

THE TRUXTON REVIEW

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ABOUT THE TRUXTUN REVIEW

The Truxtun Review is a legal journal dedicated to criminal defense, constitutional law, and the administration of justice, with particular attention to issues affecting California's Central Valley.

Through legal scholarship, professional commentary, and analysis of contemporary legal developments, *The Truxtun Review* seeks to encourage thoughtful discussion about criminal jurisprudence, constitutional protections, and the role of defense counsel in the American justice system.

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THE JOKER DEFENSE: WHY SO SERIOUS?

Fabricated Confessions, the Sixth Amendment, and the Constitutional Cost of a Prosecutor's "Joke"

Peter Kang¹

ABSTRACT

The Joker treats deception and cruelty as entertainment. A prosecutor can't. In *People v. Velasco-Palacios*, a deputy district attorney inserted a fabricated confession into the English translation of a defendant's Spanish interrogation and gave the altered transcript to defense counsel during plea negotiations. The prosecutor later called his fabrication a "joke." By then, the false statement impacted counsel's advice, damaged defendant's trust in his attorney, and triggered the removal of his appointed counsel. The California Court of Appeal affirmed the dismissal of charges. This Note examines how the Sixth Amendment protects a defendant's relationship with counsel before trial and why interfering with that relationship warrants an extraordinary dismissal remedy. Batman stories provide a useful lens to explore the issues presented in *Velasco-Palacios*.²

INTRODUCTION: THE JOKER DEFENSE

In Gotham City, Joker turns cruelty and nihilism into a twisted joke. In Kern County, California, a prosecutor inserted incriminating statements into an interrogation transcript even though the defendant never made them. When confronted, prosecutor claimed it was intended as a "joke." The constitutional question wasn't whether the "joke" was amusing. It wasn't. It was whether government's conduct interfered with defendant's right to effective representation.³

The Fifth District in affirming outright case dismissal focused on prosecutor's interference with the attorney client relationship and the removal of defendant's appointed attorney on the case.⁴

¹ Peter Kang, Kern County Public Defender. Served as Chief Deputy Public Defender from 2013 to 2018 and as Assistant Public Defender from 2018 to 2021. Over his career, he has secured multiple acquittals in high-stakes trials involving life sentences. In December 2021, the Kern County Board of Supervisors appointed him as the Kern County Public Defender. Mr. Kang graduated with Highest Distinction and Phi Beta Kappa honors from UC Berkeley. He earned his law degree from UC Law San Francisco and completed a Public Policy and International Affairs JSI Fellowship at Carnegie Mellon University. Before joining the Public Defender's Office, he served as a USAF captain and as a base's Chief of Military Justice during the 9/11 attacks and the subsequent Global War on Terrorism.

² *People v. Velasco-Palacios*, 235 Cal. App. 4th 439, 442-52 (2015) (affirming dismissal based on prosecutorial interference with the right to counsel).

³ *Velasco-Palacios*, 235 Cal. App. 4th at 442-45, 447-49.

⁴ *Id.* at 447-52.

A prosecutor doesn't have to eavesdrop on privileged strategy sessions to interfere with counsel. Velasco-Palacios' case showed that the government can also irreparably harm the attorney client relationship by planting fabricated evidence in material an attorney uses to advise a client. The Sixth Amendment protects meaningful assistance during the proceedings that precede trial, not simply conduct in the courtroom.⁵

WITH GREAT POWER COMES THE PROSECUTOR'S GREAT RESPONSIBILITY

As the second son of Korean immigrant parents, I grew up reading and loving comic books. When I got the chance in elementary school to change my Korean name to an English one, I chose Peter, after Peter Parker, the Amazing Spiderman.

As I got older, my love of superheroes gave way to social activism, an Ethnic Studies degree from UC Berkeley, and a law degree from UC Law San Francisco. But Spiderman's famous mantra stuck with me: *With great power comes great responsibility*. Not just good advice from an uncle. It's the core job description for a prosecutor.

Prosecutors have the great power of the state behind them, and that comes the great responsibility to seek justice, not simply convictions. Nearly a century ago, the Supreme Court made that clear in *Berger v. United States*: a prosecutor's job isn't just to win, but to see that justice is done - as that court famously stated, the prosecutor "may strike hard blows, he is not at liberty to strike foul ones".⁶

In no multiverse or jurisdiction would deliberately fabricating evidence be considered zealous advocacy. It's an abuse of power that strikes at the heart of our justice system. Peter Parker understood something that every prosecutor should: Having the power to do something doesn't give you the right to do it. Spiderman constantly held back his punches because he knew if he didn't, people would get seriously hurt or die.

Velasco-Palacios faced five charges pursuant to Penal Code section 288(a), alleging lewd conduct with a child under fourteen. During pre-trial negotiations, parties discussed a possible eight year prison disposition. Prosecutor Robert Murray told Velasco-Palacios' assigned deputy public defender Ernest Hinman that he was considering adding more serious charges alleging penetration which carried a possible life sentence. After finding no evidence for increased charges, Murray sent a translated interrogation on October 21, 2013, containing two lines that he fabricated.⁷

The fabricated lines had a detective calling Velasco-Palacios a child molester, to which Velasco-Palacios replied, "I know. I'm just glad she's not pregnant like her

⁵U.S. CONST. amend. VI; CAL. CONST. art. I, § 15; see *Velasco-Palacios*, 235 Cal. App. 4th at 444-45, 448-51.

⁶*Berger v. United States*, 295 U.S. 78, 88 (1935)

⁷*Velasco-Palacios*, 235 Cal. App. 4th at 442-43; CAL. PENAL CODE § 288(a) (West 2013).

mother.” This comment placed directly within a translated transcript, if it were actually said, could justify criminal charges carrying a potential life sentence.⁸

WHY BATMAN’S HUSH WAS SUCH AN INTERESTING VILLAIN

Batman faced dangerous villains, but he hasn't always won. I remember being shocked when Bane broke Batman’s back in *Knightfall*, Deathstroke and Lady Shiva outfought him, and fights with Superman, Wonder Woman, Darkseid, (and even the Predator) kept showing just how vulnerable Batman is against super-powered opponents.

Despite Batman just being a man in a costume, I insisted to friends that Batman could beat anyone in the DC Universe given enough prep time. I read Frank Miller's *The Dark Knight Returns* as evidence that even an aging Batman with his intelligence, specialized equipment, and careful planning can beat Superman.

I still defend Frank Miller’s *Dark Knight* run as absolute perfection. But *Batman: Hush* had me seeing him differently than I expected. Batman faces something arguably worse than a broken back or physical defeat. His enemies manipulate the evidence, exploit his trust, and use his greatest strength, his detective skills, against him. For all his preparation and intelligence, Batman fails to recognize the full extent of deception until the end. Villains aren’t punching him, they’re playing with his mind, making him question reality. And unlike a beating from Bane, it's an attack he can't really train for or prepare his way out of.

Mild spoilers ahead to *Batman: Hush* so skip this section if you want to read *Hush* first. Hush and his accomplices stage Thomas Elliot’s apparent murder and make Joker appear responsible. Villains influence Batman by manipulating the truth. Similarly, in Velasco-Palacios’ case, the prosecutor introduced fabricated information into the attorney client relationship - misinformation that later caused massive irreversible harm to trust between attorney and client.⁹

During the Kern County Superior Court hearing on the defense's motion to dismiss for outrageous government misconduct, Velasco-Palacios broke down in tears on the witness stand. He testified that his life wasn’t a joke, expressing profound heartbreak and confusion over not being able to trust anyone.

Hinman testified at the hearing that he told his client that the supposed admission could support life charges. Velasco-Palacios insisted he had not spoken those words. Like the manufactured evidence in *Batman: Hush*, the prosecutor's fabricated confession did not remain in an isolated bubble. It became information through which subsequent decisions were made. The deception did not remain dormant in a discovery file. It entered the epicenter of attorney advice, communication, and strategy.¹⁰

⁸*Velasco-Palacios*, 235 Cal. App. 4th at 442-43

⁹See id. at 443-44, 448-49.

¹⁰Id. at 443-44, 448-49.

There's an important difference between passive spying and active contamination. In *Barber v. Municipal Court*, an undercover officer posed as a co-defendant, was arrested with a protest group, and sat in on confidential attorney-client strategy and defense meetings. The California Supreme Court found violated defendants' right to counsel. In *Morrow v. Superior Court*, a prosecutor told an investigator to eavesdrop on private, in-custody attorney-client conversations, which raised similar concerns. Those cases involved access to protected communications. In *Velasco-Palacios*, however, the prosecution went a different, but no less intrusive direction. Rather than wrongfully obtaining confidential information, it injected a toxic fabricated confession into the attorney client relationship which corrupted counsel's strategic decisions and advice. The *Batman: Hush* analogy illustrates the distinction: an attack need not be direct or physical to inflict irreparable harm. A carefully planted lie can be just as destructive as listening in on strategy. False information spreads and infiltrates the attorney client relationship and ultimately destroys trust and creates enormous suspicion on who to believe.¹¹

WAITING NINE DAYS TO DELIVER A PUNCH LINE

Prosecutor Murray sent Velasco-Palacios' attorney the fabricated transcript on October 21 and appeared in court with defense counsel on October 28 without disclosing the lie. Murray didn't admit to falsifying the transcript until October 30, and only after defense attorney Hinman requested the source recording. Importantly, defense counsel had to proceed cautiously. Rather than directly confronting Murray about the suspicious statement or identifying the particular language at issue, defense counsel sought only the underlying recording. Discussing the statement directly with prosecutor risked alerting him to an issue he may have missed. The nine day delay therefore matters not only because the fabricated statement remained apparently authentic, but also because defense counsel was placed in the difficult position of investigating potentially false evidence without revealing what the defense had discovered or why it was significant.¹²

At the evidentiary hearing on the defense's motion to dismiss, Murray characterized the fabricated statements as a "joke," despite acknowledging that he had no history of joking with Hinman in that way. The Kern County Superior Court rejected the notion that Murray's alleged "joke" diminished the seriousness of his conduct. The court regarded the dissemination of a fabricated confession during ongoing plea negotiations as outrageous, regardless of Murray's insistence that the statements were intended as humor. The harm lay not just in Murray's claimed intent, but in the introduction of false evidence into a critical stage of the defense process.¹³

¹¹*Barber v. Mun. Ct.*, 24 Cal. 3d 742, 748-50, 755-60 (1979); *Morrow v. Superior Ct.*, 30 Cal. App. 4th 1252, 1261-63 (1994); *Velasco-Palacios*, 235 Cal. App. 4th at 448-49.

¹²*Velasco-Palacios*, 235 Cal. App. 4th at 443-44, 447.

¹³*Velasco-Palacios*, 235 Cal. App. 4th at 443-44 (recounting the prosecutor's testimony and the trial court's findings).

The nine day wait exposed the flaw in Murray's explanation. What good is calling a fabricated confession a "joke" after defense counsel treated it as genuine for nine days, potentially reshaping legal strategy around it, and losing client's trust? The damage occurred when the lie was believed and isn't healed when Murray finally comes clean. As I stated at a press conference following the hearing, if this was a joke, I don't understand the punchline. When comedians joke, they relieve the tension fairly quickly with a well-timed punchline. They don't say tune in next week to hear why it was funny. Murray's long overdue admission set the record straight, but it didn't undo the damage already inflicted on the attorney client relationship.¹⁴

Like the Joker who plants a lie, lets chaos unfold, and then dismisses the damage with his infamous taunt in *The Dark Knight*, "Why so serious?", a prosecutor cannot treat any kind of deception on their part to defense counsel as harmless or inconsequential. Something many of us learned in grade school, you can't just hurt someone's feelings and expect them to be okay if you follow it up with "just kidding".¹⁵ The joke sometimes hides real feelings about a matter.

ATTORNEY CLIENT RELATIONSHIP IS THE DYNAMIC DUO

For me, Batman and Robin represent one of the most recognizable duos in comic book history. Yeah, I'm aware that more than one Robin wore the cape, and Batman has gone through and ruined a lot sidekicks. But the original "Dynamic Duo" remains the gold standard for a relationship built on trust, loyalty, and purpose. Beneath costumes, questionable child labor practices, and Batman's refusal to get counseling for unresolved childhood trauma lies, there is deep trust and respect for each other. The relationship between a defendant and their defense counsel is no different. Velasco-Palacios testified that he had been comfortable going to trial with Hinman before learning of the fabricated confession. However, his confidence in his attorney collapsed after he learned that he was lied to. He no longer trusted the person defending him. The Fifth District recognized that this wasn't just hurt feelings or a disagreement over strategy. It was concrete injury to the attorney client relationship caused by prosecutor's deception. And just as replacing Dick Grayson with Jason Todd didn't restore the magic of the original Dynamic Duo, the state can't assume that replacing counsel erases the constitutional harm already inflicted.¹⁶

Murray's fabrication ultimately led to a contested hearing on the motion to dismiss and forced Hinman's removal from the case. Because Hinman would have to testify about privileged attorney client communications and the damage Murray's misconduct had caused, the Public Defender's Office removed him from the representation and appointed me in his place. At the time, I was serving as Chief Deputy Public Defender. I assumed responsibility for the case, argued the motion to

¹⁴See id. at 443-44, 448-51

¹⁵THE DARK KNIGHT (Warner Bros. Pictures 2008); see also *Velasco-Palacios*, 235 Cal. App. 4th at 443-44.

¹⁶Id. at 443-44, 448-49.

dismiss, and was placed in the challenging position of having to call Hinman as a witness to establish the harm caused by the prosecution's misconduct. Thus, Murray's fabrication did more than undermine trust between attorney and client. It deprived the defendant of his existing counsel and disrupted the defense itself. The appellate court expressly traced that loss of counsel to Murray's misconduct.¹⁷

The Supreme Court gives particular protection to the right to choose retained counsel, while an indigent defendant doesn't have an unlimited right to select a particular appointed lawyer. California authority nevertheless recognizes the importance of continuity in an established appointed representation. Here, the appellate court considered the prosecutor's role in destroying that continuity constitutionally significant.¹⁸

On appeal, the California Attorney General raised a serious objection to dismissal. Even if the prosecutor's actions were improper, the state argued, the defendant could still receive a fair trial with a corrected evidentiary record and replacement counsel. The defense countered that the constitutional damage had already occurred, before trial, through interference with representation and plea negotiations.¹⁹

United States v. Morrison provides the limiting rule. The Supreme Court stated that, without demonstrable prejudice or a substantial threat of prejudice, dismissal is inappropriate even after deliberate interference with counsel. Relief should be fashioned to neutralize the actual taint. The Fifth District in *Velasco-Palacios* applied that principle but rejected the premise that trial admissibility was the exclusive measure of injury.²⁰

Also distinguished is *People v. Uribe* (2011) 199 Cal.App.4th 836, noting that the prosecutor's outrageous misconduct in that case did not cause the specific prejudice required to justify a total dismissal of charges. The Sixth Appellate District decided *Uribe* basing its ruling on a substantive due process theory regarding government misconduct, rather than the separate Right to Counsel inquiry that governed the present case.²¹

CONCLUSION

The Joker wants an audience to see madness and performance. When a prosecutor writes a false confession into discovery, even assuming it's just in good fun, we become spectators invited against our will to participate in an erosion of judicial integrity and honor. Some comedians talk about how jokes should not punch down, not break those who are already vulnerable. But when someone with

¹⁷Id. at 443-44, 448.

¹⁸*United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-51 (2006); *People v. Noriega*, 48 Cal. 4th 517, 523-24 (2010); *Velasco-Palacios*, 235 Cal. App. 4th at 447-48.

¹⁹Id. at 449-51

²⁰*United States v. Morrison*, 449 U.S. 361, 364-65 (1981); *Velasco-Palacios*, 235 Cal. App. 4th at 450-51.

²¹*People v. Uribe*, 199 Cal. App. 4th 836, 861-69, 872-74 (2011); *Velasco-Palacios*, 235 Cal. App. 4th at 446-47, 449-50.

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the power of the state behind them punches so far down for the sake of humor, it becomes aggressive, mean, and cruel. The Court of Appeal concluded prosecutor's attempt at stand up by affirming that Kern County Superior Court Judge Staley's dismissal could stand.

CAPITAL PUNISHMENT’S CORROSION OF THE SIXTH AMENDMENT AND A HIPPOCRATIC REMEDY

Jacob Evans¹

ABSTRACT

The Sixth Amendment promises every criminal defendant the right to a speedy and public trial, an impartial jury, notice of the charges, the opportunity to confront witnesses, and the effective assistance of counsel. These guarantees are not aspirational; they are structural. They define what a criminal trial is. The death penalty does not merely threaten to punish unjustly. It operates from the moment charges are filed to systematically undermine constitutional guarantees, not only of the eighth and fourteenth amendments, but of the fifth and sixth amendments as well. The result is a constitutional paradox: the state reserves its most severe punishment for proceedings that are least capable of producing a reliable verdict.

The argument here does not rest on the philosophical merits of capital punishment which are dubious to boot, nor on the well-documented risk of executing the innocent, nor on its disproportionate application to select demographic groups, nor on its illegitimate historical roots, nor on the empirical failure of deterrence, nor on the illegitimacy of retribution as a justification for punishment, nor on the well-established economic waste of taxpayer resources inherent in pursuing the death penalty. These are serious concerns, and they have been litigated extensively and incompletely resolved.

The present argument is narrower and, perhaps for that reason, more damning: the death penalty does not merely carry the risk of an unjust outcome; it structurally deforms the proceeding that is supposed to produce a just outcome in the first place.

THE CONTAMINATION BEGINS AT CHARGING

The constitutional damage does not begin at *voir dire*. It begins when a prosecutor decides to seek the death penalty, a decision that occurs before charges are filed and often before an arrest is made. At that moment, the prosecutorial function expands beyond its ordinary scope. In California and in most capital jurisdictions an elected district attorney authorizes the filing of capital charges. This is not an ordinary charging decision made by the assigned prosecutor applying the facts to the law. It is an institutional commitment loaded with political consequence, made by people who will not try the case, who do not know the evidence as well as

¹ Jacob Evans. California State Bar Certified Criminal Law Specialist. Supervising attorney for the Kern County Public Defender’s Office.

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the trial prosecutor, and who have substantial external incentive to appear decisive and uncompromising.

The consequences of that institutional commitment are immediate and pervasive. A defendant who might otherwise receive a preliminary plea offer receives none, or receives one so distant from the likely trial outcome as to be functionally coercive. A prosecutor who might privately assess the case as strong on manslaughter but weak on murder is constrained by the goal already manifested. Rather than adjust the charges to fit the gap between the authorized charge and the likely provable charge, that gap becomes a lever.

PLEA BARGAINING UNDER STRUCTURAL COERCION

In ordinary criminal practice, coercive plea offers are recognized as a constitutional problem. The voluntariness of a guilty plea depends at least in theory on the defendant's ability to make a rational, informed choice. A plea entered under conditions of extreme compulsion is not truly voluntary; it is capitulation.

Capital cases make this problem explicit and then proceed while ignoring it. If there is a settlement offer in a capital case, that offer is usually life imprisonment without the possibility of parole (LWOP). In California, where the moratorium on executions has been in effect since 2019 and where the average time between sentencing and execution has historically exceeded two decades, LWOP and a death sentence are as a practical matter functionally equivalent. The defendant will die in prison either way. And yet the existence of the death designation produces a nearly irresistible pressure to accept LWOP, a pressure felt not only by defendants but by defense counsel who are supposed to be the rational check on that pressure. Defense attorneys expressly reinforce to one another that LWOP is an unequivocal win; it is the prescribed goal and should be celebrated, not for the attorney's own glory but for the client's sake: "you've saved his life."

This is the most revealing feature of the structural corruption: capital defense attorneys, who have nothing personally at stake, who are trained to evaluate risk dispassionately and well-experienced in doing so, and who understand that California is not likely to execute their client, nonetheless feel compelled to recommend acceptance of an LWOP plea offer when death is on the table. If the designation is coercive to their lawyers, then it is categorically overwhelming to the defendants. A plea entered under these conditions cannot be described as voluntary in any meaningful sense; it is a rational response to an irrational threat. The system that requires voluntariness has constructed and embraced a mechanism for eliminating it.

THE TWO-COUNSEL PROBLEM

Capital defendants are entitled to two attorneys: one attorney handles the guilt phase and usually the more experienced attorney handles the penalty phase. This arrangement is well-intentioned. The theory is that penalty-phase counsel, who

focuses on mitigation, personal history, and the circumstances that might spare the defendant's life, can approach the jury as a "clean slate," without the baggage of having just presented the guilt phase to the jury unsuccessfully.

In practice, this structure creates a tension that neither attorney can remove. Penalty-phase counsel's effectiveness depends on disclosing to the prosecution, and ultimately to the jury, precisely the information that guilt-phase counsel has been protecting: the client's mental health history, the childhood trauma, the substance abuse, the prior bad acts, and everything else that constitutes the full human experience. The mitigation letter to the prosecutor, the life-history investigation, the expert evaluations, all of it requires the defense to lower the walls it would usually erect for the guilt phase of trial. But those walls are at the heart of attorney-client confidentiality, which enables and encourages the client to be honest with their lawyer in order to get good advice from their lawyer.

The result of that tension is a kind of structured incoherence. The guilt-phase attorney argues that the client is presumed innocent, that the state has not proved its case, and that the jury should not speculate about the defendant's character or history. The penalty-phase attorney, whose effectiveness depends on precisely the opposite, cannot do her job without implicitly reversing the structure that her colleague just worked to erect. The client who has been protected from disclosure in the guilt phase must meet disclosure in the penalty phase; and the jury, having heard the mitigation, is invited to reconsider what it thought it already knew. The two-attorney requirement, designed to protect the defendant, ends up creating a structural conflict that compromises both phases.

THE DISCLOSURE PARADOX BEFORE CONVICTION

The problem is not limited to the relationship between the two defense attorneys. It begins with the mitigation letter, a practice so entrenched in capital defense that it is treated as standard procedure rather than the constitutional anomaly it is.

In any other case, defense counsel does not write to the prosecutor before trial to explain their defense strategy. They do not ordinarily point out the prosecution's weaknesses, nor their backup strategy regarding sentencing. They do not expose the client's personal history, nor present the prosecutor with information that the prosecutor can then use against the client at sentencing. That would be a profound violation of the adversarial structure that the Sixth Amendment provides. Yet counsel routinely does exactly this in a capital case, and counsel does so before conviction, even before trial, because the alternative is to risk the capital designation to persist through trial and into penalty, with all of the attendant distortions that follow.

The mitigation letter is, in effect, a penalty-phase submission filed before the guilt phase has even begun. It discloses information about the defendant that the defendant has a constitutional right to withhold. It does so under compulsion: not legal compulsion, but the compulsion imposed by the enormous gravity of the

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prospect of execution. The voluntariness fiction that sustains the practice is indistinguishable from the voluntariness fiction that sustains the coerced plea. Both are products of the same structural pressure, and neither is voluntary in any sense that the Constitution should recognize.

Lewis Carroll's Queen of Hearts had a similar system: "sentence first, verdict afterwards." Capital practice has adopted this literary absurdity as a matter of professional custom.

THE DEATH-FOCUSED JURY

The Sixth Amendment guarantees trial by an impartial jury. In a capital case, that guarantee is compromised before a single prospective juror is selected, and it is compromised not only by the state but by the defense.

In an ordinary criminal trial, defense counsel uses voir dire to identify and remove jurors who cannot follow the rules of law that protect us all: the presumption of innocence, the burden and standard of proof, the proper treatment of circumstantial evidence, the requirement that the case be decided on its own merits. These are not minor procedural refinements; they are the conditions under which a fair guilt determination is possible. Capital voir dire does not have room for these inquiries, not because the rules cease to apply but because the guilt phase of the trial is not the main event.

Defense counsel in a capital case must probe the jury's capacity for mercy and compassion, identify the "killers," and remove them. The questions that dominate capital voir dire concern the penalty: whether a juror could vote for death under any circumstances, whether a juror could consider mitigation, whether a juror could weigh a life sentence against an execution and apply the law to either outcome. These are penalty-phase questions. They are being asked of people who have not heard a word of evidence on guilt and who are being told unconvincingly that the defendant is presumed to be innocent of the charges. The defense attorney who spends voir dire exploring a juror's capacity for compassion in sentencing, rather than her capacity to weigh the standard of proof, has already communicated something to that juror: conviction is expected, the real question is what follows, and even the defendant's attorney has already accepted this framing.

This is the functional equivalent of vouching, and it is more corrosive than the prosecutorial variety. A prosecutor is prohibited from expressing a personal belief in the defendant's guilt. It would be inappropriate and unjust for any juror to defer to that authority and abandon their independent judgment. The prohibition exists to protect the presumption of innocence from being assailed by professional endorsement. In a capital voir dire, defense counsel does not *say* that they believe their client is guilty; counsel *demonstrates* that belief by devoting all or nearly all of jury selection to the question of what should happen after the verdict that everyone in the room already anticipates. The message is delivered not in argument but in conduct, and it is delivered by the one participant the jury might otherwise expect to champion the defendant's innocence.

After all of this, there is also *Witherspoon v. Illinois*, which provides constitutional authorization for excluding jurors who say they cannot impose the death penalty regardless of the evidence. On a contentious, often deeply-felt political issue, an entire point of view is excluded from the “representative cross section of the community” that comprises the jury. The resulting death-qualified jury correlates with conviction-proneness, with skepticism toward mitigation, and with demographic characteristics that favor the prosecution. *Witherspoon* therefore puts a judicial imprimatur on a selection process that had already abandoned the presumption of innocence before the first challenge was exercised. It is not the cause of the problem; it is the law’s formal ratification of it.

THE SIXTH AMENDMENT’S BROKEN PROMISE

The Sixth Amendment is premised on a model of adversarial justice in which the state bears the full burden of proof, the defendant is protected from disclosure until the state meets that burden, and the fact-finder decides guilt on the basis of evidence rather than character or consequence. The death penalty, as administered, corrodes and even reverses each of these premises before the trial begins.

A defendant who faces capital charges has already, in many cases, been the subject of prosecutorial disclosures that no non-capital defendant would entertain. The jury that will decide guilt has been pre-screened for its capacity to vote for death. The defense attorneys are structurally at cross-purposes. The plea that resolves the case before trial was entered under conditions that would be recognized as coercive in any other context.

These distortions are not bugs in the administration of the death penalty. They are features of a system that assigns such significance to the ultimate sanction. Every procedural protection bends to it. The promises of the Sixth Amendment cannot be kept, when the entire system that has already decided the question of guilt before the trial begins.

The death penalty does not just risk killing the innocent. It structurally prevents the proceeding that is supposed to determine innocence from functioning as it must. Every distortion catalogued above requires the participation of defense counsel to sustain it. The mitigation letter is written by a defense attorney. The penalty-focused voir dire is conducted by a defense attorney. The LWOP plea is recommended by a defense attorney. The clean-slate co-counsel is planned by a defense attorney. At each stage, a member of a profession ostensibly committed to the adversarial paradigm abandons it and instead embraces a beggar’s motif. The system does not merely tolerate this participation; it causes it; it depends on it.

Meanwhile, we tell ourselves that a capital trial without engaged, diligent defense counsel would be recognized as the show trial it is. We justify the outcome by pointing to the presence of defense counsel. Their involvement is what makes the outcome look like justice. Their inextricably corrupted defense *appears* to legitimize the very thing they are there to defend against.

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The medical profession understood this problem and resolved it with a principle rather than a statute. Since almost two and a half millennia ago, physicians have sworn the familiar Hippocratic oath to “first, do no harm.” As a result, they have refused as a matter of professional ethics to participate in executions, to select or provide lethal drugs, to supervise their administration, or to certify death for purposes of resuming a botched procedure. The result has been entirely predictable: states cannot reliably obtain the drugs they seek, because the supply chain depends on manufacturers and distributors who answer to a profession that has declined complicity. Withholding professional legitimacy has destabilized the machinery.

Defense attorneys have not adopted a comparable principle, and the death penalty has not suffered a comparable crisis of legitimacy. Perhaps it should. If counsel collectively refused to participate in the structural charade, refused to write mitigation letters before conviction, refused to conduct voir dire organized around the penalty phase, refused to lend the appearance of adversarial fairness to a proceeding that forecloses it, the system would be forced to confront what it actually is. Defense counsel can quite literally insist that they will “do no harm,” and that they will not donate their hard-earned reputation to legitimize the death penalty.

For defense counsel in a capital case, the harm is not only to the client; it is to the institution of the trial itself. A profession serious about that injunction to do no harm might conclude that the most faithful thing it could do is refuse to be used as the instrument of the charade’s legitimization. Without such a refusal, every skilled and conscientious capital defense attorney is and will remain in some measure the death penalty’s most supportive prop.

Why Flock Cameras Matter

Nick Roth¹

ABSTRACT

Flock cameras are an increasingly common tool utilized by law enforcement to track vehicles and investigate crime. Their increasing prevalence, however, has meaningful implications for how courts define “searches” within the meaning of the Fourth Amendment’s guarantee against unreasonable searches and seizures. These implications should be understood and acknowledged by the public at large, as we continue to debate the appropriateness of the use of this technology without a warrant.

INTRODUCTION: FLOCK CAMERAS ARE HERE

You have surely heard about them by now. You may have even seen them while driving to work, the store, or the mall. Across the U.S., Flock cameras are now more prevalent than ever, but they are not without controversy. Many are concerned that Flock cameras represent yet another expression of the modern surveillance state, watching its citizens and their every move. Is this simply unfounded paranoia? Or when it comes to our privacy, do Flock cameras actually matter?

First, we must understand what they are, and what they are not. Flock cameras are devices placed in public areas that collect and store vehicle data, for every single car that passes within view of the camera.² This includes license plate numbers, but not just that. Flock cameras also record and store other data related to individual vehicles such as bumper stickers, decals, makes and models of cars, colors, and more.³ Vehicle data typically gets stored for 30 days, and the resulting database can be searched by law enforcement.⁴ Flock cameras focus on recording information related to vehicles, not individual people.⁵

¹ Nick Roth. A licensed attorney and has been a Deputy Public Defender at the Kern-County Public Defender's Office since 2016. He graduated *cum laude* with a Bachelor of Science degree from U.C. Berkeley, and graduated *cum laude* from U.C. Law S.F. (formerly U.C. Hastings), where he received his *juris doctor*. He also is a Professor of Law at the Monterey College of Law (Bakersfield campus), where he teaches Evidence and Moot Court.

² Dore, C. (2026, July 14). ‘Flock cameras are not going away anytime soon’: Safety or privacy argument as L.A. ends Flock camera contract. *KGET*. KGET.com.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

ARE THEY HELPFUL?

It cannot seriously be contested that Flock cameras help solve various crimes. Imagine that your vehicle gets stolen, and you report it to the police. 30 years ago, it could be difficult to locate your car without a bit of luck. But now, there is a realistic chance that a Flock camera may capture the vehicle traveling down a particular street, and give you the car's location in real time. Or, imagine a situation where a jealous and angry man kidnaps his ex-girlfriend's daughter. Flock cameras could be invaluable in helping to locate the man's vehicle, and by extension the man and the minor victim, as soon as possible.

THE LINK BETWEEN NEW TECHNOLOGIES AND THE FOURTH AMENDMENT

But at what cost? While it may not seem obvious, the use of Flock cameras and other similar technologies has a direct impact on our understanding of the Fourth Amendment's guarantee against unreasonable searches and seizures. To understand why, one must understand the Fourth Amendment's logic and underpinnings. The Fourth Amendment allows for the government to search its citizens, generally speaking, only when a judge approves of the search by agreeing that probable cause exists to justify the issuance of a search warrant.⁶ There are exceptions of course; police need not wait to get a warrant before entering a burning house to try and save people trapped inside.⁷ The warrant requirement, however, remains one of the primary ways that our Constitution guarantees our right to privacy. It ensures that police cannot enter homes for no reason. Nor can they go on fishing expeditions to read private text messages, search backpacks, or otherwise harass citizens in the mere hope of finding something illegal. The warrant requirement guarantees that a neutral third party, a judge, must be satisfied that probable cause to support a search exists, before the search can occur. It is thus absolutely essential to the fabric of our free society, and it shields against the creation of a totalitarian state that spies on its citizens.

THE LEGAL TEST FOR DEFINING SEARCHES

Some things are obviously searches. When police officers enters a private home without consent, a search has occurred.⁸ Similarly, when police pat down a suspect, go through someone's car, or empty the contents of a backpack or purse, a

⁶ U.S. Constitution, Amend. IV.

⁷ See *Kentucky v. King* (2011) 563 U.S. 452.

⁸ *U.S. v. Ross* (1982) 456 U.S. 798.

search has typically occurred.⁹ But other conduct is less clear. What if police rummage through your trash bin that you have left on the edge of your driveway for pickup? Is this a search, requiring police to obtain a warrant before doing so? No, as it turns out, according to the Supreme Court in *California v. Greenwood*.¹⁰ What if the police place a tracker on your car, unbeknownst to you, and use the data to find out everywhere you went for a month or so? Would this constitute a search, requiring police to get a warrant before placing the tracker? Yes, according to the Supreme Court in *United States v. Jones*.¹¹ Whether or not some conduct constitutes a search becomes an essential question in determining the limits of police powers, and whether or not police need a warrant before engaging in the conduct.

In our rapidly changing technological landscape, novel issues and new police techniques confront us daily. So, when there are close calls, how do judges determine if something that occurred was a search or not? The famous test comes from the Supreme Court case *Katz v. United States*.¹² There, the Supreme Court articulated the legal standard for evaluating potential searches. A search occurs, according to *Katz*, when two prongs are met. First, the person searched must express an actual (subjective) expectation of privacy in the item or place to be searched.¹³ For example, let us imagine that I have a backpack made of transparent material. Let us also imagine that I placed a bundle of illegal drugs in the backpack. I board a bus and a police officer happens to be on board. He sees the drugs, immediately detains me, searches my backpack, and ultimately arrests me. Was this an illegal search? Not according to the law, as the backpack was see-through. Thus, I could not show that I had an actual expectation of privacy in the backpack's contents, since anyone could have seen them.

The second prong is a little more interesting. Even if I have an actual subjective expectation of privacy in the item searched, *Katz* also requires that the expectation of privacy be one that society is prepared to recognize as reasonable (the "objective" prong).¹⁴ To illustrate, let us imagine a situation similar to that in *California v. Greenwood*, above. Suppose that, after a night of wild drug use, I throw my drug paraphernalia in my trash and place my trashcan outside on the curb to be picked up the next day. Without a warrant, police come by and search my trash, find the paraphernalia, and arrest me. Let us also imagine that, in the resulting criminal case, I move to suppress the evidence of paraphernalia, claiming it was the result of an illegal search without a warrant. I testify in the hearing, and convincingly state that I absolutely expected my trash contents to be private. The judge may find the "subjective" element satisfied. But, the judge could still find that the police did not need

⁹ See, e.g., *Terry v. Ohio* (1968) 392 U.S. 1.

¹⁰ (1988) 486 U.S. 35.

¹¹ (2012) 565 U.S. 400.

¹² (1967) 389 U.S. 347.

¹³ *Id.* at 361 (Harlan, J., concurring).

¹⁴ *Id.*

a warrant, and did not act improperly, in searching through my trash. This is because a reasonable person would not expect trash to remain private after it has been abandoned and placed out in public.

KATZ'S PUBLIC POLICY IMPLICATIONS

The *Katz* test has provided a reliable and sturdy framework for how courts evaluate police conduct. But it is not perfect. The “objective” prong of the test in particular creates interesting problems. First, it is not always clear what society thinks is reasonable when it comes to privacy expectations. Our country is made up of millions of people with millions of different views. Many folks put their entire lives on social media, and many others already tell their most private secrets to A.I. programs like Chat GPT. Yet there are still those who keep their affairs incredibly private, and do not share the details of their private lives with anyone else unless it is absolutely necessary. Which group defines what is reasonable? And how confident are we that unelected judges can accurately put their finger on the pulse of society’s privacy expectations as a whole? Particularly when we consider that many judges were former prosecutors and often worked closely with law enforcement themselves?

But another, even deeper issues pervades the *Katz* objectivity prong. Society’s attitudes, about anything really, do not remain static. They are dynamic and shift with time. They can be influenced by any number of things. Take the example of gay marriage. Legalized gay marriage 100 years ago would have been unthinkable – now it is the norm. Attitudes on privacy can also shift, and they can be influenced by the very government trying to shift them!

This is where Flock cameras come in. When the government installs Flock cameras and normalizes them in our community, it continues the process of chipping away at the outer limits of what we reasonably consider to be private and personal. After all, once Flock cameras are here, and everyone KNOWS they are here, how can anyone be surprised at them? And if no one is surprised by them, can anyone really argue that their expectation in not having their own car tracked and logged in a government database is still reasonable? If judges agree, then they will continue to allow the use of Flock cameras and subsequent database searches without a warrant. One would hope that such a system does not get abused. But without the necessity of a warrant, police will be free to use the system without any judicial oversight. And judicial oversight is and remains the primary way that the guarantee of the Fourth Amendment right against unreasonable searches remains real, rather than illusory.

Maybe the trade-off is worth it. After all, we are always making trade-offs in our society. For example, over 36,000 deaths occurred in the U.S. in 2025 as a re-

sult of traffic accidents.¹⁵ If we outlawed cars and driving completely, we would save thousands of lives that would otherwise be lost to car crashes. But as a society, we allow driving and make the trade-off. We understand that we are willing to bear all of those deaths, because they are outweighed by the overall benefit to our society provided to us by automobiles and the availability of private transportation.

CONCLUSION – WHAT WE MUST KEEP IN MIND

Perhaps Flock cameras are worth it too. But as a society, we should absolutely have a conversation about them, and about any other technology that purports to surveil us, track us, and collect data on us. And not just because we should object generally to living in a surveillance state. Part of the conversation should be an understanding that, the more such technology gets normalized, the more likely it is that judges will find a shift in all of our reasonable expectations of privacy. This will not just have psychological consequences; it will have legal ones. The applicable legal tests will encourage judges to continue allowing for more and more warrantless surveillance as long as they keep finding that our objective expectations of privacy continue to dwindle. Let us hope that they do not disappear completely.

¹⁵ (2026, April 1) Trump’s Transportation Department Announces Record-Low Traffic Deaths & Fatality Rates in 2025. National Highway Traffic Safety Administration. [nhtsa.gov](https://www.nhtsa.gov).

How Do You Defend THOSE People?

Why Public Defenders Do What They Do

Nick Roth¹

ABSTRACT

Public defenders have to defend individuals who have committed unspeakable acts. Why would anyone want to do such a job? Perhaps paradoxically, the work of a dedicated defense attorney is incredibly rewarding and life-affirming.

INTRODUCTION: AWKWARD AT THANKSGIVING

If you are a defense attorney, you have heard this question before. Perhaps you have heard it many times. Quizzical relatives may interrogate you at Thanksgiving. Good friends may question you over coffee. Even acquaintances or strangers may probe you if the subject of your job comes up, without any self-awareness of the inherently degrading nature of the inquiry.

THE EASY ANSWER

And indeed, a good first response is to object to the very nature of the question. Some of our clients are innocent – more than you might think. And many of our clients face cases that hardly define their entire lives. Defense attorneys represent people who may have drug addictions, but are not actively harming others. We represent people who are mentally ill, and may be in jail but desperately need help and treatment much more than they need incarceration. We also represent those who have committed victimless crimes. Many public defender clients face charges like driving without a license, possessing an unregistered firearm, and the like. While these folks may have broken the law, they are hardly public enemy number one. It is often a joy and pleasure to help these people through their legal troubles, get them the best resolution possible, and give them the information and guidance they need so that they hopefully do not break the law again.

¹ Nick Roth. A licensed attorney and has been a Deputy Public Defender at the Kern County Public Defender's Office since 2016. He graduated *cum laude* with a Bachelor of Science degree from U.C. Berkeley, and graduated *cum laude* from U.C. Law S.F. (formerly U.C. Hastings), where he received his *juris doctor*. He also is a Professor of Law at the Monterey College of Law (Bakersfield campus), where he teaches Evidence and Moot Court.

A PUBLIC DEFENDER'S TRUE CALLING

But let us not dodge the tough question. Make no mistake, if you stay in this business long enough, you will start getting more serious cases. Public defenders routinely represent people charged with murder, rape, child molestation, and other unspeakable acts. While some clients facing those cases may be innocent or have legitimate defenses, many more are undoubtedly guilty of horrific things.

So how and why do public defenders represent THOSE people? Certainly, no attorney representing a client charged with murder or a sex crime actually endorses such activities. But to answer the question, it is helpful to consider the sentencing hearing that will occur if such a client is found guilty after trial. At sentencing, a defense attorney will have an opportunity to present any information that can be mitigating, such as trauma the person suffered as a child, difficulties they experienced in life, mental health issues, and more.² In other words, our job requires us to make an effort to see the humanity in everyone we represent and to tell their stories – even with the worst of the worst. We do not have the luxury of looking at people in black and white terms. It is very easy for someone to hear about a tragic crime, and remark that the guilty party should rot in prison or even burn in hell. When it comes to crimes like continuous sexual abuse of a child, it is completely understandable! And when the system is working properly, those who commit unfathomable acts will be punished appropriately, even with the best attorneys in the world working on their behalf. But when you defend someone, you have no choice but to live out in real time a philosophy of loving your enemies and extending some base level of humanity and understanding to those who would never otherwise receive it.

So many of our clients interact frequently with government agencies. If they are charged with a crime, then they have necessarily been arrested by law enforcement and face prosecution. They may be on food stamps or other forms of government assistance. Very commonly, such agencies treat their clients like a number or a commodity. When you call a government office, you often don't speak to a human; you first must navigate through a labyrinth of automated options. Appointments can be very difficult to come by. And when you do speak to someone, you may be the hundredth person spoken to that day.

The attorney-client relationship, however, is something much more involved, delicate, and complex than applying for food stamps or housing assistance. Most public defenders go into the profession because they want to help the most marginalized people in our community. Those people are often distant and mistrusting; understandably so. But something amazing can happen over time when the attorney-client relationship blossoms and evolves. By promptly returning our clients' calls, answering their questions, and assuaging their concerns, they start to feel

² See Cal. Penal Code 1170(b)(6).

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heard and valued, possibly for the first time in their lives. I have had clients express their heartfelt thanks to me for fighting for them and defending them even when I lost their trial, because no one ever fought for them or sided with them before. We know how hard life can be sometimes even for those with steady jobs, homes, and families, and it is easy for difficulties to simply overwhelm and crush those who are not as lucky. Providing a guiding light to such people is a worthy undertaking.

It makes an incalculable difference to simply treat a client with dignity and respect, regardless of what they are accused of doing. So many have never experienced that before. It is also an incredible feeling to give a client the same level of attention that they could imagine receiving if they were a client of Goldman-Sachs with millions of dollars ready to invest. In doing that, we can show people: No matter what you did, no matter who you hurt or why, I am still going to demonstrate that you cannot compromise my fundamental belief in a base level of humanity for all my fellow creatures.

CONCLUSION: RECOGNIZING THE HUMANITY IN EVERYONE

It is hard sometimes. We are all imperfect after all, and no one can truly stop themselves from ever passing judgment on others, particularly those who may deserve our judgment the most. But when defense attorneys fight for someone, it means that we can hopefully trust the ultimate results to be fair and just. It means that I can sleep at night knowing not just that someone was afforded their right to competent counsel. It means that, at our best, we prove that our system (and, by association, our society) will not belittle itself by treating the accused like unnamed cattle, because WE, public defenders, refuse to treat anyone that way.

And that is why we represent THOSE people.

DEFENDING DIVERSION

How Zach Scrivner's Case Taught Us All The Wrong Lessons

Nick Roth¹

ABSTRACT

While facing accusations of sexual molestation and illegal gun possession, local politician Zach Scrivner successfully petitioned the court to grant him mental health diversion. This new law allows certain qualifying defendants to complete a rigorous mental health program in lieu of facing penal consequences. A justifiably upset public felt that Mr. Scrivner escaped justice, by availing himself of the diversion statute. The true failing, here, lies with the Attorney General's Office, who declined to file criminal charges for child molestation against Mr. Scrivner. Mental health diversion remains a positive force in our society to help truly mentally ill individuals receive the care they need, so that they do not reoffend.

INTRODUCTION: ZACH SCRIVNER'S SHOCKING ACTIONS

It is a well-known adage that bad facts make bad law. But can bad facts ruin good laws too?

Those who follow the local news in Kern County are familiar with the disturbing events surrounding Zack Scrivner. Scrivner, a former Kern County Supervisor, found himself facing felony charges after he allegedly molested his preteen daughter in her own bed. Her brother had to intervene, stab Scrivner, and disarm him before the night of horrors came to an end.²

THE SUBSEQUENT LEGAL PROCEEDINGS

As we know, anyone alleged to have committed an act of child molestation will get charged with child molestation. Well, almost anyone. Scrivner is, of course, not only a former politician; he is the nephew of Cynthia Zimmer, the current Kern

¹ Nick Roth. A licensed attorney and has been a Deputy Public Defender at the Kern County Public Defender's Office since 2016. He graduated *cum laude* with a Bachelor of Science degree from U.C. Berkeley, and graduated *cum laude* from U.C. Law S.F. (formerly U.C. Hastings), where he received his *juris doctor*. He also is a Professor of Law at the Monterey College of Law (Bakersfield campus), where he teaches Evidence and Moot Court.

² Dore, C. (2026, September 30). Justice Diverted: Secrets Surrounding Kern County's Biggest Political Family Dynasty Exposed. *KGET*. KGET.com.

County District Attorney.³ Zimmer caught wind of this incident after it happened, and placed a call directly to Kern County Sheriff Donny Youngblood to intervene.⁴ Zimmer (and therefore, the Kern County District Attorney’s Office) then declined to personally prosecute Scrivner, citing a familial conflict of interest.⁵ The case was turned over to the California Attorney General’s Office to handle the prosecution.⁶ But despite the serious allegations, the Attorney General’s Office failed to charge Scrivner with any sex crimes!⁷ They instead charged Scrivner with felony child endangerment and felony weapons offenses.⁸ Child endangerment is a serious crime, but it is not a sex-related charge, and does not require registration as a sex offender.⁹

Scrivner, through his attorney, filed a motion requesting mental health diversion (“diversion”).¹⁰ This relatively new law allows certain defendants to participate in mental health counseling and treatment if a court determines that they committed their crimes in part because of a mental health condition, and if the court also finds that they can be safely treated in the community and respond to treatment.¹¹ Treatment programs can last for up to two years, and if one successfully completes diversion, he or she is entitled to a case dismissal, without ever pleading guilty.¹² A case dismissal is the incentive for mentally ill defendants to get stabilized, stay stabilized, build the skills necessary to become contributing members of society, and hopefully stay out of trouble permanently.

In a ruling that stunned the public, the court granted diversion to Scrivner.¹³ This means that he must complete a mental health program for up to two years, but he gets to remain out of custody while he does so. If he completes his program, his case will be dismissed, without him ever seeing the inside of a jail cell.

FALLOUT AND THE SCRIVNER ACT

This result has understandably outraged many in our community. Even the briefest review of Facebook and other popular sites will yield any number of comments by folks expressing disbelief. One of my favorites comes courtesy of Kier Butterworth, commenting on former Kern D.A. Ed Jagels getting arrested for DUI:

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Cal. Penal Code 273a; Cal. Penal Code 290(c).

¹⁰ Dore (2026).

¹¹ Cal. Penal Code 1001.36.

¹² *Id.*

¹³ Dore (2026).

“Probably had the same lawyers as Scrivner  I’m sure he will get off too!!! Good Ol Boys Club still working this town!!”¹⁴

So, who is to blame here? Many have attacked the diversion statute itself. They say that diversion is a legal loophole, allowing criminals to get off without any real consequences, so that they can get out of jail and wreak havoc on our community again. Indeed, Scrivner’s estranged wife, Christina, seems to have taken this position. She has pushed for legislation reforming mental health diversion, and the “Scrivner Act” (Assembly Bill 2273) has now been signed into law.¹⁵

DIVERSION IS NOT THE ENEMY

While understandable, these attacks on diversion are misplaced. The diversion statute does not allow just anyone to apply for diversion. It expressly excludes certain criminal charges from eligibility, including almost every single type of sex crime!¹⁶ If the Attorney General’s Office had properly charged Scrivner with felony child molestation, he would have been statutorily ineligible for diversion. His attorney could not have even filed the motion in the first place. Say what you will about our legislature, but in crafting this law, they had the common sense to exclude rapists, child molesters, and murderers. So, the problem here is not really about any weaknesses in the diversion statute. The real question is why the Attorney General’s Office made the decision to stunningly undercharge Scrivner. By charging him only with child endangerment and firearms offenses, it left the door open for Scrivner to apply for diversion. And Scrivner walked right through that door.

WHY DIVERSION IS NECESSARY AND A NET POSITIVE FOR OUR SOCIETY

Our legislature passed mental health diversion in response to a massive problem in our criminal justice system.¹⁷ That system jails and imprisons thousands of individuals who commit crimes not merely because they are evil or antisocial, but rather because they are mentally ill and act out due to their symptoms. Almost any criminal defense attorney has at some point seen the following fact pattern in a po-

¹⁴ Facebook.com.

¹⁵ Dore (2026).

¹⁶ Cal. Penal Code 1001.36.

¹⁷ See, e.g., *People v. O’Hearn* (2020) 57 Cal.App.5th 280, 300-01 (“The commitment of a mentally ill defendant to state prison is an all too common event in the United States, as shown by evidence that there are 10 times more mentally ill persons in prison or jail in this nation than there are in all of our mental hospitals.”)

lice report: Police respond to a call to check the welfare of someone acting erratically in public. Police arrive, and give commands for the person to stop what they are doing so they can be detained. The person fails to comply, and the police rush towards the individual to forcefully handcuff him. The person starts panicking and thrashing around – maybe he even kicks or bites one of the officers. Once arrested, the person gets charged with felony resisting arrest by force or fear, which carries up to three years in the local jail. The person may very well be deemed dangerous, so that he gets denied bail pending a resolution of his case. As it turns out, though, that person was experiencing a debilitating schizophrenic or psychotic episode at the time of his arrest, and may have had little to no idea what was happening when officers laid hands on him.

In that scenario, most would agree that such an individual is not blameworthy in the same way as someone who very consciously decides to fight with police. Mental health diversion gives such a defendant an opportunity to address his mental health issues, without the necessity of receiving a felony conviction or an extended jail sentence. Before diversion existed, such a person would likely suffer a conviction. Perhaps he might receive antipsychotic medication while in jail, but once released, it would be difficult to ensure that he stays on his medications and avoids falling back into the same patterns of street living and self-medicating drug use. But with diversion, such a person would have the opportunity to participate in a much longer period of intensive treatment, to develop the habits to permanently and successfully manage his symptoms for the rest of his life. Both the defendant and society win; the defendant ultimately gets his case dismissed, and society receives the benefit of someone who is much less likely to commit another crime because of his mental health issues.

Our jails and prisons remain the number one providers of mental health services in California.¹⁸ Anyone who has seen the inside of a jail, however, can tell you that jails are not the ideal spaces for therapeutic treatment. Far, far from it. Diversion aims to remedy this injustice, by helping to ensure that our jails and prisons remain available for those who most deserve incarceration – those who commit the most serious crimes, and those who commit crimes because of their own conscious decisions, and not merely because they acted out because they were sick.

CONCLUSION

Back to Scrivner – why did he receive the astonishing benefit of never facing sex-crime felonies? Could it possibly have something to do with his political connections, or the fact that his aunt is the Kern County District Attorney? Hmm, I wonder. But, if you think an injustice occurred here, the folks who need to answer some hard questions are those who made the charging decision at the Attorney Gen-

¹⁸ *Id.*

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eral's Office. While mental health diversion is certainly not perfect, we should not discard it simply because of the Attorney General's mistakes.