because C.L. was only playing with a piece of string in the park, Officer "Grossman's intrusion on C.L.'s Fourth Amendment rights was significant and there was no 1038\*1038 legitimate government interest at stake." (Doc. 21 at 6-7.)

When determining whether a use of force is excessive for Fourth Amendment purposes, the question is whether the force was "'objectively reasonable in light of the facts and circumstances confronting' the ... officers." *Blankenhorn v. City of Orange*, 485 F.3d 463, 477 (9th Cir. 2007) (citation omitted). The "reasonableness" inquiry "requires careful attention to the facts and circumstances of each particular case," including (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." *Kisela v. Hughes*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 1148, 1152, 200 L.Ed.2d 449 (2018) (citation omitted). Additionally, the law is well established in the Ninth Circuit that "where it is or should be apparent to the officers that the individual involved is emotionally disturbed [or mentally ill], that is a factor that must be considered in determining ... the reasonableness of the force employed." *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001). "Because questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury." *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1994) (citations omitted).

C.L. has pleaded facts sufficient to survive a motion to dismiss. Applying the test used by the Ninth Circuit, a reasonable jury could conclude that Officer Grossman used excessive force. The first two factors of that test—the severity of the crime and whether the suspect posed an immediate threat—strongly favor C.L. Officer Grossman initiated the encounter because he suspected C.L., who was standing by himself in a park, was engaged in "illegal drug use." (Doc. 7 ¶ 25.) This is not the crime of the century. Moreover, C.L. immediately explained to Officer Grossman that he was stimming and showed Officer Grossman the piece of string that was in his hand. Yet after receiving this innocuous explanation, Officer Grossman "handcuff[ed] C.L., slam[med] him against a tree, tackle[d] him to the ground, and forcefully pin[ned] him down until backup arrived." (Doc. 21 at 6 (citing Doc. 7 ¶¶ 50-71).) C.L. also alleges that his hand "turned white" from Officer Grossman restraining him. (*Id.*)

Only the last factor—"whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight"—could weigh in Defendants' favor. But even then, the complaint only alleges that C.L. "turned to leave," not that he began running away or fought Officer Grossman. (Doc. 7 ¶ 49.) It also bears noting that C.L. was only 14 years old at the time of this incident.

For these reasons, a reasonable jury could conclude the physical force exerted against C.L. was excessive. Because the right to be free from excessive force is clearly established, Officer Grossman is not, at this juncture, entitled to qualified immunity related to Cause II.

### ***Cause III: Failure to Train and/or Supervise***

Lieutenant Arlak and Chief Hall move to dismiss Cause III because a failure to train or supervise employees "must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact,' which typically requires '[a] pattern of similar constitutional violations by untrained employees.'" (Doc. 16 at 10.) Defendants argue that "[t]here are no allegations that Lieutenant Arlak or Chief Hall directly supervised Officer Grossman, had any direct responsibility for his training, or were aware of a need to train or supervise Officer Grossman on dealing with autistic 1039\*1039 persons and were then deliberately indifferent to a need to train or supervise in that 'relevant respect.'" (*Id.* at 11.)

C.L. counters that the complaint "contains detailed allegations regarding Grossman's long history of illegal actions, conduct, and behavior" and that Lieutenant Arlak and Chief Hall "actively protect[ed] Grossman, minimizing and covering-up Grossman's illegal behavior." (Doc. 21 at 7-9.)

To assert a § 1983 claim against Lieutenant Arlak and Chief Hall, C.L. must show the "personal participation" of each defendant. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). In this instance, C.L. alleges that Lieutenant Arlak and Chief Hall failed to properly train and supervise Officer Grossman. (Doc. 7 ¶¶ 131-133.)

"A failure to train or supervise can amount to a 'policy or custom' sufficient to impose [§ 1983] liability...." Anderson v. Warner, 451 F.3d 1063, 1070 (9th Cir. 2006) (citing City of Canton, Ohio v. Harris, 489 U.S. 378, 389-90, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)). To be actionable, the failure to train or supervise must amount to "deliberate indifference to the rights of persons with whom those employees are likely to come into contact." Lee v. City of Los Angeles, 250 F.3d 668, 681 (9th Cir. 2001) (citation and internal quotation marks omitted). There must be a "direct causal link" between the failure to train or supervise and the injury suffered by the plaintiff. Anderson, 451 F.3d at 1070.

C.L. has not stated a plausible claim that Lieutenant Arlak and Chief Hall should have been aware Officer Grossman would commit the type of constitutional violation he is alleged to have committed. "A pattern of *similar* constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." Connick v. Thompson, 563 U.S. 51, 62, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011) (citation omitted) (emphasis added). Although C.L. identifies various types of misconduct that Officer Grossman allegedly committed (Doc. 7 ¶¶ 90-99), none of these allegations concerns mistreatment of an individual with a disability, and only one concerns an arrest without probable cause and use of excessive force. (Doc. 7 ¶ 96). In that latter instance, Officer Grossman was specifically admonished. (*Id.*) Consequently, C.L. has failed to allege a plausible claim that Lieutenant Arlak and Chief Hall failed to train or supervise Officer Grossman in a manner that would trigger liability under § 1983. And because C.L. hasn't alleged a constitutional violation, Lieutenant Arlak and Chief Hall are entitled to qualified immunity on Cause III.

C.L. similarly fails to allege that the City is liable under § 1983 for failing to train or supervise Officer Grossman. C.L. asserts the City failed to "enforce proper and adequate training and supervision on interacting and dealing with individuals with disabilities ..." (Doc. 7 ¶ 125.) But C.L. identifies no other instances where the City violated the rights of disabled individuals. Because C.L. has not alleged a pre-existing pattern of violations, C.L. has not stated a claim for failure to train or supervise against the City.<sup>[4]</sup> Therefore, Cause III is dismissed.

#### 1040\*1040 Cause IV: Ratification of Unconstitutional Conduct

Defendants argue that Lieutenant Arlak and Chief Hall are entitled to qualified immunity on Cause IV: Ratification of Unconstitutional Conduct. First, Defendants claim that ratification is a theory of municipal liability, "not a basis to impose individual liability on a supervisor." (Doc. 16 at 11.) Moreover, Defendants argue that C.L.'s allegations "do not show that Lieutenant Arlak or Chief Hall, individually, said or did anything deliberately to endorse unconstitutional behavior" and that solely failing to discipline Officer Grossman is insufficient to show ratification. (*Id.* at 12.)

C.L. argues that "[a] supervisor's subsequent 'ratification' of another's conduct can form the basis for liability under § 1983." (Doc. 21 at 9.) C.L. also argues that ratification occurred when Lieutenant Arlak and Chief Hall "approv[ed] of Grossman's actions, clear[ed] him of any improper conduct, fail[ed] to impose meaningful discipline, and order[ed] the BPD to defend Grossman in press conferences after C.L.'s illegal arrest." (*Id.* at 10.) Further, C.L. contends that ratification was demonstrated by Lieutenant Arlak and Chief Hall's "active protection of Grossman and their orders to other supervisors to 'quit targeting' Grossman when these supervisors attempted to impose discipline on him." (*Id.*)

As an initial matter, ratification of unconstitutional conduct appears to be both a theory of municipal and individual liability under § 1983. Larez v. City of Los Angeles, 946 F.2d 630, 645-648 (9th Cir. 1991). In Larez, the Ninth Circuit found it was not plain error where the jury held a police chief individually liable under § 1983 for "ratifying" an employee's conduct. *Id.* at 646.

Nevertheless, supervisory ratification can only form the basis for § 1983 liability "[i]n limited circumstances.... Importantly, the circumstances of the ratification must also demonstrate that the supervisor had previously set in motion acts of others which caused the others to inflict a constitutional injury." *Peschel v. City of Missoula*, 686 F.Supp.2d 1092, 1102 (D. Mont. 2009) (citing *Larez*, 946 F.2d at 645-46). As discussed in the preceding section, Lieutenant Arlak and Chief Hall can't plausibly be accused of "setting in motion" the constitutional violations that Officer Grossman allegedly committed against C.L.—there is no allegation of prior incidents involving the mistreatment of individuals with disabilities. Nor are Lieutenant Arlak or Chief Hall accused of enacting policies that encouraged unlawful arrests or the use of excessive force. Accordingly, they can't be held liable for those violations under a "ratification" theory simply because they declined to discipline Officer Grossman and directed others to defend Officer Grossman during a post-incident press conference. *Hunt v. Davis*, 749 Fed.Appx. 522, 524-26 (9th Cir. 2018) ("The complaint alleges that, following Sheriff Clark's review of his department's investigations into Hunt, Sheriff Clark made two statements generally standing by and commending his department's work .... Such post-incident statements alone do not amount to a claim for individual liability by acquiescence ... [N]either the Supreme Court nor our circuit has established that an official's post-incident ratification of or acquiescence to a claimed constitutional violation is alone sufficient for individual liability under § 1983.").

### ***Cause V: ADA (Wrongful Arrest)***

Cause V of the complaint asserts a claim for wrongful arrest, in violation of the Americans with Disabilities Act, against two defendants: Officer Grossman and the City. (Doc. 7 at 3.) Defendants argue, as a threshold matter, that Officer Grossman should be dismissed as a defendant because ~~10+1~~\*10+1 he is "an individual police officer,... not a 'public entity,'" is thus not a proper ADA defendant. (Doc. 16 at 15.) Defendants also argue that the claim generally fails because C.L. "does not plead disability with the requisite factual specificity." (*Id.* at 15 n.1.) Last, Defendants contend there can be no ADA-based claim when use of force against a disabled person "occurs as a result of that person's actions, which justify the law enforcement response[.]" (*Id.* at 16.)

In response, C.L. argues that because he has sued Officer Grossman "[i]n his official capacity," his claim against Officer Grossman qualifies as a claim against a "public entity" within the meaning of the ADA. (Doc. 21 at 12-13.) C.L. also contends that he has alleged his disability with specificity, pointing to, among other things, the allegations that autism "substantially limits one or more of C.L.'s major life activities, including caring for himself, performing manual tasks, learning, concentrating, communicating, and interacting with others." (*Id.* at 13 (quoting Doc. 7 ¶ 148).) Finally, C.L. argues that he has stated a plausible claim under the ADA because Officer Grossman "arrested C.L. because of conduct related to C.L.'s disability," specifically, by "mistaking C.L.'s 'stimming' for drug use." (Doc. 21 at 13.)

As an initial matter, the Court agrees with Defendants that the claim against Officer Grossman should be dismissed. "The term public entity [as used in the ADA] does not include individuals." *Voiles v. Reavis*, 2014 WL 5092664, \*15 (S.D. Cal. 2014) (citations omitted). Here, C.L. tries to sidestep this principle by arguing that his claim against Officer Grossman is an official-capacity claim that's tantamount to a public-entity claim against the City. The difficulty with this approach is that C.L.'s complaint already asserts a ADA wrongful-arrest claim against the City. The presence of this claim means that his official-capacity claim against Officer Grossman is duplicative. *Coles v. Goord*, 2002 WL 31640544, \*3 (N.D.N.Y. 2002) ("[S]ince Coles can assert his [ADA] claim against the Department of Correctional Services directly, there is no justification for allowing Coles to assert claims against the [individual] defendants in their official capacity.").

As for the claim against the City, the Court concludes C.L. has pleaded his disability with sufficient factual specificity. When a party alleges disability under the ADA, "courts have generally required the party to plead the disability with some factual specificity." *Bresaz v. Cty. of Santa Clara*, 136 F.Supp.3d 1125, 1135-36 (N.D. Cal. 2015) (citation omitted). It is typically sufficient to allege that the plaintiff "suffered from a specific, recognized mental or physical illness." *Id.* at 1136. Here, C.L. alleges that he has "autism spectrum disorder," which the National Institute of Mental Health recognizes as "a developmental disorder that affects communication and behavior." (Doc. 7 ¶¶ 13, 14.) Further, C.L. alleges "people with autism have difficulty communicating and interacting with others, restricted interests and repetitive behaviors, and symptoms that impair the person's ability to function properly in school, work, and other areas of life." (*Id.* ¶ 15.) These allegations are sufficient to show that C.L. has a disability recognized by the ADA.

C.L. also has stated a plausible claim that he was wrongfully arrested due to his disability. Title II of the ADA "applies to arrests." *Sheehan v. City and Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014). Title II is violated "where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity." *Id.*

1042\*1042 "To prevail on a theory of wrongful arrest under the ADA, [C.L.] must prove that (1) he was disabled; (2) [Officer Grossman] knew or should have known he was disabled; and (3) [Officer Grossman] arrested him because of legal conduct related to his disability." *Lawman v. City and Cty. of San Francisco*, 159 F.Supp.3d 1130, 1147 (N.D. Cal. 2016) (citations omitted). As explained above, C.L. has pleaded sufficient facts to conclude he has a disability under the ADA, which satisfies the first factor. The second factor is also satisfied. C.L. alleges that he told Officer Grossman "I stim with this" while holding a piece of string. (Doc. 7 ¶ 38.) A reasonable jury could conclude that Officer Grossman "should have known" C.L. was disabled. Finally, a reasonable jury could conclude the encounter constituted an arrest, not a mere *Terry* stop, and that the arrest was because of C.L.'s disability—specifically, that Officer Grossman arrested C.L. because he misperceived C.L.'s stimming, an effect of his disability, as criminal activity. This case is thus distinguishable from *Bates ex rel. Johns v. Chesterfield Cty., Va.*, 216 F.3d 367 (4th Cir. 2000), on which Defendants rely, because the plaintiff in that case "was arrested because there was probable cause to believe that he assaulted a police officer. Thus, the stop, the use of force, and the arrest of Bates were not by reason of Bates' disability, but because of Bates' objectively verifiable misconduct." *Id.* at 373. Here, in contrast, the complaint alleges that Officer Grossman initiated the arrest sequence because he saw C.L. "stimming"—which is directly attributable to his autism (and hardly "objectively verifiable misconduct").

#### ***Cause VI: ADA (Failure to Accommodate)***

In addition to asserting an ADA-based claim against Officer Grossman and the City for wrongful arrest, C.L. also asserts an ADA-based claim for failure to accommodate. (Doc. 7 at ¶¶ 156-166.) Defendants again argue, as a threshold matter, that Officer Grossman should be dismissed as a defendant because he's not a public entity. (Doc. 16 at 15.) They further contend the claim should be dismissed because "there are no plausible facts to show Grossman's actions in briefly holding C.L. until back-up arrived were 'by reason of his disability,' or were a different response than other, similarly-situated arrestees would face." (*Id.* at 16-17.) Last, they contend "there are no allegations plausibly suggesting an accommodation was even requested, and denied, at that point." (*Id.*)

C.L. argues in response that Officer Grossman, after being told that C.L. was autistic, "continued to forcefully pin C.L. down, to the point that C.L.'s hand was 'turning white.'" (Doc. 21 at 14 (citing Doc. 7 ¶¶ 63, 67, 68).) C.L. contends by not accommodating him after being informed he was autistic, Officer Grossman violated the ADA.

The Court concludes that C.L. hasn't alleged a plausible failure-to-accommodate claim and will thus dismiss Cause VI. It bears emphasizing that C.L.'s claims in Causes V and VI are alternative claims. Cause V is a claim for wrongful arrest, yet under Ninth Circuit law, Cause VI—the failure-to-accommodate claim—will lie only if the original decision to conduct the arrest was lawful. *Sheehan*, 743 F.3d at 1232 (a claim for reasonable accommodation arises "where, *although police properly investigate and arrest a person with a disability for a crime unrelated to that disability*, they fail to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees") (emphasis added). Here, once Officer Grossman made the decision to arrest C.L.—a decision that, again, for purposes 1043\*1043 of Cause VI, the Court must assume was proper and lawful—he was entitled to use some degree of physical coercion to complete the arrest sequence. *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ("Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."). Although C.L.'s condition may render him more sensitive to physical force than others, C.L. has not identified any authority suggesting a police officer must—to avoid liability under the ADA—refrain from using any force if he learns (or comes to suspect) the person he's in the process of lawfully arresting is autistic. Such a conclusion would be difficult to reconcile with *Graham*.

This case is also dissimilar to *Sheehan*. There, police responded to a report that a mentally-ill resident of a group home had a knife and was making threats toward others. 743 F.3d at 1217-20. By the time the police arrived, the home had been evacuated. *Id.* The woman initially brandished the knife toward the officers, but she then retreated to her private room. *Id.* Although "the situation had been defused sufficiently" at this point "to afford the officers an opportunity to wait

for backup and to employ less confrontational tactics," they decided to enter her room and ending up shooting her. *Id.* at 1220, 1233. The Ninth Circuit concluded that, under these facts, the plaintiff had stated a valid claim under the ADA "that the officers failed to reasonably accommodate her disability by forcing their way back into her room without taking her mental illness into account and without employing tactics that would have been likely to resolve the situation without injury to herself or others." *Id.* at 1232. Here, in contrast, soon after C.L.'s caregiver arrived and explained the situation to Officer Grossman, C.L. was released from custody. Any injuries he may have suffered were the result of Officer Grossman's decision to arrest him, not from Officer Grossman's failure to accommodate his condition after the lawful arrest was completed and the situation was defused.

## 2. State-Law Claims

### *Notice-of-Claim Statute*

Under Arizona law, a party seeking to bring a claim against a public employee or entity must file a "notice of claim" with that employee or entity within 180 days of the action accruing. A.R.S. § 12-821.01(A). "If a notice of claim is not properly filed within the statutory time limit, a plaintiff's claim is barred by statute." *Falcon ex rel. Sandoval v. Maricopa Cty.*, 213 Ariz. 525, 144 P.3d 1254, 1256 (2006) (en banc). "Actual notice and substantial compliance do not excuse failure to comply with the statutory requirements of A.R.S. § 12-821.01(A)." *Id.* at 1256.

Here, Defendants argue that C.L.'s state-law claims against the City<sup>[5]</sup> must be dismissed because (1) he attempted to serve his notice of claim by mail, which isn't a permissible service method under Arizona law in the absence of judicial approval (which he didn't obtain) and (2) he hasn't, in any event, shown the City ever received his mailing. (Doc. 16 at 17; Doc. 22 at 11-12.) In response, C.L. argues that the Arizona Supreme Court authorized service by mail against governmental entities in *Lee v. State*, 218 Ariz. 235, 182 P.3d 1044\*1044 1169 (2008), and has provided receipts showing that the notices were sent via certified mail. (Doc. 21 at 15-16.)

Defendants' arguments on these points are unavailing. First, the Court rejects Defendants' narrow interpretation of *Lee*. The Arizona Supreme Court didn't, as Defendants suggest (Doc. 22 at 11), simply accept the parties' stipulation in that case that service-by-mail would be an acceptable form of service—it went further and held, after identifying the relevant provisions of the Arizona Rules of Civil Procedure, that "[t]he rules do not prohibit mail as a form of filing..." 182 P.3d at 1172. See also *Kenney v. City of Mesa*, 2012 WL 5499424, \*6 n.9 (Ariz. Ct. App. 2012) (noting that personal delivery is only required in the case of "individuals, not governmental subdivisions," and that "the Arizona Supreme Court has already held that service of notices of claim may be accomplished by regular mail delivery" in the case of governmental subdivisions). Thus, it was permissible for C.L. to use the mail to serve his notice of claim on the City.

Second, the City also isn't entitled to dismissal, at this juncture, based on its assertion that it never received C.L.'s mailing. In *Lee*, the Arizona Supreme Court held that "[i]f a claimant presents proof of proper mailing—timely sent, correctly addressed, and postage paid—and the public entity denies receipt, it is for the factfinder to determine if the claim was in fact received within the statutory deadline." 182 P.3d at 1173. Here, C.L. has provided a certified mail receipt, addressed to the City Clerk at Town Hall, sent on January 9, 2018, with postage paid, along with proof of delivery. (Doc. 21-1.)

### *Cause VII: Battery*

Defendants argue the complaint hasn't plausibly alleged that Officer Grossman's use of force constituted prohibited police conduct. (Doc. 16 at 17.) C.L. responds that the complaint shows Officer Grossman's actions did not "represent a proper law enforcement response." (Doc. 21 at 15.)

The Court finds that C.L. has plausibly alleged a claim for battery. "The elements of common law battery consist of an intentional act by one person that 'results in harmful or offensive contact with the person of another ....'" *Rice v. Brakel*, 233 Ariz. 140, 310 P.3d 16, 19 (Ariz. Ct. App. 2013). C.L. alleges Officer Grossman intentionally "handcuff[ed] C.L., slam[med] him against a tree, tackle[d] him to the ground, and forcefully pin[ned] him down until backup arrived." (Doc. 21 at 6 (citing Doc. 7 ¶¶ 50-71).) C.L. also alleges he suffered injuries resulting from the use of force. Just as C.L.

plausibly alleges in Cause II that Officer Grossman used excessive force, C.L. plausibly alleges in Cause VII that Officer Grossman's use of force was not justified under state law.

### ***Cause VIII: Negligence***

The complaint alleges that Officer Grossman and the City had a duty to use reasonable care when: (1) "interacting with ... a person with autism," (2) "determining whether reasonable suspicion or probable cause existed to detain and arrest a person with autism," (3) "performing an arrest on a person with autism without resorting to unnecessary and excessive force," and (4) "after detaining a disabled person, continuing to use force against that person." (Doc. 7 ¶ 174.) The complaint further alleges that Officer Grossman and the City "breached their duty of care and caused harm to [C.L.], including physical pain and suffering, terror, mental anguish, humiliation, degradation, damage to reputation, and financial loss." (*Id.* ¶ 175.)

In their motion, Defendants cursorily argue this claim should be dismissed because "Officer Grossman's alleged actions represent a proper law enforcement response" 1045\*1045 and "Plaintiffs have failed to plausibly show conduct falling below any identified law enforcement standard of care" (*see* Doc. 16 at 17), and C.L. responds that the allegations are sufficient to state a claim for negligence (*see* Doc. 21 at 15). After Defendants filed their motion, however, the Arizona Supreme Court held in *Ryan v. Napier*, 245 Ariz. 54, 425 P.3d 230 (2018), that the "negligent use of intentionally inflicted force" is not "a cognizable claim" and that "an intentional act," such as effectuating an arrest or detaining a suspect, "cannot also constitute negligence." *Id.* at 236-37. In their reply, Defendants cite *Ryan* and argue that it renders Cause VIII "no longer viable" "as a matter of law." (Doc. 22 at 11.)

The Court agrees with Defendants' interpretation of *Ryan*. Cause VIII focuses solely upon Officer Grossman's intentional acts of applying force to C.L. (The complaint's theories of negligent training and supervision are asserted in a different count.) Accordingly, Cause VIII must be dismissed.

### ***Cause IX: Negligent Training and Supervision***

Cause IX of the complaint asserts a claim for negligent training and supervision against the City, Lieutenant Arlak, and Chief Hall. In their motion, Defendants advance only one reason why Cause IX should be dismissed: "[I]f Officer Grossman has acted properly, there can be no negligence in training or supervision of him." (Doc. 16 at 17.)<sup>[6]</sup>

This argument lacks merit. Under Arizona law, for an employer to be liable for negligent supervision or training, "a court must first find that the employee committed a tort." *Krieg v. Schwartz*, 2015 WL 12669893, \*9 (D. Ariz. 2015) (quoting *Kuehn v. Stanley*, 208 Ariz. 124, 91 P.3d 346, 352 (Ariz. Ct. App. 2004)).<sup>[7]</sup> Here, the Court has already concluded the complaint contains plausible allegations that Officer Grossman acted improperly (by arresting C.L. without probable cause, using excessive force, violating the ADA, and committing battery). Thus, the complaint plausibly alleges this element of the negligent training and supervision claim.

Accordingly,

IT IS ORDERED that the motion to dismiss (Doc. 16) is GRANTED IN PART AND DENIED IN PART. Causes III, IV, VI, and VIII are dismissed and Cause V is dismissed as to Officer Grossman.

[1] Defendants have requested oral argument. The Court will deny the request because the issues have been fully briefed and oral argument will not aid the Court's decision. *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

[2] The original complaint improperly included a minor's name. *See* Fed. R. Civ. P. 5.2(a)(3).

[3] The complaint identified a fifth defendant, the BPD, but this defendant was later dismissed by stipulation of the parties. (Doc. 20.)

[4] This is not a "rare" circumstance in which "unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." Connick, 563 U.S. at 64, 131 S.Ct. 1350. For instance, this is not like the hypothetical posed by the Supreme Court in *Canton* where a city arms its police force with firearms to capture fleeing felons without training the officers on the constitutional limitations on the use of deadly force. City of Canton, Ohio v. Harris, 489 U.S. 378, 390 n.10, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

[5] Defendants do not seek dismissal of the state-law claims against Officer Grossman, Lieutenant Arlak, or Chief Hall on this basis. (Doc. 16 at 17 ["[T]he City of Buckeye is entitled to strict compliance with [the notice of claim statute].... The City must be dismissed if Plaintiff cannot show that compliance."].)

[6] In their reply, Defendants also argue that "Plaintiff makes no argument that ... Officer Grossman's lawful actions were the product of negligent training and supervision." (Doc. 22 at 11.) Because Defendants did not advance this argument in their motion, and because it is not based on caselaw that was unavailable at the time Defendants filed their motion, the Court did not consider it. Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief.").

[7] Once the underlying tort is established, the employer may be liable "not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment." Quinonez for & on Behalf of Quinonez v. Andersen, 144 Ariz. 193, 696 P.2d 1342, 1346 (Ariz. Ct. App. 1984) (quoting Restatement (Second) of Agency § 213, cmt. d (1952)).

State v Roman

182 Wn app 1019 (2014)

**STATE OF WASHINGTON, Respondent,**  
**v.**  
**THOMAS JOSEPH ROMAN, Appellant.**

No. 44325-2-II.

**Court of Appeals of Washington, Division Two.**

Filed July 8, 2014.

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Sara I. Beigh, Lewis County Prosecutors Office, 345 W. Main St Fl 2, Chehalis, WA, 98532-4802, Counsel for Respondent(s).

**UNPUBLISHED OPINION**

HUNT, P.J.

Thomas Joseph Roman appeals his jury trial conviction for second degree assault by strangulation. He argues that (1) the trial court abused its discretion in refusing to instruct the jury on the lesser degree offense of fourth degree assault, (2) the State violated his constitutional right to remain silent because Officer Derek Makein impermissibly testified about Roman's exercise of his right to remain silent, and (3) defense counsel's failure to object to Makein's testimony constituted ineffective assistance of counsel. We affirm.

**FACTS**

**I. ASSAULT**

Roman and Angela Roman<sup>[1]</sup> are husband and wife. On September 30, 2012, Angela asked Roman for the car keys; when he refused, she reached into his pocket for the keys. Roman grabbed her arm, bit her, and punched her in her chest, causing her to fall; at this point, Roman had Angela in "kind of a headlock." 2 Verbatim Report of Proceedings (VRP) at 213. When Angela stood up, she screamed for help. Officer Derek Makein, who was patrolling in the area, heard her screams of "help me," drove toward the sound of screams, and found Angela and Roman, who was holding a child. 1 VRP at 58. Angela told Makein that Roman had bitten and held onto her left arm, punched her several times, and "squeeze[ed]" her neck, causing her to see stars, and that she also had injuries to her chest. 1 VRP at 85. Makein noticed Angela putting her hand near her chest, appearing in distress; he also saw a fresh bite mark on her arm. Makein arrested Roman.

**II. PROCEDURE**

The State charged Roman with second-degree assault by strangulation under RCW 9A.36.021(1)(g), with a special domestic violence allegation. At Roman's jury trial, hospital emergency room physician's assistant Gary Bilodeau testified that on September 30, 2012, he had examined Angela and prepared her medical records. Angela said that Roman had bitten her, hit her, thrown her to the ground, and choked her so that she had "[seen] stars." 1 VRP at 40. Angela's physical examination revealed petechia (broken blood vessels) in her cheeks, some redness and swelling on her throat, a bite mark on her left wrist, and bruising in several areas. Bilodeau examined Angela's neck, noticed redness on the front of it, and ordered a CAT<sup>[2]</sup> scan because Angela complained of difficulty swallowing. The CAT scan results revealed that Angela had a thyroid cartilage fracture and significant soft tissue edema in her neck, injuries consistent with strangulation. Bilodeau also testified that strangulation can cause petechia to the face.

In addition to the facts previously set forth, Officer Makein testified that as he approached the couple, he noted a strong odor of alcohol emanating from Roman. When Makein "first made contact" with Roman, Roman asked Makein, "[A]re

you profiling me because I'm a guy?" and Makein inferred from Roman's conduct that he was not going to cooperate. 1 VRP at 73, 74. Makein advised Roman that he was under arrest for domestic violence assault and read Roman his *Miranda*<sup>[3]</sup> rights. Roman "clammed up," asked for an attorney, and said he did not want to talk to Makein. 1 VRP at 73. Defense counsel did not object to Officer Makein's testimony about Roman's exercise of his right to remain silent.

After placing Roman in the police car, Makein went back to talk to Angela to continue his investigation and to make sure Angela received medical treatment. Angela repeated her earlier gesture of touching her upper chest and collarbone area, which Makein took as signs of additional injuries. Makein also noticed that Angela began coughing more as the conversation progressed and said, "My throat hurts. I'm having difficulty breathing." 1 VRP at 84. Angela also told Makein that Roman had come up behind her with his arm around her neck and squeezed her neck, causing her to "see . . . stars" and to have problems breathing. 1 VRP at 85.

In addition to the facts previously set forth, Angela testified that when she looked at her bitten hand, she saw really deep teeth marks in it and noticed it was red and swollen. She also realized she could not turn her neck and that it hurt to swallow or to open her mouth. And she had told Makein there was something wrong with her neck and throat. She did not, however, remember telling Makein that she had been choked or strangled. But Angela further testified that the pain in her throat lasted five weeks and it was painful to yawn, to stretch, or turn her neck.

Roman testified that (1) he had been drinking and was "impaired"<sup>[4]</sup> at the time of the incident; (2) when Angela tried to grab the car keys from him, he "gave her a stiff arm in the chest. She was approaching [him] as [he] put [his] arm out, so [he] got her pretty good one in the chest with a stiff arm"<sup>[5]</sup>; (3) as Angela continued trying to grab the keys, he "put [his] mouth on her arm" and bit her, but "didn't break the skin,"<sup>[6]</sup>; (4) Angela then "knocked [him] off [his] stance,"<sup>[7]</sup> he started to fall, so he grabbed onto Angela; and (5) he had been holding onto their child the whole time. In response to questions about choking Angela, Roman replied,

When [Angela] came at me I wasn't looking at her, so I put my arm up like this, I had her shoulder, and I came down and I almost fell. I guess you could consider it at one point kind of a headlock, but I wasn't—you know I was—I was told I had choked her out, and I thought it was like a big time wrestler using two hands to choke someone.

2 VRP at 213. When asked if he had ever had his hands around Angela's neck, Roman replied, "No, I never choked her, punched her, kicked her or kneed her. I didn't do any of those things. I was an ass, but I didn't do those things." 2 VRP at 221.

Defense counsel requested a jury instruction on fourth degree assault. The trial court expressed concern about giving this instruction because Roman was charged with second degree assault by strangulation, not fourth degree assault. 2 VRP at 239. In denying defense counsel's request, the trial court noted:

But if I give a lesser included of Assault 4, it seems to me that I'm inviting the jury as a compromised verdict to say I'm not convinced beyond a reasonable doubt that the State has proven that he actually strangled her, but there's no question that he actually assaulted her, because he punched her, assuming you believe her, he pushed her down and he did get her in a headlock, and that's the quandary that I have there, so you are in essence by asking for a lesser included. You are inviting the jury to compromise a verdict, where we have this specific charge.

2 VRP at 242. The jury found Roman guilty of second degree assault by strangulation and returned a special verdict of aggravated domestic violence. The trial court sentenced Roman to 6 months in prison with credit for 70 days served. Roman appeals.

## ANALYSIS

### I. LESSER DEGREE OFFENSE INSTRUCTION

Roman argues that the trial court abused its discretion and prejudiced his case when it refused to instruct the jury on the lesser offense of fourth degree assault. Holding that the evidence did not support that Roman committed only fourth degree assault, we disagree.

We review a trial court's refusal to give a lesser included offense instruction for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Both the defendant and the State have a statutory right to have supportable inferior degree offenses presented to the jury. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); see RCW 10.61.006, 10.61.003. A defendant is entitled to a jury instruction on an inferior degree offense if "(1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (internal quotation marks omitted) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

Here, the parties dispute only the third prong of this test, which is a factual question asking whether the evidence raises an inference and affirmatively establishes the defendant's theory that he committed *only* the inferior degree offense, to the exclusion of the charged offense. *Fernandez-Medina*, 141 Wn.2d at 455. To convict Roman of second degree assault by strangulation<sup>[3]</sup>, the State had to prove beyond a reasonable doubt that Roman assaulted Angela by strangulation, under circumstances not amounting to first degree assault. RCW 9A.36.021(g). "Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe. RCW 9A.04.110(26). In contrast, fourth degree assault, a gross misdemeanor, is an assault *not amounting to* first degree, second degree, third degree, or custodial assault. RCW 9A.36.041.

Here, the overwhelming evidence of Roman's strangulation of Angela and her resulting injuries does not support Roman's theory that he committed *only* the inferior degree offense of fourth degree assault. *Fernandez-Medina*, 141 Wn.2d at 455. On the contrary, the evidence supports the jury's finding Roman guilty of second degree assault by strangulation: (1) At the crime scene, Angela had told Makein that Roman had "com[e] behind her with his arm around her neck and squeeze[ed] her neck," 1 VRP at 85, and Makein had noticed signs of strangulation, including her incessant coughing and her complaints about difficulty breathing and throat pains; (2) at the hospital soon thereafter, Angela had also told hospital physician's assistant, Bilodeau, that Roman had choked her; (3) Bilodeau's examination of Angela had revealed redness on the front of her neck and petechia on her cheeks, which had likely been caused by strangulation; (4) Bilodeau had ordered a CAT scan, which showed that Angela had a thyroid cartilage fracture and substantial soft tissue edema in her neck, injuries consistent with strangulation; (5) Angela had testified about the pain in her throat that had lasted five weeks after the incident and that it had been painful to yawn, to stretch, or to turn her neck; and (6) Roman had admitted at trial that "at one point" he had Angela in "kind of a headlock." 2 VRP at 213.

The evidence did not support that Roman committed only simple fourth degree assault, which could not have encompassed the severe injuries that Angela suffered here from Roman's squeezing her neck or headlock, both synonymous with strangulation under the facts of this case. See RCW 9A.36.041. We hold, therefore, that the trial court did not abuse its discretion in concluding that the evidence did not support an inferior degree instruction and in refusing Roman's requested instruction.

## II. COMMENT ON SILENCE

Roman next argues that Makein's testimony about Roman's silence at the scene and about Roman's pre-arrest and post-arrest statements violated his constitutional right to remain silent. The State counters that (1) Makein's testimony was not a comment on Roman's exercise of his right to silence; and (2) even if it were such a comment, it was harmless error. Assuming, without deciding, that Makein's testimony was an impermissible comment on Roman's exercise of his constitutional right to remain silent, we hold that any such error was harmless beyond a reasonable doubt.

The State bears the burden of showing that a constitutional error was harmless beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); *State v. Pottorff*, 138 Wn. App 343, 347, 156 P.3d 955 (2007). We will find constitutional error harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have

reached the same result absent the error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242. Such is the case here.

Roman challenges the following testimony about his pre-arrest and post-arrest silence and statements:

[STATE:] Now, you didn't have him do any of those [sobriety tests], did you?

[OFFICER MAKEIN:] No sir. Once he was—I advised him he's under arrest for domestic violence assault, I read him [*Miranda*]. He clammed up, said I want my attorney. I don't want to talk to you, so for me once he says anything like that after I read [*Miranda*] I don't ask him anything else.

[STATE:] Describe for me when you first made contact with him how is his demeanor?

[OFFICER MAKEIN:] I would have to say defiant, probably the best word because after he made the statement, are you profiling me because I'm a guy? I tried to explain to him, no. I'm just making sure everybody is safe, making sure I'm safe, but for him once he made that statement it was clear that he wasn't going to cooperate. He wasn't going to really do anything to assist with the investigation or provide information that we need. His demeanor was basically I was pissing him off, because I determined it was a crime that occurred against his wife and put him in custody.

....

[STATE:] After the defendant is taken into custody, what did you do?

[OFFICER MAKEIN:] Of course pat him down for weapons, put him in the backseat of my car, read him [*Miranda*]. He doesn't want to talk, so I left him in the car, continued my investigation to make sure that the victim gets medical treatment, have her evaluated and that's what I did.

1 VRP at 73-75.

Absent Makein's comments, the jury would still have reached the same verdict, finding Roman guilty of second degree assault by strangulation. First, despite denying having "choke[d]" Angela, Roman admitted to the jury at trial that he had her in "kind of a headlock" "at one point." 2 VRP at 213. Second, the undisputed evidence about the nature and severity of Angela's injuries from Roman's headlock included Bilodeau's testimony about redness on the front of her neck and throat, petechia on Angela's cheeks that was likely caused by strangulation, the CAT scan results showing Angela's thyroid cartilage fracture and substantial soft tissue edema in her neck (symptoms also consistent with strangulation), and Angela's report to Bilodeau that Roman "choked" her. 1 VRP at 39. Also undisputed was Makein's testimony that Angela had coughed incessantly when he spoke with her, that she had difficulty breathing, and that she told him Roman had "squeeze[ed]" her neck. 1 VRP at 85. Angela testified that she had pain in her throat that had lasted five weeks after the incident and that it was painful to yawn, to stretch, or to turn her neck.

The overwhelming uncontroverted evidence about Angela's cheek petechia, neck and throat injuries, and breathing difficulties was consistent with strangulation. Angela attributed these injuries to Roman's having "squeez[ed]"<sup>(9)</sup> her neck; and even Roman himself admitted to having had her in "kind of a headlock." 2 VRP at 213. Based on this evidence, a reasonable jury would have convicted Roman of second degree assault by strangulation even absent Makein's testimony about Roman's silence. Accordingly, we hold that any error was harmless beyond a reasonable doubt and, thus, does not warrant reversal of Roman's conviction.

### III. EFFECTIVE ASSISTANCE OF COUNSEL

Roman last argues that his trial counsel rendered ineffective assistance in failing to object to Makein's comment on his (Roman's) right to remain silent. This argument also fails.

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice; failure to show either prong defeats such claim. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish prejudice, a defendant must show that but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). For the same

reasons that we hold Makein's comments about Roman's silence to have been harmless error, we also hold that Roman does not show that his counsel's failure to object to this testimony prejudiced him. Thus, Roman's ineffective assistance challenge fails on this second prong alone, and we need not address the deficient performance prong of the test.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

WORSWICK and MELNICK, JJ., concurs.

[1] To avoid confusion, we refer to Thomas Roman as "Roman" and Angela Roman as "Angela." We intend no disrespect.

[2] A CAT scan refers to a computed tomography scan that uses x-ray technology to take multiple cross-sectional views inside the body.

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] 2 VRP at 169.

[5] 2 VRP at 180.

[6] 2 VRP at 183.

[7] 2 VRP at 184.

[8] RCW 9A.36.021 provides, in pertinent part:

(1) *A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . .*

(g) *Assaults another by strangulation or suffocation.*

(Emphasis added.)

[9] 1 VRP at 85.

Little v. Soto,

Case No CV-17-4655-AB(jem) (Cal. Feb 20, 2019)

Copy Citation

United States District Court for the Central District of California

February 20, 2019, Decided; February 20, 2019, Filed

Case No. CV 17-4655-AB (JEM)

Reporter

2019 U.S. Dist. LEXIS 72785 \*

SAMUEL LITTLE, Petitioner, v. SOTO, Warden, Respondent.

Subsequent History: Adopted by, Writ of habeas corpus denied, Dismissed by, Judgment entered by Little v. Soto, 2019 U.S. Dist. LEXIS 72949 (C.D. Cal., Apr. 29, 2019)

Prior History: Little v. Soto, 2018 U.S. Dist. LEXIS 52318 (C.D. Cal., Feb. 6, 2018)

Core Terms

murder, assault, neck, ring, bruising, uncharged, choked, kill, culpability, clothing, punched, sexual, consciousness, fingernail, prostitution, strangled, strangulation, pulled, throat, naked, woman, seat, third-party, abrasions, swallow, blood, waist, dead, rape, Recommendation

Counsel: [\*1] Samuel Little, Petitioner, Pro se, Odessa, TX.

For Soto, Warden, Respondent: Ana R Duarte, LEAD ATTORNEY, CAAG - Office of Attorney General, California Department of Justice, Los Angeles, CA.

Judges: JOHN E. MCDERMOTT, UNITED STATES MAGISTRATE JUDGE.

Opinion by: JOHN E. MCDERMOTT

Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable Andre Birotte, Jr., United States District Judge, pursuant to 28 U.S.C. Section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On June 23, 2017, Samuel Little ("Petitioner"), a prisoner in state custody, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 ("Petition"), asserting five claims for relief. On August 15, 2017, Warden Soto ("Respondent") filed a motion to dismiss Grounds Four and Five as partially unexhausted. The Court afforded Petitioner the option of seeking a stay and abeyance while he exhausted his claims, but Petitioner chose not to pursue that option. On March 28, 2018, the District Court accepted the recommendations in the Report and Recommendation filed on February 6, 2018, and dismissed Grounds Four and Five.

On April 10, 2018, Respondent [\*2] filed an Answer to the remaining grounds for relief. Petitioner did not file a reply.

The matter is ready for decision.

## PRIOR PROCEEDINGS

On September 2, 2014, a Los Angeles County Superior Court jury found Petitioner guilty of three counts of first degree murder (Cal. Penal Code § 187(a)) and found the special circumstance that Petitioner had committed multiple murders (Cal. Penal Code § 190.2(a)(3)) to be true. (Lodged Document ("LD") 1, 4 Clerk's Transcript ("CT") 662-64, 666-67.) On September 25, 2014, the trial court sentenced Petitioner to three consecutive terms of life without the possibility of parole. (4 CT 674-75.)

Petitioner filed an appeal in the California Court of Appeal. (LD 3.) On January 30, 2017, the Court of Appeal issued an unpublished decision modifying the presentence custody credits but otherwise affirming the judgment. (LD 6.) Petitioner filed a petition for review in the California Supreme Court. (LD 7.) On May 10, 2017, the California Supreme Court summarily denied review. (LD 8.)

## SUMMARY OF EVIDENCE AT TRIAL

Based on its independent review of the record, the Court adopts the following factual summary from the California Court of Appeal's unpublished opinion as a fair and accurate summary of the evidence presented at trial: [\*3]

### 1. Prosecution evidence.

#### a. The Murder of Linda Alford.

On July 13, 1987, Los Angeles Police Department Officer Darryl Lee and his partner responded to a call about a dead body lying in an alleyway behind a residence on East 27th Street. Upon arriving at the location, the officer observed the body of an African—American woman, naked from the waist down with her shirt pulled up over her bra. She was wearing only one sock and no shoes. None of her missing clothing was found in the alley. Lee noticed "drag marks . . . in the dirt" near the woman's feet. It appeared to Lee that the woman had been killed elsewhere and her body then dumped in the alley. The dead woman was later identified as Linda Alford by her daughter.

Dr. Irwin Golden, now retired, testified that in 1987 he was a deputy medical examiner in the Los Angeles County Coroner's Office. His autopsy revealed that the cause of death was asphyxia as a result of manual strangulation. Alford had sustained multiple bruises near her jawline, hemorrhages in and around her eyes, and scratches and abrasions to her neck, some of which were caused by fingernails. Hemorrhaging beneath her scalp and temporal area was "characteristic of a blunt [\*4] injury . . . a blow or a bump to the head," and was consistent with Alford having been punched in the head. The autopsy revealed hemorrhaging to Alford's voice box and hyoid bone, "the U—shaped bone at the base of the tongue which aids swallowing." All of these injuries had been caused prior to death. A toxicology report showed that Alford had consumed alcohol and cocaine prior to her death.

DNA analyst Amanda Mendoza from Bode Technology Laboratory testified that in 2012 she tested a sexual assault kit and clothing (a bra and a T—shirt) from Alford, which was compared to DNA from Alford's blood and DNA from a buccal swab taken from the inside of Little's cheek. Semen was detected on Alford's shirt. The epithelial fraction<sup>1</sup> of the shirt sample contained a mixture of DNA from Alford and Little; there was no evidence of DNA from a third person. The sperm fraction from Alford's T—shirt DNA sample matched Little's DNA. Little is African—American. Mendoza testified the odds of this match were 1 in 450 quintillion African—Americans.<sup>2</sup> She testified, "it would take approximately 64 billion planet earths to find [ ] this D.N.A. profile one time." The right and left cup brassiere area samples contained [\*5] a mixture of three or more persons, including Alford and at least one male contributor. The male contributor's DNA profile was consistent with Little's profile.

#### b. The Murder of Audrey Nelson.

On August 14, 1989, former Los Angeles Police Department Detective Richard Santiago and his partner responded to a call about a homicide at a parking lot behind a nightclub and restaurant located at 2019 East 7th Street. Inside a dumpster,

they found the body of a Caucasian woman, naked from the waist down with her sweatshirt pulled up around her shoulders. The back of her body had dirt and her upper shoulder had some "drag marks." A search of the vicinity recovered no identification, clothing or any other personal belongings associated with the victim, who was later identified as Audrey Nelson. Crime scene photographs showed drag marks on Nelson's back, buttocks and heels. Detective Santiago opined that Nelson had definitely been murdered elsewhere and her body subsequently dumped at the scene.

On cross-examination, Santiago testified that, at some point, he came into possession of two rings which he gave to the medical examiner for comparison with marks on Nelson's neck. Neither ring belonged [\*6] to Little.

The medical examiner who performed the autopsy, Dr. Eugene Carpenter, concluded that the cause of death was strangulation. Nelson had suffered significant bruising around the front of her neck, which included fractures to the thyroid cartilage and hyoid bone, severe hemorrhaging to the throat muscles, and fingernail marks on the right side of her throat. The amount of force required to sustain such injuries was considerable and the strangulation appeared to have been done by hand. Injuries throughout her body revealed pre-death blunt-force trauma consistent with having been punched repeatedly in the head. Nelson suffered severe bruising underneath her skin; this bruising extended into her chest muscles, stomach and abdomen. In addition, "the hard bone of [her] spine . . . was crushed during a blow to the upper central abdomen . . . with deep bruising to the stomach itself," which was "a sign of considerable force." Abrasions on Nelson's back, abdomen, sides, knees and thighs were characteristic of "road burns," i.e., of having been dragged across a hard surface probably prior to death. A toxicology report revealed the presence of cocaine in Nelson's blood.

There was a severe [\*7] injury to Nelson's stomach area. According to Carpenter, "this area . . . right over the hard bone of the spine . . . it was crushed during a blow to the upper central abdomen, and with deep bruising to the stomach itself." "[I]n terms of signs of blunt force, it's a sign of severe injury to the abdomen . . . . The significance lies in that it's a sign of considerable force." Based on the fracture of bones in Nelson's throat and the extensive hemorrhaging, Carpenter testified: "these signs of force are the greatest that I have seen in a 27—year practice in a county which has its share of strangulation cases." "This stands out because of the amount of hemorrhage at the throat, the fractures, and the fact that there are no petechial hemorrhages, which is a sign that even the arteries were occluded, not just the veins, which is the usual course of events."

Carpenter also testified there was "a special injury to the front part of the neck. This is a patterned injury." He explained it was "an injury . . . consisting of abrasions, but it has a pattern to it so it's consistent with a . . . belt buckle or a brass ring in a strap or something like that. [¶] It's non-specific, but it's got structure, [\*8] and so it was measured just in case there would be some sort of comparison later."

In 2011 and 2012, Mollie Megahee, DNA analyst at Cellmark Forensics, received a sexual assault kit and a fingernail kit relating to the death of Nelson. The fingernail kit contained both "scrapings" and "clippings." DNA analysis of the sperm fraction taken from the sexual assault kit vaginal swab matched Nelson and an unknown male; Little was excluded as a possible contributor. DNA analysis of the fingernail scrapings was inconclusive due to an insufficient amount of DNA. The fingernail clippings from Nelson's right hand contained a mixture from Nelson and an unknown male. The fingernail clippings from Nelson's left hand, however, tested positive for blood and were found to contain DNA from both Nelson and Little. The odds of this male DNA profile being someone other than Little were 1 in 58.68 quadrillion.<sup>32</sup>

#### c. The Murder of Guadalupe Apodaca.

On September 3, 1989, Los Angeles Police Department Officer Jesse Soltero responded to a call about a homicide at an abandoned auto repair shop at 4316 South Ascot Avenue where a body had been discovered. The body was naked from the waist down and lay in the interior [\*9] of the garage area among debris. There was a white shoe near the body, but no other clothing or any identification at the scene. Officer Soltero observed bruises on the dead woman's neck and abrasions on her buttocks. The victim was subsequently identified as Guadalupe Apodaca.

The medical examiner, Christopher Rogers, determined that Apodaca died as a result of manual strangulation. She had sustained abrasions and bruising to her neck and around her throat, fractures to her larynx and hyoid bone, tiny points of bleeding on the eyelids and whites of her eyes, bruises around her eyes and nose, and a laceration on her lower lip. These

injuries were consistent with significant pressure having been applied to her neck. Bruising on her tongue suggested that Apodaca had bitten down on it while suffering a seizure during the strangulation process. Abrasions on her neck had curvatures characteristic of fingernail marks.

Bruising on Apodaca's chest was consistent with someone having kneeled there while strangling her. Bruises and abrasions on her right leg and around her knees were consistent with her body having been dragged prior to death. Bruises to Apodaca's forehead and around her eyes were [\*10] consistent with blunt force trauma having been inflicted on her face and head. She had likely suffered a sexual assault as well, based on the presence of blood in the anal cavity and perianal abrasions. A toxicology test revealed the presence of cocaine and alcohol in her blood.

Rogers testified he had also reviewed the autopsy reports from the Nelson and Alford deaths, and he noted the following similarities: "In each case, the deceased person was a woman . . . of a particular age, between 35 and 46. They had all been strangled manually. They all had blunt trauma in addition to the strangulation. Each of them was nude from the waist down when they were originally found. The decedents were all found in South Central Los Angeles. And they all had cocaine in their blood, and two of them . . . had alcohol."

Jennifer Sampson, a DNA analyst at Bode Technology, testified that Little's profile matched the major contributor to the DNA found on two shirt cuttings taken from Apodaca's body. The probability of these matches in the United States African—American population was, respectively, 1 in 1.6 quadrillion and 1 in 450 quintillion.

## 2. The Murder Investigation.

In April 2012, Los Angeles Police [\*11] Department Detective Mitzi Roberts was assigned to the cold case homicide unit. Formed in 2001, this unit was charged with investigating Los Angeles homicides that had remained unsolved for five years. At the time, there were more than 9,000 such cases. Roberts testified: "We were looking mostly at rape kits, things with biological evidence. As the years went on . . . as forensics improved, we started looking at clothing, pulling the same old cases, looking at clothing, fingernails. And it's still evolving based on the science."

Roberts testified she noticed similarities between the Alford, Nelson, and Apodaca killings: "[T]hey all appeared to be . . . what we would classify as body dumps. . . . [¶] They were all partially clothed, most of them only having clothing from the waist up. They were all women. The . . . proximity to each other, they were all very close to each other, as far as the crime scenes or where the bodies were located. [¶] . . . [T]he cause of death was manual strangulation. And they all appeared to have suffered some sort of beating." The bodies had all been found within a five-mile radius of each other; Alford and Apodaca's bodies had been discovered approximately [\*12] a mile and a half from each other.

In April 2012, Roberts began to conduct a background investigation of Little. She determined that he had been living in the South Los Angeles area during the period of 1987 to 1989. When she learned that Little was presently in custody in Kentucky, she sent detectives there to interview him and obtain oral swabs to be used for DNA comparison.

Los Angeles Police Department Detective Susan Antenucci, another member of the cold case unit, testified that she went to Louisville in September 2012 to meet with Little and obtain buccal samples for DNA testing. Little told her that during the years 1987 to 1990 he had been living in San Diego and South Central Los Angeles. Little also said "he was a boxer, middleweight prize boxer." When Antenucci showed Little photographs of Nelson and Apodaca, he "said he had never seen them in his life, and he was pretty adamant about it." Little told Antenucci "that he was impotent, and therefore he couldn't be with anybody." However, he also said that he could ejaculate and produce sperm. Little was subsequently extradited to Los Angeles.

Los Angeles Police Department Detective Jorge Morales testified that on October 19, [\*13] 2012, he was one of the officers who escorted Little back to California from Dallas, Texas. Morales described Little as "a big guy, about five-eleven, and I believe 235 was the weight that we used when we booked him." While they were passing through Los Angeles International Airport, Little spotted a young Hispanic woman at the terminal and said, "Look at that ass. I would like to get me some of that and get in between those legs and lick that pussy."

## 3. Uncharged Crimes Evidence.

a. Hilda N.

Hilda N. testified that on July 31, 1980, she was living in Carver Village, a housing project in Pascagoula, Mississippi. Hilda worked as a prostitute to support herself and her children. Across the street from where she lived was "the Front," a strip of night clubs, pool halls, and other businesses. She was inside one of the nightclubs when Little approached and greeted her, saying he remembered her from when she worked at the shipyard. Hilda had worked at the shipyard, but testified that she did not remember Little from working there. Hilda told Little she was looking for a date, i.e., to get paid for sex. He asked how much and she replied "\$50."

After she drank a beer that he bought for her, [\*14] they went to Hilda's apartment to have sex. But as soon as they got inside and Hilda closed the apartment door, Little punched her in the back of the head and started choking her. Hilda lost consciousness. She woke up lying on her bed with Little kneeling on the bed and holding her down as he continued to choke her and hit her in the face. She lost consciousness again and woke up naked in her bathtub. It was full of water and Little had tied a scarf around her neck. Little repeatedly pulled her up by the scarf and then pushed her head under the water. As Hilda tried to fight back, Little continued punching her in the face. She thought he was trying to kill her. Hilda eventually passed out for a third time. When Hilda's friend and fellow prostitute Delores knocked on her bedroom window and called out her name to check on her well-being, Little responded by saying, "She's taking care of business."

When Hilda next regained consciousness she was in the hospital. She spent three days there being treated for her injuries. Hilda had suffered numerous scratches and bruises over her face, neck, and chest area. Her throat hurt so much that she could not talk and her eyes were bloodshot. She [\*15] did not tell the authorities what had actually happened, but instead told them she had been the victim of a home invasion.

In November 1982, Hilda was contacted by Pascagoula police and she then told them what had actually happened. Hilda went to the police station and wrote out a statement. They showed her a set of photographs and she identified Little. She later went to court to testify against him when she was eight months pregnant, but when she got on the witness stand and saw Little she got scared and "wet [her] pants." As a result, she did not testify and was released from her subpoena.

b. Leila M.

In 1981 Leila M. was living in Pascagoula, Mississippi. Leila testified that she had "two residences," one in Carver Village "where [she] was taking care of business," and one at the Regency Woods Apartments where she lived with her three children. Her business was prostitution. On November 19, 1981, Leila was walking along the street when Little parked his car, approached her and asked, "Do you date?" Leila understood this to mean, "Do you prostitute?" and confirmed that she did and said the price was \$50. Leila said she lived right around the corner, but Little said "No. We going [\*16] to the Shamrock Hotel." They got into his car. But when Leila told Little to turn around because he had driven past the hotel, Little replied, "I don't need to turn around for what I want to do to you." He suddenly punched her in the back of the head and then between the eyes. He stopped the car, continued punching her and then began "choking the life out of [her]." Leila tried to defend herself by scratching, kicking and biting him:

"Q. So you fought back?

"A. With everything I had.

"Q. Did you think that he was trying to kill you, choke you to death?

"A. Definitely. He was going to kill me."

Leila managed to escape from the car a few times, but Little caught her each time and threw her back inside. Leila testified, "[T]his man was so quick, he could catch me before I could get from here to here, from the station wagon, and drag me back. [¶] At one point, it was a guy came by on a bicycle, a little White boy come by on a bicycle, and he asked me did I need some help, and I couldn't say nothing because at this time I couldn't talk. [¶]

"Q. Because of the pressure that [Little] put on your throat?

"A. Yes, Ma'am. And [Little said to the boy] 'She drunk. That's my ol' lady.'"

Finally, Leila [\*17] managed to climb through a small window in the back of Little's car and escaped by running through highway traffic wearing just a pair of shorts. Ultimately, someone took her to the hospital. The police never came to the hospital to interview her and at that time she did not go to the police.

In 1982 Pascagoula police officers took her to the station and questioned her about the incident. She told them she had been attacked by Little and identified him in a photo array. She subsequently went with Hilda to a court hearing, but they "didn't get a chance to talk to anybody because Hilda urinated all over herself." When Hilda left the court, Leila walked home with her: "When they told [Hilda] to go, I left with her because I felt like they wasn't going to do nothing, no way."

c. Laurie B.

Laurie B. testified that in 1984 she was living in San Diego. On the night of September 26, 1984, she was walking to her friend's apartment when Little approached from behind, put her in a choke hold, and then dragged her into his car.<sup>4</sup> Little said he had purchased \$150 worth of cocaine earlier that evening. He drove to a deserted lot near the freeway that people had been using as an illegal dumping site. [\*18] Little pulled Laurie into the car's back seat by the neck and shoulders. When he began forcibly kissing her, Laurie tried to push him away, but that "appeared to piss him off and his right hand went around [her] neck." He began to choke her: "One hand all the way around, with his thumb right in the middle, and started controlling my ability to breathe." She asked him not to hurt her and said she would cooperate if he wanted to rape her. Little said "he didn't want to hurt [her], and to trust him, and that he loved [her]." Little pulled off Laurie's nylons, underpants, and shoes. He used the nylons to tie her hands behind her back.

Little got on top of Laurie and choked her again until she passed out. When she regained consciousness, she "was gurgling, sputtering to get some air. And I . . . asked him again . . . don't hurt me; I'll cooperate, don't hurt me." Little "ignored that request and asked me to swallow. He liked to feel it when I swallowed while his thumb was over my neck." The following colloquy ensued:

"Q. And when he asked you to swallow, do you remember specifically what he said?"

"A. He loved when I swallowed, it excites him. And he had a smile on his face.

"Q. And when you [\*19] would swallow, what would he do . . . ?

"A. Oh, it became a game. Right before I would go unconscious—and I'm sure he was able to see my eyes roll back into my head, because I'd feel it—he'd lift up just enough pressure so I would not go unconscious, ask me to swallow again, press down harder so I would . . . almost go unconscious again. And it just kind of kept going until I completely went out, blacked out."

When Laurie regained consciousness, she tried to scream but no sound came out because of the pain in her throat. Little "pulled his penis out of his pants, it was erect at that time; and [he] pulled my body up toward his penis and was rubbing up against me. And then it went limp and he wasn't able to actually pull off sexual intercourse." This made Little angry again and he choked Laurie into unconsciousness. The next thing Laurie remembered was being pushed out of Little's car on to "a heap of trash." Little then got on top of her with his knees on her chest, and choked her again until she lost consciousness a final time.

When at last she awoke, Laurie discovered that her bra had been "lifted up over [her] chest." She believed Little had probably done this while she was unconscious. [\*20] Laurie testified that she "sat . . . still as a board and pretended to be dead. [¶] Because I was scared to death that he was still there watching me, that he was going to come back and realize I wasn't dead and choke me some more. [¶] So I sat there for at least 30 minutes on the ground, in the exact position that [he had] left me, in the trash." Laurie then got up and walked until she found a pay phone and called a friend to pick her up. She was treated at a hospital.

During her testimony, Laurie characterized her encounter with Little this way: ". . . I really knew this wasn't about rape, it wasn't about assault, it was about death, power and control, whether or not I was going to live."

d. Tonya J.

On October 25, 1984, at around 4:50 a.m., San Diego Police Department Officer Louis Tamagni and his partner Wayne Spees were on patrol in a marked police car with their lights off. They were driving near an abandoned lot known for "stolen vehicles, prostitution, narcotics use." They traveled a short distance along a dirt road and came across a vehicle matching the description of the car used in connection with attack on Laurie. They turned on all of the patrol car's lights. "Almost immediately [\*21] a large Black male exited" the vehicle. Tamagni identified this man as defendant Little, who "was zipping up his pants, appeared to be very nervous. He kept looking at us, kept looking at the car, kept looking at us, kept looking at the car."

When the officers asked him to come over, Little said, "It's nothing, it's just my wife and we're fighting." The officers told him to come over and talk to them. As Little approached, Tamagni could see bloody scratches on his neck. Tamagni told Spees to stay with Little while he went to check out Little's car. When Tamagni shone his flashlight into the car, he saw a naked woman—later identified as Tonya J.—in the back seat. One "leg was up over the seat; [the other leg] was . . . on the rear passenger seat in the rear of the car. Her upper torso and her head were crammed down on the floorboard between the seat portion of the driver's seat and seat portion of the rear seat. I saw a black bra not attached but on her chest." "Her lips and her mouth were bloody" and "it looked like she had been punched or beaten." Tamagni "saw bruises on her face and her neck." Tonya was motionless and unresponsive; her eyes "were rolled back into her head" and she [\*22] was "[j]ust gulping and gasping for air."

The officers arrested Little and called for an ambulance. The officers then rendered first aid to Tonya, who told them that Little had raped her. Shortly thereafter, paramedics arrived and transported Tonya to the hospital where she was treated for her injuries. Marvin Lee Shaw, a San Diego police officer, tried to interview Tonya in the trauma unit. He testified Tonya "was in somewhat a state of shock. She was in and out of consciousness. She had difficulty speaking. There was bruising on her neck, her left arm, and chest, and face area. Her eyes . . . had broken blood vessels." She also had bruises "[o]n the inner thighs and the pelvic region," and near her vagina.

As he was being transported by the police officers to a hospital for an examination, Little stated, "That bitch didn't give me my money's worth. She's going to give it to me or else." Little said he had met Tonya at a bar in downtown San Diego where she agreed to perform a sex act for \$20. He said she directed him to the location where the officers discovered them. They got into the back seat of Little's car and Tonya "started playing with it." Little told Officer Tamagni that he [\*23] "wanted more and she refused. [Little] told [Officer Tamagni] that he told her that 'She wasn't going anywhere until I got my pussy.'" Little said "he grabbed her in self-defense, that she deserved it, she cheated him." While the officers were driving him to jail, Little asked several times: "'How's the bitch? Is she going to make it[?]"

According to Little's motion papers in the trial court, a San Diego trial arising out of the Laurie B. incident ended in a mistrial, after which Little pled guilty to aggravated assault against Laurie and aggravated assault against Tonya.

## 2. Defense evidence.

Little did not testify in his own defense.

Elizabeth Sholl, a DNA analyst with the Los Angeles Police Department, testified she had determined that Little was excluded from sperm and epithelial fractions found on the swab samples taken from Apodaca's vaginal and external genitalia areas.

(LD 6 at 2-17.)

## PETITIONER'S CONTENTIONS

1. Petitioner's due process rights were violated when the trial court admitted evidence of four prior uncharged sex offenses "to bolster the three weak charged acts." (Pet. at 5, 60-70.)<sup>5</sup>
2. The evidence was constitutionally insufficient to support a finding that Petitioner committed [\*24] the charged murders. (Id. at 5, 80-83.)
3. The trial court excluded third-party culpability evidence, in violation of Petitioner's right to present a defense. (Id. at 5-6, 70-80.)

## STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the Court's consideration of Petitioner's cognizable federal claims. 28 U.S.C. § 2254(d), as amended by AEDPA, states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); see also *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (clearly [\*25] established federal law is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"). "[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." *White v. Woodall*, 572 U.S. 415, 426, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014) (internal quotation marks and citation omitted). If there is no Supreme Court precedent that controls a legal issue raised by a habeas petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law. *Wright v. Van Patten*, 552 U.S. 120, 125-26, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (per curiam); see also *Carey v. Musladin*, 549 U.S. 70, 76-77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

A federal habeas court may grant relief under the "contrary to" clause if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405-406. "The court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle . . . but unreasonably applies it to the facts of a particular case." *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). An unreasonable application of Supreme [\*26] Court holdings "must be objectively unreasonable, not merely wrong." *White*, 572 U.S. at 419 (citing *Andrade*, 538 U.S. at 75-76; internal quotation marks omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citation omitted). The state court's decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 102. "If this standard is difficult to meet, that is because it was meant to be." *Id.*

A state court need not cite Supreme Court precedent when resolving a habeas corpus claim. See *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002). "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent,] the state court decision will not be "contrary to" clearly established federal law. *Id.*

A state court's silent denial of federal claims constitutes a denial "on the merits" for purposes of federal habeas review, and the AEDPA deferential standard of review applies. *Richter*, 562 U.S. at 98-99. When no reasoned decision is available, the habeas petitioner has the burden of "showing there was no reasonable basis for the [\*27] state court to deny relief." *Id.* at 98.

The federal habeas court "looks through" a state court's unexplained decision to the last reasoned decision of a lower state court, and applies the AEDPA standard to that decision. See *Wilson v. Sellers*, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018) (federal habeas court should "look through" unexplained state court decision to last state court decision "that does provide a relevant rationale" and "should then presume that the unexplained decision adopted the same reasoning," although presumption may be rebutted); *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding the judgment or rejecting the same claim rest upon the same ground.").

Petitioner presented his claims to the state courts on direct appeal. (LD 3, 7.) The California Court of Appeal denied the claims in a reasoned decision, and the California Supreme Court summarily denied review. (LD 6, 8.) The Court looks through the California Supreme Court's silent denial to the Court of Appeal's reasoned decision and applies the AEDPA standard to that decision. See *Wilson*, 138 S. Ct. at 1192; *Ylst*, 501 U.S. at 803.

## DISCUSSION

### I. Ground One Does Not Warrant Federal Habeas Relief

In Ground One, Petitioner contends that his due process rights were [\*28] violated when the trial court admitted evidence of four prior uncharged sex offenses. (Pet. at 5, 60-70.) Respondent contends that this claim is barred by the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), fails to state a federal constitutional question, and was reasonably rejected by the state court. (Answer at 19-32.)

#### A. Background

The prosecution filed a pretrial motion seeking to admit evidence that Petitioner had killed five other women (in addition to the three women in this case) and had assaulted five more women under similar circumstances.6<sup>+</sup> (4 CT 514-35.) The trial court ruled that the prosecution could introduce evidence regarding six of the ten prior incidents. (LD 2, 2 Reporter's Transcript ("RT") A3-A10.) The prosecution presented evidence regarding four of the six prior incidents. (See LD at 9-16.)

The trial court instructed the jury with CALJIC No. 2.50 that it could not consider the evidence of other crimes to prove that Petitioner "is a person of bad character or that he has a disposition to commit crimes," and could only consider the evidence for the limited purpose of determining if it tended to show "[a] characteristic method, plan, or scheme in the commission of criminal acts similar to the method, plan, or scheme [\*29] used in the commission of the offense in this case," "[t]he existence of the intent which is a necessary element of the crime charged," "[t]he identity of the person who committed the crime," and "[a] motive for the commission of the crime charged." (4 CT 623.)

#### B. California Court of Appeal's Opinion

On direct appeal, Petitioner argued that he was denied due process when the trial court allowed the prosecution to introduce evidence that he had previously assaulted four other women. (LD 3 at 14-24.) The Court of Appeal found that the evidence was properly admitted, stating:

[Little] claims the uncharged assaults were independent and apparently spontaneous, and therefore could not provide a "connecting link between the prior and present acts." But the opposite is true—the evidence reflects these acts were planned: Little kidnapped Laurie; he punched Hilda in the back of the head the moment she closed her apartment door; and when Leila told Little that he had driven past their destination (the Shamrock Hotel), Little replied: "I don't need to turn around for what I want to do to you," and then punched her in the head. Little asserts the uncharged assaults "do not evidence intent to kill" because [\*30] all "the victims survived." But intent to kill is an element of attempted murder [citation and parenthetical omitted] and there was intent-to-kill evidence as to each uncharged assault. Hilda testified she believed Little was trying to kill her. While describing how she fought back against Little, Leila testified: "He was going to kill me." Laurie testified that she "knew this wasn't about rape, it wasn't about assault, it was about death, power and

control, whether or not I was going to live . . . ." And Little himself asked the police officers who rescued Tonya, "'How's the bitch? Is she going to make it[?]" All seven victims exhibited the hallmarks of a severe physical beating (particularly, having been punched in the head) and manual strangulation.

(Id. at 28-29.)

The Court of Appeal concluded:

We find that the murders and the uncharged crimes shared common features that were sufficiently distinctive to support a reasonable inference that Little committed the charged murders. The evidence demonstrated that Little operated according to a common plan, and had the same motive and intent in each instance. It can be logically inferred from the evidence of the uncharged crimes that Little was motivated [\*31] by a perverted sexual desire to beat and strangle the murder victims for his own pleasure. Therefore, we conclude the trial court did not abuse its discretion by admitting evidence of the uncharged assaults under Evidence Code section 1101.

(Id. at 31-32.)<sup>7</sup>

### C. Applicable Federal Law

"The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) (citation omitted). The Supreme Court has defined the category of infractions that violate "fundamental fairness" very narrowly. *Estelle v. McGuire*, 502 U.S. 62, 72-73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (citing *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)). "A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." *Boyd v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005). Evidence introduced by the prosecution will often raise more than one inference, some permissible and some not, and it is up to the jury to sort them out in light of the trial court's instructions. *Id.*; *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991). "Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must be of such quality as necessarily prevents a fair trial." *Jammal*, 926 F.2d at 920 (internal quotation marks, emphasis, and citation omitted).

When an evidentiary error claim is governed by the Section 2254(d)(1) standard [\*32] of review, federal habeas review is even more restricted. The Ninth Circuit has explained that "[u]nder AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by 'clearly established Federal law,' as laid out by the Supreme Court." *Holley*, 568 F.3d at 1101. "The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process," and "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Id.*

Specifically, the Supreme Court has never found that the introduction of propensity evidence offends the Due Process Clause. In *Estelle*, the Supreme Court expressly declined to address that question. 502 U.S. at 75 n.5 ("we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime"). The Ninth Circuit has held that because the Supreme Court has left this question open, a state court's decision to admit propensity evidence cannot violate clearly established federal law for purposes of Section 2254(d)(1). See [\*33] *Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008); *Larson v. Palmateer*, 515 F.3d 1057, 1066 (9th Cir. 2008); *Alberni v. McDaniel*, 458 F.3d 860, 866-67 (9th Cir. 2006). This Ninth Circuit precedent "squarely forecloses" the argument that admission of propensity evidence violates clearly established due process rights. *Mejia*, 534 F.3d at 1046.

### D. Analysis

#### 1. Teague

In *Teague*, the Supreme Court held that a new rule of constitutional law cannot be applied retroactively on federal collateral review to upset a state conviction or sentence unless the new rule forbids criminal punishment of primary, private individual conduct or is a "watershed" rule of criminal procedure. 489 U.S. at 310-12; see *Caspari v. Bohlen*, 510 U.S. 383, 396, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994). Federal habeas courts must decide at the outset whether *Teague* is implicated if the state argues that the petitioner seeks the benefit of a new rule. *Caspari*, 510 U.S. at 389. A rule may be "new" either because the decision relied upon by the habeas petitioner itself announced a new rule after his conviction became final, or because the habeas petitioner seeks to apply a prior decision's "old rule" to a novel setting, such that relief would create a new rule by extension of the precedent. See *Stringer v. Black*, 503 U.S. 222, 228, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992). A *Teague* analysis looks to both Supreme Court and circuit case law in determining whether the rule advocated by the petitioner is "new." *Butler v. Curry*, 528 F.3d 624, 635 n.10 (9th Cir. 2008); *Leavitt v. Arave*, 383 F.3d 809, 819 (9th Cir. 2004) (per curiam); *Bell v. Hill*, 190 F.3d 1089, 1091-92 (9th Cir. 1999); see also *Williams*, 529 U.S. at 412 (O'Connor, J., for the Court) ("With one caveat, whatever [\*34] would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1). . . . The one caveat . . . is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.").

Under settled Ninth Circuit precedent, admission of evidence may violate due process if it renders a trial fundamentally unfair. See *Holley*, 568 F.3d at 1101 & n.2; *Jammal*, 926 F.2d at 919-20; see also *Alberni*, 458 F.3d at 865 (observing that "every circuit, in cases decided prior to the enactment of AEDPA, has acknowledged, at least implicitly, that the improper introduction of evidence may violate due process if it renders a trial fundamentally unfair"). Long before Petitioner's conviction became final, the Ninth Circuit had held on federal habeas review that admission of "other acts" evidence may violate due process if there were no permissible inferences the jury could have drawn from the evidence, which was so inflammatory that it necessarily prevented a fair trial. See *Boyde*, 404 F.3d at 1172; *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998); *McKinney v. Rees*, 993 F.2d 1378, 1384-85 (9th Cir. 1993). The Court, therefore, rejects Respondent's *Teague* argument.

## 2. Merits

Petitioner contends that the admission of evidence about his prior crimes against Hilda N., Leila M., Laurie B., and Tonya [\*35] J. violated his due process rights.<sup>8</sup> (Pet. at 5, 60-70.) As discussed above, the United States Supreme Court has left open the question of whether admission of propensity evidence violates due process. *Estelle*, 502 U.S. at 75 n.5; see *Mejia*, 534 F.3d at 1047 ("[T]he United States Supreme Court has never established the principle that introduction of evidence of uncharged offenses necessarily must offend due process"). A state court's decision adjudicating an issue cannot be contrary to or an unreasonable application of Supreme Court precedent if the Supreme Court has not decided the issue. See *Van Patten*, 552 U.S. at 125-26; *Musladin*, 549 U.S. at 76-77. Because the Supreme Court has left this issue unresolved, the Court of Appeal's rejection of Petitioner's due process claim could not have violated clearly established law under Section 2254(d)(1). See *Mejia*, 534 F.3d at 1046; *Larson*, 515 F.3d at 1066; *Alberni*, 458 F.3d at 866-67.

In any event, Petitioner's claim fails under general due process principles. Admission of evidence does not violate due process if there are permissible inferences the jury can draw from the evidence. *Boyde*, 404 F.3d at 1172; *Jammal*, 926 F.2d at 920. The four uncharged assaults shared key similarities with the three murders. All seven victims were women who were prostitutes, drug users, or both.<sup>9</sup> (3 RT 989-90; 4 RT 1278-79, 1312-13, 1351; 5 RT 1838; 6 RT 2215; 7 RT 2422-23.) All the murder victims were [\*36] naked from the waist down (3 RT 917-19 [Alford]; 5 RT 1882-83 [Nelson]; 6 RT 2152-57 [Apodaca]), while the victims of the uncharged crimes were fully or partially naked (4 RT 1323 [Hilda], 1365-66, 1369 [Leila]; 5 RT 1850-51, 1858 [Laurie]; 7 RT 2413-16 [Tonya]). The murder victims had sustained blows to the head and other parts of the body and had been strangled to death. (3 RT 980-82, 985-86, 991, 995 [Alford]; 4 RT 1267-69, 1271-76, 1281 [Nelson]; 6 RT 2203-08, 2208-10, 2216 [Apodaca].) Three of the assault victims testified that Petitioner punched them with his fists in the head and other parts of the body (4 RT 1320-21, 1323 [Hilda], 1359-61, 1369 [Leila]) and/or repeatedly choked them (4 RT 1320-24 [Hilda]; 4 RT 1361 [Leila]; 5 RT 1841, 1848-49, 1851-56, 1862 [Laurie]), and a police officer testified that when the fourth assault victim was rescued, she showed signs of having been beaten and choked, drifted in and out of consciousness, and had trouble breathing and speaking (7 RT 2416-19 [Tonya]). One of the assault victims testified that Petitioner admitted to her that it excited him to feel her struggle to swallow right before he

choked her into unconsciousness. (5 RT 1582-84.) [\*37] The three assault victims who testified believed that Petitioner was trying to kill them (4 RT 1327 [Hilda]; 4 RT 1362 [Leilal]; 5 RT 1861 [Laurie]), and Petitioner himself asked the police officers who interrupted his assault on the fourth victim whether she was going to "make it." (7 RT 2423.)

Based on the similarities between the three murders and the four prior crimes, the jury could reasonably infer that Petitioner had committed all seven crimes according to a common plan and with the same intent and motive — to obtain sexual gratification from beating and strangling his victims. See *People v. Jones*, 57 Cal.4th 899, 926, 931, 161 Cal. Rptr. 3d 295, 306 P.3d 1136 (2013) (other crimes evidence properly admitted when both charged and prior crimes involved women in prostitution area who were sexually brutalized and strangled, drugs and alcohol were involved, and the dead bodies were "treated like trash"); see also *Boyde*, 404 F.3d at 1172-73 (when prior robbery shared characteristics with charged robbery, jury could draw permissible inference that defendant's commission of prior robbery made his commission of charged robbery more likely). Because there were permissible inferences the jury could draw from the evidence, its admission did not violate due process. *Boyde*, 404 F.3d at 1172; *Jammal*, 926 F.2d at 920; see also *Walters v. Maass*, 45 F.3d 1355, 1357-59 (9th Cir. 1995) (when [\*38] defendant was charged with attempted rape and kidnapping of 13-year old girl, evidence that he used same story about lost dog to kidnap and rape another 13-year old girl showed his intent, and its admission did not violate due process). Moreover, the jury was instructed that it could only consider the evidence for permissible purposes and could not use it as evidence of Petitioner's bad character. (4 CT 623.) The jury is presumed to follow its instructions. *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000); *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); see also *Walters*, 45 F.3d at 1357 (instruction limiting use of prior crime evidence to permissible purposes reduced danger of prejudice).

Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground One does not warrant federal habeas relief.

## II. Ground Two Does Not Warrant Federal Habeas Relief

In Ground Two, Petitioner contends that the evidence was constitutionally insufficient to support a finding that he committed the three charged murders. (Pet. at 5, 70-80.) In particular, he argues that the DNA evidence did not support his murder convictions. (Id. at 5.) For the reasons set forth below, the California Court of Appeal reasonably [\*39] rejected this claim.

### A. Applicable Federal Law

The Due Process Clause of the Fourteenth Amendment guarantees that a criminal defendant may be convicted only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The federal standard for assessing the constitutional sufficiency of the evidence in support of a criminal conviction is set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Under *Jackson*, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original); see also *Wright v. West*, 505 U.S. 277, 296-97, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (plurality opinion). Put another way, the *Jackson* standard "looks to whether there is sufficient evidence which, if credited, could support the conviction." *Schlup v. Delo*, 513 U.S. 298, 330, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

The *Jackson* standard preserves the jury's responsibility to resolve conflicts in the testimony, weigh the evidence, and draw inferences from basic facts. *Jackson*, 443 U.S. at 319; see also *Walters*, 45 F.3d at 1358 (reviewing court must respect the exclusive province of the trier of fact to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts). "[U]nder *Jackson*, the assessment of the credibility [\*40] of witnesses is generally beyond the scope of review." *Schlup*, 513 U.S. at 330. A federal habeas court faced with a record supporting conflicting inferences "must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326; see

also Wright, 505 U.S. at 296-97. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to sustain a conviction. *United States v. Jackson*, 72 F.3d 1370, 1381 (9th Cir. 1995); *Walters*, 45 F.3d at 1358. Ultimately, "it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos v. Smith*, 565 U.S. 1, 2, 132 S. Ct. 2, 181 L. Ed. 2d 311 (2011) (per curiam).

Although sufficiency of the evidence review is grounded in the Fourteenth Amendment, the federal court must refer to the substantive elements of the criminal offense as defined by state law and must look to state law to determine what evidence is necessary to convict on the crime charged. See *Jackson*, 443 U.S. at 324 n.16; *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005). However, "the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman v. Johnson*, 566 U.S. 650, 655, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012).

Under AEDPA, the federal habeas court's inquiry is "even more limited"; the court "ask[s] only whether the state court's decision was contrary to or reflected an unreasonable application of *Jackson* [\*41] to the facts of a particular case." *Emery v. Clark*, 643 F.3d 1210, 1213-14 (9th Cir. 2011); see also *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011) (where *Jackson* claim is "subject to the strictures of AEDPA, there is a double dose of deference that can rarely be surmounted"); *Juan H.*, 408 F.3d at 1274 (under AEDPA federal courts must "apply the standards of *Jackson* with an additional layer of deference).

## B. California Court of Appeal's Opinion

The Court of Appeal rejected Petitioner's contention that "there was insufficient evidence to prove he was the person who murdered Apodaca, Nelson and Alford." (LD 6 at 18.) It stated:

While conceding that the evidence demonstrated his DNA had been found on the clothing of Alford and Apodaca, and on the fingernail clippings of Nelson, Little argues: "However, the date of the DNA deposit could not be determined. According to the prosecution theory, these women were prostitutes and, therefore likely to have contact with many men. That [Little] may have been a customer does not make him [the] murderer. All the DNA shows is mere presence and opportunity, which is insufficient to sustain a conviction."

During closing argument, the prosecutor argued several inculpatory theories to the jury. She asserted the evidence demonstrated that Little was "a serial sexual predator and a killer. [¶] He is a man, as you've learned, who brutalizes and dehumanizes women, who derives pleasure from the infliction of pain and suffering of his victims." "You also learned . . . [\*42] . . . that these women, obviously, suffered from issues. They had cocaine addictions, and some of them may have even resorted to prostitution in order to be able to support their drug addictions. [¶] And you learned about four other women who were attacked and brutalized by the defendant, coming from the same situation."

Pointing just to the murders of Linda Alford, Audrey Nelson and Guadalupe Apodaca, the prosecutor asked the jury: "What are the chances in this case that you have three separate women who are all found dead, all three of them are strangled to death manually; all three of them are left naked from the waist down, with their genitals exposed; all three of them are disposed of in the same manner, dumped like trash, amongst debris, trash, dirt; no I.D. for any of these women was found at the crime scenes; no underwear is found at any of the three crime scenes, no skirt, no pants, no bottom half to their clothing; all three of them are discovered in the same general area of South Los Angeles . . . within, basically, a 5—mile radius of one another; and all three of them just happened to have the defendant's D.N.A. profile on them? [¶] What are the chances of that?"

The prosecutor [\*43] noted the similar locations where the bodies had been found,10 the way the bodies had been posed with their genitals exposed, the similarly fractured neck bones and severe blunt-force trauma to the victims' heads, the cocaine found in their blood, and the unsurprising fact that—because of his problem maintaining an erection—the only semen-derived DNA from Little was found in semen stains on one victim's clothing (Alford's), and he was excluded as the source of sperm found in the rape kits relating to both Alford and Apodaca.11 The prosecutor then argued, "Three of them. Three murdered victims, all extremely similar. [¶] That's just an awful lot of coincidences to have to explain away to ... a reasonable person, given the way these victims died and the similarities between their crime scenes."

(LD 6 at 19-21) (italics omitted).

The Court of Appeal discussed the California "doctrine of chances," describing it as "a seldom-used, but legitimate means of proving facts (in this case, the murderer's identity)." (Id. at 21.) It quoted the explanation of the doctrine in *People v. Robbins*, 45 Cal.3d 867, 879-80, 248 Cal. Rptr. 172, 755 P.2d 355 (1988): "[T]he mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present [\*44] in one instance, but that the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them." (Id. at 21-22) (italics omitted). It then stated:

There is no doubt that there were many similarities among the three murders. In addition, Little told police he was a professional boxer (which would explain the severe head trauma each victim suffered) and he exhibited consciousness of guilt by denying that he had ever seen either Nelson or Apodaca.

However, we need not decide if this evidence alone would have been sufficient to prove Little's identity as the perpetrator, because the prosecutor also relied on other evidence that Little committed the three murders—namely, evidence of the assaults of Hilda N., Leila M., Laurie B., and Tonya J., which was admissible under Evidence Code section 1101 to show identity, a common plan, intent and motive. As the prosecutor told the jury: "[I]n addition to the D.N.A. evidence in this case, you also have a pattern, a pattern of prior crimes. You learned that the defendant previously committed several violent, sexually motivated crimes against women." "These crimes, what they do for you, is they . . . provide [\*45] you with a blueprint. They provide you with a template to follow. Because when you look at the prior crimes, they tell you exactly what happened to the victims in the current case."

Contrary to Little's argument, there were numerous similarities between the charged murders and the uncharged assaults: three of the assault victims testified Little was trying to kill them, and Little's own comments to police arguably indicated his intent to kill Tonya; all of the assault victims had been choked and three of them had been punched in the head; two of the assault victims (Hilda and Nelson) had been subjected to an obviously pre-planned torture game apparently intended to arouse Little sexually; Laurie's testimony about Little's inability to maintain an erection is particularly significant given the DNA results from the bodies of the murder victims.

All of this evidence, the prosecutor argued, pointed to a very distinctive criminal pattern in which Little achieved sexual satisfaction through torturing his victims by manually strangling them, off and on, precisely in order to watch them fight desperately to draw their next breath.

(Id. at 22-23.)

The Court of Appeal concluded:

Having "review[ed] the whole [\*46] record in the light most favorable to the judgment," we conclude that "it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." Indeed, we conclude that there was overwhelming evidence of Little's guilt.

(Id. at 24.)

### C. Analysis

Viewed in the light most favorable to the prosecution, the record contain significant evidence from which a rational jury could find that Petitioner murdered Alford, Nelson, and Apodaca. See *Jackson*, 443 U.S. at 325-26. The three murders shared significant similarities so as to give rise to a reasonable inference that they were committed by the same person. All three women had been severely beaten and strangled to death. (3 RT 980-82, 985-86, 991, 995 [Alford]; 4 RT 1267-69, 1271-76, 1281 [Nelson]; 6 RT 2203-08, 2208-10, 2216-53 [Apodaca].) All three were naked from the waist down. (3 RT 908-09, 917-19 [Alford]; 5 RT 1882-83 [Nelson]; 6 RT 2152-57 [Apodaca]). Their bodies were found within a five-mile radius (7 RT 2475-76) in secluded locations: Alford's in an alley (3 RT 908-09), Nelson's in a dumpster (5 RT 1882-83, 1886), and Apodaca's among the debris of an abandoned auto repair shop (6 RT 2152-53). Petitioner's [\*47] DNA was found on all three women. (3 RT 1036, 1053, 1055, 1058-59; 5 RT 1557; 7 RT 2725, 2728-30.) Petitioner nevertheless falsely told the police that he had never seen Nelson or Apodaca (7 RT 2501), showing consciousness of guilt. See *People v. Edwards*, 8 Cal. App. 4th 1092, 1103, 10 Cal. Rptr. 2d 821 (1992) (defendant's false statements may support an

inference of consciousness of guilt). Petitioner used to be a boxer (7 RT 2500), which may have accounted for the victims' head injuries.

Finally, the evidence regarding the four uncharged crimes also pointed to Petitioner as the murderer of Alford, Nelson, and Apodaca. As discussed in connection with Ground One, Petitioner severely beat and repeatedly choked Hilda, Leila, Laurie, and Tonya, and the four assaults bore significant similarities to the three murders. A reasonable jury could infer that the same man — Petitioner — committed the murders and the assaults. See *People v. Erving*, 63 Cal. App. 4th 652, 661-63, 73 Cal. Rptr. 2d 815 (1998) (in an arson prosecution, when nearly 40 uncharged fires occurred at or near defendant's home in four different neighborhoods while she lived there and stopped when she moved, jury could logically infer that she was the arsonist).

Petitioner argues that the DNA evidence was inconclusive because his DNA was found only on the clothing of Alford [\*48] and Apodaca and the fingernail clippings of Nelson, and the date the DNA was deposited could not be determined. He reiterates that the prosecution theory was that the victims were prostitutes, and argues that the presence of his DNA shows only that he may have been a customer. (Pet. at 5, 82-83; LD 3 at 56.) Petitioner is asking the Court to reweigh the evidence and draw inferences different from the jury. That is impermissible. See *Coleman*, 566 U.S. at 655 ("Jackson leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts'") (citation omitted); *Cavazos*, 565 U.S. at 8 n.\* ("reweighing of facts . . . is precluded by Jackson"). Moreover, the absence of Petitioner's DNA in the victims' vaginal and rectal openings was consistent with Laurie B.'s testimony that Petitioner was unable to maintain an erection long enough for penetration. (5 RT 1857.)

Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground Two does not warrant federal habeas relief.

### III. Ground [\*49] Three Does Not Warrant Federal Habeas Relief

In Ground Three, Petitioner contends that his due process rights were violated when the trial court excluded third-party culpability evidence with respect to the murder of Nelson. (Pet. at 5-6, 70-80). For the reasons set forth below, the Court of Appeal reasonably rejected this claim.

#### A. Applicable Federal Law

It is well-established that the Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. See *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Nevertheless, a defendant does not have "an unfettered right" to present any evidence. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The right to introduce even relevant evidence is subject to reasonable restrictions to accommodate other legitimate interests in the criminal trial process. *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998); see *Montana v. Egelhoff*, 518 U.S. 37, 41-42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (Due Process Clause does not guarantee right to introduce all relevant evidence). "Only rarely" has the Supreme Court "held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Nevada v. Jackson*, 569 U.S. 505, 509, 133 S. Ct. 1990, 186 L. Ed. 2d 62 (2013).

"A specific application of this principle is found in rules regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." *Holmes*, 547 U.S. at 327. Evidence [\*50] of potential third party culpability must be admitted when, under the "facts and circumstances" of the individual case, its exclusion would deprive the defendant of a fair trial. *Chambers*, 410 U.S. at 301-03 (exclusion of third party's confessions violated due process when excluded evidence bore persuasive assurances of trustworthiness and was crucial to defense); *Lunbery v. Hornbeak*, 605 F.3d 754, 761-62 (9th Cir. 2010) (same). It is "widely accepted," however, for courts to have rules excluding evidence of third party culpability when the evidence is remote and does not sufficiently

connect the other person to the crime, or when the evidence is speculative, or does not tend to prove or disprove a material fact in issue at the defendant's trial. *Holmes*, 547 U.S. at 327.

## B. Background

The prosecution filed a pretrial motion to exclude third-party culpability evidence regarding Jack West. (4 CT 503-13.) The motion stated:

On September 8, 1989, Jack West was arrested for [Nelson's] murder. Witnesses told law enforcement that he lived with the victim, drank regularly, and routinely beat her. West was 73 years old and legally blind. At the time of his arrest, West initially denied knowing the victim, but then claimed that she was his cleaning lady and that he had not seen her for several months. Though a Coroner's criminalist [\*51] opined that a ring belonging to West was potentially consistent with an impression found on the victim's throat, it could not positively be identified as the only possible source of the mark, nor could the criminalist give an estimate as to how many other items might also be consistent. Due to the lack of evidence against West, the District Attorney's Office rejected the case. West is now dead.

(4 CT 507.)

The trial court found that the evidence about West was incapable of raising a reasonable doubt about Petitioner's guilt and granted the prosecution's motion. (2 RT B12-B16, B18-19.) It later ruled that Petitioner could introduce evidence that marks on Nelson's neck might have been made by a ring worn on the strangler's hand, but that when Petitioner was arrested he was not in possession of any such ring. (2 RT 611-13.)

During trial, the coroner who conducted Nelson's autopsy, Dr. Eugene Carpenter, acknowledged that one of Nelson's neck injuries "suggested something hard in structure." (4 RT 1287.) Trial counsel cross-examined him as follows:

Q. The injury did suggest the possibility of a ring on the hand of the person doing the compression; correct?

A. No. The injury suggested something with [\*52] a pattern structure. And a certain ring, if it meets the size requirements as I measured the injury on the neck, it would be consistent with; but looking at the lesion, there is no indication that it's a ring.

(4 RT 1293.)

But even after looking at a detective's notes documenting that he was shown West's rings, Dr. Carpenter had no independent recollection of examining them. (2 RT 1294-95.) He opined, however, that the patterned mark on Nelson's neck could have been inflicted when she was strangled. (2 RT 1297-98.) "If there is something on the hand, a . . . finger, capable of — or jewelry, or wrist watch, from an arm-bar hold . . . that can be an explanation for the mark here." (4 RT 1298.) He acknowledged that "a hand with a ring" was consistent with the mark. (4 RT 1298.)

Dr. Carpenter also testified that in 1989 Steve Dowell worked for the coroner's office as a toolmark analyst, but had since retired. (4 RT 1307.) The prosecutor later reported to the trial court that a detective had documented that Steve Dowell told him that he had "concluded that the ring [taken from West] could have caused the marks on the victim's neck" but "it could not be considered the only cause due to the [\*53] elasticity of the skin and the variance of the underlying tissue." (5 RT 1564-65.) In a later update, the prosecutor indicated that the coroner's office had searched its records but could not find a written report from Dowell, who had a reputation in the office for promising to write reports and then failing to do so, and Dowell likely did not write a report about his conclusions but only conveyed them orally. (5 RT 1828-29.) According to the prosecutor, there were two rings, and they had either been released back to West or destroyed. (5 RT 1830.)

## C. California Court of Appeal's Opinion

The Court of Appeal rejected Petitioner's claim, stating:

While acknowledging that, to be admissible, third-party culpability evidence must demonstrate more than mere motive and opportunity, Little argues that West's "ring was consistent with ring marks found on Nelson's neck." But Dr. Carpenter never testified there were "ring marks found on Nelson's neck." Carpenter testified only that this wound was consistent with a hard structured object such as a ring, a belt buckle, the metal clasp on a handbag handle, etc. . . .

As the Attorney General argues, "[t]here is nothing in the proffered evidence pertaining [\*54] to West that links him to the actual perpetration of Nelson's murder. Instead, the evidence pertains only to West's violent past and the coincidence that a ring he possessed may have been consistent with an injury Nelson suffered. Such evidence is not probative of Nelson's murder. There was no evidence that West actually committed the murder . . . ."

We agree and cannot find that the trial court abused its discretion by excluding the third-party culpability evidence regarding Jack West.

(LD 6 at 35-36.)

#### D. Analysis

"Under California law, [a defendant] has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt." *Spivey v. Rocha*, 194 F.3d 971, 978 (9th Cir. 1999) (citing *People v. Hall*, 41 Cal.3d 826, 833, 226 Cal. Rptr. 112, 718 P.2d 99 (1986).) However, a trial court is not required to admit "any evidence, however remote," showing "a third party's possible culpability." *Hall*, 41 Cal.3d at 833. "[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *Id.* California's rule regarding admissibility of third-party culpability evidence comports with [\*55] the approach approved by the Supreme Court in *Holmes*. 547 U.S. at 327. Indeed, the Supreme Court cited *Hall* to illustrate the "widely accepted" rule excluding third-party culpability evidence that does not sufficiently connect the third party to the crime. *Holmes*, 547 U.S. at 327 & n.\*.

Petitioner does not challenge this rule, but only the manner in which the state court applied the rule to exclude the evidence regarding West. The proffered evidence would have shown that West had lived with Nelson, frequently beat her, had a history of drug and alcohol abuse, had moved to a residential hotel close to where her body was found, and owned a ring consistent with an impression found on her neck. (4 CT 507, 550-51.) The evidence suggested that West had a motive and opportunity to kill Nelson, but did not connect him in any way to her murder. Even the evidence regarding West's ring was weaker than Petitioner contends, because although Dr. Carpenter testified that the impression on Nelson's neck could have been made by "a hard structured object" such as a ring, he stressed that other objects could also have caused it. (4 RT 1287, 1297-98.) The state court reasonably found that the proffered evidence did not sufficiently link West to Nelson's death.

Because [\*56] the proffered evidence was speculative and did not connect West to the crime, its exclusion by the trial court did not violate Petitioner's right to present a defense and the Court of Appeal did not unreasonably apply clearly established federal law when it rejected his claim. *Holmes*, 547 U.S. at 327; see also *Richard v. Dexter*, 399 F. App'x 198, 199 (9th Cir. 2010) ("*Richard* fails to show the proffered evidence was admissible under *People v. Hall* . . . . Therefore, its exclusion did not violate his constitutional right to present a defense under *Crane* . . . ."); *Hammonds v. McGrath*, 267 F. App'x 687, 689 (9th Cir. 2008) ("neither the California rule of evidence requiring sufficient evidence linking the third person to the crime, nor its application by the trial court in this case, constitutes a due process violation," and Court of Appeal did not unreasonably apply federal law when it affirmed exclusion of speculative evidence that did not sufficiently link third party to crime); *Spivey*, 194 F.3d at 978 (state court did not infringe defendant's constitutional rights by excluding speculative third-party culpability evidence); *Guam v. Ignacio*, 10 F.3d 608, 615 (9th Cir. 1993) (evidence that victim's mother's boyfriend spent nights at house, urged mother to report child's molestation to police, and committed suicide three months later was insufficient to connect him to molestation and defendant [\*57] was not entitled to introduce evidence of suicide).

Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. Ground Three does not warrant federal habeas relief.

## RECOMMENDATION

THE COURT, THEREFORE, RECOMMENDS that the District Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: February 20, 2019

/s/ John E. McDermott

JOHN E. MCDERMOTT

UNITED STATES MAGISTRATE JUDGE

### Footnotes

1 Mendoza testified that "epithelial cells are any cells found in the body, whether it's from blood, saliva, urine, sweat, skin cells. All of that is considered epithelial cells."

2 A "quintillion" is a one followed by 18 zeros.

3 A "quadrillion" is a one followed by 15 zeros.

4 Laurie testified she had experimented with prostitution, but that she was not engaging in sex work that night.

5 The Court will use the pagination assigned by the CM/ECF system.

6 In California, admission of other crimes evidence is governed by Cal. Evid Code § 1101. Section 1101(a) "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." *People v. Ewoldt*, 7 Cal 4th 380, 393, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994) (footnote omitted). Section 1101(b) provides that "[n]othing in this section prohibits the admission of evidence that a person committed a crime . . . when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." Cal. Evid. Code § 1101(b).

Under Cal. Evid. Code § 352, "[t]here is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." *People v. Kipp*, 18 Cal.4th 349, 371, 75 Cal. Rptr. 2d 716, 956 P.2d 1169 (1998) (citing *Ewoldt*, 7 Cal.4th at 404-05).

7 Although the Court of Appeal expressly addressed only the state law aspect of Petitioner's evidentiary error claim, Petitioner has not rebutted the presumption that the Court of Appeal silently rejected his accompanying federal claim on the merits. See *Johnson v. Williams*, 568 U.S. 289, 300-301, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013); see also *People v. Boyer*, 38 Cal.4th 412, 441 n.17, 42 Cal. Rptr. 3d 677, 133 P.3d 581 (2006) (state court's rejection of state law claim implicitly rejects an accompanying constitutional claim that is a mere "gloss" on the state law claim and "[n]o separate constitutional discussion is required").

8 The Court of Appeal referred to the victims of the uncharged crimes by their first names and the Court will do the same.

9 The prosecution's motion to admit this evidence represented that Alford was "unemployed at the time of her death," Nelson "had previously been arrested for prostitution and was homeless at the time of her death," and Apodaca "was homeless at the time of her death and had prior arrests for prostitution." (4 CT 515-17.) However, no evidence that Alford, Nelson, and Apodaca engaged in prostitution was introduced at trial. Evidence that the victims of the uncharged crimes engaged in prostitution was introduced. (LD 6 at 9, 11, 13 n.4, 15-16.)

10 Alford's body had been found in an alleyway, Nelson's in a dumpster, and Apodaca's in the debris of an abandoned building.

11 The prosecutor had argued earlier: "[A]sk yourself how come, when Detective Roberts was testifying yesterday, we didn't get anything out of the sexual assault samples, how come she was forced to look at things like the clothing and fingernail kits? [¶] That's because [Little] can't maintain an erection. You're not going to get D.N.A. semen from the areas you'd expect from someone who could not complete the act of rape because he can't maintain an erection. You don't have D.N.A. in the vaginal cavities. You don't have D.N.A. in the rectal swabs."

State v. Perez

COA 48117-1-II (Dec 20, 2016)

**STATE OF WASHINGTON, Appellant,**  
**v.**  
**ANTHONY ELOY PEREZ, Respondent.**

No. 48117-1-II.

**Court of Appeals of Washington, Division Two.**

Filed: December 20, 2016.

Appeal from Grays Harbor County Superior Court, Docket No. 15-1-00107-1, Judgment or order under review, Date filed 08/03/2015, Judge signing: Honorable David L. Edwards.

Katherine Lee Svoboda, Grays Harbor Co Pros Ofc, 102 W. Broadway Ave Rm 102, Montesano, WA, 98563-3621, Counsel for Appellant.

Jodi R. Backlund, Backlund & Mistry, Po Box 6490, Olympia, WA, 98507-6490, Counsel for Respondent.

**UNPUBLISHED OPINION**

JOHANSON, J.

The State of Washington appeals a trial court order granting Anthony Eloy Perez's motion to dismiss for governmental misconduct and dismissing the charges against Perez. The State argues that (1) some of the trial court's findings of fact are not supported by substantial evidence and (2) the trial court erred by failing to consider alternative sanctions before dismissing the case.<sup>[1]</sup> We hold that (1) substantial evidence supports all but one of the challenged findings of fact, (2) we do not address the remaining challenged finding of fact because the other findings are adequate to support the trial court's governmental misconduct finding, and (3) the trial court erred by failing to consider alternative sanctions before dismissing the case. Accordingly, we affirm the trial court's conclusion that the State engaged in governmental misconduct, but we reverse the trial court's dismissal and remand for the trial court to consider other sanctions.

**FACTS**

**I. BACKGROUND**

On March 15, 2015, officers arrested Perez on suspicion of second degree child rape. The officer who initially responded was wearing a body camera and recorded his contact with Perez. The State charged Perez with second degree rape of a child. As of March 17, the State possessed Perez's cell phone, the victim's cell phone, and deoxyribonucleic acid (DNA)-related evidence that was to be analyzed at a forensics lab.

On April 9,<sup>[2]</sup> the State filed an amended information alleging a "predatory enhancement" related to the second degree rape of a child charge, which enhanced the sentence to 25 years to life. Clerk's Papers (CP) at 47. The amended information also added two additional charges: communication with a minor for immoral purposes and sexual exploitation of a minor.

As of April 9, the Grays Harbor Sheriff's Office was still investigating, and the State was aware that additional evidence would be obtained. This additional evidence included (1) DNA results from swabs collected from Perez and the victim, (2) results of a search warrant for electronic messages between Perez and the victim from a company called "KIK," and (3) the results of a warrant to search cell phones for electronic communications between Perez and the victim. CP at 47. The trial was scheduled for August 4, four days before the expiration of the speedy trial period.

On May 6, defense counsel filed a notice of appearance and a demand for discovery and a list of witnesses. Among the items defense counsel requested were all expert reports or statements, all electronic surveillance, and all information related to any searches or seizures. On May 15, defense counsel followed up his May 6 demand for discovery with a letter "requesting documentation from the 'MK' Company, any information recovered from the defendant's cell phone, evidence contained on disks, other data recovered from the defendant's computer, and the results of DNA testing." CP at 47. On June 1, the trial court entered an omnibus order ordering the State to produce this evidence and a witness list no later than June 15.

The State failed to produce this evidence by June 15, and it failed to request additional time. The trial court later found that the State had "completely disregarded [Perez's May 15] letter and the Omnibus Order." CP at 47.

On June 22, the State sent the body camera video to the court-appointed attorney who had withdrawn from the case on May 11. The trial court later found that the State did not explain why it had waited three months before making this video available to Perez.

On June 23, Thurston County Detective Tyson Beall completed his examination of the cell phones. Detective Beall's report "describes the contents of three documents on separate disks, which included additional electronic conversations between Mr. Perez and the alleged victim. The three documents were attached by reference to the report." CP at 48. On June 25, the Washington State Crime Laboratory completed the DNA testing.

On July 1, the State finally provided a copy of the body camera footage to Perez. The trial court continued the CrR 3.5 hearing scheduled for that day to July 8 to allow Perez time to view the body camera footage he just received.

On July 23, 12 days before the August 4 trial date, and a month after the State received the reports, the State provided Perez with Detective Beall's report and the DNA report. The three disks referred to in Detective Beall's report were not included. The trial court later found that these disks were never provided to Perez.

On July 24, Perez filed a motion to dismiss for governmental misconduct and discovery violations under CrR 4.7 and CrR 8.3. He asserted that the State's failure to provide timely discovery amounted to governmental misconduct and that this misconduct prejudiced him because it forced him to choose between going to trial adequately prepared and his right to a speedy trial.

On July 27, 4 working days before the August 4 trial date, the State provided Perez with an updated DNA report. The next day, the State finally responded in part to the omnibus order by disclosing 16 lay witnesses and 3 expert witnesses. This disclosure was made 43 days after the omnibus order's deadline.

## **II. CrR 8.3(b) HEARING AND RULING**

At the hearing on Perez's CrR 8.3(b) motion to dismiss, the trial court heard argument from defense counsel and Prosecutor Katherine Svoboda. In addressing the discovery packet Perez received on July 23,<sup>[1]</sup> the trial court asked Svoboda why it took so long to get this discovery to Perez. Svoboda responded that the assistant prosecutor who was in charge of discovery had been in trial.

Svoboda agreed that the evidence that was most crucial to the enhancement allegation was contained in the discovery that Perez did not receive until July 23, but she commented that she did not think the delay justified "exclusion," let alone a dismissal.<sup>[2]</sup> Report of Proceedings (RP) at 16. Svoboda further acknowledged that new DNA evidence had arrived the day before the CrR 8.3(b) hearing, but she asserted that Perez could "make a strategic decision to go forward, or take time to look at the additional information" and that none of the more recent evidence "interject[ed] new facts or information that was not known to [defense counsel]." RP at 16. Svoboda admitted that she was not aware of whether any information had been obtained from the search warrant issued for KIK, but she stated that she would check to see if she had received everything that the sheriff's office had obtained.

After discussing the CrR 8.3(b) motion with counsel, the trial court commented that it had to carefully consider this motion because this was a serious case and the potential risk to the public needed to be balanced with ensuring that Perez received effective assistance from counsel who had a full opportunity to prepare a defense, including an opportunity to evaluate the State's evidence and possibly seek additional expert opinions. The trial court did not, however, discuss whether any sanctions other than dismissal would be appropriate.

The trial court issued written findings of fact and conclusions of law. The trial court's findings of fact are set out above. In addition to the facts set out above, the trial court entered the following findings of fact:

18. The Court found that the State was not thorough in their review of discovery, diligent in following up with police investigators who evaluated the evidence, and timely in providing evidence to Mr. Perez.

19. As the trial date approached, the State knew critical evidence had not yet been discovered and did not act with reasonable diligence to ensure that the DNA results and the computer forensic examination were provided to Mr. Perez.

20. The Court is convinced the State ignored this case for weeks as if it was unimportant.

CP at 48.

Based on these findings, the trial court entered the following conclusions of law:

2. The Court concluded that the test set forth in *State v. Teems*, 89 Wn. App. 385, 948 P.2d 1336 (1997), should be used to determine if dismissal is an appropriate remedy under CrR 8.3(b). The Court considered whether (a) arbitrary action or government misconduct (b) affected the defendant's right to speedy trial and right of counsel to prepare an adequate defense.

3. The evidence requested by Mr. Perez was uniquely within the control of the State and completely beyond the reach of Mr. Perez. The State made no attempt to obtain this evidence in response to the request of Mr. Perez or the mandate of the Omnibus Order. The State took no timely steps to determine the status of the DNA testing or to determine if the cell phone forensic examinations were completed.

4. *The State should have provided Mr. Perez copies of any disks containing materials not protected by statute from distribution, i.e., sexual depictions of the victim.*

5. The Court finds the State's assertion that it did not receive the May 15, 2015, evidence request from Mr. Perez is not credible. The Court finds the deputy prosecuting attorney handling the case made material misrepresentations to the Court about her knowledge of this letter in open court on July 13, 2015.

6. The DNA results had been known by investigators for over a month before they were provided to Mr. Perez and the entirety of the electronic conversations between Mr. Perez and alleged victim were never provided to Mr. Perez.

7. The complete failure of the State to provide the discovery required by the Omnibus Order on June 15, 2015, and its failure to act with reasonable diligence to monitor the processing of forensic evidence and to produce evidence in a timely manner, coupled with the unethical conduct of the deputy prosecuting attorney, constitutes prosecutorial misconduct involving bad faith.

8. Next, the Court considered whether the government misconduct placed the Mr. Perez in a position where he was forced to choose between effective assistance of counsel and his right to a speedy trial.

9. Since the entirety of the discovery, was not provided to Mr. Perez and his right to speedy trial was to expire on August 8, 2015, Mr. Perez's right to a speedy trial was in jeopardy. Trial was set for August 4, 2015.

10. *The cell phone contents were crucial evidence in defending the predatory enhancement charge, and the DNA evidence was crucial evidence in establishing that sexual intercourse occurred between the defendant and alleged victim.*

11. Mr. Perez must have a reasonable opportunity to review all of the evidence prior to trial, to hire experts, and to formulate a defense on his behalf.

12. The unreasonable delay in disclosing this crucial evidence meant that Mr. Perez would not have adequate time to fully prepare a defense.

13. The State placed Mr. Perez in a position to choose between his right to a speedy trial and ineffective assistance of counsel.

14. The Court dismissed all charges against the defendant, Anthony Eloy Perez.

CP at 130-31 (emphasis added). The trial court then issued an order of dismissal "pursuant to CrR 8.3(b)."<sup>[5]</sup> CP at 131.

The State appeals.

## ANALYSIS

The State argues that (1) substantial evidence does not support the trial court's findings of fact 18, 19, and 20 and challenges portions of conclusions of law 4 and 10 that are more properly characterized as findings of fact<sup>[6]</sup> and (2) the trial court erred by failing to consider alternative sanctions before dismissing the case. We hold that substantial evidence supports all of the challenged findings of fact other than finding of fact 20, but that the remaining findings support the trial court's governmental misconduct conclusion. We agree, however, that the trial court erred by failing to consider alternative sanctions.

### I. PRINCIPLES OF LAW

CrR 8.3(b)<sup>[7]</sup> governs a trial court's dismissal of criminal charges due to governmental misconduct. Under CrR 8.3(b), a trial court may dismiss a defendant's charges if the defendant makes two showings. First, the defendant must show arbitrary action or governmental misconduct. State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Such governmental misconduct "need not be of an evil or dishonest nature; simple mismanagement is sufficient." Michielli, 132 Wn.2d at 239-40 (emphasis omitted) (quoting State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). Second, a defendant seeking dismissal under CrR 8.3(b) must also show that such governmental misconduct prejudiced his or her right to a fair trial. Michielli, 132 Wn.2d at 240. "Such prejudice includes the right to a speedy trial and the right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense." Michielli, 132 Wn.2d at 240 (quoting State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)). Dismissal under CrR 8.3 is an extraordinary remedy, and thus a trial court should consider alternative remedies before resorting to dismissal. State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003).

We review a trial court's CrR 8.3(b) dismissal ruling for a manifest abuse of discretion. Michielli, 132 Wn.2d at 240. "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons." Michielli, 132 Wn.2d at 240 (quoting Blackwell, 120 Wn.2d at 830). We review a trial court's challenged factual findings for substantial evidence. State v. Sommerville, 111 Wn.2d 524, 533-34, 760 P.2d 932 (1988). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Sommerville, 111 Wn.2d at 534. Unchallenged findings of fact are verities on appeal. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

### II. FINDINGS OF FACT

#### A. FINDINGS OF FACT 18 AND 19

The State argues that findings of fact 18 and 19 are not supported by substantial evidence. We disagree.

Finding of fact 18 provides,

The Court found that the State was not thorough in their review of discovery, diligent in following up with police investigators who evaluated the evidence, and timely in providing evidence to Mr. Perez.

CP at 48. Finding of fact 19 provides,

As the trial date approached, the State knew critical evidence had not yet been discovered and did not act with reasonable diligence to ensure that the DNA results and the computer forensic examination were provided to Mr. Perez.

CP at 48.

The State argues that substantial evidence does not support the findings that the State was not thorough or diligent in its review of the discovery or that the State failed to follow up with investigators.<sup>[8]</sup> The statements made by Svoboda at the CrR 8.3 hearing and the unchallenged findings support these findings.

The unchallenged findings establish the following:

- (1) The State had been in possession of Perez's cell phone, the victim's cell phone, and the DNA-related evidence since March 17;
- (2) As of April 9, the State was aware that that additional evidence relating to the DNA testing, the results of a search warrant for information from KIK, and the searches of Perez's and the victim's phones were outstanding;
- (3) As of May 15, Perez had requested this evidence;
- (4) A June 1 omnibus order was entered ordering the State to provide the evidence requested in the May 15 letter by June 15;
- (5) The State did not provide this evidence by June 15, failed to request additional time to comply with the omnibus order, and "completely disregarded the defendant's letter and the Omnibus Order," CP at 47;
- (6) The State attempted to make the body camera video available to Perez on June 22, but sent the video to his former counsel who had withdrawn from the case on May 11, and the State did not explain why it took more than three months from the time the State acquired this evidence for it to attempt to provide it to Perez;
- (7) It took the State a month to provide the report on the forensic evaluation of the phone to Perez after the State received the report, and when it did, the three disks that were attached to the report were not included;
- (8) Perez never received the three disks mentioned in the forensic report.
- (9) The State received additional DNA evidence five working days before the trial date.
- (10) The State disclosed 16 lay witnesses and 3 expert witnesses to the defense 4 working days before the trial date and 43 days after the deadline set in the omnibus order.

These findings demonstrate that there was considerable delay between the time law enforcement obtained evidence, when the State received the evidence from law enforcement, and when the State provided this information to Perez. They also show that Perez never received some of the discovery. In addition, these findings demonstrate that the State failed to timely respond to the omnibus order. The only explanation of the delay at the CrR 8.3 hearing was that some of the delay was caused by the assistant prosecutor being in trial—apparently with no one monitoring her desk. And Svoboda's admission that she would have to verify that there was no evidence from the KIK search warrant that the sheriff's office had not forwarded to the State, suggests that as late as four working days before trial the State still did not know for certain whether there was additional outstanding discovery. These unchallenged findings and Svoboda's statements support findings of fact 18 and 19.

## **B. FINDING OF FACT 20**

The State next challenges finding of fact 20. Finding of fact 20 states, "The Court is convinced the State ignored this case for weeks as if it was unimportant." CP at 48. Because the other findings are sufficient to support the trial court's governmental misconduct conclusion, we decline to review whether substantial evidence supports this finding.

### C. CONCLUSIONS OF LAW 4 AND 10

The State next challenges the trial court's conclusions of law 4 and 10. Because, in the context of the State's arguments, these conclusions of law are more properly characterized as findings of fact, we treat them as findings of fact in this analysis. *State v. Marcum*, 24 Wn.App. 441, 445, 601 P.2d 975 (1979) (statement of fact contained within a trial court's conclusions of law is treated as a finding of fact).

Conclusion of law 4 states, "The State should have provided Mr. Perez copies of any disks containing materials not protected by statute from distribution, i.e., sexual depictions of the victim." CP at 49. The State asserts that it provided Perez with the materials from the disks containing the content of the victim's phone in the initial discovery. But the State does not assert that it provided all of the nonprotected materials from all of the disks. Additionally, the trial court found that the State never provided Perez with the three disks Detective Beall had attached to his report, and the State does not challenge this finding of fact. Accordingly, the State does not show that this conclusion of law was incorrect.

Conclusion of law 10 states,

The cell phone contents were crucial evidence in defending the predatory enhancement charge, and the DNA evidence was crucial evidence in establishing that sexual intercourse occurred between the defendant and alleged victim.

CP at 50. The State argues only that the cell phone evidence was not "crucial evidence" because "all information that was obtainable from the cell phones was given to the defense prior to July 6, 2015." Br. of Appellant at 13. But this argument does not address whether the cell phone evidence was crucial to the case; it merely reiterates the State's claim that it did not fail to provide Perez with this evidence. Thus, the State does not show that this conclusion of law was incorrect.

### III. FAILURE TO CONSIDER OTHER SANCTIONS

The State further argues that the trial court erred when it dismissed the case without considering other sanctions.<sup>[2]</sup> We agree.

Because dismissal under CrR 8.3(b) is an extraordinary remedy, the trial court should have considered alternative remedies before resorting to dismissal. *Wilson*, 149 Wn.2d at 12. Nothing in the record or the trial court's findings of fact and conclusions of law suggests that the trial court considered other sanctions that would not have infringed on Perez's speedy trial rights, such as excluding the late-disclosed evidence or witnesses.<sup>[1]</sup> Thus, the trial court erred in dismissing the charges without first examining other possible sanctions.

Accordingly, we affirm the trial court's conclusion that the State engaged in governmental misconduct, but we reverse the trial court's dismissal and remand for the trial court to consider other sanctions.<sup>[1]</sup>

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, C.J. and MELNICK, J., concurs.

[1] The State also argues that (1) the trial court erred in concluding that alleged misconduct was sufficient to support dismissal and (2) dismissal was not an appropriate sanction because the alleged misconduct was not prejudicial. Because we reverse the dismissal and remand for the trial court to consider other sanctions before dismissing this case, we do not reach these issues.

[2] Although the State submitted the amended information on April 9, the trial court did not enter an order allowing the amended information to be filed until April 13.

[3] This packet contained Detective Beall's report and the first set of DNA results.

[4] Svoboda asserted, in part, that the information from the phone searches did not insert any new facts into this case because "Mr. Perez certainly knows what the conversations were." RP at 15.

[5] The State moved for reconsideration and supported its motion for reconsideration with numerous declarations. Noting that the State had never asked for additional time to respond to the motion to dismiss or moved to supplement the record, the trial court struck the declarations and denied the motion for reconsideration. The State does not challenge these decisions on appeal.

[6] Although the State alleges in its assignments of error that "[t]he trial court's findings regarding the discovery process were not supported by substantial evidence," it fails to identify any specific finding until it states in its argument that it is challenging findings of fact 18, 19, and 20 and conclusions of law 4 and 10. Br. of Appellant at 1. Nowhere in its argument does the State set out the text of the challenged findings of fact in full. Although the State's briefing is vague and does not comply with RAP 10.4(g), we address the State's challenges to the findings of fact in the interests of justice. RAP 1.2(c); see State v. Neeley, 113 Wn. App. 100, 105, 52 P.3d 539 (2002).

[7] CrR 8.3(b) provides,

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

[8] In its argument, the State directs us to a responsive brief in which it asserts it provided an agreed-to timeline. Although this document was signed by Svoboda on July 27, the filing date on the document is August 13, 2015, the day the State filed its motion for reconsideration. Thus, it appears that this filing was among the other declarations and attachments that the trial court struck and that it was not before the trial court when it considered Perez's motion to dismiss. Accordingly, we do not consider this document.

The State also directs us to the declarations it submitted with its motion for reconsideration. The State fails to acknowledge that the trial court struck these declarations because they contained new information and the State did not ask for additional time to respond to the motion to dismiss or move to supplement the record. Accordingly, we do not consider these documents.

[9] Although Perez addresses whether the record supports dismissal as a sanction, he does not address whether the trial court failed to consider other sanctions.

[10] Although the State did not aggressively argue for a different sanction, it did mention that exclusion of certain evidence was another option.

[11] Perez asks that we decline to impose appellate costs due to his indigency. Because Perez is the substantially prevailing party, we do not award appellate costs to the State. See RAP 14.2.

State v. Govey  
284 F Supp 3d 1054 (2018)

UNITED STATES of America, Plaintiff,  
v.  
Joseph Martin GOVEY, Defendant.

Case No.: SACR 17-00103-CJC.

United States District Court, C.D. California, Southern Division.

Signed March 1, 2018.

1056\*1056 Ivy A. Wang, AUSA-US Attorney Office Santa Ana Branch Office, Santa Ana, CA, for Plaintiff.

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT**

CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE.

**I. INTRODUCTION**

Due process demands that the Government disclose to a defendant all material evidence in its possession that is favorable to the defense. This disclosure must occur at a time when the evidence can be of use and value to the defendant. Sadly, the Government in this case failed to disclose the material evidence to Defendant in a timely manner. Inexplicably, the Government waited just days before trial to disclose almost 100,000 material documents that Defendant needed to expose the trial witnesses' motive and bias against him and to attack their character for truthfulness. The Government's untimely disclosure occurred way too late for Defendant to review such an enormous amount of material documents and use them at trial. The Court now has no choice but to dismiss the charges against Defendant with prejudice.<sup>[1]</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

**A. The Charges**

The First Superseding Indictment charged Defendant with possession of 37.7 grams of methamphetamine with intent to distribute and for counterfeiting obligations of the United States. (Dkt. 28.) The charges arise out of a search of an Anaheim, California residence, including Defendant's bedroom, that Orange County Sheriff's Department ("OCSD") deputies conducted on June 6, 2017. (See Dkt. 34 at 3-4.) In Defendant's bedroom, deputies found 37.7 grams of actual methamphetamine, 1057\*1057 pay-owe sheets, washed \$1 bills, a counterfeit \$100 bill, templates, a computer, and a printer. (*Id.*) On August 16, 2017, a grand jury returned a one-count indictment charging Defendant with possession of methamphetamine with intent to distribute. (Dkt. 1.) On December 13, 2017, a grand jury returned the First Superseding Indictment, adding a second count for counterfeiting obligations. (Dkt. 28.)

**B. The Orange County Inmate Informant Scandal**

Defendant's principal defense against the charges is that the critical trial witnesses, namely the OCSD deputies who conducted or were involved in the search, have a motive and bias to overstate the evidence against Defendant. Defendant claims that the details of his several-year history with the OCSD deputies, including the deputies' involvement in a department-wide scandal involving inmate informants, is necessary to show their motive and bias.

The adversarial history between Defendant and the OCSD deputies began long before the June 2017 search. (See Dkt. 36 at 2-5.) According to Defendant, it began sometime before 2011, when OCSD deputies started an unlawful informant program at the Orange County jail. (*Id.*) Specifically, OCSD deputies were involved in a systematic practice of surreptitious monitoring and illegally using inmate informants to elicit incriminating statements from represented defendants, in clear violation of their Sixth Amendment rights. See People v. Dekraai, 5 Cal. App. 5th 1110, 1141, 210

Cal.Rptr.3d 523 (Ct. App. 2016), as modified (Dec. 14, 2016) ("[I]t is clear [OCSD] deputy sheriffs operated a well-established program whereby they placed [inmate informants] next to targeted defendants who they knew were represented by counsel to obtain statements.").

The OCSD's illegal inmate informant program came to light in recent years through evidence obtained by criminal defendants who were the targets of the program. *See id.* Not surprisingly, a very public scandal resulted when the program was exposed. Because of the constitutional violations that inured from the illegal use of inmate informants, the OCSD, the Orange County District Attorney's office, and individual deputies have all been criticized, and in some instances vilified, by the media, politicians, the legal community, and members of the public. In addition, numerous investigations and prosecutions, including several serious murder cases, have been compromised and the charges dismissed.

To highlight one example, the OCSD's improper practices led a California trial court to recuse the entire Orange County District Attorney's office in *People v. Dekraai*, a mass murder case involving eight victims, seven of whom died. After extensive evidentiary rulings, the trial court found that the deputies had violated the defendant's constitutional rights by planting an inmate informant to elicit a confession. *Dekraai*, 5 Cal. App. 5th at 1137. The trial court also found that the deputies then either intentionally lied or willfully withheld material evidence about the informant program from the trial court. *Id.* Further, the trial court found that the deputies' conduct created a conflict of interest for the District Attorney's office, which "failed its responsibility to resolve the conflict of interest by protecting the rule of law and instead ignored OCSD's attempt to compromise [the defendant's] constitutional and statutory rights." *Id.* at 1138.

The California Court of Appeal affirmed the trial court's recusal of the entire District Attorney's office in November 2016. *Id.* In its opinion, the Court of Appeal found that the District Attorney's office was not only aware of the OCSD's grave 1058\*1058 misconduct, but also failed to produce information to defendants about the informant program. *Id.* at 1146. Because the District Attorney's office was complicit in the OCSD's wrongdoing, the Court of Appeal found that the District Attorney's office had violated the defendant's due process rights and could not fairly prosecute the case. *Id.*

Although the recusal of the District Attorney's office in a mass murder case was perhaps the most public and dramatic result of the inmate informant scandal, there have been many additional repercussions. For example, in June 2016, a defendant's conviction in a fatal shooting case, *People v. Ortiz*, Case No. 11CF0862, was overturned because the District Attorney had failed to disclose material evidence regarding the inmate informant program to the defense. (*See* Dkt. 88 at 4.) The conviction was overturned and a new trial was granted after four OCSD deputies, who were called by the defendant to testify about the inmate informant program, invoked the Fifth Amendment and refused to testify. (*Id.*)

Currently, several agencies, including the United States Department of Justice (the "DOJ"), are actively investigating the OCSD, individual deputies, and the District Attorney's office in connection with the inmate informant scandal.<sup>[2]</sup>

### **C. Defendant's 2012 Attempted Murder Charges**

According to Defendant, the inmate informant scandal has a direct bearing on the instant case. Defendant claims that, when he was previously in custody at the Orange County jail, he was a target of the informant program. Deputies purportedly believed that Defendant was part of a white supremacist gang, and would routinely charge him with relatively minor crimes anticipating that he would then confess to more serious crimes to one of the inmate informants. Defendant sought to prove that he was subjected to these illegal practices in 2012, after he was charged by the District Attorney's office with attempted murder. He requested then that relevant discovery on the inmate informant program be disclosed. Ultimately, the District Attorney's office decided to dismiss the attempted murder charges, instead of complying with a court order to produce the discovery.

As relevant here, Defendant claims that the same OCSD deputies who were involved in the investigation of his 2012 attempted murder case were involved in the June 2017 search that gave rise to the instant charges—Deputy Bryan Larson and Deputy Bill Beeman. (Dkt. 36 at 2.) Defendant claims that these deputies feel aggrieved by the 2012 dismissal and since then have been trying to obtain a conviction against him. (*Id.* at 3.) So, according to Defendant, when the deputies found him with narcotics during the search, they had a motive and bias to overstate the charges and maliciously prosecute him for distributing methamphetamine. Defendant claims that the deputies knew the 37.7 grams of methamphetamine they

found were for Defendant's personal use, but they recommended bringing much more serious charges for distribution of the drugs to obtain a lengthy prison sentence. Defendant further claims that the instant charges were first brought in state court, but the deputies convinced the federal government to take over the case so that Defendant would face a higher mandatory 1059\*1059 minimum sentence of ten years' imprisonment.

Defendant also notes that the deputies involved, including Deputy Larson, have taken inconsistent positions when questioned about the inmate informant program. In particular, Deputy Larson was one of the deputies who invoked the Fifth Amendment and refused to testify when he was called as a witness by the defendant in *People v. Ortiz*. (See Dkt. 88 at 4.) Despite his prior invocation of the Fifth Amendment, Deputy Larson was willing to testify about the informant program in this case, when called as the Government's witness. (See, e.g., Dkt. 72.) Defendant asserts that at a minimum, this inconsistency shows that Deputy Larson has a clear motive and bias in favor of the prosecution.

#### **D. Discovery Requests and Orders Before Trial**

When the federal government filed the indictment against Defendant, on August 16, 2017, it planned to call two of the deputies who conducted the search, including Deputy Bryan Larson, at trial. (See Dkt. 34 at 1.) Nevertheless, the Government did not produce to Defendant any evidence about these deputies and their involvement in Defendant's prior 2012 case or the OCSD's inmate informant scandal.

The Court was first apprised of the Government's potential discovery failures on December 15, 2017, when Defendant filed a motion requesting disclosure of documents relating to the informant program. (Dkt. 36.) Defendant argued that such documents were discoverable because they relate to the credibility of certain percipient witnesses, namely Deputies Larson and Beeman. (*Id.*) Defendant also indicated that he had been asking the Government to produce the documents for several weeks. (*Id.*) That same day, the Government filed a motion to exclude any mention of the inmate informant scandal at trial. (Dkt. 34.) When these motions were filed, trial was scheduled for January 9, 2018.

On December 21, 2017, and on December 27, 2017, the Court held hearings on the motions relating to the inmate informant scandal. (Dkts. 42, 48.) At the hearings, the Court ruled that evidence of the deputies' involvement in the informant program and their history with Defendant bears on their credibility as witnesses, specifically their motive, bias, and character for untruthfulness. The Court ruled that Defendant should be afforded the opportunity to inquire into any aspects of the inmate informant scandal that bear on the deputies' credibility, including Deputy Larson's prior invocation of the Fifth Amendment.

At the end of the December 21 hearing, the Court ordered the Government to disclose the requested discovery to Defendant. The Court also ordered an evidentiary hearing to determine the scope of Deputy Larson's testimony at trial. In light of the discovery ruling and the evidentiary hearing, the Government requested a continuance of the trial from January 9, 2018, to January 30, 2018. Defendant objected to any continuance and expressed a strong desire to promptly resolve the charges against him. Over Defendant's objection, the Court granted the continuance to allow sufficient time for the Government to produce discovery and to hold the evidentiary hearing. (Dkt. 44.)

On January 25, 2018, five days before the January 30 trial date, the Government filed another motion to continue the trial date, again citing the difficulty of producing discovery. (Dkt. 88.) The Government indicated that it had requested relevant, potentially discoverable documents from the Orange County District Attorney's office and the DOJ after the hearing on December 21, 2017. (*Id.* at 3.) The Government further represented that it had recently 1060\*1060 received the materials, but required a twenty-eight day continuance to review and produce the materials. (*Id.*) The Government noted that the requested continuance would not violate Defendant's right to a speedy trial because, under the Speedy Trial Act, thirty-four days remained under the speedy trial clock. (*Id.* at 1.) In response, Defendant filed an opposition and a motion to dismiss the case for the Government's failure to comply with its discovery obligations. (Dkts. 89, 90.) Defendant argued that any continuance would have a prejudicial effect as he remained in custody pending the trial.

Over Defendant's objection, the Court again granted the Government's motion and continued the trial to February 27, 2018. (Dkt. 95.) The Court noted in its order, however, that it was troubled by the Government's conduct and its failure to gather and produce the material discovery to the defense in a timely manner. (*Id.* at 4.) The Government apparently had

waited until the eve of trial before it even started requesting materials from the OCSD, the District Attorney's office, and the DOJ. The Government's dilatory conduct was particularly troubling because it was compromising Defendant's rights to compulsory process, confrontation, and a speedy trial. The Court ultimately found that the Government had not demonstrated diligent preparation for trial, and ordered that the twenty-eight day continuance would not be excludable time for purposes of the Speedy Trial Act. (*Id.* at 5-6.) The Court also denied Defendant's motion to dismiss without prejudice, but invited Defendant to renew his motion if the Government failed to meet its discovery obligations in advance of the new trial date. (*Id.* at 6.)

### E. Defendant's Motion to Dismiss

On February 22, 2018, five days before trial was scheduled to begin, the Government lodged with the Court a manual, *in camera*, *ex parte* motion. (*See* Dkt. 104.) In its motion, the Government stated that it started producing materials to Defendant on February 15, and anticipated completing its production on February 22. (Dkt. 109 at 2.) The Government also attached to its motion two compact discs containing 20,681 documents and three video clips containing an hour and a half of footage. The Government conceded that the documents and videos were material to Defendant, but stated that these materials had not been produced because they were privileged or otherwise confidential. (*Id.* at 2.) The Government claimed, for example, that disclosure of certain materials could endanger the lives of current inmates and their family members. (*Id.* at 6.)

Notwithstanding the grave consequences that might result from disclosure, the Government belatedly asked the Court, five days before trial, to review the voluminous materials to determine whether any applicable privilege applies to each document and video clip. The Government also requested that any materials the Court orders disclosed be produced only to Defense counsel under the condition that Defense counsel may not disclose or discuss the materials with Defendant.

The next day, February 23, 2018, the Court held a pre-trial hearing to discuss the Government's motion. The Court expressed its frustration that the Government belatedly asked the Court to review an enormous amount of material and make important privilege determinations a few days before trial. Defense counsel then informed the Court that he had also belatedly received voluminous materials. The Government had not produced anything to Defendant until February 15. Then, within the span of a week, Defense counsel received approximately 75,000 documents with the caveat that Defense counsel may not disclose or discuss the materials with Defendant. Defense counsel argued that 1061\*1061 the production was not timely, as it was made one week prior to trial and Defense counsel did not have the benefit of reviewing the 75,000 documents with his client. Defense counsel represented that he had not been able to review most of the documents and it was not possible to complete his review before trial. The problem was compounded by the fact that the Government had yet to produce the over 20,000 documents that it submitted to the Court the day before. Because of the Government's actions, Defendant renewed his motion to dismiss the charges.

## III. ANALYSIS

"A district court may dismiss an indictment for a violation of due process or pursuant to its supervisory powers." United States v. Kearns, 5 F.3d 1251, 1253 (9th Cir. 1993). Defendant argues that the Government's conduct here warrants dismissal under the Court's supervisory powers. "Dismissal under the court's supervisory powers for prosecutorial misconduct requires (1) flagrant misbehavior and (2) substantial prejudice." *Id.* Accidental or merely negligent governmental conduct does not constitute flagrant misbehavior, but a reckless disregard for a defendant's constitutional rights does satisfy the requisite standard. United States v. Chapman, 524 F.3d 1073, 1085 (9th Cir. 2008). Moreover, a court should exercise its supervisory powers to dismiss the charges "only when the defendant suffers substantial prejudice and where no lesser remedial action is available." *Id.* at 1087.

### A. Flagrant Misbehavior

Unfortunately, the Government demonstrated a deliberate indifference and reckless disregard for its constitutional discovery obligations in this case. One of the principal, sworn duties of a prosecutor is to disclose to a defendant all material, favorable evidence, including impeachment evidence, in the Government's possession. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104

(1972). The evidence must be disclosed even if there has been no request by the defendant. Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). In addition, the evidence must be disclosed "at a time when the disclosure would be of value to the accused." United States v. Davenport, 753 F.2d 1460, 1462 (9th Cir. 1985). Strict compliance with these discovery obligations is required for a defendant to be afforded due process and to meaningfully exercise his Sixth Amendment right to a fair and speedy trial and his right to call and confront witnesses.

Here, the Government repeatedly failed to meet its discovery obligations. First, the Government failed to adequately investigate whether any discoverable evidence existed until it was far too late. See Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). A reasonable, competent prosecutor would have diligently obtained and reviewed any material evidence that might bear on the credibility of the trial witnesses. Strickler, 527 U.S. at 280, 119 S.Ct. 1936 (Favorable evidence "encompasses impeachment evidence as well as exculpatory evidence."); United States v. Alvarez, 358 F.3d 1194, 1208 (9th Cir. 2004) ("Evidence affecting the credibility of government witnesses is material under Brady"). The prosecutor would have then produced the evidence, regardless of any request by the defendant or court order, in a timely manner so that the defendant has a meaningful opportunity to review and use the evidence at trial. See United States v. Houston, 648 F.3d 806, 813 (9th Cir. 2011) (The government complied with Brady when it disclosed the 1062\*1062 exculpatory evidence, "well in advance of trial," at a time when the defendant could make use of the evidence.); United States v. Frazier, 203 F.Supp.3d 1128, 1133 (W.D. Wash. 2016) (The government violated Brady when it did not produce impeachment evidence until the eve of trial, "at a time where disclosure is no longer helpful to the accused.").

The Government in this case, however, did not proceed reasonably and competently, and instead inexplicably and unapologetically delayed the disclosure of material evidence. According to the Government's own admission, it always intended to call two OCS D deputies at trial. One of the deputies, Deputy Bryan Larson, clearly has a history with Defendant and the inmate informant scandal, which have a direct bearing on his credibility as a witness. Given the very public nature of the scandal and the fact that Deputy Larson invoked the Fifth Amendment when he refused to testify about the scandal, the Government had to have known that there was evidence related to the scandal that could be favorable to Defendant. Nevertheless, the Government did not make any inquiry regarding this evidence, and instead waited several months after the indictment was filed before it even attempted to obtain the evidence. And the Government only attempted to obtain the evidence after Defendant made multiple requests and the Court ordered disclosure. The Government's actions do not reflect a diligent attempt to comply with its constitutional obligations. Instead, the actions reflect a deliberate indifference and reckless disregard for them.

But the Government's wrongful conduct continued even after it obtained the material evidence from the OCS D, the District Attorney's office, and the DOJ. First, the Government requested two continuances of the trial, citing the difficulty of reviewing and producing the voluminous materials it had obtained. The continuances prejudiced the Defendant, who remained in custody without bail pending trial and who made it clear to the Government and the Court that he wanted his trial to have occurred the previous year as originally scheduled. More troubling, the Government led the Court and Defendant to believe that, given the continuances, all material evidence would be produced to the defense and in enough time for Defendant finally to make use of it at the trial.

Then, the Government produced the evidence to Defendant in a manner that demonstrated blatant indifference and reckless disregard for Defendant's ability to use the materials at trial. The Government did not produce a single piece of the material evidence until February 15, 2018, approximately a week before the trial was scheduled to begin. The Government then dumped 75,000 material documents on Defense counsel within the span of a week. In addition, on the eve of trial, the Government dumped over 20,000 material documents and an hour and a half of video footage on the Court, requesting significant privilege determinations. It was downright disingenuous for the Government to expect the Court to review such a magnitude of material documents in such short order and then turn those documents over to the defense so Defendant could make use of the documents. Neither the Court nor Defendant possesses superpowers.<sup>[2]</sup>

1063\*1063 **B. Substantial Prejudice**

The Sixth Amendment to the United States Constitution ensures every defendant "the right to a speedy and public trial," the right "to be confronted with the witnesses against him," the right "to have compulsory process for obtaining witnesses in his favor," and the right "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Each Sixth Amendment right is sacred, "necessary to a full defense," and "part of the due process of law." *Faretta v. California*, 422 U.S. 806, 818, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right to a speedy trial is fundamental and "it is one of the most basic rights preserved by our Constitution." *Klopfer v. State of N.C.*, 386 U.S. 213, 226, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). It recognizes that criminal charges may subject a defendant "to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Id.* at 222, 87 S.Ct. 988. "The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." *Faretta*, 422 U.S. at 818, 95 S.Ct. 2525. The right to effective assistance of counsel also "plays a crucial role in the adversarial system embodied in the Sixth Amendment since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quotations and citations omitted). "In short, the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it." *Faretta*, 422 U.S. at 818, 95 S.Ct. 2525.

A defendant should never be forced to give up any of these constitutional rights. Unfortunately, that is the result of the Government's actions here. Defendant's principal theory against the charges—indeed the only defense theory the Court has been made aware of—is that the evidence supports a finding of simple possession, not distribution, of methamphetamine. Defendant believes that the quantity of methamphetamine at issue, 37.7 grams, is too small to infer any intent to distribute the drugs. Defendant also believes that the deputies who found the drugs know that Defendant had no intent to distribute them, but they have a motive and bias to overstate the evidence. Given Defendant's adversarial history with the deputies and their involvement in the inmate informant scandal, Defendant had a good faith basis to present his defense theory to the jury.

The Government's conduct, however, compromised Defendant's right to prove up and present his theory to a jury. Defendant can only present his theory through the effective assistance of his counsel and after a meaningful review of the evidence produced by the Government—evidence that the Government concedes is material to the defense. But the late disclosure of almost 100,000 documents made it impossible to review the material evidence and use it against the key trial witnesses. Instead, the late disclosure of the documents left Defendant with two options: continue the trial, and give up his Sixth Amendment right to a speedy trial; or proceed with trial, and give up his Sixth Amendment rights to confrontation, compulsory process, and effective assistance of counsel. Either option denies Defendant his constitutional rights and the fair administration 1064\*1064 of justice. He clearly has suffered substantial prejudice by the Government's actions.

### **C. No Lesser Remedial Action**

Dismissal of an indictment is a drastic remedy, and should be granted only where "no lesser remedial action is available." *United States v. Barrera-Moreno*, 951 F.2d 1089, 1092 (9th Cir. 1991). The Government has not proposed any lesser remedy that would be appropriate here. The reason for the Government not doing so is obvious—there is none.

The Government's belated and voluminous production of material documents on the eve of trial created an impossible situation and forced the Court to decide between either dismissing the charges or violating Defendant's constitutional rights. If the Court ordered the parties to proceed with trial as scheduled, Defense counsel would have been compelled to examine the witnesses without reviewing a significant amount of material evidence favorable to the defense. In other words, Defendant would have been denied effective representation and his right to call and confront the important trial witnesses.

If, on the other hand, the Court ordered a several-month continuance of the trial to allow Defense counsel sufficient time to review the material documents, Defendant then would have been deprived his right to a speedy trial. Under the Speedy Trial Act, the Government had only six additional days to bring the case to trial. A continuance of six days obviously

would not have afforded Defense counsel adequate time to review the 75,000 material documents, plus the 20,000 potentially discoverable documents that had been submitted to the Court.

In short, either proceeding with the trial or continuing it would have violated Defendant's constitutional rights. Again, proceeding with the trial, Defendant is denied his Sixth Amendment right to call and confront the important trial witnesses. Continuing the trial, Defendant is denied his Sixth Amendment right to a speedy trial. The only option the Court has to preserve and protect Defendant's constitutional rights is to dismiss the charges and to do so with prejudice.<sup>[1]</sup>

#### IV. CONCLUSION

The Sixth Amendment to the United States Constitution demands that every defendant be given the right to a speedy trial, the right to compulsory process, the right to confront witnesses, and the right to effective counsel. These constitutional rights are not aspirational. Every defendant is entitled to them. Unfortunately, the Government denied Defendant those rights by failing to meet its discovery obligations in this case. The Court is left with no viable remedy but to dismiss the charges with prejudice. Accordingly, Defendant's motion to dismiss is GRANTED.

[1] This Order supplements the Court's oral ruling given at the hearing on February 23, 2018.

[2] A December 15, 2016, press release announcing the DOJ's investigation of the Orange County District Attorney's office and Sheriff's Department is available at: <https://www.justice.gov/opa/pr/justice-department-opens-investigations-orange-county-california-district-attorney-s-office-0>.

[3] To make matters worse, the Government also imposed unreasonable restrictions on Defense counsel's review of the documents, requiring Defense counsel not to share or discuss the documents with Defendant. The Court is at a loss to understand how the Government can expect Defendant to meaningfully use the documents at the trial when he is not even allowed to look at them and discuss them with his counsel.

[4] Any lesser sanction would also constitute an endorsement of the Government's misconduct and the unwillingness to take responsibility for its actions. *See Chapman, 524 F.3d at 1088*. The Court repeatedly expressed its frustration with the Government's failure to accept and execute its discovery obligations to produce the material evidence to the defense in a timely manner. The Court also gave several warnings to the Government that its failure would be grounds to dismiss the charges. Nevertheless, the Government continued to disregard its constitutional obligations. Indeed, instead of accepting responsibility, the Government argued to the Court that if Defendant has difficulty in reviewing the materials, Defendant is free to request a continuance. Needless to say, the Government's argument reflects a callous disregard for Defendant's right to a speedy trial.

U S v. Aileman

165 FRD 571 (9th Cir 1996)

United States District Court for the Northern District of California

UNITED STATES of America, Plaintiff, v. Pius AILEMEN, et al., Defendants

165 F.R.D. 571

No. CR-94-0003 VRW (WDB)

Feb. 23, 1996

United States District Court, N.D. California.

\*572Theresa J. Canepa, C. David Hall, Stephen G. Corrigan, Asst. U.S. Attys., San Francisco, CA, for U.S.

Gail Shifman, San Francisco, CA, for Pius Alemen.

REPORT AND RECOMMENDATION RE MOTION BY DEFENDANT PIUS AILEMEN FOR PRETRIAL RELEASE  
ON GROUNDS OF DUE PROCESS

BRAZIL, United States Magistrate Judge.

I. INTRODUCTION

Defendant Pius Alemen was arrested twenty-six months ago on serious drug charges. He has been in jail since, detained without bail. As we explain below, it is virtually certain that at least nine more months will pass before Alemen's trial can be commenced and completed. Alemen contends that continued confinement would violate his due process rights.

II. PRELIMINARY FINDINGS OF FACT

*A Background*

1. This is the second time the government has brought drug charges against Pius Alemen. He was first indicted on drug-dealing counts in 1989.<sup>1</sup> In a 1990 trial on those charges a jury acquitted him of the alleged drug offenses, but convicted him on a passport fraud count. *See* 3/24/95 Report and Recommendation re Motion by Defendant Alemen to Dismiss on Grounds of Double Jeopardy (RRDJ) at 2-3.

2. The government resumed investigating Alemen's activities some time after his acquittal. On July 29, 1993, the government received court authorization to conduct a wiretap to aid its investigation. The government thereafter applied for and received five additional wiretap authorizations. To support each authorization after the first, the government filed affidavits which at least partially relied on wire communications that had been intercepted pursuant to earlier authorizations. *See* RRDJ at 3-8. The wiretap lasted almost five months and intercepted nearly 10,000 telephone conversations, many of which were in foreign languages. *See* 4/14/95 letter from Omni Interpreting; 3/20/95 order by Magistrate Judge Wayne Brazil (WB); 12/9/94 affidavit by Gail Shifman (GS).

3. Alemen was arrested in mid-December 1993. *See* transcript of 12/16/93 detention hearing before Magistrate Judge Patrick Attridge. He was indicted on drug-dealing charges; a July 11, 1994 superseding indictment charged him and fourteen co-defendants with forty-two drug-related counts. *See* 7/11/94 Superseding Indictment.<sup>2</sup> Alemen has been detained without bail since his arrest. *See* 1/25/94 WB hearing minutes; 12/16/93 detention hearing transcript.

4. It can be reasonably expected that a substantial period will pass between arrest and trial in a complex drug conspiracy case such as this one, because of the large number of defendants charged in the indictment, the large number of charges against the defendants, the volume of evidence in the case, and the presence of a number of complicated legal issues. However, the length of time that has passed since Alemen's arrest and that is expected to pass before he can be tried has been significantly extended by two main sets of circumstances. First, it is necessary to translate the wiretap tapes before Alemen's trial can take place and before suppression hearings on most of the wiretap authorizations can be held. Most of the translation work still needs to be done. Second, all the counts against Alemen except one were dismissed by the

district court pursuant to a decision that trying Alemen on \*573 those counts would violate the Double Jeopardy Clause of the Fifth Amendment. This decision has been appealed by the government — and at the trial court level the government's case against Ailemen has been stayed pending resolution of the appeal. Another factor contributing to the length of the pretrial period, albeit less significantly, was slowness by the prosecution in turning over certain discovery.

### B. *The Wiretap Tapes*<sup>3</sup>

5. Though some parts of the conversations that were wiretapped are in English, most of these communications were made in one or another of four different Nigerian languages. See 3/20/95 WB order; 12/13/94 letter from Loxy Amoni; 12/9/94 GS affidavit. The parties agree that all the wiretaps need to be translated into English and transcribed before this case can be tried. See 2/13/95 order by Judge Vaughn Walker (VW).<sup>4</sup>

6. Counsel for Pius Ailemen conducted a substantial search for persons or entities able and willing to undertake a translation project of this magnitude on a short timetable. That search included submitting samples of taped conversations to potentially interested parties. By late Spring of 1994 Ailemen's lawyer had secured a bid from a company that appeared competent. Armed with that bid, on May 16, 1994, Ailemen filed a request for authorization to expend Criminal Justice Act (CJA) funds for translation of the wiretap tapes. 12/9/94 GS affidavit.

7. The application that Ailemen initially submitted asked for \$334,913 in CJA funds and proposed assigning the translation project to Omni Interpreting, a California-based company. After reviewing the application for CJA funds, the district court forwarded it to the Federal Public Defender for suggestions about ways to reduce the cost of translation. The Federal Defender forwarded the application to the Administrative Office of the United States Courts for suggestions on cost minimization. Ailemen's counsel worked with the Administrative Office in an attempt to locate lower bids for the translation project. The efforts to reduce the cost of translation failed, and the Administrative Office stated in August that the amount of the original request was appropriate and that CJA funds would be available upon approval of the court.

8. Having received no response to his initial request, on August 9, 1994, Ailemen renewed his request for CJA funds for the translation project. On December 12, 1994, he renewed his request again. The district court authorized the expenditure of the CJA funds on December 27, 1994. The amount the court approved for the translation project was the same amount originally requested, and the project was assigned to Omni Interpreting, the company which was originally proposed.

9. While Omni had a translation team ready to do the project in May 1994, at least some of the members of that team were no longer available in early 1995, when Omni learned that it had been awarded the contract. The fact that Omni had to assemble an at least partly new team of interpreters further delayed commencement of the translation process.

10. On March 16, 1995, this court set a schedule for the translation and transcription of the tapes, dividing the project into six blocks, each corresponding to approximately \*574 one sixth of the taped conversations. 3/20/95 WB order. Under current estimates, it appears that about 15,000 minutes of wiretap tapes need to be translated and transcribed.<sup>5</sup> Translation of the entirety of the tapes was originally expected to take about six months. See 4/14/95 Omni letter; 3/16/95 WB hearing transcript at 62.<sup>6</sup>

11. On May 10, 1995, and again on May 31, 1995, this court ordered translation and transcription of the tapes to be stopped — in substantial measure because of the district court's rulings on and the government's subsequent appeal of the double jeopardy issues. 6/1/95 WB order; 5/10/95 WB minute order. To date, Omni has partially translated two of the tape blocks — but has not commenced substantive work on any of the remaining four blocks. Completing the translation and transcription of the tapes is expected to take an additional five months.<sup>7</sup>

### C. *The Double Jeopardy Issue*

12. In September 1994, the Court of Appeals for the Ninth Circuit issued an important and largely unpredicted ruling that appeared to offer many defendants opportunities to challenge the prosecutions against them under the Double Jeopardy Clause of the United States Constitution — *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir.1994), *opinion amended and reh'g denied*, 56 F.3d 41 (9th Cir.1995), *cert. granted sub nom. United States v. Ursery*, — U.S. —, 116 S.Ct. 762, 133 L.Ed.2d 707 (1996). *\$405,089.23* allowed certain defendants to argue that the charges against them should be dismissed on the grounds that they were previously punished for the charged offenses through forfeiture proceedings where they lost property allegedly used in the commission of the offenses. On October 24, 1994, Dele Ailemen, a co-defendant and the defendant's brother, filed a motion to dismiss the counts against him on grounds of double jeopardy based on *\$405,089.23*. 10/24/94 Motion to Dismiss Indictment with Prejudice for Violation of

Double Jeopardy Clause. On February 7, 1995, Pius Ailemen filed a similar motion. 2/7/95 Motion to Dismiss Superseding Indictment Based upon Double Jeopardy.

13. The district court referred these motions, along with all other pending motions, to this court on February 13, 1995. 2/13/95 VW order. On March 24, 1995, this court recommended that Pius Ailemen's double jeopardy motion be granted and that all counts against him be dismissed. RRDJ at 56. On May 9, 1995, the district court accepted this court's recommendation in part, dismissing all counts against Ailemen except count 41, a money laundering count. See 5/9/95 VW hearing minutes.

\*57514. On May 24, 1995, the prosecution appealed the district court's double jeopardy rulings (except, of course, the decision permitting the government to proceed on the money laundering count). 5/24/95 Notice of Appeal. On the same day, the district court stayed (pending disposition of the appeals of the double jeopardy rulings) all trial court proceedings on the one count (money laundering) that remained within its jurisdiction. 5/24/95 VW hearing minutes. Ailemen did not object to this stay. See 5/24/95 VW hearing transcript at 17-18. On June 1, 1995, Ailemen cross-appealed the district court's decision not to dismiss the money laundering count. 6/1/95 Notice of Appeal.

15. On August 4, 1995, the Court of Appeals for the Ninth Circuit issued its opinion in *United States v. Cretacci*, 62 F.3d 307 (9th Cir.1995), holding that a defendant could have no double jeopardy claim if he had failed to file a claim in an earlier forfeiture proceeding against property in which he claimed an interest. Pius Ailemen never filed a claim in the proceedings through which the property he claimed was forfeited. RRDJ at 14. Thus, since early August of 1995 it has appeared quite likely that the district court's decision dismissing most of the charges against Ailemen will be reversed. However, as of this writing, the appeal of the district court's double jeopardy decision in this case has not been scheduled for oral argument or assigned to a panel.<sup>8</sup> If oral argument takes place, it will not occur before April 1996. See tape No. CR 96-1 of 1/30/96 WB hearing.<sup>9</sup>

#### D. Discovery

16. Ailemen alleges that the discovery necessary for him to prepare a suppression motion attacking the initial wiretap authorization was not turned over by the government until July 1994, nearly seven months after his arrest. See 12/19/95 Supplemental Memorandum in Support of Motion for Pre-Trial Release at 6,18. The government does not dispute this assertion. While it is difficult to determine from the record exactly what discovery was turned over when, and to what extent the government may have improperly delayed turning over discovery, we note the following events.

17. On February 24, 1994, Ailemen orally moved for discovery. On that same date the district court ordered the government to produce a list of the codewords allegedly used by the defendants to refer to illicit substances, as well as a list of pertinent taped phone calls. Minutes of 2/24/94 VW hearing. On April 14, 1994, Ailemen filed several discovery motions. See 4/14/94 Motion for Disclosure of Informant Information; 4/14/94 Motion for Production of Electronically Stored Information; 4/14/94 Motion for Production of Discovery and for Disclosure of Exculpatory Evidence. On May 13, 1994, the government filed motions opposing some of Ailemen's discovery requests. See 5/13/94 Opposition to Motion for Disclosure of Infor\*576mant Information; 5/13/94 Response re Motion for Production of Discovery, re Motion for Disclosure of Exculpatory Evidence; 5/13/94 Response re Motion for Production of Electronically Stored Information.

18. At a May 26, 1994 hearing, the district court expressed its displeasure with the pace at which the government was turning over discovery and with the government's failure to turn over certain discovery materials necessary for Ailemen's wiretap suppression motion. The court suggested that the government was engaging in "gamesmanship." See 5/26/94 VW hearing transcript at 151-58; see also *id.* at 159-75. Based on the aforementioned events, it appears that for several months the government resisted turning over some discoverable materials that the defense needed to prepare for the wiretap suppression motion.<sup>10</sup>

#### E. Pretrial Release Motion

19. Ailemen filed a motion for pretrial release on May 23, 1995. 5/23/95 Motion for Pretrial Release. He argued that release was mandated both by the Bail Reform Act of 1984, 18 U.S.C. §§ 3141-56 (1988), and by the Due Process Clause of the Fifth Amendment. See 1/24/95 Memorandum in Support of Motion for Pre-Trial Release.

20. The court's Pretrial Services Agency prepared a report about Pius Ailemen on June 28, 1995. This report stated that Ailemen was born in Nigeria, but had lived in the San Francisco Bay Area since 1981. Ailemen travelled to Nigeria once after 1981, in 1988, for three months. Ailemen has a brother and a half-sister who live in Los Angeles. His parents and six of his siblings or half-siblings live in Nigeria. 6/28/95 Pretrial Services Report.

The report also disclosed that Ailemen has never established legal residency in the United States, and that INS proceedings against him have been initiated but put on hold pending resolution of the criminal charges he faces. Not including the instant case, Ailemen's criminal history consists solely of his 1990 passport fraud conviction, which arose out of his 1989 arrest, principally on drug charges. His Nigerian passport was seized during the 1989-90 criminal proceedings. *Id.*

The Pretrial Services report concluded that while Ailemen poses some risk of flight, that risk could be minimized by the imposition of appropriate conditions. The report noted that Ailemen has never been convicted of a violent offense, and that any danger he poses to the community could also be minimized by appropriate conditions. The report recommended that Ailemen be released on a \$100,000 personal recognizance bond with certain conditions. *Id.*

21. On July 28, 1995, considering only his motion under the Bail Reform Act, and not ruling on his Due Process Clause arguments, I ordered Ailemen released to a half-way house under strict conditions, including a \$300,000 personal recognizance bond cosigned by five employed individuals. *See* tape No. CR 95-28 of 7/28/95 WB hearing.<sup>11</sup>

22. The government moved for reconsideration of this order before the district court. 7/31/95 Motion for Reconsideration of Magistrate's Pretrial Release Order. The district court reversed this court's release decision, \*577 ordering that Ailemen's pretrial detention continue. Minutes of 7/31/95 VW hearing. However, the district court stated that it would reexamine Ailemen's pretrial release motion if Ailemen could present a surety or sureties who would post a significant amount of property which would be subject to immediate forfeiture if Ailemen were to violate any pretrial release conditions. Transcript of 7/31/95 VW hearing at 20.

23. On September 21, 1995, and again on December 19, 1995, Ailemen filed supplemental memoranda which further developed his argument that due process mandates an end to his pretrial detention. 12/19/95 Supplemental Memorandum in Support of Motion for Pre-Trial Release; 9/21/95 Supplemental Memorandum of Points and Authorities in Support of Motion for Pre-Trial Release.

Last fall, when I expected a ruling very shortly from the Ninth Circuit on the double jeopardy appeals, I indicated that, if pressed, I probably would recommend that the district court deny Ailemen's due process motion. *See* tape No. CR 95-50 of 9/22/95 WB hearing. I asked for additional information about which players in the litigation drama were chargeable with responsibility for the passage of so much time before the trial of this matter. Since then, months have passed. I have re-examined the authorities. For reasons set forth at length below, I have concluded that what was a close case in September of 1995, when I thought the Court of Appeals would return this prosecution promptly to the trial track, is no longer a close case. I am recommending that the District Court hold that it would violate Pius Ailemen's rights under the Due Process Clause to continue his pretrial detention in jail instead of in a half-way house.

The next order of business is to examine in detail the law on which the due process motion must be resolved.

### III. LAW

It is clear that long pretrial detentions, at least in some circumstances, can violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States. *See, e.g., United States v. Millan*, 4 F.3d 1038, 1043 (2d Cir.1993); *United States v. Gelfuso*, 838 F.2d 358, 359-60 (9th Cir.1988); *United States v. Gonzales Claudio*, 806 F.2d 334, 339 (2d Cir.1986), *cert. dismissed*, 479 U.S. 978, 107 S.Ct. 562, 93 L.Ed.2d 568 (1986); *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir.1986). What is appreciably less clear, however, is the structure of the analytical process courts should use to determine, in a particular case, whether continued detention of a given defendant would violate that clause. To reduce the likelihood that we will err in our effort to identify that structure, we will begin by examining the sources of the due process limits on pretrial detention.

The Due Process Clause states that "[n]o person shall ... be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. The Due Process Clause has long been understood as having both a procedural component,

which prohibits deprivations of life, liberty, or property without adequate procedural safeguards, and a substantive component, which prohibits the government from abridging certain rights under any circumstances. *See, e.g., Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).

The constitutional ban on excessive pretrial detention can be understood as a right guaranteed by substantive due process. Substantive due process protects “ ‘personal immunities which’ ... are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ ... or are ‘implicit in the concept of ordered liberty.’ ” *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 208, 96 L.Ed. 183 (1952) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934); *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937)).

Identifying those personal immunities which are “implicit in the concept of ordered liberty” or are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” is not always an analytically straightforward undertaking. It is clear, however, that such rights are not limited to those that are expressly enumerated in the first eight amendments to the Constitution; \*578 were this not the case, the concept of substantive due process would be wholly unnecessary surplusage (as would the Ninth Amendment). *See, e.g., Moore v. East Cleveland*, 431 U.S. 494, 501-04, 97 S.Ct. 1932, 1936-38, 52 L.Ed.2d 531 (1977).

One way to remain rooted in the text of the Constitution as we attempt to identify those *un* enumerated rights that the substance of due process protects, or, stated differently, one way to guard against the possibility that identifying such rights could degenerate into undisciplined judicial subjectivity, is to insist on a clear and close connection between enumerated fundamental rights and those unenumerated immunities that also warrant protection directly by the Constitution itself. Thus, immunities that are “implicit in the concept of ordered liberty” may include unenumerated rights that it is necessary to protect in order to assure that one or more of the fundamental rights that are enumerated in the Constitution will remain viable and meaningful. The enumerated fundamental rights that are squarely implicated by Pius Ailemen’s invocation of substantive due process include the Sixth Amendment’s provision that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial” and the Eighth Amendment’s prohibition against “[e]xcessive bail”. Ailemen’s motion also squarely implicates another concept that, while not enumerated in an amendment to the Constitution, nonetheless is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” That concept, which has served as the cornerstone of our system of criminal justice, is that an accused must be presumed innocent until proven guilty. *See, e.g., United States v. Gatto*, 750 F.Supp. 664, 672 (D.N.J.1990); *United States v. Gallo*, 653 F.Supp. 320, 341 (E.D.N.Y.1986).

What we must recognize as we proceed with our analysis in this matter is that these indisputably fundamental rights — the right to a speedy trial, the protection against excessive bail, the presumption of innocence — all would be empty pronouncements, full of sound and fury but signifying nothing, for a defendant who could be imprisoned indefinitely while awaiting trial.

The issue here is not, of course, whether some pretrial detention, by itself, violates substantive due process. The United States Supreme Court put that question to rest in *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987), holding that limited pretrial detention does not violate due process so long as it is “regulatory” and “not penal.” In *Salerno*, the Supreme Court rejected a facial challenge to the constitutionality of a Bail Reform Act provision permitting pretrial detention based on potential dangerousness to society, 18 U.S.C. § 3142, ruling that some detention, so premised, would not, by itself, constitute “impermissible punishment” instead of “permissible regulation.” *Id.* at 747, 107 S.Ct. at 2101.

Significantly, the *Salerno* court expressly stated that it was intimating “no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.” 481 U.S. at 747 n. 4, 107 S.Ct. at 2102 n. 4. Thus the high court acknowledged that there could be a point, in a particular case, where the length of pretrial confinement could become excessive “*in relation to Congress’ regulatory goal.*” Such excessive confinement would be deemed punitive and would offend due process constraints. Thus *Salerno* provided an analytical framework for shaping our inquiry at the most general or abstract level. Under this seminal opinion, we are to identify the regulatory goals that pretrial detention can be said to serve (in a particular case), determine how long the pretrial detention will be, then make a judgment about whether the length of that detention is excessive in relation to those regulatory goals.

While the *Salerno* opinion did not say so explicitly, we infer from subsequent court of appeals decisions that what the courts are called upon to do in these settings is to conduct a balancing analysis in which the following components are on the scales. First, on the government's side of the scale, the courts (1) identify the regulatory goal or goals that detention of the particular defendant can be said to serve, and (2) assess the magnitude or extent of the contribution to<sup>579</sup>ward achieving those goals that the detention in question appears likely to make. Second, on the defendant's side of the scale, the court determines how long the pretrial detention will last. Finally, the court makes a judgment about whether the length of that detention outweighs (is "excessively prolonged ... in relation to"<sup>12</sup>) the interests that have been identified and measured on the government's side of the scales.

This sounds fairly straightforward until one tries to do it. The rub, of course, is that the Supreme Court has given us essentially no guidance about how, or through what criteria, to conduct that ultimate balancing-comparison. How do we value or ascribe weight to different lengths of confinement? Does that process vary with or depend at all on characteristics or circumstances of the individual defendant (e.g., should it matter whether the defendant is old, ill, or the kind of person who suffers more in confinement than most others)? More significant, when we compare apples (the government's regulatory interests) with oranges (the length of pretrial detention), how do we ascribe *relative* value to each? How do we determine their relative weight? And is the balancing analytically open-minded, or does it start with the scales pre-weighted in some measure (how much?) in favor of the government (whose detention law, *Salerno* and other courts have held, is clearly supportable, in the abstract, by important governmental interests)?

Because the *Salerno* opinion did not purport to answer these difficult questions, and because our task involves, centrally, identifying norms that are deeply rooted in our socio-political traditions, we must look for guidance in the many decisions where courts of appeals or district courts have tried to solve these problems. We look to these opinions, in part, as sources of evidence about what "the traditions and conscience of our people" have to say about the relative value of the interests we must compare. In short, we are looking for messages from the heart of our society — messages about intangibles, about values and interests that cannot be measured physically, but only philosophically or politically. And because this is fundamentally a search for our society's conscience, for truly collective norms, it is improper for me simply to ascribe the weights to the competing interests that I personally think the interests deserve. To be lawful, these assessments cannot be personal; they must be societal.

Before turning to our examination of the pertinent cases, we should pause to characterize at a general level the doctrinal landscape through which we will be travelling. As we will demonstrate below, we believe that it is possible to find, in most of the pertinent cases, a pattern — both of analysis and outcome. It is that pattern, something akin to a center of legal gravity, on which we rely most in forming our recommendations about how to resolve Pius Ailemen's motion. We think the law compels us to rely on this pattern — because, again, we are directed (in substantive due process analysis) to look for central societal norms.

But we hasten to acknowledge that there are a fair number of reported opinions that do not appear to fit within the patterns we identify. There are some that would suggest different ways of thinking about the ultimate issue before us, and some that would ascribe different weights to the interests here in competition. In other words, we have not been able to generate a coherent system that would reconcile *all* the judicial pronouncements in these kinds of cases. This is not surprising. We are dealing, after all, with issues and norms that are more resistant than most to definitional precision and to linear reasoning, and that are more susceptible than most to influence by personal values. Despite the undeniable presence of the cases that fail to fit, however, we believe that there is a pattern at the center of this area of doctrine — and it is that pattern at the center on which our analysis turns.

•What are the "regulatory interests" that the cases have identified that could serve as justifications for pretrial detention? The interest that *Salerno* identified consists of "preventing danger to the community" (protecting society from dangerous persons). <sup>580</sup>*Id.* at 747, 107 S.Ct. at 2101. Interests that other courts have identified include assuring that the defendant will not flee before trial and preventing the defendant from jeopardizing the trial process through acts such as threats against witnesses. *See, e.g., Millan*, 4 F.3d at 1043; *United States v. Melendez-Carrion (Melendez-Carrion I)*, 790 F.2d 984, 1002 (2d Cir.1986).

Clearly, each of these interests is important. In the abstract, their importance would deliver considerable weight to the government's side of the scales. As we explain in detail below, however, it is not simply the abstract significance of these kinds of interests that the courts use when they measure the weight on the government's side of the scale. Rather, the courts also attempt to analyze, separately for each regulatory goal, *how much* the continued detention of the particular

defendant who is pressing the due process challenge is likely to contribute to achieving the regulatory objective that is under consideration. Since some defendants pose no threat to one or even two of the three acknowledged goals, detaining such defendants can contribute nothing to preserving those unthreatened interests. Other defendants may pose extraordinarily clear and immediate threats to all three regulatory objectives — so that their continued detention would contribute greatly to all of those ends.

It also is extremely important to emphasize here a point that seems to have been overlooked in some of the reported opinions. When courts assess the magnitude of the threat that an individual defendant poses to the government's regulatory interests, we think that the proper focus is not on how big that threat would be if the defendant were released on np conditions, but, instead, the focus should be is on how big that threat would be if the defendant were released on stringent conditions aimed at reducing as much as possible the likelihood of harm to the threatened regulatory interests. In other words, the issue is not how much threat the defendant would pose if he were as free as any law-abiding citizen, but how much threat he would pose if he were released on the most restrictive available conditions (e.g., 24-hour confinement to a half-way house, electronic monitoring, a high bail guaranteed by people close to the defendant, random searches without probable cause, unannounced substance abuse testing, etc.). It is only by focusing on the actual conditions of release, and what those conditions would contribute to *reducing* the threat of harm to the government's regulatory interests, that courts can accurately assess how much continued imprisonment would contribute to achieving the government's regulatory goals.<sup>13</sup>

Reflecting on these considerations, it is clear that there is a huge range of circumstances that different defendants can present vis-a-vis the government's regulatory goals. That range of circumstances makes it essential, as most of the authorities repeatedly emphasize, that due process analysis proceed on a case-by-case basis. *See, e.g., Gelfuso*, 838 F.2d at 359. So there is no bright-line limit, applicable in all settings, on the length of detention pending trial. *See, e.g., Gonzales Claudio*, 806 F.2d at 340; *United States v. Melendez-Carrion (Melendez-Carrion II)*, 820 F.2d 56, 59 (2d Cir.1987). *But see Accetturo*, 783 F.2d at 396 (Sloviter, J., dissenting in part) (suggesting that supervisory power of courts be used to establish fixed time limits on pretrial detention).

The weakness of any case-by-case balancing approach, however, is that it can vest excessive discretion in judges and lead to inconsistent decision-making.<sup>14</sup> It is because we want to reduce that risk as much as possible, and because our charge is to find central societal norms, that we have conducted the detailed analysis of the relevant authorities that we present below. Along the \*581 way, we try to identify which factors carry greater weight under various circumstances. At the outset, we point out that most courts, when responding to due process motions of this kind, have tended to focus principally on three factors: (1) the non-speculative length of expected confinement; (2) the extent to which the government (the prosecution and/or the court system) bears responsibility for pretrial delay; and (3) the strength of the evidence indicating a risk of flight, a threat to the trial process, and/or a danger to the community. *See, e.g., Millan*, 4 F.3d at 1038; *Melendez-Carrion II*, 820 F.2d at 59; *Gonzales Claudio*, 806 F.2d at 340; *Accetturo*, 783 F.2d at 388; *Gallo*, 653 F.Supp. at 338.<sup>15</sup> In addition, some courts, in some circumstances, have compared the length of the likely sentence faced by the defendant to the length of the pretrial detention (in general, the closer the length of pretrial detention gets to the probable sentence, the more likely the courts are to find a due process violation). *See United States v. Shareef*, 907 F.Supp. 1481, 1484 (D.Kan.1995); *United States v. Lofranco*, 620 F.Supp. 1324, 1325 (S.D.N.Y.1985), *appeal dismissed*, 783 F.2d 38 (2d Cir.1986).

There is one court of appeals that has broken away from the balancing approach by focusing on and ascribing (in some circumstances) dispositive weight to only one of the factors described in the preceding paragraph. In *United States v. Infelise*, 934 F.2d 103, 104-05 (7th Cir.1991), the Seventh Circuit suggested that no defendant, regardless of how long he had been confined, could even begin to mount a due process challenge to his pretrial detention unless he could show, as a threshold requirement, that government action had in fact unnecessarily delayed the trial.

If judge and prosecutor are doing all they reasonably can be expected to do to move the case along, and the statutory criteria for pretrial detention are satisfied, then we do not think a defendant should be allowed to maintain a constitutional challenge to that detention. To get to first base, therefore, he must show that either the prosecution or the court has unnecessarily delayed in bringing the case to trial.

According to the Seventh Circuit, "the formulation ... suggested explains the cases." 934 F.2d at 105.

Perhaps because we have the advantage of a substantially larger pool of cases (all those decided since the spring of 1991), we do not share the view that the Seventh Circuit's "formulation ... explains the cases." As our forthcoming detailed

description of the pertinent authorities makes clear, the analysis that the vast majority of courts conduct reaches well beyond this one factor. Nor do we understand how such a single factor bar to due process claims could be squared with the Supreme Court's position in *Salerno* that the focus of the due process inquiry is to be on whether the length of the pretrial detention has become "excessively prolonged ... *in relation* to Congress' regulatory goal." See 481 U.S. at 747 n. 4, 107 S.Ct. at 2102 n. 4 (emphasis added). The high court clearly demands that we engage in an analysis that *compares* competing considerations, not that isolates one factor and assigns it dispositive power. Even absent a showing that the government unnecessarily delayed getting the case to trial, surely we would be required to at least consider a due process challenge by a defendant whose pretrial detention had lasted for years, whose maximum sentence could include no additional time in custody, and whose detention under the Bail Reform Act was a close question.<sup>16</sup> It is telling that no \*582reported opinion outside the Seventh Circuit has adopted a view that it is impossible, as a matter of law, to mount a due process challenge to the length of pretrial confinement without first showing that the government's conduct unnecessarily delayed commencement of trial.<sup>17</sup>

The one very brief pronouncement on these matters from the Court of Appeals for the Ninth Circuit accepted the balancing, case-specific approach that was then still being developed in the Second Circuit. In *Gelfuso*, the Court of Appeal for this Circuit declared:

Like the Second Circuit, we find that the due process limit on the length of pretrial detention requires assessment on a *case-by-case basis*. *United States v. Gonzales-Claudio*, 806 F.2d at 340. We consider the *length of confinement in conjunction with the extent* to which the prosecution bears responsibility for the delay that has ensued. *Id.*

838 F.2d at 359 (emphasis added).

It is clear from the passage just quoted, and from *Gonzales Claudio*, 806 F.2d at 340, the Second Circuit opinion on which the quoted passage relies, that the Court of Appeals for this Circuit has not concluded that no due process claim can exist unless the government has caused unnecessary delays. I also infer that the *Gelfuso* court did not intend to imply, in this summary statement, that only the two factors specifically mentioned could be considered in due process analysis. Clearly the *Gelfuso* panel endorsed the approach taken in *Gonzales-Claudio*, and in that opinion the Second Circuit expressly endorsed the view that courts also should consider the strength of the evidence justifying the detention decision under the Bail Reform Act. See 806 F.2d at 340. Thus the Seventh Circuit's "formulation" in *Infelise* does not accurately represent the law of this Circuit — which, instead, runs with the mainstream by insisting on a real balancing analysis.

We turn now to our detailed review of the pertinent authorities. The pattern we find in them (we concede, again, that there are decisions that do not fit) can be summarized as follows. It appears that the cases fall into three groups, which are separated from one another primarily (but not precisely) by the length of the expected pretrial detention. In the first group, the length of detention already served, or of non-speculative expected detention, is relatively short, between about six months and a year. In this setting, many courts refuse even to entertain due process challenges, concluding that the issue is not ripe. Generally, these courts announce this position without conducting a full analysis of the three main factors used in the balancing approach.

By contrast, when expected detention is of medium length, between just under a year and about two years, courts usually examine, in some detail, all three of the main factors in the balancing approach. In this group of opinions, however, there appears to be some (soft) correlation between the findings about the presence or absence of unnecessary delay that is chargeable to the government and the outcomes of the due process analyses. In many (but not all) of the cases that fall into this middle group, the courts seem inclined to find a violation of the due process clause if they find that the government was responsible for substantial delay, but when the courts find that the government is not chargeable with any significant portion of the delay they are less likely to grant the defendant's motion.

The third and final group is the most important for our purposes. It consists of cases where the expected pretrial detention is very long, more than two years. In this \*583category, the courts, with *one* notable exception, have upheld the defendant's detention only if the government did not bear responsibility for any significant portion of the delay *and* there were special circumstances indicating that the risk of harm to the government's interests (preventing flight, danger to the community, or threat to the judicial process) was extraordinarily acute.

We turn now to our detailed examination of the cases in the groupings just described.

Several courts have rejected due process challenges to pretrial detention, without undertaking a full analysis of the three main factors discussed above, on the grounds that the length of detention already served, or the non-speculative length of future detention, ' was too short to make the due process inquiry ripe. For example, in *Accetturo*, the defendants' trial was set to start six months after detention began. 783 F.2d at 383, 387. The court ruled that the defendants' "demand for stronger due process protections for detainees awaiting distant trials is ... better met farther down the procedural road." *Id.* at 388.

Likewise, in *United States v. Tortora*, 922 F.2d 880, 889 (1st Cir.1990), the defendant had been confined for more than half a year as of December 1990, his trial was not expected to start until early 1991, and the trial was expected to last up to eight months. The court held that "[a]t this stage of the proceedings, [the defendant's] incarceration ha[d] not been so protracted as to support a due process claim." *Id.*

See also *United States v. Portes*, 786 F.2d 758, 768 (7th Cir.1985) (due process challenge held "premature" where defendant had been detained six months at time of decision); *United States v. Colombo*, 777 F.2d 96, 96-97, 100 (2d Cir.1985) (due process determination "premature" where defendant detained seven months at time of decision and expected to be detained thirteen months to two years before completion of trial); *United States v. DiGiacomo*, 746 F.Supp. 1176, 1182 (D.Mass.1990) (due process violation "has not yet occurred" in case where defendants already incarcerated for four months and trial not expected to be completed for another year).

Turning to the second group of cases, where expected detention was of medium length, between about nine months and two years, we find courts usually discussing all three of the main factors of the balancing analysis — length of delay, responsibility for unnecessary delay, and flight/dangerousness. In some cases, they have discussed additional factors, such as the relationship of the length of pretrial detention to the length of the prison sentence the defendant would face if convicted. Though these cases usually do not state that the presence or absence of unnecessary delay (attributable to the prosecution or the judiciary) plays any special analytical role, as we noted, above, there appears to be some correlation between that factor and the outcomes of the cases. This may reflect a feeling in some courts that they can be fairly confident that detention is being pressed primarily to achieve legitimate regulatory goals only as long as it appears that the prosecution is not unnecessarily protracting the pretrial period. The Ninth Circuit's decision in *Gelfuso* stands as an example of a case approving expected detention of medium length in the context of finding no governmental responsibility for delay. In that matter the defendants' trial was scheduled to begin nine or ten months after their detention began. 838 F.2d at 859. The court found that the government was not responsible for any appreciable portion of the pretrial delay, as the government had denied the defendants access to evidence for only a short period while the tapes of intercepted conversations were being copied. *Id.* The court ruled, without much developed consideration, that in these circumstances due process permitted continued detention. *Id.*

Another example is *United States v. Zannino*, 798 F.2d 544 (1st Cir.1986). In that case, trial was delayed primarily because the defendant, an alleged mafia leader, had suffered a heart attack. Time passed while a determination was being made concerning whether he was fit to stand trial. *Id.* at 545-48. Even though his trial would not begin until at least sixteen months after his detention had begun, the court found that he was "palpably dangerous" to society, noted that the government had done all it could to bring \*584the case to trial expeditiously, and asserted that a defendant should not go free simply because he happened to suffer a physical disability. These considerations led the court to hold that continued detention did not violate the defendant's rights under the Due Process Clause. *Id.* at 547-49.<sup>18</sup>

See also *United States v. Orena*, 986 F.2d 628, 630-32 (2d Cir.1993) (continued detention permitted where defendant detained nine months until start of trial, government not responsible for delay, defense counsel declined offer to accelerate trial date, and defendant's violent mafia activities presented great danger to society); *Infelise*, 934 F.2d at 105 (continued detention approved where defendants expected to be detained two years until end of trial, as delay was caused by time defense counsel took to prepare defense and neither prosecution nor court system were implicated in delay); *United States v. Quartermaine*, 913 F.2d 910, 916-18 (11th Cir.1990) (pretrial detention continued where defendants would be detained eight to ten months before start of trial, evidence of risk of flight and danger to society strong, and no mention made of any government action causing delay of trial); *United States v. Jackson*, 823 F.2d 4, 7-8 (2d Cir.1987) (challenge to pretrial detention denied where detention would last at least eight months until trial, trial postponed at defendant's request, government did not bear significant responsibility for delay, and "very strong showing of risk of flight" made); *United States v. Berrios-Berrios*, 791 F.2d 246, 253-54 (2d Cir.1986) (detention allowed to continue where defendant posing risk of flight detained eight months and delay exacerbated by defendants' many motions), cert. *dismissed*, 479 U.S. 978, 107 S.Ct. 562, 93 L.Ed.2d 568 (1986); *Shareef* 907 F.Supp. at 1485-87 (continued detention of two defendants presenting

significant risk of flight and substantial danger to community approved, where defendants detained nine months at time of decision, and delay caused by legitimate appeal by prosecution; appeal did not constitute government responsibility for delay); *United States v. Gotti*, 776 F.Supp. 666, 667, 672 (E.D.N.Y.1991) (due process challenge to detention rejected where mafia defendant posing strong danger to community detained ten months at time of decision and delay not attributable to government).

In another subgroup of cases in this set— where expected detention was of medium length, between about nine months and two years — the courts have concluded that the government was responsible for at least a non-trivial portion of the pretrial delay. In these matters the courts generally (though not uniformly) have ordered the defendants released — finding that to continue to detain them would violate their due process rights. Again, however, en route to these conclusions, the courts usually discuss and assess *all* of the factors involved in the balancing analysis — and none of these opinions explicitly confirms the presence or absence of unnecessary delay to be the determinative factor.

One interesting case from this subgroup is *United States v. Vastola*, 652 F.Supp. 1446 (D.N.J.1987), which was decided a few months before the Supreme Court issued its opinion in *Salerno*. In *Vastola* the defendants whose due process motion was the subject of the court's attention were expected to be in jail eighteen months without a determination of guilt or innocence (the two petitioners were among 21 defendants who were charged in a 117-count indictment). The court found that the multiple causes of the trial being delayed included, among others, the fact that the government had been slow in providing tapes and transcripts of wiretap recordings to defense counsel and had failed to facilitate review of the tapes by providing an index to their contents. *Id.* at 1448. In part because the government bore responsibility for some of the delay, in part because the court believed that it could impose conditions on the defendants' release that would reduce appreciably the likelihood that they would pose a danger to the community (there is no indication that the court felt that release would threaten the government's interests in preventing flight or harm to the judicial process), and "most importantly [because of] the heightened infringement of defendants' liberty interest resulting from the enlargement of time," the Court held that continued detention would offend due process. *Id.* at 1447. While the *Vastola* court's characterization of the analytical role played by the length of detention<sup>19</sup> might have been modified after *Salerno*, there is no reason to believe that the court would have reached a different outcome, especially given its views about how the threats to the government's interests could be reduced by imposing conditions on pretrial release.

For other cases in this middle group where courts attended with more than passing analytical interest to the role the government played in delaying the march of the case toward trial, see *United States v. Theron*, 782 F.2d 1510, 1512, 1516 (10th Cir.1986) (where defendant expected to be detained ten to fourteen months until end of trial, delay caused by complexity of co-defendants' cases, and court denied defendant's request for severance and immediate trial, court rules that "serious constitutional questions" would arise unless it construed Speedy Trial Act, 18 U.S.C. §§3161-74 (1988), as requiring release or trial within thirty days); *United States v. Chen*, 820 F.Supp. 1205, 1209-11 (N.D.Cal.1992) (court orders release under Bail Act and suggests continued detention would present due process problem, where defendants already detained for one year, future expected detention indefinite but lengthy, delay caused by government appeal of suppression of a videotape which court found "add[ed] little to the government's case," defendants posed no serious danger to community, and release conditions sufficiently minimized risk of flight). *But see United States v. Majeed*, 807 F.Supp. 357, 358-59 (S.D.N.Y.1992) (court permits continued detention where defendant expected to be confined for ten months including trial, even though government responsible for some of delay because it filed superseding indictment and requested extension of time to turn over discovery in order to protect witness identities, as defendant's intimidation of witnesses posed threat to trial process, but court states that any further delay will lead to revocation of detention order), *aff'd*, 48 F.3d 1213 (2d Cir.1994).<sup>20</sup>

There are cases in this subset, however, where courts have ruled that due process required release even without a finding that the prosecution or courts had caused any unnecessary delay. See *Shareef*, 907 F.Supp. at 1484-85 (due process requires release of defendant detained nine months where case delayed because of necessary appeal by prosecution, defendant likely to serve only eighteen to twenty-four months if convicted, defendant had strong ties to community, and only danger defendant posed to community was economic; two co-defendants facing longer potential sentences and posing stronger risk of flight not released); *Gallo*, 653 F.Supp. at 343-45 (where defendant who had apparently made threats against witnesses was expected to be detained for eight months before beginning of long trial, court rules due process will not permit detention to continue, finding that while pretrial delay was not attributable to any fault in the government's motives or conduct, the government nonetheless bore some responsibility for delay because of volume of evidence involved and legal complexity of case); *Lofranco*, 620 F.Supp. at 1325-26 (focusing mainly on length of delay, court rules continued detention would violate due process where defendant expected to be jailed for nine and one

half months without a trial, despite fact that defendant posed risk of flight and danger to trial process and community, and even though no mention made of any government responsibility for delay).

*See also Melendez-Carrion I*, 790 F.2d 984 (controlling opinion in panel split three ways rules unconstitutional pretrial detention lasting eight months and justified by potential danger to society); *United States v. Frisone*, 795 F.2d 1, 2 (2d Cir.1986) (under *Melendez-Carrion I*, pre-trial detention of defendant for twelve months solely on grounds of dangerousness unconstitutional); *United States v. Hall*, 651 F.Supp. 13, 16 (N.D.N.Y.1985) (release ordered under Bail Act where defendant detained six months with pretrial motions still pending; court states that continued detention would raise serious constitutional questions).<sup>21</sup>

For purposes of deciding the instant motion, the most important group of cases consists of those where expected detention was two years or more. With one notable exception, *Millar*, 4 F.3d 1038, continued detention has been approved in such cases only where the prosecution or court was not responsible for any significant unnecessary delay and the threat to the government's regulatory interests that would have been posed by release of the defendant would have been extraordinarily acute, even, presumably, if stringent conditions on the release had been imposed. This pattern is well illustrated by examining three cases which dealt with the same criminal act, a robbery of a Wells Fargo depot by an alleged terrorist group dedicated to Puerto Rican independence — *Gonzales Claudio*, 806 F.2d 334; *Melendez-Carrion II*, 820 F.2d 56; and *United States v. Ojeda Rios*, 846 F.2d 167 (2d Cir.1988).<sup>22</sup>

In *Gonzales Claudio*, the court ruled that due process required the release of some of the defendants charged in the Wells Fargo robbery. 806 F.2d at 343. The expected length of detention through the end of trial was twenty-six months. *Id.* at 341. The court found that the prosecution bore significant responsibility for the pretrial delay, because it failed to expeditiously provide translation of wiretap tapes, delayed in disclosing videotape evidence to the defense, and had not turned over all discoverable materials. *Id.* at 342. Thus, even though circumstances such as the defendants' ties to an alleged terrorist organization created a significant risk that the defendants would flee, continued detention was not permitted. *Id.* at 343.

In *Melendez-Carrion II*, on the other hand, the court refused to permit release of two other defendants allegedly involved in the same Wells Fargo robbery. 820 F.2d at 61. The two had been expected to be detained thirty-two months before a trial could be concluded. *Id.* at 60. After *Gonzales Claudio* was decided by the court of appeals, the district court in which the case was pending made additional findings of fact. It concluded (in findings the court of appeals later accepted) that the government was not responsible for any significant portion of the delay. *Id.* The trial court also found that the two defendants who were petitioning for release had a record of prior flight and did not have strong ties to the community, and the court of appeals accepted these findings. *Id.* at 61. Given the clarity of the threat to the government's interests and the fact that \*587no delay was chargeable to the government, the court of appeals ruled that continued detention would not violate due process. *Id.*

*Ojeda Rios*, 846 F.2d 167, dealt with the last defendant charged in the robbery still detained before trial, one of the two who had failed to win release in *Melendez-Carrion II*. At this point, trial was not expected to begin until thirty-six months after detention began and was expected to take "many months." *Id.* at 169. While the court stated that most of the responsibility for the delay lay with zealous defense counsel, the court noted that the government had been reluctant to agree to a severance for the defendant still detained. *Id.* Though there did not appear to be any changes in the circumstances bearing on the defendant's risk of flight, the court ruled that due process required the defendant to be released under strict conditions. *Id.*

*United States v. El-Gabrowny*, 35 F.3d 63 (2d Cir.1994), and *Gatto*, 750 F.Supp. 664, are two other cases demonstrating that once expected detention becomes very long, it is generally approved only if the government has not caused unnecessary delay and there are special circumstances indicating an especially strong risk of flight and/or danger to the community. In *El-Gabrowny*, the defendants were expected to be detained twenty-seven months before the conclusion of trial. 35 F.3d at 65. The court did not find that the government had unnecessarily delayed the trial, noting that although the government had successfully opposed the defendant's application for severance, the government's position that it should not have to try the case twice and expose evidence was reasonable. *Id.* The defendant in *El-Gabrowny* was charged in the 1993 World Trade Center bombing, had assaulted and obstructed police officers when arrested, and five fraudulent foreign passports had been seized from him. *Id.* at 64. Given the infamous crime the defendant was accused of and the circumstances surrounding it, the court's finding that the defendant posed a strong risk of flight and a very serious danger to society is easily understandable. *See id.*, at 65. The *El-Gabrowny* court ruled that continued detention would not violate due process. *Id.*

As in *El-Gabrowni*, the defendants in *Gatto* were highly dangerous — they were charged with murder, other violent acts, and mafia-related racketeering crimes. See 750 F.Supp. at 674. The court in *Gatto* found that “the government ha[d] played a role in the delay” of the trial, by filing a motion for an anonymous jury days before a scheduled trial date, by failing to provide certain discovery to defendants before the scheduled trial date, and by notifying the defendants on the eve of the scheduled trial of additional evidence which the prosecution had long possessed. *Id.* at 671. However, the court also found that the defendants had delayed the trial, and stated that the unnecessary delay factor did not weigh in favor of one side or the other. *Id.* at 675. The court placed significant emphasis on the fact that much of the evidence of the most serious crimes with which the defendants were charged was stale, and the fact that a co-defendant in the case had complied with the conditions of release proposed for the defendants. *Id.* at 674-76. The court ruled that the expected detention of defendants of twenty-one to thirty months until the end of trial would violate due process and that the defendants had to be released under strict conditions. *Id.*

The only case upholding expected detention lasting over two years while finding the government to blame for some of the delay is *Millan*, 4 F.3d 1038. In *Millan*, the defendants were expected to be confined for thirty to thirty-one months without a determination of guilt or innocence. *Id.* at 1044. The appellate court accepted a finding that the prosecution was responsible for a significant period of delay: a mistrial had to be declared as a result of the government’s failure to notify the court that some of the agents who had investigated the defendants were themselves under investigation for misconduct. *Id.* at 1045. The court noted, however, that the error was not intentional, but the product of poor communication within the prosecutor’s office, suggesting that the lack of intentional misconduct reduced the extent to which the delay weighed in favor of the defendants. *Id.* The court also found that \*588the defendants posed a high risk of flight, because of their travels abroad, their ties to foreign communities, their financial resources, the seriousness of the charges against them, and the strong evidence of their guilt. *Id.* at 1046.

Perhaps most significantly, the *Millan* court also emphasized that the defendants would pose an extreme danger to the safety of the community if they were released. See *id.* at 1048. One of the defendants had been convicted of homicide, and the other had ordered the commission of numerous violent acts and had threatened witnesses and their families. *Id.* at 1047. Given this constellation of considerations, the court ruled that continued detention was not barred by due process. *Id.* at 1048.

In one sense *Millan* might be viewed simply as an outlier case, as it is the only opinion rejecting a due process challenge to detention that was expected to exceed two years when the court also concluded that conduct by the government unnecessarily caused an appreciable portion of the delay. On the other hand, *Millan* can be understood as conforming, at least loosely, to the broad balancing model we have developed. The court clearly was interested in ascribing relative weight to competing considerations. For example, while acknowledging the government’s responsibility for unnecessary delay, the court seemed to reduce the weight of that factor by suggesting that the source of the error was ‘innocent’ negligence rather than intentional misconduct. Even more telling, the court openly ascribed very great weight to the magnitude of the threat that release would pose to the government’s interest in protecting the safety of the community. In fact, the court went so far as to suggest that “the constitutional limits on a detention period based on dangerousness to the community may be looser than the limits on a detention period based solely on risk of flight.” *Id.* at 1048 (quoting *Orena*, 986 F.2d at 631).

In making this suggestion, the *Millan* court noted that “[i]n the former case [danger to the community], release risks injury to others, while in the latter case [risk of flight], release risks only the loss of a conviction.” *Id.* (quoting *Orena*, 986 F.2d at 631). While it is not clear that there are solid doctrinal underpinnings for this notion,<sup>23</sup> it is clear \*589that the *Millan* court (and the *Orena* court, which *Millan* quoted) believed that an important part of the judiciary’s responsibility in conducting this kind of due process analysis was to ascribe *relative weight* to the legitimate (regulatory) governmental interests that would be threatened by pretrial release — and to let that relative weight (as fixed by the court) have its full play in the balancing of competing interests that ensued.

It also is clear that the *Millan* court concluded that this factor (threat of harm to the government’s interest in the safety of the community) weighed extremely heavily in favor of continued detention. So *Millan* can be understood as the product of a balancing analysis where the court of appeal concluded that even though the length of detention was quite substantial, and even though the government was responsible for some unnecessary delay, the weight on the other side of the scale was so great that due process was not offended. While at least some other courts probably would ascribe different weights to the competing considerations, and come to a different conclusion on the ultimate issue, the structure of the analysis employed by the *Millan* court falls squarely within the predominant mold.

Moreover, even if *Millan* is out of the mainstream in terms of relative weights ascribed to the factors in the analysis, we think it will be useful, subsequently, to compare the facts in that case to the facts in the instant matter. Because *Millan* arguably represents one end on a spectrum of relative judicial caution about these matters, we will feel more comfort in our recommendation if it seems supportable even within the kind of framework *Millan* represents.

#### IV. APPLICATION OF LAW TO FACTS: FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this section we will proceed through the kind of balancing analysis that we believe the authorities compel. We will focus primarily on the three factors most discussed in the other cases: (1) the length of the expected delay, (2) the extent to which the prosecution and/or the courts (trial and appellate, in our case) have been responsible for any unnecessary delays, and (3) the magnitude of the risk to the government's regulatory interests in preventing the defendant's flight and in protecting the safety of the community and the integrity of the trial process that would be posed if Pius Ailemen were released on the strictest available conditions.

##### A. Length of Expected Delay

Ailemen has already been detained for twenty-six months — with no trial date in sight. Our task at this juncture is to determine how long he is likely, on a non-speculative basis, to remain in custody before conclusion of his trial. In many cases this would be a relatively straightforward inquiry, but in Mr. Ailemen's case it is not.

We begin by pointing out that the district court does not have jurisdiction over this matter at this time. Jurisdiction currently lies in the Court of Appeals for the Ninth Circuit, where the district court's rulings on the double jeopardy motions are under review. We simply do not know how long it will be before the Court of Appeals acts. We have been informed by the clerk's office at the Court of Appeals that a panel of judges has not yet been selected for this matter and that oral argument has not yet been scheduled. If oral argument is heard, it is extremely unlikely that the appellate court will return this matter to the district court in less than three months.

It is possible, however, that the appellate court will decide the issues on appeal without oral argument. In that event, a ruling could be forthcoming literally at any time. That prospect, however, does not seem likely. If these appeals lent themselves to summary disposition, it is not clear why rulings could not have been made some time ago. The authority on which summary disposition of Pius Ailemen's appeal seems most likely to be based, *Cretacci*, 62 F.3d 307, was decided on August 4, 1995, more than six months ago. Since the appellate court has not availed itself of the opportunity to dispose of Mr. Ailemen's appeal summarily in the intervening months, there is an increased likelihood that the Court has decided to resolve all the appeals in this case in the same time frame (in one proceeding). And it is not obvious that the appeals by Mr. Ailemen's co-defendants lend themselves so readily to summary disposition; they do not appear to be controlled, for example, by *Cretacci*. See *supra* note 8. If the Ninth Circuit has decided not to unbundle these appeals, it is likely that even more than three months will pass before jurisdiction over this case is returned to this court.<sup>24</sup>

It is possible, of course, that the outcome of the appeals could be termination of the case against Mr. Ailemen. But given the ruling in *Cretacci*, any such assumption would be highly speculative — and, as such, impermissible for purposes of ruling on this motion.

While the double jeopardy rulings are on appeal some parts of pretrial preparation necessarily remain on hold. But others are now being pressed forward, most notably the process of securing reliable translations (from the various Nigerian dialects into English) of the 15,000 minutes of wiretapped conversations. If we assume (as might well not be safe) that the case-development process is not slowed hereafter by the translating, an optimistic judgment about the pace at which the case could be prepared to commence trial would include the following. One month after jurisdiction is returned to this court I will hold the first evidentiary hearing on the defendants' motions challenging the initial wiretap. Counsel advise that that hearing will consume about five court days (taking evidence). It is highly unlikely that I will be able to complete the process of making findings of fact and formulating recommended conclusions of law within less than three weeks thereafter.

While those findings and recommendations are being reviewed by the district court, I can proceed to the evidentiary hearing on the second wiretap application. That is the first such hearing in which the foreign language conversations are likely to play pivotal roles — but because of the difficulties generated by the extensive use of the foreign tongues, counsel also predict that five court days will be required for this second evidentiary hearing. Again I would be surprised if I could

make the required findings and formulate the required recommendations in less than three weeks. Since I have no basis for assuming that any of these challenges to the wiretaps will result in dismissal of all counts against Mr. Ailemen, I must assume that I will be required to hold hearings on the motions the defendants will file attacking the third, fourth, fifth, and sixth wiretap authorizations in this matter. Under the most optimistic (to the government) of scenarios, conducting the evidentiary hearings on those attacks, and preparing the findings and proposed rulings, will consume *at least* another two months (and likely longer than that; four months may be appreciably more realistic).<sup>25</sup>

\*591 Even if counsel for the defendants and for the government are working diligently on the other necessary aspects of pretrial preparation at the same time the wiretaps are under scrutiny, an additional two months, at least, will be necessary to get the case fully trial ready (after the final rulings on the wiretaps). Then, given the number of defendants (probably eight to ten after things shake out) and the number of counts in the superseding indictment (forty-two), and given the role in the prosecution and defense that the conversations in Nigerian dialects will play, we can be quite confident that the trial itself will consume no fewer than two months.

Under these non-speculative assumptions, all of which appear to be generous to the government and bordering on the naive, Pius Ailemen would remain in custody for an additional nine to ten months even if the Court of Appeals returned this case to the district court this afternoon. On the appreciably more realistic assumption that it takes the Court of Appeals at least three months to return this case to the trial court, it would be at least a year from now before Mr. Ailemen's trial would be concluded. Since he already has served twenty-six months in custody, I hereby FIND that the non-speculative duration of his pretrial detention will be between thirty-five and thirty-eight months. And there is a very real prospect that this period will exceed forty months, perhaps by a good deal.

No case has upheld pretrial detention expected to last more than thirty-two months against a due process challenge. *See supra* § III; *cf. Melendez-Carrion II*, 820 F.2d at 60-61. Since the non-speculative expected length of Ailemen's detention will be at least thirty-five months, the length of detention prong of the due process analysis weighs strongly in favor of releasing Ailemen.<sup>26</sup> It follows that the other two prongs — government responsibility for delay and threats to the government's regulatory interests (flight/dangerousness) — will have to weigh strongly in favor of the government to justify continued detention.

#### B. *Responsibility for Delay*

There are three principal sources of delay in this case that are potentially chargeable to the government: (1) the prosecution's failure \*592 to promptly turn over discovery that the defendants sought, (2) the time consumed by the judicial system in connection with securing reliable translations of the wiretapped conversations, and (3) the time consumed by the judicial system responding to the appeals of the trial court's double jeopardy rulings.

Before turning to our examination of these sources of delay, we should address one threshold question: is delay that is caused by the courts, or by the judicial system, chargeable against the "government" in due process analysis of the kind we are undertaking here? No case addressing a due process challenge to pretrial detention has discussed in detail how court-caused delay should be treated. In *Infelise*, the court mentioned that success on a due process challenge to pretrial detention requires the defendant to "show that either the prosecution *or the court* has unnecessarily delayed in bringing the case to trial." 934 F.2d at 104-05 (emphasis added). Another helpful case is *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972), where the Supreme Court enunciated a four-factor balancing test for determining whether a defendant's Sixth Amendment speedy trial rights have been violated. One of these factors was the reason for the delay of the trial, which the Court discussed as follows:

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence *or overcrowded courts* should be weighted less heavily but nevertheless should be considered *since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant*.

*Id.* at 531, 92 S.Ct. at 2192 (emphasis added, footnote omitted).

Seeing no obvious reason why the Supreme Court's treatment of court-caused delay in the speedy trial arena should not be at least instructive to courts considering due process challenges to pretrial detention, I will proceed on the assumption that unnecessary delays caused by the courts can weigh in the defendant's favor in this analysis. But before focusing on court-caused delays, we will examine the one source of wasted pretrial time that appears chargeable, on the facts of this case, to the prosecution.

As noted earlier, it appears that, without substantial justification, the prosecution delayed for three to five months in producing certain discoverable information to the defendants. *See supra* Preliminary Findings of Fact ¶¶ 16-18. The prosecution has not challenged here Ailemen's contention that his counsel needed this material to prepare his challenge to the first wiretap authorization. If that material had been turned over promptly, the evidentiary hearing and the ruling on the challenge to the first wiretap could have been completed by some time in the spring or early summer of 1994 — well before \$105,089.23, 33 F.3d 1210, the Ninth Circuit decision that inspired the double jeopardy challenges to the entire case. Had that occurred, this case would be at least two months closer to being ready for trial than it is now.

The prosecution has attempted to blame the pretrial delay on the fact that the defendants have filed many pretrial motions. However, this does not excuse the government's slowness in turning over discovery. Criminal defendants have the right to zealously defend themselves, and some of the motions the defendants filed in this case resulted in significant rulings in their favor. Moreover, the government's duties to provide discovery are independent — they do not depend on the litigation behavior of defense counsel. In addition, the government has failed to make a persuasive showing that producing at least much of the requested discovery was anything but a straightforward task — requiring no extraordinary commitment of resources.

We also note that there is substantial authority for the view that the government's obligation to expedite pretrial proceedings grows when the government has moved for detention pending trial. *See, e.g., United States v. Salerno*, 794 F.2d 64, 79 n. 2 (2d Cir.1986) (Feinberg, C.J., dissenting on other grounds) ("Pretrial detention under any circumstances is an extraordinary remedy with serious due process implications. If the government seeks the benefit of that remedy it \*593 must exert itself to accelerate the date for a trial."), *rev'd*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987);<sup>27</sup> *Jackson*, 823 F.2d at 8 ("when the government moves for pretrial detention it has an obligation to arrange for the trial as quickly as possible, using 'extraordinary means' if necessary") (quoting *Salerno*, 794 F.2d at 79 n. 2); *Gonzales Claudio*, 806 F.2d at 342 n. 5 ("In cases involving many hours of taped intercepted material, the government may have to arrange for swift and reliable transcription, by extraordinary means if necessary, before moving for detention or immediately after obtaining it.") (quoting *Salerno*, 794 F.2d at 79 n. 2). Seeing no persuasive evidence that the government has taken special steps to expedite the pretrial process in this litigation, I see no reason not to conclude that at least two months of Ailemen's pretrial detention is chargeable to delay unnecessarily caused by the prosecution's handling of its discovery obligations.

More significant delays are attributable, however, to the way the judicial system handled the request by the defense for funds to support translating the wiretapped conversations. After undertaking a substantial search for candidates for the job, and after securing bid information, the defense filed a formal request for the necessary CJA funds in mid-May of 1994. Had that request been granted within a month or so, instead of at the end of that year, the teams of translators that had already been assembled could have proceeded immediately with their work, which they estimated they could have completed in segments (one wiretap at a time, seriatim) over a five to six month period.<sup>28</sup> With hard work, the defense lawyers could have prepared their challenges to the wiretaps along a parallel schedule, so that the hearings challenging the five authorizations that relied in part on translations could have been completed by the end of 1994 or early 1995.

Under such a schedule, this important part of the pretrial process could have been completed before the district court made rulings on the double jeopardy motions (Pius Ailemen's motion to dismiss on grounds of double jeopardy was not even filed until February 1995). And if the challenges to all the wiretaps had been concluded before the trial court lost jurisdiction over most of the case as a result of the double jeopardy rulings, this matter would be closer to trial now by at least five to six months.

There were good reasons for the district court to raise questions about the proposed translation plan and its hefty price tag. Raising questions, and seeking assurances that no less-costly alternative was viable, were responsible steps, given the magnitude of the request. In the end, however, it was determined that the request *as originally presented* should be approved. That conclusion in essence vindicated the homework that defense counsel had done before making the original proposal. Thus, after all was said and done, the time consumed by the judicial system as it probed the original proposal, pondered the cost to society of the undertaking, and pressed for what turned out (unforeseeably) to be non-existent cheaper options, turned out to be wasted. This activity, which did not proceed at a rocket's pace, unfortunately made no contribution to the disposition of the litigation. Because, in these senses, this delay was "unnecessary" (even though inspired by respect-worthy motives) it supports, perhaps without great weight by itself,<sup>29</sup> defendant's contention that his continued detention would offend due process norms.

\*594 While the delay in translating the tapes is chargeable to the government (the judicial system), we cannot recommend the same conclusion about the prosecution's decision to appeal the district court's double-jeopardy-based dismissal of

most of the charges against Pius Ailemen. The appeal by the prosecution was clearly necessary for its case — without it, the government would only be able to prosecute Ailemen on the money laundering count. And the appeal is far from frivolous — as a result of *Cretacci*, 62 F.3d 307, it is likely that the government will prevail. Under these circumstances, the prosecution's decision to appeal cannot be charged against the government. Cf. *Shareef*, 907 F.Supp. at 1485 (refusing to charge to the government the delay caused by its legitimate appeal of trial court rulings).<sup>30</sup>

On the other hand, the amount of time that it is taking the Ninth Circuit to decide the appeal of the double jeopardy rulings may weigh against the government to some extent. Ailemen's case appears to be squarely controlled by *Cretacci*, 62 F.3d 307. And *Cretacci*'s holding — that an administrative forfeiture proceeding does not impose punishment for double jeopardy purposes if the defendant made no claim to the forfeited property — has been squarely endorsed by the Second, Third, Fifth, Sixth, and Seventh Circuits. See *United States v. Idowu*, 74 F.3d 387 (2d Cir.1996). No federal appellate decision has challenged or criticized *Cretacci*. Nonetheless, nine months have passed since the government filed its appeal, and a ruling from the Ninth Circuit does not appear imminent. See *supra* Preliminary Findings of Fact ¶¶ 14-15.

The Court of Appeals for the Ninth Circuit has a crowded docket, and there is no reason to believe that the judges of that court are not doing everything reasonably possible to resolve, essentially in the order filed, the many cases that are pending before them. Four considerations, however, make it arguable that some of the time being consumed while jurisdiction remains in the appellate court represents "unnecessary delay." First, the appeals in this matter do not follow judgments after trial on the merits. Instead, they are, for all practical purposes, interlocutory — and while they remain pending, the progress of this litigation toward trial remains stalled. Second, this is a criminal case and is entitled to priority over most civil matters. Third, the defendant who presses this motion remains in pretrial custody while the appeals are under consideration — and he has been in custody for more than two years without a determination of guilt. Fourth, on August 4, 1995, almost 7 months ago, the Ninth Circuit *resolved* (in favor of the government) what appears to be the crucial issue on which the government's appeal of the trial court rulings in favor of Pius Ailemen turns. See *Cretacci*, 62 F.3d 307. Given the ruling in *Cretacci*, and the fact that identical outcomes have been reached by all other federal appellate courts that have addressed the same issues, it is not at all clear why Pius Ailemen's appeal could not be dispatched summarily.

It is possible, as we speculated earlier, that one reason the Court of Appeals has not ruled on the government's challenges to the district court's orders that relate to Pius Ailemen is that the appellate court is not addressing the matters that relate to him in isolation, but, as one might expect in the normal course, as part of one package in which it will resolve all the double jeopardy issues that have arisen in this one case, with respect to all the defendants. Since there are issues on appeal with respect to two of Pius Ailemen's co-defendants that may well not be controlled by *Cretacci*, handling all these matters together would slow appellate disposition. See *supra* note 8.

The rub of course, is that Pius Ailemen is not a group, but an individual. The appeals run to him as an individual. And, most significantly for current purposes, he is the only individual in this case who remains in pretrial detention. Moreover, he is, by the government's repeated averments, clearly the lead defendant in this prosecution. Thus, strong arguments can be made that, if it would expedite matters, it is appropriate to sever appellate consideration of the government's appeal of the double jeopardy rulings that relate to Pius Ailemen from the double jeopardy rulings that relate to the two co-defendants.

I do not mean to suggest that sole or even primary responsibility for severing the appeal of the rulings about Pius Ailemen from the appeals of the rulings about his co-defendants rests with the Circuit Court. It may be that responsibility for suggesting such a severance rests more properly with the prosecution. For current purposes, it really doesn't matter whether the prosecution or the courts should take this initiative or bear responsibility for the passage of the time since *Cretacci* was decided. What matters is that it is difficult to understand how one could characterize as "necessary" (to resolve the appellate issues with respect to Pius Ailemen) all the time that has passed since that apparently dispositive ruling was issued.

It also may be pertinent here to point out that the government already has severed its prosecution of two of the defendants who were named in the superseding indictment in this case — and the trials of those two defendants were completed some time ago.

Given all of these considerations, I cannot conclude that all of the nine months that have elapsed while the government's appeal of the double jeopardy rulings has been pending represent necessary delay. Especially in light of *Cretacci*, decided

almost seven months ago, at least three or four months of the time *Pius Ailemen's* case has been stalled in the appellate court must be deemed "unnecessary."

This is a finding, of course, not about culpability, but about whether, for purposes of this due process analysis, the extra time should be charged to the government. Like the delay that followed the request to fund the translations of the wiretaps, this is a "more neutral reason" for the passage of time and, for that reason, "should be weighted less heavily." *Cf. Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. But because the time charged here (the extra three to four months) cannot be deemed "necessary," we cannot ignore it — "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Cf id.*

In combination, the three sources of unnecessary delay that are attributable to the government (both the judicial system and the prosecution) have resulted in adding somewhere between eight and twelve months to Pius Ailemen's pretrial detention.<sup>31</sup> Even without any taint of culpable motives or conduct, that is a significant period. As such, it must add appreciable weight to the side of the scales that favors release on strict conditions. Because that side of the scales was already heavy (the expected length of pretrial detention being at least thirty-five to thirty-eight months), I will be compelled to find that continued detention would violate Ailemen's rights under the due process clause unless the threat to the government's competing regulatory interests that would be posed by his release *on the strictest available conditions* is extraordinarily severe.

### *C. The Magnitude of the Threat to the Government's Regulatory Interests*

As discussed earlier, there are three regulatory interests that pretrial detention could serve: (1) protecting the integrity of the trial process (by, for example, preventing a defendant from attempting to intimidate witnesses, jurors, or others involved in the \*596 prosecution), (2) preventing danger to the community, and (3) assuring that the defendant is present for trial and, if convicted, for sentencing (the risk of flight factor).

Ailemen's continued detention cannot be supported by a potential threat to the judicial process, as the government has presented no evidence that Ailemen has threatened witnesses or that he intends to take any other action that could jeopardize the integrity of his trial.

Analysis of the magnitude of the threat to the government's interest in preventing danger to the community is more complicated. We begin with a clear recognition that trafficking in illegal narcotics (heroin and cocaine, as here alleged), without more, causes serious harm to society. A drug trafficker is, by legal definition, a danger to the community. *See* 18 U.S.C. § 3142(e). Drug trafficking also creates additional real dangers— through crimes committed by addicts seeking to support their habits, through plain human suffering, and because people engaged in the sale of illegal substances sometimes commit or direct violent crimes in furtherance of their enterprises. In the case at bar, for example, the government points out that Pius Ailemen "was stabbed during a narcotics transaction" and that one of his assailants "had a gun at the time of his arrest." 7/26/95 Response and Opposition to Motion for PreTrial Release at 5.

There appears to be substantial evidence supporting the government's indictment of Pius Ailemen as a serious and sustained drug trafficker. In that very real sense, there is substantial evidence that he would pose a danger to the community if he were released without meaningful constraints.

The government has presented no evidence, however, that Ailemen has ever committed or attempted to commit acts of physical violence. While he apparently was the victim of violence in late 1993, the government has not claimed that he initiated that incident, or that in connection with it he had been carrying a weapon of any kind. Nor has the government offered evidence that he has used weapons in the past, or that he has directed crimes of violence by others. His only conviction is for passport fraud. In these senses, Pius Ailemen's background is quite different, and in some material ways less threatening to the safety of society, than the backgrounds of many of the defendants who have been deemed extreme threats to society by other courts. *Cf. El-Gabrowny*, 35 F.3d at 64-65 (evidence indicated defendant was dangerous terrorist involved in World Trade Center bombing); *Millan*, 4 F.3d at 1047 (one defendant previously convicted of homicide, other defendant had threatened witnesses and their families and had ordered the commission of numerous violent acts); *Melendez-Carrion I*, 820 F.2d at 61 (evidence indicated defendants were leaders of terrorist group).

It also is relevant here that the government has not presented evidence that Ailemen himself uses drugs. As far as we are aware, he has no narcotics habit for the support of which he might be driven to commit other crimes. Thus it appears that

the threat to the safety of the community that Ailemen poses is confined to the risk that he would traffic in drugs if he were released.

The critical point to be made in this prong of our analysis is that conditions can be imposed on Ailemen's release that would dramatically reduce the likelihood that he would pose a danger to the community by trafficking in drugs or in any other way. He can be ordered to remain, twenty-four hours a day, in a highly regimented, well-supervised halfway house, an institution that has served this court for many years and that has deep experience in dealing with serious offenders. In the half-way house, Ailemen's behavior can be monitored. His communication with persons outside the half-way house can be severely restricted. The court can order, for example, that he be permitted to make only a limited number of phone calls per day, and that each call (except those with his attorney) be monitored. The court also can order that his mail be inspected for weapons, drugs, or other contraband. In addition, the court can limit to a specified list the persons who may visit him, and can prohibit him from communicating with or seeing any of his co-defendants except in the presence of counsel. Within the half-way house, there can be strict limits on the items he may possess, and his room, his belongings, and his person can be subject to search at any time, on no notice and without cause. And he can be subjected to random testing for use of drugs or alcohol.

Under such conditions, it would be difficult, in the extreme, for Pius Ailemen to traffic in drugs or to orchestrate such trafficking by others. Such measures would reduce to a very low level the threat to the government's interest in preventing danger to the community that otherwise might be posed if this defendant were not in custody. So reduced, this threat cannot weigh heavily in favor of continued detention.<sup>32</sup>

In my view, the governmental interest most threatened by releasing Ailemen from custody is the interest in assuring his presence for trial and, if convicted, for sentencing. The half-way house is not as locked-down and not as secure as a jail or prison. A clever person (as Ailemen may be) with the will to escape from the half-way house very likely could. So while commitment to the half-way house on the strict conditions described above would reduce in some measure the risk of flight, it would not eliminate that risk. For that reason, we must examine the many factors and considerations that bear on the likelihood that Ailemen would attempt to flee from the half-way house. Only after such an examination will we be positioned to make a properly informed judgment about how much weight to ascribe to this factor in our due process analysis.

The pressure on Ailemen to try to flee will be considerable. If the Court of Appeals reinstates the drug trafficking charges against him, as seems likely, he faces possible penalties that could include life in prison.<sup>33</sup>

How he views the likelihood that he will be convicted, however, is more difficult to assess. He was prosecuted by the same authorities on serious drug charges several years ago — but succeeded in gaining an acquittal.<sup>34</sup> So the pendency of charges, per se, may not affect him as much as it might others. And while there appears to be substantial evidence in support of at least some of the drug counts in the superseding indictment,<sup>598</sup> proof of a great many of the counts, certainly the more ambitious and threatening (to Ailemen) of them, appears to turn in large measure on whether the prosecution can persuade the jury, beyond a reasonable doubt, that alleged codewords and phrases, recorded (sometimes imperfectly) from wiretapped conversations that were conducted largely in esoteric languages, clearly had culpable meanings. It appears to me that Ailemen understands (may even overestimate) the difficulties of proof presented by this evidence. Ailemen also has demonstrated a remarkable confidence and composure throughout the long pretrial period — possibly rooted in optimism that the government will not be able to overcome all of the many hurdles it will face when it tries to meet the demanding burden of proof that it must bear. These considerations are relevant because the incentives and pressures he will feel to flee are likely to vary, in part, with the level of confidence he feels about his chances of being acquitted, at least on the charges that carry the most severe sentences.

As the government points out, there are several additional considerations, some substantial, that support its contention that the risk of Pius Ailemen fleeing is high. It is not clear that he has ever had a lawful job in this country; certainly no employer has come forward to press for his return to work. While he has claimed at times in the past to have supported himself through an importing business, United States Customs has no record of defendant as an importer. And in a detention hearing in the District of Columbia after his arrest in December of 1993 he apparently stated that he was dependent for support on income sent to this country by relatives in Nigeria. He owns no property in the United States.

Ailemen also has demonstrated something less than rigid respect for his obligations to the court. He apparently does not deny, for example, that he made at least eleven unauthorized trips to Washington, D.C., while he was on probation as a result of his 1990 passport fraud conviction. The drug and money laundering activities of which he is charged also allegedly occurred while he was in that same probationary status.

The fact that the one conviction Ailemen has suffered is for passport fraud also supports the view that he represents a serious flight risk. Moreover, the government has presented evidence that he has used many aliases in the past and has travelled (or at least purchased tickets to travel) under false names. *See* 9/29/93 Affidavit of Special Agent Robert J. Silano. He is sophisticated and probably could muster the resources to pay for transportation overseas. On the other hand, Ailemen's Nigerian passport was seized during the 1989-90 proceedings, and there is no evidence that he currently possesses any travel documents.

It also is significant that Pius Ailemen never has become a legal resident of the United States, and that the INS has initiated proceedings that might well result in his deportation. Those proceedings have been stayed, however, pending disposition of the current charges — and, as with the matters covered in the indictment against him, Ailemen projects an air of confidence about his prospects for success in that arena.

The government also points out that Ailemen has parents and siblings in Nigeria, where he was raised and clearly could fit in. Thus he has a place to go (unlike some defendants who appear before me). Again, however, it is not clear how strong the pull toward Nigeria would be. Ailemen has resided in the Bay Area continuously since 1981, with the exception of one three-month trip to Nigeria in 1988. And he has two siblings in California and a considerable number of friends in the Bay Area (a good many of whom have written to the court on his behalf). Some evidence of emotional ties here is reflected in the fact that five of his friends have signed a \$300,000 personal recognizance bond to guarantee his court appearances and his compliance with strict conditions of pretrial release, including, of course, committing no additional crimes. In short, with the passage of time in this country, it appears (as his attorney has suggested) that Ailemen has come to prefer, actively, life and its promises here much more than life and its promises in Nigeria.

Ailemen asserts that he made no effort to avoid arrest in December 1993 even though \*599he expected to be arrested; the government does not dispute this assertion. *See* 12/19/95 Supplemental Memorandum in Support of Motion for Pretrial Release, Appendix at 2; 7/24/95 Memorandum of Points and Authorities in Support of Motion for Pre-Trial Release at 5 n. 3. In fact, it appears that after he was injured (in December of 1993) in connection with the alleged drug transaction in Washington, D.C., he checked himself into a local hospital, under his own name, even though he had reason to believe that his arrest was imminent. Defense counsel argues that had he been seriously inclined to flee, he would have done so when he had the chance. Of course, it is not clear whether flight was a medically available option at that point — and Ailemen could not have known what specific charges he would end up facing (and how severe the penalties for them might be). There is a counterpoint here as well, however, as it appears (from statements attributed to the defendant in a part of the wiretapped conversations) that for a substantial period before he was arrested, Ailemen knew, or strongly suspected, that government agents were tapping his phones and actively investigating his activities. Despite that apparent knowledge, he did not flee.

Ailemen also has no known history of substance abuse, so there appears to be no threat that drugs or alcohol might impair his judgment if he were outside a custodial setting.

Finally, defense counsel points out that all of Ailemen's co-defendants who are still awaiting trial in this case, including his brother Dele, have been released, and that the government has not presented any evidence that any of them have fled or violated their release conditions. *See* 12/19/95 Supplemental Memorandum in Support of Motion for Pretrial Release at 21-22, uncontradicted by prosecution; *cf. Gatto*, 750 F.Supp. at 675-76 (co-defendants' compliance with release conditions weighs in favor of releasing defendant on similar conditions).

Having assessed all of the considerations described in the preceding paragraphs, I conclude that while release of Pius Ailemen would create a real risk of flight, the size of that risk can be reduced meaningfully through the imposition of a host of conditions. In addition to the twenty-four-hour-a-day commitment to the half-way house described earlier, and the other conditions there articulated (limited and monitored use of means of communication, restrictions on visitors, etc.), the court could insist, as I did earlier, that at least five persons co-sign a large bond (\$300,000 is suggested) guaranteeing Ailemen's compliance with all the conditions of his pretrial release. Further, the court could insist that these persons be in this country lawfully, have something meaningful to lose (e.g., garnished wages) if the defendant fails to honor his bond commitments, be emotionally connected to the defendant, and have no criminal record. The knowledge that fleeing would expose such people to severe economic consequences<sup>35</sup> would help counteract the pressure and temptations Ailemen undoubtedly will experience.

Several months ago I concluded that the stringent conditions just described would, in combination, reduce the risk of flight to a level that would satisfy the requirements of the Bail Reform Act, meaning that they would serve to “reasonably assure the appearance of the person as required.” See 18 U.S.C. § 3142(g). I freely concede that this was, and remains, a close question. That fact follows in part from the nature of the judgment being made under the Act. The release/detention decision under the Bail Act is hardly an exact science. It is appreciably more inexact than trying to determine what events occurred in the past (as we do in trials). For here we are trying to make judgments about what specific individual persons, whom we certainly cannot claim to fully understand, will do in the future — how they will respond to circumstances and feelings \*600 that we have only quite limited powers to foresee. Charged with a duty by Congress, we do our best, but we know that the margins of error are ample.

The district court disagreed with my judgment about application of the Bail Reform Act to Pius Ailemen, concluding that he could not be released under the Act unless, at least, substantial property was posted on his behalf. I infer, from the district court’s willingness to reconsider releasing Ailemen under the Bail Act if sureties with sufficient property came forward, see *supra* Preliminary Findings of Fact ¶ 22, that the district judge did not conclude that this was one of the few extreme cases where it was obvious that no combination of conditions ever could be presented that would satisfy the Act’s requirements.

We also know that the range of defendants whom we would put on the detention side of the Bail Reform Act line is wide indeed: some belong there so clearly that application of the Act is essentially ministerial, while others come much closer to meeting requirements for release, at least on restrictive conditions. In other words, even if we confine the universe of defendants we are considering to those who cannot meet the requirements for release under the Act, the magnitudes of the threats to governmental interests that are posed by the defendants in this pool covers a very wide range.

That fact of life is one of the reasons why we cannot equate analysis under the Bail Reform Act with analysis under the Due Process Clause. The other reason, of course, is that the authorities who have construed the substance of due process in this setting require us to consider additional factors, including the length of the pretrial detention and the degree to which the government is chargeable with unnecessary delay in reaching a determination of guilt or innocence.

In the case at bar, I conclude that releasing Pius Ailemen on the restrictive conditions I recommend<sup>36</sup> would pose only moderate threats to the implicated governmental interests. In other words, I find that Ailemen’s case falls appreciably closer to the end of the spectrum nearest the line established by the Act than to the other end of that risk spectrum. This is not a case such as *Melendez-Carrion II*, where the defendants had a record of prior flight and the evidence indicated that they were leaders of a terrorist group. See 820 F.2d at 61. Nor is this case like *Millan*, where one defendant had been convicted of homicide, and the other defendant had threatened witnesses and their families and had ordered the commission of numerous violent acts. See 4 F.3d at 1047. And this case is unlike *El-Gabrownny*, where the defendant had resisted arrest and was charged with complicity in a terrorist act of immense proportions that had shocked America. See 35 F.3d at 64-65.

I further find that the magnitude of the risks to the government’s regulatory interests that Ailemen’s release would pose, on the conditions I would require, clearly is not sufficient to outweigh the considerations that cut decisively in his favor in the balancing analysis that we are commanded to perform under the Due Process Clause. The two competing interests are simply too heavy: (1) the extremely long period (thirty-five to thirty-eight months, at least) that he will spend in custody before his trial will be completed, and (2) the unnecessary extension of the pretrial (and up-to-now custodial) period of between eight and twelve months that is chargeable to the judicial system and the prosecution.

It is important at this final juncture to remind ourselves that no case has concluded that expected pretrial detention lasting longer than thirty-two months would be consistent with due process. We also bear in mind that only one case (*Millan*, 4 F.3d 1038) has approved expected pretrial detention exceeding two years in a context where the government bore responsibility for some appreciable portion of the pretrial delay.

## V. RECOMMENDATIONS

Given the norms that I have found in the cases, and my application of the balancing \*601 test to the specific facts of this matter, I RECOMMEND that the district court find that continued pretrial detention of Pius Ailemen would violate his rights under the Due Process Clause. I FURTHER RECOMMEND that he be released to a half-way house on the following special conditions:<sup>37</sup>

1. At least five individuals who are employed or are willing to post a significant amount of property, who have no criminal record, who are lawfully in this country, and who are emotionally connected to the defendant must sign a \$300,000 personal recognizance bond on Ailemen's behalf.
2. Ailemen must reside at ECI, a halfway house in San Francisco.
3. Ailemen may not leave ECI for any reason other than to make court appearances; when he leaves for that purpose he must be escorted to and from court by ECI staff or by his attorney.
4. With the exception of calls to his attorney, Ailemen may not make more than three telephone calls per day.
5. Every telephone call he makes to anyone other than his attorney must be monitored by ECI staff.
6. With the exception of his brother, Dele Ailemen, Pius Ailemen may not communicate in any way, directly or indirectly, with any of his co-defendants, except in the presence of counsel.
7. Ailemen's mail (incoming and outgoing) must be inspected by ECI staff for contraband.
8. Ailemen may not take any steps to acquire any travel documents.
9. Ailemen may not possess or use alcohol, controlled substances, firearms, or any other weapons or destructive devices.
10. Ailemen's room, belongings and person shall be subject to search at any time, on no notice, and without cause.
11. Ailemen will be subject to random testing for drugs or alcohol, without notice and without cause.
12. Ailemen must comply with all ECI rules not already covered by the foregoing conditions.

IT IS SO REPORTED AND RECOMMENDED.

1 The 1989 drug charges against Ailemen included conspiring to import heroin, conspiring to possess heroin with intent to distribute it, distributing heroin, and procuring interstate travel in furtherance of a business enterprise to unlawfully import and distribute heroin. RRDJ at 2.

2 Pius Ailemen was charged in 39 of the 42 counts. The charges against him included conspiracy to distribute heroin and cocaine, engaging in a continuing criminal enterprise, distribution of heroin, use of the telephone to facilitate drug trafficking, travel in interstate commerce to facilitate drug trafficking, and money laundering. *See* 7/11/94 Superseding Indictment.

3 Some documents concerning translation of the wiretap tapes are under seal. For this reason, I give either no record citations or incomplete record citations to certain statements about the translation process.

4 One of the reasons that the tapes need to be translated in their entirety is that Ailemen plans to file motions to suppress the evidence gathered pursuant to each wiretap authorization. Each such authorization (after the first) was at least partially based on evidence gathered pursuant to previously authorized portions of the wiretap. Thus, in order for each suppression motion to be litigated, the wiretap evidence gathered before the authorization at issue in the suppression motion must be translated and transcribed. *See* 3/16/95 WB hearing transcript at 20-22.

In addition, the government alleges that the defendants spoke about drugs using codewords in many of the taped conversations. The defense argues that translating the entirety of the tapes is necessary to reveal conversations which could show that the alleged codewords were not references to illicit substances. *See* 12/12/94 affidavit of J. Frank McCabe.

5 For reasons not entirely clear, the original estimate of the number of minutes that had to be translated was much higher — almost 29,000 minutes. *See* 4/14/95 Omni letter.

6 The difficulty of translating the tapes is exacerbated by several factors. The nature of this case — especially the government's allegation that the defendants discussed drug transactions using codewords — requires that the translations be of the utmost accuracy. Some of the languages used on the tapes (and in which the codewords allegedly appeared) are among the most complicated Nigerian languages. 12/12/94 Omni letter. And the Nigerian languages involved are

sufficiently different that in many instances different translators must be used for the separate languages. See 3/16/95 WB hearing transcript at 25.

7 Omni's estimate of the total amount of time required to translate the tapes has not gone down even though its estimate of the number of minutes on the tapes has. Apparently, the translation work has turned out to be considerably more difficult than Omni originally expected. Moreover, the passage of additional time between May of 1995, when the court ordered Omni to stop work on the project, and the beginning of this year, when work resumed in earnest, appears to have forced Omni to make some additional changes in the composition of the translation team. Yet another source of complication, and potential delay, is the apparent fact that many of the translators on whom Omni is forced to rely have substantial other work commitments — thus reducing the time they can devote to this one project.

Work on the translations also has been hampered by personnel and administrative difficulties within Omni. Even now the court cannot be fully confident that Omni will be positioned to complete this demanding task. If we are forced to search for another entity to complete the translation of the tapes, Ailemen's trial is likely to be delayed appreciably longer than the projections made later in this Report and Recommendation. See *infra* § 4.

8 The time it may take the Ninth Circuit to decide the appeal of Ailemen's case may be significantly lengthened by the fact that also at issue in the appeal are the double jeopardy based dismissals of charges against two of Ailemen's co-defendants. See 5/24/95 Notice of Appeal. This court has found that one of these co-defendants made a claim to the forfeited property, and that while the other did not make a claim, he also did not receive adequate notice of the forfeiture proceeding. 4/13/95 Report and Recommendation re Defendant Robert A. Tinney's Motion to Dismiss on Double Jeopardy Grounds at 8-9; 4/13/95 Report and Recommendation re Defendant Sidney Gladney's Motion to Dismiss on Double Jeopardy Grounds at 14-16. It does not appear that the Ninth Circuit will be able to summarily dispose of the double jeopardy appeals of these other two defendants under *Cretacci*.

Furthermore, there is at least some possibility that the Ninth Circuit will not act on the double jeopardy appeals in this case until the United States Supreme Court issues a ruling in the appeal of \$405,089.23, 56 F.3d 41. If the high court were to reverse \$405,089.23's holding that civil forfeiture proceedings of the kind at issue in this case can serve as the basis for a double jeopardy claim, the Ninth Circuit would have to reinstate all the charges dismissed on double jeopardy grounds in this case. The respondents' Supreme Court briefs in the appeal of \$405,-089.23 are due on March 22, 1996. *Ursery*, — U.S. —, 116 S.Ct. 762. The appeal of \$405,-089.23 will probably be argued in April and decided before the end of June.

9 It is possible that the Ninth Circuit will decide the double jeopardy appeal without oral argument. See tape No. CR 96-1 of 1/30/96 WB hearing.

10 The district court may have something to add to my discussion of these discovery matters based on its greater familiarity with the relevant proceedings.

11 The conditions that I recommended be imposed on Ailemen's release, in addition to the \$300,000 bond co-signed by five other persons, were the following:

- (1) Confinement to a half-way house twenty-four hours a day, being permitted to leave only to attend court and only in the company of an escort;
- (2) With the exception of calls to his attorney, Ailemen would be allowed only three telephone calls per day, which would be monitored;
- (3) Ailemen would be permitted reasonable telephone communication with his attorney which would not be monitored;
- (4) Ailemen would only speak with his co-defendants, except for his brother Dele Ailemen, in the presence of his attorney;
- (5) Ailemen would not possess or use alcohol, controlled substances, firearms, or other weapons;
- (6) Ailemen would not take steps to acquire any travel documents;
- (7) Ailemen would comply with all other rules of the half-way house.

See tape No. CR 95-28 of 7/28/95 WB hearing.

12 *Salerno*, 481 U.S. at 747 n. 4, 107 S.Ct. at 2102 n. 4.

13 For an extended discussion of whether, in an appellate court's view, conditions imposed by a district court would in fact reduce appreciably the danger to the community that release of the defendant without conditions would pose, and whether the government should be required to provide the support for such conditions, see *United States v. Orena*, 986 F.2d 628, 632-33 (2d Cir.1993).

14 Such inconsistency may fail to give prosecutors and courts sufficient incentives to move cases along when necessary to protect the due process rights of pretrial detainees.

15 Some courts have mentioned additional factors, such as the seriousness of the charges against the defendant, the strength of the government's case on the merits, the complexity of the case, the hardships caused by detention, the type of threat posed by the defendant, and the extent to which release conditions can minimize risk of flight and potential dangerousness. See *United States v. Hare*, 873 F.2d 796, 801 (5th Cir.1989); *Accetturo*, 783 F.2d at 388; *Gallo*, 653 F.Supp. at 338. Most of these additional considerations are related to the three main factors — length of delay, government responsibility, and flight/dangerousness — and can aid the analysis of whether each of the three main factors weighs in favor of the prosecution or the defense.

16 As we point out below, determining whether a given defendant qualifies for release under the Bail Reform Act is hardly an exact science. See *infra* § IV. Not surprisingly, given the predictive character of the judgments (guesses?) involved, the number of cases in which reasonable judges disagree about whether the Act requires detention of the defendant is not small. Moreover, there is a wide range among the defendants who cannot qualify for release — some failing to meet the Act's requirements by a far greater margin than others. The *Infelise* court's approach seems not to take these kinds of considerations fully into account.

17 There is one opinion, *United States v. Gotti*, 776 F.Supp. 666 (E.D.N.Y.1991) which quotes the passage from *Infelise* quoted by us. *Gotti*, 776 F.Supp. at 671 (quoting *Infelise*, 934 F.2d at 104-05). However, that opinion also cites cases which support the balancing approach and discusses all three of the factors generally used by courts that follow the balancing approach. See *Gotti*, 776 F.Supp. at 671-72.

18 The *Zannino* court may have been somewhat skeptical about the defendant's claim that his physical condition made him unable to stand trial, for, after his heart attack, the defendant had allegedly continued to direct mafia activities from his hospital bed. 798 F.2d at 547.

19 The *Vastola* court suggested that the length of detention was "critical due to the 'crucial liberty interest at stake.'" *Id.* at 1448 (quoting *United States v. Suppa*, 799 F.2d 115, 120 (3d Cir.1986)).

20 Courts in several cases in addition to *Majeed* have refused to order release while strongly suggesting that detention will not be allowed to continue if there are further pretrial delays. See *Jackson*, 823 F.2d at 8 (court approves expected detention of eight months until trial, but states that if trial is postponed further, it will "take any government responsibility for the delay very seriously"); *Zannino*, 798 F.2d at 549 (court approves "only a short, discrete, and finite period of additional detention" and states that if district court fails to set immediate trial date after imminent examination of defendant's medical condition, "difficult constitutional issue" will resurface); *Berrios-Berrios*, 791 F.2d at 254 (while court refuses to order release of defendant already detained for eight months, court states that if trial does not begin for more than a year after detention commenced, "[u]nless it is clear that [the defendant's] appearance cannot reasonably be assured short of detention, there would be a serious due process problem in continuing her custody").

21 None of the six cases ordering release without finding that the prosecution or court system caused any unnecessary delay where expected detention was of short to medium length have been expressly overruled. However, many of them based a finding that continued detention would violate due process primarily upon the length of detention. Since five of these six opinions were issued before the Supreme Court suggested in *Salerno*, 481 U.S. at 747 n. 4, 107 S.Ct. at 2102 n. 4, that analysis of the due process issue would require comparing the governmental interests served by the detention to the length of the pretrial custodial period, we cannot safely infer that the holdings in those five cases would be the same if they were being decided today. They remain of interest, however, because they constitute some evidence about the core societal values which we look for in resolving substantive due process issues.

22 *Berrios-Berrios*, 791 F.2d 246, and *Melendez-Carrion I*, 790 F.2d 984, discussed earlier, also concerned defendants charged in connection with the Wells Fargo robbery.

23 While the suggestion that dangerousness to the community might weigh heavier in the government's favor than risk of flight in a due process balancing analysis seems to have intuitive appeal, it also appears to be at odds with at least some important doctrinal traditions — and those kinds of traditions help inform the substance of due process.

Prior to the enactment of the Bail Reform Act in 1984, pretrial detention without bail had historically been utilized only to assure the defendant's appearance at trial or to stop the defendant from jeopardizing the trial process by acts such as threats against witnesses. See *Melendez-Carrion I*, 790 F.2d at 1002; see also *United States v. Gotti*, 794 F.2d 773, 779 (2d Cir.1986). And the change in the law pursuant to which dangerousness to the community, by itself, could support pretrial detention was controversial. *Salerno* was a 6-3 decision and was the subject of much judicial and academic debate when it came out. Compare *Salerno*, 481 U.S. at 741-55, 107 S.Ct. at 2098-2106 (majority opinion) with *id.* at 755-67, 107 S.Ct. at 2105-12 (Marshall, J., dissenting) and *id.* at 767-69, 107 S.Ct. at 2112-13 (Stevens, J., dissenting). As the historical and doctrinal underpinnings of pretrial detention based on potential dangerousness are less longstanding and

more politically controversial than the foundations of pretrial detention based on risk of flight or a threat to the trial process, it might be argued that the constitutional limits on detention based on potential danger to society should be stricter than the limits on detention imposed in order to prevent flight or protect the trial process. Substantive due process analysis, after all, is supposed to turn on norms that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." See *Rochin*, 342 U.S. at 169, 72 S.Ct. at 208 (quoting *Snyder*, 291 U.S. at 105, 54 S.Ct. at 332).

We also note, with greater analytical ambition and less analytical confidence, that there have been developments in how the high court distinguishes between "regulatory measures" and "punishment" since *Salerno* was decided that might make the Court more demanding of the government when it tries to support lengthy pretrial detentions on the ground of dangerousness. While these developments have been made under different constitutional norms than substantive due process, and while the reach of their influence may well be circumscribed, they at least suggest the possibility that the high court might be open to using somewhat more demanding standards when reviewing long pre-trial detentions to determine whether they have crossed the line that separates "regulation" from "punishment." Compare *Salerno*, 481 U.S. at 747, 107 S.Ct. at 2101-02 (citing *Schall v. Martin*, 467 U.S. 253, 269, 104 S.Ct. 2403, 2412, 81 L.Ed.2d 207 (1984); *Kennedy v. Mendoza-Martinez*, 372 \*589 U.S. 144, 168-69, 83 S.Ct. 554, 567-58, 9 L.Ed.2d 644 (1963)); *Allen v. Illinois*, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986) and *United States v. Ward*, 448 U.S. 242, 248-49, 100 S.Ct. 2636, 2641-42, 65 L.Ed.2d 742 (1980) with *Department of Revenue of Montana v. Kurth Ranch*, — U.S. —, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994); *Austin v. United States*, 509 U.S. 602, 609-623, 113 S.Ct. 2801, 2805-12, 125 L.Ed.2d 488 (1993) and *United States v. Halper*, 490 U.S. 435, 448, 109 S.Ct. 1892, 1901-02, 104 L.Ed.2d 487 (1989). In *Austin*, the Court stated that the analysis used in cases such as *Mendoza-Martinez*, 372 U.S. at 168-69, 83 S.Ct. at 567-68, and *Ward*, 448 U.S. at 248-49, 100 S.Ct. at 2641-42, applies when the question is "whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required," but *not* in cases where the "question [is] whether punishment has been imposed" (for certain Eighth Amendment purposes). See 509 U.S. at 610 n. 6, 113 S.Ct. at 2806 n. 6. Unlike the approach in *Ward*, 448 U.S. at 248-49, 100 S.Ct. at 2641-42, where articulated Congressional intent seems to play a dominant role, under *Halper*, 490 U.S. at 448, 109 S.Ct. at 1901-02, and *Austin*, 509 U.S. at 609-611, 113 S.Ct. at 2805-06, the Court is more concerned with the purposes actually served by legislation.

As will be obvious in the text, doctrinal possibilities of the kinds just mentioned play no role in my development of the recommendations in this Report.

24 The prosecution could attempt to speed the resolution of the appeal of the dismissal of the charges against Ailemen by filing a motion to sever the part of the appeal which concerns Ailemen from the part which concerns his two co-defendants.

25 These predicted time frames are probably unrealistically short. Hopefully it goes without saying that work on Mr. Ailemen's case is not my only judicial assignment — and that it is unreasonable to assume that, over a six or eight month period, I will devote every one of my working moments to this one case.

Moreover, the predicted time frames assume that the translation work will not slow down the process of conducting the suppression hearings. Recall that conducting a suppression hearing for a specific wiretap authorization will require translation of all the wiretap evidence gathered prior to that authorization. If the translations necessary for a suppression hearing are not completed before that hearing, the hearing will have to be postponed. Given the difficulties encountered with translation so far, it is not safe to assume that all the translations will be completed in a timely manner. Note also that if the Court of Appeals acts quickly, this will increase the probability that the translation process will delay the suppression hearings, because there will be less time to complete translation before the hearings begin.

26 Two cases suggest aiding the due process inquiry by comparing the length of expected detention to the prison sentence a defendant would serve if convicted. See *Shareef*, 907 F.Supp. at 1484 ("it is also appropriate to consider the potential terms of imprisonment to which the defendants may be sentenced if ultimately found guilty of the charges as compared to the prospective length of pretrial detention in determining whether the due process rights of a person may be violated"); *Lofranco*, 620 F.Supp. at 1325 ("holding a defendant without bail for longer than he would serve if tried and convicted must also violate due process").

It appears that this consideration can lead to release of the defendant where the potential sentence the defendant faces is very short, but that it cannot justify continued detention once detention has become very long. For example, in *Shareef*, the court ordered release of a defendant who had already been detained nine months and who would have faced a prison sentence of eighteen to twenty-four months if convicted. See 907 F.Supp. at 1484-85.

However, in cases where the expected length of detention exceeded two years, courts have found that the length of detention weighed in favor of release even though the defendants faced very serious charges and were subject to long prison sentences. See *Millan*, 4 F.3d at 1043; *Ojeda Rios*, 846 F.2d at 169; *Melendez-Carrion II*, 820 F.2d at 60; *Gonzales Claudio*, 806 F.2d at 341; *Gatto*, 750 F.Supp. at 675. Thus, my conclusion that the expected length of detention weighs strongly in favor of Ailemen's release is not altered by the long prison sentence that Ailemen will receive if the dismissed charges against him are reinstated and he is convicted.

27 Chief Judge Feinberg's dissenting position that the Bail Reform Act is not facially unconstitutional anticipated the Supreme Court's decision in *Salerno*, 481 U.S. 739, 107 S.Ct. 2095.

28 The district court did not authorize the required expenditures until December 27, 1994, seven months after the application was filed. See *supra* Preliminary Findings of Fact ¶¶ 6-8. Defense counsel also contends that during this seven month hiatus the team that had been assembled to do the translating dispersed — and could not be fully re-assembled when the authorization finally was forthcoming, thus causing additional time to be lost.

29 While this court-caused delay in translation of the tapes is best treated as a "more neutral reason" than intentional or even negligent conduct, nonetheless "ultimate responsibility for [it] must rest with the government." *Cf. Barker*, 407 U.S. at 531, 92 S.Ct. at 2192.

30 Ailemen suggests that the government's decision to seek a stay of the case on the money-laundering count pending the double jeopardy appeal should be charged against the government. See 12/19/95 Supplemental Memorandum in Support of Motion-for Pre-Trial Release at 16. However, Ailemen did not oppose the government's motion for a stay and later filed a cross-appeal arguing for dismissal of the money laundering count on double jeopardy grounds. See *supra* Preliminary Findings of Fact ¶ 14. For this reason, the government's decision to move for a stay does not weigh in favor of Ailemen's release.

31 Without the delays occasioned by the slow delivery to the defense of discoverable information and the judicial system's processing of the request for funds to translate the tapes, most of the case-development could have been concluded before the double jeopardy appeals intervened. And a relatively prompt response by the Court of Appeals, even *after Cretacci*, 62 F.3d 307, to the government's challenge of the dismissals of the counts against Pius Ailemen, would have enabled the case against him to go to trial by January or February of 1996. But because of the unnecessary delays, this case now cannot be trial ready until at least the end of this year, and probably until sometime in the first half of 1997.

32 Under the conditions suggested for his release, Ailemen could pose a serious threat to the safety of the community only if he were to escape from the half-way house and resume his drug trafficking. But if he chose to flee, there is a substantial likelihood that he would not remain in this country, where he would know that he would be the subject of a relentless manhunt. And while he might try from abroad to orchestrate drug transactions that could affect the United States, a threat of this kind is too remote to weigh heavily in our analytical scales.

In any case, since Ailemen could only pose a serious danger to society if he were to escape from the half-way house, the magnitude of the threat that he might pose to society certainly cannot justify continued detention to any greater extent than can the risk of flight.

33 Ailemen argues that it is improper to base his detention on charges which have been dismissed on double jeopardy grounds. See 9/21/95 Supplemental Memorandum of Points and Authorities in Support of Motion for Pre-Trial Release at 2 & n. 1; 7/24/95 Memorandum of Points and Authorities in Support of Motion for Pre-Trial Release at 6 & n. 4. Ailemen's argument is aided by *Gatto*, 750 F.Supp. 664. In *Gatto*, the court found that the government had a strong case against the defendants on charges of running an illegal gambling business, but a weak case on much more serious charges of violent crimes. See *id.* at 674. The court stated that the illegal gambling charges alone could not justify detention, and ordered release of the defendants. *Id.*

However, in this case, the dismissed charges against Ailemen will probably be reinstated by the Ninth Circuit, and the evidence supporting those charges is fairly strong. Moreover, the Bail Reform Act permits a defendant to be detained pending an appeal by the government of the dismissal of an indictment. See 18 U.S.C.A. §§ 3142, 3143(c), 3731 (West Supp.1995); see also *Shareef*, 907 F.Supp. at 1483. No challenge to the constitutionality of that provision has been made, and it is unlikely, after *Salerno*, 481 U.S. 739, 107 S.Ct. 2095, that such a challenge would be successful. If the high court does not consider pretrial detention under the Act facially unconstitutional, it does not seem likely that it would hold that detention pending appeal is unconstitutional *per se*.

Thus, at least in the circumstances presented in this case, where it is probable that the Court of Appeals will reinstate the dismissed charges, and where that probability might well intensify the pressure on the defendant to flee, there does not seem to be any statutory or constitutional bar to considering the dismissed charges in ruling on this motion.

34 While he was acquitted of all the drug charges, he was convicted of the substantially less serious passport fraud count. He served his relatively modest time on that conviction, apparently without being much the worse for the wear.

35 The adverse consequences would be much more immediate if the sureties had property to post. Since none of the sureties proffered to date have property to post, they would feel the consequences of a violation by Ailemen over a longer period of time — e.g., in the form of wage garnishments and losses of tax refunds, etc. But the fact that the consequences would be experienced over a longer period of time, in installments, does not necessarily make them less real, especially to people whose only assets are their capacities to earn an income.

36 These conditions are listed in section V, "Recommendations." They do not include a requirement that property be posted on Ailemen's behalf. Because no such property has been available, imposing that condition would be tantamount to ordering his continued detention.

37 Of course, the standard release conditions also will apply (e.g., that he obey the law, appear as required in court and to serve any sentence imposed, and that he not harass, intimidate, or tamper with any witness, victim, informant, juror or officer of the court).