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Court of Appeal, Second District,
Division 8.

Ronald Black VOGEL, Plaintiff and Respondent,
v.
COUNTY OF LOS ANGELES,
Defendant and Appellant.

No. B164381.

|
(Los Angeles County Super. Ct. No. BC 269042).

|
March 22, 2004.

APPEAL from a judgment of the Superior Court of Los Angeles County. [Mary Ann Murphy](#), Judge. Reversed with directions.

Attorneys and Law Firms

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Opinion

[FLIER, J.](#)

*1 The County of Los Angeles appeals from the denial of its special motion to strike the complaint of Ronald Black Vogel II under [Code of Civil Procedure section 425.16](#).¹ We conclude Vogel's action arises from statutorily protected activity and the trial court erred in concluding it does not fall within the statute. We further determine that Vogel cannot establish a probability of succeeding on the merits.

STATEMENT OF FACTS

In May 1997, Maya B., a minor, reported to the Los Angeles County Sheriff's Department alleging improper sexual contact by Vogel, an adult. The sheriff's department assigned Detective Jim Gates to investigate the report.

During the investigation and pursuant to a June 11, 1997, search warrant, Detective Gates picked up Vogel for questioning and took photographs of Vogel's naked genital area. Detective Gates took the photographs because Maya had reported a distinctive characteristic of Vogel's genitalia-clipped pubic hair. Following standard procedures, Detective Gates took both full-body photographs and close-ups of Vogel's genitals.

On June 13, 1997, the Los Angeles District Attorney's Office filed a criminal complaint against Vogel charging him with five felony counts of unlawful sexual intercourse with a minor and oral copulation of a person under 16.

Before trial, Vogel entered a plea agreement and was convicted of one count of unlawful sexual intercourse with a minor. At a July 27, 1998, sentencing hearing, the court reclassified Vogel's conviction as a misdemeanor and sentenced him to three years of probation, 90 days in county jail and certain fines. Conditions of probation included that he was to stay away from Maya and that he was barred from being in the presence of or associating with girls under the age of 14, except in the presence of another responsible adult who knew of his conviction.

After Vogel's criminal conviction, Maya, now an adult, sued Vogel and two companies for civil damages under various theories arising from the sexual molestation. In January 2001, Maya subpoenaed Detective Gates to testify at her trial. The subpoena did not request production of documents.

As part of his usual preparation for testifying at trial, Detective Gates obtained his investigative file, which included the photographs relating to the criminal investigation of Vogel. Detective Gates obtained copies of the photographs from the crime lab and delivered them to Maya's counsel a few days before his testimony.

Prior to trial, Vogel filed a motion in limine to prevent introduction of any evidence concerning the criminal

investigation, which the trial court denied as to the photographs and investigation but granted as to references to Vogel's arrest and conviction. At trial, Maya's counsel examined Detective Gates and laid a foundation for admitting the photographs into evidence. The trial court allowed one of the photographs to be admitted into evidence over Vogel's objections, and it was shown to the jury. Vogel moved for a mistrial based on the introduction of the photograph, which the court denied.

*2 The jury found for Maya and awarded \$2.39 million in damages, including \$1.6 million in punitive damages. The trial court entered judgment against Vogel on March 15, 2001, and later denied his motion for new trial based in part on the photograph's admission. Vogel has appealed that judgment.²

On February 28, 2002, Vogel filed the present action against the county and its employee, Detective Gates. In his second amended complaint, filed September 24, 2002, Vogel alleged claims of invasion of state and federal constitutional privacy rights and intentional and negligent infliction of emotion distress, and requested injunctive relief. The factual basis of these claims is the allegation that Detective Gates, who had been subpoenaed to testify, had voluntarily obtained nude photographs of Vogel's genitalia from the county's records and delivered them to Maya's counsel without a subpoena duces tecum, for use in Maya's trial. On November 13, 2002, the county filed its anti-SLAPP motion to strike Vogel's complaint.

On December 12, 2002, the trial court denied the county's anti-SLAPP motion. The court ruled: "The defendant did not meet the criteria for showing that the act of removing the photographs from the crime lab and voluntarily delivering them to counsel for plaintiff arises from an act in furtherance of his right to free speech under the U.S. [*sic*] or California Constitution or in connection with a public issue for the reasons set forth on the record." The trial court did not rule on whether Vogel established a probability of prevailing on the merits.

At the same time, the trial court sustained the county's demurrer to the entire second amended complaint on grounds of immunity and the litigation privilege with leave to amend.

On January 9, 2003, the county filed a timely appeal from the denial of its anti-SLAPP motion.

CONTENTIONS

The county contends that Detective Gates's conduct fell within the scope of the anti-SLAPP statute, because his delivery of the photographs to Maya's counsel was inextricably intertwined with his testimony about those photographs and was thus a communication in connection with an issue under consideration by a judicial body (§ 425.16, subd. (e)(2)) and because the delivery fell into the category of "any other conduct" related to an issue of public interest (§ 425.16, subd. (e)(4)). The county also contends Vogel cannot establish a probability of succeeding on the merits and the order denying the anti-SLAPP motion accordingly should be reversed with directions.

Vogel contends that the voluntary duplication and delivery of his nude photographs was not protected speech. He argues that the photographs were produced without a subpoena, outside the courtroom, to a private attorney and without any restriction on their use; once his criminal case was resolved, his rights to privacy should have been preserved by maintaining the photographs as a confidential part of a closed police investigation.

STANDARD OF REVIEW

*3 In ruling on a defendant's special motion to strike under section 425.16, the trial court engages in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b) (2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) " 'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.] [Citation.]' " (*Kajima Engineering & Construction, Inc. v. City of Los Angeles*

(2002) 95 Cal.App.4th 921, 928.) The Legislature has mandated that the anti-SLAPP statute “shall be construed broadly.” (§ 425.16, subd. (a); *Navellier, supra*, 29 Cal.4th at p. 92.)

We review the trial court's order de novo, employing these same standards. (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 919 (*Rivero*).)

DISCUSSION

Section 425.16 provides, among other things: “A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).)

The trial court ruled that the county did not meet its burden under the first prong of the anti-SLAPP statute because Detective Gates's removal of photographs from the crime lab and voluntary delivery of copies to Maya's counsel in the civil case did not arise from an act in furtherance of a right to free speech under the federal or state constitution in connection with a public issue.

We hold that the county met the first prong of the anti-SLAPP test and that Vogel failed to meet his burden of establishing a probability of prevailing on his claims under the second prong.

I. “Arising from” Prong

Subdivision (e) of section 425.16 defines acts covered by the anti-SLAPP statute to include “(1) any written or oral statement or writing made before a legislative, executive, or *judicial proceeding*, or any other official proceeding authorized by law; (2) any written or oral statement or *writing made* in connection with an issue under consideration or review by a legislative, executive, or *judicial body*, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or *any other conduct* in furtherance of the exercise of the constitutional right of petition or the constitutional right of

free speech *in connection with a public issue or an issue of public interest.*” (§ 425.16, subd. (e), emphasis added.)

*4 Vogel concedes that Detective Gates properly testified as a witness in Maya's trial, and he does not challenge the production of Detective Gates's criminal file in Maya's civil case. He cannot contend otherwise, since the anti-SLAPP statute expressly covers any “oral statement or writing made before a ... judicial proceeding.” (§ 425.16, subd. (e)(1); see also *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 237-238 (*Sipple*).)

In the trial court and on appeal, Vogel has focused on Detective Gates's actions in retrieving and having the crime lab duplicate his photographs of Vogel and delivering them to Maya's attorney without a subpoena duces tecum. The trial court concluded that Detective Gates's conduct in “removing” the photographs from the crime lab and delivering them to Maya's counsel fell outside the anti-SLAPP statute.

However, there is no factual support for the trial court's conclusion that Detective Gates removed photographs from the crime lab. The only evidence is that he asked the crime lab to make photographic copies from negatives retained at the crime lab. Our examination thus centers on whether Detective Gates's conduct in voluntarily delivering copies of the photographs to Maya's counsel in the underlying civil case falls within the anti-SLAPP statute.

“Our primary task in construing a statute is to determine the Legislature's intent. [Citation.] Where possible, ‘we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law....’ [Citation.]” (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733 (*Jarrow*).) Anti-SLAPP jurisprudence has consistently adhered to this “plain language” approach. (*Ibid.*) The critical issue in this analysis is whether Vogel's cause of action “is based on the defendant's protected free speech or petitioning activity.” (*Navellier, supra*, 29 Cal.4th at p. 89.) The focus of the anti-SLAPP statute is on the defendant's activity that gives rise to alleged liability and whether that activity constitutes protected speech or petitioning. (*Id.* at p. 92.) The statute does not require that a moving defendant demonstrate that the defendant's protected statements or writings were made on its own behalf. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116 (*Briggs*).) “ [P]lainly read, section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by, an official proceeding

or body.’ “ (*Jarrow, supra*, at p. 734, quoting *Briggs, supra*, at p. 1113.) To qualify under [section 425.16, subdivision \(e\)\(1\) and \(e\)\(2\)](#), “ ‘the statute requires simply *any* writing or statement made in, or in connection with an issue under consideration or review by, the specified proceeding or body.’ “ (*Briggs, supra*, at p. 1116.) Under the anti-SLAPP statute’s plain terms, “ ‘it is the context or setting itself that makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding.’ “ (*Ibid.*)

*5 Detective Gates was under a subpoena to appear and testify in the *Maya B. v. Vogel* trial. The evidence shows that Detective Gates retrieved his criminal investigation file in response to the subpoena, as he always did to prepare for testifying as a witness. After appearing for the trial pursuant to the subpoena but before his actual testimony, Detective Gates obtained copies of the photographs of Vogel that were part of the criminal investigation file and provided them to Maya’s counsel. Despite Vogel’s unsupported contention that third parties may have been exposed to the photographs, the only evidence is that Detective Gates obtained reproductions through the crime lab and delivered the photographic copies directly to Maya’s counsel in connection with and in support of his pending testimony. Detective Gates then testified at the trial, laying a foundation for admitting one of the photographs in evidence.

[Section 425.16, subdivision \(e\)\(2\)](#) includes, as an act in furtherance of a person’s right of petition or free speech, a “writing made in connection with an issue under consideration or review by a ... judicial body.” A photograph is a “writing.” [Evidence Code section 250](#) formerly provided: “ ‘Writing’ means handwriting, typewriting, printing, photostating, *photographing*, and every other means of recording upon any tangible thing any form of communication or representation....” (Emphasis added.) In that sense, the photographic copies were “writing[s] made in connection with an issue under consideration or review by” a judicial body. In *Briggs*, the Supreme Court observed that courts considering the question have concluded that communications preparatory to or in anticipation of litigation are entitled to the benefits of [section 425.16](#). (*Briggs, supra*, 19 Cal.4th at p. 1115, citing, e.g., *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [anti-SLAPP statute applies to communications made during an attorney’s investigatory interviews preparatory to hearing].) Such communications are protected even when

made to a private citizen. (*Dove, supra*, at p. 784.) Detective Gates’s conduct in obtaining and delivering to Maya’s counsel copies of his photographs of Vogel was a communication preparatory to his testimony in the trial.

Detective Gates’s actions also qualify under [section 425.16, subdivision \(e\)\(4\)](#), as “other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech.” His delivery of the photographs and communications with Maya’s counsel were “inextricably intertwined with and part and parcel” of his testimony at trial. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 615 (*Roberts*).) Though Vogel attempts to segregate Detective Gates’s action in delivering copies of photographs to counsel from his testimony, that action clearly was in furtherance of his testimony as a trial witness. (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308 [“a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity”].)

*6 Detective Gates’s actions, on which the county’s liability is based, was in furtherance of the constitutional right of free speech on two levels. First, Detective Gates, who was subpoenaed to testify as a witness, had a right to produce supporting documentation in a pending judicial proceeding without fear of civil liability. (*Briggs, supra*, 19 Cal.4th at p. 1118 [“The Legislature’s stated intent is best served ... by a construction of [section 425.16](#) that broadly encompasses participation in official proceedings, generally”]; see also 2 [Witkin, Cal. Evidence](#) (4th ed. 2000) [Witnesses](#), §§ 14, 60, 61, pp. 272, 309, 311-312.) Once under subpoena, Detective Gates was under certain obligations as a witness. ([Evid.Code, § 911, subs. \(a\) & \(b\)](#) [unless otherwise provided by statute, no person has privilege to refuse to be a witness or to refuse either to disclose a matter or to produce a writing, object or thing].) Second, Detective Gates’s conduct also was in furtherance of Maya’s constitutional right to petition the government for redress from Vogel’s tortious acts. (*Briggs, supra*, at p. 1116.)

Detective Gates’s activities also plainly concerned a public issue or an issue of public interest under [section 425.16, subdivision \(e\)\(4\)](#): sexual molestation of minors by adult employers. In that respect this case resembles *Sipple, supra*, 71 Cal.App.4th at page 238, where the court held domestic violence allegations constitute an important issue of public interest, rather than *Rivero, supra*, 105 Cal.App.4th at

pages 924-925, which concerned a purely private workplace dispute.

Vogel asserts that his right of privacy was violated by Detective Gates's production of his photographs without a subpoena duces tecum; he further asserts that, once Vogel's criminal case was resolved without the photographs becoming public, his rights to privacy should have been preserved by maintaining the photographs as a "confidential" part of a closed police investigation. Such an inquiry is more properly addressed in the determination of the second prong, whether Vogel can show a probability of prevailing on the merits.³ (*Navellier, supra*, 29 Cal.4th at p. 94.)

The county thus met its threshold burden of demonstrating that Vogel's action arises from the type of speech and petitioning activity that is protected by the anti-SLAPP statute. The trial court erred in denying the county's motion to strike on the basis that Vogel's suit did not meet the first prong of the applicable test.

2. "Probability of Prevailing" Prong

Once a court "concludes the challenged cause of action arises from protected petitioning, it then 'determines whether the plaintiff has demonstrated a probability of prevailing on the claim.' [Citation.] To satisfy this prong, the plaintiff must 'state[] and substantiate[] a legally sufficient claim.' [Citation .] 'Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' [Citation.]" (*Jarrow, supra*, 31 Cal.4th at p. 741, fn. omitted.)

*7 The county contends Vogel cannot establish a probability of succeeding on the merits and we should reverse the trial court's order denying the anti-SLAPP motion with directions to enter an order granting the county's motion.

The trial court did not determine whether Vogel satisfied the second prong on the special motion to strike because it ruled the county did not meet its burden under the first prong. Apparently relying on the trial court's failure to rule on the second prong, Vogel does not directly address in his respondent's brief whether he can prevail on the merits. We may nevertheless reach the second prong since Vogel had the opportunity to address this issue in his respondent's brief (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 692, fn. *)

and it is subject to our independent review. (*1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585 (*Steinberg*); *Roberts, supra*, 105 Cal.App.4th at pp. 615-616.)

It was Vogel's burden to plead and prove a prima facie case. (*Roberts, supra*, 105 Cal.App.4th at p. 616.) The trial court sustained the county's demurrer to the second amended complaint with leave to amend. In doing so, the court orally indicated it was sustaining the demurrer on grounds including the litigation privilege. On appeal, Vogel only conclusionally asserts that Detective Gates's delivery of the nude photographs "outside of the Court proceeding" was not a privileged act and that the litigation privilege does not apply to the detective's "non-communicative" conduct. Vogel's assertions are unsupported by citations to the record, reasoned argument or legal authority. " 'This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record.' " (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) We thus may disregard Vogel's unsupported assertions.

In any case, Vogel cannot establish a legally sufficient claim because Detective Gates's actions were privileged and essentially communicative in nature.

The Legislature has provided in [Civil Code section 47, subdivision \(b\)](#), an absolute privilege for communications (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 [discussing former [section 47, subdivision \(2\)](#)] (*Silberg*)).) The litigation privilege is designed "to afford litigants and witnesses ... the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Id.* at p. 213, citation omitted.) The privilege "promotes the effectiveness of judicial proceedings by encouraging 'open channels of communication and the presentation of evidence' in judicial proceedings." (*Ibid.*) In furtherance of this purpose, "witnesses should be free from the fear of protracted and costly lawsuits which otherwise might cause them either to distort their testimony or refuse to testify altogether. [Citations.]" (*Id.* at p. 214; accord, *Moore v. Conliffe* (1994) 7 Cal.4th 634, 642 (*Moore*)).) Furthermore, the litigation privilege ensures the integrity and finality of the ultimate resolution of the controversy reached through the litigation process. (*Moore*, at p. 642.) The privilege is intended to stop "an unending roundelay of litigation," preventing litigants from attacking the integrity

of the evidence after the proceedings have been concluded. (*Silberg*, at p. 214; *Moore*, at p. 643.)

*8 In the present case, the litigation privilege clearly applies to Detective Gates's testimony in the *Maya B. v. Vogel* case and his acts in preparation for that testimony, including obtaining copies of Vogel's photographs and furnishing them to counsel. That the acts occurred outside the courtroom does not deprive him of the privilege. The litigation privilege applies to publications in the course of a judicial proceeding to achieve the objects of the litigation, even if the publication is made outside the courtroom. (*Silberg*, *supra*, 50 Cal.3d at p. 212; see also *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.)

The privilege also applies to Detective Gates's so-called "non-communicative conduct" in handing the photographs to Maya's counsel because his act was related to his testimony at the underlying trial. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1196 [solicitation in preparation for lawsuit]; *Steinberg*, *supra*, 107 Cal.App.4th at pp. 587-588 [privilege applies to conduct in forming joint venture and arranging meetings].) This result is consistent with our recent decision in *Drum v. Bleau, Fox & Associates*, where we held that to qualify for the litigation privilege "the event claimed to be protected must be *communication* not *conduct*." (*Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1024 (*Drum*)). In *Drum*, we differentiated between injury allegedly arising from communicative acts and injury resulting from noncommunicative conduct noting the distinction has "traditionally served as a threshold issue in determining the applicability" "of the litigation privilege. (*Ibid.*) Following the Supreme Court's lead in *Rubin*, we explained whether the privilege applies where conduct is "stirred with communication" depends on "whether the activities were 'communicative in their essential nature....'" (*Drum*, *supra*, at p. 1026.) Handing the photographs to counsel falls on the side of communication since the alleged injury-invasion of privacy-arises from communication of allegedly

private information. The essential nature of Detective Gates's action was communicative since he produced the photographs to support and corroborate his testimony at trial. The photographs and the information contained in them were "statements" just as *lis pendens* (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 379-380), mechanics liens (*Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 24-25) or homeowners assessment liens (*Wilton v. Mountain Wood Homeowners Assn.* (1993) 18 Cal.App.4th 565, 569-570) constituted statements. In each case communication of information was their purpose. (*Drum*, *supra*, at pp. 1024-1028.)

Moreover, in *Drum*, the conduct in question was a postjudgment levy on property, an act complete in itself. (*Drum*, *supra*, 107 Cal.App.4th at p. 1026.) Here, the handing of the photographs was a necessary step preparatory to Detective Gates's testimony in a pending case, i.e., part of the process of communication. (*Ibid.*)

*9 Vogel therefore has not demonstrated and cannot demonstrate a probability of prevailing on his claim. (*Jarrow*, *supra*, 31 Cal.4th at p. 746; *Equilon*, *supra*, 29 Cal.4th at p. 67; *Steinberg*, *supra*, 107 Cal.App.4th at pp. 586-588.)

DISPOSITION

The order is reversed with directions to the trial court to enter a new order granting the [section 425.16](#) motion to strike. The county is awarded costs on appeal.

We concur: [COOPER](#), P.J., and [RUBIN](#), J.

All Citations

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Footnotes

1 [Code of Civil Procedure section 425.16](#) provides for early dismissal of "strategic lawsuits against public participation" (SLAPP) (see *Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 (*Navellier*)), and motions brought under the statute are known as "anti-SLAPP" motions.

Unless otherwise noted, all section references are to the Code of Civil Procedure.

2 We affirm that judgment in a nonpublished decision in *Maya B. v. Vogel* (B150299) issued concurrently.

3 In any case, Vogel cites no authority for this proposition, and we need not address arguments for which a party provides no supporting authority. (*Michael P. v. Superior Court* (2001) 92 Cal.App.4th 1036, 1042.) We note criminal investigative files may not be absolutely protected from disclosure (*id.* at pp. 1044-1046; *Markwell v. Sykes* (1959) 173 Cal.App.2d

642, 647; see 2 Witkin, Cal. Evidence, *supra*, Witnesses, § 248, pp. 518-519) and take judicial notice that the trial court in the underlying case denied Vogel's motion in limine to exclude the photographs as evidence and denied his subsequent motion for mistrial based on admission of one of the photographs. (Evid.Code, §§ 452, subd. (d), 453, 459.) In our concurrently issued decision in *Maya B. v. Vogel, supra*, B150299, we hold the trial court properly exercised its discretion in admitting the photograph into evidence in that trial.

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