

Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re BENJAMIN LEE BATHEN,)	San Diego County Superior Court
)	Case No. SCS 294342
Petitioner,)	
)	
)	
On Habeas Corpus.)	Related Court of Appeal
)	No. D074538
)	
_____)	

PETITION FOR WRIT OF HABEAS CORPUS
WITH MEMORANDUM OF SUPPORTING
POINTS AND AUTHORITIES

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Question Presented

Did trial counsel render ineffective assistance by failing to investigate a medication-related defense for the defendant with no history of violence who began taking an antidepressant and then left threatening messages on the voicemail of his former therapist?

Introduction

As anyone who has watched a pharmaceutical commercial on television can attest, prescription medications, particularly those that affect mood and mental

state, come with a list of disclaimers that seem to cover side effects all the way from headache to foot pain. Petitioner's physician prescribed Lexapro – a widely-used antidepressant. While using Lexapro and living in Virginia, petitioner, a person with no prior criminal record and no history of violence or threats, made three separate criminal threats, by phone, against his former psychologist who lived in San Diego. Petitioner's conduct was bizarre and irrational and came out of the blue. The calls occurred nine years after the psychologist last treated or had any contact with petitioner.

Although Lexapro is ordinarily safe and does not lead to criminal conduct, it can, in some cases, result in the side effect of causing a person to engage in violence and threatening conduct. That it did so here was the most reasonable explanation why a normally peaceful, law-abiding, rational person with no history of engaging in violence or making threats would, for no apparent reason, threaten to kill and rape his former therapist.

Any reasonably competent counsel representing petitioner would have investigated what might explain his client's uncharacteristic and unusual criminal behavior against a person who had tried to assist petitioner, whom petitioner had no contact with for nine years, and whom petitioner had no reason to dislike, let alone kill or rape. Although it would always be possible for a client to suddenly become a criminal, the most obvious explanation for such conduct in a person

without a shred of criminal history would have been some sort of mental problem or disorder. And the most likely cause, aside from adult-onset mental disease, would have been some form of substance abuse involving either illicit narcotics or prescription medication.

In such a situation, competent defense counsel would investigate and discover petitioner's use of Lexapro and would seek to learn if it could cause the behavior underlying the charges petitioner faced. As a matter of fact, at the time of trial it was well-known in the criminal defense community that the use of certain antidepressants can cause violent outbursts such as those underlying the charges in this case. Investigation into Lexapro thus would have led counsel to discover its potential to cause side effects such as conduct identical to that underlying the charges in this case. Being aware of that potential, counsel would have retained an expert witness to determine whether petitioner's conduct was based in whole or in part on the use Lexapro rather than being a product of a productive, peaceful and law-abiding citizen suddenly becoming a dangerous and potentially violent criminal for no discernible reason. And if the expert concluded that the use of Lexapro was a contributing or the primary cause for petitioner's conduct, reasonable counsel would have based a defense on this evidence.

This defense could have taken either of two forms. One would have been voluntary intoxication that negated the specific-intent element of the criminal

threat charges. (Penal Code section 29.4.) The other defense would have been unconsciousness based on involuntary intoxication in that although petitioner knew he was taking a prescribed medication, he did not know that it could result in him making criminal threats and did not recognize it was doing this. (Penal Code section 26, subd. Four.)

Both defenses were stronger than the defenses counsel advanced. One of those defenses was that petitioner did not make the threats, even though it was obvious he did. The other was that the threats did not cause the victim to be in sustained fear for safety because petitioner was 3,000 miles away, even though death threats would cause any reasonable person be in sustained fear. The withheld defenses would have provided an objective and reasonable explanation for why a normally peaceful and law-abiding person might engage in behavior that was antithetical to everything in that person's prior behavior and character.

The failure of petitioner's counsel to investigate, discover and present a defense based on side effects from petitioner's use of Lexapro constituted ineffective assistance of counsel because reasonably competent counsel would have would have presented such a defense, and because it is reasonably probable the jury would have reached a result more favorable to petitioner if petitioner's counsel had done this.

Writ Petition

I

Petitioner was charged with three counts of criminal threats directed towards his former psychologist. (Penal Code section 422.)¹

II

He was convicted in a jury trial of all three counts, and was sentenced to two years in prison (mid-term two year sentence for each count with counts two and three to run concurrent).

III

The victim, Dr. J., was a psychologist who began treating petitioner for depression in 2004.

IV

The sessions continued after petitioner moved to Boston, Mass. in 2008, but the victim was only licensed in California, and the sessions ended several months later.

V

Approximately nine years later, after petitioner had moved to northern Virginia, he left threatening messages on the victim's voicemail. In the first

¹ The facts in this background section of the petitioner are all taken from the appellate opinion attached as Exhibit H.

message he commented:

“I’m going to bust your fucking skull open you worthless bitch ... I’ll bash your fucking skull. You’re fucking dead. I’m going to carve you up you fucking whore.”

VI

The victim was terrified when she heard the message, and her husband investigated the source of the calls, determined it was petitioner, and reported the matter to the Chula Vista Police Department.

VII

About one month later, after the victim had taken several security precautions, she received a second threatening call from petitioner on her voicemail, where he said:

“... I can hurt you too you mother fucker. I’m going to carve you up. I’m going to rape you. I’m going to fuck you up. I’ll carve your fucking smile off your face you stupid bitch.”

VIII

The victim recognized petitioner’s voice, and was again terrified and humiliated.

IX

Two days later, she received a third call, where petitioner said:

“... I’m still planning on coming out there kidnapping you, torturing

you, raping the living shit out of you... I'm going to set you on fire... You're going to fucking die. Then I'm going to find your daughter. I'm going to rape and murder that bitch too. You're fucking dead."

X

After the third call, the victim received a restraining order against petitioner.

XI

At trial, the prosecution presented evidence showing the threatening calls had been made from locations close to petitioner's home and work addresses near Washington, D.C.

XII

The defense theory at trial was that petitioner was innocent, the prosecution did not prove he was the caller, and it presented an expert witness challenging the accuracy of cell phone tracking. The defense further argued that even if petitioner was the caller, the victim could not have reasonably feared imminent harm since petitioner was three thousand miles away at the time the calls were made.

Facts Relating to Counsel

XIII

Petitioner was represented at trial by attorney Alicia Freeze (Cal. State Bar No. 281268).

XIV

Petitioner had limited contact with counsel. Counsel states in her attached declaration that the two communicated “almost daily,” but petitioner says most communications were brief and the phone records showed they had only three conversations that lasted more than three minutes — one lasted approximately 10 minutes, another 39, and a third was 56 minutes. (Exh. A, paras. 23, 24; Exh. B, para. 11; Exh. I.)

XV

Freeze states that petitioner insisted on presenting the defense that he was not the person who made the calls, but petitioner states that Freeze selected the defense. (Exh. B, para 11; Exh. A. para 20.)

The defense that was not explored or presented

XVI

Defense counsel never explored the possibility that petitioner’s threatening outbursts may have been a product of his depression or medications that he had been taking at the time the calls were made. (Exh. B, para. 11.)

XVII

Counsel did have a psychological evaluation performed by Dr. Ray Murphy, and in the report Dr. Murphy noted that petitioner had been prescribed Lexapro, which is an anti-depressant. However, Dr. Murphy was only asked to provide an

opinion on petitioner's "emotional status" and was not asked to address mental health factors, including medication that may have negated the specific intent required under section 422, and there was no discussion about the offense during the evaluation. (Exh. A, para. 26; Exh. B, para. 6.) Petitioner suggested that a psychologist review the case initially, since he knew he was a psychiatric patient and a mental health defense should have been explored. (Exh. A, para. 25.)

XVIII

Petitioner never considered that the outbursts may have been caused by the Lexapro (or a generic version of the drug he had been taking), and was confused by his conduct as his doctors had told him the medication was safe and effective for his mild depression. (Exh. A, para. 15.)

The present investigation

XIX

The Food and Drug Administration Medication Guide states clearly that the drug may result in suicidal or violent thoughts or actions, and that agitation may be accompanied by hallucinations. (Exh. F-1.) Petitioner's medical/psychiatric file was also reviewed by a psychiatrist and psychopharmacologist (and lawyer) Alan Abrams who emphasizes that it was well-known in the psychiatric and criminal defense communities that antidepressants like the Lexapro petitioner was taking, caused violent outbursts, and he believes this is the only logical

explanation for petitioner's behavior. (Exh. D.) Local criminal defense expert Richard Gates agrees the connection between antidepressants and violent conduct was well-known at the time of petitioner's trial, and that counsel had a duty to investigate that defense under the present facts. (Exh. C.)

XX

The FDA Adverse Events Reporting System reports hundreds of events involving screaming, homicidal ideation, homicide, gun shots, imprisonment, Akathisia and Tardive Dyskenisia. (Exh. F-2.)

XXI

In his direct appeal to the Court of Appeal (Fourth District, Division One), petitioner argued:

- 1) There was insufficient evidence to support the convictions.
- 2) The trial court had a sua sponte duty to instruct on the lesser included offense of attempted criminal threat.
- 3) The trial court erred in denying probation and imposing the two year midterm sentence.

All arguments were rejected and the judgment was affirmed in Case No. D074538. (Exh. H.)

XXII

Petitioner was represented in his direct appeal by Kevin Smith (State Bar

No. 84877) P.O. Box 80708, San Marino, CA 91118.

XXIII

On April 1st, 2020, petitioner filed a petition for writ of habeas corpus in the San Diego Superior Court alleging the claim being made here — that trial counsel rendered ineffective assistance in failing to research a drug-based defense.

XXIV

On May 6th, 2020, the superior court (the Honorable Timothy R. Walsh) denied the petition in a 10 page order without even requesting a response from the prosecution. (Exh. K.)

XXV

On July 7th, 2020, petitioner filed a petition for a writ of habeas corpus in the Court of Appeal (Fourth District, Division One).

XXVI

That petition was denied on substantive and procedural grounds (petition was untimely given the 21 month delay between the time he allegedly became aware of the defense and the time he filed the petition seeking relief.) (Exh. M, Court's order, pp. 2-3.)

XXVII

Petitioner is represented in the present proceeding by Patrick Morgan Ford (State Bar No. 114398) 1901 First Ave. Ste. 400, San Diego, CA 92101.

XXVII

Petitioner was released from state prison on April 22nd, 2018, and is currently under the supervision of the Division of Adult Parole Operations until October 22nd, 2020.

XXVII

Petitioner has no other adequate remedy at law as the factual basis for this petition falls outside the record on appeal.

XXVIII

Other than this petition, there are no other motions, applications or petitions on file with this respect to this case in any court.

XXIX

Petitioner hereby requests that the court take judicial notice of the appellate record in this case although all documents relevant to the claim are attached as exhibits.

Prayer for Relief

Petitioner respectfully prays that following the issuance of an order to show cause or an evidentiary hearing if the court deems it necessary, a writ of habeas corpus be issued directing that the judgment be set aside. Alternatively, petitioner respectfully prays that this court transfer the case to the superior court with directions to issue an order to show cause on the ineffective assistance of counsel issue.

Dated: 8/31/20

Respectfully submitted,

s/Patrick Morgan Ford
PATRICK MORGAN FORD,
Attorney for Petitioner
BENJAMIN LEE BATHEN

Verification

I, Patrick Morgan Ford, declare as follows:

I am an attorney licensed to practice before the courts of the State of California and have my office located in San Diego, California.

I am the attorney for petitioner herein and am authorized to file this petition. Petitioner is out of the county, and unable to personally execute this verification, and because I am more familiar with the matters alleged, I am filing this petition pursuant to Penal Code section 1474. I have drafted this petition and know its contents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 8/31/20

Respectfully submitted,

s/Patrick Morgan Ford
PATRICK MORGAN FORD,
Attorney for Petitioner
BENJAMIN LEE BATHEN

**Memorandum of Points and Authorities
Factual Background**

Factual Support

Petitioner asserts that trial counsel, Alicia Freeze, rendered ineffective assistance by failing to consider or investigate a defense that the antidepressant he was taking caused him to irrationally act out in the way he did in making the threatening phone calls to Dr. J.

In support of his assertion, petitioner presents the following evidence:

1) The declaration of petitioner describing, among other things, his brief contacts with counsel, and her early conclusion regarding an identity defense. He includes a record of all phone conversations with counsel, showing only three legitimate conversations in preparation for trial — these were the only communications they had as he was in Virginia until shortly before trial. According to petitioner, counsel never inquired into or researched the possibility of a drug-related defense. Petitioner refers to his own research conducted following his conviction (done mostly in the prison law library) where he learned of the well-established connection between antidepressants such as Lexapro, and violent outbursts and he provides the timeline for the actions he took to

present the new issue to the superior court. (Exh. A, I.) He also includes a copy of his prescription for Lexapro written in 2016. (Exh. L.)

2) The declaration of trial counsel, Alicia Freeze, who states that she spoke often with petitioner, and never explored the possibility of a medication-based defense because petitioner insisted on denying his participation in the calls, and in the alternative claiming that his distance prevented any reasonable fear of immediate harm to Dr. J. Freeze did obtain an evaluation from a psychologist to examine petitioner's "emotional status," and to see whether he had an emotional disorder or was otherwise dangerous. (Exh. B.)

3) The declaration of "Strickland Expert," Richard Gates², who concludes that trial counsel must investigate all possible defenses before selecting one, and it doesn't matter how often the two spoke or whose idea it was to present an identity defense. He states that the facts here presented obvious red flags showing a mental

² In Judge Walsh's order denying the writ, he repeatedly referred to Mr. Gates as "Dr. Gates," although Mr. Gates is a deputy public defender. Judge Walsh also repeatedly referred to the potential defense discussed presently as "voluntary" rather than "involuntary" intoxication. (See Exh. K.)

health defense was appropriate, and it was well-known in the legal community at the time of petitioner's trial that antidepressants could cause the kind of conduct petitioner exhibited here. A defense focusing on the Lexapro would have negated the specific intent element of the charged criminal threats provision. That petitioner may have insisted he was innocent is common, and counsel must explore the reasonable alternative defenses before accepting the defendant's first suggestion. The fact that counsel retained a psychologist for an examination of petitioner's "emotional status," served no purpose since that exam failed to address the critical element of specific intent. Counsel should have collected petitioner's medical records and presented them to a mental health expert for an opinion on the intent element. (Exh. C.)

4) Declaration of Dr. Alan Abrams, Ph.D., J.D., who explains the connection between Lexapro and aggressive or violent conduct, and the fact that it was common knowledge in the mental health community that aggressive conduct was a side effect of the drug. After reviewing petitioner's file, he concludes the drugs caused petitioner's outbursts, and notes there is no other reasonable explanation. He emphasizes that Dr. Murphy, as a psychologist,

likely had no background in psychopharmacology, and made no mention of considering the impact of Lexapro on petitioner's actions.

(Exh. D.)

5) The letter from Selma Eikelenboom-Schieveld, M.D., Ph.D., a forensic medical examiner who performed DNA testing (CYP 450 testing) on petitioner and explains the testing shows petitioner metabolizes medications at a slower rate. His CYP 450 genetic code provides a biochemical explanation for the occurrence of medication induced toxicity, with symptoms of akathisia. His out-of-character aggressive behavior was predictable, and would have amounted to involuntary intoxication. (Exh. E.)

6) A) FDA-Approved Medication Guide for Lexapro, which warns that it may cause aggressive or violent conduct. (Exh. F-1.)

B) FDA Adverse Events Reporting System (FAERS) Public Dashboard showing the numbers of reported adverse events for Lexapro (Escitalopram). (Exh. F-2.)

C) Google search linking antidepressants to violence. (Exh. F-3.)

7. The declaration of Dr. David Antonuccio, who notes that he was first contacted by petitioner (upon his release from prison) on October 16th, 2019, for a mental health evaluation, saw him on December 6th, and wrote his evaluation 10 days later. He concluded that petitioner's threats to the victim were produced in part by his medication. He continues that when patients are given a medication, they typically presume it is safe, and they would not normally conclude aberrant behavior was caused by the medication. He learned this was the first time a doctor had suggested to petitioner that his agitation may have been caused by the medication. (Exh. N.)

8. The declaration of Professor David Healy, who has testified as an expert witness in many cases where antidepressants led to violence, and who agrees a person taking the drug may not recognize it as the source of the problem relating to volatile behavior.

The trial court's denial of the petition was based upon a misunderstanding of habeas corpus law.

The superior court described the procedure it would follow in reviewing the petition. The court noted it was petitioner's obligation to set forth a prima facie statement of facts that would entitle him to habeas corpus relief. (Exh. K, p. 2, citing *In re Bower* (1985) 38 Cal.3d 865, 872, and *In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4.)

The court then found “The petitioner bears the burden of proving the facts upon which he bases his claim for relief.” (Exh. K p. 2, citing *In re Riddle* (1962) 57 Cal.2d 848, 852.) “Vague or conclusionary allegations do not warrant habeas relief.” (Order, p. 2, citing *People v. Duvall* (1995) 9 Cal.4th 464, 474.) The court’s order shows a misunderstanding of habeas corpus law which provides for two distinct stages that a petitioner must go through in California’s habeas corpus process.

The first stage is the pleading or allegation stage, and the second is the proof stage.

The pleading stage is initiated by the filing of a habeas petition. At this stage, petitioner merely has the “burden of allegation,” meaning that he has to make “a prima facie statement fo specific facts, which if established, entitled him to ... relief.” (*In re Sassounian* (1995) 9 Cal.4th 535, 547, quoting *In re Hochberg, supra*, 2 Cal.3d at 875, fn.4.) The petition must allege the specific facts underlying his claim so they are not conclusory, but when he does, the habeas court will “assume the petition’s factual allegations are true.” (*People v. Duvall, supra*, 9 Cal.4th at 474; accord, e.g., *In re Lawler* (1979) 23 Cal.3d 190, 194 (taking the facts alleged as true.”.)

The situation is very different at the second stage of a habeas corpus proceeding. The habeas court reaches the second stage if it concludes the petition

has stated a prima facie case for relief, and issues an order to show cause or a request for an informal response. (*People v. Duvall, supra*, 9 Cal.4th at 475.) At this second stage, the petitioner must prove the factual allegations, and must do so by a preponderance of the evidence. (*In re Robbins* (1998) 18 Cal.4th 770, 815, fn. 1.)

If significant contested factual issues arise, the court may order an evidentiary hearing, or the parties can agree to submit the case on the basis of documentary evidence and resolve the case without a hearing. (*In re Scott* (2003) 29 Cal.4th 783, 822-823; *People v. Romero* (1994) 8 Cal.4th 728, 739, 740.)

The superior court in the present case misunderstood the two-stage process and denied the petition after finding that petitioner failed to prove (in the initial petition) facts upon which he bases his claims for relief.

In the present case *Duvall* requires that the court accept as true that trial counsel never explored the possibility that the outbursts were caused by petitioner's medications, that there was substantial available research on the topic, that the connection between antidepressants and violent outbursts was well-known in the criminal defense community, and that petitioner never considered that the outbursts may have been caused by Lexapro.

The Court of Appeal's denial

The Court of Appeal found the petition was procedurally barred as untimely.

(Exh. M, pp. 2-3, citing *In re Reno* (2012) 55 Cal.4th 428, 459-460.) The court found that under the facts presented, approximately 21 months elapsed between the time petitioner first learned of the problem with Lexapro's side effects in the prison library, and the time he filed the habeas petition in the superior court.

(Exh. M, p. 3.)

In *Reno, supra*, this court explained the law governing timeliness in the context of habeas corpus litigation. Timeliness is subject to a three-part analysis. First, if there has been no substantial delay, the claim is timely and must be adjudicated on the merits. Next, if there has been substantial delay and the petitioner demonstrates good cause for the delay, the untimely claim must be adjudicated on the merits. Third, if there has been substantial delay with no good cause the matter must be adjudicated on the merits if petitioner's claim meets one of the four exceptions listed in *Reno*. (*In re Reno, supra*, 55 Cal.4th at p. 460.)

Substantial delay is measured from the time petitioner or his counsel knew or reasonably should have known of the information offered in support of the claim and legal basis for the claim. (*In re Robbins* (1998) 18 Cal.4th 770, 780.) The petitioner must allege with specificity facts showing when the information in support of the claim was offered, and that the information was neither known or should have been known at any earlier time. The petitioner bears the burden of establishing the absence of substantial delay through specific allegations which

may be supported by relevant exhibits. (*Ibid.*) These specific allegations “should be succinct and to the point; there is no need for them to be lengthy.” (*In re Reno, supra*, 55 Cal.4th at p. 462.) The mere “prior existence” of facts offered in support of a claim does not establish that a petitioner earlier knew or should have known of the existence of those facts. (*In re Robbins, supra*, 18 Cal.4th at p. 794.) A defendant has no duty to conduct an “unfocused investigation having as its object uncovering any possible factual basis for a collateral attack on the judgment.” (*Ibid.*, internal quotation marks and citation omitted.)

A petitioner may establish good cause by showing particular circumstances sufficient to justify a substantial delay. (*In re Robbins, supra*, 18 Cal.4th at p. 806.) Good cause is present during the period of time in which a petitioner is investigating a potentially meritorious claim. (*In re Douglas* (2011) 200 Cal.App.4th 236, 244.) (See *In re Sanders* (1970) 2 Cal.3d 1033, 1040-1041, where the habeas petition was found timely where it was filed three years after petitioner discovered the issue and had been working to find counsel; and *In re Spears* (1984) 157 Cal.App. 3d 1203, 1208 where the court found a delay of 18 months was excused due to petitioner’s inability to represent himself and his efforts to find counsel.)

The facts here demonstrate good cause. Petitioner establishes the timeline in his declaration (which adds timeliness-related facts not presented in his

declaration in the earlier petitions). He states that in March of 2019, after meeting with a prison psychologist shortly before his release, she commented that he might have been on the wrong medication. (Exh. A, para. 32.) He then began researching antidepressant drugs in the limited prison library, and learned of the connection between SSRI drugs and problems associated with rage. (Exh. A, para. 33.)

He continued his research after being released the next month and later met with Dr. David Antonuccio who confirmed the connection between the drug he was taking and rage episodes. (Exh. A, paras. 40-55; Exh. N.)

He then spoke with his direct appeal counsel to learn how the issue could be presented to a court, and was told that it had to be done through a habeas corpus petition. (Exh. A, para. 41.)

He then began looking for habeas counsel and found Pat Ford (the undersigned), who he retained on December 11th, 2019. (Exh. A, para. 42.)

The habeas petition was then filed in the superior court within 4.5 months — on April 1st, 2020.

The undersigned habeas counsel also includes a declaration describing steps taken. (See Exh O.) Aside from a typically busy case load, counsel investigated the science behind the claimed connection between antidepressants and volatile behavior, contacted several expert witnesses, including two

psychopharmacologists who had a conflict of interest as they knew the victim of the threats, Dr. Jacobs. On January 9th, 2020, counsel contacted trial counsel, Alicia Freeze, for an explanation of tactical reasons for not presenting or even investigating a drug-based defense. Following several communications, Freeze provided her declaration on March 2nd, 2020. (Exh. O.) The petition was finalized and filed a month later on April 1st, 2020. (Exh. O.)

There was no unreasonable delay in this process.

Court of Appeal's finding on the merits

The court suggests that petitioner had the obligation to investigate the defense himself or to volunteer information that would have alerted counsel to the drug-based defense. (Exh. M, p. 3.) But the law doesn't require this, and the suggestion doesn't make sense. Counsel should know if an otherwise normal person does something irrational that there may be a mental illness problem — especially where, as here, the threat was made to a former mental health therapist. This court should find that mental illness or medication should have been part of the defense counsel's investigation when looking for the right defense to the charges.

Applicable law regarding ineffective assistance of counsel.

Under the Sixth Amendment to the United States Constitution and article 1, § 15 of the California Constitution, a criminal defendant has the right to the

assistance of counsel. The right entitles a defendant not to some bare assistance, but rather to *effective* assistance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

The test for determining whether a criminal defendant received ineffective assistance is well-settled. The court must first determine whether counsel's representation fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668.) The court then inquires whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Ibid.*) A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. (*Id.* at p. 694; *In re Neely* (1993) 6 Cal.4th 901, 909.)

Part of counsel's constitutional obligation to the client requires that he or she investigate carefully all defenses of law or fact that may be available. (*Strickland, v. Washington, supra*, 466 U.S. at p. 691; *People v. Ledesma, supra*, 43 Cal.3d at p. 215.) Trial counsel's first duty to his client is to investigate the facts of the case and research the law applicable to those facts. (*People v. Ledesma, supra*, 43 Cal.3d at pp. 216-218.) "The defendant can reasonably expect that before counsel undertakes to act, or not to act, counsel will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (*In re Fields* (1990) 51 Cal.3d 1063, 1069.)

The proper measure of attorney performance remains simply

reasonableness under the prevailing professional norms, and the American Bar Association standards are a guide to determining what is reasonable. (*Padilla v. Kentucky* (2010) 559 U.S. 356, 366.) Standard 4-4.1(a) of the ABA’s Standards for Criminal Justice Prosecution Function and Defense Function provides that “Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case. The duty to investigate exists regardless of the existence of facts constituting guilt or the accused’s admissions. (ABA Standards for Criminal Justice Prosecution Function and Defense Function (3rd Ed. 1993), p. 181.) Commentary to this standard, which is entitled “The Importance of Prompt Investigation” emphasizes that “effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial ...” (*Id.* at p. 183.)

Legal Analysis

Petitioner hired attorney Alicia Freeze to represent him in a case where he had been charged with three counts of making criminal threats — horrible messages threatening rape and murder. The charges were unusual because as awful as the phone calls to petitioner’s former therapist were, there was nothing in his background that would explain the conduct. He was a productive person with

a good job, no history of criminal or violent behavior, and no history of threats to (or problems with) the therapist who he had not seen in years. He did suffer from mild to moderate depression which was treated in the early 2000's when he lived in San Diego, but there had never been any prior outbursts — much less terrible threats such as those he made to the victim in 2017.

Petitioner hired Freeze based on an online ad he saw. There is a dispute in the declarations as to how much interaction they had, as Freeze says they had “almost daily conversations,” while petitioner says the two had several abbreviated contacts including brief email exchanges and conversations that lasted about an hour and 45 minutes in total. (Exhs. A, paras. 23, 24; Exh. B, para. 11.) The attached phone records dispute Freeze’s claim of “almost daily conversations.” 26 phone calls were made between the two after Freeze was hired. 21 were made by petitioner and went straight to voice mail. Only three calls before trial exceeded three minutes — one was 10 minutes and related to possible experts, the second was a 37 minute Skype call, and the third call was a 56 minute call on May 28th, 2018 where for the first time they discussed the trial, including petitioner’s history with Dr. Jacobs and the evidence the prosecution would present at trial. (Exh. A, paras. 23-24, Exh. I.)

The defense theory at trial was that it was not petitioner’s voice on the recording, and even if it was him, the calls were made from the east coast so the

victim couldn't really have been in fear of immediate harm. (Exh. H, p. 6.) The declarations differ as to whose idea it was to present the identity defense. Freeze says petitioner always insisted "that he never made the calls, and if he did, the issue went to the 'immediacy' aspect." (Exh. B, para. 11.) Petitioner says he informed counsel that he made the calls. (Exh. A, para. 21.) Interestingly, petitioner did not suspect the anti-depressants caused the outbursts until he was researching the issue in prison. (Exh. A, para. 28.) He had always been told the drugs were safe and effective, and he could not account for his odd behavior. (Exh. A, para. 15.) This was reasonable according to Dr. Antonuccio, who stresses that patients typically presume prescribed medications are safe and don't normally conclude that aberrant behavior was caused by medication. (Exh. N.)

However, what is uncontroverted is that Freeze never investigated a different defense — specifically, a defense based on lack of intent to commit a criminal threat under section 422 due to petitioner's ingestion of an antidepressant, Lexapro. Section 422 is a specific intent offense and Lexapro's printed warnings regarding side effects support a finding of voluntary intoxication that negates specific intent under section 29.4. The printed warnings also support a finding of unconsciousness under section 26. She acknowledges that she never investigated such a defense. (Exh. B, para. 11.) Also noteworthy is that petitioner had spoken with several potential witnesses who were prepared to testify about

his changed behavior in the relevant months. These witnesses attempted to contact Freeze but she never returned their calls. (Exh. J.)

The defense *Strickland* expert, Richard Gates, makes several key points regarding the importance of investigating potential defenses.

First, the client's initial denial of guilt does not relieve counsel of the duty to investigate other defenses. While there is a dispute as to whether petitioner denied being the person speaking on the recorded calls, that dispute is not relevant to the present claim since a denial is common and often the starting point in the process where the attorney and client discuss and develop the defense strategy. (Exh. C, para. 7.)

Next, a mental defense of some kind was obvious in the present case. The fact that the victim was petitioner's former psychologist was "an obvious red flag," and counsel should have explored the underlying problem (depression) and his relationship with the victim (which would have shown there was no motive for the threats). (Exh. C, para. 8.)

Next, and perhaps most significant, was the fact well-known in the criminal defense community that the ingestion of certain antidepressants (often referred to generally as "SSRI" drugs) could cause violent outbursts such as those that occurred in the present case. Gates notes that a Google search or review of the warning label would have confirmed the connection between Lexapro and the

potential for a violent outburst. (Exh. C, para. 9.)

Mental health expert, Alan Abrams, M.D., J.D. confirms that there was substantial scientific and legal literature available showing the connection between SSRI drugs and violent/aggressive behavior, and that was well-known in the medical and psychiatric community since 2005, when the FDA started requiring the warning on labels for all SSRI antidepressants. (Exh. D, p. 1.) Abrams notes that Dr. Raymond Murphy, who prepared a report that was later excluded at trial, was a psychologist “not likely familiar with psychopharmacology,” and apparently never considered the role Lexapro may have played in the incidents. (Exh. D, p. 2.) Gates concludes that the consultation with Dr. Murphy would have “served no purpose in trial” because he did not address the critical element of specific intent. (Exh. D, para. 10.)³

Petitioner was a good person and a productive citizen who inexplicably made awful threats to his former therapist after having ingested Lexapro. Trial counsel, by her own admission, made no attempt to investigate a defense based on Lexapro. She selected the identity defense based on her claim of petitioner’s insistence that he did not make the calls or even if he did, the victim could not

³ Also noteworthy is that DNA testing can show whether a person is prone to the side effects of a medication due to the way he or she metabolizes the drug. That testing was later done on petitioner and the results show petitioner was likely to act out in the way he did after taking Lexapro. (See Exh. E.)

reasonably have feared immediate harm.

However, these defenses were inconsistent with each other and would detract from the credibility of the defense. (Exh. C, para. 7.) The only legitimate defense to the charge was that petitioner was not a violent or dangerous person until he took the Lexapro, which causes violent or aggressive behavior, and due to his ingestion of the antidepressant, he lacked the specific intent to commit the criminal threats under section 422.

This should have been known by Freeze, and if not known when she consulted with petitioner, it was easily discoverable upon basic research. This was especially true given the red flags including the fact that the victim was petitioner's therapist. After hearing that single fact, counsel should have obtained petitioner's medical records from his therapist and presented them to a mental health expert for review. There is no tactical justification for counsel's failure to investigate the medication-based defense, and had the jurors been presented with this legitimate defense, it is reasonably probable that petitioner would not have been convicted of the serious felony conduct as described in section 422.

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Conclusion

Petitioner respectfully requests that this court issue an order to show cause why the requested relief should not be granted, or transfer the case to the superior court, with directions to issue an order to show cause.

Dated: 8/31/20

Respectfully submitted,

s/Patrick Morgan Ford
PATRICK MORGAN FORD,
Attorney for Petitioner
BENJAMIN LEE BATHEN

Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 6,902 words, as determined by the word count feature of the program used to produce the brief.

Dated: 8/31/20

s/Patrick Morgan Ford
PATRICK MORGAN FORD

In re Benjamin Lee Bathen

RELATED CASE NO. SCS294342

DECLARATION OF SERVICE BY U.S. MAIL AND
ELECTRONIC SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I hereby certify that on August 31, 2020, I mailed the following document *Petition for Writ of Habeas Corpus* as follows:

Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266
sdag.docketing@doj.ca.gov

Office of the District Attorney
330 West Broadway
San Diego, CA 92101
da.appellate@sdca.org

Benjamin Bathen
1741 Santa Cruz Ave.
Santa Clara, CA 95051

Executed on August 31, 2020, at San Diego, California.

Esther F. Rowe
Esther F. Rowe

Exhibit A —
Declaration of Benjamin Bathen

DECLARATION OF BENJAMIN BATHEN

I, Benjamin Bathen, declare:

1. I'm a college-educated computer programmer and have never previously been in any legal trouble.

2. In 2017, I was convicted of three counts of criminal threats in violation of Penal Code section 422. (See People v. Bathen - San Diego Superior Court Case No. SCS294342; Court of Appeal No. D074538.) My trial attorney was Alicia Freeze.

3. The complaint in my case was filed by Dr. Carolyn Jacobs a therapist who treated me between the fall of 2004 and September of 2008 for what she believed to be unipolar depression.

4. Dr. Jacobs is not authorized to prescribe medication. However, throughout therapy she recommended that I take antidepressants known as SSRI's in almost all our sessions and provided me with the name and address of a psychiatrist who would write the prescription. Initially I declined but eventually agreed to try it after she stated "It's my moral and ethical obligation to make sure you are taking this medication." and assured me that it would not affect my ability to serve in the military or obtain a security clearance. I was not in the military at the time but had considered enlisting. I was unaware that a federal government black box warning had been issued in October of 2004 shortly before I started therapy.

5. I went to the psychiatrist she referred me to and started on fluoxetine(Prozac) in the beginning of 2005. The adverse reactions started immediately but were never recognized as side effects. I was told that I needed to take the recommended dosage when I asked that it be reduced.

6. In 2007 after discussing it with my general practitioner, I switched to Wellbutrin which is not an SSRI because it is also used for smoking cessation.

7. I relocated to Boston, Massachusetts at the beginning of March of 2008. Dr. Jacobs is only licensed to treat patients in California, but our therapy sessions continued until September 23rd of 2008.

8. By 2016, Wellbutrin(IC Bupropion) had driven my blood pressure up to dangerous levels. My general practitioner in Springfield Virginia where I moved to in 2016, Dr. Barbano would not write the prescription I had been taking for most of the last eight or nine years. I told him Dr. Jacobs said Lexapro was a good medication for me. He reluctantly agreed to prescribe it when my blood pressure returned to normal levels.

9. In January of 2017 I began to show signs of akathisia, a medically induced syndrome that makes it hard for you to stay still caused by antipsychotics and SSRI's. My supervisors noticed that I was compulsively pacing back and forth at work and I was reprimanded for it. I was beginning to develop memory issues and periods of disorientation as well as involuntary facial grimacing(tardive dyskinesia).

DECLARATION OF BENJAMIN BATHEN

I, Benjamin Bathen, declare:

1. I'm a college-educated computer programmer and have never previously been in any legal trouble.
2. In 2017, I was convicted of three counts of criminal threats in violation of Penal Code section 422. (See People v. Bathen - San Diego Superior Court Case No. SCS294342; Court of Appeal No. D074538.) My trial attorney was Alicia Freeze.
3. The complaint in my case was filed by Dr. Carolyn Jacobs a therapist who treated me between the fall of 2004 and September of 2008 for what she believed to be unipolar depression.
4. Dr. Jacobs is not authorized to prescribe medication. However, throughout therapy she recommended that I take antidepressants known as SSRI's in almost all our sessions and provided me with the name and address of a psychiatrist who would write the prescription. Initially I declined but eventually agreed to try it after she stated "It's my moral and ethical obligation to make sure you are taking this medication." and assured me that it would not affect my ability to serve in the military or obtain a security clearance. I was not in the military at the time but had considered enlisting. I was unaware that a federal government black box warning had been issued in October of 2004 shortly before I started therapy.
5. I went to the psychiatrist she referred me to and started on fluoxetine(Prozac) in the beginning of 2005. The adverse reactions started immediately but were never recognized as side effects. I was told that I needed to take the recommended dosage when I asked that it be reduced.
6. In 2007 after discussing it with my general practitioner, I switched to Wellbutrin which is not an SSRI because it is also used for smoking cessation.
7. I relocated to Boston, Massachusetts at the beginning of March of 2008. Dr. Jacobs is only licensed to treat patients in California, but our therapy sessions continued until September 23rd of 2008.
8. By 2016, Wellbutrin(IC Bupropion) had driven my blood pressure up to dangerous levels. My general practitioner in Springfield Virginia, where I moved to in 2016, Dr. Barbano would not write the prescription I had been taking for most of the last eight or nine years. I told him Dr. Jacobs said Lexapro was a good medication for me. He reluctantly agreed to prescribe it when my blood pressure returned to normal levels.
9. Alicia never asked me if prescription medication could have caused the outbursts given the out of the blue timing of the screaming episodes and lack of any obvious motive. I could not explain why the incidents happened. She did ask me if I had taken any illegal or recreational drugs and I responded no as no alcohol or illegal drugs were involved.

10. In January of 2017 I began to show signs of akathisia, a medically induced syndrome that makes it hard for you to stay still caused by antipsychotics and SSRI's. My supervisors noticed that I was compulsively pacing back and forth at work and I was reprimanded for it. I was beginning to develop memory issues and periods of disorientation as well as involuntary facial grimacing(tardive dyskinesia).

11. Over the course of the next six months I began to experience increasing symptoms of serotonin toxicity including insomnia, mania, agitation, akathisia, and involuntary facial grimacing. The FDA medication manual for escitalopram, warns that serotonin syndrome can be life threatening and may include agitation, hallucinations, coma or other changes in mental status.

12. The specific guideline on the package insert required to be distributed with all SSRI's as a result of the FDA hearings is: "Call your healthcare provider right away if you experience any or all of the following symptoms" the list of symptoms includes "Acting aggressive or violent". The warning is stapled to the outside of the bag the medication comes in, but Alicia never investigated it.

13. On the dates of the incidents in June and July of 2017 I further experienced symptoms of serotonin syndrome, disorientation, profuse sweating and violent verbal outbursts. I called Dr. Jacobs at this time because I had repeatedly been told to call my healthcare practitioner in the event of an emergency. I did not intend to issue threats to Dr. Jacobs or anyone else. I'm not sure why I didn't contact a different doctor.

14. I understand the recordings of these episodes are extreme, sound horrible and are highly disturbing. Because SSRI's can cause these symptoms doctors are advised to monitor their patients closely and the phone line patients are instructed to call during adverse reactions is legally required to be confidential.

15. Because my doctor always told me that the medication was safe there was no way to know or inform my attorneys that the incidents were medically induced. What is clear to me now, was not clear then. I did inform Alicia that I was on the medication on the dates of the incidents, that I had no explanation as to why the incidents occurred, and that I was supposed to call that specific phone number in the event of a psychiatric emergency.

16. I was informed at the Springfield, VA police station in August of 2017 that Dr. Jacobs requested a restraining order against me in Chula Vista, CA and that this would come up on my security clearance and potentially damage my career if I did not return to California to defend against it. I was given the minimum four days' notice.

17. I hired San Diego attorney Benjamin Theule to represent me and to present Dr. Jacobs with a letter explaining that I had no intention of harming her and to assure her that she was in no immediate danger. He obtained a continuance to give me time to travel to California. I informed him that I was taking escitalopram, the generic form of Lexapro, he discussed it at length in person with Dr. Jacobs after the first restraining

order hearing which I could not attend. I sent Mr. Theule additional funds to transfer all information and documents to Alicia when we did the attorney substitution. Alicia did not request or receive this information from Mr. Theule he didn't transfer anything to her.

18. I eventually hired attorney Alicia Freeze for the trial after I read her reviews on AVVO.com, an online legal referral source, following a brief phone consultation. I transferred the full fee for her services to her account on February 12th, 2018.

19. The judge granted Alicia a continuance to prepare the defense. We only met once in person after the substitution hearing when I was still on the medication and would have shown symptoms of agitation. We did not have daily conversations. I repeatedly attempted to contact Alicia by phone and email, but her responses were extremely brief. She responded that she would love to chat, but her time was better spent focusing on writing motions in limine. Her few email responses were primarily focused on billing and scheduling issues. It was difficult to get in touch with her. I voiced this concern to her via email.

20. Alicia told me that she heard the threatening voicemail messages and didn't think I was the person who made the calls and that would be our defense.

21. I told Alicia very clearly in our very first discussion "OK you are my attorney I'm going to be completely honest with you, that is my voice on the recordings.", Alicia believed my voice sounded different when I was shouting during the episodes. At no point did I ever deny placing the phone calls to either of my attorneys. It would make no sense to do so since our conversations were privileged. I insisted that placing the phone calls does not constitute a crime.

22. There was no substantial discussion regarding potential avenues of defense other than identity between myself and Alicia Freeze. We did not have daily conversations. I issued a request for all records of incoming and outgoing phone calls from my cell phone to the Sprint Records department on June 14th 2020 to confirm this. I received their response on June 18th 2020 via email.

23. In the 122 days from when I hired Alicia the records show 26 calls. 21 of the calls are from me and go straight to Alicia's voicemail with no response. Only three calls exceed three minutes prior to the start of the trial on June 6th including a skype call.

24. The first one is a ten minute call on May 10, 2020 was to discuss why she had not hired or paid the expert witness less than a month before the trial. I emailed Alicia on may 21, 2020 expressing concern about a lack of communication between us. She agreed to pop up on Skype the next day but terminated the call early at 39 minutes 37 seconds. The Third phone call on May 28th 2020 was 56 minutes in duration and is the only discussion of what would happen at trial. The 56 minute phone call on may 28 2020 focused on going over my history with Dr. Jacobs and the evidence that would be presented against me at trial. There was no discussion of potential avenues of defense. During the 122 days I was located in Virginia and Alica was located in San Diego CA.

25. I researched and contacted Cherry Biometrics to analyze the data and review the cell phone tower maps generated by the district attorney's office. I was the person who found the expert witness, contacted him and hired him. Based on advice from my father, a former federal government attorney, I also requested a psychological evaluation. Alicia gave me the name of Dr. Raymond Murphy a psychologist and I arranged the appointments with him. In his report he recorded that I was taking generic escitalopram(Lexapro) at the time of the incidents. Alicia had access to this report prior to the trial but it was excluded from evidence.

26. In the in person segment of the psychological evaluation Dr. Murphy was very specific that we would not discuss the incidents themselves and that the meeting was only to evaluate my mental state not to determine guilt or innocence. He very clearly warned me that the conversation between us was not a privileged conversation and that unlike conversations with my attorney he could be questioned about anything discussed in the interview. He stated if you tell me you placed those phone calls I have to tell the court. I was not under oath, no court reporter was present and no recording of the interview exists. As I recall we deliberately did not discuss the incidents. If anything I may have stated that I did not commit a crime which Dr. Murphy could have misconstrued from his hand written notes as stating that I did not place the phone calls.

27. To my knowledge, Alicia never researched involuntary intoxication by prescription medication as a defense against the specific intent crime I was charged with. Common legal research software like Westlaw, or Casetext shows 10,000 results in a search for court records with the term "antidepressant". A brief google search returns multiple results linking antidepressants to aggression and violence. This information was easily discoverable.

28. While incarcerated, using the very basic prison law library, I found a reference to SSRI's causing "problems with rages". After discussing it with the prison mental health counselors they urged me to switch to a different SSRI medication, Zoloft which they said would have a calming effect. I declined the prescription.

29. After my release, I continued researching and learned how prevalent the issue was. SSRI's (including escitalopram) have been the key issue in many civil lawsuits and criminal cases. Many people have reported incidents of hostility and aggression in otherwise nonviolent people like me and sued the pharmaceutical companies that manufacture them. Some have succeeded. A jury issued a \$6.4 million to the surviving family members of Donald Schell, who fatally shot his wife, their daughter, and their granddaughter, before committing suicide while on Paxil, an SSRI.

30. I signed up for several free trials of legal software and discovered that the generic manufacturer of escitalopram(Lexapro) is currently being sued in the Alabama Supreme Court and that the brand name manufacturer was prosecuted by the Justice department and plead guilty to both felony and misdemeanor charges. I also found Andrew Thibault V. U.S. Food and Drug Administration a federal lawsuit that forced the release of 749

detailed Adverse Drug Event narrative reports which was concluded in July of 2017. All 749 reports would have been discoverable during the 11 months between when I was charged and when I was convicted.

31. It took several months after my release to get in contact with Alicia and I explained that the generic escitalopram(Lexapro) caused the incidents. She explained that she doesn't handle post-conviction litigation. I asked her to refer me to a post-conviction attorney in San Diego and she agreed but never sent any names or referrals.

32. An internet search showed that a DNA test does exist to predict adverse reactions to SSRI medication and contacted a forensic medical expert to perform an analysis. The analysis shows that due to genetic variations in my CYP450 genes I lack the liver enzymes to adequately metabolize SSRI medication and this was caused the symptoms I experienced. In other words, this was scientific proof that the drugs caused my outbursts.

33. I spoke about this issue with my appointed direct appeal attorney, Kevin Smith and sent him links to websites dedicated to making SSRI's illegal and scientific research papers I found. He told me it could not be included in my appeal because it included facts that were outside of the trial record. He advised me that I could pursue the issue later by way of a habeas corpus petition. Kevin explained that he was restricted to the information in the transcript and could only argue matters of legal error. I asked Kevin to get a list of experienced post-conviction attorneys from appellate defenders and he gave me a list of names and contact information.

34. In the fall of 2019 I filed a Freedom of Information Act request for reports of adverse reactions to escitalopram(Lexapro) with the Food and Drug Administration. Their initial response shows 33 completed homicides, 1611 completed suicides, 29 cases of imprisonment, 151 reports of Akathisia, 392 reports of aggression, 92 reports of Gun Shot wound(mostly completed suicides), and 36 reports of involuntary screaming by patients that were prescribed escitalopram(Lexapro). Both homicidal and suicidal ideation are among the most frequently reported reactions. This information is easily discoverable using the FDA's online FAERs dashboard.

35. I filed additional Freedom of Information Act requests with the FDA using the case ID numbers of the adverse reaction reports for detailed narratives of specific incidents. The results of the request are heartbreaking and outline the details of what happened to other patients who took the medication including suicide, homicide and other acts of violence. According to federal guidelines I requested and receive ten additional detailed narrative reports each month from the FDA.

36. It took some time and it was extremely difficult because going to prison exhausted my financial resources but when I had enough money to hire Pat Ford I did so immediately. Pat requested copies of my medical records with dates confirming when I was prescribed escitalopram(Lexapro) and I provided them to him.

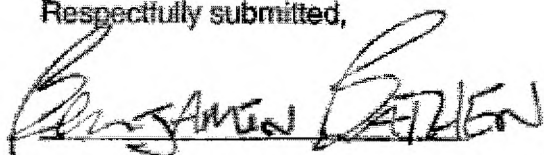
37. I stopped taking any form of antidepressant medication over a year ago. There have been no outbursts since I stopped the medication and the adverse side effects have decreased or stopped. I would never have taken this medication if I had known how incredibly harmful it is.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Diego, California.

Dated: June 28th, 2020

Respectfully submitted,

A handwritten signature in black ink that reads "Benjamin Bathen". The signature is written in a cursive style with a large, looping initial "B".

Benjamin Bathen

Exhibit B —
Declaration of Attorney Alicia Freeze

DECLARATION OF ALICIA C. FREEZE

- 1
2 1. I have personal knowledge of the statements in this Declaration and can competently
3 testify thereto.
- 4 2. I was retained to represent Benjamin L. Bathen to defend against felony criminal threat
5 charges. The allegations were that Mr. Bathen left three (3) threatening voicemails on
6 his former therapist's voicemail in June and July of 2017.
- 7 3. Mr. Bathen maintained his innocence throughout the pendency of the case.
- 8 4. Further, his repeatedly argued that due to him physically being located across the
9 country in Virginia during the times of the alleged calls, there was no immediate threat
10 if he did in fact make those calls.
- 11 5. As part of my representation of Mr. Bathen, I had him undergo a psychological
12 evaluation with Dr. Raymond Murphy. Dr. Murphy interviewed Mr. Bathen on May
13 19, 2018; May 19, 2018; May 24, 2018; May 31, 2018; and, June 4, 2018.
- 14 6. I requested an evaluation regarding Mr. Bathen's basic emotional status; whether he
15 suffered from a mental disorder; did he present as aggressive, assaultive, or predatory
16 in any fashion; and whether he was dangerous.
- 17 7. Regarding his health, Mr. Bathen told Dr. Murphy: "I have some anxiety, but I think I
18 have a good appetite for the most part. Currently, I am medicated with Lexapro by my
19 general practitioner for depression. I think it helps."
- 20 8. Dr. Murphy further indicated in his report that, "Mr. Bathen denies any suicidal
21 ideation, but states 'I felt pretty bummed out at times.' He denies any homicidal
22 ideation. He indicates that he has never been hospitalized psychiatrically, and has been
23 medicated with Prozac, Cymbalta, and Wellbutrin to no effect. He reports that Lexapro
24 has been helpful."

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9. Dr. Murphy found that Mr. Bathen had "mild depression related to current legal circumstances."

10. For his "RECOMMENDATIONS/TREATMENT PLAN," Dr. Murphy found that:

- a. "Mr. Bathen is currently charged with having made serious threats to his past psychologist. Mr. Bathen adamantly denies these allegations.
- b. Mr. Bathen does not present as aggressive, assaultive, or predatory in any fashion.
- c. Mr. Bathen would benefit from brief counseling as needed regarding his current circumstances. This would help to stabilize Mr. Bathen and provide support during this difficult period.
- d. Mr. Bathen does not present as a danger to the community at large."

11. Based on my almost daily conversations with Mr. Bathen, in person meetings with him, interviews with his family members, and Dr. Murphy's report, I did not explore the defense of medication playing a role in the case. However, I did ask Mr. Bathen if that could be a possibility, and he always responded that he wished to deny the allegations in their entirety in that he never made the phone calls, and if he did, the issue went to the "immediacy" aspect, as he was physically located on the other side of the country during the time of the alleged calls. Finally, I don't believe he indicated that he was taking Lexapro in June and July 2017.

I declare under penalty of perjury that the foregoing is true and correct.

DATED:

3/2/2020

ALICIA C. FREEZE, ESQ.

Exhibit C —

Declaration of Attorney Richard Gates

DECLARATION OF RICHARD GATES

I, Richard Gates, declare:

1. I am an attorney licensed to practice in the California Courts since 1978.
2. I am currently a Chief Trial Deputy for the Multiple Conflicts Office in the San Diego County Public Defender's Office, and have been employed as a public defender in San Diego for 35 years. Before that I was a deputy public defender in Fresno, and the appointed Public Defender for Modoc County. In addition to a heavy trial schedule, I have devoted much of my career to training both entry level and more experienced attorneys in the public defender's office. For over 10 years, I supervised the investigation and preparation of homicide cases in the office. I was often assigned the cases with complex mental health issues, and I have been asked to speak at seminars on mental health defenses in criminal cases. I am currently on the faculty of California Western School of Law as a adjunct professor, and teach a class on mental health law.
3. I have been asked by attorney Pat Ford to provide an opinion as to whether trial counsel in *People v. Bathen* (SCS 294342) provided ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1987) 466 U.S. 668, by failing to investigate a mental health defense prior to trial. In that regard, I have reviewed pertinent parts of the trial record, the appellate opinion and briefs, and declarations of Mr. Bathen, Dr. Alan Abrams and trial counsel Alicia Freeze.
4. Mr. Bathen was charged with three counts of making criminal threats against a former therapist. Prior to making any of these threats, Mr. Bathen had been taking a prescribed anti-depressant, Lexapro (or its generic version). The case was defended on the theory that Mr. Bathen was not the person speaking on the threatening recordings, and in any event because he was across the country, the victim would not have been in immediate fear of harm. Counsel never investigated the real possibility that the anti-depressant Mr. Bathen had been taken led to the outbursts, and this evidence could have defeated the specific intent element of the Penal Code section 422 charges.

5. In looking at the declarations of Mr. Bathen and counsel, there is some dispute about certain facts relating to the amount of communication they had before trial, and whose idea it was to present the defense that he was not the person speaking on the recordings.

6. These factual disputes are not particularly relevant to the present question, and instead distract from the present issue of whether counsel should have investigated a defense that focused on Mr. Bathen's use of anti-depressants.

7. A few important points need to be addressed here. First, counsel states in her declaration that "Mr. Bathen maintained his innocence throughout the pendency of the case." While Mr. Bathen denies this point, again, it is not relevant. Defense counsel are frequently confronted at the outset of the case with absolute denials by their clients. This denial cannot serve as an excuse not to investigate. In fact, investigation is the best tool to persuade a client that an absolute denial may not be the best defense, and that will result in continued investigation where additional fact gathering may show the availability of another defense. The problem was aggravated here where the chosen defense theory was inconsistent — "It wasn't me, and if it was me, the victim could not reasonably have been afraid." Jurors are often skeptical of such defenses, and counsel here should have investigated further.

8. There were strong indications in this case that the threats were caused by a mental impairment of some kind. The fact that the victim was a former therapist should have been an obvious red flag. Counsel should have investigated why Mr. Bathen had been in therapy, what was the nature of his relationship with the therapist, was there any event that triggered the threats, and if not, what caused the outbursts? While defense attorneys are not mental health professionals, any competent attorney presented with these facts would have obtained Mr. Bathen's entire medical record from the therapist and given it to a mental health expert for review.

9. Critically important here is the fact that it was well-known in the criminal defense community that there can be a relationship between anti-depressants and violent (or suicidal) behavior. Drug manufacturers

were required to report this connection on warning labels for drugs such as Lexapro, and basic Google searches would have informed anyone looking that an unintended side-effect of certain anti-depressants (or “SSRI” drugs) was violent behavior in at least enough cases to require research of this possibility by defense counsel. Mr. Bathen was an otherwise good person, with a good job, and no history of violence. The threats in the case were deeply disturbing and it is hard think of any other fact than the medication that would have caused these events.

10. The fact that counsel wasn’t aware her client was taking an anti-depressant shows precisely how little investigation she did. Her ultimate decision to try the case on the inconsistent defenses suggested by her client (accepting her version of the events) was the direct result of her failure to investigate. She states that she hired Dr. Murphy and reveals the issues she discussed with him. But this referral served no purpose in trial (though it might have produced mitigation for sentencing) because Dr. Murphy did not address the critical element of specific intent.

11. The most important aspect of a trial practice is to present a cogent theory on behalf of a criminal defendant. The defense theory often evolves over time, based on the process of elimination that results from a proper investigation. The duty to investigate exists despite a client’s denial of responsibility, and such a denial often reinforces the need for investigation. Mr. Bathen was under the influence of medication given to treat his depression that informs patients of side effects including violence or hostility. His ingestion of the drug may well have negated the specific intent required for the criminal threats charges. This theory, supported by the facts and literature, was the only defense that made sense and would have given Mr. Bathen more credibility in the eyes of the judge and jury. But counsel failed to investigate the theory and therefore did not know that it existed as an option.

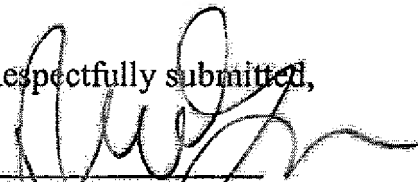
12. Under *Strickland*, strategic choices made by defense counsel following a proper investigation of the facts and law are virtually unchallengeable. Strategic choices made after a less than complete investigation are subject to a challenge under *Strickland*. In the present case, trial counsel’s failure to investigate the connection between the impact of Lexapro on Mr. Bathen and the charged threats against his former

therapist, fell below the standard of competence in the local criminal defense community.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Diego, California.

Dated: *Mar 10, 2020*

Respectfully submitted,



Richard Gates

Exhibit D —
Declaration of Dr. Alan Abrams

ALAN A. ABRAMS, M.D., J.D., FCLM
6601 JACKSON DRIVE,
SAN DIEGO, CA 92119
619-460-0344 (voice and fax)
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STATE BAR NO. 163839 (CA)

January 28, 2020

Pat Ford, Esq.,
1901 1st Ave,
San Diego, CA 92101

Re: Ben Bathen

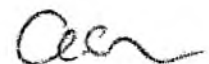
This is the declaration of Alan A. Abrams, M.D., J.D., FCLM.

My background is in clinical psychiatry, forensic psychiatry, psychopharmacology and addiction psychiatry. I have written articles in psychopharmacology and forensic psychiatry, including chapters in national textbooks. I have been a Chief Psychiatrist at two prisons in California, and the medical director of a fifty bed inpatient psychiatric hospital at the California Medical Facility (CMF - Vacaville), a state prison. Currently I serve as the director of forensic psychiatry for residency training at UCSD, in addition to my private psychiatry practice.

I was contacted by attorney Pat Ford to consult in Ben Bathen's case. Mr. Ford explained that Mr. Bathen had been convicted of three counts of making criminal threats to a former therapist, six months after he started taking Lexapro for mixed depression and anxiety. Mr. Bathen had no prior criminal history, no prior threatening or stalking behavior and he was otherwise a productive computer programmer.

I was asked by Mr. Ford whether, at the time of his trial, in 2017 there was consensus in the medical/psychiatric community that antidepressants/SSRI's including Lexapro were known to result in or cause aggressive or violent reactions in certain persons on the antidepressant medications. It is my belief that this was well known in the general community, the criminal defense community and certainly in the medical and mental health community. Starting in approximately 2005 to the present, the FDA-approved labels for all SSRI antidepressants as found in the annual Physician's Desk Reference, which includes the following information under the section entitled WARNINGS-Clinical Worsening and Suicide Risk:

"All patients being treated with antidepressants for any indication should be monitored appropriately and observed closely for clinical worsening, suicidality, and unusual changes in behavior, especially during the initial few months of a course of drug therapy, or at times of dose changes, either increases or decreases. . . The following symptoms, anxiety, agitation, panic attacks, insomnia, irritability, hostility, aggressiveness, impulsivity, akathisia (psychomotor



restlessness), hypomania, and mania, have been reported in adult and pediatric patients being treated with antidepressants for major depressive disorder as well as for other indications, both psychiatric and non-psychiatric.” Beginning in 2005, the “Prozac Defense” has been raised by criminal defendants claiming that their violent behavior was the result of taking Prozac, an SSRI very similar to Lexapro. Prozac has been cited in more medication defense criminal cases in the United States than has any other psychotropic drug. There are advocates on both sides of this question, but a competent attorney faced with a client on an SSRI who begins to act out of character in an aggressive manner would certainly know this could be the result of, or side effect from, the medication. Dr. Raymond Murphy is a psychologist, not likely familiar with psychopharmacology. He makes no mention of considering the role of Lexapro in Mr. Bathen’s behavior. Dr. Murphy’s examination by itself, failed to consider the role of medication side effects. Dr. Murphy should have informed or been asked by Mr. Bathen’s attorney if he was qualified to make a proper assessment of Mr. Bathen’s behavior forming the basis of the criminal charges. Even if Mr. Bathen denied the criminal acts, the lawyer he hired to represent him in the criminal threats trial did not provide any meaningful defense by failing to consider the well known relationship of SSRI antidepressants, agitation, confusion and aggression.

SSRI antidepressants like Lexapro can cause agitation in a number of ways through the serotonergic neurotransmission system, by increasing the amount of serotonin around key nerve centers. Lexapro can also cause what is known as Serotonin Syndrome which is a toxidrome characterized by a range of behaviors and symptoms including delirium and death. Though retrospective diagnosis is quite difficult, the Serotonin Syndrome could certainly have been the cause of Mr. Bathen’s behavior. The symptoms reported by Mr. Bathen to David Antonuccio, PhD, in December 2019, such as confusion, agitation, restlessness, twitching, heavy sweating, myoclonus, and flushing are far more characteristic of Serotonin Syndrome than akathisia.

There is, and was, in 2017 a very substantial amount of scientific and legal literature (and both) that was easily available online that would have shown the connection between SSRI antidepressants and violent or aggressive behavior. While violence toward self or others (suicidal thoughts or behaviors) is uncommon, the psychiatric community was concerned by the FDA’s report of a correlation and a risk.

I have reviewed Mr. Bathen’s medical, pharmacy and psychiatric records. It appears to a medical certainty that his outbursts were connected to his ingestion of Lexapro. There is no other plausible scientific explanation. This relationship between Lexapro, agitation, confusion and aggression is something that his defense attorney should have investigated and should have shared with the finder of fact who was trying to determine whether Mr. Bathen should be convicted of the charged crimes.

I swear under penalty of perjury under the laws of California that the statements made in this declaration are true. Dated January 28, 2020 at San Diego, CA.



 1/28/2020

Alan A. Abrams, MD JD

Exhibit E —
Letter from Dr. Eikelenboom-Schieveld



Independent Forensic Services

Law Office of Patrick Morgan Ford,
1901 1st Ave Ste 400,
San Diego, CA 92101
per email: ljlegal@sbcglobal.net

Conifer, March 14, 2020

Dear Mr. Ford,

On behalf of your client Benjamin Bathen, date of birth November 30, 1977, I hereby send you some background information on CYP450 testing and my findings in the case of your client.

Qualifications and Experience

I have been trained as a social worker and I have worked in that capacity for 9 years. After I finished medical school in 1992, I practiced medicine as an intern in surgery, obstetrics, emergency medicine and internal medicine for 8 years.

I have been a forensic medical examiner since 1999, previously employed by the City of Amsterdam as a coroner and by the Netherlands Forensic Institute, the state forensic laboratory. In 2003, we started IFS. We have laboratory facilities that provide forensic DNA-testing, crime scene reconstruction, trace recovery, bloodstain pattern analysis and forensic medical examinations in, among others, cause and time of death, toxicology and injury interpretation.

In 2011, we moved to Colorado and opened a second laboratory. Our facilities have been accredited according to ISO-17025 by the Dutch Board of Accreditation (RvA) and the American Society of Crime Laboratory Directors (ASCLD).

In 2013, I started working on criminal cases that involved the use of medication and genetic variants for the DNA of enzymes that metabolize drugs and other substances from the body, called the cytochrome P450 system (CYP450).

I have been conducting investigations in more than 100 cases of violent behavior under the influence of psychoactive medication. I have testified in court as an expert in this area in Holland. In the US I have been accepted as an expert on CYP450 testing in a Shreck hearing.

I followed a course in Toxicogenomics and Systems Toxicology, I have published in peer reviewed journals, wrote a blog about pharmacogenomic testing and recently, I finished my Ph.D. at the University of Denver, focusing on CYP450.

I have been a court appointed witness in the Netherlands since 2004. I have provided opinions under the instructions of both the prosecution and the defense, and I see it as my duty to provide a comprehensive, scientific and impartial opinion for the court on matters that are within my expertise. The nature of that opinion is not influenced by the requirements of any individual party. I also inform the court of any matters that are outside my expertise, and I understand my obligation to revise my opinion if matters are disclosed that make this necessary.



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Available Documents

Files from the Office of the District Attorney of San Diego, Appellant's Opening brief, Respondent's brief, Appellant's reply, all for the Court of Appeal, mental health evaluation done by prof. dr. D. Antonuccio, dated June 12, 2019, declaration by A. Abrams, psychiatrist, dated January 28, 2020.

CYP450 genetic testing was ordered by me and performed by OneOme laboratory in Minneapolis, August 2nd, 2019.

Opinion

In 2017, Mr. Bathen threatened his former psychologist by telephone on three different occasions. During that period, he was on prescription antidepressant medication, *e.g.*, 10mg of escitalopram, a selective serotonin reuptake inhibitor (SSRI).

This substance, like all psychoactive medication, has an effect on the brain function. Psychoactive medication can cause side effects. It leads to changes in the equilibrium of the brain chemistry, especially the neurotransmitters, which conduct the signals transference between brain cells (neurons).

Neurotransmitters play a major role in the higher brain functions, like the modulation of emotions, cognitive functions and behavior. Psychiatric drugs disturb the delicate equilibrium in the brain chemistry. Because of the chemical imbalance they cause, the coherence between the different parts of the brain can be disturbed, leading to an interruption in the communication between the frontal lobes and the rest of the brain. The frontal lobes guide the "higher functions" of the brain, and that is where judgment and memory are primarily located. When that coherence is disrupted, it can cause mental malfunctions, with impulses that any ordinary person is unlikely to be able to withstand.^[1-3] This goes to the heart of the question of whether these individuals possess free will or are able to form intent.

In the scientific literature, there is an abundance of articles and papers about a possible causal relation between psychoactive medication and abhorrent behavior, acts of violence, and suicide.^[2, 4-6] All psychoactive medication can cause these side effects, but antidepressants like SSRIs, are notorious.

Most medications that interact with brain chemistry are metabolized and expelled from the body by so-called CYP450 genes and enzymes. The individual genes produce the enzymes, and the enzymes metabolize the medication. As metabolism proceeds, the concentration of the medication in the blood is reduced. However, many people have genetic variants for their CYP450 DNA, which generate enzymes that have reduced metabolic capacity. This can lead to accumulation of the medication in the blood, to toxicity and to the dangerous side effects as mentioned previous.

There are many CYP450s, but there are six most important ones. These six CYP450 were tested, and your client has genetic variants for five of them. The medication your client was on when he called his former therapist, was escitalopram. This drug needs to be metabolized by CYP2C19, CYP2D6 and CYP3A4. In your client's case, all three CYP450s have reduced to severely reduced metabolic function. He would not have been able to metabolize escitalopram at the rate somebody who has a normal CYP450 DNA profile could expelled this medication from the body. The dose prescribed by physicians, is based on the metabolic capability of a normal metabolizer and not on an individual with a significantly reduced rate of metabolism like your client.



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It is my opinion as a medical professional that, at the time of the telephone calls, Mr. Bathen was suffering from severe neurotoxicity. The side effects of the substances in his blood prohibited him from being able to deliberate and prevented him from forming the requisite intent. With his impaired brain function he was not capable of making a sound judgment, and overseeing the consequences of his actions. Nor was he able to control his impulses, or to conform his behavior to the law. When the brain is inundated with chemicals and normal conductivity is disrupted, the subsequent behavior is not under a person's mental control, they are not willful decisions.

When behavior and violence can be classified as side effects of medication, within the scientific community that is considered strong evidence for a causal relation. The DNA variants for your client's CYP450 genes provide a biochemical explanation for the occurrence of medication-induced toxicity, with symptoms of akathisia. Consequently, the conclusion is justified that, had escitalopram not been prescribed to him, the behavior he exhibited most likely would not have occurred. Given that this medication was prescribed, and he was not warned for the side effects, this can be considered involuntary intoxication. This should provide him with a defense of temporary insanity.

It was already known in 1995 that psychoactive medication is metabolized by CYP450 enzymes and that DNA variants for CYP450 genes could lead to toxic levels with dangerous side effects.^[7-9] In 2004, Kircheimer in a large review study explained the need for predictive pharmacogenetic CYP450 testing.^[10] Grasmader (2004) recommended CYP450 genotyping to prevent side effects like the ones your client suffered from.^[11] Since that time, CYP450 testing has been widely accepted in the medical community^[12-15] Consensus guidelines for the use of pharmacogenetic testing have been published.^[16, 17]

Your client's CYP450 DNA profile should have been determined before he was prescribed escitalopram. Had the physician been aware of your client's CYP450 profile and his significantly reduced metabolic capacity, I am convinced he would not have dispensed that medication to him.

Kind regards,

Conifer March 14, 2020

Selma Eikelenboom-Schieveld, M.D., Ph.D. Forensic Medical Examiner
Independent Forensic Services, LLC

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Exhibit F —
Relevant Research Regarding Antidepressants

F-1

17.2 FDA-Approved Medication Guide

Medication Guide

Lexapro® (leks-a-pro)
(escitalopram) Tablets/Oral Solution

Read the Medication Guide that comes with Lexapro before you start taking it and each time you get a refill. There may be new information. This Medication Guide does not take the place of talking to your healthcare provider about your medical condition or treatment. Talk with your healthcare provider if there is something you do not understand or want to learn more about.

What is the most important information I should know about Lexapro?

Lexapro and other antidepressant medicines may cause serious side effects, including:

1. Suicidal thoughts or actions:

- **Lexapro and other antidepressant medicines may increase suicidal thoughts or actions** in some children, teenagers, or young adults within the **first few months of treatment or when the dose is changed.**
- Depression or other serious mental illnesses are the most important causes of suicidal thoughts or actions.
- Watch for these changes and call your healthcare provider right away if you notice:
 - New or sudden changes in mood, behavior, actions, thoughts, or feelings, especially if severe.
- Pay particular attention to such changes when Lexapro is started or when the dose is changed.

Keep all follow-up visits with your healthcare provider and call between visits if you are worried about symptoms.

Call your healthcare provider right away if you have any of the following symptoms, or call 911 if an emergency, especially if they are new, worse, or worry you:

- attempts to commit suicide
- acting on dangerous impulses
- acting aggressive or violent
- thoughts about suicide or dying
- new or worse depression
- new or worse anxiety or panic attacks
- feeling agitated, restless, angry or irritable
- trouble sleeping
- an increase in activity or talking more than what is normal for you
- other unusual changes in behavior or mood

Call your healthcare provider right away if you have any of the following symptoms, or call 911 if an emergency. Lexapro may be associated with these serious side effects:

2. Serotonin Syndrome. This condition can be life-threatening and may include:

- agitation, hallucinations, coma or other changes in mental status

- coordination problems or muscle twitching (overactive reflexes)
- racing heartbeat, high or low blood pressure
- sweating or fever
- nausea, vomiting, or diarrhea
- muscle rigidity
- **3. Severe allergic reactions:**
 - trouble breathing
 - swelling of the face, tongue, eyes or mouth
 - rash, itchy welts (hives) or blisters, alone or with fever or joint pain

4. Abnormal bleeding: Lexapro and other antidepressant medicines may increase your risk of bleeding or bruising, especially if you take the blood thinner warfarin (Coumadin®, Jantoven®), a non-steroidal antiinflammatory drug (NSAIDs, like ibuprofen or naproxen), or aspirin.

5. Seizures or convulsions

6. Manic episodes:

- greatly increased energy
- severe trouble sleeping
- racing thoughts
- reckless behavior
- unusually grand ideas
- excessive happiness or irritability
- talking more or faster than usual

7. Changes in appetite or weight. Children and adolescents should have height and weight monitored during treatment.

8. Low salt (sodium) levels in the blood. Elderly people may be at greater risk for this. Symptoms may include:

- headache
- weakness or feeling unsteady
- confusion, problems concentrating or thinking or memory problems

9. Visual problems

- eye pain
- changes in vision
- swelling or redness in or around the eye

Only some people are at risk for these problems. You may want to undergo an eye examination to see if you are at risk and receive preventative treatment if you are.

Do not stop Lexapro without first talking to your healthcare provider. Stopping Lexapro too quickly may cause serious symptoms including:

- anxiety, irritability, high or low mood, feeling restless or changes in sleep habits
- headache, sweating, nausea, dizziness
- electric shock-like sensations, shaking, confusion

What is Lexapro?

Lexapro is a prescription medicine used to treat depression. It is important to talk with your healthcare provider about the risks of treating depression and also the risks of not treating it. You should discuss all treatment choices with your healthcare provider. Lexapro is also used to treat:

- Major Depressive Disorder (MDD)
- Generalized Anxiety Disorder (GAD)

Talk to your healthcare provider if you do not think that your condition is getting better with Lexapro treatment.

Escitalopram (P); Escitalopram Oxalate (G); Lexapro (P)

Home
 Escitalopram
 Escitalopram Oxalate
 Lexapro
 Lexapro (P)

FDA Adverse Event Reporting
 FDA Adverse Event Reporting

Search by Product

US Food & Drug

ESCITALOPRAM (P); ESCITALOPRAM OXALATE (G); LEXAPRO (P)

Total Cases: 23,141

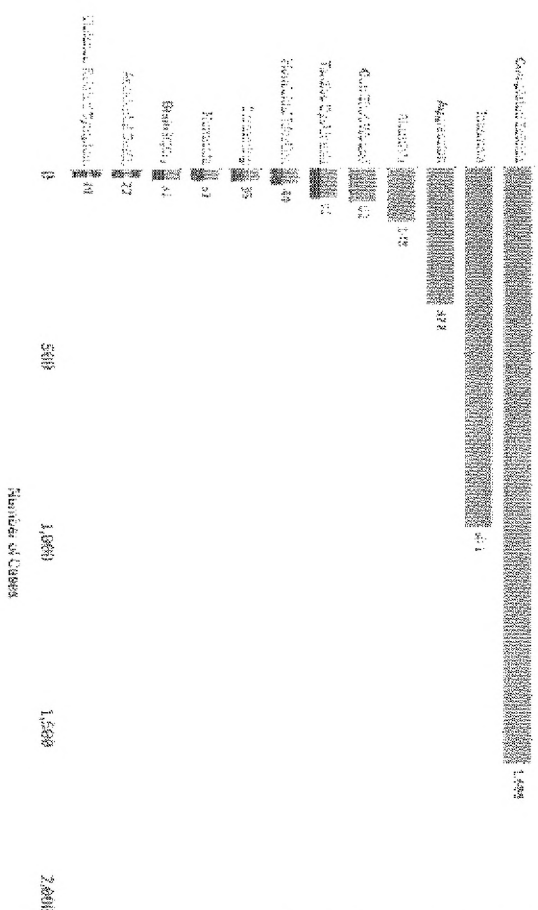
Number of Adverse Events: 2,908

Number of Deaths: 1,651

Adverse Event by Reaction

Reaction	Number of Cases	Percentage
Headache	1,008	53.18%
Dizziness	871	38.93%
Nausea	572	24.74%
Agitation	340	14.70%
Insomnia	92	3.93%
Weight Decreased	82	3.55%
Depression	62	2.68%
Parosmia	44	1.88%
Constipation	35	1.51%
Blurred Vision	32	1.38%
Abnormal Laboratory	31	1.34%
Abnormal Blood Chemistry	22	0.95%
Abnormal Blood Test	19	0.82%
Total	3,141	100.00%

Case Count by Reaction



Date as of: 12/18/2020
 The page displays the number of cases reported for the product name, brand name, or generic name. The number of cases is based on the number of adverse events reported by the reporter who is listed on the adverse event report. The number of cases is based on the number of adverse events reported by the reporter who is listed on the adverse event report. The number of cases is based on the number of adverse events reported by the reporter who is listed on the adverse event report.

Intended for healthcare professionals

🗨️ Rapid response to:

Feature Medicine and the Media

Antidepressants and murder: case not closed

BMJ 2017; 358 doi: <https://doi.org/10.1136/bmj.j3697> (Published 02 August 2017) Cite this as: BMJ 2017;358:j3697

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Rapid Response:

Antidepressants increase the risk of suicide, violence and homicide at all ages

The FDA admitted in 2007 that SSRIs can cause madness at all ages and that the drugs are very dangerous; otherwise daily monitoring wouldn't be needed: "Families and caregivers of patients should be advised to look for the emergence of such symptoms on a day-to-day basis, since changes may be abrupt" ... "All patients being treated with antidepressants for any indication should be monitored appropriately and observed closely for clinical worsening, suicidality, and unusual changes in behavior, especially during the initial few months of a course of drug therapy, or at times of dose changes, either increases or decreases. The following symptoms, anxiety, agitation, panic attacks, insomnia, irritability, hostility, aggressiveness, impulsivity, akathisia (psychomotor restlessness), hypomania, and mania, have been reported in adult and pediatric patients being treated with antidepressants" (1).

Such daily monitoring is, however, a fake fix. People cannot be monitored every minute and many have committed SSRI-induced suicide or homicide within a few hours after everyone thought they were perfectly okay.

As the published trial literature related to suicidality and aggression on antidepressants is unreliable, we looked at 64,381 pages of clinical study reports (70 trials) we got from the European Medicines Agency. We showed for the first time that SSRIs in comparison with placebo increase aggression in children and adolescents, odds ratio 2.79 (95% CI 1.62 to 4.81) (2). This is an important finding considering the many school shootings where the killers were on SSRIs.

In a systematic review of placebo-controlled trials in adult healthy volunteers, we showed that antidepressants double the occurrence of events that the FDA has defined as possible precursors to suicide and violence, odds ratio

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incontinence in the open-label extension phase of the clinical studies had 2.6 times more suicide attempts than other women of the same age (5).

Looking at precursor events to suicide and violence is just like looking at prognostic factors for heart disease. We say that increased cholesterol, smoking and inactivity increase the risk of heart attacks and heart deaths and therefore recommend people to do something about it. Psychiatric leaders, however, routinely try to get away with untenable arguments. Many say, for example, that antidepressants can be given safely to children arguing that there were no more suicides in the trials, only more suicidal events, as if there was no relation between the two, although we all know that a suicide starts with suicidal thoughts, followed by preparations and one or more attempts. The same can be said about homicide. It can no longer be doubted that antidepressants are dangerous and can cause suicide and homicide at any age (5-7). It is absurd to use drugs for depression that increase the risk of suicide and homicide when we know that cognitive behavioural therapy can halve the risk of suicide in patients who have been admitted after a suicide attempt (8) and when psychotherapy does not increase the risk of murder.

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Competing interests: No competing interests

03 September 2017

Peter C Gøtzsche
Professor
Nordic Cochrane Centre
Copenhagen

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Do Antidepressants Increase Violent Behavior?

By Remy Melina January 12, 2011



(image: © Dreamstime)

Antidepressants are supposed to make people feel happier and more at ease, but a study has linked several prescription antidepressants to an increased risk of violent behavior, including physical assault and homicide.

The December 2010 study from the Institute for Safe Medication Practices found five antidepressants to be among the 10 prescription drugs most disproportionately linked with reports of violent behavior.

ADVERTISING



The linking of antidepressants with violent behavior is extremely controversial; some mental health professionals argue that such conclusions can be counterproductive. For instance, some scientists fear depressed patients will be discouraged from seeking appropriate medical care by the warning that the Food and Drug Administration requires on the labels of all antidepressant drugs, referring to aggressive behavior.

Others argue that the rate of violent behavior among those taking antidepressants should not come as a surprise, because those people may already have had behavioral issues that made them prone to violence. In fact, their capacity for violence may have been the very reason they started taking antidepressants.

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LIVESCIENCE

But the study from the Institute for Safe Medication Practices, a nonprofit watchdog group based in Pennsylvania, weighs against the argument about pre-existing tendencies. Acts of violence towards others are a genuine and serious adverse drug event that is associated with a relatively small group of drugs, including 11 antidepressant drugs, the study said.

The study was based on an analysis of 484 adverse events reported to the FDA from 2004 to 2009 that were related to prescription drugs.

The varying results among drugs for smoking cessation and mood stabilization show it is unlikely that the violence events are attributed to existing problems in the patient populations treated, researchers wrote in the study, which was published in the journal PloS One. Of the top 10 drugs disproportionately linked with reports of violent behavior toward others, five were antidepressants.

Prozac (fluoxetine) was most commonly linked to aggression, increasing violent behavior 10.9 times. Paxil (paroxetine), Luvox (fluvoxamine), Effexor (venlafaxine) and Pristiq (desvenlafaxine) were 10.3, 8.4, 8.3 and 7.9 times, respectively, more likely to be linked with violence.

As for why some people on antidepressants become more violent, study co-author Thomas J. Moore told Life's Little Mysteries that the exact cause of these behavioral changes remains unknown and requires further research.

Several previous studies indicated that certain antidepressants also can increase the risk of suicide, but these results are harder to analyze because the rate of increased suicidal tendencies varies depending on the age of the patient with children and teenagers more vulnerable to suicidal behavior when on antidepressants, according to the FDA.

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Exhibit G —

Report from Dr. Raymond Murphy

RAYMOND G. MURPHY, PH.D.

- Licensed Psychologist PSY 4878
- Forensic Consultation
- Psychological Evaluations (Criminal, Domestic, Juvenile)

- Domestic Violence Consultation
- PTSD Consultation
- Child Sharing Plans

STATEMENT OF SERVICES

INVOICE NUMBER: NA

DATE: 05-19-18, 05-24-18, 05-31-18, and 06-04-18

ATTORNEY: Alicia C. Freeze
Attorney at Law
7676 Hazard Center Drive, Suite 500
San Diego, CA 92108
Phone#: (619) 363-5146
E-mail: acfreeze726@gmail.com

CLIENT: Benjamin L. Bathen

DATE OF SERVICE: 05-19-18, 05-24-18, 05-31-18, and 06-04-18

BOOKING NUMBER: NA

COURT#: CS294342

SERVICE PROVIDED: Psychological evaluation.

FEE: NA

SERVICE PROVIDER: Raymond G. Murphy, Ph.D.
Licensed Psychologist

PLEASE MAKE CHECK PAYABLE TO: **Raymond G. Murphy, Ph.D.**
P.O. BOX 80367
San Diego, CA 92138

Because of the lengthy processing time for this type of billing, please file the necessary paperwork immediately to avoid delay in payment. Thank you for your assistance.

RAYMOND G. MURPHY, PH.D.

- Licensed Psychologist PSY 4878
- Forensic Consultation
- Psychological Evaluations (Criminal, Domestic, Juvenile)

- Domestic Violence Consultation
 - PTSD Consultation
 - Child Sharing Plans
-

PSYCHOLOGICAL EVALUATION PRIVILEGED, CONFIDENTIAL INFORMATION

DATE OF EVALUATION

05-19-18, 05-24-18, 05-31-18, and 06-04-18

IDENTIFICATION

NAME: Benjamin L. Bathen
AGE: 40
DATE OF BIRTH: 11-30-77
RESIDENCE: Springfield, Virginia
MARITAL STATUS: Single, no children
EMPLOYMENT: Web developer
BOOKING NUMBER: NA
COURT#: CS294342

SOURCE OF REFERRAL

Mr. Bathen was referred for a comprehensive psychological evaluation by his attorney, Ms. Alicia Freeze. Ms. Freeze is requesting information regarding Mr. Bathen's basic emotional status, whether he suffers from a mental disorder, does he present as aggressive, assaultive, or predatory in any fashion, and is he dangerous.

PRESENTING PROBLEM

When asked why he is currently involved in the legal process, Mr. Bathen states that he has been charged with making criminal threats.

PROCEDURES UTILIZED

- Clinical interview/history
- Mental Status Examination
- Brief Psychiatric Rating Scale
- Substance Abuse Subtle Screening Inventory
- HCR-20 Violence Checklist
- Firestone Assessment of Violent Thought
- Hare Psychopathy Checklist

Client Name: Benjamin L. Bathen

Date of Evaluation: 05-19-18, 05-24-18, 05-31-18, and 06-04-18

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RECORDS REVIEWED

- Charge summary dated June 27, 2017.
- Chula Vista Police Department crime report dated 06-05-17 by De La Pena.
- Chula Vista Police Department officer's report dated 06-23-17 by Petray.
- District Attorney Bureau of Investigations victim/witness interview by G. Gain, six pages.
- Minute order dated 09-18-17.
- Civil harassment restraining order after hearing, CH130, filed September 18, 2017.
- Temporary restraining order, CH110, filed July 26, 2017.
- Minute order dated 08-15-17.
- Proof of personal service, CH200, filed August 15, 2017.
- Request for civil harassment restraining orders, CH100, filed July 26, 2017.
- Personal communication from Carolyn Jacobs, Psy.D. dated July 26, 2017.
- Jail call notes, three pages.
- District Attorney Bureau of Investigations monitored jail communications, G. Gain dated 10-27-17.

HISTORY

Mr. Bathen reports that he was born at Ft. Belvoir, Virginia. His father was in the Army, attached to Judge Advocate General's office. He lived in Virginia with his family until approximately age 10, and then moved to Germany with his family to age 18.

Mr. Bathen's mother is 72. She lives in Scotts Valley, California, Northern California Bay Area. She is retired, and he indicates that they have a good relationship.

Mr. Bathen's parents divorced when he was 13. His father is 74 and lives in Falls Church, Virginia. He is retired from the Army and retired from the Federal Government. They have a good relationship.

Mr. Bathen reports that he has four sisters, one biological sister that is 42, two adopted sisters that are 20 and 18, and one stepsister. He describes his childhood as "very good. I played soccer. I grew up on military bases. We moved a lot because my dad was in the military, but we were a loving family. When my parents divorced, it was kind of hard on me, but I didn't get any counseling. Otherwise, I did well. I enjoyed school and had fun as a kid."

Mr. Bathen denies any abuse as a child. He indicates that he was never physically, sexually, or emotionally abused.

Client Name: Benjamin L. Bathen

Date of Evaluation: 05-19-18, 05-24-18, 05-31-18, and 06-04-18

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Health History

Regarding his health, Mr. Bathen states "it's okay, but not great. It could be better. I should work on it. I recently did the Air Force 5K. I am in the Air National Guard. I enlisted in 2017."

When asked if he uses tobacco, he states that he smokes but has never used any drugs of any kind. His use of alcohol is limited. He continues stating "they say I have borderline high blood pressure. I sleep good. I use melatonin, which helps. My eating is okay. I have some anxiety, but I think I have a good appetite for the most part. Currently, I am medicated with Lexapro by my general practitioner for depression. I think it helps."

Mr. Bathen's medical history is generally uneventful. He reports no problems as a child or adolescent. In his 20s, he had no problems. In his 30s, he reports having his wisdom teeth removed, and currently he is doing quite well.

Regarding mental health history, Mr. Bathen indicates the following. "I first realized that I was depressed when I was in San Diego. I was about 26. I was working for Rockstar Games. They had severe working conditions. It was the video game industry which is horrible. I felt depressed over what was going on. I went back East to see my family. I saw a therapist in Washington, Roberta Gilbert, Ph.D. I saw her one time. She referred me to Dr. Carolyn Jacobs in San Diego. I guess they were colleagues."

He continues "I started seeing Dr. Jacobs here in the fall of 2004. I saw her regularly face-to-face, and after I moved to Los Angeles, I was working for Disney Pictures. We did phone consultation. I did that until September of 2008. My last contact with her was in February of 2009 by e-mail."

When questioned about any diagnosis for his emotional concerns, he states "she never gave me a specific diagnosis. After her, I saw a psychologist in Cambridge, Massachusetts. He said I had mild depression due to my work situation."

Mr. Bathen denies any suicidal ideation, but states "I felt pretty bummed out at times." He denies any homicidal ideation. He indicates that he has never been hospitalized psychiatrically, and has been medicated with Prozac, Cymbalta, and Wellbutrin to no effect. He reports that Lexapro has been helpful.

Mr. Bathen denies ever being involved in rehabilitation due to alcohol or drug use. He has never had a DUI and never been cited for public intoxication. He has never attended 12-step programming for any addictive behaviors.

Client Name: Benjamin L. Bathen

Date of Evaluation: 05-19-18, 05-24-18, 05-31-18, and 06-04-18

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Educational History

Mr. Bathen reports that he attended Heidelberg American High School in Germany, graduating in 1996. He states that he was a good student with a 3.5 grade point average. He states "I was very happy there. I had lots of activities. I was captain of the wrestling team. I ran cross country. I did a lot of dating. I had quite a few girlfriends."

Mr. Bathen reports that he had an academic scholarship and attended "The School of the Art Institute of Chicago". He studied art and technology and received his Bachelor's of Fine Art in 2000.

In addition, Mr. Bathen reports that he has taken numerous classes at UCLA, Harvard, and University of Massachusetts Boston, which is currently in process. "I have taken a lot of classes in computer science and programming, so that I could stay current in the field."

Mr. Bathen reports that he is a member of the Maryland Air National Guard 175 Wing, and he is currently in training to complete his basic training.

Employment History

Mr. Bathen reports a work history that is quite varied and extensive. He first started working at 14, mowing lawns and working on the Army base. He continued working on the military base at the PX up until 17. He then went to college, where he worked in the mailroom sorting mail for 2 years. In addition, he was a resident assistant for a year.

From 19 to 25, Mr. Bathen reports that he did various jobs providing animation, drawing cartoons, and working in the video game industry for Funnybone Interactive, producing computer games for kids.

At 25, Mr. Bathen began working for Rockstar in San Diego. He relocated from the East Coast, and states "it was the hardest year of my life. I eventually got laid off by Rockstar. I had been working 6 days a week. I went to work for High Moon. It was so bad that I stayed 2 days and walked out."

He continues "following High Moon, I went to work for Sony as a contractor. I was working 36 hours a week plus 45 hours of overtime. They wanted a minimum of 60 hours a week. I was having a lot of trouble. I did that for 6 months and finally got a job in LA working at Disney Virtual Reality Studios in Hollywood. I did that for 3 years and I can only say that they are the best."

At about this time, Mr. Bathen reports that he began his phone consultations with Dr. Jacobs, because he had moved from San Diego to LA.

Client Name: Benjamin L. Bathen

Date of Evaluation: 05-19-18, 05-24-18, 05-31-18, and 06-04-18

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At 30, Mr. Bathen's worked for Harmonix Music System in Cambridge, Massachusetts located at the Harvard Film Library. They developed the video game "Beatles Rock Band." He states "by 32, I was burned out. I had had enough. I needed a change. Almost everyone I knew in this business was taking Prozac. Their health deteriorated. Their blood pressure went up. Everything was bad."

Mr. Bathen states "I went to school at Harvard, taking one course at a time in things like Java language, website development, and programming."

At 34, I secured a programming job at SDL, a small programming company. I was there for about a year and a half. It was okay."

By 36, I worked for First Marblehead, a student loan company, as a programmer, doing Java. I was also attending University of Massachusetts, pursuing a Master's of Science in information technology. I did well. I completed the program. I was there for about a year."

"At 37, I worked for Ark Network Security Solutions, doing cyber security. I was there for about a year. At 39, I worked for 7 months at a non-profit IFPRI, doing programming, and then got my current job at NumbersUSA, where I have worked continuously. It's a non-profit in Washington. I am a web programmer. It is a great job. We provide funding for lower levels of immigration."

Mr. Bathen states "eventually, I would like to work for the Federal Government in a similar type of job."

Recreation

For fun, Mr. Bathen states "the year that I was unemployed, I spent in Cambridge, was the best year of my life. I did cycling, martial arts, salsa dancing. I became social. I met lots of women. I worked out. I felt really good."

Marital History

Currently, Mr. Bathen states "I have a girlfriend, Dana. She is a major in the United States Air Force Reserve. She does administrative work. We don't live together, but we see each other regularly." They have no plans for marriage at this time, although he states "I would consider it."

Mr. Bathen reports "I have had several live-in relationships of about a year or more. I still have contact with these women, their friends. I always like to have a girlfriend."

Legal History

Mr. Bathen indicates that he has been arrested one time only regarding his current offense.

Client Name: Benjamin L. Bathen

Date of Evaluation: 05-19-18, 05-24-18, 05-31-18, and 06-04-18

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Mr. Bathen states that he has no priors. He has never been arrested for driving under the influence, never been arrested for public intoxication, and never attended 12-step programming.

Mr. Bathen reports a limited drug history. He indicates that he used marijuana in high school briefly, and has not used marijuana or any other drugs since that time.

Mr. Bathen's use of alcohol is similarly limited. He indicates that he may drink socially, possibly have a beer. He has been drunk only a few times, and never had any serious effects from alcohol, such as blackouts.

DISCUSSION OF PRESENT CIRCUMSTANCES

Mr. Bathen reports that he is currently being charged with making criminal threats to Dr. Carolyn Jacobs, Psy.D. Dr. Jacobs was Mr. Bathen's therapist from the fall of 2004 to February of 2009, when their last contact was by e-mail.

Mr. Bathen reports the following. "She alleges I am a threat to her, that I threatened her life in June and July of 2017. She says there were three voicemails that were left on her machine. The court issued a subpoena for the phone number used. Dr. Jacobs claims it is me. There is no factual basis for that claim. I deny that I made those voicemail messages."

Mr. Bathen goes on to state "I haven't been to California since the beginning of 2008 when I was last there."

Mr. Bathen states "we had a phone consultation till 2009, and the relationship ended by e-mail about April of 2009. I have had no contact with her since then and I didn't leave those threatening messages."

BEHAVIOR, ATTITUDES, AND MENTAL STATUS

Mr. Bathen is an attractive, youthful-looking, 40-year-old male. He is right-side dominant with vision and hearing that appeared to be well within normal limits. He was dressed neatly in a clean businesslike attire at the time of the examination. His grooming was appropriate. He has short nicely combed hair and no facial hair.

Mr. Bathen presents as an engaging, open, and conversational manner. It is apparent that he is quite bright and his verbal presentation is fluent, well-organized, direct, and engaging.

Mr. Bathen was cooperative throughout the evaluation process. His verbal skills appeared to be excellent. Mr. Bathen's mental status is well-oriented to person, place, and time with no evidence of serious mental disorder, hallucinations, or delusions. His affect was appropriate at all times.

Client Name: Benjamin L. Bathen

Date of Evaluation: 05-19-18, 05-24-18, 05-31-18, and 06-04-18

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TEST RESULTS

- Intellectual Factors

Intellectually, Mr. Bathen appears to be functioning at or above the average range as indicated by basic cognitive skills. His word usage and development is excellent. His ability to present complex issues and use problem-solving techniques is well above average, and there is clear evidence of an excellent knowledge of the world around him and the fine details of his technical employment. There is little doubt Mr. Bathen functions at a high level of intellect and cognitive ability.

- Emotional Factors

Emotionally, Mr. Bathen presents a picture of a generally adaptive and well directed 40-year-old male. There are no signs of psychotic thought processes or idiosyncratic thinking, nor are there indications of any other type of mental disorder. Mr. Bathen does present with mild depressive overtones, although these appear to be long-standing and of a situational nature, primarily related to employment circumstances. Mr. Bathen has never experienced any unusual mental state that would require psychiatric intervention or hospitalization, and indeed, his pursuit of counseling/psychotherapy has been for personal growth and self-improvement.

At the present time, Mr. Bathen presents with some evidence of anxiety regarding his current legal circumstances, although he indicates that he is relatively certain that there will be a positive outcome and that he will be able to move on.

Mr. Bathen presents with no unusual emotional tone that would suggest difficulties in maintaining goal direction or focus. He is highly prosocial in his general activities, both vocational and social, and there is no indication whatsoever of any potential for aggressive acting out.

- Aggression and Violence

Mr. Bathen was administered the HCR-20 Violence Checklist as a means of assessing potential for risk in this arena. His history and background offer no evidence whatsoever that he is likely to act out in an aggressive, assaultive, or predatory fashion.

In addition, Mr. Bathen was administered the Firestone Assessment of Violent Thought, a measure of an individual's utilization of anger and aggressive fantasies. His performance on the Firestone Assessment of Violent Thought was well within the normative range, with no indicators whatsoever falling in a range of scores that would suggest any difficulty with anger or its expression.

Mr. Bathen's overall Firestone Assessment of Violent Thought total was at the 19th percentile with a T-score of 41, placing him well below any risk factors. His validity scales are well within the acceptable range, and there were no indications of negativity in his performance.

Client Name: Benjamin L. Bathen

Date of Evaluation: 05-19-18, 05-24-18, 05-31-18, and 06-04-18

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Mr. Bathen's overall performance in areas related to anger and its expression was well within acceptable/normal ranges, offering no evidence whatsoever of past indicators or current functioning that would suggest he is likely to act out in an aggressive, assaultive fashion.

- Substance Abuse Factors

Mr. Bathen's performance on the Substance Abuse Subtle Screening Inventory offered no indicators that he is likely to indulge excessively in use of alcohol or drugs. His 9 critical item scores were all scored in the negative direction, and his overall probability for having substance abuse problem was scored at the lowest level.

- Antisocial Factors

Mr. Bathen was administered the Hare Psychopathy Checklist as a means of assessing basic levels of antisocial development or criminalized behavior. Indeed, Mr. Bathen's history and background offered no evidence whatsoever of antisocial functioning. His adult life has been highly prosocial and well directed with strong emphasis on employment and social skills. His performance on the Hare Psychopathy Checklist placed him in the lowest possible category of potential for acting out in an antisocial or criminalized fashion.

IMPRESSION

- Mild depression related to current legal circumstances.
- Global Assessment of Functioning: Current – 60 to 70, mild symptoms.

RECOMMENDATIONS/TREATMENT PLAN

1. Mr. Bathen is currently charged with having made serious threats to his past psychologist. Mr. Bathen adamantly denies these allegations.
2. Mr. Bathen does not present as aggressive, assaultive, or predatory in any fashion.
3. Mr. Bathen would benefit from brief counseling as needed regarding his current circumstances. This would help to stabilize Mr. Bathen and provide support during this difficult period.
4. Mr. Bathen does not present as a danger to the community at large.



Raymond G. Murphy, Ph.D.
Forensic And Consulting Psychologist
RGM/mm/sr

Exhibit H —

Appellate Opinion in People v. Bathen

Filed 10/4/19 P. v. Bathen CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BENJAMIN LEE BATHEN,

Defendant and Appellant.

D074538

(Super. Ct. No. SCS294342)

APPEAL from a judgment of the Superior Court of San Diego County, Stephanie Sontag, Judge. Affirmed.

Kevin Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers, Lise S. Jacobson, and Adrienne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Benjamin Lee Bathen of three counts of criminal threats directed toward his former psychologist, C.J. (Pen. Code, § 422).¹ The trial court sentenced Bathen to the midterm sentence of two years for each count, with counts two and three to run concurrent to count one, for a total prison term of two years. On appeal, Bathen contends: (1) insufficient evidence supported the convictions; (2) the court had a sua sponte duty to instruct the jury on the lesser-included offense of attempted criminal threat; and (3) the court erred in denying probation and imposing the midterm sentence of two years in prison. We reject these contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

C.J. is a psychologist in private practice in Chula Vista. She began treating Bathen in person from her office in 2004. Bathen eventually moved to Los Angeles and continued his treatment with C.J. telephonically. C.J. is only licensed to practice in the state of California. As a result, she was required to terminate her sessions with Bathen shortly after he moved to the east coast in 2008. After conducting a few more telephonic sessions with Bathen to ensure his "continuity of care," C.J. provided him referrals for psychologists in his area. Bathen "was not happy" and became "agitated" when he learned C.J. was ending his therapy sessions.

A few months later, C.J. began receiving e-mails from Bathen stating he was upset with her and asking her to apologize to him. He also threatened to lodge a complaint

¹ All further undesignated statutory references are to the Penal Code unless otherwise indicated.

with her professional organization if she refused to listen to his grievances or failed to provide him with a face-to-face apology. The e-mails made C.J. feel "uneasy." Accordingly, she requested Bathen's new address so she could send him a formal termination letter, but he declined and would only have contact via e-mail. Except for this e-mail correspondence in early 2009, C.J. and Bathen did not speak telephonically or in person after his last session took place in 2008.

Almost nine years later, C.J. was home alone when she received the following message on her confidential office voicemail system:

"Hey Dr. [C.J.], I just want to let you know that I'm going to bust your fucking skull open you worthless bitch. You don't ever fucking talk to me like that you fucking whore. Fuck you. I'll bash your fucking skull. You're fucking dead. I'm going to carve you up you fucking whore. Shut the fuck up!"

C.J. became "terrified," "afraid," "nauseous," and "numb" when she heard the message. Not knowing if the person was nearby, she looked around the house and confirmed all the doors and windows were locked. She immediately called her husband and left a voicemail asking him to come home as soon as possible. C.J. sounded "concerned and nervous" when her husband returned the call and appeared "upset" when he arrived home. After C.J. played the message for him, he accessed her voicemail system through the telephone company's website and ascertained the telephone number that made the call. He then performed an Internet search to determine the name associated with the telephone number, revealing Bathen's name. He shared this information with C.J., who reported it to the Chula Vista Police Department.

Although C.J. did not initially recognize Bathen's voice on the message, she later recognized it when her husband mentioned Bathen's name. She recognized Bathen's inflection and high-pitched voice due to prior therapy sessions where he had become agitated. C.J. testified Bathen's voice sounded the same as when he was "anxious," "angry," or "stirred up" in his therapy sessions. C.J. did not know Bathen's location when she heard the voicemail.

After reporting the incident to law enforcement, C.J. remained afraid and on "pretty high alert." She reexamined her home security system and had security doors installed at her office. At work, she walked to and from her car in the office parking lot with coworkers and had her husband meet her at the office and drive home with her when she worked late. She also installed a doorbell system at her office to restrict entrance into the building. At home, she became more vigilant and focused on her safety and security. She kept her doors and windows locked and avoided shopping centers with garages.

About a month later, C.J. received the following voicemail:

"Hey Dr. [C.J.], I just want to let you know what a fucking bitch you are. You don't talk to me about fucking dating you asshole. You should start dating. You should start dating. I can hurt you too you mother fucker. I'm going to carve you up, I'm going to rape you, I'm going to torture you, I'm going to fuck you up. I'll carve your fucking smile off your face you stupid bitch. I'm not going to fucking start dating! Fuck you!"

This time, C.J. immediately recognized Bathen's voice. She had a visceral reaction to the message and vomited. She noticed more intensity in Bathen's voice and the message "terrified," "frightened," and "humiliated" her given its sexual content. She "thought [her] life was in danger" because Bathen's threats had escalated, becoming more

violent and explicit. At that time, she still did not know Bathen's location. She again reported the incident to her husband and the police.

Two days later, C.J. received the following voicemail:

"Hey Dr. [C.J.], I just want to let you know that I'm still planning on coming out there kidnapping you, torturing you, raping the living shit out of you, and then I've come up with a great idea, I'm going to set you on fire. You dumb fucking bitch. Fuck you! Maybe you think, maybe get laid. Your friends think you need to get laid. You thought that shit was funny. You're going to fucking die. Then I'm going to find your daughter. I'm going to rape and murder that bitch too. You're fucking dead."

C.J. recognized Bathen's voice. This concerned C.J. as she did not recall ever mentioning her daughter to Bathen. C.J. thought she and her daughter were in danger. She called the police again to report the incident.

After receiving the third voicemail, C.J. applied for and received a civil restraining order against Bathen. She relied on law enforcement to locate Bathen and serve him with a notice to appear at the restraining order hearing. C.J. felt "really uncomfortable" during the hearing but "wanted to do what [she] could to try to put everything [she] could in [her] life around [her] to stay safe." According to her husband, C.J. became "very, very afraid" and placed their home on "lockdown." At trial, C.J. testified she still felt "upset" and "shaky" after hearing the first voicemail again in court. She kept her doors locked at home and continued to be afraid of Bathen. She also suffered from higher levels of anxiety and sleep issues due to her heightened vigilance toward protecting herself, added privacy and security measures to her social media accounts, and deleted her professional social media account to decrease her and her family's online presence.

At trial, a district attorney investigator testified about the "call detail records" for the telephone number associated with the threatening messages and confirmed the telephone calls were placed near Bathen's home and work addresses. Another district attorney investigator testified as an expert witness about the technical details of cell phones connecting to cell towers and the cell tower tracker mapping program.

Bathen's defense at trial was the prosecutor could not prove he was the person who made the threatening telephone calls. Maintaining his innocence, Bathen presented expert witness testimony at trial challenging the accuracy of cell tower tracking.

The jury returned guilty verdicts on all three criminal threats counts. The court denied probation and sentenced Bathen to a total prison term of two years.

DISCUSSION

I. *Sufficiency of the Evidence*

Bathen contends insufficient evidence supported his convictions for making criminal threats.

A. *Governing Law*

"When a defendant challenges the sufficiency of the evidence, ' "[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] [Citations.] 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.

[Citation.] [Citation.] We ' " 'presume in support of the judgment the existence of every

fact the trier could reasonably deduce from the evidence.' " " " (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

To prove a defendant made a criminal threat, "the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*).

We look to all the surrounding circumstances to determine if there was substantial evidence to prove the elements of making a criminal threat. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 814 (*Wilson*).

B. *Immediate Prospect of Execution of the Threat*

Bathen claims there was insufficient evidence to establish his threats conveyed an "immediate prospect of execution" because there was no evidence he was in Chula Vista

when the calls were placed or that he ever appeared at C.J.'s residence or office after he moved to the east coast. He also claims the threats were not immediate because C.J. knew he lived on the east coast and had not been in contact with him since he moved. We are not persuaded.

Bathen essentially argues the geographic distance between him and C.J. prevented him from "immediately" executing his threats. However, the test is not one of geographic distance. The test is whether, in light of the surrounding circumstances, e.g., the prior relationship of the parties and the manner in which the statement was made, the communication was sufficiently unequivocal, unconditional, immediate and specific as to convey to the victim a gravity of purpose and immediate prospect of execution. (*People v. Bolin* (1998) 18 Cal.4th 297, 340.) Although the criminal threat statute requires an immediate prospect of execution, it "does not require an immediate ability to carry out the threat." (*People v. Lopez* (1999) 74 Cal.App.4th 675, 679; see *People v. Melhaldo* (1998) 60 Cal.App.4th 1529, 1538 [the focus is the *future prospect* of the threat being carried out]; see also *In re David L.* (1991) 234 Cal.App.3d 1655, 1658-1660 [parties need not be in physical proximity when threat is made].)

Courts have routinely upheld criminal threat convictions absent the defendant's immediate ability to act on the threat. (*People v. Smith* (2009) 178 Cal.App.4th 475, 480 [defendant was in Texas when he threatened the victim who was in California]; *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431 [threats made from jail].) It is of no consequence that Bathen lived on the east coast when he left the threatening messages because he specifically stated he was "planning on coming out" to California to kidnap,

torture, rape, and murder C.J. and her daughter. Thus, Bathen's threats caused C.J. to implement various security precautions at her home and office, even causing her to avoid shopping centers with garages. A specific date or time was not required to establish the immediacy of execution. (See *Wilson, supra*, 186 Cal.App.4th at p. 806.)

Bathen's reliance on C.J.'s testimony she knew he had moved to the east coast and had not been in contact with him since then is also misplaced. That testimony in no way suggests that the threat was not immediate. To the contrary, C.J. testified she *did not* know Bathen's location when he left the threatening messages. Although she knew Bathen had moved to the east coast, she did not know whether he had returned to Chula Vista when she received the threatening messages nine years later. In fact, she relied on law enforcement to locate Bathen and serve him with a notice of the civil restraining order hearing. It was thus reasonable for C.J. to believe Bathen would carry out his threats against her and her daughter given the specific and graphic nature of his messages.

In sum, we conclude there was ample evidence in the record to establish the immediacy of Bathen's criminal threats.

C. *Reasonableness of Fear*

Bathen also argues there was insufficient evidence to establish C.J.'s fear was reasonable because she knew Bathen had moved to the east coast, had no further contact with him, and there was no indication he had returned to California. Bathen further asserts C.J.'s efforts to obtain a civil restraining order against him belies her fear was reasonable. We find these arguments equally unavailing.

Whether a person's fear is reasonable "can be based on all the surrounding circumstances and not just on the words alone." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340.) One of those circumstances is the parties' history. (*Ibid*; see also *People v. Garrett* (1994) 30 Cal.App.4th 962, 965 [victim fearful because of defendant's violent history].)

Here, there was substantial evidence to support a finding that C.J.'s fear was reasonable. C.J. did not know Bathen's location when she heard his threatening messages, causing her to live in fear. (*Ante*, part I.B.) She also testified that she worked at the same Chula Vista location where she had previously treated Bathen in person. Thus, she reasonably feared that he would return to her office to carry out his threats. (See *People v. Franz* (2001) 88 Cal.App.4th 1426, 1449 [victims' fear was reasonable even though a police officer was on the scene when the defendant made the threat because the victims "did not know when they would next see defendant."].)

Further, C.J. testified Bathen had expressed anger toward her for terminating his therapy sessions, requested a face-to-face meeting to air his grievances and obtain an apology, and threatened to lodge a complaint with her professional organization and file a lawsuit. Thereafter, she had no contact with Bathen for nine years. Out of the blue, Bathen left three graphic messages within a period of one month, threatening to kidnap, torture, rape, and murder her and her daughter. At trial, C.J. testified she feared for her life "from the very beginning," and that she became "really frightened" when the violent and explicit nature of the threats escalated.

Under these circumstances, we conclude there was ample evidence in the record to establish C.J.'s fear was reasonable.

II. *Attempted Criminal Threat Instruction*

Next, Bathen contends the court erred when it failed to instruct the jury sua sponte on the lesser-included offense of attempted criminal threat. We disagree.

A. *Governing Law*

"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses.' " (*People v. Souza* (2012) 54 Cal.4th 90, 115-116 (*Souza*)). "Such instructions are required only when there is substantial evidence that, if the defendant is guilty at all, he is guilty of the lesser offense, but not the greater. [Citations.] ' "' "Substantial evidence" in this context is "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" " that the lesser offense, but not the greater, was committed.' " [Citation.]' " (*People v. Wyatt* (2012) 55 Cal.4th 694, 704.)

On appeal, we review independently whether the trial court improperly failed to instruct on a lesser included offense, considering the evidence in the light most favorable to the defendant. (*Souza, supra*, 54 Cal 4th at p. 113.)

B. *Analysis*

Bathen argues the lesser included offense instruction should have been given because the jury might have convicted him of the lesser offense if it had lingering doubts about the immediacy element. Bathen points to a juror note requesting further

clarification of the meaning of "immediate" and "immediate prospect" in support of his argument that at least one juror could have opted for the lesser offense of attempted criminal threat.

An attempted criminal threat is a lesser included crime of a criminal threat. (*Toledo, supra*, 26 Cal.4th at p. 226.) " [I]f a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat.' " (*People v. Chandler* (2014) 60 Cal.4th 508, 515.)

Here, C.J.'s and her husband's testimony provided substantial evidence regarding the immediate prospect of execution of Bathen's threats. C.J. called her husband after receiving Bathen's first threatening message. She expressed fear to her husband and the police when she ascertained the name and telephone number associated with the call. She also changed her lifestyle and implemented security precautions at her home and workplace, which continued after she received Bathen's second threatening message. She worried enough about her safety that she locked all the doors and windows at her home, had security doors installed at her office, warned her coworkers about the threats, and required an escort to and from her car in the office parking lot. After receiving Bathen's third threatening message, she applied for and obtained a civil restraining order against him. At trial, C.J. testified she thought she and her daughter were in danger and that

Bathen was serious about carrying out the threats. Based on the foregoing, there was substantial evidence that Bathen committed the greater offense.

We thus conclude the court did not err by failing to give a sua sponte instruction on the lesser included offense of attempted criminal threat.

III. *Bathen's Sentence*

Finally, Bathen contends the trial court erred in denying probation and imposing a midterm prison sentence based on the "impermissible" aggravating factor of lack of remorse. He, in essence, asks us to reweigh the trial court's weighing of factors. We decline to do so.

A. *Denial of Probation*

1. *Additional Background*

At the outset of the sentencing hearing, defense counsel mentioned the importance of Bathen maintaining his innocence and deciding to take his case to trial. The court interjected: "Okay. And I have to say that maintaining innocence at this point is fine for appeal, but it is not a persuasive argument for sentencing after three convictions." After additional argument from counsel, the court addressed the issue of probation:

"And my problem when I am considering probation, when somebody is eligible for probation and somebody has a clean record, is seeing whether probation is suitable. And the troubling things [*sic*] with this case is that these threats were not in the heat of passion. [¶] So I have nine years since Mr. Bathen was treated by [C.J.]. I see a lot of criminal threats, but they are usually heat of passion. I have never seen anything like this with absolutely no help in the letters that I get to explain this. I am not going to punish Mr. Bathen for maintaining his innocence, but, frankly, what are we going to do? You are asking me to put him on probation. He says he didn't make these calls, and the evidence to me clearly indicated that he did and to

the jury. Out of the blue. I mean, I think that's [*sic*] part, the content of these calls are very scary and then it is out of the blue."

The court then stated the following reasons in denying probation:

"[T]he threats of the great bodily harm in depth and then beyond [C.J.], to her daughter to—in this day and age in the Internet, it is not hard to find anybody. The three separate occasions and the graphic and specific and unprovoked nature of the content, I do have to deny probation in this case. There was great psychological harm inflicted. It was more serious than others, I think, and I have given you my reason. I get it that Mr. Bathen has expressed remorse that [C.J.] had to suffer from these calls, but, obviously, no remorse for himself because he has taken the position that he did not commit these crimes. I need to protect society."

2. *Analysis*

"The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]' [Citation.] 'In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.'" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311, disapproved on other grounds in *People v. Cook* (2015) 60 Cal.4th 922, 939.)

Rule 4.414 of the California Rules of Court provides "[c]riteria affecting the decision to grant or deny probation[,] includ[ing] facts relating to the crime and facts relating to the defendant." Bathen correctly notes Rule 4.414, subdivision (b)(7) allows the court to consider "[w]hether the defendant is remorseful" as a factor in deciding

whether to grant or deny probation. The court's consideration of Bathen's remorse was thus appropriate under the governing California Rules of Court.

Here, the probation report, which the trial court read and considered, balanced these factors and recommended that "probation be denied." The trial court also weighed the relevant factors. The court expressly stated it considered Bathen's clean criminal history, family support, stable employment, and his willingness and ability to comply with probation terms as mitigating factors. But the court contrasted these factors with the fact that it had been "nine years since [Bathen] was treated by [C.J.]" and the threats "were not [made] in the heat of passion." The court stated what was missing from the letters submitted by Bathen's family was an explanation about why Bathen made the threats "out of the blue." The court further noted that, although it understood that Bathen had "expressed remorse that [C.J.] had to suffer from these calls," he had "no remorse for himself" because he had taken "the position that he did not commit these crimes." In denying probation, the court reasoned Bathen made "three separate" threats to C.J. that were "graphic," "specific," and "unprovoked" and inflicted "great psychological harm."

On this record, the trial court did not abuse its discretion in denying Bathen probation.

B. *Imposition of Midterm Sentence*

1. *Additional Background*

After the court denied probation, it imposed a total prison term of two years as follows:

"So all those things that we have talked about that come back to my consideration of the appropriate prison term since I am denying probation, finding that Mr. Bathen is not suitable for probation. I am selecting the midterm of two years on count 1 based on—again, it is not low term because of the content. Midterm, I am actually considering all three of the calls and selecting the midterm, the fact that it wasn't just one. I think there are more egregious [criminal threats], which is why I am not going the upper term. Probation also recommended the midterm. I think it is the appropriate selection, given the nature of the crime, but keeping in mind the fact that Mr. Bathen does not have a criminal record. [¶] I think this is where I have to take into consideration, again, Mr. Bathen and his circumstances, his family support, his work history, and his lack of record and how much time is appropriate as punishment and to discourage the commission of future acts, which I think are purposes of sentencing but also not so much that we go the other way. So I think that the two years with the counts 2 and 3 run concurrently is the appropriate sentence. So that will be my sentence."

2. *Analysis*

When a judgment of imprisonment is to be imposed and the statute specifies three possible terms (lower, middle, and upper), the choice of the appropriate term under section 1170, subdivision (b), rests within the sound discretion of the trial court. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) The court must state the reasons for its sentence choice on the record at the time of sentencing (§ 1170, subd. (c)), and we review its sentencing decision for abuse of discretion. (*Sandoval*, at p. 847.) "[S]entencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' " (*Ibid.*) An abuse of sentencing discretion occurs when the court "relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid.*)

Here, there is no basis to disturb the court's imposition of the midterm sentence as an abuse of discretion. Nor is there any merit to Bathen's argument that his "lack of remorse" was a substantial factor in imposing the midterm sentence. As the People point out, the court specifically disclaimed reliance on the mere fact that Bathen "lacked remorse" and instead focused on the overwhelming evidence of guilt and the "nature and seriousness" of his three criminal threats. Although the court stated that Bathen's innocence claim "complicate[d] the remorse factor," it immediately reiterated Bathen "ha[d] the right to maintain his innocence" and confirmed it was "not going to punish [him] for maintaining his innocence."

On this record, the trial court did not abuse its discretion in sentencing Bathen to the midterm sentence of two years.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.

Exhibit I

Phone Records Showing Calls Between Ben Bathen and Alicia Freeze



Call Details - (703) 786-3583 - Voice

Call time displays as Central Time (CT) or local time depending on how and where the call was made.

On	At	To / From	Destination	Rate	Mins	Cost
Apr 25	08:29 pm	(253) 970-4421	Incoming	AU	17:00	-
Apr 26	08:10 am	(571) 331-5723	FLS CHURCH, VA	AU	01:00	-
	08:28 pm	(253) 970-4421	TACOMA, WA	AU	32:00	-
Apr 27	01:08 pm	(253) 970-4421	TACOMA, WA	AU	02:00	-
	08:27 pm	(253) 970-4421	Incoming	AU	14:00	-
	08:58 pm	(323) 299-8801	LOS ANGELES, CA	AU	04:00	-
	08:05 pm	(323) 299-8801	LOS ANGELES, CA	AU	02:00	-
	08:06 pm	(323) 299-8801	Incoming	NW/AU	01:00	-
	08:09 pm	(323) 299-8801	LOS ANGELES, CA	NW/AU	07:00	-
	11:30 pm	(323) 299-8801	LOS ANGELES, CA	NW/AU	02:00	-
Apr 28	10:22 am	(910) 844-4109	FAYETTEVILLE, NC	NW/AU	03:00	-
	11:10 am	(253) 970-4421	TACOMA, WA	NW/AU	02:00	-
	11:31 am	(910) 844-4109	Incoming	NW/AU	02:00	-
	11:34 am	(910) 844-4109	FAYETTEVILLE, NC	NW/AU	02:00	-
	11:35 am	(703) 773-7207	FLS CHURCH, VA	NW/AU	02:00	-
	12:01 pm	(703) 418-7112	FLS CHURCH, VA	NW/AU	02:00	-
	01:48 pm	(253) 970-4421	Incoming	NW/AU	01:00	-
	01:53 pm	(253) 970-4421	TACOMA, WA	NW/AU	05:00	-
	05:29 pm	(323) 888-1258	LOS ANGELES, CA	NW/AU	05:00	-
	05:36 pm	(323) 888-1258	LOS ANGELES, CA	NW/AU	21:00	-
Apr 29	11:51 am	(910) 844-4109	FAYETTEVILLE, NC	NW/AU	02:00	-
	11:58 am	(910) 844-4109	Incoming	NW/AU	01:00	-
	12:16 pm	(253) 970-4421	Incoming	NW/AU	02:00	-
	02:34 pm	(253) 970-4421	TACOMA, WA	NW/AU	01:00	-
	03:14 pm	(253) 970-4421	Incoming	NW/AU	18:00	-
Apr 30	09:33 am	(212) 244-5405	Incoming	VW/AU	01:00	-
	09:34 pm	(253) 970-4421	TACOMA, WA	AU	01:00	-
	10:32 pm	(651) 850-8221	Incoming	NW/AU	02:00	-
May 01	05:56 pm	(253) 970-4421	TACOMA, WA	AU	02:00	-
	08:30 pm	(253) 970-4421	TACOMA, WA	AU	15:00	-
	08:21 pm	(253) 970-4421	TACOMA, WA	NW/AU	02:00	-
May 02	08:55 am	(703) 773-7207	FLS CHURCH, VA	AU	02:00	-
	08:56 pm	(253) 970-4421	TACOMA, WA	AU	12:00	-
	09:30 pm	(651) 850-8221	MINNEAPOLIS, MN	NW/AU	02:00	-
	09:37 pm	(214) 461-7375	IRVING, TX	NW/AU	02:00	-
	09:39 pm	(323) 888-1258	LOS ANGELES, CA	NW/AU	12:00	-
May 03	11:51 am	(703) 677-5846	FAIRFAX, VA	AU	02:00	-
	12:03 pm	(253) 970-4421	TACOMA, WA	AU	02:00	-
	03:25 pm	(703) 677-5846	FLS CHURCH, VA	AU	02:00	-
	03:27 pm	(703) 408-1629	ARLINGTON, VA	AU	02:00	-
	04:32 pm	(253) 970-4421	Incoming	AU	05:00	-
	04:58 pm	(703) 677-5846	FLS CHURCH, VA	AU	02:00	-
	04:58 pm	(703) 677-5846	Incoming	AU	02:00	-
	05:20 pm	(253) 970-4421	TACOMA, WA	AU	11:00	-
	05:58 pm	(253) 970-4421	Incoming	AU	03:00	-
	07:10 pm	(253) 970-4421	Incoming	AU	04:00	-
	08:03 pm	(253) 970-4421	Incoming	AU	01:00	-
May 04	05:40 pm	(253) 970-4421	TACOMA, WA	AU	03:00	-
	06:01 pm	(253) 970-4421	TACOMA, WA	AU	05:00	-
	06:01 pm	(703) 408-1629	ARLINGTON, VA	AU	02:00	-
	06:03 pm	(703) 408-1629	Incoming	CW/AU	11:00	-

Rate Type

AU	Anytime/Plan Usage
CW	Call Waiting
NW	Night and Weekends
VW	Wi-Fi Calling/Casino PLUS

Call Details - (703) 786-3583 - Voice ...continued

On	At	To / From	Destination	Rate	Mins	Cost
	10:57 pm	(651) 890-8221	MINNEAPOLIS, MN	NW/AU	13:00	-
May 05	12:36 pm	(253) 970-4421	TACOMA, WA	NW/AU	03:00	-
	12:41 pm	(253) 970-4421	TACOMA, WA	NW/AU	01:00	-
	12:43 pm	(703) 485-7232	FLS CHURCH, VA	NW/AU	02:00	-
	12:48 pm	(703) 408-1629	Incoming	NW/AU	02:00	-
	01:00 pm	(703) 408-1629	ARLINGTON, VA	NW/AU	03:00	-
	01:54 pm	(703) 408-1629	Incoming	NW/AU	02:00	-
	02:06 pm	(703) 408-1629	Incoming	NW/AU	02:00	-
	05:54 pm	(703) 408-1629	ARLINGTON, VA	NW/AU	02:00	-
May 06	04:46 pm	(253) 970-4421	Incoming	NW/AU	11:00	-
	06:24 pm	(253) 970-4421	TACOMA, WA	NW/AU	02:00	-
May 07	05:25 pm	(253) 970-4421	TACOMA, WA	AU	47:00	-
	06:40 pm	(253) 970-4421	TACOMA, WA	AU	01:00	-
	06:41 pm	(253) 970-4421	TACOMA, WA	AU	01:00	-
	06:58 pm	(760) 431-4404	OCSO OCSO, CA	NW/AU	02:00	-
	10:13 pm	(760) 212-8108	Incoming	NW/AU	16:00	-
May 08	05:43 pm	(253) 970-4421	TACOMA, WA	AU	01:00	-
	06:27 pm	(703) 485-2960	ENGLESDALE, VA	AU	01:00	-
	06:48 pm	(703) 725-2200	FLS CHURCH, VA	AU	02:00	-
	06:55 pm	(701) 801-6597	BISMARCK, ND	AU	03:00	-
	06:59 pm	(253) 970-4421	Incoming	AU	08:00	-
	06:10 pm	(253) 970-4421	Incoming	AU	23:00	-
	03:14 pm	(619) 383-8146	SNDG SNDG, CA	NW/AU	02:00	-
May 09	06:16 am	(703) 408-1629	ARLINGTON, VA	AU	02:00	-
	06:50 pm	(253) 970-4421	TACOMA, WA	AU	12:00	-
May 10	10:36 am	(210) 513-8300	SANANTONIO, TX	VW/AU	01:00	-
	10:37 am	(844) 426-5868	Toll Free Call	VW/AU	30:00	-
	12:07 pm	(844) 426-5868	Toll Free Call	AU	02:00	-
	12:20 pm	(703) 408-1629	ARLINGTON, VA	AU	27:00	-
	01:40 pm	(703) 408-1629	ARLINGTON, VA	AU	03:00	-
	04:24 pm	(671) 257-8526	ALEXANDRIA, VA	VW/AU	01:00	-
	06:08 pm	(253) 970-4421	TACOMA, WA	AU	28:00	-
	10:40 pm	(619) 383-8146	SNDG SNDG, CA	NW/AU	13:00	-
May 11	10:08 am	(703) 408-1629	ARLINGTON, VA	AU	08:00	-
	01:06 pm	(671) 257-8526	Incoming	AU	48:00	-
	03:30 pm	(601) 452-9276	SANTA CRUZ, CA	VW/AU	03:00	-
	04:37 pm	(253) 970-4421	Incoming	VW/AU	10:00	-
	05:31 pm	(253) 970-4421	TACOMA, WA	AU	01:00	-
	05:44 pm	(703) 485-7232	FLS CHURCH, VA	AU	01:00	-
	06:50 pm	(253) 970-4421	TACOMA, WA	AU	02:00	-
May 12	12:34 am	(302) 302-7857	LOSANGELES, CA	NW/AU	95:00	-
	11:33 am	(253) 970-4421	TACOMA, WA	NW/AU	08:00	-
	12:26 pm	(302) 302-7857	WASHINGTON, DC	NW/AU	02:00	-
	01:00 pm	(703) 725-2200	FLS CHURCH, VA	NW/AU	02:00	-
	01:51 pm	(703) 408-1629	ARLINGTON, VA	NW/AU	02:00	-
	02:06 pm	(302) 302-7857	WASHINGTON, DC	NW/AU	01:00	-
	03:15 pm	(703) 408-1629	ARLINGTON, VA	NW/AU	01:00	-
	06:30 pm	(253) 970-4421	TACOMA, WA	NW/AU	06:00	-
	06:13 pm	(703) 725-2200	FLS CHURCH, VA	NW/AU	02:00	-
	06:50 pm	(619) 383-8146	SNDG SNDG, CA	NW/AU	02:00	-
	06:51 pm	(302) 302-7857	WASHINGTON, DC	NW/AU	02:00	-
	06:56 pm	(253) 970-4421	TACOMA, WA	NW/AU	03:00	-
	09:31 pm	(302) 302-7857	WASHINGTON, DC	NW/AU	12:00	-
May 13	09:55 am	(253) 970-4421	TACOMA, WA	NW/AU	09:00	-

Call from Bathen to Alicia's Voicemail, 2 minutes, May 06 2018

Call to Alicia asking why she forgot to hire or pay the expert witness May 10 2018

Call from Bathen to Alicia's Voicemail, 2 minutes, May 12 2018

Rate Type
 AU Anytime/Plan Usage
 NW Night and Weekends
 VW W-Fl Calling/Calling PLUS



Call Details - (703) 786-3583 - Voice ...continued

On	At	To / From	Destination	Rate	Mins	Cost
	11:38 am	(703) 678-8810	FAIRFAX,VA	NW/AU	02:00	-
	11:42 am	(800) 432-1000	Toll Free Call	NW/AU	04:00	-
	01:35 pm	(303) 620-6087	WASHINGTON,DC	NW/AU	03:00	-
	01:43 pm	(703) 521-6846	ARLINGTON,VA	NW/AU	04:00	-
	02:14 pm	(703) 725-2200	FLS CHURCH,VA	NW/AU	02:00	-
	02:16 pm	(253) 870-4421	TACOMA,WA	NW/AU	02:00	-
	02:44 pm	(253) 870-4421	TACOMA,WA	NW/AU	07:00	-
	03:26 pm	(508) 823-6087	WASHINGTON,DC	NW/AU	05:00	-
	04:03 pm	(571) 257-6265	Incoming	NW/AU	02:00	-
	04:05 pm	(571) 257-6265	Incoming	NW/AU	58:00	-
	05:00 pm	(519) 383-5148	SNDC,SNDC,CA	NW/AU	01:00	-
	05:20 pm	(703) 725-2200	Incoming	NW/AU	30:00	-
	06:16 pm	(253) 870-4421	Incoming	NW/AU	02:00	-
	06:20 pm	(519) 383-5148	Incoming	NW/AU	33:00	-
	06:50 pm	(253) 870-4421	TACOMA,WA	NW/AU	02:00	-
	06:51 pm	(253) 870-4421	Incoming	NW/DW/AU	13:00	-
May 14	05:06 pm	(571) 257-6265	ALEXANDRIA,VA	AU	12:00	-
	05:21 pm	(253) 870-4421	TACOMA,WA	AU	12:00	-
	06:43 pm	(571) 257-6265	Incoming	AU	02:00	-
	06:51 pm	(571) 257-6265	Incoming	AU	01:00	-
	10:43 pm	(514) 447-8701	IRVING,TX	NW/AU	02:00	-
May 15	08:06 pm	(253) 870-4421	TACOMA,WA	AU	42:00	-
	08:52 pm	(703) 525-1800	FAIRFAX,VA	AU	04:00	-
May 16	11:51 am	(703) 524-2955	Incoming	VW/AU	07:00	-
	12:30 pm	(571) 257-6265	Incoming	VW/AU	13:00	-
	12:43 pm	(571) 257-6265	ALEXANDRIA,VA	VW/AU	08:00	-
	01:30 pm	(703) 524-2955	Incoming	VW/AU	08:00	-
	01:46 pm	(571) 257-6265	ALEXANDRIA,VA	AU	01:00	-
	01:46 pm	(571) 257-6265	ALEXANDRIA,VA	AU	01:00	-
	01:46 pm	(571) 257-6265	ALEXANDRIA,VA	AU	01:00	-
	01:46 pm	(571) 257-6265	ALEXANDRIA,VA	AU	04:00	-
	03:44 pm	(508) 823-6087	Incoming	VW/AU	07:00	-
	03:45 pm	(253) 870-4421	TACOMA,WA	AU	1:00:00	-
May 17	08:31 pm	(253) 870-4421	TACOMA,WA	AU	52:00	-
	10:34 pm	(214) 687-8783	IRVING,TX	NW/AU	02:00	-
	10:54 pm	(323) 688-1255	LOSANGELES,CA	NW/AU	02:00	-
	10:56 pm	(918) 788-7882	SCRM,MAINE,CA	NW/AU	28:00	-
May 18	09:20 am	(703) 488-1029	ARLINGTON,VA	AU	32:00	-
	10:36 am	(323) 688-1255	LOSANGELES,CA	AU	26:00	-
	09:13 pm	(844) 426-0000	Toll Free Call	AU	16:00	-
	03:56 pm	(253) 870-4421	TACOMA,WA	AU	04:00	-
	05:43 pm	(508) 823-6087	Incoming	AU	01:00	-
	06:58 pm	(519) 383-5148	SNDC,SNDC,CA	AU	02:00	-
	10:01 pm	(519) 850-8221	Incoming	NW/AU	28:00	-
May 19	10:06 am	(703) 524-2955	ESCONDIDO,CA	NW/AU	01:00	-
	10:50 am	(703) 524-2955	ESCONDIDO,CA	NW/AU	02:50	-
	10:57 am	(703) 524-2955	Incoming	NW/AU	04:00	-
	02:38 pm	(519) 383-5148	SNDC,SNDC,CA	NW/AU	02:00	-
	02:41 pm	(703) 725-2200	FLS CHURCH,VA	NW/AU	02:00	-
	02:54 pm	(323) 688-1255	LOSANGELES,CA	NW/AU	02:00	-
	03:26 pm	(703) 488-1029	FLS CHURCH,VA	NW/AU	49:00	-
May 20	02:50 am	(703) 524-2955	Incoming	NW/AU	01:00	-
	03:01 pm	(253) 870-4421	TACOMA,WA	NW/AU	02:00	-
	03:06 pm	(253) 870-4421	Incoming	NW/AU	07:00	-

Call from Bathen to Freeze, 1 min, Voicemail, May 13 2018

Call from Bathen to Freeze, 2 mins, Voicemail, May 18th, 2018

Call from Bathen to Freeze, 2 mins, Voicemail, May 18th, 2018

- Rate Type
- AU Anytime/Even Usage
 - CW Call Waiting
 - NW Night and Weekends
 - VW Wi-Fi Calling/Calling PLUS



Account Number: 175272052
 Bill Period: Apr 25 - May 24, 2018

Call Details - (703) 786-3583 - Voice ...continued

On	At	To/From	Destination	Rate	Mins	Cost
	10:38 pm	(253) 970-4421	TACOMA, WA	NW/AU	02:00	-
May 21	08:51 am	(253) 970-4421	TACOMA, WA	AU	01:00	-
	09:20 am	(703) 725-2200	FLS CHURCH, VA	AU	02:00	-
	09:25 am	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	12:57 pm	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	12:59 pm	(619) 383-8146	SDNG SDNG, CA	AU	02:00	-
	05:37 pm	(703) 408-1829	ARLINGTON, VA	AU	24:00	-
	06:01 pm	(918) 709-7602	SGRM MAIN, GA	AU	15:00	-
	06:44 pm	(703) 408-1829	ARLINGTON, VA	AU	09:00	-
	08:54 pm	(253) 970-4421	TACOMA, WA	AU	03:00	-
	09:24 pm	(253) 970-4421	TACOMA, WA	NW/AU	02:00	-
	09:25 pm	(253) 970-4421	Incoming	NW/AU	25:00	-
	09:50 pm	(253) 970-4421	Incoming	NW/AU	25:00	-
May 22	11:00 am	(703) 408-1829	ARLINGTON, VA	AU	11:00	-
	08:00 pm	(253) 970-4421	TACOMA, WA	AU	18:00	-
	08:18 pm	(253) 970-4421	Incoming	AU	35:00	-
	09:35 pm	(253) 970-4421	TACOMA, WA	NW/AU	23:00	-
May 23	08:45 am	(703) 408-1829	ARLINGTON, VA	AU	17:00	-
	08:04 am	(703) 725-2200	FLS CHURCH, VA	AU	02:00	-
	11:01 am	(760) 814-2988	Incoming	AU	03:00	-
	02:35 pm	(213) 590-0702	LOSANGELES, CA	VW/AU	01:00	-
	04:30 pm	(888) 877-7530	Toll Free Call	AU	03:00	-
	06:02 pm	(253) 970-4421	TACOMA, WA	AU	01:00	-
	06:03 pm	(253) 970-4421	Incoming	AU	02:00	-
	06:50 pm	(253) 970-4421	Incoming	AU	04:00	-
	10:21 pm	(202) 820-6087	WASHINGTON, DC	NW/AU	06:00	-
May 24	08:12 pm	(210) 767-6264	Incoming	AU	04:00	-
	08:47 pm	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	09:23 pm	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	09:25 pm	(253) 970-4421	TACOMA, WA	AU	15:00	-
	06:20 pm	(703) 408-1829	ARLINGTON, VA	AU	17:00	-
	09:30 pm	(202) 820-6087	Incoming	AU	06:00	-
	09:11 pm	(202) 820-6087	WASHINGTON, DC	NW/AU	01:00	-

Call from Bathen to
 Freeze, 2 mins,
 Voicemail, May 21 2018

Rate Type
 AU Anytime Plan Usage
 CW Call Waiting
 NW Night and Weekends
 VW Wi-Fi Calling/Calling PLUS



Call Details - (703) 786-3583 - Voice

Call time displays as Central Time (CT) or local time depending on how and where the call was made.

On	At	To / From	Destination	Rate	Mins	Cost
May 25	08:47 am	(703) 726-2200	FLS CHURCH,VA	AU	02:00	-
	09:20 am	(916) 709-7002	SCRM MAIN,CA	AU	02:00	-
	05:55 pm	(291) 383-4410	Incoming	AU	01:00	-
	05:16 pm	(202) 720-8087	WASHINGTON,DC	AU	02:00	-
	05:41 pm	(253) 970-4421	TACOMA,WA	AU	02:00	-
	07:27 pm	(253) 970-4421	Incoming	AU	05:00	-
	09:00 pm	(253) 970-4421	Incoming	NW/AU	04:00	-
May 26	08:41 am	(240) 401-9457	ROCKVILLE,MD	NW/AU	03:00	-
	01:16 pm	(253) 970-4421	Incoming	NW/AU	03:00	-
	07:50 pm	(253) 970-4421	TACOMA,WA	NW/AU	02:00	-
	08:03 pm	(619) 363-5146	SNCG SNCG,CA	NW/AU	01:00	-
	08:04 pm	(703) 485-7232	FLS CHURCH,VA	NW/AU	02:00	-
	05:05 pm	(703) 408-1879	ARLINGTON,VA	NW/AU	01:00	-
	10:02 pm	(253) 970-4421	Incoming	NW/AU	01:00	-
May 27	12:10 pm	(703) 485-7232	FLS CHURCH,VA	NW/AU	10:00	-
	12:34 pm	(703) 485-7232	FLS CHURCH,VA	NW/AU	01:00	-
	12:35 pm	(703) 485-7232	Incoming	NW/AU	17:00	-
	12:53 pm	(703) 485-7232	Incoming	NW/AU	01:00	-
	12:54 pm	(703) 485-7232	FLS CHURCH,VA	NW/AU	03:00	-
	09:34 pm	(253) 970-4421	TACOMA,WA	NW/AU	02:00	-
	01:59 pm	(202) 820-8087	WASHINGTON,DC	NW/AU	02:00	-
	02:02 pm	(703) 485-7232	ARLINGTON,VA	NW/AU	02:00	-
	03:50 pm	(253) 970-4421	TACOMA,WA	NW/AU	01:00	-
May 28	11:36 am	(703) 485-7232	FLS CHURCH,VA	AU	12:00	-
	02:49 pm	(253) 970-4421	TACOMA,WA	AU	01:00	-
	02:50 pm	(619) 363-5146	SNCG SNCG,CA	AU	03:00	-
	03:05 pm	(253) 970-4421	Incoming	AU	18:00	-
	04:05 pm	(703) 485-7232	FLS CHURCH,VA	AU	11:00	-
	06:24 pm	(323) 898-1258	LOS ANGELES,CA	AU	23:00	-
	08:26 pm	(544) 423-8656	Toll Free Call	AU	02:00	-
	12:01 pm	(201) 503-8300	Incoming	AU	42:00	-
	07:59 pm	(253) 970-4421	TACOMA,WA	AU	01:00	-
	08:28 pm	(619) 363-5146	Incoming	AU	56:00	-
	09:23 pm	(253) 970-4421	TACOMA,WA	NW/AU	01:00	-
	09:54 pm	(253) 970-4421	Incoming	NW/AU	02:00	-
May 29	01:18 pm	(760) 594-2988	Incoming	VW/AU	04:00	-
	01:23 pm	(800) 882-8680	Toll Free Call	VW/AU	04:00	-
	02:45 pm	(800) 438-7300	Incoming	AU	17:00	-
	05:05 pm	(571) 477-9180	Incoming	AU	01:00	-
	08:30 pm	(703) 485-7232	FLS CHURCH,VA	AU	27:00	-
	08:30 pm	(253) 970-4421	TACOMA,WA	NW/AU	04:00	-
May 30	01:32 am	(323) 898-1258	LOS ANGELES,CA	NW/AU	22:00	-
	01:55 am	(916) 709-7002	SCRM MAIN,CA	NW/AU	03:00	-
	01:56 am	(916) 709-7002	Incoming	NW/CW/AU	18:00	-
	10:56 am	(703) 408-1879	ARLINGTON,VA	AU	22:00	-
	01:24 pm	(202) 357-4861	Incoming	VW/AU	01:00	-
	05:56 pm	(253) 970-4421	TACOMA,WA	AU	11:00	-
	06:55 pm	(253) 970-4421	TACOMA,WA	AU	01:00	-
	09:42 pm	(214) 687-8789	IRVING, TX	NW/AU	02:00	-
	09:52 pm	(661) 859-8221	Incoming	NW/AU	02:00	-
May 31	07:54 pm	(760) 594-2988	BE CONHICO,CA	AU	00:00	-

Call from Bathen to Freeze, 1 min, Voicemail, May 26 2020

Call from Bathen to Freeze, 3 mins, voicemail, May 28 2020

Call from Freeze to Bathen, 56 mins, May 28 2020, 9 days before trial, discussion of what would happen at trial, administrative and travel arrangements.

Rate Type

- AU Anytime/Plan Usage
- CW Call Waiting
- NW Night and Weekends
- VW Wi-Fi Calling/Calling PLUS

Call Details - (703) 766-3583 - Voice ...continued

On	At	To / From	Destination	Rate	Mins	Cost
	07:00 pm	(780) 594-2837	Incoming	AU	01:00	-
	11:38 pm	(323) 808-1258	LOS ANGELES, CA	NW/AU	38:00	-
Jan 01	12:29 am	(918) 709-7802	SCRM MAIN, CA	NW/AU	01:00	-
	12:05 am	(918) 709-7802	Incoming	NW/AU	07:00	-
	08:37 am	(423) 205-5501	Incoming	VW/AU	01:00	-
	06:31 pm	(253) 970-4421	TACOMA, WA	AU	35:00	-
	07:47 pm	(703) 408-1829	ARLINGTON, VA	AU	30:00	-
	06:27 pm	(253) 970-4421	TACOMA, WA	NW/AU	04:00	-
	09:41 pm	(253) 970-4421	TACOMA, WA	NW/AU	03:00	-
Jan 02	03:25 pm	VoiceMail	FLS CHURCH, VA	NW/AU	01:00	-
	04:30 pm	(703) 485-7232	FLS CHURCH, VA	NW/AU	03:00	-
	04:30 pm	(703) 485-7232	FLS CHURCH, VA	NW/AU	22:00	-
	04:11 pm	(703) 485-7232	FLS CHURCH, VA	NW/AU	03:00	-
	04:55 pm	(253) 970-4421	TACOMA, WA	NW/AU	33:00	-
	11:46 pm	(253) 970-4421	Incoming	NW/AU	01:00	-
Jan 03	05:14 pm	VoiceMail	FLS CHURCH, VA	NW/AU	01:00	-
	05:36 pm	(780) 594-2837	ESCONDIDO, CA	NW/AU	02:00	-
	08:36 pm	(253) 970-4421	TACOMA, WA	NW/AU	02:00	-
	08:36 pm	(703) 408-1829	ARLINGTON, VA	NW/AU	08:00	-
	06:50 pm	(253) 970-4421	TACOMA, WA	NW/AU	01:00	-
	08:51 pm	(253) 970-4421	Incoming	NW/AU	07:00	-
Jan 04	05:31 am	(488) 518-5008	Incoming	NW/AU	01:00	-
	05:08 am	(703) 408-1829	ARLINGTON, VA	NW/AU	11:00	-
	10:50 am	(780) 594-2837	ESCONDIDO, CA	AU	02:00	-
	10:54 am	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	10:58 am	(253) 970-4421	TACOMA, WA	AU	05:00	-
	01:40 pm	(780) 542-5015	Incoming	AU	01:00	-
	04:23 pm	(619) 383-5146	SDNG SDNG, CA	AU	02:00	-
	04:35 pm	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	04:50 pm	(800) 347-3085	Toll Free Call	AU	03:00	-
	06:39 pm	(253) 970-4421	TACOMA, WA	AU	09:00	-
	06:08 pm	(658) 229-4476	SDNG VIMS, CA	AU	02:00	-
	07:51 pm	(619) 383-5146	SDNG SDNG, CA	AU	03:00	-
Jan 05	10:09 am	(619) 383-5146	SDNG SDNG, CA	AU	02:00	-
	10:47 am	(571) 257-8255	ALEXANDRIA, VA	AU	23:00	-
	11:58 am	(703) 408-1829	ARLINGTON, VA	AU	04:00	-
	12:28 pm	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	12:28 pm	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	01:41 pm	(781) 257-6554	Incoming	AU	01:00	-
	03:26 pm	(619) 383-5146	SDNG SDNG, CA	AU	33:00	-
	04:15 pm	(703) 408-1829	ARLINGTON, VA	AU	13:00	-
	04:27 pm	(703) 485-7232	FLS CHURCH, VA	AU	02:00	-
	04:58 pm	(800) 347-3085	Toll Free Call	AU	03:00	-
	06:38 pm	(703) 408-1829	ARLINGTON, VA	AU	11:00	-
	07:18 pm	(918) 709-7802	SCRM MAIN, CA	AU	24:00	-
	08:45 pm	(323) 898-1258	LOS ANGELES, CA	AU	33:00	-
Jan 08	08:11 am	(703) 485-7232	FLS CHURCH, VA	AU	17:00	-
	08:35 am	(703) 408-1829	ARLINGTON, VA	AU	32:00	-
	10:20 am	(619) 383-5146	SDNG SDNG, CA	AU	02:00	-
	10:51 am	(323) 898-1258	LOS ANGELES, CA	AU	03:00	-
	13:03 am	(918) 709-7802	SCRM MAIN, CA	AU	03:00	-
	13:15 am	(918) 709-7802	Incoming	AU	03:00	-
	11:24 am	(918) 709-7802	SCRM MAIN, CA	AU	03:00	-
	02:54 pm	(253) 970-4421	TACOMA, WA	AU	25:00	-

Call from Bathen to Freeze, 2 mins, Voicemail, Jun 04 2020

Call from Bathen to freeze, 2 mins, Voicemail, June 04 2020

Call from Bathen to freeze, 2 mins, Voicemail, June 05 2020

Call from Bathen to freeze, 33 mins, Arrival in San Diego day before the start of the trial, June 05 2020

Call from Bathen to freeze, 2 mins, Voicemail, June 06 2020

Rate Type
 AU Anytime/Plan Usage
 NW Night and Weekends
 VW W-Fi Calling/Calling PLUS



Call Details - (703) 786-3563 - Voice...continued

On	At	To / From	Destination	Rate	Mins	Cost
	04:32 pm	(703) 408-1829	ARLINGTON, VA	AU	08:00	-
	04:42 pm	(703) 485-7232	FLS CHURCH, VA	AU	08:00	-
	04:51 pm	(615) 734-1817	CHILAVISTA, GA	AU	02:00	-
	05:45 pm	(703) 677-5848	FLS CHURCH, VA	AU	15:00	-
	06:47 pm	(703) 485-7232	FLS CHURCH, VA	AU	09:00	-
Jun 07	10:14 am	(703) 485-7232	FLS CHURCH, VA	AU	02:00	-
	10:31 am	(703) 408-1829	ARLINGTON, VA	AU	17:00	-
	10:45 am	(571) 267-8285	ALEXANDRIA, VA	AU	04:00	-
	11:26 am	(615) 363-5146	SNDC SNDC, CA	AU	02:00	-
	02:48 pm	(858) 229-4476	SNDC MRMS, CA	AU	02:00	-
	02:54 pm	(858) 229-4476	Incoming	AU	07:00	-
	03:04 pm	(703) 408-1829	ARLINGTON, VA	AU	03:00	-
	03:07 pm	(703) 408-1829	Incoming	AU	16:00	-
	04:28 pm	(323) 898-1258	LOS ANGELES, CA	AU	02:00	-
	04:45 pm	(323) 898-1258	Incoming	AU	18:00	-
	05:49 pm	(703) 408-1829	Incoming	AU	01:00	-
	06:14 pm	(253) 970-4421	TACOMA, WA	AU	02:00	-
Jun 08	08:27 am	(703) 485-7232	FLS CHURCH, VA	AU	26:00	-
	10:00 am	(858) 229-4476	SNDC MRMS, CA	AU	05:00	-
	10:20 am	(703) 408-1829	ARLINGTON, VA	AU	07:00	-
	10:31 am	(253) 970-4421	TACOMA, WA	AU	07:00	-
	10:58 am	(703) 408-1829	ARLINGTON, VA	AU	09:00	-
	01:26 pm	(615) 734-1817	CHILAVISTA, GA	AU	03:00	-
	01:30 pm	(202) 820-6067	WASHINGTON, DC	AU	08:00	-
	02:18 pm	(615) 363-5146	SNDC SNDC, CA	AU	02:00	-
	02:30 pm	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	05:02 pm	(858) 229-4476	Incoming	AU	05:00	-
	06:06 pm	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	06:30 pm	(703) 408-1829	Incoming	AU	16:00	-
	07:21 pm	(858) 229-4476	Incoming	AU	01:00	-
Jun 09	09:35 am	(703) 408-1829	ARLINGTON, VA	NW/AU	13:00	-
	10:37 pm	(858) 229-4476	SNDC MRMS, CA	NW/AU	02:00	-
	10:41 pm	(858) 229-4476	Incoming	NW/AU	01:00	-
	06:56 pm	(858) 229-4476	SNDC MRMS, CA	NW/AU	01:00	-
	07:52 pm	(253) 970-4421	TACOMA, WA	NW/AU	02:00	-
Jun 10	01:07 am	(253) 970-4421	TACOMA, WA	NW/AU	09:00	-
	09:47 am	(703) 408-1829	ARLINGTON, VA	NW/AU	02:00	-
	12:23 pm	(703) 408-1829	ARLINGTON, VA	NW/AU	11:00	-
	12:35 pm	(703) 408-1829	ARLINGTON, VA	NW/AU	01:00	-
	04:07 pm	(703) 408-1829	ARLINGTON, VA	NW/AU	12:00	-
	04:24 pm	(703) 677-5848	FLS CHURCH, VA	NW/AU	07:00	-
	05:01 pm	(703) 485-7232	FLS CHURCH, VA	NW/AU	02:00	-
	05:03 pm	(253) 970-4421	TACOMA, WA	NW/AU	02:00	-
Jun 11	08:07 am	(703) 408-1829	ARLINGTON, VA	AU	10:00	-
	11:08 am	(615) 363-5146	Incoming	AU	03:00	-
	11:53 am	(703) 408-1829	ARLINGTON, VA	AU	02:00	-
	04:03 pm	(615) 734-1817	CHILAVISTA, GA	AU	02:00	-
	05:21 pm	(703) 677-5848	FLS CHURCH, VA	AU	05:00	-
	05:25 pm	(703) 485-7232	FLS CHURCH, VA	AU	11:00	-
	05:38 pm	(253) 970-4421	TACOMA, WA	AU	07:00	-
	07:49 pm	(858) 229-4476	SNDC MRMS, CA	AU	07:00	-
	08:32 pm	(615) 363-5146	SNDC SNDC, CA	AU	09:00	-
Jun 12	05:12 pm	(844) 426-9988	Toll-Free Call	AU	43:00	-
	06:12 pm	(615) 363-5146	SNDC SNDC, CA	AU	02:00	-

Call from Bathen to Freeze, 2 mins, Voicemail, Jun 07 2018

Call from Bathen to Freeze, 2 mins, Voicemail, Jun 08 2018

2 Calls from Bathen to Freeze, 2 mins, 1 min, Voicemail, Jun 09 2018

Calls from Bathen to Freeze, 8 mins, during trial, Jun 11 2018

Call from Bathen to Freeze, 3 mins, voicemail during trial, Jun 12 2018

Rate Type
AU Anytime/Plan Usage
NW Night and Weekends



Call Details - (703) 786-3583 - Voice ...continued

On	At	To / From	Destination	Rate	Mins	Cost
	04:32 pm	(703) 408-1629	ARLINGTON, VA	AU	00:00	-
	04:42 pm	(703) 485-7232	FLS CHURCH, VA	AU	00:00	-
	04:51 pm	(819) 363-5146	CHULAVISTA, CA	AU	02:00	-
	05:45 pm	(703) 408-1629	FLS CHURCH, VA	AU	15:00	-
	06:47 pm	(703) 485-7232	FLS CHURCH, VA	AU	01:00	-
Jun 07	10:14 am	(703) 485-7232	FLS CHURCH, VA	AU	02:00	-
	10:31 am	(703) 408-1629	ARLINGTON, VA	AU	17:00	-
	10:49 am	(877) 257-9265	ALEXANDRIA, VA	AU	04:00	-
	11:28 am	(819) 363-5146	SNBG SNBG, CA	AU	02:00	-
	02:45 pm	(858) 229-4476	SNBG MRMS, CA	AU	02:00	-
	02:54 pm	(858) 229-4476	Incoming	AU	07:00	-
	03:04 pm	(703) 408-1629	ARLINGTON, VA	AU	03:00	-
	03:17 pm	(703) 408-1629	Incoming	AU	16:00	-
	04:08 pm	(323) 898-1258	LOS ANGELES, CA	AU	02:00	-
	04:45 pm	(323) 898-1258	Incoming	AU	16:00	-
	05:49 pm	(703) 408-1629	Incoming	AU	01:00	-
	06:14 pm	(253) 970-4421	TACOMA, WA	AU	02:00	-
Jun 08	08:27 am	(703) 408-1629	FLS CHURCH, VA	AU	26:00	-
	10:00 am	(858) 229-4476	SNBG MRMS, CA	AU	06:00	-
	10:20 am	(703) 408-1629	ARLINGTON, VA	AU	07:00	-
	10:31 am	(253) 970-4421	TACOMA, WA	AU	07:00	-
	10:49 am	(703) 408-1629	ARLINGTON, VA	AU	05:00	-
	01:26 pm	(819) 363-5146	CHULAVISTA, CA	AU	03:00	-
	01:30 pm	(202) 220-8097	WASHINGTON, DC	AU	08:00	-
	02:18 pm	(819) 363-5146	SNBG SNBG, CA	AU	02:00	-
	02:23 pm	(703) 408-1629	ARLINGTON, VA	AU	02:00	-
	05:02 pm	(858) 229-4476	Incoming	AU	05:00	-
	06:06 pm	(703) 408-1629	ARLINGTON, VA	AU	02:00	-
	06:30 pm	(703) 408-1629	Incoming	AU	18:00	-
	07:21 pm	(858) 229-4476	Incoming	AU	07:00	-
Jun 08	09:05 am	(703) 408-1629	ARLINGTON, VA	NW AU	13:00	-
	06:37 pm	(858) 229-4476	SNBG MRMS, CA	NW AU	02:00	-
	06:41 pm	(858) 229-4476	Incoming	NW AU	01:00	-
	06:56 pm	(858) 229-4476	SNBG MRMS, CA	NW AU	01:00	-
	07:02 pm	(253) 970-4421	TACOMA, WA	NW AU	02:00	-
Jun 10	09:07 am	(253) 970-4421	TACOMA, WA	NW AU	02:00	-
	09:47 am	(703) 408-1629	ARLINGTON, VA	NW AU	02:00	-
	12:23 pm	(703) 408-1629	ARLINGTON, VA	NW AU	11:00	-
	12:55 pm	(703) 408-1629	ARLINGTON, VA	NW AU	01:00	-
	04:07 pm	(703) 408-1629	ARLINGTON, VA	NW AU	12:00	-
	04:24 pm	(703) 877-5846	FLS CHURCH, VA	NW AU	07:00	-
	05:01 pm	(703) 485-7232	FLS CHURCH, VA	NW AU	02:00	-
	05:03 pm	(253) 970-4421	TACOMA, WA	NW AU	02:00	-
Jun 11	08:07 am	(703) 408-1629	ARLINGTON, VA	AU	10:00	-
	11:08 am	(819) 363-5146	Incoming	AU	03:00	-
	11:53 am	(703) 408-1629	ARLINGTON, VA	AU	02:00	-
	04:03 pm	(819) 794-1517	CHULAVISTA, CA	AU	02:00	-
	05:21 pm	(703) 877-5846	FLS CHURCH, VA	AU	05:00	-
	05:25 pm	(703) 485-7232	FLS CHURCH, VA	AU	11:00	-
	05:36 pm	(253) 970-4421	TACOMA, WA	AU	07:00	-
	07:49 pm	(858) 229-4476	SNBG MRMS, CA	AU	07:00	-
	08:32 pm	(819) 363-5146	SNBG SNBG, CA	AU	08:00	-
Jun 12	05:12 pm	(844) 425-9966	Toll Free Call	AU	04:00	-
	06:12 pm	(819) 363-5146	SNBG SNBG, CA	AU	03:00	-

Call from Bathen to Freeze, 2 mins, Voicemail, Jun 07 2018

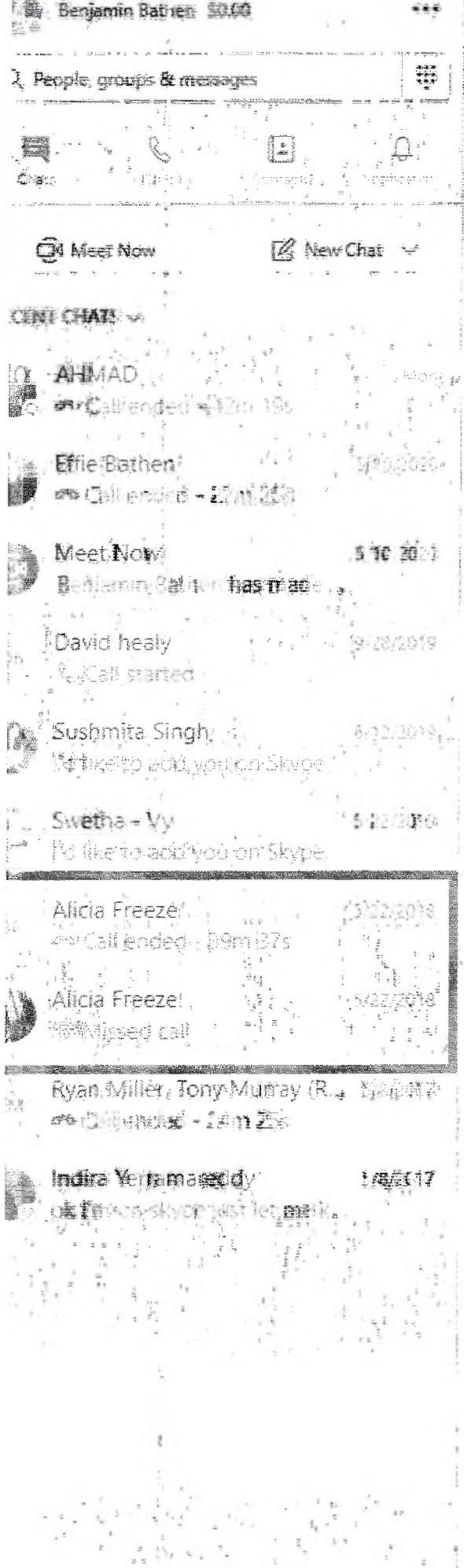
Call from Bathen to Freeze, 2 mins, Voicemail, Jun 08 2018

2Calls from Bathen to Freeze, 2 mins, 1min, Voicemail, Jun 09 2018

Calls from Bathen to Freeze, 8 mins, during trial, Jun 11 2018

Call from Bathen to Freeze, 3 mins, voicemail during

Rate Type
AU Anytime/Plan Usage
NW Night and Weekends



May 22 2018

Skype calls with Alicia Freeze. total of 39 minutes and 37 seconds. call records on skype go back to 2017

Discussion about lack of Communication

Exhibit J

Declarations of Potential Witnesses

I attempted to contact Alicia Freeze, Ben Bathen's trial attorney, prior to the trial by phone and email but received no response. In addition, at no time did Alicia Freeze attempt to contact me by phone or by email. She did not respond to my attempts to contact her. Although Ben had given her my name as a potential witness.

Had she done so, I could have told her about Ben's strange and sudden aggressive behavior, after starting on antidepressants at the end of 2004. If asked, I could have told her about Ben's sudden interest in taking up mixed martial arts at 32 years of age and about his abrupt change in mood and demeanor after he started taking antidepressant medication as recommended by Dr. Carolyn Jacobs. I could also have told Alicia Freeze that Ben admitted to me that he had placed phone calls to the office of Dr. Carolyn Jacobs in 2017.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on (date): 6/11/2020

(Signature) 

In 2018 my friend Ben Bathen informed me that he was involved in a court case concerning some calls he had made to his therapist, Dr. Carolyn Jacobs.

He provided me with his attorney Alicia Freeze's contact information and asked if I would contact her to serve as a character witness in his case.

Alicia Freeze only replied to my first e-mail but did not reply to any of my subsequent emails leading up to his court date.

In the months leading to the trial, I had various phone conversations with Ben who expressed his concern about not being able to get in touch with his lawyer either. He was concerned about their preparedness for the upcoming court date.

Had Alicia Freeze talked to me about Ben, I would have been able to discuss his uncharacteristic behavioral changes during the time we lived together in Los Angeles in 2006. During that time Ben was taking antidepressants, as recommended by Dr. Carolyn Jacobs, and I recall him being very agitated and uneasy, at times, and unable to sleep well.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 12th, 2020.

Felipe Smith

A handwritten signature in black ink, appearing to read 'Felipe Smith', followed by a long horizontal line extending to the right.

California Supreme Court

BENJAMIN LEE BATHEN,
Petitioner on Habeas Corpus

Case No. SCS 294342
Related Court of Appeal No. D074538

Declaration of Vince Crawley

1. In the late spring and summer of 2018, my stepson Benjamin Bathen was preparing for a trial for multiple felony charges in San Diego based on voicemail messages he left in June and July 2017. He frequently told me how difficult it was to reach his attorney, Alicia Freeze. Although I live in the suburbs of Washington, D.C.,
2. I attended the trial in San Diego, as well as the subsequent sentencing hearing. Ms. Freeze did not contact me or discuss the charges with me before the trial. During the trial, she was focused on the defense strategy that asserted the state had not proved Ben made the calls, and in our few conversations together Ms. Freeze never discussed or asked me about the circumstances of the incidents in question.
3. Had Ms. Freeze held an attorney-privileged discussion with me, I would have told her that Ben's personality was much changed from the beginning of 2017 to July 2017, when he placed the phone calls.
4. Many of Ben's actions at that time were in keeping with the dangerous adverse reactions that, in Ben's subsequent research, can be a side effect of certain antidepressant medications that he was taking at that time. He discussed with me his medication change in the spring of 2017, but I did not link his change in behavior with the new medication. However, at the time the calls were made, he had grown agitated. I had several discussions with him about his increasing levels of agitation.
5. Ms. Freeze did not ask me about any of the incidents or Ben's behaviors at the time of the phone calls. She continued to insist no one could prove he had made them. During the sentencing portion of the hearing, I drafted a written statement I wished to deliver, which strongly and passionately explained that the Benjamin Bathen who made those phone calls was not the person I knew, was not the person in the court room, and was not the person who, immediately after the calls, showed a marked transformation in his life. Ms. Freeze recommended I significantly water down this statement to focus only on Ben's remorse.

6. Ben's previous lawyer was a San Diego attorney named Benjamin Theule. I had only one limited conversation with Mr. Theule and did not discuss any elements of the case. Ben did tell me that Mr. Theule at one point recommended a plea bargain, but I have no knowledge that side-effects of Ben's medication would have been a factor in that plea bargain. To my knowledge, neither Mr. Theule nor Ms. Freeze investigated the question of whether or not medication could have caused violent outbursts similar to those Ben was being tried for. Ben said that both of his attorneys strongly advised him that the only potential viable defense was to cast strong doubt on the state's ability to prove the identity of the caller.

7. In the months leading up to the trial I had multiple conversations with Ben over the phone and in person. We discussed the emotional distress he was experiencing because of the legal charges and discussed how to mentally prepare himself for the trial. In our many conversations, neither Ben nor I had any discussions or, on my part, awareness of any potential aggressive side effects of his medications. Quite the reverse, when medications were discussed, it was to ensure he was taking them and had continued access to them. I understood them to be widely prescribed medications.

8. The first time Ben mentioned anything about suspecting his medications of causing the outbursts was after he was released from prison. He informed me that near the end of his sentence, after visiting the prison library, he suspected that the medication may have contributed to the incidents and began investigating this possibility in depth.

9. At no time before his sentencing was anyone in our family aware of potential aggressive side effects to Ben's medications, which we understood were intended to stabilize his mood. Even if we had suspected that the medication was causing the issue, there were no opportunities to discuss such factors with his trial counsel because, as previously stated, I had no communication with Ms. Freeze before the trial and only a few minutes of interaction outside the courtroom during the trial and sentencing.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on 8/22/2020

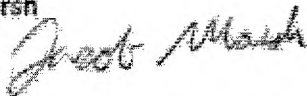
A handwritten signature in black ink, appearing to read "Vincent M. Crawley". The signature is fluid and cursive, with the first name being the most prominent.

Vincent M. Crawley
6626 Green Ash Court
Springfield Virginia

My name is Jacob Marsh. I served as Benjamin Bathen's direct supervisor during his time at work at Ark Network Security Solutions (Ark NSS). During the weeks of January and February of 2017, I observed abnormal and erratic behavior exhibited by Benjamin Bathen while at work. His desk and the other members of his team were arranged in a square formation directly outside of my office. Additionally, my office had glass front walls so I was able to observe the presence and behavior of Benjamin and the rest of the team on a daily basis. During this particular period (weeks of January and February 2017), I witnessed Benjamin get up several times from his desk, nearly every five minutes at times, over the course of a number of days. This was completely abnormal behavior for Benjamin as he usually would sit at his desk for long periods of time (i.e., hours) while coding with the rest of the team. I also noticed when interacting with him, that his face would often tense up and become almost a grimace or a frown for a few seconds. I thought it was some kind of nervous reaction but I had never observed it before in my interactions with Benjamin in the past. In addition, my colleagues at work reported that they had pulled the electronic badging logs for a week during that period showing Benjamin's abnormal amount of "badge-ins" and "badge-outs". Consequently, I was responsible for counseling Ben about the frequent breaks and lack of work progress and recall Benjamin disclosing to me that his doctor had just had him switch medications and that it may be causing some of the abnormal behavior.

I Jacob Marsh, do testify and declare that the foregoing observed events are true and correct under penalty of perjury.

Jacob Marsh



06/10/2020 06/10/2020

Exhibit K
Judge Walsh's Order

FILED
San Diego Superior Court
MAY 06 2020
Clerk of the Superior Court
By: M. Gallardo

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

IN THE MATTER OF THE APPLICATION OF:)

BENJAMIN LEE BATHEN,
Petitioner.

HSC11777
SCS294342

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

AFTER REVIEWING THE PETITION FOR WRIT OF HABEAS CORPUS AND
THE COURT FILE IN THE ABOVE REFERENCED MATTER, THE COURT FINDS:

On June 19, 2018 petitioner was convicted by jury trial of three counts of criminal threats made against his former psychologist, C.J. (Pen. Code¹, § 422). Petitioner was sentenced to the midterm sentence of two years for each count, with counts two and three to run concurrent to count one, for a total prison term of two years.

Petitioner timely appealed his conviction to the California Court of Appeal, Fourth Appellate District, Division One. (Case No. D074538.) On appeal, petitioner argued: (1) insufficient evidence supported the convictions; (2) the court had a *sua sponte* duty to instruct the jury on the lesser-included offense of attempted criminal threat; and (3) the court erred in denying probation and imposing the midterm sentence of two years in prison. The judgment was affirmed. A petition for review was denied.

¹ All unspecified statutory references are to the Penal Code.

1 On April 23, 2020 petitioner filed a petition for writ of habeas corpus in this court.
2 Petitioner complains that his trial counsel, Alicia Freeze, was ineffective because she
3 failed to investigate a mental health defense to the charges against petitioner.
4 Specifically, she did not investigate the defense of voluntary intoxication based on the
5 possibility that petitioner's antidepressant, Lexapro, caused his violent outbursts toward
6 CJ.

7 The petition is denied.

8 In reviewing a petition for writ of habeas corpus, the court presumes the
9 regularity of proceedings that resulted in a final judgment. (*Ex parte Bell* (1942) 19
10 Cal.2d 488, 500.) Every petitioner, even one filing in pro per, must set forth a *prima*
11 *facie* statement of facts that would entitle him to habeas corpus relief. (*In re Bower*
12 (1985) 38 Cal.3d 865, 872; *In re Hochberg* (1970) 2 Cal.3d 870, 875 fn 4.) The
13 petitioner then bears the burden of proving the facts upon which he bases his claim for
14 relief. (*In re Riddle* (1962) 57 Cal.2d 848, 852.) Vague or conclusory allegations do not
15 warrant habeas relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The petition should
16 include copies of "reasonably available documentary evidence in support of claims . . ."
17 (*Id.*)

18 With regard to claims of ineffective assistance of counsel, petitioner's assertions
19 must be corroborated independently by objective evidence. (*In re Alvernaz* (1992) 2
20 Cal.4th 924, 933.) Petitioner's unsubstantiated, self-serving statements do not provide a
21 sufficient basis upon which to prove his claims. (*Id.* at 945.)

22 Petitioner was treated by C.J. from 2004 to 2008 when he moved to the east
23 coast. Petitioner was not happy and became agitated when he learned C.J. would
24 terminate his treatment because she was only licensed to practice on patients in
25 California. A few months later, petitioner emailed C.J. telling her he was upset and
26 asking for an apology. He threatened to complain with her professional organization if
27 she did not listen to his grievances or apologize face-to-face. The emails made C.J.
28 uneasy. Almost nine years later, C.J. received the following voicemail:

1 Hey Dr. [C.J.], I just want to let you know that I'm going to bust your
2 fucking skull open you worthless bitch. You don't ever fucking talk to me
3 like that you fucking whore. Fuck you. I'll bash your fucking skull. You're
4 fucking dead. I'm going to carve you up you fucking whore. Shut the fuck
5 up!

6 C.J. recognized petitioner's voice when her husband mentioned petitioner's
7 name. She recognized petitioner's inflection and high-pitched voice due to prior therapy
8 sessions where he had become agitated. Petitioner's voice sounded the same as when
9 he was "anxious," "angry," or "stirred up" in his therapy sessions. About a month later,
10 C.J. received the following voicemail from petitioner:

11 Hey Dr. [C.J.], I just want to let you know what a fucking bitch you are.
12 You don't talk to me about fucking dating you asshole. You should start
13 dating. You should start dating. I can hurt you too you mother fucker. I'm
14 going to carve you up, I'm going to rape you, I'm going to torture you, I'm
15 going to fuck you up. I'll carve your fucking smile off your face you stupid
16 bitch. I'm not going to fucking start dating! Fuck you!

17 Two days later, C.J. received the following voicemail from petitioner:

18 "Hey Dr. [C.J.], I just want to let you know that I'm still planning on
19 coming out there kidnapping you, torturing you, raping the living shit out of
20 you, and then I've come up with a great idea, I'm going to set you on fire.
21 You dumb fucking bitch. Fuck you! Maybe you think, maybe get laid.
22 Your friends think you need to get laid. You thought that shit was funny.
23 You're going to fucking die. Then I'm going to find your daughter. I'm
24 going to rape and murder that bitch too. You're fucking dead."

25 Petitioner argues that counsel was ineffective because she did not investigate
26 the possibility petitioner's violent conduct toward CJ was caused by the antidepressant
27 he was taking at the time. If she had investigated this information she could have put on
28 the defense that petitioner was voluntarily intoxicated by his medication thereby
negating the specific intent element of the criminal threats.

In support, petitioner offers his own declaration in which he explains, amongst
other matters, that the Lexapro he was prescribed contained a warning on the outside of
the bag to call a healthcare provider if the patient experienced acting "aggressive or
violent", but counsel did not investigate the possibility that the medication caused
petitioner to be violent. (Exhibit A.)

1 Petitioner also offers the declaration of a "Strickland Expert", Dr. Richard Gates
2 (Exhibit C), in which Dr. Gates opines that counsel should have presented petitioner's
3 medical information to a mental health expert to get an opinion that would serve to
4 negate the intent element of the charges against petitioner and that it was unreasonable
5 of her not to do so.

6 Petitioner offers the Declaration of Dr. Alan Abrams, Ph.D., J.D., who explains
7 the connection between Lexapro and aggressive or violent conduct, and the fact it was
8 common knowledge in the mental health community that aggressive conduct is a side
9 effect of the drug. Dr. Abrams concludes the drugs caused petitioner's outburst, (Exhibit
10 D.) Dr. Abrams concludes that Dr. Raymond Murphy, a psychologist to whom petitioner
11 was referred by Ms. Freeze for a mental health assessment before trial, likely had no
12 background in psychopharmacology and made no mention of considering the impact of
13 Lexapro on petitioner's actions. Dr. Abrams charges Ms. Freeze with failing to have
14 meaningful understanding of the relationship between antidepressants and violence

15 Petitioner also includes the declaration of Dr. Selma Eikelenboom-Schieveld,
16 M.D., Ph.D., a forensic medical examiner, who performed DNA testing on petitioner.
17 She concluded that he metabolizes medications at a slower rate, which resulted in
18 neurotoxicity at the time of the offenses. (Exhibit E.) She also concludes that his
19 conduct was brought about by the side effects of his medication, was not the product of
20 deliberation, and his intoxication prevented him from forming the requisite intent.

21 Petitioner also includes information regarding the connection between Lexapro,
22 antidepressants and violence as a side effect. (Exhibits F-1, F-2, F-3.)

23 A claim of ineffective assistance of counsel has two components: "
24 'First, the defendant must show that counsel's performance was deficient.
25 This requires showing that counsel made errors so serious that counsel
26 was not functioning as the "counsel" guaranteed the defendant by the
27 Sixth Amendment. Second, the defendant must show that the deficient
28 performance prejudiced the defense. This requires showing that counsel's
errors were so serious as to deprive the defendant of a fair trial, a trial
whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a
'defendant must show that counsel's representation fell below an objective
standard of reasonableness.' [Citation.] To establish prejudice he 'must
show that there is a reasonable probability that, but for counsel's

1 unprofessional errors, the result of the proceeding would have been
 2 different. A reasonable probability is a probability sufficient to undermine
 3 confidence in the outcome.’ [Citation.]” (*Williams v. Taylor* (2000) 529 U.S.
 4 362, 390–391, 120 S.Ct. 1495, 1511–1512, 146 L.Ed.2d 389, citing
 5 *Strickland v. Washington* (1984) 466 U.S. 668, 694, 104 S.Ct. 2052, 80
 6 L.Ed.2d 674; *In re Jones* (1996) 13 Cal.4th 552, 561, 54 Cal.Rptr.2d 52,
 7 917 P.2d 1175.) The ineffectiveness must “deprive the defendant of a
 8 substantive or procedural right to which the law entitles him.” (*Williams v.*
 9 *Taylor, supra*, 529 U.S. at p. 393, 120 S.Ct. at p. 1513, fn. omitted.)
 10 “[T]here are situations in which the overriding focus on fundamental
 11 fairness may affect the analysis.” (*Id.* at p. 391, 120 S.Ct. at p. 1512.)

8 ¶¶...¶¶

9 “Defense counsel have the obligation to investigate all defenses,
 10 explore the factual bases for defenses [citation] and the applicable law.
 11 [Citation.]” (*People v. Maguire* (1998) 67 Cal.App.4th 1022, 1028, 79
 12 Cal.Rptr.2d 573.) “The defendant can be expected to rely on counsel’s
 13 independent evaluation of the charges, applicable law, and evidence, and
 14 of the risks and probable outcome of trial. [Citations.]” (*In re Alvernaz,*
 15 *supra*, 2 Cal.4th at p. 933, 8 Cal.Rptr.2d 713, 830 P.2d 747.)

13 (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1132-1133.)

14 Here, petitioner has failed to show that counsel was ineffective. He has not
 15 shown that counsel’s performance was deficient and, even assuming it was deficient,
 16 that he suffered any prejudice as a result.

17 With regard to the expert declarations, any relevance or impact they might have
 18 on petitioner’s claim is wholly undermined by the complete lack of documentation or
 19 specific facts indicating when exactly petitioner starting taking Lexapro, in what dosage,
 20 and when he stopped. Without this information, the opinions of the experts are mere
 21 hollow speculation.

22 More important, there were no facts presented to Ms. Freeze to urge her to even
 23 consider that petitioner was acting under the influence of his medication and not his own
 24 will and deliberation. Indeed, Dr. Raymond Murphy’s report, which reported the results
 25 of interviews conducted with petitioner on May 19, 24, and 31, 2018 and June 4, 2018
 26 indicated that when asked about his health, petitioner responded, in part: “Currently, I
 27 am medicated with Lexapro by my general practitioner for depression. I think it helps.”
 28 (Exhibit G, p. 3.) Petitioner again reported that Lexapro had been helpful in treating his

1 depression and denied any homicidal ideation. (*Id.*) Petitioner dismisses this report as
2 having served no purpose at trial because it did not address the critical element of
3 specific intent. However, the report shows that there were no facts supporting a
4 connection between the use of Lexapro at or around the time of the offenses, and
5 petitioner's conduct such that would put counsel, or Dr. Murphy, on notice to investigate
6 the matter further. Particularly given that petitioner insisted on maintaining his
7 innocence, reported that Lexapro had been helpful, and appeared to Dr. Murphy to be in
8 overall good mental and emotional health.

9 Thus, the experts' indictments of Ms. Freeze for failing to see the connection
10 between Lexapro and petitioner's behavior are baseless. Indeed, the facts available to
11 Ms. Freeze at the time indicated the opposite conclusion was prudent.

12 In her declaration, Ms. Freeze explains that petitioner insisted on presenting the
13 defense that he was innocent, he was not the person who made the calls. (Exhibit B.)
14 Of particular note, paragraph 11 of her declaration reads:

15 Based on my almost daily conversations with Mr. Bathen, in person
16 meetings with him, interviews with his family members, and Dr. Murphy's
17 report, I did not explore the defense of medication playing a role in the
18 case. However, I did ask Mr. Bathen if that could be a possibility, and he
19 always responded that he wished to deny the allegations in their entirety in
20 that he never made the phone calls, and if he did, the issue went to the
21 "immediacy" aspect, as he was physically located on the other side of the
22 county during the time of the alleged calls. Finally, I don't believe he
23 indicated that he was taking Lexapro in June and July 2017.

24 Petitioner claims that there is a dispute about whether or not he denied being the
25 person on the recordings in his consultations with Ms. Freeze. He claims he admitted in
26 his first discussion with Ms. Freeze that he was the caller (Exhibit A, para. 20.)
27 However, petitioner's claim is completely undermined by Dr. Murphy's report, which is
28 consistent with and corroborates Ms. Freeze's account of petitioner's denial.

29 In his written report prepared pre-trial, Dr. Murphy quoted petitioner as making
30 the following statements: "[C.J.] alleges I am a threat to her, that I threatened her life in
31 June and July 2017. She says there were three voicemails that were left on her
32 machine. The court issued subpoenas for the phone number used. [C.J.] claims it is me.

1 There is no factual basis for that claim. I deny that I made those voicemail messages.”
2 (Exhibit G., p. 6.) Petitioner continued: “[W]e had a phone consultation till 2009, and the
3 relationship ended by e-mail about April 2009. I have had no contact with her since then
4 and I didn’t leave those threatening messages.” (*Id.*) Petitioner was unequivocal in
5 maintaining his innocence before Dr. Murphy. This report supports Ms. Freeze’s
6 statement in her declaration that petitioner insisted on presenting a defense that he was
7 innocent. Incidentally, the fact that the defense of “I didn’t do it, but if I did, there was no
8 immediacy element” was, as Dr. Gates opined, internally inconsistent, weak, and
9 illogical, is consistent with Ms. Freeze’s explanation that it was petitioner’s idea, and not
10 that of a licensed, seasoned defense attorney.

11 Further, petitioner cites no authority for the proposition that counsel should have
12 insisted, over petitioner’s objection, on a defense which admitted guilt, but focused on
13 mental state. In fact, the law requires that counsel defer to her client on this point. If a
14 defendant insists on maintaining his innocence, counsel is duty bound to present a
15 defense consistent with that precondition:

16 The choice is not all or nothing: To gain assistance, a defendant
17 need not surrender control entirely to counsel. For the Sixth Amendment,
18 in “grant[ing] to the accused personally the right to make his defense,”
19 “speaks of the ‘assistance’ of counsel, and an assistant, however expert,
20 is still an assistant.” *Faretta*, 422 U.S., at 819–820, 95 S.Ct. 2525; see
21 *Gannett Co. v. DePasquale*, 443 U.S. 368, 382, n. 10, 99 S.Ct. 2898, 61
22 L.Ed.2d 608 (1979) (the Sixth Amendment “contemplat[es] a norm in
23 which the accused, and not a lawyer, is master of his own defense”). Trial
24 management is the lawyer’s province: Counsel provides his or her
25 assistance by making decisions such as “what arguments to pursue, what
26 evidentiary objections to raise, and what agreements to conclude
27 regarding the admission of evidence.” *Gonzalez v. United States*, 553 U.S.
28 242, 248, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008) (internal quotation
marks and citations omitted). Some decisions, however, are reserved for
the client—notably, whether to plead guilty, waive the right to a jury trial,
testify in one’s own behalf, and forgo an appeal. See *Jones v. Barnes*, 463
U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Autonomy to decide that the objective of the defense is to assert
innocence belongs in this latter category. Just as a defendant may
steadfastly refuse to plead guilty in the face of overwhelming evidence
against her, or reject the assistance of legal counsel despite the
defendant’s own inexperience and lack of professional qualifications, so

1 may she insist on maintaining her innocence at the guilt phase of a capital
2 trial. These are not strategic choices about how best to achieve a client's
3 objectives; they are choices about what the client's objectives in fact are.
4 See *Weaver v. Massachusetts*, 582 U.S. —, —, 137 S.Ct. 1899,
5 1908, 198 L.Ed.2d 420 (2017) (self-representation will often increase the
6 likelihood of an unfavorable outcome but "is based on the fundamental
7 legal principle that a defendant must be allowed to make his own choices
8 about the proper way to protect his own liberty"); *Martinez v. Court of
9 Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165, 120 S.Ct. 684,
10 145 L.Ed.2d 597 (2000) (Scalia, J., concurring in judgment) ("Our system
11 of laws generally presumes that the criminal defendant, after being fully
12 informed, knows his own best interests and does not need them dictated
13 by the State.").

9 (*McCoy v. Louisiana* (2018) 138 S.Ct. 1500, 1508.) Here, counsel's declaration,
10 under penalty of perjury, indicates that petitioner wanted to maintain his innocence in
11 court. Her declaration is supported by statements petitioner made to Dr. Murphy. The
12 decision to maintain innocence was petitioner's choice to make and counsel could not
13 argue a theory, such as voluntary intoxication, that was inconsistent with innocence. To
14 do so would have been ineffective assistance of counsel.

15 In sum, though petitioner claims counsel failed to investigate the defense of
16 voluntary intoxication based on adverse side effects from petitioner's use of Lexapro,
17 the documentation provided in support of the petition shows that counsel did investigate
18 and her investigation, together with petitioner's insistence on proclaiming innocence,
19 provided no basis for that particular defense. Accordingly, counsel was not deficient in
20 failing to present the defense of voluntary intoxication.

21 However, even assuming Ms. Freeze had been deficient in not probing the
22 matter of petitioner's mental health further, petitioner has not shown that he suffered
23 any prejudice as a result. Petitioner insists that a defense based on voluntary
24 intoxication was the only legitimate defense. However, he does not establish that there
25 is a reasonable probability that, but for counsel's unprofessional errors, the result of the
26 proceeding would have been different.

27 A defendant is entitled to such an instruction only when there is
28 substantial evidence of the defendant's voluntary intoxication and the
intoxication affected the defendant's "actual formation of specific intent."
(*People v. Horton* (1995) 11 Cal.4th 1068, 1119, 47 Cal.Rptr.2d 516, 906

1 P.2d 478; see also *People v. Saille* (1991) 54 Cal.3d 1103, 1117, 2
2 Cal.Rptr.2d 364, 820 P.2d 588 [explaining that a defendant charged with
3 murder is free to show that "because of his mental illness or voluntary
4 intoxication, he did not in fact form the intent unlawfully to kill" (original
5 italics)].) Here, defendant sought the instruction based solely on witness
6 DeLisa Brown's testimony that defendant was "probably spaced out" on
7 the morning of the killings. He now seeks to bolster that argument by
8 pointing to comments he had made in the recorded interview with police
9 that around the time of the killings he was "doped up" and "smokin' pretty
10 tough then." Even if we consider all three of these statements, there was
11 no error. Assuming this scant evidence of defendant's voluntary
12 intoxication would qualify as "substantial," there was no evidence at all
13 that voluntary intoxication had any effect on defendant's ability to
14 formulate intent.

15 (*People v. Williams* (1997) 16 Cal.4th 635, 677–678.)

16
17 Petitioner fails to provide any specific facts, details, or legal authority to support
18 the contention that he would have been entitled to a voluntary intoxication defense
19 instruction based on the circumstances of his offense. Specifically, there is no basis to
20 conclude that the voluntary intoxication he claims he could have been experiencing at
21 the time he made the threats, prevented him from forming the specific intent necessary
22 to commit the offense. Petitioner does not explain how voluntary intoxication and
23 antidepressant induced violent outbursts intersected to mitigate the specific intent
24 element of making a criminal threat. He does not even attempt to explain how the fact
25 Lexapro could cause violent outburst negates his mental state. He does not explain how
26 the Lexapro rendered petitioner unable to appreciate that his conduct was violent or
27 unable to control himself in those moments. There is no indication the violent outburst
28 coincided with a loss of consciousness. There are no facts, evidence, documentation, or
legal authority provided to show that such was the case. Petitioner admits in his
declaration (Exhibit A, para 24), that he stopped taking antidepressants over one year
ago and has had no outbursts since stopping the medication. However, the declaration
is not dated. More important, he does not point to any other examples of violent
outbursts that occurred while he was on the medication, no specific facts regarding a
pattern of violence toward any other persons. Additionally, the facts deduced at trial

1 were that petitioner was angry with C.J. for terminating their doctor-patient relationship;
2 in other words, petitioner had a motive for his conduct.

3 Accordingly, there is no basis to conclude that: 1) the trial court would have
4 permitted the defense of voluntary intoxication and instructed the jury accordingly; and,
5 2) the defense would have had any chance of success with the jury such that petitioner
6 missed the opportunity for a meaningful defense that might have resulted in a more
7 favorable outcome. Petitioner simply concludes, without any meaningful examination of
8 the relevant law as applicable to his facts, that he could have presented this defense
9 instead. This is not sufficient to establish prejudice.

10 Pursuant to the foregoing, the petition is denied.

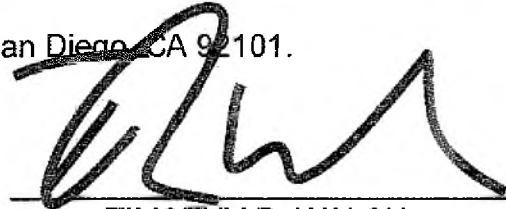
11 The request for judicial notice pf the appellate record from petitioner's appeal is
12 also denied. Petitioner does not specify which records are at issue and has not provide
13 this court with copies of those records as required. (Evid., Code, § 453.) The court does
14 not have the copy of the appellate record that was prepared for the appeal; only the
15 exhibits were returned to the county clerk. There were no other records returned from
16 the court of appeal to this court.

17 A copy of this Order shall be served upon: 1) petitioner, Benjamin Bathen 1741
18 Santa Cruz Avenue, Santa Clara, CA 95051; 2) petitioner's counsel, Patrick Morgan
19 Ford, 1901 First Avenue, Suite 400, San Diego, CA 92101; and, 3) the Office of the San
20 Diego District Attorney, 330 West Broadway, San Diego, CA 92101.

21 IT IS SO ORDERED.

22 DATE:

5/6/2020



TIMOTHY R. WALSH
JUDGE OF THE SUPERIOR COURT

<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO</p> <p><input type="checkbox"/> CENTRAL DIVISION, CENTRAL COURTHOUSE, 1100 UNION ST., SAN DIEGO, CA 92101</p> <p><input type="checkbox"/> CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101</p> <p><input type="checkbox"/> CENTRAL DIVISION, HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101</p> <p><input type="checkbox"/> CENTRAL DIVISION, FAMILY COURT, 1555 6TH AVE., SAN DIEGO, CA 92101</p> <p><input type="checkbox"/> CENTRAL DIVISION, MADGE BRADLEY, 1409 4TH AVE., SAN DIEGO, CA 92101</p> <p><input type="checkbox"/> CENTRAL DIVISION, KEARNY MESA, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123</p> <p><input type="checkbox"/> CENTRAL DIVISION, JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123</p> <p><input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020</p> <p><input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081</p> <p><input type="checkbox"/> NORTH COUNTY DIVISION, JUVENILE COURT, 325 S. MELROSE DR., VISTA, CA 92081</p> <p><input checked="" type="checkbox"/> SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910</p>	<p><small>FOR COURT USE ONLY</small></p> <p>FILED</p> <p>San Diego Superior Court</p> <p>MAY 06 2020</p> <p>Clerk of the Superior Court By: <u>M. Gallardo</u></p>
<p>PLAINTIFF(S)/PETITIONER(S) in the matter of the application of BENJAMIN L. BATHEN for petition for writ of Habeas Corpus</p>	
<p>DEFENDANT(S)/RESPONDENT(S)</p>	<p>JUDGE: <u>TIMOTHY R. WALSH</u></p> <p>DEPT:</p>
<p>CLERK'S CERTIFICATE OF SERVICE BY MAIL</p>	<p>CASE NUMBER HSC 11777</p>

I certify that I am not a party to the above-entitled cause, that I placed a copy of the following document(s):
ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

in a sealed envelope addressed to the parties shown with postage prepaid, and deposited it in the United States mail at
 Chula Vista El Cajon San Diego Vista, California.

NAME & ADDRESS

PATRICK MORGAN FORD
Attorney at Law
1901 First Avenue Suite 400
San Diego CA 92101

NAME & ADDRESS

Office of the District Attorney
330 West Broadway
San Diego CA 92101

Benjamin Bathen
1741 Santa Cruz Ave
Santa Clara CA 95051

Clerk of the Superior Court

by *M. Gallardo*, Deputy
M. Gallardo

Date: May 6, 2020

Exhibit L —
Petitioner's Prescription for
Lexapro in 2016

Telephone: (703) 764-2111

DEA #BB 3538141

EDWARD BARBANO, M.D.

8996 Burke Lake Rd., Suite 102

Burke, VA 22015

Name Ben Bather

Date 11/15/16

Address _____

R Lexapro, 10 mg
~~thirty~~ xxx
S: - T po q day

Label

Refill - 0 - 1 - 2 - 3 - 4 - PRN (5)

Dispense as Written

Voluntary Formulary Permitted

Barbano (M.D.)

Signature of Prescriber

if neither box is marked, a voluntary formulary product must be dispensed.

Telephone: (703) 764-2111

DEA #BB 3538141

EDWARD BARBANO, M.D.

8996 Burke Lake Rd., Suite 102

Burke, VA 22015

Name Benjamin Bather

Date 11/15/16

Address _____

R maxzide-25
~~90~~
S: - T po q day

Label

Refill - 0 - 1 - 2 - 3 - 4 - PRN (5)

Dispense as Written

Voluntary Formulary Permitted

Barbano (M.D.)

Signature of Prescriber

if neither box is marked, a voluntary formulary product must be dispensed.

Exhibit M —
Court of Appeal's Denial Order

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal
Fourth Appellate District
FILED ELECTRONICALLY
07/13/2020
Kevin J. Lane, Clerk
By: Michael Hubbard

In re BENJAMIN LEE BATHAN

D077657

on

(San Diego County

Habeas Corpus.

Super. Ct. No. SCS294342)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Justices Benke, Huffman, and Aaron. Judicial notice is taken of the record and opinion filed in appeal No. D074538.

On three days in June and July of 2017, Benjamin Lee Bathen telephoned the psychotherapist who treated him in California for several years before he moved to the east coast in 2008 and left messages on her voicemail stating in obscene language that he was going to rape and kill her and her daughter. At trial Bathen took the position that the People had not proven he was the caller who left the threatening messages, and he presented an expert witness who challenged the accuracy of the prosecution evidence that cell tower tracking records showed the threatening calls had been made from locations nears Bathen's home and place of business. Bathen alternatively argued that even if he had placed the calls, his former psychotherapist could not reasonably have feared imminent harm because he was on the east coast when the threats were made. The jury found Bathen guilty of three counts of making criminal threats, and on June 19, 2018, the superior court sentenced him to concurrent prison terms of two years on each count.

On appeal, Bathen claimed the evidence was insufficient to establish the immediate prospect of execution and reasonable fear elements of the offense of making a criminal threat, the superior court erroneously failed to instruct the jury on the lesser included offense of attempted criminal threat, and the court erred by denying probation and sentencing him to prison. This court rejected those claims of error and affirmed the judgment. (*People v. Bathen* (Oct. 4, 2019, D074538) [nonpub. opn.])

Approximately six months later, Bathen collaterally attacked the judgment in the superior court by filing a petition for writ of habeas corpus. He claimed his trial counsel

had provided ineffective assistance by failing to investigate and present a defense that an antidepressant medication he was taking, Lexapro, caused him to threaten his former psychotherapist. The superior court summarily denied the petition.

By the present petition, Bathen continues his collateral attack on the judgment. He contends that although “a mental defense of some kind was obvious” and it was “well-known in the criminal defense community that the ingestion of certain antidepressants . . . could cause violent outbursts,” his counsel “made no attempt to investigate a defense based on Lexapro.” Had counsel investigated and presented such a defense, Bathen argues, it is reasonably probable the jury would have found he lacked the specific intent to make criminal threats and acquitted him. Bathen also complains the superior court erroneously denied his habeas corpus petition based on a misunderstanding of the law regarding his pleading burden. Attached to the petition are declarations from Bathen, his trial counsel, legal and medical experts, and “potential witnesses”; a letter from a forensic medical examiner regarding Bathen’s decreased rate of metabolism of antidepressants; printouts from websites with information about adverse effects of Lexapro and other antidepressants; a pretrial psychological evaluation of Bathen; telephone records showing calls between Bathen and his trial counsel; the opinion on Bathen’s appeal; the superior court’s order denying his petition for writ of habeas corpus; and prescriptions for a 30-day supply of Lexapro and a 90-day supply of a diuretic dated November 15, 2016. Bathen asks this court to issue an order to show cause, hold an evidentiary hearing, and set aside the judgment of conviction.

We do not consider Bathen’s complaints against the superior court’s order denying habeas corpus relief. The order is not appealable. (Pen. Code, § 1506; *In re Hochberg* (1970) 2 Cal.3d 870, 876.) The proper procedure when a superior court denies a petition for writ of habeas corpus in a noncapital case is for the petitioner to file a new petition in the Court of Appeal. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7.) We therefore consider only the claim of ineffective assistance of counsel Bathen asserts in the petition he filed in this court.

Bathen’s petition is procedurally barred as untimely. “A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner” by filing a petition for writ of habeas corpus “without *substantial delay*.” (*In re Reno* (2012) 55 Cal.4th 428, 459, 460.) “Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. A petitioner must allege, *with specificity*, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time.” (*In re Robbins* (1998) 18 Cal.4th 770, 780.) Bathen does not specifically allege when he first became aware of the “medication-based defense” he faults trial counsel for not investigating and presenting at trial. According to his declaration, Bathen is “a college-educated computer programmer”; “[w]hile incarcerated, using the

very basic prison law library, [he] found a reference to [certain antidepressants] causing ‘problems with rages’ ” and stopped taking Lexapro; “[a]fter [his] release, [he] continued researching and learned how prevalent the issue was”; and when he had enough money, he hired current counsel. He then filed a petition for writ of habeas corpus in the superior court on April 1, 2020. By Bathen’s account, it thus appears approximately 21 months elapsed between the time he alleges he first became aware of the “medication-based defense” and the time he sought habeas corpus relief. Such delay is substantial. (E.g., *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1 [18 months]; *People v. Miller* (1992) 6 Cal.App.4th 873, 882-883 [2 years].) Although “any significant delay in seeking collateral relief . . . must be fully justified” (*People v. Jackson* (1973) 10 Cal.3d 265, 268; accord, *In re Sodersten* (2007) 146 Cal.App.4th 1163, 1221), Bathen does not even address the issue of delay in his petition. Moreover, his attached declaration suggests he knew, or at least should have known, about the potential “medication-based defense” before he retained trial counsel. Bathen alleges that in January 2017 he began experiencing a movement disorder, “memory issues,” “periods of disorientation,” and other adverse effects of Lexapro; those adverse effects increased in severity over the following six months; and on the days he left the threatening messages on his former psychotherapist’s voicemail, he experienced “disorientation, profuse sweating and violent verbal outbursts.” Bathen, who says he is a “college-educated computer programmer,” did not share this information with trial counsel, however, and waited nearly two years after he was sentenced to prison to present it in a petition for writ of habeas corpus. He has not provided “an adequate explanation for [this] delay,” which “is a prerequisite to our consideration of a collateral attack on the judgment.” (*Miller*, at p. 882; see *In re Swain* (1949) 34 Cal.2d 300, 304 [habeas corpus petitioner “must fully disclose his reasons for delaying in the presentation of [the petition]”].)

The petition, even if timely, fails to state a prima facie case for habeas corpus relief. A prisoner challenging a presumptively valid final judgment of conviction “bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them.” (*People v. Duvall* (1995) 9 Cal.4th 464, 474; accord, *In re Figueroa* (2018) 4 Cal.5th 576, 587.) To satisfy the initial pleading burden, “[t]he petition should both (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits of declarations.” (*Ibid.*) Where, as here, the petitioner claims trial counsel was ineffective for failing to discover and present evidence at trial, the petitioner must allege specific facts and submit documents showing that counsel knew or should have known further investigation was needed, and that there is a reasonable probability that, had the investigation been done and the evidence presented, the outcome of the trial would have been better for the petitioner. (*In re Cox* (2003) 30 Cal.4th 974, 1016; *People v. Williams* (1988) 44 Cal.3d 883, 937.) Bathen has not made this required showing in his petition.

The record Bathen has provided does not show counsel knew or should have known an investigation of a “medication-based defense” was needed. In his declaration, Bathen states he told trial counsel he “was on the medication on the dates of the incidents,” but he “had no explanation as to why the incidents occurred.” Bathen states counsel asked him if he “had taken any illegal or recreational drugs,” and he “responded no.” He did not tell counsel about the increasingly severe adverse side effects from Lexapro he now says he had been experiencing for six months before he left the threatening messages on his former psychotherapist’s voicemail. Instead, he repeatedly told counsel “he wished to deny the allegations in their entirety in that he never made the phone calls, and if he did, the issue went to the ‘immediacy’ aspect, as he was physically located on the other side of the country during the time of the alleged calls.” Counsel nevertheless referred Bathen to a psychologist for an evaluation. In his report, the psychologist wrote that Bathen stated, “‘I am medicated with Lexapro by my general practitioner for depression. I think it helps.’” Bathen told the psychologist he had no thoughts of suicide or homicide, had never been hospitalized for a psychiatric condition, and had taken antidepressants that were not effective but “Lexapro has been helpful.” Bathen also told the psychologist there was “no factual basis” for the criminal charges and “den[ie]d that [he] made those voicemail messages.” The psychologist diagnosed Bathen with “[m]ild depression related to current legal circumstances,” but made no mention of adverse side effects from Lexapro. Based on what little Bathen told trial counsel about his experience with Lexapro, the psychologist’s report that Bathen found the drug was “helpful” and had not experienced homicidal thoughts (such as those expressed in the messages left on his former psychotherapist’s voicemail) while taking it, and Bathen’s repeated denials of having made the threats, counsel’s failure to pursue a defense attributing Bathen’s criminal conduct to Lexapro was not “inexcusabl[e]” and thus does not constitute ineffective assistance. (*People v. Williams, supra*, 44 Cal.3d at p. 936; see *People v. Pinsky* (1979) 95 Cal.App.3d 194, 200 [“Whether the attorney’s conduct falls within the range of a reasonably competent attorney is in this case a question of law for this court to decide.”].)

The record also does not establish a reasonable probability of a better outcome for Bathen had trial counsel investigated and presented a “medication-based defense.” “In a habeas corpus petition alleging incompetent investigation or presentation of evidence by trial counsel, a petitioner . . . must generally produce that evidence . . . [to] show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different.” (*In re Fields* (1990) 51 Cal.3d 1063, 1071; accord, *In re Hardy* (2007) 41 Cal.4th 977, 1025.) The legal defense Bathen faults counsel for failing to investigate and present is involuntary intoxication, a form of unconsciousness that relieves a defendant of liability for criminal conduct. (Pen. Code, § 26, subd. Four; *People v. Velez* (1985) 175 Cal.App.3d 785, 793.) “Involuntary intoxication can be caused by the voluntary ingestion of prescription medication *if the person did not know or have reason to anticipate the drug’s intoxicating effects.*” (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1313, italics added.) Based on documents Bathen attached to his

petition, an involuntary intoxication defense would not have been available to him. In his own declaration Bathen states that in January 2017 he began experiencing adverse effects of Lexapro, including “memory issues,” “periods of disorientation,” and “mania,” which worsened over the next six months. He also states a “warning stapled to the outside of the bag the medication comes in” advised him to call his healthcare provider if he had symptoms such as “acting aggressive or violent” or “agitation, hallucinations, coma or other changes in mental status.” Bathen admits his supervisors “reprimanded” him in January 2017 for “compulsively pacing back and forth at work.” Other declarations attached to the petition also undermine an involuntary intoxication defense. The declarants (whom Bathen calls “potential witnesses”) state that: (1) Bathen engaged in “strange and sudden aggressive behavior” and had an “abrupt change in mood” when he started taking antidepressants in 2004; (2) he had “uncharacteristic behavioral changes” and was “very agitated and uneasy, at times, and unable to sleep well” when he was taking antidepressants in 2006; (3) his “personality changed” and he engaged in “erratic behavior” in the beginning of 2017, when he started taking “new medication”; and (4) he “g[o]t up from his desk, nearly every five minutes at times” and had abnormal facial movements at work in January and February 2017, and told his supervisor a recent change in medications “may be causing some of the abnormal behavior.” Bathen’s evidence thus shows he knew or had reason to know of the adverse effects of Lexapro and other antidepressants on his behavior and mental status before he made the criminal threats against his former psychotherapist. Since the defense of involuntary intoxication therefore was unavailable (*Mathson*, at p. 1327; *Velez*, at p. 797), Bathen suffered no prejudice from his trial counsel’s failure to pursue it (*In re Fields, supra*, at p. 1070).

The petition is denied.

BENKE, Acting P. J.

Copies to: All parties

Exhibit N —

Declaration of Dr. David Antonuccio

In the California Supreme Court

BENJAMIN LEE BATHEN,
Petitioner on Habeas Corpus

Case No. SCS 294342
Related Court of Appeal No. D074538

Declaration of Dr. David Antonuccio

1. I was first contacted by Benjamin Bathen by email on October 16, 2019. He was referred by psychiatrist Dr. David Healy for a possible independent mental health evaluation.
2. Mr. Bathen applied for a parole travel pass and came to Reno for an independent mental health evaluation with me on December 6, 2019.
3. I issued a report of my evaluation on December 16, 2019.
4. The conclusions of this evaluation were, among other findings, that "the prescribed medication was a contributing factor to his agitation and a mitigating factor in the associated acts. This is information that was unavailable to the patient, the court, and the jury at the time of his trial."
5. While the patient's prescribed medication carries written warnings about the risk of agitation and potential violent behavior, patients and prescribers almost always erroneously assume it is something about the patient or his condition, and not the medication, that is responsible for the aberrant behavior. It looks like that is what happened in this case. On top of that, patients are rarely warned directly about such a risk. It is virtually impossible for most patients to understand contemporaneously that what is happening to them is actually caused by their medication. It is also uncommon for prescribing doctors to recognize when agitation is caused by the medication, in part because of strongly held beliefs that the medication will help and not harm the patient (Antonuccio & Healy, 2012)..
6. To my knowledge, my evaluation was the first time Mr. Bathen had the question of agitation caused by his medication addressed in a formal assessment. I believe it was also the first time he received feedback from a professional evaluation about this likelihood.

Antonuccio, D.O., & Healy, D. (2012). Relabeling the medications we call antidepressants. *Scientifica*, Volume 2012, Article ID 965908, DOI 10.6064/2012/965908

I declare under penalty of perjury that the forgoing is true and correct. Executed on August 9, 2020.

A handwritten signature in black ink that reads "David Antonuccio, Ph.D." The signature is written in a cursive style with a large, prominent 'D' at the beginning.

David Antonuccio, Ph.D.
Professor Emeritus of Psychiatry and Behavioral Sciences
University of Nevada, Reno, School of Medicine
5190 Neil Road, Suite 215
Reno, NV 89502
775-830-2062
fax 775-827-6233
email: dantonuccio@med.unr.edu

Exhibit O —

Declaration of Attorney Pat Ford

DECLARATION OF PATRICK MORGAN FORD

I, Patrick Morgan Ford, declare:

1. I am an attorney licensed to practice in the California Courts
2. I represented Ben Bathen in habeas corpus proceedings in the San Diego Superior Court, and the Court of Appeal, Fourth District, Division One. Both cases presented the issue now before this court.
3. I was contacted by petitioner about the possibility of a habeas petition on March 30th, 2019. We discussed the case and I quoted Mr. Bathen a fee.
4. On September 25, 2019, he told me that he had been working a new job and was saving money to hire me.
5. On November 21st, 2019, he had the money to proceed, we talked further about the case.
6. He retained me on December 17th, 2019.
7. After doing some preliminary research on the case, and the medication issue, and speaking with potential experts, I contacted petitioner's trial counsel (Alicia Freeze) by email and asked her whether she knew petitioner had been taking Lexapro and whether she investigated a defense focusing on the connection between antidepressants and violent behavior. I then asked her for a declaration describing her thought process, choices or investigative efforts.
8. Freeze responded immediately, and we traded 16 emails (10 from me and six from her).
9. She eventually provided a declaration on March 2nd, 2020.
10. In my experience, this was not an exceptional delay as trial lawyers often need to process the impact of such a claim before agreeing to participate.
11. I filed the habeas corpus petition in superior court on April 1st, 2020, about one month after receiving counsel's declaration.

12. While I have an active appeals practice, there were no work-related delays on my part here.

I swear under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed at San Diego, California.

Dated: 8/20/20

Respectfully submitted,



Patrick Morgan Ford,
Attorney for Petitioner
Benjamin Bathen

Exhibit P —

Declaration of Dr. David Healy



Department of Family Medicine
Research

David Braley Health
Sciences Centre
100 Main Street West,
5th Floor
Hamilton, ON
Canada, L8P 1H6

Phone 905.525.9140 ext. 28509
Fax 905.527.4440
www.fammedmcmaster.ca/research

In the California Supreme Court

BENJAMIN LEE BATHEN,

Petitioner on Habeas Corpus

Case No. SCS 294342

Related Court of Appeal No. D074538

Declaration of Dr. David Healy

1. I am professor of psychiatry in the Department of Family Medicine at McMaster University in Canada, as well as a psychopharmacologist.
2. I have been an expert witness in nine cases involving antidepressants and suicide or violence. I have presented views that the antidepressant was unlikely to be involved in approximately 100 other cases. I have been a consultant or speaker for most of the major pharmaceutical companies. The litigation I've consulted on includes cases involving the manufacturer of Celexa and Lexapro, Forrest Laboratories.
3. Given the frequency with which these Medico-Legal issues end up in the court system, a competent attorney presented with a case involving mental health law in which the patient was treated with SSRI medication should investigate whether or not the medication played a causal role or contributing factor to the incidents as a potential avenue of defense. Relevant defenses include involuntary intoxication and Automatism/Unconsciousness.
4. My testimony and the several of the cases I've consulted on are available along with the court documents in legal software such as Castext and Westlaw and are easily discoverable.
5. Benjamin Bathen first contacted me on July 17, 2019 via email. He inquired if "Lexapro (Escitalopram) could cause a patient to become agitated and say things verbally that they usually would not say?"
6. After receiving several emails from Mr. Bathen I referred him to Dr. David Antonuccio via email on October 16, 2019 as he was then better positioned to perform an in-person evaluation of Mr. Bathen and review his medical records in detail.

7. A central problem with both antidepressant associated akathisia and psychosis in cases like this is that the takers of medications are unable to recognize the fact that the state they are in is drug-induced and that the imperative need is to discontinue treatment. In many cases, perceptions of difficulties may have been confounded by professional medical advice that the drug cannot be the source of any problem.
8. Pharmaceutical companies aggregate reports of homicide, homicidal acts, and homicidal ideation as well as physical assault, aggressive events and "conduct disorders" under the MedDRA coding terms of aggression or hostility in regulatory warnings.
9. Antidepressants can cause homicide, aggression, and suicide, even when given to healthy volunteers by triggering akathisia, emotional disinhibition, emotional blunting, and manic or psychotic reactions to treatment and lead directly to violence by this means producing in many instances an effective automatism.
10. The symptoms in Mr. Jacob Marsh's affidavit of compulsive pacing, facial grimacing and erratic behavior are consistent with Akathisia and tardive dyskinesia. Both are side effects of SSRI medication that have been associated with medically induced violence.
11. Several cases of homicide I and colleagues testified in or reviewed in an peer reviewed article published in PLoS Medicine Problems at the Interface of Medicine and Law involved treatment-induced akathisia or psychosis and resulted in either a not guilty verdict or a reduced or suspended sentence.
12. The new issues highlighted by cases like these need urgent examination jointly by jurists and psychiatrists in all countries where antidepressants are widely used. The issue of medication induced violence is a statewide issue affecting the residents of California in general and is deserving of consideration in this case.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on August 19th, 2020

A handwritten signature in black ink that reads "David Healy". The signature is written in a cursive, flowing style with a large initial 'D'.

Professor David Healy, MD FRCPsych