

**COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

0001

THE PEOPLE,

Plaintiff and Respondent

vs.

BENJAMIN BATHEN

Defendant(s) and Appellant(s)

FROM COUNTY OF SAN DIEGO

HON. STEPHANIE SONTAG

JUDGE

Court of Appeal Case Number D074538
Superior Court Case Number SCS294342

CLERK'S TRANSCRIPT

Volume 1 of 1
Pages 1 to 270

XAVIER BECERRA, ATTORNEY GENERAL
STATE OF CALIFORNIA
DEPUTY
ONE AMERICA PLAZA
600 W. BROADWAY, SUITE 1800
SAN DIEGO, CA 92101

Attorney for Plaintiff and
RESPONDENT

Attorney for Defendant and
APPELLANT

TO DCA:
TO ATTORNEY GENERAL:
TO ATTORNEY:

SUPERIOR COURT - STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

THE PEOPLE,

Plaintiff

vs.

CASE NUMBER

SCS294342

BENJAMIN BATHEN

Defendant

MASTER CHRONOLOGICAL INDEX

<u>INDEX ENTRY</u>	<u>VOL.</u>	<u>PAGE</u>
COMPLAINT - FELONY	1	9
AMENDED COMPLAINT - FELONY	1	12
AMENDED INFORMATION	1	15
PROBATION OFFICER'S REPORT	1	18
EXHIBIT LIST	1	48
COURT'S EXHIBIT 1A	1	50
COURT'S EXHIBIT 2A	1	52
COURT'S EXHIBIT 3A	1	54
COURT'S EXHIBIT 4A	1	56
COURT'S EXHIBIT 5A	1	60
COURT'S EXHIBIT 7A	1	64
COURT'S EXHIBIT 38A	1	71
JURY INSTRUCTIONS - GIVEN	1	82
JURY INSTRUCTIONS - WITHDRAWN	1	118
JURY INSTRUCTIONS - REFUSED	1	128
DECLARATION IN SUPPORT OF ARREST WARRANT	1	128
CRIMINAL PROTECTIVE ORDER	1	131
TRIAL BRIEF; MOTIONS IN LIMINE	1	133
NOTICE OF MOTION AND MOTIONS IN LIMINE	1	146
PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE CELL TOWER EVIDENCE	1	172
PEOPLE'S SUPPLEMENTAL MOTION TO EXCLUDE DEFENSE PSYCHIATRIC EVIDENCE	1	176
SENTENCING BRIEF	1	184

VOL. 0003 PAGE

MASTER CHRONOLOGICAL INDEX

0004

<u>INDEX ENTRY</u>	<u>VOL.</u>	<u>PAGE</u>
NOTICE OF APPEAL	1	201
STATEMENT IN MITIGATION	1	202
JURY NOTE NUMBER 1	1	222
COURT'S RESPONSE TO JURY NOTE NUMBER 1	1	223
JURY NOTE NUMBER 2	1	224
COURT'S RESPONSE TO JURY NOTE NUMBER 2	1	225
JURY NOTE NUMBER 3	1	226
NOTICE OF TERMINATION OF PROTECTIVE ORDER	1	227
PROTECTIVE ORDER	1	228
FELONY ABSTRACT OF JUDGMENT	1	230
COURT MINUTES 8-24-17	1	232
COURT MINUTES 9-15-17	1	234
COURT MINUTES 9-25-17	1	236
COURT MINUTES 11-3-17	1	238
COURT MINUTES 12-4-17	1	240
COURT MINUTES 1-12-18	1	243
COURT MINUTES 2-26-18	1	244
COURT MINUTES 3-26-18	1	245
COURT MINUTES 6-6-18	1	246
COURT MINUTES 6-11-18	1	247
COURT MINUTES 6-12-18	1	250
COURT MINUTES 6-14-18	1	252
COURT MINUTES 6-15-18	1	256

MASTER CHRONOLOGICAL INDEX

0005

<u>INDEX ENTRY</u>	<u>VOL.</u>	<u>PAGE</u>
COURT MINUTES 6-18-18	1	259
COURT MINUTES 6-19-18	1	261
COURT MINUTES 7-19-18	1	268
CLERK'S CERTIFICATE	1	270

MASTER ALPHABETIC INDEX

<u>INDEX ENTRY</u>	<u>VOL.</u>	<u>PAGE</u>
AMENDED COMPLAINT - FELONY	1	12
AMENDED INFORMATION	1	15
CLERK'S CERTIFICATE	1	270
COMPLAINT - FELONY	1	9
COURT MINUTES 1-12-18	1	243
COURT MINUTES 11-3-17	1	238
COURT MINUTES 12-4-17	1	240
COURT MINUTES 2-26-18	1	244
COURT MINUTES 3-26-18	1	245
COURT MINUTES 6-11-18	1	247
COURT MINUTES 6-12-18	1	250
COURT MINUTES 6-14-18	1	252
COURT MINUTES 6-15-18	1	256
COURT MINUTES 6-18-18	1	259
COURT MINUTES 6-19-18	1	261
COURT MINUTES 6-6-18	1	246
COURT MINUTES 7-19-18	1	268
COURT MINUTES 8-24-17	1	232
COURT MINUTES 9-15-17	1	234
COURT MINUTES 9-25-17	1	236
COURT'S EXHIBIT 1A	1	50
COURT'S EXHIBIT 2A	1	52
COURT'S EXHIBIT 38A	1	71

MASTER ALPHABETIC INDEX

0007
PAGE

<u>INDEX ENTRY</u>	<u>VOL.</u>	<u>PAGE</u>
COURT'S EXHIBIT 3A	1	54
COURT'S EXHIBIT 4A	1	56
COURT'S EXHIBIT 5A	1	60
COURT'S EXHIBIT 7A	1	64
COURT'S RESPONSE TO JURY NOTE NUMBER 1	1	223
COURT'S RESPONSE TO JURY NOTE NUMBER 2	1	225
CRIMINAL PROTECTIVE ORDER	1	131
DECLARATION IN SUPPORT OF ARREST WARRANT	1	128
EXHIBIT LIST	1	48
FELONY ABSTRACT OF JUDGMENT	1	230
JURY INSTRUCTIONS - GIVEN	1	82
JURY INSTRUCTIONS - REFUSED	1	128
JURY INSTRUCTIONS - WITHDRAWN	1	118
JURY NOTE NUMBER 1	1	222
JURY NOTE NUMBER 2	1	224
JURY NOTE NUMBER 3	1	226
NOTICE OF APPEAL	1	201
NOTICE OF MOTION AND MOTIONS IN LIMINE	1	146
NOTICE OF TERMINATION OF PROTECTIVE ORDER	1	227
PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE CELL TOWER EVIDENCE	1	172
PEOPLE'S SUPPLEMENTAL MOTION TO EXCLUDE DEFENSE PSYCHIATRIC EVIDENCE	1	176
PROBATION OFFICER'S REPORT	1	18

MASTER ALPHABETIC INDEX

INDEX ENTRY

0008
VOL. PAGE

PROTECTIVE ORDER

1 228

SENTENCING BRIEF

1 184

STATEMENT IN MITIGATION

1 202

TRIAL BRIEF; MOTIONS IN LIMINE

1 133

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
SOUTH COUNTY DIVISION

2011 JUN 29 A 8:48
SOUTH COUNTY

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
BENJAMIN LEE BATHEN,
dob 11/20/77;
Defendant

CT No. CS294342
DA No. BCA405

COMPLAINT-FELONY

INFORMATION
Date: _____

PC296 DNA TEST STATUS SUMMARY

Defendant	DNA Testing Requirements
BATHEN, BENJAMIN LEE	DNA sample required upon conviction

CHARGE SUMMARY

Count	Charge	Issue Type	Sentence Range	Special Allegations	Allegation Effect
1	PC422	Felony	16-2-3/\$10,000		
	BATHEN, BENJAMIN LEE				
	PC1054.3		INFORMAL REQUEST FOR DISCOVERY		

The undersigned, certifying upon information and belief, complains that in the County of San Diego, State of California, the Defendant(s) did commit the following crime(s):

JUN 28 2011

CHARGES**COUNT 1 - MAKING A CRIMINAL THREAT**

On or about June 4, 2017, BENJAMIN LEE BATHEN did unlawfully and willfully threaten to commit a crime which would result in death and great bodily injury to Carolyn Jacobs, with the specific intent that the statement, made verbally, in writing, and by means of an electronic communication device, was to be taken as a threat (even if there was no intent of actually carrying it out), which, on its face and under the circumstances in which it was made, was 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, and thereby caused that person reasonably to be in sustained fear for his/her own safety and for his/her immediate family's safety in violation of PENAL CODE SECTION 422.

NOTICE: Any defendant named on this complaint who is on criminal probation in San Diego County is, by receiving this complaint, on notice that the evidence presented to the court at the preliminary hearing on this complaint is presented for a dual purpose: the People are seeking a holding order on the charges pursuant to Penal Code Section 872 and simultaneously, the People are seeking a revocation of the defendant's probation, on any and all such probation grants, utilizing the same evidence, at the preliminary hearing. Defenses to either or both procedures should be considered and presented as appropriate at the preliminary hearing.

NOTICE: Any defendant named on this complaint who is on Mandatory Supervision in San Diego County is, by receiving this complaint, on notice that the evidence presented to the court at the preliminary hearing on this complaint is presented for a dual purpose: the People are seeking a holding order on the charges pursuant to Penal Code Section 872 and simultaneously, the People are seeking a revocation of the defendant's Mandatory Supervision pursuant to Penal Code Sections 1170(h)(5)(B) and 1203.2, on any and all such grants, utilizing the same evidence, at the preliminary hearing. Defense to either or both procedures should be considered and presented as appropriate at the preliminary hearing.

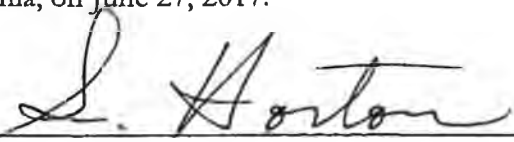
Pursuant to PENAL CODE SECTION 1054.5(b), the People are hereby informally requesting that defendant's counsel provide discovery to the People as required by PENAL CODE SECTION 1054.3.

Sheriff's records indicate that as of the booking date one or more defendants have not yet provided a DNA sample to the DOJ database. Pursuant to Penal Code Section 296(e), the court shall order collection of DNA from the defendant(s) if advised by the prosecuting attorney that a sample is required but has not been provided by the defendant. Pursuant to Penal Code sections 296/296.1, if not already required from a past conviction, any defendants who have not done so will be required to provide a sample upon conviction of this felony offense.

MANDATORY STATE PRISON INCARCERATION: An executed sentence for a felony shall be served by defendant BENJAMIN LEE BATHEN in state prison pursuant to PENAL CODE SECTIONS 1170(f) and (h)(3).

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER CS294342, CONSISTS OF 1 COUNT.

Executed at City of Chula Vista, County of San Diego, State of California, on June 27, 2017.



COMPLAINANT



INFORMATION

BONNIE M. DUMANIS
District Attorney
County of San Diego
State of California
by:

Date

Deputy District Attorney

0012

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
SOUTH COUNTY DIVISION

FILED
San Diego Superior Court

SEP 15 2017

Clerk of the Superior Court
By: R. Piche

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
BENJAMIN LEE BATHEN,
dob 11/20/77;
Defendant

CT No. **SCS294342**
DA No. BCA405
AMENDED
COMPLAINT-FELONY

INFORMATION

Date: _____

PC296 DNA TEST STATUS SUMMARY

Defendant	DNA Testing Requirements
BATHEN, BENJAMIN LEE	DNA sample required upon conviction

CHARGE SUMMARY

Count	Charge	Issue Type	Sentence Range	Special Allegations	Allegation Effect
1	PC422 BATHEN, BENJAMIN LEE	Felony	16-2-3/\$10,000		
2	PC422 BATHEN, BENJAMIN LEE	Felony	16-2-3/\$10,000		
3	PC422 BATHEN, BENJAMIN LEE	Felony	16-2-3/\$10,000		

PC1054.3

INFORMAL REQUEST FOR DISCOVERY

The undersigned, certifying upon information and belief, complains that in the County of San Diego, State of California, the Defendant(s) did commit the following crime(s):

CHARGES**COUNT 1 - MAKING A CRIMINAL THREAT**

On or about June 4, 2017, BENJAMIN LEE BATHEN did unlawfully and willfully threaten to commit a crime which would result in death and great bodily injury to Carolyn Jacobs, with the specific intent that the statement, made verbally, in writing, and by means of an electronic communication device, was to be taken as a threat (even if there was no intent of actually carrying it out), which, on its face and under the circumstances in which it was made, was 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, and thereby caused that person reasonably to be in sustained fear for his/her own safety and for his/her immediate family's safety in violation of PENAL CODE SECTION 422.

COUNT 2 - MAKING A CRIMINAL THREAT

On or about July 5, 2017, BENJAMIN LEE BATHEN did unlawfully and willfully threaten to commit a crime which would result in death and great bodily injury to Carolyn Jacobs, with the specific intent that the statement, made verbally, in writing, and by means of an electronic communication device, was to be taken as a threat (even if there was no intent of actually carrying it out), which, on its face and under the circumstances in which it was made, was 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, and thereby caused that person reasonably to be in sustained fear for his/her own safety and for his/her immediate family's safety in violation of PENAL CODE SECTION 422.

COUNT 3 - MAKING A CRIMINAL THREAT

On or about July 7, 2017, BENJAMIN LEE BATHEN did unlawfully and willfully threaten to commit a crime which would result in death and great bodily injury to Carolyn Jacobs, with the specific intent that the statement, made verbally, in writing, and by means of an electronic communication device, was to be taken as a threat (even if there was no intent of actually carrying it out), which, on its face and under the circumstances in which it was made, was 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, and thereby caused that person reasonably to be in sustained fear for his/her own safety and for his/her immediate family's safety in violation of PENAL CODE SECTION 422.

NOTICE: Any defendant named on this complaint who is on criminal probation in San Diego County is, by receiving this complaint, on notice that the evidence presented to the court at the preliminary hearing on this complaint is presented for a dual purpose: the People are seeking a holding order on the charges pursuant to Penal Code Section 872 and simultaneously, the People are seeking a revocation of the defendant's probation, on any and all such probation grants, utilizing the same evidence, at the preliminary hearing. Defenses to either or both procedures should be considered and presented as appropriate at the preliminary hearing.

NOTICE: Any defendant named on this complaint who is on Mandatory Supervision in San Diego County is, by receiving this complaint, on notice that the evidence presented to the court at the preliminary hearing on this complaint is presented for a dual purpose: the People are seeking a holding order on the charges pursuant to Penal Code Section 872 and simultaneously, the People are seeking a revocation of the defendant's Mandatory Supervision pursuant to Penal Code Sections 1170(h)(5)(B) and 1203.2, on any and all such grants, utilizing the same evidence, at the preliminary hearing. Defense to either or both procedures should be considered and presented as appropriate at the preliminary hearing.

Pursuant to PENAL CODE SECTION 1054.5(b), the People are hereby informally requesting that defendant's counsel provide discovery to the People as required by PENAL CODE SECTION 1054.3.

Sheriff's records indicate that as of the booking date one or more defendants have not yet provided a DNA sample to the DOJ database. Pursuant to Penal Code Section 296(e), the court shall order collection of DNA from the defendant(s) if advised by the prosecuting attorney that a sample is required but has not been provided by the defendant. Pursuant to Penal Code sections 296/296.1, if not already required from a past conviction, any defendants who have not done so will be required to provide a sample upon conviction of this felony offense.

MANDATORY STATE PRISON INCARCERATION: An executed sentence for a felony shall be served by defendant BENJAMIN LEE BATHEN in state prison pursuant to PENAL CODE SECTIONS 1170(f) and (h)(3).

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER CS294342, CONSISTS OF 3 COUNTS.

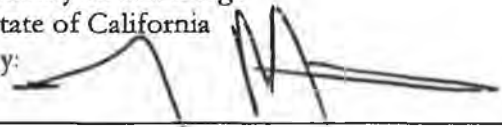
Executed at City of Chula Vista, County of San Diego, State of California, on September 15, 2017.

COMPLAINANT

INFORMATION

SUMMER STEPHAN
District Attorney
County of San Diego
State of California

by:



Deputy District Attorney

12/4/17

Date

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

F I L E D
Clerk of the Superior Court

JUN 11 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

THE PEOPLE OF THE STATE OF CALIFORNIA, <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> BENJAMIN LEE BATHEN, <i>dob 11/20/77;</i> <p style="text-align: right;">Defendant</p>
--

CT No. SCS294342
 DA No. BCA405
 AMENDED
 INFORMATION

PC296 DNA TEST STATUS SUMMARY

Defendant	DNA Testing Requirements
BATHEN, BENJAMIN LEE	DNA sample required upon conviction

CHARGE SUMMARY

Count	Charge	Issue Type	Sentence Range	Special Allegations	Allegation Effect
1	PC422 BATHEN, BENJAMIN LEE	Felony	16-2-3/\$10,000		
2	PC422 BATHEN, BENJAMIN LEE	Felony	16-2-3/\$10,000		
3	PC422 BATHEN, BENJAMIN LEE	Felony	16-2-3/\$10,000		

The District Attorney of the County of San Diego, State of California, accuses the Defendant(s) of committing, in the County of San Diego, State of California, the following crime(s):

CHARGES**COUNT 1 - MAKING A CRIMINAL THREAT**

On or about June 4, 2017, BENJAMIN LEE BATHEN did unlawfully and willfully threaten to commit a crime which would result in death and great bodily injury to Carolyn Jacobs, with the specific intent that the statement, made verbally, in writing, and by means of an electronic communication device, was to be taken as a threat (even if there was no intent of actually carrying it out), which, on its face and under the circumstances in which it was made, was 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, and thereby caused that person reasonably to be in sustained fear for his/her own safety and for his/her immediate family's safety in violation of PENAL CODE SECTION 422.

COUNT 2 - MAKING A CRIMINAL THREAT

On or about July 3, 2017, BENJAMIN LEE BATHEN did unlawfully and willfully threaten to commit a crime which would result in death and great bodily injury to Carolyn Jacobs, with the specific intent that the statement, made verbally, in writing, and by means of an electronic communication device, was to be taken as a threat (even if there was no intent of actually carrying it out), which, on its face and under the circumstances in which it was made, was 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, and thereby caused that person reasonably to be in sustained fear for his/her own safety and for his/her immediate family's safety in violation of PENAL CODE SECTION 422.

COUNT 3 - MAKING A CRIMINAL THREAT

On or about July 5, 2017, BENJAMIN LEE BATHEN did unlawfully and willfully threaten to commit a crime which would result in death and great bodily injury to Carolyn Jacobs, with the specific intent that the statement, made verbally, in writing, and by means of an electronic communication device, was to be taken as a threat (even if there was no intent of actually carrying it out), which, on its face and under the circumstances in which it was made, was 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, and thereby caused that person reasonably to be in sustained fear for his/her own safety and for his/her immediate family's safety in violation of PENAL CODE SECTION 422.

Pursuant to PENAL CODE SECTION 1054.5(b), the People are hereby informally requesting that defendant's counsel provide discovery to the People as required by PENAL CODE SECTION 1054.3.

Sheriff's records indicate that as of the booking date one or more defendants have not yet provided a DNA sample to the DOJ database. Pursuant to Penal Code Section 296(e), the court shall order collection of DNA from the defendant(s) if advised by the prosecuting attorney that a sample is required but has not been provided by the defendant. Pursuant to Penal Code sections 296/296.1, if not already required from a past conviction, any defendants who have not done so will be required to provide a sample upon conviction of this felony offense.

MANDATORY STATE PRISON INCARCERATION: An executed sentence for a felony shall be served by defendant BENJAMIN LEE BATHEN in state prison pursuant to PENAL CODE SECTIONS 1170(f) and (h)(3).

THIS INFORMATION, NUMBERED CS294342, CONSISTS OF 3 COUNTS.

Summer Stephan
District Attorney
County of San Diego
State of California

by: Cheris Loria
Deputy District Attorney

6/8/18
Date

**SAN DIEGO COUNTY PROBATION DEPARTMENT
ADULT SERVICES
PROBATION OFFICER'S REPORT**

F I L E D
Clerk of the Superior Court

JUL 19 2018 018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

THE PEOPLE OF THE STATE OF CALIFORNIA

V.

RN: BATHEN, BENJAMIN L

CN: BATHEN, BENJAMIN LEE

AKA: BATHEN, BENJAMIN L

COURT NO.: SCS294342				DEPT. & JUDGE: South Bay Division Superior Court 15 SONTAG, S			
DA FILE NO.: BCA40501				ATTORNEY: FREEZE, A. Retained			
HEARING DATE/TIME: 07/19/2018 08:30 AM				PROB. CASE NO.: 21436787			
PROBATION OFFICER: MOORE, JANET				PO TELEPHONE: 760-806-2353			
ADDRESS: 6626 GREEN ASH COURT SPRINGFIELD, VA 22152				TELEPHONE NO.: (703) 786-3583		BIRTHPLACE: FORT BELVOIR, VIRGINIA	
BIRTH DATE: 11/20/1977	AGE: 40	RACE: WHITE	SEX: M	HT: 508	WT: 190	EYES: BROWN	HAIR: BLACK
DRIVER'S LIC. NO.: D6622224 CALIFORNIA		OTHER ID DATA:		SUCCESSFUL TREATMENT AND RECOVERY (STAR) PROGRAM: ACCEPT: <input type="checkbox"/> DECLINED: <input type="checkbox"/> UNDECIDED: <input type="checkbox"/> NON-APPLICABLE: <input checked="" type="checkbox"/> (please see description below)			
DATE OFFENSE COMMITTED: 06/04/2017		DATE CONVICTED: 06/11/2018		HOW: Jury Verdict		CUSTODY STATUS: In Custody Vista VI LW	
INVESTIGATING ARRESTING AGENCY: CHULA VISTA PD				DATE INFO FILED: 12/04/2017		SDSO NO.: 17179 123746	
CII NO.: 37119160		FBI NO.: WCDE509T8		ARREST REPORT NO.: 1707855		BOOKING NO.: 18138444B	

CONVICTED OF:

Counts 1-3: PC422, Making a Criminal Threat

RECOMMENDATION: STATE PRISON

RECEIVED
JUL 13 2018
BUT NOT FILED

RELATED COURT DATA:

On 06/19/2018, the defendant was found guilty by jury.

PC29810: RELINQUISHING of FIREARMS REQUIREMENT:

The Probation Department investigation yields the following information:

1. Defendant has submitted a completed Prohibited Persons Relinquishment Form to Probation.
 Yes No
2. Prohibited Persons Relinquishment Form indicates defendant owns, possesses, or has/had under his control a firearm. Yes No NA
3. Defendant has submitted documentation/receipts confirming relinquishment of all firearms known to Probation Department. Yes No NA

Comments:

The defendant denies owning, possessing, or having under his control any firearms.

According to the records of the California Department of Justice, Automated Firearms System using the name of the defendant as identified by Department of Motor Vehicle Records **06/26/2018**, and other records available to Probation, it does not appear the defendant owns, possesses, or has custody or control of any firearms.

PC296 STATUS:

The defendant's DNA is on record with DOJ.

THE OFFENSE:

SOURCES OF INFORMATION FOR THIS SECTION

Chula Vista Police Department Report #1707855 (06/05/2017); District Attorney Investigation Report (09/27/2017)

The Probation Officer is aware that this Court also presided over the trial phase of this matter and is fully aware of the facts of this case. The following narrative is solely a synopsis of the offense and may not include information which may have been presented as evidence during the trial.

On 06/05/2017, Carolyn Jacobs contacted police to report there were three voicemails left on 06/04/2017, 07/03/2017, and 07/05/2017. Initially, she did not recognize the voice of the caller. Using her caller identification feature, her husband conducted an internet search of the phone number, which revealed it belonged to the defendant. She then recognized the voicemails as the voice of the defendant. She provided counseling services to him in 2004 until 2008 when he moved to Boston, Massachusetts. She had not heard from him since he moved to Massachusetts.

On 06/23/2017, the investigating officer contacted Mrs. Jacobs via telephone, and she essentially reported she was in fear for her safety and life. She had since been vigilant around her house and has her husband meet her after work to close her practice. 0020

In the voicemail left on 06/04/2017, the defendant states, "Hey Dr. Jacobs, 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!" **[As to Count 1]**

In the voicemail left on 07/03/2017, the defendant states, "Hey Dr. Jacobs, 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 motherfucker. 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!" **[As to Count 2]**

In the voicemail left on 07/05/2017, the defendant states, "Hey Dr. J, I just wanted 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." **[As to Count 3]**

On 09/15/2017, Carolyn Jacobs spoke to the investigating district attorney in this matter. She essentially reported she is a psychologist in the City of Chula Vista and the defendant was a former patient of hers. She stopped treating the defendant approximately nine years prior in 2008. She is terrified of the defendant and expressed fear about having to see the defendant during the restraining order hearing. After playing the voicemails left by the defendant, Mrs. Jacobs began to tremble. She has an adult daughter and was unaware how the defendant knew this fact.

The District Attorney's Office ensued an investigation using phone records, cellular phone tower records, and other evidence to eventually confirm the phone number used to contact Mrs. Jacob belonged to the defendant.

VICTIMS:

RESTITUTION: \$25,100

VICTIM NOTIFIED OF P&S HEARING: Yes INTENDS TO APPEAR: No

SOURCES OF INFORMATION FOR THIS SECTION

Standard Victim Letter Mailed (07/06/2018); Phone Call with Carolyn Jacobs (07/09/2018); Email to Victim Compensation Program (07/12/2018)

On 07/06/2018, the undersigned mailed a victim letter to Carolyn Jacobs, informing her the undersigned must prepare a report in this matter to advise the Court of her feelings about the crime, her opinion as to what sentence should be imposed, to set a restitution figure, and make a recommendation for sentencing.

On 07/09/2018, the undersigned contacted Mrs. Jacobs via her cellular phone. She provided the undersigned an impact statement, which will be attached to the end of this report. She stated, "He had no remorse about the death threats. He is a danger to me. He waited 10 years after I treated him to send me these threats. I just hope I can be notified of any of his releases from custody so I can prepare myself. I am terrified of him." Within her statement, she stated, "I believed that the three death threats from Mr. Bathen in 2017 were serious and that my life was in danger. Today, even after the criminal investigation, arrest, trial, and the three guilty verdicts found by the jury, I continue to believe that Mr. Bathen is dangerous and remains a serious threat to me. I have some peace of mind knowing that Mr. Bathen is in custody until his sentencing hearing in July. However, I continue to fear for my safety and security upon his release which will eventually take place, sometime in the future."

Mrs. Jacobs is requesting a total of \$25,100 in restitution, which includes both her and her husband's loss of wages during the investigation and court process, and security measures in her home. She will not be present for the scheduled hearing, but wanted to assure a restraining order would remain in place. She provided a written statement, which outlines her losses. However, she would like a restitution hearing scheduled to provide any necessary documentation to the Court. Any additional information received will be forwarded to the Court. It is recommended that jurisdiction in this matter be retained by the Court in the event the victim reports a loss.

To date, a claim has not been filed with the Victim Compensation Program.

DEFENDANT'S STATEMENT:

SOURCES OF INFORMATION FOR THIS SECTION

Interview with the Defendant at Vista Detention Facility

Attorney Alicia Freeze was present during the interview. The defendant was polite and cooperative throughout the interview. The purpose of the interview was explained, and he stated he understood. The process of the interview was explained, including the fact anything he said could be used in this report, and he could terminate the interview at any time. The defendant was given the opportunity to comment on the events that occurred in the Instant Offense.

He declined to discuss the facts of the offense on the advice of his attorney. He stated, "I sent a letter to the victim with my previous attorney to reassure her I had no intention of harming her after I received the civil protective order. The only reason I am in California is for this hearing and for no other reason."

The undersigned reviewed the possible general conditions of probation with the defendant. When asked if he would be willing to comply, he replied, "Yes," and stated, "I just want to go back to Virginia, and I hope to never see Mrs. Jacobs again. I just hope the Court gives me probation so I can move back to Virginia and be away from here, which is what Mrs. Jacobs would want."

CRIMINAL HISTORY:

0022

SOURCES OF INFORMATION FOR THIS SECTION

FBI & CII Report (06/26/2018); Local Records (07/09/2018)

<u>DATE</u>	<u>AGENCY</u>	<u>CHARGE</u>	<u>DISPOSITION</u>
06/04/2017	Chula Vista PD	Cts 1-3: PC422	<u>SCS294342</u> 06/19/2018: Cts 1-3 G-J-F; 07/19/2018: PH&S. Instant Offense

ADJUSTMENT ON COMMUNITY SUPERVISION:

SOURCES OF INFORMATION FOR THIS SECTION

FBI & CII Report (06/26/2018); Local Records (07/09/2018)

The defendant has never been tried on probation or parole.

PERSONAL DATA:

The defendant offered the following information. Unless noted otherwise it has not been verified.

Birth Place and Areas of Residence:

He was born in Fort Belvoir, Virginia. He was raised in a military family and moved a lot as a child. When he was two years old, his family moved to Germany, where he resided until he was five years old. He returned to Virginia, where he resided until he was nine years old. He returned to Germany, where he resided until he graduated from high school. When he was 18 years old, he moved to Chicago to attend college. When he was 22 years old, he moved to Maryland to live with his mother.

After he graduated college, he moved around a lot for his employers. When he was 23 years old, he moved to Connecticut. When he was 25 years old, he moved locally to San Diego. When he was 27 years old, he moved to Los Angeles. When he was 30 years old, he moved to Massachusetts. When he was 37 years old, he moved to Virginia and has resided there since.

Current Living Situation:

After sentencing and/or custody, he plans to return to Virginia, where he lives with his step-father.

Family Relationships:

He was one of two children born during the union of his mother and father. He has an older sister who is 42 years old and resides in Virginia. His mother remarried when he was 13 years old, but recently divorced his step-father. He remains "very close" with his step-father. His father remarried when he was 21 years old. He describes his relationship with his entire family as "good and supportive."

Marital Status and Dependents:

He has never been married and does not have any dependents. He is currently in a dating relationship with his girlfriend of one year. He described his girlfriend as "supportive."

Family Criminal History:

No one in his family has ever been arrested.

Acquaintances:

He typically associates with "working people" and military families.

Pro-Social Activities:

He enjoys salsa dancing, kickboxing, video games, and Mexican food.

Education:

The defendant graduated high school in Germany and then proceeded to college at the School of Arts in Chicago to attain his Bachelor's Degree.

Military Service:

He is currently enlisted in the reserves for the Air National Guard as an E-3 Airman as of November of 2017.

Employment History:

He incurred his first job when he was 14 years old working manual labor around the military base where he resided. Thereafter, when he was 16 years old, he worked at the Post Exchange as a mail clerk until her graduated high school. When he was 18 years old, he moved to Chicago for college and worked at the Post Exchange on campus. Simultaneously, he was also a resident assistant in the dorms he resided in until he graduated college. When he was 23 years old, he began working as a video programmer and remained in that field until he was 30 years old. Over the last 10 years, he has been employed as a web developer. Since 2012, he has been employed by NumbersUSA. Since November of 2017, he has been in the reserves for the Air National Guard.

Financial Information:

The defendant denied any major assets, savings, or debt. He earns approximately \$85,000 per year.

Psychological and Medical Problems:

He denied any psychological problems. He reported his blood pressure has been on the higher end since he has been in custody, but he is not taking any prescribed medications.

Substance Abuse and Treatment History:

When he was 16 years old, he experimented with marijuana and alcohol. As a teenager, he smoked marijuana over the course of a year once or twice a month, and has refrained from any use since then. He consumes alcohol socially with his girlfriend. He does not feel he needs continued treatment for drugs or alcohol.

Gang Affiliation:

He denied any gang affiliation.

Future Plans:

In the interim, he is hopeful to attain a Federal job, if his criminal record permits. Otherwise, he will continue working for NumbersUSA.

COLLATERAL INFORMATION:

SOURCES OF INFORMATION FOR THIS SECTION

Correspondence with District Attorney Cherie Somerville (07/09/2018); Correspondence with Attorney Alicia Freeze (07/06/2018)

Contact with the District Attorney Cherie Somerville

On 07/09/2018, an email was sent to Ms. Somerville regarding trial information to be included in this report and to request the trial brief. There was no additional information to be included from trial. Ms. Somerville provided the trial brief and victim contact information.

Contact with Attorney Alicia Freeze

On 07/09/2018, an email was sent to Attorney Freeze regarding trial information to be included in this report and regarding interviewing the defendant. Ms. Freeze wished to be present during the probation interview.

On 07/12/2018, Attorney Freeze provided the undersigned with a copy of the psychiatric evaluation completed on 05/19/2018, 05/24/2018, 05/31/2018, and 06/04/2018. The undersigned has read and considered the evaluation conducted by Dr. Raymond G. Murphy, Ph.D. Given the confidential nature of that report, and the quasi-public nature of the Probation Officer's report, the contents of the evaluation will not be summarized in any detail. Its findings have been incorporated into the Probation Officer's sentencing recommendations. Ms. Freeze also submitted character reference letters on behalf of the defendant. They are attached to the report for the Court's review.

EVIDENCE BASED ASSESSMENTS:

SOURCES OF INFORMATION FOR THIS SECTION

COMPAS Assessment Tool (07/10/2018)

Risk and Needs Assessment Tool:

The defendant was assessed by the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), a research based risk and needs assessment specifically designed to assess key risks and identify need factors which may assist in placing, supervising and case managing offenders in the community and/or secure settings.

If determined supervision and intervention is warranted, a case plan will be developed for this defendant, which will guide programming through periods of Probation supervision, mandatory supervision, and jail custody.

These Assessment results are interpreted to indicate that:

- The assessed level of risk for recidivism suggests that the defendant is likely to be successful with minimal intervention and supervision, if Probation is granted. Intervention at a more intrusive level could prove ineffective or counter-productive based upon available research.

Despite above analysis, it is recommended placing the offender in a secure setting. Although assessed that the offender, if granted, may benefit from Probation supervision, considering the nature of the offense and the aggravating circumstances coupled with low need scores, therapeutic intervention in a community setting is not recommended.

Through the assessment process, need factors were identified, that when properly addressed through appropriate programming, have been shown to reduce recidivism. This defendant has been assessed as presenting issues which make him a risk for community safety. In order to make the community safer, the following issues should be addressed:

The results and interpretation of the assessment(s) have been considered in conjunction with the other information contained herein to formulate the recommendation.

SENTENCING DATA:

Possible Circumstances in Mitigation:

Rule 4.423(b)(1): The defendant has no prior record, and the Instant Offense is his first conviction of any kind.

Possible Circumstances in Aggravation:

Rule 4.421(a)(1): The crime involved the threat of great bodily harm and acts disclosing a high degree of viciousness, in that the defendant threatened the victim and her family. He threatened to rape and torture the victim, and set her on fire. He further threatened to rape and murder the victim and her daughter.

Rule 4.408(a): The crime occurred on three separate days, on 06/04/2017, 07/03/2017, and 07/05/2017, in the defendant had time to reflect on his criminal acts.

Prison Term Analysis:

As to Counts 1-3: The sentencing options for a violation of PC422, Criminal Threats, are 16 months, 2 years, or 3 years. A review of the possible circumstances in mitigation and in aggravation shows they numerically favor aggravation. Despite the defendant having no prior convictions at his age, it is considered significant the events occurred on three separate days, giving the defendant time to reflect on his criminal acts. Further, the defendant continues to deny he committed the offense and shows no remorse for his actions. Therefore, the middle term of 2 years will be recommended should the defendant be sentenced to prison.

PC654 Issues:

PC654 prevents multiple punishments for the same act or omission. Although all counts involve the same victim, they were committed on three separate days. Therefore, PC654 does not apply.

Consecutive v. Concurrent Issues:

An argument might be made that these counts should be concurrent because each count involved the same victim. However, the fact the offenses occurred on different dates clearly indicate that the defendant had the opportunity to reflect on his criminal behavior and made the conscious decision to continue his crime spree. Therefore, pursuant to Rule 4.425(a)(3), consecutive sentencing will be recommended between all counts. Since all Counts carry the same potential prison term, Count 1 will arbitrarily be selected as the principal term.

PC1170(h)(5) Eligibility:

The offender does not appear to be eligible for sentencing pursuant to PC1170(h)(5) due to his conviction in the Instant Offense.

EVALUATION:

Probation Eligibility:

Rule 4.413(a): The defendant appears to be statutorily eligible for a grant of probation.

Circumstances Supporting a Grant of Probation:

Rule 4.414(b)(1): The defendant has no prior record and this is his first conviction of any kind.

Circumstances Supporting a Denial of Probation:

Rule 4.414(a)(1): The nature and circumstances of the crime are more serious than other instances of the same crime, in that the victim last had contact with the defendant approximately nine years prior to the criminal threats being made, which allowed the defendant substantial time to plot his thoughts and feelings about the victim.

Rule 4.414(a)(4): The defendant inflicted emotional injury, which has caused the victim to be fearful and insecure of her surroundings in fear the defendant may follow through with his criminal threats.

Rule 4.414(b)(7): The defendant appears to be without remorse, in that he did not express any regret for his actions towards the victim.

Discussion:

Benjamin Bathen is 40 years old and is appearing before the Court for a Probation Hearing and Sentencing subsequent to the defendant found guilty by a jury to Counts 1 through 3, PC422, Making a Criminal Threat. In the Instant Offense, the defendant contacted the victim, who was once his psychologist, via her work voicemail system on 06/04/2017, 07/03/2017, and 07/05/2017 and left voicemails, threatening to harm the victim and her family. He threatened to rape and torture the victim, and set her on fire. He further threatened to rape and murder the victim and her daughter.

In regards to the Instant Offense, he declined to discuss the facts of the offense on the advice of his attorney. However, it does not appear the defendant takes responsibility for his actions and does not appear to be remorseful for his actions or the victim.

The victim, Mrs. Jacobs, will not be attending the scheduled hearing. However, she provided the undersigned an impact statement and her request for restitution, which is attached to this report. In summary, the victim continues to fear the defendant and fears he will carry out his threats. She would like a criminal protective order to continue and would like to be informed of any upcoming releases or hearings involving the defendant.

The Instant Offense is the defendant's first convictions of any kind. The COMPAS Assessment Tool scored the defendant at a low risk for recidivism. Nonetheless, it is imperative the defendant is held accountable for his actions. It is noted he has led a successful career over the years as a video programmer and web developer. He also holds an extensive educational background, which includes a Bachelor's Degree and soon-to-be Master's Degree once he completes all the requirements. The undersigned took these attributes into account; however, the nature of the offense and the revolting threats made by the defendant far outweigh the defendant's candidacy for a grant of probation. More so, it is difficult to grasp that someone with such a successful career and personal life could take the time to complete these criminal acts not once, but three times on three separate days, which gave him substantial time to reflect on his criminal acts. To grant the defendant probation would minimize the severity of his crime.

With regard to the defendant's lack of remorse towards the victim, the undersigned is concerned the defendant does not grasp the severity of the Instant Offense, as if he is almost oblivious his actions instilled fear in the victim. The victim has since been unable to completely heal from the damage caused by the defendant and continues to fear he will follow through with his threats. While the defendant is temporarily inconvenienced, the victim will forever remember these horrific events and the words expressed by the defendant. Thus, it is imperative to impose an appropriate sanction for a crime of this nature in hopes to deter the defendant and others from committing a similar offense.

With that said, after careful consideration of the facts of this case, it is recommended that probation be denied and the defendant be committed to the California Department of Corrections and Rehabilitation for the term of 3 years and 4 months.

CUSTODY DATA:

<u>Date Confined</u>	<u>Date Released</u>	<u>Place</u>	<u>Custody Days</u>
09/15/2017	09/17/2017	CJ	3
06/19/2018	07/19/2018 (In Custody)	CJ	31
		Actual	34
		PC4019 (2:2)	34
		Total Credit	68

RECOMMENDATION:

That probation be denied and the defendant be committed to the California Department of Corrections and Rehabilitation for the term of 3 years and 4 months, with credit for time served of 34 actual days and 34 days PC4019, a total of 68 days credit.

That the defendant pay the following:

- Restitution fine pursuant to PC1202.4(b) in the amount of \$2700.
- Additional restitution fine pursuant to PC1202.45 in the amount of \$2700 to be stayed and remain so unless defendant's supervision is revoked.
- Court Security Fee pursuant to PC1465.8 in the amount of \$120.
- Immediate Critical Needs Account (ICNA) fee pursuant to GC70373 in the amount of \$90.
- Criminal Justice Administration Fee pursuant to GC29550.1 in the amount of \$154.00.
- Restitution per PC1202.4(f) to the following victim, Carolyn Jacobs, in the amount of \$25,100.00

All fines, fees and restitution (if applicable) shall be paid forthwith or as provided in PC2085.5

Submit to DNA testing pursuant to PC296.

Term Recommendation Breakdown by Count is as Follows:

<u>Crime</u>	<u>Suggested Base Term</u>	<u>Recommended Term</u>	<u>Recommended Stay</u>
Ct 1: PC422	2 YEARS-MIDDLE	2 YEARS	0
Ct 2: PC422	2 YEARS- MIDDLE (1/3 Mid, Consec)	8 MONTHS	0
Ct 3: PC422	2 YEARS- MIDDLE (1/3 Mid, Consec)	8 MONTHS	0

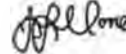
TOTAL TERM = 3 YEARS, 4 MONTHS

Respectfully submitted,

DELIVERED
JUL 13 2018
PROBATION DEPT

ADOLFO GONZALES
CHIEF PROBATION OFFICER

By:



JANET MOORE
DEPUTY PROBATION OFFICER
760-806-2353

Approved:



NATH SAYASANE
SUPERVISOR

I have read and considered the foregoing report.



JUDGE OF THE SUPERIOR COURT

STEPHANIE SONTAG *ros*

June 24, 2018

Victim Impact Statement

Victim: Dr. Carolyn Jacobs

I am currently a licensed psychologist in Chula Vista, CA. I have been in clinical practice since 1998. I provide psychotherapy services to individuals, couples and families. Prior to my career as a psychologist, I was a registered nurse for 14 years. My entire professional career has been devoted to the helping professions. My husband and I have lived, raised our family, and worked in Chula Vista since 1982.

On June 4, 2017, both my professional life and my personal life profoundly changed. On that day, I received the first physically and sexually explicit death threat from a phone message made to my private practice messaging service from Benjamin Bathen; a former patient. I subsequently received two more death threats from Mr. Bathen; one on July 3, 2017 and another on July 5, 2017. The three death threats from Mr. Bathen were specific, sexually explicit and extremely violent. The last death threat also included a specific threat to kill a family member, which significantly increased my terror and my fear. The shock and terror I experienced from the threats from Mr. Bathen describing how he would torture and kill me was confounded by the fact that I had not had any contact with this patient for 10 years.

I believed that the three death threats from Mr. Bathen in 2017 were serious and that my life was in danger. Today, even after the criminal investigation, arrest, trial, and the three guilty verdicts found by the jury, I continue to believe that Mr. Bathen is dangerous and remains a serious threat to me. I have some peace of mind knowing that Mr. Bathen is in custody until his sentencing hearing in July. However, I continue to fear for my safety and security upon his release which will eventually take place, sometime in the future.

The emotional impact of this last year has left me feeling a range of thoughts and emotions. At first, I was in a state of extreme fear and helplessness. My chronic fear response has contributed to a heightened degree of stress and chronic anxiety. I began to experience sleeplessness and nightmares. I am extremely hypervigilant; always on the lookout. I have a fear of being alone. Over time, I have become physically exhausted and emotionally numb.

My efforts to protect myself resulted in the need to alter my personal and professional routines. I sought and was granted a civil restraining order against Mr. Bathen, which is in effect until 2020. Security measures in our home were increased. I kept my windows and doors locked at all times. Even today, I am still fearful of being alone in my home.

My husband began to meet me at my office to walk me to my car. I was obligated to notify my professional colleagues in my office of the death threats in order to protect their safety and the safety of their psychotherapy patients. My colleagues instituted a "buddy system" to support one another when they walked to their cars after the work day. With the help of my landlord, I instituted increased security measures in my office, specifically related to access to who was entering and leaving the office.

Since 2017 to the present, my private practice has been negatively impacted. I have had financial loss due to the time required to meet with law enforcement, investigators, seeking civil restraining orders, appearing for hearings and continuances, meeting with District Attorneys, and participating as a witness in the trial. My husband, who is a physician and surgeon, has also been professionally impacted as he has tried to function as a support to me and participated as a witness in the trial.

I am aware that my view of the world and my profession as a safe space has changed since the crimes. The major impact on me has been the constant wondering if Mr. Bathen is going to hurt me, my husband, my children and/or my grandchildren sometime in the future. I have concerns about the level of violence and rage he expressed in the content of his death threats, especially considering the ten-year gap from my last contact with him in 2008 until he made the death threats in 2017. Finally, I have no evidence that Mr. Bathen has expressed any remorse over the pain and distress he has caused me and my family nor for the crimes he has committed. Because of his lack of remorse, I have a genuine fear of his retaliation against me and/or my family in the future. Mr. Bathen's lack of remorse and refusal to accept responsibility for his crimes, complicates my ability to reconstruct my life in the aftermath of his crimes.

Respectfully, I ask the court to consider the maximum sentence range allowed for the crimes Mr. Bathen has committed. I also request that I am notified of any post-conviction release proceedings and decisions (e.g. consideration of probation, notification of any parole hearings) that may come up for Mr. Bathen in the future. I hope that the recorded death threats that were submitted as evidence in the case will be reviewed and considered in any post-conviction decisions regarding Mr. Bathen. I request that he has no future contact (in any manner) with me and/or my family and that our confidentiality be protected as much as possible. Finally, I request that a criminal restraining (protective) order be granted for the maximum time allowed during his incarceration and for as long after his release as possible.

Thank you for this opportunity to address the Court.

Sincerely,

Dr. Carolyn Jacobs

July 9, 2018

Summary of Economic Losses

Victim: Carolyn Jacobs

[REDACTED]

[REDACTED]

Defendant: Benjamin Bathen

Birthdate: 11/20/ 1977

Court # SCS294342

Probation: 21436787

Summary of Economic Losses suffered by Carolyn Jacobs, Psy.D. and Gary Jacobs, M.D. (spouse) as a result of the crimes committed by Benjamin Bathen:

Carolyn Jacobs, Psy.D. is a licensed psychologist in private clinical practice in Chula Vista, CA.

Gary Jacobs, M.D. is a medical doctor (Ophthalmologist) and eye surgeon in private practice in Chula Vista, CA.

Both Dr. Carolyn Jacobs and Dr. Gary Jacobs had loss of wages from June 2017 to June 2018, resulting from the civil and criminal proceedings related to Mr. Bathen's investigation, trial and convictions. Both are self-employed.

Carolyn Jacobs, Psy.D, - hourly rate = \$175.00 per hour

Gary Jacobs, M.D, - hourly rate = \$400.00 per hour

June, July and August 2017 – after receiving and reporting the three death threats to law enforcement, we secured our home by keeping the windows and doors locked at all times during the investigation and until the location of Mr. Bathen was determined.

- Expense incurred from the security measures taken in our home: \$1500.00 air conditioning bill from AT&T.
- Meetings with Chula Vista Detectives (3 hours) – Carolyn Jacobs = \$525.00; Gary Jacobs = \$1200.00.
- Civil Restraining Order – to protect my safety, in addition to the criminal restraining order and upon the suggestion of law enforcement, I filed for a civil restraining order on July 26, 2017. The first civil restraining order hearing was on August 15, 2017. A contingency at the first hearing was granted and the second restraining order hearing was on September 13, 2017. My husband and I both lost wages by appearing at the civil restraining order hearings: Carolyn Jacobs - 3 ½ days of lost wages (28 hours) = \$4900.00; Gary Jacobs – 2 days of lost wages (16 hours) = \$6400.00
- Pre-trial meetings with District Attorneys (6 hours): Carolyn Jacobs = \$1050.00; Gary Jacobs = \$2400.00
- On call to testify in the trial required Carolyn Jacobs to cancel three days in her clinical practice (18 hours) – Carolyn Jacobs = \$3150.00
- Testifying as witnesses at the trial (3 hours): Carolyn Jacobs = \$525.00; Gary Jacobs = \$1200.00
- Attending closing arguments at the trial (3 hours): Carolyn Jacobs = \$525.00
- Attending jury verdicts at the trial (3 hours): Carolyn Jacobs = \$525.00; Gary Jacobs = \$1200.00

Carolyn Jacobs total loss = \$11,200.00

Gary Jacobs total loss = \$12,400.00

Loss from security measures taken in our home = \$1500.00

Total loss = \$25,100.00

8/11/ 2017

Dr. Jacobs,

Many years ago you helped me through a very difficult time in my life. I'm currently located in Springfield VA a little less than 3,000 miles away from you. I am not a threat in any way to either you or your family. I can promise you that. After reading your report I was very disturbed and can guarantee that you, your daughter, and your family have nothing to fear from Benjamin Lee Bathen. It would be very difficult if not impossible for me to relocate to San Diego.

Filing for a restraining order would seriously damage my life and my career. I am currently in the process of applying for a security clearance and this would make that impossible.

Since attending therapy with you between 2004 and 2008 I've completed multiple courses at UCLA, Harvard Extension, and been accepted to graduate school. You'll be happy to know that I am also an intermediate level salsa dancer and I have a girlfriend. I socialize two or three times a week.

I work as a web programmer for the international food and poverty research institute, a non profit with the goal of sustainably reducing poverty and hunger in developing nations.

I live close to my family and I'm repairing several of the relationships I damaged during my bout of workaholism.

When we began our therapy, which ended in 2008 you did specifically promise me that seeking to choose counseling and medication would not affect my career. The voicemailbox you refer to is the confidential voicemail of a psychologist for people to call during time periods of extreme mental distress. Isn't it possible that one of your other patients from the course of the last 8 years called that number?

I can guarantee you that you are completely safe from me and I hope you will take the time to consider all the facts before ending a young man's career and potentially taking his life away from him with a felony arrest warrant. A warrant would require me to return to San Diego which is exactly what this restraining order is designed to prevent me from doing.

While this letter is in no way shape or form an admission of guilt in regards to the voicemails in the report. I sincerely apologize for any anxiety that I may have caused you or your family over the course of our therapy sessions between 2004 and 2008.

Although it would really hurt my chances of completing the security clearance process I'm perfectly happy to grant you the restraining order if some other type of agreement cannot be reached. I am also very happy to never be anywhere near you or your family again and never to return to San Diego California.

I am sure that you are perfectly safe there in the Chula Vista courthouse and I wish you the best in your future and your career and I hope that you enjoy a long life with your family and children.

I came to you for help.

Sincerely,



Benjamin Lee Bathen

DATE: July 9, 2018

MEMORANDUM FOR: Trial Judge Stephanie Sontag

FROM: Terry Eugene Bathen, Father

SUBJECT: A Personal Perspective on Ben Bathen's Life and Family Background

PURPOSE: To assist the court in determining an appropriate sentence on July 19th.

DISCUSSION:

1. **Family Links:** Benjamin (Ben) Lee Bathen is a 40 year old man who has never been married and has no children or other dependents. Ben was born at DeWitt Army Hospital at Fort Belvoir, Virginia on November 30, 1977. He was the second child born to Eufemia (Effie) Margaret Ragsac and Terry Eugene Bathen. Ben's older sister is Emily Claire Edmiston. Ben also has two adopted half-sisters, Elnura Crawley and Melek Crawley.

2. **Childhood:** Ben and his sister grew up as Army dependents in the Washington, D.C. Metropolitan Area and in various locations in what was then identified as West Germany. Ben's father served on extended active duty between 1972 and 1992 as an Army Judge Advocate. When living in Virginia, Ben resided at 6626 Green Ash Court, Springfield, Virginia and attended public elementary schools. When assigned abroad, Ben attended Department of Defense Dependent Schools.

3. **First Divorce:** In 1990, Ben's mother Effie and father Terry jointly decided to end their marriage when Ben was 12-13 years old. Terry was assigned to a new military job in the United States while Effie, Emily and Ben stayed in Fuerth/Nuremburg, Germany. A year after the divorce, Effie married Vincent Michael Crawley, Ben's stepfather. Ben remained in Germany with his mother and stepfather until he finished high school and began studies at the School of the Art Institute of Chicago (SAIC). The impact of the divorce and separation was emotionally challenging for Ben and his sister. They routinely visited their father in Virginia during summer breaks. Shortly after their marriage, Effie and Vince adopted two infants from an orphanage in Azerbaijan. They are Ben's half-sisters.

4. **High School and College:** Ben graduated from the Frankfurt American High School in Frankfurt, Germany in 1996. He had a very successful high school experience and was active on the wrestling and track teams. He was selected as a delegate for the Model United Nations program and was active in many

extracurricular activities. A high school art teacher motivated Ben to attempt a career in fine arts. While earning his four-year bachelor of fine arts degree at SAIC, his focus expanded to 3D animation, computer graphics and game programming.

5. Work History: Following his SAIC graduation in 2000, Ben worked briefly with other SAIC students on developing children's educational software and games in Chicago. This led to a well-paying starter job near Hartford, Connecticut, where he continued developing educational programs. After a few years, Ben was selected for a more lucrative position with a development team in San Diego and began working for Rockstar Games on a version of the game Grand Theft Auto. Compared to the education field, Ben found working in the very intense and highly competitive gaming industry in San Diego to be very emotionally draining. He did not like the long hours and accelerated work routines needed to meet demanding production schedules and surge deadlines. Ben was fortunate to receive a job offer from the Disney Company to work on the development of a new online virtual community for children (Toon Town), a return to the more family friendly environment of developing educational software. He moved to the Los Angeles/Burbank where he worked for several years for Disney. He enjoyed the work but did not enjoy living in LA. It was too congested and he was living too far away from his family.

6. Move to Boston: Ben had a former high school girlfriend who was studying law in Boston. She reached out to him and he decided to look for jobs in Massachusetts. In approximately 2010, he got a job with Harmonix Music Systems developing popular guitar video games. Ben worked for Harmonix's for several years but when the company was forced to reduce its workforce, Ben was one of the artists it laid off. He seriously debated joining the Massachusetts Air National Guard or the Reserves at this point to obtain educational benefits. While unemployed, Ben focused on continuing education courses directed at obtaining an advanced degree in computer programming. He attended extension classes at Harvard and the University of Massachusetts (Boston) during this period and did a considerable amount of independent study. He found these classes to be extremely challenging since he lacked the foundational basis in higher level mathematics and science courses that are essential to success in obtaining a master's degree in computer science or information technology. During this period, he ran up substantial student loan debts. Eventually, Ben was hired by First Marblehead, a Boston financial resources organization that assisted colleges with processing

student loan applications. Ben was responsible for maintaining the company's website and designing loan application forms. He remained in this job for about two years until an office restructuring left him again on unemployment benefits. His relationship with the old high school girlfriend had long since run its course, and he began looking more and more toward relocating back to the Virginia suburbs of Washington, D.C. where the rest of his family members were living. When Ben left Massachusetts, he was heavily in debt and need \$5,000 from the family to close out his affairs in Boston and make the move to Virginia.

7. Return to Virginia: In December 2015, Ben was extremely happy to receive a job offer from Ark Network Security Solutions, a small software company in Sterling, Virginia that provided computer webpage support to members of Congress. He always planned to live closer to his family in Virginia. He enjoyed working for this company as a computer programmer and remained there for about one year. Ben was laid off by Ark on January 13, 2017. In March 2017, he was fortunate to land a new job as a website developer for the International Food Policy Research Institute (IFPRI) in downtown Washington, D.C. IFPRI is a nonprofit organization that provides research-based policy solutions to sustainably reduce poverty and end hunger and malnutrition in developing countries. Ben worked for IFPRI as a staff member on a term-limited contract because government funding support became tenuous at the beginning of the Trump administration. When his job with IFPRI ended in August or September 2017, he was successful in finding his most recent job with NumbersUSA Education and Research Foundation in Crystal City, Virginia. NumbersUSA is a nonprofit entity that focuses on a single issue, the numerical level of U.S. immigration. It generally favors reductions in immigration numbers toward traditional levels. Ben worked as a developer maintaining the extensive NumbersUSA website. He found this small organization to be well suited to his skills and abilities. He was well compensated and enjoyed working with other staff members at NumbersUSA. Unfortunately, he was forced to stop working for them on June 1, 2018 as he departed for California to prepare for his trial.

8. Anticipated Career Changes. Ben's father Terry worked as a lawyer for the Defense Intelligence Agency after retiring from the Army. Ben always wanted to obtain a similar federal civil service job that would provide employment stability, good pay, and excellent health and other benefits. In 2016, Ben applied for a position as an Advanced Visualization Specialist with the National Geo-Spatial Intelligence Agency (NGA) at Fort Belvoir, Virginia. Selection for this position

requires an extensive personal security background investigation and a counterintelligence scope polygraph examination to obtain a Top Secret/Sensitive Compartmented Information clearance. After approximately eighteen months, Ben was given a tentative offer of NGA employment and notified that his clearance had been favorably adjudicated by the security investigators. He was scheduled to begin work as a new NGA civilian employee on June 25, 2018. He was unable to report for duty because he was incarcerated in San Diego.

9. **Second Divorce.** Following his return from Boston in December 2015, Ben lived with his mother Effie, his stepfather Vince and his half-sisters at their residence at 9101 Blue Jug Landing in Burke, Virginia. Unfortunately, Effie and Vince decided to get a divorce in the summer of 2016 and began making plans for living separate and apart. In addition to their family home, which would be sold in conjunction with the divorce settlement, Effie and Vince owned a townhouse at 6626 Green Ash Court in Springfield which had been in the family for several decades and had been a long-term rental property. After the tenant's lease ended and the house became vacant in July or August 2016, Vince moved in and established it as his separate residence. Ben's mother felt that Ben would have more independence if he rented the basement apartment of his stepfather's townhouse, versus telling people he was living in his mother's basement. Ben moved in with his stepfather and lived in the lower level of the townhouse where he had grown up as a child until June 2017. Following the sale of the family home at Blue Jug Landing and completion of the divorce process in Virginia on July 3, 2018, Effie and Elnura flew to San Jose, California on July 6 and eventually settled into a 55 and over retirement community in Scott's Valley, California. They still reside there. It is accurate to say that Ben was very unsettled by his mother's second divorce and her decision to move to California. Another development concerned his 19 year old half-sister who moved into the Green Ash townhouse so she could begin attending local community college following a failed relationship after high school. She had a strained relationship with her mother and the separation preceding her parents' divorce allowed her to find the stability of moving back into her father's home. Ben decided to relocate to a shared home to provide more living space at the townhouse for his half-sister. He had one bedroom that was his personal space and shared the common areas in a large old home with four other adults. He remained at this address until March 2018 when he moved into a basement apartment in a townhouse in Fairfax, Virginia closer to

his father, stepfather, and adult sister Emily and to his anticipated new job at Fort Belvoir. He still has a lease on this small apartment.

10. **Maryland Air Guard.** Ben had long expressed a desire to join the military to obtain educational benefits and an additional source of income. He wanted to follow in the footsteps of his father and grandfather. As previously noted, Ben has periodically talked about joining the National Guard or Reserves for at least the past 10 or 15 years. Finally in November 2017, Ben signed the paperwork and passed the physical examination to join the Maryland Air National Guard as an enlisted member assigned to the 175th Wing at Warfield Air National Guard Base in Middle River, Maryland. He was planning to attend basic airman training in Texas in September or October 2018 with the goal of becoming an enlisted weapons maintenance crewman on the A-10 Warthog aircraft. As a result of his conviction in San Diego, he will most probably be given a trainee discharge and released from his service obligation.

11. **Way Forward.** Ben is emotionally upset with how his life has progressed up to this point. He has long expressed regret about his decision to attend SAIC rather than a traditional liberal arts college and some of his subsequent career choices. Since his arrest in September 2017, Ben has been incurring numerous high interest credit card debts to pay for his legal fees and air travel expenses. Given Ben's student loan and credit card debts, his only recourse may be to file for bankruptcy after his release. Hopefully he will turn his life around and mature as a result of what happened at his trial in San Diego. Ben has significant rehabilitative potential and can be a contributing member of society in the future. He is intelligent and very quick to learn complex computer programming skills through on the job training and independent studies. He is very patriotic and highly motivated to serve his country in the Air National Guard and as a member of the United States Intelligence Community. In my view, Ben is not a flight risk. He fully complied with all court directives and was always present in court when he was required to appear. Similarly, Ben will fully comply with any and all conditions of probation. Ben is not an evil or vindictive person and will pose no risk of future harm to Dr. Jacobs or her family. He has already agreed never to call or have any contact with Dr. Jacobs or her family. Similarly, Ben poses no danger to the general community in San Diego County. After his release, he will never return to San Diego. He has never before committed a violation of criminal law and has no criminal history whatsoever. He is not a violent person. No useful purpose would be served by sentencing him to a lengthy period of confinement.

When he is released, family members will welcome him back to Virginia and help him pick up the pieces of his shattered life. I hope Judge Sontag will consider the loss of Ben's job as a NGA civilian employee, his terrible financial situation and the emotional impact of his arrest, trial and conviction on the family. All family members hope Judge Sontag will show mercy as she imposes an appropriate sentence.

Respectfully Submitted

Terry Eugene Bathen

terrybathen@gmail.com
703-408-1629

Dear Officers of the Court,

I am Benjamin Lee Bathen's stepfather. I've known him and helped to raise him since before he was a teenager, and am among his closest family members. I am a former U.S. Army paratrooper and combat veteran who transitioned to becoming an international journalist (Ben and his older sister attended high school in U.S. military communities in Germany before moving back to the U.S. for college) and for the past decade I have been an international communications specialist for the federal government.

What I can tell you is that I genuinely believe my son is not a threat to anyone. He has never committed an act of violence. He is guided by loyalty, connection to family, constantly helping others. If there is a family gathering, Ben is there. If someone needs help moving, Ben is there. In a complex modern American family with parents, step-parents, siblings, and half-siblings, Ben tries to attend every holiday, anniversary, and celebration. He can be found most evenings inviting friends and family over for backyard barbecues.

We are people from humble origins whose few achievements are based on hard work and good fortune. Few people have worked harder for success as my son.

Ben's girlfriend for a year now has been an exceptionally dedicated, religious, ambitious woman who is an Air Force commander. At the many meals and visits I shared with them beginning late last summer, they spoke of future plans that increasingly have touched on the possibility of marriage and children.

After a comprehensive and incredibly intrusive in-person scrutiny of Ben's past, earlier this year he was granted among our nation's highest security clearances – a reflection of his spotless legal and social record. This allowed him to be accepted for a job of remarkable importance with a national intelligence agency that would have allowed him to focus his considerable talents, energies, and dedication to helping this nation identify and confront some of our most urgent national security threats. I, for one, would have slept better at night knowing that someone as uniquely talented and loyal as my son was on duty analyzing dangers and providing 3D visualizations to help our national leaders make tough critical decisions to protect our communities.

At the same time, last year Ben embarked on newfound and personally fulfilling service in the Air National Guard. Not as an entitled over-achiever, but as a common entry-level airman who helps keep our jets flying. He found a sense of mission, community, and national service that reinforced his values and dedication.

My family is ready to accept Ben back home on the other side of the country, to stand with him in his lifelong quest for stability, security, and integrity.

Vincent M. Crawley
Cell: 703-485-7232

July 9, 2018

Joint statement from Eufemia (Effie) Crawley and Vincent Crawley, now divorced, co-parents for Ben and his older sister for nearly three decades.

Dear Officers of the Court,

We divorced amicably a year ago but co-parented Ben and his older sister for nearly three decades and so wanted to jointly address you.

The weekend that Ben was first booked and jailed in September, he spontaneously gave his jacket to a homeless man in his cell when he saw that he was shivering from the cold. That is the sort of man our son is.

Throughout the tumults of modern life and modern disjointed families, Ben always was the reliable son – kind, loyal, always calling and visiting home, always sharing and offering his help, always trying to do the right things to make us proud ... never fully realizing just how proud we were of him.

Ben is a good man. He has never hurt anyone, ever.

We were married for 26 years, and our marriage concluded on amicable terms in the first week of July 2017. Ben was a loyal and enduring part of our lives and our marriage.

Ben is quite accomplished in his field of 3D animation and programming. He has often been invited to be a community college instructor in complex 3D modeling and animation software. However, frequent job changes appear to be part of his chosen field, in which professionals move from contract to contract. This was a way of life that did not suit his quest for stability and family life, so Ben sought and was hired for a high level competitive technical position with the U.S. intelligence community. This required completing a lengthy and comprehensive background investigations for an ultrahigh-level security clearance, to include extensive background and police checks, as well as in person interviews with family, friends, employers, and neighbors. Having passed this government clearance process, he was approved to begin his long-sought federal position on June 25, 2018.

A successful high school wrestler and delegate to the Model United Nations while growing up on U.S. military bases in Germany, Ben in 2000 completed a four-year bachelor of fine arts degree from the School of the Art Institute of Chicago. At that time it was ranked by US News and World Report as the Number One art school in the nation, and for which he had been awarded a scholarships. His after-school job was working on education software projects with a company run by fellow art school students. One of their demo projects won a national ad competition sponsored by Coca Cola.

Ben then embarked on a successful career in the early days of computer gaming and animations, when twentysomethings were driven to work binge hours well toward dawn to meet intensive

deadlines. Ben's hard work led to a position with the games division of Walt Disney Studios. Then at Harmonix in Boston, he worked on what was at the time among the most lucrative games contracts in the world: the 2009 authorized Beatles edition of the Rock Band music video game. Although considered a major artistic achievement, the sales – while respectable – did not meet projections due to a combination of the 2008-09 recession and gradually declining interest in this type of home entertainment. So, despite great professional success, Ben found himself caught up in industry layoffs.

Taking evening courses at Harvard to learn skills for a career switch into the more stable programming profession, Ben labored so hard on his projects that the Harvard computer lab manager told him that he had only seen one other student ever work so late into the night, and that was Mark Zuckerberg (the co-founder of Facebook).

Ben has a long history of rebounding from setbacks. Last year he faced yet another layoff when his nonprofit job lost its funding under the new presidential administration, but he was able to secure a better paying position with a research firm that studies immigration policies. At his newly rented home he began gardening and planned to get a dog. He met a lovely young Christian lady who is an officer in the Air Force Reserves, now his girlfriend. She encouraged him to join the military, too. He has proudly donned his Air National Guard uniform and worked his weekends each month. He was looking forward to Basic Training.

He relocated near his oldest sister so that he could see his six-year-old niece. She delights in her "Onkel." He built adult friendships with his father and step-father.

We ask the Court to have mercy on a good man.

We ask the Court to be lenient. Ben wants to be by his family in Burke, Virginia. Here is a hardworking man with a long history of decency and honesty who has spent his life helping others, who time and again has struggled against adversity and worked his way to the top of his craft. He has so many positive experiences and enjoys sharing his knowledge as a computer animation teacher. He has the ability to help so many people.

Ben's family is ready to help him reestablish his life in Virginia so that he once again can slowly rebound and rebuild and again contribute.

With deepest respect,

Eufemia Crawley
Vincent Crawley
Cell: 703-485-7232

July 9, 2018

0044

Dear Judge Sontag and Officers of the Court,

I am Ben's big sister. We are two years apart in age, and as military brats who moved every couple of years throughout childhood, we have always been extremely close.

Ben is a sweet, talented young man who has had rocky life. The last two decades have been replete with instability, layoffs, job loss, and cross-country moves. He's been in and out of jobs which seemed to be par for the course in the game industry as studios hired young computer animators to build video games but couldn't justify keeping them on after the games were finished. Ben would finally get a fantastic job and within six months, or a year at best, he'd find himself laid off yet again. While a dedicated employee in the industry, Ben worked countless hours of overtime while trying to hold onto these jobs. There was even one position where employees later won a lawsuit and compensation for the extreme number of hours of unpaid overtime required. With job instability came many moves from Illinois to California to Connecticut to Massachusetts. All of that transition meant establishing a family or support network was difficult. Each layoff and move meant more and more terrifying debt.

Ben persisted and struggled for years to change to a more stable career field. He took night classes and taught himself computer programming. As an art student wanting to make a military father proud, he took classes at Harvard Extension. I can't image how hard it was to jump from an art degree into master's level computer programming classes at Harvard, even if it is their night school. However, Ben remained resolute and worked tirelessly until he gained the skills needed to apply for more technical jobs.

Following more than a decade of this haphazard pattern of jobs and layoffs, my mother encouraged Ben to move into the family home in Virginia. Mom offered him a safe, loving place to stay in her home with her husband Vince while he got started in a new career field. Ben found a job here in northern Virginia where he could be near our family. He seemed delighted and relieved to have a safe place to stay in spite of a bit of embarrassment to be living in his parents' basement. There were family cookouts, our teen-aged sister tormenting him with Lady Gaga, and my husband and I lived only a mile away. We were happy to have Ben come and entertain our seventy-five pound Labrador and then five-year-old little girl. For Ben, I believe there was finally that sense of the peace and support of home and family.

In July of 2016, my mother returned to Virginia from a visit with extended family in California and announced her decision to divorce our stepfather, Vince. Vince had been a father figure since Ben was twelve-years-old. As parents of two girls adopted out of an Azeri orphanage, there had been the significant stress that parents of children with special needs face. However, our very Catholic mother's decision to actually pursue divorce was a stunning blow to everyone. She strongly and rather abruptly suggested that both my stepfather and Ben leave the family home. After the promise that Ben would be supported and cared for in his parents' house, this was truly a shock. Ben and Vince moved into a small townhouse that our family had up for rent but was fortunately empty at the time. It actually was our childhood home, purchased by my mother and father (mom's first husband) when we in elementary school. As the bewilderment wore off, Ben attempted to adjust to the new house – taking a trip down memory lane and looking for a silver lining that he and Vince now surprisingly had a bachelor pad. He stayed determined and worked hard while trying to pay off debt and establish a life for himself.

0045
Unfortunately, in the summer of 2017, Vince realized that my young sister, Mellie, needed to move into his home. After spending her final years of high school in a residential program working on emotional issues stemming from spending the first five years of her life in an orphanage in Azerbaijan, Mellie hit some bumps trying to find work to support herself and attend college in northern Virginia. She needed to stay with family. As my mother made clear that her home was not an option, this meant that our stepfather Vince had to ask Ben to move out to make room for his little sister. Again, this meant that Ben lost that stable family home.

The good news was that finally, things were working out for Ben. He was hired for a job with Numbers USA and seems by all accounts to have been successful and well-liked there. After years of struggling to change career tracks, he was offered his absolute dream job creating 3D graphics with the National Geospatial-Intelligence Agency pending security clearance. That clearance came through this spring, and he was set to start work with them last month. Of course, Ben's conviction has made that dream job disappear. His incarceration also means that returning to the Numbers USA job is not a likely possibility. I can only think that job prospects will be fairly limited as he returns to the work force with an art degree and three felony convictions.

Ben has been seeing an amazing young woman. Danah is a lovely, fun, and wonderful woman of faith. She is also a squadron commander in the Air National Guard, so she won't put up with any nonsense. I think she could be the love of Ben's life, and of course, our family is ready to embrace her with open arms. Ben's arrest and conviction have been a shock and complete heartbreak for Danah; although she remains supportive.

As a mother of a young daughter, I understand, perhaps more than most, how terrifying this crime is. My little brother is a good man. He's a sweet, playful uncle to my little girl. He loves his family. He will be a positive member of our community here. We are all praying to have my little brother back in Virginia where we can help him attempt to rebuild.

Sincerely,

Emily Edmiston
(703) 725-22000
Emily.Edmiston@gmail.com



**CALIFORNIA DEPARTMENT OF JUSTICE
BUREAU OF FIREARMS
Prohibited Persons Relinquishment Form**
(Penal Code 29810)



Pursuant to Penal Code section 29810, any person who is convicted of any offense listed in sections 29800 or 29805 is prohibited from owning, purchasing, receiving, possessing, or having under his or her custody or control, any firearms, ammunition, and ammunition feeding devices, including but not limited to magazines. Any person subject to section 29800 or 29805, shall relinquish all firearms through a designee within the time periods set forth in subdivision (d) or (e) of Penal Code section 29810, by surrendering the firearms to the control of a local law enforcement agency, selling the firearms to a licensed firearms dealer, or transferring the firearms for storage to a firearms dealer pursuant to section 29830.

Please note: This form is intended for use in relinquishing firearms only. As a reminder, any person who is convicted of any offense listed in sections 29800 or 29805 is also prohibited from owning or possessing ammunition, ammunition feeding devices, including but not limited to magazines, clips, speed loaders, and autoloaders.

A. Prohibited Person Information (Defendant):

Last Name: Batten		First Name: Benjamin		Middle Name: Lee	
Physical Residence Address: 6626 Green Ash Court			City: Springfield	State: VA	Zip Code:
Date of Birth (mm/dd/yyyy):	California Driver License or Identification No.:	Sex: M	Phone No. (include area code):		

B. Firearm(s) Information (To report additional firearm(s), use supplemental form (BOF 1023)):

RLB
Initial

I do not own, possess, or have under my custody or control, any firearms, ammunition, or ammunition feeding devices, including but not limited to magazines.

Benjamin Batten
Signature

7/10/2018
Date

Firearm Type: <input type="radio"/> Handgun <input type="radio"/> Rifle <input type="radio"/> Shotgun		Serial Number:		Make:	Model:
Caliber:	Color:	Firearm Origin:	Barrel Length:	<input type="radio"/> in. <input type="radio"/> cm.	Category (i.e. semi-automatic, single-shot, bolt action):
Describe Firearm (Identification Marks):					
Current Location of Firearm (including address and other information about the firearm's specific location):					

Firearm Type: <input type="radio"/> Handgun <input type="radio"/> Rifle <input type="radio"/> Shotgun		Serial Number:		Make:	Model:
Caliber:	Color:	Firearm Origin:	Barrel Length:	<input type="radio"/> in. <input type="radio"/> cm.	Category (i.e. semi-automatic, single-shot, bolt action):
Describe Firearm (Identification Marks):					
Current Location of Firearm (including address and other information about the firearm's specific location):					



CALIFORNIA DEPARTMENT OF JUSTICE
BUREAU OF FIREARMS
Prohibited Persons Relinquishment Form



Firearm Type: <input type="radio"/> Handgun <input type="radio"/> Rifle <input type="radio"/> Shotgun		Serial Number:	Make:	Model:
--	--	----------------	-------	--------

Caliber:	Color:	Firearm Origin:	Barrel Length:	<input type="radio"/> in. <input type="radio"/> cm.	Category (i.e. semi-automatic, single-shot, bolt action):
----------	--------	-----------------	----------------	--	---

Describe Firearm (Identification Marks):

Current Location of Firearm (including address and other information about the firearm's specific location):

Firearm Type: <input type="radio"/> Handgun <input type="radio"/> Rifle <input type="radio"/> Shotgun		Serial Number:	Make:	Model:
--	--	----------------	-------	--------

Caliber:	Color:	Firearm Origin:	Barrel Length:	<input type="radio"/> in. <input type="radio"/> cm.	Category (i.e. semi-automatic, single-shot, bolt action):
----------	--------	-----------------	----------------	--	---

Describe Firearm (Identification Marks):

Current Location of Firearm (including address and other information about the firearm's specific location):

BLB
Initial Failure to file a completed Prohibited Persons Relinquishment Form (BOF 1022) with the assigned probation officer within the specified time period shall constitute an infraction punishable by a fine not exceeding \$100.

BLB
Initial By initialing here I understand that any person who lives with me (cohabitant) and who owns firearms must store those firearms in accordance with Penal Code section 25135.

C. Court Authorized Exception(s):

Yes No Pursuant to Penal Code section 29810(f), the court has approved a shortened or enlarged relinquishment time period or has allowed for an alternative method for relinquishment (If checked "yes," attach court documentation).

D. Power of Attorney (Consenting Third-Party)/Law Enforcement Designee Assignment:

I, _____, hereby designate _____
 Printed Name of Defendant Printed Name of Power of Attorney/LEA Designee
 to have Power of Attorney for the purpose of transferring or disposing of my firearm(s).

E. Defendant Declaration:

As the firearm owner, I hereby declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. I understand that I, as defendant, and/or the designee are obligated to submit a completed Prohibited Persons Relinquishment Form (BOF 1022) to my assigned probation officer within the specified time period.

I have been released from law enforcement custody and understand my designee shall dispose of any firearms I own, possess, or have in my custody or control within five days of my conviction.

I remain in law enforcement custody and understand my designee shall dispose of any firearms I own, possess or have in my custody or control within fourteen days of my conviction.

Signature Date

Case/Docket #: _____



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

EXHIBIT LIST

CLERK: R. Camou DEPT.: 15
CASE NO.: SCS294342 HEARING TYPE: Jury Trial
CASE NAME: The PEOPLE VS.: BATHAN
COUNSEL: C. Somerville / A. Freeze

COURT USE ONLY 1048
F I L E D
Clerk of the Superior Court
JUN 19 2018
By: M. Reddy, Deputy

Name(s) and address(es)

NO. CT TTΔ	ID Date	EVID Date	EXHIBIT DESCRIPTION	EC OP	NO. CT TTΔ	ID Date	EVID Date	EXHIBIT DESCRIPTION	EC OP
1 CT	6-14-18	6-15-18	Audio recording of Carolyn Jacobs' voice-mail, dated June 4, 2017	TT	7a CT	6-14-18	6-15-18	Transcript of dialogue of Court's Exhibit 7	TT
1a CT	6-14-18	6-15-18	Transcript of dialogue of Court's Exhibit 1	TT	8 CT	6-14-18	6-15-18	1 page, Subscriber Information Sheet from T-Mobile	TT
2 CT	6-14-18	6-15-18	Audio recording of Carolyn Jacobs' voice-mail, dated July 3, 2017	TT	9 CT	6-14-18	6-15-18	1 page, Subscriber Information Sheet from T-Mobile continuation of Court's Exhibit 8	TT
2a CT	6-14-18	6-15-18	Transcript of dialogue of Court's Exhibit 2	TT	10 CT	6-14-18	6-15-18	1 page, Call Detail Record of 617-992-4648 from June 4, 2017	TT
3 CT	6-14-18	6-15-18	Audio recording of Carolyn Jacobs' voice-mail, dated July 5, 2017	TT	11 CT	6-14-18	6-15-18	1 page, Call Detail Record of 617-992-4648 from June 4, 2017	TT
3a CT	6-14-18	6-15-18	Transcript of dialogue of Court's Exhibit 3	TT	12 CT	6-14-18	6-15-18	1 page, Call Detail Record of 617-992-4648 from July 3, 2017	TT
4 CT	6-14-18	6-15-18	Audio recording of Jail Call by Benjamin Bathen with unkn male and unkn female, dated 9/16/17	TT	13 CT	6-14-18	6-15-18	1 page, Call Detail Record of 617-992-4648 from July 3, 2017	TT
4a CT	6-14-18	6-15-18	Transcript of dialogue of Court's Exhibit 4	TT	14 CT	6-14-18	6-15-18	1 page, Call Detail Record of 617-992-4648 from July 5, 2017	TT
5 CT	6-14-18	6-15-18	Audio recording of Jail Call by Benjamin Bathen with bail bond representative, dated 9/16/17	TT	15 CT	6-14-18	6-15-18	1 page, Call Detail Record of 617-992-4648 from July 5, 2017	TT
5a CT	6-14-18	6-15-18	Transcript of dialogue of Court's Exhibit 5	TT	16 CT	6-14-18	6-15-18	1 page, Google Map titled: Tower Hits From 6/1/17 - 7/6/17	TT
6 CT	6-14-18	6-15-18	Audio recording of Jail Call by Benjamin Bathen w/Emilio Sanchez, bail bond rep, dated 9/17/17	TT	17 CT	6-14-18	6-15-18	1 page, Google Map, tracking phone calls of 617-992-4648 on July 3, 2017	TT
6a CT	6-14-18	6-15-18	Transcript of dialogue of Court's Exhibit 6	TT	18 CT	6-14-18	6-15-18	1 page, Google Map, tracking phone call of 617-992-4648 on July 5, 2017	TT
7 CT	6-14-18	6-15-18	Audio recording of Jail Call by Benjamin Bathen with Gerald, bail bond representative, dated 9/17/17	TT	19 CT	6-14-18	6-15-18	1 page, Orientation slide titled: Cell Site Analysis (617) 992-4648 June 1, 2017 to July 7, 2017	TT

DISTRIBUTION

White - Court File
Canary - Court Clerk
Pink - Exhibit Envelope

ID - Marked for Identification
EVID - Entered in Evidence
TT - Plaintiff/Petitioner Offered
Δ - Defendant/Respondent Offered

○ - Not Received by Exhibit Clerk
EC - Exhibit's Custodian's use only
OP - Offering Party
CT - Court

PAGE NO. 1 of 2

Date: 6-19-18

Signature of Exhibits Custodian

CASE NAME	CASE NUMBER
PEOPLE vs. BATHAN	0049 SCS294342

NO. CT TTΔ	ID Date	EVID Date	EXHIBIT DESCRIPTION	EC OP	NO. CT TTΔ	ID Date	EVID Date	EXHIBIT DESCRIPTION	EC OP
20 CT	6-15-18	6-15-18	1 page, Tower Frequency Chart	TT	33 CT	6-15-18	6-15-18	Custody of Record Document from T-Mobil	TT
21 CT	6-15-18	6-15-18	1 page titled: #1 Tower Connection, with map at 9211 Old Keene Mill Rd, Burke, VA	TT	34 CT	6-15-18	6-15-18	Compact Disk containing Call Detail Records and Billing Information	TT
22 CT	6-15-18	6-15-18	1 page titled: Point of Interest, with map at 6626 Green Ash Ct, Springfield, VA	TT	35 CT	6-14-18	6-15-18	1 page print out of e-mail, dated April 28, 2008	Δ
23 CT	6-15-18	6-15-18	1 page chart titled: #1 Tower Connection Usage – Date & Day of Week	TT	36 CT	6-14-18	6-15-18	1 page print out of e-mail, dated July 1, 2008	Δ
24 CT	6-15-18	6-15-18	1 page titled: #2 Tower Connection, with map at 1003 K Street NW, Washington, DC	TT	37 CT	6-14-18	6-15-18	1 page print out of e-mail, dated September 1, 2008	Δ
25 CT	6-15-18	6-15-18	1 page titled: Point of Interest, with map at 1201 I Street NW, Washington, DC	TT	38 CT	6-15-18	6-15-18	Audio recording of Jail Call by Benjamin Bathen with All Star bail bond representative, Hank	Δ
26 CT	6-15-18	6-15-18	1 page chart titled: #2 Tower Connection Usage – Date & Day of Week	TT	38a CT	6-15-18	6-15-18	Transcript of dialogue of Court's Exhibit 38	Δ
27 CT	6-15-18	6-15-18	1 page titled: #3 Tower Connection, with map at 9501 Old Burke Lake Rd, Burke, VA	TT	39 CT	6-15-18	6-15-18	1 page titled: Cell Tower Coverage Cell Phone 617-992-4648, with map	Δ
28 CT	6-15-18	6-15-18	1 page titled: Point of Interest, with map at 9501 Old Burke Lake Rd, Burke, VA	TT					
29 CT	6-15-18	6-15-18	1 page chart titled: #3 Tower Connection Usage – Date & Day of Week	TT					
30 CT	6-15-18	6-15-18	1 page titled: #4 Tower Connection, with map at 1125 N Patrick Henry Dr, Arlington, VA	TT					
31 CT	6-15-18	6-15-18	1 page titled: Point of Interest, with map at 1125 N Patrick Henry Dr, Arlington, VA	TT					
32 CT	6-15-18	6-15-18	1 page chart titled: #4 Tower Connection Usage – Date & Day of Week	TT					

DISTRIBUTION

White – Court File
 Canary – Court Clerk
 Pink – Exhibit Envelope

ID – Marked for Identification
 EVID – Entered in Evidence
 TT – Plaintiff/Petitioner Offered
 Δ – Defendant/Respondent Offered

Q – Not Received by Exhibit Clerk
 EC – Exhibits Custodian's use only
 OP – Offering Party
 CT – Court

Date: 6-19-18



Signature of Exhibits Custodian

1 CASE NAME: PEOPLE vs BENJAMIN BATHEN

2 DA CASE NO: BCA405

3 COURT NO: CS294342
4
5
6
7
8

9 TRANSCRIPTION OF
10 CAROLYN JACOBS' VOICEMAIL
11 ON
12 JUNE 4, 2017
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

28 TRANSCRIBED BY: JOEL J. MADERO



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

This is a transcription of a voicemail left to Carolyn Jacobs on June 4, 2017.

Hey Dr. Jacobs, 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!

END OF VOICEMAIL

1 CASE NAME: PEOPLE vs BENJAMIN BATHEN
2 DA CASE NO: BCA405
3
4 COURT NO: CS294342
5
6
7
8

9 TRANSCRIPTION OF
10 CAROLYN JACOBS' VOICEMAIL
11 ON
12 JULY 3, 2017
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

28 TRANSCRIBED BY: JOEL J. MADERO



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

This is a transcription of a voicemail left to Carolyn Jacobs on July 3, 2017.

Hey Dr. Jacobs, 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!

END OF VOICEMAIL

1 CASE NAME: PEOPLE vs BENJAMIN BATHEN

2 DA CASE NO: BCA405

3 COURT NO: CS294342

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TRANSCRIPTION OF
CAROLYN JACOBS' VOICEMAIL

ON

JULY 5, 2017

TRANSCRIBED BY: JOEL J. MADERO



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

This is a transcription of a voicemail left to Carolyn Jacobs on July 5, 2017.

Hey Dr. 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.

END OF VOICEMAIL

1 CASE NAME: PEOPLE VS. BATHEN
2 D.A. CASE NO.: BCA405
3 COURT NO: CS294342
4
5
6
7
8
9

10
11 INTERVIEW OF:
12 BENJAMIN BATHEN
13 BY:
14 UNKNOWN MALE AND UNKNOWN FEMALE
15 ON
16 SEPTEMBER 16, 2017
17
18
19
20
21
22
23
24
25
26
27
28



1 LEGEND:
2 UM: UNKNOWN MALE
3 UF: UNKNOWN FEMALE
4 BATHEN: BENJAMIN BATHEN, DEFENDANT
5 RECORDING: AUTOMATED RECORDING
6

7 RECORDING: Hello this is a free call from Ben Bathen an inmate at San Diego Central
8 Jail. This call is being to recorded if you are an attorney, physician or
9 religious advisor and would like to speak with your client without being
10 recorded you must first contact the Sheriff's Department at 858-565-3519
11 during normal business hours. If you proceed with this call, you do so with
12 the understanding that this telephone call is non-confidential and will be
13 recorded by the Sheriff's Department and shared with any law enforcement
14 or government entity seeking to listen to and use it. If you agree to have
15 this call recorded and wish to proceed with this call please continue.
16 Otherwise you should terminate this call now. Find an inmate's calling
17 account to make sure a call is never missed. You can fund an inmates
18 account without setting up an inmates account of your own. Simply visit
19 www.securistech.net or call 1-800-844-6591 and select the option to fund
20 an inmate debit account today. To accept this free call press 1. Thank you
21 for using securis. You may start the conversation now.

22 UM: What's up bro.

23 BATHEN: Hey, what's going on man. I can't believe I got through to you. You get
24 out already?

25 UM: Hell yeah I'm free.

26 BATHEN: Oh, congratulations. Um, did you get a chance to look up that phone
27 number?

28 UM: Yeah, let me, uh, what was it again? Hold on. Hold on.

1 BATHEN: It's look at um, www.theulelaw.com
2 UM: Hold on, hold on.
3 Background noise.
4 UM: Alright, what was it bro?
5 BATHEN: Uh, www.theulelaw.com
6 UM: www
7 BATHEN: Yeah. So www.T-H-E
8 UM: Can you spell it out?
9 Background noise.
10 UM: Spell it out bro.
11 BATHEN: Uh, T-H-E-U-L-E...
12 UM: T-H-U-E-L...
13 BATHEN: Yes, it's T-H-E- like the, U-L-E
14 UM: Fuck, I can't understand you...hey what is it?
15 BATHEN: It's T-H-E-U-L-E.
16 UF: T-H-E.
17 BATHEN: U-L-E.
18 UF: U-L-E.
19 BATHEN: Yeah, and then L-A-W.COM.
20 UF: L-A-W.COM.
21 UM: Alright I got it, it's uh, Theule Law San Diego DUI Criminal
22 (unintelligible).
23 BATHEN: Uh, yeah.
24 UM: Uh, you want (unintelligible) number, right?
25 BATHEN: Yeah, does it have his phone number on there or...
26 UM: Yeah, there's a number right here, 619.
27 BATHEN: Okay.
28 UM: 236.

1 BATHEN: 236.
2 UM: 9700.
3 BATHEN: 236-9700.
4 UM: Yeah.
5 BATHEN: 236-9700. Okay, awesome, thanks a lot man.
6 UM: Alright no problem bro.
7 BATHEN: Okay, later, good luck. Have fun out there.
8 UM: Late.

9

10

11 ...

12 **[END OF RECORDING]**

13

14

15

16

17

18

19

20

21

22

23

24

25

26

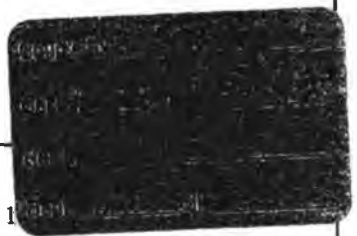
27

28

1 CASE NAME: PEOPLE VS. BATHEN
2 D.A. CASE NO.: BCA405
3 COURT NO: CS294342
4
5
6
7
8
9

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTERVIEW OF:
BENJAMIN BATHEN
BY:
BAIL BOND REPRESENTATIVE
ON
SEPTEMBER 16, 2017



1 LEGEND:

2 BAIL BOND: BAIL BOND REPRESENTATIVE

3 BATHEN: BENJAMIN BATHEN, DEFENDANT

4 RECORDING: AUTOMATED RECORDING

5
6 RECORDING: Hello this is a free call from Ben Bathen an inmate at San Diego Central
7 Jail. This call is being to recorded if you are an attorney, physician or
8 religious advisor and would like to speak with your client without being
9 recorded you must first contact the Sheriff's Department at 858-565-3519
10 during normal business hours. If you proceed with this call, you do so with
11 the understanding that this telephone call is non-confidential and will be
12 recorded by the Sheriff's Department and shared with any law enforcement
13 or government entity seeking to listen to and use it. If you agree to have
14 this call recorded and wish to proceed with this call please continue.
15 Otherwise you should terminate this call now. Find an inmate's calling
16 account to make sure a call is never missed. You can fund an inmates
17 account without setting up a calling account of your own. Simply visit
18 www.securistech.net or call 1-800-844-6591 and select the option to fund
19 an inmate debit account today. To accept this free call press 1. To refuse
20 this free call press 2. If you would like to permanently block your number
21 from receiving calls from this facility press 6. You can fund an inmates
22 account without setting up a calling account of your own. Simply visit
23 www.securistech.net or call 1-800-844-6591 and select the option to...
24 Thank you for using securis. You may start the conversation now.

25 BAIL BOND: Bail Bond.

26 BATHEN: Hey, is this All Power? .

27 BAIL BOND: Yes.

28 BATHEN: Hey, this is Ben Bathen, I called about 30 minutes ago.

1 BAIL BOND: Yeah, um, uh, your bail is 100 K right?
2 BATHEN: Yeah, it's one-hundred thousand.
3 BAIL BOND: Yeah, he's on his way right now. Emilio. He's going to go talk to you,
4 visit you, get all the information and he's going to be getting you out
5 alright.
6 BATHEN: He is getting me out.
7 BAIL BOND: Yeah, he's going to be working on getting you out today.
8 BATHEN: Today?
9 BAIL BOND: He's, he's on his way right now to go see you.
10 BATHEN: Okay, and the co-signer thing isn't an issue?
11 BAIL BOND: Uh, again, you talk to him and uh, let him know everything...
12 BATHEN: Okay.
13 BAIL BOND: And that way we can be good. Uh, but either way if he um, he does go,
14 he's going to go see you right now. That's why I have the lines.
15 BATHEN: Okay.
16 BAIL BOND: So, I'm over here in Vista I'm sorry and he's in San Diego but he just
17 transferred to me right now because he's going to see you.
18 BATHEN: Okay.
19 BAIL BOND: Okay, but either way, I want you to call me in 30 minutes.
20 BATHEN: Okay, you will get your money.
21 BAIL BOND: Yeah, yeah, yeah, don't worry about that. Just talk to Emilio.
22 BATHEN: Okay, I'll...
23 BAIL BOND: Okay. Like I said call me back in 30 minutes. This is All Power. I got
24 you.
25 BATHEN: Alright, you're awesome man.
26 BAIL BOND: . Alright, you got it buddy thanks.
27 BATHEN: Yeah, bye.
28 UM: Alright bye.

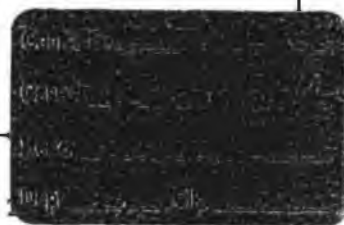
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

[END OF RECORDING]

1 CASE NAME: PEOPLE VS. BATHEN
2 D.A. CASE NO.: BCA405
3 COURT NO: CS294342
4
5
6
7
8
9

10
11 INTERVIEW OF:
12 BENJAMIN BATHEN
13 BY:
14 BAIL BOND REPRESENTATIVE
15 ON
16 SEPTEMBER 17, 2017
17
18
19
20
21
22
23
24
25
26
27

28 TRANSCRIBED BY: Melissa Strickland, Ubiquis



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LEGEND:

GERALD: GERALD, BAIL BOND REPRESENTATIVE

BATHEN: BENJAMIN BATHEN, DEFENDANT

RECORDING: AUTOMATED RECORDING

RECORDING: This call is subject to recording and monitoring.

GERALD: Hey, can you hear me?

BATHEN: Yeah.

GERALD: Okay. So, uh, Mr. Theule told me to come visit you.

BATHEN: Okay, great.

GERALD: Um, so when you get out tonight, he says contact him, he's already made payments, I guess, on your hotel or somethin' like that.

BATHEN: Okay.

GERALD: Um, to contact him in the morning. Yeah, so they're gonna have court tomorrow, but, uh, you'll have to come to our office and sign all the paperwork and all that kind of stuff.

BATHEN: Okay. So I am getting out tonight then.

GERALD: Yeah, that's why I'm here.

BATHEN: Okay, great.

GERALD: All right? Um...

BATHEN: Are we doin' that now?

GERALD: Yeah, I gotta go downstairs and do that, and I just had to relay that message so you knew.

BATHEN: Okay, great. So (unintelligible)

GERALD: What's your ...

BATHEN: ...call him tomorrow morning?

GERALD: Yeah. What's your phone number?

1 BATHEN: Uh, shit. I, honestly, don't know. It's a new cell phone.

2 GERALD: Oh, okay.

3 BATHEN: Um, he has it.

4 GERALD: Oh, oh. It's not on you?

5 BATHEN: Yeah.

6 GERALD: Okay.

7 BATHEN: Uh, Ben Theule has the cell phone.

8 GERALD: Okay. All right. And then, um, all right. So, yeah, he has your ... He has
9 the cell phone? And then what's your ... what's your address?

10 BATHEN: Uh, it's 1132 North Kentucky Street ...

11 GERALD: Arlington, VA?

12 BATHEN: Arlington, VA 22205. That's correct.

13 GERALD: All right. Okay. So ... and when you're aware that you do have court
14 tomorrow?

15 BATHEN: Yes.

16 GERALD: Okay. All right. So I'm gonna go ahead and get this bond posted for you.

17 BATHEN: Okay, great.

18 GERALD: Um, and then you'll get with, uh ... with Ben and then, uh, you guys gotta
19 come to our office, sign, and ... and take care of everything like that.

20 BATHEN: Okay. Tomorrow?

21 GERALD: Yeah.

22 BATHEN: Okay.

23 GERALD: Yeah. But you're ...

24 BATHEN: So ...

25 GERALD: ...gettin' out tonight.

26 BATHEN: Oh, so right now, tonight, I can just go back to the hotel, get some sleep,
27 get cleaned up, and everything like that?

28 GERALD: Yeah. And do you have Ben's number?

1 BATHEN: Uh, I do. It's, uh, 619-770-8587.

2 GERALD: His cell ... I'm gonna leave a card, and they're gonna give you ... I'll leave
3 a note on there, and I'll write it on the back of my business card, Ben's
4 number.

5 BATHEN: Okay, great.

6 GERALD: All right? Okay.

7 BATHEN: Um, okay. That's ... that's awesome.

8 GERALD: Yeah. And then you know all about bail. You gotta show up to all your
9 court dates and all that kind of stuff. Right?

10 BATHEN: Yeah. So, basically, um, I think there's a good chance that he can appear
11 for me for most of the dates.

12 GERALD: Oh.

13 BATHEN: Uh, 'cause ...

14 GERALD: You gotta talk with that ... with him about that. I ... I wouldn't know.

15 BATHEN: I will make a hundred percent sure because you're a very large
16 (unintelligible) looking dude.

17 GERALD: Yeah, yeah. You ever ...

18 BATHEN: Don't worry about that. There's no chance of me violating any ... any
19 court dates or anything like that, 'cause I'm ... I'm up for a really good job
20 in Virginia, but it's ...

21 GERALD: What ... what are you doin' now for work?

22 BATHEN: I'm a web programmer, uh, for a, um, a non-profit in Washington, DC, just
23 (unintelligible) International Food and Poverty Research Institute.

24 GERALD: Oh, okay. How long have you been workin' over there?

25 BATHEN: Um, I have been workin' over there for, um, probably like, uh, six months.

26 GERALD: Oh, okay. How long have you been livin' on the East Coast?

27 BATHEN: Uh, I have been on the East Coast now since 2008.

28 GERALD: Oh, okay.

1 BATHEN: Thank you so much for comin' to get me, by the way. I know you're doin'
2 this as a favor for Ben and it's, um, I feel like you're savin' my life.

3 GERALD: Yeah, yeah. No problem. So ... but, uh, the one thing that my company
4 wanted to ask, due to the fact that you're out of state, uh, but makin' the
5 court dates will be no problem. Right?

6 BATHEN: No, making the court dates won't be a problem.

7 GERALD: Okay.

8 BATHEN: I mean, I'll be able to, um, to fly out here for one ... the ones that I do need
9 to, and, uh, they let us do one court date already, where he appeared for me,
10 you know, at the, um, at the court.

11 GERALD: Uh-huh.

12 BATHEN: I think, you know, he's pretty confident that once this is settled, I'm
13 probably looking at, you know, a misdemeanor.

14 GERALD: Yeah.

15 BATHEN: So, I mean, it doesn't make sense to turn around and flee, leave your career
16 that pays a six-figure salary for, um, you know, a misdemeanor and a fine,
17 basically. You know, it'd be easier to just pay the whatever it is, the a
18 thousand bucks. I mean, the only thing is, like, they might put me on
19 probation or something like that, but, you know, he says he's ... he's pretty
20 sure there's no chance of jail time.

21 GERALD: Yeah, that's good. And this ... this is California, so, you know, the laws
22 are a little different here, a little more lenient, too, which is a good thing in
23 this case.

24 BATHEN: But you think they are?

25 GERALD: Yeah.

26 BATHEN: California? Well, I don't know. To me, it seemed very serious. I don't
27 know. I mean, I'm a computer nerd. I've never been in jail before or
28 anything like that. So this whole thing just scared the pants off me.

1 GERALD: Yeah. I hear that.

2 BATHEN: You know what I mean? Like, uh, I don't really find myself in jail on a
3 regular basis. Um, there was one other bail bondsman from All Power. He
4 came by and pulled my property bag.

5 GERALD: Uh-huh.

6 BATHEN: So I'll need to call him and get him to, uh, give it back, basically.

7 GERALD: All right. Okay. So here's what I'm gonna do. I'm gonna go ahead ...
8 How long ago was that? A while ago or ...

9 BATHEN: That was this morning.

10 GERALD: Oh, okay. Yeah. Don't worry about that. Um, you're gonna get out
11 tonight. I'm goin' downstairs to post a bond. I just had to give you the
12 message from Mr. Theule, and, uh, I'll see you tomorrow. We'll do the
13 paperwork and take care of everything.

14 BATHEN: Okay. What about, um, my property bag, 'cause he's got my wallet and my
15 keys.

16 GERALD: Oh, yeah. You can just go over there and get it once you're out.

17 BATHEN: Oh, okay. Where's All Power? Is it just ...

18 GERALD: Just across the street.

19 BATHEN: Oh, it's just across the street?

20 GERALD: Yeah.

21 BATHEN: Okay, great.

22 GERALD: Yeah. I'm gonna have my card on here, so if you've got any questions, you
23 can call my cell phone.

24 BATHEN: Okay. That's perfect.

25 GERALD: All right?

26 BATHEN: And I'll just walk over and get it when I, uh ...

27 GERALD: Yeah.

28 BATHEN: Okay. And then what was your name again?

1 GERALD: Gerald.
2 BATHEN: Gerald?
3 GERALD: Yeah. And then your other ...
4 BATHEN: (unintelligible)
5 GERALD: ...person you've been dealin' with is Gerard. So, yeah, don't worry.
6 BATHEN: I will make sure that I'm at all my court dates, and I will make one hundred
7 percent sure that I will (unintelligible) financial agreement.
8 GERALD: All right.
9 BATHEN: I can guarantee that.
10 GERALD: All right, brother. All right?
11 BATHEN: Fine.
12 GERALD: Next time I see you, you outside. All right?
13 BATHEN: Great.
14 GERALD: Okay.
15 BATHEN: That sounds good.
16 GERALD: All right, brother.
17 BATHEN: See you.
18 GERALD: Bye.
19 BATHEN: Bye.

20 ...

21 [END OF RECORDING]

22

23

24

25

26

27

28

0071



PEOPLE vs BATHEN**CASE NO.: SCS294342
SAN DIEGO SUPERIOR COURT
SOUTH BAY DIVISION****IN CUSTODY PHONE CALL
TO ALL STAR BAIL BONDS
TRANSCRIPTION****By: Tanya Hauck**

1
2
3
4
5
6
7
8 **OPERATOR:** Hello. This is a free call from--

9 **BATHEN:** Ben Bathen.

10 **OPERATOR:** An inmate at San Diego Central Jail. This call is being recorded. If you are an
11 attorney, physician or a religious adviser and would like to speak to your
12 Client without being recorded, you must first contact the Sheriff's Department
13 at 8-5-8-5-6-5-3-5-1-9 during normal business hours. If you proceed with this
14 call, you do so with the understanding that the telephone call is non-
15 confidential and will be recorded by the Sheriff's Department and shared with
16 any Law Enforcement and Government entity seeking to listen to and use it. If
17 you agree to have this call recorded and wish to proceed with this call, please
18 continue. Otherwise you should terminate this call now. Fund an inmate's
19 calling call to make sure a call is never missed. You can fund an Inmate's
20 account without setting up a calling account of your own. Thank you for using
21 Secure Us. You may start the conversation now.

22 **BAIL BONDSMAN:** Bail Bonds. This is Hank.

23 **BATHEN:** Hey how's it going? My name is Ben Bathen. I'm trying to bail out.

24 **HANK:** What's your name?

25 **BATHEN:** Uh first name is Benjamin B-E-N-J-A-M-I-N and the last name is Bathen B-A-
26 T-H-E-N. They set bail at um two hundred thousand.

27
28 **HANK:** Alright. What happened man? Uh, Bathen?

1 **BATHEN:** Yeah Bathen, B-A-T-H-

2 **HANK:** What's your date--okay I found you.

3 **BATHEN:** You see it?

4 **HANK:** Yeah I see Benjamin no middle name nineteen seventy seven?

5 **BATHEN:** Yeah that's me.

7 **HANK:** I found you. Says here you got booked in about two days ago?

8 **BATHEN:** Yeah it was Friday. They um, they did suddenly. I went in for the Arraignment
9 and uh all of a sudden they added a bunch of additional charges and decided to
10 take me in to custody. Yeah um [inaudible] Lawyer was there, which wasn't a
11 big surprise. So he's been trying to get me bail but I'm not sure which
12 company's he's going through. Um I was wondering if it would be possible for
13 me to bail myself out. I mean this is the first time being arrested so I don't
14 really know how this works.

15 **HANK:** Alright um well, so just tell me exactly like what--you said your charges are
16 additional court date and threat crime cause of death, cause death and great
17 bodily injury?

18 **BATHEN:** Um yeah they're alleging--they're alleging that I left an angry voicemail on
19 somebody's answering machine.

20 **HANK:** Okay alright so...

22 **BATHEN:** A couple months ago. That would have been back in June, July.

23 **HANK:** Okay and you already went to---when was your Arraignment?

24 **BATHEN:** Uh, Arraignment was the day before yesterday, Friday.

25 **HANK:** Okay. What do you do for work, man?

26
27 ///
28 ///

1 **BATHEN:** Uh I'm a Web Programmer so I make pretty good money. I mean I'm getting
2 seventy one thousand right now. Um...you know and I have a pretty good
3 credit rating. It's about seven hundred.

4 **HANK:** [inaudible]

5 **BATHEN:** Uh, sorry I can't hear you very well. Someone is flushing the toilet.

6 **HANK:** Oh someone is flushing the toilet. Alright let me see. Um, so you're a web
7 designer uh which company or do you do it by yourself?

8

9 **BATHEN:** No I do it for a company called the Ifpri I-F-P-R-I and it's the International
10 Food and Poverty Research Institute.

11 **HANK:** [inaudible] No middle name, correct?

12 **BATHEN:** No I have a middle name. It's Lee L-E-E.

13 **HANK:** You were born on November thirtieth?

14 **BATHEN:** November thirtieth ninety seventy seven. That's correct.

15 **HANK:** Okay. Alright so you're trying to see if you can get yourself out, correct?

16 **BATHEN:** Yeah. I mean I could definitely do like a thousand today to get myself out um
17 and then I'm not really sure how you need or when um...

18

19 **HANK:** Okay uh where do you live?

20 **BATHEN:** Uh I live in Northern Virginia actually. I flew out here just for the
21 Arraignment.

22 **HANK:** Oh. What's your address in Northern Virginia?

23 **BATHEN:** Uh it's 1132 North Kentucky Street. Arlington, Virginia. And the zip code is
24 22205.

25

26 **HANK:** Okay what's your cell phone?

27

28

1 **BATHEN:** Uh shit I don't have my cell phone number it's like 7-0-3-3-9-6-3-9-8-5. That
2 might be incorrect though. I'm not quite sure.

3 **HANK:** Alright so--alright how long have you been working as a web designer?

4 **BATHEN:** Web Programmer. Programmer.

5 **HANK:** How long have you been doing that for?

6 **BATHEN:** I've been doing that for about five years probably. I mean um I can definitely
7 pay you your money you know it's just a question of can I do it while I'm
8 locked in a cell over here [inaudible].

9 **HANK:** We can definitely work something out. Uh what state were you born in?

10 **BATHEN:** I was born in Virginia. Fort Belvoir Virginia.

11 **HANK:** You got any kids?

12 **BATHEN:** No, no kids.

13 **HANK:** Okay any previous arrests? Oh you said no.

14 **BATHEN:** No, it should be fine. No previous issues.

15 **HANK:** Uh does anybody know you're in jail right now?

16 **BATHEN:** What's that?

17 **HANK:** Does anybody know you're in jail?

18 **BATHEN:** Um just my Lawyer. And he's been trying to reach out to my family--

19 **HANK:** They're not answering?

20 **BATHEN:** --you know, but it's not for sure whether or not he's um getting in touch with
21 them. I mean he was saying he was going to bail me out yesterday. He said a
22 couple hours and you'll be out. But then um...you know, he had a couple phone
23 calls and I wasn't able to reach him after that, you know um so basically just
24 my Attorney. His name is Benjamin Pheule. B-E-N-J-A-M-I-N and his last
25 name is P-H-E-U-L-E.
26
27
28

1 **HANK:** Okay, alright. Well part of the process-- what's your social?
2 **BATHEN:** Uh 2-2-3-1-9-9-2-5-7.
3 **HANK:** Okay you say you can do a thousand today?
4 **BATHEN:** Yeah I can do a thousand today and I think I've got my debit card here with
5 me.
6
7 **HANK:** Any property [inaudible]?
8 **BATHEN:** Uh I don't own any property. I don't own a home or anything like that.
9
10 **HANK:** Okay. Um how long have you lived at the Kentucky Street one?
11 **BATHEN:** Uh I've only been over there probably four months.
12 **HANK:** Okay and you say your credit score is pretty good?
13 **BATHEN:** Yeah my credit score is pretty good. About seven hundred.
14 **HANK:** Okay. Alright and um would you uh fly back to Virginia as soon as you get out
15 or are you gonna stick around here?
16
17 **BATHEN:** Um well we're gonna have one more--
18 **HANK:** You can go to court case tomorrow.
19 **BATHEN:** We're gonna have one more hearing, uh that would be tomorrow on Monday.
20 **HANK:** Yeah.
21 **BATHEN:** And then I'll fly back on Tuesday.
22 **HANK:** And you will be due back on...you will be due back next Monday for Court.
23 **BATHEN:** Yeah my Lawyer was going to see if he could appear for me for that.
24 **HANK:** Your Lawyer?
25 **BATHEN:** Yeah he should be able to do most of the appearances without me there
26 actually physically present you know.
27
28

1 **HANK:** Alright um I'm gonna need to put two references because you got a big bond
2 and I need two references at least. Um starting with your closest family
3 member still living. It could be your wife, parent, brother.

4 **BATHEN:** Um my closest family member--just a second I just had to stand up--closest
5 family member would be Eufemia Crawley. That's my mother.

6 **HANK:** Thea?

7 **BATHEN:** It's E-U-F-E-M-I-A and the last name is Crawley C-R-A-W-L-E-Y.

8 **HANK:** I got Crawley. Okay so E-U-F-E-M-I-A?

9 **BATHEN:** Yup.

10 **HANK:** Eufemia? Okay and she lives in Virginia as well?

11 **BATHEN:** No she lives in Scotts Valley, California. It's near the Bay Area.

12 **HANK:** She's living out here in California?

13 **BATHEN:** Yup.

14 **HANK:** Do you know her cell phone number? Or her phone number?

15 **BATHEN:** Uh I can give it to you as soon as I get out. They have my cell phone and
16 everything so I don't have anybody's phone number.

17 **HANK:** Do they have your cell phone in your property?

18 **BATHEN:** Yes.

19 **HANK:** So what I can do, is I can go request your property and just um I can get your
20 number from there and we can call her and we can get her to co sign for you
21 and get you out.

22 **BATHEN:** Uh huh.

23 ///
24 ///
25 ///

1 **HANK:** I'm sure she'd co-sign for you, you know. You have good credit and you have
2 good everything but uh, since it is a big bond, the law does require that we get
3 a co-signer.

4 **BATHEN:** Okay the law requires me to get a co-signer?

5 **HANK:** Basically, yeah. [inaudible] the law, the office. The work place, the bail
6 industry. Yeah. [inaudible]
7

8 **BATHEN:** So what does that mean exactly co-signing and like it means they're--

9 **HANK:** Basically it means what she will be doing by co-signing, she would be taking
10 responsibility as well as you going to Court and making whatever payments
11 you need to make. Um, I'll give you, I'll do you a deal. I'll get you out--cos
12 normally it's ten percent so you would owe me ten thousand but I'm not gonna
13 do it at ten thousand. I'm gonna make you a deal, I'm gonna do it at six
14 thousand.

15 **BATHEN:** Six thousand. Okay?

16 **HANK:** Does that sound doable? You don't have to, I mean [inaudible]--

17 **BATHEN:** So I would have to give you the thousand today and I would make payments
18 on the six thousand?
19

20 **HANK:** Yes we can arrange a payment method for the remaining five thousand.

21 **BATHEN:** Okay and so all you need is my mother to co-sign. And how long do you have
22 to pay the six thousand?

23 **HANK:** Uh usually because it's a big bond we would do two installments. We would do
24 one thousand when you get out and another thousand in two weeks and we'll
25 do like you know a couple hundred bucks a month after that. That would mean
26 two hundred bucks a month after that.

27 ///

28 ///

1 **BATHEN:** Okay well that's actually not that bad um let me--my Lawyer has all these
2 phone numbers alright um...

3

4 **HANK:** I can request your property and I get these phone numbers off your phone and
5 make the calls and get you out by uh ten.

6 **BATHEN:** Get me out by when?

7 **HANK:** We can get you out by ten a.m. if we can get all this stuff going real quick. We
8 can get you out by ten a.m. Right now it's five, so it would be a five hour deal.

9

10 **BATHEN:** Okay. Um let me try to get in contact with my Lawyer cos there's two--there's
11 my property bag here. Alright? I have nothing on me. And I'm not sure that the
12 cell phone is in the property bag. It might be in my backpack, which my
13 Lawyer has cos he took it from here, you know. But I can call him and tell him
14 if we can get in touch with my mother, All Power is willing to do it for six
15 thousand, one thousand up front. Which I think is...that's the best that I've
16 heard of.

17 **HANK:** Yeah that's what we do. We uh, we just need your mother, or anybody for that
18 matter, it could be anybody that you know of that would be willing to co-sign
19 and you could get them to co-sign. Preferably somebody who lives in
20 California. That's why I say your mom, cos your mom does live here in
21 California. Does your dad live here too or just your mom?

22 **BATHEN:** Dad lives in Virginia. So it could be anybody and they don't have to put up
23 collateral or anything they just have to sign their name?

24 **HANK:** For this? No um for this no we would just need to get a co signer and uh the
25 one thousand up front should do and then the one thousand in two weeks
26 should do and then with the payment plan we can knock it out.

27 **BATHEN:** Okay that can happen.

28

1 **HANK:** Alright and then I'll talk to my Supervisor, but it sounds like a deal. Alright go
2 ahead and give me a call back as soon as you can. If you want it even speeds
3 up the process if I request your property. That way the Sheriff thinks you're
4 getting out and [inaudible]

5 **BATHEN:** Okay let me get in touch with the Lawyer and my mother first. You know cos I
6 wanna make sure she's gonna go through with it. It should be a done deal.
7 What's your name?

8 **HANK:** My name is Hank and you're calling All Power.

9 **BATHEN:** Hank at All Power. Okay I should be able to give you a call back in a couple of
10 hours.

11 **HANK:** Alright.

12 **BATHEN:** Okay. Hank, you saved my life, bro.

13 **HANK:** Thank you. Talk to you later. Bye.

14 **OPERATOR:** The caller has hung up.

15
16
17 **[END OF CALL]**
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I, Tanya Hauck, certify that the foregoing is a true and accurate transcript of the audio in the above titled matter.

Date: 6/10/18

Tanya Hauck
Tanya Hauck

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101 <input type="checkbox"/> CENTRAL DIVISION, HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081 <input checked="" type="checkbox"/> SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910		FOR COURT USE ONLY 0082 F I L E D Clerk of the Superior Court JUN 18 2018 CLERK OF THE SUPERIOR COURT BY: <u>R. Camou</u>
PLAINTIFF(S) THE PEOPLE		
DEFENDANT(S) BATHEN		
JURY INSTRUCTIONS	CASE NUMBER SCS294342	

JURY INSTRUCTIONS

GIVEN

REFUSED

WITHDRAWN

3550. Pre-Deliberation Instructions

When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

As I told you at the beginning of the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists. You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone. Do not communicate using: a computer, smartphone, cellular device, tablet or I-pad during your deliberations.

It is very important that you not use the Internet, a dictionary, or social media in any way in connection with this case during your deliberations.

During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. These exhibits will be sent into the jury room with you when you begin to deliberate.

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the (question of guilt) [REDACTED] unless I ask you to do so.

Your verdict on each count must be unanimous. This means that, to return a verdict, all of you must agree to it. Do not reach a decision by the flip of a coin or by any similar act.

It is not my role to tell you what your verdict should be. Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.

You must reach your verdict without any consideration of punishment.

You will be given verdict forms. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict forms and notify the bailiff. If you are able to reach a unanimous decision on only one or only some of the charges, fill in those verdict forms only, and notify the bailiff. Return any unsigned verdict form.

Exact copy of CALCRIM No. 3550, Revised April 2011, except adaptations.

JURY INSTRUCTION:

PEOPLE V BathanDATE, JUN 18 2018REQUESTED BY DA DEFENSE/ CTGIVEN GIVEN AS MODIFIED

REFUSED/REASON _____

OBJECTED BY PRO/ DEF/ CRT.

WITHDRAWN

Stephan Aubry pro

To the alternate jurors: The jury will soon begin deliberating, but you are still alternate jurors and are bound by my earlier instructions about your conduct.

Do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends, and not even with each other. Do not have any contact with the deliberating jurors. Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors.

Exact copy of CALCRIM No. 3577, Revised June 2007, except adaptations.

JURY INSTRUCTION:
PEOPLE V Ba then
DATE 6-18-18
REQUESTED BY DEFENSE/ CT
 GIVEN/GIVEN MODIFIED
REFUSED/RE S
OBJECTED BY PLO./ DEF./ CRT.
WITHDRAWN

Stephan Aubry 202

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101 <input type="checkbox"/> CENTRAL DIVISION, HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081 <input checked="" type="checkbox"/> SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910		FOR COURT USE ONLY 087 FILED Clerk of the Superior Court JUN 15 2018 CLERK OF THE SUPERIOR COURT BY: <u>R. Camou</u>
PLAINTIFF(S) THE PEOPLE		
DEFENDANT(S) BATHEN		
JURY INSTRUCTIONS		CASE NUMBER SCS294342

JURY INSTRUCTIONS

GIVEN

REFUSED

WITHDRAWN

200. Duties of Judge and Jury

Members of the jury, I will now instruct you on the law that applies to this case. I will give you a copy of the instructions to use in the jury room. The instructions that you receive may be printed, typed, or written by hand. Certain sections may have been crossed-out or added. Disregard any deleted sections and do not try to guess what they might have been. Only consider the final version of the instructions in your deliberations.

You must decide what the facts are. It is up to all of you, and you alone to decide what happened, based only on the evidence that has been presented to you in this trial.

Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant or alleged victim, based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, or socioeconomic status.

You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions.

Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it.

Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically

defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings.

Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them.

Exact copy of CALCRIM No. 200, Revised December 2008, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bathen
DATE JUN 15 2018
REQUESTED BY DA / DEFENSE / CT
GIVEN GIVEN AS MODIFIED
REFUSED / REASON _____
OBJECTED BY PEO. / DEF. / CRT.
WITHDRAWN

Stephan Aubry 202

201. Do Not Investigate

Do not use the Internet, a dictionary, or social media in any way in connection with this case, either on your own or as a group. Do not investigate the facts or the law or do any research regarding this case, either on your own, or as a group. Do not conduct any tests or experiments, or visit the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

Exact copy of CALCRIM No. 201, Revised February 2012, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY (DA) DEFENSE/ CT
(GIVEN)/GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephan Aubry psc

202. Note-Taking and Reading Back of Testimony

You have been given notebooks and may have taken notes during the trial. You may use your notes during deliberations. Your notes are for your own individual use to help you remember what happened during the trial. Please keep in mind that your notes may be inaccurate or incomplete.

If there is a disagreement about the testimony at trial, you may ask that the court reporter's record be read to you. It is the record that must guide your deliberations, not your notes. You must accept the court reporter's record as accurate.

Please do not remove your notes from the jury room.

At the end of the trial, your notes will be collected and destroyed.

Exact copy of CALCRIM No. 202, Revised February 2012, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bqthan
DATE JUN 15 2018
REQUESTED BY: DEFENSE/ CT
 GIVEN/ GIVEN AS MODIFIED
REFUSED/ REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephan Aubry RSC

207. Proof Need Not Show Actual Date

It is alleged that the crimes occurred on or about June 4, 2017, July 3, 2017, and July 5, 2017. The People are not required to prove that the crime took place exactly on those days but only that they happened reasonably close to those days.

Exact copy of CALCRIM No. 207. Revised February 2016, except adaptations.

JURY INSTRUCTION:
PEOPLE V Balthan
DATE JUN 15 2018
REQUESTED BY: DA DEFENSE/ CT
 GIVEN GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephan Aubry RJC

220. Reasonable Doubt

The fact that a criminal charge has been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial.

A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.

Exact copy of CALCRIM No. 220, Revised February 2013, except adaptations.

JURY INSTRUCTION:
 PEOPLE V Bathan
 DATE JUN 15 2018
 REQUESTED BY: DA DEFENSE/ CT
 GIVEN/GIVEN AS MODIFIED
 REFUSED/REASON _____
 OBJECTED BY PEO./ DEF./ CRT.
 WITHDRAWN

Stephanie Smith RJC

222. Evidence

“Evidence” is the sworn testimony of witnesses, the exhibits admitted into evidence; and anything else I told you to consider as evidence.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses’ answers are evidence. The attorneys’ questions are significant only if they helped you to understand the witnesses’ answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true.

During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses.

The court reporter has made a record of everything that was said during the trial. If you decide that it is necessary, you may ask that the court reporter’s record be read to you. You must accept the court reporter’s record as accurate.

PEOPLE V Bathan

DATE JUN 15 2018

REQUESTED BY: (DA) DEFENSE/ CT

(GIVEN) GIVEN AS MODIFIED

REFUSED/REASON _____

OBJECTED BY PEO./ DEF./ CRT.

WITHDRAWN

0095

Stephanie Aubry [Signature]

Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. *Circumstantial evidence* also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.

Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence.

Exact copy of CALCRIM No. 223, Revised February 2013.

JURY INSTRUCTION:
PEOPLE V Bathelvi
DATE JUN 15 2018
REQUESTED BY: DA / DEFENSE / CT
 GIVEN / GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephanie Aubrey 102

224. Circumstantial Evidence: Sufficiency of Evidence

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

Exact copy of CALCRIM No. 224, Revised February 2013.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY: **DA** **DEFENSE/ CT**
 GIVEN **GIVEN AS MODIFIED**
REFUSED/REASON _____
OBJECTED BY **PEO./ DEF./ CRT.**
WITHDRAWN

Stephan Aubry *RSJ*

You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have.

You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

- **How well could the witness see, hear, or otherwise perceive the things about which the witness testified?**
- **How well was the witness able to remember and describe what happened?**
- **What was the witness's behavior while testifying?**
- **Did the witness understand the questions and answer them directly?**
- **Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?**

- 0099
- **What was the witness's attitude about the case or about testifying?**
 - **Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?**
 - **How reasonable is the testimony when you consider all the other evidence in the case?**
 - **Did other evidence prove or disprove any fact about which the witness testified?**

Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.

If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.

JURY INSTRUCTION:

PEOPLE V Bauman

DATE JUN 15 2018

REQUESTED BY: (DA) DEFENSE/ CT

GIVEN GIVEN AS MODIFIED

REFUSED/REASON _____

OBJECTED BY PEO./ DEF./ CRT.

WITHDRAWN

0100

Stephanie Aubrey Rose

251. Union of Act and Intent: Specific Intent or Mental State

0101

The crimes charged in this case require proof of the union, or joint operation, of act and wrongful intent.

For you to find a person guilty of the crimes in this case of Criminal Threats, as charged in Count 1, 2 and 3, that person must not only intentionally commit the prohibited act, but must do so with a specific intent. The act and the specific intent required are explained in the instruction for that crime.

Exact copy of CALCRIM No. 251, Revised April 2008, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY: DA DEFENSE/ CT
GIVEN/GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephen Aubry POC

300. All Available Evidence

Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant.

Exact copy of CALCRIM No. 300, New January 2006.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY (DA) DEFENSE/ CT
(GIVEN)/GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephen Aubry rose

301. Single Witness's Testimony

The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

Exact copy of CALCRIM No. 301, Revised September 2017, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bathari
DATE JUN 15 2018
REQUESTED BY (DA) DEFENSE/ CT
(GIVEN)/GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephane Aubry RSC

302. Evaluating Conflicting Evidence

If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.

Exact copy of CALCRIM No. 302; Revised June 2007.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY DA DEFENSE/ CT
GIVEN GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephanie Aubry RSC

303. Limited Purpose Evidence in General

During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other.

Exact copy of CALCRIM No. 303, New January 2006.

JURY INSTRUCTION:
PEOPLE V Batnan
DATE JUN 15 2018
REQUESTED BY: DA/DEFENSE/ CT
GIVEN/GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephanie Aubrey rose

You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways:

1. To evaluate whether the witness's testimony in court is believable;

AND

2. As evidence that the information in those earlier statements is true.

Exact copy of CALCRIM No. 318, Revised August 2012, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY: DA DEFENSE/ CT
GIVEN GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephanie Aubrey rsc

332. Expert Witness Testimony

Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate.

You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

An expert witness may be asked a hypothetical question. A *hypothetical question* asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion.

If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters on which each witness relied. You may also compare the experts' qualifications.

JURY INSTRUCTION:

PEOPLE V Bathan

DATE JUN 15 2018

REQUESTED BY (DA) DEFENSE/ CT

(GIVEN) GIVEN AS MODIFIED

REFUSED/REASON

OBJECTED BY PEO./ DEF./ CRT.

WITHDRAWN

0108

Stephan Aubry RJC

333. Opinion Testimony of Lay Witness

Witnesses who were not testifying as experts, gave their opinions during the trial. You may but are not required to accept those opinions as true or correct. You may give the opinions whatever weight you think appropriate. Consider the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witnesses gave for any opinion, and the facts or information on which the witnesses relied in forming that opinion. You must decide whether information on which the witnesses relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

Exact copy of CALCRIM No. 333, New January 2006, except adaptations.

JURY INSTRUCTION:
 PEOPLE V Batnan
 DATE JUN 15 2018
 REQUESTED BY: DA / DEFENSE / CT
 GIVEN / GIVEN AS MODIFIED
 REFUSED / REASON _____
 OBJECTED BY PEO. / DEF. / CRT.
 WITHDRAWN

Stephanie Aubry RSC

355. Defendant's Right Not to Testify

0110

A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way.

Exact copy of CALCRIM No. 355, New January 2006.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY: DA DEFENSE/ CT
 GIVEN GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephanie Smith JSC

358. Evidence of Defendant's Statements

0111

You have heard evidence that the defendant made oral statements before the trial/. You must decide whether the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements.

Exact copy of CALCRIM No. 358, Revised September 2017, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY (DA) DEFENSE/ CT
GIVEN/GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO/ DEF./ CRT.
WITHDRAWN

Stephen Aubrey

The defendant may not be convicted of any crime based on his out-of-court statements alone. You may rely on the defendant's out-of court statements to convict him only if you first conclude that other evidence shows that the charged crime was committed.

That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

This requirement of other evidence does not apply to proving the identity of the person who committed the crime. If other evidence shows that the charged crime was committed, the identity of the person who committed it may be proved by the defendant's statements alone.

You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt.

Exact copy of CALCRIM No. 359, Revised March 2018, except adaptations

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY: (DA) DEFENSE/ CT
GIVEN GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephen Amby RJC

The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive.

Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.

Exact copy of CALCRIM No. 370, Revised March 2017, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2010
REQUESTED BY (DA) DEFENSE/ CT
(GIVEN) GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephen A. Aubrey RJC

The defendant is charged in Counts 1, 2 and 3 with having made a criminal threat in violation of Penal Code section 422.

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Carolyn Jacobs;
2. The defendant made the threat by electronic communication device;
3. The defendant intended that his statements be understood as a threat and intended that it be communicated to Carolyn Jacobs;
4. The threat was so clear, immediate, unconditional, and specific that it communicated to Carolyn Jacobs a serious intention and the immediate prospect that the threat would be carried out;
5. The threat actually caused Carolyn Jacobs to be in sustained fear for her own safety or for the safety of her immediate family;

AND

6. Carolyn Jacobs' fear was reasonable under the circumstances.

0115

Someone commits an act *willfully* when he or she does it willingly or on purpose.

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances.

Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act.

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory.

An immediate ability to carry out the threat is not required.

An *electronic communication device* includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.

Immediate family means any spouse, parents, and children.

JURY INSTRUCTION:

PEOPLE V Bathan

DATE JUN 15 2018

REQUESTED BY (D) / DEFENSE / CT

~~GIVEN~~ GIVEN AS MODIFIED

REFUSED/REASON _____

OBJECTED BY PEO. / DEF. / CRT.

WITHDRAWN

0116

Stephanie Aubry ROR

Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one.

Exact copy of CALCRIM No. 3515, Revised February 2012, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY DA DEFENSE/ CT
GIVEN/GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephen Aubrey

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101 <input type="checkbox"/> CENTRAL DIVISION, HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081 <input checked="" type="checkbox"/> SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910	<p style="text-align: right;">FOR COURT USE ONLY 0118</p> <p style="text-align: center;">F I L E D Clerk of the Superior Court</p> <p style="text-align: center;">JUN 15 2018</p> <p>CLERK OF THE SUPERIOR COURT BY: <u>R. Camou</u></p> <p>CASE NUMBER SCS294342</p>
PLAINTIFF(S) THE PEOPLE	
DEFENDANT(S) BATHEN	
JURY INSTRUCTIONS	

JURY INSTRUCTIONS

GIVEN

REFUSED

WITHDRAWN

3500. Unanimity

withdrawn 0119

The defendant is charged with Criminal Threats in Count 1, 2, and 3.

The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed.

Exact copy of CALCRIM No. 3500, New January 2006, except adaptations.

JURY INSTRUCTION:

PEOPLE V Bathan

DATE JUN 15 2018

REQUESTED BY: DA DEFENSE/ CT

GIVEN/GIVEN AS MODIFIED

REFUSED/REASON _____

OBJECTED BY PEO./ DEF./ CRT.

WITHDRAWN

Stephanie Aubry REC

Johnson
0120

360. Statements to an Expert

_____ <Insert name> testified that in reaching (his/her) conclusions as an expert witness, (he/she) considered [a] statement[s] made by _____ <insert name>. [I am referring only to the statement[s] _____ <insert or describe statements admitted for this limited purpose>.] You may consider (that/those) statement[s] only to evaluate the expert's opinion. Do not consider (that/those) statements as proof that the information contained in the statement[s] is true.

Exact copy of CALCRIM No. 360, Revised March 2018, except adaptations.

JURY INSTRUCTION:
PEOPLE V. Bathan
DATE JUN 15 2018
REQUESTED BY: DA/DEFENSE/ CT
GIVEN/GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephanie Smith RSC

07/20/18

0121

333. Opinion Testimony of Lay Witness

A witness who was not testifying as an expert, gave her opinions during the trial. You may but are not required to accept those opinions as true or correct. You may give the opinions whatever weight you think appropriate. Consider the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

Exact copy of CALCRIM No. 333, New January 2006, except adaptations.

JURY INSTRUCTION:
PEOPLE V Bathan
DATE JUN 15 2018
REQUESTED BY (DA) DEFENSE/ CT
GIVEN/GIVEN AS MODIFIED
REFUSED/REASON _____
OBJECTED BY PEO./ DEF./ CRT.
WITHDRAWN

Stephen Aubrey *PCSC*

W/Drawn

0122

225. Circumstantial Evidence: Intent or Mental State

The People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent. The instruction for each crime explains the intent required.

An intent may be proved by circumstantial evidence.

Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

Exact copy of CALCRIM No. 225, Revised April 2011, except adaptations.

JURY INSTRUCTION:

PEOPLE V Bathan

DATE JUN 15 2018

REQUESTED BY: DA / DEFENSE / CT

GIVEN / GIVEN AS MODIFIED

REFUSED / REASON _____

OBJECTED BY PEO. / DEF. / CRT.

WITHDRAWN

0123

Stephanie Aubry 152

W/Drawn

0124

357. Adoptive Admissions

If you conclude that someone made a statement outside of court that (accused the defendant of the crime/[or] tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true:

- 1. The statement was made to the defendant or made in (his/her) presence;**
- 2. The defendant heard and understood the statement;**
- 3. The defendant would, under all the circumstances, naturally have denied the statement if (he/she) thought it was not true;**

AND

- 4. The defendant could have denied it but did not.**

If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.

If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose.

Exact copy of CALCRIM No. 357, Revised February 2014, except adaptations.

JURY INSTRUCTION:

PEOPLE V Batten

DATE JUN 15 2018

REQUESTED BY: DA DEFENSE/ CT

GIVEN/GIVEN AS MODIFIED

REFUSED/REASON _____

OBJECTED BY PEO./ DEF./ CRT.

WITHDRAWN

Stephanie Aubry POC

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
 CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101
 CENTRAL DIVISION, HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101
 EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020
 NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081
 SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910

FOR COURT USE ONLY 0126

F I L E D
 Clerk of the Superior Court

JUN 15 2018

CLERK OF THE SUPERIOR COURT
 BY: R. Camou

PLAINTIFF(S)

THE PEOPLE

DEFENDANT(S)

BATHEN

JURY INSTRUCTIONS

CASE NUMBER

SCS294342

JURY INSTRUCTIONS

GIVEN

REFUSED

WITHDRAWN

Refused

0127

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

In order for you to find that the Defendant committed this crime, you must find that he had the specific intent to instill fear in others. In other words, emotional outbursts, and mere angry utterances or ranting soliloquies, are not sufficient.

People v. Wilson (2010) 186 Cal.App.4th 789

In re Ryan D. (2002) 100 Cal.App.4th 854, 861

People v. Felix (2001) 92 Cal.App.4th 905, 913

People v. Teal (1998) 61 Cal.App.4th 277, 281

JURY INSTRUCTION:

PEOPLE V Bathan

DATE JUN 15 2018

REQUESTED BY: DA/~~DEFENSE~~/CT

GIVEN/GIVEN AS MODIFIED

~~REFUSED~~ REASON _____

OBJECTED BY PEO./ DEF./ CRT.

WITHDRAWN

Stephanie Aubry RSC

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

0128

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff,

v.

Benjamin Lee Bathen, (DOB 11/20/1977)

Defendant

**DECLARATION IN
SUPPORT OF
ARREST WARRANT**

Case No. CS294342

D.A. No. BCA405

CVPD Case No. 1707855

I, James Petray, ID# CV0820, declare I am a peace officer employed by the Chula Vista Police Department. I have learned the following from the official Chula Vista Police Department files and reports:

On 6/5/17, at approximately 1352 hours, CVPD Officer De La Pena #984 was dispatched to 538 Beacon Place regarding a report of criminal threats. Upon arrival, Officer De La Pena contacted the victim, Carolyn Jacobs. Jacobs explained that she is a psychologist and that the person who left the verbal threats was a former patient.

Jacobs stated that she began providing counseling services to the suspect, Benjamin Bathen (11-20-77), in 2004. At that time, he lived in Oceanside, California. In 2006, Bathen moved to the Burbank area of Los Angeles County. Jacobs continued to provide counseling services to Bathen. The counseling sessions were primarily by phone consultation, however, Bathen did commute to Chula Vista on occasion for consultation between 2006 and 2008. Jacobs explained that she provided consultations by phone because she is licensed in the State of California and Bathen still lived in California.

In 2008, Bathen moved to Massachusetts. Jacobs is not licensed as a psychologist in the state of Massachusetts and was forced to stop providing counseling services to him. Bathen became upset and threatened to sue her. Prior to the voicemail left by Jacobs on 6-4-17, she had not heard from Bathen since his move to Massachusetts

On 6-4-17, Jacobs checked her work voicemail and received the following voice message. The message was left on 6-4-17 at approximately 1325 hours:

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

Jacobs said that she initially did not recognize the voice on the message, however, her caller ID identified the incoming phone number as (617) 992-4648 and that number is associated with Benjamin Bathen. I later conducted a record check of the phone number and confirmed that it belonged to Benjamin Bathen (11-20-77). When Jacobs observed Bathen's name, she remembered him as being a former patient, and she recognized the voice as belonging to Bathen.

Jacobs knew that Bathen moved to Massachusetts in 2008 and did not have an address for him. She did not know if Bathen has returned to southern California. Since Bathen was angry about being dropped as a client by Jacobs in 2008, coupled with the angry tone and specific description (of harming Jacobs) in the voice message, Jacobs believed that Bathen could carry out his threat of killing her. She is further concerned because Bathen knows where her office is located.

On 6-23-17 I contacted the victim, Carolyn Jacobs, via the telephone to inquire about her state of mind and how she felt after receiving the threatening message from Bathen. Jacobs told me that she was in fear for her safety and life. After this incident, she has been vigilant around her house. Also, as a result of this incident, Jacobs' husband meets her after work when she closes the business.

WHEREFORE, your declarant prays for the issuance of a warrant for the arrest of the above-named defendant for the following violations:

<u>CHARGE</u>	<u>ISSUE TYPE</u>	<u>CHARGE TITLE</u>
422 PC	Felony	THREATEN CRIME W/ INENT TO TERRORIZE

The description of Benjamin Lee Bathen is as follows:

DOB: 11/20/1977 Eye Color: Brown Height: 5' 8"
Race: White Hair Color: Black Weight: 190
Sex: Male

Identifying Marks, Scars and Tattoos:

Unknown

Forms of Identification:

Driver's License: D6622224 CA
Social Security: 223-19-9257

Last known address: Unknown

I declare, upon information and belief, that the foregoing is true and correct under penalty of perjury. () 130

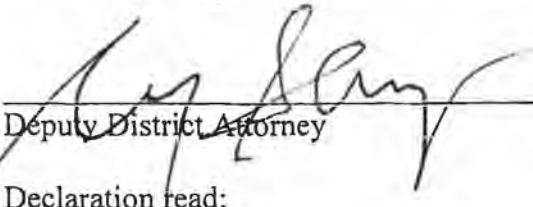
Executed in the County of San Diego, State of California, on this 15th day of June, 2017.



Declarant

Bail recommendation: 75,000

Reviewed for legal sufficiency by:



Deputy District Attorney

Declaration read;
Probable cause to arrest is found;
Warrant to issue.

The defendant is to be admitted to bail in
the sum of 25,000.00 dollars.



Judge of the Superior Court

6/30/17

Date

JURIS CCMS
JUL 05 2017
J. ALCANTARA

CR-161

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
STREET ADDRESS: SOUTH COUNTY DIVISION
MAILING ADDRESS: 500 3RD AVE.
CITY AND ZIP CODE: CHULA VISTA, CA 91910-5649
BRANCH NAME: SOUTH BAY BRANCH

FOR COURT USE ONLY

FILED
San Diego Superior Court
SEP 15 2017
Clerk of the Superior Court
By: R. Piche

PEOPLE OF THE STATE OF CALIFORNIA
vs.
DEFENDANT: Benjamin Lee Bathen

CASE NUMBER:
CS294342

CRIMINAL PROTECTIVE ORDER—OTHER THAN DOMESTIC VIOLENCE (CLETS - CPO) (Pen. Code, §§ 136.2, 136.2(i)(1), and 646.9(k))
 ORDER UNDER PENAL CODE, § 136.2
 MODIFICATION
ORDER UNDER:
 PENAL CODE, § 136.2(i)(1) PENAL CODE, § 646.9(k)

PERSON TO BE RESTRAINED (complete name): Benjamin Lee Bathen
Sex: M F Ht.: 5-08 Wt.: 190 Hair color: blk Eye color: brn Race: W Age: 39 Date of birth: 11/20/77

- This proceeding was heard on (date): 09/15/2017 at (time): 1:30 PM in Dept.: 12 Room:
by judicial officer (name): ~~William J. McGrath~~ Wm McGrath, Wm
 - This order expires on (date): . If no date is listed, this order expires three years from date of issuance.
 - Defendant was personally served with a copy of this order at the court hearing, and no additional proof of service of this order is required.
 - FULL NAME, AGE, AND GENDER OF EACH PROTECTED PERSON:
Carolyn Jacobs, Female, 07/10/49
 - The court has information that the defendant owns or has a firearm or ammunition, or both.
- GOOD CAUSE APPEARING, THE COURT ORDERS THAT THE ABOVE-NAMED DEFENDANT**
- must not harass, strike, threaten, assault (sexually or otherwise), follow, stalk, molest, destroy or damage personal or real property, disturb the peace, keep under surveillance, or block movements of the protected persons named above.
 - must not own, possess, buy or try to buy, receive or try to receive, or otherwise obtain a firearm or ammunition. The defendant must surrender to local law enforcement, or sell to or store with a licensed gun dealer any firearm owned by the defendant or subject to his or her immediate possession or control within 24 hours after service of this order and must file a receipt with the court showing compliance with this order within 48 hours of receiving this order.
 The court has made the necessary findings and applies the firearm relinquishment exemption under Code Civ. Proc., § 527.9(f). The defendant is not required to relinquish this firearm (specify make, model, and serial number of firearm):
 - must not attempt to or actually prevent or dissuade any victim or witness from attending a hearing or testifying or making a report to any law enforcement agency or person.
 - must take no action to obtain the addresses or locations of protected persons or their family members, caretakers, or guardian unless good cause exists otherwise. The court finds good cause not to make the order in item 9.
 - must be placed on electronic monitoring for (specify length of time): . (Not to exceed one year from the date of this order. Pen. Code, § 136.2(a)(1)(G)(iv), and Pen. Code, § 136.2(i)(2).)
 - must have no personal, electronic, telephonic, or written contact with the protected persons named above.
 - must have no contact with the protected persons named above through a third party, except an attorney of record.
 - must not come within 100 yards of the protected persons named above.
 - may have peaceful contact with the protected persons named above, as an exception to the "no-contact" or "stay-away" provision in item 11, 12, or 13 of this order, only for the safe exchange of children and court-ordered visitation as stated in:
 - the Family, Juvenile, or Probate court order in case number: issued on (date):
 - any Family, Juvenile, or Probate court order issued after the date this order is signed.
 - The protected persons may record any prohibited communications made by the restrained person.
 - Other orders including stay-away orders from specific locations:
home, employment, school, vehicle

Executed on: Sep 15, 2017
(DATE)


William J. McGrath, Judge Department/Division:
(SIGNATURE OF JUDICIAL OFFICER)

Scanned
9-15-17
[Signature]

WARNINGS AND NOTICES

1. **VIOLATION OF THE ORDER IS SUBJECT TO CRIMINAL PROSECUTION.** Violation of this protective order may be punished as a felony, a misdemeanor, or contempt of court.
2. **NOTICE REGARDING FIREARMS.** Any person subject to a protective order is prohibited from owning, possessing, purchasing or attempting to purchase, receiving or attempting to receive, or otherwise obtaining a firearm. Such conduct is subject to a \$1,000 fine and imprisonment. The person subject to these orders must relinquish any firearms (by surrendering the firearm to local law enforcement, or by selling or storing it with a licensed gun dealer) and not own or possess any firearms during the period of the protective order. (Pen. Code, § 136.2(d).) Under federal law, the issuance of a protective order after hearing will generally prohibit the restrained person from owning, accepting, transporting, or possessing firearms or ammunition. A violation of this prohibition is a separate federal crime.

Specified defendants may request an exemption from the firearm relinquishment requirements stated in item 7 on page 1 of this order. *The court must check the box under item 7 to order an exemption from the firearm relinquishment requirements.* If the defendant can show that the firearm is necessary as a condition of continued employment, the court may grant an exemption for a particular firearm to be in the defendant's possession only during work hours and while traveling to and from work. If a peace officer's employment and personal safety depend on the ability to carry a firearm, a court may grant an exemption that allows the officer to carry a firearm on or off duty, but only if the court finds, after a mandatory psychological examination of the peace officer, that the officer does not pose a threat of harm. (Code Civ. Proc., § 527.9(f).)

3. ENFORCING THIS ORDER IN CALIFORNIA

- This order must be enforced in California by any law enforcement agency that has received the order or is shown a copy of the order or has verified its existence on the California Law Enforcement Telecommunications System (CLETS).
- Law enforcement must determine whether the restrained person had notice of the order. If notice cannot be verified, law enforcement must advise the restrained person of the terms of the order and, if the restrained person fails to comply, must enforce it. (Code Civil Proc., § 527.6.)

4. CONFLICTING ORDERS-PRIORITIES FOR ENFORCEMENT

If more than one restraining order has been issued, the orders must be enforced according to the following priorities:

- a. *Emergency Protective Order:* If one of the orders is an Emergency Protective Order (form EPO-001) and is more restrictive than other restraining or protective orders, it has precedence in enforcement over all other orders. (Pen. Code, § 136.2(c)(1)(A).)
- b. *No-Contact Order:* If there is no EPO, a no-contact order that is included in a restraining or protective order has precedence in enforcement over any other restraining or protective order.
- c. *Criminal Order:* If none of the orders include a no-contact order, a domestic violence protective order issued in a criminal case takes precedence in enforcement over any conflicting civil court order. (Pen. Code, § 136.2(e)(2).) Any nonconflicting terms of the civil restraining order remain in effect and enforceable.
- d. *Family, Juvenile, or Civil Order:* If more than one family, juvenile, or other civil restraining or protective order has been issued, the one that was issued last must be enforced.

5. EFFECTIVE DATE AND EXPIRATION DATE OF ORDERS

- These orders are effective as of the date they were issued by a judicial officer.
- These orders expire as ordered in item 2 on page 1 of this order, **or as explained below.**
- Orders under Penal Code section 136.2(a) are valid as long as the court has jurisdiction over the case. They are not valid after imposition of a county jail or state prison commitment. (See *People v. Stone* (2004) 123 Cal.App.4th 153.)
- Orders issued under Penal Code sections 136.2(i)(1) and 646.9(k) are valid for up to 10 years and may be issued by the court whether the defendant is sentenced to state prison or county jail, or subject to mandatory supervision or if imposition of sentence is suspended and the defendant is placed on probation.
- To terminate this protective order, courts should use form CR-165, *Notice of Termination of Protective Order in Criminal Proceeding (CLETS)*.

6. CHILD CUSTODY AND VISITATION

- Child custody and visitation orders may be established or modified in Family, Juvenile, or Probate court.
- Unless box a or b in item 14 on page 1 is checked, contact between the restrained and protected persons permitted by a Family, Juvenile, or Probate court order for child custody or visitation must not conflict with the provisions of this order.
- If box a or b in item 14 on page 1 is checked, the restrained and protected persons should always carry a certified copy of the most recent child custody or visitation order issued by the Family, Juvenile, or Probate court.

F I L O I B 3
Clerk of the Superior Court

JUN 11 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

1 SUMMER STEPHAN
2 District Attorney
3 CHERIE B. SOMERVILLE
4 Deputy District Attorney, SBN 244220
5 333 H Street, Suite 4000
6 Chula Vista, CA 91910
7 (619) 498-5904
8 cherie.somerville@sdcca.org

9 Attorneys for Plaintiff

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN DIEGO, SOUTH COUNTY DIVISION

12 THE PEOPLE OF THE STATE OF CALIFORNIA,
13 Plaintiff,

14 v.

15 BENJAMIN LEE BATHEN,
16 Defendant.

CT. No.: SCS294342
DA No.: BCA405

**TRIAL BRIEF; MOTIONS IN
LIMINE.**

Date: June 11, 2018
Time: 1:30 p.m.
Dept:
Time: 4 Days

21 Comes now the plaintiff, the People of the State of California, by and through their
22 attorneys, SUMMER STEPHAN, District Attorney, CHERIE B. SOMERVILLE, Deputy
23 District Attorney, and respectfully submits the following PEOPLE'S TRIAL BRIEF, and
24 MOTIONS IN LIMINE.

25 ////
26 ////
27 ////
28 ////

I.**STATEMENT OF CASE**

1
2
3 On August 24, 2017, BENJAMIN BATHEN (hereinafter "Defendant") was
4 scheduled for felony arraignment. Defendant's attorney of record at the time, Benjamin
5 Theule, appeared for Defendant and the court issued and held a \$25,000.00 bench warrant
6 until September 15, 2017. On September 15, 2017, Defendant appeared for his felony
7 arraignment on a three count Complaint. The court set bail at \$100,000.00. Defendant was
8 charged with three counts of violating Penal Code section 422 (Criminal Threats). The
9 crimes were alleged to have occurred on June 4, 2017, July 3, 2017, and July 5, 2017. The
10 named victim was Carolyn Jacobs.

11 The Preliminary Hearing was conducted on December 4, 2017, in front of the
12 Honorable Judge Richard Oberholzer. Defendant was bound over on all charges. Defendant
13 was immediately arraigned on the Information. Readiness Conferences were held on June
14 30, 2014, August 19, 2014, and October 21, 2014.

15 On April 2, 2018, Alicia Freeze substituted in as attorney of record for
16 Defendant. The case is now before this court for motions hearing and trial.

II**STATEMENT OF FACTS****BACKGROUND RELATIONSHIP BETWEEN VICTIM AND DEFENDANT:**

17 Doctor Carolyn Jacobs (hereinafter "Dr. Jacobs") is a licensed psychologist in the
18 state of California. Dr. Jacobs has been in private practice in Chula Vista since 1992. Prior to
19 becoming a psychologist Dr. Jacobs was a nurse.

20 Dr. Jacobs began treating Defendant in September of 2004. Defendant was
21 referred to Dr. Jacobs by a colleague in the Washington D.C. area where Defendant had been
22 living prior to moving to Southern California. Dr. Jacobs would see Defendant for in-person
23 counseling sessions approximately every 2-3 weeks. When Defendant moved to Los Angeles
24
25
26
27
28

1 they had phone counseling sessions.

2 In late 2008, Defendant informed Dr. Jacobs he would be moving to the Boston
3 area for a job. Dr. Jacobs spoke with Defendant about the termination process and made some
4 recommendations for therapists in the Boston area. Dr. Jacobs profession license only permits
5 her to practice in the state of California. Defendant wanted to continue therapy with Dr. Jacobs
6 and became angry that she could not continue to treat him. Dr. Jacobs explained why she could
7 not treat him and provided referrals for local therapists. During this time, Dr. Jacobs began
8 receiving emails from Defendant. Defendant was offender by some comment and said he was
9 going to file a lawsuit against Dr. Jacobs. Dr. Jacobs was never able to get clarification on what
10 the specific complaint was. In one of the emails, Defendant wanted Dr. Jacobs to apologize to
11 him. At this point, Dr. Jacobs contacted her professional liability insurance company and spoke
12 with one of their attorneys regarding the termination process. Dr. Jacobs was assured she was
13 in good standing with the board. In the last email Dr. Jacobs received from Defendant said he
14 had the American Association line on speed dial and that if she did not apologize to him he
15 would be initiating a law suit by a specific date. This last communication between Defendant
16 and Dr. Jacobs occurred in late 2008 to early 22009. Dr. Jacobs did not hear from Defendant
17 until receiving the three voice messages on her work answering service on June 4th, July 3d, and
18 July 5th of 2017. No lawsuit was ever filed by Defendant.

19
20 **COUNT 1**

21 **FIRST PHONE RECORDING ON JUNE 4, 2017:**

22 June 4th, 2017, was a Sunday. Dr. Jacobs checked her AT&T message service
23 on June 5th, 2017, and discovered the first voice message from Defendant had been left on
24 June 4th, around 1:20 p.m.

25 The June 4th voice message is as follows:

26 *“Hey Dr. Jacobs, I just want to let you know that I’m going to bust your*
27 *fucking skull open you worthless bitch. You don’t ever fucking talk to me like*
28

1 *that you fucking whore. Fuck you, I'll bash your fucking skull. You're fucking*
2 *dead. I'm going to carve you up you fucking whore. Shut the fuck up!"*

3
4 Dr. Jacobs was home alone when she listened to the voice message. Dr. Jacobs
5 was really terrified, frightened and stunned. Dr. Jacobs called her husband, Dr. Gary Jacobs,
6 and left a message for him to come home as soon as possible. Once Dr. Gary Jacobs was out
7 of surgery he came home. Dr. Gary Jacobs listened to the voice message, went on-line and
8 pulled up the phone number that left the voice message. Dr. Gary Jacobs was able to pulled
9 up the name Benjamin Bathen associated with the phone number 617-992-4648. The 617
10 area code is from the Boston, MA area. Dr. Jacobs then recognized the voice as belonging to
11 Defendant. Dr. Jacobs and Dr. Gary Jacobs called 911 to report the death threats.
12

13 Chula Vista Police Officer Alan De La Pena took a report from the Jacobs and
14 recorded the voice message. Officer De La Pena located Defendant's Facebook profile
15 which showed he was residing in Virginia and ha studied Information Technology at Boston
16 Mass. Officer De La Pena called the phone number but did not receive an answer.

17 Dr. Jacobs took the threat very seriously. Dr. Jacobs kept the home security on
18 all the time, kept the windows and doors locked 24/7, notified her colleagues to keep an eye
19 out for anyone who might be coming to the office who should not be, a new security system
20 was installed at the office, the hedges surrounding the property were trimmed down and Dr.
21 Jacobs husband would meet her after work. Dr. Jacobs described having anxiety about not
22 knowing where Defendant was and if he would be apprehended.

23 **COUNT 2**

24 **SECOND PHONE RECORDING ON JULY 3, 2017:**

25 July 3d, 2017, was a Monday. Dr. Jacobs received a second voice message on
26 her AT&T answering service from Defendant.

27 The July 3d voice message is as follows:
28

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

7 **COUNT 3**

8 **THIRD PHONE RECORDING ON JULY 5, 2017:**

9 July 5th, 2017, was a Wednesday. Dr. Jacobs received a third voice message on
10 her AT&T answering service from Defendant.

11 The July 5th voice message is as follows:

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

19
20
21 Dr. Jacobs reported the July voice messages to the Chula Vista Police
22 Department. Dr. Jacobs was very terrified. The calls were more specific and more violent.
23 The threat to come out, the sexual nature of the threats and the threat to harm her daughter
24 led Dr. Jacobs to take all necessary precautions to keep her family and herself safe.

25
26 On July 26, 2017, Dr. Jacobs petitioned the court for a Civil Harassment
27 Restraining Order. The Honorable Judge Dwayne Morning granted a temporary restraining
28 order on July 26, 2017. On August 15, 2017, the permanent restraining order hearing was

1 continued until September 18, 2017. On September 18, 2017, after a hearing and testimony
2 from Dr. Jacobs, the Honorable Judge Garry Haehnle granted a permanent restraining order
3 that is in effect until September 12, 2020.

4 **CELL PHONE RECORDS FOR 617-992-4648**

5 On October 27, 2017, District Attorney Investigator Greg Gain was granted
6 Search Warrant S17-487 by the Honorable Judge Ana Espana. The Search Warrant
7 authorized the following items to be seized from T-Mobile: Subscriber Information for
8 telephone number 617-992-4648, Call Detail Records for telephone number 617-992-4648,
9 Text Message Detail Records for telephone number 617-992-4648, Cell Site Location
10 Information for telephone number 617-992-4648 and Cell Tower Cite Lists containing all
11 originating and terminating cell sites accessed by telephone number 617-992-4648. The date
12 range for all records requested from T-Mobile was between June 1, 2017 and July 6, 2017.

13
14 The primary account holder's name is listed as In Prepaid None Customer.
15 The bill birth date is listed as 11/30/1977. Defendant's date of birth is 11/20/1977. The
16 subscriber address on the Call Detail Records is 1132 N. Kentucky Street, Arlington, VA
17 22205. This is Defendant's home address as he states on a jail call made on September 17,
18 2017. The Home Market of the telephone number is Boston, MA. Defendant moved to
19 Boston, MA in 2008. The account was active between September 1, 2014 through
20 September 4, 2017. In a jail call on September 17, 2017, Defendant says he does not know
21 his cell phone number because he has a new cell phone. The current status of the telephone
22 number as of October 27, 2017, was listed as cancelled.

23 The Call Detail Records show an outgoing call from Defendant's phone
24 number 617-992-4648 on 6/4/17 at 20:24:37 (UTC) to 619-525-7747 (Dr. Jacobs' phone
25 number). The duration of the call is listed as 80 seconds. The address listed as the
26 originating tower is

27
28 The Call Detail Records show an outgoing call from Defendant's phone

1 number 617-992-4648 on 7/3/17 at 19:48:02 (UTC) to 619-525-7747 (Dr. Jacobs' phone
 2 number). The duration of the call is listed as 34 seconds. The Call Detail Records show an
 3 outgoing call from Defendant's phone number 617-992-4648 on 7/3/17 at 19:52:26 (UTC) to
 4 619-525-7747 (Dr. Jacobs' phone number). The duration of the call is listed as 60 seconds.
 5 The address of the originating and terminating tower for both calls is 810 Vermont Ave.
 6 North West, Washington, D.C.

7
 8 The Call Detail Records show an outgoing call from Defendant's phone
 9 number 617-992-4648 on 7/5/17 at 13:14:53 (UTC) to 619-525-7747 (Dr. Jacobs' phone
 10 number). The duration of the call is listed as 78 seconds. The address of the originating and
 11 terminating tower for this call is 810 Vermont Ave. North West, Washington, D.C.

12 **OPEN SOURCE INVESTIGATION FOR 617-992-4648**

13 District Attorney Investigator Greg Gain conducted a Google search of
 14 telephone number on September 18, 2017. DAI Gain put 617-992-4648 into the Google
 15 search bar and saw that 4 of the top 5 results identified the phone number as being associated
 16 with Ben or Benjamin Bathen. DAI Gain took screen shots of the Google search results.



1 DAI Gain clicked on the web address www.benbathen.com and saw a website
2 containing examples of Defendant's working computer graphics. The phone number listed
3 on the home page was listed as (703)786-3583.

4 **CALL DETAIL RECORD MAPPING FOR 617-992-4648**

5 Using the Tower Tracker program DAI Gain was able to map the call detail
6 records (CDR's) for three calls: 2 calls on July 3, 2017, and 1 call on July 5, 2017. The
7 Tower Tracker program merges CDR's and cell phone tower data and displays them utilizing
8 Google Earth mapping. The program displays the cell tower with the Azimuth or sector of
9 the cell tower utilized for the origination and termination of the phone call. DAI Gain first
10 created a map that displayed all the cell towers utilized during the time frame of the received
11 CDR's: June 1st, 2017 through July 6, 2017. DAI Gain then plotted Defendant's home
12 address and work address as provided in JIMS during the booking process and by Defendant
13 in jail calls (home: 1132 N. Kentucky Street, Arlington, VA; work: 1201 I Street NW,
14 Washington, D.C.). The maps showed that all of the cell towers utilized during this time
15 frame were in the vicinity of Arlington, VA and Washington, D.C.

17 The call detail records did show a call from Defendant's phone number to Dr.
18 Jacobs' phone number on June 4, 2017. However, the CDR's did not list a latitude or
19 longitude for this call nor did they list an address for the originating and terminating tower.
20 DAI Gain reached out to T-Mobile for further clarification as to the location of the tower for
21 this call but did not receive a response.

22 The CDR's did list latitude and longitude for the two calls placed from
23 Defendant's phone on 7/3/17 and the one call place on 7/5/17 to Dr. Jacobs' number. The
24 cell tower used for both of the calls covered the vicinity of Defendant's work address.

26 The CDR's did list latitude and longitude for the call place from Defendant's
27 phone on 7/5/17 to Dr. Jacobs' number. The cell tower used for the call covered the vicinity
28 of Defendant's work address.

DEFENDANT'S JAIL CALLS

DAI Gain monitored jail calls placed by Defendant while he was in the San Diego County Jail on September 16th and 17th, 2017. In one call on September 17th, Defendant discusses the fact that Dr. Jacobs' was his former therapist and had a restraining order against him. Defendant confirms he lives in Virginia. Defendant goes on to say *"she's alleging that somebody left an angry voicemail message on her cell phone, uh, or her answering machine. And she said that it's me. Um, you know, but I would point out that the law says, for a threats case, the...the alleged victim has to believe that there's a credible, realistic, reasonable belief that the...the threat could be immediately carried out right...And, you know, I was sitting in an office cubicle in Washington, D.C....at a non-profit, um, writing software to help reduce poverty and hunger worldwide. So, you know, I mean, I...I...I could not, um, carry out any threats against anyone."*

In a second call on September 17th, Defendant says *"I think, you know, he's pretty confident that once this is settled, I'm probably looking at, you know, a misdemeanor. So, I mean it doesn't make sense to turn around and flee, leave you career that pays a six-figure salary for, um, you know, a misdemeanor and a fine, basically. You know, it'd be easier to just pay the whatever it is, the a thousand bucks. I mean, the only thing is, like, they might put me on probation or something like that, but, you know, he says he's...he's pretty sure there's no chance of jail time."* The defendant also lists his place of work and home address in the phone call.

In 7 of the 13 calls monitored by DAI Gain, Defendant began the conversation by saying "Hey." All three of the voice messages that Defendant left Dr. Jacobs begin with Defendant saying "Hey."

LOCATIONS

1132 N. Kentucky Street, Arlington, VA.

1201 I Street NW, Washington, D.C.

1 **POTENTIAL WITNESSES**

- 2 1. Doctor Carolyn Jacobs
3 2. Doctor Gary Jacobs
4 3. Officer Alan De La Pena, Chula Vista Police Department
5 4. District Attorney Investigator Greg Gain
6 5. District Attorney Investigator Donald Holmes
7 6. T-Mobile representative Kenneth Lecesne
8

9
10 **III.**

11 **MOTIONS IN LIMINE**

12 **A. MOTION TO INTRODUCE JAIL CALLS MADE BY DEFENDANT AS
13 RELEVANT CIRCUMSTANTIAL EVIDENCE OF IDENTIFICATION.**

14 **1. JAIL CALLS MADE BY DEFENDANT ARE RELEVANT TO PROVE
15 IDENTITY.**

16 Evidence Code section 210 defines relevant evidence as “evidence, including
17 evidence relevant to the credibility of a witness or hearsay declarant, having any
18 tendency in reason to prove or disprove any disputed fact that is of consequence to the
19 determination of the action.” Evidence Code section 210.

20 The jailhouse calls placed by Defendant are relevant as to his identity as the
21 caller who left the three threatening messages on Dr. Jacobs’ voice mail. In the
22 jailhouse calls, Defendant discusses the facts of the case, greets several callers with
23 “Hey” and provides his home address and place of work.

24 All three of the threatening voice messages begin with “Hey.” The two
25 jailhouse calls that have been selected out seven in which Defendant answers the call
26 with “Hey” are relevant to show inflection and Defendant’s provity for using this
27 greeting thus, establishing identity via circumstantial evidence.

28 Defendant discusses the law of criminal threats and makes statements about
how he could not have immediately carried out a threat against anyone because he

1 was in his cubicle in Washington D.C. at the time of the calls. The statement
2 corroborates the fact that Defendant made the calls as his cell records show that the
3 calls were placed from the Virginia and Washington D.C. area. Furthermore,
4 Defendant's belief that he is not guilty of the crimes because he was in another state at
5 the time of the calls is evidence of his guilt.

6 Defendant provides the name of his workplace and his home address in one of
7 the jail calls. This information is circumstantial evidence that the cell phone records
8 are in fact defendant's records. Defendant set up his account on a Pay basis which
9 does not require a name or proof of identifying information. However, the address
10 provided for the billing of the records is defendant's home address. Futhermore,
11 Defendant's work address encompasses the vicinity where the cell towers were used
12 for the calls made on July 3d and July 5th of 2017.

13
14 **2. Defendant's Statements Are Admissible Pursuant to Evidence Code**
15 **Section 1220.**

16 All jurisdictions admit the party-opponent's own personal admissions in civil and
17 criminal cases. Evidence Code section 1220 creates an exception to the hearsay rule for
18 statements "when offered against the declarant in an action to which he is a party . . ."

19 The admissions exception operates in a one-sided way in criminal cases. The accused
20 is the party-opponent of the People, and therefore the hearsay rule is not an obstacle to the
21 use by the prosecution of the out-of-court statements of the accused. The defense must find
22 some other exception to the hearsay rule if it wishes to admit the defendant's hearsay
23 statement against the People. The People wish to introduce Defendant's statements, as they
24 are admissible as a hearsay exception pursuant to Evidence Code section 1220.

25 ///
26 ///
27 ///
28 ///

1
2 **3. Complete Tape Recordings Should Be Admitted**

3 In the instant case, the defendant's statements were tape recorded via the Sheriff's
4 Department Securis system. Tape recordings are the most accurate representation of what
5 was said and how it was said. They are admissible as statements of a party-opponent.

6 **4. A Transcript Has Been Prepared.**

7 The People have prepared a typewritten transcript of the interviews intended to be
8 introduced at trial. A copy has been provided to the defense. (See Cal. Rules of Court, rule
9 243.9.)

10 **5. The Recordings Are Authentic.**

11 Tape recordings are writings. (See Evid. Code, §§ 140, 250.) Authentication of a
12 writing means "the introduction of evidence sufficient to sustain a finding that it is the
13 writing that the proponent of the evidence claims it is" or "the establishment of such facts by
14 any other means provided by law." (Evid. Code, § 1400.) An interviewing detective may
15 authenticate the videotape. (See Evid. Code, § 1411.) Evidence Code section 1413 provides
16 for the authentication of a writing by "anyone who saw the writing being made or executed."
17 Jailhouse recordings may be authenticated by the investigator who monitored the
18 conversation in question. (People v. Estrada (1979) 9 Cal.App.3d 76, 100). Furthermore,
19 the recordings are authenticated by evidence that the writings refer to or states matters that
20 are unlikely to be known to anyone other than the person who is claimed by the proponent of
21 the evidence to be the author of its writing. (Evid. Code, § 1421).

22 DAI Gain monitored jailhouse calls made by the defendant. The defendant identifies
23 himself by name, discusses facts of the case and states facts that would only be known to the
24 defendant and thus the jailhouse calls are self-authenticating when placed in context of this
25 case and the facts.

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. To Exclude Potential Witnesses From The Courtroom Pursuant to Evidence Code Section 777.

Evidence Code section 777 stated "...the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses." *Evidence Code section 777*. The People request that the court exclude witness from the courtroom while they are not testifying and subject to examination pursuant to Evidence Code section 777.

Dated: June 11, 2018

Respectfully Submitted,
SUMMER STEPHAN
District Attorney

By: 

CHERIE B. SOMERVILLE
Deputy District Attorney

F I L E D
Clerk of the Superior Court

0146

JUN 11 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

LAW OFFICE OF ALICIA C. FREEZE
ALICIA C. FREEZE, ESQ. SBN: 281268
7676 Hazard Center Drive, Suite 500
San Diego, CA 92108
Phone: 619-363-5146
Fax: 619-607-3328
Email: acfreeze726@gmail.com

Attorneys for Defendant, **BENJAMIN L. BATHEN**

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

SOUTH COUNTY DIVISION

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff,

vs.

BENJAMIN L. BATHEN,
Defendant.

) Case No.: SCS294342

) **NOTICE OF MOTION AND MOTIONS**
) **IN LIMINE**

) DATE: June 11, 2018
) TIME: 1:30 p.m.
) DEPT: 16

**TO: THE CLERK OF THE COURT AND THE DISTRICT ATTORNEY FOR
THE COUNTY OF SAN DIEGO;**

ATTN: DEPUTY DISTRICT ATTORNEY CHERIE SOMERVILLE:

NOTICE IS HEREBY GIVEN that on the above date and time, or as soon thereafter as counsel may be heard in the courtroom assigned for trial, defendant, **BENJAMIN L. BATHEN**, by and through his attorney, **ALICIA C. FREEZE, ESQ.** will move this court to grant all listed Motions in Limine.

1 These motions will be based on this Notice of Motion, the pleadings in this action, the
2 attached Memorandum of Points and Authorities, and arguments to be presented at the time
3 and place herein scheduled for the motion.

4 Mr. BATHEN hereby requests the trial court to conduct Evidence Code section 402
5 and/or section 403 hearing(s) and/or exclude the Deputy District Attorney from attempting to
6 admit into evidence and/or elicit testimony concerning the below-referenced evidence.

7 The Motions in Limine include:

8 1. General Motions in Limine (Section I.):

- 9 a. Motion to exclude witnesses from courtroom when not testifying,
10 pursuant to California Evidence Code section 777.
- 11 b. Motion to admonish witnesses not to discuss their testimony.
- 12 c. Motion to preclude testimony from witnesses not listed in police report or
13 provided in the witness list.
- 14 d. Motion to preclude any evidence previously requested by the defense
15 through the Discovery process and which was not provided.

16 2. Motion in Limine to exclude the mention of anyone as a "victim." (Section
17 II.)

18 3. Motion in Limine to exclude the prosecution from conferring with witnesses
19 once cross-examination has begun. (Section III.)

20 4. Motion in Limine to exclude prosecution's cell site evidence, maps &
21 analysis (Section IV.)

22 5. Motion in Limine to exclude investigator's testimony regarding voice
23 recognition (Section V.)

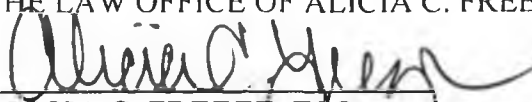
24 6. Motion in Limine to exclude testimony regarding Google search (Section
25 VI.)
26
27
28

1 For the reasons set out below in the attached points and authorities, and any other
2 argument or motions to be made or filed in the trial department, the defense and BENJAMIN
3 L. BATHEN request that all listed Motions in Limine be granted.
4

5 Dated: June 11, 2018

6 Respectfully Submitted,

7 THE LAW OFFICE OF ALICIA C. FREEZE, APC

8 

9 ALICIA C. FREEZE, ESQ.

10 Attorney for Defendant
11 **BENJAMIN L. BATHEN**
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **LAW OFFICE OF ALICIA C. FREEZE**
 2 **ALICIA C. FREEZE, ESQ.** **SBN: 281268**
 3 7676 Hazard Center Drive, Suite 500
 4 San Diego, CA 92108
 5 Phone: 619-363-5146
 6 Fax: 619-607-3328
 7 Email: acfreeze726@gmail.com

8 Attorney for Defendant, **BENJAMIN L. BATHEN**

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **IN AND FOR THE COUNTY OF SAN DIEGO**

11 **SOUTH BAY DIVISION**

12 THE PEOPLE OF THE STATE OF
 13 CALIFORNIA,

14 Plaintiff,

15 v.

16 **BENJAMIN L. BATHEN,**

17 Defendant.

Case No.: **SCS294342**

**POINTS AND AUTHORITIES IN
 SUPPORT OF DEFENDANT'S
 MOTIONS IN LIMINE**

18
 19
 20 **BRIEF STATEMENT OF THE FACTS**

21 Defendant BENJAMIN L. BATHEN was a patient of complaining witness Dr. Carolyn
 22 Jacobs, a licensed psychologist, from approximately 2004 to 2009. In 2008, Mr. BATHEN
 23 moved from California to Massachusetts. However, he still received counseling sessions from
 24 Dr. Jacobs via email and telephone until March 2009. Dr. Jacobs has not seen or spoken with
 25 Mr. BATHEN since then.

26 On or about June 5, July 3 and July 5, of 2017, Dr. Jacobs received three (3) voice
 27 messages on her confidential work voice mail system, by a male voice threatening to harm her
 28

1 and her daughter. She did not recognize the voice. Her Caller ID identified the number as 617-
2 992-4648. Her husband "Googled" the number and saw that it somehow connected to a "BEN
3 BATHEN."¹ Dr. Jacobs and her husband contacted Chula Vista Police Department and Officer
4 Alan De La Pena was dispatched to their home.

5 Dr. Jacobs indicated that while she initially did not recognize the voice, when she saw
6 it may relate back to Mr. BATHEN, she then believed it to be Mr. BATHEN's voice. She
7 further testified that she is fear for her life, despite Mr. BATHEN living on the East Coast and
8 she not seeing or hearing from Mr. BATHEN in 9 years.

9 Supervising District Attorney Investigator (SDAI) Gregory Gain subsequently
10 subpoenaed T-Mobile Call Detail Records (CDR) for the prepaid, or "burner" phone used, and
11 Cell Phone Tower information. It is the prosecution's argument that this information places
12 Mr. BATHEN near his home and/or work place at the time of the calls. It is the defense's
13 position that this conclusion is unfounded, ignores well-known measurement problems, and if
14 admitted, will mislead and confuse the jury.

15 SDAI Gain also listened into jail calls and social visits while Mr. BATHEN was in
16 custody of the San Diego County Sheriff. The prosecution will attempt to call SDAI Gain as a
17 witness to testify that the voice on the voice messages in question is the same voice on the jail
18 calls, despite no information that SDAI Gain is qualified as a witness to testify to voice
19 recognition.
20

21 //
22 //
23 // -
24 //
25 //

26
27 ¹ When Supervising District Attorney Investigator (SDAI) Gregory Gain went to Mr. BATHEN's
28 website, a different phone number was listed as his contact. No reference was made to the number that called Dr.
Jacobs. Defense counsel has also "Googled" the same number and no reference to "Ben Bathen" has been found.

POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS IN LIMINE

I.

GENERAL MOTIONS IN LIMINE

- a. Motion to exclude witnesses from courtroom when not testifying, pursuant to California Evidence Code section 777.
- b. Motion to admonish witnesses not to discuss their testimony.
- c. Motion to preclude testimony from witnesses not listed in police report or provided in the witness list.
- d. Motion to preclude any evidence previously requested by the defense through the Discovery process and which was not provided.

II.

MOTION IN LIMINE REQUESTING TO EXCLUDE THE MENTION OF ANYONE AS A "VICTIM"

DEFENDANT BENJAMIN L. BATHEN (hereinafter, "Mr. BATHEN") respectfully requests this Court order that during the course of this matter the prosecutor, court personnel, and prosecution witnesses be precluded from referring to DR. CAROLYN JACOBS as "victim," and that no jury instructions, *Voir Dire*, or answers to questions from the jury shall refer to Dr. JACOBS as the "victim," or any other related term.

A. Reference to the Complaining Witness as the "Victim."

We must all agree that a "victim" for purposes of a criminal prosecution is someone who has suffered a loss of property, an injury, an abuse, or death as a result of crime. (See, e.g. dictionary.com) Certainly, that is the way it would be referenced in this trial. The allegation is that the complaining witness, Dr. JACOBS, is a victim of Mr. BATHEN. By using the term "victim," there is an implication that Mr. BATHEN is already, in fact, guilty. This implication is prejudicial to the Defendant and goes against the due process protections

1 that he is guaranteed under the United States and California Constitutions.

2 **B. Whether Dr. JACOBS is a Victim is a Question of Fact for the Jury, and the**
3 **Jury Alone, to Determine.**

4 When a law enforcement officer comes into Court, often wearing his uniform bearing
5 all of the evidence that he is an authority figure and part of the prosecution team, and is
6 allowed to designate anyone as a "victim," the impact of that designation is to plant in the
7 minds of the jurors that the person is in fact a "victim" because it has been so stated by a very
8 significant authority figure testifying for the prosecution.

9 **C. When Any Witness is Allowed to Describe Dr. JACOBS as "The Victim," it**
10 **has an Impact on the Jury.**

11 When testimony is elicited from witnesses, describing the decedent as "the victim," this
12 detail becomes evidence in the minds of the jurors because it has been allowed in as testimony.
13 The prosecution is aware of this effect, and that is why prosecutors continually refer to an
14 alleged victim as "the victim."

15 The prosecutor, Court personnel, and the People's witnesses should not be allowed to
16 characterize the complaining witness during the trial as "the victim" any more than the defense
17 should be permitted to call the defendant throughout the trial "the falsely accused" or the
18 "victim of circumstances" or even "the obviously innocent defendant," etc.

19 This requested prohibition would extend to include *Voir Dire*, Opening Statement
20 (which is not to be argumentative), Trial Testimony, and Closing Argument. If otherwise,
21 what is to prevent the defense from referring to Mr. BATHEN with any of the aforementioned
22 descriptions, particularly "the falsely accused"? Common sense dictates that at least until the
23 jury decides the case, the decedent remains an "alleged" victim and not "the victim."
24

25 //

26 //

D. The "Victim" Characterization is Argumentative and Subverts the Defendant's Presumption of Innocence.

This subversion occurs by allowing repeated characterizing of the Prosecutor's version of events as the correct version of events. As such, it violates the defendant's state and federal right to the presumption of innocence as protected by the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution. It also violates the Defendant's Sixth and Fourteenth Amendment right to a jury determination of the facts, as well as the analog protections provided by the California Constitution.

Prosecutorial statements are assumed to make an impression upon the minds of jurors because the office "carries such weight with a jury that his statement of fact predicated on his knowledge, rather than on the evidence, constitutes reversible error." (*People v. Purvis* (1963) 60 Cal.2d 323, 341, emphasis added.) Generally, a lawyer cannot use subterfuge to place before a jury matters which it cannot properly consider. (*People v. Daggelli* (1990) 225 Cal.App.3d 751, 759.) And, a prosecutor cannot use argument or questioning as a basis to testify before the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 827-28.) **"When a lawyer asserts that something not in the record is true, he is, in effect, testifying; He is telling the jury: 'Look, I know a lot more about this case than you, so believe me when I tell you X is a fact.' This is definitely improper."** (*United States v. Kojanyani* (9th Cir. 1993) 8 F.3d 1315, 1321., emphasis added.)

In *People v. Sanchez*, 208 Cal.App.3d 721, the court rejected an appeal claim of constitutionally ineffective assistance of counsel for failure to assert this position at trial, **but this was because there were fewer mentions of the term by the prosecutor than defense,** and because it was largely restricted to comments in *Voir Dire*. (*People v. Sanchez* (1989) *supra*, 739, 740, emphasis added.) **However, even though the issued was not raised properly on appeal, the court found that the use of the term "victim" by the prosecutor**

1 was improper. Therefore witnesses in this case should be addressed by their proper given
2 names, or the anonymity designation of Mr. or Mrs. Doe.

3 III.

4 MOTION TO EXCLUDE THE PROSECUTION FROM CONFERRING WITH
5 WITNESSES ONCE CROSS-EXAMINATION HAS BEGUN

6 The People should be prohibited from conferring with a witness once cross-
7 examination has begun. (*Perry v. Leeke* (1998) 488 U.S. 272.) The holding in *Perry, supra*,
8 applies to all witnesses. As the U.S. Supreme Court stated:
9

10 “Accordingly, it is entirely appropriate for a trial judge to decide, after
11 listening to direct examination of any witnesses, whether the defendant or a
12 non-defendant, that cross-examination is more likely to elicit truthful
13 responses if it goes forward without allowing the witness an opportunity to
14 consult with third parties, including his or her lawyer. In other words, the
15 truth-seeking function of the trial can be impeded in other ways other than
16 unethical “coaching.” Cross-examination often depends for its effectiveness
17 on the ability of counsel to punch holes in a witnesses’ testimony at just the
18 right time, in just the right way. Permitting a witness, including a criminal
19 defendant, to consult with counsel after direct examination but before cross-
20 examination grants the witness an opportunity to regroup and regain a pose
21 and sense of strategy that the unaided witness would not possess. This is true
22 even if we assume no deceit on the part of the witness. It is simply an
23 empirical predicate of our system of adversary rather than inquisitorial justice
24 that cross-examination of a witness who is un-counseled between direct and
25 cross-examination is more likely to lead to the discovery of truth than is cross-
26 examination of a witness who is given time to pause and consult with is
27 attorney.”

28 (*Perry v. Leeke* (1998) 488 U.S. 272, 282.)

Accordingly, the prosecution should be prohibited from conferring with the witness
once cross-examination has begun.

//
//
//

IV.

**MOTION TO EXCLUDE PROSECUTION'S CELL SITE EVIDENCE, MAPS &
ANALYSIS**

The prosecution intends to introduce historical cell site records reflecting the location of cell towers during certain cellular phone calls. The District Attorney's Office also intends to call Supervising District Attorney Investigator (SDAI) Gregory Gain as a witness to testify regarding exhibits he prepared based on the historical cell site records.

Specifically, the District Attorney proffers SDAI Gain's testimony and exhibits to reflect that the cell towers used by Mr. BATHEN's cell phone during this time were in the vicinity of his work and home. It is the prosecution's argument, thus, that the phone tolls and cell tower data corroborates the belief that Mr. BATHEN was at his place of employment when at least two (2) of the three (3) phone calls were made.

The defense objects to the admission of records related to historical cell site information and to SDAI Gain's testimony. Defendant submits that the government has provided insufficient detail of its expert testimony under California Rules of Evidence 720(a): "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject *to which his testimony relates*. Against the objection of a party, such special knowledge, skill, experience, training, or education *must be shown before the witness may testify as an expert*." (Evid. Code § 720(a), emphasis added.)

Furthermore, the prosecution has not established that its proposed expert testimony meets the strictures of *Daubert v. Merrell Dow Pharms., Inc.* (1993) 509 U.S. 579, 589. **As such, Mr. BATHEN requests a *Daubert* hearing prior to the admission of testimony related to cell site information and estimated ranges.**

//

1 **A. SDAI Gain's Testimony Regarding Cell Phone Towers Must be Excluded**

2 The prosecution has provided the defense with a six (6) page report from SDAI Gain
3 where he "summarizes" the Call Detail Report (CDR) and cell tower data for the phone
4 number in question, grasping at straws to link Mr. BATHEN to these voice messages in
5 question.

6 This Discovery indicates that on June 4, 2017, a call was made to the complaining
7 witness. The cell tower Location Area Code (LAC) relating to the phone call is listed, but has
8 no latitude or longitude. The LAC in question covers all of northeast Washington DC;
9 approximately 404 cell towers. None of them corresponded with the specific Cell ID. When
10 SDAI Gain inquired, T-Mobile was unable to explain any further. This on its own calls into
11 question the completeness of the records, and their reliability. If they cannot be corroborated,
12 perhaps they are faulty.

13 SDAI Gain's report further indicates that he prepared "maps" using the District
14 Attorney's "Tower Tracker" program, which merges the CDR and cell phone tower data, and
15 displays them using a Google Earth map, ultimately coming to the "conclusion" that all the
16 cell towers utilized by the cell phone in question during the relevant time frame were located
17 in the vicinity of Virginia and Washington DC, where Mr. BATHEN allegedly works and
18 lives.

19 No other detail regarding the relevance of the location of the cell towers or of the
20 methodology or reasoning for the estimated cell tower range is provided.

21 SDAI Gain must be excluded from testifying as it relates to this "summary" of cell
22 phone calls and towers. The prosecution's proposed testimony does not meet the requirements
23 of *Daubert*. In *Daubert*, the Supreme Court held that the courts are the gatekeepers to the
24 admissibility of scientific evidence. (*Daubert v. Merrell Dow Pharms., Inc.* (1993) 509 U.S.
25 579, 597.) The Court required that such scientific evidence be both relevant and reliable. (*Id.*)
26
27
28

1 This gate-keeping responsibility, as well as the relevance and reliability requirements, were
2 subsequently extended to all expert testimony in *Kumho Tire Co., Ltd. v. Carmichael* (1999)
3 26 U.S. 137, 150.

4 Beginning first with the anticipated testimony regarding the locations of cell towers
5 and their relation to purportedly relevant locations, it appears that the prosecution has made
6 **the assumption that a cell phone call must necessarily utilize the nearest tower and that**
7 **the individual making the call must therefore be within a certain geographic range. But**
8 **the prosecution has provided no basis or methodology for this theory.** Without providing
9 any support, the location of cell phone towers, especially in comparison to purported relevant
10 locations, is irrelevant. The prosecution cannot simply admit evidence regarding the cell phone
11 tower used during a certain call and leave the jury with the inference that the tower used is the
12 tower nearest to the phone. Rather, the District Attorney must demonstrate that this is, in fact,
13 how cell phones work. Nothing in its Discovery provides any detail regarding how the
14 evidence is relevant or reliable. Rather, the evidence is highly prejudicial because the jury will
15 intuitively assume that the nearest tower is the tower used by a cell phone.

17 The prosecution has also provided no methodology for SDAI Gain's estimate ranges of
18 cell towers. In *Daubert*, the Supreme Court laid out non-exhaustive general criteria for
19 assessing the reliability and validity of an expert's testimony including whether the expert's
20 methodology in question can or has been tested, whether it has been subjected to peer review
21 and publication, the methodology's known or potential error rate and the existence and
22 maintenance of standards controlling its operation, and whether the methodology has attracted
23 widespread acceptance within a relevant scientific community. (*Daubert, supra*, 509 U.S. at
24 pp. 593-594.) By not detailing any methodology that SDAI's Gain will employ, this Court can
25 make no finding as to whether the methodology is reliable.
26
27
28

1 In light of the above, the Defense requests that SDAI Gain's historical cell site data be
2 precluded from admission and that SDAI Gain be prohibited from testifying.

3 Alternatively, the defense requests a *Daubert* hearing on the issue of the admissibility
4 of historical cell site data and estimated ranges, as the testimony is neither reliable nor
5 relevant.

6 **B. Testimony of Defense Expert Manfred Schenk**

7 Defense Expert Manfred Schenk (See attached Curriculum Vitae, **Exhibit A**) will
8 testify that the value of Call Detail Records in this case has been grossly over-estimated, and if
9 admitted, would materially mislead the jury regarding the significance of Call Detail Records.
10

11 Mr. Schenk will explain that specific and determinative cell phone handset location
12 information is simply not obtainable from historical Call Detail Records. No measurable data
13 is presented to support geo-location. He will further testify that a cell phone network is so
14 complex and so variable moment to moment that one cannot infer anything that would be
15 deductive, repeatable, or contain any degree of assurance or reliability about a cell phone
16 handset's location from the single site location that connected it to the provider's network.
17 Additionally, the elementary requirement that you need three distinct (non-colinear) sources of
18 information to triangulate a location is ignored. It is not possible to discriminate or isolate a
19 location from Historical Cell Phone Call Detail Records. If the Court allows for the conflation
20 of a known cell site location with the unknown cell phone handset location, it would lead to a
21 grave injustice. (See attached Report, **Exhibit B.**)
22

23 //
24 //
25 //
26 //
27 //

V.

**MOTION TO EXCLUDE PROSECUTION'S INVESTIGATOR'S TESTIMONY
REGARDING VOICE RECOGNITION**

The prosecution intends to call SDAI Gain to testify as to voice recognition of the phone messages that are the subject of this criminal action. Specifically, SDAI Gain will testify that he compared the voice on jail calls and social visits involving Mr. BATHEN while in the custody of the San Diego County Sheriff to the voice of the phone messages, and he "believes they are the same person." per his report, because Mr. BATHEN has the "proclivity of saying 'hey' at the beginning of these conversations."

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject *to which his testimony relates*. Against the objection of a party, such special knowledge, skill, experience, training, or education *must be shown before the witness may testify as an expert*." (Evid. Code § 720(a), emphasis added.)

The court may, *and upon objection shall*, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. (Evid. Code § 803, emphasis added.)

There is no evidence or information whatsoever that SDAI Gain has any special knowledge or skill relating to voice recognition. Allowing him to testify as to any voice recognition between the jail calls and the voice message will run afoul to Evidence Code section 352, which acts as the safeguard against misuse of information in cases where the admission of such evidence would result in a fundamentally unfair trial. Evidence Code section 352 allows a trial court to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of

1 misleading the jury.” (Evid. Code § 352.) SDAI Gain is not an expert in voice recognition,
2 and allowing him to testify as such would mislead the jury. As such, he must be excluded from
3 testifying as to any opinion as to voice recognition.

4 **VI.**

5 **MOTION TO EXCLUDE TESTIMONY REGARDING GOOGLE SEARCH**

6 “Hearsay evidence” is evidence of a statement that was made other than by a witness
7 while testifying at the hearing and that is offered to prove the truth of the matter stated. Except
8 as provided by law, hearsay evidence is inadmissible. (Evid. Code § 1200.)
9

10 In this case, the prosecution wishes to call Gary Jacobs to the stand to testify as to the
11 results of a “Google” search where allegedly he typed in the phone number linked to the voice
12 messages, and the Google search results listed “Benjamin Bathen” or “Ben Bathen” as
13 someone related to the number. This would be hearsay evidence – this is information allegedly
14 propounded by Google at some point in the past and presented now to show the truth of the
15 matter asserted – namely, that the number is linked to Benjamin Bathen.

16 Furthermore, neither Mr. Jacobs nor SDAI Gain can be permitted to present the actual
17 Google results themselves. Authentication of a writing is required before it may be received in
18 evidence. Authentication of a writing is required before secondary evidence of its content may
19 be received in evidence. (Evid. Code § 1401.)
20

21 SDAI Gain includes a “screenshot” of the Google results in his 6 page report but it has
22 no date or time associated with when the “screenshot” was taken. This would be vague as to
23 time and go to foundational concerns.

24 Authentication of a writing means (a) the introduction of evidence sufficient to sustain
25 a finding that it is the writing that the proponent of the evidence claims it is or (b) the
26 establishment of such facts by any other means provided by law. (Evid. Code § 1400.)
27
28

1 A writing may be authenticated by evidence that: (a) The party against whom it is
2 offered has at any time admitted its authenticity; or (b) The writing has been acted upon as
3 authentic by the party against whom it is offered. (Evid. Code § 1414.)

4 Except as otherwise provided by statute, oral testimony is not admissible to prove the
5 content of a writing. (Evid. Code § 1523.)

6 In *People v. Beckley* (2010) 185 Cal. App. 4th 509, the prosecution offered a
7 photograph of defendant Beckley's girlfriend Fulmore flashing a gang sign that the
8 investigating detective had downloaded from the defendant's home page of his MySpace
9 internet website. The trial court admitted the photograph over both defendants' objections that
10 it had not been authenticated. The Court of Appeals agreed with the defendants that the court
11 erred in admitting the photograph. The *Beckley* court held: "A photograph is a 'writing' and
12 '[a]uthentication of a writing is required before it may be received in evidence.' (Evid. Code,
13 §§ 250; 1401(a)). A photograph or other writing may be authenticated by 'the introduction of
14 evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence
15 claims it is...'" (Evid. Code, § 1400; *People v. Beckley* (2010) 185 Cal. App. 4th 509, 514.)
16 The *Beckley* court looked to *People v. Bowley* (1963) 59 Cal. 2d 855: "It is well settled that
17 the testimony of a person who was present at the time a film was made that it accurately
18 depicts what it purports to show is a legally sufficient foundation for its admission into
19 evidence." (*People v. Bowley* (1963) 59 Cal. 2d 855, 859.) In addition, authentication of a
20 photograph "may be provided by the aid of expert testimony..." (*Id.* at p. 862.)
21

22 In *Beckley*, both defendants conceded that the face in the MySpace photograph was
23 who it was (Beckley's girlfriend, Fulmore), but the record did not contain the kind of evidence
24 described in *Bowley* or any other evidence sufficient to sustain a finding that it was indeed a
25 photograph that the prosecution claimed it was; namely, an accurate depiction of [Beckley's
26 girlfriend] Fulmore actually flashing a gang sign. The detective could not testify from his
27
28

1 personal knowledge that the photograph truthfully portrayed Fulmore flashing the gang sign
2 and no expert testified that the picture was not a “composite” or “faked” photograph. Such
3 expert testimony is even more critical today to prevent the admission of manipulated images
4 than it was when *Bowley* was decided. (*People v. Beckley, supra*, 185 Cal. App. 4th at p. 515.)
5

6 Recent experience shows that digital photographs can be changed to produce false
7 images. (See, e.g., *U.S. v. Newsome* (3d Cir. 2006) 439 F.3d 181, 183 [digital
8 photographs used to make fake identification cards].) Indeed, with the advent of
9 computer software programs such as Adobe Photoshop “it does not always take skill,
10 experience, or even cognizance to alter a digital photo.” (Parry, *Digital Manipulation
11 and Photographic Evidence: Defrauding The Courts One Thousand Words At A Time*
12 (2009) 2009 J. Tech. L. & Pol’y 175, 183.) Even the Attorney General recognizes the
13 untrustworthiness of images downloaded from the Internet, quoting the court’s warning
14 in *St. Clair v. Johnny's Oyster & Shrimp, Inc.* (S.D.Tex. 1999) 76 F. Supp. 2d 773, 775
15 that “[a]nyone can put anything on the Internet. No web-site is monitored for accuracy
16 and *nothing* contained therein is under oath or even subject to independent verification
17 absent underlying documentation. Moreover, the Court holds no illusions that hackers
18 can adulterate the content of *any* web-site from *any* location at *any* time.”

19 (*People v. Beckley, supra*, 185 Cal. App. 4th at pp. 515-516.)

20 Accordingly, Mr. Jacobs and SDAI Gain must be barred from testifying as to the
21 alleged Google results, as it is hearsay. Furthermore, neither witness should be permitted to
22 produce any photograph or “screenshot” of the alleged results, as it would run afoul to the
23 California Evidence Code and California case law.
24
25
26
27
28

//
//
//
//
//
//
//
//
//

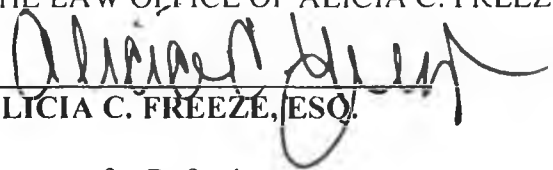
CONCLUSION

Defendant **BENJAMIN L. BATHEN** respectfully requests that the court grant his Motions in Limine, so as to ensure that he receives the fair trial guaranteed to him by the Fourth, Sixth and Fourteenth Amendments of the United States Constitution, and the California Evidence Code.

Dated: June 11, 2018

Respectfully Submitted,

THE LAW OFFICE OF ALICIA C. FREEZE, APC


ALICIA C. FREEZE, ESQ.

Attorney for Defendant
BENJAMIN L. BATHEN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

**Cherry Biometrics Inc.
6312 Seven Corners Center #251
Falls Church, VA 22044
(201) 513-8300**

Manfred Schenk Professional Profile

Mr. Schenk is a Senior Manager and Computer Scientist. He is actively engaged in development of patent pending/trade-secret, biometric and location-aware cyber security solutions. He is a member of the Telecommunications Society for Electrical and Electronic Engineers (IEEE).

His Experience incorporates both radio frequency (RF) and digital communications: including mobile, long lines and switching. Mobile broadband knowledge includes: Proposed G5 Features and Functions including Massive Machine Communications, G4 LTE-Advanced, LTE, HetNet, NAS, Carrier Aggregation. He has many years of computer programming and telecommunications network design experience that focus on queuing and RF transmissions within the aerospace, telephone, brokerage and banking industries.

Some of the past organizations that he has assisted include: International Telephone & Telegraph (ITT), Western Union International, IBM, Prudential Bache, the US Navy and NASA. He was an early design team member of Project Apollo 11, The Mission to the Moon.

His expert witness experience includes many cases where Cell Phone Company Call Detail Records (CDR's) were initially misinterpreted including:

- The Habeas and subsequent freeing of Lisa Roberts. Lisa had served 12 years in prison before being released as innocent.
- The Federal Daubert Hearing associated with the United States of America v. Antonio Evans Case No. 10 CR 747-3 where Federal Judge Joan Humphrey Lefkow ordered that "Special FBI Agent Raschke may not testify concerning the theory of granulization, which

the court finds to be unreliable. In addition, the estimated coverage areas contained in summary exhibit 6 must be removed before the court will admit this exhibit." The case ended with a not guilty verdict of all charges including kidnapping.

- The Federal Daubert Hearing associated with the United States of America v. Roderick Thornton. In that case U. S. District Judge Amy Totenberg ruled, "The Court would have significant concerns if Special Agent Fitzgerald were to offer an expert opinion on the precise street location or radius where the Defendant's phone communications were made based on the telecommunications data and methodology identified in his testimony."
- The State of Florida v. Adrian Brown. Mr. Brown was found not guilty of murder and he walked out of the courtroom.
- The State of Ohio v. Jamar Houser, a murder case, the judge called Mr. Houser "innocent," and released him.
- The State of Connecticut v. Antoine Davis, the jury determined him not guilty of all charges including: home invasion, robbery, burglary, assault, larceny, accessory to kidnapping with a firearm and conspiracy.
- United States of America v. Terrance Brown, Toriano Johnson, Daryl Davis, Hasam Williams, and Joseph K. Simmons. A Brinks driver was killed and each defendant's cell phone used the same nearby cell tower that was located across the street from the murder. Death penalty charges were reduced to a series of attempted robberies of armored trucks. One of the five defendants charged was acquitted, while others were convicted of some charges.

His expert witness experience in fingerprint analysis included the case of State of Washington v. Kanphandara Chea 10-1-03227-1 SEA in which there was no conviction.

PROFESSIONAL EXPERIENCE

Senior Technology Officer 2001 – Present Cherry Biometrics, Inc. and Schenk Consultants, Los Angeles, CA

Project leader, proprietary next generation cybersecurity solutions that use geolocation attributes and biometric repositories. Research the latent fingerprint matching paradigm including the handling of deformations and similarities. Study the inclusion of new parameters and technologies including skin pores and enhancements. Additional projects included digital photography, cell tower tracking and cyber security.

CENTURY CORP., formerly DSP Inc. 1995 – 2001

IBM Supplier/Business Partner and Sony Business Partner Manager

Manage assembly line re-engineering projects for Xerox Manufacturing and Yoo-hoo Beverage. These very large international re-engineering projects incorporated SCADDA assembly lines, CCTV systems and factory IT systems. Analyst for DSP Corp. a technology supplier and business partner who built digital imaging solutions for IBM and Sony that helped launch their business-to-business replacement of conventional photography with digital photography. Digital images are indexed and stored into large repositories allowing

rapid access and display of images along with associated reports including arrest records. Popular uses for this pioneering technology included insurance claims and the digital storage and retrieval of an individual's arrest history and associated mug shots. Clients included: State Farm Insurance, Kemper Insurance, Allstate Insurance, Farmers Insurance, Clark Police, the Albany Police and hundreds of other organizations worldwide.

Riverside Research Institute, New York, NY 1992 - 1995

Medical Research Analyst

Research and design of diagnostic equipment that uses ultrasound to recognize tissue associated with prostate cancer. Successful medical trials confirmed the detection of neoplasm of the prostate as well as liver and breast. Design considerations included the integration of custom fast Fourier transformation (FFT) chips with RISC processors. Further researched included the feasibility of a therapeutic ultrasound heat treatment modality.

Independent Consultant

Assisted International Telephone & Telegraph (ITT), a defense contractor and cell phone operator, in the design of their formative cellular infrastructures. Tasks included frequency and channel capacity planning, simulation and modeling, waveform design and analysis, digital beamforming techniques, digital signal processing, and statistics and stochastic processes. Additional projects included: The design of a global money order system used by Western Union, a sales tracking system for IBM clients, the design of the underwater real-time digital communications system used by The Integrated Radio Room of the Trident Submarine for the U.S. Navy, and the design of an infra-red missile tracking system for the U.S. Air Force.

EDUCATION

University of Michigan, M.A. Mathematics

Rutgers University, B.A. Mathematics

Newark College of Engineering, A.S. Engineering

Member of the Telecommunications Society for Electrical and Electronic Engineers (IEEE).

Member of the California Wireless Phone Association (CALWA)

International Association for Pattern Recognition

EXHIBIT B

Cherry Biometrics, Inc.
6312 Seven Corners Center #251
Falls Church, VA 22044
(201) 513-8300

June 5, 2018

Alicia C. Freeze, Esq.
Law Office of Alicia C. Freeze, APC
7676 Hazard Center Drive, Suite 500
San Diego, CA 92108
Cell: (619) 363-5146

RE: People v. Benjamin L. Bathen

Case No. SCS294342

Historical Cellular Analysis

If called upon to testify, I could competently state the following under oath. I have carefully reviewed assumptions and accuracy claims in the prosecution's analysis that I find to be overly optimistic as they ignore well known measurement problems.

Cell site/tower location is not cell phone location. The precise location of the cell phone cannot be known with the use of Historical Call Detail Records, since the latter capture cell tower locations not cell phone locations, and these locations can be separated by 21.75 miles. [1]

Background

In order to locate certain persons, law enforcement has subpoenaed the Call Detail Records (CDRs) of mobile phone subscribers. FBI Analysts posit that the subject's cell phone connects with the nearest tower with the strongest signal. That may be accurate sometimes, but no proof is provided. And from a network standpoint the assertion cannot be true on a consistent, repeatable and deterministic basis, for networks are continually balancing their call volume load capacity across all tower resources.

The cell towers chosen to complete a call are determined by proprietary software algorithms. The cell phone handset does not control the resources of the cell phone provider. The Mobile Switching Center (MSC) assigns the radio frequency (RF) channels and cell tower that connect a call under the control of the Network Control Center (NCC). It is not proximity or signal strength that is the primary determinant in assignment but rather the needs of the network to balance and distribute its resources

as efficiently as possible to accommodate the maximum number of subscribers at the most economical cost.

The use of historical cell site records to locate or place with precision the origin of a cell phone is a technique recently advanced in the context of law enforcement prosecutions. No scientific community or organization considers this technique valid.

Actual Location of Caller

To truly locate a mobile phone subscriber, we must emulate the Federal Communications Commission (FCC) technique for E911 emergency calls. The FCC requires the use of one of two techniques, viz., Global Positioning System (GPS) or Trilateration using three or more cell towers simultaneously. Both techniques use the differences in time-of-arrival (TOA) signals to compute a location. Accuracy of position is mandated to be within 50 to 300 meters (165 to 1000 feet) 67% of the time.

The cell phone's RF (radio frequency) signal is omni-directional and at .6 watts (a usual power output) radiates out to a theoretical limit of 31.2 miles. Terrain as in hills, buildings and obstructions will shorten this distance. But let us assume a usable signal for 21 miles. [1] Thus a cell phone handset is "located" somewhere within 1385+ square miles.

Calculation: The area formula for a circle is $A=\pi*r^2$, so r is 21 times 21 equals 441, times π is 3.14 which equals 1385 square miles.

Most cell towers now have three antennas to cover this circle, so if we can identify an antenna face we would divide 1385 square miles by three and get 461+ square miles. So, a cell phone handset would, probably, be located somewhere within this 120-degree region for a determinative location. Any more specific conclusion locating the phone within this 461 square mile range of the 120-degree region is induction, possibility, probability and conjecture, but not science or scientific or deduction or certainty or "beyond reasonable doubt."

Errors in Assumption

Given the single cell tower connection site contained in Call Detail Records, the location of the cell phone is assumed to be a short distance from the cell site. This limited range assumption is optimistic and not supported by scientific theory. The National Institute of Standards and Technology states:

"Cell towers can service phones at distances of up to 35 kilometers (approximately 21 miles) and may service several distinct sectors." [1]

Given this extensive range, the delimiting arcs from prosecution maps should be removed before these maps are presented to the jury to avoid misleading assumptions

and visual appearances. It would also be appropriate for the sector lines to be extended to a 21-mile distance.

Additionally, the accuracy of the Call Detail Records presented by cell phone provider T-Mobile cannot be corroborated. Utilizing computer application Google Earth, it is not clear that a cell site exists at the Veteran's Administration Building located at 810 Vermont Avenue NW, DC, as documented by T-Mobile Call Detail Records. FCC Cell Sites and Antennae databases contain no entries for 810 Vermont Avenue. Across the street at 811 Vermont Avenue, there is cellular equipment visible belonging to the cell phone provider Sprint, as recorded by FCC.

Summary and Conclusion

In my professional opinion, the value of Call Detail Records has been grossly over estimated. Juries have been materially misled regarding the significance of Call Detail Records. Such records were never intended to, and do not indicate:

- 1) The locations of other cell towers near the cell phone handset;
- 2) The distance from the tower or strength of signal of the handset at the time of the call;
- 3) The identity of other towers used during a call, and, most critically;
- 4) The identity of the tower closest to the handset.

Simply put, specific and determinative cell phone handset location information is not obtainable from historical Call Detail Records. No measurable data is presented to support geo-location. A cell phone network is so complex and so variable moment to moment that one cannot infer anything that would be deductive, repeatable, or contain any degree of assurance or reliability about a cell phone handset's location from the single site location that connected it to the provider's network. Additionally, the elementary requirement that you need three distinct (non-colinear) sources of information to triangulate a location is ignored.

In short, it is not possible to discriminate or isolate a location from Historical Cell Phone Call Detail Records. We dare not conflate a known cell site location with the unknown cell phone handset location, for this could lead to cases of grave injustice.

[1] NIST Special Publication 800-101 Revision 1, Guidelines on Mobile Device Forensics, May 2014, page 54, paragraph 2



Manfred Schenk

1 SUMMER STEPHAN
District Attorney
2 CHERIE B. SOMERVILLE
Deputy District Attorney, SBN 244220
3 333 H Street, Suite 4000
Chula Vista, CA 91910
4 Tel. (619) 498-5904

F I L E D
Clerk of the Superior Court
JUN 11 2018
CLERK OF THE SUPERIOR COURT
BY: R. Camou

5 EMAIL: cherie.somerville@sdca.org

6 Attorneys for Plaintiff

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE SOUTHERN COUNTY OF SAN DIEGO

11 THE PEOPLE OF THE STATE OF CALIFORNIA,
12 Plaintiff,

Case No. SCS294342
DA No. BCA405

13 v.

**PEOPLE'S RESPONSE TO
DEFENDANT'S MOTION TO
EXCLUDE CELL TOWER
EVIDENCE**

14 BENJAMIN LEE BATHEN,
15 Defendant.

Date: June 11, 2018
Time: 1:30 p.m.
Dept:

21 Comes now the plaintiff, the People of the State of California, by and through their
22 attorneys, SUMMER STEPHAN, District Attorney, CHERIE B. SOMERVILLE, Deputy
23 District Attorney, and respectfully submits the following PEOPLE'S RESPONSE TO
24 DEFENDANT'S MOTION TO EXCLUDE CELL TOWER EVIDENCE.

25 ////
26 ////
27 ////
28 ////
29 ////

1 **POINTS AND AUTHORITIES AND ARGUMENTS**

2 **I.**
3 **CELL TOWER EVIDENCE IS RELEVANT, PROBATIVE**
4 **AND NOT SUBJECT TO KELLY-FRYE.**

5 The People will call analyst Donald Holmes to testify about the manner in which the
6 location of a cell phone can be pinpointed through the cell phone tower system. This evidence
7 relates to the tracking of the approximate location of defendant's cell phone on the date of the
8 three phone calls in question. Defendant objects under *People v. Kelly* (1976) 17 Cal. 3d 24,
9 and Evidence Code section 352.

10 In *People v. Kelly*, the California Supreme Court held the admissibility of expert
11 testimony based on 'a new scientific technique' requires proof of its reliability. To satisfy this
12 requirement, the proponent of the testimony must show: (1) the technique has gained general
13 acceptance in the particular field to which it belongs, (2) any witness testifying on general
14 acceptance is properly qualified as an expert on the subject, and (3) correct scientific procedures
15 were used in the particular case. (*Wilson v. Phillips* (1999) 73 Cal.App.4th 250, 254.) "The
16 Kelly test is intended to forestall the jury's uncritical acceptance of scientific evidence or
17 technology that is so foreign to everyday experience as to be unusually difficult for laypersons
18 to evaluate. [Citation.] In most other instances, the jurors are permitted to rely on their own
19 common sense and good judgment in evaluating the weight of the evidence presented to them.
20 [Citations.]" (*People v. Venegas* (1998) 18 Cal.4th 47, 80.)

21 "[A]bsent some special feature which effectively blindsides the jury, expert opinion
22 testimony is not subject to Kelly ... (*People v. Stoll* (1989) 49 Cal.3d 1136, 1157; see *People v.*
23 *Cegers* (1992) 7 Cal.App.4th 988, 999, 9 Cal.Rptr.2d 297 [no "magical device was unveiled to
24 astound a gullible jury"].) *Kelly* "only applies to that limited class of expert testimony which is
25 based, in whole or part, on a technique, process, or theory which is new to science and, even
26 more so, the law." (*People v. Stoll*, at p. 1156; see, e.g., *People v. Pride* (1992) 3 Cal.4th 195,
27 239, [Kelly not applicable to hair comparison evidence that had been "routinely admitted in
28 California for many years without any suggestion that it [was] unreliable"]; *People v. Nolan*
29 (2002) 95 Cal.App.4th 1210, 1215 [Kelly not applicable to a urine testing device; urinalysis was

1 not new, and other jurisdictions had accepted device's "validity for almost a decade"]; *People v.*
2 *Bury* (1996) 41 Cal.App.4th 1194, 1201 [Kelly not applicable to a breathalyzer; technique was
3 not novel, and breath tests for blood alcohol had "long been recognized by decisional law in
4 California as scientifically valid"].)

5 The use of cell phones to locate a caller is not new to the law. Cell phone evidence has
6 been introduced for that purpose in a number of cases across the country without any concern
7 for the validity of the underlying science. (*People v. Martin* (2002) 98 Cal.App.4th 408, 412
8 [prosecution "relied on [the defendant's] cell phone records to establish his location during the
9 crucial time period"].) Even if the use of cell phone records for this purpose truly were new to
10 the law, this is not the type of unfamiliar technique "foreign to everyday experience" whose
11 application requires validation under *Kelly*. (*People v. Venegas* (1998) 18 Cal.4th 47, 80.) It is
12 within the common experience of every person who has used a radio or television antenna that
13 electromagnetic signals are broadcast and received over a distance. There is therefore nothing
14 unusual or foreign in the notion that the cellular telephone system uses towers that receive call
15 signals broadcast from cell phones near to them. Further, over 170 million Americans own cell
16 phones, and "almost everyone is presumably aware in a general sense that making cell calls
17 entails sending and receiving information via cell towers." (Note, *Who Knows Where You've*
18 *Been? Privacy Concerns Regarding the Use of Cellular Phones as Personal Locators* (2004) 18
19 *Harv. J.L. & Tech.* 307, 312, 313.)

20 The proposed cell tower testimony is relevant as the People have to prove the identity of
21 the caller. The fact that Defendant's phone accessed cell towers in the vicinity of where
22 Defendant was living, working and stated he was when the calls were made is highly probative
23 evidence of a material fact in dispute and as such is admissible. The testimony will not result in
24 an undue consumption of time, will not be unduly prejudicial and, as it is directly related to the
25 material issues in the case, will not confuse the issues or mislead the jury.

26 ////

27 ////

28 ////

29 ////

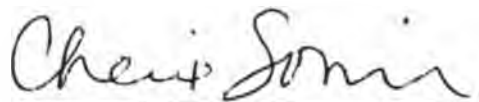
CONCLUSION

For the reasons stated, it is respectfully requested the Court admit the cell tower evidence.

Dated: June 11, 2018

Respectfully submitted:

SUMMER STEPHAN
District Attorney



By:

CHERIE B. SOMERVILLE
Deputy District Attorney

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

1 SUMMER STEPHAN
District Attorney
2 CHERIE B. SOMERVILLE
Deputy District Attorney, SBN 244220
3 333 H Street, Suite 4000
Tel: (619) 498-5904
4 Email: Cherie.somerville@sdca.org

5 Attorneys for Plaintiff

6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 FOR THE COUNTY OF SAN DIEGO
8 SOUTH BAY DIVISION

9 THE PEOPLE OF THE STATE OF CALIFORNIA,

10 Plaintiff,

11 v.

12 BENJAMIN LEE BATHEN,

13 Defendant.

No. SCS294342 / BCA405

**PEOPLE'S SUPPLEMENTAL
MOTION TO EXCLUDE
DEFENSE PSYCHIATRIC
EVIDENCE.**

Date: June 12, 2018
Time: 9:00 a.m.
Dept: 15

14
15 The People anticipate Defendant will call a non-percipient witness, Dr. Raymond Murphy,
16 at the guilt phase of trial, based on information previously provided and based on counsel's
17 statement yesterday in court. The People have been provided with a report from Dr. Murphy.
18 The People are uncertain as to what the exact proffered testimony and relevance of Dr. Murphy's
19 testimony. Dr. Murphy concluded that 1) Mr. Bathen adamantly denies the allegations, 2) Mr.
20 Bathen does not present as aggressive, assaultive, or predatory in any fashion, 3) Mr. Bathen
21 would benefit from brief counseling as needed regarding his current circumstances. This would
22 help to stabilize Mr. Bathen and provide support during this difficult time, and 4) Mr. Bathen
23 does not present a danger to the community at large. Dr. Murphy concluded that Defendant has
24 mild depression related to the current case. Dr. Murphy did not diagnose Defendant with any
25 mental disorder or defect during the time of the Criminal Threats. Dr. Murphy's conclusions are
26 merely inadmissible character evidence based on inadmissible hearsay. None of the proffered
27 conclusions presented by Dr. Murphy are relevant to the charges and therefore should not be
28 admissible. Dr. Murphy's conclusions are all based on hearsay statements from Mr. Bathen.
Therefore, the People respectfully submit the following Motion in Limine to exclude defense
expert testimony.

F I L 0176
Clerk of the Superior Court E D

JUN 12 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

ARGUMENT**I.****THE DEFENSE CANNOT USE AN EXPERT AS A VEHICLE TO GAIN INTRODUCTION OF OTHERWISE INADMISSIBLE HEARSAY STATEMENTS.**

The People are at a loss as to why Dr. Murphy is being called as a witness other than as a way to introduce inadmissible hearsay and character evidence for which Dr. Murphy is not qualified to testify to. Dr. Murphy gives “recommendations/treatment plan” as his opinion. None of this is relevant to any issue in this case. Dr. Murphy’s report is entirely based on Defendant’s self-serving inadmissible hearsay and ardent denial of the charges. Dr. Murphy never gives any opinion as to Defendant’s mental state at the time of the charged offenses. As such, these statements are inadmissible as introduced by the defense. There is no hearsay exception allowing the defense to present such statements. Moreover, the defense psychiatric expert should not be allowed to discuss the details of Defendant’s interviews when he renders his opinion in the case.

Evidence Code section 801 provides that an expert’s opinion may be based on matter otherwise independently inadmissible so long as the matter may be reasonably relied upon by an expert in forming such opinion. Further, Evidence Code section 802 allows a witness giving opinion testimony to state on direct examination the matter upon which that opinion is based. There are, however, important limitations on the use of these Code sections. An expert cannot be utilized to testify to otherwise inadmissible hearsay under the rationale that the hearsay serves as a “basis” for the expert opinion.

In *People v. Coleman* (1985) 38 Cal.3d 69, 90-92, our Supreme Court recognized that:

““ While an expert may state on direct examination the matters which he relied in forming his opinion, he may not testify to the details of such matters. [citing *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757; other citations omitted.] The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence.” (*Id.*, at p.92; emphasis added.)

The Supreme Court went on to note that: “...in aggravated situations, where hearsay evidence is recited in detail, a limiting instruction may not remedy the problem.” (*Ibid.*; citations omitted.)

In *People v. Nahabedian* (1959) 171 Cal.App.2d 302, 310-311, the Court stated that: “[T]here is no right to put in evidence of matters which are incompetent as substantive evidence for the purpose of fortifying the opinion of an expert witness, even though they are offered under the guise of reasons for his opinion, and even though they might properly have been admitted on cross-examination to test and diminish the weight to be given his opinion. [Citations omitted.]

1 “The general rule which permits a witness to state the reasons upon which his opinion is
2 premised may not be used as a vehicle to bring before the jury incompetent evidence.” (*Id.* at pp.
3 310-311; emphasis in original.)

4 The Supreme Court’s position and forerunning case law thus set forth the permissible
5 parameters of Evidence Code §§ 801 and 802. Defendant’s experts can properly testify, if
6 applicable, that their opinions were based on out-of-court statements, written reports, or other
7 material that might be hearsay if its admission was sought independently. However, it is error to
8 allow defendant’s experts to testify about the details of these matters. (*People v. Nicolaus* (1991)
9 54 Cal.3d. 551, 582-583.)

10 In *People v. Nicolaus, surpa*, 54 Cal.3d 551, the defense called a psychiatric expert. In
11 preparing his opinion in the case, he in part relied on professional articles on the “psychiatric
12 mechanisms of child murderers.” Defense counsel sought to have admitted into evidence copies
13 of these articles and several letters written by the defendant. The trial court refused to formally
14 admit the documents into evidence. The California Supreme Court upheld the exclusion and held
15 that exclusion of those documents did not prevent the defendant from presenting evidence
16 relevant to his defense.

17 Allowing an expert to state the matters upon which he relied in forming his opinion, but
18 preventing the expert to testify as to the *details* of such matters rests on the rationale that while an
19 expert may give reasons on direct examination for his opinions, including the matters he
20 considered in forming them, the expert may not under the guise of reasons bring before the jury
21 incompetent hearsay evidence.

22 Clearly, to allow such evidence would effectively preclude the prosecution from cross-
23 examining the validity of trustworthiness of the underlying statements themselves. It would
24 permit a Defendant in any criminal case to put forth his entire defense through the testimony of a
25 single witness (the “expert”) thereby precluding any cross-examination of a defendant or his
26 witnesses. This is not the law.

27 Another example is found in *People v. Edwards* (1991) 54 Cal.3d 787, in which the defendant
28 shot two young girls who were camping in the Cleveland National Forest, killing one of them.
The defendant then fled to Maryland where was arrested nine days later. At trial, the defense
sought to introduce his notebook where he recorded certain thoughts in a notebook. For example,
he complained of having headaches and feeling sick and often referred to himself in the third-
person. After his arrest, the defendant was interviewed on tape at length. The defendant cried at

1 several points, claimed not to remember anything about the shooting and the immediately
2 surrounding events, and complained of headaches. The defense attempted to introduce this taped
3 interview. The prosecution objected to both the notebook and the taped interview on hearsay
4 grounds. The trial court sustained the objection and the California Supreme Court upheld its
5 exclusion of the evidence:

6 **“A defendant in a criminal case may not introduce hearsay evidence for the purpose of**
7 **testifying while avoiding cross-examination. (*People v. Harris* (1984) 36 Cal.3d. 36, 69.)**

8 We anticipate the defense may attempt to ask Dr. Murphy questions regarding interviews he
9 has conducted with Defendant and possibly other individuals. Clearly, Dr. Murphy may not
10 discuss details of the conversations he has had with Defendant or other individuals he has
11 interviewed.

12 Dr. Murphy’s entire report is based off of Defendant’s self-serving hearsay statements. Dr.
13 Murphy states that Defendant has mild depression related to the current legal circumstances. This
14 is in no way relevant to any issue in this case and therefore, must be excluded. Furthermore, Dr.
15 Murphy states that Defendant does not present as aggressive, assaultive or predatory in any
16 fashion. This is not an issue in the case. Dr. Murphy also stated that Mr. Bathen is not a danger
17 to the community at large. This is not an issue in the case and should not be presented to the jury.
18 The report by Dr. Murphy is a report prepared for sentencing. It is not the type of expert
19 testimony that should be presented to a jury in the guilt phase of a trial. All of Dr. Murphy’s
20 “recommendations/treatment plan” are based on inadmissible hearsay and do not have any
21 relevance to any of the issues presented in this case.

22 The defense is trying to elicit hearsay evidence and character evidence from Dr. Murphy
23 while couching it as an expert opinion. Dr. Murphy bases his treatment plan and
24 recommendations on Defendant’s adamant denial of the charges. This evidence must be
25 excluded.

26 III.

27 **A DEFENSE EXPERT CANNOT TESTIFY AS TO THE ULTIMATE ISSUE** 28 **CONCERNING DEFENDANT’S MENTAL STATE PURSUANT TO PENAL CODE** **SECTIONS 28 AND 29.**

While expert testimony, which embraces ultimate issue to be decided by trier of fact is
generally admissible pursuant to Evidence Code section 805, Penal Code sections 28 and 29
provide for a statutory exclusion of opinion to the ultimate issue when the expert is testifying as
to whether the defendant had the required mental₄ state to commit the offense in question.

1 Penal Code section 29 prohibits the admission of expert testimony at the guilt phase of a
2 criminal trial on the question of whether the defendant had the required mental state. (See 1
3 *Cal.Crim.Law* (4th), *Defenses*, §§27, 28.) In *People v. McCowan* (1986) 182 Cal.App.3d 1, the
4 defendant was charged with first degree murder, second degree murder, and attempted murder.
5 The trial judge, relying on Penal Code §29, refused to permit defense counsel to ask psychiatric
6 experts whether the defendant had the capacity to form a mental state in issue on the date he
7 allegedly committed the offenses, and further barred expert testimony on whether *had* formed the
8 required mental state at the time of the crimes. The court held the ruling was proper:

9 “The legislature has determined that judges and jurors are capable of deciding whether a
10 defendant’s mental illness resulted in an inability to form the mental state required to sustain
11 the charge. Such testimony is not ‘sufficiently beyond common experience that the opinion of
12 an expert would assist the trier of fact.’” (*Id.* at p. 14.) (See 16 A.L.R.4th 666 [admissibility of
13 expert testimony as to whether defendant had requisite specific intent.])

14 In *People v. Molina* (1988) 202 Cal.App. 3d 1168, the court took note of Penal Code section
15 28 (which abolished the defense of diminished capacity) and Penal Code section 29 and stated:

16 “The apparent meaning of the statutory language is that evidence of mental problems is
17 inadmissible to show that a defendant *lacked the capacity to form* the requisite mental state,
18 but is admissible to show that the defendant *actually lacked the requisite mental state*. An
19 expert may testify regarding the defendant’s mental condition so long as the expert gives *no*
20 *opinion on the ultimate question of whether or not the defendant actually had the requisite*
21 *mental state.*” (*Id.* at p. 1173)

22 In *People v. Rangel* (1992) 11 Cal.App.4th 291, the trial court struck a defendant’s expert’s
23 opinion that, given defendant’s voluntary intoxication, defendant did not deliberate, premeditate,
24 or harbor the requisite specific intent to kill. The Court held that exclusion of this opinion
25 testimony was proper. The Court explained that Penal Code §29 applies to expert testimony
26 encompassing the effects of voluntary intoxication. (*Id.* at 302.)

27 In *People v. Nunn* (1966) 50 Cal.App.4th 1357, the defense proposed to present expert
28 testimony to the effect that defendant’s “tendency to overreact, coupled with his level of
inebriation, resulted in his compulsive firing of the weapon.” (*Id.* at 1362.) The trial judge ruled
this opinion was inadmissible under Penal Code sections 28 and 29 and the appellate court upheld
the trial court’s ruling:

“[Penal Code 29] does not simply forbid the use of certain words, it prohibits an expert
from offering an opinion on the ultimate question of whether the defendant had or did
not have a particular mental state at the time he acted. An expert may not evade the
restrictions of section 29 by couching an opinion in words which are or would be taken

1 as synonyms for the mental states involved. Nor may an expert evade section 29 by
2 offering the opinion that the defendant at the time he acted had a state of mind which is
3 the opposite of, and necessarily negates, the existence of the required mental state.” (*Id.*
4 at 1364.)

5 In *People v. Page* (1991) 2 Cal.App.4th 161, 187, the Court again deal with the issue of a trial
6 court restricting the matter of which an expert may testify. The trial court allowed the
7 psychologist to testify as to the general principles of social psychology, but it would not allow the
8 professor to specifically relate those principles to the defendant’s statements, nor to offer an
9 opinion concerning the reliability of the confession. Specifically, the defense was not allowed to
10 play the tape recording containing Defendant’s statements or specifically refer to any portion of
11 that taped statement. The Appellate Court agreed and upheld the trial court’s decision.

12 The following are additional examples addressed by the California Supreme and Appellate
13 Courts. (See *People v. San Nicholas* (2004) 34 Cal.4th 614, 662 [in capital murder case in which
14 defendant was accused of murdering his wife and her niece, trial judge did not abuse discretion in
15 excluding psychiatrist’s testimony on spillover rage that related to whether defendant actually had
16 requisite mental state, his testimony on general brain physiology that dealt with capacity to form
17 mental state, and his testimony on neurotransmitters and those elements of spillover that
18 amounted to capacity evidence]; *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1327 [in
19 robbery prosecution, trial judge did not err in refusing to allow defense counsel to ask defense
20 expert hypothetical question that would have indirectly elicited opinion regarding defendant’s
21 specific intent in taking money from the bank.])

22 To be clear, however, the People do agree that an expert may testify as to Defendant’s mental
23 disorders so that a jury may be able to infer that the defendant lacked the requisite intent. (*People*
24 *v. Cortes* (2011) 192 Cal.App.4th 873, 902.)

25 Lastly, Penal Code sections 28 and 29 have been deemed constitutional. In *People v. Jackson*
26 (1984) 152 Cal.App. 961, the Court rejected a claim that Penal Code sections 27, 28 and 29
27 violate due process. The Court stated exclusion of capacity evidence under Penal Code section 28
28 does not prevent a defendant from disproving the necessary mental state, and thus does not
relieve the prosecution of its burden of proving every element of the crime. (*Id.* at 968.) Likewise,
exclusion of expert opinion testimony on the ultimate mental state under Penal Code 29 does not
prevent a defendant from presenting a defense based on lack of the required mental element. (*Id.*
at 969.) In *People v. McCowan* (1986) 182 Cal.App.3d 1, the court held that exclusion of capacity
evidence under Penal Code §§ 25(a) and 28 (*supra*, §27) does not prevent a defendant from

1 presenting a defense. (*Id.* at pp. 13-14.) Penal Code §29 permits expert testimony about a
2 defendant's mental state; the statute's prohibition extends only to expert testimony about a
3 defendant's mental state; the statute's prohibition extends only to expert testimony on the ultimate
4 issue of the mental state required for the offense. The limitations thus imposed by the statutes are
5 constitutionally permissible. (*Id.* at 14.) (See *People v. Young* (1987) 189 Cal.App.3d 891, 905
6 [challenges to constitutionality of Penal Code §§ 25, 28, 29 "have been consistently rejected."].)

7 Accordingly, the People are seeking an order preventing testimony concerning whether
8 Defendant had the capacity to form the requisite mental state and testimony that opines whether
9 Defendant actually had formed the requisite mental state. Moreover, the People are seeking to
10 exclude this testimony in whole as it has no relevance to any issue in this case. Again, the
11 defense is seeking to elicit inadmissible hearsay evidence in the form of inadmissible character
12 evidence disguised as some form of expert opinion.

13 IV.

14 **IF DR. MURPHY IS ALLOWED TO TESTIFY THE PEOPLE ARE ENTITLED TO ALL 15 RECORDS AND TAPES OF INTERVIEWS OF THE DEFENDANT CONDUCTED BY 16 ANY DEFENSE EXPERTS.**

17 The People request that once this trial commences, that the defense be required to provide the
18 People with un-redacted copies of all reports along with copies of all interviews conducted of the
19 defendant that were relied upon by defense experts.

20 In *People v. Jones* (2003) 29 Cal.4th 1229, the California Supreme Court upheld the trial
21 court's order that the defense provide the prosecution with un-redacted copies of reports prepared
22 by the court-appointed psychiatrist before the expert testified. The *Jones* court reasoned that:
23 "*By injecting his mental state as an issue in the case, and calling Dr. Thomas to testify, defendant*
24 *waived any challenge to the contents of the interviews on which Dr. Thomas relied.*" The
25 California Supreme Court went on, in footnote 10, to distinguish *Andrade v. Superior Court*
26 (1996) 46 Cal.App.4th 1609 and *Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260. The
27 *Jones* Court distinguished those cases on the grounds that they dealt with pretrial discovery. The
28 Court reasoned that since the trial court order was made during trial, the pretrial discovery rules
set out in Penal Code section 1054.3 were not implicated. As such, the trial court's order that the
defense provide the full report was upheld.

////

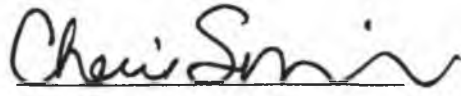
////

CONCLUSION

The People request that the court exclude any testimony from Dr. Murphy as it is not relevant and it is based completely on inadmissible hearsay from Defendant. Dr, Murphy's report in no way presents any defense to the charges in this case.

DATED: June 12, 2018

SUMMER STEPHAN
Respectfully submitted,
CHERIE B. SOMERVILLE
District Attorney

By: 

CHERIE B. SOMERVILLE
Deputy District Attorney
Attorneys for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CCPA

0184

FILED
SAN DIEGO SUPERIOR COURT
BY _____ JUL 19 2018
M. COIA

1 SUMMER STEPHAN
2 District Attorney
3 CHERIE B. SOMERVILLE
4 Deputy District Attorney, SBN 244220
5 333 H Street, Suite 4000
6 Chula Vista, CA 91910
7 (619) 498-5904
8 cherie.somerville@sdcca.org

9 Attorneys for Plaintiff

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN DIEGO, SOUTH DIVISION

12 THE PEOPLE OF THE STATE OF CALIFORNIA,
13 Plaintiff,

14 v.

15 BENJAMIN LEE BATHEN,

16 Defendant.

CT. No.: SCS294342
DA No.: BCA405

SENTENCING BRIEF.

Date: July 19, 2018
Time: 8:30 a.m.
Dept: 15

17 Comes now the plaintiff, the People of the State of California, by and through their
18 attorneys, SUMMER STEPHAN, District Attorney, CHERIE B. SOMERVILLE, Deputy
19 District Attorney, and respectfully submits the following SENTENCING BRIEF.

20 **I.**

21 **STATEMENT OF THE CASE**

22 On August 24, 2017, BENJAMIN BATHEN (hereinafter "Defendant") was scheduled
23 for felony arraignment. Defendant's attorney of record at the time, Benjamin Theule, appeared
24 for Defendant and the court issued and held a \$25,000.00 bench warrant until September 15,
25
26
27
28

1 2017. On September 15, 2017, Defendant appeared for his felony arraignment on a three count
2 Complaint. The court set bail at \$100,000.00. Defendant was charged with three counts of
3 violating Penal Code section 422 (Criminal Threats). The crimes were alleged to have occurred
4 on June 4, 2017, July 3, 2017, and July 5, 2017. The named victim was Carolyn Jacobs.

5 The Preliminary Hearing was conducted on December 4, 2017, in front of the Honorable
6 Judge Richard Oberholzer. Defendant was bound over on all charges. Defendant was
7 immediately arraigned on the Information. Readiness Conferences were held on June 30, 2014,
8 August 19, 2014, and October 21, 2014.

9 On April 2, 2018, Alicia Freeze substituted in as attorney of record for Defendant. On
10 June 11, 2018, the jury trial commenced in front of the Honorable Judge Stephanie Sontag. On
11 June 19, 2018, the jury returned verdicts of guilt on all three counts of Penal Code section 422
12 as felonies. Defendant was remanded into custody and a sentencing date was scheduled for
13 July 19, 2018. The case is now before this court for sentencing.

14 II.

15 STATEMENT OF FACTS

16 BACKGROUND RELATIONSHIP BETWEEN VICTIM AND DEFENDANT:

17 Doctor Carolyn Jacobs (hereinafter "Dr. Jacobs") is a licensed psychologist in the
18 state of California. Dr. Jacobs has been in private practice in Chula Vista since 1992. Prior
19 to becoming a psychologist Dr. Jacobs was a nurse.

20 Dr. Jacobs began treating Defendant in September of 2004. Defendant was referred
21 to Dr. Jacobs by a colleague in the Washington D.C. area where Defendant had been living
22 prior to moving to Southern California. Dr. Jacobs would see Defendant for in-person
23 counseling sessions approximately every 2-3 weeks. When Defendant moved to Los
24 Angeles they had phone counseling sessions.

25 In late 2008, Defendant informed Dr. Jacobs he would be moving to the Boston area
26 for a job. Dr. Jacobs spoke with Defendant about the termination process and made some
27 recommendations for therapists in the Boston area. Dr. Jacobs profession license only
28

1 permits her to practice in the state of California. Defendant wanted to continue therapy with
2 Dr. Jacobs and became angry that she could not continue to treat him. Dr. Jacobs explained
3 why she could not treat him and provided referrals for local therapists. During this time, Dr.
4 Jacobs began receiving emails from Defendant. Defendant was offender by some comment
5 and said he was going to file a lawsuit against Dr. Jacobs. Dr. Jacobs was never able to get
6 clarification on what the specific complaint was. In one of the emails, Defendant wanted Dr.
7 Jacobs to apologize to him. At this point, Dr. Jacobs contacted her professional liability
8 insurance company and spoke with one of their attorneys regarding the termination process.
9 Dr. Jacobs was assured she was in good standing with the board. In the last email Dr. Jacobs
10 received from Defendant said he had the American Association line on speed dial and that if
11 she did not apologize to him he would be initiating a law suit by a specific date. This last
12 communication between Defendant and Dr. Jacobs occurred in late 2008 to early 2009. Dr.
13 Jacobs did not hear from Defendant until receiving the three voice messages on her work
14 answering service on June 4th, July 3d, and July 5th of 2017. No lawsuit was ever filed by
15 Defendant.

16 **COUNT 1**

17 **FIRST PHONE RECORDING ON JUNE 4, 2017:**

18 June 4th, 2017, was a Sunday. Dr. Jacobs checked her AT&T message service on
19 June 5th, 2017, and discovered the first voice message from Defendant had been left on June
20 4th, around 1:20 p.m.

21 The June 4th voice message is as follows:

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

26 Dr. Jacobs was home alone when she listened to the voice message. Dr. Jacobs was
27 really terrified, frightened and stunned. Dr. Jacobs called her husband, Dr. Gary Jacobs, and
28 left a message for him to come home as soon as possible. Once Dr. Gary Jacobs was out of

1 surgery he came home. Dr. Gary Jacobs listened to the voice message, went on-line and
2 pulled up the phone number that left the voice message. Dr. Gary Jacobs was able to pulled
3 up the name Benjamin Bathen associated with the phone number 617-992-4648. The 617
4 area code is from the Boston, MA area. Dr. Jacobs then recognized the voice as belonging to
5 Defendant. Dr. Jacobs and Dr. Gary Jacobs called 911 to report the death threats.

6 Chula Vista Police Officer Alan De La Pena took a report from the Jacobs and
7 recorded the voice message. Officer De La Pena located Defendant's Facebook profile
8 which showed he was residing in Virginia and ha studied Information Technology at Boston
9 Mass. Officer De La Pena called the phone number but did not receive an answer.

10 Dr. Jacobs took the threat very seriously. Dr. Jacobs kept the home security on all the
11 time, kept the windows and doors locked 24/7, notified her colleagues to keep an eye out for
12 anyone who might be coming to the office who should not be, a new security system was
13 installed at the office, the hedges surrounding the property were trimmed down and Dr.
14 Jacobs husband would meet her after work. Dr. Jacobs described having anxiety about not
15 knowing where Defendant was and if he would be apprehended.

16 **COUNT 2**

17 **SECOND PHONE RECORDING ON JULY 3, 2017:**

18 July 3d, 2017, was a Monday. Dr. Jacobs received a second voice message on her
19 AT&T answering service from Defendant.

20 The July 3d voice message is as follows:

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

27 ////

28 ////

1 **COUNT 3**

2 **THIRD PHONE RECORDING ON JULY 5, 2017:**

3 July 5th, 2017, was a Wednesday. Dr. Jacobs received a third voice message on her
4 AT&T answering service from Defendant.

5 The July 5th voice message is as follows:

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

12
13 Dr. Jacobs reported the July voice messages to the Chula Vista Police Department.
14 Dr. Jacobs was very terrified. The calls were more specific and more violent. The threat to
15 come out, the sexual nature of the threats and the threat to harm her daughter led Dr. Jacobs
16 to take all necessary precautions to keep her family and herself safe.

17 On July 26, 2017, Dr. Jacobs petitioned the court for a Civil Harassment Restraining
18 Order. The Honorable Judge Dwayne Morning granted a temporary restraining order on July
19 26, 2017. On August 15, 2017, the permanent restraining order hearing was continued until
20 September 18, 2017. On September 18, 2017, after a hearing and testimony from Dr. Jacobs,
21 the Honorable Judge Garry Haehnle granted a permanent restraining order that is in effect
22 until September 12, 2020.

23 **CELL PHONE RECORDS FOR 617-992-4648**

24 On October 27, 2017, District Attorney Investigator Greg Gain was granted Search
25 Warrant S17-487 by the Honorable Judge Ana Espana. The Search Warrant authorized the
26 following items to be seized from T-Mobile: Subscriber Information for telephone number
27 617-992-4648, Call Detail Records for telephone number 617-992-4648, Text Message
28 Detail Records for telephone number 617-992-4648, Cell Site Location Information for

1 telephone number 617-992-4648 and Cell Tower Cite Lists containing all originating and
2 terminating cell sites accessed by telephone number 617-992-4648. The date range for all
3 records requested from T-Mobile was between June 1, 2017 and July 6, 2017.

4 The primary account holder's name is listed as In Prepaid None Customer. The bill
5 birth date is listed as 11/30/1977. Defendant's date of birth is 11/20/1977. The subscriber
6 address on the Call Detail Records is 1132 N. Kentucky Street, Arlington, VA 22205. This
7 is Defendant's home address as he states on a jail call made on September 17, 2017. The
8 Home Market of the telephone number is Boston, MA. Defendant moved to Boston, MA in
9 2008. The account was active between September 1, 2014 through September 4, 2017. In a
10 jail call on September 17, 2017, Defendant says he does not know his cell phone number
11 because he has a new cell phone. The current status of the telephone number as of October
12 27, 2017, was listed as cancelled.

13 The Call Detail Records show an outgoing call from Defendant's phone number 617-
14 992-4648 on 6/4/17 at 20:24:37 (UTC) to 619-525-7747 (Dr. Jacobs' phone number). The
15 duration of the call is listed as 80 seconds. The address listed as the originating tower is

16 The Call Detail Records show an outgoing call from Defendant's phone number 617-
17 992-4648 on 7/3/17 at 19:48:02 (UTC) to 619-525-7747 (Dr. Jacobs' phone number). The
18 duration of the call is listed as 34 seconds. The Call Detail Records show an outgoing call
19 from Defendant's phone number 617-992-4648 on 7/3/17 at 19:52:26 (UTC) to 619-525-
20 7747 (Dr. Jacobs' phone number). The duration of the call is listed as 60 seconds. The
21 address of the originating and terminating tower for both calls is 810 Vermont Ave. North
22 West, Washington, D.C.

23 The Call Detail Records show an outgoing call from Defendant's phone number 617-
24 992-4648 on 7/5/17 at 13:14:53 (UTC) to 619-525-7747 (Dr. Jacobs' phone number). The
25 duration of the call is listed as 78 seconds. The address of the originating and terminating
26 tower for this call is 810 Vermont Ave. North West, Washington, D.C.

27 **CALL DETAIL RECORD MAPPING FOR 617-992-4648**

28 Using the Tower Tracker program DAI Gain was able to map the call detail records

1 (CDR's) for three calls: 2 calls on July 3, 2017, and 1 call on July 5, 2017. The Tower
2 Tracker program merges CDR's and cell phone tower data and displays them utilizing
3 Google Earth mapping. The program displays the cell tower with the Azimuth or sector of
4 the cell tower utilized for the origination and termination of the phone call. DAI Gain first
5 created a map that displayed all the cell towers utilized during the time frame of the received
6 CDR's: June 1st, 2017 through July 6, 2017. DAI Gain then plotted Defendant's home
7 address and work address as provided in JIMS during the booking process and by Defendant
8 in jail calls (home: 1132 N. Kentucky Street, Arlington, VA; work: 1201 I Street NW,
9 Washington, D.C.). The maps showed that all of the cell towers utilized during this time
10 frame were in the vicinity of Arlington, VA and Washington, D.C.

11 The call detail records did show a call from Defendant's phone number to Dr. Jacobs'
12 phone number on June 4, 2017. However, the CDR's did not list a latitude or longitude for
13 this call nor did they list an address for the originating and terminating tower. DAI Gain
14 reached out to T-Mobile for further clarification as to the location of the tower for this call
15 but did not receive a response.

16 The CDR's did list latitude and longitude for the two calls placed from Defendant's
17 phone on 7/3/17 and the one call place on 7/5/17 to Dr. Jacobs' number. The cell tower
18 used for both of the calls covered the vicinity of Defendant's work address.

19 The CDR's did list latitude and longitude for the call place from Defendant's phone
20 on 7/5/17 to Dr. Jacobs' number. The cell tower used for the call covered the vicinity of
21 Defendant's work address.

22 DEFENDANT'S JAIL CALLS

23 DAI Gain monitored jail calls placed by Defendant while he was in the San Diego
24 County Jail on September 16th and 17th, 2017. In one call on September 17th, Defendant
25 discusses the fact that Dr. Jacobs' was his former therapist and had a restraining order
26 against him. Defendant confirms he lives in Virginia. Defendant goes on to say "she's
27 alleging that somebody left an angry voicemail message on her cell phone, uh, or her
28 answering machine. And she said that it's me. Um, you know, but I would point out that the

1 law says, for a threats case, the...the alleged victim has to believe that there's a credible,
2 realistic, reasonable belief that the...the threat could be immediately carried out right...And,
3 you know, I was sitting in an office cubicle in Washington, D.C....at a non-profit, um,
4 writing software to help reduce poverty and hunger worldwide. So, you know, I mean,
5 I...I...I could not, um, carry out any threats against anyone."

6 In a second call on September 17th, Defendant says "I think, you know, he's pretty
7 confident that once this is settled, I'm probably looking at, you know, a misdemeanor. So, I
8 mean it doesn't make sense to turn around and flee, leave you career that pays a six-figure
9 salary for, um, you know, a misdemeanor and a fine, basically. You know, it'd be easier to
10 just pay the whatever it is, the a thousand bucks. I mean, the only thing is, like, they might
11 put me on probation or something like that, but, you know, he says he's...he's pretty sure
12 there's no chance of jail time." The defendant also lists his place of work and home address
13 in the phone call.

14 In 7 of the 13 calls monitored by DAI Gain, Defendant began the conversation by
15 saying "Hey." All three of the voice messages that Defendant left Dr. Jacobs begin with
16 Defendant saying "Hey."

17 **POINTS AND AUTHORITIES**

18 **III.**

19 **SENTENCING OBJECTIVES**

20 "The Legislature finds and declares that the purpose of imprisonment for crime is
21 punishment. This purpose is best served by terms proportionate to the seriousness of the
22 offense. . . ." (Penal Code section 1170(a)(1).) The extremely violent and graphic nature of
23 Defendant's threats, along with the following sentencing objectives and circumstances in
24 aggravation, should be of primary concern to this court. The Judicial Council Rules provide
25 the following objectives to be achieved in sentencing.

26 **Rule 4.410 *General Objectives in Sentencing.***

27 A prison commitment would accomplish the following goals:

- 28 (1) Protect society and the victim from defendant's conduct;

- 1 (2) Punish defendant for his criminal behavior;
- 2 (3) Encourage the defendant to lead a law abiding life in the future and deter him from
3 future offenses;
- 4 (4) Deter others from criminal conduct by demonstrating its consequences;
- 5 (5) Prevent the defendant from committing new crimes by isolating him for the period
6 of incarceration;
- 7 (6) Secure restitution for the victim of the defendant's crime; and
- 8 (7) Achieve uniformity in sentencing.

9 **IV.**

10 **AGGRAVATION**

11 An examination of this case's facts establishes that the circumstances in aggravation
12 outweigh the circumstances in mitigation which are defined by Rule 423 of the California
13 Rules of Court. The circumstances in aggravation are as follows:

14 **Rule 4.414(a). *Facts relating to the crime, whether or not charged or chargeable as***
15 ***enhancements, including:***

16 **Rule 4.414(a)(1): *The nature, seriousness and circumstances of the crime as***
17 ***compared to other instances of the same crime.*** The extremely violent and sexually explicit
18 threats the defendant left for Dr. Jacobs are shocking and terrorized the victim. The abject
19 terror and torment inflicted by the defendant make these crimes stand out in comparison to
20 other criminal threats cases. There was nothing vague, conditional or ambiguous about what
21 the defendant intended to do to Dr. Jacobs and her daughter.

22 **Rule 4.414(a)(2): *Whether the defendant was armed with or used a weapon.*** The
23 defendant's words were his weapon.

24 **Rule 4.414(a)(3): *The vulnerability of the victim.*** Dr. Jacobs was particularly
25 vulnerable given that she had no idea where the defendant was calling from and when and
26 where he would show up to carry out his threats to kidnap her, cut her, set her on fire, bash
27 her skull in, rape her and her daughter and murder them. Dr. Jacobs has had to live in a state
28 of anxiety and fear of what would happen to herself, her colleagues, their patients and her

1 family.

2 **Rule 4.414(a)(4): *Whether the defendant inflicted physical or emotional injury.***

3 The defendant has inflicted extreme mental and emotional injury on Dr. Jacobs (see
4 attachment A: *Victim Impact Statement from Dr. Carolyn Jacobs*).

5 **Rule 4.414(a)(6): *Whether the defendant was an active or a passive participant.***

6 The defendant was the active participant in these crimes.

7 **Rule 4.414(a)(7): *Whether the crime involved unusual circumstances unlikely to***
8 ***recur.*** The fact that the defendant has been stewing for years over his hatred for Dr. Jacobs is
9 extremely concerning. The People are gravely concerned that the defendant will act out on
10 his threats now so even more than ever since the defendant is now blaming Dr. Jacobs for
11 deliberately ruining his life.

12 **Rule 4.414(b). *Factors relating to the defendant include that:***

13 **Rule 4.414(b)(3). *Willingness to comply with probation.*** The defendant refuses to
14 admit his guilt despite the overwhelming evidence in support of the verdicts. The defendant
15 has zero insight into his actions which gives the People no confidence he would be a suitable
16 candidate for probation.

17 **Rule 4.414(b)(7). *Remorse.*** The defendant refuses to admit his guilt despite the
18 overwhelming evidence in support of the verdicts. The defendant blames Dr. Jacobs and has
19 never shown even the slightest indication of remorse. The defendant has referred to the
20 threats as “angry messages” in jail calls and has never shown any empathy for the pain and
21 suffering he has and continues to inflict on Dr. Jacobs.

22 V.

23 **PROBATION SHOULD BE DENIED AND DEFENDANT SHOULD BE**
24 **SENTENCED TO STATE PRISON**

25 While it is true that Defendant does not have a prior criminal record, several factors
26 weigh heavily in favor of denying probation. First, the extremely violent and sexually
27 explicit nature of the threats made. While Defendant will conclude his punishment relatively
28 quickly, Dr. Jacobs will bear the impact of the Defendant’s violence the rest of her life.

1 Second, Defendant has been stewing over his perceived issues with Dr. Jacobs for
2 years. The fact that he has held onto this rage for so long is evidence of someone who has
3 come unhinged.

4 Third, Defendant has now been convicted of three strike offenses and is blaming Dr.
5 Jacobs for his current situation. This is alarming when looking at the totality of the
6 circumstances given the amount of rage he felt before being convicted. Defendant's conduct
7 is outrageous, and a prison sentence will send a clear message that Defendant's conduct will
8 not be tolerated and he will be held accountable.

9 Finally, on August 11, 2017, Defendant composed a letter to Dr. Jacobs which
10 probation included as an attachment to the probation report. In the letter, Defendant
11 attempted to dissuade Dr. Jacobs from pursuing criminal charges. Defendant attempted to
12 manipulate and dissuade Dr. Jacobs by stating "...I hope you consider all the facts before
13 ending a young man's career and potentially taking his life away from him with a felony
14 arrest warrant."

15 There are clearly two sides to Defendant. One is the person his family believes him to
16 be and the side he portrays with his education and work history. The other is the
17 manipulative and explosively violent man who harbors deep seeded hatred towards Dr.
18 Jacobs. All of these factors present an overwhelming case for imposing a state prison
19 sentence.

20 VI.

21 **DEFENDANT SHOULD BE SENTENCED ON COUNTS ONE, TWO AND**
22 **THREE AND THOSE TERMS MUST BE CONSECUTIVE**

23 **Penal Code section 667(c)(6) requires consecutive sentences on Counts One**
24 **(PC422), Two (PC422) and Three (PC422).**

25 Penal Code section 667(c)(6) states:

26 (6) If there is a current conviction for more than one felony count not committed on
27 the same occasion, and not arising from the same set of operative facts, the court shall
28 sentence the defendant consecutively on each count pursuant to subdivision (e)."

1
2 In *People v. Lawrence* (2000) 24 Cal.4th 219, the defendant, who had four prior
3 strikes (three for robbery and one for attempted robbery), shoplifted a bottle of liquor and
4 was pursued by the store manager. The defendant ran into the enclosed backyard of a
5 residence one block east and one block north of the store. There, the defendant got in a fight
6 with the homeowner and committed a felony assault against the homeowner's fiancée. The
7 defendant argued that the offenses (the petty theft with a prior and the assault) were
8 committed on the same occasion, and therefore, the court was not required to impose
9 consecutive sentences under section 667(c)(6). The trial court disagreed and sentenced the
10 defendant to consecutive life terms. The Court of Appeal adopted the defendant's argument
11 and reversed. The Supreme Court, in turn, reversed the Court of Appeal and affirmed the
12 trial court's sentence. The Supreme Court wrote,

13 "Nothing in either the language of subdivision (a)(6) and (7) or its legislative history
14 suggests the electorate intended these words to have a special or peculiar import different
15 from their ordinary, generally understood meaning. The phrase 'committed on the same
16 occasion' is commonly understood to refer to at least a close temporal and spatial proximity
17 between two events, although it may involve other factors as well. Making mandatory
18 consecutive sentences for those current crimes committed on different occasions is consistent
19 with the focus of the three strikes law, which is recidivism. (Id. at p. 226, citing *People v.*
20 *Deloza* (1998) 18 Cal.4th 585, 594-595, italics in original.) Crimes which must be sentenced
21 consecutively are ones which either occur at different times or at different places around the
22 same time.

23 In *People v. Jenkins* (2001) 86 Cal.App.4th 699, the defendant had three prior strikes
24 for two armed robberies and a residential burglary. The defendant was convicted of
25 attempted murder with a knife, residential burglary, aggravated assault, and making a
26 criminal threat. ***On a single day, the following occurred*** (emphasis added): From outside
27 an apartment where his ex-girlfriend was, the defendant threatened to kill her. Next, the
28 defendant broke into the home armed with a knife and attempted to enter the ex-girlfriend's

1 room. He was disarmed of his knife while doing that. Next, when the ex-girlfriend's
 2 daughter tried to intervene, the defendant shoved the daughter down the stairs, telling her, "I
 3 love you, but I gotta kill your momma." Next, the defendant went downstairs, armed himself
 4 with a knife, returned upstairs, and attempted to kill his ex-girlfriend by stabbing her. The
 5 appellate court found that section 667(c)(6) applied, noting that although the offenses all
 6 occurred at the same apartment, different victims were involved, "[a]dditionally, the
 7 elements of the attempted murder of Arlisa (the ex-girlfriend) and the assault of Jamila (the
 8 daughter) were different. Finally, we note that each offense was separated by a sufficient
 9 amount of time in which defendant could consider the consequences of continuing to commit
 10 new criminal acts." (Id. at p. 707.)

11 In the instant case, Defendant made each of the criminal threats on separate dates
 12 (June 4, 2017, July 3, 2017 and July 5, 2017). The threats increased in their seriousness over
 13 the course of the month, each one more graphic and violent than the last. The law requires
 14 consecutive sentences for each of the three counts.

15 CONCLUSION AND REQUESTED SENTENCE

16 For the foregoing reasons, the People respectfully request the court impose consecutive
 17 sentences on each count as follows:

18	COUNT ONE: PC422	3 years consecutive
19	COUNT TWO: PC422	8 months consecutive
20	COUNT THREE: PC422	8 months consecutive

21
 22 **TOTAL:** The People request the court sentence the defendant to a term of imprisonment
 23 in the state prison for **4 years and 4 months.**

24 Dated: July 16, 2018

Respectfully Submitted,
 SUMMER STEPHAN
 District Attorney

25
 26
 27
 28

By:

Cherie Somerville
 CHERIE B. SOMERVILLE
 Deputy District Attorney

ATTACHMENT
“A”
VICTIM IMPACT
STATEMENT

June 24, 2018

Victim Impact Statement

Victim: Dr. Carolyn Jacobs

I am currently a licensed psychologist in Chula Vista, CA. I have been in clinical practice since 1998. I provide psychotherapy services to individuals, couples and families. Prior to my career as a psychologist, I was a registered nurse for 14 years. My entire professional career has been devoted to the helping professions. My husband and I have lived, raised our family, and worked in Chula Vista since 1982.

On June 4, 2017, both my professional life and my personal life profoundly changed. On that day, I received the first physically and sexually explicit death threat from a phone message made to my private practice messaging service from Benjamin Bathen; a former patient. I subsequently received two more death threats from Mr. Bathen; one on July 3, 2017 and another on July 5, 2017. The three death threats from Mr. Bathen were specific, sexually explicit and extremely violent. The last death threat also included a specific threat to kill a family member, which significantly increased my terror and my fear. The shock and terror I experienced from the threats from Mr. Bathen describing how he would torture and kill me was confounded by the fact that I had not had any contact with this patient for 10 years.

I believed that the three death threats from Mr. Bathen in 2017 were serious and that my life was in danger. Today, even after the criminal investigation, arrest, trial, and the three guilty verdicts found by the jury, I continue to believe that Mr. Bathen is dangerous and remains a serious threat to me. I have some peace of mind knowing that Mr. Bathen is in custody until his sentencing hearing in July. However, I continue to fear for my safety and security upon his release which will eventually take place, sometime in the future.

The emotional impact of this last year has left me feeling a range of thoughts and emotions. At first, I was in a state of extreme fear and helplessness. My chronic fear response has contributed to a heightened degree of stress and chronic anxiety. I began to experience sleeplessness and nightmares. I am extremely hypervigilant; always on the lookout. I have a fear of being alone. Over time, I have become physically exhausted and emotionally numb.

My efforts to protect myself resulted in the need to alter my personal and professional routines. I sought and was granted a civil restraining order against Mr. Bathen, which is in effect until 2020. Security measures in our home were increased. I kept my windows and doors locked at all times. Even today, I am still fearful of being alone in my home.

My husband began to meet me at my office to walk me to my car. I was obligated to notify my professional colleagues in my office of the death threats in order to protect their safety and the safety of their psychotherapy patients. My colleagues instituted a "buddy system" to support one another when they walked to their cars after the work day. With the help of my landlord, I instituted increased security measures in my office, specifically related to access to who was entering and leaving the office.

Since 2017 to the present, my private practice has been negatively impacted. I have had financial loss due to the time required to meet with law enforcement, investigators, seeking civil restraining orders, appearing for hearings and continuances, meeting with District Attorneys, and participating as a witness in the trial. My husband, who is a physician and surgeon, has also been professionally impacted as he has tried to function as a support to me and participated as a witness in the trial.

I am aware that my view of the world and my profession as a safe space has changed since the crimes. The major impact on me has been the constant wondering if Mr. Bathen is going to hurt me, my husband, my children and/or my grandchildren sometime in the future. I have concerns about the level of violence and rage he expressed in the content of his death threats, especially considering the ten-year gap from my last contact with him in 2008 until he made the death threats in 2017. Finally, I have no evidence that Mr. Bathen has expressed any remorse over the pain and distress he has caused me and my family nor for the crimes he has committed. Because of his lack of remorse, I have a genuine fear of his retaliation against me and/or my family in the future. Mr. Bathen's lack of remorse and refusal to accept responsibility for his crimes, complicates my ability to reconstruct my life in the aftermath of his crimes.

Respectfully, I ask the court to consider the maximum sentence range allowed for the crimes Mr. Bathen has committed. I also request that I am notified of any post-conviction release proceedings and decisions (e.g. consideration of probation, notification of any parole hearings) that may come up for Mr. Bathen in the future. I hope that the recorded death threats that were submitted as evidence in the case will be reviewed and considered in any post-conviction decisions regarding Mr. Bathen. I request that he has no future contact (in any manner) with me and/or my family and that our confidentiality be protected as much as possible. Finally, I request that a criminal restraining (protective) order be granted for the maximum time allowed during his incarceration and for as long after his release as possible.

Thank you for this opportunity to address the Court.

Sincerely,

Dr. Carolyn Jacobs

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO, SOUTH COUNTY DIVISION
500 THIRD AVENUE, CHULA VISTA, CA 91910**

0200

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,

vs.

BENJAMIN LEE BATHEN,

Defendant.

Case No. SCS294342
DA No. BCA405

PROOF OF SERVICE BY MAIL AND FAX
SAN DIEGO COUNTY SUPERIOR COURT
CCP S 1013 AND 2018.5
CA RULES OF COURT 2001 & 2011

BY _____
JUL 16 2018
M. COTA

I, the undersigned, declare as follows:

I am employed in the county of San Diego, over eighteen years of age and not a party to the within action. My business address is 333 H Street, Suite 4000, Chula Vista, CA 91910.

On **July 16, 2018**, I served a copy of the within:

SENTENCING BRIEF

to the interested parties in the within action by placing a true copy thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Mail at 333 H Street, Suite 4000, Chula Vista, CA 91910, addressed as follows:

ALICIA FREEZE, Esq.
7676 Hazard Center Dr. #500
San Diego, CA 92108

I also FAXED the same document(s). The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2005(i), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on:

July 16, 2018, at 333 H Street, Suite 4000, Chula Vista, CA 91910.



Lilianne Huntley
Criminal Legal Secretary
District Attorney's Office
South Bay Branch

ATTORNEY OR PARTY WITHOUT ATTORNEY. STATE BAR NO: 281268
 NAME ALICIA C. FREEZE, ESQ.
 FIRM NAME: LAW OFFICE OF ALICIA C. FREEZE, APC
 STREET ADDRESS 7676 HAZARD CENTER DRIVE, SUITE 500
 CITY SAN DIEGO STATE CA ZIP CODE: 92108
 TELEPHONE NO 619-363-5146 FAX NO 619-607-3328
 E MAIL ADDRESS acfreeze726@gmail.com
 ATTORNEY FOR (name) BENJAMIN BATHEN

FOR COURT USE ONLY

0201

FILED
Clerk of the Superior Court

AUG 15 2018

By: N. ZUAZO, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
 PEOPLE OF THE STATE OF CALIFORNIA
 vs.
 Defendant: BENJAMIN BATHEN
 Date of birth: 11/30/1977
 Cal. Dept. of Corrections and Rehabilitation No. (if any): PENDING AS OF 8/15/18

CASE NUMBER
SCS294342

NOTICE OF APPEAL—FELONY (DEFENDANT)
 (Pen. Code, §§ 1237, 1237.5, 1538.5(m); Cal. Rules of Court, rule 8.304)

NOTICE

- You must file this form in the SUPERIOR COURT WITHIN 60 DAYS after the court rendered the judgment or made the order you are appealing.
- **IMPORTANT:** If your appeal challenges the validity of a guilty plea, a no-contest plea, or an admission of a probation violation, you must also complete the Request for Certificate of Probable Cause on page 2 of this form. (Pen. Code, § 1237.5.)

1. Defendant appeals from a judgment rendered or an order made by the superior court.

NAME of defendant: BENJAMIN BATHEN

DATE of the order or judgment: 7/19/2018

2. Complete either item a. or item b. Do not complete both.

a. If this appeal is after entry of a plea of guilty or no contest or an admission of a probation violation, check all that apply:

- (1) This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea. (Cal. Rules of Court, rule 8.304(b).)
- (2) This appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5.
- (3) This appeal challenges the validity of the plea or admission. (You must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature.)
- (4) Other basis for this appeal (you must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature) (specify):

b. For all other appeals, check one:

- (1) This appeal is after a jury or court trial. (Pen. Code, § 1237(a).)
- (2) This appeal is after a contested violation of probation. (Pen. Code, § 1237(b).)
- (3) Other (specify):

3. Defendant requests that the court appoint an attorney for this appeal. Defendant was was not represented by an appointed attorney in the superior court.

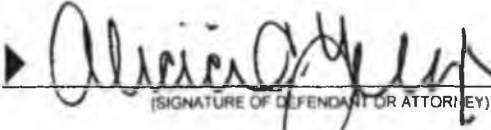
4. Defendant's mailing address is: same as in attorney box above.

as follows:
CALIFORNIA DEPARTMENT OF CORRECTIONS (INMATE NUMBER PENDING)

Date: 8/15/2018

ALICIA C. FREEZE, ESQ.

(TYPE OR PRINT NAME)


 (SIGNATURE OF DEFENDANT OR ATTORNEY)

F I L O E D
Clerk of the Superior Court

JUL 17 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

1 **LAW OFFICE OF ALICIA C. FREEZE, APC**
2 **ALICIA C. FREEZE, ESQ. SBN: 281268**
3 7676 Hazard Center Drive, Suite 500
4 San Diego, CA 92108
5 Phone: 619-363-5146
6 Fax: 619-607-3328
7 Email: acfreeze726@gmail.com

8 Attorneys for Defendant
9 **BENJAMIN LEE BATHEN**

10
11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13
14 **IN AND FOR THE COUNTY OF SAN DIEGO**
15
16 **SOUTH COUNTY DIVISION**

17 THE PEOPLE OF THE STATE OF)
18 CALIFORNIA,)
19)
20)
21 Plaintiff,)
22)
23)
24)
25 **BENJAMIN LEE BATHEN,**)
26)
27 Defendant.)
28)

CASE NO. SCS294342
D.A. NO. BCA40501
STATEMENT IN MITIGATION

DATE: July 19, 2018
TIME: 9:00 a.m.
DEPT: 15

29
30 **TO: PLAINTIFF ABOVE-NAMED AND ITS ATTORNEY, SUMMER STEPHAN, DISTRICT**
31 **ATTORNEY FOR THE COUNTY OF SAN DIEGO; AND, TO ADOLFO GONZALES,**
32 **CHIEF PROBATION OFFICER;**

33 **ATTENTION: DEPUTY PROBATION OFFICER JANET MOORE**

34 **ATTENTION: HONORABLE STEPHANIE SONTAG;**

35 The defendant herein, BENJAMIN LEE BATHEN, submits the following statement in
36 mitigation.

37 All references are to the California Rules of Court.
38

I.**SUMMARY OF FACTS [Rule 4.437(c)(1)]**

Defendant BENJAMIN LEE BATHEN (hereinafter, "Mr. BATHEN"), adopts the facts as documented in the Probation Officer's Report.

II.**MATTERS IN DISPUTE & NOTICE OF INTENTION TO OFFER EVIDENCE**

The only matter in dispute is the representation that Mr. BATHEN does not show remorse. Mr. BATHEN expressed to Deputy Probation Officer Janet Moore during the hour-long Probation Interview at the Vista Detention Facility that he felt very sorry that Dr. Jacobs is fearful, and that at no point did he ever wish any harm to her or her family. I was personally present during the Probation interview and observed Mr. BATHEN express these remorseful thoughts to DPO Moore.

III.**THE COURT SHOULD IMPOSE FELONY PROBATION WITH CREDIT FOR TIME SERVED**

The critical question posed today is: In what manner should the court exercise its discretion in resolving the issue of whether to impose a state prison commitment, or probation?

The District Attorney's Office, through its representative, will recommend that the court resolve the question by imposing a state prison sentence. It is our position that such a resolution would be overly harsh.

We are urging that this Honorable Court exercise its discretion by imposing Felony Probation.

In support of this recommendation, we respectfully request this Honorable Court to review the supportive documents submitted on behalf of Mr. BATHEN; specifically, the Psychological Evaluation conducted by Dr. Raymond Murphy; the letter written by Mr. BATHEN August 2017, which was submitted to Dr. Jacobs; and, the four (4) letters in support.

Mr. BATHEN should be given the benefit of several mitigating factors. He should get Felony

1 Probation, and be released to CPAC pending approval of Interstate Compact to travel in and reside in the
2 state of Virginia, based on the following mitigating factors:

- 3 1) He has absolutely no record whatsoever;
- 4 2) Mr. BATHEN has no firearms registered to him or access to firearms;
- 5 3) He has a strong support network through family and friends;
- 6 4) He is highly educated and has a military background;
- 7 5) Mr. BATHEN voluntarily flew out to San Diego to address the charges and allegations, and
8 has timely appeared for each and every court proceeding, without issue;
- 9 6) Mr. BATHEN has not contacted, either directly or indirectly, the alleged victim in this case at
10 any point during the pendency of this case, which has been over one (1) year;
- 11 7) Prior to the proceedings, Dr. Jacobs had not spoken with Mr. BATHEN in ten (10) years;
- 12 8) Mr. BATHEN does not reside anywhere near Dr. Jacobs nor anywhere near California, but
13 rather resides on the other side of the country in Virginia;
- 14 9) There were no weapons used;
- 15 10) The purported victim did not seek any medical attention. There were no sustainable injuries;
- 16 11) Mr. BATHEN was cooperative with law enforcement; and,
- 17 12) Mr. BATHEN is willing to comply with any and all Criminal Protective Orders for any
18 period of time, up to the maximum period of time allowed by law.

19 IV.

20 CRITERIA SUPPORTING A GRANT OF PROBATION [Rule 4.414]

21 Rule 4.414(a): Facts relating to the crime, including:

22 Rule 4.414(a)(1): The nature, seriousness and circumstances of the crime as compared to other
23 instances of the same crime. *Here, the allegations are that Mr. BATHEN made three (3) threatening phone*
24
25
26
27
28

1 calls to his former psychologist over a year ago. It is established that Mr. BATHEN does not reside in the
2 state of California and has not been in the state of California for over ten (10) years. He only traveled to
3 California for the purpose of litigating this case. Mr. BATHEN resides on the East Coast, and has lived
4 there since 2008. Specifically, he has lived in Massachusetts and Virginia. He has always been employed,
5 and surrounded by family support. He has had no negative contact with law enforcement.
6

7 In fact, it was his first and only contact with law enforcement when officers tracked him down in
8 Virginia in order to serve him with the Civil Harassment Temporary Restraining Order back in August of
9 2017 and advise him of a pending felony warrant. Mr. BATHEN thereafter hired a San Diego County based
10 attorney, and voluntarily got on a plane and flew to San Diego to attend the Felony Arraignment and Civil
11 Harassment TRO hearing.
12

13 "Criminal Threats" are defined as threats where there is a danger of imminent bodily injury. Mr.
14 BATHEN explained to Dr. Jacobs almost a year ago, in September of 2017, that he wishes no harm on her:

- 15 • "I can guarantee you that you are completely safe from me..."
- 16 • "I am not a threat in any way to either you or your family."
- 17 • "I can guarantee that you, your daughter, and your family have nothing to fear..."
- 18 • "I wish you the best in your future and your career and I hope that you enjoy a long life with
19 your family and children."
20

21 The California Legislature defined Penal Code section 422 in narrow terms, in order to not infringe
22 on constitutionally protected Free Speech pursuant to the First Amendment of the United States
23 Constitution. There must be an "immediate prospect;" in the call made on July 5, 2017, the message
24 indicates a "plan" to come "out there." There is no immediate prospect of execution of the threat in that
25 language.
26

27 Furthermore, emotional outbursts and mere angry utterances or ranting soliloquies, are not criminal
28

1 *threats per Penal Code section 422. (People v. Wilson (2010) 186 Cal.App.4th 789, 805.)*

2 *While Mr. BATHEN understands that the jury found him guilty of the crime, he respectfully urges*
3 *this Honorable Court to look to the law, the historical basis, and the intent of the Legislature when drafting*
4 *Section 422.*

5
6 Rule 4.414(a)(2): *The defendant was neither armed with nor used a weapon. Mr. BATHEN did not*
7 *use a weapon in this case. He does not have any firearms registered to him.*

8 Rule 4.414(a)(3): *The victim in this case was not necessarily within those classes of persons deemed*
9 *“vulnerable.” The purported victim, Dr. Jacobs, is an able-bodied, educated licensed psychologist.*

10 Rule 4.414(a)(4): *The defendant did not inflict bodily injury. No injuries were sustained. While it is*
11 *understood that Dr. Jacobs is still “fearful” and “insecure of her surroundings,” her fear at this point is*
12 *unreasonable. Since the inception of this case, in August 2017, Mr. BATHEN has not reached out to Dr.*
13 *Jacobs. He has not called her; he has not tried to engage with her in Court or outside of the Courthouse at*
14 *the many hearings conducted in this case; he has not tried to contact her on social media or via email; he*
15 *has not gone anywhere near her office since they stopped in-person sessions close to twelve (12) years ago;*
16 *he has never attempted to contact her at her home; and, he tried to mitigate any concern on her part by*
17 *writing her a detailed letter in August 2017 (provided to Dr. Jacobs via Mr. BATHEN’s attorney), where he*
18 *emphasized five (5) times to Dr. Jacobs that she and her family “have nothing to fear from Benjamin Lee*
19 *Bathen.”*

20
21 Rule 4.414(a)(5): *The actual degree of monetary loss to the victim is unknown. Dr. Jacobs submitted*
22 *a detailed Summary of Economic Losses to Probation requesting \$25,100.00. Dr. Jacobs never testified*
23 *under oath to any monetary loss she suffered. Mr. BATHEN understands that Dr. Jacobs may have had to*
24 *miss out on some anticipated lost wages. However, he reserves the right to dispute the determination of the*
25 *total amount of restitution. Specifically, Mr. BATHEN requests proof that sessions were actually canceled as*
26
27
28

1 a result of Dr. Jacobs involvement in this criminal case. Just because hours were spent preparing this case,
2 does not mean that those hours would have been otherwise paid for by a current or potential client of hers.
3 Mr. BATHEN furthermore disputes any lost wages on the part of Dr. Jacobs for choosing to attend closing
4 arguments and jury verdicts.

5
6 Rule 414(a)(6): The defendant did not plan the commission of the crime. *There is no evidence*
7 *that Ms. BATHEN planned the phone calls. Rather, testimony confirmed that Dr. Jacobs and Mr.*
8 *BATHEN had not spoken to each other in ten (10) years.*

9
10 Rule 4.414(a)(9): The defendant did not take advantage of a position of trust or confidence to
11 commit the crime. *Dr. Jacobs has not spoken with Mr. BATHEN in over ten (10) years. In fact, she had*
12 *purged his file and initially did not recognize his voice.*

13 **Rule 4.414(b): Facts relating to the defendant, including:**

14 Rule 4.414(b)(1): The defendant has minimal criminal record. *Mr. BATHEN has absolutely no*
15 *record whatsoever.*

16 Rule 4.414(b)(3): Defendant is willing and able to comply with the conditions of probation. *Mr.*
17 *BATHEN is willing and able to comply with probation and indicated that directly to the Probation Officer*
18 *during his interview. He stated, "I just want to go back to Virginia, and I hope to never see Dr. Jacobs*
19 *again. I just hope the court gives me Probation so I can move back to Virginia and be away from here,*
20 *which is what Dr. Jacobs would want."*

21
22 Rule 4.414(b)(4): The defendant is able to comply with reasonable terms of probation. *Mr. BATHEN*
23 *is a 40 year old man with no criminal history. He is highly educated. Mr. BATHEN has a High School*
24 *Diploma, as well as a Bachelor of Fine Arts Degree from the School of the Art Institute of Chicago. He is*
25 *currently working on his Master's Degree. He is in good health, exercising often through salsa dancing and*
26 *seeking mental health treatment when needed. Mr. BATHEN was raised in a military family where he was*
27
28

1 taught discipline and a strong work ethic. In that vein, Mr. BATHEN has always been employed, and during
2 a brief period of unemployment while living in Massachusetts, he used that time to attend extension classes
3 at Harvard and the University of Massachusetts (Boston). When employed, Mr. BATHEN has excelled.
4 Currently, he is still employed by NumbersUSA, an education and research foundation, and they are aware
5 of Mr. BATHEN's current situation, yet remain supportive.
6

7 Mr. BATHEN has a strong, supportive family. His father, Terry Bathen, was an attorney for the
8 Defense Intelligence Agency after retiring from the United States Army. Mr. BATHEN always wished to
9 follow in the footsteps of his father, and has periodically discussed his hopes to join the National Guard
10 or Reserves. In November 2017, Mr. BATHEN passed the physical examination to join the Maryland Air
11 National Guard as an enlisted member assigned to the 175th Wing at Warfield Air National Guard Base
12 in Middle River, Maryland.
13

14 Mr. BATHEN's family remains supportive. His father, Terry, and step-father, Vincent Crawley,
15 attended the entirety of the trial proceedings. If granted Probation, Mr. BATHEN would return to Virginia
16 to reside with Mr. Crawley. Mr. Crawley is also a former United States Army veteran. Mr. BATHEN's
17 girlfriend is an officer in the Air Force Reserves. Mr. BATHEN is now physically living close to his sister,
18 Emily Edmiston, and his niece, and enjoys spending time with them. (See attached letters in support).
19

20 Rule 4.414(b)(5): The effect of imprisonment on the defendant and particularly his family will be
21 extremely negative and counter-productive. Mr. BATHEN has strong family ties. As evidenced by the letters
22 in support, he has a life and future in Virginia. If sentenced to a lengthy incarceration, his family would be
23 forced to take on the burden of his financials. Furthermore, sentencing Mr. BATHEN to a prison sentence
24 would result in him losing his job and ability to pay court fines and restitution costs. In addition, he would
25 be released on parole in San Diego County, leaving him homeless, as he has no ties here. He would be
26 homeless, depressed, and angry, stuck in an area where he has no support. I doubt this is what Dr. Jacobs
27
28

1 *wants.*

2 Rule 4.414(b)(6): The stigma of felony conviction on the defendant's record is sufficient
3 punishment in and of itself. *Mr. BATHEN came to San Diego County in June 2018 with a clean record. This*
4 *conviction places three (3) felony strikes on his otherwise stellar background. If sentenced to a lengthy*
5 *incarceration, he will lose his job. He is already likely kicked out of the National Guard, which is on its own*
6 *quite upsetting for a man who had looked forward for close to fifteen (15) years to becoming an enlisted*
7 *member and was so proud to be accepted. Furthermore, in 2016, Mr. BATHEN applied for a position as an*
8 *Advanced Visualization Specialist with the National Geo-Spatial Intelligence Agency (NGA). The process*
9 *requires an extensive background investigation and polygraph examination in order to obtain a Top Secret*
10 *clearance. After eighteen (18) months, Mr. BATHEN was given a tentative offer of NGA employment. He*
11 *was set to begin work on June 25, 2018. Clearly, he did not report for duty, as he was incarcerated.*

14 Rule 4.414(b)(7): The defendant is sincerely remorseful. *Despite the Probation Officer's Report,*
15 *Mr. BATHEN is in fact quite remorseful and has expressed apology after apology since August 2017.*

16 Rule 4.414(b)(8): The defendant is not a danger to others if not imprisoned. *Mr. BATHEN has*
17 *no criminal record and he has no record of physical violence.*

19 **V.**

20 **CIRCUMSTANCES IN MITIGATION [Rule 4.423]**

21 **Facts Relating to the Crime:**

22 Rule 4.423(a)(2): The victim was an initiator of, willing participant in, or aggressor or provoker of
23 the incident. *It appears from the phone calls that the caller was responding to something that Dr. Jacobs*
24 *had said that had upset the caller.*

26 Rule 4.423(6): The defendant exercised caution to avoid harm to persons or damage to property,
27 or the amounts of money or property taken were deliberately small, or no physical harm was caused. *Mr.*
28

1 BATHEN did not damage any property, take any money, or physically injure Dr. Jacobs. While Dr.
2 Jacobs has expressed fear of Mr. BATHEN, there is no evidence that she has had to seek counseling or
3 mental health treatment as a result of the conduct.

4 Rule 4.423(7): The defendant believed that he or she had a claim or right to the property taken, or
5 for other reasons mistakenly believed that the conduct was legal. Jail calls were submitted as part of the
6 trial in this case. There are calls where Mr. BATHEN advises a bail bondsman that he lives in Virginia
7 and was working in Washington DC during these calls and he believed that the law required that the
8 threat be immediate: "I could not, um, carry out any threats to anyone."
9

10 **Facts Relating to the Defendant:**

11 Rule 4.423(b)(1): The defendant has a relatively insignificant criminal record, and has no prior
12 crimes of violence. Mr. BATHEN has no record.

13 Rule 4.423(b)(3): The defendant voluntarily acknowledged wrongdoing at an early stage of the
14 criminal process. While Mr. BATHEN has not said "guilty," he has routinely expressed remorse towards Dr.
15 Jacobs and tried to quell any of her fears. He has appeared timely for every court appearance, was
16 respectful during all proceedings, and has been polite and cooperative.
17
18

19 VI.

20 **PROPOSED SENTENCE AND OBJECTIVES OF SENTENCING [Rule 4.410]**
21 **GENERAL OBJECTIVES OF SENTENCING**
22 **PROPOSED SENTENCE**

23 Mr. BATHEN should be sentenced to Felony Probation, with credit for time served. Pending
24 approval through Interstate Compact to travel to and reside in Virginia, Mr. BATHEN should be released to
25 CPAC and reside in a hotel or Airbnb with a family member.

26 Mr. BATHEN has no criminal record. He was raised in a disciplined, military family. He successfully
27 completed and received both a High School diploma and Bachelor of Arts. He is working on his Master's
28

1 Degree.

2 Mr. BATHEN is a member of the Maryland Air National Guard.

3 He was set to begin employment as an Advanced Visualization Specialist with the National Geo-
4 Spatial Intelligence Agency (NGA) in Virginia with Top Security Clearance on June 25, 2018, but unable to
5 report for duty due to his incarceration.
6

7 Mr. BATHEN has strong family ties and this is evidenced by the four (4) letters in support attached
8 to the Probation Report.

9 Mr. BATHEN was evaluated by Dr. Raymond Murphy. The Psychological Evaluation is attached
10 hereto. Dr. Murphy found Mr. BATHEN to be non violent and of very low risk of aggression or violence.
11 Dr. Murphy indicated that Mr. BATHEN *"does not present as aggressive, assaultive, or predatory in any
12 fashion."* He further concluded that Mr. BATHEN *"does not present as a danger to the community at large."*
13

14 Mr. BATHEN has advised Dr. Jacobs on several occasions that he is not a threat to her in any
15 manner. In August 2017 he wrote a letter to her emphasizing this no less than five (5) times:

- 16 • *"I am not a threat in any way to either you or your family."*
- 17
- 18 • *"After reading your report I was very disturbed and can guarantee that you, your daughter,
19 and your family have nothing to fear from Benjamin Lee Bathen."*
- 20 • *"I can guarantee you that you are completely safe from me..."*
- 21 • *"I sincerely apologize for any anxiety that I may have caused you or your family over the
22 course of our therapy sessions between 2004 and 2008."*
- 23
- 24 • *"I am also very happy to never be anywhere near you or your family again and never return
25 to San Diego, California."*

26 //

27 //

28

- “I am sure that you are perfectly safe in the Chula Vista courthouse and I wish you the best in your future and your career and I hope that you enjoy a long life with your family and children.”

Mr. BATHEN cannot be penalized for failing to accept responsibility for these calls. The Supreme Court has repeatedly emphasized that to “punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.” (*United States v. Goodwin*, 457 U.S. 368, 372 (1982)). In *United States v. Watt*, the United States Court of Appeals for the Ninth Circuit warned that a “sentencing court cannot consider *against* a defendant any constitutionally protected conduct.” (*United States v. Watt*, 910 F.2d 587, 592 (9th Cir. 1990)). There is a fundamental principle that for “an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional.” (*Wayte v. United States*, 470 U.S. 598, 630 (1985)). “Enhancing a sentence solely because a defendant chooses to go to trial risks chilling future criminal defendants from exercising their constitutional rights...the Sixth Amendment right to trial remains an important safeguard to defendants who insist on their innocence. Permitting courts to impose harsher sentences on those few defendants who do go to trial could in practice restrict the exercise of the right to those with unusual risk tolerance – or uncommon courage.” (*United States of America v. Albert Silva Hernandez, Jr.*, No. 13-10428, D.C. No. 2:12-cr-00254-JCM-PAL-1, Filed July 10, 2018 (9th Cir. 2018)).

VII.

GENERAL OBJECTIVES OF SENTENCING

- a. Protect society.
- b. Punish the defendant.
- c. Encourage the defendant to lead a law abiding life in the future and deter him from future offenses.

- 1 d. Deter others from criminal conduct by demonstrating its consequences.
2 e. Prevent the defendant from committing new crimes by isolating him for the period of
3 incarceration.
4 f. Secure restitution for the victims of crime.
5 g. Achieve uniformity in sentencing.
6

7 **CONCLUSION**

8 For the above-mentioned reasons, Mr. BATHEN requests that he be sentenced to Felony Probation,
9 with release to CPAC pending Interstate Compact to be permitted to reside in Virginia.
10

11 Dated: July 17, 2018

12 Respectfully submitted,

13 THE LAW OFFICES OF ALICIA C. FREEZE, APC
14

15
16 by: 

17 ALICIA C. FREEZE, ESQ.
18
19
20
21
22
23
24
25
26
27
28

- 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

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.

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.

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.

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.

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.

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.

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

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081 <input checked="" type="checkbox"/> SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910		<small>FOR COURT USE ONLY</small> 0222 F I L E D Clerk of the Superior Court JUN 18 2018 CLERK OF THE SUPERIOR COURT BY: <u>R. Camou</u>	
PEOPLE OF THE STATE OF CALIFORNIA			
DEFENDANT(S) BATHEN			
JURY NOTE		CASE NUMBER SCS294342	

NOTE NUMBER: 1

1) Relative to element #4 needed for conviction, how does the law interpret immediate? and immediate prospect?

#1

Dated: 6/18/18

Juror #: 10

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020 <input checked="" type="checkbox"/> SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910		FOR COURT USE ONLY 1223 FILED Clerk of the Superior Court JUN 18 2018 CLERK OF THE SUPERIOR COURT BY: <u>R. Camou</u>
PEOPLE OF THE STATE OF CALIFORNIA VS BATHEN	PLAINTIFF DEFENDANT	
COURT'S RESPONSE TO JURY NOTE NUMBER: 1		CASE NUMBER SCS294342

Please see CalCrim 200:

"Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

The word "immediate" and phrase "immediate prospect" are not specifically defined so are to be understood using their ordinary meanings.

Date: 6/18/18


STEPHANIE SONTAG Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
 CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101
 EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020
 NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081
 SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910

FOR COURT USE ONLY

F I L E U 324
Clerk of the Superior Court

JUN 19 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

CASE NUMBER
SCS294342

PEOPLE OF THE STATE OF CALIFORNIA

DEFENDANT(S)
BATHEN

JURY NOTE

NOTE NUMBER: 2

Can a juror consider the credibility of a witness by observing that witness' body language while sitting in the courtroom audience, but not testifying?

Does Dr. Jacobs have an obligation to notify a person of a threat by one of her patients regardless of the relationship?

Dated: 6-19-18

Juror #: 1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020 <input checked="" type="checkbox"/> SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910		FOR COURT USE ONLY 0225 F I L E D Clerk of the Superior Court JUN 19 2018 CLERK OF THE SUPERIOR COURT BY: <u>R. Camou</u>
PEOPLE OF THE STATE OF CALIFORNIA VS BATHEN	PLAINTIFF DEFENDANT	
COURT'S RESPONSE TO JURY NOTE NUMBER: 2		CASE NUMBER SCS294342

Please see CalCrim 200: " You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial.

CalCrim 222 provides: "Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.... You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses"

Here, a witness' body language while sitting in the audience is not evidence of that witness' credibility.

Further, you cannot consider issues where evidence was not presented. You must limit your deliberations to the issues and evidence presented in this trial.

Date: 6/19/18


Judge of the Superior Court
STEPHANIE SONTAG

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
 CENTRAL DIVISION, COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101
 EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020
 NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92081
 SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910

FOR COURT USE ONLY

F I L E 236
Clerk of the Superior Court

JUN 19 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

CASE NUMBER
SCS294342

PEOPLE OF THE STATE OF CALIFORNIA

DEFENDANT(S)
BATHEN

JURY NOTE

NOTE NUMBER: 3

*We have reached verdicts
on all counts*

Dated: 6-19-18

Juror #: 1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 500 3rd AVE MAILING ADDRESS: 500 3rd AVE CITY AND ZIP CODE: CHULA VISTA, CA 91910 BRANCH NAME: SOUTH COUNTY	FOR COURT USE ONLY 0227 FILED Clerk of the Superior Court JUL 19 2018 CLERK OF THE SUPERIOR COURT BY <u>R. Camou</u>
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: Benjamin Lee Bathen	CASE NUMBER: CS294342
NOTICE OF TERMINATION OF PROTECTIVE ORDER IN CRIMINAL PROCEEDING (Penal Code, §§ 136.2, 136.2(i)(1), 273.5(j), 368(f), 646.9(k), and 1203.097(a)(2))	

NOTICE: THIS TERMINATION ORDER DOES NOT TERMINATE ANY EXISTING FAMILY, JUVENILE, OR PROBATE COURT ORDERS.

ORDER

1. THE COURT ORDERS:

Effective (today's date): July 19, 2018, the Protective Order in the above-entitled case and issued on (date): 9/15/17 restraining (name of restrained person): Benjamin Lee Bathen listing as protected person(s): Carolyn Jacobs, Female, 7/10/49

is terminated.

2. This termination order supersedes all prior protective orders in the above-entitled case.
3. The court or its designee must ensure that this order is electronically transmitted to the Department of Justice within one business day by either (check one)
 - a. transmitting a physical copy of the order to a local law enforcement agency authorized by the Department of Justice to enter orders into the California Law Enforcement Telecommunications System (CLETS)
 - b. entering the order into CLETS directly, but only with the approval of the Department of Justice.
4. The prosecuting agency is to notify the protected person(s) of this order.

Executed on: JUL 19 2018 (DATE) Stephanie Sontag (SIGNATURE OF JUDICIAL OFFICER) Stephanie Sontag Department/Division: / South

STEPHANIE SONTAG

*Scanned
 7-19-18*

1) 2018

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
STREET ADDRESS: SOUTH COUNTY DIVISION
MAILING ADDRESS: 500 3RD AVE
CITY AND ZIP CODE: CHULA VISTA, CA 91910-5649
BRANCH NAME: SOUTH BAY BRANCH

FOR COURT USE ONLY

E I L E D
Clerk of the Superior Court

JUL 19 2018

PEOPLE OF THE STATE OF CALIFORNIA
vs.
DEFENDANT: Benjamin Lee Bathen

CLERK OF THE SUPERIOR COURT
BY: R. Camou

CRIMINAL PROTECTIVE ORDER—OTHER THAN DOMESTIC VIOLENCE (CLETS - CPO) (Pen. Code, §§ 136.2, 136.2(i)(1), and 646.9(k))

ORDER UNDER PENAL CODE, § 136.2
 MODIFICATION
ORDER UNDER:
 PENAL CODE, § 136.2(i)(1) **PENAL CODE, § 646.9(k)**

CASE NUMBER
SCS294342

PERSON TO BE RESTRAINED (complete name): Benjamin Lee Bathen
Sex: M F Ht.: 5-08 Wt.: 190 Hair color: blk Eye color: brn Race: W Age: 40 Date of birth: 11/20/77

- This proceeding was heard on (date): 7/19/2018 at (time): 8:30 a.m. in Dept.: 15 Room:
- This order expires on (date): 7/18/2028 . If no date is listed, this order expires three years from date of issuance.**
- Defendant was personally served with a copy of this order at the court hearing, and no additional proof of service of this order is required.
- FULL NAME, AGE, AND GENDER OF EACH PROTECTED PERSON:**
CAROLYN JACOBS (female 7/10/49)
- The court has information that the defendant owns or has a firearm or ammunition, or both.

GOOD CAUSE APPEARING, THE COURT ORDERS THAT THE ABOVE-NAMED DEFENDANT

- must not harass, strike, threaten, assault (sexually or otherwise), follow, stalk, molest, destroy or damage personal or real property, disturb the peace, keep under surveillance, or block movements of the protected persons named above.
- must not own, possess, buy or try to buy, receive or try to receive, or otherwise obtain a firearm or ammunition. The defendant must surrender to local law enforcement, or sell to or store with a licensed gun dealer any firearm owned by the defendant or subject to his or her immediate possession or control within 24 hours after service of this order and must file a receipt with the court showing compliance with this order within 48 hours of receiving this order.**
 The court has made the necessary findings and applies the firearm relinquishment exemption under Code Civ. Proc., § 527.9(f). The defendant is not required to relinquish this firearm (specify make, model, and serial number of firearm):
- must not attempt to or actually prevent or dissuade any victim or witness from attending a hearing or testifying or making a report to any law enforcement agency or person.
- must take no action to obtain the addresses or locations of protected persons or their family members, caretakers, or guardian unless good cause exists otherwise. The court finds good cause not to make the order in item 9.
- must be placed on electronic monitoring for (specify length of time): (Not to exceed one year from the date of this order. Pen. Code, § 136.2(a)(1)(G)(iv), and Pen. Code, § 136.2(i)(2).)
- must have no personal, electronic, telephonic, or written contact with the protected persons named above.
- must have no contact with the protected persons named above through a third party, except an attorney of record.
- must not come within 100 yards of the protected persons named above.
- may have peaceful contact with the protected persons named above, as an exception to the "no-contact" or "stay-away" provision in item 11, 12, or 13 of this order, only for the safe exchange of children and court-ordered visitation as stated in:
 - the Family, Juvenile, or Probate court order in case number: issued on (date):
 - any Family, Juvenile, or Probate court order issued after the date this order is signed.
- The protected persons may record any prohibited communications made by the restrained person.
- Other orders including stay-away orders from specific locations:
home, employment, school, vehicle

Executed on: Jul 19, 2018 (DATE) Stephanie Sontag (SIGNATURE OF JUDICIAL OFFICER) Department/Division: STEPHANIE SONTAG

*Scanned
7-19-18*

WARNINGS AND NOTICES

- 1. **VIOLATION OF THE ORDER IS SUBJECT TO CRIMINAL PROSECUTION.** Violation of this protective order may be punished as a felony, a misdemeanor, or contempt of court.
- 2. **NOTICE REGARDING FIREARMS.** Any person subject to a protective order is prohibited from owning, possessing, purchasing or attempting to purchase, receiving or attempting to receive, or otherwise obtaining a firearm. Such conduct is subject to a \$1,000 fine and imprisonment. The person subject to these orders must relinquish any firearms (by surrendering the firearm to local law enforcement, or by selling or storing it with a licensed gun dealer) and not own or possess any firearms during the period of the protective order. (Pen. Code, § 136.2(d).) Under federal law, the issuance of a protective order after hearing will generally prohibit the restrained person from owning, accepting, transporting, or possessing firearms or ammunition. A violation of this prohibition is a separate federal crime.

Specified defendants may request an exemption from the firearm relinquishment requirements stated in item 7 on page 1 of this order. *The court must check the box under item 7 to order an exemption from the firearm relinquishment requirements.* If the defendant can show that the firearm is necessary as a condition of continued employment, the court may grant an exemption for a particular firearm to be in the defendant's possession only during work hours and while traveling to and from work. If a peace officer's employment and personal safety depend on the ability to carry a firearm, a court may grant an exemption that allows the officer to carry a firearm on or off duty, but only if the court finds, after a mandatory psychological examination of the peace officer, that the officer does not pose a threat of harm. (Code Civ. Proc., § 527.9(f).)

3. ENFORCING THIS ORDER IN CALIFORNIA

- This order must be enforced in California by any law enforcement agency that has received the order or is shown a copy of the order or has verified its existence on the California Law Enforcement Telecommunications System (CLETS).
- Law enforcement must determine whether the restrained person had notice of the order. If notice cannot be verified, law enforcement must advise the restrained person of the terms of the order and, if the restrained person fails to comply, must enforce it. (Code Civil Proc., § 527.6.)

4. CONFLICTING ORDERS-PRIORITIES FOR ENFORCEMENT

- If more than one restraining order has been issued, the orders must be enforced according to the following priorities:**
- a. *Emergency Protective Order:* If one of the orders is an Emergency Protective Order (form EPO-001) and is more restrictive than other restraining or protective orders, it has precedence in enforcement over all other orders. (Pen. Code, § 136.2(c)(1)(A).)
 - b. *No-Contact Order:* If there is no EPO, a no-contact order that is included in a restraining or protective order has precedence in enforcement over any other restraining or protective order.
 - c. *Criminal Order:* If none of the orders include a no-contact order, a domestic violence protective order issued in a criminal case takes precedence in enforcement over any conflicting civil court order. (Pen. Code, § 136.2(e)(2).) Any nonconflicting terms of the civil restraining order remain in effect and enforceable.
 - d. *Family, Juvenile, or Civil Order:* If more than one family, juvenile, or other civil restraining or protective order has been issued, the one that was issued last must be enforced.

5. EFFECTIVE DATE AND EXPIRATION DATE OF ORDERS

- These orders are effective as of the date they were issued by a judicial officer.
- These orders expire as ordered in item 2 on page 1 of this order, or as explained below.
- Orders under Penal Code section 136.2(a) are valid as long as the court has jurisdiction over the case. They are not valid after imposition of a county jail or state prison commitment. (See *People v. Stone* (2004) 123 Cal.App.4th 153.)
- Orders issued under Penal Code sections 136.2(i)(1) and 646.9(k) are valid for up to 10 years and may be issued by the court whether the defendant is sentenced to state prison or county jail, or subject to mandatory supervision or if imposition of sentence is suspended and the defendant is placed on probation.
- To terminate this protective order, courts should use form CR-165, *Notice of Termination of Protective Order in Criminal Proceeding (CLETS)*.

6. CHILD CUSTODY AND VISITATION

- Child custody and visitation orders may be established or modified in Family, Juvenile, or Probate court.
- Unless box a or b in item 14 on page 1 is checked, contact between the restrained and protected persons permitted by a Family, Juvenile, or Probate court order for child custody or visitation must not conflict with the provisions of this order.
- If box a or b in item 14 on page 1 is checked, the restrained and protected persons should always carry a certified copy of the most recent child custody or visitation order issued by the Family, Juvenile, or Probate court.

FELONY ABSTRACT OF JUDGMENT—DETERMINATE
 (NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED)

CR-290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: SAN DIEGO, South Division		0230	
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: BENJAMIN LEE BATHEN	DOR: 11/20/1977	SCS294342-A	
AKA		-B	
CII NO.: 37119160		-C	
BOOKING NO.: 18138444 <input type="checkbox"/> NOT PRESENT		-D	
FELONY ABSTRACT OF JUDGMENT <input checked="" type="checkbox"/> PRISON COMMITMENT <input type="checkbox"/> COUNTY JAIL COMMITMENT	<input type="checkbox"/> AMENDED ABSTRACT	CLERK OF THE SUPERIOR COURT BY: <u>R. Camou</u>	
DATE OF HEARING 07/19/2018	DEPT. NO. 15	JUDGE STEPHANIE SONTAG	
CLERK R. Camou	REPORTER N. Lloyd / 12587	PROBATION NO. OR PROBATION OFFICER 21436787	<input type="checkbox"/> IMMEDIATE SENTENCING
COUNSEL FOR PEOPLE C. Somerville	COUNSEL FOR DEFENDANT A. Freeze		<input type="checkbox"/> APPOINTED

1. Defendant was convicted of the commission of the following felonies:

Additional counts are listed on attachment _____ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YR.)	CONVICTED BY			TERM (L, M, U)	CONCURRENT	1/2 CONSECUTIVE	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE (REFER TO MEMO)	654 STAY	SERIOUS FELONY	VICIOUS FELONY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED		
						JURY	COURT	PLEA									YRS	MCS.	
1	PC	422	Making a Criminal Threat	2017	6/19/2018	X			M									2	0
2	PC	422	Making a Criminal Threat	2017	6/19/2018	X			M	X								(2)	(0)
3	PC	422	Making a Criminal Threat	2017	6/19/2018	X			M	X								(2)	(0)

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

COUNT	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL

3. ENHANCEMENTS charged and found to be true for PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL

4. Defendant sentenced to county jail per 1170(h)(1) or (2)

- to prison per 1170(a), 1170.1(a) or 1170(h)(3) due to current or prior serious or violent felony PC 290 or PC 186.11 enhancement
 per PC 667(b)-(f) or PC 1170.12 (strike prior)
 per PC 1170(a)(3). Preconfinement credits equal or exceed time imposed. Defendant ordered to report to local parole or probation office.

5. INCOMPLETE SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6. TOTAL TIME ON ATTACHED PAGES: _____

7. Additional indeterminate term (see CR-292).

8. TOTAL TIME: 2 0

Attachments may be used but must be referred to in this document.

PEOPLE OF THE STATE OF CALIFORNIA vs.
 DEFENDANT: BENJAMIN LEE BATHEN

SCS294342-A -B -C -D

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. Restitution Fines:

- Case A: \$300 per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); \$300 per PC 1202.45 suspended unless parole is revoked. \$ per PC 1202.44 is now due, probation having been revoked.
- Case B: \$ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); \$ per PC 1202.45 suspended unless parole is revoked. \$ per PC 1202.44 is now due, probation having been revoked.
- Case C: \$ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); \$ per PC 1202.45 suspended unless parole is revoked. \$ per PC 1202.44 is now due, probation having been revoked.
- Case D: \$ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); \$ per PC 1202.45 suspended unless parole is revoked. \$ per PC 1202.44 is now due, probation having been revoked.

b. Restitution per PC 1202.4(f):

- Case A: \$ Amount to be determined to victim(s)* Restitution Fund
 - Case B: \$ Amount to be determined to victim(s)* Restitution Fund
 - Case C: \$ Amount to be determined to victim(s)* Restitution Fund
 - Case D: \$ Amount to be determined to victim(s)* Restitution Fund
- *Victim name(s), if known, and amount breakdown in item 13, below. *Victim name(s) in probation officer's report.

c. Fines:

- Case A: \$ per PC 1202.5 \$ per VC 23550 or days county jail prison in lieu of fine concurrent consecutive includes: \$ Lab Fee per HS 11372.5(a) \$ Drug Program Fee per HS 11372.7(a) for each qualifying offense
- Case B: \$ per PC 1202.5 \$ per VC 23550 or days county jail prison in lieu of fine concurrent consecutive includes: \$ Lab Fee per HS 11372.5(a) \$ Drug Program Fee per HS 11372.7(a) for each qualifying offense
- Case C: \$ per PC 1202.5 \$ per VC 23550 or days county jail prison in lieu of fine concurrent consecutive includes: \$ Lab Fee per HS 11372.5(a) \$ Drug Program Fee per HS 11372.7(a) for each qualifying offense
- Case D: \$ per PC 1202.5 \$ per VC 23550 or days county jail prison in lieu of fine concurrent consecutive includes: \$ Lab Fee per HS 11372.5(a) \$ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. Court Operations Assessment: \$120 per PC 1465.8. e. Conviction Assessment: \$90 per GC 70373. f. Other: \$ per (specify):

10. TESTING: Compliance with PC 296 verified AIDS per PC 1202.1 other (specify): PC296

11. REGISTRATION REQUIREMENT: per (specify code section):

12. MANDATORY SUPERVISION: Execution of a portion of the defendant's sentence is suspended and deemed a period of mandatory supervision under Penal Code section 1170(h)(5)(B) as follows (specify total sentence, portion suspended, and amount to be served forthwith):

Total: Suspended: Served forthwith:

13. Other orders (specify):

16. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A	68	34	2933 2933.1 4019
B			2933 2933.1 4019
C			2933 2933.1 4019
D			2933 2933.1 4019
Date Sentence Pronounced		Time Served in State Institution	
7/19/2018		DMH	CDC CRC
		()	() ()

14. IMMEDIATE SENTENCING: Probation to prepare and submit a post-sentence report to CDCR per 1203c.

Defendant's race/national origin: WHITE

15. EXECUTION OF SENTENCING IMPOSED

- a. at initial sentencing hearing 7/19/2018
- b. at resentencing per decision on appeal
- c. after revocation of probation
- d. at resentencing per recall of commitment (PC 1170(d).)
- e. other (specify):

17. The defendant is remanded to the custody of the sheriff forthwith after 48 hours excluding Saturdays, Sundays, and holidays.

To be delivered to the reception center designated by the director of the California Department of Corrections and Rehabilitation county jail other (specify):

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE R. CAMOU R. CAMOU DATE Jul 30 2019

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central Division East County Division North County Division South County Division
PEOPLE vs. BATHEN BENJAMIN L STATUS WT \$ 25000
CASE # CS274342 PROS # BCA40501 DOB 112077 BKG # CTS: 1622 hrs.
DATE: 08/24/17 AT 1:30pm DEPT # 42012 INTERP: Spanish Sworn Oath on File
JUDGE/COMMISSIONER JUDGE T. Weathers STIP FILED REPORTER: R. Gee
CLERK: A. Curran CSR # / COUNTER #: 3913

CHARGE(S): PC422

FUTURE DATES: Curran Benjamin Thiele CONFIRMED VACATED

Attorney for the People (A/T/OAG) Supervised Cert. Legal Intern
Admitted/Retained (FO/APD/OAG/Retained/Consulting) Supervised Cert. Legal Intern
DEFENDANT: PRESENT VIA AUDIO VIDEO SELF REPRESENTED NOT PRESENT NO PRODUCE FAILED TO APPEAR

Case called for FTA Arraignment Bail Review Readiness/DWT Jury Trial Preliminary Examination Motion
DEJ Full Limited Protective Order Expires Protected Party
Warrant Ordered/issued on 8-20-17 Held to today Cleared Outstanding Bail Bond \$ forfeited.

CASE TRANSFERRED TO DEPT. TIME ESTIMATE:

Complaint amended by interlineation to read:
Amended Amendment to complaint filed charging adding VC23103 (a) pursuant to VC23103.5 VC22107, VC21659(a), PC647(f)
as INFRACTION(S) pursuant to PC17(d)(2) other:
Defendant advised of and waives the right to a separate and conflict-free attorney / interpreter for this court appearance.
Defendant duly arraigned and advised of the constitutional and statutory rights as indicated on the reverse side of this minute order.
Acknowledgment of advisal of constitutional rights signed and filed. Defendant has received copy of complaint.
Defendant waives reading of complaint. Deft. states true name is on complaint line)
DEFENDANT PLEADS NOT GUILTY and denies any priors/allegations/separate convictions alleged on amended complaint.
Defendant WAIVES: time for speedy trial 10 day/60 day statutory time for preliminary hearing personal presence per PC977
bail review jury trial preliminary hearing

COUNSEL MOTION FOR APPOINTED ATTORNEY Granted Public Defender Alternate Public Defender Office of Assigned Counsel
Atty: Re-appointed Denied Referred to Near Indigent Panel Defendant to retain counsel.
Motion for self-representation is granted denied. Faretta/Lopez Waiver signed & filed. OAC appointed - legal runner/reasonable ancillary services

CONVICTION Def. is sworn and examined. Defendant withdraws any previously entered plea.

DEFENDANT PLEADS: GUILTY NO CONTEST TO: VC23152(a) / (b)
admits separate conviction(s) alleged allegation(s)
Charges contained in amended/amendment to complaint VC23103(a) per 23103.5 as a lesser included offense of
On motion of Court/People/Defendant remaining count(s) is/are DISMISSED Allegation(s)/Prior(s) remaining are STRICKEN FOJ VOP
Plea form executed and filed People vs. West BAC:
Court finds a knowing and intelligent waiver of constitutional rights and factual basis for the plea.
ADVISALS given by the court: Theft - PC666 DUI - VC23593 Consequences of Conviction - PC1016.5
WAIVERS: Arbuckle Blakely Cruz Harvey Appeal Rights Non-Bio. Evidence Disposal Time for sentencing see JUDGMENT MINUTES.
PC1210 Drug Court accepted declined
Stipulated bindover. Case certified as a general jurisdiction matter. Complaint deemed the information.
Defendant to provide DNA database samples as directed by Sheriff or Probation Dept. (PC296).

MOTION for recall of warrant by People Defendant without objection GRANTED DENIED.

PC1000 Defendant's motion for reinstatement to PC1000 granted as to count(s) for mo./ yrs. New term
Time waived for sentencing S.D. Rescue Mission Program Enroll by Comply with all directions of Assessor.
\$ DEJ Admin Fees (PC1001.16(a) and PC1001.90) Forthwith By
Defendant has satisfactorily COMPLETED the DEJ Program, previously entered plea to count(s) set aside and charges dismissed.
Defendant has FAILED to satisfactorily perform in the DEJ Program. PC1000 set aside and any unpaid fees pertaining thereto deleted.
Court makes a finding of guilt to the charge(s) pled. Time waived for sentencing. see JUDGMENT.

REFERRALS Report forthwith by to Assessment Unit Probation Department Probation to interview
Pre-sentence Mini Supplemental Psych Limited re: Drugs / Alcohol / Domestic Violence / Anger Management / Anger Management / Anger Management / Anger Management
Pre-sentence report waived Court Collections for payment of attorney fees \$ Indigent as to attorney fees
The court finds that the defendant has the ability to retain the County of San Diego for the costs of court appointed attorney fees.

HEARINGS Report on motion of People Defense Opposed Unopposed By Stipulation, Statutory time is WAVED
DEFENDANT IS ORDERED TO APPEAR for on at
Re: Attorney in Dept. Motion/PC1538.5 at SEP 11 2017
Arraignment 8-15-17 at 1:30pm in Dept. 12 Jury / Court Trial at
Bail Review in Dept. Sentencing at S. Anderson
Readiness/DWT in Dept. Prob. Hrg. & Sent at
Prelim Exam in Dept. DEJ Drug Ct at
Time Estimate: hr/day Days remaining Set with case(s):

MENTAL HEALTH Proceedings suspended pursuant to PC1318 Mental competency examination on at by Forensic
Psychiatry Clinic. Females - Room 1003, Central Division; Males - Central Detention Facility. Hearing on at in Dept. of
Central Division. The Sheriff is ordered to transport the defendant to and from the examination and hearing as directed.

OTHER Verbal notice of license suspension (DL 310) signed. Fingerprint form filed. Attorney Benjamin Thiele returned.
Book & Release - Report on to Central Visits Las Colinas Detention Facility.
Defendant resides and works in Washington D.C. area.
The court orders defendant to have no contact with victim
Pending next court appearance.
Defendant to represent at arraignment.

CUSTODY STATUS: Remained REMAIND to custody of Sheriff without bail with bail set / increased to / reduced to \$
PC1275.1 HOLD. Pretrial Services Report Ordered re: SOR Refer to CPAC.

REMAINS AT LIBERTY RELEASED: on bail previously posted. after booking DEJ SUPERVISED OR - comply with P.T.S. conditions
Same terms and conditions to an authorized representative of: on at
Release Conditions: Attend self-help mtgs, per week and submit proof at each court hearing Abstain from alcohol.
Not use or possess any controlled substances without a valid prescription. Not possess narcotic paraphernalia.
Def. waives 4th amendment rights and agrees to submit person, vehicle, place of residence, property, personal effects to search at any time with or without a
warrant, and with or without reasonable cause, when required by a Probation Officer or other law enforcement officer until revoked. for the duration of
deferred entry of judgment. Have no contact with / stay away from Protective Order issued.
Previously ordered: 4th WAIVER continues deleted PROTECTIVE ORDER continues deleted Protective Order issued.

WARRANT Arrest Warrant ordered Bail set at \$ 25,000 No Bail Counsel reports no contact with defendant.
Schedule for hearing: Mandatory appearance Night service authorized. Cash bail may be forfeited. ISSUED ON: 08-24-2017
HOLD issuance to DATE ABOVE Warrant previously ordered/issued remains outstanding rescinded RECALLED ON:
Affidavit requested. Due by:

BAIL is exonerated forfeited Fine from bail, refund balance. Declaration of non-collusion/ re-assumption of liability filed.
Bail forfeiture is set aside and bond is reinstated exonerated upon payment of court cost \$ within 30 days cost waived
Bond #: Bond \$ Bond Co.

Date: 08/24/17 ATTEST A TRUE COPY, Clerk of the Superior Court by Deputy

Distribution by: on to Jail Def. Atty. Pros. Prob. R&R Interpreter Acct. Assessment Other:

DEFENDANT ADVISAL OF RIGHTS

0233

DEFENDANT ADVISED OF THE FOLLOWING RIGHTS:

- The right to be tried by a jury (except for infractions)
- The right to confront and to cross-examine all the witnesses against you
- The right at the trial to present evidence in your favor and either to testify for yourself or, if you wish, you may remain silent
- The right to a speedy and public trial
- The right to have witnesses subpoenaed, at no cost, to testify in your behalf, and to obtain all evidence which might exonerate you
- The right to have an attorney defend you at all stages of the proceedings; that said attorney may be of your choice or shall be court appointed (except for infractions; if you are unable to afford counsel)

IF AN ATTORNEY IS APPOINTED TO REPRESENT you, at the conclusion of the *criminal* proceedings, the court will, after a hearing, make a determination of your present ability to pay all or a portion of the attorney fees (Penal Code 987.8). If the court determines that you have the ability to pay all or part of the cost, the court will so order. Such an order will have the same force and effect as a judgment in a civil action and will be subject to collection (Penal Code 987.8). If you have been ordered to repay the cost of a court appointed attorney and your financial circumstances change, you may apply to the court to modify or vacate the order (Penal Code 987.8 (h)).

IF YOU ARE NOT A CITIZEN, the conviction of the offense for which you are charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Upon conviction, probation may be revoked on prior convictions of VC23103/23152/14601 and the sentencing court will be notified.

Upon a misdemeanor conviction for VC12500(a), subsequent arrest/citation for suspended/revoked/invalid/ or no California Driver License may result in an additional charge Vehicle Code 14607.8.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO CRIMINAL COURT LOCATIONS www.sdcourt.ca.gov			
Central Division County Courthouse 220 West Broadway San Diego, CA 92101	East County Division 250 East Main Street El Cajon, CA 92020	North County Division 325 S. Melrose Drive Vista, CA 92081	South County Division 500 Third Avenue Chula Vista, CA 91910
Court Reporter's Address: PO BOX 120128, San Diego, CA 92112			

ALTERNATE PUBLIC DEFENDER Central (619) 446-2900 East County (619) 441-4890 North County (760) 940-6450 South County (619) 498-2085	PUBLIC DEFENDER (PD) Central (619) 338-4700 East County (619) 579-3316 North County (760) 945-4000 South County (619) 498-2001
OFFICE OF ASSIGNED COUNSEL (OAC) (619) 338-4800	REVENUE AND RECOVERY Central (619) 515-6200 East County (619) 441-4607 North County (760) 806-6396
PSP (Public Service Program thru Probation Dept.) Central (858) 560-3258 East County (619) 441-3441 North County (760) 806-2333 South County (858) 560-3258	

OWN RECOGNIZANCE (O/R) RELEASE TERMS – SIGNED PROMISE TO COMPLY

I AGREE to all of the following conditions of a release on my own recognizance:

- (1) I will appear at all times and places as ordered by the court;
- (2) I will obey all conditions imposed by the court;
- (3) I will not depart this state without permission of the court;
- (4) I waive extradition if I fail to appear as ordered by the court and am apprehended outside of California.

I understand that if I willfully fail to obey the conditions of my release, I am guilty of an additional crime: MISDEMEANOR, if now charged with a misdemeanor, punishable by a fine of up to \$1,000, up to 6 months in jail, or both; FELONY, if now charged with a felony, punishable by up to 3 years in State Prison or 1 year in county jail, a fine of \$5,000 or both. Failure to comply may result in a warrant for your arrest and/or the suspension of your driver license. Your case may also be referred to a collection agency and a civil assessment may be added pursuant to Penal Code 1214.1.

Defendant's Signature	Telephone Number	Driver License No. & State
Home Address	City	State
		Zip Code

KEEP THIS DOCUMENT FOR REFERENCE
The court will NOT send you any other notification for future appearances

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central Division East County Division North County Division South County Division

PEOPLE vs. BATHEN BENJAMIN L STATUS: OR \$ 123 CB (Y/N)
CASE # CS294342 PROS # BCA40501 DOB 12077 BKG # CTS days hrs
DATE 09-15-17 AT 01:30 DEPT # 012 INTERP: Spanish Sworn Oath on File
JUDGE/COMM/TEMP JUDGE ED VASSEN J McGRATH
CLERK Rade STIP. FILED REPORTER NYREE LLOYD
CSR # / COUNTER #: CSR 12587

CHARGE(S): PC422

FUTURE DATES: J. Madern B. THEULE CONFIRMED VACATED 31-26-50

Attorney for the People (BAC) (BAG) (Supervisor) Cert. Legal Intern Attorney for Defendant (PD / APD / OAC / Retained / Counseling) Supervised Cert. Legal Intern
Defendant: [X] Present [] VIA AUDIO VIDEO [] SELF REPRESENTED [] NOT PRESENT [] NOT PRODUCED [] FAILED TO APPEAR
Case called for [] FTA [X] Arraignment [] Bail Review [] Readiness/DWT [] Jury Trial [] Preliminary Examination [] Motion
[] DEJ [] Full [] Limited Protective Order Expires: Protected Party:
[] Warrant Ordered/Issued on [] Held to today [] Cleared [] Outstanding [] Bail Bond # \$ forfeited.

CASE TRANSFERRED TO DEPT. TIME ESTIMATE: DOB: 11-30-77

Complaint amended [] by interlineation to read
[X] Amended [] Amendment to [X] complaint filed [] charging [X] adding [] VC23103 (a) pursuant to VC23103.5 [] VC22107, VC21658(a), PC647(f)
as INFRACTION(S) pursuant to PC17(d)(2). [] other
[] Defendant advised of and waives the right to a separate and conflict-free attorney / interpreter for this court appearance.
[X] Defendant duly arraigned and advised of the constitutional and statutory rights as indicated on the reverse side of this minute order.
[X] Acknowledgment of advisal of constitutional rights signed and filed [] Defendant has received copy of complaint.
[X] Defendant waives reading of complaint. [] Deft. states true name is [] on complaint [] line)
[X] DEFENDANT PLEADS NOT GUILTY and denies any priors/allegations/separate convictions alleged [X] on amended complaint.
[] Defendant WAIVES: [] time for speedy trial [] 10 day/60 day statutory time for preliminary hearing [] personal presence [] per PC977
[] bail review [] jury trial [] preliminary hearing

COUNSEL [] MOTION FOR APPOINTED ATTORNEY [] Granted [] Public Defender [] Alternate Public Defender [] Office of Assigned Counsel
Atty: [] Re-appointed [] Denied [] Referred to Near Indigent Panel [] Defendant to retain counsel
[] Motion for self-representation is [] granted [] denied. [] Faretta/Lopez Waiver signed & filed. [] OAC appointed - legal runner/reasonable ancillary services

CONVICTION [] Deft. is sworn and examined. [] Defendant withdraws any previously entered plea.
DEFENDANT PLEADS: [] GUILTY [] NO CONTEST to: VC23152(a) / (b)
[] Admits [] separate conviction(s) alleged: allegation(s)
[] Charges contained in amended/amendment to complaint. [] VC23103(a) per 23103.5 [] as a lesser included offense of
[] On motion of Court/People/Defendant remaining count(s) is/are DISMISSED. Allegation(s)/Priors remaining is/are STRICKEN [] FOJ [] VOP
[] Plea form executed and filed [] People vs. West [] BAC:
[] Court finds a knowing and intelligent waiver of constitutional rights and factual basis for the plea.
[] ADVISALS given by the court: [] Theft - PC666 [] DUI - VC23593 [] Consequences of Conviction - PC1016.5
[] WAIVERS: [] Arbuckle [] Blakely [] Cruz [] Harvey [] Appeal Rights [] Non-Bio. Evidence Disposal [] Time for sentencing, see JUDGMENT MINUTES.
[] PC1210 [] Drug Court [] accepted [] declined
[] Stipulated bindover. [] Case certified as a general jurisdiction matter. [] Complaint deemed the information.
[] Defendant to provide DNA database samples as directed by Sheriff or Probation Dept. (PC296).

MOTION for bail increase by [X] People [] Defendant [] with [] without objection [] GRANTED [] DENIED.
PC1000 [] Defendant's motion for [] reinstatement to [] PC1000 granted as to count(s) for mo./ yrs. [] New term
[] Time waived for sentencing [] S.D. Rescue Mission Program [] Enroll by [] Comply with all directions of Assessor.
[] \$ DEJ Admin Fees (PC1001.16(a) and PC1001.90) [] Forthwith [] By
[] Defendant has satisfactorily COMPLETED the DEJ Program, previously entered plea to count(s) set aside and charges dismissed.
[] Defendant has FAILED to satisfactorily perform in the DEJ Program. [] PC1000 set aside and any unpaid fees pertaining thereto deleted.
[] Court makes a finding of guilt to the charge(s) pled. [] Time waived for sentencing, see JUDGMENT.

REFERRALS Report [] forthwith [] by [] to [] Assessment Unit [] Probation Department [] Probation to interview.
[] Pre-sentence [] Mini [] Supplemental [] Psych. [] Limited re: Drugs / Alcohol / Domestic Violence / Anger Management / Restitution Report Ordered.
[] Pre-sentence report waived. [] Court Collections [] for payment of attorney fees ** \$ [] indigent as to attorney fees

HEARINGS Set on motion of [] People [] Defense [] Opposed [] Unopposed [] By Stipulation. [] Statutory time is WAIVED
DEFENDANT IS ORDERED TO APPEAR for [] on [] at [] in Dept.
[] Re: Attorney [] at [] in Dept. [] Motion/PC1538.5 [] at [] in Dept.
[] Arraignment [] at [] in Dept. [] Jury / Court Trial [] at [] in Dept.
[] Bail Review [] at [] in Dept. [] Sentencing [] at [] in Dept.
[X] Readiness/DWT 9-25-17 at 8:30 in Dept. 14 [] Prob. Hrg. & Sent [] at [] in Dept.
[] Prelim Exam 9-28-17 at 8:30 in Dept. 16 [] (EJ) [] Drug Ct [] at [] in Dept.
Time Estimate: Friday Days remaining: Set with case(s):

MENTAL HEALTH [] Proceedings suspended pursuant to PC1368. Mental competency examination on [] at [] by Forensic
Psychiatry Clinic. Females - Room 1003, Central Division; Males - Central Detention Facility. Hearing on [] at [] in Dept. [] of the
Central Division. [] The Sheriff is ordered to transport the defendant to and from the examination and hearing stated above.

OTHER [] Verbal notice of license suspension (DL 310) signed. [] Fingerprint form filed.
[] Book & Release - Report on [] at [] to [] Central [] Vista [] Las Colinas Detention Facility.

O.T. P. for 9-18-17 at 1:30pm in Dept. 9 for TRO case
31-2017-00027388 - cu - HR - SC

CUSTODY STATUS Defendant [X] REMANDED to custody of Sheriff [] without bail [X] with bail set at / increased to / reduced to \$ 100,000
[] PC1275.1 HOLD. [] Pretrial Services Report Ordered re: SOR [] Refer to CPAC.
[] REMAINS AT LIBERTY [] RELEASED: [] on bail previously posted. [] after booking [] DEJ [] OR [] SUPERVISED OR - comply with P.T.S. conditions
[] same terms and conditions [] to an authorized representative of: [] on [] at
[] Release Conditions: [] Attend self-help mtgs. per week and submit proof at each court hearing. [] Abstain from alcohol.
[] Not use or possess any controlled substances without a valid prescription. [] Not possess narcotic paraphernalia.
[] Deft. waives 4th amendment rights and agrees to submit person, vehicle, place of residence, property, personal effects to search at any time with or without a
warrant, and with or without reasonable cause, when required by a Probation Officer or other law enforcement officer [] until revoked. [] for the duration of
deferred entry of judgment. [] Have no contact with / stay away from: [] Protective Order issued.
[] Previously ordered: [] 4th WAIVER [] continues [] deleted [] PROTECTIVE ORDER [] continues [] deleted.

WARRANT [] Arrest [] Bench [] Warrant ordered [] Bail set at \$ [] No Bail. [] Counsel reports no contact with defendant.
[] Schedule for hearing. [] Mandatory appearance [] Night service authorized [] Cash bail may be forfeited. [] ISSUED ON: 9/17
[] HOLD issuance to DATE ABOVE [] Warrant previously ordered/issued [] remains outstanding [] rescinded [] RECALLED ON:
[] Affidavit requested. Due by:

BAIL is [] exonerated [] forfeited [] Fine from bail, refund balance. [] Declaration of non-collusion/ re-assumption of liability filed.
[] Bail forfeiture is set aside and bond is [] reinstated [] exonerated [] upon payment of court cost \$ [] within 30 days [] cost waived
[] Bond #: [] Bond \$ [] Bond Co.

Date: [] ATTEST A TRUE COPY, Clerk of the Superior Court by [] Deputy

Distribution by: [] on 9/16 to: Jail Det. Aty. Pros. Prob. R&R Interpreter Acct. Assessment Other:

* DEFENDANT ADVISAL OF RIGHTS

0235

DEFENDANT ADVISED OF THE FOLLOWING RIGHTS:

- The right to be tried by a jury (except for infractions)
- The right to confront and to cross-examine all the witnesses against you
- The right at the trial to present evidence in your favor and either to testify for yourself or, if you wish, you may remain silent
- The right to a speedy and public trial
- The right to have witnesses subpoenaed, at no cost, to testify in your behalf, and to obtain all evidence which might exonerate you
- The right to have an attorney defend you at all stages of the proceedings; that said attorney may be of your choice or shall be court appointed (except for infractions) if you are unable to afford counsel

IF AN ATTORNEY IS APPOINTED TO REPRESENT you, at the conclusion of the *criminal* proceedings, the court will, after a hearing, make a determination of your present ability to pay all or a portion of the attorney fees (Penal Code 987.8). If the court determines that you have the ability to pay all or part of the cost, the court will so order. Such an order will have the same force and effect as a judgment in a civil action and will be subject to collection (Penal Code 987.8). If you have been ordered to repay the cost of a court appointed attorney and your financial circumstances change, you may apply to the court to modify or vacate the order (Penal Code 987.8 (h)).

IF YOU ARE NOT A CITIZEN, the conviction of the offense for which you are charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Upon conviction, probation may be revoked on prior convictions of VC23103/23152/14601 and the sentencing court will be notified.

Upon a misdemeanor conviction for VC12500(a), subsequent arrest/citation for suspended/revoked/invalid/ or no California Driver License may result in an additional charge Vehicle Code 14607.8.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO CRIMINAL COURT LOCATIONS www.sdcourt.ca.gov			
Central Division County Courthouse 220 West Broadway San Diego, CA 92101	East County Division 250 East Main Street El Cajon, CA 92020	North County Division 325 S. Melrose Drive Vista, CA 92081	South County Division 500 Third Avenue Chula Vista, CA 91910
Court Reporter's Address: PO BOX 120128, San Diego, CA 92112			

ALTERNATE PUBLIC DEFENDER Central (619) 446-2900 East County (619) 441-4890 North County (760) 940-6450 South County (619) 498-2085	PUBLIC DEFENDER (PD) Central (619) 338-4700 East County (619) 579-3316 North County (760) 945-4000 South County (619) 498-2001
OFFICE OF ASSIGNED COUNSEL (OAC) (619) 338-4800 PSP (Public Service Program thru Probation Dept.) Central (858) 560-3258 East County (619) 441-3441 North County (760) 806-2333 South County (858) 560-3258	REVENUE AND RECOVERY Central (619) 515-6260 East County (619) 441-4607 North County (760) 806-8396

OWN RECOGNIZANCE (O/R) RELEASE TERMS – SIGNED PROMISE TO COMPLY

I AGREE to all of the following conditions of a release on my own recognizance:

- (1) I will appear at all times and places as ordered by the court;
- (2) I will obey all conditions imposed by the court;
- (3) I will not depart this state without permission of the court;
- (4) I waive extradition if I fail to appear as ordered by the court and am apprehended outside of California.

I understand that if I willfully fail to obey the conditions of my release, I am guilty of an additional crime: MISDEMEANOR, if now charged with a misdemeanor, punishable by a fine of up to \$1,000, up to 6 months in jail, or both; FELONY, if now charged with a felony, punishable by up to 3 years in State Prison or 1 year in county jail, a fine of \$5,000 or both. Failure to comply may result in a warrant for your arrest and/or the suspension of your driver license. Your case may also be referred to a collection agency and a civil assessment may be added pursuant to Penal Code 1214.1.

Defendant's Signature	Telephone Number	Driver License No. & State
Home Address	City	State
		Zip Code

KEEP THIS DOCUMENT FOR REFERENCE
 The court will NOT send you any other notification for future appearances

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SIEGO

Central Division East County Division North County Division South County Division

PEOPLE vs. BATHEN BENJAMIN L STATUS BOND \$ 100.00
CASE # CS294342 PROS # BCA40501 DOB 112077 BKG #
DATE: 09-25-17 AT 08:30 DEPT # 014 INTERP
JUDGE/COM/TEMP JUDGE FERRER/STANLEY STIP. FILED REPORTER: Mr. Aldo Shapiro
CLERK: NANCY CSR # / COUNTER #

CHARGE(S): PC422

FILED/NOTES: PE 09-28-17 0830 016 CONFIRMED VACATED
B. THEULE R 21 2 50

DEFENDANT: PRESENT VIA AUDIO VIDEO SELF REPRESENTED NOT PRESENT NOT PRODUCED FAILED TO APPEAR
Case called for FTA Arraignment Bail Review Readiness/DWT Jury Trial Preliminary Examination Motion
DEJ Full Limited Protective Order Expires: Protected Party:
Warrant Ordered/issued on Held to today Cleared Outstanding Bail Bond # forfeited.

CASE TRANSFERRED TO DEPT. TIME ESTIMATE:
Complaint amended by Interrelation to read:
Amended Amendment to complaint filed charging adding VC23103(a) pursuant to VC23103.5 VC22107, VC21658(a), PC647(f)
as INFRACTION(S) pursuant to PC17(d)(2) other
Defendant advised of and waives the right to a separate and conflict-free attorney / interpreter for this court appearance
Defendant duly arraigned and advised of the constitutional and statutory rights as indicated on the reverse side of this minute order
Acknowledgment of advisal of constitutional rights signed and filed. Defendant has received copy of complaint.
Defendant waives reading of complaint. Def. states true name is on complaint (line)
DEFENDANT PLEADS NOT GUILTY and denies any priors/allegations/separate convictions alleged on amended complaint.
Defendant WAIVES: time for speedy trial 10 day/60 day statutory time for preliminary hearing personal presence per PC977
ball review jury trial preliminary hearing

COUNSEL MOTION FOR APPOINTED ATTORNEY Granted Public Defender Alternate Public Defender Office of Assigned Counsel
Atty: Re-appointed Denied Referred to Near Indigent Panel Defendant to retain counsel.
Motion for self-representation is granted denied. Faretta/Lopez Waiver signed & filed. OAC appointed - legal runner/reasonable ancillary services.

CONVICTION Def. is sworn and examined. Defendant withdraws any previously entered plea.
DEFENDANT PLEADS: GUILTY NO CONTEST to: VC23152(a) / (b)
Admits separate conviction(s) alleged/ allegation(s)
Charges contained in amended/amendment to complaint. VC23103(a) per 23103.5 as a lesser included offense of
On motion of Court/People/Defendant remaining count(s): is/are DISMISSED. Allegation(s)/Prior(s) remaining is/are STRICKEN FOJ VOP
Plea form executed and filed People vs. West BAC:
Court finds a knowing and intelligent waiver of constitutional rights and factual basis for the plea.
ADVISALS given by the court: Theft - PC666 DUI - VC23593 Consequences of Conviction - PC1016.5
WAIVERS: Arbuckle Blakely Cruz Harvey Appeal Rights Non-Bio. Evidence Disposal Time for sentencing, see JUDGMENT MINUTES.
PC1210 Drug Court accepted declined.
Stipulated bindover. Case certified as a general jurisdiction matter. Complaint deemed the information.
Defendant to provide DNA database samples as directed by Sheriff or Probation Dept. (PC296).

MOTION for by People Defendant with without objection GRANTED DENIED.
PC1000 Defendant's motion for reinstatement to PC1000 granted as to count(s) for mo./ yrs. New term
Time waived for sentencing S.D. Rescue Mission Program Enroll by Comply with all directions of Assessor
\$ DEJ Admin Fees (PC1001 16(a) and PC1001.90) Forthwith By
Defendant has satisfactorily COMPLETED the DEJ Program, previously entered plea to count(s) set aside and charges dismissed
Defendant has FAILED to satisfactorily perform in the DEJ Program PC1000 set aside and any unpaid fees pertaining thereto deleted.
Court makes a finding of guilt to the charge(s) pled. Time waived for sentencing, see JUDGMENT.

REFERRALS Report forthwith by to Assessment Unit Probation Department Probation to interview.
Pre-sentence Mini Supplemental Psych. Limited re: Drugs / Alcohol / Domestic Violence / Anger Management / Restitution Report Ordered.
Pre-sentence report waived Court Collections for payment of attorney fees ** \$ Indigent as to attorney fees.
** The court finds that the defendant has the ability to repay the court costs. Go for the costs court appointed attorney fees.

HEARINGS Set/cont. on motion of People Defense Opposed Unopposed By Stipulation. Statutory time is WAIVED
DEFENDANT IS ORDERED TO APPEAR for on at in Dept.
Re: Attorney at in Dept. Motion/PC1538.5 at in Dept.
Arraignment at in Dept. Jury / Court Trial at in Dept.
Bail Review at in Dept. Sentencing at in Dept.
Readiness/DWT 11-3-17 at in Dept. 14 Prob. Hrg. & Sent at in Dept.
Prelim Exam 12-1-17 at in Dept. 10 DEJ / Drug Ct at in Dept.
Time Estimate: 14 day Days remaining: Set forth case(s):

MENTAL HEALTH Proceedings suspended pursuant to PC1368. Mental competency examination on at by Forensic
Psychiatry Clinic. Females - Room 1003, Central Division; Males - Central Detention Facility. Hearing on at in Dept. of the
Central Division. The Sheriff is ordered to transport the defendant to and from the examination and hearing stated above.

OTHER Verbal notice of license suspension (DL 310) signed. Fingerprint form filed.
Book & Release - Report on at to Central Vista Las Colinas Detention Facility.

CUSTODY STATUS Defendant REMANDED to custody of Sheriff without bail with bail set at / increased to / reduced to \$
PC1275.1 HOLD. Pretrial Services Report Ordered re: SOR Refer to CPAC.

REMAINS AT LIBERTY RELEASED: on bail previously posted, after booking DEJ OR SUPERVISED OR - comply with P.T.S. conditions
Terms and conditions to an authorized representative of: on
Release Conditions. Attend self-help mtgs. per week and submit proof at each court hearing. Abstain from
Not use or possess any controlled substances without a valid prescription. Not possess narcotic paraphernalia.
Def. waives amendment rights and agrees to submit person, vehicle, place of residence, property, personal effects to search and time with or without a
warrant, and with or without reasonable cause, when required by a Probation Officer or other law enforcement officer uninvited for the duration of
deferred entry of judgment. Have no contact with / stay away from
Previously ordered WAIVER continues deleted PROTECTIVE ORDER continues deleted.
WARRANT Arrest Bench Warrant ordered Bail set at \$ No Bail Court orders no contact with defendant.
Schedule for hearing Mandatory appearance. Night service authorized. Cash bail may be forfeited. ISSUED ON:
HOLD issuance to DATE ABOVE Warrant previously ordered/issued remains outstanding recorded RECALLED ON:
Affidavit requested. Due by:

BAIL is exonerated forfeited Fine from bail, refund balance Declaration of non-collusion/ re-assumption of liability filed.
Bail forfeiture is set aside and bond is reinstated exonerated upon payment of court cost \$ within 30 days cost waived
Bond #: Bond \$ Bond Co.

Date: ATTEST A TRUE COPY, Clerk of the Superior Court by Deputy

Distribution by: on to: Jail Post. Pros. Prob. R&R Interpreter Accl. Assessment Other:
MIRIAM NORFELONY - PRE-DISPOSITION MINUTES

*** DEFENDANT ADVISAL OF RIGHTS**

0237

DEFENDANT ADVISED OF THE FOLLOWING RIGHTS:

- The right to be tried by a jury (except for infractions)
- The right to confront and to cross-examine all the witnesses against you
- The right at the trial to present evidence in your favor and either to testify for yourself or, if you wish, you may remain silent
- The right to a speedy and public trial
- The right to have witnesses subpoenaed, at no cost, to testify in your behalf, and to obtain all evidence which might exonerate you
- The right to have an attorney defend you at all stages of the proceedings; that said attorney may be of your choice or shall be court appointed (except for infractions) if you are unable to afford counsel

IF AN ATTORNEY IS APPOINTED TO REPRESENT you, at the conclusion of the *criminal* proceedings, the court will, after a hearing, make a determination of your present ability to pay all or a portion of the attorney fees (Penal Code 987.8). If the court determines that you have the ability to pay all or part of the cost, the court will so order. *Such an order will have the same force and effect as a judgment in a civil action and will be subject to collection (Penal Code 987.8).* If you have been ordered to repay the cost of a court appointed attorney and your financial circumstances change, you may apply to the court to modify or vacate the order (Penal Code 987.8 (h)).

IF YOU ARE NOT A CITIZEN, the conviction of the offense for which you are charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States

Upon conviction, probation may be revoked on prior convictions of VC23103/23152/14601 and the sentencing court will be notified.

Upon a misdemeanor conviction for VC12500(a), subsequent arrest/citation for suspended/revoked/invalid/ or no California Driver License may result in an additional charge Vehicle Code 14607.8.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO			
CRIMINAL COURT LOCATIONS			
www.sdcourt.ca.gov			
Central Division County Courthouse 220 West Broadway San Diego, CA 92101	East County Division 250 East Main Street El Cajon, CA 92020	North County Division 325 S. Meirose Drive Vista, CA 92081	South County Division 500 Third Avenue Chula Vista, CA 91910
Court Reporter's Address: PO BOX 120128, San Diego, CA 92112			

<p>ALTERNATE PUBLIC DEFENDER</p> <p>Central (619) 446-2900 East County (619) 441-4890 North County (760) 940-6450 South County (619) 498-2085</p> <p>OFFICE OF ASSIGNED COUNSEL (OAC) (619) 338-4800</p> <p>PSP (Public Service Program thru Probation Dept.)</p> <p>Central (858) 560-3258 East County (619) 441-3441 North County (760) 806-2333 South County (858) 560-3258</p>	<p>PUBLIC DEFENDER (PD)</p> <p>Central (619) 338-4700 East County (619) 579-3316 North County (760) 945-4000 South County (619) 498-2001</p> <p>REVENUE AND RECOVERY</p> <p>Central (619) 515-6200 East County (619) 441-4607 North County (760) 806-6396</p>
---	--

OWN RECOGNIZANCE (O/R) RELEASE TERMS – SIGNED PROMISE TO COMPLY

I AGREE to all of the following conditions of a release on my own recognizance:

- (1) I will appear at all times and places as ordered by the court;
- (2) I will obey all conditions imposed by the court;
- (3) I will not depart this state without permission of the court;
- (4) I waive extradition if I fail to appear as ordered by the court and am apprehended outside of California.

I understand that if I willfully fail to obey the conditions of my release, I am guilty of an additional crime: MISDEMEANOR, if now charged with a misdemeanor, punishable by a fine of up to \$1,000, up to 6 months in jail, or both. FELONY, if now charged with a felony, punishable by up to 3 years in State Prison or 1 year in county jail, a fine of \$5,000 or both. Failure to comply may result in a warrant for your arrest and/or the suspension of your driver license. Your case may also be referred to a collection agency and a civil assessment may be added pursuant to Penal Code 1214.1.

Defendant's Signature	Telephone Number	Driver License No. & State
Home Address	City	State
Zip Code		

KEEP THIS DOCUMENT FOR REFERENCE
 The court will NOT send you any other notification for future appearances

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central Division East County Division North County Division South County Division

PEOPLE vs. BATHEN BENJAMIN L STATUS: BOND \$ 100,000
CASE # CS294342 PROS. # BCA40501 DOB: 112077 BKG #
DATE: 11-03-17 AT 08:30 DEPT. # 014 INTERP:
JUDGE/COMM EMP JUDGE: FRANCIS M. DEVANEY
CLERK: RUAYOILEZ

CHARGE(S): PC422 PC422 PC422

FUTURE DATES: PE 12-04-17 0830 016
B. THEULE 2B-2 50

Attorney for the People (BDA/DCA/DAG) Supervised Cert. Legal Intern
Attorney for Defendant (PD: APD/OAC) Supervised Cert. Legal Intern
DEFENDANT: PRESENT VIA AUDIO VIDEO SELF REPRESENTED NOT PRESENT
Case called for FTA Arraignment Bail Review Readiness/DWT Jury Trial Preliminary Examination Motion
DEJ Full Limited Protective Order Expires 1-15-17 Protected Party
Warrant Ordered/Issued on Held to today Cleared Outstanding Bail Bond # forfeited.

CASE TRANSFERRED TO DEPT. TIME ESTIMATE:
Complaint amended by interlineation to read:
Amended Amendment to complaint filed charging adding VC23103 (a) pursuant to VC23103.5 VC22107, VC21658(a), PC647(f)
as INFRACTION(S) pursuant to PC17(d)(2). other:
Defendant advised of and waives the right to a separate and conflict-free attorney / interpreter for this court appearance.
Defendant duly arraigned and advised of the constitutional and statutory rights as indicated on the reverse side of this minute order.
Acknowledgment of advisal of constitutional rights signed and filed. Defendant has received copy of complaint.
Defendant waives reading of complaint. Def. states true name is or complaint
DEFENDANT PLEADS NOT GUILTY and denies any priors/allegations/separate convictions alleged on amended complaint.
Defendant WAIVES: time for speedy trial 10 day/60 day statutory time for preliminary hearing personal presence per PC977
bail review jury trial preliminary hearing

COUNSEL MOTION FOR APPOINTED ATTORNEY Granted Public Defender Alternate Public Defender Office of Assigned Counsel
Atty. Re-appointed Denied Referred to Near Indigent Panel Defendant to retain counsel.
Motion for self-representation is granted denied. Faretta/Lopez Waiver signed & filed. OAC appointed - legal runner/reasonable ancillary services.

CONVICTION Def. is sworn and examined. Defendant withdraws any previously entered plea.
DEFENDANT PLEADS: GUILTY NO CONTEST to: VC23152(a) / (b)
Admits separate conviction(s) alleged/ allegation(s)
Charges contained in amended/amendment to complaint. VC23103(a) per 23103.5 as a lesser included offense of
On motion of Court/People/Defendant remaining count(s) is/are DISMISSED. Allegation(s)/Prior(s) remaining is/are STRICKEN FOJ VOP
Plea form executed and filed People vs. West BAC.
Court finds a knowing and intelligent waiver of constitutional rights and factual basis for the plea.
ADVISALS given by the court: Theft - PC666 DUI - VC23593 Consequences of Conviction - PC1016.5
WAIVERS: Arbuckle Blakely Cruz Harvey Appeal Rights Non-Bio. Evidence Disposal Time for sentencing, see JUDGMENT MINUTES.
PC1210 Drug Court accepted declined.
Stipulated bindover. Case certified as a general jurisdiction matter. Complaint deemed the information.
Defendant to provide DNA database samples as directed by Sheriff or Probation Dept. (PC296).

MOTION for by People Defense Opposed Unopposed By Stipulation, Statutory time is WAIVED
PC1000 Defendant's motion for reinstatement to PC1000 granted as to count(s) for mo/ yrs. New term
Time waived for sentencing S.D. Rescue Mission Program Enroll by Comply with all directions of Assessor.
\$ DEJ Admin Fees (PC1001.16(a) and PC1001.90) Forthwith By
Defendant has satisfactorily COMPLETED the DEJ Program, previously entered plea to count(s) set aside and charges dismissed.
Defendant has FAILED to satisfactorily perform in the DEJ Program. PC1000 set aside and any unpaid fees pertaining thereto deleted.
Court makes a finding of guilt to the charge(s) pled. Time waived for sentencing, see JUDGMENT.

REFERRALS Report forthwith by to Assessment Unit Probation Department Probation to interview.
Pre-sentence Mini Supplemental Psych. Limited re: Drugs / Alcohol / Domestic Violence / Anger Management / Restitution Report Ordered.
Pre-sentence report waived. Court Collections for payment of attorney fees \$ Indigent as to attorney fees.
** The court finds that the defendant has the ability to repay the County of San Diego for the costs of court appointed attorney fees.

HEARINGS Set/cont. on motion of People Defense Opposed Unopposed By Stipulation, Statutory time is WAIVED
DEFENDANT IS ORDERED TO APPEAR for on at in Dept.
Re: Attorney at in Dept. Motion/PC1538.5 at in Dept.
Arraignment at in Dept. Jury / Court Trial at in Dept.
Bail Review at in Dept. Sentencing at in Dept.
Readiness/DWT at in Dept. Prob. Hrg. & Sent at in Dept.
Prelim Exam at in Dept. DEJ Drug Ct at in Dept.
Time Estimate: hr/day Days remaining: Set with case(s):

MENTAL HEALTH Proceedings suspended pursuant to PC1368. Mental competency examination on at by Forensic
Psychiatry Clinic. Females - Room 1003, Central Division; Males - Central Detention Facility. Hearing on at in Dept. of the
Central Division. The Sheriff is ordered to transport the defendant to and from the examination and hearing stated above.

OTHER Verbal notice of license suspension (DL 310) signed. Fingerprint form filed.
Book & Release - Report on at to Central Vista Las Colinas Detention Facility.

CUSTODY STATUS Defendant REMANDED to custody of Sheriff without bail with bail set at / increased to / reduced to \$
PC1275.1 HOLD. Pretrial Services Report Ordered re: SOR Refer to CPAC.
REMAINS AT LIBERTY RELEASED: on bail previously posted. after booking DEJ OR SUPERVISED OR - comply with P.T.S. conditions
some terms and conditions to an authorized representative of: on at
Release Conditions: Attend self-help mtgs. per week and submit proof at each court hearing. Abstain from alcohol.
Not use or possess any controlled substances without a valid prescription. Not possess narcotic paraphernalia.
Def. waives 4th amendment rights and agrees to submit person, vehicle, place of residence, property, personal effects to search at any time with or without a
warrant, and with or without reasonable cause, when required by a Probation Officer or other law enforcement officer until revoked. for the duration of
deferred entry of judgment. Have no contact with / stay away from Protective Order issued.
Previously ordered: 4th WAIVER continues deleted PROTECTIVE ORDER continues deleted.

WARRANT Arrest Bench Warrant ordered Bail set at \$ No Bail. Counsel reports no contact with defendant.
Schedule for hearing. Mandatory appearance. Night service authorized. Cash bail may be forfeited. ISSUED ON:
HOLD issuance to DATE ABOVE. Warrant previously ordered/issued remains outstanding rescinded RECALLED ON:
Affidavit requested. Due by:

BAIL is exonerated forfeited Fine from bail, refund balance. Declaration of non-collusion/ re-assumption of liability filed.
Bail forfeiture is set aside and bond is reinstated exonerated upon payment of court cost \$ within 30 days cost waived
Bond #: Bond \$ Bond Co.

Date: ATTEST A TRUE COPY. Clerk of the Superior Court by Deputy

Distribution by: on 11/3 to: Jail Det. Atty. Pros. Prob. R&R Interpreter Acct. Assessment Other:
SDSC CRM-150 (Rev 1/14) MISDEMEANOR/FELONY - PRE-DISPOSITION MINUTES

***DEFENDANT ADVISAL OF RIGHTS**

0239

DEFENDANT ADVISED OF THE FOLLOWING RIGHTS:

- The right to be tried by a jury (except for infractions)
- The right to confront and to cross-examine all the witnesses against you
- The right at the trial to present evidence in your favor and either to testify for yourself or, if you wish, you may remain silent
- The right to a speedy and public trial
- The right to have witnesses subpoenaed, at no cost, to testify in your behalf, and to obtain all evidence which might exonerate you
- The right to have an attorney defend you at all stages of the proceedings; that said attorney may be of your choice or shall be court appointed (except for infractions) if you are unable to afford counsel

IF AN ATTORNEY IS APPOINTED TO REPRESENT you, at the conclusion of the *criminal* proceedings, the court will, after a hearing, make a determination of your present ability to pay all or a portion of the attorney fees (Penal Code 987.8). If the court determines that you have the ability to pay all or part of the cost, the court will so order. *Such an order will have the same force and effect as a judgment in a civil action and will be subject to collection (Penal Code 987.8).* If you have been ordered to repay the cost of a court appointed attorney and your financial circumstances change, you may apply to the court to modify or vacate the order (Penal Code 987.8 (h)).

IF YOU ARE NOT A CITIZEN, the conviction of the offense for which you are charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Upon conviction, probation may be revoked on prior convictions of VC23103/23152/14601 and the sentencing court will be notified.

Upon a misdemeanor conviction for VC12500(a), subsequent arrest/citation for suspended/revoked/invalid/ or no California Driver License may result in an additional charge Vehicle Code 14607.8

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO CRIMINAL COURT LOCATIONS www.sdcourt.ca.gov			
Central Division County Courthouse 220 West Broadway San Diego, CA 92101	East County Division 250 East Main Street El Cajon, CA 92020	North County Division 325 S. Melrose Drive Vista, CA 92081	South County Division 500 Third Avenue Chula Vista, CA 91910
Court Reporter's Address: PO BOX 120128, San Diego, CA 92112			

ALTERNATE PUBLIC DEFENDER Central (619) 446-2900 East County (619) 441-4890 North County (760) 940-6450 South County (619) 498-2085	PUBLIC DEFENDER (PD) Central (619) 338-4700 East County (619) 579-3316 North County (760) 945-4000 South County (619) 498-2001
OFFICE OF ASSIGNED COUNSEL (OAC) (619) 338-4800 PSP (Public Service Program thru Probation Dept.) Central (858) 560-3258 East County (619) 441-3441 North County (760) 806-2333 South County (858) 560-3258	REVENUE AND RECOVERY Central (619) 515-6200 East County (619) 441-4607 North County (760) 806-6396

OWN RECOGNIZANCE (O/R) RELEASE TERMS – SIGNED PROMISE TO COMPLY

I AGREE to all of the following conditions of a release on my own recognizance:

- (1) I will appear at all times and places as ordered by the court;
- (2) I will obey all conditions imposed by the court;
- (3) I will not depart this state without permission of the court;
- (4) I waive extradition if I fail to appear as ordered by the court and am apprehended outside of California.

I understand that if I willfully fail to obey the conditions of my release, I am guilty of an additional crime: MISDEMEANOR, if now charged with a misdemeanor, punishable by a fine of up to \$1,000, up to 6 months in jail, or both; FELONY, if now charged with a felony, punishable by up to 3 years in State Prison or 1 year in county jail, a fine of \$5,000 or both. Failure to comply may result in a warrant for your arrest and/or the suspension of your driver license. Your case may also be referred to a collection agency and a civil assessment may be added pursuant to Penal Code 1214.1.

X [Signature] Defendant's Signature

Telephone Number

Driver License No. & State

Home Address

City

State

Zip Code

KEEP THIS DOCUMENT FOR REFERENCE
The court will NOT send you any other notification for future appearances

Central Division East County Division North County Division South County Division

PEOPLE vs. BATHEN BENJAMIN I. STATUS: BOND \$ 100,000
CASE # CS294342 PROS. # BCA40501 DOB: 1120?? BKG #
DATE: 12-04-17 AT 08:30 DEPT. # 016 INTERP.
JUDGE/COMMISSIONER: MARIA ESPANA
CLERK: [Signature]

CHARGE(S): PC422 PC422 PC422

FUTURE DATES: [Signature] B. THEULE R 21-3-50

DEFENDANT: [Signature] PRESENT VIA AUDIO VIDEO SELF REPRESENTED NOT PRESENT NOT PRODUCED FAILED TO APPEAR

Case called for FTA Arraignment Bail Review Readiness/DWT Jury Trial Preliminary Examination Motion
DEJ Warrant Ordered/Issued on Held to today Cleared Outstanding Bail Bond \$ forfeited.

CASE TRANSFERRED TO DEPT. TIME ESTIMATE: 10-45 MIN

Complaint amended by Interim to read:
Amended Amendment to complaint filed charging adding VC23103(a) pursuant to VC23103.5 VC22107, VC21658(a), PC647(f)
as INFRACTION(S) pursuant to PC17(d)(2) other:
Defendant advised of and waives the right to a separate and conflict-free attorney / interpreter for this court appearance.
Defendant duly arraigned and advised of the constitutional and statutory rights as indicated on the reverse side of this minute order
Acknowledgment of advisal of constitutional rights signed and filed. Defendant has received copy of complaint.
Defendant waives reading of complaint. Def. states true name is on complaint (line)
DEFENDANT PLEADS NOT GUILTY and denies any priors/allegations/separate convictions alleged on amended complaint.
Defendant WAIVES: time for speedy trial 10 day/60 day statutory time for preliminary hearing personal presence per PC977
bail review jury trial preliminary hearing

COUNSEL MOTION FOR APPOINTED ATTORNEY Granted Public Defender Alternate Public Defender Office of Assigned Counsel
Atty: Re-appointed Denied Referred to Near Indigent Panel Defendant to retain counsel.
Motion for self-representation is granted denied. Faretta/Lopez Waiver signed & filed. OAC appointed - legal runner/reasonable ancillary services.

CONVICTION Def. is sworn and examined. Defendant withdraws any previously entered plea.

DEFENDANT PLEADS: GUILTY NO CONTEST to: VC23152(a) / (b)
Admits separate conviction(s) alleged/ allegation(s)
Charges contained in amended/amendment to complaint. VC23103(a) per 23103.5 as a lesser included offense of
On motion of Court/People/Defendant remaining count(s) is/are DISMISSED. Allegation(s)/Prior(s) remaining is/are STRICKEN FOJ VOP
Plea form executed and filed People vs. West BAC:
Court finds a knowing and intelligent waiver of constitutional rights and factual basis for the plea.
ADVISALS over by the court: Theft - PC686 DUI - VC23593 Consequences of Conviction - PC1016.5
WAIVERS: Arbuckle Blakely Cruz Harvey Appeal Rights Non-Bio. Evidence Disposal Time for sentencing, see JUDGMENT MINUTES.
PC1210 Drug Court accepted declined.
Stipulated bindover. Case certified as a general jurisdiction matter Complaint deemed the information.
Defendant to provide DNA database samples as directed by Sheriff or Probation Dept. (PC296).

MOTION for by People Defendant with without objection GRANTED DENIED.
PC1000 Defendant's motion for reinstatement to PC1000 granted as to count(s) for mo./ yrs. New term
Time waived for sentencing S.D. Rescue Mission Program Enroll by Comply with all directions of Assessor.
\$ DEJ Admin Fees (PC1001.16(a) and PC1001.90) Forthwith By
Defendant has satisfactorily COMPLETED the DEJ Program, previously entered plea to count(s) set aside and charges dismissed.
Defendant has FAILED to satisfactorily perform in the DEJ Program. PC1000 set aside and any unpaid fees pertaining thereto deleted.
Court makes a finding of guilt to the charge(s) pled. Time waived for sentencing, see JUDGMENT.

REFERRALS Report forthwith by to Assessment Unit Probation Department Probation to interview.
Pre-sentence Mini Supplemental Psych Limited re: Drugs / Alcohol / Domestic Violence / Anger Management / Restitution Report Ordered.
Pre-sentence report waived. Court Collections for payment of attorney fees \$ Indigent as to attorney fees.
** The court finds that the defendant has the ability to repay the County of San Diego for the costs of court appointed attorney fees.

HEARINGS Set/cont. on motion of People Defense Opposed Unopposed By Stipulation. Statutory time is WAIVED
DEFENDANT IS ORDERED TO APPEAR for on at in Dept.
Re: Attorney at in Dept. Motion/PC1538.5 at in Dept.
Arraignment at in Dept. Jury / Court Trial at in Dept.
Bail Review at in Dept. Sentencing at in Dept.
Readiness/DWT at in Dept. Prob. Hrg. & Sent at in Dept.
Prelim Exam at in Dept. DEJ Drug Ct at in Dept.
Time Estimate: hr/day Days remaining: Set with case(s)

MENTAL HEALTH Proceedings suspended pursuant to PC1368. Mental competency examination on at by Forensic
Psychiatry Clinic. Females - Room 1003, Central Division; Males - Central Detention Facility. Hearing on at in Dept. of the
Central Division. The Sheriff is ordered to transport the defendant to and from the examination and hearing stated above.

OTHER Verbal notice of license suspension (DL 310) signed. Fingerprint form filed.
Book & Release - Report on at to Central Vista Las Colinas Detention Facility

CUSTODY STATUS Defendant REMANDED to custody of Sheriff without bail with bail set at / increased to / reduced to \$
PC1275.1 HOLD. Pretrial Services Report Ordered re: SOR Refer to CPAC.
REMAINS AT LIBERTY RELEASED: on bail previously posted. after booking DEJ OR SUPERVISED OR - comply with P.T.S conditions
same terms and conditions to an authorized representative of: on at
Release Conditions: Attend self-help mtgs. per week and submit proof at each court hearing. Abstinence from alcohol.
Not use or possess any controlled substances without a valid prescription. Not possess narcotic paraphernalia.
Def. waives 4th amendment rights and agrees to submit person, vehicle, place of residence, property, personal effects to search at any time with or without a
warrant, and with or without reasonable cause when required by a Probation Officer or other law enforcement officer until revoked. for the duration of
deferred entry of judgment. Have no contact with / stay away from: Protective Order issued.
Previously ordered: 4th WAIVER continues deleted PROTECTIVE ORDER continues deleted.

WARRANT Arrest Bench Warrant ordered Bail set at \$ No Bail. Counsel reports no contact with defendant.
Schedule for hearing. Mandatory appearance. Night service authorized. Cash bail may be forfeited. ISSUED ON:
HOLD issuance to DATE ABOVE. Warrant previously ordered/issued remains outstanding rescinded RECALLED ON:
Affidavit requested. Due by:

BAIL is exonerated forfeited Fine from bail, refund balance. Declaration of non-collusion/ re-assumption of liability filed.
Bail forfeiture is set aside and bond is reinstated exonerated upon payment of court cost \$ within 30 days cost waived
Bond #: Bond \$ Bond Co.

Date: ATTEST A TRUE COPY, Clerk of the Superior Court by Deputy

Distribution by: on to: Jail Def. Atty. Proc. Prob. R&R Interpreter Acct. Assessment Other:

DEFENDANT ADVISED OF THE FOLLOWING RIGHTS:

- The right to be tried by a jury (except for infractions)
- The right to confront and to cross-examine all the witnesses against you
- The right at the trial to present evidence in your favor and either to testify for yourself or, if you wish, you may remain silent
- The right to a speedy and public trial
- The right to have witnesses subpoenaed, at no cost, to testify in your behalf, and to obtain all evidence which might exonerate you
- The right to have an attorney defend you at all stages of the proceedings; that said attorney may be of your choice or shall be court appointed (except for infractions) if you are unable to afford counsel

IF AN ATTORNEY IS APPOINTED TO REPRESENT you, at the conclusion of the *criminal* proceedings, the court will, after a hearing, make a determination of your present ability to pay all or a portion of the attorney fees (Penal Code 987.8). If the court determines that you have the ability to pay all or part of the cost, the court will so order. Such an order will have the same force and effect as a judgment in a civil action and will be subject to collection (Penal Code 987.8). If you have been ordered to repay the cost of a court appointed attorney and your financial circumstances change, you may apply to the court to modify or vacate the order (Penal Code 987.8 (h)).

IF YOU ARE NOT A CITIZEN, the conviction of the offense for which you are charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Upon conviction, probation may be revoked on prior convictions of VC23103/23152/14601 and the sentencing court will be notified.

Upon a misdemeanor conviction for VC12500(a), subsequent arrest/citation for suspended/revoked/invalid/ or no California Driver License may result in an additional charge Vehicle Code 14607.8.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO			
CRIMINAL COURT LOCATIONS			
www.sdcourt.ca.gov			
Central Division County Courthouse 220 West Broadway San Diego, CA 92101	East County Division 250 East Main Street El Cajon, CA 92020	North County Division 325 S. Melrose Drive Vista, CA 92081	South County Division 500 Third Avenue Chula Vista, CA 91910
Court Reporter's Address: PO BOX 120126, San Diego, CA 92112			

ALTERNATE PUBLIC DEFENDER Central (619) 446-2900 East County (619) 441-4890 North County (760) 940-6450 South County (619) 498-2085 OFFICE OF ASSIGNED COUNSEL (OAC) (619) 338-4800 PSP (Public Service Program thru Probation Dept.) Central (858) 560-3258 East County (619) 441-3441 North County (760) 806-2333 South County (858) 560-3258	PUBLIC DEFENDER (PD) Central (619) 338-4700 East County (619) 579-3316 North County (760) 945-4000 South County (619) 498-2001 REVENUE AND RECOVERY Central (619) 515-6200 East County (619) 441-4607 North County (760) 806-6396
--	---

OWN RECOGNIZANCE (O/R) RELEASE TERMS – SIGNED PROMISE TO COMPLY

I AGREE to all of the following conditions of a release on my own recognizance:

- (1) I will appear at all times and places as ordered by the court.
- (2) I will obey all conditions imposed by the court;
- (3) I will not depart this state without permission of the court
- (4) I waive extradition if I fail to appear as ordered by the court and am apprehended outside of California.

I understand that if I willfully fail to obey the conditions of my release, I am guilty of an additional crime: MISDEMEANOR, if now charged with a misdemeanor, punishable by a fine of up to \$1,000, up to 6 months in jail or both; FELONY, if now charged with a felony, punishable by up to 3 years in State Prison or 1 year in county jail, a fine of \$5,000 or both. Failure to comply may result in a warrant for your arrest and/or the suspension of your driver license. Your case may also be referred to a collection agency and a civil assessment may be added pursuant to Penal Code 1214.1.

Defendant's Signature	Telephone Number	Driver License No. & State
Home Address	City	State
Zip Code		

KEEP THIS DOCUMENT FOR REFERENCE
 The court will NOT send you any other notification for future appearances

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central Division East County Division North County Division South County Division

PEOPLE vs. Bathen Benjamin L STATUS: BOND 100.000 800 CTS (Y/N) 31/24 hrs.
CASE # CS294342 PROS. # DOB: 11-20-77 BKG # 17159457 CTS: 31/24 hrs.
DATE: 12-4-17 AT AM DEPT. # 12 INTERP: Spanish Sworn Oath on File
JUDGE/COMM/TEMP JUDGE: R. Oberholzer STIP. FILED REPORTER: K. Morales
CLERK: N. Scoville CSR # / COUNTER #: 71236

CHARGE(S): ① PC422 ② PC422 ③ PC 422

FUTURE DATES: CONFIRMED VACATED

Attorney for the People (CS / BSA / BAG) Supervised Cert. Legal Intern Attorney for Defendant (PD / APD / OAD / POC / POC (Training)) Supervised Cert. Legal Intern

DEFENDANT: PRESENT VIA AUDIO VIDEO SELF REPRESENTED NOT PRESENT NOT PRODUCED FAILED TO APPEAR

CASE CALLED FOR PRELIMINARY EXAMINATION

Amended complaint filed, reading waived, true name as charged, deft. pleads not guilty, denies all allegations.
 Parties waive right to continuous preliminary hearing Stipulated bindover.
 People's motion to designate _____ as the investigating officer: granted denied.
 People's Defendant's Joint motion to exclude witnesses public: granted denied. Witnesses admonished by the court.
 Counsel stipulate the Court Reporter does not need to record the Audio CD played

Counsel stipulate that _____ is deemed to have testified to certain matters recited on the record.
 Stipulation recited on the record by _____ Stipulation for preliminary hearing and motions only.

PEO	DEF	WITNESSES SWORN AND EXAMINED	P.D.C #	EXHIBIT DESCRIPTION:	MRKD	RECD
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>Carolyn Jacobs</u>	<u>1.1</u>	<u>CD - Audio 6-4-17</u>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>		<u>1.2</u>	<u>CD - Audio 7-5-17</u>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>		<u>1.3</u>	<u>CD - Audio of 7-7-17</u>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>		<u>1</u>	<u>CD w Audio</u>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>				<input type="checkbox"/>	<input type="checkbox"/>

SEE ATTACHED EXHIBIT LIST
 The People rest. No affirmative evidence presented by defendant. Defendant rests. Arguments by counsel. Submitted.

MOTIONS/WAIVERS People's Defendant's Joint motion _____ granted denied.
 Defendant's motion to suppress evidence pursuant to PC1538.5 is granted denied.
 Defendant's motion to reduce to misdemeanor - PC17(b)(5) pursuant to the Esteybar case is granted denied.
 Complaint is amended by interlineation as follows:

FINDINGS It appearing to the court that the following offenses have been committed, and that there is sufficient cause to believe that the defendant is guilty, the defendant is HELD TO ANSWER on the following counts: All Counts as charged

Defendant DISCHARGED as to the following counts which are DISMISSED for insufficiency of evidence:

ARRAIGNMENT

Counsel stipulate that the complaint is deemed to be the Information. Reading of the Information is waived, true name as charged, defendant pleads not guilty, denies all allegations. Transcript waived for arraignment. Appointment of counsel reaffirmed.
 Defendant waives statutory time for trial. Fingerprint form filed.

DEFENDANT ORDERED TO APPEAR FOR:

Preliminary Exam. to resume _____ at _____ in Dept. _____
 Arraignment on Information _____ at _____ in Dept. _____
 Bail Review _____ at _____ in Dept. _____
 Readiness Conference 1-12-18 at 7:30 in Dept. 14
 Jury Trial 1-23-18 at 1:30 in Dept. 16 Days left 10
 Motions due: 12-20-17

MENTAL HEALTH Proceedings suspended pursuant to PC1368. Mental competency examination on _____ at _____ by _____ by Forensic Psychiatry Clinic. Females - Room 1003, Central Division; Males - Central Detention Facility. Hearing on _____ at _____ in Dept. _____ of the Central Division. The Sheriff is ordered to transport the defendant to and from the examination and hearing stated above

OTHER

Counsel stipulate that if a motion is filed, the readiness conference date may be advanced/continued to the motion hearing date.
 Exhibits released to offering party by stipulation.
 The following witnesses are ordered to return on _____

DEC 15 2017

S. Anderson

CUSTODY STATUS Deft. REMANDED to custody of Sheriff without bail bail set at/increased to/reduced to \$ _____ PC1275 1 HOLD

Pre-Trial Services report ordered re: SOR
 Deft. RELEASED: on bail previously posted case dismissed OR/SOR
 to _____ on _____ at _____
 Previously ordered 4th WAIVER continues deleted PROTECTIVE ORDER continues deleted.
BAIL is exonerated Declaration of non-collusion/ re assumption of liability filed.
 Bail forfeiture set aside and bond reinstated exonerated upon payment of court cost \$ _____ within 30 days cost waived
 Bond #: _____ Bond \$ _____ Bond Co. _____

Date: 12-4-17 RICHARD J. OBERHOLZER Judge of the Superior Court

ATTEST A TRUE COPY. Clerk of the Superior Court by _____ Deputy
Distribution of _____ on 12/4 to: Jail (Def) (Att) (Other) _____

00 SBS

BB 100,000

SC5294342 DA BCA40501

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CENTRAL EAST NORTH SOUTH SUP READINESS COM 1243

DATE 01-12-18 AT 08:30 M.

PRESENT: HON FRANCIS M. DEVAENEY S. Sontag JUDGE PRESIDING, DEPARTMENT 014

CLERK [Signature] REPORTER SKosmata CSR# 7253 REPORTER'S ADDRESS: [Signature] BOX 120128, SAN DIEGO, CA 92112

THE PEOPLE OF THE STATE OF CALIFORNIA VS. DEPUTY DISTRICT ATTORNEY / DEPUTY ATTORNEY GENERAL

RATHEN BENJAMIN L R - B. THEULE ATTORNEY FOR DEFENDANT (PD / APD / OAC / RETAINED)

VIOLATION OF PC422 PC422 PC422 P.O.

ALLEG(S)/ENH(S) INTERP. OATH ON FILE / SWN.

PRIOR(S) LANGUAGE

DEFENDANT [X] PRESENT [] SELF REPRESENTED [] NOT PRESENT [] NOT PRODUCED

READINESS [] AMENDED COMPLAINT / INFO. / INDICTMENT FILED, READING WAIVED, TRUE NAME AS CHARGED, DEFT. PLEADS NOT GUILTY, DENIES ALLEGS.

[] COMPLAINT / INFORMATION AMENDED BY INTERLINEATION [] COMPLAINT DEEMED INFORMATION.

[X] PRELIMINARY HEARING / TRIAL 1/23/18 CONFIRMED / REMAINS VACATED. [] READINESS [] MOTIONS REMAIN(S) / VACATED.

[] DEFENDANT ADVISED OF RIGHTS, WAIVES RIGHTS. [] DEFT. SWORN AND EXAMINED. [] DEFENDANT WITHDRAWS "NOT GUILTY" PLEA AND NOW PLEADS

[] GUILTY [] NOLO CONTENDERE TO: 1130 D16

[] PEOPLE V. WEST PLEA. [] COUNSEL AND DEFENDANT STIPULATE TO PRELIMINARY / GRAND JURY TRANSCRIPT AS FACTUAL BASIS OF PLEA. [] ON MOTION OF COURT / PEOPLE / DEFENDANT COUNT(S) REMAINING IS / ARE DISMISSED FOJ / VOP. [] ON MOTION OF COURT / PEOPLE / DEFENDANT ALLEGATION(S)/PRIOR(S) REMAINING IS / ARE STRICKEN FOJ / VOP. [] DEFENDANT TO PROVIDE DNA SAMPLES AS DIRECTED BY SHERIFF OR PROBATION (PC296). [] PC1210 [] ACCEPTED [] DECLINED. PC1000 [] PC1000, DEFERRED ENTRY OF JUDGMENT, GRANTED MOS./YRS. [] NEW TERM [] RE-REFERRAL [] REPORT TO SUBSTANCE ABUSE ASSESSMENT UNIT FORTHWITH. [] DEFENDANT TO PAY \$ ADMIN FEE \$ DEJ RESTITUTION FEE PER PC1001.90 BY [] DEFT. SUCCESSFULLY COMPLETED PC1000. PREVIOUSLY ENTERED PLEA TO COUNT(S) SET ASIDE, AND THE CHARGE(S) IS/ARE DISMISSED. [] DEFT FAILED THE PC1000 PROGRAM. ANY UNPAID PC1000 FEES ARE DELETED. [] COURT MAKES A FINDING OF GUILTY TO THE CHARGE(S) PLED.

FUTURE HEARINGS WAIVERS: [X] STATUTORY TIME PRELIM / TRIAL / JUDGMENT. [] PRELIMINARY HEARING [] SPEEDY TRIAL. [] HARVEY / CRUZ / ARBUCKLE. [] NON-BIOLOGICAL EVIDENCE DISPOSAL. [] PRESENCE AT POST-SENTENCE HEARING. [] ATTORNEY / INTERPRETER CONFLICT FOR THIS HEARING. [] COMPLAINT DEEMED THE INFORMATION, IMMEDIATE ARRAIGNMENT (SEE CRM-002A). [] IMMEDIATE SENTENCE (SEE CRM-002B)

Jury trial IS SET FOR / CONT'D / TRAILED TO 4/2/18 AT 100 IN DEPT. 116

ON MOTION OF COURT / PEO. / DEFT. REASON: EST. PRELIM: DAYS LEFT (TRIAL) 10

[] READINESS IS SET FOR / CONT'D TO AT IN DEPT. MOTIONS DUE:

MENTAL HEALTH [] PROCEEDING SUSPENDED PER PC1368. MENTAL COMPETENCY EXAMINATION ON AT BY FORENSIC PSYCHIATRY CLINIC. FEMALES, ROOM 1003, CENTRAL COURTHOUSE; MALES, CENTRAL DETENTION FACILITY.

HEARING ON AT IN DEPARTMENT CENTRAL COURTHOUSE.

[] THE SHERIFF IS ORDERED TO TRANSPORT DEFENDANT TO AND FROM THE EXAMINATION AND HEARING SHOWN ABOVE. PROBATION REFERRAL [] REPORT ORDERED: [] PRESENTENCE. [] POST-SENTENCE, COPY TO BE SENT DIRECTLY TO CDCR PER PC1203C. [] DEFENDANT FOUND GUILTY BY [] JURY VERDICT. [] COURT FINDING. [] DEFT. WAIVES POST-SENTENCE INTERVIEW.

[] DEFENDANT ORDERED TO REMAIN IN COURTROOM UNTIL INTERVIEWED BY COURT PROBATION OFFICER FOR A LIMITED REPORT. [] DEFENDANT REFERRED TO / ORDERED TO REPORT IMMEDIATELY TO PROBATION DEPT. FOR INTERVIEW: [] 3977 OHIO STREET, SAN DIEGO [] 330 W. BROADWAY, 5TH FL, SAN DIEGO [] 325 S. MELROSE DR., VISTA [] 250 E. MAIN ST., 8TH FL, EL CAJON [] 1095 BAY BLVD., CHULA VISTA

CUSTODY STATUS [] DEFT. REMANDED TO CUSTODY OF SHERIFF [] WITHOUT BAIL [] BAIL SET AT/REDUCED/INCREASED TO \$ [] PC1275.1 HOLD [] DEFENDANT ORDERED RELEASED FROM CUSTODY THIS CASE ONLY [] ON OR / SOR [] ON DEJ [] CASE DISMISSED [] ACQUITTED.

[X] DEFENDANT TO REMAIN AT LIBERTY [X] ON BOND POSTED \$ 100,000 [] ON OR / SOR [] ON DEJ [] ON SAME TERMS & CONDITIONS [] DEFENDANT ORDERED TO RETURN.

[] 4TH AMENDMENT WAIVER: IMPOSED. / REMAINS IN EFFECT. / DELETED. [] PROTECTIVE ORDER: ISSUED. / REMAINS IN EFFECT. / MODIFIED. / DELETED.

BONDS / WARRANTS [] BENCH WARRANT TO ISSUE, BAIL SET AT \$ [] COUNSEL REPORTS NO CONTACT WITH DEFENDANT. [] SERVICE FORTHWITH. [] ORDERED WITHHELD TO [] BENCH WARRANT ISSUED / ORDERED IS RECALLED / RESCINDED. [] DECL. OF NON-COLLUSION & RE-ASSUMPTION OF LIABILITY FILED. [] BAIL FORF. IS SET ASIDE. [] BAIL [] REINSTATED [] EXONERATED [] FORFEITED

[] UPON PAYMENT OF COURT COST \$ WITHIN 30 DAYS. [] COST WAIVED. BOND AMT \$ BOND NO. BOND COMPANY AGENT

OTHER

Date: ATTEST A TRUE COPY, Clerk of the Superior Court by Deputy

Distribution by JAW on 1/12/18 to JAIL DEF. ATTY. PROB. R&R Other: FELONY MINUTES - MISCELLANEOUS

SCS294342 DA BCA40501

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CENTRAL EAST NORTH ~~SOUTH~~ 244 FURTHER PROCEEDINGS

DATE 02-26-18 AT 08:30 M.

PRESENT: HON FRANCIS N. DEVLIN

JUDGE PRESIDING, DEPARTMENT 014

CLERK K. Boyles

REPORTER J. Law N/R

CSR# 12056

REPORTER'S ADDRESS: P.O. BOX 12056 SAN DIEGO, CA 92112

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

BATHEN BENJAMIN L DEFENDANT

DEPUTY DISTRICT ATTORNEY / DEPUTY ATTORNEY GENERAL

R - B. THE... ATTORNEY FOR DEFENDANT (PD / APD / OAC / RETAINED)

VIOLATION OF PC422 PC422 PC422 P.O.

ALLEG(S)/ENH(S) INTERP. OATH ON FILE / SWN.

PRIOR(S) LANGUAGE

DEFENDANT PRESENT SELF REPRESENTED NOT PRESENT NOT PRODUCED

READINESS AMENDED COMPLAINT / INFO. / INDICTMENT FILED, READING WAIVED, TRUE NAME AS CHARGED, DEFT. PLEADS NOT GUILTY, DENIES ALLEGS.

COMPLAINT / INFORMATION AMENDED BY INTERLINEATION COMPLAINT DEEMED INFORMATION.

RELMINARY HEARING TRIAL 4/2/18 1:30 Dico CONFIRMED REMAINS VACATED. READINESS MOTIONS REMAIN(S) / VACATED.

DEFENDANT ADVISED OF RIGHTS, WAIVES RIGHTS. DEFT. SWORN AND EXAMINED. DEFENDANT WITHDRAWS "NOT GUILTY" PLEA AND NOW PLEADS

GUILTY NOLO CONTENDERE TO:

PEOPLE V. WEST PLEA. COUNSEL AND DEFENDANT STIPULATE TO PRELIMINARY / GRAND JURY TRANSCRIPT AS FACTUAL BASIS OF PLEA.

ON MOTION OF COURT / PEOPLE / DEFENDANT COUNT(S) REMAINING IS / ARE DISMISSED FOJ / VOP.

ON MOTION OF COURT / PEOPLE / DEFENDANT ALLEGATION(S)/PRIOR(S) REMAINING IS / ARE STRICKEN FOJ / VOP.

DEFENDANT TO PROVIDE DNA SAMPLES AS DIRECTED BY SHERIFF OR PROBATION (PC296). PC1210 ACCEPTED. DECLINED.

PC1000 PC1000, DEFERRED ENTRY OF JUDGMENT, GRANTED MOS./YRS. NEW TERM RE-REFERRAL REPORT TO SUBSTANCE ABUSE

ASSESSMENT UNIT FORTHWITH. DEFENDANT TO PAY \$ ADMIN FEE \$ DEJ RESTITUTION FEE PER PC1001.90 BY

DEFT. SUCCESSFULLY COMPLETED PC1000. PREVIOUSLY ENTERED PLEA TO COUNT(S) SET ASIDE, AND THE CHARGE(S) IS/ARE DISMISSED.

DEFT FAILED THE PC1000 PROGRAM. ANY UNPAID PC1000 FEES ARE DELETED. COURT MAKES A FINDING OF GUILT TO THE CHARGE(S) PLED.

FUTURE HEARINGS WAIVERS: STATUTORY TIME PRELIM / TRIAL / JUDGMENT. PRELIMINARY HEARING SPEEDY TRIAL HARVEY / CRUZ / ARBUCKLE.

NON-BIOLOGICAL EVIDENCE DISPOSAL. PRESENCE AT POST-SENTENCE HEARING. ATTORNEY / INTERPRETER CONFLICT FOR THIS HEARING.

COMPLAINT DEEMED THE INFORMATION, IMMEDIATE ARRAIGNMENT (SEE CRM-002A). IMMEDIATE SENTENCING (SEE CRM-002B).

IS SET FOR / CONT'D / TRAILED TO AT IN DEPT.

ON MOTION OF COURT / PEO. / DEFT. REASON: EST. PRELIM: DAYS LEFT (TRIAL)

READINESS IS SET FOR / CONT'D TO AT IN DEPT. MOTIONS DUE:

MENTAL HEALTH PROCEEDING SUSPENDED PER PC1368. MENTAL COMPETENCY EXAMINATION ON AT

BY FORENSIC PSYCHIATRY CLINIC. FEMALES, ROOM 1003, CENTRAL COURTHOUSE; MALES, CENTRAL DETENTION FACILITY.

HEARING ON AT IN DEPARTMENT CENTRAL COURTHOUSE.

THE SHERIFF IS ORDERED TO TRANSPORT DEFENDANT TO AND FROM THE EXAMINATION AND HEARING SHOWN ABOVE.

PROBATION REFERRAL REPORT ORDERED: PRESENTENCE. POST-SENTENCE, COPY TO BE SENT DIRECTLY TO CDCR PER PC1203C.

DEFENDANT FOUND GUILTY BY JURY VERDICT. COURT FINDING. DEFT. WAIVES POST-SENTENCE INTERVIEW.

DEFENDANT ORDERED TO REMAIN IN COURTROOM UNTIL INTERVIEWED BY COURT PROBATION OFFICER FOR A LIMITED REPORT.

DEFENDANT REFERRED TO / ORDERED TO REPORT IMMEDIATELY TO PROBATION DEPT. FOR INTERVIEW: 3977 OHIO STREET, SAN DIEGO

330 W. BROADWAY, 5TH FL, SAN DIEGO 325 S. MELROSE DR., VISTA 250 E. MAIN ST., 8TH FL, EL CAJON 1095 BAY BLVD., CHULA VISTA

CUSTODY STATUS DEFT. REMANDED TO CUSTODY OF SHERIFF WITHOUT BAIL BAIL SET AT/REDUCED/INCREASED TO \$ PC1275.1 HOLD

DEFENDANT ORDERED RELEASED FROM CUSTODY THIS CASE ONLY ON OR / SOR ON DEJ CASE DISMISSED ACQUITTED.

DEFENDANT TO REMAIN AT LIBERTY ON BOND POSTED \$ 100,000 ON OR / SOR ON DEJ ON SAME TERMS & CONDITIONS

DEFENDANT ORDERED TO RETURN 4TH AMENDMENT WAIVER: IMPOSED. / REMAINS IN EFFECT. / DELETED. PROTECTIVE ORDER: ISSUED. REMAINS IN EFFECT. / MODIFIED. / DELETED.

BONDS / WARRANTS BENCH WARRANT TO ISSUE, BAIL SET AT \$ COUNSEL REPORTS NO CONTACT WITH DEFENDANT.

SERVICE FORTHWITH. ORDERED WITHHELD TO BENCH WARRANT ISSUED / ORDERED IS RECALLED / RESCINDED.

DECL. OF NON-COLLUSION & RE-ASSUMPTION OF LIABILITY FILED. BAIL FORF. IS SET ASIDE. BAIL REINSTATED EXONERATED FORFEITED

UPON PAYMENT OF COURT COST \$ WITHIN 30 DAYS. COST WAIVED. BOND AMT \$ BOND NO.

BOND COMPANY AGENT

OTHER Matter taken off calendar. Atty substituted in must be present with defendant

Date: ATTEST A TRUE COPY, Clerk of the Superior Court by Deputy

Distribution by on to JAIL DEFT. ATTY. PROS. PROB. R&R Other:

mail: Alicia Paez, 7676 Sappard Ct, DL #500 SD 9208

00
BEARD
BEARD

BB 100.000

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CENTRAL EAST NORTH SOUTH 8245

DATE 3-26-18 AT 830 M.

PRESENT: HON G Huennle JUDGE PRESIDING, DEPARTMENT 14

CLERK [Signature] REPORTER [Signature] CSR# 100576

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
Butner, Benjamin
DEFENDANT

REPORTER'S ADDRESS: P.O. BOX 128123, SAN DIEGO, CA 92112
C. Somerville
DEPUTY DISTRICT ATTORNEY / DEPUTY ATTORNEY GENERAL
B. Theule / A. Freeze
ATTORNEY FOR DEFENDANT (PD / APD / OAC / RETAINED)

VIOLATION OF _____ P.O. _____
ALLEG(S)/ENH(S) _____ INTERP. _____ OATH ON FILE / SWN.

PRIOR(S) _____ LANGUAGE _____
DEFENDANT PRESENT SELF REPRESENTED NOT PRESENT NOT PRODUCED

READINESS AMENDED COMPLAINT / INFO. / INDICTMENT FILED, READING WAIVED, TRUE NAME AS CHARGED, DEFT. PLEADS NOT GUILTY, DENIES ALLEGS.
 COMPLAINT / INFORMATION AMENDED BY INTERLINEATION _____ COMPLAINT DEEMED INFORMATION.
 PRELIMINARY HEARING / TRIAL 4/18 CONFIRMED / REMAINS / VACATED. READINESS MOTIONS _____ REMAIN(S) / VACATED.
 DEFENDANT ADVISED OF RIGHTS, WAIVES RIGHTS AND DEFT. SWORN AND EXAMINED DEFENDANT WITHDRAWS "NOT GUILTY" PLEA AND NOW PLEADS
 GUILTY NOLO CONTENDERE TO: _____

PEOPLE V. WEST PLEA. COUNSEL AND DEFENDANT STIPULATE TO PRELIMINARY / GRAND JURY TRANSCRIPT AS FACTUAL BASIS OF PLEA.
 ON MOTION OF COURT / PEOPLE / DEFENDANT COUNT(S) _____ REMAINING IS / ARE DISMISSED FOJ / VOP.
 ON MOTION OF COURT / PEOPLE / DEFENDANT ALLEGATION(S)/PRIOR(S) _____ REMAINING IS / ARE STRICKEN FOJ / VOP.
 DEFENDANT TO PROVIDE DNA SAMPLES AS DIRECTED BY SHERIFF OR PROBATION (PC296). PC1210 ACCEPTED. DECLINED.
PC1000 PC1000, DEFERRED ENTRY OF JUDGMENT, GRANTED _____ MOS./YRS. NEW TERM RE-REFERRAL REPORT TO SUBSTANCE ABUSE ASSESSMENT UNIT FORTHWITH. DEFENDANT TO PAY \$ _____ ADMIN FEE \$ _____ DEJ RESTITUTION FEE PER PC1001.90 BY _____
 DEFT. SUCCESSFULLY COMPLETED PC1000. PREVIOUSLY ENTERED PLEA TO COUNT(S) _____ SET ASIDE, AND THE CHARGE(S) IS/ARE DISMISSED.
 DEFT FAILED THE PC1000 PROGRAM. ANY UNPAID PC1000 FEES ARE DELETED. COURT MAKES A FINDING OF GUILT TO THE CHARGE(S) PLED.

FUTURE HEARINGS WAIVERS: STATUTORY TIME PRELIM / TRIAL / JUDGMENT. PRELIMINARY HEARING SPEEDY TRIAL. HARVEY / CRUZ / ARBUCKLE.
 NON-BIOLOGICAL EVIDENCE DISPOSAL. PRESENCE AT POST-SENTENCE HEARING. ATTORNEY / INTERPRETER CONFLICT FOR THIS HEARING.
 COMPLAINT DEEMED THE INFORMATION, IMMEDIATE ARRAIGNMENT (SEE CRM-002A). IMMEDIATE SENTENCING (SEE CRM-002B).
Jury trial IS SET FOR / CONT'D / TRAILED TO 4/18 AT 10:00 IN DEPT. 10
ON MOTION OF COURT / PEO. / DEFT. REASON: _____ EST. PRELIM. _____ DAYS LEFT (TRIAL) 10
 READINESS IS SET FOR / CONT'D TO _____ AT _____ IN DEPT. _____ MOTIONS DUE: _____

MENTAL HEALTH PROCEEDING SUSPENDED PER PC1368. MENTAL COMPETENCY EXAMINATION ON _____ AT _____
BY FORENSIC PSYCHIATRY CLINIC. FEMALES, ROOM 1003, CENTRAL COURTHOUSE; MALES, CENTRAL DETENTION FACILITY.
HEARING ON _____ AT _____ IN DEPARTMENT _____, CENTRAL COURTHOUSE.

THE SHERIFF IS ORDERED TO TRANSPORT DEFENDANT TO AND FROM THE EXAMINATION AND HEARING SHOWN ABOVE.
PROBATION REFERRAL REPORT ORDERED: PRESENTENCE. POST-SENTENCE, COPY TO BE SENT DIRECTLY TO CDCR PER PC1203C.
 DEFENDANT FOUND GUILTY BY JURY VERDICT. COURT FINDING. DEFT. WAIVES POST-SENTENCE INTERVIEW.
 DEFENDANT ORDERED TO REMAIN IN COURTROOM UNTIL INTERVIEWED BY COURT PROBATION OFFICER FOR A LIMITED REPORT.

DEFENDANT REFERRED TO / ORDERED TO REPORT IMMEDIATELY TO PROBATION DEPT. FOR INTERVIEW: 3977 OHIO STREET, SAN DIEGO
 330 W. BROADWAY, 5TH FL, SAN DIEGO 325 S. MELROSE DR., VISTA 250 E. MAIN ST., 8TH FL, EL CAJON 1095 BAY BLVD., CHULA VISTA

CUSTODY STATUS DEFT. REMANDED TO CUSTODY OF SHERIFF WITHOUT BAIL BAIL SET AT/REDUCED/INCREASED TO \$ _____ PC1275.1 HOLD
 DEFENDANT ORDERED RELEASED FROM CUSTODY THIS CASE ONLY ON OR / SOR ON DEJ CASE DISMISSED ACQUITTED.
 DEFENDANT TO REMAIN AT LIBERTY, ON BOND POSTED \$ 100,000 ON OR / SOR ON DEJ ON SAME TERMS & CONDITIONS
 DEFENDANT ORDERED TO RETURN.

4TH AMENDMENT WAIVER: IMPOSED. / REMAINS IN EFFECT. / DELETED. PROTECTIVE ORDER: ISSUED. / REMAINS IN EFFECT. / MODIFIED. / DELETED.

BONDS / WARRANTS BENCH WARRANT TO ISSUE, BAIL SET AT \$ _____ COUNSEL REPORTS NO CONTACT WITH DEFENDANT.
 SERVICE FORTHWITH. ORDERED WITHHELD TO _____ BENCH WARRANT ISSUED / ORDERED _____ IS RECALLED / RESCINDED.
 DECL. OF NON-COLLUSION & RE-ASSUMPTION OF LIABILITY FILED. BAIL FORF. IS SET ASIDE. BAIL REINSTATED EXONERATED FORFEITED
 UPON PAYMENT OF COURT COST \$ _____ WITHIN 30 DAYS. COST WAIVED. BOND AMT \$ _____ BOND NO. _____
BOND COMPANY _____ AGENT _____

OTHER
Benjamin Theule is relieved. Anclia Freeze is retained

Date: _____
Distribution by [Signature] on [Signature] to JAIL DEFT. ATTY. PROS. PROB. R&R Other: [Signature]
FELONY MINUTES - MISCELLANEOUS [Signature]

SBM

SC9294342 DA BCA40501

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

DATE 06-06-18 AT 01:30 M

CENTRAL EAST NORTH SOUTH TRIAL CALL 0246

PRESENT: HON THEODORE WEATHERS JUDGE PRESIDING, DEPARTMENT 016

CLERK *Scarrle* REPORTER *K Morales* CSR# 1686

REPORTER'S ADDRESS: P.O. BOX 120128, SAN DIEGO, CA 92112

THE PEOPLE OF THE STATE OF CALIFORNIA

DEPUTY DISTRICT ATTORNEY / DEPUTY ATTORNEY GENERAL

BATHEN VS. BENJAMIN L

R - A. FREEZE

DEFENDANT

ATTORNEY FOR DEFENDANT (PD / APD / OAC / RETAINED)

VIOLATION OF PC422 PC422 PC422 P.O.

ALLEG(S)/ENH(S) INTERP. OATH ON FILE / SWN.

PRIOR(S) LANGUAGE

DEFENDANT PRESENT SELF REPRESENTED NOT PRESENT NOT PRODUCED

READINESS AMENDED COMPLAINT / INFO. / INDICTMENT FILED. READING WAIVED. TRUE NAME AS CHARGED. DEFT. PLEADS NOT GUILTY, DENIES ALLEGS.

COMPLAINT / INFORMATION AMENDED BY INTERLINEATION COMPLAINT DEEMED INFORMATION.

PRELIMINARY HEARING / TRIAL CONFIRMED / REMAINS / VACATED. READINESS MOTIONS REMAIN(S) / VACATED.

DEFENDANT ADVISED OF RIGHTS, WAIVES RIGHTS. DEFT. SWORN AND EXAMINED. DEFENDANT WITHDRAWS "NOT GUILTY" PLEA AND NOW PLEADS

GUILTY NOLO CONTENDERE TO:

PEOPLE V. WEST PLEA. COUNSEL AND DEFENDANT STIPULATE TO PRELIMINARY / GRAND JURY TRANSCRIPT AS FACTUAL BASIS OF PLEA.

ON MOTION OF COURT / PEOPLE / DEFENDANT COUNT(S) REMAINING IS / ARE DISMISSED / VOP.

ON MOTION OF COURT / PEOPLE / DEFENDANT ALLEGATION(S)/PRIOR(S) REMAINING IS / ARE STRICKEN / VOP.

DEFENDANT TO PROVIDE DNA SAMPLES AS DIRECTED BY SHERIFF OR PROBATION (PC296). PC1210 ACCEPTED. DECLINED.

PC1000 PC1000, DEFERRED ENTRY OF JUDGMENT, GRANTED MOS./YRS. NEW TERM RE-REFERRAL REPORT TO SUBSTANCE ABUSE

ASSESSMENT UNIT FORTHWITH. DEFENDANT TO PAY \$ ADMIN FEE \$ DEJ RESTITUTION FEE PER PC1001.90 BY

DEFT. SUCCESSFULLY COMPLETED PC1000. PREVIOUSLY ENTERED PLEA TO COUNT(S) SET ASIDE, AND THE CHARGE(S) IS/ARE DISMISSED.

DEFT FAILED THE PC1000 PROGRAM. ANY UNPAID PC1000 FEES ARE DELETED. COURT MAKES A FINDING OF GUILT TO THE CHARGE(S) PLED.

FUTURE HEARINGS WAIVERS: STATUTORY TIME PRELIM / TRIAL / JUDGMENT. PRELIMINARY HEARING SPEEDY TRIAL. HARVEY / CRUZ / ARBUCKLE.

NON-BIOLOGICAL EVIDENCE DISPOSAL. PRESENCE AT POST-SENTENCE HEARING. ATTORNEY / INTERPRETER CONFLICT FOR THIS HEARING.

COMPLAINT DEEMED THE INFORMATION, IMMEDIATE ARRAIGNMENT (SEE CRM-002A). IMMEDIATE SENTENCING (SEE CRM-002B)

ON MOTION OF COURT / PEO. / DEFT. REASON: EST. PRELIM: DAYS LEFT (TRIAL) 5

READINESS IS SET FOR / CONT'D TO AT IN DEPT. MOTIONS DUE:

MENTAL HEALTH PROCEEDING SUSPENDED PER PC1368. MENTAL COMPETENCY EXAMINATION ON AT

BY FORENSIC PSYCHIATRY CLINIC. FEMALES, ROOM 1003, CENTRAL COURTHOUSE; MALES, CENTRAL DETENTION FACILITY.

HEARING ON AT IN DEPARTMENT CENTRAL COURTHOUSE.

THE SHERIFF IS ORDERED TO TRANSPORT DEFENDANT TO AND FROM THE EXAMINATION AND HEARING SHOWN ABOVE.

PROBATION REFERRAL REPORT ORDERED: PRESENTENCE. POST-SENTENCE, COPY TO BE SENT DIRECTLY TO CDCR PER PC1203C.

DEFENDANT FOUND GUILTY BY JURY VERDICT. COURT FINDING. DEFT. WAIVES POST-SENTENCE INTERVIEW.

DEFENDANT ORDERED TO REMAIN IN COURTROOM UNTIL INTERVIEWED BY COURT PROBATION OFFICER FOR A LIMITED REPORT.

DEFENDANT REFERRED TO / ORDERED TO REPORT IMMEDIATELY TO PROBATION DEPT. FOR INTERVIEW: 3977 OHIO STREET, SAN DIEGO

330 W. BROADWAY, 5TH FL, SAN DIEGO 325 S. MELROSE DR., VISTA 250 E. MAIN ST., 8TH FL, EL CAJON 1095 BAY BLVD., CHULA VISTA

CUSTODY STATUS DEFT. REMANDED TO CUSTODY OF SHERIFF WITHOUT BAIL BAIL SET AT/REDUCED/INCREASED TO \$ PC1275.1 HOLD

DEFENDANT ORDERED RELEASED FROM CUSTODY THIS CASE ONLY ON OR SOR ON DEJ CASE DISMISSED ACQUITTED.

DEFENDANT TO REMAIN AT LIBERTY ON BOND POSTED \$ 100,000 ON OR / SOR ON DEJ ON SAME TERMS & CONDITIONS

DEFENDANT ORDERED TO RETURN.

4TH AMENDMENT WAIVER: IMPOSED. / REMAINS IN EFFECT. / DELETED. PROTECTIVE ORDER: ISSUED. / REMAINS IN EFFECT. / MODIFIED. / DELETED.

BONDS / WARRANTS BENCH WARRANT TO ISSUE, BAIL SET AT \$ COUNSEL REPORTS NO CONTACT WITH DEFENDANT.

SERVICE FORTHWITH. ORDERED WITHHELD TO BENCH WARRANT ISSUED / ORDERED IS RECALLED / RESCINDED.

DECL. OF NON-COLLUSION & RE-ASSUMPTION OF LIABILITY FILED. BAIL FORF. IS SET ASIDE. BAIL REINSTATED EXONERATED FORFEITED

UPON PAYMENT OF COURT COST \$ WITHIN 30 DAYS. COST WAIVED. BOND AMT \$ BOND NO.

BOND COMPANY AGENT

OTHER Joint request to trail to 6-11-18 is granted by the court.

Date: 060618 ATTEST A TRUE COPY, Clerk of the Superior Court by Deputy

BB100,000

Trial-D15

SCS 294342 B044050

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

DATE 6-11-18 AT 1:30 PM. JURY DAY EST!
CENTRAL EAST NORTH SOUTH

PRESENT: HON. M. Weathers JUDGE PRESIDING, DEPARTMENT 16

CLERK Garrillo REPORTER Kmmles CSR# 7686

REPORTER'S ADDRESS: P.O. BOX 120128, SAN DIEGO, CA 92117

THE PEOPLE OF THE STATE OF CALIFORNIA

Defendant: Bathen, Benjamin L.

DEPUTY DISTRICT ATTORNEY / DEPUTY ATTORNEY GENERAL

A. Freeze

ATTORNEY FOR DEFENDANT (PD / APD / OAC / RETAINED)

VIOLATION OF PC 422 PC 422 PC 422 P.O.

ALLEG(S)/ENH(S) INTERP. OATH ON FILE / SWN.

PRIOR(S) LANGUAGE DEFENDANT PRESENT SELF REPRESENTED NOT PRESENT NOT PRODUCED

READINESS AMENDED COMPLAINT INFO INDICTMENT FILED, READING WAIVED, TRUE NAME AS CHARGED, DEFT. PLEADS NOT GUILTY, DENIES ALLEGS.

COMPLAINT / INFORMATION AMENDED BY INTERLINEATION COMPLAINT DEEMED INFORMATION.

PRELIMINARY HEARING / TRIAL CONFIRMED / REMAINS / VACATED. READINESS MOTIONS REMAIN(S) / VACATED.

DEFENDANT ADVISED OF RIGHTS, WAIVES RIGHTS. DEFT. SWORN AND EXAMINED. DEFENDANT WITHDRAWS "NOT GUILTY" PLEA AND NOW PLEADS

GUILTY NOLO CONTENDERE TO: Case is transferred to department 15 for jury trial.

PEOPLE V. WEST PLEA. COUNSEL AND DEFENDANT STIPULATE TO PRELIMINARY / GRAND JURY TRANSCRIPT AS FACTUAL BASIS OF PLEA.

ON MOTION OF COURT / PEOPLE / DEFENDANT COUNT(S) REMAINING IS / ARE DISMISSED FOJ / VOP.

ON MOTION OF COURT / PEOPLE / DEFENDANT ALLEGATION(S)/PRIOR(S) REMAINING IS / ARE STRICKEN FOJ / VOP.

DEFENDANT TO PROVIDE DNA SAMPLES AS DIRECTED BY SHERIFF OR PROBATION (PC296). PC1210 ACCEPTED. DECLINED.

PC1000 DEFERRED ENTRY OF JUDGMENT, GRANTED MOS./YRS. NEW TERM RE-REFERRAL REPORT TO SUBSTANCE ABUSE ASSESSMENT UNIT FORTHWITH.

DEFENDANT TO PAY \$ ADMIN FEE \$ DEJ RESTITUTION FEE PER PC1001.90 BY

DEFT. SUCCESSFULLY COMPLETED PC1000. PREVIOUSLY ENTERED PLEA TO COUNT(S) SET ASIDE, AND THE CHARGE(S) IS/ARE DISMISSED.

DEFT FAILED THE PC1000 PROGRAM. ANY UNPAID PC1000 FEES ARE DELETED. COURT MAKES A FINDING OF GUILT TO THE CHARGE(S) PLED.

FUTURE HEARINGS WAIVERS: STATUTORY TIME PRELIM / TRIAL / JUDGMENT. PRELIMINARY HEARING SPEEDY TRIAL HARVEY / CRUZ / ARBUCKLE.

NON-BIOLOGICAL EVIDENCE DISPOSAL. PRESENCE AT POST-SENTENCE HEARING. ATTORNEY / INTERPRETER CONFLICT FOR THIS HEARING.

COMPLAINT DEEMED THE INFORMATION, IMMEDIATE ARRAIGNMENT (SEE CRM-002A). IMMEDIATE SENTENCING (SEE CRM-002B).

IS SET FOR / CONT'D / TRAILED TO AT IN DEPT.

ON MOTION OF COURT / PEO. / DEFT. REASON: EST. PRELIM: DAYS LEFT (TRIAL)

READINESS IS SET FOR / CONT'D TO AT IN DEPT. MOTIONS DUE:

MENTAL HEALTH PROCEEDING SUSPENDED PER PC1368. MENTAL COMPETENCY EXAMINATION ON AT

BY FORENSIC PSYCHIATRY CLINIC. FEMALES, ROOM 1003, CENTRAL COURTHOUSE; MALES, CENTRAL DETENTION FACILITY.

HEARING ON AT IN DEPARTMENT CENTRAL COURTHOUSE.

THE SHERIFF IS ORDERED TO TRANSPORT DEFENDANT TO AND FROM THE EXAMINATION AND HEARING SHOWN ABOVE.

PROBATION REFERRAL REPORT ORDERED: PRESENTENCE. POST-SENTENCE, COPY TO BE SENT DIRECTLY TO CDCR PER PC1203C.

DEFENDANT FOUND GUILTY BY JURY VERDICT. COURT FINDING. DEFT. WAIVES POST-SENTENCE INTERVIEW.

DEFENDANT ORDERED TO REMAIN IN COURTROOM UNTIL INTERVIEWED BY COURT PROBATION OFFICER FOR A LIMITED REPORT.

DEFENDANT REFERRED TO / ORDERED TO REPORT IMMEDIATELY TO PROBATION DEPT. FOR INTERVIEW: 3977 OHIO STREET, SAN DIEGO

330 W. BROADWAY, 5TH FL, SAN DIEGO 325 S. MELROSE DR., VISTA 250 E. MAIN ST., 8TH FL, EL CAJON 1095 BAY BLVD., CHULA VISTA

CUSTODY STATUS DEFT. REMANDED TO CUSTODY OF SHERIFF WITHOUT BAIL BAIL SET AT/REDUCED/INCREASED TO \$ PC1275.1 HOLD

DEFENDANT ORDERED RELEASED FROM CUSTODY THIS CASE ONLY ON OR / SOR ON DEJ CASE DISMISSED ACQUITTED.

DEFENDANT TO REMAIN AT LIBERTY ON BOND POSTED \$ ON OR / SOR ON DEJ ON SAME TERMS & CONDITIONS

DEFENDANT ORDERED TO RETURN. 4TH AMENDMENT WAIVER: IMPOSED. / REMAINS IN EFFECT. / DELETED. PROTECTIVE ORDER: ISSUED. / REMAINS IN EFFECT. / MODIFIED. / DELETED.

BONDS / WARRANTS BENCH WARRANT TO ISSUE, BAIL SET AT \$ COUNSEL REPORTS NO CONTACT WITH DEFENDANT.

SERVICE FORTHWITH. ORDERED WITHHELD TO BENCH WARRANT ISSUED / ORDERED IS RECALLED / RESCINDED.

DECL. OF NON-COLLUSION & RE-ASSUMPTION OF LIABILITY FILED. BAIL FORF. IS SET ASIDE. BAIL REINSTATED EXONERATED FORFEITED

UPON PAYMENT OF COURT COST \$ WITHIN 30 DAYS. COST WAIVED. BOND AMT \$ BOND NO.

BOND COMPANY AGENT

OTHER

Date: ATTEST A TRUE COPY, Clerk of the Superior Court by Deputy

Distribution by on to JAIL DEFT. ATTY. PROS. PROB. R&R Other:

SDSC CRM-002C (Rev. 10/12) FELONY MINUTES - MISCELLANEOUS

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

DATE: June 11, 2018 **DEPT:** 15 **REPORTER A:** Y. Medina-Luna **CSR#** 12697
PRESENT HON.: STEPHANIE SONTAG **REPORTER B:** None **CSR#**
JUDGE **COUNTER #** N/A

CLERK: R. Camou

REPORTERS' ADDRESS: P.O. BOX 128
SAN DIEGO, CA 92112-4104

BAILIFF: E. Tarr

SCS294342

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
By Deputy District Attorney, Cherie B. Somerville

vs.

BENJAMIN LEE BATHEN, Defendant,
By Retained Attorney, Alicia C. Freeze

2:14 p.m. This being the time set for **JURY TRIAL** in the above-entitled cause, having been assigned from Department 16, Deputy District Attorney Cherie Somerville appears on behalf of the People. Retained Attorney, Alicia C. Freeze appears on behalf of the defendant, personally present. **PRIOR TO TRIAL COMMENCING**, Court convenes and the defendant is arraigned on the Amended Information, filed and lodged this day.

2:18 p.m. The Court rules as follows on the People’s motions in limine:

- A. Motion to Introduce Jail Calls Made by Defendant as Relevant Circumstantial Evidence of Identification is granted.
- B. To Exclude Potential Witnesses from The Courtroom Pursuant to Evidence Code Section 777 is granted.

2:21 p.m. The Court rules as follows on the defendant’s motions in limine:

- I. General Motions in limine.
 - a. Motion to Exclude Witness from Courtroom When Not Testifying, Pursuant to California Evidence Code Section 777 is granted.
 - b. Motion to Admonish Witnesses Not to Discuss Their Testimony is granted.

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

DATE: June 12, 2018 **DEPT:** 15 **REPORTER A:** Y. Medina-Luna **CSR#** 12697
PRESENT HON.: STEPHANIE SONTAG **REPORTER B:** None **CSR#**
JUDGE **COUNTER #** N/A
CLERK: R. Camou
BAILIFF: E. Tarr **REPORTERS' ADDRESS:** P.O. BOX 128
SAN DIEGO, CA 92112-4104

SCS294342 **THE PEOPLE OF THE STATE OF CALIFORNIA**, Plaintiff,
By Deputy District Attorney, Cherie B. Somerville

vs.

BENJAMIN LEE BATHEN, Defendant,
By Retained Attorney, Alicia C. Freeze

9:10 a.m. This being the time set for **JURY TRIAL** in the above-entitled cause, having been continued from June 11, 2018, Deputy District Attorney Cherie Somerville appears on behalf of the People. Retained Attorney, Alicia C. Freeze appears on behalf of the defendant, personally present. Court convenes, the Court rules as follows on the defendant's motions in limine VI - Motion to Exclude Testimony Regarding Google Search is **granted in part and denied in part**, as further stated on the record.

9:18 a.m. Court is in recess.

9:48 a.m. The clerk takes roll and fifty-one prospective jurors enter the courtroom in the presence of counsel and the defendant (8 minutes, unreported).

9:57 a.m. Court reconvenes with counsel as noted above, the defendant, and the prospective jurors present. **TRIAL COMMENCES** when at the direction of the Court, the clerk administers the oath for qualifications to the prospective jurors. The Court introduces counsel, explains the jury selection process and reads the charging portion of the Amended Information. Voir dire begins.

10:22 a.m. The prospective jurors are admonished and excused. Outside the presence of the prospective jurors, Court and counsel discuss prospective juror #12.

10:28 a.m. Court is in recess.

10:47 a.m. Court reconvenes with counsel as noted above, the defendant and the prospective jurors present. Voir dire resumes.

11:58 a.m. The prospective jurors are admonished and excused.

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

DATE: June 14, 2018 **DEPT:** 15 **REPORTER A:** Y. Medina-Luna **CSR#** 12697
PRESENT HON.: STEPHANIE SONTAG **REPORTER B:** None **CSR#**
JUDGE **COUNTER #** N/A
CLERK: R. Camou
BAILIFF: C.J. Rueda / J. Kelly **REPORTERS' ADDRESS:** P.O. BOX 128
SAN DIEGO, CA 92112-4104

SCS294342 **THE PEOPLE OF THE STATE OF CALIFORNIA**, Plaintiff,
By Deputy District Attorney, Cherie B. Somerville

vs.

BENJAMIN LEE BATHEN, Defendant,
By Retained Attorney, Alicia C. Freeze

8:30 a.m. This being the time set for **JURY TRIAL** in the above-entitled cause, having been continued from June 12, 2018, Deputy District Attorney Cherie Somerville appears on behalf of the People. Retained Attorney, Alicia C. Freeze appears on behalf of the defendant, personally present. Court convenes outside the presence of the jurors. The Court addresses counsel regarding the scope of questions as to the defendant's treatment or diagnosis by the alleged victim.

Clerk's Note: J. Kelly takes over as bailiff (8:38 a.m.).

9:01 a.m. The defendant renews objection regarding Defendant's Motion in Limine VI.

9:04 a.m. The People address the issue of confidential relationship.

9:05 a.m. Court is in recess.

9:17 a.m. Court reconvenes with counsel as noted above, the defendant and all jurors present and **TRIAL RESUMES**.

9:18 a.m. A sidebar conference is held in the back hallway (2 minutes, unreported).

9:20 a.m. Cherie Somerville presents opening statement on behalf of the People.

9:32 a.m. Alicia Freeze presents opening statement on behalf of the defendant.

9:39 a.m. GARY JACOBS is affirmed and examined on behalf of the People.

10:05 a.m. The witness is excused. The jurors are admonished and excused. Outside the presence of the jurors, the Court addresses counsel regarding therapist patient relationship exceptions and the scope of questions to alleged victim.

10:09 a.m. Court is in recess.

10:24 a.m. Court reconvenes with counsel as noted above, the defendant and all jurors present. CAROLYN JACOBS is affirmed and examined on behalf of the People.

10:58 a.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 1 – Audio recording of Carolyn Jacobs' voice-mail, dated June 4, 2017
- 1a – Transcript of dialogue of Court's Exhibit 1 (A duplicate of this transcript is provided to the clerk and filed this date.)

Court's Exhibit 1 is played (1 minute unreported); counsel waive reporting. Direct examination resumes.

11:12 a.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 2 – Audio recording of Carolyn Jacobs' voice-mail, dated July 3, 2017
- 2a – Transcript of dialogue of Court's Exhibit 2 (A duplicate of this transcript is provided to the clerk and filed this date.)

Court's Exhibit 2 is played (1 minute unreported). Direct examination resumes.

11:19 a.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 3 – Audio recording of Carolyn Jacobs' voice-mail, dated July 5, 2017
- 3a – Transcript of dialogue of Court's Exhibit 3 (A duplicate of this transcript is provided to the clerk and filed this date.)

Court's Exhibit 3 is played (1 minute unreported). Direct examination resumes.

11:52 a.m. A sidebar conference is held in the back hallway (3 minutes, unreported). Cross examination resumes.

12:00 p.m. The jurors are admonished and excused. Outside the presence of the jurors, the Court admonishes Ms. Freeze regarding repeatability.

12:03 p.m. Court is in recess.

1:36 p.m. Court reconvenes with counsel as noted above, the defendant and all jurors present. CAROLYN JACOBS previously affirmed, is further examined on behalf of the People. Cross examination resumes.

1:37 p.m. The following Court's Exhibits are marked for identification on behalf of the defendant:

- 35 – 1 page print out of e-mail, dated April 28, 2008

36 – 1 page print out of e-mail, dated July 1, 2008

37 – 1 page print out of e-mail, dated September 1, 2008

1:54 p.m. A sidebar conference is held in the back hallway (2 minutes, unreported). Cross examination resumes.

2:12 p.m. The witness is excused. GREGORY GAIN, DAI, is affirmed and examined on behalf of the People.

2:28 p.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 4 – Audio recording of Jail Call by Benjamin Bathen with unknown male and unknown female, dated September 16, 2017
- 4a – Transcript of dialogue of Court's Exhibit 4 (A duplicate of this transcript is provided to the clerk and filed this date.)

Court's Exhibit 4 is played (4 minutes unreported). Direct examination resumes.

2:35 p.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 5 – Audio recording of Jail Call by Benjamin Bathen with bail bond representative, dated September 16, 2017
- 5a – Transcript of dialogue of Court's Exhibit 5 (A duplicate of this transcript is provided to the clerk and filed this date.)

Court's Exhibit 5 is played (2 minutes unreported). Direct examination resumes.

2:39 p.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 6 – Audio recording of Jail Call by Benjamin Bathen with Emilio Sanchez, bail bond representative, dated September 17, 2017
- 6a – Transcript of dialogue of Court's Exhibit 6 (A duplicate of this transcript is provided to the clerk and filed this date.)

Court's Exhibit 6 is played (12 minutes unreported). Direct examination resumes.

2:52 p.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 7 – Audio recording of Jail Call by Benjamin Bathen with Gerald, bail bond representative, dated September 17, 2017
- 7a – Transcript of dialogue of Court's Exhibit 7 (A duplicate of this transcript is provided to the clerk and filed this date.)

Court's Exhibit 7 is played (7 minutes unreported).

3:00 p.m. The jurors are admonished and excused and Court is in recess.

3:18 p.m. Court reconvenes with counsel as noted above, the defendant and all jurors present. GREGORY GAIN, DAI, previously affirmed, is further examined on behalf of the People. Direct examination resumes.

3:23 p.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 8 – 1 page, Subscriber Information Sheet from T-Mobile
- 9 – 1 page, Subscriber Information Sheet from T-Mobile, continuation of Court's Exhibit 8
- 10 – 1 page, Call Detail Record of 617-992-4648 from June 4, 2017
- 11 – 1 page, Call Detail Record of 617-992-4648 from June 4, 2017
- 12 – 1 page, Call Detail Record of 617-992-4648 from July 3, 2017
- 13 – 1 page, Call Detail Record of 617-992-4648 from July 3, 2017
- 14 – 1 page, Call Detail Record of 617-992-4648 from July 5, 2017
- 15 – 1 page, Call Detail Record of 617-992-4648 from July 5, 2017

3:50 p.m. A sidebar conference is held in the back hallway (2 minutes, unreported). Direct examination resumes.

3:53 p.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 16 – 1 page, Google Map titled: Tower Hits From 6/1/17 – 7/6/17
- 17 – 1 page, Google Map, tracking phone calls of 617-992-4648 on July 3, 2017
- 18 – 1 page, Google Map, tracking phone call of 617-992-4648 on July 5, 2017

4:29 p.m. Jurors are admonished and excused until the date and time shown below. Outside the presence of the jurors, the Court invites the People to provide Jury Instructions 303, 333 and 359; and invites parties to submit any other requested Jury Instructions.

4:30 p.m. Off the record, Court and counsel discuss scheduling.

4:32 p.m. The defendant makes a motion to introduce audio recording of a jail call made by the defendant. The motion is taken under submission.

4:38 p.m. Court is adjourned until **Friday, June 15, 2018 at 9:15 a.m. in Department 15.**

Defendant remains at liberty on bail previously posted.

\\
\\
\\
\\
-rjc-

0256

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

DATE: June 15, 2018 **DEPT:** 15 **REPORTER A:** Y. Medina-Luna **CSR#** 12697
PRESENT HON.: STEPHANIE SONTAG **REPORTER B:** None **CSR#**
JUDGE **COUNTER #** N/A

CLERK: R. Camou **REPORTERS' ADDRESS:** P.O. BOX 128
BAILIFF: J. Kelly **SAN DIEGO, CA 92112-4104**

SCS294342 **THE PEOPLE OF THE STATE OF CALIFORNIA**, Plaintiff,
By Deputy District Attorney, Cherie B. Somerville

vs.

BENJAMIN LEE BATHEN, Defendant,
By Retained Attorney, Alicia C. Freeze

9:15 a.m. This being the time set for **JURY TRIAL** in the above-entitled cause, having been continued from June 14, 2018, Deputy District Attorney Cherie Somerville appears on behalf of the People. Retained Attorney, Alicia C. Freeze appears on behalf of the defendant, personally present. Court convenes outside the presence of the jurors. The Court informs counsel that Juror #2 has had an emergency and is not able to be here this morning. Counsel stipulate to substitute Juror #2 with an alternate juror.

Clerk's Note: Prior to Court convening, Juror #2 contacts the clerk by phone to inform the Court of a family emergency.

9:17 a.m. Court and counsel discuss the defendant's motion to introduce audio recording of a jail call made by the defendant. The People stipulate as to foundation. The Court will allow the recording.

9:19 a.m. Court indicates Alternate Juror #13 will replace Juror #2.

9:22 a.m. *Clerk's Note: The clerk informs the Court that Juror #8 requests the Court and parties to raise their voice.* Jurors enter the courtroom. Counsel as noted above, the defendant and all jurors are present, except for Juror #2. Juror #2 is released from jury service and Juror #13 is now Juror #2. The Court orders the seating of Alternate Juror #13 to the #2 seat. **TRIAL RESUMES.** The Court addresses the jurors and asks if anyone needs an assisted listening device.

9:24 a.m. GREGORY GAIN, DAI, previously affirmed, is further examined on behalf of the People. Cross examination resumes.

9:28 a.m. The following Court's Exhibits are marked for identification on behalf of the defendant:

- 38 – Audio recording of Jail Call by Benjamin Bathen with All Star bail bond representative, Hank
38a – Transcript of dialogue of Court's Exhibit 38 (A duplicate of this transcript is provided to the clerk and filed this date.)

9:53 a.m. Court's Exhibit 38 is played and paused, (1 minute unreported).

9:37 a.m. The remainder of Court's Exhibit 38 is played (15 minutes unreported). Cross examination resumes.

10:05 a.m. A sidebar conference is held in the back hallway (3 minutes, unreported). Cross examination resumes.

10:26 a.m. The witness is excused. DON HOLMES, DAI, is affirmed and examined on behalf of the People.

10:30 a.m. Jurors are admonished and excused and Court is in recess.

10:52 a.m. Court reconvenes with counsel as noted above, the defendant and all jurors present. DON HOLMES, DAI, previously affirmed, is further examined on behalf of the People. Direct examination resumes.

11:18 a.m. The following Court's Exhibits are marked for identification on behalf of the People:

- 19 – 1 page, Orientation slide titled: Cell Site Analysis (617) 992-4648 June 1, 2017 to July 7, 2017
- 20 – 1 page, Tower Frequency Chart
- 21 – 1 page titled: #1 Tower Connection, with map at 9211 Old Keene Mill Rd, Burke, VA
- 22 – 1 page titled: Point of Interest, with map at 6626 Green Ash Ct, Springfield, VA
- 23 – 1 page chart titled: #1 Tower Connection Usage – Date & Day of Week
- 24 – 1 page titled: #2 Tower Connection, with map at 1003 K Street NW, Washington, DC
- 25 – 1 page titled: Point of Interest, with map at 1201 I Street NW, Washington, DC
- 26 – 1 page chart titled: #2 Tower Connection Usage – Date & Day of Week
- 27 – 1 page titled: #3 Tower Connection, with map at 9501 Old Burke Lake Rd, Burke, VA
- 28 – 1 page titled: Point of Interest, with map at 9501 Old Burke Lake Rd, Burke, VA
- 29 – 1 page chart titled: #3 Tower Connection Usage – Date & Day of Week
- 30 – 1 page titled: #4 Tower Connection, with map at 1125 N Patrick Henry Dr, Arlington, VA
- 31 – 1 page titled: Point of Interest, with map at 1125 N Patrick Henry Dr, Arlington, VA
- 32 – 1 page chart titled: #4 Tower Connection Usage – Date & Day of Week

12:08 p.m. A sidebar conference is held in the back hallway (2 minutes, unreported). Cross examination resumes.

12:12 p.m. The witness is excused. Jurors are admonished and excused. Court is in recess.

1:17 p.m. Court reconvenes with counsel as noted above and the defendant present. Outside the presence of the jurors, Court and counsel review jury instructions.

1:32 p.m. The People inform the Court of intention to move verified business records into evidence.

1:34 p.m. The jurors enter the courtroom. Counsel as noted above, the defendant and all jurors are present. The following Court's Exhibits are marked for identification on behalf of the People:

33 – Custody of Record Document from T-Mobil

34 – Compact Disk containing Call Detail Records and Billing Information

1:35 p.m. The People rest, subject to the admission of exhibits. MANFRED SCHENK, is affirmed and examined on behalf of the defendant.

2:09 p.m. The following Court's Exhibits are marked for identification on behalf of the defendant:

39 – 1 page titled: Cell Tower Coverage Cell Phone 617-992-4648, with map

2:57 p.m. The witness is excused. The defendant rests, subject to the admission of exhibits.

2:58 p.m. Jurors are admonished and excused. Outside the presence of the jurors, Alicia Freeze makes a motion for judgment of acquittal pursuant to PC 1118.1. The motion is denied.

The following Court's Exhibits are now received in evidence on behalf of the People: 1 through 34.

The following Court's Exhibits are now received in evidence on behalf of the defendant: 38 and 39.

3:03 p.m. Outside the presence of the jurors, Court and counsel discuss defendant's proposed jury instruction. Court is in recess.

3:24 p.m. Court reconvenes with counsel as noted above, the defendant and all jurors present. The Court now instructs the jury in the law applicable to this case. The complete set of the instructions will be provided to the jurors during deliberations.

3:44 p.m. Cherie Somerville presents closing argument on behalf of the People.

4:24 p.m. Jurors are admonished and excused. Court is adjourned until **Monday, June 18, 2018 at 9:00 a.m. in Department 15.**

Defendant remains at liberty on bail previously posted.

\
\
\
\
-rjc-

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

DATE: June 18, 2018 **DEPT:** 15 **REPORTER A:** Y. Medina-Luna **CSR#** 12697
PRESENT HON.: STEPHANIE SONTAG **REPORTER B:** None **CSR#**
JUDGE **COUNTER #** N/A
CLERK: R. Camou
BAILIFF: D. Lannon **REPORTERS' ADDRESS:** P.O. BOX 128
SAN DIEGO, CA 92112-4104

SCS294342 **THE PEOPLE OF THE STATE OF CALIFORNIA**, Plaintiff,
By Deputy District Attorney, Cherie B. Somerville

vs.

BENJAMIN LEE BATHEN, Defendant,
By Retained Attorney, Alicia C. Freeze

9:09 a.m. This being the time set for **JURY TRIAL** in the above-entitled cause, having been continued from June 15, 2018, Deputy District Attorney Cherie Somerville appears on behalf of the People. Retained Attorney, Alicia C. Freeze appears on behalf of the defendant, personally present. Court convenes with all jurors are present and **TRIAL RESUMES**. Alicia Freeze presents closing argument on behalf of the defendant.

9:32 a.m. Cheri Somerville presents rebuttal argument on behalf of the People.

10:15 a.m. The Court now reads final jury instructions.

10:20 a.m. The bailiff is sworn to take custody of the jury, and the **CONTESTED CASE IS SUBMITTED**. The sworn bailiff escorts the jury to the deliberation room. Outside the presence of the jury, the Court instructs, admonishes and excuses the alternate juror who remains on telephone stand-by.

10:25 a.m. Court is adjourned.

12:00 p.m. The jury is admonished and excused for lunch by the sworn bailiff.

1:00 p.m. The jury is returned to the deliberation room by the sworn bailiff. Deliberations resume.

2:00 a.m. The bailiff delivers the following note (marked as **Jury Note Number: 1**) to the Court:

Jury Note Number: 1

- 1) Relative to element #4 needed for conviction, how does the law interpret immediate? and immediate prospect?

Signed,
Juror #10
6/18/18

Clerk's Note: Counsel are given a copy of Jury Note #1 and the Court's proposed response, by e-mail and agree on a response to Jury Note Number: 1.

2:15 p.m. The Court directs the bailiff to deliver the following written response to the jury:

Court's Response to Jury Note Number: 1

Please see CalCrim 200:

"Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

The word "immediate" and phrase "immediate prospect" are not specifically defined so are to be understood using their ordinary meanings.

Signed,
Stephanie Sontag,
Judge of the Superior Court
6/18/18

3:45 p.m. The jury is admonished and excused for break by the sworn bailiff.

4:00 p.m. The jury is returned to the deliberation room by the sworn bailiff. Deliberations resume.

4:30 p.m. The jury is admonished and excused for the evening by the sworn bailiff and directed to return on **Tuesday, June 19, 2018, at 9:00 a.m. to Department 15** to resume deliberations.

Defendant remains at liberty on bail previously posted.

\
\
\
\
\
\
\
\
\
\
-tjc-

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

DATE: June 19, 2018 **DEPT:** 15 **REPORTER A:** Y. Medina-Luna **CSR#** 12697
PRESENT HON.: STEPHANIE SONTAG **REPORTER B:** None **CSR#**
JUDGE **COUNTER #** N/A
CLERK: R. Camou
BAILIFF: D. Lannon **REPORTERS' ADDRESS:** P.O. BOX 128
SAN DIEGO, CA 92112-4104

SCS294342 **THE PEOPLE OF THE STATE OF CALIFORNIA**, Plaintiff,
By Deputy District Attorney, Cherie B. Somerville

vs.

BENJAMIN LEE BATHEN, Defendant,
By Retained Attorney, Alicia C. Freeze

9:00 a.m. This being the time set for **JURY TRIAL** in the above-entitled cause, having been continued from June 18, 2018, all jurors are present and are returned to the deliberation room by the sworn bailiff.

9:20 a.m. The bailiff delivers the following note (marked as **Jury Note Number: 2**) to the Court:

Jury Note Number: 2

Can a juror consider the credibility of a witness by observing that witness' body language while sitting in the courtroom audience, but not testifying?

Does Dr. Jacobs have an obligation to notify a person of a threat by one of her patients regardless of the relationship?

Signed,
Juror #1
6/19/18

10:10 a.m. Court is in session with counsel as noted above and the defendant present. Outside the presence of the jury, Court and counsel discuss and agree on a response to Jury Note Number: 2.

10:13 a.m. Court is in recess. The Court directs the bailiff to deliver the following written response to the jury:

Court's Response to Jury Note Number: 2

Please see CalCrim 200: “ You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial.

CalCrim 222 provides: “Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.... You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses”

Here, a witness’ body language while sitting in the audience is not evidence of that witness’ credibility.

Further, you cannot consider issues where evidence was not presented. You must limit your deliberations to the issues and evidence presented in this trial.

Signed,
Stephanie Sontag,
Judge of the Superior Court
6/19/18

10:39 a.m. The jury is admonished and excused for break by the sworn bailiff.

10:55 a.m. The jury is returned to the deliberation room by the sworn bailiff. Deliberations resume.

11:20 a.m. The bailiff delivers the following note (marked as **Jury Note Number: 3**) to the Court:

Jury Note Number: 3

We have reached verdicts on all counts.

Signed,
Juror #1
6/19/18

At the Court’s direction, the clerk notifies counsel and the alternate juror and instructs them to return to court at 1:30 p.m.

11:25 a.m. The jury is admonished and excused for lunch by the sworn bailiff.

1:35 p.m. Court reconvenes with counsel as noted above and the defendant present. The jurors are escorted into the courtroom by the sworn bailiff. Upon the Court’s inquiry, the presiding juror reports that the jury has reached a verdict. **TRIAL RESUMES** when, at the direction of the Court, the clerk reads the verdicts, copies of which are attached hereto and incorporated herein.

1:38 p.m. At the defendant’s request, the jury is polled with the following results to the question, “Are these your verdicts?”: 12 Yes

1:40 p.m. At the direction of the Court, the verdicts are recorded. The jurors are thanked for their participation, released from the admonishment, and discharged from jury service. All jurors leave the courtroom.

1:50 p.m. Defendant waives time for judgement. Probation Hearing and Sentencing is set for **Thursday, July 19, 2018, at 8:30 a.m., in Department 15.**

1:52 p.m. Court is adjourned in this matter.

The defendant is remanded forthwith into the custody of the Sheriff without bail.

Attached: Verdict Forms (3 pages).

\\
\\
\\
\\
\\
\\
\\
\\
\\
\\
-rjc-

**In the Superior Court of the State of California
IN AND FOR THE COUNTY OF SAN DIEGO**

0264

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

BENJAMIN LEE BATHEN,
Defendant

SC No. SCS294342

F I L E D
Clerk of the Superior Court

JUN 19 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

VERDICT

We, the jury in the above entitled cause, find the Defendant, BENJAMIN LEE BATHEN

Guilty of the crime of MAKING A CRIMINAL THREAT
GUILTY/NOT GUILTY

in violation of Penal Code section 422 as charged in COUNT ONE.

Dated 6-19-2018 Juror 1
Foreperson

In the Superior Court of the State of California
IN AND FOR THE COUNTY OF SAN DIEGO

0265

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

SC No. SCS294342

vs.

F I L E D
Clerk of the Superior Court

BENJAMIN LEE BATHEN,

Defendant

JUN 19 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

VERDICT

We, the jury in the above entitled cause, find the Defendant, BENJAMIN LEE BATHEN

Guilty of the crime of MAKING A CRIMINAL THREAT
GUILTY/NOT GUILTY

in violation of Penal Code section 422 as charged in COUNT TWO.

Dated 6-19-2018

Juror 1
Foreperson

VERDICT

In the Superior Court of the State of California
IN AND FOR THE COUNTY OF SAN DIEGO

0266

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

BENJAMIN LEE BATHEN,

Defendant

SC No. SCS294342

F I L E D
Clerk of the Superior Court

JUN 19 2018

CLERK OF THE SUPERIOR COURT
BY: R. Camou

VERDICT

We, the jury in the above entitled cause, find the Defendant, BENJAMIN LEE BATHEN

Guilty of the crime of MAKING A CRIMINAL THREAT
GUILTY/NOT GUILTY

in violation of Penal Code section 422 as charged in COUNT THREE.

Dated

6-19-2018

Juror 1

Foreperson

VERDICT

CS294342 DA BC A405

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Court Commit

DATE 6/19/18 AT 130 M.

CENTRAL EAST NORTH SOUTH 267

PRESENT: HON S. Sontag JUDGE PRESIDING, DEPARTMENT 15

CLERK R. Adams REPORTER Y. Medina CSR# 12697
REPORTER'S ADDRESS: P.O. BOX 120128, SAN DIEGO, CA 92112

THE PEOPLE OF THE STATE OF CALIFORNIA

Bathen vs Benjamin L
DEFENDANT

C. Sommerville
A. Freeze
DEPUTY DISTRICT ATTORNEY / DEPUTY ATTORNEY GENERAL
ATTORNEY FOR DEFENDANT (PD / APD / OAC) (RETAINED)

VIOLATION OF CT1-PC422, CT2-PC422, CT3-PC422 P.O.
ALLEG(S)/ENH(S) INTERP. OATH ON FILE / SWN.

PRIOR(S) LANGUAGE
DEFENDANT PRESENT SELF REPRESENTED NOT PRESENT NOT PRODUCED

READINESS AMENDED COMPLAINT / INFO. / INDICTMENT FILED, READING WAIVED, TRUE NAME AS CHARGED, DEFT. PLEADS NOT GUILTY, DENIES ALLEGS.
COMPLAINT / INFORMATION AMENDED BY INTERLINEATION COMPLAINT DEEMED INFORMATION.
PRELIMINARY HEARING / TRIAL CONFIRMED / REMAINS / VACATED. READINESS MOTIONS REMAIN(S) / VACATED.
DEFENDANT ADVISED OF RIGHTS, WAIVES RIGHTS. DEFT. SWORN AND EXAMINED. DEFENDANT WITHDRAWS "NOT GUILTY" PLEA AND NOW PLEADS GUILTY NOLO CONTENDERE TO:

by Verdict CT1 - PC 422
CT2 - PC 422
CT3 - PC 422

PEOPLE V. WEST PLEA. COUNSEL AND DEFENDANT STIPULATE TO PRELIMINARY / GRAND JURY TRANSCRIPT AS FACTUAL BASIS OF PLEA.
ON MOTION OF COURT / PEOPLE / DEFENDANT COUNT(S) REMAINING IS / ARE DISMISSED FOJ / VOP.
ON MOTION OF COURT / PEOPLE / DEFENDANT ALLEGATION(S)/PRIOR(S) REMAINING IS / ARE STRICKEN FOJ / VOP.
DEFENDANT TO PROVIDE DNA SAMPLES AS DIRECTED BY SHERIFF OR PROBATION (PC296). PC1210 ACCEPTED. DECLINED.
PC1000 PC1000, DEFERRED ENTRY OF JUDGMENT, GRANTED MOS./YRS. NEW TERM RE-REFERRAL REPORT TO SUBSTANCE ABUSE ASSESSMENT UNIT FORTHWITH. DEFENDANT TO PAY \$ ADMIN FEE \$ DEJ RESTITUTION FEE PER PC1001.90 BY
DEFT. SUCCESSFULLY COMPLETED PC1000. PREVIOUSLY ENTERED PLEA TO COUNT(S) SET ASIDE, AND THE CHARGE(S) IS/ARE DISMISSED.
DEFT FAILED THE PC1000 PROGRAM. ANY UNPAID PC1000 FEES ARE DELETED. COURT MAKES A FINDING OF GUILT TO THE CHARGE(S) PLED.

FUTURE HEARINGS WAIVERS: STATUTORY TIME PRELIM / TRIAL / JUDGMENT. PRELIMINARY HEARING SPEEDY TRIAL. HARVEY / CRUZ / ARBUCKLE.
NON-BIOLOGICAL EVIDENCE DISPOSAL. PRESENCE AT POST-SENTENCE HEARING. ATTORNEY / INTERPRETER CONFLICT FOR THIS HEARING.
COMPLAINT DEEMED THE INFORMATION, IMMEDIATE ARRAIGNMENT (SEE CRM-002A). IMMEDIATE SENTENCING (SEE CRM-002B).
ON MOTION OF COURT / PEO. / DEFT. REASON: PHES IS SET FOR CONT'D / TRAILED TO 7/19/18 AT 830 IN DEPT. 15
EST. PRELIM: DAYS LEFT (TRIAL)

MENTAL HEALTH PROCEEDING SUSPENDED PER PC1368. MENTAL COMPETENCY EXAMINATION ON AT
BY FORENSIC PSYCHIATRY CLINIC. FEMALES, ROOM 1003, CENTRAL COURTHOUSE; MALES, CENTRAL DETENTION FACILITY.
HEARING ON AT IN DEPARTMENT CENTRAL COURTHOUSE.

THE SHERIFF IS ORDERED TO TRANSPORT DEFENDANT TO AND FROM THE EXAMINATION AND HEARING SHOWN ABOVE.
PROBATION REFERRAL REPORT ORDERED: PRESENTENCE. POST-SENTENCE, COPY TO BE SENT DIRECTLY TO CDCR PER PC1203C.
DEFENDANT FOUND GUILTY BY JURY VERDICT. COURT FINDING. DEFT. WAIVES POST-SENTENCE INTERVIEW.
DEFENDANT ORDERED TO REMAIN IN COURTROOM UNTIL INTERVIEWED BY COURT PROBATION OFFICER FOR A LIMITED REPORT.
DEFENDANT REFERRED TO / ORDERED TO REPORT IMMEDIATELY TO PROBATION DEPT. FOR INTERVIEW. 3977 OHIO STREET, SAN DIEGO

330 W. BROADWAY, 5TH FL, SAN DIEGO 325 S. MELROSE DR., VISTA 250 E. MAIN ST., 8TH FL, EL CAJON 1095 BAY BLVD., CHULA VISTA
CUSTODY STATUS DEFT. REMANDED TO CUSTODY OF SHERIFF WITHOUT BAIL BAIL SET AT/REDUCED/INCREASED TO \$ PC1275.1 HOLD
DEFENDANT ORDERED RELEASED FROM CUSTODY THIS CASE ONLY ON OR / SOR ON DEJ CASE DISMISSED ACQUITTED.
DEFENDANT TO REMAIN AT LIBERTY ON BOND POSTED \$ ON OR / SOR ON DEJ ON SAME TERMS & CONDITIONS
DEFENDANT ORDERED TO RETURN.

4TH AMENDMENT WAIVER: IMPOSED. / REMAINS IN EFFECT. / DELETED. PROTECTIVE ORDER: ISSUED. / REMAINS IN EFFECT. / MODIFIED. / DELETED.
BONDS / WARRANTS BENCH WARRANT TO ISSUE, BAIL SET AT \$ COUNSEL REPORTS NO CONTACT WITH DEFENDANT.
SERVICE FORTHWITH. ORDERED WITHHELD TO BENCH WARRANT ISSUED / ORDERED IS RECALLED / RESCINDED.
DECL. OF NON-COLLUSION & RE-ASSUMPTION OF LIABILITY FILED. BAIL FORF. IS SET ASIDE. BAIL REINSTATED EXONERATED FORFEITED
UPON PAYMENT OF COURT COST \$ WITHIN 30 DAYS. COST WAIVED. BOND AMT \$ BOND NO.

BOND COMPANY AGENT OTHER

Date: 6/19 ATTEST A TRUE COPY, Clerk of the Superior Court by FELONY MINUTES MISCELLANEOUS BOND JUL 16 2018

606294342 DA BCA4050

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

DATE 07-19-18 AT 08:30 M.

CENTRAL EAST NORTH PROB HEAR-SENTENCING COURT 268

PRESENT: HON STEPHANIE SONTAG JUDGE PRESIDING, DEPARTMENT 015

CLERK R. Cameron REPORTER M. Lloyd CSR# 12587

REPORTER'S ADDRESS: P.O. BOX 120128, SAN DIEGO, CA 92112

THE PEOPLE OF THE STATE OF CALIFORNIA

BATHEN VS. BENJAMIN L

C. Somerville DEPUTY DISTRICT ATTORNEY / DEPUTY ATTORNEY GENERAL R - A. FREEZE

DEFENDANT

ATTORNEY FOR DEFENDANT (PD / APD / OAC / RETAINED)

VIOLATION OF Ctl PC422 Gr2 PC422 Gr3 PC422 P.O.

ENH(S) INTERP. OATH ON FILE / SWN.

PRIOR(S) LANGUAGE

DEFENDANT PRESENT SELF REPRESENTED NOT PRESENT NOT PRODUCED

PROB. REV. DEFENDANT ADVISED OF RIGHTS AND ADMITS / DENIES A VIOLATION OF PROBATION WAIVES HEARING.

PROBATION IS / REMAINS: FORMALLY / SUMMARILY REVOKED REINSTATED MODIFIED CONT. SAME CONDITIONS TERMED EXT. TO:

JUDGMENT WAIVES ARRAIGNMENT. ARRAIGNED FOR JUDGMENT. IMPOSITION / EXECUTION OF SENTENCE IS SUSPENDED.

PROBATION IS: DENIED GRANTED YEARS (FORMAL / TO COURT) TO EXPIRE CONVERTS TO PROB. TO COURT

COMMITMENT TO SHERIFF FOR DAYS. STAYED TO PENDING SUCCESSFUL COMPL. OF PROBATION. PAROLE NOT TO BE GRANTED.

PERFORM DAYS PSP. HOURS VOL. WORK AT NONPROFIT ORG. SUBMIT PROOF TO PROBATION / COURT BY

4TH AMENDMENT WAIVER: IMPOSED. REMAINS IN EFFECT. DELETED. PROTECTIVE ORDER: ISSUED REMAINS IN EFFECT. / MODIFIED. / TERMINATED.

FURTHER CONDITIONS ARE SET FORTH IN PROBATION ORDER. WORK FURLOUGH, REPORT: TO 5600 OVERLAND AVE. STE 190, SAN DIEGO 8:00 A.M.

COMMITMENT TO DEPT. OF CORRECTIONS & REHAB. DIVISION OF JUVENILE JUSTICE SAN DIEGO COUNTY SHERIFF (PC1170(h)/2057) ON

COUNT CODE & NO. FOR LOWER / MIDDLE / UPPER / INDETERMINATE TERM OF 2 YEARS MONTHS / TO LIFE.

EXECUTION OF CONCLUDING DAYS MONTHS YEARS OF SENTENCE IS SUSPENDED, DURING WHICH TIME THE DEFT. SHALL BE SUBJECT

TO MANDATORY SUPV. BY THE PROB. DEPT. (PC1170(h)(5)(b)). TERMS AND CONDITIONS SET FORTH IN THE ORDER GRANTING MANDATORY SUPV. (CRM-255).

PER PC1170(d) PER WI1737 PRINCIPAL COUNT. STIPULATED SENTENCE. NO EARLY RELEASE OF ANY TYPE AUTHORIZED.

SENTENCE PER PC667(b)-(l)/1170.12. NOTICE OF FIREARMS PROHIBITION GIVEN PER PC29805.

NO VISITATION PER PC1202.05. VICTIM IS UNDER 18 YRS. OF AGE. DA TO COMPLY WITH NOTICES.

TESTING: COMPLIANCE WITH PC296 VERIFIED. DNA (PC296) HIV (PC1202.1)

DEFENDANT ADVISED RE: PAROLE APPEAL RIGHTS REGISTER PER PC290 HS11590 PC457.1 PC186.30

DEFENDANT TO PAY: FINE OF INCLUDING PENALTY ASSESSMENT, PLUS THE FOLLOWING:

INSTALLMENT/ACCOUNTS RECEIVABLE FEE (PC1205(e)) \$ DRUG PROGRAM FEE (HS11372.7) \$

LAB ANALYSIS FEE (HS11372.5) \$ THEFT FINE (PC1202.5) \$

COURT OPERATIONS ASSESSMENT (PC1465.8) \$ 180 CRIM JUSTICE ADMIN FEE (GC29550 et seq.) \$ 0

CRIMINAL CONVICTION ASSESSMENT (GC70373) \$ 90 SEX OFFENDER REG. FINE (PC290.3) \$

PROB. HAVING BEEN FORMALLY REVOKED, THE PREVIOUS REST. FINE OF \$ SUSP. PER PC1202.44, IS NOW DUE.

RESTITUTION FINES: \$ 300 (PC1202.4(b)) PLUS 10% (PC1202.4(l)) FORTHWITH (PC2085.5)

\$ 300 (PC1202.44/PC1202.45) SUSPENDED UNLESS PROBATION/PAROLE/SUPERVISION REVOKED.

RESTITUTION TO VICTIM(S) PER P.O.'S REPORT / RESTITUTION FUND (PC1202.4(f)) \$ / IN AN AMOUNT

TO BE DETERMINED. JOINT & SEVERAL. AT COMBINED RATE OF \$ PER MONTH TO START 60 DAYS AFTER RELEASE / ON

REPORT TO PROBATION REVENUE & RECOVERY COURT COLLECTIONS FORTHWITH. WITHIN 72 HRS. OF RELEASE FROM CUSTODY.

PROCEEDINGS SUSPENDED PER PC1368, MENTAL COMPETENCY. (SEE BELOW FOR DATES OF EXAMINATION AND HEARING.)

FUTURE HEARINGS WAIVERS: TIME FOR JUDGMENT. PRESENCE FOR RESTITUTION HRG. REFERRED FOR DIAGNOSTIC EVAL PER PC1203.03. / WI707.2.

CONT. TO / SET FOR AT IN DEPT. ON MOTION OF COURT / DDA / DEPT. / PROB. OFFICER.

TO BE HEARD CONCURRENTLY WITH PRELIMINARY HEARING IN CASE TO TRAIL CASE(S)

CUSTODY STATUS DEFENDANT REMANDED TO CUSTODY OF SHERIFF WITHOUT BAIL. WITH BAIL SET AT \$

MAY BE RELEASED TO REP. OF PD / PROB./APPROVED RES. TREATMENT PROG. STAY / SERVE BAL. OF CUST. WHEN BAIL AVAIL. CUSTODY.

DEFT. ORDERED RELEASED FROM CUSTODY ON PROBATION. ON OWN / SUPERVISED RECOGNIZANCE. ON DEJ. ON MANDATORY SUPERVISION.

DEFENDANT TO REMAIN AT LIBERTY ON BOND POSTED \$ ON PROBATION. ON DEJ. ON OWN / SUPERVISED RECOGNIZANCE.

BONDS / WARRANTS BENCH WARRANT TO ISSUE, BAIL SET AT \$ COUNSEL REPORTS NO CONTACT WITH DEFENDANT.

SERVICE FORTHWITH. ORDERED WITHHELD TO BENCH WARRANT ISSUED / ORDERED IS RECALLED / RESCINDED.

DECLARATION OF NON-COLLUSION & RE-ASSUMPTION OF LIABILITY FILED. BAIL FORF. IS SET ASIDE. BAIL REINSTATED EXONERATED FORFEITED

UPON PAYMENT OF COURT COST \$ WITHIN 30 DAYS. COST WAIVED. BOND AMT \$ BOND NO.

BOND COMPANY AGENT

OTHER ALL PROPERTY IMPOUNDED, SEIZED, OR HELD IN CUSTODY IN THIS CASE TO BE DISPOSED OF PER POSSESSING AGENCY'S POLICY.

PROBATION: PREPARE SUPPLEMENTAL REPORT. / SUBMIT POST-SENT. REPORT TO CDCR PER PC1203c. SEE ATTACHED MINUTES FOR ADDITIONAL ORDERS.

CONCURRENT WITH / CONSECUTIVE TO: CLERK: REGISTRAR OF VOTERS. DMV ABSTRACT B.A.C.

The following address the Court: Terry Bathen, Vincent Crowley, and the defendant Benjamin Bathen.

Date: ATTEST A TRUE COPY, Clerk of the Superior Court by Deputy

Distribution by on 7/19 to JAIL DEFT. ATTY. PROS. PROB. R&R Other:

Case Number: SCS294342

People v. BATHEN

Date: 7-19-18

0259

COUNT # 2 / ENHANCEMENT / PRIOR: CODE NAME AND SECTION NUMBER: PC 422 A MISDEMEANOR.
 COMMITTED TO DEPT. OF CORRECTIONS & REHAB. / SHERIFF. TERM: ~~LOW~~ MID / ~~UPPER~~ / INDETERMINATE OF 2 (0) YEARS / MONTHS / DAYS / TO LIFE.
 CONCURRENT / CONSECUTIVE STAYED PER PC654 / _____ STRICKEN PER PC1385 REASON(S): _____

COUNT # 2 / ENHANCEMENT / PRIOR: CODE NAME AND SECTION NUMBER: PC 422 A MISDEMEANOR.
 COMMITTED TO DEPT. OF CORRECTIONS & REHAB. / SHERIFF. TERM: ~~LOW~~ MID / ~~UPPER~~ / INDETERMINATE OF 2 (0) YEARS / MONTHS / DAYS / TO LIFE.
 CONCURRENT / CONSECUTIVE STAYED PER PC654 / _____ STRICKEN PER PC1385 REASON(S): _____

COUNT # _____ / ENHANCEMENT / PRIOR: CODE NAME AND SECTION NUMBER: _____ A MISDEMEANOR.
 COMMITTED TO DEPT. OF CORRECTIONS & REHAB. / SHERIFF. TERM: _____ LOW / MID / UPPER / INDETERMINATE OF _____ YEARS / MONTHS / DAYS / TO LIFE.
 CONCURRENT / CONSECUTIVE STAYED PER PC654 / _____ STRICKEN PER PC1385 REASON(S): _____

COUNT # _____ / ENHANCEMENT / PRIOR: CODE NAME AND SECTION NUMBER: _____ A MISDEMEANOR.
 COMMITTED TO DEPT. OF CORRECTIONS & REHAB. / SHERIFF. TERM: _____ LOW / MID / UPPER / INDETERMINATE OF _____ YEARS / MONTHS / DAYS / TO LIFE.
 CONCURRENT / CONSECUTIVE STAYED PER PC654 / _____ STRICKEN PER PC1385 REASON(S): _____

COUNT # _____ / ENHANCEMENT / PRIOR: CODE NAME AND SECTION NUMBER: _____ A MISDEMEANOR.
 COMMITTED TO DEPT. OF CORRECTIONS & REHAB. / SHERIFF. TERM: _____ LOW / MID / UPPER / INDETERMINATE OF _____ YEARS / MONTHS / DAYS / TO LIFE.
 CONCURRENT / CONSECUTIVE STAYED PER PC654 / _____ STRICKEN PER PC1385 REASON(S): _____

COUNT # _____ / ENHANCEMENT / PRIOR: CODE NAME AND SECTION NUMBER: _____ A MISDEMEANOR.
 COMMITTED TO DEPT. OF CORRECTIONS & REHAB. / SHERIFF. TERM: _____ LOW / MID / UPPER / INDETERMINATE OF _____ YEARS / MONTHS / DAYS / TO LIFE.
 CONCURRENT / CONSECUTIVE STAYED PER PC654 / _____ STRICKEN PER PC1385 REASON(S): _____

COUNT # _____ / ENHANCEMENT / PRIOR: CODE NAME AND SECTION NUMBER: _____ A MISDEMEANOR.
 COMMITTED TO DEPT. OF CORRECTIONS & REHAB. / SHERIFF. TERM: _____ LOW / MID / UPPER / INDETERMINATE OF _____ YEARS / MONTHS / DAYS / TO LIFE.
 CONCURRENT / CONSECUTIVE STAYED PER PC654 / _____ STRICKEN PER PC1385 REASON(S): _____

COUNT # _____ / ENHANCEMENT / PRIOR: CODE NAME AND SECTION NUMBER: _____ A MISDEMEANOR.
 COMMITTED TO DEPT. OF CORRECTIONS & REHAB. / SHERIFF. TERM: _____ LOW / MID / UPPER / INDETERMINATE OF _____ YEARS / MONTHS / DAYS / TO LIFE.
 CONCURRENT / CONSECUTIVE STAYED PER PC654 / _____ STRICKEN PER PC1385 REASON(S): _____

OTHER (CONT.): off the record, monitored jail communications are filed by the people and ordered sealed.

total Term: 2 years.

Date: _____ ATTEST A TRUE COPY, Clerk of the Superior Court by _____ Deputy

Distribution by ATC on 7/19 to JAIL (DEFT. ATTY. PROS. PROB. R&R Other: _____)

FELONY MINUTES - SUPPLEMENTAL PRONOUNCEMENT OF JUDGMENT

Page 2 of 2



0270

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

CLERK'S CERTIFICATE

- Pursuant to Cal. Rules of Court, rule 8.122, the foregoing record is certified to be a full, true and correct Clerk's Transcript on appeal.
- The Clerk's Transcript has been completed and certified to the reviewing court. An additional copy will be distributed to the appellant(s), and respondent(s) if applicable, as required by the Cal. Rules of Court.
- The foregoing Clerk's Transcript was provided in part by the appellant/respondent, and these pages are numbered:

- The Superior Court case file contains all the original documents filed in this county in the action on appeal pursuant to Cal. Rules of Court, rule 8.128.
- Pursuant to Cal. Rules of Court, rule 8.336(c), the foregoing record is certified to be a full, true and correct Clerk's Transcript on appeal.
- Pursuant to Cal. Rules of Court, rules 8.409(b) and 8.450, the foregoing record is certified to be a full, true and correct Clerk's Transcript on appeal.
- Pursuant to Cal. Rules of Court, rule 8.616(a), the foregoing record is certified to be a full, true and correct Clerk's Transcript on appeal.
- Pursuant to Cal. Rules of Court, rule 8.832, the foregoing record is certified to be a full, true and correct Clerk's Transcript on appeal.

Clerk of the Superior Court

by *A Luna*, Deputy
A LUNA

Date: 9-21-18



In the Superior Court of the State of California
In and for the County of San Diego
South County Division

Department SB-12 Before Hon. Richard Oberholzer, Judge

The People,)	
)	
Plaintiff,	)	Preliminary Hearing
)	
vs.	)	Case No. SCS294342
	)	D.A. No. BCS405
Benjamin L. Bathen,)	
	)	Readiness: December 13, 2017
Defendant.	)	Trial: January 10, 2018
_____)	

Reporter's Certified Transcript

Monday, December 4, 2017

Pages 1 through 41, inclusive

APPEARANCES:

For the People: Summer Stephan
District Attorney
By: Joel Madero
Deputy District Attorney
333 H Street, Suite 4000
Chula Vista, California 91910

For the Defendant: Theule Law Firm APC
By: Benjamin Theule
Attorney at Law
2445 Fifth Avenue, No. 330
San Diego, California 92101

Kimberly A. Morales, CSR 7686
Official Court Reporter
San Diego Superior Court
Chula Vista, California 91910

Monday, December 4, 2017; Chula Vista, California

The People Vs. Benjamin Bathen
Superior Court Case No. SCS294342

-- 000 --

Chronological Index of Witnesses

Witness	Page
Carolyn Jacobs - People's Witness	
DIRECT BY MR. MADERO	6
CROSS BY MR. THEULE	25
REDIRECT BY MR. MADERO	31
RE CROSS BY MR. THEULE	32

People's Marked Index of Exhibits

Exhibit No.	Page
1 CD	18

People's Exhibits Admitted into Evidence

Exhibit No.	Page
1	34

1 Chula Vista, California - Monday, 12-4-17, 10:02 a.m.

2 -----00-----

3 THE COURT: Good morning.

4 MR. MADERO: Good morning, Your Honor.

5 MR. THEULE: Good morning, Your Honor.

6 THE COURT: All right, this is the time set for the
7 preliminary hearing in the matter of People of the State of
8 California versus Benjamin Lee Bathen.

9 MR. THEULE: Bathen, Your Honor.

10 THE COURT: I need the attorneys to announce their
11 presence, please, for the record.

12 MR. MADERO: Good morning once again, Your Honor.
13 Deputy District Attorney Joel Madero for the People.

14 MR. THEULE: Good morning, Your Honor. Benjamin
15 Theule, retained counsel, with Benjamin Bathen, who's
16 present before the Court, out of custody.

17 THE COURT: Okay. And I have an amended felony
18 Complaint. Count 1 charges on June 4th making a criminal
19 threat, in violation of Penal Code Section 422; Count 2
20 charges on July 5th of 2017 the same violation; Count 3 -- I
21 mean the same code section violation; and Count 3, also
22 Penal Code Section 422, charge of making a criminal threat
23 on July 7th of 2017.

24 Do I have the correct document?

25 MR. MADERO: Yes, Your Honor.

26 THE COURT: Okay. And, Mr. Madero, did you wish to
27 make an opening statement?

28 MR. MADERO: Your Honor, no. I think in this case the

1 only thing that I would ask -- I do have a question of the
2 Court.

3 I have an exhibit. And do you prefer People's
4 exhibit or Court's exhibit?

5 THE COURT: I don't know what they do in this
6 jurisdiction down here. I prefer People's 1, 2; and
7 Defendant's A, B, C, et cetera.

8 MR. MADERO: Perfect. Thank you, Your Honor.

9 Your Honor, as far as an opening statement, I
10 don't traditionally do it, but I'm happy to do one right now
11 if you'd like to hear one.

12 THE COURT: It's up to you. I always give counsel the
13 opportunity to do that, if they so desire.

14 MR. MADERO: Your Honor, in this case what you're going
15 to hear is that Mr. Bathen was a former patient of the
16 victim, Carolyn Jacobs. It's been some years since they've
17 had any contact. On the dates that you mentioned for Counts
18 1, 2 and 3, Benjamin Bathen made phone calls that were of a
19 disturbing nature detailing how he intended to kill his
20 former psychologist.

21 Thank you, Your Honor.

22 THE COURT: Mr. Theule, am I pronouncing that
23 correctly?

24 MR. THEULE: Theule.

25 THE COURT: Mr. Theule, do you wish to make an opening
26 statement?

27 MR. THEULE: No, Your Honor.

28 THE COURT: All right. Call your first witness,

1 please, Mr. Madero.

2 MR. MADERO: Thank you very much, your Honor. The
3 People call Carolyn Jacobs.

4 THE CLERK: Please raise your right hand.

5

6 Carolyn Jacobs,
7 called as a witness on behalf of the People,
8 having been first duly sworn, testified as follows:

9

10 THE CLERK: Please be seated at the witness stand.

11 Please state your full name, spelling your first
12 and last name for the record.

13 THE WITNESS: I'm sorry, I didn't hear you.

14 THE CLERK: Please state your full name, spelling your
15 first and last name for the record.

16 THE WITNESS: My full name, Carolyn Frances Jacobs.

17 THE CLERK: If you could spell it, please.

18 THE WITNESS: C-a-r-o-l-y-n. F-r-a-n-c-e-s.
19 J-a-c-o-b-s.

20 THE CLERK: Thank you.

21 THE COURT: Ms. Jacobs, is there a microphone down
22 there? Pull the microphone up. The bailiff will get that
23 for you.

24 THE WITNESS: Is that better, do you think? I just had
25 a hard time hearing on the other side. Thank you.

26 THE COURT: Okay. So the microphones are on. Just
27 speak in the microphone.

28 Mr. Madero, please.

1 MR. MADERO: Thank you very much, Your Honor.

2

3

DIRECT EXAMINATION

4 BY MR. MADERO:

5 Q. Good morning, Ms. Jacobs.

6 A. Good morning.

7 Q. Ms. Jacobs, do you know Benjamin Bathen?

8 A. Yes, sir.

9 Q. Do you see Benjamin Bathen here today in court?

10 A. Yes. Yes, sir.

11 Q. Can you identify where he is seated and an article
12 of clothing he's wearing?

13 A. On the left side of the dais -- the right side of
14 the dais, in a white shirt and black tie.

15 MR. MADERO: May the record reflect that the witness
16 has identified the defendant?

17 THE COURT: The record will so reflect.

18 Ms. Jacobs, will you speak right into the
19 microphone, please. You have a soft voice. I want to make
20 sure the reporter can hear everything.

21 THE WITNESS: Is that better? A little better?

22 THE COURT: I don't know if that's even on.

23 THE WITNESS: I'm not sure it's on. It says it's on.

24 THE COURT: All right. Okay.

25 Okay. Mr. Madero, please.

26 MR. MADERO: Thank you, Your Honor.

27 BY MR. MADERO:

28 Q. Ms. Jacobs, how do you know Mr. Bathen?

1 A. Mr. Bathen was a client of mine that I saw. I'm a
2 licensed psychologist, and he sought services from me. He
3 was referred to me from a colleague back in Washington,
4 D.C., and he had moved out here for a new job and was having
5 some adjustment issues and had received my name from a
6 colleague back in Washington, D.C.

7 Q. Did you become his psychologist?

8 A. Yes.

9 Q. When did you start, I guess, the doctor/patient
10 relationship with him?

11 A. It was the -- let's see, I need to refer a little
12 bit. May I refer to my notes?

13 Q. If that will refresh your recollection, please do
14 so and look up when you're done.

15 A. Okay. My recollection, it was year 2004. I think
16 it was around September of 2004.

17 Q. September of 2004?

18 A. Uh-huh.

19 Q. And at that time did you have -- was it in-person
20 meetings with Mr. Bathen?

21 A. Yes. We started out with face-to-face meetings.

22 Q. And about how often, how frequent were your, I
23 guess, meetings with Mr. Bathen?

24 A. Approximately every -- maybe every two weeks to
25 every three weeks.

26 Q. How long did the doctor/patient relationship last?

27 A. I saw Mr. Bathen through -- approximately five to
28 six sessions a year through 2008.

1 Q. And all of those were in-person meetings?

2 A. No. They were -- some were in-person and some
3 were phone consultations. At one point in the treatment he
4 moved from Oceanside to L.A. and wanted to continue his
5 phone consultations and his treatment, so --

6 Q. And you did continue at that point?

7 A. Uh-huh.

8 THE REPORTER: Is that yes?

9 THE WITNESS: Yes.

10 BY MR. MADERO:

11 Q. The court reporter is taking down all the words
12 that we're saying, so "Uh-huhs" and "huh-uhs" need to be
13 "yes" or "no".

14 A. Okay, thanks.

15 Q. Thank you.

16 In 2008, what led to the ending of the
17 doctor/patient relationship between the two of you?

18 A. Mr. Bathen informed me that he was moving back
19 east, he had received a job back in the Boston area, and
20 that he would be moving back there and setting up household
21 there. And intention going back to school at that time.

22 Q. When he informed you of that planned change, what
23 did you do?

24 A. What did I do?

25 Q. Did you have a conversation with Mr. Bathen about
26 continuing the relationship?

27 A. Well, we talked about the termination process and
28 that when he went back to the new area that, you know, I

1 recommended that he get -- continue his counseling. And I
2 made some referrals for him for counseling with providers in
3 his area.

4 Q. How did he handle the news that you would not be
5 continuing your sessions with him?

6 A. My recollection, that he was not happy with that,
7 that he had wanted to continue our contact. And I had
8 explained to him at the time that as my -- basically my
9 license, psychology license, stops at the border, so I could
10 only consult with people in town -- in California. And so
11 when he went to another state, my license would not cover my
12 practice there.

13 Q. And when you say to your recollection he wasn't
14 happy, why do you say that?

15 A. Well, at first, I'm trying to -- I'm trying to
16 recollect because I don't have the actual records because I
17 have a policy every seven years I purge my records based on
18 what's legal and ethical in the profession, and so I don't
19 have my direct records. So a lot of this I'm trying to
20 recall because records were destroyed, except for some of
21 the demographic stuff that I did keep.

22 After he -- I'm trying to think of the timing on
23 it. It was late 2008 and he had -- after he had moved back
24 to Boston, there was a delay. I hadn't heard from him for a
25 while. Then he began sending me emails and he wanted to
26 resume our contact. And I explained again that that
27 wouldn't be -- that I wouldn't be able to do that legally or
28 ethically, and encouraged him to seek out local referrals in

1 his area.

2 He was -- he sent me a few emails that he seemed
3 upset about it. And then -- then there was a drop off.
4 Then I got an email that basically said something about --
5 made a comment about something that offended him, and that
6 he was going to file a lawsuit with my American Association
7 of Marriage and Family Therapy Program, making a complaint
8 about me.

9 I never was -- I was never able to get clarity
10 specifically what the complaint was. He asked me to
11 apologize to him in the emails. And at that point, I
12 consulted my professional liability insurance company and
13 spoke to one of their attorneys there and just went over
14 everything in terms of the process of termination and what
15 had happened. And he assured me that I had done everything,
16 that I was in good standing with the, you know, state of
17 care.

18 Q. And nothing further came of that particular line
19 of emails from Mr. Bathen?

20 A. No. At that point, after he -- the last email he
21 said that he had -- I think he said he had his speed dial on
22 the line to the American Association, and if I didn't -- if
23 I didn't apologize to him, that he would be initiating
24 the -- by a certain date he would be initiating the lawsuit.

25 Q. I'd like to get timing down a little bit. You
26 said there was a delay after you ended your sessions with
27 Mr. Bathen and the time when he started email contacts with
28 you again.

1 A. Uh-huh.

2 Q. Approximately how long was that delay?

3 A. I think -- I think the last contact was 2008. And
4 then again in -- let me look here.

5 Q. If you need to look down, if you could just tell
6 the Court that you're doing so so I can ask the appropriate
7 questions.

8 A. Okay. I'm going to look at my note to --

9 Q. Will that refresh your recollection in terms of
10 how long a delay there was?

11 A. I hope so. I don't have the actual --

12 Q. If you don't have the exact dates --

13 A. I think it was probably about two and a half
14 months before I got the email that told me he was going to
15 sue me.

16 Q. So that was two and a half months after your last
17 session with him, about, approximately?

18 A. Last contact with him, yes.

19 Q. Now, prior to that, you said that there was a
20 delay between the first time he emailed you about trying to
21 continue your sessions --

22 A. Uh-huh.

23 Q. -- and the last time you actually had a session.
24 How long was that delay? You can approximate.

25 A. I think about a month, if I'm recalling it
26 accurately.

27 Q. When was the next time -- well, let me take a step
28 back. Did you hear from Mr. Bathen again?

1 A. No. After I had -- I had -- one thing I was
2 concerned about because of the emails were not really
3 confidential and he was trying to get me to respond to him
4 with emails. So I made a point in one of the emails that I
5 would like to write to him on my letterhead and I needed
6 basically a mailing address. And he refused to give me his
7 mailing address. And at that time I was going to write an
8 actual termination letter on my email with all the
9 standard -- you know, the standard forms that you would use
10 when you're terminating with a client. But he would never
11 give me his actual mailing address, so I was never able to
12 do that.

13 Q. These conversations, when were they happening in
14 terms of you trying to get his address?

15 A. In the process of the emails that were coming back
16 and forth when he was expressing his dissatisfaction with
17 me.

18 Q. That was late 2008/early 2009?

19 A. Yes, all that was during that time.

20 Q. After 2009 did you hear from Mr. Bathen again?

21 A. No, I did not.

22 Q. Have you heard anything from him since?

23 A. No, sir, until I received the phone calls.

24 Q. So I'd like to talk about the phone calls that you
25 just referenced. You received phone calls from Mr. Bathen?

26 A. Yes.

27 Q. When -- how many phone calls?

28 A. Three. Three. Three particular -- in terms of

1 the threat phone calls, that's what I'm referring to, right,
2 yes.

3 Q. Okay.

4 A. The three death threat phone calls I received.

5 Q. When was the first of those three phone calls
6 made?

7 A. It was June -- it was made on June 4th, on a
8 Sunday. It was made to my AT&T message system. And I think
9 the call came in about 1:20. I didn't pick up the call
10 until Monday morning, the next morning on the 4th.

11 And the normal time in the day I check my messages
12 in the morning and throughout the day. And I checked my
13 first message and there was a message on the phone from
14 Mr. Bathen.

15 Q. Was that 1:20 in the morning or in the afternoon?

16 A. When I checked it -- when the -- when the phone
17 call came in on Sunday, there was a time -- time note that
18 said what time it came in on my voice mail message service,
19 and that was in the afternoon.

20 Q. You said you checked it on June 5th. Did you
21 check it from -- where did you check the message from?

22 A. On June 5th?

23 Q. Yes.

24 A. Let's see, one second here. I'm looking down.

25 Q. If you could -- if I could ask you to use your
26 memory as best as you can. If you don't remember something,
27 we can walk through potentially looking at your records
28 there.

1 A. Okay. So June 5th I checked the message in the
2 morning when I got out of bed.

3 Q. You checked it from home?

4 A. From home, uh-huh.

5 Q. Without giving the exact -- your exact home
6 address can you just say what city you live in?

7 A. Chula Vista, California.

8 Q. That's in the county of San Diego?

9 A. Yes.

10 Q. When was the second call made?

11 A. The second call made was July 3rd. Yes, July 3rd.

12 Q. If I could just ask you once again to use the best
13 of your memory. If you're unable to remember based on my
14 question, let me know that you don't remember and then we
15 can go through the process of looking at your records.

16 A. Okay.

17 Q. So July 3rd you received another call. What time
18 was that at? You can approximate.

19 A. You know, I don't have the record here. I checked
20 the record -- normally I check in the mornings, my phone
21 messages. So it would be early in the morning.

22 Q. Did you check that call on July 3rd?

23 A. Yes, I checked the call on July 3rd. Probably
24 around 8:00, 8:30, 9 o'clock.

25 Q. When was the third call made?

26 A. On July 5th, again in the morning. I picked it up
27 in the morning.

28 Q. And you checked all those messages at home?

1 A. Yes.

2 Q. Now, prior to this hearing, we had an opportunity
3 to sit down and you listened to some audio on a CD. Do you
4 remember doing that?

5 A. Yes, sir.

6 MR. MADERO: Your Honor, may I approach?

7 THE COURT: You may.

8 MR. MADERO: Thank you.

9 BY MR. MADERO:

10 Q. Looking at that disk, do you recognize the disk?

11 A. Yes.

12 Q. And how do you recognize it?

13 A. My initials.

14 Q. And what is the audio on the disk?

15 A. What is the audio?

16 Q. Yeah. What is contained on the disk that you
17 listened to?

18 MR. THEULE: Objection; lack of authentication,
19 foundation.

20 THE COURT: Your response?

21 MR. MADERO: Your Honor, I believe we are getting
22 there.

23 THE COURT: Okay. I'll reserve a ruling on it. You
24 can renew that objection after he lays a foundation.

25 MR. MADERO: Thank you, Your Honor.

26 THE COURT: Mr. Madero.

27 BY MR. MADERO:

28 Q. So you did recognize what was on the CD?

1 A. Yes, I did.

2 Q. And what is on the CD?

3 A. There's three different recordings of death
4 threats that were made to -- that were very -- I don't know.
5 They were death threats that were very frightening to me.

6 Q. And were the death threats the same messages that
7 we were just speaking of that were on June 4th, July 3rd and
8 July 5th?

9 A. Yes.

10 Q. I'm going to go in order walking through these.
11 I'd like to talk about the June 4th phone call. When you
12 first heard the message, what was your reaction after you
13 heard the phone call?

14 A. I was just -- I was terrorized, I was terrified
15 actually. I was alone, home alone, and I -- I was really
16 frightened. I didn't -- sort of stunned. And at that point
17 decided to call my husband to come -- he was in the
18 operating room that day. And I left a message for him to
19 come home as soon as possible, and just sat and waited.

20 Q. How long did you wait for your husband for?

21 A. I think it was around 40 minutes.

22 Q. What did you do after your husband got home?

23 A. He -- we -- I played -- I played the tape. He
24 listened to the audio tape again, and then he went -- my
25 husband is pretty techy, savvy. So he went up to my AT&T
26 message machine -- I mean message service online, he could
27 go online and he pulled up the number.

28 MR. THEULE: Objection; calls for hearsay.

1 MR. MADERO: Your Honor, I believe this goes to effect
2 on the listener.

3 THE COURT: Not offered for the truth of the matter
4 asserted then?

5 MR. MADERO: Yes, Your Honor.

6 THE COURT: Therefore, it's not hearsay. The objection
7 is overruled.

8 BY MR. MADERO:

9 Q. So he pulled up the phone number?

10 A. He pulled up the phone number and he went online
11 and was able to connect the phone number to Mr. Bathen's
12 social media.

13 Q. And was it at that point that you realized that --

14 A. Then he said to me, "Do you know this person Ben
15 Bathen?" And then I said, "Yes, that's a -- that was a
16 previous patient of mine."

17 Q. And it was Mr. Bathen who left that first message?

18 A. Yes.

19 MR. THEULE: Objection; foundation.

20 THE COURT: Your response?

21 MR. MADERO: Your Honor, I believe that we've gone
22 through that there have been many sessions that included
23 over the phone, that this was a doctor/patient relationship,
24 and that Ms. Jacobs would be well aware of what Mr. Bathen
25 sounds like.

26 THE COURT: All right. The objection is overruled.

27 MR. MADERO: Thank you, Your Honor.

28 Your Honor, may I approach?

1 THE COURT: You may.

2 MR. MADERO: Thank you.

3 Your Honor, I will be playing what's been marked
4 as, on the CD, it is People's Exhibit 1, and it is Exhibit
5 1.1 on that disk.

6 (Exhibit 1 marked for identification)

7 THE COURT: All right. Do you have a transcript?

8 MR. MADERO: I do, Your Honor. I provided that to the
9 court.

10 THE COURT: Here it is. Okay.

11 Will counsel stipulate the reporter need not take
12 this down, to rely on the transcript?

13 MR. THEULE: So stipulated.

14 MR. MADERO: Yes, Your Honor. Thank you.

15 THE COURT: Thank you.

16 (People's Exhibit 1 played)

17 BY MR. MADERO:

18 Q. That is a fair and accurate audio from that first
19 voice mail?

20 A. Yes, sir.

21 Q. Ms. Jacobs, how long have you been a psychologist?

22 A. Since 1992.

23 Q. Have you had in the past patients who have been
24 upset with you?

25 A. No.

26 Q. You said you were afraid after hearing that first
27 phone call. Can you for the record just explain why you
28 were afraid.

1 A. Well, I took the threat very seriously and I was
2 really just afraid for my life. I didn't know if I could
3 protect myself. I just began to do things that I thought I
4 needed to do to protect myself, so I --

5 Q. What kinds of things did you start doing?

6 A. Well, I have an obligation to my -- well, first of
7 all, we have a security system, so I turned on the security
8 system. And I --

9 BY MR. MADERO:

10 Q. If I could just pause you. We, who is "we"?

11 A. My husband.

12 Q. In your home?

13 A. In our home, yes.

14 Q. Okay.

15 A. So I turned on our home security system. And I've
16 kept -- since June I've kept our doors and our windows
17 locked 24/7, even with the security system, just sort of as
18 a backup.

19 I had to notify all of my colleagues at my office
20 in Chula Vista who are also therapists and have clients that
21 there would be -- you know, to keep an eye out for anyone
22 that might be coming around that shouldn't be in the space
23 or in the office.

24 We have -- our landlord installed a new security
25 door so we could have better control of who was coming in
26 and out of our office.

27 Q. Your landlord, your office landlord?

28 A. Office landlord, yes.

1 I was -- my husband -- my husband became pretty
2 vigilant, and he would meet me after my office hours in the
3 evening, because I leave in the evening, and walk me to my
4 car. And all of my colleagues decided to set up those type
5 of situations until we knew -- at the beginning we didn't
6 know where Mr. Bathen was, if he was going to be
7 apprehended. So there was a lot of anxiety about that.

8 Q. Did you contact law enforcement after that first
9 call?

10 A. Yes.

11 MR. MADERO: Your Honor, may I approach one more time?

12 THE COURT: You may.

13 MR. MADERO: Thank you very much.

14 I'll now be playing Exhibit 1.2 on the same disk,
15 People's Exhibit 1.

16 (People's Exhibit 1 played)

17 BY MR. MADERO:

18 Q. Was that a fair and accurate audio from that
19 second phone call on July 3rd?

20 A. Yes, it was.

21 Q. After hearing that phone call, what did you do?

22 A. I called -- I called the police department again,
23 and we had another officer respond to -- I recorded it. And
24 so that was on the -- that was the 3rd, right, July 3rd.
25 And we reported it to the police.

26 And then so they were going to be coming out to
27 take another report and to record it. And in the meantime,
28 I received another one the next day or the day after, and

1 so --

2 Q. If we could just -- before getting to that third
3 phone call, if we could focus on the second phone call.

4 A. Uh-huh.

5 Q. How were you feeling after hearing the audio on
6 your voice mail from that second phone call?

7 A. I was really -- I was really terrified. I was
8 really afraid. I thought that something -- this was a
9 specific threat, and the threat seemed to be getting more
10 specific about what he was going to do to me. And they were
11 very violent.

12 And it was just -- I'm a registered nurse in my
13 other life and so, you know, I've had -- I've worked with a
14 lot of trauma with military guys from Afghanistan and from
15 Iraq. And I never really had a real sense of what it means
16 to feel that afraid and to have this whole residual, like
17 mild flashbacks, nothing that was debilitating, but just
18 very upsetting for me.

19 Q. And how do you feel today after hearing the voice
20 mails again?

21 A. Well, I'm surprised, I'm a lot more -- I feel a
22 lot more emotional. I haven't heard them in this kind of a
23 setting in a while.

24 And, frankly, I feel -- I still feel frightened
25 and I feel humiliated. It's pretty humiliating.

26 Q. Why do you feel humiliated?

27 A. I think the nature of the threats and the violence
28 of the sexual, you know, violence is just -- directed at me

1 is just humiliating.

2 MR. MADERO: Your Honor, may I approach?

3 THE COURT: You may.

4 MR. MADERO: Thank you.

5 BY MR. MADERO:

6 Q. I'll now be playing Exhibit 1.3 off of People's
7 Exhibit 1.

8 (People Exhibit 1 played)

9 BY MR. MADERO:

10 Q. You previously said that after the second phone
11 call you called law enforcement and prior to being able to
12 report that second incident there was a third incident.

13 Is this a fair and accurate audio of that third
14 incident?

15 A. Yes.

16 Q. How did you feel after hearing that third phone
17 call?

18 A. Well, that pretty much put me over the top when,
19 you know, when he -- first when he said he's planning to
20 still come out. I assume he meant California. Then when he
21 threatened my daughter, a total blindside. I had no sense
22 that anything like that was going to be, you know, part of
23 this. So that was when -- this was when I just -- I knew
24 that I had to protect myself, that the stakes were really
25 high now.

26 My only life, my colleagues and potentially my
27 patients' life, but my daughter's life with her family
28 was -- and so I just decided I had to do everything I can

1 within the letter of the law to get -- to keep myself safe
2 and to keep my family safe and my colleagues safe.

3 Q. And those remedial actions that you had previously
4 described, was that after this third phone call that you
5 received?

6 A. Yes, that and more. We set up a system, talked
7 with our landlord who was going to put up security cameras
8 so that we could track who was coming around the building.
9 And there were high hedges around our office building. The
10 landlord cut them all down. And just a general, you know,
11 sense of vigilance and hypervigilance from everybody
12 involved.

13 Q. Are those, I guess, protective measures still in
14 place today?

15 A. Yes.

16 Q. How many -- approximately how many patients have
17 you had over the years?

18 A. Let's see, I see about 15 to 18 clients a week
19 now. So I would say around seven -- probably 700 patient
20 contacts a year, I would think.

21 Q. Outside of Mr. Bathen, have you ever had an
22 experience like this one?

23 A. No.

24 Q. Have you taken any legal action outside of the
25 criminal process against Mr. Bathen?

26 MR. THEULE: Objection; relevance.

27 MR. MADERO: Your Honor --

28 THE COURT: What's the relevance?

1 MR. MADERO: I think this goes towards Ms. Jacobs' fear
2 in this case.

3 THE COURT: All right. Overruled.

4 MR. MADERO: Thank you, Your Honor.

5 A. I didn't understand your question.

6 BY MR. MADERO:

7 Q. Outside of the criminal process, have you had any
8 other court proceedings with Mr. Bathen?

9 A. Just with a restraining order.

10 Q. Do you have a restraining order?

11 A. A civil restraining order, yes. I applied for a
12 civil restraining order.

13 Q. When did you apply for that restraining order?
14 You can approximate.

15 A. Approximately June -- I guess the end of July,
16 middle of July.

17 Q. Have you had any restraining order hearings?

18 A. Yes.

19 Q. When were those or how many?

20 A. I had two.

21 Q. When was the first one?

22 MR. THEULE: Objection; relevance.

23 THE COURT: Now that I don't know what the relevance
24 would be.

25 MR. MADERO: Your Honor, I do think again that it goes
26 towards the sustained fear aspect of Ms. Jacobs in this
27 case. The following through with the restraining order I
28 think goes directly towards or potentially goes towards her

1 fear.

2 THE COURT: Well, I don't know how long a sustained
3 fear has to go by law under that section because if he's in
4 custody, for example, you wouldn't -- that wouldn't
5 particularly be relevant.

6 I'm not sure -- I'm not convinced. I'm going to
7 sustain the objection to relevance.

8 MR. MADERO: Okay, your Honor.

9 BY MR. MADERO:

10 Q. Why did you move forward with the restraining
11 order?

12 A. Why did I --

13 Q. Move forward with the restraining order.

14 A. Well, upon consultation with the detectives with
15 the police department, Chula Vista Police Department, they
16 suggested that that would be a good step to set up some
17 protection.

18 MR. MADERO: Nothing further at this time, Your Honor.

19 THE COURT: Mr. Theule, your witness.

20 MR. THEULE: Thank you, Your Honor.

21

22 CROSS-EXAMINATION

23 BY MR. THEULE:

24 Q. Ms. Jacobs, what did you do to prepare for your
25 hearing today?

26 A. What did I do to --

27 Q. To prepare for your testimony today.

28 A. Just tried to rest and spend time with my family,

1 and just try to think through, you know, based on -- based
2 on the nature of the course what kind of things I might be
3 having to answer.

4 Q. I notice you have a folder in front of you and
5 you've been referring to it during this hearing.

6 A. Uh-huh.

7 Q. Did you review those notes and things in order to
8 prepare for your testimony today?

9 A. Yes. I generally looked over my notes before I
10 came today.

11 Q. You also mentioned you had a meeting with the
12 prosecutor prior to you reviewing these recordings; is that
13 correct?

14 A. Prior to today, this morning, yes.

15 Q. What happened during that meeting?

16 A. He played the tapes for me, and I signed off that
17 they were accurate.

18 Q. I see. Was there discussion about your testimony?

19 A. No.

20 Q. You've testified today that your treatment of
21 Mr. Bathen was roughly between 2004-2008, correct?

22 A. Uh-huh.

23 THE REPORTER: Yes?

24 THE WITNESS: Yes.

25 BY MR. THEULE:

26 Q. And so during that time, approximately how many
27 meetings did you have with him, telephonic or in person?

28 A. Approximately, I would say, five, six, seven,

1 around 18 to 20 in that period of time. Average about five
2 a year during that time.

3 Q. I see. And you've testified today that your
4 treatment of him ended in 2000 -- end of 2008?

5 A. Yes. That's when he moved back to his new job
6 back east in Boston.

7 Q. And so you're aware that he was in the Boston area
8 at that time?

9 A. Uh-huh. Yes. Sorry.

10 Q. So between 2008 and the first call in this case
11 around June 4th, you had no contact with Mr. Bathen
12 whatsoever?

13 A. Only through the emails that he had sent me after
14 he moved back. I think there were four or five of them.

15 Q. And no in-person contact?

16 A. No.

17 Q. It's true that when you first received the message
18 on June 4th that you did not immediately recognize the voice
19 on the other end; is that correct?

20 A. Correct.

21 Q. And that's because it had been roughly eight, nine
22 years since you last spoke to Mr. Bathen?

23 A. Right.

24 Q. At the time of the first call, did you have any
25 credible information that Mr. Bathen was in the state of
26 California?

27 A. No.

28 Q. So it would be fair to say that a lot of your fear

1 was based on the not knowing where he was?

2 A. Correct.

3 Q. At any time had Mr. Bathen been to your personal
4 residence?

5 A. No, not that I know of.

6 Q. After the first call on June 4th, you spoke to an
7 officer De La Pena, correct?

8 A. Correct, yes.

9 Q. And to your knowledge, did Officer De La Pena try
10 to locate the whereabouts of Mr. Bathen?

11 MR. MADERO: Objection, Your Honor; calls for hearsay.

12 THE COURT: Rephrase your question. She can't know
13 what's in the mind of the officers. You have to rephrase
14 your question.

15 BY MR. THEULE:

16 Q. Did Officer De La Pena try to locate the
17 whereabouts of Mr. Bathen after the first call on June 4th?

18 MR. MADERO: Objection, Your Honor; foundation, as well
19 as calls for hearsay.

20 THE COURT: Right. It may not call for hearsay, but
21 just trying to establish the state of mind of the witness.

22 MR. THEULE: Correct.

23 THE COURT: But the form of the question is one that
24 would require foundation, so it's something that would have
25 had to have been conveyed to her.

26 BY MR. THEULE:

27 Q. Did you have any conversations with Officer
28 De La Pena after the first call on June 4th?

1 A. Let me think. Only -- only when he responded to
2 our home and he told -- and he went through all the
3 descriptions and gave me some pamphlets and said that he
4 would be directing the report to the D.A.'s office, to the
5 detective's office, I'm sorry, to the detective's office at
6 Chula Vista. That's all that I can recall.

7 Q. Were you present with Officer De La Pena when he
8 tried to investigate the person you're alleging that made
9 this call?

10 A. I don't understand your question.

11 Q. At any point did Officer De La Pena tell you that
12 it was his understanding that Mr. Bathen lived outside the
13 state of California?

14 A. No. We --

15 Q. Did he inform you of any internet search he did in
16 regards to the whereabouts of Mr. Bathen?

17 A. The officer, no.

18 Q. Did he do anything to comfort you to say that
19 perhaps Mr. Bathen was nothing to be afraid of?

20 MR. MADERO: Objection, Your Honor; relevance.

21 THE COURT: Overruled.

22 A. Would you rephrase the question? I'm sorry. Say
23 that again.

24 BY MR. THEULE:

25 Q. Did Officer De La Pena take any efforts to assure
26 you that Mr. Bathen was not around or not a threat to you
27 after the first call on June 4th?

28 A. Are you referring to the day that he was there in

1 my home or --

2 Q. Yes.

3 A. No.

4 Q. Did you attempt to call back the number that
5 called you?

6 A. Did I -- no.

7 Q. Do you know if your husband did?

8 A. I don't know.

9 MR. MADERO: Objection, Your Honor; relevance.

10 THE COURT: Overruled. She answered the question. She
11 doesn't know.

12 BY MR. THEULE:

13 Q. What was the phone number that displayed on the
14 caller ID when the first threat on June 4th, 2017, came
15 through?

16 A. I could look for it, but I don't have it in my
17 head.

18 Q. Do you know the area code?

19 A. 617.

20 Q. How confident are you that the voice you heard on
21 these recordings was the same person?

22 A. Very confident.

23 Q. How confident are you that the voice on these
24 recordings was that of Mr. Benjamin Bathen?

25 A. I'm confident.

26 Q. On a scale of 1 to 10, 10 being most confident,
27 how confident are you that the voice was Mr. Bathen?

28 MR. MADERO: Objection, Your Honor; asked and answered.

1 THE COURT: Overruled.

2 MR. THEULE: You may answer.

3 A. Ten, 9.99.

4 BY MR. THEULE:

5 Q. And this is true even though you at first did not
6 recognize the voice?

7 A. Correct.

8 MR. THEULE: No further questions.

9 THE COURT: Mr. Madero.

10 MR. MADERO: Thank you, Your Honor.

11

12

REDIRECT EXAMINATION

13 BY MR. MADERO:

14 Q. Ms. Jacobs, why -- before, on direct, you
15 indicated that you took the threats seriously. You've also
16 indicated that you're aware that Mr. Bathen had left the
17 state of California.

18 I just want to know why, why did you take the
19 threats seriously?

20 A. The threats were specific and he said my name in
21 the recordings. He knew where my office is. I assume he
22 has more information on me in terms of my kids are on social
23 media, so I'm sure he could Google.

24 Q. And talking about your children. At any time
25 during your time with Mr. Bathen did you tell him that you
26 had children?

27 A. No. I don't discuss my personal life with my
28 clients. If it was mentioned, it was not -- it would have

1 been something very off the cuff that would never have been
2 any intention to give him information about my personal
3 life.

4 Q. Beyond what you've already said, was there
5 anything else that made you take these threats seriously?

6 A. Well, I mean, just in terms of the context of
7 what's going on right now in our society and things that
8 have happened recently with, you know, lone wolves and
9 people who have been hurting other people, I think -- I
10 think I was at a high alert in that these things really can
11 happen.

12 There was also a therapist in our community a few
13 years ago who actually was murdered by one of her clients,
14 and that's something that sort of reverberated through our
15 whole professional community.

16 And so I think with the anxiety that's in the
17 society right now and me not having had any contact for nine
18 years, not having any sense of the state of this gentleman,
19 I just felt like I was at risk.

20 MR. MADERO: Nothing further at this time, Your Honor.

21 THE COURT: Mr. Theule.

22

23

REXCROSS EXAMINATION

24 BY MR. THEULE:

25 Q. Ms. Jacobs, you never mentioned that your daughter
26 was a graphic designer during any of the counseling sessions
27 you had with Mr. Bathen?

28 A. I don't know -- I don't remember.

1 Q. But it's possible?

2 A. I don't remember.

3 MR. THEULE: No further questions.

4 THE COURT: Okay. I'm sorry, I missed that. I'm not
5 sure I understood the last question.

6 There's reference in the calls about starting to
7 date or dating. Does that refresh anything in your
8 recollection with respect to this particular individual?

9 THE WITNESS: Your Honor, I just -- when I hear those
10 tapes and it goes in that direction, it feels like it goes
11 into some other level of -- it doesn't -- it doesn't -- it's
12 not consistent with the kind of work that I did with
13 Mr. Bathen when we were working.

14 It just -- he was having -- you know, I did check
15 with my professional liability about testifying today, and
16 what I'm -- what I'm mandated to say and not say. And I was
17 given permission that if there's something that has to do
18 with protecting me or my life, I could say some clinical
19 things about the client.

20 But the work that we did was basically related to
21 adjustment disorders.

22 THE COURT: You don't recall anything about dating
23 issues or talking to him about --

24 THE WITNESS: He was having some interpersonal issues.
25 He was interested in meeting people. He was having a hard
26 time meeting people.

27 THE COURT: Okay.

28 THE WITNESS: That would be the theme of it.

1 THE COURT: Okay. Anything further, Mr. Madero?

2 MR. MADERO: Nothing further, Your Honor.

3 THE COURT: Mr. Theule?

4 MR. THEULE: No, Your Honor.

5 THE COURT: Thank you. You may step down.

6 Your next witness, Mr. Madero.

7 MR. MADERO: People have no additional witnesses, Your
8 Honor. Before resting, I would ask that People's Exhibit 1
9 be entered into the court file.

10 THE COURT: People's Exhibit 1, any objection?

11 MR. THEULE: I would object to the second file on that
12 disk, Your Honor. There was testimony that that
13 conversation took place on July 3rd. However, as noted on
14 the transcript by the People, that particular transcript
15 corresponds to some call on June -- July 5th -- or July 7th.

16 MR. MADERO: And, Your Honor, just for the record,
17 Ms. Jacobs did just clarify dates in terms of when things
18 were being recorded versus the phone calls actually
19 happening.

20 So I think the second phone call does -- she did
21 say that it was a fair and accurate representation of the
22 second phone call on July 3rd. And then the third one was
23 from the July 5th date.

24 THE COURT: The objection is overruled. People's 1
25 will be admitted.

26 (People's Exhibit 1 received in evidence)

27 THE COURT: And, Mr. Theule, do you wish to present
28 evidence?

1 MR. THEULE: No, Your Honor.

2 THE COURT: Did you wish to argue, Mr. Madero, or just
3 want reserve --

4 MR. MADERO: I'll --

5 THE COURT: -- and respond to Mr. Theule?

6 MR. MADERO: I'll reserve, Your Honor. I apologize for
7 interrupting.

8 THE COURT: Mr. Theule, do you wish to argue?

9 MR. THEULE: Yes, Your Honor.

10 Your Honor, based on the evidence presented in
11 court today, I would argue that the fifth element of the 422
12 charges on all three of the calls was not sufficiently met
13 by the prosecution, and that is that the fear experienced by
14 Ms. Jacobs was reasonable.

15 Now, the reason it was not reasonable was given
16 the fact that there had been nine years that took place
17 between their last contact, she had no credible information
18 that Mr. Bathen was in the state of California, had made
19 attempts to contact her, or was in any way a threat to her.
20 There was no event that could have sparked this anger that
21 was displayed on these calls, and I think --

22 THE COURT: Isn't that itself significant with respect
23 to that? Was this some individual who was -- I mean,
24 certainly some of the greatest things to fear are people who
25 have mental illnesses because they're very unpredictable.

26 MR. THEULE: Yes, Your Honor, I believe it cuts both
27 ways. I know the prosecution would definitely take that
28 position. But I don't think there's any evidence before the

1 Court that Mr. Bathen has any mental health issues and
2 that -- because of the length of time, because there wasn't
3 a sparking incident, because a lot of the fear --

4 THE COURT: Well, I mean, you said that there's no
5 evidence that shows that he has any mental health issues.
6 But the person who receives this message doesn't know that.

7 MR. THEULE: True. But she does know --

8 THE COURT: And she hadn't seen the guy for a number of
9 years, eight years or however long it was. So I'm having a
10 little bit of trouble following the argument, I guess, is
11 what I'm saying.

12 MR. THEULE: Yes, Your Honor. I guess the crux of our
13 argument is that her fear was not reasonable given the
14 circumstances presented before the Court. He was on the
15 other side of the country. This was phone calls delivered
16 and --

17 THE COURT: And how does one know that somebody is on
18 the other side of the country?

19 MR. THEULE: Well, it's based on -- I think it's based
20 on the fact that this was a long established relationship,
21 and last time that they had contact he was on the other side
22 of the country. And I guess that's the only evidence that
23 was presented in regards to that, Your Honor. And I guess I
24 would submit on that.

25 THE COURT: Thank you.

26 Do you wish to respond, Mr. Madero?

27 MR. MADERO: Yes, Your Honor. I believe a nine-year
28 gap actually only cuts one way, it's not cutting two ways.

1 The fact that out of nowhere Mr. Bathen makes a phone call
2 to a psychologist who helped him for some years, but it has
3 been nine years since any contact, indicates that something
4 triggered him to remember her and to give specific threats
5 that Ms. Jacobs said she took as very credible because of
6 the specificity. And she took entirely reasonable steps in
7 addressing that in upgrading her security system and making
8 sure the hedges at her work were even cut.

9 When a doctor, a psychologist, has a patient for
10 some amount of years and is familiar with that person and
11 then takes these steps in response, and in light of the
12 other aspects of today's society where she talks about lone
13 wolves and the like, there's nothing in Penal Code Section
14 422 that would demand that she wait until he's on her front
15 door.

16 He gave specific threats about lighting her on
17 fire, raping her and going after her daughter, that it was
18 entirely reasonable for her to be afraid and were credible
19 threats at the time.

20 THE COURT: All right.

21 MR. MADERO: Thank you, Your Honor.

22 THE COURT: The Court has heard the evidence in the
23 case. Based on the evidence that has been presented, the
24 Court has a strong suspicion of the crimes as alleged in
25 Counts 1, 2 and 3 were committed by the defendant -- were
26 committed and that they were committed by the defendant.
27 He'll be held to answer on an Information on --

28 THE CLERK: The arraignment on the Information date is

1 December 18th, Monday, at 1:30, Department 16.

2 THE COURT: December 18th.

3 MR. THEULE: And, Your Honor, Mr. Bathen lives on the
4 east coast. If we could possibly have the Complaint deemed
5 an Information now and have him be arraigned today.

6 THE COURT: Okay, I don't have any problem with that if
7 that's the practice in San Diego.

8 MR. MADERO: That is generally what we do, Your Honor.

9 THE COURT: Okay. All right, the Information will be
10 deemed filed then. And Mr. Theule?

11 MR. THEULE: Yes, Your Honor. Based on the Court's
12 decision today, at this point we acknowledge the fact that
13 the Complaint has been deemed the Information. We would
14 waive further reading and advisal of rights, enter not
15 guilty pleas to any and all allegations that he has been
16 held to answer on. And we would like to give time waiver
17 dates for readiness conference, if possible.

18 THE COURT: What dates?

19 THE CLERK: They're showing the 30th day is
20 January 3rd, so anytime after that you can waive time. It's
21 a Wednesday. So Wednesdays.

22 THE COURT: January 3rd did you say? January 3rd?

23 THE CLERK: So any time after that they can waive time.
24 Wednesdays, that's for superior readiness.

25 MR. THEULE: Could we have January 12th?

26 THE COURT: January 12th.

27 MR. THEULE: With a time waiver.

28 THE COURT: Okay. What do they call that down here,

1 pretrial?

2 THE CLERK: That would be the superior readiness.

3 THE COURT: Just called readiness?

4 THE CLERK: Yes.

5 THE COURT: Okay. January 12th for readiness. Do we
6 give the trial date?

7 THE CLERK: Counsel, that's a Friday. And I believe
8 they're on Wednesdays.

9 MR. MADERO: I believe readinesses are handled five
10 days a week.

11 THE CLERK: Okay.

12 MR. THEULE: Yeah.

13 THE CLERK: 8:30, Your Honor.

14 THE COURT: And trial date?

15 THE CLERK: So we're showing that the jury trial date
16 is January 23rd with ten days left.

17 THE COURT: January 23rd for trial. Both of those set
18 at 8:30 in Department --

19 THE CLERK: So the jury trial is the 23rd of January at
20 1:30, Department 16. The readiness is January 12th at 8:30,
21 Department 14.

22 THE COURT: Fourteen?

23 THE CLERK: Yes, that's where they do the readiness
24 calendar.

25 THE COURT: You're ordered back on January 12th, 8:30,
26 in Department 14. Then January 23rd, 1:30, Department 16.

27 THE CLERK: And motions due December 20th.

28 THE COURT: December 20th for the filing of all

1 motions. Is that a motions date or the filing?

2 THE CLERK: That's the cut-off date for motions.

3 THE COURT: Cut-off date for motions is December 20th.

4 MR. MADERO: Your Honor, at this time would you like me
5 to sign the Complaint which has now been deemed the
6 Information?

7 Permission to enter the well.

8 THE COURT: You may.

9 MR. MADERO: Thank you.

10 THE COURT: And exhibits. Does the court keep the
11 exhibits?

12 THE CLERK: Counsel just explained we do.

13 THE COURT: All right, we are in recess.

14 MR. THEULE: Thank you, Your Honor.

15 MR. MADERO: Thank you, Your Honor.

16

17 (End of today's proceedings)

18

19

20

21

22

23

24

25

26

27

28



COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	)	FROM SAN DIEGO COUNTY
)	
PLAINTIFF AND	)	HON. STEPHANIE SONTAG
RESPONDENT,)	
	)	COURT OF APPEAL
VS.	)	NO. D074538
)	
	)	CASE NO. SCS294342
BENJAMIN BATHEN,)	
)	
DEFENDANT AND)	
APPELLANT.	)	MASTER INDEX
_____)	

REPORTER'S CERTIFIED TRANSCRIPT
VOLUME 0 OF 7
(PAGES 1 THROUGH 12/100)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST "A" STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	BENJAMIN BATHEN
AND APPELLANT:	IN PROPRIA PERSONA

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
OFFICIAL COURT REPORTER

CHRONOLOGICAL INDEX OF WITNESSES

	PAGE	LINE	VOL
GARY JACOBS - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.213	6	3
CROSS BY MS. FREEZE . . . . .	.221	6	3
REDIRECT BY MS. SOMERVILLE . . . . .	.230	10	3
CAROLYN FRANCES JACOBS - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.234	2	3
CROSS BY MS. FREEZE . . . . .	.268	2	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.287	15	3
REDIRECT BY MS. SOMERVILLE . . . . .	.301	8	3
RE CROSS BY MS. FREEZE . . . . .	.306	6	3
GREGORY GAIN - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.309	26	3
CROSS BY MS. FREEZE . . . . .	.349	14	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.380	8	4
REDIRECT BY MS. SOMERVILLE . . . . .	.396	19	4
RE CROSS BY MS. FREEZE . . . . .	.401	22	4
DONALD HOLMES - PEOPLE'S WITNESS			
CROSS BY MS. FREEZE . . . . .	.434	10	4
REDIRECT BY MS. SOMERVILLE . . . . .	.457	19	4
MANFRED SCHENK - DEFENSE WITNESS			
DIRECT BY MS. FREEZE . . . . .	.470	10	4
CROSS BY MS. SOMERVILLE . . . . .	.490	4	4
REDIRECT BY MS. FREEZE . . . . .	.507	24	4

ALPHABETIC INDEX OF WITNESSES

	PAGE	LINE	VOL
GAIN, GREGORY - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.309	26	3
CROSS BY MS. FREEZE . . . . .	.349	14	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.380	8	4
REDIRECT BY MS. SOMERVILLE . . . . .	.396	19	4
RECORD BY MS. FREEZE . . . . .	.401	22	4
HOLMES, DONALD - PEOPLE'S WITNESS			
CROSS BY MS. FREEZE . . . . .	.434	10	4
REDIRECT BY MS. SOMERVILLE . . . . .	.457	19	4
JACOBS, CAROLYN FRANCES - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.234	2	3
CROSS BY MS. FREEZE . . . . .	.268	2	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.287	15	3
REDIRECT BY MS. SOMERVILLE . . . . .	.301	8	3
RECORD BY MS. FREEZE . . . . .	.306	6	3
JACOBS, GARY - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.213	6	3
CROSS BY MS. FREEZE . . . . .	.221	6	3
REDIRECT BY MS. SOMERVILLE . . . . .	.230	10	3
SCHENK, MANFRED - DEFENSE WITNESS			
DIRECT BY MS. FREEZE . . . . .	.470	10	4
CROSS BY MS. SOMERVILLE . . . . .	.490	4	4
REDIRECT BY MS. FREEZE . . . . .	.507	24	4

INDEX OF EXHIBITS IDENTIFIED

	PAGE	LINE	VOL
1 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL DATED JUNE 4, 2017	251	18	3
1A TRANSCRIPT OF AUDIO RECORDING FROM JUNE 4, 2017	251	22	3
2 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL, DATED JULY 3, 2017	259	15	3
2A TRANSCRIPT OF AUDIO RECORDING FROM JULY 3, 2017	259	18	3
3 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL, DATED JULY 5, 2017	262	6	3
3A TRANSCRIPT OF AUDIO RECORDING DATED JULY 5, 2017	262	7	3
4 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH UNKNOWN MALE AND UNKNOWN FEMALE DATED SEPTEMBER 16, 2017	317	25	3
4A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 4	317	26	3
5 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH BAILBOND REPRESENTATIVE DATED SEPTEMBER 16, 2017	318	22	3
5A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 5	318	23	3
6 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH EMILIO SANCHEZ BAIL BOND REP. DATED SEPTEMBER 17, 2017	319	6	3
6A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 6	319	9	3

7	AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH GERALD, BAIL BOND REPRESENTATIVE DATED 9/17/17	319	21	3
7A	TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 7	319	24	3
8	SUBSCRIBER INFORMATION SHEET FROM T-MOBILE, ONE PAGE	324	9	3
9	SUBSCRIBER INFORMATION SHEET FROM T-MOBILE, CONTINUATION OF COURT'S EXHIBIT 8, ONE PAGE	328	1	3
10	CALL DETAIL RECORD OF 617-992-4648 FROM JUNE 4, 2017, ONE PAGE	329	3	3
11	CALL DETAIL RECORD OF 617-992-4648 FROM JUNE 4, 2017, ONE PAGE	331	16	3
12	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 3, 2017, ONE PAGE	332	9	3
13	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 3, 2017, ONE PAGE	332	24	3
14	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 5, 2017, ONE PAGE	333	9	3
15	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 5, 2017, ONE PAGE	333	24	3
16	GOOGLE MAP TITLED "TOWER HITS" FROM 6/1/17-7/6/17, ONE PAGE	336	11	3
17	GOOGLE MAP, TRACKING PHONE CALLS OF 617-992-4648 ON JULY 5, 2017, ONE PAGE	346	21	3

18	GOOGLE MAP, TRACKING PHONE CALL OF 617-992-4648 ON JULY 5, 2017 (ONE PAGE)	348	5	3
19	ORIENTATION SLIDE TITLED "CELL SITE ANALYSIS (617) 992-4648, JUNE 1, 2017 TO JULY 7, 2017," ONE PAGE	422	28	4
20	TOWER FREQUENCY CHART, ONE PAGE	423	14	4
21	PAGE TITLED "NO. 1 TOWER CONNECTION WITH MAP AT 9211 OLD KEEN MILL ROAD, BURKE, VA," ONE PAGE	425	12	4
22	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 6626 GREEN ASH COURT, SPRINGFIELD, VA, ONE PAGE	427	20	4
23	CHART TITLED "NO. 1 TOWER CONNECTION USAGE - DATE & DAY OF WEEK," ONE PAGE	428	10	4
24	PAGE TITLED, "NO. 2 TOWER CONNECTION" WITH MAP AT 1003 "K" STREET NW, WASHINGTON, DC, ONE PAGE	428	28	4
25	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 1201 "I" STREET NW, WASHINGTON, DC, ONE PAGE	429	23	4
26	CHART TITLED "NO. 2 TOWER CONNECTION USAGE - DATE & DAY OF WEEK," ONE PAGE	429	27	4
27	PAGE TITLED "NO. 3 TOWER CONNECTION" WITH MAP AT 9501 OLD BURKE LAKE ROAD, BURKE, VA, ONE PAGE	430	15	4

28	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 9501 OLD BURKE LAKE ROAD, BURKE, VA, ONE PAGE	431	4	4
29	CHART TITLED "NO. 3 TOWER CONNECTION USAGE - DATE & DAY OF WEEK, ONE PAGE	431	13	4
30	PAGE TITLED "NO. 4 TOWER CONNECTION" WITH MAP AT 1125 N. PATRICK HENRY DR., ARLINGTON, VA, ONE PAGE	431	24	4
31	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 1125 N. PATRICK HENRY DR., ARLINGTON, VA, ONE PAGE	432	15	4
32	CHART TITLED "NO. 4 TOWER CONNECTION USAGE - DATE AND DAY OF WEEK," ONE PAGE	432	22	4
33	CUSTODY OF RECORD DOCUMENT FROM T-MOBILE	469	5	4
34	COMPACT DISK CONTAINING CALL DETAIL RECORDS AND BILLING INFORMATION	469	10	4
35	ONE-PAGE PRINTOUT OF EMAIL DATED APRIL 28, 2008	288	3	3
36	ONE-PAGE PRINTOUT OF EMAIL DATED JULY 1, 2008	289	14	3
37	ONE-PAGE PRINTOUT OF EMAIL DATED SEPTEMBER 1, 2008	291	5	3
38	AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH ALL STAR BAIL BOND REPRESENTATIVE HANK	382	17	4

38A	TRANSCRIPT FOR AUDIO RECORDING, EXHIBIT 38	382	18	4
39	ONE PAGE TITLED "CELL TOWER COVERAGE CELL PHONE 617-992-4648" WITH MAP	485	24	4

INDEX OF EXHIBITS RECEIVED

	PAGE	LINE	VOL
1	511	12	4
1A	511	12	4
2	511	12	4
2A	511	12	4
3	511	12	4
3A	511	12	4
4	511	12	4
4A	511	12	4
5	511	12	4
5A	511	12	4
6	511	12	4
6A	511	12	4
7	511	12	4

7A	.....511	12	4
8	.....511	12	4
9	.....511	14	4
10	.....511	14	4
11	.....511	14	4
12	.....511	14	4
13	.....511	14	4
14	.....511	14	4
15	.....511	14	4
16	.....511	14	4
17	.....511	14	4
18	.....511	14	4
19	.....511	14	4
20	.....511	14	4

21	.....511	14	4
22	.....511	14	4
23	.....511	14	4
24	.....511	14	4
25	.....511	14	4
26	.....511	14	4
27	.....511	14	4
28	.....511	14	4
29	.....511	14	4
30	.....511	14	4
31	.....511	14	4
32	.....511	14	4
33	.....511	14	4
34	.....511	14	4

38	511	19	4
39	513	4	4

(Pages 13 through 100 are utilized for block numbering purposes. The next page number is 101 in Volume 1. Nothing omitted.)

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	)	FROM SAN DIEGO COUNTY
)	
PLAINTIFF AND	)	HON. STEPHANIE SONTAG
RESPONDENT,)	
	)	COURT OF APPEAL
VS.	)	NO. D074538
)	
	)	CASE NO. SCS294342
BENJAMIN BATHEN,)	
)	
DEFENDANT AND	)	MOTIONS IN LIMINE
APPELLANT.)	
_____)	

REPORTER'S CERTIFIED TRANSCRIPT
JUNE 11, 2018
VOLUME 1 OF 7
(PAGES 101 THROUGH 142)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST "A" STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	BENJAMIN BATHEN
AND APPELLANT:	IN PROPRIA PERSONA

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
OFFICIAL COURT REPORTER

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

DEPARTMENT 15

HONORABLE STEPHANIE SONTAG, JUDGE

THE PEOPLE,)	
)	
PLAINTIFF,)	
	)	CASE NO. SCS294342
VS.)	
)	
BENJAMIN BATHEN,)	
)	
DEFENDANT.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MONDAY, JUNE 11, 2018

A P P E A R A N C E S

FOR THE PLAINTIFF: SUMMER STEPHAN
 DISTRICT ATTORNEY
 BY: CHERIE SOMERVILLE
 DEPUTY DISTRICT ATTORNEY
 333 "H" STREET, SUITE 4000
 CHULA VISTA, CALIFORNIA 91910

FOR THE DEFENDANT: THE LAW OFFICE OF ALICIA C. FREEZE, APC
 BY: ALICIA C. FREEZE
 (RETAINED COUNSEL)
 7676 HAZARD CENTER DRIVE, SUITE 500
 SAN DIEGO, CALIFORNIA 92108

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
 OFFICIAL COURT REPORTER

1 Chula Vista, California; Monday, June 11, 2018

2 -- 000 --

3 MS. SOMERVILLE: Good afternoon, Your Honor.

4 MS. FREEZE: Good afternoon, Your Honor.

5 THE CLERK: This is the case of People versus Benjamin Lee
6 Bathen, case SCS294342.

7 MS. SOMERVILLE: Good afternoon, Your Honor. Cherie
8 Somerville for the People.

9 MS. FREEZE: Good afternoon, Your Honor. Alicia Freeze on
10 behalf of Mr. Bathen, who is present before the Court to my
11 left out of custody on bond.

12 THE COURT: All right. And we are here for trial. This
13 Information was filed today. Do we need an arraignment on the
14 Amended?

15 MS. SOMERVILLE: Yes, Your Honor.

16 THE COURT: Okay.

17 MS. FREEZE: Oh, yes, Your Honor. I think there was an
18 issue with the dates.

19 Your Honor, I did have an opportunity to review the
20 Information. My client's true name and date of birth does
21 appear on the Complaint. Waives formal reading. Enters pleas
22 of not guilty and requests continued representation by my
23 office.

24 THE COURT: Is that by appointment?

25 MS. FREEZE: No, Your Honor. Retained.

26 THE COURT: Not guilty plea will be entered. Denial of all
27 the allegations.

28 I had a chance to go through and read the in limine

1 motions.

2 How long is this trial?

3 MS. SOMERVILLE: Your Honor, that's the one thing that I
4 wanted to discuss with the Court is that I did bring this up
5 with presiding as well before we got sent here.

6 The trial itself should be four days at the most,
7 including, I think, jury selection; however, on Wednesday of
8 this week, I have a day-long preliminary hearing. It was my
9 request that -- and I did let defense counsel know this ahead
10 of time -- that we go dark on Wednesday so that I can do the
11 preliminary hearing. I assume that will probably be before we
12 start any testimony in the case given jury selection and the
13 motions in limine.

14 THE COURT: All right. Would that inconvenience you,
15 Ms. Freeze?

16 MS. FREEZE: No, Your Honor. That's fine.

17 THE COURT: Okay. So, ideally, pick a jury tomorrow and
18 then start testimony on Thursday?

19 MS. SOMERVILLE: Yes.

20 THE COURT: Okay. That will be fine with me. One of the
21 reasons I decided to discuss with a chambers conference --
22 unless either side would like one -- is because given the
23 nature of the in limine motions, I just wanted to go through
24 them to see if we needed a 402 hearing. And if we do, how
25 that's going to affect the jury selection.

26 So there's an explanation about why I thought I'd dive
27 right into the in limine motions, unless there's something
28 anybody has that they want to discuss first?

1 MS. SOMERVILLE: I don't think so.

2 MS. FREEZE: No, Your Honor.

3 THE COURT: Ms. Freeze.

4 MS. FREEZE: No, Your Honor. I think that -- I think
5 that's a good idea, just jumping right in, especially since I
6 do have my expert here. I attached his CV and his report,
7 Mr. Schenk. So he's here. He's present if we wanted to do
8 anything this afternoon or at least the Court -- we can clear
9 his schedule or what have you. I just wanted him to be here
10 given Ms. Somerville's going dark on Wednesday and kind of sum
11 up everybody's scheduling issues.

12 THE COURT: And my understanding is his testimony would be
13 in response to the cellular data?

14 MS. FREEZE: Correct. It would be part of my motion --
15 well, my request would be a -- my motion limited, excluded and
16 having a 402 hearing.

17 THE COURT: But the 402 hearing wouldn't be with him. That
18 would be a 402 hearing -- would be -- if I decide to go
19 forward, the 402 would be on the People's proposed expert, not
20 on your expert who would just be here to testify in opposition
21 to that. I wouldn't take testimony from your expert and
22 decide. Okay? The plaintiff's expert.

23 MS. FREEZE: I understand that, Your Honor. And I wanted
24 him here just in case the Court had any questions or anything
25 like that.

26 THE COURT: And he's welcome to stay. This is an open
27 courtroom.

28 It is unlikely, because we're talking about differences in

1 expert opinion -- or actually, some of this is just factual
2 matters, is my understanding -- correct? -- that it's getting
3 the pings from the cell phones, making out where the cell
4 phones are and just getting addresses, certain pertinent
5 addresses, and seeing whether it's within the range? That's
6 kind of my understanding of the cell phone --

7 MS. SOMERVILLE: Correct.

8 THE COURT: -- expert. So it's kind of quasi expert.

9 MS. FREEZE: Right. Their position and then our position,
10 the expertise of each. Absolutely, Your Honor.

11 THE COURT: Right, which sounds to me -- I'm going to learn
12 more in your argument, but it sounds more to me about just
13 competing testimony for the jury rather than excluding
14 testimony altogether. But I haven't found the cell phone ping
15 is so extraordinary these days to have testimony about that
16 kind of cell phone data, but maybe I'm oversimplifying things.

17 So why don't I do this: Why don't we just go through the
18 motions in order; and then when we get to the cell phone,
19 we'll do everybody's -- we'll discuss everybody's motions
20 concerning the cell phone testimony.

21 So Ms. Somerville --

22 MS. SOMERVILLE: Yes, Your Honor.

23 THE COURT: -- starting with you since you're the
24 prosecutor, your motions. The first motion is to introduce the
25 jail calls made by the defendant. And you point out that you
26 have followed all the court rules by having a transcript of
27 them and have somebody to authenticate the tape-recordings.

28 MS. SOMERVILLE: Yes, Your Honor. And it's my

1 understanding Ms. Freeze also provided me with a transcript of
2 one of the calls that she transcribed as well, so I'm not
3 objecting to that, obviously, since we listened to that call as
4 well. Our investigator, Greg Gain, can lay the foundation for
5 all the jail calls that we intend to present.

6 And so the Court is aware, I have four that I will be
7 presenting. I believe there was a total of 13.

8 THE COURT: Okay. All right. Any opposition?

9 MS. FREEZE: No, Your Honor.

10 THE COURT: Okay. It -- they will be admitted with the
11 appropriate foundation. And you're saying you are not
12 objecting to Ms. Freeze's introduction of that particular phone
13 call?

14 MS. SOMERVILLE: No. That's fine.

15 THE COURT: That being whatever one you agree she's
16 introducing since I don't know. But are you both willing to
17 stipulate now, so I don't forget, that the audio recordings
18 don't have to be reported, that we'll just append the
19 transcript to the court reporter's transcript?

20 MS. SOMERVILLE: Yes.

21 THE COURT: Transfer the calls rather than report it?

22 MS. FREEZE: Yes, Your Honor.

23 THE COURT: All right. So that -- and to exclude
24 witnesses.

25 And I think -- so just for purposes for you, Robert, A is
26 granted.

27 And B, I'm going to grant, that's to exclude witnesses.
28 And both sides have requested that; so that will be granted as

1 well.

2 So I don't think there were any other motions,
3 Ms. Somerville.

4 So, Ms. Freeze, the general motions, 1A, I've already
5 granted.

6 1B, any objection, Ms. Somerville? That's to admonish
7 witnesses not to discuss their testimony.

8 MS. SOMERVILLE: Oh, no, Your Honor.

9 THE COURT: I will ask you to do that, please.

10 C, do you have any witnesses that were not provided to
11 Ms. Freeze?

12 MS. SOMERVILLE: No.

13 THE COURT: Okay. I'm going to grant that. Obviously, in
14 rebuttal or something like that, should there be an issue, we
15 can address that at that time.

16 D, to include any evidence previously requested by the
17 defense through the discovery process which was not provided.
18 Any objection?

19 MS. SOMERVILLE: No. There is one -- so the Court is
20 aware, one body-worn camera video that I need to burn and
21 provide to Ms. Freeze, but it appears that it is just capturing
22 the audio recordings of the threats that are at issue in this
23 case. And we do already have those turned over in discovery.
24 But I will get that body-worn camera video done when we leave
25 court.

26 THE COURT: Is there any indication that's going to delay
27 the trial in any way?

28 MS. FREEZE: I don't think so, Your Honor.

1 Ms. Somerville provided me a report that looks like it was
2 generated last July by an Officer Lopez, and I just noticed
3 that it had body-worn camera. Last week, I noted that there
4 was body-worn camera on another report and she was able to get
5 it to me within a couple days; so -- and we actually ended up
6 trailing the case to today because of some scheduling and what
7 have you. So I think it should be pretty quick.

8 MS. SOMERVILLE: I should be able to get it this evening.

9 THE COURT: Excellent. Okay.

10 So all the 1A through D is granted.

11 Roman numeral II is to preclude anybody from using the
12 word "victim" and the -- in the context of the person, should
13 this be proved, the person that was harmed by the threats.

14 Ms. Somerville?

15 MS. SOMERVILLE: I don't tend to use that term when I --
16 but sometimes it slips out. That's my only concern about that.
17 But generally, I refer to everyone by their names. Just -- I
18 think it's -- it's better practice to do that.

19 THE COURT: That's especially in -- well, especially not,
20 the -- I tend to agree that it's best not to use labels. I
21 mean I usually -- unless I'm reading something that I have to
22 do, I will probably -- and is it Bathen or Bathen?

23 MS. FREEZE: Bathen, Your Honor.

24 THE COURT: Bathen. Mr. Bathen. I would ask you
25 anything --

26 MS. FREEZE: I'm sorry?

27 THE COURT: Feel free to ask you.

28 MS. FREEZE: It is Bathen, Your Honor.

1 THE COURT: So that's why I asked.

2 MS. FREEZE: My head is swimming with information. Sorry.

3 THE COURT: Okay. Mr. Bathen. I refer to Mr. Bathen as
4 "Mr. Bathen," not as "defendant" usually. And so I refer to
5 people by name.

6 So I'm granting the motion, understanding that
7 occasionally that -- if it appears that there's an inadvertent
8 slip, we'll just go on, that I won't find it a violation,
9 obviously.

10 You won't, Ms. Somerville. But if it looks like you're
11 intentionally using the word "victim," we'll talk about it
12 again. We'll use names.

13 So Roman numeral II is granted.

14 And while we're talking about it, Ms. Freeze, I don't
15 think you have tried a case before me.

16 MS. FREEZE: I think I've had some prelims, but not a jury
17 trial.

18 THE COURT: I do try to keep things fairly formal, meaning
19 that when you're addressing anyone, it's either first and last
20 names or whatever, Mister, Doctor, whatever it's going to be,
21 not just first names. We can't control witnesses. But as far
22 as your questions and referring to people in front of the jury,
23 I prefer that you do that.

24 MS. FREEZE: Thank you, Your Honor.

25 THE COURT: Roman numeral III, motion No. 3 is to exclude
26 the prosecution from conferring with witnesses once
27 cross-examining has begun.

28 Ms. Somerville.

1 MS. SOMERVILLE: I don't have a problem with that. I mean
2 I generally don't talk to them about their testimony because
3 that's not permissible; so that's fine.

4 THE COURT: Yeah. I mean, I think the key here being to
5 preclude you from conferring with witnesses about the testimony
6 and I would grant that. But sometimes the witnesses, you might
7 have spoken with them or something, and they want to talk to
8 you about scheduling, when they need to be back or whatever, no
9 matter what I said, they might double-check with you and so I
10 don't want it to be something where you are precluded from
11 saying anything. But no, you can't talk about their testimony.

12 MS. SOMERVILLE: That's fine.

13 THE COURT: Yeah.

14 MS. SOMERVILLE: Thank you. So that's granted as modified.

15 Okay. Roman numeral IV. This gets into the cell site
16 evidence. And honestly, Ms. Freeze, we're going to have -- I
17 think if the prosecution's witness is permitted to testify,
18 they're going to testify about their searches, what they've
19 obtained. They're going to map it out.

20 What is your objection if the foundation is laid?

21 MS. FREEZE: Thank you, Your Honor.

22 So this -- just today -- well, I was provided by
23 Ms. Somerville a document. I guess it would be what their
24 expert would testify to.

25 Just to kind of give the Court an idea of where I was when
26 I prepared the motions in limine is that I had provided
27 Ms. Somerville our -- a letter about my defense expert, his CV
28 and what he was going to testify to in the abundance of being

1 forthright and what have you. It's just this afternoon that I
2 was provided an actual write-up of what their expert would be
3 testifying to.

4 Ms. Somerville did indicate to me I think Friday afternoon
5 or maybe sometime over the weekend that she would have someone
6 be testifying from her office in response to what I had
7 presented to them.

8 Up until this weekend and until today, I was under the
9 impression that their -- that their investigator -- as you can
10 tell, my moving papers starting on Page 10. I'm specifically
11 talking about Supervising District Attorney Investigator
12 Gregory Gain, because I was under the impression that perhaps
13 he would consider their expert. And that's why I cite to
14 Evidence Code 720, and I cite to that because I don't believe
15 that they had presented Investigator Gain as an expert.

16 So now that I see that they actually have an expert, my
17 argument then would not be so much about Investigator Gain
18 testifying; and my argument would still stand because I
19 understand he is going to be testifying. So I wouldn't want
20 him testifying as to the summary of everything, because I
21 don't believe he's an expert as it pertains to cell phone
22 tower analysis.

23 So that would be -- that was the movement of -- that's the
24 foundation for my motions in limine is that Investigator Gain
25 isn't an expert as it pertains to --

26 THE COURT: Okay. So as it stands now, with the new
27 information you obtained, do you have an objection to this
28 evidence?

1 MS. FREEZE: I mean I still do. I still would -- I would
2 still have the Court look to my moving papers as it pertains to
3 our argument with regards to why this methodology should not
4 be -- shouldn't be even given to the jury because I believe
5 that we need to know the detail regarding the relevance of the
6 location of cell phone towers. The methodology, the reasoning
7 for this estimated cell tower range, we don't have any of that
8 information that pertains --

9 THE COURT: And frankly, you're not making sense, which
10 is -- not that you are not making sense, I'm not comprehending
11 what you're saying.

12 So we're going to have somebody. Before they come to any
13 conclusions, they're going to testify as to the foundation as
14 to the information they've gotten, the means they've gotten
15 the information, the -- their expertise in using this
16 information and what this information is going to tell the
17 jury about this particular cell phone and the location, the
18 general location.

19 Now, I would ordinarily say, okay, you have this big
20 objection. Let's do a 402 hearing, except that this is such
21 customary testimony that -- these days that I don't find it
22 extraordinary to have somebody come in with this information
23 and be able to give the foundation.

24 If your expert is going to come in and say these are
25 unreliable because X, Y, Z, I mean that's absolutely fine.
26 But I don't see why it precludes the testimony that the People
27 are relying on to begin with.

28 MS. FREEZE: And I understand, Your Honor. I think that

1 what I'm trying to put forth in my moving papers is that
2 this -- if the People put on this witness without showing the
3 reliabilities and the relevance in the forefront -- so what I'm
4 trying to say is it's the People's burden and it's the Court as
5 a gatekeeper, and that's why I write and I cite to some case
6 law in my moving papers with regards to what can be admitted to
7 or shown to the jury; right? And so it would be extremely
8 prejudicial, our argument would be *Daubert*.

9 THE COURT: And I reject that. So just out of hand, you're
10 saying that it's not expert testimony pursuant to *Daubert* or
11 *Daubert*, however. Different people pronounce it differently.

12 MS. FREEZE: So our argument, it would be misleading and
13 prejudicial to even have the jury hearing this because it's our
14 position -- and our expert would be explaining to the Court
15 what they're relying on and their historical analysis is not in
16 line with the scientific community. And so what our argument
17 is that before it even goes to the jury and it's a battle of
18 the experts, we should deal with that at the forefront that it
19 is what is actually admitted to the jury, what the jury
20 actually hears is not prejudice.

21 THE COURT: I understand what you're saying. I'm just
22 saying this is not an outlier. You might have an expert and
23 you might be persuasive and have science on his side that even
24 throw out this cell phone analysis. But to have a whole 402
25 hearing on something that is so customary seems to me a little
26 extreme.

27 MS. FREEZE: And I certainly understand that, Your Honor.
28 I think what I'm trying to portray, and perhaps I'm not

1 articulating very well, is that their -- our position is that
2 the People's expert and -- granted, like I said, up until just
3 recently I was under the impression it was Investigator Gain.
4 So I'm thinking this guy doesn't have any expertise.

5 But now I've been handed a CV. So my position is a little
6 bit different, given that although I'd still reiterate that
7 when Investigator Gain does testify that he can't testify to
8 these -- to any type of expertise.

9 But in that, our position is that their historical
10 analysis, what they -- how they are going to present it to the
11 jury is not in line with the scientific community; so it needs
12 to be addressed before the jury gets it, and that's our
13 position.

14 And obviously, Your Honor, I obtained the report from my
15 expert. I have been very forthright with Ms. Somerville by
16 providing her a detailed letter about what my expert would be
17 testifying to.

18 So, with that, Your Honor, I'd submit.

19 THE COURT: Are you trying to do specific addresses where
20 the cell phones are? Is that --

21 MS. SOMERVILLE: Well, what happened -- so there are two
22 addresses that are relevant -- frankly, the whole area is
23 relevant because Mr. -- I mean I don't think there's any
24 dispute about where Mr. Bathen lives. He lives in Arlington,
25 Virginia. All the cell phone -- and he works in Washington,
26 D.C. All the cell phone tower records include addresses for
27 the towers not even included about the mapping, and those are
28 all in Washington, D.C. and West Virginia -- excuse me,

1 Virginia. The two addresses that are on there that we've
2 identified are his home address and also his workplace because
3 he gives his workplace that has an address on "I" Street in
4 Washington, D.C.

5 Basically the mapping shows that a couple of the calls, I
6 believe it's the 3rd of July, the 5th of July, are in the
7 vicinity of a sector of a tower that would be in the area near
8 where his work is. And so I mean that's it. And --

9 THE COURT: Not a precise location.

10 MS. SOMERVILLE: No. I mean I don't think you can say
11 someone was at this corner at this time. I don't think that's
12 possible unless you had an eyewitness.

13 And just one other thing just so the Court is aware, yes,
14 I did provide Ms. Freeze with a CV from of an expert from our
15 office today, but I didn't receive the fact that they were
16 getting an expert to testify about this and, you know, all of
17 his conclusions until last week.

18 So I've kind of been scrambling to find someone. I didn't
19 know if anyone would be available from our office. Donald
20 Holmes, who does testify regularly for us about just
21 general -- how cell towers work and how cell phones connect
22 and networks, was off the last two days. The last week I was
23 sick during one day of the week as well.

24 So he has now said I can be available to come in and
25 testify. And he's not going to go into the records. Mr. Gain
26 from our office is the one who just put the -- got the search
27 warrant, put the information into the tracker. It populates
28 it via latitude, longitude and Google maps. He can explain

1 that.

2 And I just wanted Mr. Holmes to come in and do a general
3 overview for the jury, this is how networks work, this is how
4 we have towers, here are the sectors, just very basic; so --

5 THE COURT: Okay. And so your expert is going to testify
6 that this cell tower information is useless?

7 MS. FREEZE: Well, yes, Your Honor. And also there's
8 actually issues with the -- where the actual cell tower is
9 located. One of the -- part of the search warrant that was
10 obtained and Investigator Gain kind of prepares a summary in
11 his report which was turned over about the cell tower location,
12 and there aren't any latitude or longitude that was associated
13 with that particular tower. And, in fact, Investigator Gain
14 follows up with T-Mobile and never gets back any information.

15 My expert is going to testify that that tower doesn't even
16 exist. I mean if FCC -- he's looked on the FCC, and it
17 doesn't even exist. In addition, Your Honor, just briefly to
18 piggyback on what Ms. Somerville had said with regards to the
19 addresses in response to Your Honor's question, there is no --
20 with regards to where my client works, that information is
21 pulled from the jail calls and we've moved past this. Those
22 are admitted. That's fine.

23 But he doesn't give an address of where he works. He
24 tells -- he just says the company. And so if you Google the
25 company, you will get there's several offices in the East
26 Coast area. So it's an assumption to a certain extent of
27 where exactly he's working, right.

28 Because he does say to the bail bond companies, I work for

1 this company, right. This is what I do. I'm on the East
2 Coast. But he doesn't give an address. So it could be
3 anywhere in the East Coast, right.

4 And then with regards to his address, there's no
5 documentation of exactly where he resides. There's a mention
6 of it.

7 THE COURT: Facebook or something.

8 MS. FREEZE: On a jail call. But, in fact, with regards to
9 where he was served with the warrant and where he was served
10 with the restraining order, it's a different address. So
11 there's really no documentation at all whatsoever of my
12 client's actual address, except for a jail call one time that
13 he mentions to a bail agent.

14 So I mean with regard -- so I'm just saying -- so it's not
15 simple. There's a lot of layers with regards to the cell
16 phone stuff.

17 And quite honestly, I've learned a lot. It is very
18 complicated. But with regards to latitude, longitude, where
19 these cell phone towers are, how the People are relying on
20 these towers and perhaps where my client is in relation to the
21 towers and all of that, they don't provide really the
22 methodology of where they say Investigator Gain types some
23 stuff into this tower tracker and it generates things, but
24 that's all they show.

25 THE COURT: Well, they're going to have to show the
26 reliability of the tower tracker and what that is.

27 MS. FREEZE: Right.

28 THE COURT: That's all got to be foundation before he can

1 say anything about what comes out. He has to say what he's
2 putting it into.

3 I mean it just sounds to me, Ms. Freeze, that we have
4 people with different opinions about the usefulness and
5 reliability of these cell phone towers, and it sounds like you
6 have some information that will impeach the witness if they
7 try to rely on these things that you can factually contradict,
8 if there is no such, you know, identify a tower that doesn't
9 exist. So you have some great cross-examination.

10 You have your own expert to come in. But I don't know
11 that you have me precluding the People from introducing that
12 evidence, which is what you're asking for. You're saying
13 trust my expert, don't trust their information. And
14 ultimately it's for the jury to decide.

15 MS. FREEZE: And I certainly understand that, Your Honor.
16 And like I said, what I'm trying to portray to the Court is
17 that there's some -- as the Court being like, as I mentioned in
18 the moving papers, gatekeeper of what can be admitted to the
19 jury, and we certainly don't want to prejudice the jury, we
20 don't want to have the prosecution and expert -- and I put this
21 on my moving papers saying admitting evidence regarding cell
22 phone towers and, you know, where this person is and where this
23 person is located to this particular tower and where this
24 person may or may not live and be admitted to the jury, which
25 could prejudice to the jury and say, well, it must be him
26 without really explaining with the fact that what they're
27 relying on is not -- not what the scientific community relies
28 on when it comes to these cell phone tower analysis.

1 And that's why I'm requesting prior -- prior to the jury
2 hearing it, because we don't want to confuse or mislead the
3 jury and run afoul to Section 352.

4 THE COURT: Okay. You know, I'm going to take that risk,
5 as I said, because this is notwithstanding your expert who
6 might educate me otherwise when he testifies. This is not out
7 of the ballpark kind of evidence. This is not a new theory,
8 it's not new evidence.

9 If there's somebody who can speak to it, the fact that we
10 have Mr. Bathen who has identified an address as his home in a
11 jail call, that's plenty for the People to use. And then if
12 he's identified where he works and one of the offices is near
13 where he lives and the People want the jury to assume or the
14 expert to assume that's where he is, I think that's -- that
15 she can do that.

16 And then again, you know, I don't doubt your ability to
17 cross-examine and present your own evidence, and ultimately
18 it's for the jury to decide.

19 MS. FREEZE: Well, Your Honor, with regards to the part of
20 my -- I guess starting on Page 11 with regards to just
21 Investigator Gain, now that I know of Mr. Holmes and I have his
22 information and what he's going to be testifying to in a CV, I
23 would just renew my request to exclude Investigator Gain
24 testifying specifically in any type of expert fashion.

25 Obviously he can testify about what he plugged in and what
26 have you. But I don't think that he's -- unless I
27 misunderstood his qualifications, but I could be
28 misunderstanding Investigator Gain's qualifications.

1 I don't believe that he specifically can be testifying as
2 to explaining cell phone towers and I don't believe he has
3 that expertise. So I would just -- I would just renew that --
4 that motion to exclude.

5 MS. SOMERVILLE: But he lays out in his report basically
6 what he did and how the tracker works. I mean I think he
7 should be able to testify about that, testify, you know, about
8 what he does for a living, basically how long he's been -- all
9 those things that would basically allow him to say I've used
10 this program, I know how it works and here's what I came up
11 with. So --

12 THE COURT: Well, it sounds --

13 MS. SOMERVILLE: Sorry.

14 THE COURT: No, that was me. I thought you were done.

15 It sounds to me that he is, in response to Ms. Freeze's
16 objection, that he really is more of a factual witness.

17 MS. SOMERVILLE: Correct.

18 THE COURT: This is what he did. This is what he does.
19 Why he did this. This is the information he obtained.

20 MS. SOMERVILLE: Yes.

21 THE COURT: And that's a factual witness.

22 MS. FREEZE: And that's certainly fine, Your Honor,
23 obviously. But I just -- because I reread his report a number
24 of times, and at the end of the report he makes conclusory
25 statements.

26 And so my concern is that he's going to say, based on
27 everything that I looked on this Google Earth map, that
28 Mr. Bathen was sitting here making a phone call.

1 THE COURT: I think that's the expert.

2 MS. SOMERVILLE: Right. And I mean I wouldn't ask him
3 where Mr. Bathen is. I don't --

4 THE COURT: So I think you flag the issue because I
5 understand it's going to be factual testimony. If it starts
6 going over the line, I trust you to object. And if I can't,
7 we'll do a sidebar if need be or I can rule right then.

8 MS. FREEZE: Okay. Thank you, Your Honor.

9 THE COURT: You're welcome.

10 So I think that's three, which is denied.

11 Four is voice recognition, and that is a tentative grant,
12 unless, Ms. Somerville, you have some basis for someone to
13 opine as an expert that the voices are the same other than
14 just having to say here's what everybody else does to make
15 their own determination.

16 MS. SOMERVILLE: No. And I wasn't going to ask that. But,
17 Your Honor, that was motion in limine No. 5, I think.

18 THE COURT: You are correct. It is five.

19 Did I miss four or did I --

20 MS. SOMERVILLE: Four was the cell tower.

21 THE COURT: All right. Four is granted. Thank you. No.
22 Four is denied. Five is granted.

23 But you can -- I think part of this -- I don't think it's
24 the voice recognition part. Yeah. So just voice recognition,
25 no.

26 MS. SOMERVILLE: Your Honor, I know this isn't included in
27 that. But just as in the same vein, obviously the victim will
28 testify that Ms. Jacobs -- Dr. Jacobs will testify that she

1 recognizes the voice and that -- I mean obviously not as an
2 expert, but just as a person who knows Mr. Bathen.

3 THE COURT: Yep. That is fine.

4 All right. And I don't hear any objection.

5 MS. FREEZE: Right, Your Honor. Just on five, I just --
6 because, like I said, pulling from his report he believed that
7 they were the same person based on his -- the proclivity sayin
8 "hey" at the beginning of these conversations, so I was just
9 concerned that if he testified to that, that -- like I said,
10 that the jury might think that he has some type of special
11 knowledge.

12 THE COURT: He can testify that he noticed -- he's listened
13 to all the calls and he's noticed that in both instances that
14 begin with the word "hey," that's -- you know, I don't -- might
15 be persuasive to a jury, I don't know. It's not that
16 distinctive. But I think he certainly can testify that he's
17 noticed that. That's --

18 MS. FREEZE: Right. And obviously, right, and this will
19 the jail calls and we'll have the transcript. I mean --

20 THE COURT: So simply the voice recognition part.

21 MS. SOMERVILLE: Yes.

22 THE COURT: Okay. Six, to exclude testimony regarding
23 Google search. And if I -- if I'm correct and the Google
24 search --

25 MS. FREEZE: It's actually included in -- it's actually
26 included in Ms. Somerville's moving papers, Page 7.

27 THE COURT: As a factual basis.

28 MS. FREEZE: Right. Just for -- for vision for the Court

1 because I'm a visual person. So, you know, if you can kind
2 of --

3 THE COURT: Right. But this -- I thought it -- my initial
4 reaction -- and I'll hear from both of you -- is that it gets
5 admitted not for the truth of the matter, but to show the
6 investigation, the subsequent conduct and why the investigation
7 proceeded the way it did as far as the towers, but am I wrong?
8 Not the tower, the Google search.

9 MS. SOMERVILLE: No. The Google search, yes, I was going
10 to ask Investigator Gain, did he, you know, put this phone
11 number into Google; you know, did it populate with anything.
12 Then based on that, you know, did you go forward with the
13 search warrant, get records from this company. That's in
14 regards to Investigator Gain.

15 In regards to Dr. Gary Jacobs, I was going to elicit the
16 testimony from him because it's the effect that it had on his
17 wife. Once they both listened to the first call on June 4th,
18 he also input the phone number from their records into a
19 Google search and said to his wife it comes up with Benjamin
20 Bathen, and it's at that point that she realizes, oh, my gosh,
21 this is my former client and the connection is made at that
22 point and she recognizes his voice and given their history of
23 things that have happened as well.

24 THE COURT: So let's separate the two. As far as the
25 investigator testifying, these are the steps he took in the
26 investigation. He followed up based on the information that
27 came from Google search.

28 MS. FREEZE: Right. Well, Your Honor, I think -- and I la

1 out a lot of law and case law in my moving papers. I think as
2 it pertains to Investigator Gain, I think it's hearsay as it is
3 with Mr. Jacobs.

4 THE COURT: I'm separating.

5 MS. FREEZE: Right.

6 THE COURT: I do want to talk about them separately. I'm
7 not -- I am not disputing that it's hearsay. But I'm saying
8 that it would be my intention to give the jury a limited
9 instruction where it shows why he proceeded the way he
10 proceeded.

11 MS. FREEZE: Well, Your Honor, I don't think it would be --
12 I still think it would be pure hearsay because it's being
13 offered to prove that it was Ben Bathen. I mean, I think it's
14 not effect on the listener or effect on how he proceeded with
15 his investigation. I think --

16 THE COURT: I thought it was.

17 MS. FREEZE: I mean I think it's straight hearsay because
18 he doesn't need -- all he does -- he has the phone number. So
19 he doesn't have to -- he can get the phone number and then do
20 the search warrant for T-Mobile. Ben's name, Mr. Bathen's name
21 that allegedly pops up, which as I put in my moving papers, I
22 personally typed the number a number of times and nothing pops
23 up.

24 But, nevertheless -- so my objection as it pertains to
25 Investigator Gain would be it's not part and parcel of a
26 compass, if you will, in his investigation. It's not a
27 necessary piece that he needed. He had the phone number,
28 right?

1 So if it was something where they -- the number was an
2 unknown number, it was a blocked number, and I don't know who
3 this man is, I don't know who this man is who is calling my
4 office, I'm freaked out and he has to do -- you know, he has
5 to go through every single one of Dr. Jacobs' prior clients,
6 right, so he has the phone number. I don't think it's part
7 and parcel of the investigation whatsoever. Plus --

8 THE COURT: Stop. Take a breath.

9 First, I want to respond to that. And I think we all
10 should probably be starting to now slow down a little bit.

11 What it led to was the Web address and the phone number
12 that was listed on the Web address, right?

13 MS. SOMERVILLE: The -- what it came up with was that
14 different -- right. And then he had his Web address,
15 BenjaminBathen.com, I believe, and then he looked on that
16 address or that website and the phone number was different at
17 that point. It had changed.

18 THE COURT: Okay.

19 MS. SOMERVILLE: The call records also support as being
20 Mr. Bathen's cell phone records because his contract had ended
21 a week or two before and the phone number had actually been
22 canceled through Mr. Bathen's account. You can see that on
23 search warrant returns.

24 THE COURT: So why are you introducing the Google search
25 If you are, you might not be.

26 MS. SOMERVILLE: I was going to introduce the Google sea
27 just as the steps he took to attempt to verify that these
28 records were, in fact, Mr. Bathen's. It ties back into them

1 also the search warrant return that we got, because on that
2 return, there is no name. Since it was a prepaid T-Mobile
3 plan, it does list his home address as the billing address, a
4 date of birth that's 10 days off for the date of Mr. Bathen's
5 birthdate.

6 And Mr. Gain can explain, you know, how it is when you get
7 a prepaid plan, that you don't need to necessarily verify your
8 date of birth. You could basically give one that's off by 10
9 days or something. You don't need a name. But that the phone
10 number then relates back.

11 THE COURT: So you really would be introducing for the
12 truth.

13 MS. SOMERVILLE: No. To explain the steps that he then
14 took in verifying that it was --

15 THE COURT: But I thought there was no connection
16 between -- I -- originally, when I said yes to a limiting
17 instruction, I was thinking there was a connection between
18 finding the name on Google and then finding the Web address and
19 going through the phone.

20 And now you're telling me, no, there's -- it's just he did
21 this; you know, it's just a step he took. I took a step. I
22 saw that his name came up. But then I took all these other
23 steps. So --

24 MS. SOMERVILLE: Right. Part of the investigation process.
25 And I just -- I have a different take --

26 THE COURT: Well, explain it to me.

27 MS. SOMERVILLE: -- from it being hearsay. I don't see it
28 really as a statement that an out-of-court witness made. It is

1 basically just a phone number on -- and it populates up. I
2 mean there's no actual person that would ever come in to
3 testify www.Ben Bathen.com or the phone number, just those
4 numbers. I mean it's more like --

5 THE COURT: But you are offering it --

6 MS. SOMERVILLE: Sorry.

7 THE COURT: You are offering it for the truth. You are
8 offering it to say that I went on Google, his name came up;
9 therefore, it was Mr. Bathen whose number it was. That's for
10 the truth.

11 MS. SOMERVILLE: Right. But I don't see it as a statement.
12 I don't see it as actual hearsay.

13 THE COURT: Well, then bring me law that says that's not
14 hearsay, because in my --

15 MS. SOMERVILLE: Okay.

16 THE COURT: To my mind, it is a statement.

17 MS. SOMERVILLE: Okay. I will. I'll look.

18 But I mean, obviously, that's in regards to Investigator
19 Gain. But then in regards to Mr. Gary Jacobs --

20 THE COURT: Oh, no. Dr. -- yeah, Dr. Jacobs, that to me is
21 a little more clear to have the effect on the listener, and I
22 think it might also go to the defense that they decided it was
23 Mr. Bathen after they got a name maybe. I don't know.

24 But -- but why -- why they thought it was Mr. Bathen, I
25 mean that's -- that makes -- that I think is the limitation.

26 MS. SOMERVILLE: Okay.

27 MS. FREEZE: Your Honor, and I would just reiterate I think
28 it's clear hearsay. The -- Dr. Jacobs herself, the complaining

1 witness, is not the one that typed in the phone number in
2 Google. So it would be her husband that would say I typed in
3 this number and this is what it showed. And that's hearsay
4 because that's for the truth of the matter asserted.

5 THE COURT: No. It's for what they did. The effect on t
6 listener for identification later for her to listen.

7 I'm going to have to think about it. If I can't explain
8 it, then I'm questioning my decision, but I'll -- I'm going t
9 take this one under consideration, the one under submission
10 and let me look at it. I have Wednesday that I can --

11 MS. FREEZE: And then, Your Honor, my -- a second level o
12 my motion to exclude would be the actual screenshot that I
13 would ask that that not be admitted into evidence and then I
14 into the authentication and some of the case law that support
15 that request.

16 THE COURT: Okay. Well, we're not there yet because I
17 wasn't letting the detective talk about that --

18 MS. FREEZE: Okay.

19 THE COURT: -- at this point.

20 MS. FREEZE: I guess that was my -- maybe I misunderstood
21 Okay. So that would be --

22 THE COURT: The only one. I took the other -- the male
23 Dr. Jacobs is the one I'm taking under submission.

24 MS. FREEZE: Okay. So just so I'm clear, that part of my
25 request would be granted then?

26 THE COURT: The one as far as the detective because it
27 didn't have -- I thought there was a connection with the lat
28 research.

1 MS. FREEZE: Okay.

2 THE COURT: But I haven't heard that there's a connection.
3 So the only one I'm taking under submission is for -- I'll call
4 in the husband looking at Google and to see whether there's
5 some connection. And if either of you wanted to provide me
6 with more law on that, like the effect of the listener, then
7 I'll be happy to look at it. But I'll think that through a
8 little more. Not as confident in my ruling on that.

9 Okay. Roman numeral VI, we'll just say under submission.
10 And I think that's the end of the motions.

11 And just for the record, on the 402, I think I did not
12 state on the record that there's 352 analysis in addition to
13 finding that the cell phone tower testimony is not
14 extraordinary testimony in these days or cutting edge, I guess
15 I should say that -- that I think that a 402 hearing would be
16 really an excessive use of time for little benefit.

17 So okay. So far anything else about -- before we get into
18 just mechanics of how jury selection and that kind of thing?

19 MS. SOMERVILLE: No.

20 MS. FREEZE: Your Honor, just one more clarification on
21 my -- on No. 6 as it pertains to Dr. Jacobs herself, because
22 she did not herself type in the number that would then -- she
23 wouldn't be able to testify as to any type of -- okay. I just
24 want to clarify. There's a lot of moving parts.

25 THE COURT: For the record, I nodded my head yes.

26 MS. FREEZE: Thank you.

27 THE COURT: Yeah, she can't talk about -- well, see, this
28 is why I'm looking at it, because I think he would have to say

1 that he -- he looked -- if I allow it, that he looked it up,
2 came up with this name and told his wife, and then she can ta
3 it from there, that she went, oh, my gosh, now that I think
4 about it, that's who it is. It all makes sense to me.

5 And that progression is why I'm considering that I might
6 let it in because it kind of ties it up with her, I think, as
7 to the identification of the caller because she didn't
8 originally instantly know who it was.

9 MS. SOMERVILLE: Right. Because it had been a few years.
10 But then when he inputted that name and/or number and said, o
11 it's coming up with this person, it was like the light bulb
12 went off. Okay. Yeah. And she knew who it was.

13 MS. FREEZE: Right.

14 THE COURT: And I think I would have him --

15 MS. SOMERVILLE: I mean I just feel like if not with her,
16 it's just going to be left out there like, oh, you just, like
17 made this up, you just at some point just guessed when, in
18 fact, the effect was from him doing that, it triggered just -
19 like, I mean if we haven't heard from someone in a long time
20 and then anything can trigger that and that's what triggered
21 her.

22 MS. FREEZE: Right. And I certainly understand that, You
23 Honor.

24 But I think that then we're looking at multiple levels o
25 hearsay because the Google results themselves are hearsay and
26 then he's doing it, then he's relaying it to her and so now
27 have two levels of hearsay. Then there's authentication
28 issues.

1 THE COURT: Yes. And that's why I -- I'm not allowing the
2 first one in. This -- the whole issue is whether it's being
3 offered for the truth. And it's not being offered for the
4 truth. It is whether, right or wrong, he saw this name on
5 Google, he told his wife, she then goes, oh, my gosh, now that
6 I think of it and I hear the voice, that's who it is.

7 And so it's not that Google was right, it's that -- if I
8 can get your argument -- Google, right or wrong, that was how
9 she recalled Mr. Bathen and that's what led to us where we are
10 today.

11 So, I mean, the question is, you know, I'm really looking
12 at probative versus prejudicial since I'm not -- since it's
13 not being offered for the truth.

14 So that's why I need to take it under submission because,
15 you know, I'm going back and forth right now. I'm leaning
16 into letting it in, but I don't want to, you know, have you go
17 on this rollercoaster with me until I look at it and denote a
18 little more time to the law and make a decision that you can
19 rely on.

20 In jury selection, you are not going to go into details.
21 You won't do your opening statements until Thursday. And so I
22 will have -- I hope to have a decision for you tomorrow, so --
23 but it shouldn't impact jury selection at all, my decision on
24 this one, but I know you will want it before your opening
25 statement. So I will get it to you by then.

26 So the -- my rules for the courtroom are that you stand
27 when addressing the Court, a witness or the jury when the jury
28 is here. The only exception being if you are quickly making

1 an objection and you can't get up, you may certainly state
2 your objection before the answer is given.

3 You don't need to ask every time you enter the well.

4 If the first time you approach a witness, you want to ask
5 then, you can. That's very nice. If you don't, I'm not
6 deeply offended.

7 All right. But you certainly may use the well for all the
8 purposes you can, you would ordinarily be using it for voir
9 dire, opening, closing and to approach the witness.

10 I'm going to ask for a full panel of jurors. You each
11 have 10 peremptories.

12 I will tell the jury that they should have the case for
13 deliberation by Monday. Is that --

14 MS. SOMERVILLE: Yeah, that sounds good.

15 THE COURT: Just to give Thursday, Friday, Monday, that
16 will be enough, you agree, with your expert as well?

17 MS. FREEZE: Yes, Your Honor. My only concern is that on
18 Monday the 18th, I have a restraining order case in El Cajon
19 that's continued already. I don't know if it's something where
20 we can start in the afternoon. It's in front of Judge Birchak,
21 and so what I was thinking is might be calling this clerk.
22 It's not a long cause hearing. So --

23 THE COURT: What time is it scheduled for?

24 MS. FREEZE: 9:00 a.m. And I would ask for priority. And
25 he only gives me -- you only get 20 minutes; so --

26 THE COURT: Your expert is going to drive me crazy because
27 he's trying to see around you and I'm getting so distracted.

28 MS. FREEZE: Sorry. We can certainly address it maybe more

1 on Thursday at a break or something, but like I said, I --

2 THE COURT: No, that is not a problem. It's a problem in
3 connection with being dark on Wednesday.

4 MS. SOMERVILLE: Right. So now we're just kind of eating
5 away at the jury time.

6 MS. FREEZE: I can -- why don't I do this, Your Honor,
7 because we don't know if we'll even go into Monday, but
8 because, you know, we're just being proactive, why don't I
9 reach out to Judge Birchak's clerk, you know, Wednesday and
10 just say, hey, maybe I can trail it to the next day or trail
11 Wednesday. You know what I mean?

12 THE COURT: There's a couple things we can do. I mean th
13 could be -- or have you go to the hearing and then finalize
14 jury instructions if we haven't by that time and then just do
15 closing in the afternoon on Monday. Let's see where we are.

16 That's a good idea. I mean if you want to ask and see --
17 I don't know whether your client would like you not to trail.
18 And I mean in the interest of fairness, I'm giving
19 Ms. Somerville all day Wednesday and you are asking for part
20 of the day on Monday; so I'm not going to deny you.

21 I'm just trying to see how we can do it. So if you would
22 call, depending on how your client feels, and see what you ca
23 do with Judge Birchak, and then we can -- I guess at least
24 Friday morning we should be able to know more or less where v
25 are.

26 I'm just concerned if we have -- it sounds to me like th
27 cell phone testimony could possibly take some time.

28 MS. SOMERVILLE: I only have four witnesses that I inten

1 on calling. I do not think -- I don't know about
2 cross-examining, but I really don't think it's going to be
3 longer than a day.

4 THE COURT: Oh, okay.

5 MS. SOMERVILLE: For the testimony. Maybe I'm being
6 optimistic. I just --

7 THE COURT: No, I mean, I'm just thinking if the defense
8 that the science is -- is not there, that there is no scienc
9 that underlies this testimony, then I would expect more
10 cross-examination than usual.

11 But that's not saying you need to do that. I'm just
12 trying to anticipate time because you obviously -- you're we
13 qualified to decide how you want to try your case.

14 So, yeah, let's just see how it goes. But in either cas
15 even -- it sounds like it will go into Friday so I don't kno
16 how we're going to do closing before Monday afternoon. I
17 guess we can have the jury here at 11:00 on Monday.

18 MS. FREEZE: That would be sufficient, Your Honor.
19 Obviously what I'll do today is call Madam Clerk,
20 Judge Birchak's clerk, and putting them on notice, hey, mayk
21 can be a priority in and out. Like I said, it's not a long
22 cause hearing and he doesn't allow more than 15 to 20 minute
23 . So if I can be a priority, I can probably be out of there.

24 The only thing is I'm representing the restrained party
25 and we already continued it a number of times; so that's why

26 THE COURT: I understand that because we might be in a
27 position to -- and what we'll do is we can just take an hour
28 lunch on Monday to kind of make up half an hour there if we

1 need to.

2 MS. SOMERVILLE: Okay.

3 THE COURT: Okay. And just so you know, I don't know how
4 fast this is going to go tomorrow, but depending on when the
5 jury gets up here and everything, I might just take an hour
6 lunch tomorrow as well. Sometimes I do that during jury
7 selection just so the jury panel doesn't have to wait around
8 too long, but I kind of do it by ear.

9 MS. FREEZE: I'm amenable to that. My office is in
10 Mission Valley. So when I'm in trial, I stay at the courthous
11 so I'll be here.

12 THE COURT: Okay. All right. So that's just so I'll at
13 least have that in mind. And I'll just tell the jury we won't
14 be in session Wednesday. Monday morning we might be starting
15 late, but I'll give them more information.

16 MS. FREEZE: Okay. Great.

17 THE COURT: I do all jury selection by numbers so that we
18 never put anybody's name on the record. The numbers remain the
19 same as they're shuffling around when we start doing the
20 challenges so that if Juror 22 ends up in seat No. 1 or in se
21 No. 2, they are Juror 22 until the jury selection and then I'
22 renumber them. But otherwise, they keep their original
23 numbers. Otherwise, it gets too confusing.

24 Since it's going over the weekend, if we have enough
25 jurors, I would say two alternates.

26 For everybody -- and I will try to remember to explain
27 this to the jury at first break -- you obviously cannot talk
28 to the jury and even passing "Hi, how are you," "Good

1 morning," "Good evening." I'll explain to them why that is
2 and that it is a court order.

3 And I'm looking -- and Mr. Bathen, just because the
4 lawyers are used to this, but you are under that prohibition
5 as well.

6 I also like to -- more than like to -- insist that we
7 start on time and we don't keep the jury waiting. If there is
8 a break or something, a problem with witnesses, I urge you to
9 let us know so we either break early in the afternoon or start
10 later. Don't have a longer recess.

11 Do you need any more than 20 minutes for your voir dire?

12 MS. SOMERVILLE: I don't think so.

13 THE COURT: So let's do 20 minutes. If you are in the
14 middle of something fruitful, I won't stop you mid sentence or
15 mid answer.

16 When you do your questioning, of course, don't educate the
17 jurors about the particular facts of the case and held them to
18 commit themselves to vote a particular way, prejudice them for
19 or against a party, argue the case, indoctrinate the jury.
20 Obviously, this is for cause to find out whether somebody can
21 be fair and impartial.

22 And no personal stories. No -- I've had people go through
23 the law. Not long; I mean I stop them. But there's some.
24 The burden, of course, it's fair game. You know, listening to
25 everybody's fair game. But -- and generally whether they'll
26 follow the law.

27 As far as these particular charges, I don't have any
28 specific jury questions on this. Is there anything particular

1 either of you want -- need to ask, whether they've been in a
2 situation where they felt endangered from somebody's words?
3 Nothing in particular?

4 Okay. I'll just do a general voir dire. I obviously will
5 read the charges to them. What I would prefer, if it's okay
6 with everybody, is to say that there are three counts of
7 making a criminal threat on June 4th, July 3rd and July 5th
8 and do the whole date. Then read the charge rather than
9 reading it three times with three different dates.

10 MS. FREEZE: That's fine, Your Honor.

11 THE COURT: Slow learning curve. It's taking me a while
12 that I can really consolidate that I have to read everything.
13 Okay. So that's what I will read to them.

14 Do you want me to talk to the jury about a defendant's
15 right not to testify?

16 MS. FREEZE: Yes.

17 THE COURT: I will do that.

18 MS. FREEZE: Thank you, Your Honor.

19 THE COURT: And I think that's it.

20 You will question the jurors who have answered the
21 questionnaire. And I wait. Sometimes I have everybody answer
22 the questionnaire. I might in this case. Sometimes I do just
23 a few people depending on how it seems to be going. But only
24 question the ones I ask to answer the questionnaire. I will
25 address everybody in my questioning.

26 I think that's it. Anything from either one of you?

27 MS. SOMERVILLE: No.

28 THE COURT: Okay. If you have something that comes up or

1 you want to address me outside the presence of the jury in the
2 morning, please just notify the other person and your client.

3 In your case, just notify Ms. Freeze and come here early,
4 like 8:45 or something. I'm typically here by 8:30.

5 MS. SOMERVILLE: Okay. Nine o'clock?

6 THE COURT: Nine o'clock tomorrow for the jury. They
7 won't -- I think we are the only jury that went out. You don't
8 want them prescreened for anything, I wouldn't imagine. It's a
9 short trial. So as soon as they can get a panel, you might be
10 close to 9:00; so we might -- you might be done early tomorrow.

11 MS. SOMERVILLE: Okay.

12 THE COURT: If so, I'll be sure you will both have things
13 to do.

14 MS. FREEZE: Your Honor, if we do choose a jury, you don't
15 want us to start opening statements on tomorrow like, say, for
16 instance, we get a jury by, like, late morning by the grace of
17 what have you.

18 THE COURT: I like your optimism. And sometimes it depends
19 on the jury panel. As I'm sure you know, sometimes you can't
20 get them to say a word. It goes pretty fast. I think -- if I
21 can get the answer to the hearsay Google with Dr. Jacobs, I
22 might be able to get that to you by tomorrow, then tomorrow
23 morning and then you would be able to start with your opening
24 statements tomorrow afternoon and then just do evidence on
25 Thursday.

26 MS. SOMERVILLE: Probably. I would -- I just -- I don't
27 see them being very long, the opening statements, since it's
28 not a very involved case. So I don't --

1 THE COURT: I like to -- in a short trial like this, I like
2 to defer to the lawyers. Many times you like to just do the
3 opening statements right before the evidence so -- and we're
4 going to have that full day.

5 MS. SOMERVILLE: I would prefer that because if we're just
6 then dark the whole next day on Wednesday --

7 THE COURT: Ms. Freeze.

8 MS. FREEZE: Prefer starting -- prefer starting the opening
9 statements on Thursday.

10 THE COURT: You do too.

11 MS. FREEZE: Is that the question? I'm sorry.

12 THE COURT: Yes, that's the question.

13 MS. FREEZE: I mean I think that's fine. Obviously, my
14 thing is if you know if we have a jury picked quite sooner than
15 we thought, then I think we should use the time wisely just
16 with Wednesday being dark, and obviously my client lives on the
17 East Coast and he's, you know, just trying to use our time as
18 best we can.

19 THE COURT: Well, yes, that's good. But I don't anticipate
20 the opening statements being more than 15 minutes.

21 MS. SOMERVILLE: No.

22 MS. FREEZE: Oh, no.

23 THE COURT: So we're talking about half an hour. We'll
24 see. It might take us all day to do the jury. And what I do
25 if the jury is selected early, they are pretty understanding
26 about me saying the day is blocked for jury selection and so
27 half an hour I don't think is going to make any difference in
28 Mr. Bathen's travel schedule as far as getting this to the

1 jury. So let's just go ahead and pick a jury tomorrow. I am
2 little concerned when you have opening statements and they hav
3 all day to ruminate about it without hearing any evidence
4 that -- in context. So we'll just go ahead and pick the jury
5 tomorrow.

6 And with that, if there's nothing else --

7 We might be starting a little late on Friday. Yeah.

8 Well, that's late being 9:10. Okay, but we'll know.

9 MS. SOMERVILLE: Okay.

10 THE COURT: All right. See you all tomorrow.

11 MS. FREEZE: Thank you, Your Honor.

12 THE COURT: 9:00 o'clock.

13 *(At 3:22 p.m. an adjournment was taken until Tuesday*
14 *June 12, 2018, at 9:00 a.m.)*

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 San Diego, California)
2 County of San Diego) : SS.

3
4

5 I, Yvonne Medina Luna, Official Reporter for the Superior
6 Court of the State of California, in and for the County of S
7 Diego, do hereby certify:

8

9 That as such reporter, I reported in machine shorthand t
10 proceedings held in the foregoing case;

11

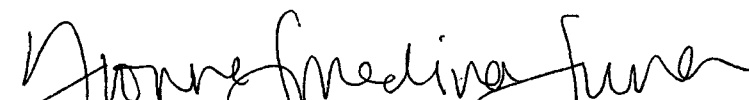
12 That my notes were transcribed into typewriting under my
13 direction and the proceedings held on June 11, 2018, contain
14 within Pages 101 through 142, are a true and correct
15 transcription.

16

17 Dated this 25th day of September 2018.

18

19


Yvonne Medina Luna, CSR No. 12697
Official Court Reporter

20

21

22

23

24

25

26

27

28

COURT OF APPEAL OF THE STATE OF CALIFORNIA
 FOURTH APPELLATE DISTRICT
 DIVISION ONE

THE PEOPLE,		)	FROM SAN DIEGO COUNTY
)	
	PLAINTIFF AND	)	HON. STEPHANIE SONTAG
	RESPONDENT,)	
		)	COURT OF APPEAL
VS.		)	NO. D074538
)	
		)	CASE NO. SCS294342
BENJAMIN BATHEN,)	
)	
	DEFENDANT AND	)	JURY TRIAL
	APPELLANT.)	
)	

REPORTER'S CERTIFIED TRANSCRIPT
 JUNE 12, 2018
 VOLUME 2 OF 7
 (PAGES 143 THROUGH 169)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST "A" STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	BENJAMIN BATHEN
AND APPELLANT:	IN PROPRIA PERSONA

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
 OFFICIAL COURT REPORTER

1 Chula Vista, California; Tuesday, June 12, 2018

2 -- 000 --

3 THE COURT: Okay. We are on the record outside of the
4 presence of the jury panel. And are they just being assembled?

5 THE CLERK: Yes, Your Honor.

6 THE COURT: I wanted to talk to you about a few issues
7 before we got started. I was -- did have an opportunity to
8 research the hearsay issue we were talking about yesterday and
9 I did want to let you know for your case preparation as soon as
10 possible what my ruling would be.

11 I did have a case from Ms. Freeze, *United States v.*
12 *Torres*, 794 F.3d 1053. But I happened to find a case that is
13 precisely on point that deals with the telephone directory on
14 the computer used by a detective in the investigation, and
15 that is *People v. Francen*, F-r-a-n-c-e-n, 210 Cal.App.4th
16 1193. It is a 6th District case from 2013. And what it comes
17 down to, unless a foundation can be laid that the compilation,
18 the telephone numbers in a directory meets the exception of
19 Evidence Code Section 1340, which is a compilation that is
20 generally used and relied upon as accurate in the course of
21 the business as defined in Section 1270 of the Evidence Code,
22 it cannot come in for the truth of the matter.

23 I think that -- let's see. I have all this stuff here --
24 *People v. Francen* -- let me get the citation -- goes
25 through -- no. I'm sorry. *People v. Moring*. *People v.*
26 *Francen* is the one that excluded the telephone directory.
27 *People v. Moring* is 15 Cal.App 5th 928, and it deals with the
28 Idena drug website and shows the steps that it does meet the

1 compilation exception.

2 So for you, Ms. Somerville, if you have somebody, I just
3 give that to you as a guideline that really sets forth the
4 steps you have to take to show that it is something on what
5 you can rely so as to introduce the number. If you can meet
6 all those steps, then it can come in. If we need to do a 402
7 just on that limited issue, we can.

8 MS. SOMERVILLE: Through the detective?

9 THE COURT: Yes.

10 MS. SOMERVILLE: Okay.

11 THE COURT: All right. So I'm not going to let it in
12 unless that foundation can be laid that it is reliable under
13 that hearsay exception. As far as the -- I'll have to get the
14 name.

15 MS. SOMERVILLE: Gary Jacobs.

16 THE COURT: Jacobs. As far as Dr. Jacobs' reliance, I am
17 letting that in not for the truth; but with the offer of proof
18 that was sent to me, that was laid out yesterday, the way the
19 name that was discovered by him on the Internet let the other
20 Dr. Jacobs to choose -- start going in the direction that it
21 was Mr. Bathen who made the threatening phone calls. I think
22 that for that purpose to bring that name to mind that it's
23 admissible, but it's not admissible for the truth. So I'm
24 letting it in for that purpose.

25 Ms. Freeze, if you wanted a limiting instruction to the
26 jury, I would do that before that testimony.

27 MS. FREEZE: Absolutely, Your Honor. And for the record,
28 may I just briefly just with regards to the case that I

1 submitted to the Court, the *Torres* case --

2 THE COURT: I'm not really accepting more argument. I
3 don't think that's pertinent, frankly. I have a case right on
4 point. That's a California case and not a federal case. So I
5 have cited that for the record that you have provided that to
6 me. I have read it.

7 MS. FREEZE: Okay. Thank you, Your Honor.

8 And just so we're clear, because my motions in limine kind
9 of was layered, so I just want to make sure that I'm clear as
10 to the Court's ruling of the -- so just to recap, Investigator
11 Gain cannot -- the screenshot of the Google results cannot
12 come in. And in order for him to speak any further about the
13 number, the prosecution has to lay that foundation of the
14 *Moring* case as you just cited.

15 THE COURT: Right. And what -- if that foundation is laid,
16 I'll revisit whether the screenshot can come in or not. If
17 it's -- that's -- but without -- without that foundation laid,
18 nothing comes in --

19 MS. FREEZE: Right.

20 THE COURT: -- concerning the telephone directory.

21 MS. FREEZE: Right. Right. And I think in my moving
22 papers I cite -- I bring up arguments with regards to
23 authentication and foundation and things like that.

24 And then just the third issue, I want to -- just so I'm
25 clear that Dr. Jacobs, Gary Jacobs, can testify as to the
26 conversation he had with the complaining witness and his
27 search results, because I just want to make sure I understand
28 that.

1 THE COURT: He can -- he can say that -- well, actually, it
2 wouldn't come from him.

3 MS. FREEZE: Right.

4 THE COURT: It would come from her saying, you know, my
5 husband said he found this -- the number. I mean we can do a
6 number of ways. It's really, he can say, I went on the
7 computer and found this number or -- and/or we can have her
8 just say, my husband said he found this on the computer. Since
9 we're not doing the truth of the matter -- I guess we have to
10 have him say he found a number and told his wife. And then she
11 can testify that she -- it jogged something in her memory and
12 she started thinking about it and went forward from there.

13 MS. FREEZE: And the Court's ruling is that that would be a
14 non-hearsay, it would be the exception to the effect?

15 THE COURT: That is correct.

16 I did get the brief from the People, and I think we can
17 address that. We should have time this afternoon after the
18 jury is selected to address that issue.

19 MS. FREEZE: Right. I haven't had a chance to read it yet,
20 Your Honor; so --

21 THE COURT: That's why I didn't want to -- it's a pretty
22 thorough brief; so I didn't just want to bring it up with
23 anybody. If we can this afternoon -- if we can't, if you need
24 more time, then we can do that, take more time.

25 MS. FREEZE: Thank you, Your Honor.

26 THE COURT: Is there anything from either of you?

27 MS. SOMERVILLE: No.

28 MS. FREEZE: No, Your Honor.

1 THE COURT: Okay. Then we'll just wait for the jury to be
2 assembled and brought up.

3 *(Jury voir dire commences. Reported but not*
4 *transcribed herein.)*

5 * * *

6 *(At 3:20 p.m. the jury was sworn by the clerk to try*
7 *the cause.)*

8 * * *

9 *(At 3:21 two individuals are sworn to serve as*
10 *alternate jurors)*

11 THE COURT: All right. ladies and gentlemen, what we're
12 going to do is I'm going to give you a few of the rules I hope
13 will help you serve as jurors in this matter and then I'm going
14 to excuse you for the evening. And we'll start on Thursday.

15 And remember we're not in session tomorrow; so start
16 Thursday morning at nine o'clock with opening statements if
17 the lawyers choose to give them and then we'll start with the
18 evidence right in.

19 So now let me talk to you just briefly about some of the
20 basic rules of law and procedure and the rules to ensure that
21 both sides can get a fair trial in this matter. Some of the
22 concepts you heard about in jury selection, but you're jurors
23 now and it's important that we emphasize them for you.

24 During the trial, don't talk about the case or about any
25 of the people or any subject involved in the case with anyone,
26 not even your family, friends, spiritual advisers and
27 therapists. Don't share information about the case in
28 writing, by e-mail or on the Internet. You must not talk

1 about these things with the jurors either until the time comes
2 to begin your deliberations.

3 As jurors you may discuss the case together only after all
4 the evidence has been presented, the attorneys have completed
5 their arguments, and I have instructed you on the law. After
6 I tell you to begin your deliberations, you may discuss the
7 case only in the jury room and only when all jurors are
8 present.

9 You can't allow anything that happens outside of the court
10 to affect your decision. You can't read, listen to or watch
11 any news report that has any subject connected with this
12 trial.

13 I don't think this trial is going to be on the news, but
14 certainly as I told you before, this is not the time to
15 educate you on this subject matter. We take you as we have
16 you today and then we will have you just consider the evidence
17 and the law.

18 Don't do any research on your own or as a group. Don't
19 use a dictionary or Internet or other reference material.
20 Don't investigate the facts of the law. Don't conduct any
21 tests or experiments or visit the scene of any event involved
22 in this case.

23 So let me just talk briefly. If there are any people here
24 who are bloggers or Facebookers or Instagram -- I'm sure I'm
25 so out of date that I don't even know how people communicate
26 anymore on the Internet -- this is not the time to do it in
27 connection with your jury service. What we do is we want you
28 to have open minds. And if you start talking about the

1 subject matter, if you start reading about the subject matter,
2 if you even share information with anybody else or receive any
3 information, you're going to -- it's human nature -- you start
4 to form some conclusions. You want, to the extent you can,
5 prevent you from doing that if you've heard everything and you
6 heard the law. That's why these rules are in place. Because
7 you can consider only the evidence presented in this courtroom
8 and the law that I give you.

9 I'm going to ask that you keep your cell phones turned off
10 while we're in session. You are going to get a little card
11 with this courtroom phone number on it. Feel free to give it
12 to someone that might need to reach you in an emergency basis.
13 We answer the phone during -- while court is in session. And,
14 actually, I don't; Mr. Camou does. So we'd be able to get you
15 a message in an emergency right away. You need not worry
16 about that.

17 So -- but while we're here, we need your cell phones
18 turned off. Please don't talk to any witness, any lawyer, any
19 party to this case. During the trial, if someone tries to
20 talk to you about the case or any people or subjects involved
21 in it, please tell them that you cannot talk to them. If they
22 persist, let us know. And I say "us." Let the deputy know
23 and we will take care of it immediately.

24 I told you earlier that I've asked that Mr. Bathen and the
25 lawyers not even talk to you at all, even to exchange
26 pleasantries. As much as they'd like to say "good morning" or
27 "good afternoon" or "nice day outside" -- because we -- and I
28 don't know whether I said this to you earlier, but we not only

1 do we not want any communication about anything concerning
2 that case, we don't even want an appearance that there could
3 be something said that shouldn't be said. And so if
4 somebody -- if you are there talking to a lawyer or a witness
5 or a party over in a corner somewhere, even if you are talking
6 about the weather and it's innocuous, it doesn't look right.
7 And people could rightfully wonder what's going on as far as
8 an exchange of information. So we just eliminate that
9 entirely. So please forgive them. They'll just be following
10 court orders.

11 As I told you, when the trial is over and you are released
12 as jurors, you may discuss the case with anyone or not discuss
13 it, it will all be up to you. If you do receive any
14 information about the case, even unintentionally, please don't
15 let the other jurors know. Let the deputy know and we will
16 take care of it.

17 Please keep -- as I mentioned -- keep an open mind
18 throughout the trial. Don't make up your mind about -- about
19 the verdict or any issue until after you discuss the case with
20 any other jurors during your deliberations. Don't take
21 anything I say or do during the trial as an indication of what
22 I think about the facts, the witnesses or what your verdict
23 should be. Don't let bias, sympathy, prejudice or public
24 opinion influence your decision.

25 You're going to be given notebooks and you're free to take
26 notes during the trial. The notebooks would be left in the
27 courtroom while the evidence portion of the trial goes on and
28 then you will be permitted to take the notebooks into the

1 deliberating room when you begin to deliberate. I don't want
2 to discourage you from taking notes, but please remember that
3 you're the judges of the credibility of the witnesses, and one
4 of the ways you judge credibility is by watching somebody.
5 And if your face is buried in your notebook, you are going to
6 lose that ability to look at the witnesses.

7 Also, we have an official record that's being made of
8 everything that's being said during this trial. So although
9 the notes are for your own individual use to help you remember
10 what happened during the trial, your notes may be inaccurate
11 or incomplete. So there will be times when you might want to
12 jot down a note of something you think is important. I don't
13 want to discourage you from doing that, as I said, but please
14 remember that you have to watch the witnesses as well as -- as
15 well as listen to them.

16 At the end of the trial, your notes will be collected and
17 destroyed. Because it's so important that we talk to you
18 again about the presumption of innocence and the People's
19 burden of proof, Mr. Bathen has pled not guilty to the charges
20 against him. And the fact that a criminal charge has been
21 filed against him is not evidence that any of the charges are
22 true.

23 You must not be biased against him just because he has
24 been arrested, charged with a crime or brought to trial. A
25 defendant in a criminal case is presumed to be innocent and
26 that presumption requires that the People prove a defendant
27 guilty beyond a reasonable doubt.

28 Whenever I tell you that the People must prove something,

1 I mean they must prove it beyond a reasonable doubt. Proof
2 beyond a reasonable doubt is proof that leaves you with an
3 abiding conviction that the charge is true. The evidence need
4 not eliminate all possible doubt because everything in life is
5 open to some possible or imaginary doubt.

6 In deciding whether the People have proved their case
7 beyond a reasonable doubt, you must impartially compare and
8 consider all the evidence that was received throughout the
9 entire trial. Unless that evidence proves Mr. Bathen guilty
10 beyond a reasonable doubt, he's entitled to an acquittal and
11 you must find him not guilty.

12 You are the judges of the facts in this case. And you
13 must consider only the evidence that's presented in this
14 courtroom. Evidence is the sworn testimony of witnesses, the
15 exhibits admitted into evidence, and anything else I tell you
16 to consider as evidence. Again, the fact that Mr. Bathen was
17 arrested, charged with a crime or brought to trial is not
18 evidence of guilt. Nothing that the attorneys say is
19 evidence.

20 In their opening statements and closing arguments, they
21 will discuss the case but their remarks are not evidence.
22 Their questions are not evidence. Only the witness's answers
23 are evidence and the attorneys' questions are significant only
24 if they help you to understand a witness's answer. Don't
25 assume something is true just because a lawyer asks some
26 question to suggest that it's true.

27 There may be objections to questions requested of a
28 witness during a trial and I will rule on those objections

1 according to the law. If I sustain an objection, a witness
2 will not be permitted to answer and you must ignore the
3 question. If the witness does not answer, don't guess what
4 the answer might have been or why I ruled as I did. If I
5 ordered testimony stricken from the record, you must disregard
6 it and cannot consider that testimony for any purpose.

7 You must disregard anything you see or hear when the Court
8 is not in session even if it's done or said by one of the
9 parties or witnesses.

10 Our court reporter is making a record of everything said
11 during the trial. If you decide that it's necessary, that
12 there's a serious disagreement about the evidence, you may ask
13 that the court reporter's notes be read to you and that would
14 be when you're in deliberation. You must accept the court
15 reporter's record as accurate.

16 Any fact in this case may be proved by direct or
17 circumstantial evidence or a combination of both. Direct
18 evidence means exactly what the name implies. It's evidence
19 that directly proves a fact.

20 Johnny is on the stand he said he saw Sam swimming in the
21 swimming pool. That is direct evidence that Sam is swimming
22 in the swimming pool.

23 Circumstantial evidence is evidence that proves a fact
24 from which you can infer another fact. Johnny gets on the
25 stand and says I didn't see Sam swimming in the swimming pool,
26 but I saw Sam standing beside the swimming pool dripping wet
27 with wet footprints going from the swimming pool to where he's
28 standing. It's not direct evidence that he was in the pool,

1 but it's circumstantial evidence that he just got out of the
2 pool. And as far as the law is concerned, it makes no
3 difference whether evidence is direct or circumstantial.

4 You may choose to believe or disbelieve either kind of
5 evidence. Whether the evidence is direct or circumstantial,
6 you should give each piece of evidence whatever weight you
7 think it deserves.

8 You're the judges of the credibility or believability of
9 the witness in deciding whether testimony is true and
10 accurate. Use your common sense and experience. You must
11 judge the testimony of each witness by the same standard
12 setting aside any bias or prejudice you may have. You may
13 believe all, part or none of any witnesses' testimony.

14 Consider the testimony of each witness and decide how much of
15 it you believe. In evaluating a witness's testimony, you may
16 consider anything that reasonably tends to prove or disprove
17 the truth or accuracy of that testimony.

18 Among the factors that you may consider are how well could
19 the witness see, hear or otherwise perceive the things about
20 which the witness testified. How well was the witness able to
21 remember and describe what happened. What was the witness's
22 behavior while testifying? Did the witness understand the
23 questions and answers them directly? Was the witness's
24 testimony influenced by a factor such as bias or prejudice, a
25 personal relationship with someone involved in a case or
26 personal interest in how the case is decided?

27 What was the witness's attitude about the case or about
28 testifying? Did a witness make a statement in the past that

1 is consistent or inconsistent with his or her testimony? How
2 reasonable is the testimony when you consider all the other
3 evidence in a case?

4 Don't automatically reject testimony just because of
5 inconsistencies or conflicts. Consider whether those
6 differences are important or not. People sometimes honestly
7 forget things or make mistakes about what they remember.
8 Also, two people may witness the same event yet see or hear it
9 differently.

10 Finally, ladies and gentlemen, if there is a law
11 enforcement witness, it's not unusual for them to refer to a
12 police report. I haven't heard the evidence either; so I'm
13 not sure actually what the testimony will be, but I want to
14 tell you up front that police reports are not introduced into
15 evidence. You will not get any police reports back when
16 you're deliberating; so that might be a good place for your
17 notebook. If there's a question to ask concerning a police
18 report, you can make a note of it since you won't be seeing
19 those back in the deliberation room.

20 All right. Finally, ladies and gentlemen, I'm going to
21 ask you to wear your juror badges when you're around the
22 courthouse. That let's everybody know that you are a juror in
23 a case.

24 We obviously have a lot of lawyers walking around talking
25 about the law and that let's them know that they shouldn't be
26 talking about things around you that you shouldn't hear. So
27 it helps them a lot.

28 We do try our best to start when we tell you we're going

1 to start. I can't -- I always think I'm in control of
2 everything and find unhappily I'm not; so sometimes I might
3 not be able to start exactly, but everybody here is committed
4 to not have you wait outside. It's very uncomfortable.

5 We are mindful of the fact that you're sacrificing your
6 time to come out here for this very important duty. I
7 appreciate it very much and we'll do our best to be efficient
8 with your time.

9 So I will tell you that -- well, let me -- let me move on
10 to feel free to bring in coffee if you'd like or another
11 beverage. We will have water out front. "Out front" meaning
12 on the bannister here or probably somewhere within reach of
13 Jurors No. 12 and 11. They might be serving water to the
14 other jurors, so be nice to Jurors 11 and 12. So -- but do
15 feel free to bring in a beverage.

16 You must let us know if you can't be here. And not that
17 I'm not encouraging you. It's not like we'll excuse you and
18 go on and do the trial without you, that this is not the time
19 to decide that you don't want to be connected with this case
20 in any way. You are our jurors. We can't do anything without
21 having every single one of you here, regular jurors and
22 alternates.

23 So if something is delaying you, please call our number
24 we're going to give you, which is our courtroom. This is the
25 only exception to giving your juror number. You may use your
26 name. You may use just your juror number. You may leave your
27 name here because that won't go on the record. So please let
28 us know.

1 I wish you all very good health so we can keep to our
2 trial schedule. And with that, I'm going to excuse you for
3 the day, except that I will ask that you wait outside. We're
4 going to need a little information from you before you leave.

5 Juror No. 1?

6 JUROR NO. 1: Are we still numbers or may we now introduce
7 ourselves to each other?

8 THE COURT: You may off the record introduce yourselves to
9 each other. Your number is only because we're on the record.

10 JUROR NO. 1: Right.

11 THE COURT: Yes. Thank you for asking that. But,
12 certainly, you may -- you may give your names to each other and
13 address each other by name as long as it's not on the record.

14 All right. If there are no other questions, ladies and
15 gentlemen, I will see you Thursday.

16 A JUROR: So will we meet here?

17 THE COURT: Yes. You are jurors now; so if something
18 happens, call our courtroom. Be here. I'm hoping to start
19 promptly at nine o'clock on Thursday morning.

20 All right. I will see you all then. Have a nice day off,
21 ladies and gentlemen.

22 A JUROR: Is that the number?

23 THE COURT: That is the number, but we're going to give you
24 cards right behind your juror badge so that you will have it in
25 writing.

26 And just going to take five minutes so Robert can get all
27 the information and then we'll start with our argument about
28 the remaining issue.

1 *(Off the record.)*

2 *(The following proceedings were had between the Court*
3 *and counsel out of the presence and hearing of the*
4 *jury.)*

5 THE COURT: All right. We are back on the record outside
6 of the presence of the jury. And we have a motion to exclude
7 defense psychiatric evidence, which I have read.

8 Ms. Somerville.

9 MS. SOMERVILLE: Thank you, Your Honor.

10 I was provided with a report last week from Dr. Raymond
11 Murphy. The report as I put in my moving papers basically
12 gives recommendations and a treatment plan after Dr. Murphy
13 interviewed Mr. Bathen, I believe on a couple occasions. And
14 I just don't see how any of his testimony is relevant in this
15 case. It's -- and I do -- so the Court is aware, Ms. Freeze
16 told me that she really wanted Dr. Murphy to come in to say
17 that Mr. Bathen was sane. And I don't know how that is
18 relevant in any way to any of the elements that we need to
19 prove for the crime that's charged. So I would just ask that
20 the Court exclude his testimony.

21 And it's he talked to Mr. Bathen; so I don't know how any
22 of his opinions will be coming in without basing that and
23 giving some inadmissible hearsay. And I'll submit.

24 THE COURT: Ms. Freeze.

25 MS. FREEZE: Yes, Your Honor. First off, I think it's
26 absolutely relevant. The testimony that's going to be brought
27 to the jury's attention is that my client was a patient of the
28 complaining witness. So his mental health is going to be an

1 issue, and that she treated him at some point in time and that
2 now nine, ten years later he's allegedly reaching out to her
3 and is having some type of mental breakdown or reaching out to
4 her in some effect.

5 I did have an opportunity to read the People's motion, an
6 eight-page motion, which unfortunately, because I didn't have
7 any time to go to my office and prepare an actual -- you know,
8 look at these case law and there's no law library here; so I'm
9 kind of doing the best I can to respond to it without having a
10 chance to look at case law or what have you.

11 THE COURT: Well, I mean if you want more time, I'll let
12 you do that. I'm not sure when we'll hear this, but we'll make
13 time. Is that what you are asking for?

14 MS. FREEZE: Well, my thing is a lot of what she's putting
15 in -- and I did have a chance to speak with Ms. Somerville on
16 the break earlier today that a lot of her concerns I'm not
17 trying to elicit from Dr. Murphy.

18 THE COURT: Then for my purposes, what exactly are you
19 trying to elicit?

20 MS. FREEZE: So it wouldn't be any of the self-serving
21 statements. Dr. Murphy's report is not just about --

22 THE COURT: What are you going to -- I don't have the
23 report so tell me -- what his report has or doesn't have is not
24 going to be of assistance to me. What's of assistance, so I
25 can at least understand your argument, is for what purpose
26 you're calling Dr. Murphy.

27 MS. FREEZE: Right. So I believe it's relevant. The
28 argument that -- .

1 THE COURT: To what -- what is he -- what are you calling
2 him for?

3 MS. FREEZE: That my client is of sound mind.

4 THE COURT: Today?

5 MS. FREEZE: Of sound mind today, that he has been
6 evaluated. My client's mental health is going to be discussed
7 in this case.

8 THE COURT: His soundness of mind today is not at issue in
9 this trial.

10 MS. FREEZE: Well, and also his mental state.

11 THE COURT: Today?

12 MS. FREEZE: Well, No. 1.

13 THE COURT: No.

14 MS. FREEZE: Okay. I respectfully disagree with the Court,
15 I guess.

16 THE COURT: If you let me finish. And I might be
17 interrupting you, but that might be a little bit of judge
18 privilege, so my apologies.

19 MS. FREEZE: That's fine.

20 THE COURT: What's going to be at issue in this trial is I
21 guess identity of the person making the threats. I'm gathering
22 that's a defense. And then an alternate defense I guess --
23 well, maybe part of the same defense that it can't be him, I'm
24 gleaning from you now, because this would be the actions of
25 somebody who is not -- this is somebody who cannot perform the
26 mental state really is what it's at issue or who could form
27 mental state. Or are you saying -- I'm really not sure what
28 you're saying.

1 But in any case, the time that anything is relevant is the
2 time the calls were made. So on those three dates.

3 Today doesn't matter. The only thing that matters today
4 is that Mr. Bathen is competent to stand trial, and there's
5 been no indication by anyone that he is not competent to stand
6 trial.

7 So with that, we need to go back to the elements of the
8 crime that occurred on the three dates, and -- if you have
9 some -- June 4th, July 3rd, and July 5th. So his mental state
10 on those three days.

11 And then we need -- we have Sanchez, and I don't know why
12 Sanchez wouldn't apply to Dr. Murphy as well, which would not
13 let in any statements made by Mr. Bathen unless he was subjected
14 to cross-examination. So we have that whole hearsay kind of
15 issue going.

16 So I'll hear from you now now that you understand my
17 concerns.

18 MS. FREEZE: Right. Again, Your Honor, I'm not trying to
19 bring in any type of hearsay statements or conclusory
20 statements from Dr. Murphy about his innocence or, you know --
21 or his danger to the community or things like that. I would
22 lay the foundation that Dr. Murphy is an expert, that he
23 evaluated my client, and the Evidence Code allows for his
24 opinion based on him being an expert and giving his opinion
25 to my client's mental health. My concern --

26 THE COURT: Mental health, again, when?

27 MS. FREEZE: I just -- my concern, Your Honor, in this type
28 of situation is that -- and I tried to voir dire on it -- is

1 that there was a doctor-patient relationship between the
2 complaining witness and my client. That doctor-patient
3 confidentiality has already been really kind of pulled because
4 she's going to be testifying that she treated my client, that
5 my client sought her -- they had sessions together and that he,
6 you know, engaged her or hired her to be a counselor. And so
7 my concern is that without him testifying, if he chooses not to
8 testify, which he has that right to do, that there's going to
9 be an assumption that because my client sought this doctor's
10 treatment, was a patient, that -- and already some things are
11 going to be disclosed that are in violation of a doctor-patient
12 privilege and things are going to be disclosed to the Court and
13 to the jury is that I think that that needs to be explained and
14 the Evidence Code allows for an expert to evaluate a defendant
15 and give their opinion as to that evaluation. I mean --

16 THE COURT: Only if it's relevant. And what's relevant is
17 Mr. Bathen at the time of the crimes. What is not relevant is
18 Mr. Bathen today, as I said, except his competency to stand
19 trial. So --

20 MS. FREEZE: I mean --

21 THE COURT: Unless I'm missing something. I mean -- but if
22 you're calling Dr. Murphy to talk about Mr. Bathen today, then
23 I have to say it's irrelevant and I'm not going to allow it.
24 If there's some other proffer, I will consider that.

25 MS. FREEZE: Okay. And I can certainly -- like I said, I
26 mean if the Court will allow me to actually look, because like
27 I said, I didn't have an opportunity to look in any case law
28 and I can bring it before the People's case in chief is

1 completed and before -- obviously, before I put on my case, if
2 the Court would allow me to do that, because this is a specific
3 intent crime.

4 I understand that -- I'm just concerned because it's an
5 unusual 422 in that we have this doctor-patient relationship
6 and she is going to be talking about treating him for mental
7 health issues. And so I think it becomes extremely relevant.

8 As I was telling Ms. Somerville earlier today, if this
9 was, you know, boyfriend/girlfriend stuff or a different type
10 of situation, but I think his mental health is going to be
11 disclosed to the jury and I think that's why it is quite
12 relevant.

13 THE COURT: So okay. A trial is a living thing and all of
14 my in limine motions are subject to what goes on at trial. For
15 example, if one of the witnesses attacked -- well, nevermind.
16 I don't even want to make hypotheticals. But -- so yes, I mean
17 I thought I was giving you the opportunity to continue this
18 hearing, but I'm not -- I'll allow you to refine what you want
19 Dr. Murphy to opine on, but we have two issues here. We
20 have -- No. 1, we have relevance to the crimes and the elements
21 of the crime, and we're not talking about sentencing where a
22 lot of this would be relevant.

23 No. 2, we have the issue of the hearsay statements, and we
24 cannot have Mr. Bathen testify to Dr. Murphy.

25 MS. FREEZE: Absolutely. I agree with that, Your Honor.

26 THE COURT: So those are the two issues. So if you
27 persuade me that there's something relevant about Dr. Murphy's
28 testimony to this crime that has been charged on three dates in

1 2017 --

2 MS. FREEZE: Uh-huh.

3 THE COURT: -- then, certainly, I'll listen to it. I mean
4 I want -- I want all evidence to come in that's relevant. I
5 don't want to exclude anything that's relevant. Seems to me
6 that if I am persuaded, you have Dr. Murphy available for a
7 402, because if there is anything and I don't see it yet, if
8 there is anything, then it's going to be very limited because
9 of both, the hearsay issues and -- but something might come up.
10 I agree something might come up in the direct testimony
11 concerning Mr. Bathen's mental health.

12 Although, I'm not sure, Ms. Somerville, whether you know
13 whether any such -- you anticipate anything?

14 MS. SOMERVILLE: Just what she was treating him for. And
15 she's not -- obviously, she's not a psychiatrist.

16 THE COURT: She's a psychologist.

17 MS. SOMERVILLE: She's a psychologist. So she was just
18 seeing him because he was having issues with interpersonal
19 relationships. He had some mild depression. It's not -- he
20 wasn't under psychiatric -- I believe she said he was taking
21 medication, but she was not a psychiatrist. It wasn't that.
22 It was more like a therapist. I think she's a therapist.

23 MS. FREEZE: And that's -- that's my concern. It's just
24 that it's the relevance.

25 THE COURT: That 10 years ago if he sought some help?

26 MS. FREEZE: Right. I just think when she's opening the
27 door to saying that this guy, you know, has these issues and
28 then -- and I mean obviously it's been 10 years and she still

1 seems to think that he has these issues now and that's why
2 she's insisting fear and he's reaching out to her. So I --
3 that's where I see the link, Your Honor. And just -- I mean
4 granted I had 30, 40 minutes looking over it over lunch.

5 And I mean looking at the *Molina* case that the People
6 themselves cite, it indicates that an expert can testify
7 regarding the defendant's mental condition so long as the
8 expert gives no opinion on the ultimate question of whether or
9 not the defendant had the requisite mental state. And I'm not
10 going to ask Dr. Murphy, do you think that my client --
11 obviously, I understand --

12 THE COURT: You know, I need a 402 for Dr. Murphy to
13 even -- to even be a basis for him to reach whatever
14 conclusions he's reaching, just saying, for somebody because --
15 and all I have -- I don't have the reports. So all I have is
16 Ms. Somerville's summary. And it gives me great pause when
17 somebody says somebody is not a danger. You make a
18 pronouncement like that, and it's like --

19 MS. FREEZE: Well --

20 THE COURT: -- wish I had that first of all --

21 MS. FREEZE: I totally understand, Your Honor. I wouldn't
22 be asking him about that. I would be asking him about the
23 tests he employed and I'd ask him about five questions. I mean
24 that's really all --

25 THE COURT: Yeah. But as I said, I won't preclude any
26 relevant evidence.

27 MS. FREEZE: Okay.

28 THE COURT: This I find irrelevant at this point.

1 MS. FREEZE: Okay.

2 THE COURT: And always subject to opening or if you want to
3 we'll find some time to address it.

4 MS. FREEZE: Okay. Thank you, Your Honor. Thank you for
5 your time.

6 THE COURT: But that's my ruling as of now.

7 MS. FREEZE: Uh-huh.

8 THE COURT: Okay.

9 MS. FREEZE: Thank you, Your Honor.

10 THE COURT: You're welcome.

11 Anything else?

12 MS. SOMERVILLE: No.

13 THE COURT: Okay. Nine o'clock ready to go in your seats.

14 MS. FREEZE: Thursday?

15 THE COURT: Thursday, yes. All right. I'll see you all
16 then.

17 (At 4:02 p.m. an adjournment was taken until
18 Thursday, June 14, 2018, at 9:00 a.m.)

19

20

21

22

23

24

25

26

27

28

1 San Diego, California)
2 County of San Diego) : SS.

3
4

5 I, Yvonne Medina Luna, Official Reporter for the Superior
6 Court of the State of California, in and for the County of San
7 Diego, do hereby certify:

8

9 That as such reporter, I reported in machine shorthand the
10 proceedings held in the foregoing case;

11

12 That my notes were transcribed into typewriting under my
13 direction and the proceedings held on June 12, 2018, contained
14 within Pages 143 through 169, are a true and correct
15 transcription.

16

17 Dated this 26th day of September 2018.

18

19

20

Yvonne Medina Luna
Yvonne Medina Luna, CSR No. 12697
Official Court Reporter

21

22

23

24

25

26

27

28

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	)	FROM SAN DIEGO COUNTY
)	
PLAINTIFF AND	)	HON. STEPHANIE SONTAG
RESPONDENT,)	
	)	COURT OF APPEAL
VS.	)	NO. D074538
)	
	)	CASE NO. SCS294342
BENJAMIN BATHEN,)	
)	
DEFENDANT AND	)	JURY TRIAL
APPELLANT.)	
_____)	

REPORTER'S CERTIFIED TRANSCRIPT
JUNE 14, 2018
VOLUME 3 OF 7
(PAGES 170 THROUGH 355)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST "A" STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	BENJAMIN BATHEN
AND APPELLANT:	IN PROPRIA PERSONA

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
OFFICIAL COURT REPORTER

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

DEPARTMENT 15

HONORABLE STEPHANIE SONTAG, JUDGE

THE PEOPLE,)	
)	
PLAINTIFF,)	
	)	CASE NO. SCS294342
VS.)	
)	
)	
BENJAMIN BATHEN,)	
)	
DEFENDANT.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
 THURSDAY, JUNE 14, 2018

A P P E A R A N C E S

FOR THE PLAINTIFF: SUMMER STEPHAN
 DISTRICT ATTORNEY
 BY: CHERIE SOMERVILLE
 DEPUTY DISTRICT ATTORNEY
 333 "H" STREET, SUITE 4000
 CHULA VISTA, CALIFORNIA 91910

FOR THE DEFENDANT: THE LAW OFFICE OF ALICIA C. FREEZE, APC
 BY: ALICIA C. FREEZE
 (RETAINED COUNSEL)
 7676 HAZARD CENTER DRIVE, SUITE 500
 SAN DIEGO, CALIFORNIA 92108

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
 OFFICIAL COURT REPORTER

CHRONOLOGICAL INDEX OF WITNESSES

	PAGE	LINE	VOL
GARY JACOBS - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.203	6	3
CROSS BY MS. FREEZE . . . . .	.211	6	3
REDIRECT BY MS. SOMERVILLE . . . . .	.220	10	3
CAROLYN FRANCES JACOBS - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.224	2	3
CROSS BY MS. FREEZE . . . . .	.258	2	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.277	15	3
REDIRECT BY MS. SOMERVILLE . . . . .	.291	8	3
RECROSS BY MS. FREEZE . . . . .	.296	6	3
GREGORY GAIN - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.299	26	3
CROSS BY MS. FREEZE . . . . .	.339	14	3

ALPHABETIC INDEX OF WITNESSES

	PAGE	LINE	VOL
GAIN, GREGORY - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.299	26	3
CROSS BY MS. FREEZE . . . . .	.339	14	3
JACOBS, CAROLYN FRANCES - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.224	2	3
CROSS BY MS. FREEZE . . . . .	.258	2	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.277	15	3
REDIRECT BY MS. SOMERVILLE . . . . .	.291	8	3
RE CROSS BY MS. FREEZE . . . . .	.296	6	3
JACOBS, GARY - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.203	6	3
CROSS BY MS. FREEZE . . . . .	.211	6	3
REDIRECT BY MS. SOMERVILLE . . . . .	.220	10	3

INDEX OF EXHIBITS IDENTIFIED

	PAGE	LINE	VOL
1 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL DATED JUNE 4, 2017	241	18	3
1A TRANSCRIPT OF AUDIO RECORDING FROM JUNE 4, 2017	241	22	3
2 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL, DATED JULY 3, 2017	249	15	3
2A TRANSCRIPT OF AUDIO RECORDING FROM JULY 3, 2017	249	18	3
3 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL, DATED JULY 5, 2017	252	6	3
3A TRANSCRIPT OF AUDIO RECORDING DATED JULY 5, 2017	252	7	3
4 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH UNKNOWN MALE AND UNKNOWN FEMALE DATED SEPTEMBER 16, 2017	307	25	3
4A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 4	307	26	3
5 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH BAILBOND REPRESENTATIVE DATED SEPTEMBER 16, 2017	308	22	3
5A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 5	308	23	3
6 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH EMILIO SANCHEZ BAIL BOND REP. DATED SEPTEMBER 17, 2017	309	6	3
6A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 6	309	9	3

7	AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH GERALD, BAIL BOND REPRESENTATIVE DATED 9/17/17	309	21	3
7A	TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 7	309	24	3
8	SUBSCRIBER INFORMATION SHEET FROM T-MOBILE, ONE PAGE	314	9	3
9	SUBSCRIBER INFORMATION SHEET FROM T-MOBILE, CONTINUATION OF COURT'S EXHIBIT 8, ONE PAGE	318	1	3
10	CALL DETAIL RECORD OF 617-992-4648 FROM JUNE 4, 2017, ONE PAGE	319	3	3
11	CALL DETAIL RECORD OF 617-992-4648 FROM JUNE 4, 2017, ONE PAGE	321	16	3
12	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 3, 2017, ONE PAGE	322	9	3
13	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 3, 2017, ONE PAGE	322	24	3
14	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 5, 2017, ONE PAGE	323	9	3
15	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 5, 2017, ONE PAGE	323	24	3
16	GOOGLE MAP TITLED "TOWER HITS" FROM 6/1/17-7/6/17, ONE PAGE	326	11	3
17	GOOGLE MAP, TRACKING PHONE CALLS OF 617-992-4648 ON JULY 5, 2017, ONE PAGE	336	21	3

18	GOOGLE MAP, TRACKING PHONE CALL OF 617-992-4648 ON JULY 5, 2017, ONE PAGE	338	5	3
35	ONE-PAGE PRINTOUT OF EMAIL DATED APRIL 28, 2008	278	3	3
36	ONE-PAGE PRINTOUT OF EMAIL DATED JULY 1, 2008	279	14	3
37	ONE-PAGE PRINTOUT OF EMAIL DATED SEPTEMBER 1, 2008	281	5	3

Chula Vista, California; Thursday, June 14, 2018

-- 000 --

(The following proceedings were had between the Court and counsel out of the presence and hearing of the jury.)

THE COURT: Good morning. Thank you for coming in early this morning. And I know, Ms. Freeze, you said you had something for the record. Shall we go ahead with mine or would you like to start?

MS. FREEZE: Go ahead, Your Honor.

THE COURT: All right. I was thinking yesterday about your motion, Ms. Somerville, to exclude the testimony of Dr. Murphy.

MS. SOMERVILLE: Your Honor, I'm sorry.

THE COURT: Okay. I'm sorry.

MS. SOMERVILLE: I thought it might -- I told Alicia if she wants to have him come in and say that he's of sound mind and not get into the statements and all of that --

THE COURT: If you're not going to object, that's fine.

In the middle I wasn't going so much for that as in while we were discussing the motion, there was some conversation about whether there was a waiver --

Good morning. I haven't seen you for a while. Okay.

THE BAILIFF: Good morning, Your Honor.

THE COURT: -- that there was a partial waiver of the privilege against disclosing treatment, confidential communications and the treatments that I -- there's no motion in limine on all of that, but I thought we ought to get it open

1 before we call Dr. -- is it Jacobs?

2 MS. SOMERVILLE: Yes.

3 THE COURT: -- before we call Dr. Jacobs. So I guess my
4 question is is she going to be testifying about the nature of
5 her treatment of Mr. Bathen? Any communications, any
6 diagnosis? I think we need to talk about that.

7 MS. SOMERVILLE: Yes. So just what I intended to ask
8 her -- basically what she had testified to at the prelim was
9 that she was treating him just for some interpersonal
10 relationship issues and, you know, the fact that he was having
11 trouble meeting some people, moving to a new area.

12 I don't know that she necessarily diagnosed him. I mean I
13 haven't asked her that and gotten into that. I think there
14 was mention of depression. But I don't think he has any, you
15 know, major diagnoses and I don't think that she did that. I
16 don't know for sure.

17 I wasn't going to ask her, you know, did you diagnose him
18 and -- but in the threats, as I outlaid in my trial brief, you
19 know, he mentioned stuff about, you know, dating and you
20 should say I'm dating and that she didn't specifically
21 remember, I believe, when she testified about that.

22 And, you know, it's been such a long time; so I just
23 wanted to, you know, get out in general, you know, basically
24 what was, you know, kind of the theme of what he came to see
25 you for. I didn't plan to get into all the specifics of what
26 they talked about. I'm not even sure that she remembers all
27 of that.

28 THE COURT: Okay. Ms. Freeze.

1 MS. FREEZE: Thank you, Your Honor. And I appreciate th
2 Court wanting to have dialogue about this today. And I mean
3 to actually -- I was ruminating on it over the break as well

4 My client at no point has waived any doctor-patient
5 privilege at all at any time. In fact, my client maintains,
6 as we sit here today, that he doesn't even believe that she'
7 permitted to even disclose that he was a patient of hers, an
8 that's always been a big concern of his and that's one of th
9 reasons where I was -- the whole purpose of me bringing
10 Dr. Murphy is that I believe that she was going to open up
11 this -- this conversation about my client's mental health.

12 And looking at the preliminary hearing transcript, the
13 Court at that hearing on Page 33 actually does --

14 THE COURT: I don't have that in front of me.

15 MS. FREEZE: -- does engage with Dr. Jacobs and does
16 inquire of her himself. And the only thing that I saw that
17 brought out, it was that she said it's not consistent with t
18 kind of work that I did with Mr. Bathen when we were working
19 and she discloses that it was just adjustment disorders with
20 him moving as well as interpersonal issues. So that was it.

21 And then in all the other police reports, she's very
22 tight-lipped. Dr. Jacobs does not disclose to any of the
23 officers, which I believe and I've -- and my client believes
24 that she's not permitted to.

25 So I do appreciate the Court bringing that out because r
26 client at no point has made any statements, has waived any
27 doctor-patient relationship.

28 THE COURT: So, as I understand it, Ms. Somerville, you

1 intend to ask kind of the same questions you asked at the
2 preliminary examination and leave it at that?

3 MS. SOMERVILLE: Yes. I wasn't the attorney at the preli
4 but I just intend to, you know, stay along those lines. I
5 wasn't going to delve into anything, but I do think, obviousl
6 the relationship is relevant to the case. It explains to the
7 jury why he, you know, would reach out to her. If not, it's
8 just some random woman who's just accusing some person who
9 lives on the other side of the country of making threats. I
10 mean it puts it in no context whatsoever.

11 So I think all of that is relevant. I think it should
12 come in. I was looking at the -- the specific Evidence Code
13 sections for, you know, therapists' relationships.

14 THE COURT: Before you get to that, let's see whether
15 there's any objection to the testimony as it came in, and I
16 haven't read the -- I don't typically read the preliminary
17 examination transcript because, unless you bring it to my
18 attention and it has some bearing on what's going to go on a
19 trial, that was a separate proceeding.

20 So what is your position, Ms. Freeze?

21 MS. FREEZE: Well, Your Honor, again, I would reiterate
22 that and my client has maintained this position that any
23 discussion with regards to --

24 THE COURT: So let's talk about the specific questions t
25 were asked in the context. And so are you objecting to the
26 question: Was ever -- how did you know him, did you know
27 him -- how did you know him?

28 MS. FREEZE: I do. I think I have to for the record, Yo

1 Honor, object to that. And I believe that that's been
2 maintained for the last year during this litigation is that
3 that's inappropriate.

4 THE COURT: It would have been helpful to have it briefed,
5 but -- but here we are. I'm going to look at it. I think that
6 there's no -- to me -- go ahead. You've looked at the
7 privilege. Let me --

8 MS. SOMERVILLE: That's okay.

9 THE COURT: We're looking at the Evidence Code section.

10 MS. SOMERVILLE: It basically starts with 1010, which is
11 where it starts to describe psychotherapists. It does talk
12 about, you know, what -- who a patient is, who a
13 psychotherapist is, who a psychologist is.

14 And basically, in Evidence Code Section 1020, there's an
15 exception for breach of duty arising out of
16 psychotherapist-patient relationship and it goes on to say
17 that there's no privilege under this article as to a
18 communication relevant to an issue of breach by the
19 psychotherapist or by the patient of a duty arising out of a
20 psychotherapist-patient relationship. And I mean I didn't
21 brief this issue either, but --

22 THE COURT: My briefing kind of went to the universe.

23 MS. SOMERVILLE: So there's that. I mean I think that
24 basically he's putting this issue by making these threats to
25 her. I mean he's really, I think, in a way waived that
26 patient-doctor privilege communication.

27 There's also Evidence Code Section 1024. And it talks
28 about, you know, patient dangerous to himself or others, that

1 there's no privilege under this article if the psychotherapist
2 has reasonable cause to believe that the patient is in such
3 mental or emotional condition as to be dangerous to himself or
4 to the person or property of another and that disclosure of
5 the communication is necessary to prevent the threat and
6 danger.

7 I just think that given those -- and I have not had a
8 chance to, you know, specifically brief these. I think most
9 of these are referring to instances where the communication
10 that is threatening is happening in an actual therapy setting.
11 So I just want, you know, that caveat to be put out there.
12 But I think we have a very unique situation where --

13 THE COURT: It's kind of a catch 22 that if he made the
14 threats, I agree he waived the privilege. If he didn't make
15 the threats, then I don't think the privilege is waived. So
16 it's -- you know, it's kind of a circular kind of reasoning.

17 But what I want to know is did this -- when the name came
18 to light, did the fact -- and I've looked at the content of
19 the messages -- did the fact of her treatment of him actually
20 form some of the basis of her fear, meaning the content. Oh,
21 he's blaming me for his physician now. I remember treating
22 him for this.

23 MS. SOMERVILLE: She doesn't remember the specific details
24 is my understanding of what -- I mean it was like Ms. Freeze
25 said, interpersonal relationship adjustment issues to, you
26 know, moving out here from the East Coast, but he specifically
27 talks about, you know, you should start dating. You should
28 start dating. I'm going to hurt you.

1 And then that kind of ties into how their doctor-patient
2 relationship terminated. He got very angry based on the fact
3 that she could no longer treat him because he was out of the
4 State of California. At that point, he had, you know, wanted
5 her to apologize to him for some comment that she had made and
6 also had threatened to sue her at that time.

7 So I mean I think it all relates back to obviously
8 something that he perceived as an insult or something and the
9 termination of their relationship. I mean, obviously, I don't
10 know exactly what it is that, you know, sparked this or, you
11 know, what specific communications he's referring to and --

12 THE COURT: Well, the confidential communications in the
13 treatment itself does not seem to be at issue here. I mean she
14 doesn't remember them. And we're not going to be talking about
15 those confidential communications specifics.

16 MS. SOMERVILLE: When she doesn't remember, like,
17 specifically telling him to date, I mean it's not --

18 THE COURT: But what I'm saying is I don't think that
19 sounds like it's at issue here that we're not having her
20 disclose what was communicated during the sessions.

21 MS. SOMERVILLE: Right. It's just what she was -- you
22 know, why he came to see her, what type of counseling he was
23 seeking that she can remember.

24 THE COURT: Well, I'm not even -- I'm thinking that the
25 fact that he was a patient -- boy, this is thornier than --

26 MS. FREEZE: Your Honor, may I?

27 THE COURT: Sure.

28 MS. FREEZE: Thank you.

1 Just briefly to respond with regard to Evidence Code 1020
2 and 1024, and I think the Court kind of touched on it just a
3 moment ago is that it's presuming that my client identified
4 himself. If he had said, hey, Dr. Jacobs, this is Ben Bathen,
5 "F" you and goes into the spew of these things, then I think
6 it would trigger perhaps those Evidence Code because there
7 might be a danger to himself or he's exhibiting behavior that
8 is concerning to her.

9 But it's presuming the entering -- allowing it to come in
10 is presuming that he's been identified, which is obviously a
11 huge issue.

12 THE COURT: It's an issue, Ms. Freeze, but obviously
13 there's sufficient evidence to believe that it's Mr. Bathen;
14 otherwise, we wouldn't be at the trial phase, we wouldn't have
15 survived the preliminary examination.

16 MS. FREEZE: I certainly understand that.

17 THE COURT: All these charges wouldn't have been filed.

18 MS. FREEZE: Right.

19 THE COURT: So I can't in a vacuum say that Mr. Bathen was
20 chosen out of the universe and just could incidentally happen
21 to have been a former patient.

22 MS. FREEZE: Right.

23 THE COURT: So I don't know how we get around.

24 MS. FREEZE: Right. And then -- and that's one of the
25 reasons.

26 And I want -- when we're done with this dialogue, my
27 discussion about how they -- how they point the finger at
28 Mr. Bathen, but let me -- if I can finish my thought as it

1 pertains to Ms. Somerville's comments with regards to this
2 very -- there's an assumption and there's an attenuation as it
3 pertains to this link between the voice messages and the
4 subject matter of those voice messages and the treatment of my
5 client.

6 And so there is no -- there's no link between the
7 treatment of my client as we've seen thus far, at least what
8 I've seen in police reports and in the preliminary hearing
9 transcript. At no time does Dr. Jacobs at any point say,
10 yeah, that was the crux of our sessions.

11 Is that he had issues dating and we were at ends and we
12 didn't see eye to eye about my treatment suggestion. There's
13 no discussion whatsoever, so I just want to sure that that's
14 clear.

15 THE COURT: Well, that will come out in evidence. I mean
16 I'm just looking at the scope of what the questioning could be
17 and I haven't heard any law from you that says that in a
18 criminal proceeding when the patient is accused of making
19 threats that the psychotherapist can't, number one, acknowledge
20 that he was a patient and that ended badly.

21 MS. FREEZE: Right. And there is a Tarasoff case, Your
22 Honor -- I can try to get the actual citation for that -- with
23 regards to the exception and the narrow exception and how
24 narrow it is because I think in my client's -- just obviously
25 we're outside the presence of the jury, but just in his line of
26 work, which will come out, and what he does with the federal
27 government, I mean just him seeing a mental health counselor
28 can be grounds for him to be terminated from his job.

1 So I mean that becoming public record has always been a
2 concern. And I believe his prior counsel, Mr. Theule, who
3 represented him until February or March of this year brought
4 that up a number of times to the District Attorney's Office.
5 This concern about this disclosure.

6 THE COURT: It's out of the bag.

7 MS. FREEZE: Well, clearly. I mean we voir dire on it.
8 But I -- just so the Court understands because the Court made
9 the comment of we're here and it's made it this far to trial.

10 THE COURT: Were you just saying that?

11 MS. FREEZE: Right.

12 THE COURT: You're concerned about it being public, and I'm
13 saying no matter what I do now it's already public. I just
14 have to say that is not going to have -- to have a bearing on
15 my decision one way or the other. My decision is going to be
16 we have a crime and 10 years ago my understanding is he sought
17 some counseling.

18 MS. FREEZE: Right.

19 THE COURT: I find it hard to believe that the fact that 10
20 years ago he sought some counseling in this day and age would
21 terminate his job with the government no matter how top secret
22 or whatever, but I could be wrong. It just sounds a little
23 incredible to me.

24 MS. FREEZE: Uh-huh.

25 THE COURT: But that's neither here nor there. I have to
26 make a decision here based on what's before me.

27 MS. FREEZE: Right, Your Honor.

28 THE COURT: And so that I could be fair to both sides. And

1 I don't think that you have to lay a foundation with some
2 connection between identifying him as a patient and her fear.
3 I mean I think you have to say she knew him as a patient.
4 That's how she knew him. He's not an unknown person.

5 MS. SOMERVILLE: Right.

6 THE COURT: But anything beyond that, you know, if it
7 contributed to her fear or she thought it was him because it
8 ended badly, but if your theory is that it was him because of
9 the content of their -- well, I see what -- that would be an
10 element of identification.

11 MS. FREEZE: And Your Honor, if I could give that cite for
12 the Tarasoff case. It's just with regards -- just the duty
13 of -- I'm sure the Court is very familiar with the case. It
14 just the Supreme Court of California, the mental health
15 professionals have that duty to protect individuals, so I can
16 give you the case.

17 THE COURT: Tarasoff. I have the citation, sure. Thank
18 you, though.

19 I was going beyond Tarasoff just to what we're doing here.

20 MS. SOMERVILLE: I mean Tarasoff is when a patient
21 threatens someone else.

22 THE COURT: Very familiar. Thank you. Very familiar with
23 Tarasoff.

24 That's kind of -- it came up in the context of 1024.

25 MS. SOMERVILLE: Right.

26 THE COURT: That's how we kind of went on that little se
27 out there. But it does show that -- that in a criminal
28 context, I think that in a case such as this where the

1 relationship was -- that was the only relationship; and if we
2 try to ignore that and don't allow the People to get in that
3 there was this relationship, then it would be -- which you
4 wouldn't mind, but it would be impossible to prove, I think,
5 that it was Mr. Bathen because then, as you said, it would be
6 just some random person coming from whatever, and this all
7 bears into whether or not it was Mr. Bathen.

8 And so I can't -- I can -- I'm going to honor the
9 patient-therapist relationship in that no confidential
10 communications. I'm not going to allow any confidential
11 communications in the therapy session because it doesn't sound
12 like it's pertinent.

13 MS. SOMERVILLE: Okay. But the general overview, this is
14 why he came to seek treatment from you, I mean I think that -
15 I think that's relevant --

16 THE COURT: I'm being quiet because I'm looking at actual
17 privilege. I want to look at the Evidence Code that's the
18 actual privilege.

19 Okay. Confidential communication between patient and
20 psychotherapist, that's 1012, meets information including
21 information obtained by an examination of the patient
22 transmitted between a patient and his psychotherapist in the
23 course of that relationship and in confidence by means which
24 so far as patient is aware discloses the information to no
25 third persons other than those who are present, further the
26 interest of the patient in the consultation.

27 And I'm not finding -- in my brief book, I'm not finding
28 anything about the right to privacy is not absolute. It may

1 yield in the furtherance of the compelling state's interest.
2 The state's interest in facilitating the legal proceeding is
3 substantial enough to compel disclosure of a great variety of
4 confidential material. That's *County of Alameda v. Superior*
5 *Court*, 194 Cal.App.3rd 254.

6 MS. SOMERVILLE: Could you give that cite again? I'm
7 sorry.

8 THE COURT: Sure. And this is all I know about -- I have
9 not read the case. It's 194 Cal.App.3rd 254.

10 This is really what we're looking -- you know, I'm looking
11 and it's almost akin to there's no privilege under this
12 article of the services of the psychotherapist were sought or
13 obtained to enable -- aid anyone or plan to commit a crime or
14 tort or to escape detention or apprehension after the
15 commission of the crime or tort, and that's Evidence Code
16 Section 1018.

17 And that's certainly not this case, but it's -- to the
18 extent that since the -- the crime with Mr. Bathen committed
19 it, he'd be able to -- the thought that he'd be able to avoid
20 detection because of former psychotherapist relationship, not
21 the content of his communication, but the relationship, I am
22 having a hard time with that.

23 So 1024. All right.

24 MS. FREEZE: And Your Honor, if I may just briefly.

25 THE COURT: Okay. We're just right at nine o'clock.

26 MS. FREEZE: Thank you, Your Honor.

27 With regards also if the Court is -- as the Court has
28 indicated, Dr. Jacobs is not permitted to be discussed

1 confidential dialogue with regards to her treatment and my
2 client. I mean just so the Court is aware, and for the
3 record, that her voice message, the voice calls that are the
4 subject of this proceeding, of this whole trial were left on a
5 confidential voice message system. So if you actually call
6 the number, it says this is a confidential voice message. So
7 just --

8 THE COURT: It's a crime. It's a crime. That's not
9 confidential.

10 MS. FREEZE: I just wanted to let the Court know that if
11 the Court had any confusion if it was a cell phone, but it was
12 the office confidential.

13 THE COURT: Doesn't matter to me. You can't commit a crime
14 on a confidential line.

15 MS. FREEZE: Right. Whether or not it's a crime, correct.

16 THE COURT: Well, that's what we're here about. But I'm
17 just saying with your proposition we can't say, oh, it's
18 confidential. I mean that is Tarasoff.

19 MS. FREEZE: I just wanted to raise that.

20 And before we take a moment, if I could just -- as I email
21 Robert, if I can just put my brief thing on the matter. It
22 has to do with some of the discussions we had on the motion
23 in limine.

24 THE COURT: Is it just to make a record?

25 MS. FREEZE: Just to make a record.

26 THE COURT: We can do it some other time.

27 MS. FREEZE: Well, I think it's important to put it on the
28 record before there's any testimony as it pertains to the

1 discussions that we had on Monday afternoon. It would just
2 take a just a minute, Your Honor.

3 THE COURT: Okay.

4 MS. FREEZE: Okay. Thank you.

5 Just, Your Honor, just so I'm clear, when we broke on
6 Monday, the Court -- I was understanding with regards to my
7 request to have any reference to the Google results excluded,
8 the Court had said that -- what I had understood is that the
9 Court was going to take under submission this effect on the
10 listener.

11 When we came back to court on Tuesday morning, the Court
12 had directed us to *Francen* which I had an opportunity to read.

13 THE COURT: That was for the detective.

14 MS. FREEZE: Correct.

15 THE COURT: And I'm excluding that reference.

16 MS. FREEZE: Right.

17 And the only thing that I just wanted to put on the record
18 is that I did provide to the Court the *Torres*,
19 *United States v. Torres*.

20 THE COURT: I already put that on the record that you
21 provided that to me.

22 MS. FREEZE: Okay. Because I guess my confusion is it -- I
23 thought the *Francen* case was also going to touch on the effect
24 on the listener because I understood the Court was going to
25 take that under submission and wanted some law, because I
26 wanted to make sure because I was a little confused. I thought
27 perhaps *Francen* talked about effect on the listener.

28 And since I had a chance to read it in its entirety, so I

1 would just like to put on the record the *Torres* case and the
2 appropriate times when effect on the listener would apply ar
3 just, again, renew my objection as to pertaining to Dr. Gary
4 Jacobs relaying his -- the search results which have now --
5 the Court has said is hearsay, talking about that to
6 Dr. Carolyn Jacobs.

7 THE COURT: We have argued that the citations are on the
8 record. I think it goes to identification in this case and
9 think that a 352 analysis and hearsay analysis that a limited
10 instruction will be sufficient.

11 MS. FREEZE: Great.

12 THE COURT: Anything else before we call in a jury?

13 MS. SOMERVILLE: No.

14 THE COURT: Okay. We shall call in the jury.

15 Who is your first witness?

16 MS. SOMERVILLE: Dr. Gary Jacobs and then Carolyn Jacobs.

17 THE COURT: Okay. We're going to take a break before
18 Carolyn Jacobs --

19 MS. SOMERVILLE: Okay.

20 THE COURT: -- so that I can do a little more looking.

21 MS. SOMERVILLE: I just want to for my own -- what I wa
22 going to say is that she saw him in general, it was for
23 interpersonal relationships.

24 THE COURT: Just say she saw him.

25 MS. SOMERVILLE: Okay. She treated him.

26 I was going to mention the fact that when she terminate
27 the relationship he got angry. He wanted an apology from h
28 for something and he threatened to sue her.

1 THE COURT: That's -- I don't think that's confidential --

2 MS. SOMERVILLE: Okay.

3 THE COURT: -- communication.

4 Okay. You will learn that it drives me crazy to have the
5 jury waiting outside. We don't have the notebooks handed out.
6 So go ahead. But for future reference, I really do like to
7 get started on time. Okay.

8 *(The following proceedings were had in open court in*
9 *the presence and hearing of the jury.)*

10 THE COURT: Okay. We're going to remain seated and come to
11 order.

12 THE BAILIFF: Remain seated and come to order. This court
13 is now in session.

14 THE COURT: Good morning, ladies and gentlemen. I hope you
15 are all ready to proceed this morning.

16 As I told you before we broke on Tuesday, we're going to
17 start with opening statements if the lawyers choose to give
18 them at this time.

19 And an opening statement is an overview of what the
20 lawyers expect that the evidence will show. As I told you on
21 Tuesday, what the lawyers say is not evidence, but it kind of
22 gives you an overview of what they expect the evidence will be
23 so they can have a framework to put in the little pieces of
24 evidence as they actually come in.

25 And I hesitated a moment because I do have to talk to the
26 lawyers for just one moment. If I could see them, and then we
27 will begin. My apologies for this.

28 *(Sidebar; unreported.)*

1 THE COURT: And thank you, ladies and gentlemen. This
2 won't happen very often. What happened we were -- we met ear
3 this morning, the lawyers and I, and there was just something
4 occurred to me before I came out to see you and came in and I
5 hadn't communicated. So I apologize that you were sitting for
6 that.

7 And would you like to give an opening statement,
8 Ms. Somerville?

9 MS. SOMERVILLE: Yes. Thank you, Your Honor.

10

11

OPENING STATEMENT

12 BY MS. SOMERVILLE:

13 Sadistic, vulgar, vile threats. Mr. Bather made these
14 threats to Carolyn Jacobs. He threatened to torture her. He
15 threatened to kidnap her. He threatened to set her on fire.
16 He threatened to rape her. He threatened to rape her daughter
17 and threatened to kill her daughter. He wanted to hurt her.
18 He felt hurt and so he took it out on Ms. Jacobs.

19 Now, this happened back in June and July of 2017. But
20 this is something that had obviously been festering for a
21 while. It had been building up and something triggered it.

22 Now, you're going to hear that Dr. Jacobs is a
23 psychologist. She has been working in private practice since
24 1992 here in Chula Vista. And Dr. Jacobs sees people at an
25 office building where other therapists work as well.

26 And starting in 2004, Dr. Jacobs began to see Mr. Bather
27 And they had sessions in person, in her office. And basically
28 it was just about interpersonal relationships and some, you

1 know, adjustment issues. Dr. Jacobs was referred to
2 Mr. Bathen from the East Coast. So he had moved here to
3 Chula Vista, to San Diego, and that's why she started treating
4 him.

5 At some point during their treatment, Mr. Bathen got a job
6 in Los Angeles so he moved to Los Angeles and still wanted to
7 have Dr. Jacobs treat him. So what they did is they had phone
8 sessions. Dr. Jacobs is licensed in the State of California
9 and she'll explain to you that when you're licensed as a
10 psychologist in California, you can only practice within the
11 state. Your license doesn't extend to any other state
12 regardless of whether it's over-the-phone sessions.

13 So in 2008, late 2008, early 2009, Mr. Bathen got a job
14 in Boston, Massachusetts. And he wanted to continue his
15 treatment with Dr. Jacobs and Dr. Jacobs explained that, you
16 know, that's illegal. She can't do that with her particular
17 license. And this upset Mr. Bathen. She was getting e-mail
18 from him basically telling him -- excuse me, telling her that
19 he was angry about something and that he wanted her to
20 apologize to him. He even went so far as to threaten to sue
21 her.

22 Dr. Jacobs reached out to her professional liability
23 insurance just to make sure that she was going through the
24 proper steps to terminate, and she tried to actually get
25 Mr. Bathen's address so she could send a formalized letter to
26 him, but he wouldn't provide that to her. Dr. Jacobs was
27 never sued. She never heard from Mr. Bathen after that, and
28 life went on.

1 The years passed as they do. She continued to practice
2 here in California.

3 On June 4th of 2017, Dr. Jacobs got a message on her work
4 voice mail. She didn't check it until the morning of
5 June 5th. She was at home and she was alone; and when she
6 listened to this message, this is what she heard.

7 THE COURT: And waive reporting?

8 MS. SOMERVILLE: Yes, Your Honor.

9 *(Audio recording played; not reported.)*

10 MS. SOMERVILLE: Obviously, Dr. Jacobs was terrorized by
11 that call. She was home alone. She called her husband. He
12 was at work. He's a doctor. Was actually in surgery at the
13 time so she had to leave him a voice message saying, "Please
14 come home."

15 He eventually got that, came home. He was able to access
16 her voice mail system for work and get the phone number, and
17 that number is 1(617)992-4648. He was able to put that in a
18 Google search bar and it came up with the name of Mr. Bathen.

19 Dr. Jacobs will tell you, when she first heard this phone
20 call, she didn't immediately recognize it. When her husband
21 asked her about that name, it was like a light bulb went off.
22 She recognized that voice. She knew what this was about. And
23 they called the police.

24 The Chula Vista Police Department came out to take a
25 statement from her. And Ms. Jacobs and her husband put in
26 place a lot of safety features. She set the alarm at the
27 house all the time. She kept the doors and the windows
28 locked. She told her colleagues at work because she was

1 concerned that, you know, if Mr. Bathen showed up to make good
2 on these threats, that not only her colleagues but their
3 patients could also be in danger.

4 Dr. Jacobs also resorted to having her husband show up to
5 work when she got off to meet her. She contacted the landlord
6 of the building where their practice is, and they had a new
7 security system installed. And they cut down some hedges
8 around the property.

9 Dr. Jacobs had a lot of anxiety about this, she'll tell
10 you. She did not know where Mr. Bathen was. On June 4th --
11 excuse me, June 3rd, Dr. Jacobs again checked her voice
12 messages and this is the call that she had received.

13 *(Audio recording played; not reported.)*

14 MS. SOMERVILLE: Dr. Jacobs then received a second call --
15 or excuse me, a third call two days later. And this is the
16 call that she received again on her work voice mail.

17 *(Audio recording played; not reported.)*

18 MS. SOMERVILLE: Those two voice messages were also
19 reported to the Chula Vista Police Department. As a result of
20 that, Dr. Jacobs went to court and she got a restraining order.

21 The restraining order was granted, and that says that he
22 can have no contact with her whatsoever. It was an additional
23 step that she took to keep herself and her family safe.

24 Now, Dr. Jacobs recognizes Mr. Bathen's voice from those
25 calls. She treated him both in person and over the telephone.
26 And this was over the span of about four years. But that
27 phone number that those calls were made from, you are going
28 to hear evidence that that phone number links back to Mr. Bathen.

1 There was a search warrant and records were obtained from
2 T-Mobile, which is the provider for that phone number. And c
3 the records, there's an address. And that address is an
4 Arlington, Virginia. That is the billing address. That
5 address is Mr. Bathen's home address.

6 You're going to hear that that phone account was a prepai
7 phone. And when you get a prepaid phone, you don't need to
8 provide a name. You don't really need to provide much in the
9 way of identifying information. But we're going to hear
10 evidence that through those cell records, through mapping of
11 the call detail records, the towers that connected to the
12 phones, that those calls were made from the Virginia and
13 Washington, D.C. area. Mr. Bathen works in Washington, D.C.

14 You're also going to hear some jail calls in this case
15 from Mr. Bathen. He was in custody for a couple days here in
16 San Diego County. And in those calls, Mr. Bathen answers so
17 of them and you're going to hear these threatening voice
18 messages again, but he starts his calls with a greeting,
19 "hey," just like in these, "hey, Dr. Jacobs" when he's talki
20 to bailbond agents or his friends.

21 Ladies and gentlemen, Dr. Jacobs was terrorized by her
22 former patient. I'm going to ask each of you to hold him
23 accountable for those threats at the end of this trial and
24 find him guilty.

25 Thank you.

26 THE COURT: Ms. Freeze, did you want to give an opening
27 this time?

28 MS. FREEZE: Please, thank you.

1 May I move about the courtroom?

2 THE COURT: Of course.

3 MS. FREEZE: Thank you.

4 Can I move this, Your Honor?

5 THE COURT: Sure.

6

7

OPENING STATEMENT

8 BY MS. FREEZE:

9 Ladies and gentlemen of the jury, you are going to see
10 that this case is about assumption. Like my grandma always
11 tells me to assume is to make an ass of you and me. You are
12 going to see there's assumption of science. There's
13 assumptions of identity. And that there's been assumptions of
14 intent.

15 You will hear about cell phone towers. The prosecution
16 will have a witness that will testify to the science of cell
17 phone towers. But you will see that this cell phone tower,
18 this testimony is assumption as well. It's not rooted in the
19 science and it's not really rooted in common sense.

20 What the prosecution witness is going to say trying to
21 pinpoint where exactly my client was. And with regards to
22 this address and this phone number linking to my client, you
23 will see that this phone was a burner phone. It had no name
24 connected to it whatsoever. And this address, there's no
25 record of my client living at that address at any point.

26 There's also going to be assumptions regarding identity.
27 Dr. Carolyn Jacobs will testify that 14 years ago, 14 years
28 ago she treated my client. There was a doctor-patient

1 relationship. And that this doctor-patient relationship ended
2 in around 2008, 2009. Almost 10 years ago. And that she's
3 gone on with her life seeing other patients. Hasn't thought
4 anything about my client. Never was concerned about my
5 client. Nothing during their sessions made her fear him at
6 any point.

7 And you will see that at first when she heard this, even
8 though that they -- they had a relationship for four years,
9 they spoke on the phone, they spoke in person, she did not
10 recognize my client's voice whatsoever. It wasn't until she
11 had some dialogue with her husband that she thought that it
12 must be him. It must be him because 10 years ago when we
13 ended our relationship, my client got mad at her, was a little
14 bit upset because -- and you will hear that he believed that
15 she did something wrong, that she perhaps was unethical in her
16 treatment of him and so she -- he brought that to her
17 attention.

18 There was something that was not right about it. And
19 their relationship ended 10 years ago. And she believes that
20 10 years ago this termination of the relationship albeit she
21 wasn't scared of him, this wasn't about that termination
22 whatsoever, that he was threatening to hurt her or became
23 negative with regards to her being in fear that now all of a
24 sudden it must be him. It must be.

25 And there's going to be an assumption regarding intent.
26 The Court is going to read to you at the close of this case
27 the law that applies to this case. And you all took the oath
28 that you will follow that law, that's why we chose you. And

1 that law is going to explain what the People have to meet
2 beyond a reasonable doubt for you to render a guilty verdict.

3 And there's six elements that the Court will read. And
4 all of those elements have to be met, not one or two, not a
5 couple here, all six of those elements of the specific intent
6 crime will have to be met.

7 There has to be the specific intent of imminent --

8 MS. SOMERVILLE: Objection. This is not appropriate for
9 opening.

10 MS. FREEZE: I'll move forward, Your Honor.

11 THE COURT: Thank you.

12 MS. FREEZE: And you will follow that law.

13 And the other law that the Court will read to you is that
14 when there's two reasonable conclusions --

15 MS. SOMERVILLE: Objection, Your Honor.

16 THE COURT: You are arguing a lot.

17 MS. FREEZE: That's fine, Your Honor. I'll move forward.

18 With regards with this assumption regarding intent,
19 there's no doubt, there's not going to be any confusion about
20 where my client lives, where he lives now, where he lived last
21 year and where he lived in 2009. He lives on the other side
22 of the country. He doesn't -- he's nowhere in California.
23 He's nowhere near California. He's literally on the other
24 side of the country.

25 We're here because the People believe that my client made
26 these calls to Dr. Jacobs. That's why we're here. And my
27 client has maintained "I'm not guilty."

28 When you listen to everything, be mindful of the

1 assumptions. Be mindful of the assumptions that the
2 prosecution's witness is making about the science of where my
3 client is.

4 Be mindful of the assumptions that are being relied upon
5 as it pertains to identity: Why she believes that it's him
6 and does that make sense? And be mindful of this intent. And
7 be mindful of the fact that my client lives on the other side
8 of the country and has for almost 10 years. And I urge you to
9 really listen and to be mindful and wait for that law, wait
10 for the direction that the Court will give you. And I'm
11 confident that at the conclusion of this case, that you will
12 see that my client is, in fact, not guilty.

13 Thank you.

14 THE COURT: All right. Thank you. And ladies and
15 gentlemen, we're going to start with the evidence portion of
16 our trial now.

17 Ms. Somerville, if you would call your first witness.

18 MS. SOMERVILLE: Thank you, Your Honor. The People call
19 Gary Jacobs.

20 THE CLERK: You do solemnly state under penalty of perjury
21 that the evidence you give in this matter shall be the truth,
22 the whole truth and nothing but the truth?

23 THE WITNESS: I do.

24 THE CLERK: Please have a seat at the witness stand.

25 And for the record, please state your full name and spell
26 your last name.

27 THE WITNESS: Gary Jacobs, J-a-c-o-b-s.

28 MS. SOMERVILLE: Thank you, Your Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GARY JACOBS,

called as a witness on behalf of the People,
having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. SOMERVILLE:

Q. Good morning.

A. Good morning.

Q. Can you tell me what you do for a living?

A. I am an ophthalmologist, which is an eye surgeon.

Q. How long have you been doing that?

A. I've been in Chula Vista since 1981.

Q. And are you married?

A. Yes.

Q. And what's the name of your wife?

A. Carolyn.

Q. Same last name?

A. Same last name.

Q. How long have the two of you been married?

A. Since 1977, I think.

Q. You have any kids?

A. Two kids.

Q. And sons, daughters?

A. One son, the oldest, 46; and a daughter who is going
to be 38 this month.

Q. Do they live at home with you?

A. No.

Q. Back on June 5th of this year, what were you doing in

1 the earlier part of the day?

2 A. Was that a Monday?

3 Q. I am not sure, but it's the date that we're going to
4 talk about when you came home.

5 A. Okay. As I said, I'm an eye surgeon. Monday is my
6 surgery day. I start early morning and I finish around noon,
7 one o'clock.

8 And when I finished, I don't keep my phone on me because
9 I'm in surgery, and I got my cell phone around noon, one
10 o'clock when I finished and there was a message from Carolyn.

11 Q. Let me stop you for a moment. I'll ask more
12 questions as you go.

13 A. Okay.

14 Q. So you got out of surgery and then you checked your
15 cell phone?

16 A. Yes.

17 Q. Okay. And you said there was a message from Carolyn.
18 What was it about?

19 A. Well, it was kind of a nervous message and basically
20 asking me to call her as soon as I get this message.

21 Q. Did you do that?

22 A. Yes, I did.

23 Q. Was this out of the ordinary? I mean you've been
24 married for 40-something years.

25 A. Yes. Yes, it was out of the ordinary. She knows I
26 don't answer my cell phone because I don't keep it on me
27 during surgery.

28 Q. And did you call her back?

1 A. I did.

2 Q. Okay. And how did she sound when you called her
3 back?

4 MS. FREEZE: Objection. Calls for hearsay.

5 THE COURT: Overruled. Not what she said but how she
6 sounded.

7 BY MS. SOMERVILLE:

8 Q. How did she sound?

9 A. She sounded quite concerned and nervous, and I told
10 her I was on my way home and --

11 Q. And when you got home, how was she, how was she
12 acting?

13 A. She was quite upset.

14 Q. Did she tell you why she was upset?

15 A. Yes.

16 Q. Did she play any messages for you?

17 A. Yes. She played her message that was on her
18 professional voice mail message.

19 Q. Okay. And how did you react to that?

20 A. I was stunned.

21 Q. What did -- what did you do once you heard that voice
22 message?

23 A. Well, I -- her voice mail system is with AT&T and I
24 knew that AT&T voice mail could be ascertained on mine. I'm
25 not sure Carolyn knew that. But so when I went online, I was
26 able to access not just the voice mail but also the phone
27 number that made the call.

28 Q. Do you recall what that number was?

1 A. No, I don't remember.

2 Q. Would looking at the copy of the AT&T record refresh
3 your memory?

4 A. Yes.

5 MS. SOMERVILLE: May I approach, Your Honor?

6 THE COURT: Yes.

7 BY MS. SOMERVILLE:

8 Q. Mr. Jacobs, I'm going to show you a copy of a piece
9 of paper that has some items that are redacted and then some
10 items that are not.

11 Would you look at that and see if that refreshes your
12 memory as to the phone number.

13 MS. FREEZE: And Your Honor, I would object as to this
14 document as the document being hearsay.

15 THE COURT: It's just to refresh memory.

16 MS. FREEZE: Thank you, Your Honor.

17 THE COURT: So overruled.

18 THE WITNESS: Yes, that's the phone number.

19 BY MS. SOMERVILLE:

20 Q. And we'll go through it step by step, but I'm going
21 to take it away from you.

22 Can you tell me what the area code was? Do you recall?

23 A. 617. The only reason I recall is because I'm looking
24 at it now. I don't have that number memorized.

25 Q. Okay. And do you recall what the rest of the number
26 was?

27 A. No, I don't remember the number.

28 Q. And if I show you this again, could you tell me what

1 the next three numbers are from that phone number?

2 A. 992.

3 Q. And what are the last four?

4 A. 4648.

5 Q. After you got that phone number off of the message,
6 what did you do?

7 A. Well, I took the number and basically threw it into
8 Google searches. And if you search long enough, you can
9 figure out who owns the phone number, basically whose phone
10 number is attached to it, and that's when I found the name of
11 the person.

12 MS. FREEZE: And Your Honor, just for the record, object as
13 to hearsay as to --

14 THE COURT: We're not quite there yet. So overruled.

15 BY MS. SOMERVILLE:

16 Q. So when you did your Google search, were you able to
17 come up with a name associated with that phone number?

18 A. Yes.

19 Q. And what was the name?

20 A. Ben Bathen.

21 MS. FREEZE: And then, Your Honor, objection as to hearsay.
22 Foundation. Authentication.

23 THE COURT: All right. And ladies and gentlemen, that
24 information is not being offered to you as actual proof of who
25 that phone number belonged to. The only reason we're giving
26 that information to you is so you can see what happened as a
27 result of communication of that information. But it is not
28 evidence that that phone number actually belonged to

1 Mr. Bathen.

2 BY MS. SOMERVILLE:

3 Q. Once you got that name, did you tell your wife?

4 A. Yes.

5 Q. And after you shared that with your wife, did either
6 of you contact the Chula Vista Police Department?

7 A. Yes.

8 Q. Did someone come out to your home that day to take a
9 report?

10 A. Yes.

11 Q. Did you provide them with the name Benjamin Bathen?

12 A. Yes.

13 Q. And did you also provide them with the phone number
14 from the call?

15 A. Yes.

16 Q. After your wife got this first voice message, did you
17 notice a change in kind of the way she was acting?

18 A. That was in June, and basically every door and every
19 window in the house was locked. June in San Diego is pretty
20 nice, but everything was locked down tight.

21 Q. Did you do anything to make sure that, you know, your
22 wife was safe during this time?

23 A. We increased communication between us during the day.
24 And I helped her upgrade her security in her office because
25 they changed some of their office policies too.

26 Q. Did you ever go to meet her at work?

27 A. Yes. Yes, I would go early in the morning with her
28 when I was available as she went into work and I go -- meet

1 her at the end of the day so she wouldn't have to come out of
2 the office by herself.

3 Q. Did you become aware at some point of a couple more
4 voice messages that your wife received in the early days of
5 July?

6 A. Yes.

7 Q. And specifically, message on July 3rd and July 5th?

8 A. Yes.

9 Q. Did you hear those --

10 A. Yes.

11 Q. -- messages?

12 And were those messages from the same phone number, the
13 (617)992-4648?

14 A. Yes.

15 Q. Did it appear that your wife was emotionally affected
16 by those calls?

17 A. It was pretty disturbing.

18 Q. Did you and your wife do anything further in terms of
19 taking personal safety measures after she received these last
20 two phone calls?

21 A. I just think we continued to do what we were doing.
22 I mean we called the police again. So the Chula Vista police
23 came out again probably July 6th because it was July 4th
24 holiday, so I think there was some break in terms of them
25 coming out.

26 But they came out and they went through this kind of
27 security suggestions and reinforcing what the first police
28 officer did in June. We tried to follow those.

1 Q. Did your wife ever go to court to get a restraining
2 order?

3 A. Yes.

4 Q. Did you go with her?

5 A. Yes.

6 Q. And do you recall what month that was in?

7 A. I don't. It was after the July period of time.

8 Q. Okay. And after getting those messages on the 3rd
9 and the 5th, did you continue to go, you know, meet your wife
10 or show up with her?

11 A. Mostly in the end of the day because she'll work a
12 little later in the evening and so I was finished with my
13 surgical cases for my office hours and I would meet her at her
14 office.

15 Q. Would the doors and windows -- were they still
16 closed?

17 A. In the home?

18 Q. Yes.

19 A. Unfortunately, yes. We were on lockdown.

20 Q. What was -- what was that like to have to --

21 A. We were living in a cocoon.

22 Q. I'm sorry?

23 A. We were living in a cocoon. You know, the windows
24 and doors were locked and the air-conditioning was on. It
25 was, you know, just not San Diego. It's pretty restrictive
26 and Carolyn was afraid after getting those messages like she
27 got. She was very, very afraid.

28 MS. SOMERVILLE: Nothing further, Your Honor.

1 THE COURT: Ms. Freeze.

2 MS. FREEZE: Thank you, Your Honor. Just one moment.

3 THE COURT: Sure.

4

5

CROSS-EXAMINATION

6 BY MS. FREEZE:

7 Q. Good morning, Dr. Jacobs.

8 A. Good morning.

9 Q. Now, Dr. Jacobs, you testified that you've resided in
10 Chula Vista since 1981; is that correct, sir?

11 A. Yes.

12 Q. At no point you resided in Washington, D.C. or on the
13 East Coast?

14 A. I was born in D.C. and I lived in D.C. until 1980.

15 Q. Okay.

16 A. I lived in the East Coast until 1980.

17 Q. You haven't resided in the East Coast since 1981. Is
18 that fair to say?

19 A. I left the East Coast in 1979, '80.

20 Q. Now, your adult children, they don't live at home;
21 correct?

22 A. Correct.

23 Q. And they don't work in or around your place of --
24 place of employment or your wife's place of employment;
25 correct?

26 A. Correct.

27 Q. Now, when you spoke with your wife on or about
28 June 5th of last year, you were -- you became aware that this

1 voice message had been left on her work -- like her work
2 confidential voice mail; correct?

3 A. Correct.

4 Q. Where other clients leave messages; correct?

5 A. That's my understanding.

6 Q. Other patients, if you will?

7 A. That's my understanding.

8 Q. Is it further your understanding that she doesn't
9 provide to her patients like a personal cell phone or another
10 way of communicating with her?

11 A. That's my understanding, that's correct.

12 Q. And is it further your understanding that your wife
13 doesn't provide to patients her residence address?

14 A. That's my understanding.

15 Q. Okay. She doesn't disclose personal information
16 about herself and your family. Fair to say?

17 A. That would be my understanding, although we might be
18 in the yellow pages or, you know, in terms of general
19 information.

20 Q. And so after this first voice message system, voice
21 message, you, in fact, were the one that contacted Chula Vista
22 Police Department; correct?

23 A. No. Carolyn made the contact.

24 Q. Okay. So -- but isn't it true that you actually were
25 the first one that made the call and then you handed the call
26 over to her?

27 A. I don't think so.

28 Q. Okay.

1 A. But it's possible, but I don't have that
2 recollection. I think -- I only did the Google search.

3 Q. Okay. But fair to say it's been over a year; right?

4 A. Correct.

5 Q. Okay. And -- but if the call -- if there was a
6 reporting of the call and you were the initial person that
7 made the call, you would agree with that, with that
8 information?

9 A. I mean if you said I'm the one that made the initial
10 call to the Chula Vista Police Department?

11 Q. Yes. Yes, sir.

12 A. I mean could that be a possibility?

13 Q. Yes, sir.

14 A. I mean I guess it's a possibility. I just don't have
15 a recollection of it.

16 Q. That's fair. Thank you.

17 And you didn't actually -- you or your wife didn't
18 really -- the initial contact with law enforcement, it wasn't
19 like a 911 call; correct? It was just like a call to the
20 Chula Vista Police Department?

21 A. My recollection is, yeah, I think it was just a call
22 to the -- it wasn't the 911.

23 Q. Okay. And then -- and since these calls were made,
24 these voice messages, your wife has continued to practice;
25 correct?

26 A. Yes.

27 Q. She didn't, like, close her business or anything like
28 that; correct?

1 A. She secured the business --

2 Q. But she --

3 A. -- office because she's in an office with other
4 therapists; so they basically lock down. They created a
5 doorbell system where people couldn't come and go without --

6 Q. Right. And that's not my question.

7 My question, sir, is she continued to practice; correct?

8 A. Yes.

9 Q. And she's had, fair to say, several hundred clients a
10 year, give or take?

11 A. I'm going to defer on that. I don't know the
12 numbers.

13 Q. Okay. Now -- and at no point between June 5th of
14 last year and today this gentleman has at any point come to
15 your residence; correct?

16 A. Not that I'm aware of.

17 Q. And this gentleman has at no point come to your
18 wife's place of work; correct?

19 A. Not that I'm aware of.

20 Q. And as far as you're aware, your wife -- my client
21 was a patient of your wife and that relationship ended quite
22 some time ago; correct?

23 A. That's my understanding.

24 Q. Approximately nine, 10 years ago?

25 A. That might be true. I think that's somewhere along
26 the lines.

27 Q. Okay. And, in fact, when -- when your wife called
28 you during your busy surgery day, she didn't say anything to

1 you like this particular client contacted me? She didn't
2 know; correct?

3 A. Correct.

4 Q. She didn't recognize the voice initially; correct?

5 A. Not initially.

6 Q. And as far as you are aware, your wife treated --
7 they had a doctor-patient relationship for about four, five
8 years?

9 MS. SOMERVILLE: Objection. Foundation.

10 THE COURT: Sustained.

11 BY MS. FREEZE:

12 Q. If you know.

13 A. I'm not sure.

14 Q. And prior to this restraining order being submitted
15 by your wife, at no point between June of last year and around
16 September of last year was there any contact, physical,
17 in-person contact, by my client to your family; correct?

18 MS. SOMERVILLE: Objection. Foundation.

19 THE COURT: Sustained.

20 MS. FREEZE: Foundation. Just asking him if my client
21 contacted their family.

22 THE COURT: Foundation.

23 BY MS. FREEZE:

24 Q. Okay. But let me back up. So there was the message
25 in June; correct?

26 A. Yes.

27 Q. And then there was the two in early July; correct?

28 A. Yes.

1 Q. And then no more calls?

2 A. As far as I'm aware of.

3 Q. Okay. And you said you were present during the
4 restraining order hearing; correct?

5 A. Yes.

6 Q. Okay. Did you testify?

7 A. No.

8 Q. Were you just in the audience?

9 A. Yes.

10 Q. Okay. And my client was present as well; correct?

11 A. Yes.

12 Q. And at no point did he motion or threaten you;
13 correct?

14 A. No.

15 Q. And at no point during the proceeding he motioned or
16 threatened towards your wife, if you are aware?

17 A. None that I was aware of.

18 Q. He didn't follow you to your car, behave in any kind
19 of erratic manner; correct?

20 A. Not that I'm aware of.

21 Q. And he had -- had an attorney defend him during that
22 proceeding; correct?

23 A. Correct.

24 Q. Denying that he made those calls?

25 MS. SOMERVILLE: Objection. Hearsay.

26 THE COURT: Sustained.

27 MS. FREEZE: Okay.

28 /////

1 BY MS. FREEZE:

2 Q. Do you recall Officer De La Pena coming to your home
3 on or about June 5th of last year?

4 A. Yes.

5 Q. And do you recall having dialogue with him and
6 sitting down with him making the report?

7 A. Yes.

8 Q. Okay. Is that fresh in your mind?

9 A. Well, it's a year old so I know more what I had for
10 breakfast today than that, but I have a general recollection
11 of that.

12 Q. And he actually came out to the residence, not the
13 place of employment; correct?

14 A. Correct.

15 Q. Mr. -- excuse me, Officer De La Pena did not go, as
16 far as you're aware, to your wife's office; correct?

17 MS. SOMERVILLE: Objection. Foundation.

18 THE COURT: As far as you're aware.

19 THE WITNESS: I believe they did started doing -- I forget
20 the terminology, but the Chula Vista police started driving by
21 more frequently and I think he might have been part of that.

22 BY MS. FREEZE:

23 Q. And I think I wasn't clear so I apologize, Doctor.

24 When you met with Dr. De La Pena, you and your wife --
25 excuse me -- Officer De La Pena at your home, you provided
26 Officer De La Pena the recording; correct?

27 A. No. He recorded it himself off of the website.

28 Q. Off of the website. So that website was accessed and

1 that's the website where the messages go?

2 A. AT&T has an online voice mail messaging system. So
3 if you get it on your phone, you can also access it online,
4 and so he recorded that himself.

5 Q. Okay. But he himself, as far as you know, when he
6 was in your residence before you and your wife, you don't
7 recall him contacting anybody directly from the voice message
8 system?

9 A. I'm -- I don't understand your question.

10 Q. You don't recall him actually going to the voice
11 message system or being on the call or calling himself, he got
12 it via you through the online portal?

13 A. Yes, we wound up going online, typing the AT&T --
14 Carolyn's, you know, business number and it lists all the
15 messages were there and we played that one message for him and
16 then he recorded it as he was observing it online.

17 Q. Thank you. And fair to say that your wife -- this
18 was an unexpected call; correct? This message?

19 A. Which call?

20 Q. The first one on June 5th.

21 A. I would say so.

22 Q. Okay. There wasn't anything recent where she said I
23 had an issue with a client recently or a patient and -- and it
24 was kind of stemming off of that patient session?

25 MS. SOMERVILLE: Objection. Hearsay.

26 THE COURT: Sustained.

27 BY MS. FREEZE:

28 Q. Fair to say it was unexpected?

1 MS. SOMERVILLE: Objection; asked and answered.

2 THE COURT: Overruled.

3 BY MS. FREEZE:

4 Q. And as far as you know, Dr. Jacobs, your wife, when
5 this name came up, she was under the impression -- and if you
6 don't know, obviously we're -- you testified as to what you
7 know, but she was aware that this patient didn't live in
8 California anymore; correct?

9 MS. SOMERVILLE: Objection; foundation.

10 THE COURT: Hearsay. Sustained.

11 BY MS. FREEZE:

12 Q. You were sitting there when your wife was interviewed
13 by Officer De La Pena; correct?

14 A. Yes.

15 Q. Okay. Was your -- if you know, was your wife ever
16 sued by my client?

17 A. I have no knowledge.

18 Q. Okay. Did your wife -- does your wife ever speak to
19 you about patients?

20 A. No.

21 Q. And you testified -- just one last question,
22 Dr. Jacobs.

23 You testified that you and your wife was -- were on
24 lockdown; correct?

25 A. My words.

26 Q. Okay. But at no time did any -- anybody come and try
27 to break into the home or anything like that, if you know?

28 A. Correct.

1 Q. Okay. And up until the time that you went to the
2 restraining order hearing last year, you had never seen
3 Mr. Bathen; correct?

4 A. Correct.

5 MS. FREEZE: Nothing further. Thank you.

6 THE COURT: Ms. Somerville.

7 MS. SOMERVILLE: Briefly. Thank you.

8

9

REDIRECT EXAMINATION

10 BY MS. SOMERVILLE:

11 Q. Dr. Jacobs, about that restraining order hearing.
12 You were asked about whether you testified or not, and I
13 believe you said you did not; correct?

14 A. Correct.

15 Q. Did your wife testify at that hearing, if you recall?

16 A. I think they might have asked her some questions,
17 but -- you know, they did. They -- I mean, she didn't come up
18 to the thing. We were all seated in that area, but -- of the
19 room, but I think they did ask her some questions, yes.

20 Q. And by "that area," you mean the area where the
21 audience sits?

22 A. I think so. My recollection is that, yes.

23 Q. Okay.

24 MS. SOMERVILLE: Thank you. Nothing further, Your Honor.

25 THE COURT: Anything further?

26 MS. FREEZE: No, Your Honor. Thank you.

27 THE COURT: May this witness be excused?

28 MS. SOMERVILLE: Yes.

1 THE COURT: Thank you, sir. You may step down.

2 Ladies and gentlemen, we're going to take a little earlier
3 break this morning than we ordinarily do. We're going to take
4 our 15 minutes at this time and then we'll try to go to noon.
5 But if anybody is uncomfortable, we will, of course, take
6 another break. That includes everybody in the courtroom. But
7 we're going to try and make it until noon after that.

8 So remember not to form or express an opinion, don't talk
9 to anybody about any subject connected with this matter. Stay
10 off the Internet, please, either communicating or receiving
11 information about this case. And I'll see you in 15 minutes.

12 *(The following proceedings were had between the Court*
13 *and counsel out of the presence and hearing of the*
14 *jury.)*

15 THE COURT: All right. The jury is gone.

16 And just for the record, we had a brief sidebar
17 conference. I'm not going to accept any further argument, but
18 I did issue a ruling on the therapist relationship that we had
19 discussed this morning.

20 I looked at *People v. Warden*, 53 Cal.3d 522. It's a 1991
21 case. And at first blush, you might think it has no bearing
22 on this case whatsoever, but it is more of a Tarasoff kind of
23 analysis of the psychotherapist relationship and what can be
24 disclosed at a criminal trial in that context.

25 And really here, even though the psychotherapist holds
26 both the privilege and is the alleged victim of this crime, we
27 do kind of have a crossover. It's a little unusual.

28 So as I told you at sidebar, my ruling is that there can't

1 be a disclosure of any of the confidential communications
2 during therapy, that I think the privilege still stands unless
3 there was any kind of exception developed during testimony.
4 But that the fact that Mr. Bathen was a patient can be asked.

5 The very general nature of the testimony, interpersonal
6 relationships, was the proffer. That can be asked. And the
7 fact that the threats to sue and the anger, which really was
8 not -- I'm not even sure it's covered by the privilege, but if
9 it is covered, then I would allow that. And the reason I'm
10 allowing these few exceptions is I think it does go to the
11 exception concerning this crime.

12 MS. SOMERVILLE: I just have one question about -- because
13 Ms. Freeze under opening statement had said that he never made
14 any threats during these sessions.

15 THE COURT: I'm not sure that it opens the door.

16 MS. SOMERVILLE: No, no, no. I just didn't want -- if I
17 don't believe that she should be able to then delve into what
18 they were talking about.

19 THE COURT: She certainly may if she wants. The client
20 holds the privilege, but then the privilege is waived. Yeah,
21 okay. If it has no bearing on the case. I mean the relevancy
22 would be the only issue.

23 MS. SOMERVILLE: Right.

24 THE COURT: But Ms. Freeze has the right to -- her client
25 can waive the privilege any time. He's the holder.

26 MS. FREEZE: And he has been, so --

27 THE COURT: You got that on the record.

28 MS. FREEZE: Just want to make sure.

1 THE COURT: No, your objection is there. That's why I know
2 there's never been a waiver and that's why I'm trying to do my
3 best to carve out the little exception.

4 MS. FREEZE: I appreciate that, Your Honor.

5 THE COURT: All right. Thank you.

6 MS. FREEZE: Thank you for taking the time to do that.

7 THE COURT: Sure.

8 We'll be in recess. Thank you.

9 *(Recess taken.)*

10 *(The following proceedings were had in open court in*
11 *the presence and hearing of the jury.)*

12 THE COURT: Your next witness, Ms. Somerville.

13 MS. SOMERVILLE: Thank you, Your Honor. The People call
14 Carolyn Jacobs.

15 THE CLERK: Do you solemnly state under penalty of perjury
16 that the evidence you give in this matter shall be the truth,
17 the whole truth and nothing but the truth?

18 THE WITNESS: I do.

19 THE CLERK: Please have a seat at the witness stand.

20 And for the record, please state your full name and spell
21 your last name.

22 THE WITNESS: Carolyn Frances Jacobs, J-a-c-o-b-s.

23

24 **CAROLYN FRANCES JACOBS,**

25 called as a witness on behalf of the People,

26 having been first duly sworn, testified as follows:

27

28 /////

DIRECT EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BY MS. SOMERVILLE:

Q. Good morning.

A. Good morning.

Q. What do you do for a living?

A. I am a licensed psychologist in private practice in Chula Vista, California.

Q. How long have you been a licensed psychologist?

A. Since 1998.

Q. What did you -- did you have a career before that?

A. Yes. I was a licensed marriage and family therapist for -- since '88. In '98. And prior to that I was a registered nurse for 14 years in the operating room.

Q. Do you have a specific degree to be a psychologist?

A. Yes. It's a psychology degree, license by the State of California.

Q. Where did you go to school?

A. To Alliance International University in San Diego.

Q. And you said you are licensed; correct?

A. Correct.

Q. Do you have to take any type of boards or exams to get a license?

A. Yes. You have to have an oral exam and a written exam, and then you have to have, once you're licensed, continuing education, you know, periodically every time your license is renewed all the way through your career, so --

Q. What do you mean by the continuing education that you have to get to keep up your license?

1 A. Well, you just have to have certain trainings and
2 courses that keep you up on, you know, on what's going on in
3 the field and -- and that, so in order to renew your license
4 every two years.

5 Q. As far as your license goes, where are you allowed to
6 practice?

7 A. Well, in the State of California, licensed by the
8 State of California.

9 Q. Can you practice outside of California?

10 A. No. Your license stops at the border.

11 Q. Is that true stopping at the border even over, say,
12 in telephone?

13 A. Well, if you're practicing psychology, you have to be
14 licensed in the state that you are practicing psychology. You
15 can have, you know, phone contact or that sort of thing. But
16 actually doing therapy, it has to be within the State of
17 California.

18 Q. Okay. And the practice that you currently have, do
19 you specialize in any -- you said you were a marriage and
20 family therapist previously. Do you still do that type of
21 treatment?

22 A. I work with individuals, couples and families. Sort
23 of a broad clinical practice. And so I'm trained to do -- to
24 work with all components of individuals and families.

25 Q. And is your practice here in Chula Vista?

26 A. Yes, it is.

27 Q. And how long have you been at that particular
28 location?

1 A. Since 1995.

2 Q. Can you kind of describe for us how that office is
3 set up. I mean there are other therapists there, doctors?

4 A. Right. There are other therapists. They're licensed
5 social workers, marriage and family therapists. They are --
6 we're all sole practitioners so we all have our own practice,
7 but we share space in the office space that we have there. So
8 we have a general waiting room area and then people are --
9 different therapists come and go throughout the week.

10 Q. Typically how long is a session that you have with a
11 client?

12 A. Usually 45 to 55 minutes.

13 Q. And do you ever do therapy sessions over the phone
14 with patients here in California?

15 A. Yes.

16 Q. Would those typically be the same length, 45 to 55
17 minutes?

18 A. Usually, usually 30 to 45 minutes.

19 Q. How do new patients find out about you?

20 A. Well, a lot of it is by referral, referral from other
21 people or other colleagues. I am also on quite a few provider
22 panels and so I'll get referrals from -- for example, employee
23 assistant programs will refer because I am an approved
24 provider with their plan.

25 There is -- you know, I have a website and so people can
26 find me on my website and so -- but primarily, it's -- in my
27 practice, because I've been at it so long, a lot of it is
28 self-referral or referrals from other patients who have

1 referred people to me, so --

2 Q. Do other colleagues, do they refer people to you?

3 A. Yes, absolutely.

4 Q. Can you kind of explain how that works?

5 A. Well, usually I'll get a call and -- and I have a
6 private confidential private voice mail service, and there
7 will be a message on the call and then I'll call the person
8 back and they'll tell me where they received the referral,
9 like, Dr. Smith, you know, recommended me.

10 Or sometimes I get referrals from psychiatrists who are
11 treating people with medication and then they want them to be
12 also in counseling services, sort of a co-treatment protocol,
13 so --

14 Q. So just so I'm clear kind of, what's the difference
15 between a psychologist and a psychiatrist?

16 A. A psychiatrist is a medical doctor; so he or she has
17 a medical degree and they're specialized mainly in brain
18 chemistry and they manage -- primarily they manage
19 medications.

20 But a psychologist is a doctor of psychology, but I can't
21 prescribe medications, but many times the model that works
22 well is if someone needs to be on medication management, the
23 psychiatrist will either refer the person to a psychologist to
24 be in counseling concurrently with their medication
25 managements. It seems to be the most effective way to work
26 with people.

27 And then sometimes if I'm seeing someone and I think that
28 they would benefit from a medication evaluation for their

1 anxiety or depression or whatever is going on, then I would
2 defer back to the psychiatrist.

3 Q. You mentioned that you have a confidential voice
4 message system set up.

5 A. Correct.

6 Q. How long have you had that?

7 A. Oh, wow, I really can't say for sure. My primary way
8 of, you know, of receiving referrals has been through -- and
9 for patients to reach me has been through my -- it's a
10 messaging service through AT&T.

11 Q. Do they -- do your patients also reach you, say, if
12 they need to reschedule or something along those lines?

13 A. Uh-huh, that's the way -- that's the way they could
14 reach me. They call my messaging service. They leave a
15 message with their contact information and then I call them
16 back.

17 Q. Do you ever give them your personal cell phone
18 number?

19 A. No, no.

20 Q. Do you ever give them your home number?

21 A. No, no. Although I have sometimes dialed back on my
22 home number or on my cell phone number, not realizing that
23 they can have access to that because I dialed them, but -- but
24 I never -- I don't unless there's something that might be a
25 crisis situation, I might give them my cell phone number if
26 they needed to reach me.

27 Q. What's your -- what's the phone number that you have
28 for your voice message system?

1 A. Do you want the number? (619)525-7747.

2 Q. And I know you can't say how long you've had that set
3 up, but has it been the same number for a substantial period
4 of time?

5 A. Yes, yes. I think it's been my only number actually
6 since I've been in practice.

7 Q. So can you just describe how you access that? I mean
8 do you just punch in the number or how do you get your voice
9 messages?

10 A. I dial that number and then I have to put in a code
11 and then it tells me to -- "to hear your messages, push one,"
12 like that; so -- and then I can push it and then the message
13 comes online and then I can -- I get the message.

14 Q. Just in a general average week, do you have a normal
15 time when you check your work messages?

16 A. I try to check them on a business day, the next
17 business day because I -- my practice is I usually work until
18 7:00 in the evening, so I check my messages the day before
19 that I received that day, the next morning, the next business
20 morning.

21 Q. And so how many days a week do you work?

22 A. Right now I'm working three, three full days a week,
23 Tuesdays, Wednesdays and Thursdays.

24 Q. And what time do you generally go in? I know you
25 said you leave around 7:00.

26 A. I usually go in -- my first appointment is at noon on
27 Tuesday, Wednesday, Thursday. And my last appointment is at
28 7:00 p.m.

1 Q. When you're having sessions with patients, do you
2 tend to talk about -- divulge personal details of your life?

3 A. Do I?

4 Q. Yes.

5 A. Back to the patient?

6 Q. Yes.

7 A. About my life?

8 Q. Yes.

9 A. No. No, I don't tend to do that. Sometimes there
10 are self-disclosure as a therapist is appropriate at times,
11 but only if it has a therapeutic -- if there's a therapeutic
12 intention to do that.

13 Q. Are there, you know, kind of standard boundaries that
14 are observed between, you know, a therapist and their patient?

15 A. Yes. Boundaries are -- are a major part of our
16 training, you know, to manage boundaries.

17 Q. Just kind of in general, describe what you mean by
18 that, by managing boundaries.

19 A. Things like you wouldn't receive -- you know, you
20 wouldn't receive gifts necessarily from a patient. You
21 wouldn't go into a business dealing with a patient. You
22 probably wouldn't -- I'm thinking what kind of situation that
23 is. I've been -- I've had to, you know, pull my boundaries
24 back.

25 For example, it depends on the clinical issues and the
26 therapeutic issues that you are dealing with, but you wouldn't
27 necessarily go to someone's, like, wedding or a celebration
28 for their child. You know, you just -- there's certain

1 boundaries that you need to keep clear between yourself and
2 your patients and your life and their life.

3 Q. At some point during your practice, did you begin
4 seeing someone or treating them by the name of Benjamin
5 Bathen?

6 A. Yes, I did.

7 Q. And do you recall around what year that was?

8 A. Around 2004.

9 Q. Do you see Mr. Bathen here in court today?

10 A. Yes.

11 Q. And can you just for the record describe the color of
12 shirt he's wearing?

13 A. It's a blue shirt.

14 MS. SOMERVILLE: Would the record reflect that the witness
15 has identified Mr. Bathen?

16 THE COURT: Where is he sitting?

17 BY MS. SOMERVILLE:

18 Q. Can you tell us where he's seated in the courtroom as
19 well?

20 A. In the corner.

21 THE COURT: Yes, the record can reflect the identification.

22 MS. SOMERVILLE: Thank you, Your Honor.

23 BY MS. SOMERVILLE:

24 Q. When you began treating Mr. Bathen in the
25 therapist-client relationship, where did you first have your
26 treatment sessions with him?

27 A. In Chula Vista in my office.

28 Q. And how often would you see him in your office?

1 A. Well, I think it's been -- when I -- I -- I think I
2 should explain, I think it was -- I saw him five sessions,
3 average five sessions from 2004 until 2008, 5,000 -- five
4 sessions a year over that period.

5 Q. And would those be the typical length of the
6 sessions -- and these are in-person sessions?

7 A. Yes.

8 Q. And would those be the typical amount of time that
9 you explained earlier, 45 to 55 minutes?

10 A. Uh-huh.

11 Q. Is that a "yes"?

12 A. Yes, yes.

13 Q. Do you recall how it was that Mr. Bathen first came
14 to you as a patient?

15 A. I think it was a referral. He had a referral from
16 someone from his -- back east, I think. I don't know if it
17 was a colleague or another patient, but I think that's how he
18 located me, I think.

19 Q. And do you remember -- you say "back east." Do you
20 remember any specific area back east?

21 A. I'm recalling it's Washington, D.C. area possibly. I
22 had done some graduate training at Georgetown there, and I had
23 some colleagues back there, and I think that that's where the
24 original -- I think that's where the referral came from.

25 Q. And when Mr. Bathen came to see you, just in general,
26 what was it that he was seeing you for?

27 A. Primarily just adjustment issues. He had recently
28 moved to the West Coast and he started a new job and was a lot

1 of stress and just trying to get settled in.

2 Q. At some point, did you begin during that 2004 to 2008
3 period having phone sessions with Mr. Bathen?

4 A. Yes, I did.

5 Q. Why did that happen?

6 A. Well, he moved -- he moved to L.A. and he was
7 still -- he was starting a new job. And he wanted to continue
8 to have contact, but it was really hard for him to come from
9 L.A. to Chula Vista and he was working a lot of hours
10 apparently he was saying, so he asked if we could do it -- you
11 know, have contact through the phone, phone consultation.

12 Q. And as you explained earlier, would those be, you
13 know, 30- to 45-minute long sessions?

14 A. Probably 45 to 55 minutes -- 30 to 45 minutes. Just
15 depends a lot of what -- you know, what the patient's schedule
16 is.

17 Q. And if you can tell us, how often would you have
18 phone therapy sessions with Mr. Bathen when he was in
19 Los Angeles?

20 A. Well, you know, I don't have access to my records
21 because every seven years we're allowed to purge our records
22 and so I had -- in 2014, I had -- if you have seven years from
23 the time you see your client, you can close the cases and you
24 can purge the records.

25 So I don't have those specific records in front of me and
26 so I am -- a lot of this I'm having to try to pull back up out
27 of my head; so -- so what was your question again? I'm sorry.

28 Q. Just a general ballpark, if you can, you know, how

1 many sessions would you have with him over the phone during
2 this time? You said you had somewhere like around five
3 sessions in person with him?

4 A. Uh-huh.

5 Q. Do you recall?

6 A. I think I had more sessions in person with him. I
7 think it was five sessions -- about five sessions a year over
8 that five-year period. Maybe five or six sessions with him
9 over the phone.

10 Q. Is that a year or is that in total?

11 A. In total, yeah.

12 Q. So that I'm clear, it's -- you recall about five
13 sessions a year during that five-year period and then about
14 five to six sessions over the phone with him during that same
15 period?

16 A. Right in that ballpark.

17 Q. At some point, did you have to end the doctor-patient
18 relationship with him?

19 A. Yes, I did.

20 Q. Do you recall what year that was?

21 A. 2008, I think.

22 Q. Was that -- do you remember what time of year it was,
23 early in the year, the summer, late 2008?

24 A. I think it was around September.

25 Q. And why was it that your therapy sessions ended?

26 A. Well, he had -- my recollection was that he got a new
27 job back east and I think he was moving back to Boston and --
28 and so I -- I think we had maybe a couple of -- maybe one or

1 two other sessions after he moved back just in terms of
2 continuity of care, so -- and I had referred him to find a
3 therapist in his area and I'd refer him three -- three
4 referrals, because I can't -- once -- because my license stops
5 at the border, I would not have been able to continue
6 treatment with him out of state.

7 Q. What do you mean? You said you had a few more
8 sessions with him for continuity of care? What does that
9 mean?

10 A. Right. The idea that because he was starting a new
11 area and he would have had to -- you know, there was typical
12 adjustment issues that rather than his -- drop a patient
13 completely, immediately, sometimes it's okay to continue to
14 support with continuity of care, with the principle of
15 continuity of care where you are not just abandoning your
16 client.

17 And so as I wanted to make sure that he had referrals,
18 appropriate referrals so that he could -- he could continue on
19 with his therapy in the other area.

20 Q. Is that something that your license and your field of
21 work allows you to do?

22 A. Yes. Yes.

23 Q. And that would obviously be for the benefit of a
24 patient?

25 A. Correct, yes. It's just so that it's not dropped
26 totally and then somebody is just left trying to find their
27 own resources or their -- you know, their own support and it's
28 appropriate to help them connect up with a therapist in the

1 area that they're moving to.

2 Q. So after, you know, you provided some referrals and
3 you had, you know, these continuity of care sessions with him
4 over the phone, did you make it clear that you couldn't
5 practice any more with him outside of the State of California?

6 A. Yes.

7 Q. And how did he take that?

8 A. He was -- he was not happy about it. And wanted --
9 and he -- he was a little agitated in one of the last sessions
10 that we had.

11 MS. FREEZE: Objection. Calls for speculation.

12 THE COURT: Overruled.

13 BY MS. SOMERVILLE:

14 Q. I mean, what did you do at that point?

15 A. Well, I just stated what -- you know, what the, you
16 know, the standard of care was and encouraged him to -- to
17 seek out, you know, the referrals that I had given him, and
18 that's basically it.

19 Q. Was that the last time you had a phone session with
20 him?

21 A. Yes.

22 Q. Did you ever hear from Mr. Bathen again around that
23 time?

24 A. Not -- well, a few -- I think it was a couple of
25 months later, I received -- I started receiving some e-mails
26 from him.

27 Q. And so a couple months later, do you remember if that
28 was, like, still in 2008 or had it moved into 2009?

1 A. It had gone into 2009, yeah. I think it was around
2 February is when I started receiving the e-mails in 2009.

3 Q. And what were these e-mails about?

4 A. Well, that he was -- he was upset with me. He -- he
5 referred to a session that he felt --

6 MS. FREEZE: Objection. Calls for privilege.

7 THE COURT: No content, please --

8 THE WITNESS: No content.

9 THE COURT: -- of a session.

10 BY MS. SOMERVILLE:

11 Q. So he was upset with you?

12 A. He was upset with me.

13 Q. And did he want you to do anything to, you know, try
14 and appease him or --

15 A. He wanted me to write -- apologize to him.

16 Q. Did you know, I mean, what this was about?

17 A. I was -- I was -- never got clarity on it. I didn't
18 understand what he was asking, you know, what he was
19 specifically upset about, what he expected me to do.

20 Q. What did you do in response to getting these e-mails?

21 A. Well, I decided to go ahead and call my professional
22 liabilities lawyer. You know, as a professional psychologist,
23 you have to have liability -- professional liability
24 insurance. And there are people that you can consult with.
25 So I called my professional liability attorney and I sort of
26 ran everything by him, and he basically --

27 Q. Why did you do this? I mean what about these e-mails
28 made you then reach out to your professional liability

1 attorney?

2 A. Just the -- there was just -- there was -- I had an
3 uneasy feeling. There was -- he was making demands that I
4 didn't understand what he was asking for and I -- my
5 recollection of what he was saying was -- wasn't the same as
6 his, and so I -- you know, I felt like this was potential
7 termination issues and I wanted to make sure that ethically I
8 was in good standing and so I called my professional liability
9 counselor there and I explained what was going on, and he
10 reassured me that I had done everything that I was required to
11 do.

12 Q. You mentioned "termination."

13 A. Uh-huh.

14 Q. So what are you talking about when you mention that?
15 You said that you wanted to, you know, talk about termination,
16 I believe.

17 A. Termination with the -- I'm sorry.

18 Q. With -- when you contacted the professional
19 liability --

20 A. I wanted to verify that I was doing everything I
21 should ethically in terms of terminating the relationship, and
22 I explained to him the issues with him being out of state.

23 And he said -- and I informed him what I had done in terms
24 of giving him referrals and I just wanted to run it by him to
25 see that I was, you know, in good practice in doing what I
26 should have been doing, you know, in the termination process.

27 And he reassured me that I was okay. That I was doing
28 everything --

1 MS. FREEZE: Objection. Calls for hearsay. Motion to
2 strike as it pertains to what the professional liability
3 attorney advised.

4 THE COURT: Sustained. It will be stricken.

5 BY MS. SOMERVILLE:

6 Q. Did you ever try to formally terminate or send him
7 any type of notice about, you know, terminating this practice?

8 A. Yes, I did actually. And I needed his -- his new
9 address to do that because I wanted to send him a formal
10 termination letter, and he would not give me his new address.
11 He would only contact me on e-mails.

12 Q. Did he ever make any type of threats to you on the
13 e-mails?

14 A. No, no.

15 Q. Did he ever mention a lawsuit?

16 A. Yes.

17 Q. Okay. What was that about?

18 A. He said that if I didn't either sit -- either sit
19 down with him on a face-to-face with an apology where I had
20 to -- I had to sit and listen and not make any comments until
21 he was finished to apologize, and so -- and if I didn't do
22 that, then he was going to report me to my professional
23 organization, American Association of Marriage and Family
24 Therapy, and make a complaint against me.

25 Q. Did the e-mails from Mr. Bathen eventually stop?

26 A. They did.

27 Q. Do you recall when that was?

28 A. Let me think. February -- I think it was around

1 April.

2 Q. So this went on for a couple months?

3 A. Back and forth, yeah.

4 Q. Were you ever served with any type of lawsuit by
5 Mr. Bathen?

6 A. No.

7 Q. Did you ever have any type of discipline proceedings
8 or anything like that through the medical board?

9 A. No.

10 Q. After these e-mails stopped in April of 2009, did you
11 continue to see patients in your private practice?

12 A. Uh-huh.

13 Q. Yeah? Yes?

14 A. Yes. I'm sorry.

15 Q. That's okay. She's typing it down.
16 You're married, right, to Gary Jacobs?

17 A. Correct.

18 Q. And you have a daughter?

19 A. Uh-huh.

20 Q. Does she -- does she have a family of her own?

21 A. She does. She's married with two little girls, a
22 seven-year-old --

23 MS. FREEZE: Objection. Calls for relevance.

24 THE COURT: Overruled. Just at this point overruled.

25 BY MS. SOMERVILLE:

26 Q. And, you know, this year were you living in
27 Chula Vista?

28 A. Say again.

1 Q. Excuse me. June of last year were you living in
2 Chula Vista?

3 A. Yes, uh-huh.

4 Q. On the morning of June 5th of 2017, did you check
5 your confidential work voice mail?

6 A. Yes, I did.

7 Q. Where were you when you checked that voice mail?

8 A. I was in my kitchen.

9 Q. Do you remember around what time of day this was?

10 A. It was around -- probably around 8:30 in the morning.

11 Q. And was there anyone at home with you during that
12 time?

13 A. No.

14 Q. Did you have any messages that morning?

15 A. Yes, I did.

16 MS. SOMERVILLE: Your Honor, at this time I would ask to
17 play Court's Exhibit 1 for identification.

18 *(Court's Exhibit No. 1 was identified.)*

19 I also have a transcript that's been marked as Court's
20 Exhibit 1A for identification as well and transcripts prepared
21 for the jury.

22 *(Court's Exhibit No. 1A was identified.)*

23 THE COURT: Any objection?

24 MS. FREEZE: Just renewing my objection from earlier with
25 regards to privilege, but we've already discussed that.

26 THE COURT: Overruled. Okay. And we're going to hand out
27 transcripts, ladies and gentlemen. The evidence is the actual
28 tape, not the transcript. The transcript is just to assist you

1 in understanding what is said on the tape.

2 And I think I already got the waiver of reporting all the
3 calls.

4 MS. SOMERVILLE: Yes, Your Honor.

5 THE COURT: And that's yes from both.

6 And Deputy, would you mind handing out the transcripts?

7 MS. SOMERVILLE: Your Honor, would the Court like the
8 Court's Exhibit 1A?

9 THE COURT: Yes.

10 All right. And the jury appears to have the transcript.

11 Ms. Somerville.

12 MS. SOMERVILLE: I'm just waiting for them to pass them
13 down.

14 THE COURT: Oh, they have them passed down. I'm sorry.

15 MS. SOMERVILLE: For the record, I am going to play what
16 has been marked Court's Exhibit 1 for identification.

17 *(Audio recording played; not reported.)*

18 MS. SOMERVILLE: For the record, I just played Court's
19 Exhibit 1.

20 THE COURT: All right. Thank you.

21 And if you pass the transcripts down to Jurors 14 and 12,
22 please.

23 BY MS. SOMERVILLE:

24 Q. Are you okay?

25 A. Yeah, I'm fine.

26 Q. Is that hard to listen to?

27 A. Yeah.

28 Q. How did it make you feel when you first heard that on

1 June 4th -- excuse me, June 5th?

2 A. I was just terrified. You know, I was afraid and --
3 and kind of numb, numbed down a little bit.

4 Q. Did you have any physical reaction?

5 A. Yeah. I was nauseous and I was -- I became afraid.
6 You know, I started looking around the house to make sure my
7 doors were locked. I didn't know, you know, if somebody was
8 nearby or whatever, and so it was just, you know, a fear -- I
9 just had a normal, I think, terrorized fear response when I
10 heard it.

11 Q. How did you feel listening to it today?

12 A. Today?

13 Q. Yes.

14 A. Very similar. It's actually, I haven't heard it for
15 a very long time so it's upsetting. It upsets me. Shaky.

16 Q. I saw you reach for some Kleenex.

17 A. Yeah. Well, I'm a crier. If I get the Kleenex, then
18 I don't cry.

19 Q. When you first listened to the call, did you
20 recognize the voice?

21 A. No, not initially.

22 Q. What did you do after you listened to this call?

23 A. Well, I called my husband. I knew he was in surgery
24 that day, so I left a message to have him -- to come home -- I
25 said come home as soon as possible.

26 And I didn't say anything other than that, but he knew
27 that I needed him to come home as soon as he could get there.
28 I know he had to finish his surgery, but --

1 Q. Why didn't you explain in the message what had
2 happened; do you remember?

3 A. To him?

4 Q. Yes.

5 A. Well, because he's an eye surgeon and I just didn't
6 want to load him up, you know, with any specifics. And I had
7 checked that my doors and my windows -- and I knew that at
8 least for now, you know, at the moment I was safe and I just
9 wanted him to give time to finish up and to get home.

10 Q. Did he get home after he heard that message?

11 A. He was home probably by 11:30 or 12:00, something
12 like that.

13 Q. When he got there, did you explain to him about the
14 message?

15 A. Yes.

16 Q. And how you were feeling?

17 A. Yes, yes, yes.

18 Q. Did you also play the message for him?

19 A. Uh-huh. He heard it on my voice mail, yeah.

20 Q. Did your husband do anything to try to figure out who
21 this call came from?

22 A. Yes. He -- there's technology, technology
23 challenged, he's not. He was able to go to my AT&T message
24 service that apparently it's online and you can go in and you
25 can get a copy of the phone number.

26 MS. FREEZE: Objection for the record, Your Honor. Just
27 speculation, foundation, authentication and hearsay.

28 THE COURT: I'll do foundation and hearsay. Sustained.

1 MS. SOMERVILLE: That's fine.

2 BY MS. SOMERVILLE:

3 Q. So did your husband at some point provide you with a
4 name associated with the phone number that left you the
5 message?

6 A. Right. After he found the phone number on my -- my
7 voice or my phone record, then he went on -- I think he -- he
8 just started going to link in social media and somehow he was
9 able to connect. He came up with the name Ben Bathen that was
10 associated with that number, and he told me that.

11 And then I said that's -- that's my old -- my old patient
12 from nine years ago.

13 MS. FREEZE: And Your Honor, just for the record, again,
14 the hearsay. I understand you've already given the Court --
15 the jury the limiting instruction. Just wanted to put it on
16 the record.

17 THE COURT: Yes.

18 BY MS. SOMERVILLE:

19 Q. So initially you didn't recognize the voice when you
20 first heard the message; right?

21 A. Correct.

22 Q. And then your husband did a little research and gave
23 you the name of Benjamin Bathen; correct?

24 A. Uh-huh. And showed me the phone number.

25 Q. And what about the name, I mean, connected you to
26 this message? How did you -- you said you recognized it?

27 A. The name?

28 Q. Yes.

1 A. I'm not sure I understand.

2 Q. I'm sorry. That was a bad question.

3 Once he told you the name Benjamin Bathen --

4 A. Uh-huh.

5 Q. -- did you recognize the voice?

6 A. Yes, I made that connection, when I could -- when
7 I -- I'm trying to think. Everything was -- let me see how
8 that went. When he said Ben Bathen, it was like, of course,
9 now I recognize the voice, once he -- once he gave me the name
10 that was connected to that phone number.

11 Q. And you've been thinking about Mr. Bathen. I mean
12 this has been a long time that had passed; right?

13 A. Right, right.

14 Q. Was it since -- was April of 2009, was that the last
15 time you had --

16 A. Yes.

17 Q. -- thought about him or --

18 A. Yes.

19 Q. And did you and your husband call the Chula Vista
20 Police Department?

21 A. Yes.

22 Q. Did you give them the phone number and the name of
23 Mr. Bathen?

24 A. Right. They responded. A patrol officer came to the
25 house and gave him the information, and he also -- yeah, so he
26 was there with us and made a report.

27 Q. After you made the report to Chula Vista Police
28 Department, were you still afraid?

1 A. Yes. He instructed us in terms of some safety
2 issues, measures that we can take, and yeah, at that point I
3 was on pretty high alert.

4 Q. What safety measures did you take?

5 A. Well, we -- we relooked at our security system in the
6 house. We -- my office in Chula Vista, we put -- were able to
7 get the landlord to put in security doors so that the doors
8 locked from the outside at all times.

9 I had to notify all of my colleagues because we all are
10 coming in and out of -- and there's a parking lot in the back
11 that's not greatly well lit, so -- so I had to let them know
12 to be cautious and that I had a threat and just to -- you
13 know, I wanted to protect my colleagues and also their
14 patients that were going to be coming in and out of the
15 office.

16 And at that point, I didn't know anymore than I had just
17 received the threat and the police had taken the reports, so
18 we just started mobilizing to try to protect and just protect
19 myself as much as I could.

20 Q. Aside from your landlord putting in security doors,
21 did you take any other safety precaution methods at work?

22 A. At work. Let's see. Just when -- like we would walk
23 each other out to our cars; and if we're going to be there
24 late, my husband would come to the office and drive home with
25 me. And some of the other therapists were doing things like
26 that.

27 Q. What about at your home? You said you relooked at
28 the security. What do you mean?

1 A. Well, we had a security system that we sometimes
2 turned on and sometimes didn't ask. We just became more
3 vigilant, more focused on keeping things, you know, more
4 secure.

5 Q. Would you keep your windows and doors locked?

6 A. Yes, for a year. For a year, I -- if I'm there,
7 especially if I'm there alone, I just -- this is very
8 sustainable and for the earth, but I just locked the doors and
9 the windows and just keep the air-conditioning on just -- I --
10 just to keep -- I just feel safer. I've just become much more
11 vigilant than I would have ever been in the past.

12 Q. Did it kind of change the way you go about your
13 everyday life?

14 A. It has. It has. I don't really like to go to
15 shopping centers anymore with garages and things like that.

16 Q. Did you know where Mr. Bathen was when the June 4,
17 2017 message was left?

18 A. No. I had no idea.

19 Q. Did that have any effect on you?

20 A. Yeah. I wish I had -- you know, I think I would have
21 been less fearful if I had known he was out of state or, you
22 know, not nearby, not in Chula Vista.

23 Q. And you didn't have any type of current address for
24 him; is that correct?

25 A. No.

26 Q. Did you end up receiving a second voice message?

27 A. Yes.

28 Q. And did you recognize the voice on that message?

1 A. Yes.

2 Q. And who did you recognize that as?

3 A. Ben Bathen.

4 Q. When did you get that second voice message?

5 A. It was about a month later, July 3rd, July 3rd.

6 Q. Was that, again, on your confidential work message?

7 A. Yes, uh-huh.

8 Q. Do you remember where you were when you found the
9 second message?

10 A. I think I was in my kitchen again checking my
11 messages.

12 MS. SOMERVILLE: Your Honor, at this time I would ask to
13 play People's Exhibit -- or excuse me, Court's Exhibit 2 for
14 identification.

15 *(Court's Exhibit No. 2 was identified.)*

16 And I also have a transcript marked as Court's Exhibit 2A
17 for identification and copies for the jury.

18 *(Court's Exhibit No. 2A was identified.)*

19 THE COURT: All right. Any objection?

20 MS. FREEZE: No, Your Honor. Just --

21 THE COURT: Go ahead.

22 MS. SOMERVILLE: Your Honor, for the record at this time
23 I'm going to play Court's Exhibit 2 for identification.

24 *(Audio recording played; not reported.)*

25 THE COURT: All right. And again, if you can pass them
26 down to jurors 14 and 12, the transcripts.

27 BY MS. SOMERVILLE:

28 Q. Are you okay?

1 A. Uh-huh.

2 Q. Was that the message that was left on your machine on
3 July 3rd?

4 A. Yes.

5 Q. How do you feel about hearing that?

6 A. It's -- actually it's terrifying and it's
7 humiliating. It's humiliating.

8 Q. What do you mean by it's humiliating?

9 A. I just think the -- I guess the sexual content of it
10 and the explicitness of it, I guess.

11 Q. Describe for me how you felt after you get this
12 second message when you are home alone.

13 A. Well, that time I actually had enough of a visceral
14 reaction that I threw up. And then after I got over that,
15 I -- I think I called my husband and then I think I called the
16 police again.

17 Q. And the second call, did you immediately recognize
18 the voice?

19 A. Yes.

20 Q. Did you get any more calls of this nature?

21 A. Yes.

22 Q. And do you remember when you got an additional call?

23 A. It was two days later, July 5th.

24 Q. How were you feeling in between, you know, getting
25 that second call and then July 5th?

26 A. Well, I was -- I was really getting frightened
27 because it had escalated and -- and the threats were much more
28 violent and explicit, and I really began to think that I was

1 really -- my life was in danger. I mean I thought from the
2 very beginning, but it was getting more clear to me that this
3 was escalating and I could be in real danger.

4 Q. Between the July 3rd call and this -- or excuse me,
5 the July 4th call and this July 3rd call, did you know where
6 Mr. Bathen was during that basically month period?

7 A. No -- did I know -- well, I know the police had
8 turned the case over to the detectives and I know the
9 detectives were working on trying to locate him.

10 Q. But did you know yourself?

11 A. No.

12 Q. So you didn't know if he was in Chula Vista when he
13 made the call?

14 A. No, no.

15 Q. And when was the third call that you received?

16 A. July 5th.

17 Q. Okay. Do you remember where you were when you
18 checked your messages again?

19 A. I think it was in my bedroom phone.

20 Q. Was anyone with you?

21 A. I think so. I can't -- I think my husband might have
22 been upstairs when I took the message. But I really can't --
23 I don't recall. I don't recall.

24 Q. That's okay.

25 A. Yeah.

26 Q. Did you recognize the caller on this third call?

27 A. Yes. It was the same voice.

28 Q. And who was that?

1 A. Ben Bathen.

2 MS. SOMERVILLE: Your Honor, I have Court's Exhibit 3 for
3 identification that I would request to play for the jury at
4 this time along with Court's Exhibit 3A marked transcript and
5 transcripts for the jurors.

6 *(Court's Exhibit No. 3 was identified.)*

7 *(Court's Exhibit No. 3A was identified.)*

8 THE COURT: Any objection?

9 MS. FREEZE: No, Your Honor. Just the repeated privilege
10 objection.

11 MS. SOMERVILLE: For the record, I'm going to play Court's
12 Exhibit 3 for identification.

13 *(Audio recording played; not reported.)*

14 BY MS. SOMERVILLE:

15 Q. Are you okay?

16 A. Uh-huh. I am -- I am okay.

17 Q. You talked about when you got the second call you
18 believed it was escalating. How did you feel after this call?

19 A. Well, he upped the ante when he made threats against
20 my family, so for me to get to another level of really
21 frightened.

22 Q. Were you concerned about your daughter?

23 A. Pardon me?

24 Q. Were you concerned about your daughter?

25 A. Yes.

26 Q. How were you feeling physically after hearing these
27 threats to rape you, to rape your daughter?

28 A. Just kind of done in, I think. Is this ever going to

1 end, you know, and how is this going to end or how could this
2 end? Am I going to be dealing with this for -- you know, way
3 into the future?

4 I mean every time I answer the phone am I going to have to
5 prepare myself for the next threat? And just that kind of
6 thing.

7 Q. Did you believe that your life was legitimately in
8 danger?

9 A. I did.

10 Q. Did you also believe that about your daughter?

11 A. Yes.

12 Q. Was this third call reported to the Chula Vista
13 Police Department?

14 A. Yes.

15 Q. Did you let your daughter know at some point about
16 the threats that had been made?

17 A. I did not.

18 Q. Why not?

19 A. We felt like -- my husband and I discussed it. We
20 both felt that we were doing everything that we could to set
21 up the protections that were -- that we could do within the
22 law. We felt like law enforcement was really -- was really
23 supporting us, and we just elected to not tell her at this
24 point because there wasn't -- we didn't feel like there was
25 any -- much more that she could have done because everything
26 was in place and everything was in process, so I just didn't
27 want to load her up.

28 Q. As a mother, you didn't want to frighten her?

1 A. As a mother, yeah, yeah, yeah.

2 Q. You said you were doing stuff, everything that you
3 could within the law?

4 A. Uh-huh.

5 Q. Did you end up coming to court to try, you know, to
6 get any protection in place for yourself?

7 A. Yes. I applied for a -- I'm blocking right now.
8 Hang on here -- a civil restraining order. I knew I would get
9 it, a civil restraining order. So I applied for a civil
10 restraining order.

11 Q. How did that process work, if you can just kind of
12 explain it?

13 A. Well, let's see. I applied. I came here and I
14 presented my -- the case and it was heard by a judge. And
15 Mr. Bathen at that time had an attorney that appeared for it
16 and asked for a contingency so it was put off.

17 And then we had to come back to court again and then
18 eventually I was granted the civil restraining order for --
19 until 2020.

20 Q. Did you have to give any type of testimony or
21 statement to the Court at the restraining order hearing?

22 A. I think it was just in the transcript. I think it
23 was just in the transcript.

24 Q. Did you prepare documents and kind of explain what
25 had been going on in the threats?

26 A. Right. Right.

27 Q. And were those submitted to the Court?

28 A. Yes.

1 Q. At that restraining order, was that the first time
2 you had seen Mr. Bathen since he had moved to the East Coast?

3 A. Yes.

4 Q. How did you feel having to come into court and see
5 him again after getting these threats?

6 A. It was just really uncomfortable. And you know, I --
7 you know, I felt -- I didn't feel unsafe because I felt like I
8 had plenty of support, law enforcement support. Structures
9 around me. But I just -- it was just uncomfortable. I just
10 wanted -- I just wanted to do what I could to try to put
11 everything I could in my life around me to stay safe. That
12 was all it was for me.

13 So that was recommended to go ahead and get -- I know
14 there would be a criminal restraining order eventually, but to
15 have a civil restraining order would be like an extra level of
16 protection.

17 Q. Did you -- after you got the restraining order, did
18 you still keep in place, you know, some of the safety
19 precautions that you had talked about before like locking the
20 door?

21 A. They're still in place. Even now. Yeah.

22 Q. Are you still afraid of Mr. Bathen?

23 A. Yes. Yes.

24 Q. Have you had any -- you know, aside obviously from
25 being afraid and having to kind of change your lifestyle,
26 protect yourself, have you had any, like, emotional or issues
27 or anything like that since this has happened?

28 A. Just a little -- probably just heightened --

1 heightened vigilance, which kind of increases just your base
2 levels of anxiety a little bit higher. Sleeping more.
3 Sleeping issues that I never had really before. But not
4 really anything -- not anything I would in any way call a
5 clinical issue, yeah.

6 Q. Aside from Mr. Bathen getting angry with you and
7 wanting to have this face-to-face sit-down basically monologue
8 to you about what his issues were when you couldn't see him
9 anymore, have you ever had any issues like this with another
10 patient?

11 A. No, I never have. Never.

12 Q. And I believe you said that you've been in the area
13 even with marriage and family therapy since 1988?

14 A. Yes.

15 Q. Before all this started, did -- you have an open
16 Facebook page?

17 A. Uh-huh.

18 Q. Where you would share things?

19 MS. FREEZE: Objection. Withdrawn.

20 THE WITNESS: I have a Web page where -- I have an
21 education-in-training program that I -- and I offer conferences
22 twice a year, training, venues in particular, Bowen Family
23 Systems, theory training for therapists and others who want to
24 learn how to work in a particular way with families and
25 individuals and so I have that on my website. And people can
26 go there and get information about my programs and my
27 trainings.

28 /////

1 BY MS. SOMERVILLE:

2 Q. In terms of social media, were you posting anything
3 online like pictures with you and your family or with your
4 daughter?

5 A. Well, that's the thing. Somehow I got -- I don't
6 know how it happens, but I guess because my kids are on social
7 media and my friends are on social media and all of a sudden
8 I'm finding myself on social media, but I didn't actually
9 intend to be on there, but I do -- I do come up on social
10 media, but I think at one time I had a LinkedIn --
11 professional LinkedIn and I got rid of that. And now I
12 have -- I think I have some safeties that I put in so that
13 only people -- only my family and my close friends can -- you
14 know, can be on my Facebook account or if I have -- I'm sorry.
15 I just don't know exactly how I got caught in that, but
16 somehow I got caught in that.

17 Q. Do you remember ever talking to Mr. Bathen about
18 having a daughter, mentioning that you have a daughter?

19 A. I don't recall that. I don't recall that.

20 Q. Is your daughter on social media online?

21 A. Yes.

22 MS. SOMERVILLE: Thank you. Nothing further, Your Honor.

23 THE COURT: Okay. Ms. Freeze.

24 MS. FREEZE: Thank you, Your Honor.

25 Just one moment.

26

27

28 ///

CROSS-EXAMINATION

1

2 BY MS. FREEZE:

3 Q. Good morning, Dr. Jacobs.

4 A. Good morning.

5 Q. Now, Dr. Jacobs, have you had the same office address
6 in Chula Vista since 1995?

7 A. Uh-huh.

8 Q. Is that a "yes"?

9 A. Yes.

10 Q. Okay. And I understand that you're a sole
11 practitioner and you said you share space with other
12 individuals kind of in the same realm of what you do or do
13 they do different things?

14 A. Same realm.

15 Q. And when Mr. Bathen was your patient, did he come to
16 that office?

17 A. Yes.

18 Q. Okay. And you said that was approximately five
19 sessions a year; is that correct?

20 A. Uh-huh. I think it averaged out about that, yeah.

21 Q. Until he moved to Los Angeles; correct?

22 A. Yes. Yes.

23 Q. Because then he stopped coming and you did phone
24 consultations?

25 A. Right. Right.

26 Q. And your -- your license allows for phone
27 consultations?

28 A. Yes.

1 Q. Okay. Do you record those phone consultations?

2 A. I don't record them, no.

3 Q. Take notes?

4 A. I take notes.

5 Q. Okay. Now, when -- I recall -- and I'm not sure if
6 you said this, the timeline, I know it's been some time and I
7 know you had testified as well, Dr. Jacobs, that you since
8 actually purged Mr. Bathen's file; correct?

9 A. Right.

10 Q. Did you say you purged the file in 2014?

11 A. Uh-huh.

12 Q. Is that a "yes"?

13 A. Yes.

14 Q. And -- and that's the -- and the rule is that you
15 purge them after seven years?

16 A. Uh-huh, from your last contact.

17 Q. Okay. So your last contact with Mr. Bathen, would
18 that be the last contact in person or over the phone?

19 A. Let's see. Over the phone.

20 Q. Okay.

21 A. Over the last -- yeah, over the phone.

22 Q. And it's your testimony that the last time you had a
23 session with him was in 2008?

24 A. Uh-huh.

25 Q. "Yes"?

26 A. Yes.

27 Q. Sorry?

28 A. I'm sorry.

1 Q. This lovely lady is trying to write down everything
2 so we want to make sure it's clear for the record.

3 A. Uh-huh.

4 Q. So -- so then you would have purged the file seven
5 years after 2008?

6 A. Right.

7 Q. So that would have been 2015?

8 A. Yeah. I'm not doing the math, but seven, yeah.

9 Q. Okay. Now, this -- is it Bowen or Bowen?

10 A. Bowen. B-o-w-e-n.

11 Q. Bowen. That's Bowen Center for the study of
12 family -- study of the family; is that correct?

13 A. Correct, uh-huh.

14 Q. And that's at the Georgetown Family Center?

15 A. Right.

16 Q. Is that in Washington, D.C.?

17 A. Correct.

18 Q. And do you go out there still like --

19 A. No.

20 Q. When was the last time you were out there?

21 A. I was there from 1995 to 2000.

22 Q. Okay. When you were there in the East Coast, did you
23 have patients or were you just speaking to other colleagues?

24 A. It was just training. I was there for training.

25 Q. Okay. Did you ever have as part of that training
26 like hypothetical patients that would come in where you did
27 training sessions with individuals or anything like that?

28 A. No, no.

1 Q. Just with other professionals?

2 A. Yes.

3 Q. Okay. So -- so that was just training so there's not
4 any type of special license that you would have just to
5 practice like in Washington, D.C. or in certain areas in that
6 area of the East Coast?

7 A. No.

8 THE COURT: And Doctor, I'm going to ask you, since we are
9 taking down everything, she can't take down two people at once.
10 So even if you know where the question is going, if you be
11 patient and wait.

12 THE WITNESS: Thank you.

13 MS. FREEZE: Thank you, Your Honor.

14 BY MS. FREEZE:

15 Q. And so when initially Mr. Bathen was referred to you,
16 it was referred -- he was living on the East Coast; is that
17 correct?

18 A. That's my understanding.

19 Q. And so perhaps through that relationship you had with
20 other colleagues on the East Coast he was directed to you?

21 A. I think so. I'm not certain about that.

22 Q. And the prosecutor was kind of asking you a little
23 bit of questions in the beginning of the questioning this
24 morning about how you receive clients; right?

25 A. Uh-huh.

26 Q. Do you recall that?

27 A. Clients?

28 Q. Yes. How you receive clients.

1 A. Yes.

2 Q. And -- and you had said that you have mostly just
3 like word-of-mouth referrals from other colleagues, things
4 like that?

5 A. Uh-huh.

6 Q. Is that "yes"?

7 A. Yes.

8 Q. And do you do any type of, like, advertising? I know
9 you mentioned your website that mentions, you know, your
10 background and things like that, but do you do any type of
11 like through Yelp or Review, you know, any type of Websites
12 that you pay to get referrals?

13 A. No.

14 Q. Have you ever heard of a website called
15 HealthGrades.com?

16 A. Could you repeat that?

17 Q. Have you ever heard of a website -- a reviewing
18 website that gives information to potential clients or
19 patients called HealthGrades.com?

20 A. Health Grades, yeah, I've heard of that, yeah.

21 Q. Have you ever gone on the website to see what is
22 written about you or reviews or anything like that?

23 MS. SOMERVILLE: Objection. Relevance.

24 THE COURT: That's just a "yes" or "no."

25 THE WITNESS: Yes.

26 BY MS. FREEZE:

27 Q. And you had testified earlier that you haven't had --
28 well, let me back up.

1 You've been practicing since 1995 in Chula Vista?

2 A. 1998.

3 Q. And approximately how many patients do you see a
4 year?

5 A. Probably 700 contacts a year.

6 Q. And you said that you treat -- your specialty is
7 families as well as individuals; correct?

8 A. Uh-huh. And couples.

9 Q. Couples. And it could be, but you don't have the
10 authority or the ability to prescribe medication and make
11 diagnoses; is that fair to say?

12 A. I can make diagnoses but I can't prescribe
13 medication.

14 Q. Okay. And so seven -- around 700 clients per year
15 for the past couple decades. So you've had a lot of patients;
16 fair to say?

17 A. Yeah.

18 Q. You don't remember every single one of their names;
19 fair to say?

20 A. Not off the top of my head.

21 Q. But if someone says a patient's name, you might say,
22 oh, yeah, I treated that person or, oh, yeah, it kind of
23 triggers?

24 A. Uh-huh.

25 Q. Would you say you have a pretty good memory then?

26 A. Yes. I think I do, yeah.

27 Q. And in those couple -- last couple decades of
28 practicing as a psychologist seeing around 700 patients per

1 year, it's your testimony that none of them has ever been mad
2 at you or made a bad complaint about you?

3 MS. SOMERVILLE: Objection. Misstates the testimony.

4 THE COURT: The doctor can correct her. Is that --

5 THE WITNESS: Would you repeat the question.

6 MS. FREEZE: Sure, sure.

7 BY MS. FREEZE:

8 Q. So you had testified that -- that you've never had
9 anybody this madder, this type of level of anger; correct?

10 A. Correct.

11 Q. As -- when I say this, kind of referring to these
12 voice messages; correct?

13 A. Yes.

14 Q. But fair to say, though, on the last couple decades
15 of practicing and seeing the volume of patients that you've
16 seen, fair to say that once in a while maybe a client or a
17 patient gets upset with you?

18 A. I don't -- I actually don't have any recollection of
19 that. If it was -- if it happened, I'm not aware of it. I
20 haven't been made aware of it.

21 Q. Okay. So have you -- with regards to this
22 HealthGrades.com and other type of reviews, you've looked at
23 reviews that patients have given you; fair to say?

24 A. I've only looked -- I actually looked at the reviews
25 maybe twice.

26 Q. Okay. And have you ever seen a negative review?

27 A. I saw one negative review.

28 Q. Okay.

1 A. Yeah.

2 Q. And is that the one that was -- that's on
3 HealthGrades.com?

4 A. I don't recall.

5 MS. FREEZE: Okay. Your Honor, may I approach?

6 MS. SOMERVILLE: I haven't seen this and I'm going to
7 object that it's hearsay as well.

8 MS. FREEZE: It's -- I think it's effect on -- effect on
9 the listener as it pertains to the review.

10 BY MS. FREEZE:

11 Q. Okay. So you are saying one bad review in the past
12 couple decades?

13 A. That's -- that I'm aware of, yeah.

14 Q. Now, talking about this confidential voice message
15 system that you had, has it always been through AT&T?

16 A. Uh-huh.

17 Q. Is that a "yes"?

18 A. Yes.

19 Q. I know it's unusual.

20 And you had said that the number that you have -- that's
21 your contact number, the (619)525-7747 you had testified that
22 that's really been your only number that you're aware of that
23 you've used in your practice for your clients to practice;
24 correct?

25 A. Correct.

26 Q. You don't give your cell phone, your home number out;
27 right? But sometimes you'll return phone calls from that
28 telephone?

1 A. Right. Also, if there is any real crisis, I have
2 given my cell phone number to someone.

3 Q. Okay. And it's also in your practice that you --
4 your general practice is not to disclose your family
5 information; correct?

6 A. Generally, yes.

7 Q. Because that's important, to have boundaries; right?

8 A. Uh-huh, uh-huh. Yes.

9 Q. Now, fair to say that you started treating or seeing
10 Mr. Bathen in 2004?

11 A. Uh-huh, yes.

12 Q. And that was when he had relocated from the East
13 Coast to Southern California for work purposes?

14 A. That's my understanding, yes.

15 Q. And he would come to your office in Chula Vista;
16 correct?

17 A. Correct.

18 Q. And during those sessions in person, would you say it
19 was a pleasant dialogue between you and Mr. Bathen?

20 A. I think we had a therapeutic alliance.

21 Q. Okay. He wouldn't make inappropriate or aggressive
22 gestures to you during those in-person contacts?

23 MS. SOMERVILLE: Your Honor, I'm going to object. Motion
24 in limine, the content of --

25 THE COURT: Overruled.

26 MS. SOMERVILLE: Thank you.

27 BY MS. FREEZE:

28 Q. And you received -- he received a referral from you

1 from an individual that you worked with, you assumed you
2 worked with, in the East Coast; correct?

3 A. Mr. Bathen reported to me that he had been referred
4 by someone from the East Coast.

5 Q. Now, when he had -- when do you recall when he moved
6 to L.A. and you started doing the phone conversations?

7 A. I really don't. I don't have -- I don't have that --

8 Q. But he wanted to stick with you despite him moving to
9 L.A. County; correct?

10 A. Correct.

11 Q. And -- and it's your testimony that you had ended
12 this relationship with Mr. Bathen around September of 2008
13 because it's your understanding he had relocated to the East
14 Coast at that time?

15 A. Right.

16 Q. When you had initially had that dialogue with
17 Mr. Bathen with regards to ending that relationship, was
18 Mr. Bathen still in California and advising you, hey, I'm
19 going to be moving; how do we do this? Or had he already
20 relocated to the East Coast?

21 A. I don't recall if he was -- I'm not sure if he was
22 here in California or if he was already back there. I'm not
23 sure.

24 Q. How -- what was your normal way of communicating with
25 Mr. Bathen when it came to scheduling appointments? Was it a
26 phone dialogue or was it e-mail?

27 A. I think it was -- it might have been both.

28 Q. Okay.

1 A. Yeah.

2 Q. And you had said that you -- when you did learn that
3 Mr. Bathen had moved to the East Coast, you had testified
4 earlier about this continuity of care to make sure that you
5 didn't just drop him -- you kind of point him in the right
6 direction; hey, if you need to chat with someone these are
7 some referrals?

8 A. Uh-huh.

9 Q. Is that correct?

10 A. Correct.

11 Q. So would you say that your communication with
12 Mr. Bathen when he was on the East Coast then was not
13 therapeutic sessions, it was just call this doctor, call this
14 doctor, best of luck to you, sir, kind of thing?

15 A. I'm trying to think. Yeah, it was more consultation.
16 I would say not therapeutic.

17 Q. What's the difference between consultation and, like,
18 a session?

19 A. As you described, you know, more like how are things
20 going and, you know, are you planning -- you know, what are
21 your plans to move on to, you know, to continue your therapy
22 and that sort of thing.

23 Q. Okay. And so that wouldn't be something that he
24 would pay for; right?

25 A. Yes, I think he did pay for that.

26 Q. He would pay for -- and so it would be a normal
27 45-minute to 55-minute session?

28 A. Correct.

1 Q. Just talking about referrals to other doctors in the
2 East Coast?

3 A. Well, I think there were some -- some therapeutic
4 issues that were addressed, but --

5 Q. But I thought you said that your license stopped at
6 the border.

7 A. Yeah. That's true. My license does stop at the
8 border.

9 Q. So it would -- you would be practicing technically
10 without a license then if you were giving him therapeutic
11 sessions over the phone if he lived in the East Coast;
12 correct?

13 A. Yes.

14 Q. Is it your testimony then today, Dr. Jacobs, that you
15 did, in fact, continue to treat Mr. Bathen or have therapeutic
16 sessions when he resided in the East Coast despite not being
17 permitted to do so?

18 A. Well, I guess I'm -- I wasn't thinking about it being
19 treatment. I was thinking about it being more transitioning
20 on as part of a termination process.

21 Q. Okay. But your testimony on direct would have been
22 that's the continuity of care. So are you then -- were you
23 maybe conferencing in with other psychologists?

24 A. No.

25 Q. Okay. So approximately how many of these phone
26 conversations would you say that you had with Mr. Bathen when
27 you were aware that he lived on the East Coast where he would
28 pay you for these 45- to 55-minute sessions?

1 A. I think it was maybe three, three sessions.

2 Q. Okay.

3 A. Three or four.

4 Q. And so -- and this is all just, hey, these are
5 referrals for you to talk to?

6 A. Well, my intention was for that, but the -- the
7 client had -- you know, had -- this was reciprocity in terms
8 that he wanted to talk about or he would share with me, but I
9 considered it more of a consultation.

10 Q. A therapeutic consultation, though; correct?

11 A. Yes.

12 Q. And he's living on the East Coast and you are in
13 California?

14 A. Right, right.

15 Q. So technically you weren't supposed to be doing that;
16 correct?

17 A. I think ethically I was supposed to be doing it
18 because it wasn't appropriate for me to just cut him off and
19 drop him.

20 Q. Right. But you said a number of times today as well
21 as at the preliminary hearing last year as well as to the many
22 Chula Vista Police Department officers that you've spoken to
23 over the last year that it's pretty straightforward, you --
24 once they move, you can't really provide any more therapeutic
25 sessions; correct?

26 MS. SOMERVILLE: Object to the form of the question.

27 THE COURT: Sustained.

28 MS. FREEZE: The form as it being compound.

1 THE COURT: Referring to many conversations, vague.

2 MS. FREEZE: Sure.

3 THE COURT: No foundation. Compound.

4 BY MS. FREEZE:

5 Q. Fair to say, Dr. Jacobs, you mentioned a number of
6 times that your license stops at the border; correct?

7 A. Correct.

8 Q. So would your sessions with Mr. Bathen then, when he
9 had moved to the East Coast, would those be doctor-patient
10 privilege type of conversations?

11 A. Yes.

12 Q. Because you are talking about treatment; correct?

13 A. Right.

14 Q. And when would you say that you recall -- you said
15 that you understand the relationship ended in September of
16 2008; is that correct?

17 A. Right.

18 Q. Okay. So if there was correspondence between you and
19 my client in April of 2008 --

20 A. Uh-huh.

21 Q. -- discussing times to discuss -- or times to have
22 sessions and he was living on the East Coast, would that be
23 incorrect?

24 A. Well, the correspondence in April was really related
25 to the previous -- what was upset that he had with me, that's
26 what -- that's the April contacts were about.

27 Q. And I apologize, Doctor. I mean April of 2008.

28 A. In April 2008. Okay. Could you track it back for

1 me? I'm lost.

2 Q. It's been some time. I appreciate it.

3 So if there's communication between my -- well, let me
4 just ask you this.

5 Do you recall communicating with my client via e-mail in
6 April of 2008 when he was living on the East Coast?

7 A. Yes.

8 Q. Okay. And when -- and there was discussions
9 regarding appointments and scheduling. What were those
10 appointments, were those therapeutic sessions?

11 A. The 2008 e-mails were him outlining his grievances to
12 me so it wasn't about making appointments.

13 Q. Okay. Maybe I'll refresh your recollection with an
14 e-mail that you had sent to my client.

15 MS. SOMERVILLE: Your Honor, I'm going to object to the
16 memory of the witness being refreshed. She never indicated
17 that her memory needs to be refreshed.

18 THE COURT: Sustained.

19 MS. FREEZE: Well, Your Honor, I believe --

20 THE COURT: Don't argue in front -- let's take a brief
21 sidebar.

22 Excuse us, ladies and gentlemen.

23 MS. FREEZE: And just to -- if -- Your Honor, if I may just
24 pick up where we left off so there's not --

25 BY MS. FREEZE:

26 Q. Dr. Jacobs, and again, I know it's been 10 years so
27 if you need a moment, and that's fine, I'm just trying to make
28 sure I understand the communication with my client when he was

1 on the East Coast.

2 So you had testified that your license stops at the
3 border; correct?

4 A. Correct.

5 Q. And so -- and you had just a moment ago testified
6 that -- that e-mail correspondence when he was on the East
7 Coast was more about him laying out in grievances and things
8 like that; correct?

9 A. Uh-huh, uh-huh.

10 Q. So if I have an e-mail correspondence between you and
11 my client in April of 2008 where you are discussing
12 appointment times -- do you recall that?

13 A. I don't. I don't. Could I -- could I see that or --

14 Q. Sure.

15 MS. FREEZE: Your Honor, may I approach?

16 THE COURT: Sure.

17 BY MS. FREEZE:

18 Q. It's an e-mail, appears to be an e-mail between you
19 and my client in April of 2008 discussing scheduling.

20 THE COURT: Okay.

21 BY MS. FREEZE:

22 Q. April of 2008. I'll just say that.

23 A. Okay.

24 Q. Does that refresh your recollection?

25 A. Uh-huh.

26 Q. Do you recall e-mailing with my client then in April
27 of 2008?

28 A. I don't recall it, but I see it there in writing,

1 so --

2 Q. Okay. And in that, he's living in the East Coast at
3 that time; correct?

4 A. I think so.

5 Q. Okay. And your -- and isn't it true that now that
6 you've had an opportunity for your memory to be refreshed and
7 looked at this document, it appears to be scheduling sessions
8 with Mr. Bathen?

9 MS. SOMERVILLE: Object. It did not refresh the witness's
10 memory.

11 THE COURT: Sustained.

12 MS. FREEZE: I believe, Your Honor, when I showed it to her
13 she had indicated that --

14 THE COURT: You can -- we can have the last question before
15 our break whether or not it refreshes the witness's memory.

16 BY MS. FREEZE:

17 Q. Did this refresh your recollection or your memory
18 speaking with Mr. Bathen via e-mail in April of 2008?

19 A. I'm -- right now I'm trying to recollect because the
20 e-mails that I was referring to was in February 2009, so
21 that's -- so I'm getting confused with the timeline. I'm
22 sorry.

23 I might have to have you -- I'm not clear about this --
24 the timing on this in terms of when he met -- when he moved
25 and when -- and when we had further conversation. So I'm
26 just -- I'm confused about it at this point.

27 Q. Okay. Did you have a chance to read this document,
28 though, when I showed it to you?

1 A. I skimmed it.

2 Q. Okay. Did it appear to have your proper e-mail
3 address on it?

4 A. Can I look at it again?

5 MS. FREEZE: If -- Your Honor, if I may approach?

6 MS. SOMERVILLE: Object as hearsay.

7 THE COURT: I'm sorry.

8 MS. SOMERVILLE: I'm going to object as hearsay, Your
9 Honor.

10 THE COURT: I'm going to allow just to do the e-mail
11 address and then we're going to break.

12 MS. FREEZE: Okay. Thank you, Your Honor.

13 THE WITNESS: That's my e-mail.

14 Yeah, okay. That's my e-mail.

15 BY MS. FREEZE:

16 Q. Okay. And --

17 THE COURT: All right. And so, as I said, that was the
18 question for the break.

19 All right. So we're going to take our noon recess at this
20 time, ladies and gentlemen, until 1:30.

21 Please remember not to form or express an opinion. Don't
22 talk to anybody about any subject connected with this matter
23 and don't do any research or investigation.

24 I'll see you all at 1:30. Thank you.

25 And ma'am, you may step down. Thank you.

26 *(The following proceedings were held in open court*
27 *outside the presence of the jury:)*

28 THE COURT: And we're on the record outside of the presence

1 of the witness and the jury.

2 And Counsel, you know, I think you had made your point. I
3 don't know how much longer I'm going to allow you, just as a
4 keeper of the time, this really has -- I allowed you to go
5 into it because it was brought up by the prosecution as far as
6 communication, but this really is not the issue in this case.

7 So you have on the record her stating that there was some
8 therapy that was done perhaps in these conversations, not
9 really clear. She doesn't remember the timeline. But you got
10 all that. You can't practice outside of the border.

11 That's not what we're here about. But, as I said, I
12 allowed you, but we're not going to go on for another
13 half-hour.

14 MS. FREEZE: I certainly understand, Your Honor. It's just
15 her credibility.

16 THE COURT: And it's done. You know, yes. You're entitled
17 to attack her credibility. I think you've done it. We're
18 getting a little repetitive on it now.

19 So if you want to finish up this subject matter, unless
20 you have something to offer me at this point that's going to
21 not be more of the same.

22 MS. FREEZE: I think I just have one or two -- one question
23 and then I'm done with that.

24 THE COURT: Okay. Excellent.

25 MS. FREEZE: Thank you.

26 THE COURT: Same wavelengths.

27 MS. FREEZE: Glad we're on the same page, Your Honor.

28 THE COURT: Thank you. I'll see you all at 1:30.

1 *(Lunch recess.)*

2 * * *

3 *(The following proceedings were had in open court in*
4 *the presence and hearing of the jury.)*

5 THE COURT: All right. We're back on the record with
6 everyone present. Do we have the witness?

7 All right. Dr. Jacobs, do you understand you are still
8 under oath?

9 THE WITNESS: Yes.

10 THE COURT: Okay. Thank you.

11 All right. Ms. Freeze.

12 MS. FREEZE: Thank you, Your Honor.

13

14 **CROSS EXAMINATION (RESUMED)**

15 BY MS. FREEZE:

16 Q. Good afternoon, Dr. Jacobs.

17 A. Good afternoon.

18 Q. So just a quick recap. We were just discussing in
19 the morning hour some e-mail correspondence with Mr. Bathen
20 from April of 2008?

21 A. Right. Right.

22 Q. And we had -- you had indicated, I think, the last --
23 the thing that you had indicated before the noon lunch hour
24 was that -- that you had confirmed that that was, in fact,
25 your e-mail address?

26 A. Yes.

27 Q. And now that that's now been marked as Court's
28 Exhibit 35 for the record and this was -- and this is dialogue

1 via e-mail with my client when he's on the East Coast;
2 correct?

3 *(Court's Exhibit No. 35 was identified.)*

4 A. Correct.

5 Q. Now --

6 A. I assume he's on the East Coast.

7 Q. And is that because of the nature of the e-mail, the
8 substance of the e-mail with regard to timing?

9 A. I just assume that it's coming from the East Coast
10 because he had moved back there.

11 Q. Okay. And so -- and you had said that you had still
12 communicated with him briefly for this continuity of care;
13 correct?

14 A. Correct.

15 Q. But you had also said that during those sessions, you
16 were, in fact, charging him for those sessions; correct?

17 A. Yes.

18 Q. Now, that was in April. Do you recall continuing to
19 speak with Mr. Bathen for the next several months into the
20 summertime of July of 2008?

21 A. 2008, okay. I think it was like February 2008.
22 March. I'm -- I'm just having to pull this up out of memory
23 because I don't have anything to refer to. I think there were
24 three sessions during that -- during that time.

25 Q. Do you recall scheduling a time to speak with
26 Mr. Bathen in July of 2008 at -- July 10th of 2008 at
27 3:00 p.m., your time? Do you recall making that appointment
28 with Mr. Bathen?

1 A. I don't recall that.

2 Q. And would it refresh your recollection to look at an
3 e-mail correspondence with Mr. Bathen?

4 A. Yes.

5 MS. FREEZE: Your Honor, may I approach?

6 THE COURT: Yes.

7 MS. FREEZE: And Your Honor, for the record I did provide
8 the prosecutor copies of the e-mail.

9 THE COURT: Okay.

10 MS. FREEZE: Thank you.

11 BY MS. FREEZE:

12 Q. Showing you what's been previously marked as Court's
13 Exhibit 36 --

14 *(Court's Exhibit No. 36 was identified.)*

15 THE COURT: Did you say it's marked as an Exhibit 36?

16 MS. FREEZE: (Nods head.)

17 THE WITNESS: Yes.

18 BY MS. FREEZE:

19 Q. Has your memory been refreshed?

20 A. By looking at that, yes, that's my e-mail address.

21 Q. Okay. Do you -- in the e-mail correspondence, you
22 provide a telephone number that's different than the telephone
23 number that you testified on direct as the one that you use.
24 And on direct examination, you indicated that since you've
25 been practicing, you've used a 619 number and I believe you
26 indicated that's 525-7747. Now, that's been your only number
27 since you've been in practice?

28 A. That's my only private practice number, yes.

1 Q. And looking at the e-mail correspondence with
2 Mr. Bathen, isn't it true that you asked him to contact you on
3 a different phone number?

4 A. Could I look at that number?

5 Q. Yes.

6 MS. FREEZE: Your Honor, if I may approach?

7 And Your Honor, just for the record, we can have a brief
8 sidebar if you'd like if the Court has any concerns.

9 THE COURT: I have no objection. I mean I have heard no
10 objection.

11 MS. FREEZE: Okay.

12 THE WITNESS: Yes, that's my cell phone number.

13 BY MS. FREEZE:

14 Q. Okay. So -- and this correspondence, the number
15 that's then included in the e-mails is your cell phone number?

16 A. Yes.

17 Q. Okay. And then do you recall speaking with
18 Mr. Bathen via e-mail in September of 2008, about two to three
19 months later?

20 A. Speaking to?

21 Q. Via e-mail.

22 A. Via e-mail. I have to see the record, but I think --
23 I would have to verify that.

24 Q. Do you recall confirming a meeting with him or some
25 type of appointment with him and confirming it for Tuesday,
26 September 23rd at your time?

27 A. I don't remember.

28 MS. FREEZE: Your Honor, may I approach?

1 THE COURT: Yes.

2 MS. FREEZE: Thank you.

3 And for the record, showing the witness what's been
4 previously marked as Court's Exhibit 37.

5 *(Court's Exhibit No. 37 was identified.)*

6 THE WITNESS: Okay.

7 BY MS. FREEZE:

8 Q. Does that refresh your recollection?

9 A. That's 2008. Yes.

10 Q. Do you recall scheduling -- now that your memory has
11 been refreshed -- scheduling an appointment with Mr. Bathen in
12 September of 2008 at 4:00 p.m. your time?

13 A. If that's what it says in the e-mail. I am having a
14 hard time recalling that. It's just been a long time.

15 Q. Do you recall now that you've had an opportunity to
16 look at this e-mail correspondence of my client explaining to
17 you that he's teaching at Boston University?

18 MS. SOMERVILLE: Objection. Hearsay.

19 THE COURT: Sustained.

20 MS. FREEZE: All right. I'll move along.

21 BY MS. FREEZE:

22 Q. Now, when -- later when there was some communication
23 with Mr. Bathen, I believe the following year in 2009, there
24 was some requests, I think you had testified to, about him
25 asking for some type of apology. Do you recall testifying to
26 that?

27 A. Yes.

28 Q. At any point did you apologize to Mr. Bathen?

1 A. I think I -- I think I sent an e-mail. First of all,
2 I asked him to send me his mailing address. His snail mailing
3 address so I can send a letterhead with -- you know, with my
4 response to it and he wouldn't give me his address.

5 Q. And then in 2009, you had reminded Mr. Bathen at some
6 point that you weren't allowed to continue with therapeutic
7 sessions due to him living in Boston; correct? Or in the East
8 Coast?

9 A. Yes.

10 Q. But you had previously for the last several months at
11 least set up some type of appointment with him; right?

12 A. Yes. And as I said, those appointments were set up
13 as part of my continuity of care process in terms of
14 terminating the therapeutic relationship.

15 Q. So the e-mails that I have shown you from April 2008,
16 July 2008 and September of 2008 marked as Exhibits 35, 36 and
17 37, those were a part of continuity of care?

18 A. Right. Right.

19 Q. And at any point, did you stop charging him for those
20 continuity of care or were they always charged?

21 A. They were always charged.

22 Q. And so at some point now then in early 2009, you say
23 we can't do this anymore kind of dialogue; correct?

24 A. Right. I mean, I felt that at this point that it was
25 time for him to -- I had given him referrals and it was time
26 for him to follow-up and move on to another provider.

27 Q. Okay. And so it appeared then in your opinion or
28 what you believed and how you had testified on direct

1 examination in that he was maybe agitated, I think you said,
2 that this was ending, this relationship was ending?

3 A. Yes. That was my take on it.

4 Q. And isn't it true at any -- at any point isn't it
5 true that my client had maybe -- had brought to your attention
6 that perhaps that he would contact like an ethical committee
7 due to this relationship ending?

8 A. He did say that he would -- he was going to contact
9 an ethical committee.

10 Q. And that was because he realized that you were
11 perhaps practicing when you should not have been practicing or
12 were not permitted?

13 MS. SOMERVILLE: Objection. Speculation.

14 THE COURT: Lacks foundation. Argumentative.

15 BY MS. FREEZE:

16 Q. And at some point did you prepare some type of letter
17 to correspond to Mr. Bathen about the final termination of
18 this relationship?

19 A. Uh-huh. Yes.

20 Q. And was that just, like, attached to an e-mail
21 because you weren't able to mail it to him?

22 A. Exactly.

23 Q. Okay. And at any point at that time, did he call and
24 leave angry messages or did he contact you either on your work
25 number or this cell phone number that he had and contact you
26 and yell at you or become angry with you regarding this
27 termination?

28 A. No. No.

1 Q. And then nine years you don't hear anything from him;
2 correct?

3 A. Right.

4 Q. As far as you know, he lives in the East Coast still?

5 A. Uh-huh.

6 Q. Is that a "yes"?

7 A. Yes. Yes. Sorry.

8 Q. That's okay. And then you receive this message
9 that -- that's been played for the jury and that the first one
10 was in June; correct?

11 A. June.

12 Q. Of 2017?

13 A. Yes. June 2017.

14 Q. And initially you hear it. And do you listen to it
15 like a number of times?

16 A. No. I heard it one time and --

17 Q. And just called your husband?

18 A. When my husband --

19 THE COURT: Wait. Stop, both of you. Let's have a
20 question -- one question, one answer. One question, one
21 answer. Thank you.

22 BY MS. FREEZE:

23 Q. So you listened to it one time?

24 A. The first time, one time.

25 Q. And then the first thing you did then was contact
26 your husband; correct?

27 A. Correct.

28 Q. Okay. And you didn't contact the police, you just

1 waited for your husband to come home?

2 A. Right.

3 Q. And you said that you -- you're not very tech savvy,
4 your husband was able to go into your voice mail account and
5 get the number and all that; correct?

6 A. Correct.

7 Q. Okay. And at any time up to this point had you
8 received any type of client leaving a message disgruntled or
9 angry about anything in the 20-some-odd years that you had
10 been practicing?

11 A. No, not that I can recall.

12 Q. Not refuting a bill or anything like that?

13 A. No.

14 Q. Okay. And then you said that you had -- while you
15 were waiting for your husband to come home, you said you kind
16 of locked up your house; correct?

17 A. Right.

18 Q. But as far as you know, you had -- well, you had
19 never in your previous contact with any of your clients
20 provided them your residence address; correct?

21 A. Correct.

22 Q. Because that would be outside the boundaries that you
23 had talked about; correct?

24 A. Right. Yes.

25 Q. Now, when you called the police, did you contact
26 Chula Vista Police Department or did your husband contact
27 them?

28 A. I contacted them.

1 Q. Okay. And was that just contacting the normal
2 Chula Vista Police Department number or was it 911?

3 A. It was the normal number.

4 Q. And then do you recall speaking with an Officer De La
5 Pena from the Chula Vista Police Department?

6 A. Yes.

7 Q. And he -- in fact, he came to your home?

8 A. He did.

9 Q. And do you recall speaking with Officer De La Pena
10 and advising him that this call kind of came out of the blue,
11 it was totally unexpected?

12 A. Yes.

13 Q. And -- and that as far as you knew, he had left
14 California and lived in the East Coast; correct?

15 A. Correct.

16 Q. And do you recall Officer De La Pena advising you
17 that based on the notion that Mr. Bathen likely still resided
18 on the East Coast that there might not be any type of imminent
19 threat or danger to you? Do you recall having a conversation
20 with him about that?

21 MS. SOMERVILLE: Objection. Hearsay.

22 MS. FREEZE: Effect on the listener.

23 THE COURT: Overruled -- not overruled. Sustained.

24 MS. FREEZE: Okay.

25 BY MS. FREEZE:

26 Q. And I know that you had said that you took some
27 safety precautions at your office. At any point did
28 Mr. Bathen at all threaten your colleagues or neighbors in

1 your office building?

2 A. Not to my knowledge.

3 Q. Now, I want to talk just briefly about this
4 restraining order hearing, the civil harassment restraining
5 order hearing.

6 You hadn't seen -- when you came to that hearing, you
7 hadn't seen Mr. Bathen since sometime in 2008 before he moved
8 to the East Coast; correct?

9 A. Correct.

10 Q. Okay. And with regards to the mention in the third
11 call of your daughter, it wouldn't have been in your practice
12 to disclose to any patients that -- your family makeup or if
13 you have children or anything like that; correct?

14 A. Not as a policy. There are times when, you know,
15 things -- you can say things that are -- if there are -- would
16 be therapy appropriate you can mention something. In general,
17 no.

18 Q. And when you -- do you recall around -- you don't
19 have to give me the specific date, Dr. Jacobs, but do you
20 recall around what month of last year that you filed the civil
21 harassment restraining order?

22 A. Let me see. It must have been maybe the end of --
23 maybe the end of July, middle or end of July.

24 Q. And when you filed the restraining order, you had to
25 serve him in some manner; correct?

26 A. Right.

27 Q. How did you go about serving Mr. Bathen with the
28 restraining order so he was placed on notice and could show

1 up?

2 A. Well, on the advice of the detectives who were on the
3 case, they instructed me to file a restraining order and then
4 they would have it served wherever he was located.

5 Q. Were you part -- part of -- fair to say part of the
6 requirement when you file a restraining order is you have to
7 show to the Court like proof of service. Did you yourself
8 file the proof of service or how did you show to the Court
9 that he had been served, if you recall?

10 MS. SOMERVILLE: Objection. Relevance.

11 THE COURT: Sustained.

12 MS. FREEZE: With regards to his location, Your Honor, at
13 the --

14 THE COURT: The fact that she received --

15 MS. FREEZE: Your Honor, if I may just briefly, it goes to
16 where my client was at the time of the hearing, at the time of
17 this incident.

18 THE COURT: You don't have a foundation for that.

19 MS. FREEZE: Can I attempt to lay the foundation?

20 THE COURT: You may.

21 MS. FREEZE: Thank you.

22 BY MS. FREEZE:

23 Q. Do you -- do you recall at all filling out a proof of
24 service and filing it with the Court?

25 A. A CH-200. I have that in my paperwork at home. I
26 think so. I recall filling out some things, but I'm not sure.
27 When you say -- when you say serving you, like, are you asking
28 me did -- was I involved in serving the subpoena?

1 Q. No, no, no. Not at all, Dr. Jacobs. And I apologize
2 if I wasn't clear. Let me back up a little bit.

3 When you initially filed the civil harassment restraining
4 order, you had to fill out a bunch of forms; right?

5 A. Right. Right, right.

6 Q. A lot of paperwork involved?

7 A. Right.

8 Q. And part of the requirement in order to proceed with
9 the proceeding, you have to show that the other person, the
10 respondent, had been served. Were you aware of that when you
11 filled out the packet?

12 A. Right, right.

13 Q. You represented yourself in that civil harassment
14 restraining order; correct?

15 A. Correct.

16 Q. And so at any point did the Court require you to file
17 a proof of service to let the Court know that the respondent,
18 Mr. Bathen, had been served?

19 A. Somehow I don't recall it coming back to me.

20 Q. Okay. Would looking at the proof of service, would
21 that refresh your recollection?

22 A. I'm sure it would help.

23 MS. FREEZE: Your Honor, may I approach?

24 MS. SOMERVILLE: I'm going to object on relevance at this
25 point.

26 THE COURT: Let me see counsel.

27 *(Sidebar; unreported.)*

28 */////*

1 BY MS. FREEZE:

2 Q. Dr. Jacobs, when -- ultimately when you appeared at
3 the civil harassment restraining order, Mr. Bathen was there?

4 A. With his attorney, yes, his first attorney.

5 Q. Okay. And prior to, the hearing was actually
6 continued one time?

7 A. Yes.

8 Q. Okay. And is it your understanding that Mr. Bathen
9 was served with notice of the restraining order hearing?

10 A. Yes.

11 Q. And is it -- do you -- is it your understanding that
12 Mr. Bathen was served with notice of the restraining order
13 hearing in Virginia?

14 A. That was my understanding.

15 Q. And that's where -- and it was your understanding
16 that that's where he resided at that time?

17 A. That's -- that's what -- he was -- I didn't locate
18 him, but I guess the investigation located where he was
19 residing.

20 Q. Thank you.

21 And I also -- Dr. Jacobs, you had testified that you are
22 continuing to follow some of the safety precautions that you
23 employed back in June and July of last year; correct?

24 A. Correct.

25 Q. But in that year, Mr. Bathen hadn't come to your
26 place of employment; correct?

27 A. No.

28 Q. And he hadn't come to your home?

1 A. No.

2 MS. FREEZE: Just one moment.

3 Nothing further. Thank you.

4 THE COURT: Okay. Ms. Somerville.

5 MS. SOMERVILLE: Thank you.

6

7

REDIRECT EXAMINATION

8 BY MS. SOMERVILLE:

9 Q. Dr. Jacobs, you would have these in-person sessions
10 with Mr. Bathen when you began treating him. Can you describe
11 for us just kind of how -- what was kind of the back and
12 forth? I mean I know some people listen. Some people talk.
13 I mean what was kind of the -- how did they work? I mean did
14 Mr. Bathen talk a lot? Did you take notes? Can you explain
15 that?

16 A. It's reciprocal interaction of languaging and
17 talking; and, you know, I do keep notes. I keep, you know,
18 case file notes about the themes of the session basically, and
19 so he brings up -- maybe he walks in and brings up things that
20 are -- a client will bring up something that's on their mind
21 and introduce it is as a topic and then we begin to dialogue
22 about it and process it.

23 Q. Do you prompt them to kind of get things out when
24 you're in the session?

25 A. At times when it's appropriate, you know. Many, many
26 people come in and they're ready, they know what they want to
27 talk about and they know what the topic, they know what's on
28 their mind and then they just start, you know, sharing what --

1 what's going on or something that happened that week or some
2 issue that's come up recently or something like that.

3 Q. Was that how it was with Mr. Bathen when he came in
4 and be open to talking and talk to you?

5 A. Yes, yes.

6 Q. And when you had your phone sessions with him, when
7 he was here in California?

8 A. Uh-huh.

9 Q. Was that more along the same lines of how you would
10 have the, you know, talking, taking notes and --

11 A. Yes.

12 Q. Same situation?

13 A. Uh-huh. Very much so, yeah.

14 Q. And in treating him, I mean, was he willing to talk
15 and did he express himself freely?

16 A. Yes.

17 Q. Was that also the same kind of setup when he was on
18 the East Coast and you were doing the continuation of care?

19 A. Yes.

20 Q. Is it fair to say Mr. Bathen didn't come in and just
21 sit there, not really say anything in the sessions?

22 A. He was quite interactive.

23 Q. When your husband mentioned to you the name Benjamin
24 Bathen, he said it kind of -- it clicked; is that right?

25 A. Uh-huh.

26 Q. This is who left this message?

27 A. Uh-huh.

28 Q. You have to answer out loud.

1 A. Oh. Yes, yes. I'm fading. I apologize.

2 Q. That's okay.

3 So aside from the name, can you tell me what it was that,
4 you know, clicked with you about this voice on this first
5 message?

6 A. It was just the inflection, I think, the -- the high
7 pitch of the voice. And I had an experience in sessions where
8 he could -- he could get agitated, not towards me, but about
9 something else. And I had experienced him getting amping up
10 and getting agitated and I had experienced his voice sounding
11 like that when he was anxious or angry or stirred up.

12 So that was real clear, you know, for me that when I heard
13 it, it just clicked that I had heard this voice before and
14 that it was Mr. Bathen's voice.

15 Q. Do you have the e-mails from when you were
16 communicating with Mr. Bathen when he moved back to the East
17 Coast?

18 A. Everything was purged when I purged his chart, his
19 file.

20 Q. When you heard the second call that you received on
21 July -- the 4th -- excuse me, July 3rd, when you got that
22 call, did you recognize the same characteristics in his voice?

23 A. Absolutely. Only it was more heightened, the
24 intensity was more heightened.

25 Q. The July 5th call as well, did you recognize the
26 voice based on his tone and based on inflection the things
27 that you describe for us?

28 A. Yes, yes.

1 Q. Did Mr. Bathen ever, you know, not pay you or fall in
2 arrears?

3 A. No, not that I'm aware of. I have a billing service
4 who does all of my billing; so most of that is handled by my
5 service. So I would have been notified of it, notified if
6 something untoward like that was going on. I never got any
7 information that he wasn't paying or that -- whatever.

8 Q. When you would speak with Mr. Bathen in these
9 sessions when he was up in the Los Angeles area, was that over
10 your work phone or would that be with your cell phone?

11 A. My cell phone in my office.

12 Q. In your office?

13 A. Uh-huh. My cell phone in my office. I don't have a
14 land phone in my office.

15 Q. And is that the same phone that you continued then to
16 speak with him on when he moved back to the East Coast?

17 A. Correct.

18 Q. Do you know about how many times you spoke with him
19 on the phone when he moved back to the East Coast?

20 A. Let me think. I think probably five times, I think.
21 Five or six. Five. All kind of blurred, but I think about
22 that many times.

23 Q. And I think you also had mentioned earlier that, you
24 know, patients would -- they'll leave you messages about
25 scheduling or rescheduling, that type of thing. Was that
26 something that would happen with Mr. Bathen?

27 A. I don't recall. I think he did contact me by e-mail
28 to schedule and maybe we -- I don't recall. I don't recall if

1 I had messages from him to wanting to schedule per my -- you
2 know, by my voice mail or my cell phone. I think it was
3 primarily through e-mail.

4 Q. Is that your cell phone? Do you normally use that
5 then when you're communicating with a client, like doing a
6 phone session?

7 A. Yes.

8 Q. Do you provide them with your home number?

9 A. No.

10 Q. And do you have another cell phone that you use at
11 all?

12 A. No.

13 Q. Have you ever gotten, you know, any threats from any
14 other clients on your cell phone?

15 A. No.

16 Q. So the three calls that you've identified as
17 Mr. Bathen leaving them for you, those are the only
18 threatening calls you have gotten in I believe it's around 22
19 years of practice?

20 A. Correct.

21 Q. Have you ever had any other clients, you know,
22 threaten to sue you over the years?

23 A. No.

24 Q. Have you ever had any other clients demand that you
25 sit down with them, have a face-to-face conversation, really a
26 one-sided conversation so they can air their grievances with
27 you?

28 A. No, I never had that.

1 MS. SOMERVILLE: I have no further questions, Your Honor.

2 THE COURT: Ms. Freeze.

3 MS. FREEZE: Thank you.

4

5

RECROSS-EXAMINATION

6 BY MS. FREEZE:

7 Q. Dr. Jacobs, with regards to your practice, do you --
8 or in the past or currently, do you provide phone
9 consultations to other patients?

10 A. In my practice?

11 Q. Yes.

12 A. Yes.

13 Q. Okay. And in your practice, whether it's phone
14 consultations or in-person consultations, do patients at times
15 get anxious as you had said earlier Mr. Bathen would in the
16 past, would they get anxious or change the level of their
17 voice when they are on the phone with you or in person?

18 A. Not generally.

19 Q. Every patient is just very calm, doesn't get upset?

20 MS. SOMERVILLE: Objection. Misstates the testimony.

21 THE COURT: Overruled.

22 THE WITNESS: That means I can answer?

23 THE COURT: Yes.

24 THE WITNESS: Not to me directly. They -- maybe their
25 intensity go up based on the fight they had with their husband
26 the night before or they're worried about their child, you
27 know, something like that, but not -- not anything directed at
28 me.

1 BY MS. FREEZE:

2 Q. Right. And I'm sorry. I wasn't clear.

3 When the prosecutor was asking questions just a moment ago
4 about recognizing Mr. Bathen's voice, you had said in the past
5 when you were speaking with him that sometimes he would -- his
6 voice would get high because he would be anxious about other
7 things; correct?

8 A. Correct.

9 Q. So other patients, do their tone changes when they're
10 talking about things that make them anxious or upset?

11 A. Yes.

12 Q. That's why they're coming to you; right?

13 A. Right.

14 Q. Okay. Now, I want to make sure I'm understanding
15 this with the phones. Your work number and the number that
16 was called in these three instances in June and July of last
17 year is (619)525-7747; correct?

18 A. Yes.

19 Q. And earlier -- earlier you had testified that you
20 don't give your cell or your home number out usually; correct?

21 A. Correct.

22 Q. But you had with Mr. Bathen; correct?

23 A. Well, if I had -- yes. I guess, yes, I did.

24 Q. And with regards to a threat to sue, isn't it true
25 really that Mr. Bathen had notified you that he was exploring
26 the option of maybe contacting some type of ethical board with
27 regards to making a complaint against you; correct?

28 A. Would you say that -- ask the question again? I'm

1 sorry. I lost it.

2 Q. That's okay. I wasn't very clear. I apologize.

3 Isn't it true that Mr. Bathen in 2009 during the
4 dissolution of your relationship with him that his contact
5 with you and his dialogue with you was about making some type
6 of complaint to the board that deals with your license?

7 A. Well, I took it as a threat because he had said he
8 wanted to -- he had put down some parameters for how we had to
9 have the next contact, and I would have to -- I would have to
10 sit and not respond and listen to everything he had to say.
11 And I forget what else was in there.

12 And then if I didn't do that, then he was going to report
13 me to my board.

14 Q. Okay. But it -- he wasn't asking for a face-to-face
15 because he was living on the East Coast; right?

16 A. At one point he said he might -- he might want to
17 come back out and sit down and have a face-to-face at one
18 point.

19 Q. Okay. But no lawyers contacted you?

20 A. No.

21 Q. You didn't receive any type of demand letter,
22 anything like that?

23 A. Nothing like that.

24 Q. Okay. And ultimately he didn't come out banging on
25 your door?

26 A. No, he didn't.

27 Q. Demand any type of face-to-face conversation?

28 A. No.

1 MS. FREEZE: Okay. Thank you. Nothing further.

2 THE COURT: Ms. Somerville.

3 MS. SOMERVILLE: I have nothing further, Your Honor.

4 THE COURT: May this witness be excused?

5 MS. SOMERVILLE: Yes.

6 MS. FREEZE: Yes.

7 THE COURT: Okay. Thank you very much, ma'am. You may
8 step down.

9 MS. SOMERVILLE: Your Honor, the People will call Gregory
10 Gain.

11 THE CLERK: Do you solemnly state under penalty of perjury
12 that the evidence you give in this matter shall be the truth,
13 the whole truth and nothing but the truth?

14 THE WITNESS: Yes, I do.

15 THE CLERK: Please have a seat at the witness stand.

16 And for the record, please state your full name and spell
17 your last name.

18 THE WITNESS: Gregory Gain, G-a-i-n.

19 THE CLERK: Thank you.

20

21 **GREGORY GAIN,**

22 called as a witness on behalf of the People,

23 having been first duly sworn, testified as follows:

24

25 **DIRECT EXAMINATION**

26 BY MS. SOMERVILLE:

27 Q. Good afternoon.

28 A. Good afternoon.

1 Q. How are you employed?

2 A. I am a police officer employed by the County of
3 San Diego, the District Attorney's Office, and I'm currently a
4 supervising investigator in the South Bay branch.

5 Q. How long have you been an investigator with the
6 District Attorney's Office?

7 A. I started with the District Attorney's Office in
8 1998; and prior to that, I worked for 11 years as a police
9 officer with the City of La Mesa.

10 Q. What do you do as -- just kind of in general as a
11 supervising investigator for the District Attorney's Office?

12 A. When cases come to the District Attorney's Office,
13 they're sent based primarily on investigations from the local
14 law enforcement agencies. So our duties vary depending on the
15 case. Some cases come to us and the investigation is complete
16 and we have very little interaction, perhaps serving
17 subpoenas. Some cases need a lot of additional investigation.

18 Once the case has been issued by the District Attorney's
19 Office, any further investigation that needs to be done is
20 done by the officers in our agency. So they could include
21 doing search warrants for locations looking for additional
22 evidence.

23 We can -- we get involved with conducting threat
24 assessments on cases where victims or witnesses -- where there
25 is a possibility there could be retaliation. We do additional
26 interviews, look for additional witnesses and additional
27 suspects.

28 And our investigation may lead to bolstering the

1 investigation that was sent to us or may lead to exonerating
2 somebody who perhaps was falsely accused. So what we do
3 really varies depending on the case that comes in, but it can
4 be from very little to almost reinvestigating the entire case.

5 Q. Okay. You've been with the office for a long time,
6 since 1998?

7 A. Yes.

8 Q. So are there different units that you've worked in in
9 different assignments?

10 A. Yes. I've -- when I came, I started in our fraud
11 unit. I was transferred and worked in the narcotics task
12 force. I had also served in the narcotics task force while I
13 was at La Mesa P.D. so I spent a total of 11 years -- over 11
14 years at narcotics task force.

15 I've been assigned to our juvenile branch. I've been
16 assigned to Superior Court downtown where I worked in our
17 major violators unit. I also worked our gang prosecution
18 unit. And now currently the supervisor here in South Bay.

19 Q. When you said you worked at La Mesa Police Department
20 before coming to the District Attorney's Office, what did
21 you -- what did you do at the La Mesa Police Department?

22 A. Started in the patrol division and eventually became
23 a detective. My primary duties while I served as a detective
24 there were working in the robbery, narcotics and vice units.
25 But La Mesa being a small agency, we don't have the luxury of
26 only focusing on one particular area. So when there was a
27 significant crime, a homicide, a rape, something like that, we
28 would all work together as a team.

1 So my experience while I was assigned to work robbery
2 included just about any violent crime that occurred in the
3 city.

4 Q. As a part of your duties as an investigating district
5 attorney, do you have to deal with cell phones and cell phone
6 records?

7 A. Yes, I do. And I've been doing that quite
8 extensively while working over at the narcotics task force.
9 That was a tool that we used quite regularly when doing our
10 investigations. And also in the major violators unit, it was
11 something we did quite extensively to help show that suspects
12 were in the vicinity of robberies that occurred as part of a
13 series or as part of a residential burglary series.

14 We did quite a bit of cell phone exploitation, not only
15 with the actual device itself being able to download and
16 examine text messages, phone calls, things of that nature, but
17 also doing the cell tower exploitation and getting call detail
18 records from phone companies.

19 Q. Do the law enforcement agencies -- I mean you get
20 cases for follow-up investigation from them at times. Did
21 they also do this type of work?

22 A. Yes. All -- any of the police officers have the
23 ability to do it. Certainly some of the smaller agencies
24 don't have some of the mapping tools when it comes to cell
25 tower tracking that I have available to me at the District
26 Attorney's Office.

27 And in some cases, certainly, you may have crimes where
28 they involve multiple agencies and no one agency has a greater

1 stake in that investigation so they don't do it. And when it
2 would come to me, the District Attorney's Office, I would be
3 the one trying to pull all of the cases together and then I
4 would write search warrants for things like the cell tower
5 data. So they can do it. It all depends on their resources
6 and their investment in the case.

7 Q. We'll get back to, you know, cell records in a little
8 bit.

9 But I want to ask you about when a person is taken into
10 custody here in San Diego County, the downtown jail, are they
11 able to make phone calls?

12 A. Yes. Actually the suspects arrested for crimes, the
13 females booked into -- are booked into Las Colinas out in
14 Santee, males generally go to the central jail downtown but
15 they can also be booked -- males and females can be booked
16 into the Vista detention facility.

17 When somebody is booked in, everybody knows we have rights
18 to make phone calls. And what the Sheriff's Department does
19 when a person is booked in, they set up a phone account for
20 them. They're allowed to select a pin number and then they're
21 put into a holding tank that has phones that they can pick up
22 and use. They can make as many local calls as they would
23 like.

24 Once they move from that -- the booking cell into their
25 housing module where they're going to be kept, then they
26 actually have to have a phone account that has money on it.
27 So family, friends are allowed to go online and deposit money
28 into an inmate's phone account or they can make a call to a

1 person outside of the jail facility; and if that person agrees
2 to accept the toll charges, they can complete their phone call
3 that way. But they are all done through the recorded monitor
4 jail system, the phone system that all the county facilities
5 have.

6 Q. Is that monitored by the Sheriff's Department?

7 A. Yes.

8 Q. Are you able to access these phone calls as a law
9 enforcement officer?

10 A. Yes. And being that I work for the County, just as a
11 Sheriff's Department does, we're given direct access, which
12 means I don't have to send or request to one of the detention
13 investigations unit detectives and have them pull it. I have
14 access to the system that's called Securus and I have access
15 to the Securus to search and monitor phone calls on my own.

16 Q. Are the phone calls recorded?

17 A. Yes, they are.

18 Q. Is there any, you know, warning or anything like that
19 that's given to an inmate letting them know that these phone
20 calls are recorded before they start their conversation?

21 A. Yes. They record an announcement that plays at the
22 beginning of the call. It's not only audible to the inmate
23 who is placing the call, but to the person who is receiving
24 the call. They are told that they are receiving a call from
25 an inmate in the San Diego County jail facility, and then it
26 talks about if they're an attorney or a clergymen, that they
27 can decline the call and have their phone number set up so
28 that law enforcement doesn't record it and listen to it

1 inadvertently, so they can -- attorneys, clergy people like
2 that that have privileged communications can actually block
3 their number and it won't actually go into the recording
4 system; so it tells both parties to the communication that the
5 phone call is being recorded.

6 Q. Are you listening to these calls -- do you ever
7 listen to it in real time or can you -- say a call was made in
8 September. Can you go grab that call in October?

9 A. You can do both. If -- the system does give you the
10 ability to monitor it real time, and certainly in certain
11 circumstances, that may be a prudent thing to do, especially
12 if you think there's imminently going to be a threat to
13 somebody's life or safety or destruction of evidence, that's
14 typically when you would do that.

15 More often than not at the District Attorney's Office,
16 because our involvement comes after the case has been
17 submitted to the D.A.'s office for prosecution, we're kind of
18 behind the curve, so we do go back. The system retains the
19 jail calls for about one year. So I've -- I've actually been
20 able to go back a little longer than one year and retrieve
21 calls and review them at that point; so they are recorded and
22 stored.

23 There's unfortunately a finite amount of space that those
24 calls can be stored; so eventually the system will drop them
25 off.

26 Q. Were you assigned to do some follow-up investigation
27 into this case where Mr. Bathen was charged?

28 A. Yes, I was.

1 Q. Part of that follow-up, did you then access some jail
2 calls that were associated with Mr. Bathen?

3 A. Yes, I did.

4 Q. How did you locate those calls?

5 A. They were located by running a search through the
6 Securus system using Mr. Bathen's name. You can also search
7 the system for calls made from a booking number. You can
8 search for calls made to particular phone numbers.

9 There's also an advanced voice biometrics that will
10 allegedly identify somebody's voice and can tell you if they
11 are using somebody else's phone account to make a phone call.
12 I personally have never had any luck with that, but this was
13 all done by searching his inmate account under his name.

14 Q. And were you able to retrieve any calls made by
15 Mr. Bathen while he was in the San Diego County jail?

16 A. Yes, I did.

17 Q. How many calls did you retrieve, if you recall?

18 A. I believe it was 13, but I'm not a hundred -- I would
19 have to refer to my notes to give you an exact number.

20 Q. If you have them with you? Do you have a copy of
21 your report?

22 A. Yes, I do. Yes. It was 13 calls.

23 Q. Were they all telephone calls or were any of these
24 visits?

25 A. Now you're going to have to make me look again.

26 Q. If that would refresh your memory.

27 A. It would refresh my recollection.

28 Q. Please do that.

1 A. Three of them were social visits.

2 Q. So those are also recorded?

3 A. Yes, they are.

4 Q. Is that video recorded or is that also just audio
5 recorded?

6 A. These are just audio recorded. The jail visitation
7 system operates similar to making a phone call similar to what
8 you might have seen in the movies where two people are sitting
9 in chairs facing each other and there's a pane of glass in
10 between them and each one has a phone that they pick up and
11 they communicate that way.

12 When a person is brought down to that visitation room for
13 a social visit, the deputies log their phone and attribute
14 that phone conversation to that particular inmate using his
15 inmate phone account.

16 Q. When you accessed -- excuse me.

17 Mr. Bathen's phone calls and social visits, had you had an
18 opportunity to listen to the phone calls that were made to
19 Dr. Jacobs?

20 A. Yes, I had.

21 MS. SOMERVILLE: Your Honor, if I may, I have an audio CD
22 to play at this time. It is marked as Court's Exhibit 4 for
23 identification. There's also an attached copy of a transcript.
24 It's marked as 4A.

25 *(Court's Exhibit No. 4 was identified.)*

26 *(Court's Exhibit No. 4A was identified.)*

27 THE COURT: Ms. Freeze?

28 MS. SOMERVILLE: This is call No. 1.

1 THE COURT: Any objection?

2 MS. FREEZE: No, Your Honor. That's fine.

3 THE COURT: And give an extra copy of the transcript.

4 MS. SOMERVILLE: For the record, I'm going to play what has
5 been marked Court's Exhibit 4 for identification.

6 THE COURT: And I believe counsel have already waived
7 reporting.

8 MS. SOMERVILLE: Yes, Your Honor.

9 *(Audio recording played; not reported.)*

10 BY MS. SOMERVILLE:

11 Q. Was that a complete and accurate recording of one of
12 the jail calls that you monitored from Mr. Theule's account --
13 excuse me, from Mr. Bathen's account?

14 A. Yes, it is.

15 THE COURT: All right. If everyone would pass down their
16 transcript, please, to Jurors 12 and 14.

17 MS. SOMERVILLE: Your Honor, at this time I have another --
18 I actually have three, so the Court is aware, exhibits. It's
19 also another jail call. It's marked as Court's Exhibit 5, also
20 with transcript marked as Court's Exhibit A for identification.

21 I'd ask permission to play that at this time.

22 *(Court's Exhibit No. 5 was identified.)*

23 *(Court's Exhibit No. 5A was identified.)*

24 THE COURT: Any objection?

25 MS. FREEZE: No, Your Honor.

26 THE COURT: Go ahead.

27 BY MS. SOMERVILLE:

28 Q. Court's Exhibit 5, is that a complete and accurate

1 recording of one of the calls that you monitored from
2 Mr. Bathen's account?

3 A. Yes, it is.

4 MS. SOMERVILLE: Your Honor, the next exhibit I have is
5 Court's Exhibit 6 for identification.

6 *(Court's Exhibit No. 6 was identified.)*

7 I also have a transcript that's marked as Court's
8 Exhibit 6A and transcripts for the jury.

9 *(Court's Exhibit No. 6A was identified.)*

10 I'd ask permission to play that at this time.

11 THE COURT: Any objection?

12 MS. FREEZE: No, Your Honor.

13 THE COURT: Go ahead.

14 *(Audio recording played; not reported.)*

15 BY MS. SOMERVILLE:

16 Q. Was that a complete and accurate recording of one of
17 the calls that you accessed from Mr. Bathen's jail account?

18 A. Yes, it is.

19 MS. SOMERVILLE: I have one more, Your Honor. Court's
20 Exhibit 7 for identification.

21 *(Court's Exhibit No. 7 was identified.)*

22 There's also a transcript that has been marked as Court's
23 Exhibit 7A for identification.

24 *(Court's Exhibit No. 7A was identified.)*

25 I'd request permission to play that at this time.

26 THE COURT: Any objection?

27 MS. FREEZE: No, Your Honor. That's fine.

28 THE COURT: Go ahead.

1 *(Audio recording played; not reported.)*

2 BY MS. SOMERVILLE:

3 Q. Was that also a complete and accurate recording of
4 one of the jail calls that you reviewed from Mr. Bathen's
5 account?

6 A. Yes, it was.

7 THE COURT: All right.

8 MS. SOMERVILLE: I'm sorry, Your Honor.

9 THE COURT: It's about time for a break. Is this a good
10 time?

11 MS. SOMERVILLE: Yes.

12 THE COURT: Okay. And we're going to take our afternoon
13 recess at this time, ladies and gentlemen, for 15 minutes.

14 Same admonition to keep an open mind. Don't form or
15 express an opinion and don't talk to anybody about any subject
16 connected with this matter. Don't do any research or
17 investigation.

18 I'll see you in 15 minutes.

19 *(The following proceedings were had between the Court*
20 *and counsel out of the presence and hearing of the*
21 *jury.)*

22 THE COURT: All right. We'll be in recess.

23 *(Recess taken.)*

24 *(The following proceedings were had in open court in*
25 *the presence and hearing of the jury.)*

26 THE COURT: All right. We're back on the record with
27 everyone present.

28 We have our witness on the stand.

1 And Ms. Somerville.

2 MS. SOMERVILLE: Thank you.

3 BY MS. SOMERVILLE:

4 Q. What were the dates of the calls that you monitored?

5 A. That I'm going to have to refer to my notes on. I
6 don't remember the dates.

7 Q. If you could please do that.

8 A. Yeah. The dates the jail calls were monitored were
9 from September 16th, 2017 through September 17th, 2017.

10 Q. Did you have a chance to speak with Carolyn Jacobs
11 about this case?

12 A. Yes, I have.

13 Q. Did you end up coming to court with her for a
14 restraining order hearing?

15 A. Yes, I did. That was on the afternoon of
16 September 18th.

17 Q. Had you discussed with her any type of, you know,
18 safety concerns or anything like that?

19 MS. FREEZE: Objection. Calls for a hearsay.

20 THE COURT: This is just a "yes" or "no."

21 THE WITNESS: Yes.

22 BY MS. SOMERVILLE:

23 Q. When you came to the court hearing with her on
24 September 18th of 2017, was Mr. Bathen in court out of
25 custody?

26 A. Yes, he was.

27 Q. Do you see Mr. Bathen here in court today?

28 A. Yes, I do.

1 Q. Can you please identify him by describing the color
2 of shirt he's wearing and where he's located in the courtroom?

3 A. The gentleman sitting at defense table wearing the
4 blue shirt with a dark blue tie.

5 MS. SOMERVILLE: Thank you.

6 Could the record reflect the witness has identified
7 Mr. Bathen?

8 THE COURT: Yes.

9 BY MS. SOMERVILLE:

10 Q. Now, I want to kind of switch gears and talk about
11 cell phone records. Did you get a search warrant for call
12 detail records associated with phone number (617)992-4648?

13 A. Yes, I did.

14 Q. And have you gotten cell phone records before,
15 reviewed them in the course of your duties?

16 A. Yes, I have. On numerous occasions.

17 Q. And were you able to determine who the cell phone
18 provider was for this phone number?

19 A. Yes. It was T-Mobile.

20 Q. Did you end up getting records from T-Mobile for that
21 specific phone number?

22 A. Yes, I did.

23 Q. What do the call detail records include?

24 A. The call detail record, essentially it includes all
25 the information that the cell phone companies need for their
26 billing and it tracks whether it was an incoming call or an
27 outgoing call. It documents where the call originated from
28 and the terminating number that was called.

1 It also includes if there's any special features used
2 during that call, like three-way calling or a call forwarding.
3 These are all things that cell phone companies keep as records
4 for billing purposes.

5 MS. FREEZE: And Your Honor, just with regards to -- I
6 would object just as foundation as to testimony regarding
7 specific call detail records. I'm not sure if there's been a
8 foundation laid as to his --

9 THE COURT: If the objection is lack of foundation --

10 MS. FREEZE: Yeah.

11 THE COURT: -- I don't think there's a lack of foundation
12 yet.

13 MS. FREEZE: Okay.

14 MS. SOMERVILLE: Thank you.

15 BY MS. SOMERVILLE:

16 Q. Is that what you were provided from T-Mobile in this
17 case, the call detail records?

18 A. Yes.

19 Q. Are those some of the things that were included in
20 the records that you received?

21 A. Yes.

22 Q. Was there also -- I know you mentioned that they keep
23 these for billing purposes. Was the bill and subscriber
24 information contained in the call detail records as well?

25 A. Yes.

26 MS. SOMERVILLE: Your Honor, may I approach?

27 THE COURT: Yes.

28 /////

1 BY MS. SOMERVILLE:

2 Q. Investigator Gain, I'm going to give you a packet of
3 some exhibits. They're 8-by-11 copies of some documents here.
4 They are labeled Court's Exhibit 8 through 18. I want to go
5 through them one by one. They have been provided to defense
6 counsel as well.

7 Looking at Court's Exhibit 8, do you recognize this
8 document?

9 *(Court's Exhibit No. 8 was identified.)*

10 A. Yes. This is the subscriber information sheet or a
11 portion thereof that I received from T-Mobile.

12 Q. Some areas have been highlighted on it. Did it come
13 like that or --

14 A. No.

15 Q. But does this appear to be an accurate representation
16 of the subscriber information that you received via the search
17 warrant?

18 A. Yes, it does.

19 MS. SOMERVILLE: Your Honor, may I publish as we go?

20 THE COURT: Any objection?

21 MS. FREEZE: I would just reiterate my foundation objection
22 as it pertains to the maps and the connection with the CDRs.

23 THE COURT: I don't think that's what this is.

24 MS. FREEZE: Okay.

25 MS. SOMERVILLE: No.

26 THE COURT: Exhibit 8, these are Exhibits 8 through 18.

27 Any objection to those?

28 MS. FREEZE: No, Your Honor.

1 THE COURT: Okay.

2 MS. SOMERVILLE: May I?

3 THE COURT: Yes. I'm sorry.

4 MS. SOMERVILLE: That's okay.

5 BY MS. SOMERVILLE:

6 Q. So I'm going to put up on the screen -- I know it's
7 kind of hard to read. So for the jurors, I'm going to ask you
8 some questions about this document, and just if you can maybe
9 point those out to them as we go, if that's okay.

10 A. Okay.

11 Q. I know there's a pointer right behind you as well.

12 THE COURT: And Juror No. 1, can you see?

13 JUROR NO. 1: It's a little hard for me to see.

14 THE COURT: Not too much.

15 MS. SOMERVILLE: Sorry.

16 THE COURT: That's fine.

17 BY MS. SOMERVILLE:

18 Q. So in Court's Exhibit 8, there is red box in the top
19 column. Can you tell us what that is?

20 A. That's the subscriber name that was provided by
21 T-Mobile for the phone that I submitted the search warrant on
22 the phone number for.

23 Q. And what does it list as the subscriber name?

24 A. It says in prepaid none, customer.

25 Q. And what does that mean, if you know?

26 A. There's two types of phone plans. You can have a
27 conventional post paid plan where you subscribe to a service,
28 you get to use the phone. And then at the end of the month

1 you get a bill for all of the features and calls and things
2 like that that you utilize for that phone.

3 And then there are now prepaid phones where you're paying
4 in advance. You get a card, you can add minutes to the phone
5 and you can use the phone as long as you still have minutes on
6 it.

7 The difference is in a post payor, a conventional billing
8 plan, the phone companies will require that you provide
9 information so they know where to find you if you don't pay
10 the bill.

11 In a prepaid, you don't have to actually provide any
12 information to register the phone in your name because you've
13 put minutes on it. You can just use those minutes; and when
14 you're out, you don't accrue a debt, the phone just stops
15 working.

16 So this tells me that this was a prepaid phone and the
17 user of the phone did not provide an actual name when they
18 subscribed to it.

19 Q. Below the red box there's a green box. And can you
20 tell us what's enclosed within that?

21 A. Included in that, that's the subscriber address
22 and -- and it has the address 1132 North Kentucky Street,
23 Arlington, Virginia 22205.

24 Q. And below that there's a box in blue. Can you tell
25 us what that is?

26 A. Yeah. That's the subscriber status. And the records
27 that I received from T-Mobile indicate that the service had
28 been canceled.

1 Q. And when you got these records, did the provider
2 include in the documents that you get instructions how to read
3 their provider information and their cell call detail records?

4 A. Yes. They include instructions for both the
5 subscriber information section and for the call detail records
6 section.

7 Q. Now, if you could go down, there is in the middle
8 column, I guess, it's account details. There are a couple
9 lines that are enclosed in red. Can you tell us what those
10 are?

11 A. Yes. Those two right there, the account effective
12 date showing that the phone was activated on September 1st,
13 2014. And the account expiration date showing that the
14 service was terminated or canceled on September 4th, 2017.

15 Q. And if you can go down to that last row. Can you
16 tell us what is enclosed in the green box.

17 A. That's the MSISDN number, and that is the phone
18 number that is associated with that particular phone account.
19 And this one it is (617)992-4648.

20 Q. And there's a blue box at the bottom of the page.
21 Can you tell us what that indicates?

22 A. That's the MSISDS market and which is essentially
23 when you have an area code for your phone, 617 is the area
24 code for Boston, so if you had a 619 in there, it would read
25 San Diego for the market area.

26 Q. Thank you.

27 If you could look at Court's Exhibit 9 for identification.
28 Do you recognize that document?

1 (Court's Exhibit No. 9 was identified.)

2 A. Yes, I do.

3 Q. And is that a continuation of what we're looking at
4 in Court's Exhibit 8?

5 A. Yes, it is.

6 Q. I'm going to put that on the screen. Can you tell us
7 in the red boxed area what is being shown there.

8 A. There's a billing birthdate; and in this particular
9 document, it shows that there was a birthdate listed of
10 November 30th, 1977.

11 Q. Thank you.

12 And below that, in the green box, what is being shown in
13 that?

14 A. The green box there is showing a billing address and
15 that, like on the first page, is 1132 North Kentucky Street,
16 Arlington, Virginia 22205.

17 Q. And then finally on this exhibit in the blue box,
18 what is that showing again?

19 A. That's showing a contact number for the subscriber,
20 and that's the phone number actually for the phone
21 (617)992-4648.

22 Q. Thank you.

23 If you could, would you please look at Court's Exhibit 10
24 for identification. Do you recognize what's being shown in
25 that?

26 A. Yes, I do. This is the call detail records from
27 June 4th, 2017.

28 Q. I'm going to show you Court's Exhibit 10 for

1 identification on the screen. Can you tell us in the red
2 boxes up there what we're looking at?

3 *(Court's Exhibit No. 10 was identified.)*

4 A. Yeah. The header seems to be shifted a little bit on
5 this. The first section here would be the date column, and
6 that's the date of a particular phone call and on this one was
7 June 4th, 2017. The time listed on there is listed as in
8 military time as 08:24 and 37 seconds.

9 With these phone documents, telephone subscribers send all
10 of these documents with a time in universal time code, which
11 is also Greenwich Mean Time or in the military is referred to
12 Zulu time. It's the international timeline where time for our
13 purposes starts.

14 So depending on where you are on the globe, you will have
15 a time difference between the universal time code and
16 San Diego, which, depending on the time of the year, whether
17 it's daylight savings or not, it's going to be seven or eight
18 hours. So this does show universal time showed of 08:34 and
19 37 seconds.

20 Next column showing the duration of 80 seconds. The M.S.
21 originating is the call type for that particular handset, and
22 it's just showing whether this is a voice call that was
23 initiated from this phone. It would be different if it were a
24 text message or if it were an incoming phone call. So "M.S.
25 originating" says that it is a voice call, does show that the
26 direction is outgoing and the calling number is the number of
27 the handset that's placing the call. In this case, it was
28 (617)992-4648.

1 And then you have the dialed number -- or the -- I'm
2 sorry, yes, the dialed number of (619)525-7747. That also
3 shows as the called number and it would show possibly a
4 difference if you were calling a phone that had call
5 forwarding or some other feature to it that you're calling a
6 number and it's referring you to a different phone number.

7 And then, again, the destination number or the -- is the
8 one down there. Again, the chart is a little skewed, but the
9 destination number where the call ultimately ended was
10 (619)525-7747.

11 And then you have the IMSI, which is a code that's
12 attached to the subscriber information on a phone. It's the
13 international mobile subscriber information.

14 Next number over is the IMEI, which is the international
15 mobile electronic information. It's the -- a special code
16 that's for that particular device.

17 So SI is for the subscriber information and EI is for the
18 electronic device information like the serial number of that
19 phone.

20 And then you have the code over there that is -- their
21 completion code showing that it was completed successfully.

22 And then to the right, that's the cell tower information.
23 This first number, the 4619 one, is what's called the LAN
24 number. It's the local area number. And then that number on
25 the far right, the 37518 is the actual cell tower.

26 So if you look at it kind of like a city address, the LAN
27 tells you you're in the city of Chula Vista. The actual cell
28 tower will tell you that you are at 300 Third Avenue, or 300

1 "H" Street, which is where we'd be right now. So the LAN is
2 an overall area.

3 And then there's all these specific towers, and I believe
4 there's about 404 towers in that local area number.

5 MS. FREEZE: And Your Honor, just with regards -- just
6 objection as to foundation as to knowledge of the witness and
7 cell phone towers.

8 THE COURT: Sustained.

9 MS. FREEZE: Motion to strike.

10 THE COURT: It will be stricken as to the cell tower
11 information.

12 MS. FREEZE: Thank you.

13 BY MS. SOMERVILLE:

14 Q. If you could go towards Exhibit 11 for
15 identification.

16 *(Court's Exhibit No. 11 was identified.)*

17 A. Yes.

18 Q. And do you recognize -- well, is that just a --
19 basically what you just indicated to us from the call detail
20 records in the previous exhibit which was Court's Exhibit 10?

21 A. Yeah. This is a synopsis that was typed out of the
22 call and this looks like it's a snip -- computer snip of the
23 screen showing what we just talked about on the previous page.

24 Q. Okay. And this is a call from June 4th of 2017?

25 A. Yes.

26 Q. Were these phone numbers pertinent in your
27 investigation?

28 A. Yes. They had been -- the (619)525-7747 had been

1 identified as the business phone number for Carolyn Jacobs and
2 the (617)992-4648 had been identified as the phone number that
3 left the threatening messages that was -- they were left from
4 by Mr. Bathen.

5 Q. Thank you.

6 Could you go to Court's Exhibit 12 for identification.
7 And just does this appear -- do you recognize what's been kind
8 of snipped out of some records?

9 *(Court's Exhibit No. 12 was identified.)*

10 A. Yes. This is also a portion of the call detail
11 records from July 3rd showing two calls. The first one at
12 19:48:02 hours in universal time code with the duration of 34
13 seconds. The one right after it at 19:52:26 hours in
14 universal time code, both of them show as originating outgoing
15 calls. The second one was 60 seconds in duration. Both of
16 them show the calling number as (617)992-4648 and both of them
17 were to Carolyn Jacobs' number, (619)525-7747. And then on
18 the far right, it does show that both of those calls were
19 successfully completed.

20 Q. Okay. Thank you.

21 If you could look at Court's Exhibit 13 for
22 identification. Do you recognize that as basically kind of a
23 recap of what you just explained for us in Court's Exhibit 12?

24 *(Court's Exhibit No. 13 was identified.)*

25 A. Yes. For the two calls on July 3rd. It's the
26 synopsis and then the snip from the records from the computer.

27 Q. Okay. And again, the same phone numbers that one had
28 been associated with the call made to Dr. Jacobs and then also

1 Dr. Jacobs' work phone number?

2 A. Yes. The called number is Dr. Jacobs' work number
3 and the calling number, if I understood you correctly, that's
4 the number that called and left the threatening message.

5 Q. Thank you.

6 If you could look at Court's Exhibit 14 for
7 identification. Do you recognize this from the call detail
8 records that you received?

9 *(Court's Exhibit No. 14 was identified.)*

10 A. Yes, I do.

11 Q. I'm going to show that to you right now. And what is
12 being displayed in the red box?

13 A. Just like with the previous calls, shows that on
14 July 5th, 2017 at 1314 hours and 53 seconds in universal time
15 code, there was a 78-second call that originated -- it was an
16 outgoing call from (617)992-4648, the dialed number, and the
17 number that actually was the destination number is Carolyn
18 Jacobs' number, (619)525-7747.

19 Q. Thank you.

20 If you could look at Court's Exhibit 15 for
21 identification. Do you recognize that, again, as a synopsis
22 of what is contained within the records and also the call
23 being isolated from the call detail records?

24 *(Court's Exhibit No. 15 was identified.)*

25 A. Yes. It's the same synopsis as the other ones for
26 the call on July 5th and the snip from the computer-generated
27 records that were sent to T-Mobile.

28 Q. Thank you.

1 Are you able to use the call detail records that you
2 received from T-Mobile and put them into some sort of mapping
3 program to show you locations of towers and calls that are
4 made?

5 A. Yes. We have a tower tracking program that is
6 utilized by the District Attorney's Office and what it
7 essentially does is it takes the call detail records and it
8 will import the cell tower locations, date and times of the
9 calls and it will merge them with a Google map which
10 essentially just creates a visual map showing which cell
11 towers were utilized for calls during the period of records
12 that we import into it. Also included on that map is the
13 azimuth or the sector.

14 THE COURT: Is that the question anymore?

15 MS. SOMERVILLE: No, that's fine, Your Honor.

16 THE COURT: Okay.

17 BY MS. SOMERVILLE:

18 Q. Let me ask you another question.

19 A. Okay.

20 Q. Have you used that program before as a part of your
21 job when you get cell phone records to map out the call detail
22 records?

23 A. Yes, I have.

24 Q. And have you done that in this case as well?

25 A. Yes, I did.

26 Q. And did that then provide you with some Google map
27 images that mapped out what the call detail records had shown?

28 A. Yes.

1 Q. How are you able to basically from the records
2 determine where a tower was? Does that make sense?

3 A. The towers when we get the call detail records and
4 T-Mobile in their records actually includes the latitude and
5 longitude for the tower that was used. So it will actually
6 put a marker on that Google map where the tower was.

7 It also interprets from the data on many cell phone towers
8 there are three antenna, it's called an azimuth, and basically
9 it's a sector to give you 360-degree coverage on a cell phone
10 tower. So each azimuth or sector is 120 degrees roughly.

11 MS. FREEZE: And sorry to interrupt. Objection. Just
12 foundation as to --

13 THE COURT: Sustained.

14 MS. FREEZE: Thank you.

15 Motion to strike.

16 THE COURT: I think everything beyond the T-Mobile records
17 indicate which cell towers -- trying to recall some of the
18 testimony. But as far as I think, that's fine. That came
19 directly from the T-Mobile records. I'm not going to strike
20 that, but the extrapolation from those records that was
21 testified to, I will strike that with lacking foundation.

22 BY MS. SOMERVILLE:

23 Q. Are you familiar basically with how call detail
24 records -- well, have you reviewed them before? I think you
25 said that you've done that?

26 A. Yes, I have.

27 Q. Okay. And have you then used the tower tracker as
28 well to take the -- to take the call detail records and then

1 map them out?

2 A. Yes.

3 Q. Did you do that in this case?

4 A. Yes, I did.

5 Q. And were you able to create any Google images based
6 off of the information in the call detail records with the
7 tower tracker?

8 A. Yes, I did.

9 Q. Okay. And can you look at Court's Exhibit 16 for
10 identification.

11 *(Court's Exhibit No. 16 was identified.)*

12 A. Okay.

13 THE COURT: And I think I might have misled counsel with
14 Court Exhibit 16, say, because I thought that the Exhibits 8
15 through 18 were all just cell phone records and I think counsel
16 made an objection to the tower locations.

17 MS. FREEZE: Correct, based on --

18 THE COURT: So -- so just some -- before you publish, I'm
19 going to -- some foundation and then I'll give Ms. Freeze an
20 opportunity to object.

21 BY MS. SOMERVILLE:

22 Q. When you received these records from T-Mobile, aside
23 from what we looked at in Court's Exhibits -- I believe it was
24 eight through --

25 THE COURT: Fifteen.

26 BY MS. SOMERVILLE:

27 Q. -- fifteen, is there any information in those that
28 you received that gives you addresses or latitude and

1 longitude regarding cell phone towers?

2 A. Yes, there is.

3 Q. Okay. And was that -- are you then able to use that
4 information from the documents with the tower tracker to make
5 a map that maps out where those cell tower locations are
6 located?

7 A. Yes. Actually I could put in the latitude and
8 longitude into a Google search bar and it will bring the same
9 map. What the tower tracker does is it basically simplifies
10 it. It reads that latitude and longitude without me having to
11 type it in individually. It reads it from the call detail
12 records and it puts it onto the map.

13 Q. Okay. So is it like a mapping software type of
14 program?

15 A. Yes.

16 Q. So you don't have to actually sit there and figure
17 out maybe on a map or something yourself?

18 A. That is correct.

19 Q. Have you done that previously when looking at records
20 and preparing reports and things off of those?

21 A. Yes, I have.

22 Q. And did you do that in this case with the latitude
23 and longitude for cell towers in order to create some maps
24 showing where towers were located for this particular phone
25 number?

26 A. Yes, I did.

27 Q. And if you could -- what was the date range that the
28 records from T-Mobile encompassed?

1 A. I believe it was June 1st to July 6th.

2 Q. What year?

3 A. I'm sorry. 2017.

4 Q. Now, Court's Exhibit 16 for identification, do you
5 recognize that as one of the Google maps that you prepared
6 based off of the call detail records you received from
7 T-Mobile?

8 A. Yes, I did.

9 MS. SOMERVILLE: Your Honor, may I publish?

10 MS. FREEZE: Your Honor, just object as to foundation.
11 If we can have a quick sidebar on this issue.

12 THE COURT: All right.

13 *(Sidebar; unreported.)*

14 THE COURT: Thanks for your patience, ladies and gentlemen.
15 Sometimes this is just inevitable. But we're ready to go
16 again.

17 MS. SOMERVILLE: Thank you.

18 BY MS. SOMERVILLE:

19 Q. You've used this software before for the tower
20 tracker to map call detail records?

21 A. In at least 20 different cases.

22 Q. And have you found it to be reliable programming
23 software?

24 A. Yes. And when I do mapping using these records, I'll
25 actually go back and physically type in latitude and longitude
26 that's included in there to make sure that what I am seeing on
27 an independent search matches what the -- this tower tracker
28 program is showing me and also look to make sure from the call

1 detail records that date and times match up to the calls that
2 are being displayed on there.

3 Q. Did you do that in this particular case?

4 A. Yes, I did.

5 Q. Okay. And I believe it was misplaced for a second.
6 Here we go.

7 So Court's Exhibit 16 for identification, is this a map
8 that you generated through the tower tracker with the latitude
9 and longitude for cell phone towers?

10 A. Yes, it is.

11 MS. SOMERVILLE: Your Honor, may I publish this?

12 THE COURT: Any objection?

13 MS. FREEZE: I renew my previous objection as foundation.

14 THE COURT: All right. Overruled.

15 MS. SOMERVILLE: Thank you.

16 BY MS. SOMERVILLE:

17 Q. So Court's Exhibit 16 for identification, can you
18 just tell us -- I just want you to tell me is this the mapping
19 that you did with the call detail records from the records you
20 received from Mr. -- well, from the T-Mobile search warrant?

21 A. Yes.

22 Q. Okay. And what area on the Google map is this
23 showing?

24 A. This is showing the area of Arlington, Virginia.

25 Q. In the call detail records that you looked at, did
26 those -- I know you said that they have a latitude and
27 longitude, but for cell towers, did they also include physical
28 addresses for some of those?

1 A. Yes, it did.

2 Q. And Arlington, Virginia, does it also show another
3 area or city on this particular map?

4 A. It's Washington, D.C.

5 Q. Okay. And there are some they look kind of like pie
6 shapes, one looks like a circle lower down to the left-hand
7 corner. What are those?

8 A. Those are the sectors of the cell tower that are used
9 for each call. What you see here actually --

10 Q. Let me stop you for a moment.

11 A. Okay.

12 Q. So the yellow -- you said those are -- do those
13 represent cell towers from the call detail records based on
14 the latitude and longitude?

15 A. What the yellow represents is the antenna on the cell
16 tower. Those smaller circles, you see a small little yellow
17 black dot with the yellow circle and a black circle around it,
18 that represents the actual tower. And then the pie shapes and
19 some of them overlap show the actual antenna, the azimuth
20 that's used for the actual cell tower.

21 Q. And this map that was generated from all of the call
22 detail records that you received showing from June 1st to
23 July 6th of 2017?

24 A. Yes. This represents all of the calls during that
25 time period.

26 Q. And did you point out any specific locations on this
27 particular Google map?

28 A. Yes. I typed in the address for Mr. Bathen's -- his

1 work address.

2 MS. FREEZE: Your Honor, objection.

3 THE COURT: Sustained.

4 MS. FREEZE: Motion to strike.

5 THE COURT: It will be stricken. There's no foundation.

6 BY MS. SOMERVILLE:

7 Q. Did you listen to -- we played some jail calls
8 earlier here in court; is that correct?

9 A. Yes.

10 Q. And did Mr. -- did you hear in Mr. Bathen's jail
11 calls him giving a work address?

12 A. Yes. And a name of the business.

13 THE COURT: Sir, the question was: Did you hear an
14 address?

15 THE WITNESS: Yes.

16 BY MS. SOMERVILLE:

17 Q. And did he provide a home address in the jail calls?

18 MS. FREEZE: And I would just object. Misstates testimony.
19 I don't believe that there was any work address that was
20 provided in any of the jail calls.

21 MS. SOMERVILLE: I will withdraw that question.

22 THE COURT: I don't know there was an address given. I
23 don't know from the ones I heard.

24 MS. SOMERVILLE: If I said that, I misspoke. I apologize.

25 BY MS. SOMERVILLE:

26 Q. Was there a home address for Mr. Bathen given in the
27 jail calls that you listened to?

28 A. Yes. The home address was --

1 Q. Okay. And did you list that on Court's Exhibit 16?

2 A. Yes, I did.

3 Q. And can you show us where that is on the exhibit?

4 A. That's here, the 1132 North Kentucky Street in
5 Arlington.

6 Q. And did you also listen to the jail calls and hear
7 Mr. Bathen say where he was working prior to coming out to
8 California when he was in custody?

9 A. Yes. That he was working at the nonprofit in
10 Washington, D.C. and he gave the name of the nonprofit.

11 MS. FREEZE: And Your Honor, just object as it pertains to
12 misstates testimony. I believe that the jail call didn't
13 have -- the question was where he was working at on that date
14 of the time of the jail call.

15 MS. SOMERVILLE: That's fine. I can rephrase the question.

16 THE COURT: That wasn't my understanding of the question.
17 But just so we have a clear record, if you would rephrase it.

18 MS. FREEZE: Thank you, Your Honor.

19 BY MS. SOMERVILLE:

20 Q. Did you hear on the jail calls -- it was one of the
21 calls that we played earlier today for you -- Mr. Bathen say
22 where he was working when he was sitting in a cubicle and
23 basically couldn't have made any or couldn't have kept anyone
24 in fear?

25 A. Yes.

26 Q. And where did he say he was working at that time? Do
27 you remember?

28 A. I don't remember the name of the nonprofit, but I do

1 recall him saying it.

2 Q. Okay. If I showed you a copy of the transcript,
3 would that refresh your memory?

4 A. Yes, it would.

5 MS. SOMERVILLE: May I approach, Your Honor?

6 THE COURT: Yes.

7 THE WITNESS: Okay.

8 BY MS. SOMERVILLE:

9 Q. Did that refresh your memory?

10 A. Yes. It was to the International Food and Poverty
11 Institute [sic].

12 Q. And did he say in what city that was located?

13 A. Yes.

14 Q. Where was that?

15 A. Washington, D.C.

16 Q. And based off of that city that he provided and the
17 specific name of the place where he worked, were you able to
18 pull up or locate any address for that?

19 A. Yes, I did. I conducted a Google search for that
20 nonprofit and found its address.

21 MS. FREEZE: Objection. Calls for hearsay. Speculation as
22 it pertains to his search results as well as speculation as to
23 where --

24 THE COURT: No speaking objections. Sustained without a
25 foundation as to the address.

26 BY MS. SOMERVILLE:

27 Q. So how did you -- well, do you use the Google search
28 in your job as an investigator?

1 A. Yes.

2 Q. Okay. And have you used that before to get locations
3 of specific -- you know, if someone -- a location of a
4 specific place?

5 A. Sure. I've used it for both professional purposes
6 and personal purpose.

7 Q. Okay. Have you ever used it to find an address for a
8 specific location?

9 A. Yes, I have.

10 Q. And have you done that both in your job and also
11 personally?

12 A. Yes, I have.

13 Q. And on those occasions, have you found it to be
14 reliable?

15 A. Yes.

16 Q. And did you do that in this case with the specific
17 place Mr. Bathen indicated that he was working?

18 A. Yes, I did.

19 Q. And were you able to get an address in the
20 Washington, D.C. area?

21 A. Yes, I was.

22 Q. And did you then put that onto Court's Exhibit 16 for
23 identification?

24 A. Yes, I did.

25 Q. And is that -- can you tell us what that address is?

26 MS. FREEZE: And again, Your Honor, I'd object as to
27 hearsay as well as speculation.

28 THE COURT: It's denied. Overruled on speculation.

1 But we need the -- where the address was other than
2 Google.

3 MS. SOMERVILLE: Thank you.

4 BY MS. SOMERVILLE:

5 Q. When you went into the Google account or Google
6 search and you entered in -- did you enter in the name of this
7 business?

8 A. Yes, I did.

9 Q. And where did that take you to?

10 A. It took me to a website for a nonprofit in
11 Washington, D.C.

12 Q. And did that website then provide an address?

13 A. Yes, it did.

14 Q. And did you then put that address on Court's
15 Exhibit 16 for identification?

16 A. Yes. The address was on "I" Street in Washington,
17 D.C.

18 MS. FREEZE: And Your Honor, I would object hearsay as to
19 the Google search.

20 THE COURT: I'm going to overrule it.

21 BY MS. SOMERVILLE:

22 Q. So on Court's Exhibit 16, where did you indicate the
23 address of the location that Mr. Bathen had said he was
24 working after you did your Google search?

25 A. Right where this red pin is. That's when I searched
26 for the address in the cell tower tracking program. It
27 brought me to that; so I placed a pin and labeled it as his
28 work address.

1 Q. Okay. And that's on the right side of the screen I
2 believe you were pointing to on Court's Exhibit 16?

3 A. Yes, that is correct.

4 Q. And then on the left side of the screen, that is
5 where you -- it's in red writing, that's where you indicated
6 Mr. Bathen's home address based on what he said in the jail
7 calls?

8 A. Yes.

9 Q. If you can, would you go to Court's Exhibit 17 for
10 identification.

11 Do you recognize what's being shown in Court's Exhibit 17
12 for identification?

13 A. Yes, I do.

14 Q. And what is being shown in that particular exhibit?

15 A. These were the two calls on July 3rd from -- from the
16 (617)992-4648 number to Carolyn Jacobs' number, (619)525-7747.

17 Q. Okay. And is that a -- Court's Exhibit 17, is that a
18 tower tracker map that you generated based off of the call
19 detail records from T-Mobile after inputting them into the
20 software?

21 *(Court's Exhibit No. 17 was identified.)*

22 A. Yes, it is.

23 Q. Going to show you Court's Exhibit 17 for
24 identification. There's a Google map up there. Down below
25 there's a dialogue box. What is that indicating?

26 A. That's a call-out box that I placed on the map to
27 show which calls specifically I was highlighting, and I use
28 that because it makes it cleaner and easier to read without

1 all the disruption from behind.

2 Q. And then up to the right-hand corner, there is the
3 yellow pie shaped. And what is that indicating from the tower
4 tracker program?

5 A. From the tower tracker program, it's showing right
6 here the little dot, black dot, with the yellow circle and
7 then a black circle around it as the location of the cell
8 tower that was used to make that call, and the yellow pie
9 represents the azimuth of that cell tower that was used to
10 complete that call.

11 Q. Did you put in the addresses that were also on
12 Court's Exhibit 16 into Court's Exhibit 17?

13 A. Yes. I had left them on the map as I narrowed my
14 search on the cell towers.

15 Q. Okay. And they're kind of hard to read because
16 they're in black. But there appears to be some writing on the
17 left-hand side. Is that the Arlington address that Mr. Bathen
18 stated in his jail calls as his home address?

19 A. You mean on the left-hand side?

20 Q. Yes.

21 A. This one here, yes, that is the address on
22 North Kentucky Street in Arlington.

23 Q. And that's indicated by like a red push pin?

24 A. Yes. This one here.

25 Q. And then on the left side within the yellow pie
26 shape, there's also another red push pin. Is there an address
27 associated with that?

28 A. Yes. In the yellow section the push pin there

1 indicates the 1201 "I" Street in Washington, D.C.

2 Q. Thank you.

3 And the last exhibit I have for you, it is Court's
4 Exhibit 18 for identification. Do you recognize that?

5 *(Court's Exhibit No. 18 was identified.)*

6 A. Yes, I do.

7 Q. And is this also -- I haven't put it up there yet.
8 Is this also a Google map that was created with the call
9 detail records when you input them into the tower tracking
10 software?

11 A. Yes, it is.

12 Q. And which particular call from the call detail
13 records did this exhibit populate?

14 A. For this one, I utilized the July 5th -- the call
15 for -- the data for the call on July 5th.

16 Q. I'm going to put it up on the screen now. Court's
17 Exhibit 18, can you just describe for us what's in the call
18 out box there?

19 A. That's showing the date and time of the call that the
20 originating phone number was, (617)992-4648 and the phone call
21 was to Carolyn Jacobs' number, (619)525-7747.

22 Q. Okay. And again, there's a yellow pie shape up in
23 the right-hand corner of this exhibit. There's a red push pin
24 in there. Is there an address associated with that?

25 A. Yes. That is also the address on "I" Street for the
26 nonprofit in Washington, D.C.

27 Q. Thank you.

28 Were you able to prepare a Google map off of the tracker

1 program for the call that was on June 4th of 2017?

2 A. No.

3 Q. Okay. And why couldn't you prepare one of those off
4 of the tracker program?

5 A. Because the call detail records that I received from
6 T-Mobile did not include the -- included the L.A.C. number but
7 not the specific tower number.

8 MS. SOMERVILLE: Thank you. Nothing further.

9 THE COURT: Ms. Freeze.

10 MS. FREEZE: Thank you, Your Honor.

11 Just one moment.

12

13

CROSS-EXAMINATION

14 BY MS. FREEZE:

15 Q. Good afternoon, Investigator Gain.

16 A. Good afternoon.

17 Q. Probably won't finish with you this afternoon, but
18 I'll start with you. Okay. Thank you.

19 Now, I want to start a little bit just talking to you a
20 little bit about your background, Investigator Gain. You are
21 not an electrical engineer; correct?

22 A. That is correct.

23 Q. You're not -- you wouldn't consider yourself an
24 expert in cell phone towers?

25 A. Well, an expert is somebody who has more knowledge
26 than the average person and I would say yes, I would be.

27 Q. And the knowledge comes from this tower tracker
28 program, though; correct?

1 A. And my experience in working in the law enforcement
2 field exploiting cell phones and cell tower data.

3 Q. Okay. And you've never worked for a cell phone
4 company, though; correct?

5 A. That is correct.

6 Q. And you were not involved in establishing any
7 cellular networks like T-Mobile or anything like that?

8 A. No.

9 Q. And you don't have a degree in mathematics; correct?

10 A. No.

11 Q. Or in engineering; correct?

12 A. No.

13 Q. And do you have any experience in the
14 telecommunications industry?

15 A. Other than how it applies to the law enforcement
16 investigations, no, I do not.

17 Q. Okay. And you are not accredited as any part of
18 engineering, mathematic or scientific group; correct?

19 A. No.

20 Q. And you are not a member of the Institute for
21 Electrical and Electronic Engineering; correct?

22 A. No.

23 Q. Now, with regards to the -- I want to start just
24 talking about the T-Mobile call detail records or CDRs that
25 were commonly referred to them; correct?

26 A. Yes.

27 Q. Now, Ms. Somerville was asking you some questions
28 about those call detail records, and those were in response to

1 a subpoena; correct?

2 A. A search warrant.

3 Q. That's -- yes, the search warrant; correct?

4 A. Yes.

5 Q. And where -- where are the original call detail
6 records? Do you have those?

7 A. The originals would be maintained by T-Mobile. They
8 e-mailed me an electronic copy of them.

9 Q. And do you know how T-Mobile runs their CDRs, what
10 kind of program they use?

11 A. No.

12 Q. Do you -- do you know what kind -- so would it be the
13 records department of T-Mobile that sent them to you? Is that
14 correct?

15 A. We get them through their law enforcement relations
16 group.

17 Q. But they didn't, like, mail you the originals or
18 anything like that? You just had a copy e-mailed to you?

19 A. They just e-mail a copy, yes, that is correct.

20 Q. So what business unit, department, entity or function
21 needs this report? Who needs the CDRs, if you are aware?

22 A. I'm assuming their billing. But beyond that, I don't
23 know how T-Mobile utilizes these records internally.

24 Q. So you don't know if it's actually something that is
25 needed or not. You are just assuming that it's maybe used for
26 billing; is that correct?

27 A. I know it's something they have.

28 Q. Okay. And do you -- have you subpoenaed, gotten

1 search warrants on CDRs from other companies like Verizon,
2 Sprint?

3 A. Yes, I have.

4 Q. Now, when you were -- when we were talking about the
5 CDR records, the records that we received as part of this
6 T-Mobile request, is that the normal -- is that kind of what
7 they all look like when you're getting it from Sprint or
8 Verizon?

9 A. Yeah. There would be minor variations or
10 differences, but the basic information is all pretty much the
11 same.

12 Q. And so it doesn't display like a Social Security
13 number; right?

14 A. If a cell phone company has that as part of their
15 subscriber information, it would be.

16 Q. And when -- in this case, you don't know if T-Mobile
17 requires any type of I.D. verification or authentication of an
18 address or anything like that when someone gets a phone
19 through T-Mobile?

20 A. It would depend on the billing plan.

21 Q. So when you had testified earlier about this phone,
22 it was like a burner phone. Is that fair to say in this case?

23 A. That is a common phrase used for prepaid phones, yes.

24 Q. Okay. And so as far as you know, they didn't -- all
25 the information they needed was just an address and a
26 birthday?

27 A. For a burner phone all they need is for you to pay
28 money for the minutes to put on the phone.

1 Q. So they don't need to verify if that's actually your
2 birthday or that's actually where you live or anything like
3 that; correct?

4 A. That is correct, yes.

5 Q. Okay. Someone could just say here's five bucks, make
6 up some random information and get the phone?

7 A. Yes.

8 Q. Okay. Now, on the call detail records it indicates
9 that the agreement was opened, if you will, on September 1st
10 of 2014; is that correct?

11 A. Yes.

12 Q. And that's when the person would have provided
13 T-Mobile that information, like the address and the birthdate
14 or whatever that person's willing to provide?

15 A. Whether they did it on that date or did it on a
16 subsequent date, I couldn't tell you.

17 Q. Well, in order for -- so the entry of the address,
18 when did that -- when was that provided to T-Mobile?

19 A. That is not included in the records. I don't know
20 when the person provided that information.

21 Q. Okay. How would you find that out? How is that
22 found out when you are looking at these CDRs?

23 A. It's not included in the information that they give.

24 Q. Did you ever follow up or inquire of T-Mobile about
25 the -- when this information was provided, whether if it was
26 done as a prerequisite as part of, like, I guess, the contract
27 or the agreement -- I pay money, I get the phone -- if that
28 was something that needed to be done in 2014 or if that could

1 have been done hours before they canceled?

2 A. I did not inquire about that, no.

3 Q. And did you ever inquire of -- did you ever go to
4 1132 North Kentucky Street, inquire how many people live
5 there, or anything like that?

6 A. No.

7 Q. Okay. Did you at any point go out to the East Coast
8 and look at these towers yourself or verify these addresses at
9 any time?

10 A. No, I did not.

11 Q. And do you know how much was paid for the phone, if
12 it was something like it was a lump sum or if it was something
13 that was paid monthly? I know you mentioned billing. So did
14 you get any of that billing information, how much was paid?

15 A. Stated in their records that it was a prepaid phone.
16 So a person prepays whatever amount of minutes they feel is
17 conducive with how they want to use the phone. As for how
18 much they paid for the phone, I would have no idea.

19 Q. Does it show at any time if it was paid in cash, if
20 it was bought with a credit card, if a check was made so it
21 could go back to that person to actually verify who is paying
22 for the phone?

23 A. The records received from T-Mobile do not show any of
24 that.

25 Q. Would that have been something that you could have
26 subpoenaed or gotten a search warrant for in order to actually
27 verify exactly who this person is?

28 A. No. In my experience working at narcotics task force

1 and tracking criminals using cell phones, they can go and
2 purchase a card of minutes at almost any store, Walmart,
3 K-Mart. They can pay cash and there would be no record of who
4 it was that made that purchase.

5 So, no, I did not do anything further to inquire as to who
6 paid, how they paid for the minutes that were on that phone.

7 Q. But you had just mentioned that in previous cases you
8 have gone and been able to find that information; correct?

9 MS. SOMERVILLE: Misstates the testimony.

10 MS. FREEZE: Perhaps I misunderstood.

11 THE COURT: Clarify.

12 MS. FREEZE: Sure.

13 BY MS. FREEZE:

14 Q. So I'm not asking about in your -- you mentioned your
15 experience with criminals and narcotics and things like that.
16 This isn't a -- not a narcotics case; right?

17 A. That is correct.

18 Q. Okay. And -- but you testified a moment ago, and
19 perhaps I misunderstood, but that in your experience when
20 trying to track down the actual owner of a phone, you've
21 learned that they've paid -- they've paid it through other
22 means, they've been able to pay it and you've been able to
23 track them down? No?

24 A. I never said anything like that.

25 Q. When you said that in -- previously that they've gone
26 and gotten cards -- I guess I misunderstood what you're saying
27 about with regards to criminals going and getting prepaid
28 debit cards. Maybe expand on that. I don't understand that.

1 A. I was just explaining how the prepaid phones work,
2 where a person can go down to any Walmart, most stores, and
3 they have packaged phones where there's a TracFone or whether
4 it's whoever the manufacturer is, they pay a flat amount for
5 the phone and then they purchase a card that they are allowed
6 to add minutes to that phone, and that can be from -- for
7 varying amounts, you scratch off on the back of the card.
8 There's a code. You enter that into your phone and that
9 allows the minutes to be added onto the phone.

10 Q. Okay. But you didn't do any type of investigation to
11 find out if Mr. Bathen had done that in this case; correct?

12 A. No, I didn't. No further investigation other than
13 read what T-Mobile had sent that it was a prepaid phone.

14 Q. Okay. And -- and when you saw that it was the
15 birthdate of November 30th of 1977, isn't it true during your
16 investigation of this case that Mr. Bathen's date of birth is
17 listed actually as November 20th of 1977?

18 A. No, it's listed in the -- on the jail booking screen
19 and on his Virginia driver's license with the November 30th
20 date and it's his California driver's license has a
21 November 20th date.

22 Q. How did you -- when did you obtain his Virginia
23 driver's license?

24 A. I ran it from my desktop computer. I didn't actually
25 obtain a physical copy of it. I just got the computer
26 printout.

27 Q. And how did you -- where does the computer printout
28 come from, where does that information -- where is it

1 generated from?

2 A. From the Department of Motor Vehicles in Virginia.

3 Q. Virginia?

4 A. Yes.

5 Q. And do you have a copy of that with you today?

6 A. Yes, I do.

7 Q. And then do you also run Mr. Bathen's name and all
8 through S.D. Law?

9 A. Yes.

10 Q. And isn't it true on S.D. Law that his address is in
11 Springfield, Virginia?

12 A. I will have to refresh my recollection on that.

13 Q. And I have a copy of the S.D. Law that's actually
14 been provided to me by the District Attorney's Office, if that
15 refreshes your recollection.

16 A. No. What I have -- what I got when I ran it through
17 eJIMS through S.D. Law was the 1132 Kentucky Street,
18 Arlington, Virginia.

19 Q. And when did you run that?

20 A. When I first started working on the case.

21 Q. Okay.

22 A. That would have been --

23 Q. And are you familiar with CLETS?

24 A. Uh-huh.

25 Q. What is CLETS?

26 A. The -- it's law enforcement telecommunication system.

27 Q. And if I have a different address from CLETS from
28 S.D. Law that was provided to my office by the District

1 Attorney's Office having a different address, how would you
2 describe that discrepancy?

3 MS. SOMERVILLE: Objection. Foundation.

4 THE WITNESS: Looking at data from two different sources.

5 BY MS. FREEZE:

6 Q. So what's the difference between your S.D. Law and
7 the S.D. Law I have?

8 MS. SOMERVILLE: Objection. Foundation.

9 THE COURT: Lacks foundation.

10 MS. FREEZE: Well, okay.

11 BY MS. FREEZE:

12 Q. That's fine. I'll move ahead.

13 Now, with regards to listening to the jail call, the jail
14 calls of my client when he was in custody, you had never heard
15 Mr. Bathen speak before; correct?

16 A. That is correct.

17 Q. He didn't speak at the restraining order hearing;
18 correct?

19 A. That is correct.

20 Q. And at no point during the calls at any point he's
21 yelling or cursing or anything like that; correct?

22 A. Which calls? The calls to the victim he was.

23 Q. The jail calls.

24 A. In the jail calls, no, he never -- I never heard him
25 yelling or screaming in the jail calls.

26 Q. Okay. And with regards to his address that he
27 provided to one of the bail bondsman, in your experience,
28 do -- let me back up.

1 In your experience, have you listened to a lot of jail
2 calls before?

3 A. Yes, I have.

4 Q. And are those jail calls between the inmate and bail
5 companies?

6 A. Occasionally.

7 Q. Okay. And in your experience, are they -- these
8 people are trying to get out of custody; correct?

9 A. Yes.

10 Q. They are -- they'll do anything they can to get out
11 of there; fair to say?

12 A. That's fair to say, yes.

13 Q. Okay. And so you -- again, you didn't do any
14 follow-up to see how many people looked at that address or how
15 long Mr. Bathen had resided at that address or anything like
16 that; correct?

17 A. That is correct.

18 Q. Now, with regards to Mr. Bathen referencing his
19 employment at the nonprofit, there was some discussion on
20 that. Isn't it true that that nonprofit has offices all over
21 the world? Did you look into that at all during your research
22 on Google?

23 A. I did see that they had offices. There was only one
24 in Washington, D.C. that I saw.

25 Q. Okay. But there's -- fair to say that there's
26 several offices all over the globe; correct?

27 A. Yes.

28 Q. Okay. And did you at any time look at any of those

1 other addresses, do a cell phone tower analysis there?

2 A. No, I did not.

3 Q. Okay. Now, let me ask you a little bit about these.

4 THE COURT: And we have a couple more minutes, but -- so
5 when you get to a reasonable break.

6 MS. FREEZE: This -- yeah, I'm segueing into a different
7 area. I'm talking about cell towers and all that next, so --

8 THE COURT: Okay. So that's going to be a lengthy subject
9 matter.

10 MS. FREEZE: Probably.

11 THE COURT: Okay. All right. Ladies and gentlemen, we'll
12 take our evening recess at this time.

13 Sorry, ladies and gentlemen. I had something we were
14 trying to reschedule tomorrow morning so we could start right
15 at 9:00.

16 So let's start at 9:15. I don't want to keep you waiting.
17 So we'll be ready by 9:15.

18 Please remember the same admonition not to form or express
19 an opinion. Don't talk to anybody about any subject connected
20 with this matter.

21 Not sure we had any addresses discussed today. If we did,
22 don't visit the scene. And stay off the Internet in
23 connection with this matter.

24 I will see you tomorrow morning at 9:15. Thank you.

25 *(The following proceedings were had between the Court*
26 *and counsel out of the presence and hearing of the*
27 *jury.)*

28 THE COURT: We're out of the presence of the jury.

1 Just went through the jury instructions really fast. I
2 will need probably a 303, 333, and 359. And then anything you
3 wanted to add, Ms. Freeze?

4 Off the record just to talk about scheduling. I don't
5 think we need this on the record.

6 *(Discussion held off the record.)*

7 THE COURT: On the record.

8 MS. FREEZE: I had a brief dialogue with Ms. Somerville
9 this afternoon about me playing one jail call that just -- that
10 I was -- and I did speak with Robert. I don't -- I only have a
11 CD that has all of them on there and so I would put it on a
12 separate one. I've been advised of that, and I could have done
13 it -- threw it on a thumb drive if it needed to be.

14 THE COURT: It has to be a way, if you are going to play
15 it, that they can play it in the jury room.

16 MS. FREEZE: Good to know.

17 And then I believe Ms. Somerville was going to be
18 objecting to that. I might not play it.

19 THE COURT: And you have to have a transcript. I'm not
20 talking about its admissibility if there is an objection.

21 MS. FREEZE: Yeah, I have a bunch. I have all of them here
22 for everybody.

23 THE COURT: Okay.

24 MS. FREEZE: And I believe Ms. Somerville wanted to be
25 heard on that.

26 MS. SOMERVILLE: Yes, I was just going to object under
27 1220. I don't think the rule of completeness applies to that
28 particular call. I mean, these were separate and distinct

1 calls, separate people. So I would object. I don't think it
2 should -- I don't think the defendant can bring that in.

3 THE COURT: And why would the defendant be able to bring
4 that since you ordinarily cannot introduce a statement by your
5 client outside of his testimony?

6 MS. FREEZE: Right. Well, I think it was going to provide
7 some insight as she showed the four or whatever -- the five
8 jail calls from earlier today regarding the Arlington address,
9 and then it would be information on that Arlington address
10 expanding how long he's resided -- resided at that Arlington
11 address.

12 THE COURT: May I see the transcript? Do you have it
13 available?

14 MS. FREEZE: Sure. And I'll bring it to the Court's
15 attention.

16 THE COURT: Well, I have to read -- skim through the whole
17 thing --

18 MS. FREEZE: Yeah, of course.

19 THE COURT: -- if you are going to play the whole thing.

20 MS. FREEZE: I have plenty of copies. I made extra.

21 THE COURT: Okay. Well, I was wrong. I can't find where
22 it says details about his address. So if you refer me to the
23 page.

24 MS. FREEZE: Page 5, line 9.

25 THE COURT: Okay. So how would that have -- is the
26 Kentucky Street address the one that's contained on the map?
27 Isn't it a different address? Isn't it in Arlington?

28 MS. SOMERVILLE: It's in Arlington, Virginia.

1 THE COURT: And the street address name that is mapped, do
2 you know offhand?

3 MS. SOMERVILLE: It's Kentucky.

4 THE COURT: It is Kentucky.

5 MS. SOMERVILLE: North Kentucky. It's 1132.

6 THE COURT: I think everything else is kind of a duplicate
7 of what's already been introduced in your calls. So ordinarily
8 I would not let it in, but I think since the address is being
9 used to depict the address in 2017, and I think the information
10 is in a jail call, I think that's about the only difference in
11 this call than the other. So it's not like introducing a whole
12 new self-serving information.

13 MS. SOMERVILLE: I mean in this he does -- you know, some
14 issues. I mean I don't think he says, like, I've never been
15 arrested before. I don't remember him saying that in the call.
16 I think he was nervous about being in jail.

17 THE COURT: He absolutely said that before in one of the
18 calls he played. He said, "I've never been in jail before"
19 and --

20 MS. FREEZE: I don't find myself in jail often or something
21 like that.

22 THE COURT: It was even more than that. It was, this is my
23 first time here or something like that. So, yeah, that
24 absolutely I remember.

25 And I forget what expression Mr. Bathen used, but it kind
26 of obviously -- I thought it stuck with me, but it didn't
27 because I can't repeat it at this moment. But yeah, but I'll
28 read through the transcript. But I think that it would create

1 a false impression to the jury or I take your objection
2 because this is not the way we introduce testimony by
3 Mr. Bathen. But since it's just an address, a recent address,
4 I think it's fair.

5 MS. SOMERVILLE: Okay. Thank you.

6 THE COURT: Yeah. So my tentative is yes, but let me read
7 it over to make sure and I'll compare it to the other
8 transcripts.

9 MS. SOMERVILLE: Okay.

10 MS. FREEZE: And then I'll burn a separate CD.

11 THE COURT: Let's go off the record for that.

12 *(At 4:38 p.m. an adjournment was taken until Friday,*
13 *June 15, 2018, at 9:15 a.m.)*

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 San Diego, California)
2 County of San Diego) : SS.

3

4

5 I, Yvonne Medina Luna, Official Reporter for the Superior
6 Court of the State of California, in and for the County of San
7 Diego, do hereby certify:

8

9 That as such reporter, I reported in machine shorthand the
10 proceedings held in the foregoing case;

11

12 That my notes were transcribed into typewriting under my
13 direction and the proceedings held on June 14, 2018, contained
14 within Pages 170 through 355, are a true and correct
15 transcription.

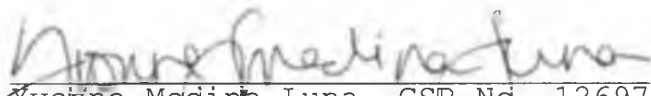
16

17 Dated this 28th day of September 2018.

18

19

20


Yvonne Medina Luna, CSR No. 12697
Official Court Reporter

21

22

23

24

25

26

27

28

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	)	FROM SAN DIEGO COUNTY
)	
PLAINTIFF AND	)	HON. STEPHANIE SONTAG
RESPONDENT,)	
	)	COURT OF APPEAL
VS.	)	NO. D074538
)	
	)	CASE NO. SCS294342
BENJAMIN BATHEN,)	
)	
DEFENDANT AND	)	JURY TRIAL
APPELLANT.)	
_____)	

REPORTER'S CERTIFIED TRANSCRIPT
JUNE 14, 2018
VOLUME 3 OF 7
(PAGES 170 THROUGH 355)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST "A" STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	BENJAMIN BATHEN
AND APPELLANT:	IN PROPRIA PERSONA

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
OFFICIAL COURT REPORTER

CHRONOLOGICAL INDEX OF WITNESSES

	PAGE	LINE	VOL
GARY JACOBS - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.203	6	3
CROSS BY MS. FREEZE . . . . .	.211	6	3
REDIRECT BY MS. SOMERVILLE . . . . .	.220	10	3
CAROLYN FRANCES JACOBS - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.224	2	3
CROSS BY MS. FREEZE . . . . .	.258	2	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.277	15	3
REDIRECT BY MS. SOMERVILLE . . . . .	.291	8	3
RECROSS BY MS. FREEZE . . . . .	.296	6	3
GREGORY GAIN - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.299	26	3
CROSS BY MS. FREEZE . . . . .	.339	14	3

ALPHABETIC INDEX OF WITNESSES

	PAGE	LINE	VOL
GAIN, GREGORY - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.299	26	3
CROSS BY MS. FREEZE . . . . .	.339	14	3
JACOBS, CAROLYN FRANCES - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.224	2	3
CROSS BY MS. FREEZE . . . . .	.258	2	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.277	15	3
REDIRECT BY MS. SOMERVILLE . . . . .	.291	8	3
RE CROSS BY MS. FREEZE . . . . .	.296	6	3
JACOBS, GARY - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.203	6	3
CROSS BY MS. FREEZE . . . . .	.211	6	3
REDIRECT BY MS. SOMERVILLE . . . . .	.220	10	3

INDEX OF EXHIBITS IDENTIFIED

	PAGE	LINE	VOL
1 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL DATED JUNE 4, 2017	241	18	3
1A TRANSCRIPT OF AUDIO RECORDING FROM JUNE 4, 2017	241	22	3
2 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL, DATED JULY 3, 2017	249	15	3
2A TRANSCRIPT OF AUDIO RECORDING FROM JULY 3, 2017	249	18	3
3 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL, DATED JULY 5, 2017	252	6	3
3A TRANSCRIPT OF AUDIO RECORDING DATED JULY 5, 2017	252	7	3
4 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH UNKNOWN MALE AND UNKNOWN FEMALE DATED SEPTEMBER 16, 2017	307	25	3
4A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 4	307	26	3
5 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH BAILBOND REPRESENTATIVE DATED SEPTEMBER 16, 2017	308	22	3
5A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 5	308	23	3
6 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH EMILIO SANCHEZ BAIL BOND REP. DATED SEPTEMBER 17, 2017	309	6	3
6A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 6	309	9	3

7	AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH GERALD, BAIL BOND REPRESENTATIVE DATED 9/17/17	309	21	3
7A	TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 7	309	24	3
8	SUBSCRIBER INFORMATION SHEET FROM T-MOBILE, ONE PAGE	314	9	3
9	SUBSCRIBER INFORMATION SHEET FROM T-MOBILE, CONTINUATION OF COURT'S EXHIBIT 8, ONE PAGE	318	1	3
10	CALL DETAIL RECORD OF 617-992-4648 FROM JUNE 4, 2017, ONE PAGE	319	3	3
11	CALL DETAIL RECORD OF 617-992-4648 FROM JUNE 4, 2017, ONE PAGE	321	16	3
12	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 3, 2017, ONE PAGE	322	9	3
13	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 3, 2017, ONE PAGE	322	24	3
14	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 5, 2017, ONE PAGE	323	9	3
15	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 5, 2017, ONE PAGE	323	24	3
16	GOOGLE MAP TITLED "TOWER HITS" FROM 6/1/17-7/6/17, ONE PAGE	326	11	3
17	GOOGLE MAP, TRACKING PHONE CALLS OF 617-992-4648 ON JULY 5, 2017, ONE PAGE	336	21	3

18	GOOGLE MAP, TRACKING PHONE CALL OF 617-992-4648 ON JULY 5, 2017, ONE PAGE	338	5	3
35	ONE-PAGE PRINTOUT OF EMAIL DATED APRIL 28, 2008	278	3	3
36	ONE-PAGE PRINTOUT OF EMAIL DATED JULY 1, 2008	279	14	3
37	ONE-PAGE PRINTOUT OF EMAIL DATED SEPTEMBER 1, 2008	281	5	3

Chula Vista, California; Thursday, June 14, 2018

-- 000 --

(The following proceedings were had between the Court and counsel out of the presence and hearing of the jury.)

THE COURT: Good morning. Thank you for coming in early this morning. And I know, Ms. Freeze, you said you had something for the record. Shall we go ahead with mine or would you like to start?

MS. FREEZE: Go ahead, Your Honor.

THE COURT: All right. I was thinking yesterday about your motion, Ms. Somerville, to exclude the testimony of Dr. Murphy.

MS. SOMERVILLE: Your Honor, I'm sorry.

THE COURT: Okay. I'm sorry.

MS. SOMERVILLE: I thought it might -- I told Alicia if she wants to have him come in and say that he's of sound mind and not get into the statements and all of that --

THE COURT: If you're not going to object, that's fine.

In the middle I wasn't going so much for that as in while we were discussing the motion, there was some conversation about whether there was a waiver --

Good morning. I haven't seen you for a while. Okay.

THE BAILIFF: Good morning, Your Honor.

THE COURT: -- that there was a partial waiver of the privilege against disclosing treatment, confidential communications and the treatments that I -- there's no motion in limine on all of that, but I thought we ought to get it open

1 before we call Dr. -- is it Jacobs?

2 MS. SOMERVILLE: Yes.

3 THE COURT: -- before we call Dr. Jacobs. So I guess my
4 question is is she going to be testifying about the nature of
5 her treatment of Mr. Bathen? Any communications, any
6 diagnosis? I think we need to talk about that.

7 MS. SOMERVILLE: Yes. So just what I intended to ask
8 her -- basically what she had testified to at the prelim was
9 that she was treating him just for some interpersonal
10 relationship issues and, you know, the fact that he was having
11 trouble meeting some people, moving to a new area.

12 I don't know that she necessarily diagnosed him. I mean I
13 haven't asked her that and gotten into that. I think there
14 was mention of depression. But I don't think he has any, you
15 know, major diagnoses and I don't think that she did that. I
16 don't know for sure.

17 I wasn't going to ask her, you know, did you diagnose him
18 and -- but in the threats, as I outlaid in my trial brief, you
19 know, he mentioned stuff about, you know, dating and you
20 should say I'm dating and that she didn't specifically
21 remember, I believe, when she testified about that.

22 And, you know, it's been such a long time; so I just
23 wanted to, you know, get out in general, you know, basically
24 what was, you know, kind of the theme of what he came to see
25 you for. I didn't plan to get into all the specifics of what
26 they talked about. I'm not even sure that she remembers all
27 of that.

28 THE COURT: Okay. Ms. Freeze.

1 MS. FREEZE: Thank you, Your Honor. And I appreciate th
2 Court wanting to have dialogue about this today. And I mean
3 to actually -- I was ruminating on it over the break as well

4 My client at no point has waived any doctor-patient
5 privilege at all at any time. In fact, my client maintains,
6 as we sit here today, that he doesn't even believe that she'
7 permitted to even disclose that he was a patient of hers, an
8 that's always been a big concern of his and that's one of th
9 reasons where I was -- the whole purpose of me bringing
10 Dr. Murphy is that I believe that she was going to open up
11 this -- this conversation about my client's mental health.

12 And looking at the preliminary hearing transcript, the
13 Court at that hearing on Page 33 actually does --

14 THE COURT: I don't have that in front of me.

15 MS. FREEZE: -- does engage with Dr. Jacobs and does
16 inquire of her himself. And the only thing that I saw that
17 brought out, it was that she said it's not consistent with t
18 kind of work that I did with Mr. Bathen when we were working
19 and she discloses that it was just adjustment disorders with
20 him moving as well as interpersonal issues. So that was it.

21 And then in all the other police reports, she's very
22 tight-lipped. Dr. Jacobs does not disclose to any of the
23 officers, which I believe and I've -- and my client believes
24 that she's not permitted to.

25 So I do appreciate the Court bringing that out because r
26 client at no point has made any statements, has waived any
27 doctor-patient relationship.

28 THE COURT: So, as I understand it, Ms. Somerville, you

1 intend to ask kind of the same questions you asked at the
2 preliminary examination and leave it at that?

3 MS. SOMERVILLE: Yes. I wasn't the attorney at the preli
4 but I just intend to, you know, stay along those lines. I
5 wasn't going to delve into anything, but I do think, obviousl
6 the relationship is relevant to the case. It explains to the
7 jury why he, you know, would reach out to her. If not, it's
8 just some random woman who's just accusing some person who
9 lives on the other side of the country of making threats. I
10 mean it puts it in no context whatsoever.

11 So I think all of that is relevant. I think it should
12 come in. I was looking at the -- the specific Evidence Code
13 sections for, you know, therapists' relationships.

14 THE COURT: Before you get to that, let's see whether
15 there's any objection to the testimony as it came in, and I
16 haven't read the -- I don't typically read the preliminary
17 examination transcript because, unless you bring it to my
18 attention and it has some bearing on what's going to go on a
19 trial, that was a separate proceeding.

20 So what is your position, Ms. Freeze?

21 MS. FREEZE: Well, Your Honor, again, I would reiterate
22 that and my client has maintained this position that any
23 discussion with regards to --

24 THE COURT: So let's talk about the specific questions t
25 were asked in the context. And so are you objecting to the
26 question: Was ever -- how did you know him, did you know
27 him -- how did you know him?

28 MS. FREEZE: I do. I think I have to for the record, Yo

1 Honor, object to that. And I believe that that's been
2 maintained for the last year during this litigation is that
3 that's inappropriate.

4 THE COURT: It would have been helpful to have it briefed,
5 but -- but here we are. I'm going to look at it. I think that
6 there's no -- to me -- go ahead. You've looked at the
7 privilege. Let me --

8 MS. SOMERVILLE: That's okay.

9 THE COURT: We're looking at the Evidence Code section.

10 MS. SOMERVILLE: It basically starts with 1010, which is
11 where it starts to describe psychotherapists. It does talk
12 about, you know, what -- who a patient is, who a
13 psychotherapist is, who a psychologist is.

14 And basically, in Evidence Code Section 1020, there's an
15 exception for breach of duty arising out of
16 psychotherapist-patient relationship and it goes on to say
17 that there's no privilege under this article as to a
18 communication relevant to an issue of breach by the
19 psychotherapist or by the patient of a duty arising out of a
20 psychotherapist-patient relationship. And I mean I didn't
21 brief this issue either, but --

22 THE COURT: My briefing kind of went to the universe.

23 MS. SOMERVILLE: So there's that. I mean I think that
24 basically he's putting this issue by making these threats to
25 her. I mean he's really, I think, in a way waived that
26 patient-doctor privilege communication.

27 There's also Evidence Code Section 1024. And it talks
28 about, you know, patient dangerous to himself or others, that

1 there's no privilege under this article if the psychotherapist
2 has reasonable cause to believe that the patient is in such
3 mental or emotional condition as to be dangerous to himself or
4 to the person or property of another and that disclosure of
5 the communication is necessary to prevent the threat and
6 danger.

7 I just think that given those -- and I have not had a
8 chance to, you know, specifically brief these. I think most
9 of these are referring to instances where the communication
10 that is threatening is happening in an actual therapy setting.
11 So I just want, you know, that caveat to be put out there.
12 But I think we have a very unique situation where --

13 THE COURT: It's kind of a catch 22 that if he made the
14 threats, I agree he waived the privilege. If he didn't make
15 the threats, then I don't think the privilege is waived. So
16 it's -- you know, it's kind of a circular kind of reasoning.

17 But what I want to know is did this -- when the name came
18 to light, did the fact -- and I've looked at the content of
19 the messages -- did the fact of her treatment of him actually
20 form some of the basis of her fear, meaning the content. Oh,
21 he's blaming me for his physician now. I remember treating
22 him for this.

23 MS. SOMERVILLE: She doesn't remember the specific details
24 is my understanding of what -- I mean it was like Ms. Freeze
25 said, interpersonal relationship adjustment issues to, you
26 know, moving out here from the East Coast, but he specifically
27 talks about, you know, you should start dating. You should
28 start dating. I'm going to hurt you.

1 And then that kind of ties into how their doctor-patient
2 relationship terminated. He got very angry based on the fact
3 that she could no longer treat him because he was out of the
4 State of California. At that point, he had, you know, wanted
5 her to apologize to him for some comment that she had made and
6 also had threatened to sue her at that time.

7 So I mean I think it all relates back to obviously
8 something that he perceived as an insult or something and the
9 termination of their relationship. I mean, obviously, I don't
10 know exactly what it is that, you know, sparked this or, you
11 know, what specific communications he's referring to and --

12 THE COURT: Well, the confidential communications in the
13 treatment itself does not seem to be at issue here. I mean she
14 doesn't remember them. And we're not going to be talking about
15 those confidential communications specifics.

16 MS. SOMERVILLE: When she doesn't remember, like,
17 specifically telling him to date, I mean it's not --

18 THE COURT: But what I'm saying is I don't think that
19 sounds like it's at issue here that we're not having her
20 disclose what was communicated during the sessions.

21 MS. SOMERVILLE: Right. It's just what she was -- you
22 know, why he came to see her, what type of counseling he was
23 seeking that she can remember.

24 THE COURT: Well, I'm not even -- I'm thinking that the
25 fact that he was a patient -- boy, this is thornier than --

26 MS. FREEZE: Your Honor, may I?

27 THE COURT: Sure.

28 MS. FREEZE: Thank you.

1 Just briefly to respond with regard to Evidence Code 1020
2 and 1024, and I think the Court kind of touched on it just a
3 moment ago is that it's presuming that my client identified
4 himself. If he had said, hey, Dr. Jacobs, this is Ben Bathen,
5 "F" you and goes into the spew of these things, then I think
6 it would trigger perhaps those Evidence Code because there
7 might be a danger to himself or he's exhibiting behavior that
8 is concerning to her.

9 But it's presuming the entering -- allowing it to come in
10 is presuming that he's been identified, which is obviously a
11 huge issue.

12 THE COURT: It's an issue, Ms. Freeze, but obviously
13 there's sufficient evidence to believe that it's Mr. Bathen;
14 otherwise, we wouldn't be at the trial phase, we wouldn't have
15 survived the preliminary examination.

16 MS. FREEZE: I certainly understand that.

17 THE COURT: All these charges wouldn't have been filed.

18 MS. FREEZE: Right.

19 THE COURT: So I can't in a vacuum say that Mr. Bathen was
20 chosen out of the universe and just could incidentally happen
21 to have been a former patient.

22 MS. FREEZE: Right.

23 THE COURT: So I don't know how we get around.

24 MS. FREEZE: Right. And then -- and that's one of the
25 reasons.

26 And I want -- when we're done with this dialogue, my
27 discussion about how they -- how they point the finger at
28 Mr. Bathen, but let me -- if I can finish my thought as it

1 pertains to Ms. Somerville's comments with regards to this
2 very -- there's an assumption and there's an attenuation as it
3 pertains to this link between the voice messages and the
4 subject matter of those voice messages and the treatment of my
5 client.

6 And so there is no -- there's no link between the
7 treatment of my client as we've seen thus far, at least what
8 I've seen in police reports and in the preliminary hearing
9 transcript. At no time does Dr. Jacobs at any point say,
10 yeah, that was the crux of our sessions.

11 Is that he had issues dating and we were at ends and we
12 didn't see eye to eye about my treatment suggestion. There's
13 no discussion whatsoever, so I just want to sure that that's
14 clear.

15 THE COURT: Well, that will come out in evidence. I mean
16 I'm just looking at the scope of what the questioning could be
17 and I haven't heard any law from you that says that in a
18 criminal proceeding when the patient is accused of making
19 threats that the psychotherapist can't, number one, acknowledge
20 that he was a patient and that ended badly.

21 MS. FREEZE: Right. And there is a Tarasoff case, Your
22 Honor -- I can try to get the actual citation for that -- with
23 regards to the exception and the narrow exception and how
24 narrow it is because I think in my client's -- just obviously
25 we're outside the presence of the jury, but just in his line of
26 work, which will come out, and what he does with the federal
27 government, I mean just him seeing a mental health counselor
28 can be grounds for him to be terminated from his job.

1 So I mean that becoming public record has always been a
2 concern. And I believe his prior counsel, Mr. Theule, who
3 represented him until February or March of this year brought
4 that up a number of times to the District Attorney's Office.
5 This concern about this disclosure.

6 THE COURT: It's out of the bag.

7 MS. FREEZE: Well, clearly. I mean we voir dire on it.
8 But I -- just so the Court understands because the Court made
9 the comment of we're here and it's made it this far to trial.

10 THE COURT: Were you just saying that?

11 MS. FREEZE: Right.

12 THE COURT: You're concerned about it being public, and I'm
13 saying no matter what I do now it's already public. I just
14 have to say that is not going to have -- to have a bearing on
15 my decision one way or the other. My decision is going to be
16 we have a crime and 10 years ago my understanding is he sought
17 some counseling.

18 MS. FREEZE: Right.

19 THE COURT: I find it hard to believe that the fact that 10
20 years ago he sought some counseling in this day and age would
21 terminate his job with the government no matter how top secret
22 or whatever, but I could be wrong. It just sounds a little
23 incredible to me.

24 MS. FREEZE: Uh-huh.

25 THE COURT: But that's neither here nor there. I have to
26 make a decision here based on what's before me.

27 MS. FREEZE: Right, Your Honor.

28 THE COURT: And so that I could be fair to both sides. And

1 I don't think that you have to lay a foundation with some
2 connection between identifying him as a patient and her fear.
3 I mean I think you have to say she knew him as a patient.
4 That's how she knew him. He's not an unknown person.

5 MS. SOMERVILLE: Right.

6 THE COURT: But anything beyond that, you know, if it
7 contributed to her fear or she thought it was him because it
8 ended badly, but if your theory is that it was him because of
9 the content of their -- well, I see what -- that would be an
10 element of identification.

11 MS. FREEZE: And Your Honor, if I could give that cite for
12 the Tarasoff case. It's just with regards -- just the duty
13 of -- I'm sure the Court is very familiar with the case. It
14 just the Supreme Court of California, the mental health
15 professionals have that duty to protect individuals, so I can
16 give you the case.

17 THE COURT: Tarasoff. I have the citation, sure. Thank
18 you, though.

19 I was going beyond Tarasoff just to what we're doing here.

20 MS. SOMERVILLE: I mean Tarasoff is when a patient
21 threatens someone else.

22 THE COURT: Very familiar. Thank you. Very familiar with
23 Tarasoff.

24 That's kind of -- it came up in the context of 1024.

25 MS. SOMERVILLE: Right.

26 THE COURT: That's how we kind of went on that little se
27 out there. But it does show that -- that in a criminal
28 context, I think that in a case such as this where the

1 relationship was -- that was the only relationship; and if we
2 try to ignore that and don't allow the People to get in that
3 there was this relationship, then it would be -- which you
4 wouldn't mind, but it would be impossible to prove, I think,
5 that it was Mr. Bathen because then, as you said, it would be
6 just some random person coming from whatever, and this all
7 bears into whether or not it was Mr. Bathen.

8 And so I can't -- I can -- I'm going to honor the
9 patient-therapist relationship in that no confidential
10 communications. I'm not going to allow any confidential
11 communications in the therapy session because it doesn't soun
12 like it's pertinent.

13 MS. SOMERVILLE: Okay. But the general overview, this is
14 why he came to seek treatment from you, I mean I think that -
15 I think that's relevant --

16 THE COURT: I'm being quiet because I'm looking at actual
17 privilege. I want to look at the Evidence Code that's the
18 actual privilege.

19 Okay. Confidential communication between patient and
20 psychotherapist, that's 1012, meets information including
21 information obtained by an examination of the patient
22 transmitted between a patient and his psychotherapist in the
23 course of that relationship and in confidence by means which
24 so far as patient is aware discloses the information to no
25 third persons other than those who are present, further the
26 interest of the patient in the consultation.

27 And I'm not finding -- in my brief book, I'm not finding
28 anything about the right to privacy is not absolute. It may

1 yield in the furtherance of the compelling state's interest.
2 The state's interest in facilitating the legal proceeding is
3 substantial enough to compel disclosure of a great variety of
4 confidential material. That's *County of Alameda v. Superior*
5 *Court*, 194 Cal.App.3rd 254.

6 MS. SOMERVILLE: Could you give that cite again? I'm
7 sorry.

8 THE COURT: Sure. And this is all I know about -- I have
9 not read the case. It's 194 Cal.App.3rd 254.

10 This is really what we're looking -- you know, I'm looking
11 and it's almost akin to there's no privilege under this
12 article of the services of the psychotherapist were sought or
13 obtained to enable -- aid anyone or plan to commit a crime or
14 tort or to escape detention or apprehension after the
15 commission of the crime or tort, and that's Evidence Code
16 Section 1018.

17 And that's certainly not this case, but it's -- to the
18 extent that since the -- the crime with Mr. Bathen committed
19 it, he'd be able to -- the thought that he'd be able to avoid
20 detection because of former psychotherapist relationship, not
21 the content of his communication, but the relationship, I am
22 having a hard time with that.

23 So 1024. All right.

24 MS. FREEZE: And Your Honor, if I may just briefly.

25 THE COURT: Okay. We're just right at nine o'clock.

26 MS. FREEZE: Thank you, Your Honor.

27 With regards also if the Court is -- as the Court has
28 indicated, Dr. Jacobs is not permitted to be discussed

1 confidential dialogue with regards to her treatment and my
2 client. I mean just so the Court is aware, and for the
3 record, that her voice message, the voice calls that are the
4 subject of this proceeding, of this whole trial were left on a
5 confidential voice message system. So if you actually call
6 the number, it says this is a confidential voice message. So
7 just --

8 THE COURT: It's a crime. It's a crime. That's not
9 confidential.

10 MS. FREEZE: I just wanted to let the Court know that if
11 the Court had any confusion if it was a cell phone, but it was
12 the office confidential.

13 THE COURT: Doesn't matter to me. You can't commit a crime
14 on a confidential line.

15 MS. FREEZE: Right. Whether or not it's a crime, correct.

16 THE COURT: Well, that's what we're here about. But I'm
17 just saying with your proposition we can't say, oh, it's
18 confidential. I mean that is Tarasoff.

19 MS. FREEZE: I just wanted to raise that.

20 And before we take a moment, if I could just -- as I email
21 Robert, if I can just put my brief thing on the matter. It
22 has to do with some of the discussions we had on the motion
23 in limine.

24 THE COURT: Is it just to make a record?

25 MS. FREEZE: Just to make a record.

26 THE COURT: We can do it some other time.

27 MS. FREEZE: Well, I think it's important to put it on the
28 record before there's any testimony as it pertains to the

1 discussions that we had on Monday afternoon. It would just
2 take a just a minute, Your Honor.

3 THE COURT: Okay.

4 MS. FREEZE: Okay. Thank you.

5 Just, Your Honor, just so I'm clear, when we broke on
6 Monday, the Court -- I was understanding with regards to my
7 request to have any reference to the Google results excluded,
8 the Court had said that -- what I had understood is that the
9 Court was going to take under submission this effect on the
10 listener.

11 When we came back to court on Tuesday morning, the Court
12 had directed us to *Francen* which I had an opportunity to read.

13 THE COURT: That was for the detective.

14 MS. FREEZE: Correct.

15 THE COURT: And I'm excluding that reference.

16 MS. FREEZE: Right.

17 And the only thing that I just wanted to put on the record
18 is that I did provide to the Court the *Torres*,
19 *United States v. Torres*.

20 THE COURT: I already put that on the record that you
21 provided that to me.

22 MS. FREEZE: Okay. Because I guess my confusion is it -- I
23 thought the *Francen* case was also going to touch on the effect
24 on the listener because I understood the Court was going to
25 take that under submission and wanted some law, because I
26 wanted to make sure because I was a little confused. I thought
27 perhaps *Francen* talked about effect on the listener.

28 And since I had a chance to read it in its entirety, so I

1 would just like to put on the record the *Torres* case and the
2 appropriate times when effect on the listener would apply ar
3 just, again, renew my objection as to pertaining to Dr. Gary
4 Jacobs relaying his -- the search results which have now --
5 the Court has said is hearsay, talking about that to
6 Dr. Carolyn Jacobs.

7 THE COURT: We have argued that the citations are on the
8 record. I think it goes to identification in this case and
9 think that a 352 analysis and hearsay analysis that a limited
10 instruction will be sufficient.

11 MS. FREEZE: Great.

12 THE COURT: Anything else before we call in a jury?

13 MS. SOMERVILLE: No.

14 THE COURT: Okay. We shall call in the jury.

15 Who is your first witness?

16 MS. SOMERVILLE: Dr. Gary Jacobs and then Carolyn Jacobs.

17 THE COURT: Okay. We're going to take a break before
18 Carolyn Jacobs --

19 MS. SOMERVILLE: Okay.

20 THE COURT: -- so that I can do a little more looking.

21 MS. SOMERVILLE: I just want to for my own -- what I wa
22 going to say is that she saw him in general, it was for
23 interpersonal relationships.

24 THE COURT: Just say she saw him.

25 MS. SOMERVILLE: Okay. She treated him.

26 I was going to mention the fact that when she terminate
27 the relationship he got angry. He wanted an apology from h
28 for something and he threatened to sue her.

1 THE COURT: That's -- I don't think that's confidential --

2 MS. SOMERVILLE: Okay.

3 THE COURT: -- communication.

4 Okay. You will learn that it drives me crazy to have the
5 jury waiting outside. We don't have the notebooks handed out.
6 So go ahead. But for future reference, I really do like to
7 get started on time. Okay.

8 *(The following proceedings were had in open court in*
9 *the presence and hearing of the jury.)*

10 THE COURT: Okay. We're going to remain seated and come to
11 order.

12 THE BAILIFF: Remain seated and come to order. This court
13 is now in session.

14 THE COURT: Good morning, ladies and gentlemen. I hope you
15 are all ready to proceed this morning.

16 As I told you before we broke on Tuesday, we're going to
17 start with opening statements if the lawyers choose to give
18 them at this time.

19 And an opening statement is an overview of what the
20 lawyers expect that the evidence will show. As I told you on
21 Tuesday, what the lawyers say is not evidence, but it kind of
22 gives you an overview of what they expect the evidence will be
23 so they can have a framework to put in the little pieces of
24 evidence as they actually come in.

25 And I hesitated a moment because I do have to talk to the
26 lawyers for just one moment. If I could see them, and then we
27 will begin. My apologies for this.

28 *(Sidebar; unreported.)*

1 THE COURT: And thank you, ladies and gentlemen. This
2 won't happen very often. What happened we were -- we met ear
3 this morning, the lawyers and I, and there was just something
4 occurred to me before I came out to see you and came in and I
5 hadn't communicated. So I apologize that you were sitting for
6 that.

7 And would you like to give an opening statement,
8 Ms. Somerville?

9 MS. SOMERVILLE: Yes. Thank you, Your Honor.

10

11

OPENING STATEMENT

12 BY MS. SOMERVILLE:

13 Sadistic, vulgar, vile threats. Mr. Bather made these
14 threats to Carolyn Jacobs. He threatened to torture her. He
15 threatened to kidnap her. He threatened to set her on fire.
16 He threatened to rape her. He threatened to rape her daughter
17 and threatened to kill her daughter. He wanted to hurt her.
18 He felt hurt and so he took it out on Ms. Jacobs.

19 Now, this happened back in June and July of 2017. But
20 this is something that had obviously been festering for a
21 while. It had been building up and something triggered it.

22 Now, you're going to hear that Dr. Jacobs is a
23 psychologist. She has been working in private practice since
24 1992 here in Chula Vista. And Dr. Jacobs sees people at an
25 office building where other therapists work as well.

26 And starting in 2004, Dr. Jacobs began to see Mr. Bather
27 And they had sessions in person, in her office. And basically
28 it was just about interpersonal relationships and some, you

1 know, adjustment issues. Dr. Jacobs was referred to
2 Mr. Bathen from the East Coast. So he had moved here to
3 Chula Vista, to San Diego, and that's why she started treating
4 him.

5 At some point during their treatment, Mr. Bathen got a job
6 in Los Angeles so he moved to Los Angeles and still wanted to
7 have Dr. Jacobs treat him. So what they did is they had phone
8 sessions. Dr. Jacobs is licensed in the State of California
9 and she'll explain to you that when you're licensed as a
10 psychologist in California, you can only practice within the
11 state. Your license doesn't extend to any other state
12 regardless of whether it's over-the-phone sessions.

13 So in 2008, late 2008, early 2009, Mr. Bathen got a job
14 in Boston, Massachusetts. And he wanted to continue his
15 treatment with Dr. Jacobs and Dr. Jacobs explained that, you
16 know, that's illegal. She can't do that with her particular
17 license. And this upset Mr. Bathen. She was getting e-mail
18 from him basically telling him -- excuse me, telling her that
19 he was angry about something and that he wanted her to
20 apologize to him. He even went so far as to threaten to sue
21 her.

22 Dr. Jacobs reached out to her professional liability
23 insurance just to make sure that she was going through the
24 proper steps to terminate, and she tried to actually get
25 Mr. Bathen's address so she could send a formalized letter to
26 him, but he wouldn't provide that to her. Dr. Jacobs was
27 never sued. She never heard from Mr. Bathen after that, and
28 life went on.

1 The years passed as they do. She continued to practice
2 here in California.

3 On June 4th of 2017, Dr. Jacobs got a message on her work
4 voice mail. She didn't check it until the morning of
5 June 5th. She was at home and she was alone; and when she
6 listened to this message, this is what she heard.

7 THE COURT: And waive reporting?

8 MS. SOMERVILLE: Yes, Your Honor.

9 *(Audio recording played; not reported.)*

10 MS. SOMERVILLE: Obviously, Dr. Jacobs was terrorized by
11 that call. She was home alone. She called her husband. He
12 was at work. He's a doctor. Was actually in surgery at the
13 time so she had to leave him a voice message saying, "Please
14 come home."

15 He eventually got that, came home. He was able to access
16 her voice mail system for work and get the phone number, and
17 that number is 1(617)992-4648. He was able to put that in a
18 Google search bar and it came up with the name of Mr. Bathen.

19 Dr. Jacobs will tell you, when she first heard this phone
20 call, she didn't immediately recognize it. When her husband
21 asked her about that name, it was like a light bulb went off.
22 She recognized that voice. She knew what this was about. And
23 they called the police.

24 The Chula Vista Police Department came out to take a
25 statement from her. And Ms. Jacobs and her husband put in
26 place a lot of safety features. She set the alarm at the
27 house all the time. She kept the doors and the windows
28 locked. She told her colleagues at work because she was

1 concerned that, you know, if Mr. Bathen showed up to make good
2 on these threats, that not only her colleagues but their
3 patients could also be in danger.

4 Dr. Jacobs also resorted to having her husband show up to
5 work when she got off to meet her. She contacted the landlord
6 of the building where their practice is, and they had a new
7 security system installed. And they cut down some hedges
8 around the property.

9 Dr. Jacobs had a lot of anxiety about this, she'll tell
10 you. She did not know where Mr. Bathen was. On June 4th --
11 excuse me, June 3rd, Dr. Jacobs again checked her voice
12 messages and this is the call that she had received.

13 *(Audio recording played; not reported.)*

14 MS. SOMERVILLE: Dr. Jacobs then received a second call --
15 or excuse me, a third call two days later. And this is the
16 call that she received again on her work voice mail.

17 *(Audio recording played; not reported.)*

18 MS. SOMERVILLE: Those two voice messages were also
19 reported to the Chula Vista Police Department. As a result of
20 that, Dr. Jacobs went to court and she got a restraining order.

21 The restraining order was granted, and that says that he
22 can have no contact with her whatsoever. It was an additional
23 step that she took to keep herself and her family safe.

24 Now, Dr. Jacobs recognizes Mr. Bathen's voice from those
25 calls. She treated him both in person and over the telephone.
26 And this was over the span of about four years. But that
27 phone number that those calls were made from, you are going
28 to hear evidence that that phone number links back to Mr. Bathen.

1 There was a search warrant and records were obtained from
2 T-Mobile, which is the provider for that phone number. And c
3 the records, there's an address. And that address is an
4 Arlington, Virginia. That is the billing address. That
5 address is Mr. Bathen's home address.

6 You're going to hear that that phone account was a prepai
7 phone. And when you get a prepaid phone, you don't need to
8 provide a name. You don't really need to provide much in the
9 way of identifying information. But we're going to hear
10 evidence that through those cell records, through mapping of
11 the call detail records, the towers that connected to the
12 phones, that those calls were made from the Virginia and
13 Washington, D.C. area. Mr. Bathen works in Washington, D.C.

14 You're also going to hear some jail calls in this case
15 from Mr. Bathen. He was in custody for a couple days here in
16 San Diego County. And in those calls, Mr. Bathen answers so
17 of them and you're going to hear these threatening voice
18 messages again, but he starts his calls with a greeting,
19 "hey," just like in these, "hey, Dr. Jacobs" when he's talki
20 to bailbond agents or his friends.

21 Ladies and gentlemen, Dr. Jacobs was terrorized by her
22 former patient. I'm going to ask each of you to hold him
23 accountable for those threats at the end of this trial and
24 find him guilty.

25 Thank you.

26 THE COURT: Ms. Freeze, did you want to give an opening
27 this time?

28 MS. FREEZE: Please, thank you.

1 May I move about the courtroom?

2 THE COURT: Of course.

3 MS. FREEZE: Thank you.

4 Can I move this, Your Honor?

5 THE COURT: Sure.

6

7

OPENING STATEMENT

8 BY MS. FREEZE:

9 Ladies and gentlemen of the jury, you are going to see
10 that this case is about assumption. Like my grandma always
11 tells me to assume is to make an ass of you and me. You are
12 going to see there's assumption of science. There's
13 assumptions of identity. And that there's been assumptions of
14 intent.

15 You will hear about cell phone towers. The prosecution
16 will have a witness that will testify to the science of cell
17 phone towers. But you will see that this cell phone tower,
18 this testimony is assumption as well. It's not rooted in the
19 science and it's not really rooted in common sense.

20 What the prosecution witness is going to say trying to
21 pinpoint where exactly my client was. And with regards to
22 this address and this phone number linking to my client, you
23 will see that this phone was a burner phone. It had no name
24 connected to it whatsoever. And this address, there's no
25 record of my client living at that address at any point.

26 There's also going to be assumptions regarding identity.
27 Dr. Carolyn Jacobs will testify that 14 years ago, 14 years
28 ago she treated my client. There was a doctor-patient

1 relationship. And that this doctor-patient relationship ended
2 in around 2008, 2009. Almost 10 years ago. And that she's
3 gone on with her life seeing other patients. Hasn't thought
4 anything about my client. Never was concerned about my
5 client. Nothing during their sessions made her fear him at
6 any point.

7 And you will see that at first when she heard this, even
8 though that they -- they had a relationship for four years,
9 they spoke on the phone, they spoke in person, she did not
10 recognize my client's voice whatsoever. It wasn't until she
11 had some dialogue with her husband that she thought that it
12 must be him. It must be him because 10 years ago when we
13 ended our relationship, my client got mad at her, was a little
14 bit upset because -- and you will hear that he believed that
15 she did something wrong, that she perhaps was unethical in her
16 treatment of him and so she -- he brought that to her
17 attention.

18 There was something that was not right about it. And
19 their relationship ended 10 years ago. And she believes that
20 10 years ago this termination of the relationship albeit she
21 wasn't scared of him, this wasn't about that termination
22 whatsoever, that he was threatening to hurt her or became
23 negative with regards to her being in fear that now all of a
24 sudden it must be him. It must be.

25 And there's going to be an assumption regarding intent.
26 The Court is going to read to you at the close of this case
27 the law that applies to this case. And you all took the oath
28 that you will follow that law, that's why we chose you. And

1 that law is going to explain what the People have to meet
2 beyond a reasonable doubt for you to render a guilty verdict.

3 And there's six elements that the Court will read. And
4 all of those elements have to be met, not one or two, not a
5 couple here, all six of those elements of the specific intent
6 crime will have to be met.

7 There has to be the specific intent of imminent --

8 MS. SOMERVILLE: Objection. This is not appropriate for
9 opening.

10 MS. FREEZE: I'll move forward, Your Honor.

11 THE COURT: Thank you.

12 MS. FREEZE: And you will follow that law.

13 And the other law that the Court will read to you is that
14 when there's two reasonable conclusions --

15 MS. SOMERVILLE: Objection, Your Honor.

16 THE COURT: You are arguing a lot.

17 MS. FREEZE: That's fine, Your Honor. I'll move forward.

18 With regards with this assumption regarding intent,
19 there's no doubt, there's not going to be any confusion about
20 where my client lives, where he lives now, where he lived last
21 year and where he lived in 2009. He lives on the other side
22 of the country. He doesn't -- he's nowhere in California.
23 He's nowhere near California. He's literally on the other
24 side of the country.

25 We're here because the People believe that my client made
26 these calls to Dr. Jacobs. That's why we're here. And my
27 client has maintained "I'm not guilty."

28 When you listen to everything, be mindful of the

1 assumptions. Be mindful of the assumptions that the
2 prosecution's witness is making about the science of where my
3 client is.

4 Be mindful of the assumptions that are being relied upon
5 as it pertains to identity: Why she believes that it's him
6 and does that make sense? And be mindful of this intent. And
7 be mindful of the fact that my client lives on the other side
8 of the country and has for almost 10 years. And I urge you to
9 really listen and to be mindful and wait for that law, wait
10 for the direction that the Court will give you. And I'm
11 confident that at the conclusion of this case, that you will
12 see that my client is, in fact, not guilty.

13 Thank you.

14 THE COURT: All right. Thank you. And ladies and
15 gentlemen, we're going to start with the evidence portion of
16 our trial now.

17 Ms. Somerville, if you would call your first witness.

18 MS. SOMERVILLE: Thank you, Your Honor. The People call
19 Gary Jacobs.

20 THE CLERK: You do solemnly state under penalty of perjury
21 that the evidence you give in this matter shall be the truth,
22 the whole truth and nothing but the truth?

23 THE WITNESS: I do.

24 THE CLERK: Please have a seat at the witness stand.

25 And for the record, please state your full name and spell
26 your last name.

27 THE WITNESS: Gary Jacobs, J-a-c-o-b-s.

28 MS. SOMERVILLE: Thank you, Your Honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GARY JACOBS,

called as a witness on behalf of the People,
having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. SOMERVILLE:

Q. Good morning.

A. Good morning.

Q. Can you tell me what you do for a living?

A. I am an ophthalmologist, which is an eye surgeon.

Q. How long have you been doing that?

A. I've been in Chula Vista since 1981.

Q. And are you married?

A. Yes.

Q. And what's the name of your wife?

A. Carolyn.

Q. Same last name?

A. Same last name.

Q. How long have the two of you been married?

A. Since 1977, I think.

Q. You have any kids?

A. Two kids.

Q. And sons, daughters?

A. One son, the oldest, 46; and a daughter who is going
to be 38 this month.

Q. Do they live at home with you?

A. No.

Q. Back on June 5th of this year, what were you doing in

1 the earlier part of the day?

2 A. Was that a Monday?

3 Q. I am not sure, but it's the date that we're going to
4 talk about when you came home.

5 A. Okay. As I said, I'm an eye surgeon. Monday is my
6 surgery day. I start early morning and I finish around noon,
7 one o'clock.

8 And when I finished, I don't keep my phone on me because
9 I'm in surgery, and I got my cell phone around noon, one
10 o'clock when I finished and there was a message from Carolyn.

11 Q. Let me stop you for a moment. I'll ask more
12 questions as you go.

13 A. Okay.

14 Q. So you got out of surgery and then you checked your
15 cell phone?

16 A. Yes.

17 Q. Okay. And you said there was a message from Carolyn.
18 What was it about?

19 A. Well, it was kind of a nervous message and basically
20 asking me to call her as soon as I get this message.

21 Q. Did you do that?

22 A. Yes, I did.

23 Q. Was this out of the ordinary? I mean you've been
24 married for 40-something years.

25 A. Yes. Yes, it was out of the ordinary. She knows I
26 don't answer my cell phone because I don't keep it on me
27 during surgery.

28 Q. And did you call her back?

1 A. I did.

2 Q. Okay. And how did she sound when you called her
3 back?

4 MS. FREEZE: Objection. Calls for hearsay.

5 THE COURT: Overruled. Not what she said but how she
6 sounded.

7 BY MS. SOMERVILLE:

8 Q. How did she sound?

9 A. She sounded quite concerned and nervous, and I told
10 her I was on my way home and --

11 Q. And when you got home, how was she, how was she
12 acting?

13 A. She was quite upset.

14 Q. Did she tell you why she was upset?

15 A. Yes.

16 Q. Did she play any messages for you?

17 A. Yes. She played her message that was on her
18 professional voice mail message.

19 Q. Okay. And how did you react to that?

20 A. I was stunned.

21 Q. What did -- what did you do once you heard that voice
22 message?

23 A. Well, I -- her voice mail system is with AT&T and I
24 knew that AT&T voice mail could be ascertained on mine. I'm
25 not sure Carolyn knew that. But so when I went online, I was
26 able to access not just the voice mail but also the phone
27 number that made the call.

28 Q. Do you recall what that number was?

1 A. No, I don't remember.

2 Q. Would looking at the copy of the AT&T record refresh
3 your memory?

4 A. Yes.

5 MS. SOMERVILLE: May I approach, Your Honor?

6 THE COURT: Yes.

7 BY MS. SOMERVILLE:

8 Q. Mr. Jacobs, I'm going to show you a copy of a piece
9 of paper that has some items that are redacted and then some
10 items that are not.

11 Would you look at that and see if that refreshes your
12 memory as to the phone number.

13 MS. FREEZE: And Your Honor, I would object as to this
14 document as the document being hearsay.

15 THE COURT: It's just to refresh memory.

16 MS. FREEZE: Thank you, Your Honor.

17 THE COURT: So overruled.

18 THE WITNESS: Yes, that's the phone number.

19 BY MS. SOMERVILLE:

20 Q. And we'll go through it step by step, but I'm going
21 to take it away from you.

22 Can you tell me what the area code was? Do you recall?

23 A. 617. The only reason I recall is because I'm looking
24 at it now. I don't have that number memorized.

25 Q. Okay. And do you recall what the rest of the number
26 was?

27 A. No, I don't remember the number.

28 Q. And if I show you this again, could you tell me what

1 the next three numbers are from that phone number?

2 A. 992.

3 Q. And what are the last four?

4 A. 4648.

5 Q. After you got that phone number off of the message,
6 what did you do?

7 A. Well, I took the number and basically threw it into
8 Google searches. And if you search long enough, you can
9 figure out who owns the phone number, basically whose phone
10 number is attached to it, and that's when I found the name of
11 the person.

12 MS. FREEZE: And Your Honor, just for the record, object as
13 to hearsay as to --

14 THE COURT: We're not quite there yet. So overruled.

15 BY MS. SOMERVILLE:

16 Q. So when you did your Google search, were you able to
17 come up with a name associated with that phone number?

18 A. Yes.

19 Q. And what was the name?

20 A. Ben Bathen.

21 MS. FREEZE: And then, Your Honor, objection as to hearsay.
22 Foundation. Authentication.

23 THE COURT: All right. And ladies and gentlemen, that
24 information is not being offered to you as actual proof of who
25 that phone number belonged to. The only reason we're giving
26 that information to you is so you can see what happened as a
27 result of communication of that information. But it is not
28 evidence that that phone number actually belonged to

1 Mr. Bathen.

2 BY MS. SOMERVILLE:

3 Q. Once you got that name, did you tell your wife?

4 A. Yes.

5 Q. And after you shared that with your wife, did either
6 of you contact the Chula Vista Police Department?

7 A. Yes.

8 Q. Did someone come out to your home that day to take a
9 report?

10 A. Yes.

11 Q. Did you provide them with the name Benjamin Bathen?

12 A. Yes.

13 Q. And did you also provide them with the phone number
14 from the call?

15 A. Yes.

16 Q. After your wife got this first voice message, did you
17 notice a change in kind of the way she was acting?

18 A. That was in June, and basically every door and every
19 window in the house was locked. June in San Diego is pretty
20 nice, but everything was locked down tight.

21 Q. Did you do anything to make sure that, you know, your
22 wife was safe during this time?

23 A. We increased communication between us during the day.
24 And I helped her upgrade her security in her office because
25 they changed some of their office policies too.

26 Q. Did you ever go to meet her at work?

27 A. Yes. Yes, I would go early in the morning with her
28 when I was available as she went into work and I go -- meet

1 her at the end of the day so she wouldn't have to come out of
2 the office by herself.

3 Q. Did you become aware at some point of a couple more
4 voice messages that your wife received in the early days of
5 July?

6 A. Yes.

7 Q. And specifically, message on July 3rd and July 5th?

8 A. Yes.

9 Q. Did you hear those --

10 A. Yes.

11 Q. -- messages?

12 And were those messages from the same phone number, the
13 (617)992-4648?

14 A. Yes.

15 Q. Did it appear that your wife was emotionally affected
16 by those calls?

17 A. It was pretty disturbing.

18 Q. Did you and your wife do anything further in terms of
19 taking personal safety measures after she received these last
20 two phone calls?

21 A. I just think we continued to do what we were doing.
22 I mean we called the police again. So the Chula Vista police
23 came out again probably July 6th because it was July 4th
24 holiday, so I think there was some break in terms of them
25 coming out.

26 But they came out and they went through this kind of
27 security suggestions and reinforcing what the first police
28 officer did in June. We tried to follow those.

1 Q. Did your wife ever go to court to get a restraining
2 order?

3 A. Yes.

4 Q. Did you go with her?

5 A. Yes.

6 Q. And do you recall what month that was in?

7 A. I don't. It was after the July period of time.

8 Q. Okay. And after getting those messages on the 3rd
9 and the 5th, did you continue to go, you know, meet your wife
10 or show up with her?

11 A. Mostly in the end of the day because she'll work a
12 little later in the evening and so I was finished with my
13 surgical cases for my office hours and I would meet her at her
14 office.

15 Q. Would the doors and windows -- were they still
16 closed?

17 A. In the home?

18 Q. Yes.

19 A. Unfortunately, yes. We were on lockdown.

20 Q. What was -- what was that like to have to --

21 A. We were living in a cocoon.

22 Q. I'm sorry?

23 A. We were living in a cocoon. You know, the windows
24 and doors were locked and the air-conditioning was on. It
25 was, you know, just not San Diego. It's pretty restrictive
26 and Carolyn was afraid after getting those messages like she
27 got. She was very, very afraid.

28 MS. SOMERVILLE: Nothing further, Your Honor.

1 THE COURT: Ms. Freeze.

2 MS. FREEZE: Thank you, Your Honor. Just one moment.

3 THE COURT: Sure.

4

5

CROSS-EXAMINATION

6 BY MS. FREEZE:

7 Q. Good morning, Dr. Jacobs.

8 A. Good morning.

9 Q. Now, Dr. Jacobs, you testified that you've resided in
10 Chula Vista since 1981; is that correct, sir?

11 A. Yes.

12 Q. At no point you resided in Washington, D.C. or on the
13 East Coast?

14 A. I was born in D.C. and I lived in D.C. until 1980.

15 Q. Okay.

16 A. I lived in the East Coast until 1980.

17 Q. You haven't resided in the East Coast since 1981. Is
18 that fair to say?

19 A. I left the East Coast in 1979, '80.

20 Q. Now, your adult children, they don't live at home;
21 correct?

22 A. Correct.

23 Q. And they don't work in or around your place of --
24 place of employment or your wife's place of employment;
25 correct?

26 A. Correct.

27 Q. Now, when you spoke with your wife on or about
28 June 5th of last year, you were -- you became aware that this

1 voice message had been left on her work -- like her work
2 confidential voice mail; correct?

3 A. Correct.

4 Q. Where other clients leave messages; correct?

5 A. That's my understanding.

6 Q. Other patients, if you will?

7 A. That's my understanding.

8 Q. Is it further your understanding that she doesn't
9 provide to her patients like a personal cell phone or another
10 way of communicating with her?

11 A. That's my understanding, that's correct.

12 Q. And is it further your understanding that your wife
13 doesn't provide to patients her residence address?

14 A. That's my understanding.

15 Q. Okay. She doesn't disclose personal information
16 about herself and your family. Fair to say?

17 A. That would be my understanding, although we might be
18 in the yellow pages or, you know, in terms of general
19 information.

20 Q. And so after this first voice message system, voice
21 message, you, in fact, were the one that contacted Chula Vista
22 Police Department; correct?

23 A. No. Carolyn made the contact.

24 Q. Okay. So -- but isn't it true that you actually were
25 the first one that made the call and then you handed the call
26 over to her?

27 A. I don't think so.

28 Q. Okay.

1 A. But it's possible, but I don't have that
2 recollection. I think -- I only did the Google search.

3 Q. Okay. But fair to say it's been over a year; right?

4 A. Correct.

5 Q. Okay. And -- but if the call -- if there was a
6 reporting of the call and you were the initial person that
7 made the call, you would agree with that, with that
8 information?

9 A. I mean if you said I'm the one that made the initial
10 call to the Chula Vista Police Department?

11 Q. Yes. Yes, sir.

12 A. I mean could that be a possibility?

13 Q. Yes, sir.

14 A. I mean I guess it's a possibility. I just don't have
15 a recollection of it.

16 Q. That's fair. Thank you.

17 And you didn't actually -- you or your wife didn't
18 really -- the initial contact with law enforcement, it wasn't
19 like a 911 call; correct? It was just like a call to the
20 Chula Vista Police Department?

21 A. My recollection is, yeah, I think it was just a call
22 to the -- it wasn't the 911.

23 Q. Okay. And then -- and since these calls were made,
24 these voice messages, your wife has continued to practice;
25 correct?

26 A. Yes.

27 Q. She didn't, like, close her business or anything like
28 that; correct?

1 A. She secured the business --

2 Q. But she --

3 A. -- office because she's in an office with other
4 therapists; so they basically lock down. They created a
5 doorbell system where people couldn't come and go without --

6 Q. Right. And that's not my question.

7 My question, sir, is she continued to practice; correct?

8 A. Yes.

9 Q. And she's had, fair to say, several hundred clients a
10 year, give or take?

11 A. I'm going to defer on that. I don't know the
12 numbers.

13 Q. Okay. Now -- and at no point between June 5th of
14 last year and today this gentleman has at any point come to
15 your residence; correct?

16 A. Not that I'm aware of.

17 Q. And this gentleman has at no point come to your
18 wife's place of work; correct?

19 A. Not that I'm aware of.

20 Q. And as far as you're aware, your wife -- my client
21 was a patient of your wife and that relationship ended quite
22 some time ago; correct?

23 A. That's my understanding.

24 Q. Approximately nine, 10 years ago?

25 A. That might be true. I think that's somewhere along
26 the lines.

27 Q. Okay. And, in fact, when -- when your wife called
28 you during your busy surgery day, she didn't say anything to

1 you like this particular client contacted me? She didn't
2 know; correct?

3 A. Correct.

4 Q. She didn't recognize the voice initially; correct?

5 A. Not initially.

6 Q. And as far as you are aware, your wife treated --
7 they had a doctor-patient relationship for about four, five
8 years?

9 MS. SOMERVILLE: Objection. Foundation.

10 THE COURT: Sustained.

11 BY MS. FREEZE:

12 Q. If you know.

13 A. I'm not sure.

14 Q. And prior to this restraining order being submitted
15 by your wife, at no point between June of last year and around
16 September of last year was there any contact, physical,
17 in-person contact, by my client to your family; correct?

18 MS. SOMERVILLE: Objection. Foundation.

19 THE COURT: Sustained.

20 MS. FREEZE: Foundation. Just asking him if my client
21 contacted their family.

22 THE COURT: Foundation.

23 BY MS. FREEZE:

24 Q. Okay. But let me back up. So there was the message
25 in June; correct?

26 A. Yes.

27 Q. And then there was the two in early July; correct?

28 A. Yes.

1 Q. And then no more calls?

2 A. As far as I'm aware of.

3 Q. Okay. And you said you were present during the
4 restraining order hearing; correct?

5 A. Yes.

6 Q. Okay. Did you testify?

7 A. No.

8 Q. Were you just in the audience?

9 A. Yes.

10 Q. Okay. And my client was present as well; correct?

11 A. Yes.

12 Q. And at no point did he motion or threaten you;
13 correct?

14 A. No.

15 Q. And at no point during the proceeding he motioned or
16 threatened towards your wife, if you are aware?

17 A. None that I was aware of.

18 Q. He didn't follow you to your car, behave in any kind
19 of erratic manner; correct?

20 A. Not that I'm aware of.

21 Q. And he had -- had an attorney defend him during that
22 proceeding; correct?

23 A. Correct.

24 Q. Denying that he made those calls?

25 MS. SOMERVILLE: Objection. Hearsay.

26 THE COURT: Sustained.

27 MS. FREEZE: Okay.

28 /////

1 BY MS. FREEZE:

2 Q. Do you recall Officer De La Pena coming to your home
3 on or about June 5th of last year?

4 A. Yes.

5 Q. And do you recall having dialogue with him and
6 sitting down with him making the report?

7 A. Yes.

8 Q. Okay. Is that fresh in your mind?

9 A. Well, it's a year old so I know more what I had for
10 breakfast today than that, but I have a general recollection
11 of that.

12 Q. And he actually came out to the residence, not the
13 place of employment; correct?

14 A. Correct.

15 Q. Mr. -- excuse me, Officer De La Pena did not go, as
16 far as you're aware, to your wife's office; correct?

17 MS. SOMERVILLE: Objection. Foundation.

18 THE COURT: As far as you're aware.

19 THE WITNESS: I believe they did started doing -- I forget
20 the terminology, but the Chula Vista police started driving by
21 more frequently and I think he might have been part of that.

22 BY MS. FREEZE:

23 Q. And I think I wasn't clear so I apologize, Doctor.

24 When you met with Dr. De La Pena, you and your wife --
25 excuse me -- Officer De La Pena at your home, you provided
26 Officer De La Pena the recording; correct?

27 A. No. He recorded it himself off of the website.

28 Q. Off of the website. So that website was accessed and

1 that's the website where the messages go?

2 A. AT&T has an online voice mail messaging system. So
3 if you get it on your phone, you can also access it online,
4 and so he recorded that himself.

5 Q. Okay. But he himself, as far as you know, when he
6 was in your residence before you and your wife, you don't
7 recall him contacting anybody directly from the voice message
8 system?

9 A. I'm -- I don't understand your question.

10 Q. You don't recall him actually going to the voice
11 message system or being on the call or calling himself, he got
12 it via you through the online portal?

13 A. Yes, we wound up going online, typing the AT&T --
14 Carolyn's, you know, business number and it lists all the
15 messages were there and we played that one message for him and
16 then he recorded it as he was observing it online.

17 Q. Thank you. And fair to say that your wife -- this
18 was an unexpected call; correct? This message?

19 A. Which call?

20 Q. The first one on June 5th.

21 A. I would say so.

22 Q. Okay. There wasn't anything recent where she said I
23 had an issue with a client recently or a patient and -- and it
24 was kind of stemming off of that patient session?

25 MS. SOMERVILLE: Objection. Hearsay.

26 THE COURT: Sustained.

27 BY MS. FREEZE:

28 Q. Fair to say it was unexpected?

1 MS. SOMERVILLE: Objection; asked and answered.

2 THE COURT: Overruled.

3 BY MS. FREEZE:

4 Q. And as far as you know, Dr. Jacobs, your wife, when
5 this name came up, she was under the impression -- and if you
6 don't know, obviously we're -- you testified as to what you
7 know, but she was aware that this patient didn't live in
8 California anymore; correct?

9 MS. SOMERVILLE: Objection; foundation.

10 THE COURT: Hearsay. Sustained.

11 BY MS. FREEZE:

12 Q. You were sitting there when your wife was interviewed
13 by Officer De La Pena; correct?

14 A. Yes.

15 Q. Okay. Was your -- if you know, was your wife ever
16 sued by my client?

17 A. I have no knowledge.

18 Q. Okay. Did your wife -- does your wife ever speak to
19 you about patients?

20 A. No.

21 Q. And you testified -- just one last question,
22 Dr. Jacobs.

23 You testified that you and your wife was -- were on
24 lockdown; correct?

25 A. My words.

26 Q. Okay. But at no time did any -- anybody come and try
27 to break into the home or anything like that, if you know?

28 A. Correct.

1 Q. Okay. And up until the time that you went to the
2 restraining order hearing last year, you had never seen
3 Mr. Bathen; correct?

4 A. Correct.

5 MS. FREEZE: Nothing further. Thank you.

6 THE COURT: Ms. Somerville.

7 MS. SOMERVILLE: Briefly. Thank you.

8

9

REDIRECT EXAMINATION

10 BY MS. SOMERVILLE:

11 Q. Dr. Jacobs, about that restraining order hearing.
12 You were asked about whether you testified or not, and I
13 believe you said you did not; correct?

14 A. Correct.

15 Q. Did your wife testify at that hearing, if you recall?

16 A. I think they might have asked her some questions,
17 but -- you know, they did. They -- I mean, she didn't come up
18 to the thing. We were all seated in that area, but -- of the
19 room, but I think they did ask her some questions, yes.

20 Q. And by "that area," you mean the area where the
21 audience sits?

22 A. I think so. My recollection is that, yes.

23 Q. Okay.

24 MS. SOMERVILLE: Thank you. Nothing further, Your Honor.

25 THE COURT: Anything further?

26 MS. FREEZE: No, Your Honor. Thank you.

27 THE COURT: May this witness be excused?

28 MS. SOMERVILLE: Yes.

1 THE COURT: Thank you, sir. You may step down.

2 Ladies and gentlemen, we're going to take a little earlier
3 break this morning than we ordinarily do. We're going to take
4 our 15 minutes at this time and then we'll try to go to noon.
5 But if anybody is uncomfortable, we will, of course, take
6 another break. That includes everybody in the courtroom. But
7 we're going to try and make it until noon after that.

8 So remember not to form or express an opinion, don't talk
9 to anybody about any subject connected with this matter. Stay
10 off the Internet, please, either communicating or receiving
11 information about this case. And I'll see you in 15 minutes.

12 *(The following proceedings were had between the Court*
13 *and counsel out of the presence and hearing of the*
14 *jury.)*

15 THE COURT: All right. The jury is gone.

16 And just for the record, we had a brief sidebar
17 conference. I'm not going to accept any further argument, but
18 I did issue a ruling on the therapist relationship that we had
19 discussed this morning.

20 I looked at *People v. Warden*, 53 Cal.3d 522. It's a 1991
21 case. And at first blush, you might think it has no bearing
22 on this case whatsoever, but it is more of a Tarasoff kind of
23 analysis of the psychotherapist relationship and what can be
24 disclosed at a criminal trial in that context.

25 And really here, even though the psychotherapist holds
26 both the privilege and is the alleged victim of this crime, we
27 do kind of have a crossover. It's a little unusual.

28 So as I told you at sidebar, my ruling is that there can't

1 be a disclosure of any of the confidential communications
2 during therapy, that I think the privilege still stands unless
3 there was any kind of exception developed during testimony.
4 But that the fact that Mr. Bathen was a patient can be asked.

5 The very general nature of the testimony, interpersonal
6 relationships, was the proffer. That can be asked. And the
7 fact that the threats to sue and the anger, which really was
8 not -- I'm not even sure it's covered by the privilege, but if
9 it is covered, then I would allow that. And the reason I'm
10 allowing these few exceptions is I think it does go to the
11 exception concerning this crime.

12 MS. SOMERVILLE: I just have one question about -- because
13 Ms. Freeze under opening statement had said that he never made
14 any threats during these sessions.

15 THE COURT: I'm not sure that it opens the door.

16 MS. SOMERVILLE: No, no, no. I just didn't want -- if I
17 don't believe that she should be able to then delve into what
18 they were talking about.

19 THE COURT: She certainly may if she wants. The client
20 holds the privilege, but then the privilege is waived. Yeah,
21 okay. If it has no bearing on the case. I mean the relevancy
22 would be the only issue.

23 MS. SOMERVILLE: Right.

24 THE COURT: But Ms. Freeze has the right to -- her client
25 can waive the privilege any time. He's the holder.

26 MS. FREEZE: And he has been, so --

27 THE COURT: You got that on the record.

28 MS. FREEZE: Just want to make sure.

1 THE COURT: No, your objection is there. That's why I know
2 there's never been a waiver and that's why I'm trying to do my
3 best to carve out the little exception.

4 MS. FREEZE: I appreciate that, Your Honor.

5 THE COURT: All right. Thank you.

6 MS. FREEZE: Thank you for taking the time to do that.

7 THE COURT: Sure.

8 We'll be in recess. Thank you.

9 *(Recess taken.)*

10 *(The following proceedings were had in open court in*
11 *the presence and hearing of the jury.)*

12 THE COURT: Your next witness, Ms. Somerville.

13 MS. SOMERVILLE: Thank you, Your Honor. The People call
14 Carolyn Jacobs.

15 THE CLERK: Do you solemnly state under penalty of perjury
16 that the evidence you give in this matter shall be the truth,
17 the whole truth and nothing but the truth?

18 THE WITNESS: I do.

19 THE CLERK: Please have a seat at the witness stand.

20 And for the record, please state your full name and spell
21 your last name.

22 THE WITNESS: Carolyn Frances Jacobs, J-a-c-o-b-s.

23

24

CAROLYN FRANCES JACOBS,

25

called as a witness on behalf of the People,

26

having been first duly sworn, testified as follows:

27

28 //

DIRECT EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BY MS. SOMERVILLE:

Q. Good morning.

A. Good morning.

Q. What do you do for a living?

A. I am a licensed psychologist in private practice in Chula Vista, California.

Q. How long have you been a licensed psychologist?

A. Since 1998.

Q. What did you -- did you have a career before that?

A. Yes. I was a licensed marriage and family therapist for -- since '88. In '98. And prior to that I was a registered nurse for 14 years in the operating room.

Q. Do you have a specific degree to be a psychologist?

A. Yes. It's a psychology degree, license by the State of California.

Q. Where did you go to school?

A. To Alliance International University in San Diego.

Q. And you said you are licensed; correct?

A. Correct.

Q. Do you have to take any type of boards or exams to get a license?

A. Yes. You have to have an oral exam and a written exam, and then you have to have, once you're licensed, continuing education, you know, periodically every time your license is renewed all the way through your career, so --

Q. What do you mean by the continuing education that you have to get to keep up your license?

1 A. Well, you just have to have certain trainings and
2 courses that keep you up on, you know, on what's going on in
3 the field and -- and that, so in order to renew your license
4 every two years.

5 Q. As far as your license goes, where are you allowed to
6 practice?

7 A. Well, in the State of California, licensed by the
8 State of California.

9 Q. Can you practice outside of California?

10 A. No. Your license stops at the border.

11 Q. Is that true stopping at the border even over, say,
12 in telephone?

13 A. Well, if you're practicing psychology, you have to be
14 licensed in the state that you are practicing psychology. You
15 can have, you know, phone contact or that sort of thing. But
16 actually doing therapy, it has to be within the State of
17 California.

18 Q. Okay. And the practice that you currently have, do
19 you specialize in any -- you said you were a marriage and
20 family therapist previously. Do you still do that type of
21 treatment?

22 A. I work with individuals, couples and families. Sort
23 of a broad clinical practice. And so I'm trained to do -- to
24 work with all components of individuals and families.

25 Q. And is your practice here in Chula Vista?

26 A. Yes, it is.

27 Q. And how long have you been at that particular
28 location?

1 A. Since 1995.

2 Q. Can you kind of describe for us how that office is
3 set up. I mean there are other therapists there, doctors?

4 A. Right. There are other therapists. They're licensed
5 social workers, marriage and family therapists. They are --
6 we're all sole practitioners so we all have our own practice,
7 but we share space in the office space that we have there. So
8 we have a general waiting room area and then people are --
9 different therapists come and go throughout the week.

10 Q. Typically how long is a session that you have with a
11 client?

12 A. Usually 45 to 55 minutes.

13 Q. And do you ever do therapy sessions over the phone
14 with patients here in California?

15 A. Yes.

16 Q. Would those typically be the same length, 45 to 55
17 minutes?

18 A. Usually, usually 30 to 45 minutes.

19 Q. How do new patients find out about you?

20 A. Well, a lot of it is by referral, referral from other
21 people or other colleagues. I am also on quite a few provider
22 panels and so I'll get referrals from -- for example, employee
23 assistant programs will refer because I am an approved
24 provider with their plan.

25 There is -- you know, I have a website and so people can
26 find me on my website and so -- but primarily, it's -- in my
27 practice, because I've been at it so long, a lot of it is
28 self-referral or referrals from other patients who have

1 referred people to me, so --

2 Q. Do other colleagues, do they refer people to you?

3 A. Yes, absolutely.

4 Q. Can you kind of explain how that works?

5 A. Well, usually I'll get a call and -- and I have a
6 private confidential private voice mail service, and there
7 will be a message on the call and then I'll call the person
8 back and they'll tell me where they received the referral,
9 like, Dr. Smith, you know, recommended me.

10 Or sometimes I get referrals from psychiatrists who are
11 treating people with medication and then they want them to be
12 also in counseling services, sort of a co-treatment protocol,
13 so --

14 Q. So just so I'm clear kind of, what's the difference
15 between a psychologist and a psychiatrist?

16 A. A psychiatrist is a medical doctor; so he or she has
17 a medical degree and they're specialized mainly in brain
18 chemistry and they manage -- primarily they manage
19 medications.

20 But a psychologist is a doctor of psychology, but I can't
21 prescribe medications, but many times the model that works
22 well is if someone needs to be on medication management, the
23 psychiatrist will either refer the person to a psychologist to
24 be in counseling concurrently with their medication
25 managements. It seems to be the most effective way to work
26 with people.

27 And then sometimes if I'm seeing someone and I think that
28 they would benefit from a medication evaluation for their

1 anxiety or depression or whatever is going on, then I would
2 defer back to the psychiatrist.

3 Q. You mentioned that you have a confidential voice
4 message system set up.

5 A. Correct.

6 Q. How long have you had that?

7 A. Oh, wow, I really can't say for sure. My primary way
8 of, you know, of receiving referrals has been through -- and
9 for patients to reach me has been through my -- it's a
10 messaging service through AT&T.

11 Q. Do they -- do your patients also reach you, say, if
12 they need to reschedule or something along those lines?

13 A. Uh-huh, that's the way -- that's the way they could
14 reach me. They call my messaging service. They leave a
15 message with their contact information and then I call them
16 back.

17 Q. Do you ever give them your personal cell phone
18 number?

19 A. No, no.

20 Q. Do you ever give them your home number?

21 A. No, no. Although I have sometimes dialed back on my
22 home number or on my cell phone number, not realizing that
23 they can have access to that because I dialed them, but -- but
24 I never -- I don't unless there's something that might be a
25 crisis situation, I might give them my cell phone number if
26 they needed to reach me.

27 Q. What's your -- what's the phone number that you have
28 for your voice message system?

1 A. Do you want the number? (619)525-7747.

2 Q. And I know you can't say how long you've had that set
3 up, but has it been the same number for a substantial period
4 of time?

5 A. Yes, yes. I think it's been my only number actually
6 since I've been in practice.

7 Q. So can you just describe how you access that? I mean
8 do you just punch in the number or how do you get your voice
9 messages?

10 A. I dial that number and then I have to put in a code
11 and then it tells me to -- "to hear your messages, push one,"
12 like that; so -- and then I can push it and then the message
13 comes online and then I can -- I get the message.

14 Q. Just in a general average week, do you have a normal
15 time when you check your work messages?

16 A. I try to check them on a business day, the next
17 business day because I -- my practice is I usually work until
18 7:00 in the evening, so I check my messages the day before
19 that I received that day, the next morning, the next business
20 morning.

21 Q. And so how many days a week do you work?

22 A. Right now I'm working three, three full days a week,
23 Tuesdays, Wednesdays and Thursdays.

24 Q. And what time do you generally go in? I know you
25 said you leave around 7:00.

26 A. I usually go in -- my first appointment is at noon on
27 Tuesday, Wednesday, Thursday. And my last appointment is at
28 7:00 p.m.

1 Q. When you're having sessions with patients, do you
2 tend to talk about -- divulge personal details of your life?

3 A. Do I?

4 Q. Yes.

5 A. Back to the patient?

6 Q. Yes.

7 A. About my life?

8 Q. Yes.

9 A. No. No, I don't tend to do that. Sometimes there
10 are self-disclosure as a therapist is appropriate at times,
11 but only if it has a therapeutic -- if there's a therapeutic
12 intention to do that.

13 Q. Are there, you know, kind of standard boundaries that
14 are observed between, you know, a therapist and their patient?

15 A. Yes. Boundaries are -- are a major part of our
16 training, you know, to manage boundaries.

17 Q. Just kind of in general, describe what you mean by
18 that, by managing boundaries.

19 A. Things like you wouldn't receive -- you know, you
20 wouldn't receive gifts necessarily from a patient. You
21 wouldn't go into a business dealing with a patient. You
22 probably wouldn't -- I'm thinking what kind of situation that
23 is. I've been -- I've had to, you know, pull my boundaries
24 back.

25 For example, it depends on the clinical issues and the
26 therapeutic issues that you are dealing with, but you wouldn't
27 necessarily go to someone's, like, wedding or a celebration
28 for their child. You know, you just -- there's certain

1 boundaries that you need to keep clear between yourself and
2 your patients and your life and their life.

3 Q. At some point during your practice, did you begin
4 seeing someone or treating them by the name of Benjamin
5 Bathen?

6 A. Yes, I did.

7 Q. And do you recall around what year that was?

8 A. Around 2004.

9 Q. Do you see Mr. Bathen here in court today?

10 A. Yes.

11 Q. And can you just for the record describe the color of
12 shirt he's wearing?

13 A. It's a blue shirt.

14 MS. SOMERVILLE: Would the record reflect that the witness
15 has identified Mr. Bathen?

16 THE COURT: Where is he sitting?

17 BY MS. SOMERVILLE:

18 Q. Can you tell us where he's seated in the courtroom as
19 well?

20 A. In the corner.

21 THE COURT: Yes, the record can reflect the identification.

22 MS. SOMERVILLE: Thank you, Your Honor.

23 BY MS. SOMERVILLE:

24 Q. When you began treating Mr. Bathen in the
25 therapist-client relationship, where did you first have your
26 treatment sessions with him?

27 A. In Chula Vista in my office.

28 Q. And how often would you see him in your office?

1 A. Well, I think it's been -- when I -- I -- I think I
2 should explain, I think it was -- I saw him five sessions,
3 average five sessions from 2004 until 2008, 5,000 -- five
4 sessions a year over that period.

5 Q. And would those be the typical length of the
6 sessions -- and these are in-person sessions?

7 A. Yes.

8 Q. And would those be the typical amount of time that
9 you explained earlier, 45 to 55 minutes?

10 A. Uh-huh.

11 Q. Is that a "yes"?

12 A. Yes, yes.

13 Q. Do you recall how it was that Mr. Bathen first came
14 to you as a patient?

15 A. I think it was a referral. He had a referral from
16 someone from his -- back east, I think. I don't know if it
17 was a colleague or another patient, but I think that's how he
18 located me, I think.

19 Q. And do you remember -- you say "back east." Do you
20 remember any specific area back east?

21 A. I'm recalling it's Washington, D.C. area possibly. I
22 had done some graduate training at Georgetown there, and I had
23 some colleagues back there, and I think that that's where the
24 original -- I think that's where the referral came from.

25 Q. And when Mr. Bathen came to see you, just in general,
26 what was it that he was seeing you for?

27 A. Primarily just adjustment issues. He had recently
28 moved to the West Coast and he started a new job and was a lot

1 of stress and just trying to get settled in.

2 Q. At some point, did you begin during that 2004 to 2008
3 period having phone sessions with Mr. Bathen?

4 A. Yes, I did.

5 Q. Why did that happen?

6 A. Well, he moved -- he moved to L.A. and he was
7 still -- he was starting a new job. And he wanted to continue
8 to have contact, but it was really hard for him to come from
9 L.A. to Chula Vista and he was working a lot of hours
10 apparently he was saying, so he asked if we could do it -- you
11 know, have contact through the phone, phone consultation.

12 Q. And as you explained earlier, would those be, you
13 know, 30- to 45-minute long sessions?

14 A. Probably 45 to 55 minutes -- 30 to 45 minutes. Just
15 depends a lot of what -- you know, what the patient's schedule
16 is.

17 Q. And if you can tell us, how often would you have
18 phone therapy sessions with Mr. Bathen when he was in
19 Los Angeles?

20 A. Well, you know, I don't have access to my records
21 because every seven years we're allowed to purge our records
22 and so I had -- in 2014, I had -- if you have seven years from
23 the time you see your client, you can close the cases and you
24 can purge the records.

25 So I don't have those specific records in front of me and
26 so I am -- a lot of this I'm having to try to pull back up out
27 of my head; so -- so what was your question again? I'm sorry.

28 Q. Just a general ballpark, if you can, you know, how

1 many sessions would you have with him over the phone during
2 this time? You said you had somewhere like around five
3 sessions in person with him?

4 A. Uh-huh.

5 Q. Do you recall?

6 A. I think I had more sessions in person with him. I
7 think it was five sessions -- about five sessions a year over
8 that five-year period. Maybe five or six sessions with him
9 over the phone.

10 Q. Is that a year or is that in total?

11 A. In total, yeah.

12 Q. So that I'm clear, it's -- you recall about five
13 sessions a year during that five-year period and then about
14 five to six sessions over the phone with him during that same
15 period?

16 A. Right in that ballpark.

17 Q. At some point, did you have to end the doctor-patient
18 relationship with him?

19 A. Yes, I did.

20 Q. Do you recall what year that was?

21 A. 2008, I think.

22 Q. Was that -- do you remember what time of year it was,
23 early in the year, the summer, late 2008?

24 A. I think it was around September.

25 Q. And why was it that your therapy sessions ended?

26 A. Well, he had -- my recollection was that he got a new
27 job back east and I think he was moving back to Boston and --
28 and so I -- I think we had maybe a couple of -- maybe one or

1 two other sessions after he moved back just in terms of
2 continuity of care, so -- and I had referred him to find a
3 therapist in his area and I'd refer him three -- three
4 referrals, because I can't -- once -- because my license stops
5 at the border, I would not have been able to continue
6 treatment with him out of state.

7 Q. What do you mean? You said you had a few more
8 sessions with him for continuity of care? What does that
9 mean?

10 A. Right. The idea that because he was starting a new
11 area and he would have had to -- you know, there was typical
12 adjustment issues that rather than his -- drop a patient
13 completely, immediately, sometimes it's okay to continue to
14 support with continuity of care, with the principle of
15 continuity of care where you are not just abandoning your
16 client.

17 And so as I wanted to make sure that he had referrals,
18 appropriate referrals so that he could -- he could continue on
19 with his therapy in the other area.

20 Q. Is that something that your license and your field of
21 work allows you to do?

22 A. Yes. Yes.

23 Q. And that would obviously be for the benefit of a
24 patient?

25 A. Correct, yes. It's just so that it's not dropped
26 totally and then somebody is just left trying to find their
27 own resources or their -- you know, their own support and it's
28 appropriate to help them connect up with a therapist in the

1 area that they're moving to.

2 Q. So after, you know, you provided some referrals and
3 you had, you know, these continuity of care sessions with him
4 over the phone, did you make it clear that you couldn't
5 practice any more with him outside of the State of California?

6 A. Yes.

7 Q. And how did he take that?

8 A. He was -- he was not happy about it. And wanted --
9 and he -- he was a little agitated in one of the last sessions
10 that we had.

11 MS. FREEZE: Objection. Calls for speculation.

12 THE COURT: Overruled.

13 BY MS. SOMERVILLE:

14 Q. I mean, what did you do at that point?

15 A. Well, I just stated what -- you know, what the, you
16 know, the standard of care was and encouraged him to -- to
17 seek out, you know, the referrals that I had given him, and
18 that's basically it.

19 Q. Was that the last time you had a phone session with
20 him?

21 A. Yes.

22 Q. Did you ever hear from Mr. Bathen again around that
23 time?

24 A. Not -- well, a few -- I think it was a couple of
25 months later, I received -- I started receiving some e-mails
26 from him.

27 Q. And so a couple months later, do you remember if that
28 was, like, still in 2008 or had it moved into 2009?

1 A. It had gone into 2009, yeah. I think it was around
2 February is when I started receiving the e-mails in 2009.

3 Q. And what were these e-mails about?

4 A. Well, that he was -- he was upset with me. He -- he
5 referred to a session that he felt --

6 MS. FREEZE: Objection. Calls for privilege.

7 THE COURT: No content, please --

8 THE WITNESS: No content.

9 THE COURT: -- of a session.

10 BY MS. SOMERVILLE:

11 Q. So he was upset with you?

12 A. He was upset with me.

13 Q. And did he want you to do anything to, you know, try
14 and appease him or --

15 A. He wanted me to write -- apologize to him.

16 Q. Did you know, I mean, what this was about?

17 A. I was -- I was -- never got clarity on it. I didn't
18 understand what he was asking, you know, what he was
19 specifically upset about, what he expected me to do.

20 Q. What did you do in response to getting these e-mails?

21 A. Well, I decided to go ahead and call my professional
22 liabilities lawyer. You know, as a professional psychologist,
23 you have to have liability -- professional liability
24 insurance. And there are people that you can consult with.
25 So I called my professional liability attorney and I sort of
26 ran everything by him, and he basically --

27 Q. Why did you do this? I mean what about these e-mails
28 made you then reach out to your professional liability

1 attorney?

2 A. Just the -- there was just -- there was -- I had an
3 uneasy feeling. There was -- he was making demands that I
4 didn't understand what he was asking for and I -- my
5 recollection of what he was saying was -- wasn't the same as
6 his, and so I -- you know, I felt like this was potential
7 termination issues and I wanted to make sure that ethically I
8 was in good standing and so I called my professional liability
9 counselor there and I explained what was going on, and he
10 reassured me that I had done everything that I was required to
11 do.

12 Q. You mentioned "termination."

13 A. Uh-huh.

14 Q. So what are you talking about when you mention that?
15 You said that you wanted to, you know, talk about termination,
16 I believe.

17 A. Termination with the -- I'm sorry.

18 Q. With -- when you contacted the professional
19 liability --

20 A. I wanted to verify that I was doing everything I
21 should ethically in terms of terminating the relationship, and
22 I explained to him the issues with him being out of state.

23 And he said -- and I informed him what I had done in terms
24 of giving him referrals and I just wanted to run it by him to
25 see that I was, you know, in good practice in doing what I
26 should have been doing, you know, in the termination process.

27 And he reassured me that I was okay. That I was doing
28 everything --

1 MS. FREEZE: Objection. Calls for hearsay. Motion to
2 strike as it pertains to what the professional liability
3 attorney advised.

4 THE COURT: Sustained. It will be stricken.

5 BY MS. SOMERVILLE:

6 Q. Did you ever try to formally terminate or send him
7 any type of notice about, you know, terminating this practice?

8 A. Yes, I did actually. And I needed his -- his new
9 address to do that because I wanted to send him a formal
10 termination letter, and he would not give me his new address.
11 He would only contact me on e-mails.

12 Q. Did he ever make any type of threats to you on the
13 e-mails?

14 A. No, no.

15 Q. Did he ever mention a lawsuit?

16 A. Yes.

17 Q. Okay. What was that about?

18 A. He said that if I didn't either sit -- either sit
19 down with him on a face-to-face with an apology where I had
20 to -- I had to sit and listen and not make any comments until
21 he was finished to apologize, and so -- and if I didn't do
22 that, then he was going to report me to my professional
23 organization, American Association of Marriage and Family
24 Therapy, and make a complaint against me.

25 Q. Did the e-mails from Mr. Bathen eventually stop?

26 A. They did.

27 Q. Do you recall when that was?

28 A. Let me think. February -- I think it was around

1 April.

2 Q. So this went on for a couple months?

3 A. Back and forth, yeah.

4 Q. Were you ever served with any type of lawsuit by
5 Mr. Bathen?

6 A. No.

7 Q. Did you ever have any type of discipline proceedings
8 or anything like that through the medical board?

9 A. No.

10 Q. After these e-mails stopped in April of 2009, did you
11 continue to see patients in your private practice?

12 A. Uh-huh.

13 Q. Yeah? Yes?

14 A. Yes. I'm sorry.

15 Q. That's okay. She's typing it down.
16 You're married, right, to Gary Jacobs?

17 A. Correct.

18 Q. And you have a daughter?

19 A. Uh-huh.

20 Q. Does she -- does she have a family of her own?

21 A. She does. She's married with two little girls, a
22 seven-year-old --

23 MS. FREEZE: Objection. Calls for relevance.

24 THE COURT: Overruled. Just at this point overruled.

25 BY MS. SOMERVILLE:

26 Q. And, you know, this year were you living in
27 Chula Vista?

28 A. Say again.

1 Q. Excuse me. June of last year were you living in
2 Chula Vista?

3 A. Yes, uh-huh.

4 Q. On the morning of June 5th of 2017, did you check
5 your confidential work voice mail?

6 A. Yes, I did.

7 Q. Where were you when you checked that voice mail?

8 A. I was in my kitchen.

9 Q. Do you remember around what time of day this was?

10 A. It was around -- probably around 8:30 in the morning.

11 Q. And was there anyone at home with you during that
12 time?

13 A. No.

14 Q. Did you have any messages that morning?

15 A. Yes, I did.

16 MS. SOMERVILLE: Your Honor, at this time I would ask to
17 play Court's Exhibit 1 for identification.

18 *(Court's Exhibit No. 1 was identified.)*

19 I also have a transcript that's been marked as Court's
20 Exhibit 1A for identification as well and transcripts prepared
21 for the jury.

22 *(Court's Exhibit No. 1A was identified.)*

23 THE COURT: Any objection?

24 MS. FREEZE: Just renewing my objection from earlier with
25 regards to privilege, but we've already discussed that.

26 THE COURT: Overruled. Okay. And we're going to hand out
27 transcripts, ladies and gentlemen. The evidence is the actual
28 tape, not the transcript. The transcript is just to assist you

1 in understanding what is said on the tape.

2 And I think I already got the waiver of reporting all the
3 calls.

4 MS. SOMERVILLE: Yes, Your Honor.

5 THE COURT: And that's yes from both.

6 And Deputy, would you mind handing out the transcripts?

7 MS. SOMERVILLE: Your Honor, would the Court like the
8 Court's Exhibit 1A?

9 THE COURT: Yes.

10 All right. And the jury appears to have the transcript.

11 Ms. Somerville.

12 MS. SOMERVILLE: I'm just waiting for them to pass them
13 down.

14 THE COURT: Oh, they have them passed down. I'm sorry.

15 MS. SOMERVILLE: For the record, I am going to play what
16 has been marked Court's Exhibit 1 for identification.

17 *(Audio recording played; not reported.)*

18 MS. SOMERVILLE: For the record, I just played Court's
19 Exhibit 1.

20 THE COURT: All right. Thank you.

21 And if you pass the transcripts down to Jurors 14 and 12,
22 please.

23 BY MS. SOMERVILLE:

24 Q. Are you okay?

25 A. Yeah, I'm fine.

26 Q. Is that hard to listen to?

27 A. Yeah.

28 Q. How did it make you feel when you first heard that on

1 June 4th -- excuse me, June 5th?

2 A. I was just terrified. You know, I was afraid and --
3 and kind of numb, numbed down a little bit.

4 Q. Did you have any physical reaction?

5 A. Yeah. I was nauseous and I was -- I became afraid.
6 You know, I started looking around the house to make sure my
7 doors were locked. I didn't know, you know, if somebody was
8 nearby or whatever, and so it was just, you know, a fear -- I
9 just had a normal, I think, terrorized fear response when I
10 heard it.

11 Q. How did you feel listening to it today?

12 A. Today?

13 Q. Yes.

14 A. Very similar. It's actually, I haven't heard it for
15 a very long time so it's upsetting. It upsets me. Shaky.

16 Q. I saw you reach for some Kleenex.

17 A. Yeah. Well, I'm a crier. If I get the Kleenex, then
18 I don't cry.

19 Q. When you first listened to the call, did you
20 recognize the voice?

21 A. No, not initially.

22 Q. What did you do after you listened to this call?

23 A. Well, I called my husband. I knew he was in surgery
24 that day, so I left a message to have him -- to come home -- I
25 said come home as soon as possible.

26 And I didn't say anything other than that, but he knew
27 that I needed him to come home as soon as he could get there.
28 I know he had to finish his surgery, but --

1 Q. Why didn't you explain in the message what had
2 happened; do you remember?

3 A. To him?

4 Q. Yes.

5 A. Well, because he's an eye surgeon and I just didn't
6 want to load him up, you know, with any specifics. And I had
7 checked that my doors and my windows -- and I knew that at
8 least for now, you know, at the moment I was safe and I just
9 wanted him to give time to finish up and to get home.

10 Q. Did he get home after he heard that message?

11 A. He was home probably by 11:30 or 12:00, something
12 like that.

13 Q. When he got there, did you explain to him about the
14 message?

15 A. Yes.

16 Q. And how you were feeling?

17 A. Yes, yes, yes.

18 Q. Did you also play the message for him?

19 A. Uh-huh. He heard it on my voice mail, yeah.

20 Q. Did your husband do anything to try to figure out who
21 this call came from?

22 A. Yes. He -- there's technology, technology
23 challenged, he's not. He was able to go to my AT&T message
24 service that apparently it's online and you can go in and you
25 can get a copy of the phone number.

26 MS. FREEZE: Objection for the record, Your Honor. Just
27 speculation, foundation, authentication and hearsay.

28 THE COURT: I'll do foundation and hearsay. Sustained.

1 MS. SOMERVILLE: That's fine.

2 BY MS. SOMERVILLE:

3 Q. So did your husband at some point provide you with a
4 name associated with the phone number that left you the
5 message?

6 A. Right. After he found the phone number on my -- my
7 voice or my phone record, then he went on -- I think he -- he
8 just started going to link in social media and somehow he was
9 able to connect. He came up with the name Ben Bathen that was
10 associated with that number, and he told me that.

11 And then I said that's -- that's my old -- my old patient
12 from nine years ago.

13 MS. FREEZE: And Your Honor, just for the record, again,
14 the hearsay. I understand you've already given the Court --
15 the jury the limiting instruction. Just wanted to put it on
16 the record.

17 THE COURT: Yes.

18 BY MS. SOMERVILLE:

19 Q. So initially you didn't recognize the voice when you
20 first heard the message; right?

21 A. Correct.

22 Q. And then your husband did a little research and gave
23 you the name of Benjamin Bathen; correct?

24 A. Uh-huh. And showed me the phone number.

25 Q. And what about the name, I mean, connected you to
26 this message? How did you -- you said you recognized it?

27 A. The name?

28 Q. Yes.

1 A. I'm not sure I understand.

2 Q. I'm sorry. That was a bad question.

3 Once he told you the name Benjamin Bathen --

4 A. Uh-huh.

5 Q. -- did you recognize the voice?

6 A. Yes, I made that connection, when I could -- when
7 I -- I'm trying to think. Everything was -- let me see how
8 that went. When he said Ben Bathen, it was like, of course,
9 now I recognize the voice, once he -- once he gave me the name
10 that was connected to that phone number.

11 Q. And you've been thinking about Mr. Bathen. I mean
12 this has been a long time that had passed; right?

13 A. Right, right.

14 Q. Was it since -- was April of 2009, was that the last
15 time you had --

16 A. Yes.

17 Q. -- thought about him or --

18 A. Yes.

19 Q. And did you and your husband call the Chula Vista
20 Police Department?

21 A. Yes.

22 Q. Did you give them the phone number and the name of
23 Mr. Bathen?

24 A. Right. They responded. A patrol officer came to the
25 house and gave him the information, and he also -- yeah, so he
26 was there with us and made a report.

27 Q. After you made the report to Chula Vista Police
28 Department, were you still afraid?

1 A. Yes. He instructed us in terms of some safety
2 issues, measures that we can take, and yeah, at that point I
3 was on pretty high alert.

4 Q. What safety measures did you take?

5 A. Well, we -- we relooked at our security system in the
6 house. We -- my office in Chula Vista, we put -- were able to
7 get the landlord to put in security doors so that the doors
8 locked from the outside at all times.

9 I had to notify all of my colleagues because we all are
10 coming in and out of -- and there's a parking lot in the back
11 that's not greatly well lit, so -- so I had to let them know
12 to be cautious and that I had a threat and just to -- you
13 know, I wanted to protect my colleagues and also their
14 patients that were going to be coming in and out of the
15 office.

16 And at that point, I didn't know anymore than I had just
17 received the threat and the police had taken the reports, so
18 we just started mobilizing to try to protect and just protect
19 myself as much as I could.

20 Q. Aside from your landlord putting in security doors,
21 did you take any other safety precaution methods at work?

22 A. At work. Let's see. Just when -- like we would walk
23 each other out to our cars; and if we're going to be there
24 late, my husband would come to the office and drive home with
25 me. And some of the other therapists were doing things like
26 that.

27 Q. What about at your home? You said you relooked at
28 the security. What do you mean?

1 A. Well, we had a security system that we sometimes
2 turned on and sometimes didn't ask. We just became more
3 vigilant, more focused on keeping things, you know, more
4 secure.

5 Q. Would you keep your windows and doors locked?

6 A. Yes, for a year. For a year, I -- if I'm there,
7 especially if I'm there alone, I just -- this is very
8 sustainable and for the earth, but I just locked the doors and
9 the windows and just keep the air-conditioning on just -- I --
10 just to keep -- I just feel safer. I've just become much more
11 vigilant than I would have ever been in the past.

12 Q. Did it kind of change the way you go about your
13 everyday life?

14 A. It has. It has. I don't really like to go to
15 shopping centers anymore with garages and things like that.

16 Q. Did you know where Mr. Bathen was when the June 4,
17 2017 message was left?

18 A. No. I had no idea.

19 Q. Did that have any effect on you?

20 A. Yeah. I wish I had -- you know, I think I would have
21 been less fearful if I had known he was out of state or, you
22 know, not nearby, not in Chula Vista.

23 Q. And you didn't have any type of current address for
24 him; is that correct?

25 A. No.

26 Q. Did you end up receiving a second voice message?

27 A. Yes.

28 Q. And did you recognize the voice on that message?

1 A. Yes.

2 Q. And who did you recognize that as?

3 A. Ben Bathen.

4 Q. When did you get that second voice message?

5 A. It was about a month later, July 3rd, July 3rd.

6 Q. Was that, again, on your confidential work message?

7 A. Yes, uh-huh.

8 Q. Do you remember where you were when you found the
9 second message?

10 A. I think I was in my kitchen again checking my
11 messages.

12 MS. SOMERVILLE: Your Honor, at this time I would ask to
13 play People's Exhibit -- or excuse me, Court's Exhibit 2 for
14 identification.

15 *(Court's Exhibit No. 2 was identified.)*

16 And I also have a transcript marked as Court's Exhibit 2A
17 for identification and copies for the jury.

18 *(Court's Exhibit No. 2A was identified.)*

19 THE COURT: All right. Any objection?

20 MS. FREEZE: No, Your Honor. Just --

21 THE COURT: Go ahead.

22 MS. SOMERVILLE: Your Honor, for the record at this time
23 I'm going to play Court's Exhibit 2 for identification.

24 *(Audio recording played; not reported.)*

25 THE COURT: All right. And again, if you can pass them
26 down to jurors 14 and 12, the transcripts.

27 BY MS. SOMERVILLE:

28 Q. Are you okay?

1 A. Uh-huh.

2 Q. Was that the message that was left on your machine on
3 July 3rd?

4 A. Yes.

5 Q. How do you feel about hearing that?

6 A. It's -- actually it's terrifying and it's
7 humiliating. It's humiliating.

8 Q. What do you mean by it's humiliating?

9 A. I just think the -- I guess the sexual content of it
10 and the explicitness of it, I guess.

11 Q. Describe for me how you felt after you get this
12 second message when you are home alone.

13 A. Well, that time I actually had enough of a visceral
14 reaction that I threw up. And then after I got over that,
15 I -- I think I called my husband and then I think I called the
16 police again.

17 Q. And the second call, did you immediately recognize
18 the voice?

19 A. Yes.

20 Q. Did you get any more calls of this nature?

21 A. Yes.

22 Q. And do you remember when you got an additional call?

23 A. It was two days later, July 5th.

24 Q. How were you feeling in between, you know, getting
25 that second call and then July 5th?

26 A. Well, I was -- I was really getting frightened
27 because it had escalated and -- and the threats were much more
28 violent and explicit, and I really began to think that I was

1 really -- my life was in danger. I mean I thought from the
2 very beginning, but it was getting more clear to me that this
3 was escalating and I could be in real danger.

4 Q. Between the July 3rd call and this -- or excuse me,
5 the July 4th call and this July 3rd call, did you know where
6 Mr. Bathen was during that basically month period?

7 A. No -- did I know -- well, I know the police had
8 turned the case over to the detectives and I know the
9 detectives were working on trying to locate him.

10 Q. But did you know yourself?

11 A. No.

12 Q. So you didn't know if he was in Chula Vista when he
13 made the call?

14 A. No, no.

15 Q. And when was the third call that you received?

16 A. July 5th.

17 Q. Okay. Do you remember where you were when you
18 checked your messages again?

19 A. I think it was in my bedroom phone.

20 Q. Was anyone with you?

21 A. I think so. I can't -- I think my husband might have
22 been upstairs when I took the message. But I really can't --
23 I don't recall. I don't recall.

24 Q. That's okay.

25 A. Yeah.

26 Q. Did you recognize the caller on this third call?

27 A. Yes. It was the same voice.

28 Q. And who was that?

1 A. Ben Bathen.

2 MS. SOMERVILLE: Your Honor, I have Court's Exhibit 3 for
3 identification that I would request to play for the jury at
4 this time along with Court's Exhibit 3A marked transcript and
5 transcripts for the jurors.

6 *(Court's Exhibit No. 3 was identified.)*

7 *(Court's Exhibit No. 3A was identified.)*

8 THE COURT: Any objection?

9 MS. FREEZE: No, Your Honor. Just the repeated privilege
10 objection.

11 MS. SOMERVILLE: For the record, I'm going to play Court's
12 Exhibit 3 for identification.

13 *(Audio recording played; not reported.)*

14 BY MS. SOMERVILLE:

15 Q. Are you okay?

16 A. Uh-huh. I am -- I am okay.

17 Q. You talked about when you got the second call you
18 believed it was escalating. How did you feel after this call?

19 A. Well, he upped the ante when he made threats against
20 my family, so for me to get to another level of really
21 frightened.

22 Q. Were you concerned about your daughter?

23 A. Pardon me?

24 Q. Were you concerned about your daughter?

25 A. Yes.

26 Q. How were you feeling physically after hearing these
27 threats to rape you, to rape your daughter?

28 A. Just kind of done in, I think. Is this ever going to

1 end, you know, and how is this going to end or how could this
2 end? Am I going to be dealing with this for -- you know, way
3 into the future?

4 I mean every time I answer the phone am I going to have to
5 prepare myself for the next threat? And just that kind of
6 thing.

7 Q. Did you believe that your life was legitimately in
8 danger?

9 A. I did.

10 Q. Did you also believe that about your daughter?

11 A. Yes.

12 Q. Was this third call reported to the Chula Vista
13 Police Department?

14 A. Yes.

15 Q. Did you let your daughter know at some point about
16 the threats that had been made?

17 A. I did not.

18 Q. Why not?

19 A. We felt like -- my husband and I discussed it. We
20 both felt that we were doing everything that we could to set
21 up the protections that were -- that we could do within the
22 law. We felt like law enforcement was really -- was really
23 supporting us, and we just elected to not tell her at this
24 point because there wasn't -- we didn't feel like there was
25 any -- much more that she could have done because everything
26 was in place and everything was in process, so I just didn't
27 want to load her up.

28 Q. As a mother, you didn't want to frighten her?

1 A. As a mother, yeah, yeah, yeah.

2 Q. You said you were doing stuff, everything that you
3 could within the law?

4 A. Uh-huh.

5 Q. Did you end up coming to court to try, you know, to
6 get any protection in place for yourself?

7 A. Yes. I applied for a -- I'm blocking right now.
8 Hang on here -- a civil restraining order. I knew I would get
9 it, a civil restraining order. So I applied for a civil
10 restraining order.

11 Q. How did that process work, if you can just kind of
12 explain it?

13 A. Well, let's see. I applied. I came here and I
14 presented my -- the case and it was heard by a judge. And
15 Mr. Bathen at that time had an attorney that appeared for it
16 and asked for a contingency so it was put off.

17 And then we had to come back to court again and then
18 eventually I was granted the civil restraining order for --
19 until 2020.

20 Q. Did you have to give any type of testimony or
21 statement to the Court at the restraining order hearing?

22 A. I think it was just in the transcript. I think it
23 was just in the transcript.

24 Q. Did you prepare documents and kind of explain what
25 had been going on in the threats?

26 A. Right. Right.

27 Q. And were those submitted to the Court?

28 A. Yes.

1 Q. At that restraining order, was that the first time
2 you had seen Mr. Bathen since he had moved to the East Coast?

3 A. Yes.

4 Q. How did you feel having to come into court and see
5 him again after getting these threats?

6 A. It was just really uncomfortable. And you know, I --
7 you know, I felt -- I didn't feel unsafe because I felt like I
8 had plenty of support, law enforcement support. Structures
9 around me. But I just -- it was just uncomfortable. I just
10 wanted -- I just wanted to do what I could to try to put
11 everything I could in my life around me to stay safe. That
12 was all it was for me.

13 So that was recommended to go ahead and get -- I know
14 there would be a criminal restraining order eventually, but to
15 have a civil restraining order would be like an extra level of
16 protection.

17 Q. Did you -- after you got the restraining order, did
18 you still keep in place, you know, some of the safety
19 precautions that you had talked about before like locking the
20 door?

21 A. They're still in place. Even now. Yeah.

22 Q. Are you still afraid of Mr. Bathen?

23 A. Yes. Yes.

24 Q. Have you had any -- you know, aside obviously from
25 being afraid and having to kind of change your lifestyle,
26 protect yourself, have you had any, like, emotional or issues
27 or anything like that since this has happened?

28 A. Just a little -- probably just heightened --

1 heightened vigilance, which kind of increases just your base
2 levels of anxiety a little bit higher. Sleeping more.
3 Sleeping issues that I never had really before. But not
4 really anything -- not anything I would in any way call a
5 clinical issue, yeah.

6 Q. Aside from Mr. Bathen getting angry with you and
7 wanting to have this face-to-face sit-down basically monologue
8 to you about what his issues were when you couldn't see him
9 anymore, have you ever had any issues like this with another
10 patient?

11 A. No, I never have. Never.

12 Q. And I believe you said that you've been in the area
13 even with marriage and family therapy since 1988?

14 A. Yes.

15 Q. Before all this started, did -- you have an open
16 Facebook page?

17 A. Uh-huh.

18 Q. Where you would share things?

19 MS. FREEZE: Objection. Withdrawn.

20 THE WITNESS: I have a Web page where -- I have an
21 education-in-training program that I -- and I offer conferences
22 twice a year, training, venues in particular, Bowen Family
23 Systems, theory training for therapists and others who want to
24 learn how to work in a particular way with families and
25 individuals and so I have that on my website. And people can
26 go there and get information about my programs and my
27 trainings.

28 /////

1 BY MS. SOMERVILLE:

2 Q. In terms of social media, were you posting anything
3 online like pictures with you and your family or with your
4 daughter?

5 A. Well, that's the thing. Somehow I got -- I don't
6 know how it happens, but I guess because my kids are on social
7 media and my friends are on social media and all of a sudden
8 I'm finding myself on social media, but I didn't actually
9 intend to be on there, but I do -- I do come up on social
10 media, but I think at one time I had a LinkedIn --
11 professional LinkedIn and I got rid of that. And now I
12 have -- I think I have some safeties that I put in so that
13 only people -- only my family and my close friends can -- you
14 know, can be on my Facebook account or if I have -- I'm sorry.
15 I just don't know exactly how I got caught in that, but
16 somehow I got caught in that.

17 Q. Do you remember ever talking to Mr. Bathen about
18 having a daughter, mentioning that you have a daughter?

19 A. I don't recall that. I don't recall that.

20 Q. Is your daughter on social media online?

21 A. Yes.

22 MS. SOMERVILLE: Thank you. Nothing further, Your Honor.

23 THE COURT: Okay. Ms. Freeze.

24 MS. FREEZE: Thank you, Your Honor.

25 Just one moment.

26

27

28 ///

CROSS-EXAMINATION

1

2 BY MS. FREEZE:

3 Q. Good morning, Dr. Jacobs.

4 A. Good morning.

5 Q. Now, Dr. Jacobs, have you had the same office address
6 in Chula Vista since 1995?

7 A. Uh-huh.

8 Q. Is that a "yes"?

9 A. Yes.

10 Q. Okay. And I understand that you're a sole
11 practitioner and you said you share space with other
12 individuals kind of in the same realm of what you do or do
13 they do different things?

14 A. Same realm.

15 Q. And when Mr. Bathen was your patient, did he come to
16 that office?

17 A. Yes.

18 Q. Okay. And you said that was approximately five
19 sessions a year; is that correct?

20 A. Uh-huh. I think it averaged out about that, yeah.

21 Q. Until he moved to Los Angeles; correct?

22 A. Yes. Yes.

23 Q. Because then he stopped coming and you did phone
24 consultations?

25 A. Right. Right.

26 Q. And your -- your license allows for phone
27 consultations?

28 A. Yes.

1 Q. Okay. Do you record those phone consultations?

2 A. I don't record them, no.

3 Q. Take notes?

4 A. I take notes.

5 Q. Okay. Now, when -- I recall -- and I'm not sure if
6 you said this, the timeline, I know it's been some time and I
7 know you had testified as well, Dr. Jacobs, that you since
8 actually purged Mr. Bathen's file; correct?

9 A. Right.

10 Q. Did you say you purged the file in 2014?

11 A. Uh-huh.

12 Q. Is that a "yes"?

13 A. Yes.

14 Q. And -- and that's the -- and the rule is that you
15 purge them after seven years?

16 A. Uh-huh, from your last contact.

17 Q. Okay. So your last contact with Mr. Bathen, would
18 that be the last contact in person or over the phone?

19 A. Let's see. Over the phone.

20 Q. Okay.

21 A. Over the last -- yeah, over the phone.

22 Q. And it's your testimony that the last time you had a
23 session with him was in 2008?

24 A. Uh-huh.

25 Q. "Yes"?

26 A. Yes.

27 Q. Sorry?

28 A. I'm sorry.

1 Q. This lovely lady is trying to write down everything
2 so we want to make sure it's clear for the record.

3 A. Uh-huh.

4 Q. So -- so then you would have purged the file seven
5 years after 2008?

6 A. Right.

7 Q. So that would have been 2015?

8 A. Yeah. I'm not doing the math, but seven, yeah.

9 Q. Okay. Now, this -- is it Bowen or Bowen?

10 A. Bowen. B-o-w-e-n.

11 Q. Bowen. That's Bowen Center for the study of
12 family -- study of the family; is that correct?

13 A. Correct, uh-huh.

14 Q. And that's at the Georgetown Family Center?

15 A. Right.

16 Q. Is that in Washington, D.C.?

17 A. Correct.

18 Q. And do you go out there still like --

19 A. No.

20 Q. When was the last time you were out there?

21 A. I was there from 1995 to 2000.

22 Q. Okay. When you were there in the East Coast, did you
23 have patients or were you just speaking to other colleagues?

24 A. It was just training. I was there for training.

25 Q. Okay. Did you ever have as part of that training
26 like hypothetical patients that would come in where you did
27 training sessions with individuals or anything like that?

28 A. No, no.

1 Q. Just with other professionals?

2 A. Yes.

3 Q. Okay. So -- so that was just training so there's not
4 any type of special license that you would have just to
5 practice like in Washington, D.C. or in certain areas in that
6 area of the East Coast?

7 A. No.

8 THE COURT: And Doctor, I'm going to ask you, since we are
9 taking down everything, she can't take down two people at once.
10 So even if you know where the question is going, if you be
11 patient and wait.

12 THE WITNESS: Thank you.

13 MS. FREEZE: Thank you, Your Honor.

14 BY MS. FREEZE:

15 Q. And so when initially Mr. Bathen was referred to you,
16 it was referred -- he was living on the East Coast; is that
17 correct?

18 A. That's my understanding.

19 Q. And so perhaps through that relationship you had with
20 other colleagues on the East Coast he was directed to you?

21 A. I think so. I'm not certain about that.

22 Q. And the prosecutor was kind of asking you a little
23 bit of questions in the beginning of the questioning this
24 morning about how you receive clients; right?

25 A. Uh-huh.

26 Q. Do you recall that?

27 A. Clients?

28 Q. Yes. How you receive clients.

1 A. Yes.

2 Q. And -- and you had said that you have mostly just
3 like word-of-mouth referrals from other colleagues, things
4 like that?

5 A. Uh-huh.

6 Q. Is that "yes"?

7 A. Yes.

8 Q. And do you do any type of, like, advertising? I know
9 you mentioned your website that mentions, you know, your
10 background and things like that, but do you do any type of
11 like through Yelp or Review, you know, any type of Websites
12 that you pay to get referrals?

13 A. No.

14 Q. Have you ever heard of a website called
15 HealthGrades.com?

16 A. Could you repeat that?

17 Q. Have you ever heard of a website -- a reviewing
18 website that gives information to potential clients or
19 patients called HealthGrades.com?

20 A. Health Grades, yeah, I've heard of that, yeah.

21 Q. Have you ever gone on the website to see what is
22 written about you or reviews or anything like that?

23 MS. SOMERVILLE: Objection. Relevance.

24 THE COURT: That's just a "yes" or "no."

25 THE WITNESS: Yes.

26 BY MS. FREEZE:

27 Q. And you had testified earlier that you haven't had --
28 well, let me back up.

1 You've been practicing since 1995 in Chula Vista?

2 A. 1998.

3 Q. And approximately how many patients do you see a
4 year?

5 A. Probably 700 contacts a year.

6 Q. And you said that you treat -- your specialty is
7 families as well as individuals; correct?

8 A. Uh-huh. And couples.

9 Q. Couples. And it could be, but you don't have the
10 authority or the ability to prescribe medication and make
11 diagnoses; is that fair to say?

12 A. I can make diagnoses but I can't prescribe
13 medication.

14 Q. Okay. And so seven -- around 700 clients per year
15 for the past couple decades. So you've had a lot of patients;
16 fair to say?

17 A. Yeah.

18 Q. You don't remember every single one of their names;
19 fair to say?

20 A. Not off the top of my head.

21 Q. But if someone says a patient's name, you might say,
22 oh, yeah, I treated that person or, oh, yeah, it kind of
23 triggers?

24 A. Uh-huh.

25 Q. Would you say you have a pretty good memory then?

26 A. Yes. I think I do, yeah.

27 Q. And in those couple -- last couple decades of
28 practicing as a psychologist seeing around 700 patients per

1 year, it's your testimony that none of them has ever been mad
2 at you or made a bad complaint about you?

3 MS. SOMERVILLE: Objection. Misstates the testimony.

4 THE COURT: The doctor can correct her. Is that --

5 THE WITNESS: Would you repeat the question.

6 MS. FREEZE: Sure, sure.

7 BY MS. FREEZE:

8 Q. So you had testified that -- that you've never had
9 anybody this madder, this type of level of anger; correct?

10 A. Correct.

11 Q. As -- when I say this, kind of referring to these
12 voice messages; correct?

13 A. Yes.

14 Q. But fair to say, though, on the last couple decades
15 of practicing and seeing the volume of patients that you've
16 seen, fair to say that once in a while maybe a client or a
17 patient gets upset with you?

18 A. I don't -- I actually don't have any recollection of
19 that. If it was -- if it happened, I'm not aware of it. I
20 haven't been made aware of it.

21 Q. Okay. So have you -- with regards to this
22 HealthGrades.com and other type of reviews, you've looked at
23 reviews that patients have given you; fair to say?

24 A. I've only looked -- I actually looked at the reviews
25 maybe twice.

26 Q. Okay. And have you ever seen a negative review?

27 A. I saw one negative review.

28 Q. Okay.

1 A. Yeah.

2 Q. And is that the one that was -- that's on
3 HealthGrades.com?

4 A. I don't recall.

5 MS. FREEZE: Okay. Your Honor, may I approach?

6 MS. SOMERVILLE: I haven't seen this and I'm going to
7 object that it's hearsay as well.

8 MS. FREEZE: It's -- I think it's effect on -- effect on
9 the listener as it pertains to the review.

10 BY MS. FREEZE:

11 Q. Okay. So you are saying one bad review in the past
12 couple decades?

13 A. That's -- that I'm aware of, yeah.

14 Q. Now, talking about this confidential voice message
15 system that you had, has it always been through AT&T?

16 A. Uh-huh.

17 Q. Is that a "yes"?

18 A. Yes.

19 Q. I know it's unusual.

20 And you had said that the number that you have -- that's
21 your contact number, the (619)525-7747 you had testified that
22 that's really been your only number that you're aware of that
23 you've used in your practice for your clients to practice;
24 correct?

25 A. Correct.

26 Q. You don't give your cell phone, your home number out;
27 right? But sometimes you'll return phone calls from that
28 telephone?

1 A. Right. Also, if there is any real crisis, I have
2 given my cell phone number to someone.

3 Q. Okay. And it's also in your practice that you --
4 your general practice is not to disclose your family
5 information; correct?

6 A. Generally, yes.

7 Q. Because that's important, to have boundaries; right?

8 A. Uh-huh, uh-huh. Yes.

9 Q. Now, fair to say that you started treating or seeing
10 Mr. Bathen in 2004?

11 A. Uh-huh, yes.

12 Q. And that was when he had relocated from the East
13 Coast to Southern California for work purposes?

14 A. That's my understanding, yes.

15 Q. And he would come to your office in Chula Vista;
16 correct?

17 A. Correct.

18 Q. And during those sessions in person, would you say it
19 was a pleasant dialogue between you and Mr. Bathen?

20 A. I think we had a therapeutic alliance.

21 Q. Okay. He wouldn't make inappropriate or aggressive
22 gestures to you during those in-person contacts?

23 MS. SOMERVILLE: Your Honor, I'm going to object. Motion
24 in limine, the content of --

25 THE COURT: Overruled.

26 MS. SOMERVILLE: Thank you.

27 BY MS. FREEZE:

28 Q. And you received -- he received a referral from you

1 from an individual that you worked with, you assumed you
2 worked with, in the East Coast; correct?

3 A. Mr. Bathen reported to me that he had been referred
4 by someone from the East Coast.

5 Q. Now, when he had -- when do you recall when he moved
6 to L.A. and you started doing the phone conversations?

7 A. I really don't. I don't have -- I don't have that --

8 Q. But he wanted to stick with you despite him moving to
9 L.A. County; correct?

10 A. Correct.

11 Q. And -- and it's your testimony that you had ended
12 this relationship with Mr. Bathen around September of 2008
13 because it's your understanding he had relocated to the East
14 Coast at that time?

15 A. Right.

16 Q. When you had initially had that dialogue with
17 Mr. Bathen with regards to ending that relationship, was
18 Mr. Bathen still in California and advising you, hey, I'm
19 going to be moving; how do we do this? Or had he already
20 relocated to the East Coast?

21 A. I don't recall if he was -- I'm not sure if he was
22 here in California or if he was already back there. I'm not
23 sure.

24 Q. How -- what was your normal way of communicating with
25 Mr. Bathen when it came to scheduling appointments? Was it a
26 phone dialogue or was it e-mail?

27 A. I think it was -- it might have been both.

28 Q. Okay.

1 A. Yeah.

2 Q. And you had said that you -- when you did learn that
3 Mr. Bathen had moved to the East Coast, you had testified
4 earlier about this continuity of care to make sure that you
5 didn't just drop him -- you kind of point him in the right
6 direction; hey, if you need to chat with someone these are
7 some referrals?

8 A. Uh-huh.

9 Q. Is that correct?

10 A. Correct.

11 Q. So would you say that your communication with
12 Mr. Bathen when he was on the East Coast then was not
13 therapeutic sessions, it was just call this doctor, call this
14 doctor, best of luck to you, sir, kind of thing?

15 A. I'm trying to think. Yeah, it was more consultation.
16 I would say not therapeutic.

17 Q. What's the difference between consultation and, like,
18 a session?

19 A. As you described, you know, more like how are things
20 going and, you know, are you planning -- you know, what are
21 your plans to move on to, you know, to continue your therapy
22 and that sort of thing.

23 Q. Okay. And so that wouldn't be something that he
24 would pay for; right?

25 A. Yes, I think he did pay for that.

26 Q. He would pay for -- and so it would be a normal
27 45-minute to 55-minute session?

28 A. Correct.

1 Q. Just talking about referrals to other doctors in the
2 East Coast?

3 A. Well, I think there were some -- some therapeutic
4 issues that were addressed, but --

5 Q. But I thought you said that your license stopped at
6 the border.

7 A. Yeah. That's true. My license does stop at the
8 border.

9 Q. So it would -- you would be practicing technically
10 without a license then if you were giving him therapeutic
11 sessions over the phone if he lived in the East Coast;
12 correct?

13 A. Yes.

14 Q. Is it your testimony then today, Dr. Jacobs, that you
15 did, in fact, continue to treat Mr. Bathen or have therapeutic
16 sessions when he resided in the East Coast despite not being
17 permitted to do so?

18 A. Well, I guess I'm -- I wasn't thinking about it being
19 treatment. I was thinking about it being more transitioning
20 on as part of a termination process.

21 Q. Okay. But your testimony on direct would have been
22 that's the continuity of care. So are you then -- were you
23 maybe conferencing in with other psychologists?

24 A. No.

25 Q. Okay. So approximately how many of these phone
26 conversations would you say that you had with Mr. Bathen when
27 you were aware that he lived on the East Coast where he would
28 pay you for these 45- to 55-minute sessions?

1 A. I think it was maybe three, three sessions.

2 Q. Okay.

3 A. Three or four.

4 Q. And so -- and this is all just, hey, these are
5 referrals for you to talk to?

6 A. Well, my intention was for that, but the -- the
7 client had -- you know, had -- this was reciprocity in terms
8 that he wanted to talk about or he would share with me, but I
9 considered it more of a consultation.

10 Q. A therapeutic consultation, though; correct?

11 A. Yes.

12 Q. And he's living on the East Coast and you are in
13 California?

14 A. Right, right.

15 Q. So technically you weren't supposed to be doing that;
16 correct?

17 A. I think ethically I was supposed to be doing it
18 because it wasn't appropriate for me to just cut him off and
19 drop him.

20 Q. Right. But you said a number of times today as well
21 as at the preliminary hearing last year as well as to the many
22 Chula Vista Police Department officers that you've spoken to
23 over the last year that it's pretty straightforward, you --
24 once they move, you can't really provide any more therapeutic
25 sessions; correct?

26 MS. SOMERVILLE: Object to the form of the question.

27 THE COURT: Sustained.

28 MS. FREEZE: The form as it being compound.

1 THE COURT: Referring to many conversations, vague.

2 MS. FREEZE: Sure.

3 THE COURT: No foundation. Compound.

4 BY MS. FREEZE:

5 Q. Fair to say, Dr. Jacobs, you mentioned a number of
6 times that your license stops at the border; correct?

7 A. Correct.

8 Q. So would your sessions with Mr. Bathen then, when he
9 had moved to the East Coast, would those be doctor-patient
10 privilege type of conversations?

11 A. Yes.

12 Q. Because you are talking about treatment; correct?

13 A. Right.

14 Q. And when would you say that you recall -- you said
15 that you understand the relationship ended in September of
16 2008; is that correct?

17 A. Right.

18 Q. Okay. So if there was correspondence between you and
19 my client in April of 2008 --

20 A. Uh-huh.

21 Q. -- discussing times to discuss -- or times to have
22 sessions and he was living on the East Coast, would that be
23 incorrect?

24 A. Well, the correspondence in April was really related
25 to the previous -- what was upset that he had with me, that's
26 what -- that's the April contacts were about.

27 Q. And I apologize, Doctor. I mean April of 2008.

28 A. In April 2008. Okay. Could you track it back for

1 me? I'm lost.

2 Q. It's been some time. I appreciate it.

3 So if there's communication between my -- well, let me
4 just ask you this.

5 Do you recall communicating with my client via e-mail in
6 April of 2008 when he was living on the East Coast?

7 A. Yes.

8 Q. Okay. And when -- and there was discussions
9 regarding appointments and scheduling. What were those
10 appointments, were those therapeutic sessions?

11 A. The 2008 e-mails were him outlining his grievances to
12 me so it wasn't about making appointments.

13 Q. Okay. Maybe I'll refresh your recollection with an
14 e-mail that you had sent to my client.

15 MS. SOMERVILLE: Your Honor, I'm going to object to the
16 memory of the witness being refreshed. She never indicated
17 that her memory needs to be refreshed.

18 THE COURT: Sustained.

19 MS. FREEZE: Well, Your Honor, I believe --

20 THE COURT: Don't argue in front -- let's take a brief
21 sidebar.

22 Excuse us, ladies and gentlemen.

23 MS. FREEZE: And just to -- if -- Your Honor, if I may just
24 pick up where we left off so there's not --

25 BY MS. FREEZE:

26 Q. Dr. Jacobs, and again, I know it's been 10 years so
27 if you need a moment, and that's fine, I'm just trying to make
28 sure I understand the communication with my client when he was

1 on the East Coast.

2 So you had testified that your license stops at the
3 border; correct?

4 A. Correct.

5 Q. And so -- and you had just a moment ago testified
6 that -- that e-mail correspondence when he was on the East
7 Coast was more about him laying out in grievances and things
8 like that; correct?

9 A. Uh-huh, uh-huh.

10 Q. So if I have an e-mail correspondence between you and
11 my client in April of 2008 where you are discussing
12 appointment times -- do you recall that?

13 A. I don't. I don't. Could I -- could I see that or --

14 Q. Sure.

15 MS. FREEZE: Your Honor, may I approach?

16 THE COURT: Sure.

17 BY MS. FREEZE:

18 Q. It's an e-mail, appears to be an e-mail between you
19 and my client in April of 2008 discussing scheduling.

20 THE COURT: Okay.

21 BY MS. FREEZE:

22 Q. April of 2008. I'll just say that.

23 A. Okay.

24 Q. Does that refresh your recollection?

25 A. Uh-huh.

26 Q. Do you recall e-mailing with my client then in April
27 of 2008?

28 A. I don't recall it, but I see it there in writing,

1 so --

2 Q. Okay. And in that, he's living in the East Coast at
3 that time; correct?

4 A. I think so.

5 Q. Okay. And your -- and isn't it true that now that
6 you've had an opportunity for your memory to be refreshed and
7 looked at this document, it appears to be scheduling sessions
8 with Mr. Bathen?

9 MS. SOMERVILLE: Object. It did not refresh the witness's
10 memory.

11 THE COURT: Sustained.

12 MS. FREEZE: I believe, Your Honor, when I showed it to her
13 she had indicated that --

14 THE COURT: You can -- we can have the last question before
15 our break whether or not it refreshes the witness's memory.

16 BY MS. FREEZE:

17 Q. Did this refresh your recollection or your memory
18 speaking with Mr. Bathen via e-mail in April of 2008?

19 A. I'm -- right now I'm trying to recollect because the
20 e-mails that I was referring to was in February 2009, so
21 that's -- so I'm getting confused with the timeline. I'm
22 sorry.

23 I might have to have you -- I'm not clear about this --
24 the timing on this in terms of when he met -- when he moved
25 and when -- and when we had further conversation. So I'm
26 just -- I'm confused about it at this point.

27 Q. Okay. Did you have a chance to read this document,
28 though, when I showed it to you?

1 A. I skimmed it.

2 Q. Okay. Did it appear to have your proper e-mail
3 address on it?

4 A. Can I look at it again?

5 MS. FREEZE: If -- Your Honor, if I may approach?

6 MS. SOMERVILLE: Object as hearsay.

7 THE COURT: I'm sorry.

8 MS. SOMERVILLE: I'm going to object as hearsay, Your
9 Honor.

10 THE COURT: I'm going to allow just to do the e-mail
11 address and then we're going to break.

12 MS. FREEZE: Okay. Thank you, Your Honor.

13 THE WITNESS: That's my e-mail.

14 Yeah, okay. That's my e-mail.

15 BY MS. FREEZE:

16 Q. Okay. And --

17 THE COURT: All right. And so, as I said, that was the
18 question for the break.

19 All right. So we're going to take our noon recess at this
20 time, ladies and gentlemen, until 1:30.

21 Please remember not to form or express an opinion. Don't
22 talk to anybody about any subject connected with this matter
23 and don't do any research or investigation.

24 I'll see you all at 1:30. Thank you.

25 And ma'am, you may step down. Thank you.

26 *(The following proceedings were held in open court*
27 *outside the presence of the jury:)*

28 THE COURT: And we're on the record outside of the presence

1 of the witness and the jury.

2 And Counsel, you know, I think you had made your point. I
3 don't know how much longer I'm going to allow you, just as a
4 keeper of the time, this really has -- I allowed you to go
5 into it because it was brought up by the prosecution as far as
6 communication, but this really is not the issue in this case.

7 So you have on the record her stating that there was some
8 therapy that was done perhaps in these conversations, not
9 really clear. She doesn't remember the timeline. But you got
10 all that. You can't practice outside of the border.

11 That's not what we're here about. But, as I said, I
12 allowed you, but we're not going to go on for another
13 half-hour.

14 MS. FREEZE: I certainly understand, Your Honor. It's just
15 her credibility.

16 THE COURT: And it's done. You know, yes. You're entitled
17 to attack her credibility. I think you've done it. We're
18 getting a little repetitive on it now.

19 So if you want to finish up this subject matter, unless
20 you have something to offer me at this point that's going to
21 not be more of the same.

22 MS. FREEZE: I think I just have one or two -- one question
23 and then I'm done with that.

24 THE COURT: Okay. Excellent.

25 MS. FREEZE: Thank you.

26 THE COURT: Same wavelengths.

27 MS. FREEZE: Glad we're on the same page, Your Honor.

28 THE COURT: Thank you. I'll see you all at 1:30.

1 *(Lunch recess.)*

2 ***

3 *(The following proceedings were had in open court in*
4 *the presence and hearing of the jury.)*

5 THE COURT: All right. We're back on the record with
6 everyone present. Do we have the witness?

7 All right. Dr. Jacobs, do you understand you are still
8 under oath?

9 THE WITNESS: Yes.

10 THE COURT: Okay. Thank you.

11 All right. Ms. Freeze.

12 MS. FREEZE: Thank you, Your Honor.

13

14 **CROSS EXAMINATION (RESUMED)**

15 BY MS. FREEZE:

16 Q. Good afternoon, Dr. Jacobs.

17 A. Good afternoon.

18 Q. So just a quick recap. We were just discussing in
19 the morning hour some e-mail correspondence with Mr. Bathen
20 from April of 2008?

21 A. Right. Right.

22 Q. And we had -- you had indicated, I think, the last --
23 the thing that you had indicated before the noon lunch hour
24 was that -- that you had confirmed that that was, in fact,
25 your e-mail address?

26 A. Yes.

27 Q. And now that that's now been marked as Court's
28 Exhibit 35 for the record and this was -- and this is dialogue

1 via e-mail with my client when he's on the East Coast;
2 correct?

3 *(Court's Exhibit No. 35 was identified.)*

4 A. Correct.

5 Q. Now --

6 A. I assume he's on the East Coast.

7 Q. And is that because of the nature of the e-mail, the
8 substance of the e-mail with regard to timing?

9 A. I just assume that it's coming from the East Coast
10 because he had moved back there.

11 Q. Okay. And so -- and you had said that you had still
12 communicated with him briefly for this continuity of care;
13 correct?

14 A. Correct.

15 Q. But you had also said that during those sessions, you
16 were, in fact, charging him for those sessions; correct?

17 A. Yes.

18 Q. Now, that was in April. Do you recall continuing to
19 speak with Mr. Bathen for the next several months into the
20 summertime of July of 2008?

21 A. 2008, okay. I think it was like February 2008.
22 March. I'm -- I'm just having to pull this up out of memory
23 because I don't have anything to refer to. I think there were
24 three sessions during that -- during that time.

25 Q. Do you recall scheduling a time to speak with
26 Mr. Bathen in July of 2008 at -- July 10th of 2008 at
27 3:00 p.m., your time? Do you recall making that appointment
28 with Mr. Bathen?

1 A. I don't recall that.

2 Q. And would it refresh your recollection to look at an
3 e-mail correspondence with Mr. Bathen?

4 A. Yes.

5 MS. FREEZE: Your Honor, may I approach?

6 THE COURT: Yes.

7 MS. FREEZE: And Your Honor, for the record I did provide
8 the prosecutor copies of the e-mail.

9 THE COURT: Okay.

10 MS. FREEZE: Thank you.

11 BY MS. FREEZE:

12 Q. Showing you what's been previously marked as Court's
13 Exhibit 36 --

14 *(Court's Exhibit No. 36 was identified.)*

15 THE COURT: Did you say it's marked as an Exhibit 36?

16 MS. FREEZE: (Nods head.)

17 THE WITNESS: Yes.

18 BY MS. FREEZE:

19 Q. Has your memory been refreshed?

20 A. By looking at that, yes, that's my e-mail address.

21 Q. Okay. Do you -- in the e-mail correspondence, you
22 provide a telephone number that's different than the telephone
23 number that you testified on direct as the one that you use.
24 And on direct examination, you indicated that since you've
25 been practicing, you've used a 619 number and I believe you
26 indicated that's 525-7747. Now, that's been your only number
27 since you've been in practice?

28 A. That's my only private practice number, yes.

1 Q. And looking at the e-mail correspondence with
2 Mr. Bathen, isn't it true that you asked him to contact you on
3 a different phone number?

4 A. Could I look at that number?

5 Q. Yes.

6 MS. FREEZE: Your Honor, if I may approach?

7 And Your Honor, just for the record, we can have a brief
8 sidebar if you'd like if the Court has any concerns.

9 THE COURT: I have no objection. I mean I have heard no
10 objection.

11 MS. FREEZE: Okay.

12 THE WITNESS: Yes, that's my cell phone number.

13 BY MS. FREEZE:

14 Q. Okay. So -- and this correspondence, the number
15 that's then included in the e-mails is your cell phone number?

16 A. Yes.

17 Q. Okay. And then do you recall speaking with
18 Mr. Bathen via e-mail in September of 2008, about two to three
19 months later?

20 A. Speaking to?

21 Q. Via e-mail.

22 A. Via e-mail. I have to see the record, but I think --
23 I would have to verify that.

24 Q. Do you recall confirming a meeting with him or some
25 type of appointment with him and confirming it for Tuesday,
26 September 23rd at your time?

27 A. I don't remember.

28 MS. FREEZE: Your Honor, may I approach?

1 THE COURT: Yes.

2 MS. FREEZE: Thank you.

3 And for the record, showing the witness what's been
4 previously marked as Court's Exhibit 37.

5 *(Court's Exhibit No. 37 was identified.)*

6 THE WITNESS: Okay.

7 BY MS. FREEZE:

8 Q. Does that refresh your recollection?

9 A. That's 2008. Yes.

10 Q. Do you recall scheduling -- now that your memory has
11 been refreshed -- scheduling an appointment with Mr. Bathen in
12 September of 2008 at 4:00 p.m. your time?

13 A. If that's what it says in the e-mail. I am having a
14 hard time recalling that. It's just been a long time.

15 Q. Do you recall now that you've had an opportunity to
16 look at this e-mail correspondence of my client explaining to
17 you that he's teaching at Boston University?

18 MS. SOMERVILLE: Objection. Hearsay.

19 THE COURT: Sustained.

20 MS. FREEZE: All right. I'll move along.

21 BY MS. FREEZE:

22 Q. Now, when -- later when there was some communication
23 with Mr. Bathen, I believe the following year in 2009, there
24 was some requests, I think you had testified to, about him
25 asking for some type of apology. Do you recall testifying to
26 that?

27 A. Yes.

28 Q. At any point did you apologize to Mr. Bathen?

1 A. I think I -- I think I sent an e-mail. First of all,
2 I asked him to send me his mailing address. His snail mailing
3 address so I can send a letterhead with -- you know, with my
4 response to it and he wouldn't give me his address.

5 Q. And then in 2009, you had reminded Mr. Bathen at some
6 point that you weren't allowed to continue with therapeutic
7 sessions due to him living in Boston; correct? Or in the East
8 Coast?

9 A. Yes.

10 Q. But you had previously for the last several months at
11 least set up some type of appointment with him; right?

12 A. Yes. And as I said, those appointments were set up
13 as part of my continuity of care process in terms of
14 terminating the therapeutic relationship.

15 Q. So the e-mails that I have shown you from April 2008,
16 July 2008 and September of 2008 marked as Exhibits 35, 36 and
17 37, those were a part of continuity of care?

18 A. Right. Right.

19 Q. And at any point, did you stop charging him for those
20 continuity of care or were they always charged?

21 A. They were always charged.

22 Q. And so at some point now then in early 2009, you say
23 we can't do this anymore kind of dialogue; correct?

24 A. Right. I mean, I felt that at this point that it was
25 time for him to -- I had given him referrals and it was time
26 for him to follow-up and move on to another provider.

27 Q. Okay. And so it appeared then in your opinion or
28 what you believed and how you had testified on direct

1 examination in that he was maybe agitated, I think you said,
2 that this was ending, this relationship was ending?

3 A. Yes. That was my take on it.

4 Q. And isn't it true at any -- at any point isn't it
5 true that my client had maybe -- had brought to your attention
6 that perhaps that he would contact like an ethical committee
7 due to this relationship ending?

8 A. He did say that he would -- he was going to contact
9 an ethical committee.

10 Q. And that was because he realized that you were
11 perhaps practicing when you should not have been practicing or
12 were not permitted?

13 MS. SOMERVILLE: Objection. Speculation.

14 THE COURT: Lacks foundation. Argumentative.

15 BY MS. FREEZE:

16 Q. And at some point did you prepare some type of letter
17 to correspond to Mr. Bathen about the final termination of
18 this relationship?

19 A. Uh-huh. Yes.

20 Q. And was that just, like, attached to an e-mail
21 because you weren't able to mail it to him?

22 A. Exactly.

23 Q. Okay. And at any point at that time, did he call and
24 leave angry messages or did he contact you either on your work
25 number or this cell phone number that he had and contact you
26 and yell at you or become angry with you regarding this
27 termination?

28 A. No. No.

1 Q. And then nine years you don't hear anything from him;
2 correct?

3 A. Right.

4 Q. As far as you know, he lives in the East Coast still?

5 A. Uh-huh.

6 Q. Is that a "yes"?

7 A. Yes. Yes. Sorry.

8 Q. That's okay. And then you receive this message
9 that -- that's been played for the jury and that the first one
10 was in June; correct?

11 A. June.

12 Q. Of 2017?

13 A. Yes. June 2017.

14 Q. And initially you hear it. And do you listen to it
15 like a number of times?

16 A. No. I heard it one time and --

17 Q. And just called your husband?

18 A. When my husband --

19 THE COURT: Wait. Stop, both of you. Let's have a
20 question -- one question, one answer. One question, one
21 answer. Thank you.

22 BY MS. FREEZE:

23 Q. So you listened to it one time?

24 A. The first time, one time.

25 Q. And then the first thing you did then was contact
26 your husband; correct?

27 A. Correct.

28 Q. Okay. And you didn't contact the police, you just

1 waited for your husband to come home?

2 A. Right.

3 Q. And you said that you -- you're not very tech savvy,
4 your husband was able to go into your voice mail account and
5 get the number and all that; correct?

6 A. Correct.

7 Q. Okay. And at any time up to this point had you
8 received any type of client leaving a message disgruntled or
9 angry about anything in the 20-some-odd years that you had
10 been practicing?

11 A. No, not that I can recall.

12 Q. Not refuting a bill or anything like that?

13 A. No.

14 Q. Okay. And then you said that you had -- while you
15 were waiting for your husband to come home, you said you kind
16 of locked up your house; correct?

17 A. Right.

18 Q. But as far as you know, you had -- well, you had
19 never in your previous contact with any of your clients
20 provided them your residence address; correct?

21 A. Correct.

22 Q. Because that would be outside the boundaries that you
23 had talked about; correct?

24 A. Right. Yes.

25 Q. Now, when you called the police, did you contact
26 Chula Vista Police Department or did your husband contact
27 them?

28 A. I contacted them.

1 Q. Okay. And was that just contacting the normal
2 Chula Vista Police Department number or was it 911?

3 A. It was the normal number.

4 Q. And then do you recall speaking with an Officer De La
5 Pena from the Chula Vista Police Department?

6 A. Yes.

7 Q. And he -- in fact, he came to your home?

8 A. He did.

9 Q. And do you recall speaking with Officer De La Pena
10 and advising him that this call kind of came out of the blue,
11 it was totally unexpected?

12 A. Yes.

13 Q. And -- and that as far as you knew, he had left
14 California and lived in the East Coast; correct?

15 A. Correct.

16 Q. And do you recall Officer De La Pena advising you
17 that based on the notion that Mr. Bathen likely still resided
18 on the East Coast that there might not be any type of imminent
19 threat or danger to you? Do you recall having a conversation
20 with him about that?

21 MS. SOMERVILLE: Objection. Hearsay.

22 MS. FREEZE: Effect on the listener.

23 THE COURT: Overruled -- not overruled. Sustained.

24 MS. FREEZE: Okay.

25 BY MS. FREEZE:

26 Q. And I know that you had said that you took some
27 safety precautions at your office. At any point did
28 Mr. Bathen at all threaten your colleagues or neighbors in

1 your office building?

2 A. Not to my knowledge.

3 Q. Now, I want to talk just briefly about this
4 restraining order hearing, the civil harassment restraining
5 order hearing.

6 You hadn't seen -- when you came to that hearing, you
7 hadn't seen Mr. Bathen since sometime in 2008 before he moved
8 to the East Coast; correct?

9 A. Correct.

10 Q. Okay. And with regards to the mention in the third
11 call of your daughter, it wouldn't have been in your practice
12 to disclose to any patients that -- your family makeup or if
13 you have children or anything like that; correct?

14 A. Not as a policy. There are times when, you know,
15 things -- you can say things that are -- if there are -- would
16 be therapy appropriate you can mention something. In general,
17 no.

18 Q. And when you -- do you recall around -- you don't
19 have to give me the specific date, Dr. Jacobs, but do you
20 recall around what month of last year that you filed the civil
21 harassment restraining order?

22 A. Let me see. It must have been maybe the end of --
23 maybe the end of July, middle or end of July.

24 Q. And when you filed the restraining order, you had to
25 serve him in some manner; correct?

26 A. Right.

27 Q. How did you go about serving Mr. Bathen with the
28 restraining order so he was placed on notice and could show

1 up?

2 A. Well, on the advice of the detectives who were on the
3 case, they instructed me to file a restraining order and then
4 they would have it served wherever he was located.

5 Q. Were you part -- part of -- fair to say part of the
6 requirement when you file a restraining order is you have to
7 show to the Court like proof of service. Did you yourself
8 file the proof of service or how did you show to the Court
9 that he had been served, if you recall?

10 MS. SOMERVILLE: Objection. Relevance.

11 THE COURT: Sustained.

12 MS. FREEZE: With regards to his location, Your Honor, at
13 the --

14 THE COURT: The fact that she received --

15 MS. FREEZE: Your Honor, if I may just briefly, it goes to
16 where my client was at the time of the hearing, at the time of
17 this incident.

18 THE COURT: You don't have a foundation for that.

19 MS. FREEZE: Can I attempt to lay the foundation?

20 THE COURT: You may.

21 MS. FREEZE: Thank you.

22 BY MS. FREEZE:

23 Q. Do you -- do you recall at all filling out a proof of
24 service and filing it with the Court?

25 A. A CH-200. I have that in my paperwork at home. I
26 think so. I recall filling out some things, but I'm not sure.
27 When you say -- when you say serving you, like, are you asking
28 me did -- was I involved in serving the subpoena?

1 Q. No, no, no. Not at all, Dr. Jacobs. And I apologize
2 if I wasn't clear. Let me back up a little bit.

3 When you initially filed the civil harassment restraining
4 order, you had to fill out a bunch of forms; right?

5 A. Right. Right, right.

6 Q. A lot of paperwork involved?

7 A. Right.

8 Q. And part of the requirement in order to proceed with
9 the proceeding, you have to show that the other person, the
10 respondent, had been served. Were you aware of that when you
11 filled out the packet?

12 A. Right, right.

13 Q. You represented yourself in that civil harassment
14 restraining order; correct?

15 A. Correct.

16 Q. And so at any point did the Court require you to file
17 a proof of service to let the Court know that the respondent,
18 Mr. Bathen, had been served?

19 A. Somehow I don't recall it coming back to me.

20 Q. Okay. Would looking at the proof of service, would
21 that refresh your recollection?

22 A. I'm sure it would help.

23 MS. FREEZE: Your Honor, may I approach?

24 MS. SOMERVILLE: I'm going to object on relevance at this
25 point.

26 THE COURT: Let me see counsel.

27 *(Sidebar; unreported.)*

28 */////*

1 BY MS. FREEZE:

2 Q. Dr. Jacobs, when -- ultimately when you appeared at
3 the civil harassment restraining order, Mr. Bathen was there?

4 A. With his attorney, yes, his first attorney.

5 Q. Okay. And prior to, the hearing was actually
6 continued one time?

7 A. Yes.

8 Q. Okay. And is it your understanding that Mr. Bathen
9 was served with notice of the restraining order hearing?

10 A. Yes.

11 Q. And is it -- do you -- is it your understanding that
12 Mr. Bathen was served with notice of the restraining order
13 hearing in Virginia?

14 A. That was my understanding.

15 Q. And that's where -- and it was your understanding
16 that that's where he resided at that time?

17 A. That's -- that's what -- he was -- I didn't locate
18 him, but I guess the investigation located where he was
19 residing.

20 Q. Thank you.

21 And I also -- Dr. Jacobs, you had testified that you are
22 continuing to follow some of the safety precautions that you
23 employed back in June and July of last year; correct?

24 A. Correct.

25 Q. But in that year, Mr. Bathen hadn't come to your
26 place of employment; correct?

27 A. No.

28 Q. And he hadn't come to your home?

1 A. No.

2 MS. FREEZE: Just one moment.

3 Nothing further. Thank you.

4 THE COURT: Okay. Ms. Somerville.

5 MS. SOMERVILLE: Thank you.

6

7

REDIRECT EXAMINATION

8 BY MS. SOMERVILLE:

9 Q. Dr. Jacobs, you would have these in-person sessions
10 with Mr. Bathen when you began treating him. Can you describe
11 for us just kind of how -- what was kind of the back and
12 forth? I mean I know some people listen. Some people talk.
13 I mean what was kind of the -- how did they work? I mean did
14 Mr. Bathen talk a lot? Did you take notes? Can you explain
15 that?

16 A. It's reciprocal interaction of languaging and
17 talking; and, you know, I do keep notes. I keep, you know,
18 case file notes about the themes of the session basically, and
19 so he brings up -- maybe he walks in and brings up things that
20 are -- a client will bring up something that's on their mind
21 and introduce it is as a topic and then we begin to dialogue
22 about it and process it.

23 Q. Do you prompt them to kind of get things out when
24 you're in the session?

25 A. At times when it's appropriate, you know. Many, many
26 people come in and they're ready, they know what they want to
27 talk about and they know what the topic, they know what's on
28 their mind and then they just start, you know, sharing what --

1 what's going on or something that happened that week or some
2 issue that's come up recently or something like that.

3 Q. Was that how it was with Mr. Bathen when he came in
4 and be open to talking and talk to you?

5 A. Yes, yes.

6 Q. And when you had your phone sessions with him, when
7 he was here in California?

8 A. Uh-huh.

9 Q. Was that more along the same lines of how you would
10 have the, you know, talking, taking notes and --

11 A. Yes.

12 Q. Same situation?

13 A. Uh-huh. Very much so, yeah.

14 Q. And in treating him, I mean, was he willing to talk
15 and did he express himself freely?

16 A. Yes.

17 Q. Was that also the same kind of setup when he was on
18 the East Coast and you were doing the continuation of care?

19 A. Yes.

20 Q. Is it fair to say Mr. Bathen didn't come in and just
21 sit there, not really say anything in the sessions?

22 A. He was quite interactive.

23 Q. When your husband mentioned to you the name Benjamin
24 Bathen, he said it kind of -- it clicked; is that right?

25 A. Uh-huh.

26 Q. This is who left this message?

27 A. Uh-huh.

28 Q. You have to answer out loud.

1 A. Oh. Yes, yes. I'm fading. I apologize.

2 Q. That's okay.

3 So aside from the name, can you tell me what it was that,
4 you know, clicked with you about this voice on this first
5 message?

6 A. It was just the inflection, I think, the -- the high
7 pitch of the voice. And I had an experience in sessions where
8 he could -- he could get agitated, not towards me, but about
9 something else. And I had experienced him getting amping up
10 and getting agitated and I had experienced his voice sounding
11 like that when he was anxious or angry or stirred up.

12 So that was real clear, you know, for me that when I heard
13 it, it just clicked that I had heard this voice before and
14 that it was Mr. Bathen's voice.

15 Q. Do you have the e-mails from when you were
16 communicating with Mr. Bathen when he moved back to the East
17 Coast?

18 A. Everything was purged when I purged his chart, his
19 file.

20 Q. When you heard the second call that you received on
21 July -- the 4th -- excuse me, July 3rd, when you got that
22 call, did you recognize the same characteristics in his voice?

23 A. Absolutely. Only it was more heightened, the
24 intensity was more heightened.

25 Q. The July 5th call as well, did you recognize the
26 voice based on his tone and based on inflection the things
27 that you describe for us?

28 A. Yes, yes.

1 Q. Did Mr. Bathen ever, you know, not pay you or fall in
2 arrears?

3 A. No, not that I'm aware of. I have a billing service
4 who does all of my billing; so most of that is handled by my
5 service. So I would have been notified of it, notified if
6 something untoward like that was going on. I never got any
7 information that he wasn't paying or that -- whatever.

8 Q. When you would speak with Mr. Bathen in these
9 sessions when he was up in the Los Angeles area, was that over
10 your work phone or would that be with your cell phone?

11 A. My cell phone in my office.

12 Q. In your office?

13 A. Uh-huh. My cell phone in my office. I don't have a
14 land phone in my office.

15 Q. And is that the same phone that you continued then to
16 speak with him on when he moved back to the East Coast?

17 A. Correct.

18 Q. Do you know about how many times you spoke with him
19 on the phone when he moved back to the East Coast?

20 A. Let me think. I think probably five times, I think.
21 Five or six. Five. All kind of blurred, but I think about
22 that many times.

23 Q. And I think you also had mentioned earlier that, you
24 know, patients would -- they'll leave you messages about
25 scheduling or rescheduling, that type of thing. Was that
26 something that would happen with Mr. Bathen?

27 A. I don't recall. I think he did contact me by e-mail
28 to schedule and maybe we -- I don't recall. I don't recall if

1 I had messages from him to wanting to schedule per my -- you
2 know, by my voice mail or my cell phone. I think it was
3 primarily through e-mail.

4 Q. Is that your cell phone? Do you normally use that
5 then when you're communicating with a client, like doing a
6 phone session?

7 A. Yes.

8 Q. Do you provide them with your home number?

9 A. No.

10 Q. And do you have another cell phone that you use at
11 all?

12 A. No.

13 Q. Have you ever gotten, you know, any threats from any
14 other clients on your cell phone?

15 A. No.

16 Q. So the three calls that you've identified as
17 Mr. Bathen leaving them for you, those are the only
18 threatening calls you have gotten in I believe it's around 22
19 years of practice?

20 A. Correct.

21 Q. Have you ever had any other clients, you know,
22 threaten to sue you over the years?

23 A. No.

24 Q. Have you ever had any other clients demand that you
25 sit down with them, have a face-to-face conversation, really a
26 one-sided conversation so they can air their grievances with
27 you?

28 A. No, I never had that.

1 MS. SOMERVILLE: I have no further questions, Your Honor.

2 THE COURT: Ms. Freeze.

3 MS. FREEZE: Thank you.

4

5

RECROSS-EXAMINATION

6 BY MS. FREEZE:

7 Q. Dr. Jacobs, with regards to your practice, do you --
8 or in the past or currently, do you provide phone
9 consultations to other patients?

10 A. In my practice?

11 Q. Yes.

12 A. Yes.

13 Q. Okay. And in your practice, whether it's phone
14 consultations or in-person consultations, do patients at times
15 get anxious as you had said earlier Mr. Bathen would in the
16 past, would they get anxious or change the level of their
17 voice when they are on the phone with you or in person?

18 A. Not generally.

19 Q. Every patient is just very calm, doesn't get upset?

20 MS. SOMERVILLE: Objection. Misstates the testimony.

21 THE COURT: Overruled.

22 THE WITNESS: That means I can answer?

23 THE COURT: Yes.

24 THE WITNESS: Not to me directly. They -- maybe their
25 intensity go up based on the fight they had with their husband
26 the night before or they're worried about their child, you
27 know, something like that, but not -- not anything directed at
28 me.

1 BY MS. FREEZE:

2 Q. Right. And I'm sorry. I wasn't clear.

3 When the prosecutor was asking questions just a moment ago
4 about recognizing Mr. Bathen's voice, you had said in the past
5 when you were speaking with him that sometimes he would -- his
6 voice would get high because he would be anxious about other
7 things; correct?

8 A. Correct.

9 Q. So other patients, do their tone changes when they're
10 talking about things that make them anxious or upset?

11 A. Yes.

12 Q. That's why they're coming to you; right?

13 A. Right.

14 Q. Okay. Now, I want to make sure I'm understanding
15 this with the phones. Your work number and the number that
16 was called in these three instances in June and July of last
17 year is (619)525-7747; correct?

18 A. Yes.

19 Q. And earlier -- earlier you had testified that you
20 don't give your cell or your home number out usually; correct?

21 A. Correct.

22 Q. But you had with Mr. Bathen; correct?

23 A. Well, if I had -- yes. I guess, yes, I did.

24 Q. And with regards to a threat to sue, isn't it true
25 really that Mr. Bathen had notified you that he was exploring
26 the option of maybe contacting some type of ethical board with
27 regards to making a complaint against you; correct?

28 A. Would you say that -- ask the question again? I'm

1 sorry. I lost it.

2 Q. That's okay. I wasn't very clear. I apologize.

3 Isn't it true that Mr. Bathen in 2009 during the
4 dissolution of your relationship with him that his contact
5 with you and his dialogue with you was about making some type
6 of complaint to the board that deals with your license?

7 A. Well, I took it as a threat because he had said he
8 wanted to -- he had put down some parameters for how we had to
9 have the next contact, and I would have to -- I would have to
10 sit and not respond and listen to everything he had to say.
11 And I forget what else was in there.

12 And then if I didn't do that, then he was going to report
13 me to my board.

14 Q. Okay. But it -- he wasn't asking for a face-to-face
15 because he was living on the East Coast; right?

16 A. At one point he said he might -- he might want to
17 come back out and sit down and have a face-to-face at one
18 point.

19 Q. Okay. But no lawyers contacted you?

20 A. No.

21 Q. You didn't receive any type of demand letter,
22 anything like that?

23 A. Nothing like that.

24 Q. Okay. And ultimately he didn't come out banging on
25 your door?

26 A. No, he didn't.

27 Q. Demand any type of face-to-face conversation?

28 A. No.

1 MS. FREEZE: Okay. Thank you. Nothing further.

2 THE COURT: Ms. Somerville.

3 MS. SOMERVILLE: I have nothing further, Your Honor.

4 THE COURT: May this witness be excused?

5 MS. SOMERVILLE: Yes.

6 MS. FREEZE: Yes.

7 THE COURT: Okay. Thank you very much, ma'am. You may
8 step down.

9 MS. SOMERVILLE: Your Honor, the People will call Gregory
10 Gain.

11 THE CLERK: Do you solemnly state under penalty of perjury
12 that the evidence you give in this matter shall be the truth,
13 the whole truth and nothing but the truth?

14 THE WITNESS: Yes, I do.

15 THE CLERK: Please have a seat at the witness stand.

16 And for the record, please state your full name and spell
17 your last name.

18 THE WITNESS: Gregory Gain, G-a-i-n.

19 THE CLERK: Thank you.

20

21 **GREGORY GAIN,**

22 called as a witness on behalf of the People,

23 having been first duly sworn, testified as follows:

24

25 **DIRECT EXAMINATION**

26 BY MS. SOMERVILLE:

27 Q. Good afternoon.

28 A. Good afternoon.

1 Q. How are you employed?

2 A. I am a police officer employed by the County of
3 San Diego, the District Attorney's Office, and I'm currently a
4 supervising investigator in the South Bay branch.

5 Q. How long have you been an investigator with the
6 District Attorney's Office?

7 A. I started with the District Attorney's Office in
8 1998; and prior to that, I worked for 11 years as a police
9 officer with the City of La Mesa.

10 Q. What do you do as -- just kind of in general as a
11 supervising investigator for the District Attorney's Office?

12 A. When cases come to the District Attorney's Office,
13 they're sent based primarily on investigations from the local
14 law enforcement agencies. So our duties vary depending on the
15 case. Some cases come to us and the investigation is complete
16 and we have very little interaction, perhaps serving
17 subpoenas. Some cases need a lot of additional investigation.

18 Once the case has been issued by the District Attorney's
19 Office, any further investigation that needs to be done is
20 done by the officers in our agency. So they could include
21 doing search warrants for locations looking for additional
22 evidence.

23 We can -- we get involved with conducting threat
24 assessments on cases where victims or witnesses -- where there
25 is a possibility there could be retaliation. We do additional
26 interviews, look for additional witnesses and additional
27 suspects.

28 And our investigation may lead to bolstering the

1 investigation that was sent to us or may lead to exonerating
2 somebody who perhaps was falsely accused. So what we do
3 really varies depending on the case that comes in, but it can
4 be from very little to almost reinvestigating the entire case.

5 Q. Okay. You've been with the office for a long time,
6 since 1998?

7 A. Yes.

8 Q. So are there different units that you've worked in in
9 different assignments?

10 A. Yes. I've -- when I came, I started in our fraud
11 unit. I was transferred and worked in the narcotics task
12 force. I had also served in the narcotics task force while I
13 was at La Mesa P.D. so I spent a total of 11 years -- over 11
14 years at narcotics task force.

15 I've been assigned to our juvenile branch. I've been
16 assigned to Superior Court downtown where I worked in our
17 major violators unit. I also worked our gang prosecution
18 unit. And now currently the supervisor here in South Bay.

19 Q. When you said you worked at La Mesa Police Department
20 before coming to the District Attorney's Office, what did
21 you -- what did you do at the La Mesa Police Department?

22 A. Started in the patrol division and eventually became
23 a detective. My primary duties while I served as a detective
24 there were working in the robbery, narcotics and vice units.
25 But La Mesa being a small agency, we don't have the luxury of
26 only focusing on one particular area. So when there was a
27 significant crime, a homicide, a rape, something like that, we
28 would all work together as a team.

1 So my experience while I was assigned to work robbery
2 included just about any violent crime that occurred in the
3 city.

4 Q. As a part of your duties as an investigating district
5 attorney, do you have to deal with cell phones and cell phone
6 records?

7 A. Yes, I do. And I've been doing that quite
8 extensively while working over at the narcotics task force.
9 That was a tool that we used quite regularly when doing our
10 investigations. And also in the major violators unit, it was
11 something we did quite extensively to help show that suspects
12 were in the vicinity of robberies that occurred as part of a
13 series or as part of a residential burglary series.

14 We did quite a bit of cell phone exploitation, not only
15 with the actual device itself being able to download and
16 examine text messages, phone calls, things of that nature, but
17 also doing the cell tower exploitation and getting call detail
18 records from phone companies.

19 Q. Do the law enforcement agencies -- I mean you get
20 cases for follow-up investigation from them at times. Did
21 they also do this type of work?

22 A. Yes. All -- any of the police officers have the
23 ability to do it. Certainly some of the smaller agencies
24 don't have some of the mapping tools when it comes to cell
25 tower tracking that I have available to me at the District
26 Attorney's Office.

27 And in some cases, certainly, you may have crimes where
28 they involve multiple agencies and no one agency has a greater

1 stake in that investigation so they don't do it. And when it
2 would come to me, the District Attorney's Office, I would be
3 the one trying to pull all of the cases together and then I
4 would write search warrants for things like the cell tower
5 data. So they can do it. It all depends on their resources
6 and their investment in the case.

7 Q. We'll get back to, you know, cell records in a little
8 bit.

9 But I want to ask you about when a person is taken into
10 custody here in San Diego County, the downtown jail, are they
11 able to make phone calls?

12 A. Yes. Actually the suspects arrested for crimes, the
13 females booked into -- are booked into Las Colinas out in
14 Santee, males generally go to the central jail downtown but
15 they can also be booked -- males and females can be booked
16 into the Vista detention facility.

17 When somebody is booked in, everybody knows we have rights
18 to make phone calls. And what the Sheriff's Department does
19 when a person is booked in, they set up a phone account for
20 them. They're allowed to select a pin number and then they're
21 put into a holding tank that has phones that they can pick up
22 and use. They can make as many local calls as they would
23 like.

24 Once they move from that -- the booking cell into their
25 housing module where they're going to be kept, then they
26 actually have to have a phone account that has money on it.
27 So family, friends are allowed to go online and deposit money
28 into an inmate's phone account or they can make a call to a

1 person outside of the jail facility; and if that person agrees
2 to accept the toll charges, they can complete their phone call
3 that way. But they are all done through the recorded monitor
4 jail system, the phone system that all the county facilities
5 have.

6 Q. Is that monitored by the Sheriff's Department?

7 A. Yes.

8 Q. Are you able to access these phone calls as a law
9 enforcement officer?

10 A. Yes. And being that I work for the County, just as a
11 Sheriff's Department does, we're given direct access, which
12 means I don't have to send or request to one of the detention
13 investigations unit detectives and have them pull it. I have
14 access to the system that's called Securus and I have access
15 to the Securus to search and monitor phone calls on my own.

16 Q. Are the phone calls recorded?

17 A. Yes, they are.

18 Q. Is there any, you know, warning or anything like that
19 that's given to an inmate letting them know that these phone
20 calls are recorded before they start their conversation?

21 A. Yes. They record an announcement that plays at the
22 beginning of the call. It's not only audible to the inmate
23 who is placing the call, but to the person who is receiving
24 the call. They are told that they are receiving a call from
25 an inmate in the San Diego County jail facility, and then it
26 talks about if they're an attorney or a clergymen, that they
27 can decline the call and have their phone number set up so
28 that law enforcement doesn't record it and listen to it

1 inadvertently, so they can -- attorneys, clergy people like
2 that that have privileged communications can actually block
3 their number and it won't actually go into the recording
4 system; so it tells both parties to the communication that the
5 phone call is being recorded.

6 Q. Are you listening to these calls -- do you ever
7 listen to it in real time or can you -- say a call was made in
8 September. Can you go grab that call in October?

9 A. You can do both. If -- the system does give you the
10 ability to monitor it real time, and certainly in certain
11 circumstances, that may be a prudent thing to do, especially
12 if you think there's imminently going to be a threat to
13 somebody's life or safety or destruction of evidence, that's
14 typically when you would do that.

15 More often than not at the District Attorney's Office,
16 because our involvement comes after the case has been
17 submitted to the D.A.'s office for prosecution, we're kind of
18 behind the curve, so we do go back. The system retains the
19 jail calls for about one year. So I've -- I've actually been
20 able to go back a little longer than one year and retrieve
21 calls and review them at that point; so they are recorded and
22 stored.

23 There's unfortunately a finite amount of space that those
24 calls can be stored; so eventually the system will drop them
25 off.

26 Q. Were you assigned to do some follow-up investigation
27 into this case where Mr. Bathen was charged?

28 A. Yes, I was.

1 Q. Part of that follow-up, did you then access some jail
2 calls that were associated with Mr. Bathen?

3 A. Yes, I did.

4 Q. How did you locate those calls?

5 A. They were located by running a search through the
6 Securus system using Mr. Bathen's name. You can also search
7 the system for calls made from a booking number. You can
8 search for calls made to particular phone numbers.

9 There's also an advanced voice biometrics that will
10 allegedly identify somebody's voice and can tell you if they
11 are using somebody else's phone account to make a phone call.
12 I personally have never had any luck with that, but this was
13 all done by searching his inmate account under his name.

14 Q. And were you able to retrieve any calls made by
15 Mr. Bathen while he was in the San Diego County jail?

16 A. Yes, I did.

17 Q. How many calls did you retrieve, if you recall?

18 A. I believe it was 13, but I'm not a hundred -- I would
19 have to refer to my notes to give you an exact number.

20 Q. If you have them with you? Do you have a copy of
21 your report?

22 A. Yes, I do. Yes. It was 13 calls.

23 Q. Were they all telephone calls or were any of these
24 visits?

25 A. Now you're going to have to make me look again.

26 Q. If that would refresh your memory.

27 A. It would refresh my recollection.

28 Q. Please do that.

1 A. Three of them were social visits.

2 Q. So those are also recorded?

3 A. Yes, they are.

4 Q. Is that video recorded or is that also just audio
5 recorded?

6 A. These are just audio recorded. The jail visitation
7 system operates similar to making a phone call similar to what
8 you might have seen in the movies where two people are sitting
9 in chairs facing each other and there's a pane of glass in
10 between them and each one has a phone that they pick up and
11 they communicate that way.

12 When a person is brought down to that visitation room for
13 a social visit, the deputies log their phone and attribute
14 that phone conversation to that particular inmate using his
15 inmate phone account.

16 Q. When you accessed -- excuse me.

17 Mr. Bathen's phone calls and social visits, had you had an
18 opportunity to listen to the phone calls that were made to
19 Dr. Jacobs?

20 A. Yes, I had.

21 MS. SOMERVILLE: Your Honor, if I may, I have an audio CD
22 to play at this time. It is marked as Court's Exhibit 4 for
23 identification. There's also an attached copy of a transcript.
24 It's marked as 4A.

25 *(Court's Exhibit No. 4 was identified.)*

26 *(Court's Exhibit No. 4A was identified.)*

27 THE COURT: Ms. Freeze?

28 MS. SOMERVILLE: This is call No. 1.

1 THE COURT: Any objection?

2 MS. FREEZE: No, Your Honor. That's fine.

3 THE COURT: And give an extra copy of the transcript.

4 MS. SOMERVILLE: For the record, I'm going to play what has
5 been marked Court's Exhibit 4 for identification.

6 THE COURT: And I believe counsel have already waived
7 reporting.

8 MS. SOMERVILLE: Yes, Your Honor.

9 *(Audio recording played; not reported.)*

10 BY MS. SOMERVILLE:

11 Q. Was that a complete and accurate recording of one of
12 the jail calls that you monitored from Mr. Theule's account --
13 excuse me, from Mr. Bathen's account?

14 A. Yes, it is.

15 THE COURT: All right. If everyone would pass down their
16 transcript, please, to Jurors 12 and 14.

17 MS. SOMERVILLE: Your Honor, at this time I have another --
18 I actually have three, so the Court is aware, exhibits. It's
19 also another jail call. It's marked as Court's Exhibit 5, also
20 with transcript marked as Court's Exhibit A for identification.

21 I'd ask permission to play that at this time.

22 *(Court's Exhibit No. 5 was identified.)*

23 *(Court's Exhibit No. 5A was identified.)*

24 THE COURT: Any objection?

25 MS. FREEZE: No, Your Honor.

26 THE COURT: Go ahead.

27 BY MS. SOMERVILLE:

28 Q. Court's Exhibit 5, is that a complete and accurate

1 recording of one of the calls that you monitored from
2 Mr. Bathen's account?

3 A. Yes, it is.

4 MS. SOMERVILLE: Your Honor, the next exhibit I have is
5 Court's Exhibit 6 for identification.

6 *(Court's Exhibit No. 6 was identified.)*

7 I also have a transcript that's marked as Court's
8 Exhibit 6A and transcripts for the jury.

9 *(Court's Exhibit No. 6A was identified.)*

10 I'd ask permission to play that at this time.

11 THE COURT: Any objection?

12 MS. FREEZE: No, Your Honor.

13 THE COURT: Go ahead.

14 *(Audio recording played; not reported.)*

15 BY MS. SOMERVILLE:

16 Q. Was that a complete and accurate recording of one of
17 the calls that you accessed from Mr. Bathen's jail account?

18 A. Yes, it is.

19 MS. SOMERVILLE: I have one more, Your Honor. Court's
20 Exhibit 7 for identification.

21 *(Court's Exhibit No. 7 was identified.)*

22 There's also a transcript that has been marked as Court's
23 Exhibit 7A for identification.

24 *(Court's Exhibit No. 7A was identified.)*

25 I'd request permission to play that at this time.

26 THE COURT: Any objection?

27 MS. FREEZE: No, Your Honor. That's fine.

28 THE COURT: Go ahead.

1 *(Audio recording played; not reported.)*

2 BY MS. SOMERVILLE:

3 Q. Was that also a complete and accurate recording of
4 one of the jail calls that you reviewed from Mr. Bathen's
5 account?

6 A. Yes, it was.

7 THE COURT: All right.

8 MS. SOMERVILLE: I'm sorry, Your Honor.

9 THE COURT: It's about time for a break. Is this a good
10 time?

11 MS. SOMERVILLE: Yes.

12 THE COURT: Okay. And we're going to take our afternoon
13 recess at this time, ladies and gentlemen, for 15 minutes.

14 Same admonition to keep an open mind. Don't form or
15 express an opinion and don't talk to anybody about any subject
16 connected with this matter. Don't do any research or
17 investigation.

18 I'll see you in 15 minutes.

19 *(The following proceedings were had between the Court*
20 *and counsel out of the presence and hearing of the*
21 *jury.)*

22 THE COURT: All right. We'll be in recess.

23 *(Recess taken.)*

24 *(The following proceedings were had in open court in*
25 *the presence and hearing of the jury.)*

26 THE COURT: All right. We're back on the record with
27 everyone present.

28 We have our witness on the stand.

1 And Ms. Somerville.

2 MS. SOMERVILLE: Thank you.

3 BY MS. SOMERVILLE:

4 Q. What were the dates of the calls that you monitored?

5 A. That I'm going to have to refer to my notes on. I
6 don't remember the dates.

7 Q. If you could please do that.

8 A. Yeah. The dates the jail calls were monitored were
9 from September 16th, 2017 through September 17th, 2017.

10 Q. Did you have a chance to speak with Carolyn Jacobs
11 about this case?

12 A. Yes, I have.

13 Q. Did you end up coming to court with her for a
14 restraining order hearing?

15 A. Yes, I did. That was on the afternoon of
16 September 18th.

17 Q. Had you discussed with her any type of, you know,
18 safety concerns or anything like that?

19 MS. FREEZE: Objection. Calls for a hearsay.

20 THE COURT: This is just a "yes" or "no."

21 THE WITNESS: Yes.

22 BY MS. SOMERVILLE:

23 Q. When you came to the court hearing with her on
24 September 18th of 2017, was Mr. Bathen in court out of
25 custody?

26 A. Yes, he was.

27 Q. Do you see Mr. Bathen here in court today?

28 A. Yes, I do.

1 Q. Can you please identify him by describing the color
2 of shirt he's wearing and where he's located in the courtroom?

3 A. The gentleman sitting at defense table wearing the
4 blue shirt with a dark blue tie.

5 MS. SOMERVILLE: Thank you.

6 Could the record reflect the witness has identified
7 Mr. Bathen?

8 THE COURT: Yes.

9 BY MS. SOMERVILLE:

10 Q. Now, I want to kind of switch gears and talk about
11 cell phone records. Did you get a search warrant for call
12 detail records associated with phone number (617)992-4648?

13 A. Yes, I did.

14 Q. And have you gotten cell phone records before,
15 reviewed them in the course of your duties?

16 A. Yes, I have. On numerous occasions.

17 Q. And were you able to determine who the cell phone
18 provider was for this phone number?

19 A. Yes. It was T-Mobile.

20 Q. Did you end up getting records from T-Mobile for that
21 specific phone number?

22 A. Yes, I did.

23 Q. What do the call detail records include?

24 A. The call detail record, essentially it includes all
25 the information that the cell phone companies need for their
26 billing and it tracks whether it was an incoming call or an
27 outgoing call. It documents where the call originated from
28 and the terminating number that was called.

1 It also includes if there's any special features used
2 during that call, like three-way calling or a call forwarding.
3 These are all things that cell phone companies keep as records
4 for billing purposes.

5 MS. FREEZE: And Your Honor, just with regards to -- I
6 would object just as foundation as to testimony regarding
7 specific call detail records. I'm not sure if there's been a
8 foundation laid as to his --

9 THE COURT: If the objection is lack of foundation --

10 MS. FREEZE: Yeah.

11 THE COURT: -- I don't think there's a lack of foundation
12 yet.

13 MS. FREEZE: Okay.

14 MS. SOMERVILLE: Thank you.

15 BY MS. SOMERVILLE:

16 Q. Is that what you were provided from T-Mobile in this
17 case, the call detail records?

18 A. Yes.

19 Q. Are those some of the things that were included in
20 the records that you received?

21 A. Yes.

22 Q. Was there also -- I know you mentioned that they keep
23 these for billing purposes. Was the bill and subscriber
24 information contained in the call detail records as well?

25 A. Yes.

26 MS. SOMERVILLE: Your Honor, may I approach?

27 THE COURT: Yes.

28 /////

1 BY MS. SOMERVILLE:

2 Q. Investigator Gain, I'm going to give you a packet of
3 some exhibits. They're 8-by-11 copies of some documents here.
4 They are labeled Court's Exhibit 8 through 18. I want to go
5 through them one by one. They have been provided to defense
6 counsel as well.

7 Looking at Court's Exhibit 8, do you recognize this
8 document?

9 *(Court's Exhibit No. 8 was identified.)*

10 A. Yes. This is the subscriber information sheet or a
11 portion thereof that I received from T-Mobile.

12 Q. Some areas have been highlighted on it. Did it come
13 like that or --

14 A. No.

15 Q. But does this appear to be an accurate representation
16 of the subscriber information that you received via the search
17 warrant?

18 A. Yes, it does.

19 MS. SOMERVILLE: Your Honor, may I publish as we go?

20 THE COURT: Any objection?

21 MS. FREEZE: I would just reiterate my foundation objection
22 as it pertains to the maps and the connection with the CDRs.

23 THE COURT: I don't think that's what this is.

24 MS. FREEZE: Okay.

25 MS. SOMERVILLE: No.

26 THE COURT: Exhibit 8, these are Exhibits 8 through 18.

27 Any objection to those?

28 MS. FREEZE: No, Your Honor.

1 THE COURT: Okay.

2 MS. SOMERVILLE: May I?

3 THE COURT: Yes. I'm sorry.

4 MS. SOMERVILLE: That's okay.

5 BY MS. SOMERVILLE:

6 Q. So I'm going to put up on the screen -- I know it's
7 kind of hard to read. So for the jurors, I'm going to ask you
8 some questions about this document, and just if you can maybe
9 point those out to them as we go, if that's okay.

10 A. Okay.

11 Q. I know there's a pointer right behind you as well.

12 THE COURT: And Juror No. 1, can you see?

13 JUROR NO. 1: It's a little hard for me to see.

14 THE COURT: Not too much.

15 MS. SOMERVILLE: Sorry.

16 THE COURT: That's fine.

17 BY MS. SOMERVILLE:

18 Q. So in Court's Exhibit 8, there is red box in the top
19 column. Can you tell us what that is?

20 A. That's the subscriber name that was provided by
21 T-Mobile for the phone that I submitted the search warrant on
22 the phone number for.

23 Q. And what does it list as the subscriber name?

24 A. It says in prepaid none, customer.

25 Q. And what does that mean, if you know?

26 A. There's two types of phone plans. You can have a
27 conventional post paid plan where you subscribe to a service,
28 you get to use the phone. And then at the end of the month

1 you get a bill for all of the features and calls and things
2 like that that you utilize for that phone.

3 And then there are now prepaid phones where you're paying
4 in advance. You get a card, you can add minutes to the phone
5 and you can use the phone as long as you still have minutes on
6 it.

7 The difference is in a post payor, a conventional billing
8 plan, the phone companies will require that you provide
9 information so they know where to find you if you don't pay
10 the bill.

11 In a prepaid, you don't have to actually provide any
12 information to register the phone in your name because you've
13 put minutes on it. You can just use those minutes; and when
14 you're out, you don't accrue a debt, the phone just stops
15 working.

16 So this tells me that this was a prepaid phone and the
17 user of the phone did not provide an actual name when they
18 subscribed to it.

19 Q. Below the red box there's a green box. And can you
20 tell us what's enclosed within that?

21 A. Included in that, that's the subscriber address
22 and -- and it has the address 1132 North Kentucky Street,
23 Arlington, Virginia 22205.

24 Q. And below that there's a box in blue. Can you tell
25 us what that is?

26 A. Yeah. That's the subscriber status. And the records
27 that I received from T-Mobile indicate that the service had
28 been canceled.

1 Q. And when you got these records, did the provider
2 include in the documents that you get instructions how to read
3 their provider information and their cell call detail records?

4 A. Yes. They include instructions for both the
5 subscriber information section and for the call detail records
6 section.

7 Q. Now, if you could go down, there is in the middle
8 column, I guess, it's account details. There are a couple
9 lines that are enclosed in red. Can you tell us what those
10 are?

11 A. Yes. Those two right there, the account effective
12 date showing that the phone was activated on September 1st,
13 2014. And the account expiration date showing that the
14 service was terminated or canceled on September 4th, 2017.

15 Q. And if you can go down to that last row. Can you
16 tell us what is enclosed in the green box.

17 A. That's the MSISDN number, and that is the phone
18 number that is associated with that particular phone account.
19 And this one it is (617)992-4648.

20 Q. And there's a blue box at the bottom of the page.
21 Can you tell us what that indicates?

22 A. That's the MSISDS market and which is essentially
23 when you have an area code for your phone, 617 is the area
24 code for Boston, so if you had a 619 in there, it would read
25 San Diego for the market area.

26 Q. Thank you.

27 If you could look at Court's Exhibit 9 for identification.
28 Do you recognize that document?

1 (Court's Exhibit No. 9 was identified.)

2 A. Yes, I do.

3 Q. And is that a continuation of what we're looking at
4 in Court's Exhibit 8?

5 A. Yes, it is.

6 Q. I'm going to put that on the screen. Can you tell us
7 in the red boxed area what is being shown there.

8 A. There's a billing birthdate; and in this particular
9 document, it shows that there was a birthdate listed of
10 November 30th, 1977.

11 Q. Thank you.

12 And below that, in the green box, what is being shown in
13 that?

14 A. The green box there is showing a billing address and
15 that, like on the first page, is 1132 North Kentucky Street,
16 Arlington, Virginia 22205.

17 Q. And then finally on this exhibit in the blue box,
18 what is that showing again?

19 A. That's showing a contact number for the subscriber,
20 and that's the phone number actually for the phone
21 (617)992-4648.

22 Q. Thank you.

23 If you could, would you please look at Court's Exhibit 10
24 for identification. Do you recognize what's being shown in
25 that?

26 A. Yes, I do. This is the call detail records from
27 June 4th, 2017.

28 Q. I'm going to show you Court's Exhibit 10 for

1 identification on the screen. Can you tell us in the red
2 boxes up there what we're looking at?

3 *(Court's Exhibit No. 10 was identified.)*

4 A. Yeah. The header seems to be shifted a little bit on
5 this. The first section here would be the date column, and
6 that's the date of a particular phone call and on this one was
7 June 4th, 2017. The time listed on there is listed as in
8 military time as 08:24 and 37 seconds.

9 With these phone documents, telephone subscribers send all
10 of these documents with a time in universal time code, which
11 is also Greenwich Mean Time or in the military is referred to
12 Zulu time. It's the international timeline where time for our
13 purposes starts.

14 So depending on where you are on the globe, you will have
15 a time difference between the universal time code and
16 San Diego, which, depending on the time of the year, whether
17 it's daylight savings or not, it's going to be seven or eight
18 hours. So this does show universal time showed of 08:34 and
19 37 seconds.

20 Next column showing the duration of 80 seconds. The M.S.
21 originating is the call type for that particular handset, and
22 it's just showing whether this is a voice call that was
23 initiated from this phone. It would be different if it were a
24 text message or if it were an incoming phone call. So "M.S.
25 originating" says that it is a voice call, does show that the
26 direction is outgoing and the calling number is the number of
27 the handset that's placing the call. In this case, it was
28 (617)992-4648.

1 And then you have the dialed number -- or the -- I'm
2 sorry, yes, the dialed number of (619)525-7747. That also
3 shows as the called number and it would show possibly a
4 difference if you were calling a phone that had call
5 forwarding or some other feature to it that you're calling a
6 number and it's referring you to a different phone number.

7 And then, again, the destination number or the -- is the
8 one down there. Again, the chart is a little skewed, but the
9 destination number where the call ultimately ended was
10 (619)525-7747.

11 And then you have the IMSI, which is a code that's
12 attached to the subscriber information on a phone. It's the
13 international mobile subscriber information.

14 Next number over is the IMEI, which is the international
15 mobile electronic information. It's the -- a special code
16 that's for that particular device.

17 So SI is for the subscriber information and EI is for the
18 electronic device information like the serial number of that
19 phone.

20 And then you have the code over there that is -- their
21 completion code showing that it was completed successfully.

22 And then to the right, that's the cell tower information.
23 This first number, the 4619 one, is what's called the LAN
24 number. It's the local area number. And then that number on
25 the far right, the 37518 is the actual cell tower.

26 So if you look at it kind of like a city address, the LAN
27 tells you you're in the city of Chula Vista. The actual cell
28 tower will tell you that you are at 300 Third Avenue, or 300

1 "H" Street, which is where we'd be right now. So the LAN is
2 an overall area.

3 And then there's all these specific towers, and I believe
4 there's about 404 towers in that local area number.

5 MS. FREEZE: And Your Honor, just with regards -- just
6 objection as to foundation as to knowledge of the witness and
7 cell phone towers.

8 THE COURT: Sustained.

9 MS. FREEZE: Motion to strike.

10 THE COURT: It will be stricken as to the cell tower
11 information.

12 MS. FREEZE: Thank you.

13 BY MS. SOMERVILLE:

14 Q. If you could go towards Exhibit 11 for
15 identification.

16 *(Court's Exhibit No. 11 was identified.)*

17 A. Yes.

18 Q. And do you recognize -- well, is that just a --
19 basically what you just indicated to us from the call detail
20 records in the previous exhibit which was Court's Exhibit 10?

21 A. Yeah. This is a synopsis that was typed out of the
22 call and this looks like it's a snip -- computer snip of the
23 screen showing what we just talked about on the previous page.

24 Q. Okay. And this is a call from June 4th of 2017?

25 A. Yes.

26 Q. Were these phone numbers pertinent in your
27 investigation?

28 A. Yes. They had been -- the (619)525-7747 had been

1 identified as the business phone number for Carolyn Jacobs and
2 the (617)992-4648 had been identified as the phone number that
3 left the threatening messages that was -- they were left from
4 by Mr. Bathen.

5 Q. Thank you.

6 Could you go to Court's Exhibit 12 for identification.
7 And just does this appear -- do you recognize what's been kind
8 of snipped out of some records?

9 *(Court's Exhibit No. 12 was identified.)*

10 A. Yes. This is also a portion of the call detail
11 records from July 3rd showing two calls. The first one at
12 19:48:02 hours in universal time code with the duration of 34
13 seconds. The one right after it at 19:52:26 hours in
14 universal time code, both of them show as originating outgoing
15 calls. The second one was 60 seconds in duration. Both of
16 them show the calling number as (617)992-4648 and both of them
17 were to Carolyn Jacobs' number, (619)525-7747. And then on
18 the far right, it does show that both of those calls were
19 successfully completed.

20 Q. Okay. Thank you.

21 If you could look at Court's Exhibit 13 for
22 identification. Do you recognize that as basically kind of a
23 recap of what you just explained for us in Court's Exhibit 12?

24 *(Court's Exhibit No. 13 was identified.)*

25 A. Yes. For the two calls on July 3rd. It's the
26 synopsis and then the snip from the records from the computer.

27 Q. Okay. And again, the same phone numbers that one had
28 been associated with the call made to Dr. Jacobs and then also

1 Dr. Jacobs' work phone number?

2 A. Yes. The called number is Dr. Jacobs' work number
3 and the calling number, if I understood you correctly, that's
4 the number that called and left the threatening message.

5 Q. Thank you.

6 If you could look at Court's Exhibit 14 for
7 identification. Do you recognize this from the call detail
8 records that you received?

9 *(Court's Exhibit No. 14 was identified.)*

10 A. Yes, I do.

11 Q. I'm going to show that to you right now. And what is
12 being displayed in the red box?

13 A. Just like with the previous calls, shows that on
14 July 5th, 2017 at 1314 hours and 53 seconds in universal time
15 code, there was a 78-second call that originated -- it was an
16 outgoing call from (617)992-4648, the dialed number, and the
17 number that actually was the destination number is Carolyn
18 Jacobs' number, (619)525-7747.

19 Q. Thank you.

20 If you could look at Court's Exhibit 15 for
21 identification. Do you recognize that, again, as a synopsis
22 of what is contained within the records and also the call
23 being isolated from the call detail records?

24 *(Court's Exhibit No. 15 was identified.)*

25 A. Yes. It's the same synopsis as the other ones for
26 the call on July 5th and the snip from the computer-generated
27 records that were sent to T-Mobile.

28 Q. Thank you.

1 Are you able to use the call detail records that you
2 received from T-Mobile and put them into some sort of mapping
3 program to show you locations of towers and calls that are
4 made?

5 A. Yes. We have a tower tracking program that is
6 utilized by the District Attorney's Office and what it
7 essentially does is it takes the call detail records and it
8 will import the cell tower locations, date and times of the
9 calls and it will merge them with a Google map which
10 essentially just creates a visual map showing which cell
11 towers were utilized for calls during the period of records
12 that we import into it. Also included on that map is the
13 azimuth or the sector.

14 THE COURT: Is that the question anymore?

15 MS. SOMERVILLE: No, that's fine, Your Honor.

16 THE COURT: Okay.

17 BY MS. SOMERVILLE:

18 Q. Let me ask you another question.

19 A. Okay.

20 Q. Have you used that program before as a part of your
21 job when you get cell phone records to map out the call detail
22 records?

23 A. Yes, I have.

24 Q. And have you done that in this case as well?

25 A. Yes, I did.

26 Q. And did that then provide you with some Google map
27 images that mapped out what the call detail records had shown?

28 A. Yes.

1 Q. How are you able to basically from the records
2 determine where a tower was? Does that make sense?

3 A. The towers when we get the call detail records and
4 T-Mobile in their records actually includes the latitude and
5 longitude for the tower that was used. So it will actually
6 put a marker on that Google map where the tower was.

7 It also interprets from the data on many cell phone towers
8 there are three antenna, it's called an azimuth, and basically
9 it's a sector to give you 360-degree coverage on a cell phone
10 tower. So each azimuth or sector is 120 degrees roughly.

11 MS. FREEZE: And sorry to interrupt. Objection. Just
12 foundation as to --

13 THE COURT: Sustained.

14 MS. FREEZE: Thank you.

15 Motion to strike.

16 THE COURT: I think everything beyond the T-Mobile records
17 indicate which cell towers -- trying to recall some of the
18 testimony. But as far as I think, that's fine. That came
19 directly from the T-Mobile records. I'm not going to strike
20 that, but the extrapolation from those records that was
21 testified to, I will strike that with lacking foundation.

22 BY MS. SOMERVILLE:

23 Q. Are you familiar basically with how call detail
24 records -- well, have you reviewed them before? I think you
25 said that you've done that?

26 A. Yes, I have.

27 Q. Okay. And have you then used the tower tracker as
28 well to take the -- to take the call detail records and then

1 map them out?

2 A. Yes.

3 Q. Did you do that in this case?

4 A. Yes, I did.

5 Q. And were you able to create any Google images based
6 off of the information in the call detail records with the
7 tower tracker?

8 A. Yes, I did.

9 Q. Okay. And can you look at Court's Exhibit 16 for
10 identification.

11 *(Court's Exhibit No. 16 was identified.)*

12 A. Okay.

13 THE COURT: And I think I might have misled counsel with
14 Court Exhibit 16, say, because I thought that the Exhibits 8
15 through 18 were all just cell phone records and I think counsel
16 made an objection to the tower locations.

17 MS. FREEZE: Correct, based on --

18 THE COURT: So -- so just some -- before you publish, I'm
19 going to -- some foundation and then I'll give Ms. Freeze an
20 opportunity to object.

21 BY MS. SOMERVILLE:

22 Q. When you received these records from T-Mobile, aside
23 from what we looked at in Court's Exhibits -- I believe it was
24 eight through --

25 THE COURT: Fifteen.

26 BY MS. SOMERVILLE:

27 Q. -- fifteen, is there any information in those that
28 you received that gives you addresses or latitude and

1 longitude regarding cell phone towers?

2 A. Yes, there is.

3 Q. Okay. And was that -- are you then able to use that
4 information from the documents with the tower tracker to make
5 a map that maps out where those cell tower locations are
6 located?

7 A. Yes. Actually I could put in the latitude and
8 longitude into a Google search bar and it will bring the same
9 map. What the tower tracker does is it basically simplifies
10 it. It reads that latitude and longitude without me having to
11 type it in individually. It reads it from the call detail
12 records and it puts it onto the map.

13 Q. Okay. So is it like a mapping software type of
14 program?

15 A. Yes.

16 Q. So you don't have to actually sit there and figure
17 out maybe on a map or something yourself?

18 A. That is correct.

19 Q. Have you done that previously when looking at records
20 and preparing reports and things off of those?

21 A. Yes, I have.

22 Q. And did you do that in this case with the latitude
23 and longitude for cell towers in order to create some maps
24 showing where towers were located for this particular phone
25 number?

26 A. Yes, I did.

27 Q. And if you could -- what was the date range that the
28 records from T-Mobile encompassed?

1 A. I believe it was June 1st to July 6th.

2 Q. What year?

3 A. I'm sorry. 2017.

4 Q. Now, Court's Exhibit 16 for identification, do you
5 recognize that as one of the Google maps that you prepared
6 based off of the call detail records you received from
7 T-Mobile?

8 A. Yes, I did.

9 MS. SOMERVILLE: Your Honor, may I publish?

10 MS. FREEZE: Your Honor, just object as to foundation.
11 If we can have a quick sidebar on this issue.

12 THE COURT: All right.

13 *(Sidebar; unreported.)*

14 THE COURT: Thanks for your patience, ladies and gentlemen.
15 Sometimes this is just inevitable. But we're ready to go
16 again.

17 MS. SOMERVILLE: Thank you.

18 BY MS. SOMERVILLE:

19 Q. You've used this software before for the tower
20 tracker to map call detail records?

21 A. In at least 20 different cases.

22 Q. And have you found it to be reliable programming
23 software?

24 A. Yes. And when I do mapping using these records, I'll
25 actually go back and physically type in latitude and longitude
26 that's included in there to make sure that what I am seeing on
27 an independent search matches what the -- this tower tracker
28 program is showing me and also look to make sure from the call

1 detail records that date and times match up to the calls that
2 are being displayed on there.

3 Q. Did you do that in this particular case?

4 A. Yes, I did.

5 Q. Okay. And I believe it was misplaced for a second.
6 Here we go.

7 So Court's Exhibit 16 for identification, is this a map
8 that you generated through the tower tracker with the latitude
9 and longitude for cell phone towers?

10 A. Yes, it is.

11 MS. SOMERVILLE: Your Honor, may I publish this?

12 THE COURT: Any objection?

13 MS. FREEZE: I renew my previous objection as foundation.

14 THE COURT: All right. Overruled.

15 MS. SOMERVILLE: Thank you.

16 BY MS. SOMERVILLE:

17 Q. So Court's Exhibit 16 for identification, can you
18 just tell us -- I just want you to tell me is this the mapping
19 that you did with the call detail records from the records you
20 received from Mr. -- well, from the T-Mobile search warrant?

21 A. Yes.

22 Q. Okay. And what area on the Google map is this
23 showing?

24 A. This is showing the area of Arlington, Virginia.

25 Q. In the call detail records that you looked at, did
26 those -- I know you said that they have a latitude and
27 longitude, but for cell towers, did they also include physical
28 addresses for some of those?

1 A. Yes, it did.

2 Q. And Arlington, Virginia, does it also show another
3 area or city on this particular map?

4 A. It's Washington, D.C.

5 Q. Okay. And there are some they look kind of like pie
6 shapes, one looks like a circle lower down to the left-hand
7 corner. What are those?

8 A. Those are the sectors of the cell tower that are used
9 for each call. What you see here actually --

10 Q. Let me stop you for a moment.

11 A. Okay.

12 Q. So the yellow -- you said those are -- do those
13 represent cell towers from the call detail records based on
14 the latitude and longitude?

15 A. What the yellow represents is the antenna on the cell
16 tower. Those smaller circles, you see a small little yellow
17 black dot with the yellow circle and a black circle around it,
18 that represents the actual tower. And then the pie shapes and
19 some of them overlap show the actual antenna, the azimuth
20 that's used for the actual cell tower.

21 Q. And this map that was generated from all of the call
22 detail records that you received showing from June 1st to
23 July 6th of 2017?

24 A. Yes. This represents all of the calls during that
25 time period.

26 Q. And did you point out any specific locations on this
27 particular Google map?

28 A. Yes. I typed in the address for Mr. Bathen's -- his

1 work address.

2 MS. FREEZE: Your Honor, objection.

3 THE COURT: Sustained.

4 MS. FREEZE: Motion to strike.

5 THE COURT: It will be stricken. There's no foundation.

6 BY MS. SOMERVILLE:

7 Q. Did you listen to -- we played some jail calls
8 earlier here in court; is that correct?

9 A. Yes.

10 Q. And did Mr. -- did you hear in Mr. Bathen's jail
11 calls him giving a work address?

12 A. Yes. And a name of the business.

13 THE COURT: Sir, the question was: Did you hear an
14 address?

15 THE WITNESS: Yes.

16 BY MS. SOMERVILLE:

17 Q. And did he provide a home address in the jail calls?

18 MS. FREEZE: And I would just object. Misstates testimony.
19 I don't believe that there was any work address that was
20 provided in any of the jail calls.

21 MS. SOMERVILLE: I will withdraw that question.

22 THE COURT: I don't know there was an address given. I
23 don't know from the ones I heard.

24 MS. SOMERVILLE: If I said that, I misspoke. I apologize.

25 BY MS. SOMERVILLE:

26 Q. Was there a home address for Mr. Bathen given in the
27 jail calls that you listened to?

28 A. Yes. The home address was --

1 Q. Okay. And did you list that on Court's Exhibit 16?

2 A. Yes, I did.

3 Q. And can you show us where that is on the exhibit?

4 A. That's here, the 1132 North Kentucky Street in
5 Arlington.

6 Q. And did you also listen to the jail calls and hear
7 Mr. Bathen say where he was working prior to coming out to
8 California when he was in custody?

9 A. Yes. That he was working at the nonprofit in
10 Washington, D.C. and he gave the name of the nonprofit.

11 MS. FREEZE: And Your Honor, just object as it pertains to
12 misstates testimony. I believe that the jail call didn't
13 have -- the question was where he was working at on that date
14 of the time of the jail call.

15 MS. SOMERVILLE: That's fine. I can rephrase the question.

16 THE COURT: That wasn't my understanding of the question.
17 But just so we have a clear record, if you would rephrase it.

18 MS. FREEZE: Thank you, Your Honor.

19 BY MS. SOMERVILLE:

20 Q. Did you hear on the jail calls -- it was one of the
21 calls that we played earlier today for you -- Mr. Bathen say
22 where he was working when he was sitting in a cubicle and
23 basically couldn't have made any or couldn't have kept anyone
24 in fear?

25 A. Yes.

26 Q. And where did he say he was working at that time? Do
27 you remember?

28 A. I don't remember the name of the nonprofit, but I do

1 recall him saying it.

2 Q. Okay. If I showed you a copy of the transcript,
3 would that refresh your memory?

4 A. Yes, it would.

5 MS. SOMERVILLE: May I approach, Your Honor?

6 THE COURT: Yes.

7 THE WITNESS: Okay.

8 BY MS. SOMERVILLE:

9 Q. Did that refresh your memory?

10 A. Yes. It was to the International Food and Poverty
11 Institute [sic].

12 Q. And did he say in what city that was located?

13 A. Yes.

14 Q. Where was that?

15 A. Washington, D.C.

16 Q. And based off of that city that he provided and the
17 specific name of the place where he worked, were you able to
18 pull up or locate any address for that?

19 A. Yes, I did. I conducted a Google search for that
20 nonprofit and found its address.

21 MS. FREEZE: Objection. Calls for hearsay. Speculation as
22 it pertains to his search results as well as speculation as to
23 where --

24 THE COURT: No speaking objections. Sustained without a
25 foundation as to the address.

26 BY MS. SOMERVILLE:

27 Q. So how did you -- well, do you use the Google search
28 in your job as an investigator?

1 A. Yes.

2 Q. Okay. And have you used that before to get locations
3 of specific -- you know, if someone -- a location of a
4 specific place?

5 A. Sure. I've used it for both professional purposes
6 and personal purpose.

7 Q. Okay. Have you ever used it to find an address for a
8 specific location?

9 A. Yes, I have.

10 Q. And have you done that both in your job and also
11 personally?

12 A. Yes, I have.

13 Q. And on those occasions, have you found it to be
14 reliable?

15 A. Yes.

16 Q. And did you do that in this case with the specific
17 place Mr. Bathen indicated that he was working?

18 A. Yes, I did.

19 Q. And were you able to get an address in the
20 Washington, D.C. area?

21 A. Yes, I was.

22 Q. And did you then put that onto Court's Exhibit 16 for
23 identification?

24 A. Yes, I did.

25 Q. And is that -- can you tell us what that address is?

26 MS. FREEZE: And again, Your Honor, I'd object as to
27 hearsay as well as speculation.

28 THE COURT: It's denied. Overruled on speculation.

1 But we need the -- where the address was other than
2 Google.

3 MS. SOMERVILLE: Thank you.

4 BY MS. SOMERVILLE:

5 Q. When you went into the Google account or Google
6 search and you entered in -- did you enter in the name of this
7 business?

8 A. Yes, I did.

9 Q. And where did that take you to?

10 A. It took me to a website for a nonprofit in
11 Washington, D.C.

12 Q. And did that website then provide an address?

13 A. Yes, it did.

14 Q. And did you then put that address on Court's
15 Exhibit 16 for identification?

16 A. Yes. The address was on "I" Street in Washington,
17 D.C.

18 MS. FREEZE: And Your Honor, I would object hearsay as to
19 the Google search.

20 THE COURT: I'm going to overrule it.

21 BY MS. SOMERVILLE:

22 Q. So on Court's Exhibit 16, where did you indicate the
23 address of the location that Mr. Bathen had said he was
24 working after you did your Google search?

25 A. Right where this red pin is. That's when I searched
26 for the address in the cell tower tracking program. It
27 brought me to that; so I placed a pin and labeled it as his
28 work address.

1 Q. Okay. And that's on the right side of the screen I
2 believe you were pointing to on Court's Exhibit 16?

3 A. Yes, that is correct.

4 Q. And then on the left side of the screen, that is
5 where you -- it's in red writing, that's where you indicated
6 Mr. Bathen's home address based on what he said in the jail
7 calls?

8 A. Yes.

9 Q. If you can, would you go to Court's Exhibit 17 for
10 identification.

11 Do you recognize what's being shown in Court's Exhibit 17
12 for identification?

13 A. Yes, I do.

14 Q. And what is being shown in that particular exhibit?

15 A. These were the two calls on July 3rd from -- from the
16 (617)992-4648 number to Carolyn Jacobs' number, (619)525-7747.

17 Q. Okay. And is that a -- Court's Exhibit 17, is that a
18 tower tracker map that you generated based off of the call
19 detail records from T-Mobile after inputting them into the
20 software?

21 *(Court's Exhibit No. 17 was identified.)*

22 A. Yes, it is.

23 Q. Going to show you Court's Exhibit 17 for
24 identification. There's a Google map up there. Down below
25 there's a dialogue box. What is that indicating?

26 A. That's a call-out box that I placed on the map to
27 show which calls specifically I was highlighting, and I use
28 that because it makes it cleaner and easier to read without

1 all the disruption from behind.

2 Q. And then up to the right-hand corner, there is the
3 yellow pie shaped. And what is that indicating from the tower
4 tracker program?

5 A. From the tower tracker program, it's showing right
6 here the little dot, black dot, with the yellow circle and
7 then a black circle around it as the location of the cell
8 tower that was used to make that call, and the yellow pie
9 represents the azimuth of that cell tower that was used to
10 complete that call.

11 Q. Did you put in the addresses that were also on
12 Court's Exhibit 16 into Court's Exhibit 17?

13 A. Yes. I had left them on the map as I narrowed my
14 search on the cell towers.

15 Q. Okay. And they're kind of hard to read because
16 they're in black. But there appears to be some writing on the
17 left-hand side. Is that the Arlington address that Mr. Bathen
18 stated in his jail calls as his home address?

19 A. You mean on the left-hand side?

20 Q. Yes.

21 A. This one here, yes, that is the address on
22 North Kentucky Street in Arlington.

23 Q. And that's indicated by like a red push pin?

24 A. Yes. This one here.

25 Q. And then on the left side within the yellow pie
26 shape, there's also another red push pin. Is there an address
27 associated with that?

28 A. Yes. In the yellow section the push pin there

1 indicates the 1201 "I" Street in Washington, D.C.

2 Q. Thank you.

3 And the last exhibit I have for you, it is Court's
4 Exhibit 18 for identification. Do you recognize that?

5 *(Court's Exhibit No. 18 was identified.)*

6 A. Yes, I do.

7 Q. And is this also -- I haven't put it up there yet.
8 Is this also a Google map that was created with the call
9 detail records when you input them into the tower tracking
10 software?

11 A. Yes, it is.

12 Q. And which particular call from the call detail
13 records did this exhibit populate?

14 A. For this one, I utilized the July 5th -- the call
15 for -- the data for the call on July 5th.

16 Q. I'm going to put it up on the screen now. Court's
17 Exhibit 18, can you just describe for us what's in the call
18 out box there?

19 A. That's showing the date and time of the call that the
20 originating phone number was, (617)992-4648 and the phone call
21 was to Carolyn Jacobs' number, (619)525-7747.

22 Q. Okay. And again, there's a yellow pie shape up in
23 the right-hand corner of this exhibit. There's a red push pin
24 in there. Is there an address associated with that?

25 A. Yes. That is also the address on "I" Street for the
26 nonprofit in Washington, D.C.

27 Q. Thank you.

28 Were you able to prepare a Google map off of the tracker

1 program for the call that was on June 4th of 2017?

2 A. No.

3 Q. Okay. And why couldn't you prepare one of those off
4 of the tracker program?

5 A. Because the call detail records that I received from
6 T-Mobile did not include the -- included the L.A.C. number but
7 not the specific tower number.

8 MS. SOMERVILLE: Thank you. Nothing further.

9 THE COURT: Ms. Freeze.

10 MS. FREEZE: Thank you, Your Honor.

11 Just one moment.

12

13

CROSS-EXAMINATION

14 BY MS. FREEZE:

15 Q. Good afternoon, Investigator Gain.

16 A. Good afternoon.

17 Q. Probably won't finish with you this afternoon, but
18 I'll start with you. Okay. Thank you.

19 Now, I want to start a little bit just talking to you a
20 little bit about your background, Investigator Gain. You are
21 not an electrical engineer; correct?

22 A. That is correct.

23 Q. You're not -- you wouldn't consider yourself an
24 expert in cell phone towers?

25 A. Well, an expert is somebody who has more knowledge
26 than the average person and I would say yes, I would be.

27 Q. And the knowledge comes from this tower tracker
28 program, though; correct?

1 A. And my experience in working in the law enforcement
2 field exploiting cell phones and cell tower data.

3 Q. Okay. And you've never worked for a cell phone
4 company, though; correct?

5 A. That is correct.

6 Q. And you were not involved in establishing any
7 cellular networks like T-Mobile or anything like that?

8 A. No.

9 Q. And you don't have a degree in mathematics; correct?

10 A. No.

11 Q. Or in engineering; correct?

12 A. No.

13 Q. And do you have any experience in the
14 telecommunications industry?

15 A. Other than how it applies to the law enforcement
16 investigations, no, I do not.

17 Q. Okay. And you are not accredited as any part of
18 engineering, mathematic or scientific group; correct?

19 A. No.

20 Q. And you are not a member of the Institute for
21 Electrical and Electronic Engineering; correct?

22 A. No.

23 Q. Now, with regards to the -- I want to start just
24 talking about the T-Mobile call detail records or CDRs that
25 were commonly referred to them; correct?

26 A. Yes.

27 Q. Now, Ms. Somerville was asking you some questions
28 about those call detail records, and those were in response to

1 a subpoena; correct?

2 A. A search warrant.

3 Q. That's -- yes, the search warrant; correct?

4 A. Yes.

5 Q. And where -- where are the original call detail
6 records? Do you have those?

7 A. The originals would be maintained by T-Mobile. They
8 e-mailed me an electronic copy of them.

9 Q. And do you know how T-Mobile runs their CDRs, what
10 kind of program they use?

11 A. No.

12 Q. Do you -- do you know what kind -- so would it be the
13 records department of T-Mobile that sent them to you? Is that
14 correct?

15 A. We get them through their law enforcement relations
16 group.

17 Q. But they didn't, like, mail you the originals or
18 anything like that? You just had a copy e-mailed to you?

19 A. They just e-mail a copy, yes, that is correct.

20 Q. So what business unit, department, entity or function
21 needs this report? Who needs the CDRs, if you are aware?

22 A. I'm assuming their billing. But beyond that, I don't
23 know how T-Mobile utilizes these records internally.

24 Q. So you don't know if it's actually something that is
25 needed or not. You are just assuming that it's maybe used for
26 billing; is that correct?

27 A. I know it's something they have.

28 Q. Okay. And do you -- have you subpoenaed, gotten

1 search warrants on CDRs from other companies like Verizon,
2 Sprint?

3 A. Yes, I have.

4 Q. Now, when you were -- when we were talking about the
5 CDR records, the records that we received as part of this
6 T-Mobile request, is that the normal -- is that kind of what
7 they all look like when you're getting it from Sprint or
8 Verizon?

9 A. Yeah. There would be minor variations or
10 differences, but the basic information is all pretty much the
11 same.

12 Q. And so it doesn't display like a Social Security
13 number; right?

14 A. If a cell phone company has that as part of their
15 subscriber information, it would be.

16 Q. And when -- in this case, you don't know if T-Mobile
17 requires any type of I.D. verification or authentication of an
18 address or anything like that when someone gets a phone
19 through T-Mobile?

20 A. It would depend on the billing plan.

21 Q. So when you had testified earlier about this phone,
22 it was like a burner phone. Is that fair to say in this case?

23 A. That is a common phrase used for prepaid phones, yes.

24 Q. Okay. And so as far as you know, they didn't -- all
25 the information they needed was just an address and a
26 birthday?

27 A. For a burner phone all they need is for you to pay
28 money for the minutes to put on the phone.

1 Q. So they don't need to verify if that's actually your
2 birthday or that's actually where you live or anything like
3 that; correct?

4 A. That is correct, yes.

5 Q. Okay. Someone could just say here's five bucks, make
6 up some random information and get the phone?

7 A. Yes.

8 Q. Okay. Now, on the call detail records it indicates
9 that the agreement was opened, if you will, on September 1st
10 of 2014; is that correct?

11 A. Yes.

12 Q. And that's when the person would have provided
13 T-Mobile that information, like the address and the birthdate
14 or whatever that person's willing to provide?

15 A. Whether they did it on that date or did it on a
16 subsequent date, I couldn't tell you.

17 Q. Well, in order for -- so the entry of the address,
18 when did that -- when was that provided to T-Mobile?

19 A. That is not included in the records. I don't know
20 when the person provided that information.

21 Q. Okay. How would you find that out? How is that
22 found out when you are looking at these CDRs?

23 A. It's not included in the information that they give.

24 Q. Did you ever follow up or inquire of T-Mobile about
25 the -- when this information was provided, whether if it was
26 done as a prerequisite as part of, like, I guess, the contract
27 or the agreement -- I pay money, I get the phone -- if that
28 was something that needed to be done in 2014 or if that could

1 have been done hours before they canceled?

2 A. I did not inquire about that, no.

3 Q. And did you ever inquire of -- did you ever go to
4 1132 North Kentucky Street, inquire how many people live
5 there, or anything like that?

6 A. No.

7 Q. Okay. Did you at any point go out to the East Coast
8 and look at these towers yourself or verify these addresses at
9 any time?

10 A. No, I did not.

11 Q. And do you know how much was paid for the phone, if
12 it was something like it was a lump sum or if it was something
13 that was paid monthly? I know you mentioned billing. So did
14 you get any of that billing information, how much was paid?

15 A. Stated in their records that it was a prepaid phone.
16 So a person prepays whatever amount of minutes they feel is
17 conducive with how they want to use the phone. As for how
18 much they paid for the phone, I would have no idea.

19 Q. Does it show at any time if it was paid in cash, if
20 it was bought with a credit card, if a check was made so it
21 could go back to that person to actually verify who is paying
22 for the phone?

23 A. The records received from T-Mobile do not show any of
24 that.

25 Q. Would that have been something that you could have
26 subpoenaed or gotten a search warrant for in order to actually
27 verify exactly who this person is?

28 A. No. In my experience working at narcotics task force

1 and tracking criminals using cell phones, they can go and
2 purchase a card of minutes at almost any store, Walmart,
3 K-Mart. They can pay cash and there would be no record of who
4 it was that made that purchase.

5 So, no, I did not do anything further to inquire as to who
6 paid, how they paid for the minutes that were on that phone.

7 Q. But you had just mentioned that in previous cases you
8 have gone and been able to find that information; correct?

9 MS. SOMERVILLE: Misstates the testimony.

10 MS. FREEZE: Perhaps I misunderstood.

11 THE COURT: Clarify.

12 MS. FREEZE: Sure.

13 BY MS. FREEZE:

14 Q. So I'm not asking about in your -- you mentioned your
15 experience with criminals and narcotics and things like that.
16 This isn't a -- not a narcotics case; right?

17 A. That is correct.

18 Q. Okay. And -- but you testified a moment ago, and
19 perhaps I misunderstood, but that in your experience when
20 trying to track down the actual owner of a phone, you've
21 learned that they've paid -- they've paid it through other
22 means, they've been able to pay it and you've been able to
23 track them down? No?

24 A. I never said anything like that.

25 Q. When you said that in -- previously that they've gone
26 and gotten cards -- I guess I misunderstood what you're saying
27 about with regards to criminals going and getting prepaid
28 debit cards. Maybe expand on that. I don't understand that.

1 A. I was just explaining how the prepaid phones work,
2 where a person can go down to any Walmart, most stores, and
3 they have packaged phones where there's a TracFone or whether
4 it's whoever the manufacturer is, they pay a flat amount for
5 the phone and then they purchase a card that they are allowed
6 to add minutes to that phone, and that can be from -- for
7 varying amounts, you scratch off on the back of the card.
8 There's a code. You enter that into your phone and that
9 allows the minutes to be added onto the phone.

10 Q. Okay. But you didn't do any type of investigation to
11 find out if Mr. Bathen had done that in this case; correct?

12 A. No, I didn't. No further investigation other than
13 read what T-Mobile had sent that it was a prepaid phone.

14 Q. Okay. And -- and when you saw that it was the
15 birthdate of November 30th of 1977, isn't it true during your
16 investigation of this case that Mr. Bathen's date of birth is
17 listed actually as November 20th of 1977?

18 A. No, it's listed in the -- on the jail booking screen
19 and on his Virginia driver's license with the November 30th
20 date and it's his California driver's license has a
21 November 20th date.

22 Q. How did you -- when did you obtain his Virginia
23 driver's license?

24 A. I ran it from my desktop computer. I didn't actually
25 obtain a physical copy of it. I just got the computer
26 printout.

27 Q. And how did you -- where does the computer printout
28 come from, where does that information -- where is it

1 generated from?

2 A. From the Department of Motor Vehicles in Virginia.

3 Q. Virginia?

4 A. Yes.

5 Q. And do you have a copy of that with you today?

6 A. Yes, I do.

7 Q. And then do you also run Mr. Bathen's name and all
8 through S.D. Law?

9 A. Yes.

10 Q. And isn't it true on S.D. Law that his address is in
11 Springfield, Virginia?

12 A. I will have to refresh my recollection on that.

13 Q. And I have a copy of the S.D. Law that's actually
14 been provided to me by the District Attorney's Office, if that
15 refreshes your recollection.

16 A. No. What I have -- what I got when I ran it through
17 eJIMS through S.D. Law was the 1132 Kentucky Street,
18 Arlington, Virginia.

19 Q. And when did you run that?

20 A. When I first started working on the case.

21 Q. Okay.

22 A. That would have been --

23 Q. And are you familiar with CLETS?

24 A. Uh-huh.

25 Q. What is CLETS?

26 A. The -- it's law enforcement telecommunication system.

27 Q. And if I have a different address from CLETS from
28 S.D. Law that was provided to my office by the District

1 Attorney's Office having a different address, how would you
2 describe that discrepancy?

3 MS. SOMERVILLE: Objection. Foundation.

4 THE WITNESS: Looking at data from two different sources.

5 BY MS. FREEZE:

6 Q. So what's the difference between your S.D. Law and
7 the S.D. Law I have?

8 MS. SOMERVILLE: Objection. Foundation.

9 THE COURT: Lacks foundation.

10 MS. FREEZE: Well, okay.

11 BY MS. FREEZE:

12 Q. That's fine. I'll move ahead.

13 Now, with regards to listening to the jail call, the jail
14 calls of my client when he was in custody, you had never heard
15 Mr. Bathen speak before; correct?

16 A. That is correct.

17 Q. He didn't speak at the restraining order hearing;
18 correct?

19 A. That is correct.

20 Q. And at no point during the calls at any point he's
21 yelling or cursing or anything like that; correct?

22 A. Which calls? The calls to the victim he was.

23 Q. The jail calls.

24 A. In the jail calls, no, he never -- I never heard him
25 yelling or screaming in the jail calls.

26 Q. Okay. And with regards to his address that he
27 provided to one of the bail bondsman, in your experience,
28 do -- let me back up.

1 In your experience, have you listened to a lot of jail
2 calls before?

3 A. Yes, I have.

4 Q. And are those jail calls between the inmate and bail
5 companies?

6 A. Occasionally.

7 Q. Okay. And in your experience, are they -- these
8 people are trying to get out of custody; correct?

9 A. Yes.

10 Q. They are -- they'll do anything they can to get out
11 of there; fair to say?

12 A. That's fair to say, yes.

13 Q. Okay. And so you -- again, you didn't do any
14 follow-up to see how many people looked at that address or how
15 long Mr. Bathen had resided at that address or anything like
16 that; correct?

17 A. That is correct.

18 Q. Now, with regards to Mr. Bathen referencing his
19 employment at the nonprofit, there was some discussion on
20 that. Isn't it true that that nonprofit has offices all over
21 the world? Did you look into that at all during your research
22 on Google?

23 A. I did see that they had offices. There was only one
24 in Washington, D.C. that I saw.

25 Q. Okay. But there's -- fair to say that there's
26 several offices all over the globe; correct?

27 A. Yes.

28 Q. Okay. And did you at any time look at any of those

1 other addresses, do a cell phone tower analysis there?

2 A. No, I did not.

3 Q. Okay. Now, let me ask you a little bit about these.

4 THE COURT: And we have a couple more minutes, but -- so
5 when you get to a reasonable break.

6 MS. FREEZE: This -- yeah, I'm segueing into a different
7 area. I'm talking about cell towers and all that next, so --

8 THE COURT: Okay. So that's going to be a lengthy subject
9 matter.

10 MS. FREEZE: Probably.

11 THE COURT: Okay. All right. Ladies and gentlemen, we'll
12 take our evening recess at this time.

13 Sorry, ladies and gentlemen. I had something we were
14 trying to reschedule tomorrow morning so we could start right
15 at 9:00.

16 So let's start at 9:15. I don't want to keep you waiting.
17 So we'll be ready by 9:15.

18 Please remember the same admonition not to form or express
19 an opinion. Don't talk to anybody about any subject connected
20 with this matter.

21 Not sure we had any addresses discussed today. If we did,
22 don't visit the scene. And stay off the Internet in
23 connection with this matter.

24 I will see you tomorrow morning at 9:15. Thank you.

25 *(The following proceedings were had between the Court*
26 *and counsel out of the presence and hearing of the*
27 *jury.)*

28 THE COURT: We're out of the presence of the jury.

1 Just went through the jury instructions really fast. I
2 will need probably a 303, 333, and 359. And then anything you
3 wanted to add, Ms. Freeze?

4 Off the record just to talk about scheduling. I don't
5 think we need this on the record.

6 *(Discussion held off the record.)*

7 THE COURT: On the record.

8 MS. FREEZE: I had a brief dialogue with Ms. Somerville
9 this afternoon about me playing one jail call that just -- that
10 I was -- and I did speak with Robert. I don't -- I only have a
11 CD that has all of them on there and so I would put it on a
12 separate one. I've been advised of that, and I could have done
13 it -- threw it on a thumb drive if it needed to be.

14 THE COURT: It has to be a way, if you are going to play
15 it, that they can play it in the jury room.

16 MS. FREEZE: Good to know.

17 And then I believe Ms. Somerville was going to be
18 objecting to that. I might not play it.

19 THE COURT: And you have to have a transcript. I'm not
20 talking about its admissibility if there is an objection.

21 MS. FREEZE: Yeah, I have a bunch. I have all of them here
22 for everybody.

23 THE COURT: Okay.

24 MS. FREEZE: And I believe Ms. Somerville wanted to be
25 heard on that.

26 MS. SOMERVILLE: Yes, I was just going to object under
27 1220. I don't think the rule of completeness applies to that
28 particular call. I mean, these were separate and distinct

1 calls, separate people. So I would object. I don't think it
2 should -- I don't think the defendant can bring that in.

3 THE COURT: And why would the defendant be able to bring
4 that since you ordinarily cannot introduce a statement by your
5 client outside of his testimony?

6 MS. FREEZE: Right. Well, I think it was going to provide
7 some insight as she showed the four or whatever -- the five
8 jail calls from earlier today regarding the Arlington address,
9 and then it would be information on that Arlington address
10 expanding how long he's resided -- resided at that Arlington
11 address.

12 THE COURT: May I see the transcript? Do you have it
13 available?

14 MS. FREEZE: Sure. And I'll bring it to the Court's
15 attention.

16 THE COURT: Well, I have to read -- skim through the whole
17 thing --

18 MS. FREEZE: Yeah, of course.

19 THE COURT: -- if you are going to play the whole thing.

20 MS. FREEZE: I have plenty of copies. I made extra.

21 THE COURT: Okay. Well, I was wrong. I can't find where
22 it says details about his address. So if you refer me to the
23 page.

24 MS. FREEZE: Page 5, line 9.

25 THE COURT: Okay. So how would that have -- is the
26 Kentucky Street address the one that's contained on the map?
27 Isn't it a different address? Isn't it in Arlington?

28 MS. SOMERVILLE: It's in Arlington, Virginia.

1 THE COURT: And the street address name that is mapped, do
2 you know offhand?

3 MS. SOMERVILLE: It's Kentucky.

4 THE COURT: It is Kentucky.

5 MS. SOMERVILLE: North Kentucky. It's 1132.

6 THE COURT: I think everything else is kind of a duplicate
7 of what's already been introduced in your calls. So ordinarily
8 I would not let it in, but I think since the address is being
9 used to depict the address in 2017, and I think the information
10 is in a jail call, I think that's about the only difference in
11 this call than the other. So it's not like introducing a whole
12 new self-serving information.

13 MS. SOMERVILLE: I mean in this he does -- you know, some
14 issues. I mean I don't think he says, like, I've never been
15 arrested before. I don't remember him saying that in the call.
16 I think he was nervous about being in jail.

17 THE COURT: He absolutely said that before in one of the
18 calls he played. He said, "I've never been in jail before"
19 and --

20 MS. FREEZE: I don't find myself in jail often or something
21 like that.

22 THE COURT: It was even more than that. It was, this is my
23 first time here or something like that. So, yeah, that
24 absolutely I remember.

25 And I forget what expression Mr. Bathen used, but it kind
26 of obviously -- I thought it stuck with me, but it didn't
27 because I can't repeat it at this moment. But yeah, but I'll
28 read through the transcript. But I think that it would create

1 a false impression to the jury or I take your objection
2 because this is not the way we introduce testimony by
3 Mr. Bathen. But since it's just an address, a recent address,
4 I think it's fair.

5 MS. SOMERVILLE: Okay. Thank you.

6 THE COURT: Yeah. So my tentative is yes, but let me read
7 it over to make sure and I'll compare it to the other
8 transcripts.

9 MS. SOMERVILLE: Okay.

10 MS. FREEZE: And then I'll burn a separate CD.

11 THE COURT: Let's go off the record for that.

12 *(At 4:38 p.m. an adjournment was taken until Friday,*
13 *June 15, 2018, at 9:15 a.m.)*

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 San Diego, California)
2 County of San Diego) : SS.

3

4

5 I, Yvonne Medina Luna, Official Reporter for the Superior
6 Court of the State of California, in and for the County of San
7 Diego, do hereby certify:

8

9 That as such reporter, I reported in machine shorthand the
10 proceedings held in the foregoing case;

11

12 That my notes were transcribed into typewriting under my
13 direction and the proceedings held on June 14, 2018, contained
14 within Pages 170 through 355, are a true and correct
15 transcription.

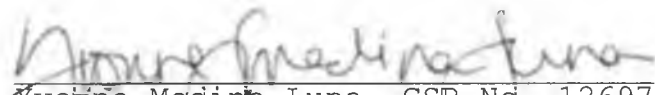
16

17 Dated this 28th day of September 2018.

18

19

20


Yvonne Medina Luna, CSR No. 12697
Official Court Reporter

21

22

23

24

25

26

27

28

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	)	FROM SAN DIEGO COUNTY
)	
PLAINTIFF AND	)	HON. STEPHANIE SONTAG
RESPONDENT,)	
	)	COURT OF APPEAL
VS.	)	NO. D074538
)	
	)	CASE NO. SCS294342
BENJAMIN BATHEN,)	
)	
DEFENDANT AND)	
APPELLANT.	)	JURY TRIAL
)	

REPORTER'S CERTIFIED TRANSCRIPT
JUNE 15, 2018
VOLUME 4 OF 7
(PAGES 356 THROUGH 535)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST "A" STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	BENJAMIN BATHEN
AND APPELLANT:	IN PROPRIA PERSONA

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
OFFICIAL COURT REPORTER

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

DEPARTMENT 15

HONORABLE STEPHANIE SONTAG, JUDGE

THE PEOPLE,)	
)	
PLAINTIFF,)	
	)	CASE NO. SCS294342
VS.)	
)	
)	
BENJAMIN BATHEN,)	
)	
DEFENDANT.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FRIDAY, JUNE 15, 2018

A P P E A R A N C E S

FOR THE PLAINTIFF: SUMMER STEPHAN
 DISTRICT ATTORNEY
 BY: CHERIE SOMERVILLE
 DEPUTY DISTRICT ATTORNEY
 333 "H" STREET, SUITE 4000
 CHULA VISTA, CALIFORNIA 91910

FOR THE DEFENDANT: THE LAW OFFICE OF ALICIA C. FREEZE, APC
 BY: ALICIA C. FREEZE
 (RETAINED COUNSEL)
 7676 HAZARD CENTER DRIVE, SUITE 500
 SAN DIEGO, CALIFORNIA 92108

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
 OFFICIAL COURT REPORTER

CHRONOLOGICAL INDEX OF WITNESSES

	PAGE	LINE	VOL
GREGORY GAIN - PEOPLE'S WITNESS			
CROSS (RESUMED) BY MS. FREEZE . . . . .	.370	8	4
REDIRECT BY MS. SOMERVILLE . . . . .	.386	19	4
RE CROSS BY MS. FREEZE . . . . .	.391	22	4
DONALD HOLMES - PEOPLE'S WITNESS			
CROSS BY MS. FREEZE . . . . .	.424	10	4
REDIRECT BY MS. SOMERVILLE . . . . .	.447	18	4
MANFRED SCHENK - DEFENSE WITNESS			
DIRECT BY MS. FREEZE . . . . .	.460	9	4
CROSS BY MS. SOMERVILLE . . . . .	.480	3	4
REDIRECT BY MS. FREEZE . . . . .	.497	24	4

ALPHABETIC INDEX OF WITNESSES

	PAGE	LINE	VOL
GAIN, GREGORY - PEOPLE'S WITNESS			
CROSS (RESUMED) BY MS. FREEZE . . . . .	.370	8	4
REDIRECT BY MS. SOMERVILLE . . . . .	.386	19	4
RE CROSS BY MS. FREEZE . . . . .	.391	22	4
HOLMES, DONALD - PEOPLE'S WITNESS			
CROSS BY MS. FREEZE . . . . .	.424	10	4
REDIRECT BY MS. SOMERVILLE . . . . .	.447	18	4
SCHENK, MANFRED - DEFENSE WITNESS			
DIRECT BY MS. FREEZE . . . . .	.460	9	4
CROSS BY MS. SOMERVILLE . . . . .	.480	3	4
REDIRECT BY MS. FREEZE . . . . .	.497	24	4

INDEX OF EXHIBITS IDENTIFIED

	PAGE	LINE	VOL
19 ORIENTATION SLIDE TITLED "CELL SITE ANALYSIS (617) 992-4648, JUNE 1, 2017 TO JULY 7, 2017," ONE PAGE	412	28	4
20 TOWER FREQUENCY CHART, ONE PAGE	413	14	4
21 PAGE TITLED "NO. 1 TOWER CONNECTION WITH MAP AT 9211 OLD KEEN MILL ROAD, BURKE, VA," ONE PAGE	415	12	4
22 PAGE TITLED "POINT OF INTEREST" WITH MAP AT 6626 GREEN ASH COURT, SPRINGFIELD, VA, ONE PAGE	417	20	4
23 CHART TITLED "NO. 1 TOWER CONNECTION USAGE - DATE & DAY OF WEEK," ONE PAGE	418	10	4
24 PAGE TITLED, "NO. 2 TOWER CONNECTION" WITH MAP AT 1003 "K" STREET NW, WASHINGTON, DC, ONE PAGE	418	28	4
25 PAGE TITLED "POINT OF INTEREST" WITH MAP AT 1201 "I" STREET NW, WASHINGTON, DC, ONE PAGE	419	23	4
26 CHART TITLED "NO. 2 TOWER CONNECTION USAGE - DATE & DAY OF WEEK," ONE PAGE	419	27	4
27 PAGE TITLED "NO. 3 TOWER CONNECTION" WITH MAP AT 9501 OLD BURKE LAKE ROAD, BURKE, VA, ONE PAGE	420	15	4

28	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 9501 OLD BURKE LAKE ROAD, BURKE, VA, ONE PAGE	421	4	4
29	CHART TITLED "NO. 3 TOWER CONNECTION USAGE - DATE & DAY OF WEEK, ONE PAGE	421	13	4
30	PAGE TITLED "NO. 4 TOWER CONNECTION" WITH MAP AT 1125 N. PATRICK HENRY DR., ARLINGTON, VA, ONE PAGE	421	24	4
31	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 1125 N. PATRICK HENRY DR., ARLINGTON, VA, ONE PAGE	422	15	4
32	CHART TITLED "NO. 4 TOWER CONNECTION USAGE - DATE AND DAY OF WEEK," ONE PAGE	422	22	4
33	CUSTODY OF RECORD DOCUMENT FROM T-MOBILE	459	4	4
34	COMPACT DISK CONTAINING CALL DETAIL RECORDS AND BILLING INFORMATION	459	9	4
38	AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH ALL STAR BAIL BOND REPRESENTATIVE HANK	372	17	4
38A	TRANSCRIPT FOR AUDIO RECORDING, EXHIBIT 38	372	18	4
39	ONE PAGE TITLED "CELL TOWER COVERAGE CELL PHONE 617-992-4648" WITH MAP	475	23	4

INDEX OF EXHIBITS RECEIVED

	PAGE	LINE	VOL
1	501	12	4
1A	501	12	4
2	501	12	4
2A	501	12	4
3	501	12	4
3A	501	12	4
4	501	12	4
4A	501	12	4
5	501	12	4
5A	501	12	4
6	501	12	4
6A	501	12	4
7	501	12	4

7A	501	12	4
8	501	12	4
9	501	14	4
10	501	14	4
11	501	14	4
12	501	14	4
13	501	14	4
14	501	14	4
15	501	14	4
16	501	14	4
17	501	14	4
18	501	14	4
19	501	14	4
20	501	14	4

21	501	14	4
22	501	14	4
23	501	14	4
24	501	14	4
25	501	14	4
26	501	14	4
27	501	14	4
28	501	14	4
29	501	14	4
30	501	14	4
31	501	14	4
32	501	14	4
33	501	14	4
34	501	14	4

38501 19 4

39503 4 4

1 Chula Vista, California; Friday, June 15, 2018

2 -- 000 --

3 *(The following proceedings were had between the Court*
4 *and counsel out of the presence and hearing of the*
5 *jury.)*

6 THE COURT: We're on the record outside of the presence of
7 the jury. We had Juror No. 2 call in. She --

8 She? He?

9 THE CLERK: She.

10 THE COURT: She. I don't put gender down on my notes, so I
11 don't know.

12 Anyway, she --

13 Thank you, Robert.

14 She took her son to the emergency room last night. Just
15 got back this morning, is not able to come in today.

16 I would prefer that we just go ahead without her, but it's
17 up to you. We'd have to go dark today and start again on
18 Monday if we didn't replace her.

19 Looks like we'd be done today, which would be my
20 preference.

21 MS. FREEZE: Right.

22 MS. SOMERVILLE: I'm fine with that, Your Honor.

23 MS. FREEZE: We can employ one of the alternates.

24 THE COURT: Oh, sure. We have an alternate to put in, but
25 I just wouldn't do that without everybody agreeing if that's
26 the way we're going proceed.

27 MS. FREEZE: Yep. That sounds good to me, Your Honor.

28 THE COURT: Is that good for you, Ms. Somerville?

1 MS. SOMERVILLE: Yes.

2 MS. FREEZE: So, it would be --

3 THE COURT: On the jail call, I have reviewed it. On the
4 call of September 17, 2017 that was admitted, there is a
5 reference on Page 5, line 26 that Mr. Bathen has not been in
6 jail before. So that's not new information. Even if it was, I
7 think the rule of completeness would require if there was
8 another jail call that clarified the address. I think that
9 does come in.

10 So subject to foundation, though, I mean unless there's a
11 stipulation, you would have to lay the foundation for the jail
12 call.

13 MS. FREEZE: Thank you, Your Honor.

14 MS. SOMERVILLE: I'll stipulate to foundation. I believe
15 Mr. Gain already provided that, so we don't have to go into
16 that.

17 THE COURT: Thank you.

18 MS. FREEZE: Great.

19 THE COURT: Okay. So I think those were the outstanding
20 matters. Was there anything else? I mean we're not talking
21 about jury instructions at this time. We'll do that after
22 evidence is over.

23 MS. SOMERVILLE: Okay.

24 MS. FREEZE: Yeah. I think so. I just sent one.

25 Robert, did you receive that?

26 THE COURT: Yes, I have it.

27 MS. FREEZE: Okay. Great.

28 THE COURT: I have everybody's jury instructions that they

1 sent this morning.

2 MS. SOMERVILLE: One thing, how are we determining who is
3 going to be the alternate?

4 THE COURT: Next in order.

5 MS. SOMERVILLE: Oh, okay. That's fine with me. Thank
6 you.

7 THE COURT: Yeah. I know some people do a lottery, but I
8 figure it's all we've done, everything in order. And that's
9 what I did. So Juror No. 13 will now -- will be Juror 2. All
10 right?

11 MS. FREEZE: Hopefully Juror 13 is here.

12 THE COURT: Okay. Shall we see whether they're all here?
13 And you are all ready to go? Ms. Somerville?

14 MS. FREEZE: Yes, Your Honor.

15 MS. SOMERVILLE: Yes, Your Honor.

16 *(The following proceedings were had in open court in*
17 *the presence and hearing of the jury.)*

18 THE COURT: We're on the record with the jury present now.
19 And ladies and gentlemen, Juror No. 2 is not going to be
20 able to continue with the trial; so we're going to have
21 Juror 13, you are now regular Juror No. 2. So we'll have you
22 take your seat down there.

23 So, as you can see, our alternates are very, very
24 important.

25 You may sit wherever you'd like to sit, Juror 14. Are you
26 good? You have three seats. No, not in the back.

27 All right. And I heard that at least one of you is having
28 trouble perhaps hearing, people's voices may be dropping. We

1 will all make an effort to speak up.

2 Also, though, we do have assisted hearing devices. So if
3 you -- anybody thinks that's necessary, let me know and that
4 will amplify what's going on. So you would like one.

5 A JUROR: Oh, no, no, no. The chairs are so noisy until we
6 make a little movement. Sometimes when you guys are talking,
7 it makes a sound and it's, like, what did they say?

8 THE COURT: If you or you missed something, raise your hand
9 and we'll -- it's important that, obviously, you hear
10 something, and I guess I could get a can of WD-40 and start
11 spraying, but too late for today. Everyone sit still.

12 Okay. We'll do our best. And just let us know if you
13 can't hear. Really, it's so important that you do. And we
14 have had some soft-spoken people.

15 Okay. So, with that, I think we're all ready to go.

16 And, Ms. Somerville, if you call your next witness.

17 MS. SOMERVILLE: Your Honor, I believe he's still on cross,
18 but I will get Investigator Gain.

19 THE COURT: Thank you. I had forgotten.

20 I'm going to have you just sit down and remind you that
21 you are still under oath.

22 We have our witness on the stand.

23 And as I told you, you understand you are still under
24 oath?

25 THE WITNESS: Yes, I do, Your Honor.

26 THE COURT: Ms. Freeze.

27 MS. FREEZE: Thank you, Your Honor.

28 /////

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GREGORY GAIN,

called as a witness on behalf of the People,
having been previously duly sworn, testified
as follows:

CROSS-EXAMINATION (RESUMED)

BY MS. FREEZE:

Q. Good morning, Investigator Gain. Nice to see you again. Just get organized here.

Okay. So, Investigator Gain, I just want to do a quick recap, not too much, just to make sure we're on the same page from where we left off yesterday.

Now, we were looking through some of the call detail records from T-Mobile; correct?

A. Yes, that is correct.

Q. And there's no subscriber name on those CDR's; correct.

A. Correct.

Q. Okay. And this is -- and we had talked a little bit about how an individual gets these prepaid phones or these burner phones. They can really provide any type of information whatsoever in order to get the phone; fair to say?

A. Yes.

Q. Great. And we looked at the CDR's, the effective date was September 1st of 2014 with the address on Kentucky Street and then it was canceled approximately three years later on September 4th of 2017; correct?

1 A. Yes.

2 Q. Now, the calls that were made to Dr. Jacobs, that
3 number that was used, the number that was called, excuse me,
4 was the (619)525-7747 number; correct?

5 A. Yes.

6 Q. There was no calls made to a different number, her
7 cell phone (619)254-2343 -- correct? -- as far as you are
8 aware?

9 A. Not that I was aware.

10 Q. And she never brought up any concerns about someone
11 leaving messages on a different line, her home number, cell
12 number or anything like that; correct?

13 A. No, just the calls to that.

14 Q. Now, with regards to the jail calls that we listened
15 to yesterday, isn't it true that there was several jail calls
16 that you listened to as part of your investigation; correct?

17 A. There were 13 total and I think we looked and three
18 of them were social visits and the other 10 were phone calls.

19 Q. And obviously some were -- there were sometimes when
20 Mr. Bathen had, like, his attorney come and visit him or talk
21 to him, you wouldn't be recording those calls; correct?

22 A. No. The jail system doesn't -- they have a separate
23 room for attorney-client visits.

24 Q. Now, and in one of the calls, isn't it true that
25 Mr. Bathen indicates to one of the bail bondsman that he'd
26 only actually lived at that Kentucky Street address for a
27 couple months?

28 A. I don't specifically recall that being said.

1 Q. Would listening to the call refresh your
2 recollection?

3 A. Or referring to the transcript.

4 Q. Absolutely. I have that for you as well.

5 A. Okay.

6 MS. FREEZE: And this, I believe, has been marked already,
7 Robert, as exhibit -- I think you have the --

8 THE COURT: Thirty-eight, I think.

9 MS. FREEZE: I thought we marked it yesterday, Robert. Did
10 we not?

11 THE CLERK: Yes.

12 MS. FREEZE: Your Honor, may -- thank you.

13 BY MS. FREEZE:

14 Q. And this has been marked for the record as Court's
15 Exhibit 38A. And while we're doing that, perhaps I can hand
16 out to the jury, Your Honor, the transcripts?

17 *(Court's Exhibit No. 38 was identified.)*

18 *(Court's Exhibit No. 38A was identified.)*

19 THE COURT: Right. The actual -- just for the record, the
20 call is Exhibit 38. The transcript will be Exhibit 38A. And
21 that's as we did yesterday, the transcript is just to assist
22 you in understanding what's on the recording, which is the
23 actual evidence.

24 MS. FREEZE: Thank you, Your Honor.

25 And Your Honor, may I enter the well so I can provide
26 Madam Court Reporter a copy? Thank you.

27 THE COURT: And I think the witness as well. Do you
28 have --

1 MS. FREEZE: Your Honor. May I approach?

2 THE COURT: Yes.

3 BY MS. FREEZE:

4 Q. Handing you what's been marked as Court's
5 Exhibit 38A.

6 MS. FREEZE: Might be having technical difficulties. We'll
7 see.

8 MS. SOMERVILLE: It's not playing, Your Honor.

9 THE COURT: Why don't you play it on your computer.

10 MS. FREEZE: Thank you, Your Honor. Sorry about that. It
11 was perfectly -- if it doesn't work, Your Honor, we can just
12 move along. Don't want to waste time.

13 THE COURT: It just cuts off.

14 MS. SOMERVILLE: It just cuts off.

15 MS. FREEZE: I don't know why. It played perfectly this
16 morning.

17 Let me try mine.

18 THE COURT: And I'm going to urge you not to read the
19 transcripts.

20 And maybe what we can do, Ms. Freeze, is just ask the
21 question from the transcript. And then if you want to play it
22 later, we'll have time on the break for you to see if that
23 works for you.

24 MS. FREEZE: Just point to the part -- the portion in the
25 transcript? Yes, absolutely. It appears to be working, but
26 we'll see.

27 THE COURT: Okay. Are you going to have to put it by the
28 microphone?

1 MS. FREEZE: That's the loudest.

2 BY MS. FREEZE:

3 Q. Can you hear that okay, Investigator Gain, or do you
4 want me to bring it closer to you?

5 THE COURT: Why don't you pause it. And then let's get it
6 closer to the jury.

7 MS. FREEZE: Does it help if we put the microphone next to
8 it?

9 THE COURT: It does help, but it also might help if it's
10 closer.

11 MS. SOMERVILLE: I have speakers that we can plug into it.

12 THE COURT: Okay.

13 MS. SOMERVILLE: If that's okay.

14 MS. FREEZE: And Your Honor -- Your Honor, just we don't
15 need to if the Court is okay with just playing a portion of it
16 then, but --

17 THE COURT: Well, we handed out the transcript and
18 everything. I thought you were playing the whole thing.

19 MS. FREEZE: Well, that was the plan, Your Honor. I'm not
20 sure -- obviously.

21 THE COURT: I think the only part that's played so far is
22 just the beginning of the operator announcing that it's a jail
23 call and I think the jury has heard that several times already
24 so we can probably just go on from there.

25 Can you hear it?

26 A JUROR: Barely. Can you put the microphone on it?

27 THE COURT: Let's put the microphone. Pause it.

28 MS. FREEZE: Sure.

1 (Audio recording played; not reported.)

2 THE COURT: Is everybody able to hear that? Are you able
3 to hear the actual recording?

4 A JUROR: A little bit.

5 THE COURT: You are?

6 A JUROR: A little bit.

7 THE COURT: All right. If you pass down the transcripts,
8 please.

9 MS. FREEZE: Your Honor, may I approach the witness?

10 THE COURT: Yes.

11 MS. FREEZE: Thank you.

12 BY MS. FREEZE:

13 Q. Mr. Gain, do you recall listening to that call?

14 A. Yes, I do.

15 Q. And in that call, Mr. Bathen advises the bail
16 bondsman that he's resided at the Kentucky Street for a couple
17 months; correct?

18 A. Since probably four.

19 Q. Four months?

20 A. Yes.

21 Q. And fair to say these jail calls, these 13 jail calls
22 that you listened to, Mr. Bathen is trying to get out of
23 custody; correct?

24 A. Yes.

25 Q. Okay. Now, I want to touch a little bit on your
26 investigation. You were assigned to this case actually a
27 couple months after the calls in September of last year;
28 correct?

1 A. Yes, that is correct.

2 Q. And at that point, the D.A.'s office, which you work
3 for, excuse me, they had -- they hadn't actually received a
4 copy of the phone calls; correct?

5 A. At that point, yes, that is correct.

6 Q. And, in fact, when you get on the case in September
7 of last year, you -- that's when you go and you actually meet
8 with Dr. Jacobs for the first time; correct?

9 A. Correct.

10 Q. And you attended the civil harassment restraining
11 order hearing?

12 A. Yes, that is correct.

13 Q. And you meet with her and her husband and you
14 actually at that point burn a copy of the three voice mails?

15 A. Yes, they provided me a copy of them.

16 Q. Yet at that point in September, a felony warrant had
17 already been issued, charges had already been filed by your
18 office; correct?

19 MS. SOMERVILLE: Objection. Assumes facts not in evidence.
20 Relevance.

21 THE COURT: Sustained.

22 MS. FREEZE: Your Honor, may I be heard?

23 THE COURT: Why don't you move on.

24 MS. FREEZE: Okay.

25 BY MS. FREEZE:

26 Q. So you were assigned to do the investigation in
27 September; correct?

28 A. Of 2017, yes.

1 Q. Okay. And I think yesterday when you were speaking
2 on direct, you were talking a little bit about your role as an
3 investigator with the D.A.'s office; correct?

4 A. Yes, I did.

5 Q. And there's different times that you get involved in
6 a case; correct?

7 A. Correct.

8 Q. And in this case -- well, let me back up.

9 Usually -- and correct me if I'm wrong -- that a local law
10 enforcement agency, police officers will work on a case, a
11 detective will be assigned to it and then that case -- and
12 then those reports are sent to the D.A.'s office; correct?

13 A. They don't all go through a detective. Some -- some
14 cases we get directly from arrests that patrol officers made.
15 Some are cases that detectives put together. However, the
16 agency handles it, that's their protocol. But the cases do
17 come preferably with all the reports to our office.

18 Q. Okay. But when you were -- when you got involved, it
19 had been a couple months then since the actual calls had been
20 made; correct?

21 A. Yes.

22 Q. Okay. And did you have an opportunity when you were
23 assigned to this case to review some of those Chula Vista
24 Police Department reports?

25 A. Yes, I did.

26 Q. Did you have an opportunity to review, like, the
27 body-worn camera and additional ancillary parts of their
28 investigation as well?

1 A. I had access to them. I did not view the body-worn
2 camera.

3 Q. Okay. And so isn't it true, though, that the
4 Chula Vista Police Department, they hadn't made any
5 recommendation to the District Attorney's Office for charges
6 to be filed?

7 MS. SOMERVILLE: Objection. Relevance.

8 THE COURT: Sustained.

9 MS. FREEZE: Okay.

10 BY MS. FREEZE:

11 Q. So when you get involved, you get the -- the copies
12 of the voice mails from Dr. Jacobs; correct?

13 A. Correct.

14 Q. And was that after the civil harassment restraining
15 order? Was it the same day?

16 A. It was the same day.

17 Q. Okay. And at that point, you kind of take it from
18 there, you continue your investigation; correct?

19 A. Yes, that is correct.

20 Q. And that's when you started listening to the jail
21 calls and things like that; correct?

22 A. Yes.

23 Q. Now, and then you prepare the -- I think you said it
24 was the search warrant for the call detail records and all
25 that stuff; correct?

26 A. Yes.

27 Q. Now, I want to talk to you a little bit about these
28 maps. Okay? Now, when you prepare these maps that we were

1 looking at yesterday, how can you forensically know how a
2 computer network controlling a group of cell sites, often
3 referred to as cell towers, interacted with the cell phones?
4 How do you know that?

5 MS. SOMERVILLE: Objection. Foundation.

6 THE COURT: Well, I think that's the question.

7 THE WITNESS: Well, at that point I have to rely on the
8 records that are provided from the cell phone company that they
9 are true and correct. When the cell phone company provides the
10 call detail record, then it indicates which cell towers were
11 used, I have to assume that is correct.

12 BY MS. FREEZE:

13 Q. Okay.

14 A. That, and I don't have any way to go out and
15 independently identify how cell phones are connecting to which
16 towers.

17 Q. Okay. But this -- so your testimony is that the
18 CDR's tell you exactly what tower they're using?

19 A. Yes.

20 Q. Okay. And the maps that you prepared, they assume
21 that the cell phone connects to the closest tower; correct?

22 A. No. It maps the tower that it was connected to.

23 Q. Okay.

24 A. Whether it's the closest or not, I don't know.

25 Q. Okay. So let's talk a little bit about cell tower,
26 cell site selection. So can you -- and perhaps do you have a
27 copy of the call detail records with you that say exactly what
28 tower?

1 THE COURT: Are you talking about exhibits?

2 MS. FREEZE: Yes.

3 THE COURT: Do we have an exhibit number or --

4 BY MS. FREEZE:

5 Q. So let me show you Court's exhibit --

6 MS. FREEZE: Your Honor, may I approach?

7 THE COURT: Yeah.

8 BY MS. FREEZE:

9 Q. -- Court's Exhibit 8 and 9.

10 Okay. So this is Court's Exhibit 8. These are the
11 CDR's -- correct? -- from T-Mobile; is that correct?

12 A. That's the subscriber information.

13 Q. Okay. So does the cell tower information -- is it on
14 there?

15 A. No.

16 Q. And then looking at Court's Exhibit 9, does it show
17 the tower location there?

18 A. No.

19 Q. Okay. And then -- well, I will just go through
20 because Court's Exhibit 10, does it show the location of the
21 tower there?

22 A. Yeah. On the far right-hand side, the 46191 is the
23 location area code. And 37518 is the cell tower that was
24 used.

25 Q. And how do you find that? How do you know that?

26 A. Well, like I said yesterday, the headers on this are
27 a little skewed on this presentation. But it says right there
28 in the call detail records when you travel down from the

1 header where it -- I believe it says first LAC and the tower,
2 you follow that down, and that's T-Mobile's way of saying that
3 is the LAC and the tower that was connected using for that
4 call.

5 Q. Where it says EMEI in completion code?

6 A. No. The EMEI, like I said, this is skewed. So
7 technically, if you were to look at the actual records, the
8 heading for those two columns on the right, it's actually off
9 the screen here. It's not included in this.

10 Q. Okay. So let me -- and let me show you what I'm
11 looking at.

12 MS. FREEZE: Your Honor, may I approach?

13 THE COURT: Yeah.

14 BY MS. FREEZE:

15 Q. Court's Exhibit 10. EMEI.

16 A. Right. Those actually are these numbers over here.
17 I can use the pointer so everybody can see. The -- that
18 header IMSI is actually this row of numbers here. So this
19 whole header should be slid over and IMSI should be here.
20 This is your column for all the IMSI number and the IMEI,
21 which is the identification for the phone is right here.

22 Q. So those row of numbers starting with 35 --

23 A. Yes.

24 Q. -- those numbers are what?

25 A. That's the IMEI. And the completion code that's way
26 over there on the right should be right over this row here.
27 That tells you whether the call was completed successfully or
28 unsuccessful.

1 Q. And so EMEI is the number that starts with 35?

2 A. Yes.

3 Q. And what does EMEI stand for?

4 A. That's the IMEI, International Mobile Equipment
5 Identifier, which is the actual phone itself.

6 Q. The phone itself?

7 A. Correct.

8 Q. Not the tower?

9 A. Correct. Not the tower.

10 Q. Okay. So where do you see the number of where it
11 locates the tower?

12 A. These numbers over here.

13 Q. Okay.

14 A. And I know that from me looking at the records and
15 having the proper heading on them, that is going to identify
16 that as the tower location, the first tower location where the
17 call was completed when it first began.

18 Q. So the general area of the tower or an actual
19 physical tower?

20 A. The first number, the 46191, that is the general
21 area. That's the area code for that cell tower and that --
22 there's multiple towers all connected to that LAC to the one
23 LAC.

24 So for 46191, from reading in the T-Mobile records,
25 there's 404 individual cell towers that connect through that
26 LAC, and that number on the far right is the number that
27 identifies the specific tower that was utilized to complete
28 that call.

1 Q. Okay. But the general area has 404 towers?

2 A. Yes. According to the records that I read, yes.

3 Q. Okay. And the cell phone -- your maps and your --
4 how you're breaking that down, it's saying that a certain cell
5 phone makes a connection with certain cell site antennas;
6 correct? I think you were talking a little bit yesterday
7 about antennas; correct?

8 A. Yes.

9 MS. SOMERVILLE: Objection. Foundation.

10 THE COURT: Sustained.

11 BY MS. FREEZE:

12 Q. And how do you statistically -- what statistical
13 studies have you relied on when you are preparing on this
14 data?

15 A. I don't know of any statistical studies other than I
16 rely on the information that was provided by T-Mobile to be
17 true and correct.

18 Q. Okay. And -- and then you plug it into that little
19 program; right? The D.A.'s office?

20 A. Yes.

21 Q. Okay. And based on your typing in all this
22 information, isn't it true that R.F. signals, or radio
23 frequency signals, can connect with a servicing tower within
24 21 miles?

25 MS. SOMERVILLE: Objection. Foundation.

26 THE COURT: Sustained.

27 BY MS. FREEZE:

28 Q. Are you familiar with SINR?

1 MS. SOMERVILLE: Objection. Foundation.

2 THE COURT: Counsel, let me see you briefly.

3 BY MS. FREEZE:

4 Q. Okay. Investigator Gain, with regards to finding
5 these addresses, you had testified that you had found -- you
6 had just Googled the address, the general address of where
7 my -- you believe my client worked; correct?

8 A. Yes.

9 Q. And that was from the jail call; correct?

10 A. Yes.

11 Q. But in fact, there's hundreds of offices for that
12 particular nonprofit; correct?

13 A. I don't know the exact number of offices, but I know
14 they do have other offices. Yes, that is correct.

15 Q. And you don't have any independent knowledge of where
16 my client was in June and July of 2017; correct?

17 A. Other than what was stated in the jail calls and what
18 I believe to be true from the cell towers, no.

19 Q. Okay. Correct. Okay. Thank you.

20 And you haven't personally interviewed my client; correct?

21 A. That is correct.

22 Q. Okay. And at the civil harassment restraining order
23 that you observed, Mr. Bathen didn't testify; correct?

24 A. That is correct.

25 Q. And at the civil harassment restraining order, the
26 audio of the messages weren't playing; correct?

27 A. That is also correct.

28 Q. It was just Dr. Jacobs' testimony; correct?

1 A. Yes.

2 Q. Now, I wanted to talk to you a little bit, you were
3 testifying about this yesterday, about this international
4 time. You said that the CDR from the June 4th call was at
5 8:24.

6 How do you -- what kind of process do you use to get the
7 actual time in Pacific coast time, East Coast time, how do you
8 transfer this international time?

9 A. There's multiple time -- time clocks that you can
10 find on the Internet that will adjust from the universal time
11 code to Eastern time zone, Central, anywhere in the world. So
12 you will look at a certain date and time on this clock that
13 you can find on the Internet, and it will show throughout the
14 different time zones what time it would be locally here in
15 San Diego.

16 Q. Okay. And I think you had said that when you were
17 trying to -- when you received this data from T-Mobile and you
18 were getting the locations of these towers, the -- in fact,
19 the first call from June 4th, you were able to get some
20 location; but, in fact, you weren't able to actually locate
21 the cell tower -- correct? -- for the first call on June 4th?

22 A. The -- on the call detail records, it did not include
23 a -- the cell tower, yes. I could not find a cell tower for
24 that -- that corresponded to what was in the records.

25 Q. And so it could have been any of the 404 cell towers
26 that are associated with that 4619 number; correct?

27 A. That would be my assumption because I believe it did
28 list the LAC.

1 Q. But you never were actually able to find the cell
2 tower that was utilized?

3 A. That is correct.

4 Q. And, in fact, you followed up with a T-Mobile
5 representative and you never heard back?

6 A. That is correct also.

7 Q. So perhaps -- and all of the cell towers that were --
8 that you believe were utilized by the cell phone were in the
9 vicinity of all of Virginia as well as Washington, D.C.;
10 correct?

11 A. Everything that I got in the call detail records
12 showed in that vicinity, yes.

13 MS. FREEZE: Okay. All right. Nothing further. Thank
14 you.

15 THE COURT: Ms. Somerville.

16 MS. SOMERVILLE: Thank you.

17

18

REDIRECT EXAMINATION

19 BY MS. SOMERVILLE:

20 Q. Good morning again.

21 A. Good morning.

22 Q. Of the calls from the jail that you listened to and
23 the social visits, would you say Mr. Bathen had a similar way
24 of greeting people on the phone?

25 A. Yes. He had a similar affect or proclivity to say
26 "Hey, this is" or "Hey, how are you." Many of those sentences
27 conversation started with "hey."

28 Q. Was that significant to you at all in this

1 investigation?

2 A. I also --

3 MS. FREEZE: Objection. Foundation.

4 THE COURT: Overruled.

5 THE WITNESS: Yes. I also saw the same thing in the calls
6 to Dr. Jacobs where the calls would start with "Hey, Dr. J." or
7 "Hey, Dr. Jacobs," and then go from there.

8 Q. So each -- is it fair to say that each one of the
9 three calls that were made started with "hey," either
10 "Dr. Jacobs" or "Dr. J."?

11 A. Yes.

12 Q. And in the jail call that we listened to here in
13 court this morning, Mr. Bathen again gives his work location
14 as the International Food Poverty Research Institute [sic]; is
15 that correct?

16 A. Yes, it is.

17 Q. And he also provided a date of birth in the jail call
18 that we listened to this morning; is that correct?

19 A. Yes, he did.

20 Q. And what was that date of birth?

21 A. November 30th, 1977.

22 Q. Had you seen that same date of birth in the call --
23 in the billing information that you received in the records
24 from T-Mobile?

25 A. Yes. Under the subscriber information, it listed
26 that date of birth.

27 Q. And in this jail call that we listened to here today
28 in court as well, did Mr. Bathen again provide the address of

1 1132 North Kentucky Street in Arlington, Virginia?

2 A. Yes, he did.

3 Q. And Mr. Bathen gave a phone number in this jail call
4 as well; is that correct?

5 A. Yes, I believe it was 703 area code.

6 Q. And he wasn't quite sure about that number -- is that
7 accurate? -- from listening to the call?

8 A. Yes, that is accurate.

9 Q. And let me grab this exhibit for a moment. And we
10 looked at these yesterday, but in Court's Exhibit 8 for
11 identification in that middle row where there is a box
12 highlighting a couple things in red, can you tell us what the
13 account expiration date was for this particular phone number?

14 A. It was September 4th of 2017.

15 Q. And the jail calls that you reviewed for Mr. Bathen
16 were from September 16th and September 17th of 2017; is that
17 correct?

18 A. Yes, it is.

19 Q. And Mr. Bathen had indicated in this jail call as
20 well that he had been living at the North Kentucky Street
21 address for -- and I want to get it accurate --

22 MS. FREEZE: Objection. Leading.

23 THE COURT: Overruled.

24 BY MS. SOMERVILLE:

25 Q. I believe Mr. Bathen said it's on Page 5. It is
26 line 11. "I've only been over there probably for four
27 months." Is that an accurate statement of what he said in the
28 jail call?

1 A. Yes, it is.

2 Q. And is that consistent with what you saw in the call
3 detail records that he was at that address for approximately
4 four months?

5 MS. FREEZE: Objection. Foundation.

6 THE COURT: Sustained.

7 BY MS. SOMERVILLE:

8 Q. What date range, again, did these records cover?

9 A. I believe it was June 1st through July 6th of 2017.

10 Q. And so June would be around four months before he
11 made these jail calls; is that correct?

12 MS. FREEZE: Objection. Leading.

13 THE COURT: Sustained.

14 MS. SOMERVILLE: I can rephrase it.

15 BY MS. SOMERVILLE:

16 Q. Based on what he said about how long he had been
17 living at the Arlington street address and when you listened
18 to the jail calls, what was the time frame from June to
19 September?

20 A. Okay. I think you meant the Kentucky.

21 Q. Yes, sorry.

22 A. North Kentucky address. So I want to make sure I
23 understand. You are asking roughly the time frame from when
24 these calls were made in June, the first one was made in June
25 to when?

26 Q. Let me rephrase the question. I'm sorry. It was two
27 bad questions in a row.

28 So -- so from the time frame you got the records, June 1st

1 of 2017, I believe till July 6th of 2017; correct?

2 A. Uh-huh, yes.

3 Q. Okay. And then the calls that you listened to for
4 the jail calls were September 16th through September 17th; is
5 that correct?

6 A. Correct.

7 Q. So from June 1st to September 16th of 2017,
8 approximately how many months is that?

9 A. It's roughly three and a half months.

10 Q. Do you also recall in the jail call we listened to
11 today in court Mr. Bathen indicating that he had been born in
12 Virginia?

13 A. Yes, I do.

14 Q. The call detail records that you received from
15 T-Mobile, I know we had just shown some exhibits here in
16 court, and I'll just go to the one that is marked as Court's
17 Exhibit 10.

18 Is this all the information that came on those call detail
19 records or is there more information?

20 A. There's more information that would extend out. They
21 send it in a spreadsheet; so when you try to print it or view
22 it on a screen, it does tend to cut off at some point unless
23 you make it very small and can fit it all on the monitor.

24 Q. And in the call detail records for some of the other
25 calls that were made during this June 1st to July 6th time
26 frame, were there tower location information?

27 A. Yes.

28 Q. Were there also actual physical addresses associated

1 with those tower locations?

2 A. Some of the towers do include a physical address.

3 Q. So the call on June 4th that you were not able to map
4 out because there wasn't any latitude or longitude information
5 in the call detail records, that call did show that it was
6 successfully completed --

7 MS. FREEZE: Objection. Leading.

8 THE COURT: Sustained.

9 BY MS. SOMERVILLE:

10 Q. Did that call show that it was successfully completed
11 from the (617)992-4648 number to Dr. Jacobs' number?

12 A. Yes. In the call detail records, the data
13 corresponded with the call. I just couldn't -- the tower
14 tracking program couldn't find the location of the specific
15 tower that was used.

16 MS. SOMERVILLE: Thank you, Your Honor. I have nothing
17 further.

18 THE COURT: Ms. Freeze.

19 MS. FREEZE: Just briefly Your Honor. Thank you.

20

21

RECROSS-EXAMINATION

22 BY MS. FREEZE:

23 Q. Investigator Gain, you don't have any expertise or
24 training in voice recognition; correct?

25 A. Other than, I guess, 53 years of life experience.

26 Q. Right. But you don't have any special training or
27 scientific background or anything like that with regards to
28 voice recognition?

1 A. No.

2 Q. And the thing that jumped out at you is that he says
3 "hey"?

4 A. That is one of the things, yes.

5 Q. And isn't it true in the 13 jail calls that you
6 listened to that he says, "Hey, this is Ben Bathen" --

7 A. In multiple of those jail calls, yes.

8 Q. -- he identifies himself pretty quickly?

9 A. Yes.

10 Q. And in the three voice mails that were left for
11 Dr. Jacobs, he doesn't identify himself, there's no name;
12 correct?

13 A. He did not provide a name in the calls, no.

14 Q. Now, with regards to this address and T-Mobile
15 records, you obviously don't work for T-Mobile; correct?

16 A. No, I do not.

17 Q. Okay. And -- but when you were looking at the
18 T-Mobile records, this address that's provided, that's the
19 address that's given in order to pay for the phone; right?
20 That's how you get it, you get some type of information;
21 correct?

22 A. No. You can get a phone without giving any
23 information, but if, as you're being prompted to set up the
24 phone, if you choose to include that information on a prepaid
25 phone, you can.

26 Q. So with regards to the calls that were made in June
27 and July, a couple months prior to the arrest and Mr. Bathen
28 being in custody, you don't need to call T-Mobile and give the

1 address each time you make the call; correct?

2 A. No.

3 Q. You just have to -- or you -- if you don't want to --
4 the time that you give information, if at all, and any
5 information would be when you set up the -- the agreement with
6 T-Mobile; correct?

7 A. That would be an assumption on my part. I would
8 imagine you could give that information at any time while you
9 have that phone serviced by them.

10 Q. Okay. And as far as you know, looking at the
11 T-Mobile records, Exhibits 8 and 9, the account effective date
12 was September 1st of 2014; correct?

13 A. Yes.

14 Q. Now, your purpose for getting all this information
15 was to locate Mr. Bathen -- correct? -- or who you believe to
16 be using this phone; correct?

17 A. No. My purpose was to see that at the time when
18 those calls were made to Dr. Jacobs, that they were made from
19 a location that was consistent with the physical location
20 where I believe Mr. Bathen was. I wasn't trying to locate him
21 at that time in September because I actually already knew
22 where he was. That's why the search warrant was only for the
23 call detail records from June 1st to July 6th.

24 Q. But, okay. But -- and those were -- you believe tend
25 to be is on the other side of the country; correct?

26 A. Yes.

27 Q. Okay. At no point you believed Mr. Bathen was
28 anywhere in the State of California in June or July of last

1 year?

2 MS. SOMERVILLE: Objection. Relevance.

3 THE COURT: Foundation. Sustained.

4 BY MS. FREEZE:

5 Q. Okay. Well, Investigator Gain, have you, in your
6 several years of being in law enforcement, being an
7 investigator, have you -- are you familiar with criminal
8 threats?

9 MS. SOMERVILLE: Objection. It calls for a legal
10 conclusion. We're going down that road.

11 THE COURT: Sustained. You just need to rephrase the
12 question before this.

13 MS. FREEZE: I can do that, Your Honor.

14 BY MS. FREEZE:

15 Q. Have you -- how long have you been working? Remind
16 me, Investigator Gain, how long have you been working with the
17 D.A.'s office?

18 A. I started with the District Attorney's Office in
19 1998. So a little over 20 years with the D.A.'s office and 31
20 years total law enforcement.

21 Q. And you said it was with La Mesa; correct?

22 A. That is correct.

23 Q. And when you were working at La Mesa, were you ever
24 assigned to investigate an individual making threats to
25 another individual?

26 MS. SOMERVILLE: Objection. Relevance.

27 THE COURT: Sustained.

28 MS. FREEZE: Nothing further, Your Honor.

1 THE COURT: Okay. Anything further?

2 MS. SOMERVILLE: No, Your Honor.

3 THE COURT: May this witness be excused?

4 MS. SOMERVILLE: Yes.

5 THE COURT: Thank you very much, sir.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: We're going to take a break at 10:30 this
8 morning. Because I have another matter briefly exactly at
9 10:30, we're going to get the next witness, swear that witness
10 and be all ready to start then after our break.

11 MS. SOMERVILLE: Thank you, Your Honor. The People call
12 Donald Holmes.

13 THE CLERK: Do you solemnly state under penalty of perjury
14 that the evidence you give in this matter shall be the truth,
15 the whole truth and nothing but the truth?

16 THE WITNESS: I do.

17 THE CLERK: Please have a seat at the witness stand.

18 And for the record, please state your full name and spell
19 your last name.

20 THE WITNESS: Don Holmes, H-o-l-m-e-s.

21 THE CLERK: Thank you.

22

23 **DONALD HOLMES,**

24 called as a witness on behalf of the People,

25 having been first duly sworn, testified as follows:

26

27 //

28 //

DIRECT EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BY MS. SOMERVILLE:

Q. Good morning.

A. Good morning.

Q. How are you employed?

A. I am an investigator with the San Diego District Attorney's Office.

Q. How long have you been an investigator with the District Attorney's Office?

A. A little over 10 years.

Q. Where do you currently work within the office, what unit?

A. I'm assigned to our Special Operations division, which is our Professional Standards and Public Corruption division.

Q. What type of cases do you work on in that specific division?

A. We do everything from police officer misconduct, internal employee misconduct issues, election fraud violations, staff government funds, those kind of things.

Q. And how long have you been in that specific unit?

A. I believe four years now.

Q. Are you a peace officer in California?

A. Yes, I am.

Q. What other divisions have you worked in in the District Attorney's Office aside from the Special Operations?

A. When I first came to the D.A., that was back in 2008. I was assigned to the Insurance Fraud division working various

1 aspects of insurance fraud.

2 Then I transferred to Gang Prosecution unit about three
3 years after that and spent two and a half to three years there
4 before coming to Special Operations.

5 Q. Where were you employed before coming to the District
6 Attorney's Office?

7 A. I was a police officer and detective with the
8 El Cajon Police Department.

9 Q. How long did you work for the El Cajon Police
10 Department?

11 A. A little over six years.

12 Q. Do you have any specific training and experience in
13 regards to cell phone records?

14 A. Yes.

15 MS. SOMERVILLE: Would this be a good time?

16 THE COURT: I was waiting for an indication of a good time
17 for a break.

18 Ladies and gentlemen, we're going to take a couple minutes
19 extra. We're going to take a 20-minute break for Ms. Medina.
20 Sometimes I fill up our breaks and she never gets one. I'm
21 padding it a little bit so she can have a break as well.

22 We are -- we're moving right along, so don't be concerned
23 if we take a few minutes extra in our break.

24 Please remember to keep an open mind. Don't form or
25 express an opinion. Don't talk to anybody about any subject
26 connected with this matter. Don't do any search or
27 investigation. I'll see you in 20 minutes.

28 (Recess taken.)

1 *(The following proceedings were had in open court in*
2 *the presence and hearing of the jury.)*

3 THE COURT: All right. We're back on the record. We have
4 everyone present and our witness on the stand.

5 And Ms. Somerville.

6 MS. SOMERVILLE: Thank you.

7 BY MS. SOMERVILLE:

8 Q. I think we left off, I'd asked you if you had any
9 training and experience in regards to cell phone records?

10 A. Correct.

11 Q. And can you tell us what training and experience you
12 have in that field?

13 A. Sure. So I've started -- I've been working with cell
14 phone records for over 12 years. I started as a detective
15 with the El Cajon Police Department writing search warrants
16 for these types of records and evaluating and mapping call
17 detail records and calling connections as part of my
18 investigations.

19 That continued with my work here at the D.A.'s office. I
20 had training from the California District Attorneys
21 Association. I had training through the regional computer
22 forensic laboratory.

23 I've had training specifically with engineers who are
24 responsible for setting up and operating the network in
25 San Diego County, engineers from Verizon, AT&T and Cricket.

26 I've had training from Qualcomm regarding the evolution of
27 cell phone technology and LTE Concepts.

28 Also done over 30 hours of field testing with the FBI

1 cellular analysis and survey team. It's a component of the
2 FBI that does this type of work on a full-time basis.

3 And then I've obtained over 50 search warrants personally
4 for these types of records. I've consulted with other law
5 enforcement officers and agencies on at least 175 other cases
6 and testified as an expert in this field over 30 times here in
7 San Diego County.

8 THE COURT: And I'm going to ask that you keep your voice
9 up and talk a little slower.

10 THE WITNESS: Okay.

11 BY MS. SOMERVILLE:

12 Q. Do you ever give any trainings or presentations in
13 regards to cell phone records and cell phone towers?

14 A. Yes.

15 Q. Can you tell us about that?

16 A. So I provided obviously training to personnel within
17 my department. I provided regional training to officers
18 within the County of San Diego, the San Diego Sheriff's
19 Department, specifically San Diego Police Department and other
20 smaller municipalities that operate within the county.

21 I've also provided training through the California
22 District Attorneys Association, which is a statewide program
23 for training district attorneys throughout the State of
24 California.

25 Q. How do you keep up with changes in technology in this
26 field?

27 A. Well, I mean really as far as changes in technology,
28 it's been pretty static for a while as far as the evolution of

1 LTE technology. So the way the phone records work, the phone
2 companies keep records, call detail records, which contain
3 information about subscribers' activity. So calls, text
4 messages, data usage, those kind of things.

5 And in addition to that information, they include
6 information about what tower the phone specifically connected
7 to, and we're able to use that information to create a visual
8 representation of what the paper records, the phone records,
9 show.

10 So on a particular date and time what phone, what tower a
11 phone connected to and what type of transaction it was.

12 Q. Can you tell us just how it is that cell phones and
13 cell towers interact?

14 A. Yes. So cell phone is kind of a glorified radio,
15 communicates with a cell phone tower via radio waves. Those
16 signals sent back and forth in a duplex manner so that you can
17 talk and hear someone else talking at the same time. And that
18 allows the portability and mobility of the cell phone. You
19 are not tethered to landline or a hard cable like you would in
20 your house.

21 You are able to move around open space and the radio waves
22 create a gap between where you are and the actual lines of
23 fiberoptic cable or whatever other infrastructure that the
24 communication is traveling and you get to the other party.

25 Q. Cell towers specifically, can those be in various
26 formats, various structures?

27 A. Sure. So kind of originally when they started they
28 were big, tall radio towers with large antenna attached to the

1 outside of them. Pretty, you know, obtrusive. So they have
2 definitely come a long way with how they design them.

3 They will attach them to sides of building. They will
4 build them into landscape-type items. And I'm sure people
5 have seen palm trees and those kind of things around the area
6 and fake trees with cell phones attached to. They find pretty
7 creative ways, I guess, to minimize how -- how much they stick
8 out within the community.

9 Q. Do cell phone providers like Verizon, AT&T, do they
10 have their own cell towers or do they share cell towers?

11 A. So kind of a little of both. Every network, every
12 major network -- so you are talking AT&T, Verizon, Sprint,
13 T-Mobile -- all maintain their own cell networks. There are
14 areas of the country where they may not have the same kind of
15 footprint that they do in other portions. So, in that case,
16 they would have roaming agreements with other carriers which
17 would allow their customer to now operate within that
18 company's cell phone network, and then they have obviously fee
19 arrangements for those types of situations.

20 Q. Do the networks, do they routinely update and check
21 on these cell towers to make sure that they're working so that
22 people can connect?

23 A. Sure. So yes, cell towers, obviously, they are
24 pretty important to the cell phone companies. They are there
25 for a reason. They cost the companies a lot of money to put
26 in and establish and maintain, and they are there because
27 there's a purpose.

28 They are either addressing a demographic issue, meaning

1 there's maybe a capacity problem with that particular area and
2 they need to have that tower functioning so that all their
3 customers can have access to connect and receive phone
4 communications when they want to, which is obviously the most
5 important to the customer.

6 So there's some sort of geographical barrier coverage
7 issues, and they're looking to patch that with additional
8 towers.

9 Q. Can you explain to us how a cell phone basically
10 would connect or how it would seek out a tower?

11 A. So the -- when the phone is on, it's in constant
12 communication with the network. And that's an administrative
13 capacities, kind of just checking in. It's not actually
14 taking, you know, kind of one of the slots, so to speak, of an
15 active call or a text message being routed. And that's the
16 way the network keeps track of where the phone is in the event
17 that it actually needs to send a message or direct a phone
18 call to the phone, it knows where in the network to send that
19 information.

20 So it's an ongoing communication. And then in the event a
21 call were to go out to the phone or come into the phone, it
22 would go from that call set up piece, into the network, and
23 then network would have control over, okay, now that you're on
24 the phone in an active call, we have to be concerned about
25 where you're going to move to, that's the mobilities of the
26 mobile phone.

27 So if I were to now start driving from here in Chula Vista
28 and heading north, the phone would need to know what towers

1 are nearby so that it can hand off to subsequent towers and
2 keep that connection that we all enjoy.

3 Q. So do cell phone companies tend to have more towers
4 in a more populated area versus, say, somewhere out, like, in
5 El Centro where there's less of a population?

6 A. The simple answer is yes. Capacity is a huge issue.
7 Towers can only handle so many customers. So in very dense
8 populated areas like downtown San Diego, you'd see tower
9 density may be a quarter mile. They are very closely spaced.

10 As you get farther out into rural areas where there may be
11 not many land obstructions or not as much customer demand,
12 those towers can start spreading out in San Diego County to
13 maybe one, two, three miles apart.

14 In Middle America where there aren't many people and
15 there's flat terrain, those things can spread out 10 or so
16 miles.

17 Q. You mentioned physical obstructions. How does that
18 affect what cell tower a phone connects to when either a call
19 comes in or goes out?

20 A. Well, it's not so much the physical obstruction that
21 affects it. The phone is simply checking to find out where
22 its best signal is, what is the strongest tower I can connect
23 to, and that's the tower it's going to connect with to
24 initiate that call.

25 If there is a barrier or some sort of an obstruction, it
26 would weaken the signal from maybe a closer tower that would
27 cause it to select a different tower that doesn't have that
28 same kind of obstruction, if that's what you're asking.

1 Q. Do cell towers have different sectors on them?

2 A. Yes. Most are set up in a three-sector layout. So
3 there's multiple antenna that are positioned around a tower.
4 Each antenna to cover about one-third of a foot or
5 120 degrees; so if they're spaced out evenly along that
6 circle, they would cover 400 -- 360 degrees.

7 Q. Generally three antennas on a cell phone tower?

8 A. Typically, yes. There are times where they can have
9 omnidirectional towers where they cover a full 360 degrees.
10 Depends on what the need of the network is in that specific
11 area.

12 Q. What is an azimuth?

13 A. So azimuth is essentially a compass reading, zero
14 being due north, 90 degrees being east, 180 degrees being
15 south and 270 degrees being west. And it's basically the
16 compass heading for the center of the direction that the
17 antenna faces. So we talked about those three antennas that
18 are positioned around the tower. Those are not set in a
19 specific direction.

20 That's the term by the engineer that actually is designing
21 that network for that area. So they may decide that we need a
22 sector to face an azimuth of 15 degrees. The person that goes
23 out and actually puts the antenna on the tower will orient the
24 antenna so that it points at the very center of that
25 120-degree beam at 15 degrees.

26 Q. What is beam width in relation to cell towers?

27 A. Again, so a beam width is -- the cell phone companies
28 are buying these antenna from antenna manufacturers. Those

1 come with a preset beam width, so think about like a nozzle
2 for your sprinklers. Some of them are 45 degrees that are
3 meant to be in a corner of a sidewalk to 180 degrees. Some of
4 them are full circles.

5 So, again, depending on how they want to focus the actual
6 direction of that antenna, they may choose a different beam
7 width on the actual antenna they purchase from the company.

8 Q. Just assuming I made a phone call here right in
9 Chula Vista and then drove to Los Angeles and continued that
10 call, never hung up, would I remain on the same tower or would
11 that change towers throughout the course of my drive?

12 A. Yes. So on something that far, from here to
13 Los Angeles, you may hand off to a hundred or so towers along
14 the course of that trip. Again, in San Diego County typical
15 range for a cell tower, one to three miles.

16 And as you start to reach those limitations of where that
17 tower is going to cover, the phone is working on figuring out
18 where that next tower is that it can connect to. And the
19 switch for the phone call, the computer that controls all this
20 is making that determination in transferring the phone to a
21 particular tower as you move out of range of one and in a
22 range of another.

23 So as long as towers are appropriately spaced and you can
24 continue to make those handoffs, you can keep the call going
25 and it's seamless to you. But there's a lot of stuff going on
26 in the back end of that.

27 Q. If someone were to make a call from the courthouse,
28 would that call, if it was answered, always necessarily

1 connect to the nearest tower?

2 A. No, not necessarily. So more often than not the
3 closest tower is your best signal. But the phone doesn't care
4 about distance per se. It's simply looking for the strongest
5 signal that it can connect to.

6 Q. If a call were placed from here, say, in the
7 courthouse, would a tower in Los Angeles connect that call?

8 A. No.

9 Q. Why not?

10 A. Well, it's just -- it's way beyond the range of what
11 the phone or the tower could range.

12 Q. Is there a range that is generally seen when you look
13 at records and review these things?

14 A. Yes. So in talking with the engineers for the
15 different companies, they, again, are not looking to overshoot
16 the next closest tower in any particular direction. Again,
17 think of it kind of like sprinklers for your yard. They're
18 intended to cover a specific piece of your lawn. And as they
19 put additional towers, they're intended to serve specific
20 functions and pieces of that network that they're trying to
21 provide coverage for, so they will adjust power on the tower,
22 they will adjust the tilt of the antenna so that they can try
23 to control where that radio signal is going to emanate and
24 keep it in a confined area.

25 If you kind of think of it like a conversation like at a
26 wedding reception where you have multiple tables of people
27 talking, you can see and hear conversations that are going on
28 in tables around you, but it's very inefficient for you to

1 stand at one table and try to talk to somebody three tables
2 across from you.

3 That same concept holds true for radio signal. It creates
4 noise within the network and degrades the quality for
5 everyone's conversations. So they are looking to confine that
6 radio frequency, kind of that table, so to speak.

7 Q. So that would give you the best quality, the best
8 signal; is that accurate?

9 A. Best signal. And again, typically that's going to be
10 the border of the next surrounding tower in any particular
11 direction.

12 Q. Do you know roughly how much it costs to build a cell
13 tower?

14 A. Currently, no. I know back, you know, probably eight
15 or so years ago, they were hundreds of thousands of dollars to
16 put one in. I don't know what they are currently. You know,
17 obviously as technology gets better in the way they adapt
18 networks, they are looking to create smaller, less obtrusive
19 towers. They can cover a smaller piece of area in a turn,
20 make that kind of ugliness of the traditional cell tower
21 network kind of go away.

22 Q. How is cell phone tower evidence different from GPS?

23 A. So GPS or Global Positioning System, is a way that
24 we're going to precise geographic location for where a
25 particular person or device is so that you will get latitude,
26 longitude coordinates that are intended to show where that
27 device is.

28 Cell phone records, we don't know the exact GPS of the

1 phone. We know what tower the phone connected to and often we
2 know what sector of that tower and we also know what direction
3 that sector faces. So that's going to cover anywhere from in
4 San Diego, you're typically one to maybe three square miles of
5 space that a phone could operate and connect to that tower.

6 Q. So when you look at call detail records and are able
7 to map out where the towers are and which towers were used by
8 a particular phone number, you are not able to determine the
9 exact, specific location where the cell phone was when the
10 call was made; is that correct?

11 A. Right. It's a general location. We don't get to
12 know exactly where the phone is because there's many locations
13 within that area that the phone could be and still connect to
14 that tower.

15 Q. So it's a general vicinity?

16 A. Correct.

17 Q. When a sector is used by a cell phone on a tower, how
18 far out does that range extend generally?

19 A. So, like I said, it depends on what the next closest
20 tower is. So, again, in San Diego, you're not typically going
21 to get more than two or three miles apart as far as spacing of
22 individual towers. In rural parts of the country, that can
23 get a lot broader. Or stretches of freeway where it's
24 uninhabited, they will dock towers along the freeway, they are
25 a little more spaced out so that you know the people that are
26 traveling from point A to point B have the illusion that that
27 network is robust due to that entire area.

28 Q. What is generally contained in call detail records

1 when you get those back from a provider via a search warrant?

2 A. Typically -- we kind of touched on that a little bit
3 earlier. So call detail records are essentially kind of a
4 reproduction of the billing records for a phone. You may
5 often get in the mail a list of calls that you made and
6 durations and those kind of things.

7 These are a little more detailed in that they will go
8 through the date of the call, the time the call occurred, the
9 identification of the numbers involved. So who made the call,
10 who received the call, and that includes even on times where
11 they are blocked numbers on your phone where the phone records
12 get the -- or the phone companies gets the actual numbers that
13 are being used.

14 You will get the duration of the event if it is a phone
15 call, what switch, meaning what computer hub handled the
16 routing of it, and then typically the starting tower and
17 sector that the call initiated on and the terminating tower
18 and sector.

19 And again, we kind of talked about that example, a trip
20 from here to Los Angeles, even though the phone may connect to
21 many, many towers throughout the course of that trip, the
22 phone company records will indicate where did it start and
23 where did it end.

24 Q. Do the call detail records ever provide physical
25 addresses for a tower?

26 A. Yes. So we -- phone companies are obviously keeping
27 that information to keep track of how many minutes you're
28 using, where we're having issues in the network for dropped

1 calls, that kind of things, how many text messages you are
2 sending, how much data you used. So that's the call detail
3 record portion of that is what those records are captured for.

4 There's typically a code on that that will identify what
5 cell phone tower the phone connected to. And that kind of
6 branches into the engineering side of the phone company. So
7 there are, again, engineers who are responsible for setting up
8 and maintaining the networks. They keep a list of where all
9 their towers are. Their towers all get a specific
10 identifiable number that, again, correspond to the information
11 shown on the call detail records.

12 And the engineers will often in their spreadsheet of
13 towers identify a physical street address in addition to the
14 GPS coordinates of the tower itself.

15 Q. Do the GPS coordinates listed in the call detail
16 records help you determine where a cell tower is located when
17 a call connects with that?

18 A. Yes.

19 Q. Have you ever reviewed records where GPS information
20 or a tower listing was not present?

21 A. I'm not sure -- meaning so the records didn't have
22 the tower information?

23 Q. Right. Sometimes do records have a missing tower
24 number, missing tower information?

25 A. So yes. So I think what you're referring to in this
26 particular set of records, there were a series of calls and
27 text messages that were showing as connecting to towers. But
28 the call detail records didn't provide the actual location of

1 those towers.

2 And what happens is the cell phone company, again, the
3 engineering piece of it, will sometimes renumber or change
4 identifications for the switch, meaning that computer hub or
5 the actual tower itself. So, in those cases, you can go back
6 to a historical tower list that was relevant to that period in
7 time, and that's what I did in this particular case to
8 identify where those specific towers were located.

9 Q. Did you have an opportunity to review the call detail
10 records for this particular case with phone number
11 (617)992-4648?

12 A. Yes, I did.

13 Q. And did you do anything with those cell phone records
14 to show what towers were being activated by the calls?

15 A. Yes.

16 Q. What, in general, did you do with the records?

17 A. Well, we go through a process of geocoding the
18 information, which is a fancy way to basically say you convert
19 the text information into a readable format for a mapping
20 software. In my case, I use Google Earth for that mapping
21 piece. So it takes the information from the records and
22 allows you to identify the tower location on a map and what
23 sector was connected to and what direction that sector faces.

24 Q. Did you do that with the Tower Tracker mapping
25 program?

26 A. Yes.

27 Q. Did you create something called tower frequency
28 chart?

1 A. Yes.

2 Q. Why did you do that?

3 A. In this particular case, I was asked to look at
4 information that would tend to identify the user of the phone.
5 In this case, particularly to the defendant.

6 So in cases where we're looking to see who actually
7 possesses and uses the phone standard process would be to see
8 what towers the phone connects to most often and what
9 locations relevant to that individual are nearby or not nearby
10 those locations.

11 MS. SOMERVILLE: May I approach, Your Honor?

12 THE COURT: Yes.

13 BY MS. SOMERVILLE:

14 Q. I have some exhibits for you, Investigator Holmes.
15 They're Court's Exhibits 19 through 32. Can you just flip
16 through those quickly to see if you recognize them?

17 A. Yes, I recognize these.

18 Q. Are these tower frequency charts that you created off
19 of the call detail records in this particular case?

20 A. These cites are all based off the call detail
21 records, yes.

22 MS. SOMERVILLE: And can I have one moment, Your Honor?

23 THE COURT: Yes.

24 MS. SOMERVILLE: Thank you.

25 BY MS. SOMERVILLE:

26 Q. So I believe the first exhibit you have in front of
27 you is Court's Exhibit 19. Is that accurate?

28 /////

1 *(Court's Exhibit No. 19 was identified.)*

2 A. Yes.

3 Q. And what is that?

4 A. Just an orientation slide identifying the phone
5 number involved for the case and the date range of the
6 records.

7 Q. And is that on the screen here in court?

8 A. Yes.

9 Q. And that was the date range of all the call detail
10 records that you reviewed in this particular case?

11 A. Correct.

12 Q. And if you could look at Court's Exhibit 20 for
13 identification. Do you recognize that particular exhibit?

14 *(Court's Exhibit No. 20 was identified.)*

15 A. Yes, I do.

16 Q. And putting that on the large screen TV in court.
17 Can you explain what we're looking at in this particular
18 exhibit?

19 A. So this is the -- again, that kind of tower frequency
20 analysis. So we looked at the entirety of the records for
21 June 1st to July 7th and calculated a total of tower
22 connections to any tower that was existing in that period of
23 time and these are the top 10 towers that the phone connected
24 to.

25 Q. And I see there's a cell I.D. number, it's a second
26 column over; is that correct?

27 A. Yes.

28 Q. What is the cell I.D. number?

1 A. That's, again, that specific number that relates to a
2 tower within T-Mobile's network that the phone connected to.

3 Q. And going over to the next column, can you tell us
4 what we're looking at here?

5 A. This is a column that shows the total amount of
6 connections to each individual tower. So, for example, the
7 tower the phone most frequently connected to was cell I.D.
8 37518. And it connected to it 837 times during that
9 month-and-a-half period.

10 Q. What is the next column over, the percentage of
11 total, referring to?

12 A. So that's, again, an assessment of -- based upon all
13 of the tower connections that existed, what percentage of all
14 those connections were on this specific individual tower, and
15 in this case almost 52 percent of all connections from the
16 phone were to that specific tower.

17 Q. And then just to the right of that, there's a
18 location column and some addresses. Where did you obtain
19 those from?

20 A. That, again, is from the engineering list, the tower
21 list that the engineers maintained for T-Mobile. That's the
22 street address that they have recorded in their records that
23 relates to that specific tower.

24 Q. And then just to the right of that, there's a "lat"
25 and "long." Is that referring to latitude and longitude?

26 A. Correct.

27 Q. And is that what you already described for us?

28 A. Correct. Those are the actual GPS coordinates that

1 the engineers recorded for the actual tower physical location.

2 Q. And the azimuth on there, why did you include that in
3 the chart?

4 A. Again, it shows what direction. So each of these,
5 the way T-Mobile -- they combine the sector and cell I.D. into
6 the same reference number. So, in this case, this particular
7 tower is referencing a tower and sector, and that sector,
8 again, on that compass heading as at 135 degrees.

9 Q. If you could look at Court's Exhibit 21 for
10 identification. Should be the next slide. Do you recognize
11 that?

12 *(Court's Exhibit No. 21 was identified.)*

13 A. Yes, I do.

14 Q. Okay. And what is this particular slide showing?

15 A. This, again, is that visual representation of where
16 the tower is, what sector the phone connected to and what
17 direction that sector faces. So, in this case, that yellow
18 pie wedge shows the direction of the antenna of that
19 particular tower faces, which is southeast.

20 Q. So this is showing the tower that had the almost
21 52 percent total of connections from this phone number?

22 A. Correct, yes. Yeah, the information provided in that
23 table at the bottom so we're clear on what tower we're
24 referring to.

25 Q. And that was the same tower that we saw in the last
26 exhibit, Court's Exhibit 20?

27 A. Correct.

28 Q. Did you do anything in this case to attempt to

1 identify whether or not there were any addresses associated
2 with Mr. Bathen in relation to the particular towers?

3 A. Yes.

4 Q. What did you do?

5 A. So there was some information, address information,
6 provided within the case files as far as stated address for
7 Mr. Bathen. And in addition to that, there were some
8 relatives that were identified during one of the jail phone
9 calls, and so I used our national law enforcement telecom
10 indication system to obtain DMV records for his stepfather and
11 mother as well as Mr. Bathen to find out what address of
12 record they had on file with the DMV in Virginia.

13 Q. Do you routinely access this database in the course
14 of your duties?

15 A. Yes.

16 Q. And is the information accessible to the public or is
17 it only accessible to law enforcement or government?

18 A. No. So it would be -- this is something that shares
19 specifically within law enforcement, not to -- the public, I
20 guess, couldn't get that information if they went through the
21 DMV through some official channel that way. But this is
22 something specific for us to be able to get these types of
23 records for people throughout the country.

24 Q. And have you accessed this database for other cases?

25 A. Yes.

26 Q. Have you found that it's reliable based on your
27 review of the case or review of cell phone records?

28 A. Well, it's reliable and that's what the entity has on

1 file for that individual.

2 Q. And when you said that there were some names for some
3 relatives for Mr. Bathen, on this particular cell tower, were
4 you able to identify an address in relation to one of his
5 relatives?

6 A. Yes.

7 Q. And who was that?

8 A. Vincent Crawley.

9 Q. What was your understanding of his relationship with
10 Mr. Bathen?

11 A. I believe he said he was his stepfather.

12 Q. Can you --

13 MS. FREEZE: Objection. Relevance and objection.

14 Speculation.

15 THE COURT: Overruled.

16 BY MS. SOMERVILLE:

17 Q. Could you look at Court's Exhibit 22 for
18 identification. It's the next exhibit. Do you recognize
19 that?

20 *(Court's Exhibit No. 22 was identified.)*

21 A. Yes, I do.

22 Q. Okay. And is that on the PowerPoint here in court?

23 A. Yes.

24 Q. And can you tell us what we're looking at in this
25 particular exhibit?

26 A. So this is, again, combining those kind of two pieces
27 of information. So we're looking at the most frequent tower
28 and sector and what direction that sector faces, and then we

1 are plotting the location of the address for Mr. Crawley
2 according to the Virginia driver's license records, which is
3 that blue house with the black circle around it.

4 Q. And why do you have Mr. Bathen's name on that exhibit
5 as well?

6 A. Because when I pull that same information from
7 Virginia DMV for Mr. Bathen, that's the address of records for
8 him as well.

9 Q. Can you go to Court's Exhibit 23 for identification.
10 *(Court's Exhibit No. 23 was identified.)*

11 A. Yes.

12 Q. Do you recognize that?

13 A. Yes, I do.

14 Q. And is that also on the screen here in court?

15 A. Yes.

16 Q. There's a lot of information on that. Can you tell
17 us what this particular chart is demonstrating?

18 A. So this is kind of the next -- next step looking at
19 not only is this the most used tower, but based across the
20 days of the week how often is the phone connecting to this
21 particular tower. In this case, it's daily throughout the
22 entirety of the records with the exception of June 14th; there
23 were no connections to this tower, but otherwise daily
24 connections with this tower through July 7th, Sunday through
25 Saturday.

26 Q. Could you look at Court's Exhibit 24 for
27 identification. Do you recognize that exhibit?

28 /////

1 *(Court's Exhibit No. 24 was identified.)*

2 A. Yes, I do.

3 Q. And can you describe for us what we're looking at in
4 Court's Exhibit 24?

5 A. This is moving on to the second most frequent tower
6 used, which is towers three, nine, seven, 83 and it's
7 identified right at the top right corner of the pie wedge and
8 it's a sector that faces southwest.

9 Q. Were you able to associate any particular addresses
10 or locations with this tower?

11 A. Yes, I was.

12 Q. And how were you able to do that?

13 A. I had plotted the location of Mr. Bathen's
14 employment, the International Food Policy Research Institute,
15 in Washington, D.C.

16 Q. And where did you obtain that information?

17 A. That was, again, from the information on -- I believe
18 in the case file, the reports that I had read.

19 Q. I'm going to show you Court's Exhibit 25 for
20 identification. Does that show the location that you were
21 able to plot for the International Food Policy Research
22 Institute?

23 *(Court's Exhibit No. 25 was identified.)*

24 A. Yes.

25 Q. Can you look at Court's Exhibit 26 for
26 identification. What is that showing?

27 *(Court's Exhibit No. 26 was identified.)*

28 A. So, again, this is similar to the chart we looked at

1 before; and specifically on this, instead of looking at
2 individual dates, I was more concerned with day of week and
3 time of day. If this is something that is consistent with
4 somebody's work location, I wanted to see the hours of the day
5 and the days of the week where the phone was making these
6 connections.

7 And in this case, there were no connections on any weekend
8 days during the period of records that we had and all of the
9 tower connections occurred between 6:00 a.m. in the morning
10 and it goes all the way to 3:59 p.m. in the evening Monday
11 through Friday for those connections, which is consistent with
12 work.

13 Q. Can you look at Court's Exhibit 27 for
14 identification, please. Do you recognize that exhibit?

15 *(Court's Exhibit No. 27 was identified.)*

16 A. Yes.

17 Q. And what are we looking at in this particular
18 exhibit?

19 A. This is moving on to the third most frequent tower
20 connection.

21 Q. And were you able to associate an address? I know
22 you said you accessed the database for some information on
23 family members. Were you able to associate a family member of
24 Mr. Bathen with this particular cell tower?

25 A. Yes.

26 Q. And who was that?

27 A. His mother Eufemia Crawley.

28 Q. And how did you get her name?

1 A. Same address.

2 Q. Can you look at Court's Exhibit 28 for
3 identification. Is that what's on the screen in court?

4 *(Court's Exhibit No. 28 was identified.)*

5 A. Yes.

6 Q. And that address, how were you able to address that
7 particular address?

8 A. Again, that's the address of record through the
9 Virginia Department of Motor Vehicles.

10 Q. I'm going to show you Court's Exhibit 29 for
11 identification. If you can flip to that as well. Can you
12 explain this particular exhibit to us?

13 *(Court's Exhibit No. 29 was identified.)*

14 A. Yes. So this is the same chart as we looked at on
15 the first tower that we analyzed, again, looking at the days
16 that the phone connected to that particular tower and the days
17 of the week.

18 You will see this is a much more sporadic connection. Not
19 consistently daily contact like you would see at a primary
20 residence or work. Just kind of showing the frequency of
21 connections across the days of the week and days of the month.

22 Q. Have you look at Court's Exhibit 30 for
23 identification. Do you recognize that?

24 *(Court's Exhibit No. 30 was identified.)*

25 A. Yes.

26 Q. And can you just describe what we're looking at in
27 this particular exhibit?

28 A. This is the fourth tower, fourth most frequently used

1 tower by the phone.

2 Q. Can you look at -- well, for this particular tower,
3 were you able to associate it with a location related to
4 Mr. Bathen?

5 A. Yes.

6 Q. And how were you able to do that?

7 A. This was the stated address by Mr. Bathen during one
8 of the interviews in the --

9 Q. Interviews or --

10 A. It's a recorded conversation with a bail agent,
11 interview by the bail agent.

12 Q. I'm going to put that on the screen right now as
13 Court's Exhibit 31 for identification. Does that represent
14 the 1132 North Kentucky Street in Arlington, Virginia?

15 *(Court's Exhibit No. 31 was identified.)*

16 A. Yes.

17 Q. And this was the fourth tower on the list, I believe,
18 of 10 towers that you created with the most frequency?

19 A. Correct.

20 Q. And last I have Court's Exhibit 32 for
21 identification. Are you there?

22 *(Court's Exhibit No. 32 was identified.)*

23 A. Yes.

24 Q. Okay. Do you recognize that?

25 A. I do.

26 Q. And can you just explain for us again what we're
27 looking at in this particular exhibit?

28 A. This is the same kind of usage information, what days

1 of the month and then what days of the week was the phone
2 connecting to that tower. And you'll see that there really
3 weren't any tower connections until July 1st. And then
4 between July 2nd and July 6th, there were 50 connections,
5 which is pretty high, and across, again, Sunday through
6 Thursday.

7 So it just indicates that for some reason in July there
8 was a change in connection activity where that prior address
9 that was the most frequent in June stopped being used and now
10 this particular tower near the North Kentucky Street address
11 became the primary tower the phone was connecting to.

12 Q. Did you map the actual calls that were in question in
13 this case?

14 A. I did not.

15 Q. Is it your understanding that another investigator
16 had already done that?

17 A. Correct.

18 Q. In your training and experience, would you say that
19 it's accurate that you can really only approximate a 418
20 square mile area as a specific location to determine where a
21 single cell tower data is? Does that make sense?

22 A. It could make sense if that were the extreme
23 conditions and there were no other towers around. Again, kind
24 of rural America.

25 In downtown Washington, D.C. where their towers are
26 separated a quarter mile apart, you are looking about a
27 quarter mile coverage area for each of those towers.

28 Q. So that particular range, based on your training and

1 experience, would not be consistent with an urban area such as
2 the downtown D.C. area?

3 A. Yeah, there's no way.

4 MS. SOMERVILLE: Thank you. Nothing further, Your Honor.

5 THE COURT: Ms. Freeze.

6 MS. FREEZE: Yes, Your Honor. Thank you.

7 Just one moment.

8

9

CROSS-EXAMINATION

10 BY MS. FREEZE:

11 Q. Good morning. Still the morning; right? Good
12 morning, Mr. Holmes. Thank you for being here.

13 Now, Mr. Holmes -- or is it Detective Holmes?

14 A. Mr. Holmes is fine.

15 Q. Okay. Sorry. You're not an electrical engineer;
16 correct?

17 A. Correct.

18 Q. And you have never worked for a cell phone company
19 before; correct?

20 A. Correct.

21 Q. You said you were with the El Cajon P.D. and then you
22 started working with the D.A.'s office in 2008; correct?

23 A. Correct.

24 Q. And doing insurance fraud and gangs initially?

25 A. Correct.

26 Q. Now, and you -- you're not involved in establishing
27 any of the cellular networks?

28 A. Correct.

1 Q. And you are not involved in the recordkeeping or
2 maintenance of cellular networks; correct?

3 A. Correct.

4 Q. And you don't have a degree in mathematics; correct?

5 A. No.

6 Q. Or a degree in engineering?

7 A. Nope.

8 Q. Do you have any experience in the telecommunications
9 industry?

10 A. No.

11 Q. Do you have any specific training that would allow
12 you to work in that industry?

13 A. No.

14 Q. Now -- and you are not accredited as any part of any
15 engineering, mathematic or scientific group; correct?

16 A. Correct.

17 Q. Are you a member of the Institute for Electrical and
18 Electronic Engineering?

19 A. No.

20 Q. Now, I want to talk a little bit about -- just one
21 second.

22 Now, generally -- not talking specifically yet -- just
23 talking a little bit about some of the things you talked about
24 on direct with Ms. Somerville about generally with cell tower
25 science, I want to chat with you a little bit about that.

26 Now, you had said on direct examination that you prepare
27 these maps as kind of a visual representative of these towers
28 as a visual aid I think is what you used; correct?

1 A. Correct.

2 Q. Oh, and let me back up just a little bit with regards
3 to your training. You had said that you had some training
4 with engineers in San Diego County with placement of cell
5 towers; is that correct?

6 A. Correct.

7 Q. Did you -- have you worked with any engineers with
8 placement of cell towers on the East Coast?

9 A. No.

10 Q. Now, with regards to cell phone -- are you familiar
11 with the term U.E.?

12 A. U.E., no.

13 Q. Okay. And are you familiar with the term R.F.?

14 A. Radio frequency.

15 Q. Yes.

16 Now, you had said that with cell towers they spend a lot
17 of money putting these cell towers -- I think you said it was
18 several thousand dollars a couple years ago building these
19 cell towers; correct?

20 A. Correct.

21 Q. Fair to say cell phone networks, it's a
22 billion-dollar industry?

23 A. Absolutely.

24 Q. And these CDRA call detail records, those are
25 initially used for, like, billing; is that fair to say?

26 A. In addition to other things, but primarily yes.

27 Q. And obviously with these cell towers companies --
28 excuse me, cell companies like T-Mobile, Verizon, there's a

1 variety of them, the goal there is for the customers to be
2 able to connect with another person on the phone and have a
3 clear signal; correct?

4 A. Correct.

5 Q. But you had said that towers, what they're connecting
6 to when a call is made, it's going to the closest, the
7 nearest?

8 A. No, it's not what I said.

9 What I said was the phone is looking for what -- what
10 tower is providing the best signal. Oftentimes that is the
11 closest, but it may not necessarily be that.

12 Q. Okay. The strongest?

13 A. The strongest signal, correct.

14 Q. Okay. So -- but obviously if, for instance, you are
15 in a football stadium, everybody is on the phone, they
16 wouldn't all go to the -- that closest tower; right?

17 A. They would go to whatever tower is providing the
18 strongest signal.

19 Q. Fair to say that if a tower is -- the nearest tower
20 is being used and it's not as clear, then the cell phone would
21 go to the clearest tower; correct?

22 A. No.

23 Q. No?

24 A. So what happens in that case -- and it's a question
25 we addressed specifically with the engineers -- was what would
26 happen if I'm within the coverage area of tower A and that's
27 providing the strongest signal and tower A is at full
28 capacity, 100 percent usage, no space for any additional

1 calls, if the phone was within an area where it could see and
2 connect to another tower, what would it do?

3 And the answer is the phone just doesn't get to make the
4 call. The way they set up the network, they're looking for
5 the strongest signal. There are very huge and enormous
6 natural disasters or a major emergency where capacity really
7 becomes an issue, but you would basically try to connect to
8 the network and it would time out and you wouldn't be able to
9 make a call and you would have to try calling back.

10 Something we kind of all experience a few years ago when
11 the power went out, everybody was trying to make phone calls.
12 And it wasn't that the towers were not working, it was that
13 they were at full capacity and you weren't able to get space
14 on the network to actually make your phone call.

15 Now, once the phone connects to the network, then it's
16 searching for a series of towers that are around it and the
17 network itself can make a determination as to when and which
18 tower it hands off to.

19 Q. So are you familiar with SINR?

20 A. No.

21 Q. Are you -- so are you familiar at all with the
22 National Institute of Standards in Technology, commonly
23 referred to as NIST?

24 A. I've heard about it.

25 Q. Have you studied it at all or been a part of that --
26 that science background with NIST?

27 A. I'm not a member of that organization, no.

28 Q. So have you ever heard of signal strength -- the

1 equation, the ratio of signal-to-interference-plus-noise?

2 A. Yes.

3 Q. So that would be SINR.

4 A. Okay.

5 Q. So isn't it true that that ratio then, that's what
6 cell networks use, that's the technology or the ratio to find
7 the clearest, not necessarily the nearest or the strongest
8 tower?

9 A. Again, clear, strongest in my book is the same thing.
10 It's looking for how it can make that best connection to that
11 primary tower; and if that tower is busy, the phone has to
12 wait until it's not busy or it has to move to where another
13 tower is a clearer or stronger signal.

14 Q. Okay. So noise would be when you say obviously the
15 customer doesn't want any noise on the phone, right, because
16 then these customers would leave that particular cell network
17 and go to a competitor; right?

18 A. Yes. I'm not so sure that noise means you are going
19 to hear static on the phone. And the signal degrades because,
20 again, that issue where multiple conversations are occurring
21 at close proximity to each other and in order for those
22 conversations to be heard clearly, the volume has to kind of
23 go up.

24 And if you are -- if you and I were speaking and somebody
25 behind you decided to talk to somebody across from me, that
26 strains our ability to communicate clearly. And that same
27 concept holds true into radio frequency.

28 So they want to force phones and towers to communicate

1 within those reasonable parameters in order to prevent that
2 noise from creating interference and degrading the signal of a
3 much broader portion of a network.

4 Q. Right. And that's the signal strength divided by
5 interference plus noise, that's -- that's the ratio that
6 they're relying on; correct?

7 A. Correct.

8 Q. Now, in this case you had the -- the call detail
9 records; correct?

10 A. Yes. .

11 Q. What was the SINR value that you entered into your
12 program for the call on the calls in this case?

13 A. We don't evaluate that.

14 Q. But that would be where -- that's how the cell phone
15 networks chooses the tower; correct?

16 A. They identify the tower they connected to, which is
17 the tower that we show.

18 Q. Okay. But okay. And so -- but -- and in your
19 experience, the SINR value wouldn't be recorded on call detail
20 records; correct?

21 A. No.

22 Q. Because obviously then competitors would be able to
23 steal that equation; right?

24 A. I'm not sure that the equation would change. The
25 equation is the equation.

26 Q. Well, the equation is how the cell network chooses
27 the tower that they're going to use. That's the clearest
28 towers for their customer so they make money; correct?

1 A. Correct.

2 Q. Okay. Now, are you familiar with RSSI, receive
3 signal strength indicator?

4 A. I've heard of the term, yes.

5 Q. Okay. And what's the relevance of that?

6 A. I don't know.

7 Q. Okay. Do you know the three types of load?

8 A. No.

9 Q. Do you -- do you know if the towers in this case were
10 CDMA or GSM towers?

11 A. They are GSM.

12 Q. And how did you learn that?

13 A. T-Mobile is a DSM carrier.

14 Q. What's a specific range of a GSM tower?

15 A. The limitations -- I believe the max range of a tower
16 is slightly in excess of 20 miles. But, again, that is
17 subject to manipulation by the phone company. So, for
18 instance, they may set an absolute cap of 10 miles, and
19 that's, again, that kind of round trip delay measurement that
20 the phone call is taking.

21 So if a phone is more than a certain distance away, the
22 network doesn't want that to be allowed to connect to a tower,
23 they can set a parameter that if the round trip delay is
24 longer than a particular amount of time, it will not even
25 consider allowing that phone to make a connection.

26 Q. Where did you find that information?

27 A. That's through my conversations with the engineers
28 that design and maintain these networks.

1 Q. That's not -- okay. So you're saying that the
2 engineers, even though the GSM tower, the specific range is
3 21 miles, you're saying that that can be limited?

4 A. Absolutely.

5 Q. Okay. Now --

6 A. Well, can I clarify that? I don't mean -- the tower
7 still goes as far as it goes, but the phone is not allowed to
8 connect to the tower because it's too far out distance wise,
9 the carrier won't allow it based on their program.

10 Q. Okay. But --

11 A. It doesn't change the ability for the tower if it's a
12 full out to reach that distance.

13 Q. So the towers in this case were GSM towers and the
14 max range that they could reach would be 21 miles; correct?

15 A. Correct.

16 Q. And you don't have any information before us today
17 that said it was limited in any manner -- in these three
18 cases; correct?

19 A. Correct. Other than the fact, like I said, the big
20 barometer is where is next closest tower, how far away it is.
21 That would be again your boundary of how far you would expect
22 the phone to still travel and still connect to that tower.

23 Q. Right. But it's not about the closest tower. It's
24 about the clearest.

25 A. But if you put towers between you and another tower,
26 there's very little possibility that that tower is still going
27 to remain the best, clearest signal.

28 Q. Where do you get that information?

1 A. Again, that's through my conversations with the
2 engineers that design the networks.

3 Q. Okay. Now, in this case we were looking at cell site
4 data from 2017; correct?

5 A. Correct.

6 Q. And did you have any part of designing this
7 particular cell network?

8 A. No.

9 Q. Did you have any part in planning how many calls went
10 through the towers in question?

11 A. No.

12 Q. Did you have any part in the analysis or planning
13 regarding how to place cell towers in a general area?

14 A. No.

15 Q. Now, antennas -- well, let's talk about the sectors
16 actually first. So cell sites or cell towers, same thing;
17 right?

18 A. Correct.

19 Q. They're divided into sectors in order to increase the
20 cell phone use or capacity. We kind of chatted about that;
21 right?

22 A. Right.

23 Q. Now -- and as you mentioned earlier, and I want to
24 talk a little bit more about it, we talked about these
25 antennas; right? And there are multiple antennas on a cell
26 tower; correct?

27 A. Potentially, yes.

28 Q. And then the radiation power -- excuse me, radiation

1 pattern extends to the front, to the sides, to the rear; is
2 that correct?

3 A. For each tower?

4 Q. Yes.

5 A. Yes.

6 Q. And then there's lobes on each of the antennas as
7 well?

8 A. Yes.

9 Q. Okay. And so with that being said, there's an
10 overlap of the signal range; correct?

11 A. Correct.

12 Q. Because there's all these antennas lobes and all that
13 stuff; right?

14 A. Correct, yes. The radio waves don't travel in
15 straight perfect lines.

16 Q. So what is sector overlap? What is that? What does
17 that mean?

18 A. Well, it's just, again, as you have an individual
19 tower, if you divide it into three separate sectors, they're
20 going to be portions where those sectors actually meet just
21 like you would like a sprinkler in your yard where there's
22 overlap of water; because if you don't have the overlap and
23 you are standing in that unwatered area, it's a dead spot and
24 cell phone companies don't want dead spots.

25 Q. And that would be -- and that's where I was going to
26 go, and that's important to diminish these dropped calls --

27 A. Correct.

28 Q. -- when you are on the phone and then all of a sudden

1 it just ends; right?

2 A. Correct.

3 Q. Okay. But then doesn't -- with the sector overlap,
4 obviously it being helpful and it being a design feature,
5 doesn't it also diminish our confidence in the directionality
6 of the R.F. or the radio frequency, the signal origin?

7 A. No.

8 Q. Well, we can't be certain that a front lobe radiation
9 has locked into our cell phone signal, could be a side lobe or
10 a back lobe; correct?

11 A. Well, we know what sector the phone connected to.
12 And we work backwards from that. So we know based on the
13 tower and the sector the phone connected to, we look at that
14 particular directionality and figure out a general location of
15 where that phone could be. Could it be 5 percent or
16 10 percent outside of that solid line on my exhibit, yes, that
17 would be part of what we talked about that sector overlap.

18 Could it be at or maybe 50 feet behind the tower and still
19 connect to that sector? Yes, that's kind of that rear lobe
20 piece. But that's such a small space compared to the overall,
21 you know, 3-mile area that that image is depicting.

22 So really the way to do it is to look at what tower was
23 used and work backwards as opposed to where could the phone be
24 and which tower would it connect to. We know which tower the
25 phone connected to because it says on the records and it's a
26 lot easier to work that way as opposed to guessing.

27 Q. The tower that extends that, it can extend over
28 20 miles, the range?

1 A. Yes. None of these extend 20 miles. But yes, a
2 tower that could potentially extend 20 miles, yes.

3 Q. And isn't it true, though, that sectors are actually
4 oval shaped and not pie shaped as your map shows?

5 A. Well, that's oversimplification as far as oval shape.
6 It really depends again on that sector overlap. And it's not
7 only on an individual tower, it's the tower across from it
8 that's radiating signal back to it, and those radio waves are
9 kind of meeting. And depending on a whole host of different
10 issues, geographical, what other -- whatever other
11 obstructions there are, those are going to have, you know,
12 different coverage patterns.

13 So there may be more L-shape if there's a large land
14 obstruction or there could be more -- there are propagation
15 maps, which I guess the engineers for these phone companies
16 that use mathematical equations to try to identify generally
17 what these towers would cover. It's more kind of globular,
18 almost kind of like if you knocked over a glass of water, it
19 would radiate out in every direction and kind of --

20 THE COURT REPORTER: Please slow down.

21 THE WITNESS: -- radiates out in every direction --

22 THE COURT: You are not slowing.

23 THE WITNESS: Sorry.

24 BY MS. FREEZE:

25 Q. The --

26 THE COURT: Wait, wait. I interrupted the witness because
27 he was speaking too fast, and --

28 MS. FREEZE: I think he answered the question. I would

1 just --

2 THE COURT: I'm going to let him finish the answer if there
3 was an end to it. Just slow. I mean if there was more to it.
4 I said it wrong.

5 THE WITNESS: Essentially it's going to settle wherever it
6 settles. And based on the terrain and other things and
7 obstructions that are surrounding it.

8 BY MS. FREEZE:

9 Q. So the sector overlap, why isn't there this overlap
10 in your maps?

11 A. Because we're showing one sector and it's meant to
12 show the direction the sector faces as opposed to the exact
13 footprint of the sector.

14 Q. And so when you say -- so the towers -- I haven't --
15 well, how many towers are in the area in question; do you
16 know?

17 A. Which area in question?

18 Q. The Virginia -- do you know how many towers are in
19 Virginia?

20 A. I haven't counted, but it's probably a thousand.

21 Q. Do you know how many towers are in Washington, D.C.?

22 A. I haven't counted.

23 Q. Now, when you know where the tower -- so you kind of
24 get an idea where the tower is when you get these call detail
25 records; right?

26 A. Well, we get the location where the tower is, yes.

27 Q. Right. And so -- but you don't know where the phone
28 is.

1 A. Correct.

2 Q. The maps that you're showing are tracking the towers,
3 not necessarily where the phone is; correct?

4 A. They're tracking the towers that the phone connected
5 to, correct.

6 Q. Okay. Now, do you know exactly where the antennas
7 were angled back in 2017 on these towers?

8 A. Again, yes, based on my comparison of the two tower
9 lists, the one in January 2017 and the one in July 2017, the
10 locations, the azimuths are identical.

11 Q. But those -- those antenna locations, they are not
12 included in the call detail records, though; right?

13 A. What do you mean?

14 Q. The location of the actual antennas, how they are
15 angled, that's not included in the CDR's; right?

16 A. Yes, that's the azimuth. So T-Mobile does pull that
17 information in, but they're pulling it from that tower list
18 that I was talking about.

19 Q. Okay. And with regards to -- just one second.

20 And then with regards to signal strength, that can be
21 affected by distance and obstructions, things like that;
22 correct?

23 A. Sure.

24 Q. And I think you had said this before. A cell phone
25 is in constant communication with multiple towers wherever
26 it's actually turned on; correct?

27 A. Well, it's continuously checking in with the network.
28 It's not in contact with multiple towers until it's actually

1 engaged in actually a call, and the reason for that is they
2 want to create a list of nearby towers so they know which
3 potential tower to hand off to based on their own proprietary
4 decision-making process on their engineering end.

5 Q. So your testimony is that it's only when it makes the
6 call that it -- that the tower takes the information even with
7 it just being on the tower that doesn't access its
8 information?

9 A. No, I said it's continuously checking in, but it
10 doesn't need to check in with seven towers at the same time.
11 It checks in with the tower that's providing the strongest
12 signal letting it know where it is and vice versa.

13 And then once that call is initiated and brought into the
14 actual network, now it's concerned about what towers are
15 nearby. That may not be the best signal, but are potential
16 towers for the phone to connect in the event they start
17 moving.

18 Q. Right. And you continue to say the strongest. But
19 it -- again, it goes off that ratio of the clearest; correct?

20 A. I think I kind of use those words interchangeably.
21 Clearest, strongest are the same.

22 Q. Your testimony is that clearest and strongest are the
23 same?

24 A. Correct.

25 Q. Based on your training and experience?

26 A. Correct. It's looking for the best signal.

27 Q. Okay. Now, do you know what a switching system is
28 within a network?

1 A. Yes.

2 Q. What is that?

3 A. That's, again, kind of like the operator. It's the
4 computer hub that's controlling the routing of calls as they
5 connect the towers and route through their network to other
6 users or other phone subscribers.

7 Q. Okay. And did you work with the switching system in
8 the network with the T-Mobile?

9 A. Like was I employed there?

10 Q. Did you work with them at all directly or get any
11 information directly from them?

12 A. No. We got the records straight from T-Mobile.

13 Q. And the switching system can move a call wherever
14 there is room within the range of that cell phone's radio
15 signal; correct?

16 A. Once it's connected on an actual call, correct.

17 Q. And the call detail records that you looked at in
18 this case, they didn't have any indicator specifically
19 regarding the range of any of the phones; correct?

20 A. Of the phones, no, just identifies what tower and
21 sector the phone connected to.

22 Q. Because I noticed you kept saying one to three miles.
23 But we've discussed that the range is 21 miles. So can you
24 explain to me --

25 A. Maximum range can be 21 miles. However, in actual
26 practice in urban areas in the one to three miles I referred
27 to in San Diego County is typically the maximum range you
28 would see for a tower in San Diego County for a phone to

1 connect to it.

2 Q. But that's here in San Diego, not the towers in
3 question.

4 A. Well, the networks operate the same. AT&T operates
5 the same here as it does anywhere in the country, same with
6 T-Mobile and Verizon.

7 The issue at hand is more about where are the surrounding
8 towers, how far apart are they, and that would then either
9 narrow or expand how far away a phone can be from that tower
10 and still connect to it. Again, still operating under the
11 21-mile maximum distance the phone could probably be.

12 Q. And so really the point -- where you start with these
13 towers and getting all this information is from the CDR's
14 themselves?

15 A. Correct.

16 Q. That's your starting point; right?

17 A. Correct.

18 Q. And in this case, do you have the original CDRA? Oh,
19 just a copy.

20 A. What do you mean?

21 Q. Like how did you obtain the call detail records?

22 A. I was provided the call detail records via e-mail.

23 Q. Now, in the call detail records, though, there was an
24 issue with the alleged first call from June 4th. Are you
25 familiar with that situation?

26 A. Yes. So there wasn't an issue. It was just that at
27 the time that the records were produced, which was after July
28 of 2017, T-Mobile had renumbered a switch. And so when they

1 were trying to pull in the location of the tower, it didn't
2 match; so they left it blank or off of the records so the
3 tower was identified and the switch was identified, but
4 T-Mobile couldn't find a match.

5 So what I did is I went and found or -- and reviewed a
6 list from January of 2017, and based on the previous name or
7 number for the switch and cell tower, I was able to map the
8 actual location of those towers, which is the same towers that
9 were being used after the renaming.

10 Q. Okay. But wouldn't the -- not being able to identify
11 that tower in the CDR's that were provided, wouldn't that put
12 into question the reliability potentially of the CDR's that
13 were provided?

14 A. No. It just -- if you understand how the phone
15 companies work and how the engineering site works, it's just
16 another cue that you need to take another step and find out if
17 there's a renumbering. I had it happen a number of times in
18 cases that I worked.

19 Q. Now, with regards to looking at this tower frequency
20 chart, I think it's Exhibit 20 for the record, you -- you
21 prepared that tower frequency chart, I think you said, with
22 your looking at the CDR's and using a mapping software, I
23 think you said -- is it Tower Tracker and then Google Earth?
24 Is that how you put everything together?

25 A. Correct. So the actual -- the pie wedges and the map
26 is from Google Earth and Tower Tracker. And these charts are
27 just simply an Excel calculation adding up frequency and
28 counting the amount of times that these events occurred.

1 Q. And so the location of rank, meaning tower number;
2 correct?

3 A. No. Rank meaning the most frequent being No. 1 all
4 the way down through 10 being the 10th most frequently
5 connected to tower.

6 Q. I misspoke. I meant when we were looking at all
7 these exhibits you had it, like, No. 1, No. 2.

8 A. Yes, so sorry.

9 Going into subsequent slides, the No. 1 means the
10 No. 1 most frequently used tower; No. 2 is the second most and
11 so on.

12 Q. Thank you.

13 Okay. And so then you are given some potential addresses,
14 relevant addresses to map in relation to these tower
15 frequency -- tower ranges, if you will; is that correct?

16 A. Correct. So I use the case reports to identify one
17 of them and then obtain other addresses based on the names
18 that appeared in those reports through the Virginia Department
19 of Motor Vehicle.

20 Q. Okay. And so you were told about an address that was
21 in Arlington, Virginia; correct?

22 A. Correct.

23 Q. That was provided to you reviewing all those reports
24 and stuff?

25 A. Correct.

26 Q. And that would be rank No. 3 -- or no, excuse me,
27 rank No. 4 used approximately around 3 percent of the time; is
28 that correct? Am I reading that right?

1 A. You are reading it correct. What I talked about
2 where there was no activity at that particular tower or sector
3 during almost the entire month of June. So that 54
4 connections occur within a span of, I believe, six days.

5 Q. Okay. So the Arlington address that's in question is
6 it's connecting to that tower 3 percent of the time?

7 A. Correct.

8 Q. Okay. And this isn't my normal area, so I'm learning
9 as well. Okay. So -- and then this address. But then when
10 you did a check through the Department of Motor Vehicles, the
11 address that was actually associated with Mr. Bathen was on
12 Green Ash Court in Springfield, Virginia; correct?

13 A. Correct.

14 Q. Okay. There was no record that you could find of
15 Mr. Bathen living on -- in Arlington on Kentucky Street;
16 correct?

17 A. Other than the statement that was --

18 Q. I'm not asking about the statement with regard --

19 THE COURT: You have to let the witness answer.

20 THE WITNESS: Correct. That was a statement he provided to
21 the bail agent was the address. That's the information that I
22 have where that came from.

23 BY MS. FREEZE:

24 Q. Okay. That's the only connection that you -- that
25 you have when you were doing all of this investigation and
26 preparing all this information together. The only information
27 that connected Mr. Bathen to this Arlington street address
28 that you were being told was through a bail bond conversation;

1 correct?

2 A. Correct.

3 Q. Okay. And the DMV document that you were looking at,
4 I think it's over here, part of your packet, does it say how
5 long he's resided at that address?

6 A. I don't believe so.

7 Q. And that when you access -- how do you access that
8 through the DMV? Do you have to get, like, a search warrant
9 or how is that provided?

10 A. It's a computer database. So we have obviously law
11 enforcement credentials to log in and access it through that
12 database so we can pull records from those entities throughout
13 the entire country.

14 Q. Okay. And then the address in D.C., you were never
15 actually provided an employment address or a work address for
16 Mr. Bathen; correct?

17 A. Correct. That was based off the name of the company,
18 a search of that company and where they are located.

19 Q. Okay. And when you search that company, that
20 nonprofit agency, fair to say that there's hundreds of offices
21 throughout the globe?

22 A. To be honest, I don't recall. That's the address
23 that I came up with for that specific company.

24 Q. Isn't that true that's where the headquarters is?

25 A. That may be how I used it. I don't remember exactly.
26 But that was the address that I associated with that company.

27 Q. Okay. And there was no information that's ever been
28 provided to you that Mr. Bathen works at the headquarters of

1 that nonprofit agency; correct?

2 A. I don't have that information, no.

3 Q. And then the relevance with regards to his --

4 THE COURT: Okay. I'm going to -- let me talk to counsel
5 about scheduling. We are past the noon hour. I was -- let me
6 talk to counsel.

7 And ladies and gentlemen, I'll be excusing you for lunch
8 as soon as we figure out when you're coming back.

9 *(Sidebar; unreported.)*

10 THE COURT: All right. Ladies and gentlemen, I think
11 Ms. Freeze is just about finished. It's just going to be a
12 couple more minutes. So with your patience, I'm going to have
13 her finish her questioning so this witness can be excused.

14 BY MS. FREEZE:

15 Q. And then, Mr. Holmes, the third address that you used
16 you believe to be the address of Mr. Bathen's mother; correct?

17 A. Correct.

18 Q. And that was pulled from DMV records?

19 A. Correct.

20 Q. Did you also have a chance to listen to the jail call
21 where Mr. Bathen tells the bail agent where she lives
22 actually, provides the address?

23 A. I believe that was in there as well, yes.

24 Q. Okay. And that's in the Bay Area in Northern
25 California?

26 A. Yes.

27 Q. Okay. Did you plug that address into these to find
28 out the location? Obviously not; right?

1 A. It's clear across the country. No, right.

2 Q. Exactly.

3 Thank you. I think that's it. Just one moment.

4 And did you ever look at the location between -- or in any
5 of your involvement with this case with regards to the
6 distance between the address in Arlington, Virginia and
7 Chula Vista, California?

8 A. The distance?

9 Q. Yes.

10 A. No. It's a long way.

11 Q. Like around 2,000, 3,000 miles?

12 A. If you say so.

13 MS. FREEZE: Nothing further. Thank you.

14 MS. SOMERVILLE: I do have a question, Your Honor.

15

16

17 ///

18

REDIRECT EXAMINATION

19 BY MS. SOMERVILLE:

20 Q. You were just asked about the address in Northern
21 California.

22 A. Correct.

23 Q. Were there any towers that were utilized in
24 California during this date range from the call detail
25 records?

26 A. No.

27 MS. SOMERVILLE: Okay. Thank you. Nothing further.

28 THE COURT: Anything further?

1 MS. FREEZE: Nothing further.

2 THE COURT: May this witness be excused?

3 MS. SOMERVILLE: Yes, Your Honor.

4 MS. FREEZE: Yes.

5 THE COURT: Thank you very much.

6 All right, ladies and gentlemen. We're doing pretty well.
7 We're -- we're not done, but we're just about done. I
8 anticipate that you will have the case late this afternoon for
9 deliberation.

10 But I urge you to keep an open mind. Don't form or
11 express an opinion. Don't talk to anybody about any subject
12 connected with this matter.

13 You have gotten a lot of information and some of you might
14 be curious and try to figure out how it all relates to cell
15 phones and that kind of thing.

16 Please stay off the Internet if you are curious. This is
17 not the time to research.

18 I'm going to have you return at 1:30. So it's a little
19 shorter break than usual.

20 Is that going to cause a hardship to anybody? Okay. I'm
21 getting all shakes no.

22 So with the admonition I've given you, I will excuse you
23 for our noon recess and I'll see you all at 1:30.

24 *(The following proceedings were had between the Court*
25 *and counsel out of the presence and hearing of the*
26 *jury.)*

27 THE COURT: All right. And the jury is gone. And I told
28 you I will see you all at 1:15. And we can just start with

1 jury instructions. They're pretty straightforward.

2 Okay. Thank you very much.

3 *(Lunch recess.)*

4

...

5 *(The following proceedings were had between the Court*
6 *and counsel out of the presence and hearing of the*
7 *jury.)*

8 THE COURT: All right. What I propose to do, we do have
9 one proposed defense jury instruction.

10 We're on the record outside the presence of the jury.

11 I propose this. Okay. So my thought in the time we have
12 is just to go through the regular jury instructions. There's
13 one special jury instruction proposed. And if we have time,
14 we will get to that at this point.

15 I'm going to tell you if I tend to give it. And so if you
16 have an objection, let me know. If I don't hear, then I'll
17 assume there's no objection. Most of these are standard
18 instructions. They all are actually. I'll give 200.
19 Crossing out in the first paragraph.

20 MS. SOMERVILLE: I'm ready. Sorry.

21 THE COURT: The bracketed sentence. Each of you has a
22 copy.

23 MS. SOMERVILLE: Oh, okay.

24 THE COURT: Other than that, I will give it.

25 I will give 201.

26 202, the last paragraph will read, "At the end of the
27 trial, your notes will be collected and destroyed."

28 Did you e-mail these, Ms. Somerville?

1 MS. SOMERVILLE: No. But I can. I have them with me.

2 MS. FREEZE: Did you skip over 201, Your Honor? I'm sorry.

3 THE COURT: Nope. I said yes to 201. 207, yes. 220, yes.

4 222, yes. 223, yes. I give 224 or 225, not both. If

5 it's -- if the circumstantial evidence is just for intent or

6 mental state, I give that. If it's for intent or mental state

7 and something else, I give 224 pursuant to the bench notes.

8 MS. SOMERVILLE: It's for everything, Your Honor, for I.D.

9 as well, so --

10 THE COURT: 224.

11 MS. SOMERVILLE: Thank you.

12 MS. FREEZE: So 225 is not going to be read?

13 THE COURT: Not going to be read.

14 226, going to the second page. I understand,

15 Ms. Somerville, you are going to rest; is that correct?

16 MS. SOMERVILLE: Yes, Your Honor. Subject to the
17 receipt -- I have also the call detail records on a CD with the
18 certificate from the custodian of records and then I will be
19 resting.

20 THE COURT: You know, I was wondering about that because
21 they were all being talked about in response to a search
22 warrant.

23 MS. FREEZE: Yeah, that's good to know.

24 MS. SOMERVILLE: Yes.

25 THE COURT: Okay. That's so funny. All right. On the
26 second page of 226, there's a number of bracketed items.

27 Got it?

28 MS. FREEZE: The third page; right?

1 THE COURT: I have it as the second page of 226, the
2 bracketed.

3 MS. SOMERVILLE: Oh, bracketed on Page 3 as well.

4 THE COURT: Okay. Yes, okay. Thank you.

5 Any of those bracketed items that you want to leave in?

6 MS. SOMERVILLE: I don't know that any of them need to be
7 left in based on the evidence that was given.

8 MS. FREEZE: I think the -- the only one that wouldn't
9 apply would be "has a witness been convicted as a felony." I
10 think they all apply.

11 THE COURT: No. What is the character for truthfulness.
12 Admit to being untruthful. Engage in other conduct that
13 reflects on his or her believability. Promised immunity or a
14 leniency.

15 MS. FREEZE: Not the last one.

16 THE COURT: Who's been convicted of a felony?

17 MS. FREEZE: Oh, I'm sorry. Are we talking about taking it
18 out or keeping it in?

19 THE COURT: No, taking it out.

20 MS. FREEZE: I'm saying taking out the felony reference.

21 THE COURT: But the other ones, how do they apply, the
22 bracketed ones?

23 MS. FREEZE: Admit to being untruthful?

24 THE COURT: Yes. Who admitted to being untruthful?

25 MS. FREEZE: Yes, I guess not outright, but I guess that
26 can go to a different type of jury instruction. But I mean I
27 think when you -- any time there is impeachment or any type of
28 questioning pointing to a witness doing something that he or

1 she admitted to not doing and then showing that they did do it,
2 I mean I think the jury should --

3 THE COURT: I don't think -- I don't know of any such
4 evidence. If you are trying to talk about Dr. Jacobs --
5 they -- they didn't remember some dates very accurately. I
6 didn't find -- I didn't find her to be either untruthful or
7 admitting to being untruthful.

8 But I think that first bracketed, if you are arguing that
9 other evidence prove or disprove any fact about which the
10 witness testified, so if you want to use that for your
11 impeachment of her, but she didn't admit to being untruthful
12 and I don't think you -- unless you give me an example of
13 where she was untruthful.

14 MS. FREEZE: Well, I think specifically she said she never
15 gives out her cell phone number. I mean that's just an
16 example. She said she -- she was clear on direct examination
17 she never gave out her cell phone to clients, and then on
18 cross-examination she admitted she gave my client her cell
19 phone number.

20 THE COURT: I think that she gave them at times, that it
21 was not her practice to do it, and then she said in
22 cross-examination that she gave it when she was doing the phone
23 counseling. But that's my recollection.

24 MS. SOMERVILLE: Yes. Yes, that is my recollection too.
25 And the only time I've ever had this given is when a witness
26 actually says, yeah, I lied to the cops or yes, I lied in this
27 situation. I think that is what that is intended for.

28 MS. FREEZE: Okay. That's fine. I'll submit to the Court.

1 THE COURT: So I'm going to take all of these out. I'm not
2 even sure about "did other evidence prove or disprove any fact
3 about which the witness testified," but if you'd like that in
4 so that as a -- your argument that you impeached her with that
5 e-mail that said she gave her cell phone, I'll leave that in.

6 MS. FREEZE: Thank you, Your Honor.

7 THE COURT: The others come out. On the third page,
8 there's no character evidence of -- that should come out. And
9 you are not introducing any -- expecting to introduce character
10 evidence?

11 MS. FREEZE: No, Your Honor.

12 THE COURT: We can leave the next paragraph in about
13 remembering.

14 MS. SOMERVILLE: Yes.

15 THE COURT: And then are you saying that you think
16 Dr. Jacobs deliberately lied? Do you want that last paragraph?

17 MS. FREEZE: No, I don't think she deliberately -- oh,
18 yeah, yeah. Maybe this. Right. I mean I would ask to keep
19 that in, but I'll submit to the Court.

20 THE COURT: Okay. All right. No, I don't want to get in
21 the middle of your argument. It's just if you don't think
22 there's any evidence to support it, I won't give it, but that's
23 fine.

24 I'll give 251, 300, 301, 302, 303.

25 MS. FREEZE: I don't think --

26 THE COURT: That's the new one that I asked for.

27 MS. FREEZE: I'm sorry. And I forgot I printed it out.

28 MS. SOMERVILLE: I brought copies.

1 THE COURT: Did you?

2 MS. SOMERVILLE: Yes.

3 THE COURT: It's a limited purpose. The evidence was
4 admitted for a limited purpose.

5 MS. FREEZE: Yes, thank you. I saw that electronically.
6 Failed to print it out. Thank you so much.

7 THE COURT: Okay. So I'll give that.

8 I'll give 318.

9 332, I don't think the last two paragraphs apply. I don't
10 think there was a hypothetical, was there?

11 MS. SOMERVILLE: I did ask, you know, if someone made a
12 call from here and went to L.A. sort of.

13 THE COURT: Okay. We'll leave it in. And the last, I
14 don't understand. You are going to have competing expert
15 witnesses on any particular subject?

16 MS. FREEZE: Well, I just have my expert that's going to
17 testify as to the cell phone tower science.

18 THE COURT: Oh, I thought you said you were having
19 Dr. Murphy come in.

20 MS. FREEZE: Oh, I'm sorry, Your Honor. I misspoke. So
21 Dr. Murphy, it was with regards to my client's mental health,
22 but he's not going to be testifying. The only expert I have is
23 my cell phone, Manfred Schenk.

24 THE COURT: Oh, okay.

25 MS. FREEZE: During my --

26 THE COURT: I misunderstood. I thought you were calling
27 him as of yesterday so I was confused. So I will leave the
28 last paragraph in.

1 355 I will give.

2 357, I'm not sure what this applies.

3 MS. SOMERVILLE: It doesn't, Your Honor. I realized I put
4 it in there and it should be taken out.

5 THE COURT: So it's withdrawn?

6 MS. SOMERVILLE: Yes.

7 MS. FREEZE: Your Honor, Ms. Somerville provided me 333 as
8 well today. Is that in Your Honor's packet?

9 MS. SOMERVILLE: Opinion testimony of a lay witness.

10 THE COURT: Oh, yes. I asked for that. Yes, I'm going to
11 give that just because I think lay witness -- thank you.

12 MS. SOMERVILLE: I have a copy, Your Honor, as well. I saw
13 the e-mail where it should have -- where defense counsel was
14 requesting that it include not just one witness, but --

15 THE COURT: Oh, it should be witnesses.

16 MS. SOMERVILLE: Yes. And I have a copy of that, so if the
17 Court would like that.

18 THE COURT: Thank you. I would. I probably would have
19 corrected it when I read it, but I appreciate it that I don't
20 have to make written corrections.

21 Oh, which reminds me. On 200, did I? No, that's right.
22 Never mind.

23 358 I will give. And 359.

24 MS. FREEZE: I don't have --

25 THE COURT: That's a new one too. You don't give 358
26 without 359.

27 MS. FREEZE: 350 -- 333.

28 MS. SOMERVILLE: Here, I have a copy of it.

1 MS. FREEZE: Got it. Thank you.

2 THE COURT: 360, I'm not sure since Dr. Murphy is not
3 testifying that you need this.

4 MS. FREEZE: No, I have an expert, Your Honor.

5 THE COURT: I know. But Dr. Murphy -- not -- that would
6 be -- I would think that's what the 360, the statement to an
7 expert, that would be somebody who interviewed Mr. Bathen, but
8 I don't think Mr. Bathen made statements to your expert.

9 MS. FREEZE: Oh. Right, correct.

10 THE COURT: Correct.

11 MS. FREEZE: Correct. So we can get rid of this one.

12 THE COURT: Correct. He did not.

13 MS. FREEZE: Sorry.

14 THE COURT: So --

15 MS. FREEZE: Getting mixed up. My eyes are burning. I
16 have bad allergies, so I apologize.

17 THE COURT: 370 I'll give.

18 1300, I would pose that in Element 1 we change it to
19 unlawfully kill or unlawfully cause great bodily injury to
20 Carolyn Jacobs and/or her daughter because I think only one of
21 the phone calls went to mention of the daughter.

22 MS. SOMERVILLE: It does. And you know, actually I was --
23 when I was looking at this last night, I thought we could just
24 remove the daughter because further down it actually mentions
25 immediate family members.

26 THE COURT: I think that's better.

27 MS. SOMERVILLE: Yes.

28 MS. FREEZE: I was going to say the same thing. Thank you.

1 THE COURT: Otherwise, it looked good to me.

2 3500, I don't think it applies because you've only proved
3 one act for each of the counts.

4 MS. SOMERVILLE: Right. And I think I had just put it in
5 because there were multiple threats within each threat, but I
6 don't think that's the situation here.

7 THE COURT: Yeah, I don't think it's appropriate. So are
8 you -- do you want me to refuse it?

9 MS. SOMERVILLE: I'll withdraw it.

10 THE COURT: Withdraw.

11 3515 will be given. And 3550.

12 We are at 1:30. So why don't we go ahead, and then we'll
13 certainly discuss your proposed jury instructions at a break
14 we'll take right before at the end of the evidence.

15 MS. FREEZE: Great, Your Honor. And I'm not sure, I did
16 bring the case that I -- I know I cite several cases, but I
17 brought the most recent one. If the Court --

18 THE COURT: Let's talk about it later.

19 MS. FREEZE: Okay.

20 THE COURT: All right. And --

21 MS. SOMERVILLE: Would you like me to address these later
22 when I'm moving all the exhibits into evidence or before I
23 actually close my case? I was just --

24 THE COURT: I think you have to. Unless there's a
25 stipulation, I think you have to actually --

26 MS. SOMERVILLE: Okay. I will.

27 THE COURT: -- introduce the -- the verified business
28 records.

1 MS. SOMERVILLE: That's fine. And if it's acceptable to
2 the Court, I'll just describe obviously what each of the items
3 are.

4 THE COURT: I mean if it's stipulated to, then we don't
5 actually even need to do it in front of the jury, but it's your
6 burden of proving, so --

7 MS. SOMERVILLE: That's fine. I'll just make my request to
8 admit them.

9 THE COURT: Okay. All right. And with that, is everybody
10 ready for the jury to be brought in?

11 MS. FREEZE: Yes.

12 THE COURT: If they -- we can make sure they are all here
13 first, Deputy.

14 Robert, if not, we can talk about that last jury
15 instruction.

16 *(The following proceedings were had in open court in*
17 *the presence and hearing of the jury.)*

18 THE COURT: All right. We're back on the record with
19 everyone present.

20 And Ms. Somerville.

21 MS. SOMERVILLE: Yes, Your Honor. The People have no
22 further witnesses.

23 However, we do have Court's Exhibit 33, which is a
24 custodian of records document from T-Mobile Metro PCS
25 certifying that the records were made at or near the time of
26 the occurrence of the matters as set forth by or from
27 information transmitted by a person with knowledge of those
28 matters, that such records were kept in the course of

1 regularly conducted business activities.

2 The business activity made such records as a regular
3 practice. And if such record is not the original, such record
4 is a duplicate of the original.

5 *(Court's Exhibit No. 33 was identified.)*

6 We also have Court's Exhibit 34 for identification, which
7 is a CD that contains the call detail records and the billing
8 information that was provided from T-Mobile as referenced in
9 Court's Exhibit 33.

10 *(Court's Exhibit No. 34 was identified.)*

11 And with that, subject to the receipt of all the exhibits,
12 we would rest.

13 THE COURT: All right. Thank you.

14 Ms. Freeze.

15 MS. FREEZE: Yes, Your Honor. And then at this time, I'd
16 like to make a motion outside the presence of the jury.

17 THE COURT: We'll reserve on that.

18 Call your next witness.

19 MS. FREEZE: All right. Thank you, Your Honor.

20 The defense would like to call Manfred Schenk,
21 S-c-h-e-n-k. Schenk.

22 THE CLERK: Do you solemnly state under penalty of perjury
23 that the evidence you give in this matter, shall be the truth,
24 the whole truth and nothing but the truth?

25 THE WITNESS: I do.

26 THE CLERK: Please have a seat at the witness stand.

27 For the record, please state your full name and spell it.

28 THE WITNESS: My name is Manfred Schenk, spelled

1 M-a-n-f-r-e-d, S-c-h-e-n-k.

2 THE CLERK: Thank you.

3 MS. FREEZE: Thank you, Your Honor.

4

5

MANFRED SCHENK,

6

called as a witness on behalf of the Defense,

7

having been first duly sworn, testified as follows:

8

9

DIRECT EXAMINATION

10 BY MS. FREEZE:

11 Q. Good afternoon, Mr. Schenk.

12 A. Good afternoon.

13 Q. What is your profession?

14 A. I am a mathematician by training, and I've been
15 working in the area of systems development and computers and
16 network analysis and things of that particular nature for 50
17 years.

18 Q. Okay. And what company do you currently work for?

19 A. I work for an organization called Cherry Biometrics.

20 Q. What do you do for Cherry Biometrics?

21 A. Cherry Biometrics is an organization that deals in
22 authentication and -- and identification software and hardware
23 products.

24 Q. And what are some of the things that you've worked on
25 in your career?

26 A. Oh. In the area of radio frequency technology, I've
27 worked in various, various projects. Two of them for the
28 Navy, one for the Air Force and -- and another one for NASA.

1 Q. Okay. And what kind of -- you said that you are a
2 mathematician; is that correct?

3 A. Correct.

4 Q. And where did you obtain your degrees?

5 A. I started out in the area of engineering in North
6 College of Engineering, which is now called New Jersey
7 Institute of Technology. And I have an associate degree in
8 engineering from there.

9 And then I switched to -- my major to mathematics and went
10 to Rutgers University in order to get a bachelor's degree in
11 mathematics.

12 And subsequent to that, I went to the University of
13 Michigan and got a master's degree in mathematics.

14 Q. Thank you.

15 And are you involved -- or are you involved in any
16 memberships?

17 A. I am involved in two areas, specifically, the
18 Institute for Electrical and Electronic Engineers, commonly
19 known as the IEEE, which is an organization of about 400 -- I
20 think about 440,000 members, and I'm a member of that
21 particular organization.

22 And specifically in the area of communications technology,
23 this also -- it's subgroups there, and that's -- that is a
24 specialty area that -- that I'm associated with.

25 California also has an organization that's trying to --
26 trying to understand the telecommunications field and whatever
27 else and they are an organization called California Wireless
28 Association.

1 Q. And what kind of organizations have you worked with?

2 A. Lots of organizations. Specifically, I started out
3 at I.B.M. and subsequent to that I worked for Western Union,
4 and also ITT, which is International Telephone and Telegraph.
5 They are a cell phone provider company in the international
6 sphere and arena.

7 Q. And you mentioned that you worked with NASA. What
8 did you do with NASA?

9 A. I worked on the lunar excursion module. That was the
10 descent stage that actually landed on the moon. And my little
11 contribution there was that I worked on the radar system that
12 represented the -- essentially was a radar altimeter, and it
13 used the R.F. radio frequency signals and bounced them off the
14 moon in order to determine what the distance is from the
15 landing module down to the surface of the earth. So my -- my
16 little contribution there was called lunar landing radar.

17 Q. Thank you.

18 And what is -- are you familiar with the National
19 Institute of Standards in Technology?

20 A. Yes, I am.

21 Q. What is that?

22 A. It's the premier organization for the federal
23 government that develops international standards. I'm sure
24 you've seen on -- there's equipment and things of that
25 particular nature where they have the standards or whatever
26 else, so this is the organization then, in fact, that develops
27 those particular standards.

28 And I happen to be a member. And with National Institute

1 of Standards and Technology and I have -- I have a chance to
2 load on those particular standards.

3 Q. Have you been qualified as an expert in court before?

4 A. Yes, I have.

5 Q. Okay. Now, moving on to the case in question. Are
6 you -- I want to talk a little bit about call detail records.

7 A. Yes.

8 Q. What -- are you familiar with call detail records?

9 A. Yes, I am.

10 Q. What are call detail records?

11 A. They are the records that a cell phone provider
12 keeps, maintains, collects for the -- for activity on their
13 particular cell site, and there's a logging computer that logs
14 all of that information as traffic transit through that
15 particular system.

16 The main computer that panels all of your cell phone and
17 communications is called the MSC, which is the message
18 switching computer. So when I talk about an MSC, that's what
19 I'm talking about.

20 Q. And is it -- so CDRs come from MSC?

21 A. Yes, the -- well, it's probably not the MSC that, in
22 fact, is collecting that information. It's probably an
23 auxilliary computer that's also being controlled by the
24 message switching computer, but there is a logging computer
25 there that is keeping all -- keeping all of these records.

26 Q. And the specific purpose for call detail records?

27 A. Well, they used to have a purpose 20-plus years ago
28 in the sense that if, in fact, you had a -- a dispute about

1 your bill or whatever else, you indicated that, in fact, you
2 didn't make this particular telephone call, they used to
3 charge you on a per-call basis and things of that particular
4 nature. So telephone company couldn't, in fact, go back and
5 advise you in regards to approximately where you made
6 telephone calls from or whatever else.

7 But everyone is on a fixed plan at this particular point
8 in time on unlimited services and all of that. So these
9 records are what they call vestigial remain. They've been
10 superceded by numerous other logging records and so they are
11 historic remnants of a -- of an activity that's more than 20
12 years old.

13 Q. Thank you. And do you know how they -- how law
14 enforcement obtains CDRs?

15 A. They have to subpoena them. So they get a court
16 order and they have to go to their cell phone provider that
17 you are being serviced by and then they will ask in the
18 subpoena, give me CDR records, your call detail records for
19 that particular phone from -- for such and such time period,
20 whatever, that's how they do that.

21 And then what the cell phone provider does is they go to a
22 large database of where they track where they have collected
23 all of the cell phone in the information for all of their
24 customers, and then they will extract that specific telephone
25 number and then provide -- provide a report of those
26 particular -- of that particular telephone number.

27 Q. Thank you.

28 And so besides the billing, what specifically is CDR

1 providing? Is it just date and time of calls, things like
2 that?

3 A. Well, the information that's on there is, in fact,
4 date and time and what telephone call, what telephone number
5 call, what other telephone number and the duration and the
6 amount of time for that particular call, and then ultimately,
7 you know, whether the call was completed or not completed and
8 a host of other information.

9 But ultimately what's also recorded is the specific
10 equipment that was used in order to connect that particular
11 call. So now we're talking about -- we're talking about an
12 antenna on a cell tower, and then we can determine the
13 location where that particular connection occurred.

14 Q. So, Mr. Schenk, so the CDRs can provide the actual
15 cell tower or cell site location?

16 A. The CDRs, in fact, have the connection point, your
17 wireless connection point where you connect to the network so
18 that particular antenna and tower location is, in fact,
19 captured in the call detail records.

20 Q. And have you ever -- in your 50-some-odd-year
21 experience, have you ever seen call detail records that are
22 inaccurate?

23 A. Yes, I have.

24 Q. And inaccurate how?

25 A. Well, not all calls are completed properly. And so,
26 therefore, you may have -- in your logging function, you may
27 have information which says that -- that you started a call at
28 some -- a particular point in time, but for some reason or

1 other it disappears and then it goes away, it gets lost in the
2 system, in which case then you have abnormal call or
3 uncompleted call or something of that particular nature.

4 And what the -- what the cell phone companies usually do
5 when those records too spurious or whatever else, they usually
6 scrub them from the information that is, in fact, provided --
7 well, in response to a subpoena.

8 Q. And so what is your concern when you find inaccurate
9 information in call detail records?

10 A. Well, it leads to questioning the accuracy and the
11 authenticity of that particular record. I mean law
12 enforcement relies very heavily on this information, but
13 sometimes when there's inaccuracies within the entire report,
14 we must have some judgment in regards to how much validity and
15 credence that we should, in fact, give to these particular
16 records.

17 Q. Now, are call detail records, are they specific
18 enough to pinpoint where a caller is?

19 A. No. That's -- that's really, really the point. The
20 accurate information that we have is where is the cell tower
21 or cell site and possibly which particular antenna, in fact,
22 that you've connected to. But that's -- so that's the
23 connection point for your wireless signal.

24 However, the -- it doesn't tell you -- it doesn't tell you
25 where the phone is located. So it's important that we must
26 not confuse the location of the cell site with the location of
27 the cell phone caller because those two points places whatever
28 can be separated by more than 21 miles.

1 And how do we know that? We know that because the -- we
2 mentioned earlier the National Institute for Standards and
3 Technology is a governing agency which, you know, provides
4 guidance in the area of cell phone and cell phone
5 communication, and they publish back in 2007 and revised in
6 2014 two documents which basically say the same thing, which
7 is that -- that the -- that the distance, the range at which a
8 caller can connect to a cell site, is -- is in excess of
9 35 kilometers, which translates to about 21.75 miles.

10 Q. Thank you.

11 And so with regards to where a -- when a person makes a
12 call on their cell phone, is the caller going to the nearest
13 tower? Is it going to the strongest? Where is it? How is it
14 determined what tower is used when an individual makes a phone
15 call on their cell phone?

16 A. Well, it's pretty complex algorithm or whatever else
17 and obviously some aspects of this complex algorithm are
18 proprietary and different companies have different little
19 tweaks on it or whatever else in order to distinguish their
20 service from someone else.

21 But basically the -- the -- the cell signal goes out and
22 contacts a multiplicity of towers within the area, and that
23 information then is transmitted from the cell sites to the
24 message switching computer. The message switching computer
25 then performs a calculation in regards to what is the best
26 quality and clarity signal context that, in fact, it can make
27 at that particular instant in time, and there's three
28 components that it mainly focuses on, which is what is the

1 actual signal strength. So sometimes that's referred to RSSI,
2 which is received signal strength indicator.

3 Anyway, so it's based on signal strength. That's one
4 component.

5 And another component is what is the electronic noise for
6 level that exists within each individual site at that
7 particular instant. And then, in addition to that, is there
8 any interference, electronic interference component that, in
9 fact, is there.

10 So now we -- it develops a ratio, and that particular
11 ratio is called SINR, which stands for that the ratio is the
12 signal divided by the interference plus the noise. So we come
13 up with a quality measurement for each and every single cell
14 site within the neighborhood vicinity, whatever else, of where
15 the cell phone caller is. And then the very, very best signal
16 ratio that, in fact, is established, that would be the
17 candidate for making that particular wireless connection.

18 Now, there's another little twist here, whatever else,
19 which is some cell phone companies have their own towers.
20 Some cell phone companies rents towers. If you have a choice
21 between using a tower, you know, that you own versus one that
22 you rent and you have to pay money for, well, you know, if
23 your signal quality is sufficiently good enough to do -- you
24 know, to connect that particular call, then you know,
25 economics would dictate that, in fact, potentially you would
26 use your own tower rather -- rather than pay for a rental
27 tower, you know, in the communication industry, it's called a
28 tariff for whatever else, but anyway it's basically a usage

1 rental component.

2 So we are going to pick a tower that's a very, very clear
3 signal, that is to say, have very little interference and
4 hopefully low noise and a good quality signal strength but
5 also a cheap one, cheapest to the company, whatever else.

6 So the -- the selection mechanism of actually choosing
7 which particular tower to use is -- is not as trivial as is
8 typically made out to be that -- which is to say, that your
9 cell phone goes to the strongest signal, no. I mean that may
10 be true sometimes, but it's not necessarily true all the time,
11 whatever else.

12 As I'm trying to explain, lots of little nuances and
13 complexities that are there.

14 Q. Thank you, Mr. Schenk.

15 So strength doesn't necessarily equal clarity?

16 A. That's correct.

17 Q. Now, in this case, did you have an opportunity to
18 review the call detail records that were subpoenaed from
19 T-Mobile?

20 A. Yes.

21 Q. And did you see that they were covering three phone
22 calls in June and July of last year?

23 A. Yes.

24 Q. Now, was there any concern regarding the accuracy of
25 these call detail records based on your training and
26 experience?

27 A. Yes. There was quite a number; actually, you know,
28 probably 11, 1200 records there. Many, many, many thousands

1 or at least hundreds have also missing fields in them. You
2 know, information that should be filled out but it isn't for
3 some reason or other. It's blank, you know, and doesn't
4 appear to be in any obvious explanation for those particular
5 blanks.

6 And I also noticed that for many, many of the records, the
7 duration time is scheduled to be in 60 seconds or whatever.
8 So the implication being that that particular phone call is
9 recorded by that particular call detail records, in fact,
10 lasted 60 seconds. And it's easily demonstrably proveable,
11 you know, from records that are around, the records that were
12 interested in that, in fact, that that field cannot be
13 accurate because, you know, there are records there that are a
14 few seconds apart and whatever else, and obviously they can't
15 be 60 seconds.

16 So -- so we have lots and lots of errors of that
17 particular nature there. And there's other errors there, as I
18 said, that are blank, blank fields and there's no explanation
19 as to why those particular fields are blank. So this T-Mobile
20 record is a real sloppy records, whatever else.

21 Q. So I want to speak to you about the June -- the first
22 call in question from June 4th. Was there anything specific
23 to that call that caused you concern with regards to the
24 reliability of the CDRs?

25 A. Yeah. For instance, that's a typical example of
26 where fields are missing. And in that particular case, what's
27 missing there is the actual cell site and antenna that, in
28 fact, connected that particular call. That field happens to

1 be blank for that particular call. So there's an example of a
2 particular call where -- where information, in fact, is
3 missing.

4 Q. Did you try on your own to try to find that tower?

5 A. Yes, I did. Not very successfully.

6 Q. Okay. Now, with regards to the second call on
7 July 3rd of 2017, did you have an opportunity to review the
8 call detail records and the location of the cell tower in that
9 call?

10 A. I did, yes. And the interesting part about that
11 particular one is the call detail record not only had the
12 address of the identification number of the cell tower and
13 the -- and the antenna used, but it also had an address, a
14 regular mailing address within the call detail record as well
15 as a latitude and longitude; so you know, I mean, that's
16 pretty accurate information.

17 However, the address that, in fact, is provided -- was
18 provided was 810 Vermont Avenue, I think, whatever it was, in
19 Washington, D.C. Okay. So I went to Google Earth and I
20 looked at Google Earth and I zoomed in on that particular
21 building and turned out to be the Veterans Administration
22 building two, three blocks from the White House, and I scanned
23 over the rooftop off whatever else trying to find a cell site,
24 and it's not obvious to me that there's a cell site.

25 Why would there be a cell site on top of a federal
26 building, you know? I don't know. But anyway, I looked and I
27 couldn't find one.

28 I looked across the street, 811, and lots and lots of cell

1 site equipment there, but turns out that that belongs to
2 Sprint, doesn't belong to T-Mobile, at least the majority of
3 it, whatever.

4 So I went further, and I looked, I went to the FCC. FCC
5 main function is in order to make sure that frequencies are
6 controlled and people don't interfere with each other, that's
7 their main primary duty, whatever. So they keep a pretty
8 accurate record in regards to transmitters, you know, what is
9 transmitting information or R.F. signals, radio frequency
10 signals.

11 And I looked at the database, and I think I put in a
12 search query function in order to putting 810 Vermont Avenue
13 Northwest, I guess, whatever it was -- anyway, whatever, and
14 did a search for 1-mile radius around that particular
15 building. And they could not come up with -- in a -- I could
16 not come up with a cell site and I could not come up with any
17 antenna transmitting capabilities from 810 Vermont Avenue.

18 So, as I said, I mean I did find some across the street at
19 811, but the majority of that equipment was from a different
20 company, was from Sprint. It was not associated with
21 T-Mobile.

22 So, anyway, bottom line is do I have doubts about the call
23 detail records that, in fact, T-Mobile submitted? Yes, I do.
24 As I have just explained, I have, you know, very serious
25 questions in regards to the accuracy of that particular
26 address.

27 Q. Thank you, Mr. Schenk.

28 And I think I might have with regards to there was the --

1 just so we're clear, there was the three calls, correct, that
2 you -- that you've been presented this information in this
3 case; correct?

4 A. That's correct, right.

5 Q. And two of the calls actually had a location, but
6 there was one call that -- there was one CDR report that
7 couldn't find the location, and that's the one that you were
8 just testifying to; correct? Or is it the second call?

9 A. No, I think there were two calls on the 3rd of July
10 and one call on the 5th of July and utilized one that had no
11 address information was the one on June 4th I believe is --

12 Q. Correct.

13 A. -- what you were referring to earlier.

14 Q. Thank you.

15 Now, with regards to these -- I want to talk a little bit
16 about the sectors. They're divided into sectors. And what
17 are sectors, just briefly?

18 A. Basically antennas. And in order to increase the
19 capacity for each particular cell site, what the telephone
20 companies have done is they've -- they put a three separate
21 antennas and then they angled the antennas in slightly
22 different directions in order to divide up the total amount of
23 volume of traffic, if you wish. So -- but there's very large
24 amount of overlap between those particular sectors, so the
25 directionality that you can gain from those sectors and all
26 that is -- well, it's certainly less than 100 percent,
27 whatever else because there's a great deal -- there's a
28 significant amount of overlap between adjoining sectors. ;

1 Okay. Now, why is that the case? Well, it is the case
2 because of the way that antennas radiate out a signal. And
3 the benefit to the cell phone provider and company is that if
4 you're traveling through a particular sector then, then are
5 you not -- then you are not going to drop the call as it
6 switches from one sector antenna to the neighboring sector
7 antenna or whatever else?

8 So it works -- it works through the benefit of the
9 communications and the service and of the company and all
10 that. And it gives you a very rough idea in regards to the
11 directionality of where a particular cell phone is located in
12 relationship to the cell site.

13 Q. Thank you.

14 So I want to talk to you a little bit about that. So when
15 you are looking at maps, were these sectors where the
16 frequency is radiating, are they -- is it a circle or is it
17 more of a pie shape or how does that -- how do you show that
18 demonstratively?

19 A. Well, the way that we've shown that and where we get
20 that information from is from the actual antenna
21 manufacturers. They publish what they call the radiation
22 pattern of their particular antennas. They have different
23 antennas which cover different amounts of arcs of radiation,
24 so we went to the antenna manufacturers and we extracted from
25 there the radiation pattern and lobes, whatever, in fact, that
26 they publish, and then subsequent to that we plotted on our
27 maps the -- what those particular patterns are.

28 And it's pretty clear that, in fact, if you put -- if you

1 put three of them together, you have -- as I describe, you
2 have a significant amount of overlap between adjoining
3 sectors.

4 Q. Thank you.

5 So I want to show you -- this is a document --

6 MS. FREEZE: Your Honor, may I approach?

7 THE COURT: Yes.

8 BY MS. FREEZE:

9 Q. This is a document that you prepared. Let me show
10 you.

11 THE COURT: Exhibit?

12 MS. FREEZE: Let me just show you this first.

13 THE COURT: Exhibit?

14 MS. FREEZE: I haven't marked it yet. Just one moment,
15 Your Honor.

16 I think we're at 40.

17 THE CLERK: Thirty-nine.

18 THE COURT: Are you going to have more than one exhibit
19 marked?

20 MS. FREEZE: Nope.

21 BY MS. FREEZE:

22 Q. Mr. Schenk, I am approaching you and have what's
23 marked as Court's Exhibit 39. What is this document?

24 *(Court's Exhibit No. 39 was identified.)*

25 A. That is a radiation pattern for a specific antenna
26 that was utilized on -- on July 3rd showing the extent of the
27 R.F. range, coverage range that is possible, scientifically
28 possible, for that particular telephone call.

1 Q. And when -- R.F. being -- what's that?

2 A. R.F. is radio frequency.

3 Q. And so this is where -- so a phone call could have
4 been made anywhere within this area and it would have
5 connected to that tower?

6 A. Has the capability to connect to that particular
7 tower, that's correct. That's what the National Institute of
8 Standards and Technology says in their guidelines, guidelines
9 to forensic technology both in 2007 and 2014. So they
10 indicate that the abilities is to connect your cell phone
11 signal emanating from your cell phone can reach out 21-plus
12 miles and reach that particular tower and then connect with
13 that tower and you can have your communication via that
14 particular tower, so that's the maximum range.

15 Now, that's calculated based upon what the wattage
16 power -- wattage is on your cell phone. Your cell phone
17 operates normally .6 watts. And if you do the -- the original
18 calculations using frequency and speeds of light, whatever,
19 which is what radio frequencies travel at, you can -- and what
20 the frequency, you can determine wavelength and distance and
21 whatever and at that particular power setting, your cell phone
22 signal actually goes out to 31.2 miles.

23 However, the cell phone companies said we don't want to
24 handle signals that are that far away and so, therefore, in
25 their compression technology they limit it, the amount of
26 distance that that particular cell phone signal will, in fact,
27 be serviced.

28 And so the digitization of those particular signals then

1 came into the fact that they had to restrict the range of
2 signals down to a little bit more than 21 miles.

3 Q. And is there any meaning to the different colors?

4 A. Just in order to indicate the different sectors and
5 the purposes in order to show the very significant amount of
6 overlap that occurs between those particular sectors. So what
7 we have is we will typically show the main front lobe of
8 radiation pattern being emanated forth from -- from your
9 antenna.

10 And -- but there are also what they call side lobes
11 that -- that are also radiated out from the antenna, and
12 there's even back lobes. So an antenna can radiate backwards
13 from its particular position, and we try to show that on -- on
14 that particular map in regards to the -- the different colors
15 and the different shapes; and that, as I indicated, we got
16 this information from the antenna manufacturers in regards to
17 what their radiation pattern ranges are.

18 Q. And --

19 MS. FREEZE: Just one moment. One moment, Your Honor. If
20 I may.

21 Your Honor, may I enter the well to see the numbers of the
22 exhibits?

23 THE COURT: Yes. Thank you.

24 MS. FREEZE: Your Honor, may I approach?

25 THE COURT: Yes.

26 MS. FREEZE: Thank you.

27 BY MS. FREEZE:

28 Q. Mr. Schenk, I am showing you what's been previously

1 marked. These are copies of Court's Exhibit 24, 21, 24, 27.
2 And these are maps generated by the District Attorney's Office
3 regarding towers that were used in this case.

4 Can you explain the difference between this range of the
5 pie shape and what issues you have with this range as it
6 pertains to the analysis that you did?

7 A. Yes. In regards to the shapes of these particular --
8 these are nice little pie-shaped or fan-shaped regions,
9 et cetera, et cetera, that's not how a cell phone -- that's
10 not how a cell site antenna actually radiates its pattern
11 outward.

12 As I indicated on my map, it's more oval-shaped or the
13 mathematical term accordion shape, but anyway essentially
14 pretty close to oval shape, and so the shape that, in fact, is
15 strong here is, in fact, inaccurate, whatever. And much more.

16 And, more importantly, there's no indication here in
17 regards to what the range of the highlighted area here is. It
18 invites you to assume that it's a very, very short distance.
19 And certainly in the second case where we're talking about
20 Washington, presumably Washington, D.C., it shows a range of
21 one, two, three, four, five, six, seven, eight, nine, 10, 11,
22 maybe about 14 blocks or, you know, approximately. So if you
23 go eight -- if you go eight to 10 blocks per mile, you are
24 talking about maybe a mile and a half, whatever else, that's
25 got nothing to do with -- with -- with 21 miles.

26 So the way that these -- the way that these maps, in fact,
27 are drawn are scientifically inaccurate and they are
28 misleading to the point where it invites you to assume that --

1 that the cell phone has to be within the shaded area, and that
2 particular shaded area is a very, very short distance from
3 the -- from the cell site.

4 So just in order to give you an idea of the huge distances
5 that, in fact, that we're talking about, if we are talking
6 about 21 miles, let's make it easy for my purposes -- let's
7 call it 20 miles, but if we go back to Euclidean geometry in
8 tenth grade, we know what the area of a circle, it's
9 πr^2 . So we have a radius of 20 miles. 20 times 20
10 is 400 times π , which is 3.1415, blah, blah, blah. Are you
11 talking about 400, you know, 12, 1300 square miles? We're
12 talking about square miles.

13 Okay. Let's assume that we know which antennas we are.
14 So we'll divide by three. And let's say we're back down to
15 400 square miles. But that's a huge, huge area that, in fact,
16 we're talking about.

17 Just as a comparison, for instance, so we're talking about
18 one cell site and one antenna having a maximum range of
19 400-plus square miles. I looked it up. The area of
20 Washington, D.C. is 64 square miles. So one cell site on one
21 antenna can cover seven Washington, D.C.s, whatever else.
22 That's where the phone could possibly be, whatever else.

23 So we have no idea as to where a particular phone is in
24 relationship to a cell tower. And attempting to track a
25 particular person with a particular cell phone by utilizing a
26 cell tower, it's just inherently flawed.

27 MS. FREEZE: Thank you. Nothing further.

28 THE COURT: Ms. Somerville.

1 MS. SOMERVILLE: Thank you.

2

3

CROSS-EXAMINATION

4 BY MS. SOMERVILLE:

5 Q. Good afternoon.

6 A. Good afternoon.

7 Q. Hi. Mr. Schenk, how much are you being paid to
8 testify here in court?

9 A. Our company rate is \$300 per hour.

10 Q. How much were you paid to review the cell phone
11 records?

12 MS. FREEZE: Objection. Relevance.

13 THE COURT: Overruled.

14 THE WITNESS: It's part -- it's part of a standard fee, in
15 fact, we have and to -- to review the evidence to provide a map
16 and then to provide testimony in court.

17 BY MS. SOMERVILLE:

18 Q. Okay. So how much is the bill for your preparation,
19 review and your testimony?

20 A. \$7,500.

21 Q. Okay. That's how much you've gotten paid to review
22 these records and then come into court today and testify?

23 A. That's correct.

24 Q. Okay. Did you subpoena the call detail records on
25 your own from T-Mobile?

26 A. No, I did not.

27 Q. And I think you had mentioned that you can get cell
28 phone records, call detail records, you get them through a

1 subpoena; correct?

2 A. Correct.

3 Q. You can also get them through a search warrant;
4 correct?

5 A. Presumably, yes. I'm not familiar with the legal
6 differences between the search warrant and a subpoena.

7 Q. But you have testified in criminal cases before;
8 correct?

9 A. Yes, I have.

10 Q. And that's for the defense; correct?

11 A. Majority of cases, yes.

12 Q. Did you have a chance to review the billing
13 information on the call detail records for this particular
14 case?

15 A. Not as such, no. Billing records are obviously
16 submitted to the client and all of that, so no, I did not see
17 those records.

18 Q. Those were included in the records you were given,
19 weren't they?

20 A. Not that I'm aware of. Not that I remember, no.

21 Q. So you are not aware of the fact that Mr. Bathen's
22 address is on the billing information for the call detail
23 records?

24 MS. FREEZE: Objection. Counsel -- I would just object.
25 Counsel is testifying as to a fact.

26 THE COURT: Overruled.

27 THE WITNESS: No, I am not aware of the addresses that, in
28 fact, are involved.

1 BY MS. SOMERVILLE:

2 Q. Okay. So you are not aware of the fact that the
3 address on the billing information for these specific call
4 detail records was 1132 North Kentucky Street in Arlington,
5 Virginia?

6 A. I saw that address and I believe -- and was in the
7 subscriber information or whatever for that particular -- for
8 a particular telephone number.

9 Q. Okay. So you did see the subscriber information in
10 some of the billing information; is that correct?

11 A. Okay. If you want to call it billing information,
12 yes, I did see that.

13 Q. And did you also see the fact that the market where
14 this phone or the area code for this phone originated out of
15 Boston, Massachusetts?

16 A. Yes. I saw there was, I believe, 617 area code
17 number, yes.

18 Q. Okay. And did you also note that under the billing
19 details, the billing date of birth was 11/3/1977?

20 A. Yes. I saw that in the subscriber information, yes.

21 Q. Okay. Did you also see in this subscriber
22 information that the account effective date was September 1st
23 of 2014?

24 A. Yes.

25 Q. And that the account expiration date was
26 September 4th, 2017?

27 A. Yes.

28 Q. You said you looked at all the call detail records.

1 There's a lot of information in there in an Excel spreadsheet
2 format; correct?

3 A. Yes.

4 Q. And in that information, there was a call from
5 June 4th, 2017; correct?

6 A. Yes.

7 Q. In fact, there were multiple calls on June 4th, 2017?

8 A. Yes.

9 Q. And one of the calls was from the (617)992-4648
10 number originating with that number and then calling number
11 (619)525-7747; is that correct?

12 A. Yes.

13 Q. And that was completed successfully, according to the
14 records; correct?

15 A. Yes.

16 Q. And then on the records, furthermore, there were
17 multiple calls on July 3rd of 2017; is that correct?

18 A. Correct.

19 Q. And two calls on July 3rd, again, originated from the
20 617 number and called (619)525-7747; correct?

21 A. Yes.

22 Q. And both of those calls were successfully completed;
23 correct?

24 A. Yes.

25 Q. And I just wanted to go back actually to the June 4th
26 call. The duration of that call was 80 seconds; is that
27 correct?

28 A. I believe that's -- yes, I recall that was 80

1 seconds.

2 Q. And then the duration of the two calls on July 3rd
3 was one of the calls was 34 seconds; correct?

4 A. Correct.

5 Q. And the other call was 60 seconds; correct?

6 A. Correct.

7 Q. And then there was also a call on June 5th of 2017,
8 again, an outgoing call from the 617 area code number to the
9 (619)525-7747; correct?

10 A. I don't recall seeing the June 5, but --

11 Q. May I approach?

12 A. -- I may have missed it.

13 MS. SOMERVILLE: If I may grab the exhibit, Your Honor?

14 THE COURT: Sure.

15 BY MS. SOMERVILLE:

16 Q. Mr. Schenk, I'm going to show you what has been
17 marked as Court's Exhibit 14 for identification. Just have
18 you look at this.

19 Does this appear to look how the call details looked?

20 A. You said June 5th. That's why you confused me. Yes,
21 I know the July -- the July telephone -- 5th, yes.

22 Q. Thank you. I apologize if I misspoke.

23 So the July 5th, 2017 call, that call was also from the
24 617 phone number; correct?

25 A. Correct.

26 Q. Okay. And that call was also to the same number, the
27 (619)525-7747?

28 A. Correct.

1 Q. And that was successfully completed; correct?

2 A. Correct.

3 Q. And that duration of that call was 78 seconds. Does
4 that sounds right?

5 A. That's correct.

6 Q. When you reviewed all of the call detail records, all
7 the towers that were accessed from the records, those were all
8 in the Washington, D.C., Virginia area; correct?

9 A. Yes.

10 Q. Like none of these calls were in Ohio?

11 A. No, but I should correct myself. I don't know
12 whether they were all within the Washington, D.C. area or
13 surrounding area or whatever else, but yes, the surrounding
14 area.

15 Q. Okay. The surrounding Washington, D.C. area?

16 A. Correct.

17 Q. Because Washington, D.C. is only, I think you said,
18 about 60 --

19 A. Sixty-four square miles. It's a pretty small little
20 place.

21 Q. But the calls were also in the Virginia area?

22 A. Correct.

23 Q. And they encompassed the Arlington, Virginia area as
24 well?

25 A. Correct.

26 Q. Are you -- have you ever seen call detail records
27 before where there is no tower information because the cell
28 phone provider has renamed a tower during that time frame?

1 A. I've certainly seen confusions in regards to renaming
2 towers when Sprint went through their convulsion of getting
3 rid of one service and switching to another one. There were
4 many, many sloppy records, so yes, I've seen that before.

5 Q. Okay. Did you have a chance to go back and access a
6 phone tower list from earlier in 2017 to map the June 4th,
7 2017 call?

8 A. I did not.

9 Q. You do know that those exist; correct?

10 A. I'm sorry?

11 Q. You do know that those exist; correct?

12 A. I would presume it would exist somewhere, but I
13 wasn't provided that information and it -- it was not obvious
14 to me as to where -- where, in fact, it was.

15 Q. Okay. But you have worked in this area, you
16 testified as an expert. I'm sure you have some access to old
17 tower lists from within the same year -- is that correct? --
18 from cell phone companies?

19 A. For different cell phone companies, the answer is
20 yes. But as you indicated, location, addresses change and the
21 change of the time; and to be able to be certain about things,
22 I would rather not guess.

23 Q. The records in this case that you had a chance to
24 review that did have tower information and latitude and
25 longitude, those were consistent with an individual using cell
26 towers within that, you know, Washington, D.C., Arlington,
27 Virginia area; correct?

28 A. As I said, I didn't -- I didn't have a latitude and

1 longitude for that particular cell site. I was referenced in
2 June 4th and so I don't know.

3 Q. Okay. My question was for the calls that did have
4 the tower information and that did have the latitude and
5 longitude, all those calls were consistent with a phone being
6 used in and around that area; is that correct?

7 A. Yes.

8 Q. And you don't work for a cell phone carrier, you
9 don't work for AT&T or Verizon or T-Mobile?

10 A. I do not.

11 Q. And I believe you said that call detail records had a
12 purpose 20 years ago; is that right?

13 A. Yes.

14 Q. But every major cell phone carrier company still
15 generates these records and keeps them in the normal course of
16 their business; correct?

17 A. Well, that tricky question with what's normal course
18 of business. There have been other records that have logging
19 records which have succeeded the functions of the call detail
20 records. So, as I indicated before, call detail records are
21 pretty much a vestigial remnant of an earlier time period.

22 The more accurate information that we have now what are
23 called RTT information, PCMD information and things of that
24 particular nature, which are much, much more voluminous
25 records.

26 So call detail records are -- are pretty ancient records.
27 And in view of the fact that they are generated ad hoc, that
28 is to say, based on particular demand, the implication is that

1 there is no --

2 Q. Sir, I'm sorry. That wasn't my question. Let me
3 stop you.

4 I just asked if the major carriers still keep call detail
5 records.

6 A. Yes. They generate based on subpoenas that, in fact,
7 they are presented with.

8 Q. You had talked about the range of 21 miles; is that
9 correct?

10 A. Correct.

11 Q. Okay. Now, it's true that in an urban area, right,
12 like Washington, D.C. area, there are more cell towers than
13 there would be out in, say, a suburban area or out in a rural
14 area; correct?

15 A. Correct.

16 Q. So when someone is using a phone and they're getting
17 an incoming call or they're making an outgoing call in an area
18 such as Washington, D.C., there are going to be various cell
19 towers within that 21-mile range; is that correct?

20 A. Correct. Many choices.

21 Q. So what are the odds that in an area like Washington,
22 D.C. where there are many cell towers that a call would reach
23 all the way out to, say, the 21-mile range versus selecting
24 any of the towers along the way?

25 A. Well, again, that's a probabilistic guess. I'm not
26 into probabilistic guesses. I'm here in order to indicate
27 what the physics is, what the science is, and what the
28 National Institute of Standards and Technology says that those

1 particular ranges, in fact, are.

2 If you recall, a few years back here in AT&T in the
3 Los Angeles area, there was a knockout and something like
4 9,806 towers went dead for two or three days or whatever else.
5 So sometimes it can take a distance for you to make your
6 connection.

7 Q. I want to talk to you about -- you talked about
8 trying to locate a tower that was from the July 3rd of 2017
9 call, specifically, the call that was made to the 619 area
10 code number. Do you remember that?

11 A. Yes.

12 Q. And you said that you looked on Google maps to try
13 and find the actual tower; is that correct?

14 A. That's correct.

15 Q. Okay. You do know that Google maps updates pictures
16 on a basis; correct?

17 A. Correct.

18 Q. Okay. And it doesn't show every single angle of a
19 particular building or every single location on it; is that
20 correct?

21 A. No, it does not.

22 Q. And I believe you said that there was -- you were
23 able on Google maps to see a tower at the -- it was 810 where
24 you couldn't locate a tower looking on Google maps, but you
25 found one on 811; is that correct?

26 A. That's correct.

27 Q. So the building right next door.

28 A. Well, it's across the street.

1 Q. Right across the street?

2 A. Right.

3 Q. And what streets was that on?

4 A. Vermont Avenue. I'm sorry. Is it East Vermont
5 Avenue? Whatever. I'm forgetting the --

6 Q. That's okay.

7 A. Whatever else.

8 Q. And you said how far is East Vermont or Vermont
9 Avenue from the White House.

10 A. I get the impression it's only three or four blocks.
11 They are very, very short distance.

12 Q. And are you aware that "I" Street is, in fact, about
13 two blocks south if you are facing the front facade of the
14 White House?

15 A. Yes, it's -- it's fairly nearby there, yes.

16 Q. Okay. So "I" Street and Vermont are right near each
17 other?

18 A. Correct.

19 Q. And is it your testimony here that there are no cell
20 towers on government buildings?

21 A. I didn't say that. I would -- I would hesitate to --
22 to make that blanket statement. But I would find it strange
23 if, in fact, that there were. But -- but I certainly don't
24 know all government buildings and I certainly don't know that
25 there are no cell phone towers anywhere, whatever else. But
26 anyway --

27 Q. So there could be a cell phone tower on a government
28 building?

1 A. Could be.

2 Q. And you did talk about earlier something in terms of
3 tariff.

4 A. Tariffs.

5 Q. That's like a one cell phone company charging another
6 cell phone company to share a tower?

7 A. Well, if, in fact, the second company owns it, yes,
8 you know, then -- but there are many, many different
9 arrangements, you know, that are made within the industry, so
10 there are -- there are people that are owned property, people
11 that own towers at one property and cell phone companies share
12 a particular structure or something of that nature. So there
13 are many, many business and rental arrangements or whatever,
14 and I'm certainly not privy to all of them, whatever.

15 Q. I believe you said that the tower that you located
16 was from Sprint; is that correct?

17 A. I'm sorry?

18 Q. I believe you said the tower that you located at
19 811 Vermont was from Sprint?

20 A. Yes. I think there's about six different
21 organizations there. I think four of them were from Sprint
22 and two of them were from other organizations that I didn't
23 recognize.

24 Q. Okay. And do you know if T-Mobile shares that tower?

25 A. No, I do not. So from the antenna database that I
26 got information from the FCC, it was not obvious to me that
27 there was T-Mobile equipment on -- on 811 Vermont.

28 Q. Okay. But you, in fact, don't know --

1 A. I don't know.

2 Q. -- if that's the case?

3 A. Right.

4 Q. The shape of the sectors you were talking about,
5 counsel showed you an exhibit where it has a pie shape; is
6 that correct?

7 A. The -- the information that was presented from the
8 prosecution expert, you know, had pie-shaped, wedge-shaped
9 areas of radiation coverage.

10 Q. Correct. And the radiation coverage, actually it's
11 not a pretty picture like a pie; correct?

12 A. Correct.

13 Q. Okay. And so it's more like radio waves or wavy;
14 right? Or they make -- they are not just straight?

15 A. Not straight lines, that's correct.

16 Q. The exhibit that you had -- so it's Court's Exhibit
17 39 for identification -- this is the -- the map that you
18 created; correct?

19 I'm just going to publish that to the jury at this time.

20 This particular exhibit, if you could just look at that.
21 This exhibit just mapped, I believe, one call; is that
22 correct?

23 A. Well, both the July -- there are two July 3 calls and
24 there's one July 5 call, and they all use the same tower and
25 sector as is exhibited by this particular map.

26 Q. Okay. So the July 3rd and the July 5th call made to
27 the 619 area code, they use the -- the same cell tower and the
28 same sector?

1 A. Correct.

2 MS. SOMERVILLE: May I approach, Your Honor?

3 THE COURT: Yes.

4 BY MS. SOMERVILLE:

5 Q. Mr. Schenk, I want to show you Court's Exhibit 17 and
6 Court's Exhibit 18 for identification. Have you seen these
7 before?

8 A. Yes.

9 Q. So 17, that shows the two calls on July 3rd of 2017;
10 is that correct?

11 A. Correct.

12 Q. And then the Court's Exhibit 18, that also shows the
13 one call on July 5th; correct?

14 A. Correct.

15 Q. And those appear to be in the same location, the same
16 sector of the cell tower; is that correct?

17 A. Correct. The call detail records that are associated
18 with those three calls all reference the same antenna and same
19 cell site and -- which is the same site that, in fact, I
20 indicated in this particular map.

21 Q. Okay. Thank you.

22 And you can't tell right where exactly precisely a cell
23 phone is when it's connecting to a tower?

24 A. No.

25 Q. You couldn't tell the sector, you can tell the tower,
26 but you can't tell where the actual person is with the phone?

27 A. I can tell from the call detail records what the
28 sector is that's reported there; but as I indicated, that's --

1 there's lots and lots of overlap.

2 And so am I absolutely sure which particular sector that
3 it's in? No, I'm not. But we do have an indication in the
4 call detail records in regards to which particular sector that
5 it was reported in.

6 Q. And your mapping of the cell tower information for
7 the two July 3rd and the two July 5th calls appears to be
8 consistent with the mapping done by the District Attorney's
9 Office as well; correct?

10 A. Yes. Consistent in regards to the location of the
11 cell site. The maps are very, very different in regards to
12 the -- regards to the extent and the range of potential
13 connection that, in fact, occurred. My map shows 21 miles out
14 from that particular cell site.

15 The indication on prosecution map is infinitely shorter in
16 distance. So from that -- making that particular distinction,
17 cell sites and sectors are, in fact, the same.

18 Q. You've testified in court before; correct?

19 A. Yes.

20 Q. Have you seen these Tower Tracker maps before?

21 A. Tower Tracker maps?

22 Q. The maps with the pie shape.

23 A. Yes, I have.

24 Q. And so you are aware that really the pie shape is
25 just demonstrative, that's not an exact precise, what would I
26 say, location or feet or miles where that is radiating out?
27 It's just to show a general area?

28 A. I'm aware, but I'm concerned that the jury can be

1 misled by making the assumption that -- that the cell phone
2 has to be located within the -- within the shaded area and
3 within that particular pie-shaped region. That's why I'm
4 emphasizing the fact this one, it's not a pie shape, it's much
5 more diffuse that -- than that.

6 . And secondly, it's much, much, much, much longer in range,
7 from that particular tower. So your assumption, you know,
8 that your cell phone has to be confined within that particular
9 shaded area is, in fact, scientifically false. That's my
10 point, that's my emphasis, yes.

11 Q. Okay. Did you do anything to, in fact, look at the
12 tower frequency of the call detail records?

13 A. No. Because statistical analysis is, in fact, not
14 helpful because of the randomization that, in fact, occurs as
15 a function of signal strength interference and noise. So
16 those are the three components that are utilizing in order to
17 select a particular tower. So those very moment-to-moment,
18 second-to-second, millisecond-to-millisecond and so doing
19 frequency distributions in regards to, you know, specific
20 towers and all of that, that's obviously helpful to -- to the
21 police and to investigate a function, et cetera, et cetera,
22 but it is not helpful in terms of being able to saying with
23 scientific certainty that as to where a particular cell phone
24 is located.

25 Q. Would you say it's helpful to understanding the call
26 records if you have specific locations where, say,
27 Mr. Bathen's call records -- excuse me -- where the call
28 records are, are you then showing that person being in that

1 specific location?

2 A. It may be helpful for investigative purposes, yes.
3 But, as I said, it is not helpful to me in terms of being able
4 to determine where a particular cell phone is in relationship
5 to any specific tower. So frequency is not -- is not helpful
6 to me.

7 Q. Well, if a tower is being utilized at an address
8 where someone gave their work, their place of business and the
9 call detail records show that they are routinely connecting
10 with that tower Monday through Friday, 6:00 a.m. to 3:30 p.m.,
11 wouldn't that be consistent with a person being at work?

12 A. Potentially, yes.

13 Q. And again, if that person had a home address and it
14 showed that they were consistently hitting off a tower near
15 that home address, wouldn't that be consistent with the person
16 living at that address?

17 A. Potentially, yes.

18 Q. Did you look at the call detail records in relation
19 to where Mr. Bathen was living during the month of June and
20 early July of 2017?

21 A. I did not.

22 Q. Did you look at Mr. Bathen's work address in relation
23 to the call detail records from July -- excuse me -- from
24 June 1st of 2017 till July 6th of 2017?

25 MS. FREEZE: And Your Honor, just object. There is no
26 address for that. That's not been put into evidence. There's
27 a name, but --

28 THE COURT: Rephrase if you need to.

1 BY MS. SOMERVILLE:

2 Q. Were you aware that Mr. Bathen works at the
3 International -- or was indicated that he was working at the
4 International Food Policy Research Institute in Washington,
5 D.C.?

6 A. Yes, it said that in the reports.

7 Q. And that, in fact, there is a location for the
8 International Food Policy Research Institute on "I" Street in
9 Washington, D.C.?

10 A. Yes, it said that in the reports.

11 Q. And did you look at any of the call detail records in
12 reference to that location?

13 A. Yes, I did.

14 Q. Okay. And it consistently showed that Mr. Bathen was
15 in and around the area where he worked; correct?

16 A. Call detail records we have been focusing on, in
17 fact, would encompass that particular address, yes.

18 MS. SOMERVILLE: I don't have anything further, Your Honor.

19 THE COURT: Ms. Freeze, anything further?

20 MS. FREEZE: I have three questions, Your Honor.

21 THE COURT: Go for it.

22

23 **REDIRECT EXAMINATION**

24 BY MS. FREEZE:

25 Q. Mr. Schenk, just a couple questions. Ms. Somerville
26 was asking you about the June 4th call detail records, and
27 it's showing that it was a successful phone call.

28 Do you recall her asking -- her asking you that?

1 A. Correct.

2 Q. But you yourself, you weren't able to actually find a
3 tower, though; correct?

4 A. That's correct.

5 Q. And that led you to believe that the CDRs might be
6 inaccurate some way?

7 A. That and hundreds of other fields that, in fact, are
8 missing would -- within that entire record that T-Mobile
9 provided, yes.

10 Q. And the towers that you were looking at in this case
11 are all on the East Coast; correct?

12 A. That's correct.

13 Q. Okay. And nowhere in the reports that you had a
14 chance to review in preparation for today's testimony as well
15 as your maps and reports, nowhere in those reports show that
16 Mr. Bathen ever told anybody the exact address of where he
17 works; correct?

18 A. That's correct.

19 Q. And then with regards to the T-Mobile subscriber
20 information, if you know, do you know at all if they ever
21 authenticate or confirm that information that's provided to
22 them?

23 A. I believe this was what is called a prepaid phone.
24 So, therefore, the information that is in there is strictly
25 voluntary and, as far as I know, is not corroborated by
26 anyone -- excuse me -- is not corroborated by the cell phone
27 company.

28 Many times there are default parameters in -- put in there

1 and things of that particular nature. But whatever
2 information is there is not assumed or known to be accurate or
3 to be verified by anyone. Whereas, contrary, if, in fact, it
4 is a subscription, then obviously you need an address in order
5 to send a bill to. So that's not -- that's not the issue
6 here.

7 Q. So -- but just real quick. When you said default
8 parameters, is it your understanding that if someone doesn't
9 provide information, it just defaults to random information?

10 A. Potentially, yes. I mean, I've seen names put in. I
11 remember some AT&T records some time ago where they put in
12 default information in regards to the -- to the name. I
13 remember one humorous one which was -- the name was Joe Lopez,
14 so you know, whatever. So --

15 MS. FREEZE: Thank you, Mr. Schenk. Nothing further.

16 THE COURT: Ms. Somerville.

17 MS. SOMERVILLE: No, Your Honor. I have no further
18 questions.

19 THE COURT: May this witness be excused?

20 MS. FREEZE: Please.

21 THE COURT: Thank you, sir. You may step down.

22 Ms. Freeze.

23 MS. FREEZE: Nothing further, Your Honor. At this time I
24 just ask to move into evidence --

25 THE COURT: Okay. And we'll do the exhibits off the
26 record.

27 But subject to the admission of exhibits --

28 MS. FREEZE: Correct.

1 THE COURT: -- you are resting.

2 Are you going to have any rebuttal?

3 MS. SOMERVILLE: No, Your Honor.

4 THE COURT: All right. Ladies and gentlemen, we have the
5 evidence portion of our trial complete. We need to do a couple
6 things outside your presence and everybody needs a break as
7 well.

8 So we're going to take, I'm hoping, just 20 minutes to be
9 able to do this and give people 10 minutes of a break in here
10 as well, so please forgive me if it runs over a couple
11 minutes. We're going to try our best to do 20 minutes.

12 Please, even though you've heard the evidence, don't form
13 an opinion. You haven't heard the argument or the law. Keep
14 an open mind and don't do any research, of course, or
15 investigation.

16 I'll see you in 20 minutes.

17 *(The following proceedings were had between the Court*
18 *and counsel out of the presence and hearing of the*
19 *jury.)*

20 THE COURT: The jury is gone. Your motion?

21 MS. FREEZE: Yes, Your Honor. Pursuant to Penal Code 1118,
22 that would be my motion at this time with regards to the
23 People, what they've presented obviously before I put my expert
24 on, Mr. --

25 THE COURT: Right.

26 MS. FREEZE: As it pertains to immediate imminent threat of
27 bodily injury and reasonable fear.

28 THE COURT: All right. Thank you. I find there's

1 sufficient evidence to -- on all counts to give to the jury and
2 so I will deny your motion.

3 Exhibits.

4 MS. SOMERVILLE: Yes, Your Honor. Can I come grab them
5 just so I can make sure I have the exact numbers?

6 So, Your Honor, I believe the People have Exhibits 1
7 through 34. We would ask that the Court receive those into
8 evidence at this time.

9 THE COURT: Any objection?

10 MS. FREEZE: No, Your Honor.

11 THE COURT: They will be received.

12 *(Whereupon Exhibits 1 through 34 were received into*
13 *evidence.)*

14 THE COURT: And for the defense.

15 MS. FREEZE: Yes, Your Honor. I'd ask to admit Court's
16 Exhibit 38A and -- Your Honor, may I enter the well to grab --

17 THE COURT: Thirty-eight I'll do. Not 38A. That's the
18 transcript. Oh, I'm sorry.

19 *(Whereupon Exhibit 38 was received into evidence.)*

20 MS. FREEZE: Thirty-eight. I had it in my hand. And may I
21 enter the well?

22 THE COURT: Sure.

23 MS. FREEZE: Thank you.

24 And then Exhibits -- Court's Exhibits 35, 36, and 37.

25 THE COURT: Any objection?

26 MS. SOMERVILLE: I do have an objection to the --

27 MS. FREEZE: Oh, I'm sorry. And that one too.

28 THE COURT: Thirty-nine.

1 MS. FREEZE: Thirty-nine.

2 THE COURT: You have an objection to 39?

3 MS. SOMERVILLE: No, I do not have an objection to 39, Your
4 Honor. If I can just look at these. I also don't have an
5 objection to 38.

6 THE COURT: Tell me what do you have an objection?

7 MS. SOMERVILLE: I do have an objection to 35, 36 and 37.
8 These are the e-mails that Dr. Jacobs was shown. They contain
9 a large --

10 THE COURT: I'm going to sustain the objection to those.
11 They were never authenticated.

12 MS. FREEZE: I believe that she had testified --

13 THE COURT: If they were used to refresh her memory. They
14 were not -- I'll look at them.

15 MS. FREEZE: And just, also, I wasn't admitting if there
16 was any hearsay objections either. It would just be to
17 conflict -- whether or not the issue of she was treating him or
18 not would go to the jury. I'm not offering them for the truth
19 of the matter.

20 THE COURT: Well, they go in for the truth when they're
21 admitted. You used them appropriately in the
22 cross-examination, but they don't go to the jury because they
23 do go in once they're admitted. I mean once they're admitted,
24 then -- she testified as to that there was this e-mail
25 correspondence. She testified as to charging. You have your
26 argument that she was treating him.

27 Yeah, but this is hearsay. She didn't testify as to her
28 conversation, the content. She testified as to the dates.

1 And it refreshed her memory. So it is hearsay. I'm not going
2 to let it in.

3 All right. But the others do come in.

4 *(Whereupon Exhibit 39 was received into evidence.)*

5 We have -- and pardon me for -- I'm not going to cut
6 short. I'm moving right along. We are very short staffed on
7 Monday. If we can get done today, it would be lovely. If we
8 can't, we can't. But that's why I'm moving things right
9 along.

10 Your proposed instruction, I'm going to give you my
11 tentative to focus your argument, and that is it is a correct
12 statement of the law. I have no problem with -- but that is a
13 correct statement of the law.

14 However, I think that CALCRIM 1300 gives the elements for
15 the crime. I think that what you're asking to instruct the
16 jury is fair game for argument.

17 MS. FREEZE: Okay.

18 THE COURT: But not to instruct the jury.

19 MS. FREEZE: Okay. If -- thank you for that clarity, Your
20 Honor.

21 THE COURT: Yeah, but arguing, I think you're absolutely
22 right, accurate.

23 MS. FREEZE: Okay.

24 MS. SOMERVILLE: Thank you.

25 THE COURT: Anything else before we break so you can have
26 your 10 minutes to get your closings together?

27 Off the record.

28 *(Recess taken.)*

1 THE COURT: Ladies and gentlemen, what I'm going to do now
2 is read the law to you that applies to this case. I am going
3 to give you a couple copies of these instructions when you go
4 back to the jury room so it's not important that you take down
5 every word that I say, but this is just so that you have an
6 understanding of whatever the law is before you hear the
7 arguments by the lawyers. I read it to you because I know then
8 that it's accurate and I'm not paraphrasing and misstating the
9 law.

10 Members of the jury, I will now instruct you on the law
11 that applies to this case. I will give you a copy of the
12 instructions to use in the jury room. The instructions that
13 you receive may be printed, typed or written by hand. Certain
14 sections may have been crossed out or added. Disregard any
15 deleted sections and do not try to guess what they might have
16 been. Only consider the final version of the instructions in
17 your deliberations.

18 You must decide what the facts are, and it is up to you
19 and you alone to decide what happened based only on the
20 evidence that has been presented to you in this trial.

21 Do not let bias, sympathy, prejudice or public opinion
22 influence your decision. Bias includes, but is not limited
23 to, bias for or against the witnesses, attorneys, defendant or
24 alleged victim based on disability, gender, nationality,
25 national origin, race or ethnicity, religion, gender identity,
26 sexual orientation, age or socioeconomic status.

27 You must follow the law as I explain it to you even if you
28 disagree with it. If you believe that the attorneys' comments

1 on the law conflict with my instructions, then you must follow
2 my instructions. Pay careful attention to all of these
3 instructions and consider them together.

4 If I repeat any instruction or idea, do not conclude that
5 it is more important than any other instruction or idea just
6 because I repeated it.

7 Some words or phrases used during this trial have legal
8 meanings that are different than their meanings in everyday
9 use. These words and phrases will be specifically defined in
10 these instructions. Please be sure to listen carefully and
11 follow the definitions that I give you. Words and phrases not
12 specifically defined in these instructions are to be applied
13 using their ordinary everyday meanings.

14 Some of these instructions may not apply depending on your
15 findings about the facts of the case. Do not assume just
16 because I give a particular instruction that I am suggesting
17 anything about the facts. After you have decided what the
18 facts are, follow the instructions that do apply to the facts
19 as you find them.

20 Do not use the Internet, a dictionary or social media in
21 any way in connection with this case either on your own or as
22 a group. Do not investigate the facts or the law or do any
23 research regarding this case either on your own or as a group.
24 Do not conduct any tests or experiments or visit the scene of
25 any event involved in this case. If you happen to pass by the
26 scene, do not stop and investigate.

27 You have been given notebooks and may have taken notes
28 during the trial. You may use your notes during

1 deliberations. Your notes are for your own individual use to
2 help you remember what happened during the trial. Please keep
3 in mind that your notes may be inaccurate or incomplete.

4 If there is a disagreement about the testimony at trial,
5 you may ask that the court reporter's records be read to you.
6 It is the record that must guide your deliberations, not your
7 notes. You must accept the court reporter's record as
8 accurate. Please do not remove your notes from the jury room.

9 At the end of the trial, your notes will be collected and
10 destroyed.

11 It is alleged that the crimes occurred on or about June 4,
12 2017, July 3, 2000 -- I'm sorry, July 3rd, 2017, and July 5th,
13 2017. The People are not required to prove that the crimes
14 took place actually on those dates, but only that they
15 happened recently close to those days.

16 The fact that a criminal charge has been filed against the
17 defendant is not evidence that the charge is true. You must
18 not be biased against the defendant just because he has been
19 arrested, charged with a crime or brought to trial.

20 A defendant in a criminal case is presumed to be innocent.
21 This presumption requires that the People prove the defendant
22 guilty beyond a reasonable doubt. Whenever I tell you the
23 People must prove something, I mean they must prove it beyond
24 a reasonable doubt.

25 Proof beyond a reasonable doubt is proof that leaves you
26 with an abiding conviction that the charge is true. The
27 evidence need not eliminate all possible doubt because
28 everything in life is open to some possible or imaginary

1 doubt.

2 In deciding whether the People have proved their case
3 beyond a reasonable doubt, you must impartially compare and
4 consider all the evidence that was received throughout the
5 entire trial. Unless the evidence proves the defendant guilty
6 beyond a reasonable doubt, he is entitled to an acquittal and
7 you must find him not guilty.

8 Evidence is the sworn testimony of witnesses, the exhibits
9 admitted into evidence and anything else I told you to
10 consider as evidence.

11 Anything the attorneys say is not evidence. In their
12 opening statements and closing arguments, the attorneys
13 discussed the case, but their remarks are not evidence. Their
14 questions are not evidence. Only the witnesses' answers are
15 evidence. The attorneys' questions are significant only if
16 they helped you to understand the witnesses' answers. Do not
17 assume that something is true just because one of the
18 attorneys asked a question that suggested it was true.

19 During the trial, the attorneys may have objected to
20 questions or moved to strike the answers given by the
21 witnesses. I ruled on the objections according to the law.

22 If I sustained an objection, you must ignore the question.
23 If the witness was not permitted to answer, do not guess what
24 the answer might have been or why I ruled as I did.

25 If I ordered testimony stricken from the record, you must
26 disregard it and must not consider that testimony for any
27 purpose.

28 You must disregard anything you saw or heard when the

1 court was not in session, even if it was said or done by one
2 of the parties or witnesses.

3 The court reporter has made a record of everything that
4 was said during the trial. If you decide that it's necessary,
5 you may ask that the court reporter's record be read to you.
6 You must accept the court reporter's record as accurate.

7 Facts may be proved by direct or circumstantial evidence
8 or by a combination of both. Direct evidence can prove a fact
9 by itself. For example, if a witness testifies he saw it
10 raining outside before he came into the courthouse, that
11 testimony is direct evidence that it was raining.

12 Circumstantial evidence also may be called indirect
13 evidence. Circumstantial evidence does not directly prove the
14 fact to be decided but is evidence of another fact or group of
15 facts from which you may logically and reasonably conclude the
16 truth of the fact in question. For example, if a witness
17 testifies that he saw someone come inside wearing a raincoat
18 covered with drops of water, that testimony is circumstantial
19 evidence because it may support a conclusion that it was
20 raining outside.

21 Both direct and circumstantial evidence are acceptable
22 types of evidence to prove or disprove the elements of a
23 charge, including intent and mental state and acts necessary
24 to a conviction and neither is necessarily more reliable than
25 the other. Neither is entitled to any greater weight than the
26 other. You must decide whether a fact at issue has been
27 proved based on all the evidence.

28 Before you may rely on circumstantial evidence to conclude

1 that a fact necessary to find the defendant guilty has been
2 proved, you must be convinced that the People have proved each
3 fact essential to that conclusion beyond a reasonable doubt.

4 Also, before you may rely on circumstantial evidence to
5 find the defendant guilty, you must be convinced that the only
6 reasonable conclusion supported by the circumstantial evidence
7 is that the defendant is guilty. If you can draw two or more
8 reasonable conclusions from the circumstantial evidence and
9 one of those reasonable conclusions points to innocence and
10 another to guilt, you must accept the one that points to
11 innocence.

12 However, when considering circumstantial evidence, you
13 must accept only reasonable conclusions and reject any that
14 are unreasonable -- unreasonable.

15 You alone must judge the credibility or believability of
16 the witnesses. In deciding whether testimony is true and
17 accurate, use your common sense and experience. You must
18 judge the testimony of each witness by the same standard
19 setting aside any bias or prejudice you may have. You may
20 believe all, part or none of any witness's testimony.
21 Consider the testimony of each witness and decide how much of
22 it you believe.

23 In evaluating a witness's testimony, you may consider
24 anything that reasonably tends to prove or disprove the truth
25 or accuracy of that testimony. Among the factors that you may
26 consider are:

27 How well could the witness see, hear or otherwise perceive
28 the things about which the witness testified?

1 How well was the witness able to remember and describe
2 what happened?

3 What was the witness's behavior while testifying?

4 Did the witness understand the questions and answer them
5 directly?

6 Was the witness's testimony influenced by a factor such as
7 bias or prejudice, a personal relationship with someone
8 involved in the case or a personal interest in how the case is
9 decided?

10 What was the witness's attitude about the case or about
11 testifying?

12 Did the witness make a statement in the past that is
13 consistent or inconsistent with his or her testimony?

14 How reasonable is the testimony when you consider all the
15 other evidence in the case?

16 Did other evidence prove or disprove any fact about which
17 the witness testified?

18 Do not automatically reject testimony just because of
19 inconsistencies or conflicts. Consider whether the
20 differences are important or not. People sometimes honestly
21 forget things or make mistakes about what they remember.
22 Also, two people may witness the same event yet see or hear it
23 differently.

24 If you do not believe a witness's testimony that he or she
25 no longer remembers something, that testimony is inconsistent
26 with the witness' earlier statement on that subject.

27 If you decide that a witness deliberately lied about
28 something significant in this case, you should consider not

1 believing anything that witness says; or if you think the
2 witness lied about some things but told the truth about
3 others, you may simply accept the part that you think is true
4 and ignore the rest.

5 The crimes charged in this case require the proof of a
6 union or joint operation of acts and wrongful intent. For you
7 to find a person guilty of the crimes in this case, criminal
8 threats as charged in Counts 1, 2, and 3, that person must not
9 only intentionally commit the prohibited act but must do so
10 with a specific intent. The act and the intent required are
11 explained in the instructions for that crime.

12 Neither side is required to call all witnesses who may
13 have information about the case or to produce all physical
14 evidence that might be relevant. The testimony of only one
15 witness can prove any fact. Before you conclude that the
16 testimony of one witness proves a fact, you should carefully
17 review all the evidence.

18 If you determine there's a conflict in the evidence, you
19 must decide what evidence, if any, to believe. Do not simply
20 count the number of witnesses who would agree or disagree on a
21 point and accept the testimony of the greater number of
22 witnesses.

23 On the other hand, do not disregard the testimony of any
24 witness without a reason or because of prejudice or a desire
25 to favor one side or the other. What is important is whether
26 the testimony or any other evidence convinces you, not just
27 the number of witnesses who testify about a certain point.

28 During the trial, certain evidence was admitted for a

1 limited purpose. You may consider that evidence only for that
2 purpose only and for no other. You have heard evidence of
3 statements that a witness made before the trial. If you
4 decide that the witness made those statements, you may use the
5 statements in two ways:

6 One, to evaluate whether the witness's testimony in court
7 is believable;

8 And two, as evidence that information in those earlier
9 statements is true.

10 Witnesses were allowed to testify as experts and to give
11 opinions. You must consider the opinions, but you are not
12 required to accept them as true or correct. The meaning and
13 importance of any opinion are for you to decide.

14 And in evaluating the believability of an expert witness,
15 follow the instructions about the believability of witnesses
16 generally.

17 In addition, consider the expert's knowledge, skill,
18 experience, training and education, the reasons the expert
19 gave for any opinion and the fact or information on which the
20 expert relied in reaching that opinion.

21 You must decide whether information in which the expert
22 relied was true and accurate. You may disregard any opinion
23 that you find unbelievable, unreasonable, or unsupported by
24 the evidence.

25 An expert witness may be asked a hypothetical question. A
26 hypothetical question asks the witness to assume certain facts
27 are true and to give an opinion based on the assumed facts.
28 It is up to you to decide whether an assumed fact has been

1 proved.

2 If you conclude that an assumed fact is not true, consider
3 the effect of the expert's reliance on that fact in evaluating
4 the expert's opinion.

5 If the expert witnesses disagreed with one another, you
6 should weigh each opinion against the others. You should
7 examine the reasons given for each opinion and the facts or
8 other matters on which each witness relied. You may also
9 compare the expert's qualifications.

10 Witnesses who are not testifying as experts gave their
11 opinions during the trial. You may, but are not required to,
12 accept those opinions as true or correct. You may give the
13 opinions whatever weight you think appropriate. Consider the
14 extent of the witness's opportunity to perceive the matters on
15 which his or her opinion is based, the reason the witnesses
16 gave for any opinion, and the facts of which the witnesses
17 relied in forming that opinion.

18 You must decide whether information on which the witnesses
19 relied was true and accurate. You may disregard all or any
20 part of an opinion that you find unbelievable, unreasonable or
21 unsupported by the evidence.

22 A defendant has an absolute constitutional right not to
23 testify. He or she may rely on the state of the evidence and
24 argue that the People have failed to prove the charges beyond
25 a reasonable doubt. Do not consider for any reason at all the
26 fact that the defendant did not testify. Do not discuss that
27 fact during your deliberations or let it influence your
28 decision in any way.

1 You have heard evidence that the defendant made oral
2 statements before the trial. You must decide whether the
3 defendant made any of these statements in whole or in part.
4 If you decide that the defendant made such statements,
5 consider the statements along with all the other evidence in
6 reaching your verdict. It is up to you to decide how much
7 importance to give the statements.

8 The defendant may not be convicted of any crime based on
9 his out-of-court statements alone. You may rely on the
10 defendant's out-of-court statements to convict him only if you
11 first conclude that other evidence shows that the charged
12 crime was committed. That other evidence may be slight and
13 only be enough to support a reasonable inference that a crime
14 was committed.

15 This requirement of other evidence does not apply to
16 proving the identity of the person who committed the crime.
17 If other evidence shows that the charged crime was committed,
18 the identity of the person who committed it may be proved by
19 the defendant's statements alone. You may not convict the
20 defendant unless the People have proved his guilt beyond a
21 reasonable doubt.

22 The People are not required to prove that the defendant
23 had a motive to admit any of the crimes charged. In reaching
24 your verdict, you may, however, consider whether the defendant
25 had a motive.

26 Having a motive may be a factor tending to show that the
27 defendant is guilty. Not having a motive may be a factor
28 tending to show the defendant is not guilty.

1 The defendant is charged in Counts 1, 2, and 3 with having
2 made a criminal threat, in violation of Penal Code Section
3 422. To prove that the defendant is guilty of this crime, the
4 People must prove that:

5 One, the defendant willfully threatened to unlawfully kill
6 or unlawfully cause great bodily injury to Carolyn Jacobs;

7 Two, the defendant made the threat with an electronic
8 communication device;

9 Three, the defendant intended that his statements be
10 understood as a threat and intended that it be communicated to
11 Carolyn Jacobs;

12 Four, the threat was so clear, immediate, unconditional
13 and specific that it communicated to Carolyn Jacobs a serious
14 intention and the immediate prospect that the threat would be
15 carried out;

16 Five, the threat actually caused Carolyn Jacobs to be in
17 sustained fear for her own safety or for the safety of her
18 immediate family;

19 Six, Carolyn Jacobs' fear was reasonable under the
20 circumstances.

21 Someone commits an act willfully when he or she does it
22 willingly or on purpose. In deciding whether a threat was
23 sufficiently clear, immediate, unconditional and specific,
24 consider the words themselves as well as the surrounding
25 circumstances.

26 Someone who intends that a statement be understood as a
27 threat does not have to actually intend to carry out the
28 threatened act.

1 Great bodily injury means significant or substantial
2 physical injury. It is an injury that is greater than minor
3 or moderate harm.

4 Sustained fear means fear for a period of time that is
5 more than momentary, fleeting or transitory. An immediate
6 ability to carry out the threat is not required.

7 An electronic communication device includes, but is not
8 limited to, a telephone, cellular telephone, pager, computer,
9 video recorder or fax machine.

10 Immediate family means any spouse, parents or children.

11 Each of the counts charged in this case is a separate
12 crime. You must consider each count separately. Return a
13 separate verdict for each counts.

14 All right. Ladies and gentlemen, I have just one jury
15 instruction left, and that's more appropriate right before you
16 go to deliberate. So we're going to pause and start the
17 closing arguments.

18 As you certainly know by now, the prosecution has the
19 burden of proving each element of a crime beyond a reasonable
20 doubt. Because of this, Ms. Somerville will have an
21 opportunity to address you twice. She's going to start and
22 then she'll be able to briefly address you after Ms. Freeze
23 has completed her argument. She'll only be able to talk to
24 you once.

25 I'm sorry. I was distracted.

26 As you also know by now, what the attorneys say is not
27 evidence. But they have the right now to tell you what they
28 believe the evidence shows and how the law applies to it.

1 If you don't believe that a fact has been proven that
2 they're saying has been proven, you go with what you heard the
3 evidence to be and what you think the facts proven are. And
4 the same with the law. If they misstate the law, you ought to
5 follow the law that I give you and we'll give you back in the
6 jury room.

7 And with that, Ms. Somerville.

8 MS. SOMERVILLE: Your Honor, may I have a moment? I
9 believe the TV went to sleep.

10 THE COURT: Yes, you may.

11 We are all working diligently, ladies and gentlemen, to
12 see how much we can accomplish by the end of the day. So yes.

13

14

CLOSING ARGUMENT

15 BY MS. SOMERVILLE:

16 Good afternoon. As I told you a couple days ago, this
17 case is about sadistic, vile, violent threats that Mr. Bathen
18 left for Dr. Jacobs on June 4th, July 3rd, and July 5th of
19 last year. And he wanted her to hurt and he wanted to
20 terrorize her. And that's because of how their relationship
21 ended.

22 Mr. Bathen made these calls fully aware that they would
23 absolutely terrorize her and they did. She told you that she
24 was basically a prisoner in her own house. She had to
25 rearrange her work. She had to tell her colleagues about what
26 was going on so she can make sure to take the appropriate
27 caution so that clients weren't in danger, so that her
28 co-workers weren't in danger.

1 Her husband was coming to meet her at work. She told you
2 she kept her doors, her windows locked despite the fact that
3 it was the summertime. This had a huge impact on her life to
4 the point where she was actually physically ill, if you will
5 remember that, when she received the second call, to the point
6 where she actually had to vomit in her own home.

7 Mr. Bathen wanted her to hurt her. He was upset because
8 she wouldn't sit down and let him basically tell her every
9 single thing that he had a problem with.

10 Ladies and gentlemen, this is not a case about identity.
11 The evidence in this case has proved to you beyond a
12 reasonable doubt that this man is the person who made these
13 calls.

14 The June 4th call.

15 *(Audio recording played; not reported.)*

16 MS. SOMERVILLE: The July 4th call that Dr. Jacobs
17 received.

18 *(Audio recording played; not reported.)*

19 MS. SOMERVILLE: And the third call she received.

20 *(Audio recording played; not reported.)*

21 MS. SOMERVILLE: Of course she was terrified by those
22 calls. Those calls are vicious. They are vile. They're
23 sexually explicit. He basically lists about anything you can
24 do to someone to terrorize them. And especially a woman, a
25 mother to then go after her daughter and to say that he's going
26 to rape her and kill her.

27 He knew exactly the effect that these calls would have on
28 her. Frankly, the calls speak for themselves.

1 You know, sometimes in these type of cases words can be,
2 you know, read maybe one of two ways, maybe the calls aren't
3 very specific or threatening. That's not the case. This is
4 an extreme example. This is an example of when the law steps
5 in and says enough. This is an absolute crime. Your words
6 are terrifying. This isn't freedom of speech. This is a
7 crime.

8 I want to talk to you right now a little bit about the
9 law. I know that the judge just read to you all of the jury
10 instructions and you are going to have them with you in the
11 back when you go to deliberate.

12 There are a few instructions that I want to point out
13 because I think they'll help you in your deliberations.

14 I also want to go over the specific elements for the
15 crimes that we have charged in this case. And there's three
16 counts. They are all the same so we'll go over those and kind
17 of talk about all of them as we go and how these calls and the
18 evidence that you heard here proves that Mr. Bathen is guilty
19 beyond a reasonable doubt.

20 And then we'll talk about why the evidence shows that this
21 man and this man alone is the one who left the sadistic, vile,
22 violent calls.

23 So let's get into some of the law. One of the
24 instructions that the judge told you about is single witness
25 testimony. It's very important in this case. The testimony
26 of only one witness can prove any fact. Carefully review all
27 the evidence. Assume there was no cell phone tower evidence
28 in this case. But obviously we have that. And it's extremely

1 important circumstantial evidence of Mr. Bathen's identity and
2 his guilt. But assume we didn't.

3 This jury instruction tells you that basically one
4 witness's testimony can prove any fact. And if you take
5 Dr. Jacobs' testimony alone, her testimony, her credible
6 testimony, the fact that she had a significant relationship as
7 a doctor-patient with Mr. Bathen, the fact that she's heard
8 his voice over and over again in face-to-face sessions, that
9 they had phone consultations that were up to 55 minutes long
10 throughout this four-year period, the fact that she was
11 physically terrified, the fact that she received these calls
12 on a phone number that was for her work. All of that
13 evidence, if you believe it, if you believe that, that her
14 testimony alone proves his guilt beyond a reasonable doubt,
15 that's all you need to convict Mr. Bathen.

16 But that's not all we have in this case obviously.

17 Witness credibility is another instruction, and there's
18 actually a lot in this instruction and it's very important to
19 read and review the whole instruction. And the judge just
20 read it to you, but this is something that the instruction
21 talks about.

22 Use your common sense and experience. Just because we're
23 in the courtroom doesn't mean that your life experience, all
24 of your common sense, that you have to put that aside when you
25 are deliberating in a criminal case. And in fact, it will
26 help you, helps you look at the evidence and decide what is
27 reasonable. Who is telling the truth; right? Does this make
28 sense to me? You get to use your common sense and your

1 experience.

2 How reasonable is the testimony when you consider all the
3 other evidence? How reasonable is Dr. Jacobs' testimony that
4 she recognized that voice, that she knew it was Mr. Bathen?
5 How reasonable is that when you consider the other evidence,
6 which is the cell phone evidence in this case?

7 And we'll go over that a little bit in detail as we get
8 further along.

9 Did the other evidence prove or disprove any fact about
10 which a witness testified? Again, that would be the cell
11 phone evidence supporting the testimony that Dr. Jacobs gave
12 you here in court.

13 This instruction also cautions you do not automatically
14 reject testimony just because of inconsistencies or conflicts.
15 You have to remember that this relationship that they had, it
16 was quite a while ago. It was ongoing, right, over the course
17 of at least four years. It sounds like a little longer than
18 that.

19 Dr. Jacobs no longer has her notes. Legally she's allowed
20 to get rid of her documents within seven years. She didn't
21 have any of that to sit down and study and go over before she
22 came into court. I mean she couldn't predict that this was
23 going to happen; right? I mean, this basically came out of
24 the blue at her.

25 So if you do find some minor inconsistencies as far as
26 dates and things like that, that's reasonable, that's
27 believable. People honestly do forget things. And do not
28 automatically reject her testimony just because of some

1 inconsistencies or some conflicts.

2 Consider whether they are important. People honestly
3 forget things or make mistakes about what they remember. That
4 is just the way life is. That's the way our memories work,
5 especially when things have happened years ago.

6 Let's look at an overview of the charges in this case.
7 And like I said, obviously each one of the calls, that's a
8 separate charge and they are all the same crime. They are all
9 a crime. It's a violation of Penal Code Section 422, making a
10 criminal threat.

11 And we have them separated out by date; so each call is
12 its own crime, June 4th, July 3rd and July 5th.

13 And let's talk about what the law requires for the crime
14 of making a criminal threat. There are six elements. You can
15 think of them as, like, ingredients if you are making a cake
16 or making brownies.

17 The first element or ingredient is that the defendant
18 willfully threatened to unlawfully kill or unlawfully cause
19 great bodily injury to Dr. Jacobs. Willfully means that it
20 wasn't an accident, that it was done on purpose. And I don't
21 believe that that is an issue in this case, given the calls
22 that we have.

23 Great bodily injury just means more than moderate harm,
24 threatening, the threats in this case. I don't believe that's
25 really an issue either for you.

26 So Count 1, we have the threats that he made that we just
27 listened to. "I'm going to bust your fucking skull open, you
28 worthless bitch. I'll bash your fucking skull in." And I'm

1 reading these verbatim obviously from the calls that we just
2 listened to. "You're dead. I'm going to carve you up."
3 Those are for Count 1.

4 In regards to Count 2, again, you have the threat, "I'm
5 going to carve you up." And you will remember that she said
6 the second call, this is the one that made her physically ill.
7 It got worse, right, than the first call. "I'm going to rape
8 you. I'm going to torture you." Again, "I'm going to carve
9 that fucking smile off your face." You can read the rest of
10 that.

11 And again, great bodily injury is just significant or
12 substantial or physical injury.

13 And for the third count that we have here he threatens to
14 kidnap her. Torture her. Rape her. Set her on fire. She's
15 going to die.

16 And then he's taking it to obviously the next level that
17 he's going to find her daughter, he's going to rape her and
18 he's going to murder her too. These are so sadistic, so vile,
19 and so hate filled. He wanted to make her hurt like he was
20 hurting.

21 The second element is that it was made by electronic
22 communication. That just means it was made over the
23 telephone.

24 And the third element is that he intended his statements
25 to be understood as a threat and he intended that it be
26 communicated to Dr. Jacobs.

27 Obviously, they were left on her phone. This is the
28 intent of communicating them to her. They weren't sent to

1 some other person in the hopes that they maybe get to her.
2 They were right on her voice message. And he -- he intended
3 them to be understood as a threat.

4 And the words speak for themselves. There's nothing vague
5 about these words. They say what they say and they mean what
6 they mean.

7 The fourth element is that the threat was so clear,
8 immediate, unconditional and specific that it communicated to
9 Dr. Jacobs a serious intention and the immediate prospect that
10 the threat would be carried out.

11 Again, these were very clear, very specific threats about
12 what he was going to do to her and what he was going to do to
13 her daughter. They weren't conditional. They weren't, you
14 know, if this happens, then I'm going to do this. I mean
15 these were immediate. These were going to happen.

16 And in fact, in the third call, but remember that he said,
17 "Hey, Dr. J., I'm still planning on coming out there."
18 Consider the words and the -- excuse me, and the surrounding
19 circumstances when taking into consideration this particular
20 element.

21 And then the fifth element is that the threat actually
22 caused Carolyn Jacobs to be in sustained fear for her own
23 safety or for the safety of her immediate family. It's just a
24 period of time that is more than momentary, more than
25 fleeting.

26 And immediate family refers to children.

27 The sustained fear, she basically had to change up her
28 routine, lock herself inside of her house, she doesn't like to

1 be out in large crowds anymore. She's had to have her husband
2 come and meet her at work. She's had to take steps to make
3 sure that her colleagues are safe, to make sure that their
4 clients are safe at work.

5 And this went on and she's still afraid. She even went as
6 far as to come to the court before this criminal trial and to
7 get a restraining order that's in effect until 2020 against
8 Mr. Bathen. That's sustained fear.

9 And the last element of making a criminal threat is that
10 her fear was reasonable under the circumstances. Of course it
11 was reasonable. Look at the threats. Look at how vile they
12 were. Look at how specific they were. Look at how they
13 threatened her daughter. Absolutely reasonable under the
14 circumstances. Especially given the fact of how her
15 relationship with Mr. Bathen ended.

16 There's a couple last things. These are not elements, but
17 these are important things to note in the instruction for this
18 crime. Someone who intends that a statement be understood as
19 a threat does not actually have to intend to carry out that
20 threat. You do not have to actually intend to carry out that
21 threat. He never had to actually intend to make good on these
22 to rape her, to set her on fire, to torture her, to kidnap
23 her, to rape her daughter. He never had to actually intend to
24 carry those out. That is not an element that we are required
25 to prove.

26 And lastly, an immediate ability to carry out the threat
27 is not required. And this is very important because, as we
28 know, Mr. Bathen was in the Arlington, Virginia and the

1 Washington D.C. area when he made these threats against
2 Dr. Jacob. But he doesn't have to be here in California.

3 An immediate ability to carry out a threat is not
4 required. And frankly, just because he's in the
5 Washington, D.C., Virginia area, I mean this is 2018; right?
6 Very easy to hop on an airplane to get across the country.
7 It's not like it was, you know, in 1830 where he would have to
8 get on a wagon, possibly make it here, maybe not, take months
9 and months at a time. But it doesn't matter. He does not
10 have to have the immediate ability to carry out the threat.

11 Let's talk about why we know that Mr. Bathen is the person
12 who made these calls. First of all, we have Dr. Jacobs. They
13 were in this therapist-patient relationship from 2004 to 2009.
14 She said they had about five office sessions per year during
15 this time frame.

16 There were about five to six phone sessions once he moved
17 to the Los Angeles area.

18 And then there were about five to six continuity of care
19 sessions when he left California and then moved back to the
20 East Coast for work. She said that most of these calls and
21 sessions were between 45 to 55 minutes. That's regular for
22 her. That's a substantial amount of time that they had these
23 sessions.

24 And these are sessions where she described, I mean,
25 Mr. Bathen is talking to her; right? He's talking to her
26 about whatever issues that they're discussing in their
27 sessions. And she's taking notes and, you know, she's
28 interacting with him. She's talking with him as well. She is

1 very familiar with Mr. Bathen's voice.

2 She said that she recognized his tone and inflection in
3 these voice messages. Obviously, when she got the first call
4 she didn't know immediately who that was. When her husband
5 got home and he put the number into the Google search bar and
6 came up with Benjamin Bathen and said that to her, it was
7 like, yes, a light bulb went off. She recognized his voice.
8 She knew it was him. And she knew it was him throughout the
9 rest of the two calls.

10 She said that he had been angry and upset in session; so
11 it's not like she'd ever -- you know, he'd just be calm and
12 talking with her. She'd heard his voice like this before.
13 She was very familiar with it; right?

14 And he moved to Boston, Massachusetts and they continued
15 their sessions. And then she explained to you how this
16 relationship ended; right? She did the continuity of care,
17 which basically is she's not going to drop a client who has
18 seen her in therapy. She's not going to immediately cut them
19 off. She said ethically that wouldn't be right. So they
20 continued to have these communications.

21 She provided him with referrals for the East Coast so that
22 he could transition on to another therapist, and Mr. Bathen,
23 towards the end of this, through the e-mails that she
24 described for you, got stuck on something. He wanted an
25 apology from her. He was upset with her. And she said she
26 could never really get clarification about what that was.

27 And then he makes this demand that she meet face-to-face
28 with him, that she sit there, not say anything so basically he

1 can unload on her whatever grievances he has. Man, that was
2 not going to happen. And then he also threatened to contact
3 her licensing board. This did not end well. He made some
4 bizarre demands from her.

5 And then he threatened her. He threatened to call the
6 licensing board. She's never been threatened by another
7 patient. She has seen a lot of people. She told you that it
8 may have even been around 700 a year. She's never had another
9 situation like this.

10 And she obtained a temporary restraining order, and I know
11 I had mentioned that before, but she actually came into court
12 and explained what had happened. And a restraining order was
13 granted until 2020. That's pretty powerful.

14 Dr. Jacobs didn't just pick Mr. Bathen out of thin air.
15 She knows his voice. She knows what happened when their
16 relationship ended, how it ended. Mr. Bathen made these
17 calls, and she had has no reason to come in here and lie at
18 all. She has no reason to just make this up and say, yeah,
19 it's Mr. Bathen.

20 Let's talk about how the jail calls further show that
21 Mr. Bathen made these threats. This is from one of the calls,
22 and they were on September 16th and 17th. I think you know
23 he's pretty confident that once this is settled I'm probably
24 looking at, you know, a misdemeanor. She's referring to his
25 attorney who he was referring to in the jail calls,
26 Mr. Theule.

27 He goes on to say, "So, I mean, it doesn't make sense to
28 turn around and flee, leave your career that pays a six-figure

1 salary for, um, you know, a misdemeanor and a fine basically."

2 And then he goes on to say, "You know, it would be easier
3 to pay, you know, whatever it is, the thousand bucks. I mean
4 the only thing is like they might put me on probation or
5 something like that."

6 He's pretty sure there's no chance of jail time. These
7 are not the statements of someone who did not make these
8 calls. These are the statements of someone who made the
9 calls. And basically, I mean, it might be probation or
10 something like that. But he's pretty sure there's no chance
11 of jail time. I might as well just pay the fine. It doesn't
12 really matter. He's basically making admissions in his jail
13 calls to the bail bonds agent about this.

14 And then he goes on to say, "And she said that it's me."

15 You know, but I would point out that the law says for a
16 threats case, the alleged victim has to believe that there's a
17 credible, realistic, reasonable belief that the threat could
18 be immediately carried out; right? And you know, I was
19 sitting in an office cubicle in Washington, D.C.

20 He is wrong on the law, first of all. You've been
21 instructed on the law and we just went over it. The immediate
22 ability to carry out a threat is not required. This -- again,
23 this is a statement of someone who is basically admitting but
24 is misinformed about the law and thinks that because I am on
25 the other side of the country, because I am at work, because
26 I'm sitting in my office cubicle it doesn't meet the
27 requirements.

28 At a nonprofit writing software to help reduce poverty,

1 reduce hunger worldwide so, you know, I could not carry out
2 any threats against anyone. That is not required.

3 Then in the jail calls -- and you will hear these. And
4 you will have all these recordings with you back in the jury
5 room. And I would urge you to listen to them. Every one of
6 the threatening calls that he makes he starts out on the call
7 when he's, like, "Hey, Dr. Jacobs." Listen to these jail
8 calls that begin this way. The voices are identical because
9 they are the same person. "Hey, what's going on, man." "Hey,
10 is this All-Pro?" "Hey, this is Ben Bathen. I called about
11 30 minutes ago."

12 Listen to his tone of voice in those calls. It's very
13 obvious when you listen to them that Mr. Bathen is the one who
14 made these calls.

15 He also gives his address to the bail bonds agent, right,
16 the 1132 North Kentucky, Arlington, Virginia address. He
17 gives his date of birth as 11/3/1977. And he says that he was
18 living in Virginia. He says that he works at the
19 International Food Policy Research Institute. That he was
20 born in Virginia. That his stepfather is Vincent Crawley and
21 that his mother is Eufemia Crawley.

22 And you will note in there that he also says that he just
23 has a new cell phone number. In fact, he tries to recite it
24 at one point in the calls, and he's not even sure if he's
25 giving the right phone.

26 And this is important because all of these things show you
27 that those cell records that the calls were made from are
28 Mr. Bathen's, that was Mr. Bathen's phone. All of this is

1 corroborated by what is in those cell phone records.

2 And let's talk about that. So obviously the phone number
3 with the 617 area code, that's Boston, Massachusetts area
4 code, that's where Mr. Bathen moved to right after. He ended
5 his, you know, sessions here in Los Angeles with Dr. Jacobs.

6 And his address on the billing records, right, the same
7 thing that he said in the jail calls, is the 1132 North
8 Kentucky Street in Arlington, Virginia. That is Mr. Bathen
9 saying that that is his address in jail calls, and that is the
10 exact address that is on the billing information for these
11 calls.

12 His date of birth, the same date of birth that he gives in
13 the jail calls, is reflected in the billing information for
14 the call detail records, 11/30, excuse me, that's incorrect,
15 but it's 1977.

16 And you will note that in the call billing information the
17 dates that the phone number was effective were from
18 September 1st, 2014 to September 4th, 2014, and that is
19 consistent with someone who doesn't know their cell phone
20 number and who says that they just got a new cell phone.
21 Because he was in custody on September 16th and September 17th
22 of 2017, so it makes perfect sense that this was his phone
23 number, he didn't have his new phone number memorized by heart
24 like someone would if they've had a number for a significant
25 period of time.

26 All the towers were in the Virginia and Washington, D.C.
27 area. And again, in those jail calls, Mr. Bathen is just
28 confirming what we know from the call detail records, even

1 what their own expert agreed with today, all of these calls
2 were coming from Virginia and Washington, D.C. area.
3 Regardless of where the exact location that the cell phone
4 was, they are all coming from the same place where Mr. Bathen
5 lives and works.

6 The records show that there was, in fact, a call and it
7 was completed on the 4th of June to Dr. Jacobs' work voice
8 message. The records show that they were, in fact, two
9 completed calls. We know there was only one voice message, so
10 clearly he didn't leave a message on that other call.

11 But we know that there were two completed calls to her
12 voice message again on the 3rd of July. And then on the 5th
13 of July, there's also a completed call to Dr. Jacobs. All of
14 this is consistent with her testimony.

15 Again, the call detail records Mr. Holmes was able to
16 explain to you that he mapped the address for the
17 International Food Policy Research Institute. It's on
18 "I" Street. It's very near the White House, and that this is
19 where the calls from July 3rd and July 5th. They were
20 originating from an area where this location is and were the
21 sector from that cell tower would encompass.

22 He also did the four frequency maps so you could see how
23 often Mr. Bathen's phone was connecting to this particular
24 tower that also made the threatening calls. It was consistent
25 with someone being at work. It was Monday through Friday.
26 There were no weekend hits on that tower. And it was from
27 6:00 in the morning till about 3:30 in the afternoon.
28 Absolutely consistent with Mr. Bathen being at his place of

1 employment.

2 And then Blue Jug Landing and Green Ash Court, Virginia,
3 those were addresses that the tower frequency charts -- and
4 you will have those back with you in the deliberation room --
5 those were the addresses for his stepfather and for his
6 mother. And those were also on the tower frequency chart as
7 locations where his cell phone was connecting with towers on a
8 regular basis.

9 And 1132 North Kentucky Street, Arlington, Virginia, that
10 was also on the tower frequency chart. And that is the
11 address that Mr. Bathen gave twice in his jail calls as his
12 residence, and that's the same address that Mr. Bathen said he
13 had been living at for about four months.

14 Ladies and gentlemen, Mr. Bathen hid behind a phone to
15 terrorize Dr. Jacobs. He terrorized her. He changed her
16 life. He intended to make her feel whatever type of pain he
17 was feeling. He intended to absolutely terrorize her.

18 Listen to those calls again when you're in the jury room.
19 That's what she had to live with. That's what she is still
20 living with.

21 Mr. Bathen is the only person who made those calls, and
22 the evidence in this case proves beyond a reasonable doubt
23 that he is guilty of making each and every one of those calls.
24 Please return a verdict of guilty and tell him that.

25 Thank you.

26 THE COURT: All right. Well, we're at the end of the day,
27 ladies and gentlemen, so we will resume Monday morning at
28 nine o'clock.

1 You have not heard the argument of Ms. Freeze. I urge
2 you, again, to keep an open mind until you've heard
3 everything.

4 Please continue to refrain from talking to anybody about
5 any subject connected with this matter or doing any research
6 or investigation.

7 I will see you on Monday at nine o'clock. And have a nice
8 weekend.

9 *(The following proceedings were had between the Court
10 and counsel out of the presence and hearing of the
11 jury.)*

12 THE COURT: All right. See you all Monday.

13 *(At 4:24 p.m. an adjournment was taken until Monday,
14 June 18, 2018, at 9:00 a.m.)*

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 San Diego, California)
2 County of San Diego) : SS.

3

4

5 I, Yvonne Medina Luna, Official Reporter for the Superior
6 Court of the State of California, in and for the County of San
7 Diego, do hereby certify:

8

9 That as such reporter, I reported in machine shorthand the
10 proceedings held in the foregoing case;

11

12 That my notes were transcribed into typewriting under my
13 direction and the proceedings held on June 15, 2018, contained
14 within Pages 356 through 535, are a true and correct
15 transcription.

16

17 Dated this 30th day of September 2018.

18

19

Handwritten signature of Yvonne Medina Luna
Yvonne Medina Luna, CSR No. 12697
Official Court Reporter

20

21

22

23

24

25

26

27

28

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	)	FROM SAN DIEGO COUNTY
)	
PLAINTIFF AND	)	HON. STEPHANIE SONTAG
RESPONDENT,)	
	)	COURT OF APPEAL
VS.	)	NO. D074538
)	
	)	CASE NO. SCS294342
BENJAMIN BATHEN,)	
)	
DEFENDANT AND)	
APPELLANT.	)	MASTER INDEX
_____)	

REPORTER'S CERTIFIED TRANSCRIPT
VOLUME 0 OF 7
(PAGES 1 THROUGH 12/100)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST "A" STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	BENJAMIN BATHEN
AND APPELLANT:	IN PROPRIA PERSONA

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
OFFICIAL COURT REPORTER

CHRONOLOGICAL INDEX OF WITNESSES

	PAGE	LINE	VOL
GARY JACOBS - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.213	6	3
CROSS BY MS. FREEZE . . . . .	.221	6	3
REDIRECT BY MS. SOMERVILLE . . . . .	.230	10	3
CAROLYN FRANCES JACOBS - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.234	2	3
CROSS BY MS. FREEZE . . . . .	.268	2	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.287	15	3
REDIRECT BY MS. SOMERVILLE . . . . .	.301	8	3
RE CROSS BY MS. FREEZE . . . . .	.306	6	3
GREGORY GAIN - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.309	26	3
CROSS BY MS. FREEZE . . . . .	.349	14	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.380	8	4
REDIRECT BY MS. SOMERVILLE . . . . .	.396	19	4
RE CROSS BY MS. FREEZE . . . . .	.401	22	4
DONALD HOLMES - PEOPLE'S WITNESS			
CROSS BY MS. FREEZE . . . . .	.434	10	4
REDIRECT BY MS. SOMERVILLE . . . . .	.457	19	4
MANFRED SCHENK - DEFENSE WITNESS			
DIRECT BY MS. FREEZE . . . . .	.470	10	4
CROSS BY MS. SOMERVILLE . . . . .	.490	4	4
REDIRECT BY MS. FREEZE . . . . .	.507	24	4

ALPHABETIC INDEX OF WITNESSES

	PAGE	LINE	VOL
GAIN, GREGORY - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.309	26	3
CROSS BY MS. FREEZE . . . . .	.349	14	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.380	8	4
REDIRECT BY MS. SOMERVILLE . . . . .	.396	19	4
RECORD BY MS. FREEZE . . . . .	.401	22	4
HOLMES, DONALD - PEOPLE'S WITNESS			
CROSS BY MS. FREEZE . . . . .	.434	10	4
REDIRECT BY MS. SOMERVILLE . . . . .	.457	19	4
JACOBS, CAROLYN FRANCES - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.234	2	3
CROSS BY MS. FREEZE . . . . .	.268	2	3
CROSS (RESUMED) BY MS. FREEZE . . . . .	.287	15	3
REDIRECT BY MS. SOMERVILLE . . . . .	.301	8	3
RECORD BY MS. FREEZE . . . . .	.306	6	3
JACOBS, GARY - PEOPLE'S WITNESS			
DIRECT BY MS. SOMERVILLE . . . . .	.213	6	3
CROSS BY MS. FREEZE . . . . .	.221	6	3
REDIRECT BY MS. SOMERVILLE . . . . .	.230	10	3
SCHENK, MANFRED - DEFENSE WITNESS			
DIRECT BY MS. FREEZE . . . . .	.470	10	4
CROSS BY MS. SOMERVILLE . . . . .	.490	4	4
REDIRECT BY MS. FREEZE . . . . .	.507	24	4

INDEX OF EXHIBITS IDENTIFIED

	PAGE	LINE	VOL
1 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL DATED JUNE 4, 2017	251	18	3
1A TRANSCRIPT OF AUDIO RECORDING FROM JUNE 4, 2017	251	22	3
2 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL, DATED JULY 3, 2017	259	15	3
2A TRANSCRIPT OF AUDIO RECORDING FROM JULY 3, 2017	259	18	3
3 AUDIO RECORDING OF CAROLYN JACOBS' VOICE MAIL, DATED JULY 5, 2017	262	6	3
3A TRANSCRIPT OF AUDIO RECORDING DATED JULY 5, 2017	262	7	3
4 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH UNKNOWN MALE AND UNKNOWN FEMALE DATED SEPTEMBER 16, 2017	317	25	3
4A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 4	317	26	3
5 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH BAILBOND REPRESENTATIVE DATED SEPTEMBER 16, 2017	318	22	3
5A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 5	318	23	3
6 AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH EMILIO SANCHEZ BAIL BOND REP. DATED SEPTEMBER 17, 2017	319	6	3
6A TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 6	319	9	3

7	AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH GERALD, BAIL BOND REPRESENTATIVE DATED 9/17/17	319	21	3
7A	TRANSCRIPT OF AUDIO RECORDING, EXHIBIT 7	319	24	3
8	SUBSCRIBER INFORMATION SHEET FROM T-MOBILE, ONE PAGE	324	9	3
9	SUBSCRIBER INFORMATION SHEET FROM T-MOBILE, CONTINUATION OF COURT'S EXHIBIT 8, ONE PAGE	328	1	3
10	CALL DETAIL RECORD OF 617-992-4648 FROM JUNE 4, 2017, ONE PAGE	329	3	3
11	CALL DETAIL RECORD OF 617-992-4648 FROM JUNE 4, 2017, ONE PAGE	331	16	3
12	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 3, 2017, ONE PAGE	332	9	3
13	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 3, 2017, ONE PAGE	332	24	3
14	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 5, 2017, ONE PAGE	333	9	3
15	CALL DETAIL RECORD OF 617-992-4648 FROM JULY 5, 2017, ONE PAGE	333	24	3
16	GOOGLE MAP TITLED "TOWER HITS" FROM 6/1/17-7/6/17, ONE PAGE	336	11	3
17	GOOGLE MAP, TRACKING PHONE CALLS OF 617-992-4648 ON JULY 5, 2017, ONE PAGE	346	21	3

18	GOOGLE MAP, TRACKING PHONE CALL OF 617-992-4648 ON JULY 5, 2017 (ONE PAGE)	348	5	3
19	ORIENTATION SLIDE TITLED "CELL SITE ANALYSIS (617) 992-4648, JUNE 1, 2017 TO JULY 7, 2017," ONE PAGE	422	28	4
20	TOWER FREQUENCY CHART, ONE PAGE	423	14	4
21	PAGE TITLED "NO. 1 TOWER CONNECTION WITH MAP AT 9211 OLD KEEN MILL ROAD, BURKE, VA," ONE PAGE	425	12	4
22	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 6626 GREEN ASH COURT, SPRINGFIELD, VA, ONE PAGE	427	20	4
23	CHART TITLED "NO. 1 TOWER CONNECTION USAGE - DATE & DAY OF WEEK," ONE PAGE	428	10	4
24	PAGE TITLED, "NO. 2 TOWER CONNECTION" WITH MAP AT 1003 "K" STREET NW, WASHINGTON, DC, ONE PAGE	428	28	4
25	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 1201 "I" STREET NW, WASHINGTON, DC, ONE PAGE	429	23	4
26	CHART TITLED "NO. 2 TOWER CONNECTION USAGE - DATE & DAY OF WEEK," ONE PAGE	429	27	4
27	PAGE TITLED "NO. 3 TOWER CONNECTION" WITH MAP AT 9501 OLD BURKE LAKE ROAD, BURKE, VA, ONE PAGE	430	15	4

28	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 9501 OLD BURKE LAKE ROAD, BURKE, VA, ONE PAGE	431	4	4
29	CHART TITLED "NO. 3 TOWER CONNECTION USAGE - DATE & DAY OF WEEK, ONE PAGE	431	13	4
30	PAGE TITLED "NO. 4 TOWER CONNECTION" WITH MAP AT 1125 N. PATRICK HENRY DR., ARLINGTON, VA, ONE PAGE	431	24	4
31	PAGE TITLED "POINT OF INTEREST" WITH MAP AT 1125 N. PATRICK HENRY DR., ARLINGTON, VA, ONE PAGE	432	15	4
32	CHART TITLED "NO. 4 TOWER CONNECTION USAGE - DATE AND DAY OF WEEK," ONE PAGE	432	22	4
33	CUSTODY OF RECORD DOCUMENT FROM T-MOBILE	469	5	4
34	COMPACT DISK CONTAINING CALL DETAIL RECORDS AND BILLING INFORMATION	469	10	4
35	ONE-PAGE PRINTOUT OF EMAIL DATED APRIL 28, 2008	288	3	3
36	ONE-PAGE PRINTOUT OF EMAIL DATED JULY 1, 2008	289	14	3
37	ONE-PAGE PRINTOUT OF EMAIL DATED SEPTEMBER 1, 2008	291	5	3
38	AUDIO RECORDING OF JAIL CALL BY BENJAMIN BATHEN WITH ALL STAR BAIL BOND REPRESENTATIVE HANK	382	17	4

38A	TRANSCRIPT FOR AUDIO RECORDING, EXHIBIT 38	382	18	4
39	ONE PAGE TITLED "CELL TOWER COVERAGE CELL PHONE 617-992-4648" WITH MAP	485	24	4

INDEX OF EXHIBITS RECEIVED

	PAGE	LINE	VOL
1	511	12	4
1A	511	12	4
2	511	12	4
2A	511	12	4
3	511	12	4
3A	511	12	4
4	511	12	4
4A	511	12	4
5	511	12	4
5A	511	12	4
6	511	12	4
6A	511	12	4
7	511	12	4

7A	511	12	4
8	511	12	4
9	511	14	4
10	511	14	4
11	511	14	4
12	511	14	4
13	511	14	4
14	511	14	4
15	511	14	4
16	511	14	4
17	511	14	4
18	511	14	4
19	511	14	4
20	511	14	4

21	511	14	4
22	511	14	4
23	511	14	4
24	511	14	4
25	511	14	4
26	511	14	4
27	511	14	4
28	511	14	4
29	511	14	4
30	511	14	4
31	511	14	4
32	511	14	4
33	511	14	4
34	511	14	4

38	511	19	4
39	513	4	4

(Pages 13 through 100 are utilized for block numbering purposes. The next page number is 101 in Volume 1. Nothing omitted.)

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	)	FROM SAN DIEGO COUNTY
)	
PLAINTIFF AND	)	HON. STEPHANIE SONTAG
RESPONDENT,)	
	)	COURT OF APPEAL
VS.	)	NO. D074538
)	
	)	CASE NO. SCS294342
BENJAMIN BATHEN,)	
)	
DEFENDANT AND	)	JURY TRIAL
APPELLANT.)	
)	

REPORTER'S CERTIFIED TRANSCRIPT
JUNE 18, 2018
VOLUME 5 OF 7
(PAGES 536 THROUGH 576)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST "A" STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	BENJAMIN BATHEN
AND APPELLANT:	IN PROPRIA PERSONA

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
OFFICIAL COURT REPORTER

1 a caller or that it can narrow the area where a caller could
2 be. We had our defense expert, Manfred Schenk, he helped put
3 a man on the moon with NASA. Okay. His -- his expertise is
4 spanning over 50 years. And he was clear. The science is
5 clear. You can't use towers to locate a phone. A tower range
6 can be up to 21 miles. Mr. Bathen could have been anywhere in
7 the Virginia and Washington, D.C. area in June and July of
8 last year.

9 Mr. Bathen's actual address with the Department of Motor
10 Vehicles is on Green Ash Court in Springfield, Virginia. He
11 only lived at this Arlington street address that was a point
12 of all these jail calls for four months when asked by a bail
13 bondsman in September of 2017, when asked by a bail bondsman
14 so he could get out of jail. He didn't plan on being in jail.
15 He had never been in jail before as the jail calls show. He
16 was calling around and doing everything he possibly could to
17 get out of jail.

18 The T-Mobile burner phone service began in September of
19 2014. So the address, if provided, would have been provided
20 three years prior in September of 2014. But he had only lived
21 at that Arlington street address for four months.

22 And what is this Arlington street address? Is it a home?
23 Is it an apartment complex? Is it a temporary or permanent
24 residence? Did they go and call there or ask the police to go
25 there and verify what this address is, what this home is? Is
26 it an Airbnb? We don't know.

27 And additionally, it's really irrelevant because in order
28 to get that phone, you could just give arbitrary information

1 or, as Mr. Schenk said, it could be just default information
2 that went in there.

3 Another assumption, ladies and gentlemen: Identity.
4 Dr. Jacobs treated Mr. Bathen for several years. They spoke
5 in person and they spoke over the phone. She did not
6 recognize his voice initially. He never threatened her in
7 their four- to five-year relationship. It was never negative
8 until the end and we'll get there.

9 She testified under oath that she only uses this number,
10 (619)525-7747. She, quote, said I have used that since she
11 opened her practice. She never gives out her cell or her home
12 number. She never talks about family.

13 When Mr. Bathen moved to the East Coast, Dr. Jacobs was
14 very clear. She said my license stops at the border. She
15 said that many times. She was very clear about that. Yet she
16 continued to have sessions with my client. She says -- and
17 she charged him for it. She was treating him without a
18 license.

19 She says it was continuity of care. For six months? I
20 showed her e-mails from April 2008 all the way through
21 September of 2008. She's charging 45, 55-minute conversations
22 for continuity of care and charging him? She confirmed those
23 appointments.

24 And Mr. Bathen was calling her cell phone. He wasn't
25 using the other number that she said that she always uses and
26 that she's always been using throughout her practice. He had
27 to call a special number, the cell phone. That was the last
28 number he called Dr. Jacobs on. He didn't make calls on the

1 619-525 number. He was calling her on her cell phone.

2 And then in 2009 after these five to six sessions that
3 he's being treated over the phone, paying for them, she says
4 it's over, I'm not really allowed. I'm not really allowed to
5 be doing this. Well, yeah, I mean, he's frustrated. That's a
6 little strange. He's been receiving treatment, counseling
7 sessions. He's been paying for it. And now she's saying that
8 I'm not really allowed to do that anymore? Has he been
9 receiving treatment from a therapist practicing without a
10 license? He wanted some answers. He was a little confused.

11 He didn't threaten her at that time. He didn't say "F
12 you, Dr. Jacobs" or, you know, there wasn't any yelling back
13 and forth. There was no threatening, "I want my money back"
14 or anything like that. It was just I want some clarification.
15 I am a little confused. What have we been doing? That was
16 his grievance. He wanted some clarification.

17 He wanted an apology. Have you been doing something that
18 you weren't allowed to? Have I been receiving treatment from
19 a therapist that perhaps wasn't supposed to be doing what
20 they're doing, practicing without their license?

21 And then there's nothing for 10 years. He doesn't
22 communicate with her. He doesn't come to California. He
23 doesn't have any family here. He has a mother in Northern
24 Cal, but there's no reason for him to come to Southern
25 California. He's living his life on the East Coast.

26 Then Mr. Bathen has been unexpectedly taken into custody.
27 He finds out that there's this case out here. He buys a
28 ticket as it says on the jail calls. He flies out here.

1 Voluntarily shows up. Hires an attorney. Goes to court and
2 is taken into custody.

3 And we spent a lot of time on these jail calls because
4 they're -- I don't know why. Perhaps they're grasping at
5 straws. Because he's calling every bail agent to get out,
6 like anybody would. If you've ever been in custody, you don't
7 want to be there. You want to get out. And he's called.
8 He's incarcerated. His liberty interests have been
9 restrained. He's sitting in a gross cell calling everybody he
10 can possibly think of to get out.

11 He's been, in his mind, wrongfully accused and wrongfully
12 taken into custody, yet he's calm. He's not yelling. He's
13 not screaming. This isn't a man that has severe anger
14 problems where he's screaming at everybody despite being told
15 different things from different bail agents and sitting in
16 custody when he was not planning on that. He's very calm.

17 He says I'm a computer nerd. This whole thing just scared
18 the pants off me. I mean I don't want any trouble. I have a
19 good job. I'll follow the rules. Even the bail agent is kind
20 of confused. I'm just trying to, you know, connect the dots
21 here. You haven't lived in San Diego since 2005.

22 The other assumption: Intent. These messages seem to
23 reference some type of recent conversation; right? It's like
24 they're picked up from where they left off. But there's no
25 link. It's attenuated.

26 The individual says you don't talk to me about dating.
27 When did they talk about dating? There was no testimony that
28 they talked about dating or any issues to that -- in that

1 regard.

2 "Don't ever fucking talk to me like that." When? Ten
3 years ago? Dr. Jacobs testified she has not spoken to my
4 client in 10 years. She's purged the file.

5 "Your friends think you need to get laid." When did she
6 speak with these friends? When was there any discussion about
7 that?

8 I live in Virginia, 3,000 miles away. I take care of my
9 responsibilities.

10 Immediacy is required. Ladies and gentlemen of the jury,
11 even if you think that my client made these calls. You say,
12 you know what, I don't understand the cell phone mumbo-jumbo,
13 I think it's him, let's go to the step further then.

14 You have to meet all -- the prosecution has to meet the
15 following six elements to find Mr. Bathen guilty beyond a
16 reasonable doubt. And that's because we're talking about
17 speech. We are talking about freedom of speech. The First
18 Amendment. The California legislature had to make this Penal
19 Code Section extremely narrow because we're penalizing speech.
20 So it has to meet all of these six elements. Not just a few,
21 not just one or two. Maybe all five but not the six. All six
22 elements have to be met beyond a reasonable doubt because
23 we're talking about speech. The freedom to express yourself.

24 And be mindful, angry outbursts are, in fact, protected by
25 the First Amendment. It has to be specific. And we'll go
26 through those elements.

27 That Mr. Bathen willfully threatened to cause -- or excuse
28 me, willfully threatened to unlawfully kill or unlawfully

1 cause great bodily injury to Dr. Jacobs;

2 And Mr. Bathen made the threat electronically to
3 Dr. Jacobs;

4 And Mr. Bathen intended that the statement be understood
5 as a threat and intended that it be communicated to
6 Dr. Jacobs;

7 And the threat was so clear, immediate, unconditional and
8 specific that it communicated to Dr. Jacobs a serious
9 intention and immediate prospect that the threat would be
10 carried out.

11 The California legislature said "immediate" twice in the
12 fourth element. It has to be narrow. Future threats are
13 protected. It has to be immediate.

14 And the threat actually caused Dr. Jacobs to be in
15 sustained fear for her own safety;

16 And Dr. Jacobs' fear was reasonable under the
17 circumstances.

18 Don't be confused by the People saying ability is not
19 required. Immediate ability is not required. Ability is
20 skill. Yes, if he -- whether or not he can or physically --
21 he physically can do this isn't an issue; right? The law
22 requires immediate prospect. Prospect is the likelihood. The
23 law requires the immediate likelihood of the threat being
24 carried out.

25 Be mindful, the California legislature spent time carving
26 out the six elements. And on that fourth element, immediate
27 is mentioned twice. The California legislature made it
28 important that instantaneous, that immediate prospect, that

1 immediate likelihood because future threats are protected
2 First Amendment speech.

3 And with a message, one of the messages says "still
4 planning," not I'm on my way. That's not an immediate
5 prospect. An immediate prospect from 3,000 miles away on the
6 other side of the country?

7 And we aren't in the wagon days, as the People were
8 saying. Of course it's not going to take two months for an
9 individual to fly from the East Coast to the West Coast. But
10 it's immediate. It's -- is that immediate? Getting --
11 booking an airplane, getting on the airplane, flying out,
12 renting a car, that's not what the California legislature was
13 thinking about when they carved out this code because we're
14 talking about freedom of speech, ladies and gentlemen, the
15 First Amendment.

16 We can all agree, again, Mr. Bathen is nowhere near
17 Chula Vista. He's nowhere near California. And Dr. Jacobs
18 confirmed, when she went to the hearing in September of last
19 year, she confirmed that Mr. Bathen lived on the East Coast.
20 There was a proof of service. He was served there. That's
21 where he lived. He had been living there since 2008. She
22 knew that. They had their telephonic sessions.

23 The law requires immediacy. It requires instant -- the
24 instant likelihood. This immediate prospect that is going to
25 come, that this threat is going to be carried out. And
26 "immediate," again, referenced two times, the threat was so
27 immediate and immediate prospect. Pounding it in your head.
28 You can only circumvent the First Amendment if these are met,

1 each of these six elements.

2 Now, let's talk about the last element, the sixth element.
3 Reasonable fear. Dr. Jacobs has not seen or spoken with
4 Mr. Bathen in 10 years. She said it was unexpected. She
5 didn't really recognize his voice. He lives on the other side
6 of the country. That's the last she knew. He has no reason
7 to come to Southern California. He never threatened her in
8 the past.

9 His only grievance was from 10 years ago when he said,
10 you're treating me for four to five, six sessions, you're
11 charging me, we are having 45-minute to 55-minute
12 conversations and then all of a sudden you stop, you say I'm
13 not allowed to do this. Well, I want an explanation. What's
14 going on here?

15 That wouldn't trigger -- that doesn't make any sense for
16 an individual 10 years later to call and say crazy stuff,
17 angry outbursts on a phone message. Words alone are not a
18 crime.

19 The People say, well, the calls themselves, they speak for
20 themselves; right? I'm not saying that these messages
21 aren't -- they are not nice. Obviously there's some rude
22 things that are being said, whether you believe it's from
23 Mr. Bathen or someone else. Yeah, they are not nice words.
24 They're angry outbursts. It's just slang, a bunch of words
25 out and just angry outbursts. That's allowed. Angry
26 outbursts are allowed. That's protected speech.

27 The calls can't speak for themselves. You've got to meet
28 all six of those elements.

1 The only way you can circumvent the First Amendment if the
2 words pose an imminent threat. I'm talking banging on the
3 door, I'm going to come in there, I'm going to kick your ass,
4 I'm going to beat you up, road rage situations where you see
5 each other, you're coming at the other individual. Heated
6 conversations, fights between husbands and wives, other type
7 of domestic violence situations. That's what a 422 is. It's
8 that imminent threat. "I'm coming to get you."

9 You cannot penalize angry outbursts from 3,000 miles away.
10 The law doesn't allow it.

11 We took time on Tuesday to listen to you and speak with
12 you, get to know you. We took a whole day to pick this jury.
13 We wanted to pick the jury that followed the law. That's why
14 we spent so much time talking with you, engaging with you,
15 having you open up and talk about personal things because we
16 want to make sure that you can understand the law. And you
17 took an oath that you would follow the law. And this is the
18 law.

19 Another jury instruction that Your Honor has read to you
20 on Friday and will be in the back in the jury deliberations
21 with you is that if you can draw two or more reasonable
22 conclusions from the evidence, one to innocence and one to
23 guilty, you must choose the one that points to innocence or a
24 not guilty verdict. You must. That is the law.

25 And you had the packet of the law. Of course Your Honor
26 read all of it through on Friday and we retired that day. You
27 will have a chance to reread that law. And I want to
28 encourage you to do so because you did take that oath, to

1 follow the law, to read everything, to look at all the
2 evidence.

3 And you can listen to the messages again. I'm sure
4 Ms. Somerville, she might have them played again this morning
5 because she gets to stand up after me and gets to speak with
6 you one more time because she has the burden. This is all I
7 get. And she might play them again because they're emotional.
8 They might get you a little upset. But you can't make your
9 decision based on your emotion. You have to make your
10 decision based on the law.

11 And again, I'm not saying that these messages aren't
12 upsetting, that -- they're not very nice, but again, is it so
13 specific, is it immediate prospect of harm? Is it
14 unconditional?

15 Proof beyond a doubt is proof that leaves you with an
16 abiding conviction that the charge is true. Speaking of
17 Tuesday in jury selection, some people had trouble with that.
18 Some people said that's weird. I can't really wrap my head
19 around that. I see someone kind of pulled over on the side of
20 the road and I think they must have done something wrong;
21 right? And I even said I sometimes do at that as well; right?
22 But that's not the law.

23 Just because my client is sitting next to me over here
24 away from you and he's been charged with a crime, it doesn't
25 make him guilty. When we all walked in here on Tuesday of
26 last week, he was innocent. Innocent because there was no
27 evidence. And we had some trouble with that; right. We had
28 to play the game. The Court had to ask you a couple times how

1 you would vote because it is unusual. But that's the law. He
2 walked in on Tuesday innocent.

3 Unless the proof -- unless the People have put forth
4 evidence proving that beyond a reasonable doubt that he's
5 guilty, you must find that he's innocent. That's the law.

6 And what is abiding conviction? An abiding conviction is
7 you believe that, it's in your gut. You're okay with that
8 decision now, today, Friday, 4th of July weekend, Christmas
9 holidays. It's an abiding conviction.

10 Words alone are not a crime. Look at all the evidence.
11 And again, even if you think, look, all this cell phone stuff,
12 all this testimony with experts and what have you, look, I
13 think he -- I think he made the call. Okay. I just -- I
14 think he made the call. I don't really know why. It doesn't
15 really make any sense. It's been 10 years. You know, I think
16 he made the call.

17 And then you have got to go through all those elements.
18 You've got to go through them. Was it specific? Or was it
19 just an angry outburst? Was it just ranting? Because that's
20 allowed. That's allowed.

21 Again, the People will say an immediate ability is not
22 required. But remember an ability is a skill. Yeah, whether
23 or not he physically can do what he is saying he can do, that
24 doesn't matter. It's the prospect, though. It's that
25 likelihood.

26 The California legislature, the Penal Code that is
27 penalizing speech, it must be specific. Because, if not, then
28 what's the First Amendment? It's being torn away.

1 When you were sworn in on Tuesday of last week, you all
2 stood and took an oath. And you took an oath to follow the
3 law that the Court instructed you on. And that's extremely
4 important. And in fact, you will find in your jury
5 instruction packet that there's actually jury instruction that
6 goes into what your duties are as a juror.

7 Now, you alone decide what happened; right? Our
8 arguments, what we say, what we think isn't evidence. It's up
9 to the 12 of you to decide exactly what happened in this case.
10 And you can only do that based on the evidence that was
11 presented in this trial. You can't let bias, sympathy,
12 prejudice, public opinion influence your decision in any way.
13 It must be based on the facts and the law.

14 This includes bias for or against the witnesses, the
15 attorneys, the defendant or the alleged victim. You must
16 follow the law as the Court explained it to you even if you
17 don't agree with it. You took an oath to follow the law in
18 this case.

19 Proof beyond a reasonable doubt, it's proof that leaves
20 you with an abiding conviction that the charge is true. The
21 evidence need not eliminate all possible doubt because
22 everything in life is open to some possible or imaginary
23 doubt. Proof beyond a reasonable doubt is not proof beyond a
24 shadow of a doubt. It's not proof beyond all imaginary or
25 possible doubt. It is proof beyond a reasonable doubt.

26 I want to just go over what direct and circumstantial
27 evidence are with you because you had both of those in this
28 case.

1 And facts may be proved by both direct and circumstantial
2 evidence or a combination. Direct evidence can prove a fact
3 by itself; and in the jury instruction that you heard, direct
4 evidence is a witness coming into the courtroom and saying, I
5 saw it raining outside. That's direct evidence that it's
6 raining outside.

7 Circumstantial evidence does not directly prove the fact
8 to be decided but is evidence of another fact or a group of
9 facts from which you may logically and reasonably conclude the
10 truth of the fact in question -- right? -- that it was
11 raining. If someone comes in and tells you, I saw a man enter
12 the courthouse, he was holding an umbrella, he had a raincoat
13 on and there was water all over it. That is circumstantial
14 evidence. It's facts from which you can draw a reasonable
15 conclusion that it was raining outside.

16 Now, both are acceptable types of evidence. I know it
17 gets a bad rap sometimes; right? We always hear on TV shows,
18 well, it's all circumstantial, it's all circumstantial. Well,
19 frankly, a lot of very powerful evidence is circumstantial
20 evidence. Cell phone records, DNA evidence, those type of
21 evidence are facts from which you can draw an inference that
22 someone was in a particular location. That is circumstantial
23 evidence. It's powerful evidence. Neither is necessarily
24 more reliable than the other.

25 Circumstantial evidence. Sufficiency of evidence. I want
26 to touch on this because what was left out by the defense was
27 the second part to this instruction. The instruction says if
28 you can draw two or more reasonable conclusions from the

1 circumstantial evidence and one of those reasonable -- the law
2 loves that word, reasonable. We talk about reasonable things
3 when we're in court. One of those reasonable conclusions
4 points to innocence and another to guilt, you must accept the
5 one that points to innocence. Remember, we're talking about
6 reasonable conclusions.

7 The instruction then goes on, and this was left out:
8 However, when considering circumstantial evidence, you must
9 accept only reasonable conclusions and reject any that are
10 unreasonable.

11 And again, the testimony of only one witness can prove any
12 fact. Before you conclude that the testimony of one witness
13 proves a fact, carefully review all of the evidence.

14 I want to go over the instruction for this crime again for
15 you so that you're clear on what is actually required.

16 Again, we have the three counts, the June 4th, the
17 July 3rd, and the July 5th.

18 June 4th.

19 *(Audio recording played; not reported.)*

20 MS. SOMERVILLE: That's Count 1.

21 Count 2 is the July 3rd call.

22 *(Audio recording played; not reported.)*

23 MS. SOMERVILLE: And then we have the July 5th call.

24 *(Audio recording played; not reported.)*

25 MS. SOMERVILLE: So while we talk about what exactly the
26 jury instruction, the law requires for this crime to be proved,
27 I'm not going to talk about who did this. I'm going to talk
28 about why this is a crime. Why those calls are absolutely

1 based on the evidence in this case, not protected by the First
2 Amendment. They are a crime. The law takes a stand, okay.

3 This is not someone just spouting off, oh, I can't stand
4 that person I work with. I just wish, you know, what, maybe
5 they get in a car accident, something. Okay. No.

6 If there were ever threats that were a crime, they are the
7 threats that were made in this case.

8 So let's talk about why this is a crime. Willfully
9 threatened to unlawfully kill or unlawfully cause great bodily
10 injury to Dr. Carolyn Jacobs.

11 On the 6/4 call, there are four specific clear threats
12 about what he would do to her. On the July 3rd call, there
13 were five. And on the July 5th call, there were six. These
14 threats were threats to bash her skull in, to rape her, to
15 torture her. There were threats to murder her, to murder her
16 daughter. This was not just someone spouting off. These are
17 crimes. These words are crimes.

18 The second element, that it was made by electronic
19 communication. It was made over the phone.

20 The third element is that the caller intended his
21 statements to be understood as a threat and he intended that
22 it be communicated to Dr. Carolyn Jacobs.

23 Now, clearly they were intended for Dr. Jacobs; right?
24 They were left on her work voice message. They addressed her
25 specifically at the beginning of each call. "Hey, Dr. Jacobs.
26 Hey, Dr. J." The caller intended for them to be communicated
27 to her.

28 Now, when you talk about intending his statements to be

1 understood as a threat, obviously we can't just open up the
2 top of someone's head, look inside and go, oh, okay, I get --
3 I get what you meant; right? We look at the circumstances and
4 we look at the person's words to figure out exactly what their
5 intent was. We use circumstantial evidence to figure out
6 intent.

7 And in this case, when you look at those words, they're
8 crystal clear. The caller intended them to be taken as a
9 threat and they were deadly serious. Look at the words and
10 look at the circumstances.

11 The fourth element: That the threat was so clear,
12 immediate, unconditional and specific that it communicated to
13 Dr. Jacobs a serious intention and immediate prospect that the
14 threat would be carried out. I'm going to do this, I'm going
15 to do that. I'm still planning on coming out there. He
16 wasn't mincing words. Okay. He wasn't saying, well, if this
17 happens, if X, Y or Z happens, then I'm going to do this.

18 These were direct, specific, immediate threats. They
19 communicated to her a serious intention that this would be
20 immediately carried out.

21 Look at all the steps she took. Look at everything she
22 did to protect herself. I mean frankly, she's a prisoner of
23 his words. She got physically ill from this. She was in a
24 state of anxiety. She had to lock herself inside of her home
25 to protect herself. I mean she's a grown woman. She's a
26 doctor. She has to have her husband come and meet her at work
27 because of these calls. She has to tell her colleagues so
28 that they can protect themselves and other patients.

1 There was a serious intention and immediate prospect that
2 the threat would be carried out. And she went as far to come
3 into a court to ask a judge to give her a restraining order to
4 protect herself from this man.

5 Consider the words and the circumstances surrounding the
6 threats. The threat actually caused her to be in sustained
7 fear for her own safety and the safety of her immediate
8 family. Of course it did. And we just went over everything
9 that she did. She's still afraid. She told you that. And
10 you saw how she reacted when those calls were played for her
11 in this courtroom.

12 This wasn't mere spouting off. These were sadistic,
13 horrifying, vile threats intended to terrorize her. And her
14 fear was reasonable under the circumstances.

15 I don't know how her fear could be unreasonable given the
16 threats that were made. On what planet would her fear be
17 unreasonable? She's not some hysterical woman who is blowing
18 something way out of proportion. Her fear was proportionate
19 to the extreme violent threats that were left for her.

20 This is directly out of the jury instructions that you
21 will receive. Someone who intends that a statement be
22 understood as a threat does not have to actually intend to
23 carry out the threat. And an immediate ability to carry out
24 the threat is not required.

25 The law doesn't say you have to be on someone's doorstep,
26 they have to know where you are in order to be convicted of
27 this crime. Because someone could just drive to L.A., do all
28 of this and then say, well, you know what, I wasn't on your

1 doorstep, sorry. It's not a crime. The law isn't a fool.

2 The immediate ability to carry out the threat is not
3 required. Regardless of what Mr. Bathen thought in his jail
4 calls was the law. He's mistaken. The law is the law.
5 Doesn't matter if he was in Virginia or Washington, D.C.,
6 which we know for a fact he was, or if he was in National City
7 making these calls. It does not matter. Do not be misled by
8 that statement that he had to have been on her doorstep or,
9 you know, some type of road rage incident. That is not the
10 law.

11 Now I want to talk to you about why we know that
12 Mr. Bathen is the one who left all of these calls. Why we
13 know that the evidence has shown beyond a reasonable doubt
14 that it's him and him alone.

15 We had Dr. Carolyn Jacobs' testimony; right? She was a
16 registered nurse. She's been a licensed psychologist for over
17 20 years. And she's been in private practice in Chula Vista
18 in the same office since 1995.

19 Not only her previous career but her current profession is
20 one to help people; right? People go to therapy because they
21 want to deal with issues in their lives. They want to learn
22 how to lead a better life; right? They want to work through
23 things.

24 That's why Mr. Bathen came to her, but clearly it didn't
25 work out well. We see the end result of that here in court
26 today.

27 Now, I have this chart up here and I want to go through it
28 row by row. So Dr. Jacobs received these three calls; right?

1 She told us about that. We have the three recorded phone
2 calls that went to her voice mail. And we know that the
3 number they came from is the 617-4648 directly to her work
4 voice mail.

5 She told you that, yes, right, when she first got this
6 call, she didn't immediately click. I mean it's not in her
7 life anymore. It hasn't been, you know, a constant thing.
8 She's not treating him anymore. But once the name, she knew.
9 It was like a light bulb went off. She recognized his voice.
10 She recognized the tone and the pitch. She's heard him upset
11 and angry before; right? They have five in-person sessions
12 per year, five to six phone sessions per year and five
13 continuity of care phone sessions, and these are, you know,
14 about an hour long.

15 This is not some, you know, person who came in, had a
16 consultation and then she never saw again. This is someone
17 whose voice she is very familiar with. Just because, you
18 know, obviously she's in extreme shock when she gets this
19 phone call; right? I mean it is out of the blue. She didn't
20 just immediately go, Mr. Bathen; that doesn't mean it wasn't
21 Mr. Bathen. Right?

22 She treated him from 2004 to 2009. You know, I want to
23 actually mention something too. This whole thing about
24 continuity of care, you know, practicing outside of
25 California -- okay -- the defense is trying to make her out to
26 be some unethical, you know, terrible therapist. She
27 explained she felt like she had an ethical obligation to
28 continue care with Mr. Bathen while she was making referrals

1 for him to get treatment on the East Coast. She didn't just
2 drop him.

3 Clearly, he had some substantial issues that needed
4 continuing treatment; right? This wasn't just someone who
5 said, well, you know, I'm moving, whatever. Once I get
6 situated, I'll figure it out. I'll go online and I'll get
7 another therapist. That was obviously not what was going on
8 in this case.

9 She treated Mr. Bathen; right? And then we have from 2004
10 to 2005, we even have his own jail calls confirming this, this
11 was my former therapist, we had phone consultation since 2005
12 and those phone consultations continued up to 2009.
13 Mr. Bathen in his own words is confirming just how well she
14 would recognize his voice given the fact that they've had
15 substantial amounts of time on the phone together.

16 She said Mr. Bathen moved to Boston. That's where he went
17 when he relocated. That 617 phone number, that is a Boston
18 area code phone number.

19 I've been on the East Coast since 2008. That's what he
20 tells the bail agent. That is consistent with what Dr. Jacobs
21 told you when he relocated. And then, again, he mentions, you
22 know, to the bail agent something about "while I was living in
23 Boston."

24 All of this evidence establishes that Mr. Bathen is the
25 one who made these calls.

26 Dr. Jacobs was granted the restraining order; right? And
27 it prevents Mr. Bathen, not some other random person, from
28 contacting her until 2012 [sic]. She came to the courthouse,

1 she explained to the judge what was going on, and the order
2 was granted.

3 She identified Mr. Bathen in court as the person who made
4 these three calls. She had no other issues with patients.
5 She's had no other threats. And there are no other suspects,
6 period.

7 Now, Mr. Bathen's bizarre demand. She explained to us how
8 this ultimately ended; right? He wanted a face-to-face
9 sit-down where basically she sat there, didn't say a word. He
10 could unleash on her all of his whatever grievances, whatever
11 wrongs he felt. That is bizarre. I mean that's not normal.
12 That's not normal request of someone regardless of, you know,
13 therapist-patient relationship.

14 And she wasn't going to allow that. She wasn't going to
15 sit there and have obviously this disgruntled person going off
16 on her while she sat mute.

17 Think of how that upset him. That was it. That was it.
18 She was -- she was not going to have these demands. She
19 contacted her professional liability attorney to make sure to
20 get the termination process done correctly. He refused to
21 give her his address so she couldn't even send him a formal
22 letter.

23 And then she couldn't even figure out: Apologize for
24 what? She could never get clarification from him on that
25 point.

26 Mr. Bathen had unresolved issues with Dr. Jacobs. And
27 that's when we talk about motive. So motive is a powerful
28 thing; right? Sometimes cases occur and you just are, like,

1 why? Right? But a lot of the time, and especially in cases
2 like this, there's a reason; right? There's maybe child
3 custody issues. Maybe there's some, you know, scorned lover.
4 Maybe there's revenge. Maybe there's financial reasons or
5 just pure and simple hate.

6 And clearly, this had been building in Mr. Bathen to where
7 it came out on these three calls on June 4th, July 3rd and
8 July 5th.

9 The law says the People are not required to prove that the
10 defendant had a motive to commit any of the crimes. In
11 reaching your verdict, you may, however, consider whether he
12 had a motive. Having a motive may be a factor tending to show
13 that he's guilty. Not having a motive may be a factor tending
14 to show that he's not guilty.

15 The motive in this case, right, I mean, to a normal
16 person, it seems bizarre; but when you really break down what
17 it was, it was just human emotion. It was human hate. He
18 didn't get his way when this relationship ended and for
19 whatever reason this had been fermenting and building inside
20 of him. And ultimately, it culminated in these vicious,
21 sadistic, terrifying calls.

22 Let's talk about the voice messages and jail calls and how
23 these establish that Mr. Bathen is the person who made the
24 calls. The introduction to all three of the calls, "Hey,
25 Dr. Jacobs, hey, Dr. Jacobs." He also says "Hey, Dr. J.;
26 right?

27 In his jail calls, which you'll have, listen to his voice.
28 Seriously. Of course he's not screaming and threatening to

1 rape the bail agent. I mean he wants them to help him so he
2 can get out of jail; right? Hey, what's going on, man? Hey,
3 is this All-Power [sic]? Hey, this is Ben Bathen. I called
4 about 30 minutes ago.

5 When you listen to those, he's not, you know, gone off
6 ballistic at the beginning of these voice messages that he
7 left Dr. Jacobs either. His tone, his inflection, it's the
8 same. That's powerful evidence establishing that Mr. Bathen
9 made these calls. "Hey, Dr. J., Hey, Dr. J., I just want to
10 let you know that I'm still planning on coming out there."
11 He's saying that because he's on the East Coast; right? I'm
12 going to plan to come out to the West Coast, plan to go to the
13 East Coast. That's how people talk, right, when they're
14 referring to going from one coast to the other or from going,
15 you know, a fairly long distance to another. I'm planning on
16 coming out there. That's additional evidence that Mr. Bathen
17 made these calls.

18 Let's look at the phone records and the jail calls; right?
19 The phone number, the 716. In the phone records, right, it
20 shows, and you can see I've taken a snippet out of the billing
21 reference information so that you have that. And you're going
22 to have all the exhibits with you back in the jury room so you
23 can look at them closely; right?

24 Boston, Massachusetts area code and he also says, right,
25 confirms that he was living in Boston. You see the number is
26 listed in the records. You see that the market which
27 identifies the area code is Boston, Massachusetts, exactly
28 where he went when he left California.

1 The subscriber address, 1132 North Kentucky Street,
2 Virginia, 22205. Mr. Bathen twice in these jail calls says
3 that is where he lives. His own words. And in there, in this
4 prepaid burner phone, that's the address.

5 Now, the testimony was not that the information is set in
6 stone and you put it in when you buy the phone; right? The
7 testimony was basically you go in and you get more minutes to
8 put on these phones, okay. It's not like a normal, right,
9 plan when you go into T-Mobile or Sprint and give all your
10 information initially because you are setting up a contract.
11 This is an ongoing thing. So to say that this was put in
12 there in 2014, that just is not what the testimony was at all.

13 The expiration date on this phone was 9/4/17. And in the
14 jail calls, those were made from 9/16 to 9/17. And in those
15 calls, Mr. Bathen is saying to the bail agent, I don't know,
16 it's a new cell number; right? The agent is trying to get his
17 cell phone number from him to contact him. And he says, I
18 don't have my cell phone number. That's because on
19 September 4th of 2017 that number was terminated.

20 Date of birth; right? Okay. These records have
21 Mr. Bathen's date of birth. He tells the bail agent in those
22 calls that his birthdate is November 30th, 1977. And again,
23 right, he tells the bail agent, I've only been over there
24 probably four months. This is about that Kentucky Street
25 address. But when you look at the records as well, it's
26 circled down at the bottom, it says, "Last refilled, 8/25/17."

27 He could have given his address then. He could have given
28 his address at any point. The fact of the matter is is all

1 this billing information is all evidence of Mr. Bathen and
2 Mr. Bathen alone.

3 The area where he lived, his home address, his birthdate,
4 the fact that the call was terminated, that is all evidence
5 that Mr. Bathen made these phone calls.

6 And then you look at the calls themselves. And you will
7 have them with you. They're on CD. They're in an Excel
8 spreadsheet format. But you can scroll through and see
9 exactly where these calls are listed.

10 There was a successful call on June 4th from his number to
11 Dr. Jacobs. There were two successful calls, right, obviously
12 only one voice message on July 3rd from Mr. Bathen's phone to
13 Dr. Jacobs' voice mail.

14 And again, the records show that on July 5th, there was a
15 successfully completed call from his number to her voice mail.
16 That is proof that Mr. Bathen is the person who made these
17 calls.

18 The cell tower mapping. Right? Mr. Holmes told you that
19 he did tower frequency charts. That's to establish the
20 reliability of these calls when you link it up with locations
21 where the user, where you would expect them to be; right? The
22 No. 1 tower that was used with Mr. Bathen's records was his
23 dad's address, right, his stepfather's address.

24 And he said this, in the jail calls, my dad lives in
25 Virginia. It's Vince Crawley, that's my stepfather.

26 The second point of interest; right? It's the
27 International Food Policy Research Institute on "I" Street in
28 Washington, D.C. I am a Web programmer for a nonprofit in

1 Washington, D.C., International Food Policy Research
2 Institute. He says that a couple times in these calls.

3 He gives this location where he works. The tower
4 frequency charts show that he was hitting on a tower that
5 covers that vicinity. And that it was Monday through Friday,
6 right, from around 6:30 or 6:00 in the morning until 3:30 in
7 the afternoon. That's powerful evidence that he made these
8 calls. His phone records are hitting consistently in an area
9 with consistent evidence that he was at work.

10 And then we have the calls that were mapped on July 3rd;
11 right? And he goes on to say when he's talking to the bail
12 agent, and we'll talk about this statement, you know, and as
13 you know, I was sitting in an office cubicle in Washington,
14 D.C. That is where the tower that was used to make the calls
15 on July 3rd was activated. From where his place of work is.
16 It's additional evidence that Mr. Bathen and Mr. Bathen alone
17 made these calls.

18 And then we have the July 5th call; right? Again, he
19 talks about, you know, I was sitting in an office cubicle in
20 Washington, D.C. The same tower is utilized for this specific
21 call that was made to Dr. Jacobs on July 5th.

22 And the third ranking tower, right, where Mr. Bathen's
23 calls were connecting the most, Eufemia Crawley. And
24 Mr. Bathen says that that's his mother's name, right, in the
25 jail calls.

26 Now, he also says my mother lives in Northern California,
27 but Mr. Holmes talked about locating a Virginia driver's
28 license with this address.

1 And Mr. Bathen also says in these calls that he was born
2 in Virginia; right?

3 So there's a residence in this area where his phone is
4 connecting to a tower consistently that is associated with his
5 mother.

6 And the last tower that I'm going to talk about from the
7 frequency chart is the one where Mr. Bathen's address is. He
8 is consistently connecting to a tower near his address, the
9 address he repeatedly gives to the bail agents as where he
10 lives. That is powerful evidence that these phone calls based
11 off these phone records were made by Mr. Bathen and no one
12 else.

13 So defense witness Manfred Schenk, he was paid \$7,500 to
14 review call detail records and prepare one map. That's a lot
15 of money. He was paid \$350 an hour for his testimony. That's
16 a lot of money.

17 And what did he tell us? I mean ultimately, what did he
18 say? Yeah, all the towers were connecting in the area of
19 Washington, D.C. and Virginia, which is exactly what we told
20 you.

21 And he said that the call detail records had a purpose
22 20 years ago. Okay. Cell phone companies are big business;
23 right? I mean it's a huge industry. Everyone has a cell
24 phone. And, right, their bottom line is to make money.
25 They're not going to waste resources, waste money on
26 collecting all this data, keeping these records for no reason.

27 That is just not inaccurate statement, period. That they
28 had a purpose 20 years ago. Because a company that's into

1 making money is not going to be wasting resources on something
2 that's basically like a dinosaur; right? It's a relic from
3 the past. That's not accurate. They keep this information
4 for billing purposes. They're not in the business of losing
5 money.

6 So some of Mr. Bathen's statements, I think -- you know,
7 I'm pretty confident -- he's pretty confident that "Once it's
8 settled, I'm probably looking at, you know, a misdemeanor.
9 So, I mean, it doesn't make sense to turn around and flee,
10 leave your career that pays six-figure salary for basically,
11 you know, a misdemeanor and a fine.

12 "You know, it would be easier to just pay whatever it is,
13 the thousand bucks. I mean, the only thing is, like, they
14 might put me on probation or something like that." He's
15 pretty sure there's no chance of jail time.

16 Those are not statements that he did not commit these
17 crimes. Someone who didn't commit these crimes doesn't talk
18 like that. It's additional evidence that Mr. Bathen committed
19 these crimes.

20 Now, Mr. Bathen, right, himself, okay, he's a smart guy.
21 I mean, he's clever; right? I mean obviously he has a good
22 job. He repeatedly mentions about how he makes, you know, six
23 figures and he's helping, you know, whatever, write software
24 that cures poverty and world hunger.

25 Okay. I mean I think we all know, right, we're all
26 adults, that just because you have a good job doesn't mean
27 that you can't commit a crime. It doesn't mean that you're
28 any better than the average person, right, on the street.

1 Doesn't mean that you can't be criminally responsible for your
2 actions just because you have a good job, just because you've
3 never been in jail before. There's a first time for
4 everything.

5 And then Mr. Bathen says, "And she said that it's me, you
6 know. But I would point out that the law says for a threats
7 case, the alleged victim has to believe that there's a
8 credible, realistic, reasonable belief that the threat could
9 be immediately carried out; right? And you know, I was
10 sitting in an office cubicle in Washington, D.C. at a
11 nonprofit writing software to help reduce poverty and hunger
12 worldwide. So, you know, I mean, I could not carry out
13 threats against anyone."

14 That is not required. He's smart, but he doesn't know the
15 law. And he doesn't get to hide behind a phone and leave
16 sadistic, horrifying messages that terrorized Dr. Jacobs.

17 Ladies and gentlemen, you have heard all the evidence in
18 this case. The evidence in this case proves to you beyond a
19 reasonable doubt that:

20 One, a crime was committed;

21 And that, two, Mr. Bathen is the person who committed this
22 crime.

23 Because the evidence has shown beyond a reasonable doubt
24 that he is guilty, the only reasonable verdict is guilty on
25 all charges.

26 Thank you.

27 THE COURT: Ladies and gentlemen, when you go to the jury
28 room, the first thing that you should do is choose a

1 foreperson. The foreperson should see to it that your
2 discussions are carried on in an organized way and that
3 everyone has a fair chance to be heard.

4 It is your duty to talk with one another and to deliberate
5 in the jury room. You should try to agree on a verdict if you
6 can. Each of you must decide the case for yourself but only
7 after you've discussed the evidence with the other jurors.

8 Do not hesitate to change your mind if you become
9 convinced that you are wrong, but do not change your minds
10 just because other jurors disagree with you.

11 Keep an open mind and openly exchange your thoughts and
12 ideas about this case. Stating your opinions too strongly at
13 the beginning or immediately announcing how you plan to vote
14 may interfere with an open discussion.

15 Please treat one another courteously. Your role is to be
16 an impartial judge of the facts, not to act as an advocate for
17 one side or the other.

18 As I told you at the beginning of the trial, do not talk
19 about the case or about any of the people or any subject
20 involved in this with anyone, including, but not limited to,
21 your spouse or other family or friends, spiritual leaders or
22 advisers or therapists.

23 You must discuss the case only in the jury room and only
24 when all jurors are present. Do not discuss your
25 deliberations with anyone. Do not communicate using a
26 computer, smartphone, cellular device, tablet or iPad during
27 your deliberations.

28 It is very important that you not use the Internet, a

1 dictionary or social media in any way in connection with this
2 case during your deliberations.

3 During the trial, several items were received into
4 evidence as exhibits. You may examine whatever exhibits you
5 think will help you in your deliberations. These exhibits
6 will be sent into the jury room with you when you begin to
7 deliberate.

8 If you need to communicate with me while you're
9 deliberating, send a note through the bailiff signed by the
10 foreperson or by one or more members of the jury.

11 And when I say "sign," ladies and gentlemen, I mean just
12 your juror number.

13 To have a complete record of this trial, it's important
14 that you not communicate with me except by a written note. If
15 you have questions, I will talk with the attorneys before I
16 answer so it may take some time. You should continue your
17 deliberations while you wait for my answer. I will answer any
18 questions in writing or orally here in open court.

19 Do not reveal to me or anyone else how the vote stands on
20 the question of guilt unless I ask you to do so.

21 Your verdict on each count must be unanimous. And this
22 means that to return a verdict, all of you must agree to it.
23 Do not reach a decision by the flip of a coin or by any
24 similar act.

25 Your verdict on each counts must be unanimous. This means
26 that to return a verdict, all of you must agree to it. Do not
27 reach a decision by the flip of a coin or by any similar act.

28 It is not my role to tell you what your verdict should be.

1 Do not take anything I said or did during the trial as an
2 indication of what I think about the facts, the witnesses or
3 what your verdict should be. You must reach your verdict
4 without any consideration of punishment.

5 You will be given verdict forms. As soon as all jurors
6 have agreed on a verdict, the foreperson must date and sign
7 the appropriate verdict form and notify the bailiff.

8 If you are able to reach a unanimous decision on only one
9 or only some of the charges, fill in those verdict forms only
10 and notify the bailiff. Return any unsigned verdict form.

11 Your deliberations, ladies and gentlemen, will follow the
12 Court's schedule we've pretty much stuck to, 9:00 to 12:00,
13 1:30 to 4:30, Monday through Friday.

14 I have told you that in the event of a serious
15 disagreement about testimony in this matter, you may have the
16 court reporter's record read to you. It takes her a while to
17 get the transcript in readable form so you should continue to
18 deliberate while the transcript is being prepared.

19 Also, just so you know, I have instructed her that she has
20 to read the entire testimony of a witness. So if you're
21 saying, I heard a witness say this particular thing and you
22 tell her just read that, I've asked her to read the entire
23 testimony because things get addressed again on redirect and
24 cross-examination; and so if you get the first time the
25 subject is mentioned, you might not get how the testimony
26 actually came out.

27 And so just a word of caution, because you cannot
28 deliberate while the record is being read to you.

1 So what I'm going to do now is swear in the -- have the
2 bailiff sworn in, please.

3 THE CLERK: Please raise your right hand.

4 Do you solemnly state that you will keep this jury
5 together in some quiet and convenient place; that you will
6 permit no person to speak with them or communicate with them
7 nor will you speak with them yourself about this cause unless
8 by order of the Court or to ask if they have agreed upon a
9 verdict, and you will return them into court when they have so
10 agreed or when so ordered?

11 THE BAILIFF: I do.

12 THE COURT: Thank you.

13 All right. I'm going to have the 12 regular jurors -- and
14 I -- whenever you communicate with me, even if you are signing
15 the verdict forms, use your juror number. Again, that just
16 keeps your personal information confidential.

17 I have the 12 regular jurors. If you will take all of
18 your personal belongs and follow the deputy, and then I'll
19 talk to the alternate. You may take your notebooks.

20 *(The jury retired to commence deliberations.)*

21 THE COURT: And to our alternates juror, the jury will soon
22 begin deliberating, but you are still an alternate juror and
23 are bound by my earlier instructions about your conducts.

24 Do not talk about the case or about any of the people or
25 any subject involved with it with anyone, not even your family
26 or friends.

27 Do not have any contact with the deliberating jurors.

28 Do not decide how you would vote if you were deliberating.

1 Do not form or express an opinion about the issues in this
2 case unless you are substituted for one of the deliberating
3 jurors.

4 You may go wherever you'd like as long as you are within a
5 reasonable distance of the courthouse so that if we need you
6 to substitute in for a juror, we can reach you.

7 If you would like to be here to have the jury -- the
8 verdict read, then you need to be a little closer so you can
9 within 20 minutes or so, I would say.

10 Do we have your phone number where you can be reached?

11 ALTERNATE JUROR: Yes.

12 THE COURT: Okay. And you must answer that phone number as
13 an alternate juror.

14 And we will -- do you know whether you want to hear the
15 verdict being read or whether you'd like to just go about your
16 business?

17 ALTERNATE JUROR: I'd like to hear.

18 THE COURT: Okay. So we will call you as -- the -- well,
19 within 20 minutes -- we will call you to come in, have it be
20 read. If you decide that you no longer want to wait around for
21 it, then we will call you to let you know that there has been a
22 verdict so you are no longer an alternate juror.

23 So this -- the restrictions remain just so long as you are
24 an alternate juror in this matter.

25 ALTERNATE JUROR: I understand.

26 THE COURT: All right. Thank you.

27 And if you would leave your notebook. And you are
28 excused.

1 ALTERNATE JUROR: Thank you.

2 THE COURT: We will be in touch.

3 *(The alternate juror exits the courtroom.)*

4 THE COURT: Okay. And, Ms. Somerville, we have your cell
5 phone number?

6 MS. SOMERVILLE: If not, I can provide it again.

7 THE COURT: And Ms. Freeze?

8 MS. FREEZE: It's on my card, but I can confirm with
9 Robert.

10 THE COURT: Okay. If you would confirm.

11 And Ms. Freeze, you are going to be within a reasonable
12 distance?

13 MS. FREEZE: Yes, Your Honor. I'm not sure if Your Honor
14 remembers and it's been a little bit of scrambling on my end
15 because I forgot to remind the Court of my matters this morning
16 in El Cajon. So some of them have trailed till this afternoon.

17 I know Friday we were tired and by the time we got out of
18 here it was 5:00 and I was driving and I realized that.

19 So -- and I also have a sentencing in El Cajon this
20 afternoon that I can probably still try and get coverage for.
21 But if I can't, I would be in El Cajon and I would just leave
22 quickly. I think it's about 25 minutes from here.

23 THE COURT: All right.

24 MS. FREEZE: I've been blessed. My friends have come to my
25 aid this last week and I've been able to get coverage. So
26 hopefully that will continue till this afternoon. But if I
27 can't, that's where I'll be. It's a quick misdemeanor
28 sentencing so it should be very quick.

1 THE COURT: Okay. All right.

2 And Mr. Bathen is going to be around the courthouse?

3 MS. FREEZE: Yes.

4 THE COURT: Okay. Excellent. We will be in touch.

5 MS. FREEZE: Thank you, Your Honor.

6 MS. SOMERVILLE: All right. Thank you, everyone.

7 *(End of proceedings this date.)*

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 San Diego, California)
2 County of San Diego) : SS.

3

4

5 I, Yvonne Medina Luna, Official Reporter for the Superior
6 Court of the State of California, in and for the County of San
7 Diego, do hereby certify:

8

9 That as such reporter, I reported in machine shorthand the
10 proceedings held in the foregoing case;

11

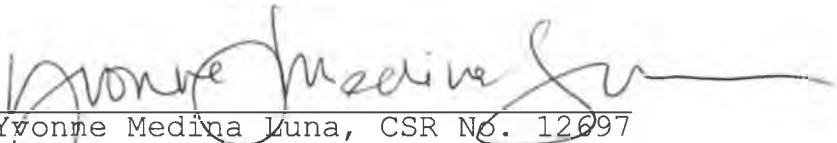
12 That my notes were transcribed into typewriting under my
13 direction and the proceedings held on June 18, 2018, contained
14 within Pages 536 through 576, are a true and correct
15 transcription.

16

17 Dated this 1st day of October 2018.

18

19


Yvonne Medina Luna, CSR No. 12697
Official Court Reporter

20

21

22

23

24

25

26

27

28

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,	)	FROM SAN DIEGO COUNTY
)	
PLAINTIFF AND	)	HON. STEPHANIE SONTAG
RESPONDENT,)	
	)	COURT OF APPEAL
VS.	)	NO. D074538
)	
	)	CASE NO. SCS294342
BENJAMIN BATHEN,)	
)	
DEFENDANT AND)	
APPELLANT.	)	VERDICT
_____)	

REPORTER'S CERTIFIED TRANSCRIPT
JUNE 19, 2018
VOLUME 6 OF 7
(PAGES 577 THROUGH 592)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST "A" STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	BENJAMIN BATHEN
AND APPELLANT:	IN PROPRIA PERSONA

REPORTED BY: YVONNE MEDINA LUNA, CSR 12697
OFFICIAL COURT REPORTER

1 Chula Vista, California; Tuesday, June 19, 2018

2 -- 000 --

3 *(The following proceedings were had between the Court*
4 *and counsel out of the presence and hearing of the*
5 *jury.)*

6 THE COURT: Good morning. I trust you have all seen the
7 jury note.

8 MS. SOMERVILLE: Yes.

9 MS. FREEZE: Yes.

10 THE COURT: We're in the presence -- we're on the record
11 outside the presence of the jury.

12 My proposed response is -- and then I'll listen to
13 argument:

14 "Please see CALCRIM 200. You must decide what the facts
15 are. It is up to all of you and you alone to decide what
16 happened based only on the evidence that has been presented to
17 you in this trial.

18 "CALCRIM 222 provides evidence is the sworn testimony of
19 witnesses, the exhibits admitted into evidence, and anything
20 else I told you to consider as evidence.

21 "You must disregard anything you saw or heard when the
22 Court was not in session even if it was done or said by one of
23 the parties or witnesses.

24 "Here a witness's body language while sitting in the
25 audience is not evidence of that witness's credibility.
26 Further, you cannot consider issues where evidence was not
27 presented. You must limit your deliberations to the issues
28 and evidence presented in this trial."

1 MS. SOMERVILLE: That's fine with me.

2 MS. FREEZE: That seems fine with me, Your Honor.

3 THE COURT: Okay. All right. So stay close. Not that I'm
4 predicting, because I have lost the ability to predict with the
5 jury, but they seem to be communicating; and interestingly, it
6 looks like it's a different juror.

7 MS. FREEZE: I noticed that.

8 THE COURT: So, Robert, I'll send this to you. And then
9 we'll just wait. All right. Thank you.

10 MS. FREEZE: Thank you, Your Honor.

11 *(Recess taken.)*

12 *(The following proceedings were had between the Court*
13 *and counsel out of the presence and hearing of the*
14 *jury.)*

15 THE COURT: Good afternoon. We're on the record outside of
16 the presence of the jury.

17 I understand that the jury has reached verdicts in this
18 matter. Anything before I bring the jury out?

19 MS. FREEZE: No, Your Honor.

20 MS. SOMERVILLE: No, Your Honor.

21 *(The following proceedings were had in open court in*
22 *the presence and hearing of the jury.)*

23 THE COURT: All right. We now have our 12 jurors present
24 and we have our alternate juror as well.

25 Who is the foreperson?

26 Juror No. 1, I understand the jury has reached verdicts;
27 is that correct?

28 JUROR NUMBER 1: That's correct.

1 THE COURT: Would you hand the forms to the bailiff,
2 please.

3 (Juror Number 1 complies.)

4 THE COURT: Will you read the verdicts.

5 THE CLERK: Yes, Your Honor.

6 In the Superior Court of the State of California, in and
7 for the County of San Diego.

8 The People of the State of California, Plaintiff, versus
9 Benjamin Lee Bathen, Defendant. Case number CS294342.

10 Verdict: We, the jury in the above-entitled cause, find
11 the defendant, Benjamin Lee Bathen, guilty of the crime of
12 making a criminal threat, in violation of Penal Code Section
13 422 as charged in Count 1.

14 Dated June 19th, 2018, signed Juror Foreperson No. 1.
15 Same action, same title, same cause.

16 Verdict: We, the jury in the above-entitled cause, find
17 the defendant, Benjamin Lee Bathen, guilty of the crime of
18 making a criminal threat, in violation of Penal Code Section
19 422 as charged in Count 2.

20 Dated June 19, 2018, signed Juror Foreperson No. 1.
21 Same action, same title, same cause.

22 Verdict: We, the jury in the above-entitled cause, find
23 the defendant, Benjamin Lee Bathen, guilty of the crime of
24 making a criminal threat, in violation of Penal Code Section
25 422 as charged in Count 3.

26 Dated June 19th, 2018, signed Juror Foreperson No. 1.

27 Ladies and gentlemen of the jury, are these and were these
28 your verdicts as read?

1 THE JURORS: Yes.

2 THE COURT: Does either side want to poll the jury?

3 MS. FREEZE: Please, Your Honor.

4 THE COURT: Okay. Will you poll the jury.

5 THE CLERK: Yes, Your Honor.

6 Ladies and gentlemen of the jury, as your number is
7 called, please answer yes or no to the question: Are these
8 your verdicts?

9 Juror No. 1?

10 JUROR NUMBER 1: Yes.

11 THE CLERK: Juror No. 2?

12 JUROR NUMBER 2: Yes.

13 THE CLERK: Juror No. 3?

14 JUROR NUMBER 3: Yes.

15 THE CLERK: Juror No. 4?

16 JUROR NUMBER 4: Yes.

17 THE CLERK: Juror No. 5?

18 JUROR NUMBER 5: Yes.

19 THE CLERK: Juror No. 6?

20 JUROR NUMBER 6: Yes.

21 THE CLERK: Juror No. 7?

22 JUROR NUMBER 7: Yes.

23 THE CLERK: Juror No. 8?

24 JUROR NUMBER 8: Yes.

25 THE CLERK: Juror No. 9?

26 JUROR NUMBER 9: Yes.

27 THE CLERK: Juror No. 10?

28 JUROR NUMBER 10: Yes.

1 THE CLERK: Juror No. 11?

2 JUROR NUMBER 11: Yes.

3 THE CLERK: And Juror No. 12?

4 JUROR NUMBER 12: Yes.

5 THE CLERK: Your Honor, I have 12 in the affirmative.

6 THE COURT: Please record the verdict.

7 THE CLERK: So recorded, Your Honor.

8 THE COURT: Waive reading as recorded?

9 MS. SOMERVILLE: Yes, Your Honor.

10 MS. FREEZE: Yes.

11 THE COURT: Okay. Ladies and gentlemen, this does conclude
12 your jury service in this matter. I want to thank you very
13 much for your service.

14 As I told you at the beginning, I want to thank you for
15 your attention, for being here in a timely manner. And,
16 obviously, from the length of your deliberations and from the
17 questions, I know that you were taking this matter as
18 seriously as you needed to.

19 And we can't do it without you. You are our system of
20 criminal justice, and I can't thank you enough for your
21 service on behalf of me and all the judges in this court.

22 I have told you throughout this trial that you can't talk
23 to anybody about any subject connected with this matter. You
24 are now released from any kind of restriction because your
25 jury service in this matter is over.

26 You may talk to anybody that you want, but you don't need
27 to talk to anybody if you don't want to talk to anybody. If
28 anybody bothers you or tries to talk to you and a simple "no,

1 thank you" isn't enough, come back to the courtroom and let us
2 know.

3 Your information, your personal information, is sealed, as
4 I told you. It remains sealed. The only way somebody can get
5 your personal information is to come to court, make a motion
6 that they want your personal information. I would have to
7 find good cause to release that information and you would be
8 notified of the hearing if any such information was requested.

9 I don't anticipate that that would happen, but rest
10 assured that you would get plenty of notice before you would
11 ever have that personal information released and you would be
12 welcome to come to court and object to the release of that
13 information.

14 And again, even if you don't come to court, I'd have to
15 find good cause to release any information. We protect your
16 privacy because we need your service and we want you to be
17 comfortable serving as jurors.

18 It's often helpful to the lawyers to talk to the jurors
19 about the case and about their presentation. And so if any of
20 you have time and the inclination, you are welcome to wait
21 outside the courtroom and they'll be outside, but it's going
22 to take a few minutes in here. We are not anywhere near
23 releasing the lawyers here.

24 So you have plenty of time to just leisurely walk away.
25 And we do have people in the audience, but they as well are
26 not going to -- to bother you.

27 If you want to leave, please do. If you have the time and
28 the inclination to stay, again, it's often helpful to the

1 Court.

2 So, ladies and gentlemen, I can't thank you enough for
3 your jury service. I hope this was a good enough experience
4 that you will happily come back to court the next time you get
5 your summons.

6 Thank you. You are discharged.

7 *(The following proceedings were had between the Court*
8 *and counsel out of the presence and hearing of the*
9 *jury.)*

10 THE COURT: All right. And the jury is gone. So we need
11 to talk about custody status and we need to talk about
12 sentencing date.

13 So I have to say due to Mr. Bathen's lack of ties to
14 San Diego and the serious nature of threat convictions, I'm
15 inclined to take him into custody today, but I'd be happy to
16 hear argument if that is -- if somebody objects.

17 MS. FREEZE: Your Honor, if I may be heard.

18 THE COURT: Sure.

19 MS. FREEZE: I have provided to the Court, and the People
20 have a copy of this. It is -- it's a psychological evaluation.

21 Obviously we're not at sentencing, but my client has no
22 record. And again, for the record, I have provided this -- a
23 copy to the People last week or the week prior.

24 It is a positive psychological evaluation. It does
25 highlight the fact that he has no record, that he was
26 cooperative with the evaluation, that he's tested on a various
27 tests, mental health tests, substance abuse issues, a variety
28 of tests that Dr. Murphy employs.

1 It's very clear that Dr. Murphy does not find him to be --
2 his conclusions, his opinion is that he is not a danger to the
3 community.

4 I think that the lack of ties here, in fact, bodes better,
5 a stronger argument for keeping him out and having him go back
6 to Virginia.

7 He does work full-time. And his family is there. There's
8 no reason for him to be here.

9 Again, educated, has a full-time job, no record. This
10 case has been -- it's a year old, and my client hasn't had any
11 violations of the civil harassment restraining order or
12 criminal protective order.

13 I think that if he was reaching out to her or there was
14 issues at the several different hearings that he's appeared
15 at, like, if there was any type of aggressions between them or
16 making her feel uncomfortable at the hearings, the preliminary
17 hearing, the civil harassment restraining order hearing, I
18 would certainly understand the Court's thoughts to take him
19 in.

20 But it's been a year and there hasn't been one single
21 violation. He flies out for his hearings and then he goes
22 home.

23 I think it would be a continued detriment cost-wise for
24 him to be out of work and not going back to Virginia. And,
25 again, he has family on the East Coast. No family here. I do
26 understand that's -- the Court sees it as a negative, I see
27 that as there's no reason for him to come out except for court
28 hearings.

1 THE COURT: All right. And Ms. Somerville?

2 MS. SOMERVILLE: Your Honor, we would strongly agree with
3 the Court. I believe he's a flight risk. The threats in this
4 case were so violent. He's now been convicted of three
5 strikes. I believe he is still a danger to the victim. I
6 believe there's obviously something seriously off with
7 Mr. Bathen.

8 I would note that the one thing missing in that report is
9 that Dr. Murphy never listened to the calls. They are lacking
10 from the list of things that he reviewed. So I don't know --
11 you know, I take that evaluation -- I give it very low weight
12 because I don't know how that wasn't something that was
13 considered, and it was basically based off of Mr. Bathen's
14 history and him saying that he didn't do any of this.

15 THE COURT: And there lies the rub too. It's Mr. Bathen
16 denying that he made these phone calls. Those phone calls -- I
17 heard them. They were full of rage and now he is convicted of
18 these serious crimes, and I can only imagine that his anger at
19 Dr. Jacobs could increase.

20 I don't know. I mean Mr. Bathen has been very polite.
21 He's been here on time. He has not bothered Dr. Jacobs. I
22 totally understand that side of it. He's not violated his
23 bail.

24 But, frankly, those calls were extreme. And he's a plane
25 away. And I don't know. I'm not trying to make an
26 evaluation, but I wouldn't be surprised if he blames
27 Dr. Jacobs for the position he's in now since he took no
28 responsibility for the crimes, has never taken any

1 responsibility for the crimes, which I'm not holding against
2 him. I mean that's our system. Not guilty and he's entitled
3 to a trial.

4 So, because of that, I am going to have him taken into
5 custody. I wanted to do that first so that -- before we set
6 the sentencing date so that you would have that information,
7 Ms. Freeze.

8 So the due course sentencing is?

9 THE CLERK: July 18th.

10 THE COURT: July 18th.

11 What would you like to do?

12 MS. FREEZE: If that's the earliest date at 1:30?

13 THE COURT: It's the earliest because I'm going to need a
14 probation report. I mean we have Mr. Bathen here with no -- we
15 have these two extremes --

16 MS. FREEZE: At 1:30?

17 THE COURT: 8:30 or 9:00. Can you do 9:00?

18 MS. FREEZE: I can do the following day, the 19th?

19 THE COURT: Yes. Let me just check.

20 MS. FREEZE: Friday, the 20th?

21 THE COURT: The 20th, no.

22 I think I might -- so the 19th I can do.

23 MS. FREEZE: Okay. The 19th.

24 THE COURT: Okay. So if you need to do it in the
25 afternoon, it would have to be something like 3:30 because I'm
26 in trial.

27 MS. FREEZE: The 19th in the morning is fine.

28 THE COURT: Okay. Let's do it --

1 MS. SOMERVILLE: Your Honor, I'm sorry. I was just
2 informed by the victims that they are not going to be here on
3 that date. I know they would like to be here for the
4 sentencing.

5 THE COURT: Are they going to be here on the 18th?

6 DR. GARY JACOBS: The next week.

7 THE COURT: I can't delay it past the due course date.

8 DR. GARY JACOBS: Before?

9 THE COURT: I need the time -- I don't need it, the
10 probation department needs time. They need the time to do it.

11 Now, if everybody agrees to do it the following week, I
12 can. Mr. Bathen has the right to be sentenced within those
13 days. And so you have a right to be here and to be heard.

14 So I could do it a day earlier, so I think the probation
15 department would have the report on time; or if Ms. Freeze and
16 Mr. Bathen would like to do it the following week, I can do
17 that as well.

18 MS. FREEZE: The earliest, the better, Your Honor.

19 THE COURT: So unfortunately the -- I can take statements
20 as well, it doesn't have to be in person. So feel free. And I
21 will -- obviously I consider everything at the time of
22 sentencing.

23 Mr. Bathen, you have the right to be sentenced by
24 July 18th. Do you give up that right and continue it one day
25 to July 19th?

26 THE DEFENDANT: Yes, Your Honor.

27 THE COURT: We'll do that.

28 I will order a probation report. And we'll, of course,

1 consider -- did you want me to keep the psychological
2 evaluation for sentencing?

3 MS. FREEZE: Please.

4 THE COURT: And did you want that kept in the confidential
5 folder?

6 MS. FREEZE: Please.

7 THE COURT: I will do that.

8 MS. FREEZE: Thank you, Your Honor.

9 THE COURT: Very good.

10 And I want to at this time thank both lawyers for the very
11 good and very professional presentation that you both did at
12 trial. Thank you very much. It's a pleasure having you.

13 MS. SOMERVILLE: Thank you.

14 MS. FREEZE: Thank you, Your Honor.

15 THE COURT: We'll be in recess.

16 I said 8:30 for the sentencing if you can.

17 *(End of proceedings.)*

18

19

20

21

22

23

24

25

26

27

28

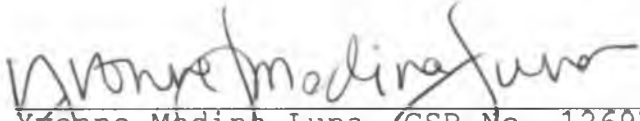
1 San Diego, California)
2 : SS.
3 County of San Diego)
4

5 I, Yvonne Medina Luna, Official Reporter for the Superior
6 Court of the State of California, in and for the County of San
7 Diego, do hereby certify:

8
9 That as such reporter, I reported in machine shorthand the
10 proceedings held in the foregoing case;

11
12 That my notes were transcribed into typewriting under my
13 direction and the proceedings held on June 19, 2018, contained
14 within Pages 577 through 591, are a true and correct
15 transcription.

16
17 Dated this 1st day of October 2018.

18
19 
20 Yvonne Medina Luna, CSR No. 12697
21 Official Court Reporter
22
23
24
25
26
27
28

COURT OF APPEAL OF THE STATE OF CALIFORNIA
 FOURTH APPELLATE DISTRICT
 DIVISION ONE

-000-

THE PEOPLE,)	
)	
PLAINTIFF & RESPONDENT,	)	COURT OF APPEAL
	)	CASE NO. D074538
VS.)	
)	
BENJAMIN LEE BATHEN,)	
	)	SUPERIOR COURT
DEFENDANT & APPELLANT.	)	CASE NO. SCS294342

CERTIFIED TRANSCRIPT

FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY
 HONORABLE STEPHANIE SONTAG, JUDGE
 DEPARTMENT 15

REPORTER'S APPEAL TRANSCRIPT

VOLUME 7 OF 7
 THURSDAY, JULY 19, 2018
 (PAGES 592 - 613)

APPEARANCES:

FOR THE PLAINTIFF	XAVIER BECERRA
AND RESPONDENT:	ATTORNEY GENERAL
	110 WEST A STREET
	SAN DIEGO, CALIFORNIA 92101

FOR THE DEFENDANT	IN PROPRIA PERSONA
AND APPELLANT:	

NYREE-DAWN LLOYD, CSR 12587
 OFFICIAL COURT REPORTER, SAN DIEGO SUPERIOR COURT

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

DEPARTMENT SB-15 BEFORE HON. STEPHANIE SONTAG, JUDGE

-000-

THE PEOPLE,)	
)	
PLAINTIFF,	)	<u>FELONY SENTENCING</u>
)	
VS.	)	CASE NO. SCS294342
	)	D.A. NO. BCA40501
BENJAMIN LEE BATHEN,)	
)	
DEFENDANT.)	

REPORTER'S TRANSCRIPT

CERTIFIED TRANSCRIPT

THURSDAY, JULY 19, 2018

APPEARANCES:

FOR THE PEOPLE: SUMMER STEPHAN
 DISTRICT ATTORNEY
 BY: CHERIE BRIANNE SOMERVILLE, ESQ.
 DEPUTY DISTRICT ATTORNEY
 333 H STREET, SUITE 4000
 CHULA VISTA, CALIFORNIA 91910

FOR THE DEFENDANT: THE LAW OFFICE OF ALICIA FREEZE, APC
 BY: ALICIA C. FREEZE, ESQ.
 7676 HAZARD CENTER DRIVE, SUITE 500
 SAN DIEGO, CALIFORNIA 92108

NYREE LLOYD, CSR 12587
 OFFICIAL COURT REPORTER
 SAN DIEGO SUPERIOR COURT
 CHULA VISTA, CALIFORNIA 91910

1 THURSDAY, JULY 19, 2018; CHULA VISTA, CALIFORNIA

2 8:55 A.M.

3 -- 000 --

4 **THE COURT:** GOOD MORNING.

5 **THE CLERK:** WE ARE CALLING THE CASE OF THE PEOPLE VERSUS
6 BENJAMIN LEE BATHEN, CASE SCS294342.

7 **MS. SOMERVILLE:** CHERIE SOMERVILLE FOR THE PEOPLE.

8 **MS. FREEZE:** GOOD MORNING, YOUR HONOR.

9 ALICIA FREEZE ON BEHALF OF MR. BATHEN, WHO IS PRESENT
10 BEFORE THE COURT TO MY RIGHT IN CUSTODY.

11 ALSO IN THE COURTROOM THIS MORNING IS MY CLIENT'S FATHER
12 TERRY BATHEN, AS WELL AS HIS STEPFATHER VINCE CRAWLEY, AS WELL
13 AS HIS FORMER ATTORNEY BENJAMIN THEULE.

14 **THE COURT:** ALL RIGHT. WE ARE HERE FOR SENTENCING.
15 WAIVE ARRAIGNMENT?

16 **MS. FREEZE:** WAIVE ARRAIGNMENT. YES. NO LEGAL CAUSE.

17 **THE COURT:** OKAY. THANK YOU.

18 I HAVE READ THE PROBATION REPORT. I HAVE READ THE
19 ATTACHMENTS WHICH CONSISTS OF THE LETTER FROM DR. JACOBS WITH
20 A RESTITUTION AND LETTERS FROM THE FAMILY. I HAVE READ
21 MS. SOMERVILLE'S STATEMENT -- SENTENCING BRIEF.

22 AND, MS. FREEZE, I HAVE READ YOURS AS WELL AS WELL AS
23 DR. MURPHY'S EVALUATION.

24 THE RECOMMENDATION FROM PROBATION IS FOR TWO YEARS, FOUR
25 MONTHS IN STATE PRISON.

26 AND DID YOU WANT TO BE HEARD, MS. FREEZE?

27 **MS. FREEZE:** YES, YOUR HONOR. THANK YOU. YOUR HONOR --

28 **THE COURT:** LET ME TAKE JUST A MOMENT. I HAVE JUST -- I

1 HAVE JUST RECEIVED A LETTER THAT MR. BATHEN IS AT THE VISTA
2 DETENTION FACILITY VETERAN'S MODULE, THE IMPORT OF THIS --

3 **MS. FREEZE:** YES, YOUR HONOR. JUST THE POINTS AT THE
4 BOTTOM OF -- SOME OF THE PROGRAMS HE HAS BEEN ENGAGED IN.

5 **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH.

6 **MS. FREEZE:** THANK YOU, YOUR HONOR.

7 WITHOUT GOING THROUGH EVERYTHING I ADDRESSED IN MY LENGTHY
8 STATEMENT OF MITIGATION, I DO WANT TO HIGHLIGHT A FEW THINGS,
9 YOUR HONOR, AND THEN BRIEFLY HAVE MY CLIENT'S FATHER AND
10 STEPFATHER JUST MAKE A QUICK -- I KNOW THAT THEY HAVE PROVIDED
11 LENGTHY STATEMENTS AND LETTERS OF SUPPORT OF MY CLIENT THAT
12 WAS ATTACHED TO THE PROBATION REPORT, BUT THEY WANTED TO
13 ADDRESS THE COURT JUST BRIEFLY AS WELL. THEY HAVE FLOWN OUT
14 FROM THE EAST COAST TO BE HERE TODAY, AND THEN JUST SOMETHING
15 BRIEF FROM MY CLIENT AS WELL.

16 FIRST OFF, YOUR HONOR, MR. BATHEN STANDS BEFORE YOUR HONOR
17 A 40-YEAR-OLD MAN WITH ABSOLUTELY NO CRIMINAL RECORD. HE
18 DOESN'T HAVE ACCESS TO FIREARMS. HE HAS NEVER HAD ANY
19 NEGATIVE CONTACT WITH LAW ENFORCEMENT. AND WHAT I THINK IS
20 ALSO REALLY IMPORTANT HERE IS THAT MR. BATHEN HAS INCREDIBLE
21 FAMILY SUPPORT. HE, AS THE LETTERS THAT ARE ATTACHED TO THE
22 PROBATION REPORT INDICATE, HE HAS VERY HIGHLY EDUCATED FAMILY
23 THAT IS AROUND HIM THAT LOVE HIM, THAT CARE ABOUT HIM, AND
24 THAT ARE VERY SUPPORTIVE OF HIM. HE HAS A FATHER, STEPFATHER,
25 HIS MOTHER, HIS SISTER, AND HE IS -- THIS LIFE THAT HE LIVES
26 IS ON THE OTHER SIDE OF THE COUNTRY, AWAY FROM DR. JACOBS.

27 MR. BATHEN, AND I THINK EVERYONE HERE, UNDERSTANDS THAT
28 THESE CALLS THAT WERE MADE WERE SCARY. THEY WERE ANGRY. THEY

1 WERE -- AND, OBVIOUSLY, THEY UPSET DR. JACOBS. AND WE
2 CERTAINLY UNDERSTAND THAT. THESE ARE UPSETTING MESSAGES TO
3 ANYBODY, WHETHER YOU ARE A MALE OR FEMALE, JUST HEARING THEM
4 IS UPSETTING. WE UNDERSTAND THAT, BUT I THINK WHAT IS
5 IMPORTANT HERE IS THAT MY CLIENT HAS MAINTAINED HIS INNOCENCE.
6 HE HAS TAKEN THIS CASE TO TRIAL. I CITE SOME LAW ABOUT
7 ADDITIONAL PUNISHMENT FOR GOING TO TRIAL, AND WE HAVE
8 EXPLORED --

9 **THE COURT:** OKAY. AND I HAVE TO SAY THAT MAINTAINING
10 INNOCENCE AT THIS POINT IS FINE FOR APPEAL, BUT IT IS NOT A
11 PERSUASIVE ARGUMENT FOR SENTENCING AFTER THREE CONVICTIONS.

12 **MS. FREEZE:** I UNDERSTAND THAT, YOUR HONOR. I WANTED TO
13 JUST CLARIFY THAT, IN THAT I UNDERSTAND THAT THE PROBATION
14 REPORT INDICATES THAT HE DOESN'T HAVE ANY REMORSE, AND I TRIED
15 TO CLARIFY THAT IN MY MOVING PAPERS. I WAS ACTUALLY PHYSICALLY
16 THERE WHEN MR. BATHEN WAS INTERVIEWED BY PROBATION. AS THE
17 PROBATION REPORT INDICATES, HE WAS POLITE, HE WAS COOPERATIVE,
18 AND HE DID EXPRESS REMORSE. GRANTED WE ARE IN THE PROCESS OF
19 FILING AN APPEAL. WE ARE GOING TO BE CHALLENGING THAT. SO
20 THERE IS A GRAY LINE. YOU WANT TO SHOW THAT REMORSE, BUT YOU
21 HAVE TO -- HAVE TO BE KIND OF, A LITTLE BIT CAREFUL BECAUSE OF
22 THAT PENDING APPEAL.

23 THAT BEING SAID, HE WAS VERY REMORSEFUL, AND I THINK IT IS
24 IMPORTANT FOR THE COURT TO LOOK AT THAT LETTER THAT HE WROTE
25 TO DR. JACOBS LAST AUGUST SAYING, "I DON'T WANT TO HURT YOU.
26 I DON'T WANT TO HARM YOUR FAMILY. I AM SORRY YOU FEEL THIS
27 WAY. I AM ON THE OTHER SIDE OF THE COUNTRY. I MEAN YOU NO
28 HARM." IN FACT, HE SAYS, "I WISH YOU THE BEST FOR YOU AND

1 YOUR FAMILY."

2 WHEN HE WAS NOTIFIED OF THIS PENDING LITIGATION, HE
3 VOLUNTARILY GOT A PLANE TICKET. HE FOUND A SAN DIEGO COUNTY
4 BASED ATTORNEY. HE DIDN'T HAVE TO BE EXTRADITED OR FIGHT IT
5 IN ANY MANNER. HE HAS FLOWN OUT FOR EVERY SINGLE COURT
6 APPEARANCE. HE HAS BEEN TIMELY. HE HAS BEEN WELL DRESSED, HE
7 HAS REPRESENTED HIMSELF TO THE COURT. THERE HASN'T BEEN ANY
8 FAILURES TO APPEAR OR ANYTHING LIKE THAT.

9 I THINK ANOTHER IMPORTANT FACTOR, YOUR HONOR, THAT THE
10 COURT SHOULD CONSIDER BESIDES, OF COURSE, THE FACT THAT HE HAS
11 NO RECORD AND THINGS OF THAT NATURE IS THAT HE HASN'T HAD ANY
12 VIOLATIONS OF THE CRIMINAL PROTECTIVE ORDER OR THE CIVIL
13 HARASSMENT RESTRAINING ORDER. THIS CASE HAS BEEN GOING ON FOR
14 ABOUT A YEAR NOW, AND THERE HASN'T BEEN ANY, YOU KNOW, CALLS,
15 EMAILS. EVEN JUST SEEING DR. JACOBS IN THE HALLWAY AND SEEING
16 HER AT DIFFERENT HEARINGS, THERE HASN'T BEEN ANY STARES OR
17 HAVING HER FEEL UNCOMFORTABLE AT ALL, WHERE MY CLIENT HAS
18 TRIED TO ENGAGE WITH HER OR ANYTHING. HE DOESN'T WANT
19 ANYTHING TO DO WITH DR. JACOBS. HE WANTS TO GO ON WITH HIS
20 LIFE, MOVE BACK TO VIRGINIA, TRY TO KEEP HIS JOB WITH
21 NUMBERSUSA. I HAVE HAD AN OPPORTUNITY TO SPEAK WITH THEM.
22 THEY ARE VERY SUPPORTIVE OF MY CLIENT AND WOULD WELCOME HIM
23 BACK. IF HE IS ABLE TO GET OUT OF CUSTODY AT A POINT IN THE
24 FUTURE, THEY WOULD WELCOME HIM BECAUSE HE HAS SPECIAL SKILLS
25 AND HE IS A HARD WORKER.

26 THERE WERE -- I UNDERSTAND THAT DR. JACOBS HAS EMOTIONAL
27 INJURY. I ABSOLUTELY UNDERSTAND THAT. LUCKILY, THERE IS NO
28 PHYSICAL INJURIES. THERE WAS NO WEAPONS OR ANY TYPE OF, YOU

1 KNOW, DISPLAYING OF WEAPONS TO HER. IT WAS -- WORDS WERE THE
2 WEAPONS, AND I UNDERSTAND THAT, YOUR HONOR. BUT AT THIS
3 POINT, HER SUSTAINED FEAR IS REALLY, AT THIS POINT,
4 UNREASONABLE. THERE HAS BEEN NO REASON FOR HER TO CONTINUE TO
5 BE IN FEAR FOR MY CLIENT. IT HAS BEEN OVER A YEAR, AND THERE
6 HAS BEEN NOTHING THAT WOULD HAVE HER STILL BE CONCERNED. IN
7 FACT, HE WROTE THAT LETTER, AND THEN THROUGH THE PENDENCY OF
8 THE CASE, MY UNDERSTANDING IS THAT MR. THEULE HAD REPRESENTED
9 TO THE PEOPLE, LOOK, MY CLIENT DOESN'T WANT TO HURT THIS
10 WOMAN. HE JUST WANTS TO MOVE ON. HE WILL ABIDE BY ANY
11 CRIMINAL PROTECTIVE ORDER FOR WHATEVER LENGTH OF TIME,
12 WHATEVER CIVIL HARASSMENTS, RESTRAINING ORDER FOR WHATEVER
13 LENGTH OF TIME. HE DOESN'T WANT TO UPSET THIS WOMAN. HE JUST
14 WANTS TO MOVE ON WITH HIS LIFE.

15 I THINK WHEN LOOKING AT THE NATURE AND SERIOUSNESS OF THIS
16 CRIME COMPARED TO OTHERS, THIS IS, AS I MENTIONED IN MY MOVING
17 PAPERS, YES, PENAL CODE 422, I UNDERSTAND, AGAIN, THAT THERE
18 WAS GUILTY VERDICTS, YOUR HONOR. BUT LOOKING AT THE CONTEXT
19 OF THE LAW, THIS ISN'T -- THIS WASN'T A SITUATION WHERE THIS
20 WOMAN WAS, YOU KNOW, HE WAS BANGING ON THE DOOR AND SHE WAS
21 TRYING TO RUN FROM HIM OR THAT IMMEDIATE KIND OF FEAR THAT SHE
22 WAS GOING TO BE HURT WITHIN MINUTES OR SECONDS OR HOURS. YES,
23 SHE HAD THAT FEAR. SHE WAS CONCERNED. BUT AGAIN, ALWAYS
24 KNOWING THAT HE WAS ON THE OTHER SIDE OF THE COUNTRY AND
25 THAT -- AND I THINK THAT IS IMPORTANT FOR THE COURT TO BE
26 MINDFUL OF.

27 YOUR HONOR, WITH REGARDS TO THE -- AND I AM GOING TO MOVE
28 TO MY -- PAGES 6 AND 7, TALKING ABOUT ABLE TO COMPLY WITH

1 REASONABLE TERMS OF PROBATION AND WILLING AND ABLE TO COMPLY
2 AND ACTUALLY ABLE TO COMPLY. I THINK THAT MR. BATHEN IS AN
3 INDIVIDUAL WHO IS EDUCATED, DOES HAVE THAT MILITARY DISCIPLINE
4 WHERE HE WILL FOLLOW THE RULES OF THE LAW. HE WILL DOT HIS
5 I'S. HE WILL CROSS HIS T'S. AND IF YOUR HONOR IS INCLINED TO
6 KEEP HIM ON PROBATION, THE IDEA THAT HE CAN, AT SOME POINT,
7 REDUCE THIS AND EXPUNGE IT SO THAT HE ACTUALLY CAN HAVE A
8 FRUITFUL CAREER AND NOT HAVE A FELONY FOR THE REST OF HIS
9 LIFE, I THINK, IS IMPETUS FOR HIM TO COMPLY AS WELL.

10 I THINK IT IS IMPORTANT, YOUR HONOR, LOOKING AT THE EFFECT
11 OF IMPRISONMENT ON THE DEFENDANT AND PARTICULARLY HIS FAMILY,
12 RULE 4.415(B)(5) WHICH I DISCUSS ON PAGE 7 AND 8. HE IS --
13 THIS MAN WALKED INTO THIS COURTROOM, YOUR HONOR, WITH NO
14 RECORD, AND HE HAS NOW THREE STRIKES. THAT IS VERY SERIOUS.
15 HE HAS SPENT 68 -- 69 DAYS IN CUSTODY. THIS MAN HAD NEVER
16 BEEN IN CUSTODY BEFORE EXCEPT FOR THE PERIOD OF TIME IN
17 SEPTEMBER OF LAST YEAR WHEN HE WAS IN FOR TWO TO THREE DAYS.
18 THIS ISN'T A MAN WHO HAS BEEN IN AND OUT OF CUSTODY. HE IS
19 GOING TO BE KICKED OUT OF THE MILITARY. I MEAN, THAT'S PRETTY
20 CLEAR. THE FACT THAT NUMBERSUSA IS KEEPING HIM ON, I THINK,
21 IS TESTAMENT TO WHO HE IS AS AN INDIVIDUAL, BUT NOT IF HE IS
22 INCARCERATED FOR YEARS. HE WON'T HAVE A JOB. HE WILL HAVE
23 THREE FELONY STRIKES THAT CAN'T BE REDUCED, CAN'T BE EXPUNGED,
24 AND HE WILL BE EFFECTIVELY RELEASED FROM PRISON, STUCK IN SAN
25 DIEGO COUNTY, PENDING ANY TYPE OF PAROLE TRANSFER, HOMELESS
26 WITH NO SERVICES, NO FAMILY TO SUPPORT HIM. AND QUITE
27 FRANKLY, I WOULD THINK THAT WOULD BE SOMETHING DR. JACOBS
28 WOULDN'T WANT. SHE WOULD WANT HIM TO LEAVE, GO BACK TO THE

1 OTHER SIDE OF THE COUNTRY, MAYBE BE ON AN ANKLE MONITORING
2 DEVICE, MAYBE MONITORED BY PROBATION IN VIRGINIA. I WOULD
3 HIGHLY DOUBT THAT DR. JACOBS WOULD WANT THIS MAN TO GO TO
4 PRISON FOR A LENGTHY PRISON SENTENCE, BE RELEASED ON PAROLE,
5 HOMELESS, WANDERING THE STREETS OF CHULA VISTA. I CAN'T
6 IMAGINE THAT THAT IS PRODUCTIVE AT ALL.

7 AGAIN, YOUR HONOR, I DON'T WANT THE COURT TO MISUNDERSTAND
8 MY CLIENT'S COMMENTS DURING THE PROBATION INTERVIEW. HE IS
9 REMORSEFUL. HE DOES FEEL BAD THAT DR. JACOBS HAS HARVESTED
10 THIS FEAR OF HIM FOR THIS PERIOD OF TIME. ALL HE HAS TRIED TO
11 DO IS QUELL THAT AND SAY LOOK, GOD BLESS. GO ON YOUR WAY. I
12 WILL GO ON MY WAY. I MEAN YOU NO HARM.

13 SO, YOUR HONOR, WITH THAT, AND MY LENGTHY STATEMENTS THAT
14 I PUT IN MY STATEMENT OF MITIGATION, AS WELL AS THE FACT THAT
15 DR. MURPHY DID EVALUATE MY CLIENT AND DID NOT FIND HIM TO BE A
16 THREAT TO THE COMMUNITY, WE WOULD RESPECTFULLY URGE THE COURT
17 TO GRANT PROBATION WITH CREDIT FOR TIME SERVED; OR AT THE VERY
18 LEAST, KEEP HIM IN FOR THE MAXIMUM AMOUNT OF TIME IN COUNTY
19 JAIL, CONTINUE WITH THE PROGRAMS HE IS DOING AT THE VISTA
20 DETENTION FACILITY SUCH AS ANGER MANAGEMENT, COUNSELING,
21 MEDITATION, AND SET HIM UP SO THAT HE DOESN'T FAIL, SO THAT HE
22 DOESN'T HAVE TO GET OUT AND BE RUINED FOR THE REST OF HIS
23 LIFE.

24 WITH THAT BEING SAID, YOUR HONOR, IF I CAN HAVE YOUR HONOR
25 HEAR BRIEFLY A COUPLE STATEMENTS FROM HIS FATHER TERRY BATHEN
26 AND HIS STEPFATHER VINCE CRAWLEY.

27 **THE COURT:** I HAVE READ THE LETTERS. IT IS UNUSUAL TO HAVE
28 FAMILY MEMBERS SPEAK, BUT I WILL ALLOW IT IN THIS SITUATION, AS

1 LONG AS IT IS BRIEF AND NOT REPETITIOUS BECAUSE I HAVE READ
2 EVERYTHING.

3 **MS. FREEZE:** THANK YOU, YOUR HONOR.

4 **THE COURT:** AND, SIR, IF YOU WOULD JUST STATE YOUR NAME
5 FIRST.

6 **THE WITNESS:** I AM BEN BATHEN'S FATHER, TERRY, T-E-R-R-Y
7 B-A-T-H-E-N.

8 GOOD MORNING, YOUR HONOR. I WAS PRESENT IN COURT TO HEAR
9 THE TESTIMONY OF DR. JACOBS AND HAVE READ HER IMPACT
10 STATEMENT. I WANT TO ASSURE THIS COURT THAT OUR ENTIRE
11 FAMILY, INCLUDING BEN, IS DEEPLY AWARE OF THE EMOTIONAL TRAUMA
12 AND FEAR CAUSED BY THOSE VERBAL VOICE MAILS. WE HAVE SINCERE
13 EMPATHY FOR DR. JACOBS AND HER FAMILY. BEN HAS ACKNOWLEDGED
14 THESE FEELINGS TO US. WE SINCERELY REGRET THE JACOBS FAMILY
15 EXPERIENCED SUCH EMOTIONAL DISTRESS. WE ARE CONFIDENT THAT
16 YOU WILL IMPOSE A JUST AND REASONABLE SENTENCE AND PRAY IT
17 WILL INCLUDE PROBATION. WE WANT TO ASSURE YOU THAT WE WILL
18 WELCOME BEN BACK TO VIRGINIA AND DO ALL IN OUR POWER TO ASSIST
19 HIM IN MAKING THE TRANSITION TO A PRODUCTIVE LIFE, AS A LAW
20 ABIDING AND CONTRIBUTING MEMBER OF SOCIETY. THANK YOU.

21 **THE COURT:** THANK YOU.

22 **MS. FREEZE:** THANK YOU. AND THEN JUST MR. CRAWLEY. THIS
23 IS MY CLIENT'S STEPFATHER.

24 **THE WITNESS:** MY NAME IS VINCENT CRAWLEY, AND I HAVE BEEN
25 BEN'S STEPFATHER FOR ALMOST 30 YEARS NOW.

26 SO, YOUR HONOR, I AM BEN'S STEPFATHER. I CAN TELL YOU AS
27 A STEPFATHER, AS A FATHER, AND AS A HUSBAND THAT EVERYONE IN
28 OUR FAMILY DEEPLY UNDERSTANDS AND SYMPATHIZES WITH WHAT

1 DR. JACOBS AND HER FAMILY HAS HAD TO GO THROUGH.

2 BEN IN PRIVATE HAS MAINTAINED HIS INNOCENCE, BUT HE HAS
3 ALSO EXPRESSED GREAT REMORSE FOR WHAT HAS HAPPENED AND THE
4 EFFECTS THAT IT HAS HAD. BECAUSE HIS JAILHOUSE CALLS ARE
5 MONITORED AND BECAUSE HE HAS A RIGHT TO APPEAL THE VERDICT, WE
6 CAN'T REALLY HAVE BEEN ABLE TO HAVE HAD A GENUINE
7 CONVERSATION. BUT ON BEHALF OF HIS FAMILY, I CAN EXPRESS MY
8 DEEPEST, MOST GENUINE SYMPATHY FOR THE JACOBS FAMILY AND FOR
9 EVERYONE WHO HAS BEEN AFFECTED. ALL OF US HAVE EXPERIENCED
10 VERY HUMAN FEARS AND SLEEPLESS NIGHTS OVER THIS.

11 WHAT I CAN TELL YOU IS THAT BEN'S FAMILY IS READY TO
12 ACCEPT HIM BACK HOME ON THE OTHER SIDE OF THE COUNTRY WHERE HE
13 HAS A SUPPORT NETWORK IN PLACE TO HELP HIM TO REFLECT, TO
14 REBUILD, TO REPAIR, AND TO STAND WITH HIM.

15 THANK YOU SO MUCH.

16 **THE COURT:** THANK YOU.

17 **MS. FREEZE:** THANK YOU, YOUR HONOR. JUST ONE MOMENT.

18 AND MY CLIENT WOULD ALSO LIKE TO MAKE A STATEMENT, YOUR
19 HONOR, JUST BRIEFLY.

20 **THE COURT:** OF COURSE.

21 **MS. FREEZE:** IF HE CAN.

22 **THE COURT:** ABSOLUTELY. YES, MR. BATHEN.

23 **THE DEFENDANT:** THANK YOU, YOUR HONOR.

24 I AM GENUINELY SORRY FOR ANY FEAR I MAY HAVE CAUSED
25 DR. JACOBS AND WISH HER THE BEST, AND I THINK THAT IS THE
26 POSITION THAT I HAVE TAKEN SINCE I WAS NOTIFIED IN AUGUST OF
27 2017, AND I IMMEDIATELY HIRED MR. THEULE, SITTING BEHIND ME,
28 TO NOTIFY DR. JACOBS IN WRITING THAT SHE IS NOT IN ANY DANGER

1 FROM ME.

2 **MS. FREEZE:** THANK YOU, YOUR HONOR.

3 **THE COURT:** THANK YOU.

4 **MS. FREEZE:** WITH THAT, I SUBMIT.

5 **THE COURT:** MS. SOMERVILLE.

6 **MS. SOMERVILLE:** THANK YOU, YOUR HONOR.

7 THIS CASE REALLY -- I THINK OTHER CRIMINAL THREATS CASES
8 PALES IN COMPARISON TO IT. THE COURT OBVIOUSLY HEARD THE
9 TRIAL. THIS IS SOMETHING THAT HAS TERRORIZED DR. JACOBS, AND
10 THE COURT RECEIVED HER VICTIM IMPACT STATEMENT. IT IS
11 SOMETHING THAT IS GOING TO BE WITH HER FOR THE REST OF HER
12 LIFE. I DON'T THINK THAT ANY OF US CAN REALLY GRASP HOW IT IS
13 TO HAVE TO GO ABOUT YOUR DAY CONSTANTLY WONDERING IF THIS MAN
14 IS GOING TO SHOW UP AND MAKE GOOD ON HIS THREATS, IF HE IS
15 GOING TO COME AFTER YOUR FAMILY. AND SHE DESCRIBED IN DETAIL
16 THE ANXIETY, THE FEAR, BASICALLY THE TENOR THAT SHE HAS HAD TO
17 LIVE THROUGH. THIS CASE IS SO SERIOUS. THE THREATS WERE SO
18 EXPLICIT. THEY WERE SEXUAL IN NATURE. THEY ARE JUST
19 TERRIFYING TO LISTEN TO. AND, FRANKLY, I HAVE NEVER HEARD
20 THREATS LIKE THIS, AND IT IS VERY CONCERNING TO THE PEOPLE.
21 VERY CONCERNING THAT MR. BATHEN NOW CONTINUES TO BLAME
22 DR. JACOBS FOR THE PREDICAMENT HE IS IN. THERE HAS BEEN NO
23 REFLECTION AND NO INSIGHT INTO WHY THIS HAPPENED. I THINK
24 THAT'S VERY TROUBLING. I THINK WE ARE IN A SOCIETY NOW WHERE
25 PEOPLE HAVE BECOME UNHINGED. THEY FEEL THAT THEY CAN, YOU
26 KNOW, ACT OUT ON ANY PERCEIVED INJUSTICE OR, YOU KNOW, SLIGHT
27 THAT THEY HAVE BEEN HOLDING IN.

28 AND THE FACT THAT MR. BATHEN HAS STOOD ON THIS AND WAITED

1 FOR TEN YEARS TO LASH OUT IS EXTREMELY TROUBLING. I KNOW
2 THERE WAS THE PSYCHOLOGICAL EVALUATION THAT WAS SUBMITTED BY
3 DR. MURPHY. I PUT NO STOCK IN THAT FRANKLY. DR. MURPHY
4 LISTED OUT ON PAGE 2 OF THAT REPORT EVERYTHING HE REVIEWED.
5 HE REVIEWED THE JAIL CALLS IN THIS CASE. YET, THE ONE THING
6 MISSING IS THE ACTUAL RECORDED CALLS. I MEAN, I JUST HAVE TO
7 WONDER WHY SOMEONE WOULD NOT LISTEN TO THE ACTUAL CRIME IN
8 THIS CASE, AND THEN MAKE A REPRESENTATION THAT THIS PERSON
9 ISN'T VIOLENT. IT BOGGLES MY MIND THAT THAT OCCURRED.

10 YOUR HONOR, WHEN I ALSO, WHEN I RECEIVED THIS LETTER THAT
11 MR. BATHEN HAD WROTE TO DR. JACOB'S BACK IN AUGUST OF LAST
12 YEAR, I WAS FRANKLY SHOCKED BY IT. I MEAN, THE WAY IT IS
13 WORDED, IT IS MANIPULATIVE. I THINK IT BASICALLY IS TRYING TO
14 COERCE HER INTO NOT GOING FORWARD WITH THE CRIMINAL CASE, TO
15 MENTION THAT BASICALLY SHE IS GOING TO RUIN THIS YOUNG MAN'S
16 LIFE. I MEAN, WE ARE HERE BECAUSE OF MR. BATHEN. WE ARE NOT
17 HERE BECAUSE OF DR. JACOBS, AND I THINK THAT IT IS REALLY, THE
18 IMPACT ON THIS VICTIM, THE SERIOUS NATURE OF THIS CRIME.

19 I UNDERSTAND HE HAS NO PRIOR CRIMINAL RECORD, BUT THERE
20 ARE SOME CRIMES THAT WARRANT A SEVERE PUNISHMENT UNDER THE
21 LAW. MR. BATHEN IS NOT A YOUNG 18 YEAR OLD. HE IS A
22 40-YEAR-OLD MAN. HE DEFINITELY HAS TWO SEPARATE, DISTINCT
23 LIVES. I MEAN, IT IS ALMOST LIKE DR. JEKYLL AND MR. HYDE.
24 YOU HAVE THE MR. BATHEN WHO IS EDUCATED, WHO HAS HAD A, YOU
25 KNOW, CAREER IN THE COMPUTER FIELD, AND THEN YOU HAVE THIS
26 PERSON WHO HAS SOME EXPLOSIVE ANGER. AND WHETHER HIS FAMILY
27 HAS SEEN THAT OR NOT, I MEAN, WE DON'T KNOW. BUT WE HAVE SEEN
28 IT, AND WE SAW IT IN THIS CASE. I THINK IT ALSO SAYS

1 SOMETHING THAT PROBATION ALSO RECOMMENDED THAT MR. BATHEN BE
2 SENT TO PRISON. I THINK IT IS, YOU KNOW, FAIRLY UNUSUAL WHEN
3 YOU HAVE SOMEONE WHO HAS NO CRIMINAL HISTORY, BUT THIS CRIME
4 IS SO EGREGIOUS THAT, YOU KNOW, MR. BATHEN NEEDS TO BE
5 SENTENCED TO STATE PRISON.

6 FRANKLY, PROBATION OBVIOUSLY IS, YOU KNOW, A GRANT THAT
7 THE COURT GIVES, AND I DON'T THINK THAT MR. BATHEN CAN BENEFIT
8 FROM PROBATION. PEOPLE CAN BENEFIT FROM PROBATION WHEN THEY
9 ARE, YOU KNOW, RECOGNIZING THAT THEY HAVE PROBLEMS. PROBATION
10 CAN HELP THEM. THAT IS NOT THE CASE HERE, AND THE EVIDENCE
11 WAS OVERWHELMING THAT THIS IS MR. BATHEN.

12 SO, I HAVE SEEN NO REMORSE. I HAVE NOT HEARD ANY REMORSE.
13 I JUST DON'T UNDERSTAND WHERE THAT'S COMING FROM. PROBATION
14 RECOGNIZED THAT AS WELL. DR. JACOBS RECOGNIZED THAT AS WELL
15 IN HER STATEMENT.

16 I JUST THINK, YOUR HONOR, THAT GIVEN THIS CASE, OUR
17 RECOMMENDATION IS APPROPRIATE. MR. BATHEN WILL NOT SERVE THE
18 ENTIRE FOUR YEARS, FOUR MONTHS THAT WE ARE ASKING FOR, BUT
19 DR. JACOBS WILL SERVE A LIFE SENTENCE WONDERING IF THIS MAN
20 WILL EVER SHOW UP AND CARRY OUT HIS THREATS.

21 AND WITH THAT, YOUR HONOR, I WOULD SUBMIT. I DO ALSO HAVE
22 TWO SEPARATE CRIMINAL PROTECTIVE ORDERS. ONE IS FOR THREE
23 YEARS. THE OTHER CRIMINAL PROTECTIVE ORDER IS FOR TEN YEARS.
24 I WOULD BE ASKING THE COURT TO IMPOSE THE TEN-YEAR CRIMINAL
25 PROTECTIVE ORDER, IRRESPECTIVE OF WHETHER OR NOT MR. BATHEN IS
26 SENTENCED TO STATE PRISON OR GIVEN PROBATION.

27 **THE COURT:** ALL RIGHT.

28 **MS. SOMERVILLE:** AND WITH THAT, I WOULD SUBMIT.

1 **THE COURT:** THANK YOU.

2 ALL RIGHT. I APPRECIATE ALL YOUR ARGUMENTS. I APPRECIATE
3 YOUR BRIEFS, AND AS I SAID BEFORE, I HAVE READ EVERYTHING AND,
4 FRANKLY, I HAVE SPENT A LOT OF TIME CONSIDERING THIS BECAUSE
5 IT IS JUST A PUZZLING MATTER.

6 REST ASSURED, MS. FREEZE, I NEVER PUNISH SOMEBODY FOR
7 GOING TO TRIAL. I AM A GREAT BELIEVER IN OUR CRIMINAL JUSTICE
8 SYSTEM AFTER ALL THESE YEARS. AND SOMEBODY HAS A RIGHT TO A
9 TRIAL AND THEY SHOULD, THEY SHOULD PUT THE PEOPLE TO THE TEST.
10 I KNOW MR. BATHEN DOES STILL MAINTAIN HIS INNOCENCE, WHICH
11 DOES COMPLICATE THE REMORSE FACTOR. FRANKLY, I AGREE WITH
12 MS. SOMERVILLE THAT THE EVIDENCE WAS OVERWHELMING, AND,
13 MR. BATHEN, YOU KNOW, HE HAS THE RIGHT TO MAINTAIN HIS
14 INNOCENCE IF HE WANTS, AND HE DOES AND PROBABLY BELIEVES IT, I
15 GUESS. BUT I CAN'T, I CAN'T CONSIDER THAT AT ALL BECAUSE I
16 DID FIND THE EVIDENCE OVERWHELMING OF GUILT. AND MY PROBLEM
17 WHEN I AM CONSIDERING PROBATION, WHEN SOMEBODY IS ELIGIBLE FOR
18 PROBATION AND SOMEBODY HAS A CLEAN RECORD, IS SEEING WHETHER
19 PROBATION IS SUITABLE. AND THE TROUBLING THINGS WITH THIS
20 CASE IS THAT THESE THREATS WERE NOT IN THE HEAT OF PASSION. I
21 HAVE LETTERS FROM FAMILY MEMBERS, CLOSE SUPPORT. I HAVE A
22 DESCRIPTION TO DR. MURPHY FROM MR. BATHEN THAT LIFE IS
23 WONDERFUL. I HAVE A JOB. I HAVE MY FAMILY AROUND ME. I HAVE
24 A GIRLFRIEND THAT I HAVE HAD FOR A YEAR. AND THAT'S THE
25 FAMILY MEMBERS, THE WAY THAT THEY REFLECTED AS WELL. I MEAN,
26 THE FACT THAT HIS MOTHER GOT A DIVORCE WHEN HE WAS IN HIS
27 30'S, I AM JUST NOT TAKING THAT AS A REASON FOR THESE THREATS.
28 SO I HAVE NINE YEARS SINCE MR. BATHEN WAS TREATED BY

1 DR. JACOBS. I SEE A LOT OF CRIMINAL THREATS, BUT THEY ARE
2 USUALLY HEAT OF PASSION. I HAVE NEVER SEEN ANYTHING LIKE THIS
3 WITH ABSOLUTELY NO HELP IN THE LETTERS THAT I GET TO EXPLAIN
4 THIS. I AM NOT GOING TO PUNISH MR. BATHEN FOR MAINTAINING HIS
5 INNOCENCE, BUT, FRANKLY, WHAT ARE WE GOING TO DO? YOU ARE
6 ASKING ME TO PUT HIM ON PROBATION. HE SAYS HE DIDN'T MAKE
7 THESE CALLS, AND THE EVIDENCE TO ME CLEARLY INDICATED THAT HE
8 DID AND TO THE JURY. OUT OF THE BLUE. I MEAN, I THINK THAT'S
9 PART, THE CONTENT OF THESE CALLS ARE VERY SCARY AND THEN IT IS
10 OUT OF THE BLUE. I MEAN, I THINK THAT IS PART OF WHAT
11 DR. JACOBS -- IS SCARY TO HER. IT IS LIKE HOW MUCH TIME HAS
12 TO GO BY BEFORE YOU ARE SAFE, AND SHE DIDN'T EVEN KNOW THAT
13 MR. BATHEN WAS HAVING THOSE THOUGHTS.

14 SO NOTHING ADDRESSED DR. MURPHY'S EVALUATION, BASICALLY
15 ASSUMES MR. BATHEN'S INNOCENCE, TO ME. HE ACCEPTS WHAT
16 MR. BATHEN SAID. NO, THIS IS A MAN -- THERE IS NO DIAGNOSIS.
17 IT IS -- MR. BATHEN IS SITUATIONALLY DEPRESSED BECAUSE HE IS
18 IN THIS PREDICAMENT. SO THAT IS NO HELP. FOR DR. MURPHY TO
19 SIT THERE AND SAY HE IS NOT VIOLENT. WELL, I KNOW HE LIVED IN
20 VIRGINIA. THERE ARE PLANES. EVEN IF THERE WAS JUST ONE CALL
21 THAT MR. BATHEN WAS GOING THROUGH SOMETHING, SOMEHOW THOUGHT
22 OF DR. JACOBS AFTER ALL THESE YEARS, EVEN IF THERE IS ONE, I
23 THINK I WOULD BE IN A DIFFERENT POSITION MAYBE. BUT
24 REPEATED -- I MEAN DR. JACOBS, HOW IS SHE GOING TO FEEL SAFE?
25 THIS CAME OUT OF THE BLUE. THIS ISN'T IN THE MIDDLE OF A
26 CONTENTIOUS THERAPY SITUATION OR ONGOING RELATIONSHIP, THIS
27 WAS OUT OF THE BLUE. SHE MAYBE WON'T FEEL SAFE FROM
28 MR. BATHEN, BUT IT IS ALSO A LIFE CHANGER, I WOULD THINK, FOR

1 SOMEBODY WHO IS A VICTIM OF A CRIME LIKE THIS, THAT SOMEBODY
2 OUT OF THE BLUE FROM YOUR PAST CAN COME FORWARD AND MAKE THESE
3 EXPLICIT, HORRIBLE, THREATS.

4 SO IT IS REALLY OF A DIFFERENT NATURE. BECAUSE I, YOU
5 KNOW, HE PORTRAYS HIMSELF AS HAVING THIS WONDERFUL PERFECT
6 LIFE, JOB CHANGES HERE AND THERE BUT ALWAYS EMPLOYED. THE
7 MILITARY WAS -- THAT WAS AFTER THESE CHARGES WERE BROUGHT.
8 SO -- BUT STILL, I MEAN, IT IS -- MR. BATHEN -- WELL, HE IS
9 NOT ACCEPTING HIS RESPONSIBILITY, BUT I DON'T THINK THEY
10 UNDERSTAND THE GRAVITY.

11 I -- IF SOMEBODY IS ELIGIBLE FOR PROBATION, I SERIOUSLY
12 LIKE TO PUT PEOPLE ON PROBATION BEFORE GOING TO STATE PRISON.
13 BUT FOR THE REASONS I HAVE STATED, YOU KNOW, THE FACT THAT
14 THERE WAS NO IMPETUS FOR THIS. THERE WAS NO EXPLANATION GIVEN
15 TO ME WHATSOEVER FOR THESE HORRIBLE THREATS TO BE MADE. SO I
16 CAN'T SAY, WELL, LET'S PUT MR. BATHEN ON PROBATION AND HAVE
17 HIM ADDRESS IT. ADDRESS WHAT? I DON'T KNOW. I MEAN -- AND I
18 FEEL FOR THE FAMILY MEMBERS. THEY KNOW MR. BATHEN AND LOVE
19 HIM AND WILL DO -- I BELIEVE WOULD DO ANYTHING TO PREVENT HIM
20 FROM BEING IN THIS POSITION, AND WOULD TRY TO MAKE HIM
21 SUCCESSFUL ON PROBATION. I APPRECIATE YOUR SINCERITY AND YOUR
22 LOVE AND YOUR HONESTY. I DO. BUT I DON'T THINK, YOU KNOW,
23 THIS -- I DON'T THINK YOU KNOW WHERE THIS COMES FROM EITHER,
24 HONESTLY. IF SOMEBODY DOES KNOW WHERE THIS COMES FROM, THERE
25 IS NO INDICATION GIVEN TO ME AND I CAN'T FIGURE IT OUT.

26 SO I UNDERSTAND THAT MR. BATHEN WAS WORKING AND NO RECORD.
27 THAT IS A BIG MITIGATING FACTOR TO ME, BUT THE THREATS OF THE
28 GREAT BODILY HARM IN DEPTH AND THEN BEYOND DR. JACOBS, TO HER

1 DAUGHTER TO -- IN THIS DAY AND AGE IN THE INTERNET, IT IS NOT
2 HARD TO FIND ANYBODY. THE THREE SEPARATE OCCASIONS AND THE
3 GRAPHIC AND SPECIFIC AND UNPROVOKED NATURE OF THE CONTENT, I
4 DO HAVE TO DENY PROBATION IN THIS CASE. THERE WAS GREAT
5 PSYCHOLOGICAL HARM INFLICTED. IT WAS MORE SERIOUS THAN
6 OTHERS, I THINK, AND I HAVE GIVEN YOU MY REASON. I GET IT
7 THAT MR. BATHEN HAS EXPRESSED REMORSE THAT DR. JACOBS HAD TO
8 SUFFER FROM THESE CALLS, BUT, OBVIOUSLY, NO REMORSE FOR
9 HIMSELF BECAUSE HE HAS TAKEN THE POSITION THAT HE DID NOT
10 COMMIT THESE CRIMES. I NEED TO PROTECT SOCIETY.

11 MS. SOMERVILLE, I DISAGREE WITH YOUR READING OF 667(C).
12 THAT REQUIRES A PRIOR STRIKE TO HAVE A MANDATORY CONSECUTIVE,
13 AND SO, YOU KNOW, I DOUBLE-CHECKED. IT WAS SOMETHING NEW TO
14 ME, THAT THIS ARGUMENT WITHOUT A PRIOR STRIKE, BUT 667
15 SUBSECTION (C) SAYS, "NOTWITHSTANDING ANY OTHER LAW, IF A
16 DEFENDANT HAS BEEN CONVICTED OF FELONY AND HAS BEEN PLED AND
17 PROVED THAT THE DEFENDANT HAS ONE OR MORE PREVIOUS OR PRIOR
18 VIOLENT FELONY CONVICTIONS, THEN IT IS MANDATORY CONSECUTIVE."

19 **MS. SOMERVILLE:** YOU ARE CORRECT, AND I REALIZED THAT.

20 **THE COURT:** OKAY. IT GAVE ME PAUSE. I DID LOOK AT IT. SO
21 ALL THOSE THINGS THAT WE HAVE TALKED ABOUT THAT COME BACK TO MY
22 CONSIDERATION OF THE APPROPRIATE PRISON TERM SINCE I AM DENYING
23 PROBATION, FINDING THAT MR. BATHEN IS NOT SUITABLE FOR
24 PROBATION. I AM SELECTING THE MIDTERM OF TWO YEARS ON COUNT 1
25 BASED ON -- AGAIN, IT IS NOT LOW TERM BECAUSE OF THE CONTENT.
26 MIDTERM, I AM ACTUALLY CONSIDERING ALL THREE OF THE CALLS AND
27 SELECTING THE MIDTERM, THE FACT THAT IT WASN'T JUST ONE. I
28 THINK THERE ARE MORE EGREGIOUS 422'S, WHICH IS WHY I AM NOT

1 GOING THE UPPER TERM. PROBATION ALSO RECOMMENDED THE MIDTERM.
2 I THINK IT IS THE APPROPRIATE SELECTION, GIVEN THE NATURE OF
3 THE CRIME, BUT KEEPING IN MIND THE FACT THAT MR. BATHEN DOES
4 NOT HAVE A CRIMINAL RECORD.

5 I AM GOING TO, ON COUNTS 2 AND 3, I AM SELECTING THE
6 MIDTERM TO RUN CONCURRENTLY, AND I AM DOING THAT. I
7 UNDERSTAND THAT BOTH PROBATION AND MS. SOMERVILLE REQUESTED
8 THAT I RUN CONSECUTIVE, BUT I THINK THIS IS WHERE I HAVE TO
9 TAKE INTO CONSIDERATION, AGAIN, MR. BATHEN AND HIS
10 CIRCUMSTANCES, HIS FAMILY SUPPORT, HIS WORK HISTORY, AND HIS
11 LACK OF RECORD AND HOW MUCH TIME IS APPROPRIATE AS PUNISHMENT
12 AND TO DISCOURAGE THE COMMISSION OF FUTURE ACTS, WHICH I THINK
13 ARE PURPOSES OF SENTENCING BUT ALSO NOT SO MUCH THAT WE GO THE
14 OTHER WAY. SO I THINK THAT THE TWO YEARS WITH THE COUNTS 2
15 AND 3 RUN CONCURRENTLY IS THE APPROPRIATE SENTENCE. SO THAT
16 WILL BE MY SENTENCE.

17 THE CREDITS ARE 34 ACTUAL, 34 4019 FOR A TOTAL CREDITS OF
18 68 DAYS. THERE IS A RESTITUTION FINE OF \$300, AN ADDITIONAL
19 RESTITUTION FINE OF \$300, STAYED PENDING SUCCESSFUL COMPLETION
20 OF PAROLE. A COURT SECURITY FEE OF \$120 AND CRIMINAL NEEDS
21 ACCOUNT FEE OF \$90. I WILL ORDER RESTITUTION TO THE VICTIM,
22 AND I UNDERSTAND THAT YOU WOULD LIKE A RESTITUTION HEARING.
23 SO WE WILL SCHEDULE A RESTITUTION HEARING. I WILL NOT PUT THE
24 AMOUNT OF RESTITUTION.

25 AND, MR. BATHEN, YOU HAVE THE RIGHT TO BE HERE AT A
26 RESTITUTION HEARING. IT IS TYPICALLY SET, AND YOU WILL BE IN
27 PRISON OR YOU CAN GIVE UP THAT RIGHT AND JUST HAVE YOUR LAWYER
28 HANDLE IT FOR YOU. THAT IS TOTALLY UP TO YOU, IF YOU WANT TO

1 TAKE A MOMENT AND TALK TO YOUR LAWYER ABOUT IT.

2 **THE DEFENDANT:** I WOULD LIKE TO BE PRESENT FOR THAT, YOUR
3 HONOR.

4 **THE COURT:** OKAY. THAT IS ABSOLUTELY FINE. WE WILL
5 SCHEDULE THAT IN A MOMENT. BEFORE THAT, I WANT TO TALK TO YOU.
6 I KNOW YOU HAVE SAID YOU ARE GOING TO APPEAL, WHICH IS
7 PERFECTLY FINE, BUT I HAVE TO GIVE YOU YOUR RIGHT TO APPEAL
8 JUST SO THAT IT IS ON THE RECORD, THAT YOU UNDERSTAND YOU HAVE
9 60 DAYS WITHIN WHICH TO APPEAL. IF YOU DON'T FILE IT WITHIN 60
10 DAYS OR YOUR LAWYER DOESN'T FILE THE NOTICE OF APPEAL WITHIN 60
11 DAYS, YOU LOSE YOUR RIGHT TO APPEAL. SO THAT IS AN ABSOLUTE
12 DEADLINE THAT NOBODY HAS ANY GIVE OVER. THEY CAN'T SAY 61 IS
13 CLOSE ENOUGH. IT IS JURISDICTIONAL 60 DAYS. SO MAKE SURE THAT
14 YOUR NOTICE OF APPEAL IS FILED WITHIN 60 DAYS.

15 IF YOU CAN'T AFFORD AN ATTORNEY, ONE WILL BE APPOINTED FOR
16 YOU TO REPRESENT YOU ON APPEAL, AND YOU WILL HAVE THE RIGHT TO
17 A TRANSCRIPT FOR YOUR APPEAL.

18 DO YOU UNDERSTAND YOUR APPELLATE RIGHTS?

19 **THE DEFENDANT:** YES, YOUR HONOR.

20 **THE COURT:** ALL RIGHT. I AM GOING TO ISSUE THE TEN-YEAR
21 PROTECTIVE ORDER AS REQUESTED BY THE PEOPLE TO HAVE NO CONTACT,
22 DIRECT OR INDIRECT, WITH DR. JACOBS. AND, OF COURSE, THAT'S --
23 THAT INCLUDES IF YOU WANTED TO SEND ANOTHER LETTER ASSURING HER
24 THAT SHE WOULD BE FINE, YOU CAN'T DO THAT. ALL RIGHT. SO
25 THAT'S NO CONTACT WHATSOEVER. SO I JUST HAVE TO MAKE SURE THAT
26 I HAVE THE RIGHT ONE. WHERE DO YOU HAVE THE TIME ON THERE?

27 **MS. SOMERVILLE:** YOUR HONOR, IT IS BOX 2.

28 **THE COURT:** OKAY. THANK YOU.

1 SO WITH THAT, THANK YOU, EVERYONE, FOR COMING AND FOR
2 GIVING ME THE INFORMATION.

3 I WISH YOU GOOD LUCK, MR. BATHEN. THANK YOU.
4 WE WILL BE IN RECESS.

5
6
7 (THE PROCEEDINGS WERE CONCLUDED.)

8
9 * * *

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 STATE OF CALIFORNIA)

2 :SS.

3 COUNTY OF SAN DIEGO)

4
5 I, NYREE-DAWN LLOYD, OFFICIAL REPORTER FOR THE
6 SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE
7 COUNTY OF SAN DIEGO, DO HEREBY CERTIFY:

8 THAT AS SUCH REPORTER, I REPORTED IN MACHINE SHORTHAND
9 THE PROCEEDINGS HELD IN THE FOREGOING CASE;

10 THAT MY NOTES WERE TRANSCRIBED INTO TYPEWRITING UNDER MY
11 DIRECTION AND THE PROCEEDINGS HELD ON JULY 19, 2018, CONTAINED
12 WITHIN PAGES 592 THROUGH 613, ARE A TRUE AND CORRECT
13 TRANSCRIPTION.

14
15 DATED THIS 1ST DAY OF OCTOBER 2018.

16
17
18 
19

20 NYREE-DAWN LLOYD, CSR NO. 12587
21
22
23
24
25
26
27
28