

NOT TO BE PUBLISHED

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

JESSE ISAIAS SANTANA,

Petitioner,

v.

THE SUPERIOR COURT OF YUBA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

C066008

(Super. Ct. No.
CRF-08-825)

DAVID WILLIAM VASQUEZ,

Petitioner,

v.

THE SUPERIOR COURT OF YUBA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

C066009

(Super. Ct. No.
CRF-08-825)

THE PEOPLE,

Plaintiff and Appellant,

v.

JESSE ISAIAS SANTANA et al.,

Defendants and Respondents.

C066219

(Super. Ct. No.
CRF-08-825)

THE PEOPLE,

Petitioner,

v.

THE SUPERIOR COURT OF YUBA COUNTY,

Respondent;

JESSE ISAIAS SANTANA et al.,

Real Parties in Interest.

C066447

(Super. Ct. No.
CRF-08-825)

A teenage girl, S.A., told a detective that she had been the victim of her employer's ongoing criminal sexual harassment. Her attorney, defendant and petitioner Jesse Isaias Santana (hereafter defendant Santana), then negotiated an agreement with the employer's attorney, defendant and petitioner David William Vasquez (hereafter defendant Vasquez). The agreement recited that "[i]n consideration of" S.A.'s receipt of \$100,000, she would settle any civil claims she had against the employer and would "request that criminal charges not be filed . . . , and w[ould] exercise any privilege she may have pursuant to law[]

not to testify in any proceedings” Even though the parties never consummated this agreement, the legal fallout from this paragraph has generated volumes.

A grand jury indicted the two attorneys for conspiring to obstruct justice (Pen. Code, § 182, subd. (a)(5)),¹ two different species of bribery,² and both simple witness dissuasion (§ 136.1, subd. (b)(2)) and dissuasion for financial gain (§ 136.1, subd. (c)(4)). The defendant attorneys moved to set aside the five-count indictment. The trial court granted defendants’ motions as to the two bribery counts (and as to the count charging defendant Santana with witness dissuasion for financial gain) and denied them as to the remainder.

The defendant attorneys filed petitions for writ of prohibition directing the trial court to grant the balance of their motions to set aside. (Case Nos. C066008 [Santana] & C066009 [Vasquez].) We granted the motion of the People to consolidate the matters for purposes of briefing, argument, and decision. We also issued orders to show cause and a stay of the proceedings in the trial court.

¹ Undesignated statutory references are to the Penal Code. All statutory references are to those sections in effect at the time of the November 2008 indictments at issue.

² The indictment charged defendant Vasquez with offering a bribe with the understanding that the person would not attend trial or another judicial proceeding (§ 138, subd. (a)), and defendant Santana with offering to receive a bribe (as an aider/abettor) to be absent from a trial or proceeding or to influence the giving of testimony (§ 138, subd. (b)).

The People filed a notice of appeal from the trial court's order to the extent that it granted defendants' motions to set aside the indictment. (Case No. C066219 [the People's appeal].) They also sought a writ of mandate on "the exact same issues on the exact same set of facts" directing the same relief. (Case No. C066447 [the People's writ].) After granting a stay and issuing an order to show cause in connection with the writ, on our own motion we first consolidated *these* two cases for purposes of argument and decision only, then consolidated them with the other two pending cases as well.³

The record in defendant Santana's petition incorporates all the pertinent exhibits to defendant Vasquez's petition, except for the transcripts of the two hearings on the motions to set aside the indictment. The exhibits in support of the People's opposition to the petitions do not appear to contain any additional pertinent material, nor does the record in the People's appeal or the exhibits to the People's petition.

As to defendant Santana, we shall grant his petition for a writ directing the trial court to set aside the indictment in its entirety because an otherwise disqualified judge did not

³ We shall construe pending motions in the People's appeal that the People and defendant Santana have filed for judicial notice of transcripts in other cases as requests to incorporate them by reference, as judicial notice is proper only of the existence and not the contents of the transcripts. (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 148; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-1569; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 864-865.) As thus construed, we shall grant the motions.

have jurisdiction to convene the grand jury that indicted him. This moots our consideration of his substantive challenges to the indictment.

As to defendant Vasquez, we do not agree that the grand jury indicted him for conspiracy to obstruct justice or witness dissuasion on less than probable cause as a result of erroneous expert testimony and incomplete instructions. We shall therefore deny his petition.

We shall affirm the People's appeal on a different basis than that specified in the trial court's ruling, on which we solicited supplemental briefing from the affected parties. Determining that their appeal at this point is an adequate remedy, we shall deny the People's petition for a writ of mandate. (8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 59, p. 937.)

FACTUAL AND PROCEDURAL BACKGROUND

A. Judge Scrogin and the Grand Jury

In response to defendant Santana's motion in May 2009 to disqualify her for cause in a criminal matter, Judge Julia L. Scrogin filed points and authorities and a verified answer. Defendant Santana attached the disqualification motion and Judge Scrogin's response as an exhibit to his motion to dismiss the indictment in order to develop the facts regarding the impaneling of the criminal grand jury that indicted the defendant attorneys. We draw the following facts from this source.

Judge Scrogin's Recusals (June-November 2008)

Judge Scrogin had been the prosecutor in a "high-profile murder case" in which defendant Santana had been successful in obtaining an acquittal in 2004 after two retrials. Judge Scrogin denied having any lingering animosity toward him as a result, and before May 2009 Santana had not sought to disqualify her in a few "minor misdemeanor matters" over which she had presided.

Starting in June 2008, for a "brief period" Judge Scrogin chose to recuse herself from hearing cases in which defendant Santana was of counsel "to avoid the appearance of impropriety."⁴ She was aware from word of mouth and a May 2008 newspaper article that a visiting judge had issued warrants to search the offices of the defendant attorneys. In June 2008, she read another article containing assertions from defense counsel that the criminal investigation of defendant Santana, for his involvement in the negotiation of the settlement agreement at issue in this case, was intended to "'scuttle'" his application for an appointment to a vacancy on the Sutter County Superior Court in order that a prosecutor could obtain it. Judge Scrogin had written a letter in support of a rival candidate, and did not support defendant Santana's appointment.

⁴ These included misdemeanor cases in June 2008, September 2008, and November 2008. After the indictment, Judge Scrogin and the rest of the Yuba County bench recused themselves from the defendant attorneys' case.

The Governor made the appointment to the Sutter County court in January 2009. At that point, Judge Scrogin deemed the grounds warranting recusal for an appearance of impropriety to have ceased.

Impaneling the Grand Jury (September 2008)

In 2008, Judge Scrogin was assigned the duty of supervising the grand jury. In this role, she presided over the impanelment of a special criminal grand jury on September 16, 2008.

In this capacity, she conducted voir dire of the potential grand jurors to determine if they were qualified to sit on the grand jury, and solicited basic biographical information from prospective jurors in the course of determining whether they could be fair and impartial. In the process, she excused several potential jurors for cause, one of whom had surmised the subjects of the grand jury and had personal knowledge. After filing a copy of the charge with the clerk, Judge Scrogin left the courtroom, and the grand jury began its proceedings.

B. Griesa Grand Jury Proceedings (September & October 2008)

The circumstances of the alleged criminal offenses against S.A., which she described in testimony before the grand jury that indicted her employer (Joseph Griesa), are generally irrelevant to the derivative proceedings against the defendant attorneys. We thus give only a limited summary of them. However, because the grand jury was instructed that it could consider testimony from the Griesa proceedings in connection with the later proceedings against the defendant attorneys, we

include testimony (primarily of S.A. and her sister) that relates to the manner in which the settlement agreement came into being.⁵

S.A. was born in July 1990. Having graduated early from high school, she was attending community college in 2006 and close to obtaining her associate's degree in bioscience with plans to transfer to the University of California, Davis to eventually become a medical examiner.

Griesa had been her older brother's probation officer years earlier, and had become a family friend. He left the probation department to run a Marysville towing company, where S.A.'s older sister had worked as a dispatcher for a couple of years. In 2006, Griesa offered S.A. a job as a weekend dispatcher.

Beginning with a company Christmas party in 2006, Griesa began to subject S.A. to continuous physical and verbal sexual abuse, and sent her inappropriate text messages. In brief, S.A. described Griesa masturbating in her presence while watching pornographic movies in his office; sticking his hands inside her clothing to touch her breasts and genitalia; attempting to force her to fellate him; and being physically violent with her. She also described an incident in which he had fondled her in his vehicle after she drank a beverage that had left her feeling woozy, and may have sodomized her. He threatened to kill her

⁵ The same grand jury that returned the Griesa indictment also returned the indictments of defendants Santana and Vasquez.

and her family if she made any complaints (at times pointing a gun at her or holding a knife to her neck); boasted of having Al Capone as a relative; and touted the protection afforded to him from his extensive connections with local law enforcement (whom S.A. had seen attending weekly poker parties in the office). As further evidence of his influence, she testified that Griesa had intervened in her favor before she started to work for him by having pending charges dropped that had arisen from her fight with another girl.

In November 2007, S.A. was arrested at work for harboring two younger teen runaways who were apparently hanging around the office at Griesa's direction (after Griesa denied any knowledge of their presence to the police, and S.A. had argued with one of the police officers). S.A. told Griesa that her parents were not going to allow her to continue to work at a place where she had been arrested. After this, one of Griesa's drivers saw some of the text messages from Griesa's phone on S.A.'s phone when she had left it at her desk. The driver told another of Griesa's drivers what he had seen and the second driver contacted a highway patrol officer about the inappropriate behavior, who in turn contacted Detective Randall Elliott.

Detective Elliott of the Marysville Police Department interviewed S.A. on November 9, 2007. She did not recall telling him everything that had taken place with Griesa, but did

turn over her cell phone with the text messages.⁶ He asked her whether she could be confused about whether Griesa had been flirting with her. Elliott managed to have the harboring charges against her dismissed after hearing a call S.A. had recorded with Griesa discussing the matter. This was S.A.'s only contact with Elliott, other than an unsuccessful attempt at a pretext call to Griesa shortly after the interview.

S.A. and her sister did not think that law enforcement was going to respond to her report about Griesa, because Detective Elliott had told her that he did not think there was sufficient evidence to bring charges in a "he said/she said" situation. One of S.A.'s sisters testified that Elliott suggested S.A. pursue a civil action against Griesa because criminal proceedings might not happen.⁷ S.A.'s sisters spoke with Elliott afterward about Griesa removing "stuff . . . like computers" from his office, at which time Elliott reiterated his previous recommendation of seeking civil redress because criminal proceedings did not seem likely. S.A. also told her sister that she did not want to pursue criminal charges or testify because

⁶ For his part, Detective Elliott testified that he did not recall S.A. mentioning a number of the incidents that had figured in her testimony before the grand jury. He also noted that he found her demeanor in the interview to be unusually detached when describing Griesa's conduct.

⁷ Detective Elliott denied ever speaking discouragingly about the degree of likelihood of criminal prosecution, but did recall noting in passing that S.A. had a civil remedy available as well.

she did not want her father and brother to find out, the former being in poor health and the latter inclined to hot-headed responses in protection of his family. Her sisters, who worked at defendant Santana's law firm, put S.A. in touch with him. Santana agreed to represent S.A. pro bono in settlement discussions.

Other than letting Griesa know he was conducting an investigation, Detective Elliott never spoke with Griesa (with whom he was not familiar). Defendant Santana called Elliott in December 2007 to tell him that S.A. did not want to pursue criminal charges because she wanted to move to the Bay Area and put the matter behind her. When Elliott asked him if he could call S.A. to discuss her change of mind, defendant Santana told him that he had instructed his client not to speak to Elliott, and had advised her to refuse to testify if called as a witness.

C. Santana & Vasquez Grand Jury Proceedings (November 2008)

S.A. and Her Sister

Detective Elliott interviewed S.A. on November 9, 2007. She told him about Griesa's sexual advances. She and Elliott made an unsuccessful pretext call to Griesa (who did not answer). Elliott made it clear to S.A. and her sister that he did not think anything was going to happen to Griesa because it was a "he said/she said" situation, and the only form of redress they might get would be civil (alluding to the notorious O.J. Simpson acquittal and later civil trial). S.A. did not speak again to the detective after that.

A couple of weeks later, S.A.'s sister, who worked for defendant Santana, put S.A. in touch with him to discuss the circumstances of her arrest (for harboring runaways). At this time, S.A. described what had been happening with Griesa. S.A., on advice of her present counsel, declined to testify about the content of her discussions with defendant Santana that led to the preparation of the settlement. However, she did disclose that defendant Santana had explained there was a quiet way to resolve her claims against Griesa without going to court, and there was the alternative where everything would become public. A settlement would keep the matter out of court. He explained to her that she would be getting money "in exchange for not talking to . . . [or] cooperating with the police, [and] not testifying in court."

Judge Scrogin directed S.A. to answer further questions regarding conversations with defendant Santana.⁸ S.A. then testified that her account for defendant Santana of Griesa's behavior was more detailed than in her interview with the detective (and had become even more comprehensive after speaking with subsequent counsel and testifying before the Griesa grand jury). However, she then reiterated her refusal to disclose anything else about the advice she had received from defendant Santana, and the prosecutor abandoned further questioning on

⁸ Judge Scrogin refused to honor the request of S.A.'s counsel to recuse herself, stating that there was not yet an "official proceeding" pending.

that issue. The prosecutor later asked the grand jury foreman to direct S.A. to answer the question about what advice she received from defendant Santana. She continued in her refusal to answer. The prosecutor indicated that Judge Scrogin would later "take up the issue of contempt."

After a couple of meetings with defendant Santana, on December 13, 2007, S.A. and her mother executed the settlement we quoted at the outset.⁹ As S.A. and her family understood it, before she could receive any settlement from Griesa, a judge would have to approve it. Defendant Santana was not keeping any portion of the settlement for his services. S.A. did not see any previous draft of the settlement agreement. Around Christmas, S.A. contacted defendant Santana and asked if there were any way to change her mind. Her father had at this point found out about her claims against Griesa, which had been her main motivation for wanting to avoid publicity. Defendant Santana told her that it was not too late to change her mind, and referred her to another lawyer. (S.A.'s mother elsewhere testified that S.A. was concerned that Griesa might victimize someone else.)

S.A.'s sister acknowledged that she had told an investigator for the Yuba County District Attorney's office that

⁹ Defendant Vasquez's legal secretary testified that the language, "and will exercise any privilege she may have pursuant to law not to testify in any proceedings," was added to the agreement at his behest.

defendant Vasquez had contacted defendant Santana's office to *initiate* Santana's contact with the family to discuss their interest in resolving S.A.'s claims against Griesa. However, this was an assumption on her part because she was not working in defendant Santana's office at that time. She therefore did not know whether the defendant attorneys had consulted together before defendant Santana initially met with S.A.¹⁰ The first meeting with defendant Santana was solely to get advice; the issue of a civil settlement did not arise until later. The sister had told S.A. this would be her only option if she wanted to keep the matter quiet.

Detective Elliott

Detective Elliott testified that it was S.A. and her sister who had characterized the case as a "he said/she said," and had expressed frustration with the criminal justice process. In response, he mentioned to them the possibility of seeking civil redress.

Detective Elliott called Griesa shortly afterward, giving only a general description of the claims against him, and asking if Griesa would be willing to talk with him. Griesa said he

¹⁰ The investigator testified as follows from the contents of his audio recording of the interview: S.A.'s sister initially spoke with her employer (defendant Santana's associate) about whether S.A. needed an attorney; her employer suggested S.A. might want to proceed in civil court; and her employer later called the sister to pass on the information that defendant Vasquez had called the law office to suggest that defendant Santana talk to S.A. about settling.

wanted to speak with his attorney first. Defendant Vasquez called the detective later that day. Elliott may have been more specific about S.A.'s allegations against Griesa in talking with defendant Vasquez. Asserting that he was leaving on a cruise within a day or so, defendant Vasquez asked the detective to refrain from sending a report to the prosecutor's office until after his return. The detective assented.

Prior to December 11, 2007, defendant Vasquez called the detective back and announced that Griesa and the victim had "worked something out," and there would not be any further need to interview Griesa. Defendant Vasquez may have been more specific about what this meant, but the detective did not take any notes of this conversation.

On December 11, defendant Santana called Detective Elliott, identifying himself as S.A.'s attorney and informing Elliott that S.A. did not wish any criminal prosecution to take place and would not testify if called as a witness, and he had also instructed her not to talk further with Elliott. This struck Elliott as unusual in a situation not involving an intimate relationship between a suspected sex offender or domestic abuser and a victim, so he sent a supplemental report to the prosecutor's office that noted his suspicions of bribery. Defendant Santana later called Elliott on December 21 to inform him that he no longer represented S.A., and she would be willing to cooperate fully in Griesa's criminal prosecution.

Griesa

Griesa had been a social acquaintance of both defendant attorneys before November 2007. After Detective Elliott called him, Griesa immediately called defendant Vasquez. Defendant Vasquez made use of the "he said/she said" term for the case, and sketched out the alternatives of a public trial versus handling it behind closed doors. Because of the risk of damage to his reputation and business even if he prevailed, Griesa fervently wanted the latter. Griesa claimed the attorney advised him to pay S.A. off with enough money so that she would not sue civilly and would refuse to testify in criminal proceedings (which would preclude his conviction). Defendant Vasquez told Griesa that he would find someone to represent S.A. in negotiations. Griesa mentioned defendant Santana's firm, where S.A.'s sisters worked. This information caused defendant Vasquez to raise his estimate of the likelihood of settlement; he boasted about having arranged such things many times with defendant Santana. Defendant Vasquez called Griesa back to express the opinion that defendant Santana would be able to make the settlement happen.

Griesa was not pleased when he learned the settlement was going to cost \$100,000 and thought that the defendant attorneys were "playing" him; a family friend, Attorney Tim Evans, who was a former superior court judge agreed. However, after defendant Vasquez got agreement from defendant Santana to two installment payments within 60 days, Griesa had a check delivered for \$50,000 made payable to defendant Vasquez's trust account. At

the suggestion of Attorney Evans, Griesa also determined that he had insurance coverage for sexual harassment and contacted his adjuster, who told him the company would not fund any closed-door agreement. The insurer later sent him a letter in January 2008 expressing its belief that the agreement Griesa forwarded to it was unenforceable and contrary to public policy.

After receiving an unsigned copy of the settlement agreement, Griesa took time to consult with another attorney. However, defendant Vasquez called Griesa around Christmas to let him know that S.A. had changed her mind and had obtained new counsel, so the settlement was off. Defendant Vasquez told Griesa that he was speaking with members of the prosecutor's office about whether criminal charges would be filed in light of the efforts at a settlement, and continued to pursue the possibility of settlement with S.A.'s new attorney. In February 2008, Griesa engaged the services of Attorney Evans as his defense counsel for the next several months.

After picking up his file from defendant Vasquez, Griesa found the copy of the settlement that S.A. and her mother had executed. On the advice of Attorney Evans, who agreed with the insurer's dim view of the agreement that the defendant attorneys had drafted, Griesa decided to share this information with the prosecutor's office.¹¹

¹¹ We note Griesa was convicted in June 2009 of contributing to the delinquency of S.A. and annoying or molesting her (the jury either acquitting him or failing to reach verdicts on other

Expert Testimony

Attorney Evans attested to his years of experience on both sides of the bench, offering the following legal opinions. He asserted it was not permissible to "civilly compromise" a felony (the procedure under sections 1377-1379).¹² He also testified that a settlement of a civil claim involving a minor is not effective without judicial approval of its terms even if both a parent and minor execute it. He asserted a deposit of settlement funds should be in a restricted account. He did not think the agreement in this case was enforceable because it did not comply with these standards. In his years on the bench, he had also never seen a request for an upfront deposit of settlement funds before judicial approval. Finally, Attorney Evans believed the present agreement "appears to be tinkering with evidence"; in his view, soliciting the noncooperation of a witness "obstruct[s] the presentation of criminal charges," since sex offenses are "not prosecutable absent statements" given to authorities. As a result, he had advised Griesa to give his file from defendant Vasquez to the prosecutor's office.

counts). His appeal in case No. C066058 is pending in this court.

¹² It is unclear why the subject of civil compromise pursuant to these statutes arose in the grand jury proceedings, as criminal charges had yet to be filed at the time of the involvement of the defendant attorneys. (§ 1378 ["If the person injured appears before the court *in which the action is pending* at any time before trial, and acknowledges that [she] has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant may be discharged therefrom; . . ." (Italics added.)].)

A State Bar deputy trial attorney testified generally at length about the structure of that organization, the rules governing conduct of attorneys, and requirements for continuing education. She then described the ordinary process for creating an attorney-client relationship (either for fees or pro bono), and the manner in which settlements are reached. She reiterated the account Attorney Evans gave of the laws governing judicial approval of a minor's settlement, diving more deeply into the provisions of the California Rules of Court, rule 7.950, governing the contents of a petition to confirm a minor's settlement (which include *public* disclosure in the petition of the circumstances underlying the settlement), and the forms the Judicial Council has developed for the process. This was all to the end of giving the opinion that a settlement document not in compliance with these provisions would not be valid. The State Bar attorney also testified about sections 1377 and 1378's provisions for a civil compromise of a pending criminal matter, asserting it was limited to misdemeanors other than child molestation and was subject to court approval. Turning to the file Griesa provided to the prosecutor, the State Bar attorney faulted it for lacking any interview notes or a retainer agreement, and faulted the written settlement agreement for failing to comply with the legal criteria she had set out for settlement of a minor's claim.

Attorney Michael Jones attested to his lengthy legal experience since 1988, which included sexual harassment cases

and his tenure as a prosecutor. His testimony on legal questions was in accord with the other two expert witnesses about the formalities for entering into an attorney-client relationship, the proper format for settling a minor's claim, the process for a civil compromise for existing criminal charges under section 1378, and the existence of a statute prohibiting confidential settlement agreements where felony sexual offenses are involved (Code Civ. Proc., § 1002). Attorney Jones opined that the agreement in the present case bordered on malpractice. He believed it was never proper to instruct a client not to speak with the police "[b]ecause at that time you, in my opinion, are obstructing justice." He would instead insist on his presence at any questioning of the client. He could not imagine an attorney who was negotiating a settlement not having inquired about the availability of insurance coverage. He asserted that an attorney has the obligation to ensure that a minor's parent fully understands a settlement in order to avoid malpractice. He found that the wording of the settlement at issue was void as contrary to the provisions for enforcing a minor's settlement and the other restrictions he had described. In his opinion, the agreement was an obstruction of justice that was "just outright wrong." Finally, he testified that a witness did not have any *privilege* not to testify, citing (in the course of his lengthy criticism of that term) to an attorney disbarred for witness dissuasion and to case authority that he described as invalidating nonprosecution agreements with crime victims. He stated that a witness *can* in fact be compelled to testify,

and an attorney who directed otherwise would be committing a crime.

D. Subsequent Proceedings

The grand jury issued its indictment of the defendant attorneys in November 2008. In July 2009, the prosecutor filed an amended indictment. As noted, it charged the two defendants with a conspiracy to obstruct justice; defendant Vasquez with bribing a witness; defendant Santana with offering to receive a bribe of a witness; and the two defendant attorneys with both dissuading a witness and dissuading a witness for financial gain.

In November 2009, the defendant attorneys jointly filed a motion to dismiss the indictment on statutory (§ 995) and nonstatutory grounds, requesting an evidentiary hearing as to the latter. Having substituted for the local prosecutor in June 2009, the Attorney General filed the opposition. After the defendant attorneys filed their reply brief, the trial court convened in January 2010 to hear argument on the motions (in connection with which it had submitted a series of written questions to the parties). Over the next several months, the court received testimony in support of the motions on several occasions before taking the matter under submission; as none of the parties allude to these hearings or include the testimony in the record in any of these cases, we assume they are not material to the issues before us.

The trial court issued its initial ruling in July 2010. We relate only its aspects relevant to the matters here.

The trial court sustained various objections to the testimony of the legal experts as being irrelevant and incompetent, specifically finding their opinions incorrect that the settlement agreement did not have proper parental consent, that S.A. could have been forced to testify, and that it would be improper to advise a client that she could decline to testify.

Finding that the bribery statute required an understanding that the bribe would result in S.A. refusing to *attend* trial or *change* her testimony, the trial court concluded the settlement required her only to refuse to *testify*. This was not a *corrupt* interference with the administration of justice, as S.A. could have refused to testify without being jailed for contempt (Code Civ. Proc., § 1219), and therefore the settlement did not amount to bribery under Penal Code section 138. Since the grand jury heard expert opinion that S.A. *could* be compelled to testify and was not instructed at all regarding her statutory immunity from being jailed for contempt, there was prejudicial error as a result with respect to the bribery counts against the two defendant attorneys.

The trial court, however, did not find this error to have infected the remaining counts, because these offenses were not concerned with *testimony* but with preventing the *prosecution* of criminal offenses, something for which a potential witness does

not have any species of immunity for a failure to cooperate. Moreover, the fact that S.A. could *choose* not to testify did not shield the defendant attorneys from liability for obstruction of justice or witness dissuasion for *seeking* to bring about that result.¹³ Finding that defendant Santana did not receive any consideration for negotiating the settlement, the trial court dismissed the count against him of dissuading a witness for financial gain.¹⁴ In contrast, there was some evidence that Griesa had paid defendant Vasquez for his settlement efforts, so the court denied the motion as to him for dissuasion of a witness for financial gain.

With respect to the issue of the participation of Judge Scrogin in the grand jury proceedings, the ruling was terse. It simply described her participation as "perfunctory," and as a result it did not require dismissal.

The court subsequently designated its order as a tentative ruling, and allowed motions for "reconsideration." In August 2010, following a hearing, the trial court reaffirmed its tentative ruling with some additional explanation from the bench. It noted the settlement agreement would not refer to the assertion of a "privilege" not to testify if the understanding had been for S.A. to refuse entirely to attend trial. It

¹³ The trial court did strike a few of the alleged overt acts as not furthering any obstruction of justice, an action the People do not challenge in this court.

¹⁴ The People do not challenge this ruling on appeal.

reaffirmed that for purposes of the *bribery* statute, the corrupt motive must have as its object an *unlawful* interference with the judicial process (noting in this context that offering money to conceal a crime is not *bribery* because a person does not have any legal obligation to report a crime, in contrast with the duty to comply with a subpoena to attend trial).¹⁵ Thus, the failure to instruct on S.A.'s privilege not to testify, and the erroneous expert opinions on the subject, precluded the grand jury from examining whether the defendant attorneys lacked a corrupt intent for purposes of bribery. On the other hand, it was unlawful for purposes of obstruction and dissuasion to attempt to prevent S.A. from assisting with the criminal investigation and prosecution of Griesa under any circumstances, so the lack of instruction and the erroneous expert opinions were irrelevant.

The People, as noted above, filed a notice of appeal (and a writ of mandate) from the dismissal of the bribery counts. The defendant attorneys filed their petitions for writs of prohibition.

¹⁵ It would, however, be compounding a felony (§ 153) to be a person involved in the acceptance of money to conceal evidence of a crime. (*People v. Pic'l* (1982) 31 Cal.3d 731, 742-745 (*Pic'l*).)

DISCUSSION

I. Defendant Santana's Petition

We review a motion to set aside an indictment de novo. (*People v. Superior Court (Costa)* (2010) 183 Cal.App.4th 690, 699.) Defendant Santana argues that Judge Scrogin's actions in impaneling the grand jury are void because there were grounds for her disqualification on the basis of an appearance of bias against him. We must first determine whether this issue is a proper basis for challenging an indictment, a proposition the parties apparently take for granted.

A statutory ground for setting aside an indictment is where it was not properly "found, endorsed, and presented." (§ 995, subd. (a)(1)(A).) We have noted that a statutory motion to set aside an indictment does not contemplate the introduction of evidence outside the record of the proceedings before the grand jury. (*People v. Sherwin* (2000) 82 Cal.App.4th 1404, 1411.) The People, however, do not dispute that this ground is cognizable through the vehicle of a nonstatutory motion to set aside as well.¹⁶

¹⁶ A defendant may additionally seek to set aside an indictment on the basis of grand jury proceedings that resulted in a denial of the right to due process. (*Stark v. Superior Court* (2011) 52 Cal.4th 368, 417 (*Stark*) [adequate showing that prosecutor's conflict of interest substantially impaired grand jury's independence would violate due process]; *People v. Backus* (1979) 23 Cal.3d 360, 393 (*Backus*) [indictment likely based on incompetent and irrelevant evidence would violate due process].) A fundamental element of due process is an impartial judge. (*People v. Cowan* (2010) 50 Cal.4th 401, 455-456.) However, where (as here) the claim is merely that there was an appearance

In this context, "mere irregularities in formation of the grand jury or its proceedings are not proper grounds" for relief, on the theory that an indictment "serves merely to bring the accused to trial, and . . . procedural departures are not prejudicial if the defendant ultimately receives a fair trial on the merits." (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 229, p. 438.) As annotated in the treatise, it is not a basis for setting aside an indictment to claim that: a grand juror had actual or perceived bias against a defendant; the foreman failed to direct any prejudiced grand jurors to retire; a grand juror was not competent to sit on the grand jury; or the superior court judges assembling the grand jury list had purposely departed from the statutory procedures for selecting grand jurors in order to predetermine a particular type of grand juror. (*Ibid.*)

The latter situation arose in *Fitts v. Superior Court* (1935) 4 Cal.2d 514, which noted that as long as a superior court acted within its jurisdiction in impaneling a grand jury, irregularities do not render an indictment void; it distinguished an earlier case, *Bruner v. Superior Court* (1891) 92 Cal. 239, in which the superior court *did not have jurisdiction* to appoint an "elisor" to summon jurors (in the absence of a showing that the sheriff was disqualified to

of impropriety rather than actual bias (or an unacceptably high probability of actual bias), this is merely a question of disqualification as a matter of state law and not due process. (*Cowan*, at pp. 456-457.)

perform that duty), and thus the unauthorized elisor's convening of the panel was void (which rendered the indictment a nullity). (*Fitts, supra*, at pp. 520-521, citing *Bruner, supra*, at p. 249; accord, *People v. Byrd* (1954) 42 Cal.2d 200, 205-206 [distinguishing *Fitts* and *Bruner*].)

We return to the issue of judicial disqualifications. A disqualification occurs when the facts creating it arise, not when the disqualification is adjudicated. (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776 (*Christie*).)¹⁷ At that point, the judge "is deprived of the *fundamental jurisdiction* to hear and rule on any further matters." (*Christie*, at p. 777, fn. 3.) As a result, the judicial acts of a disqualified judge "are void and must be vacated."¹⁸ (*Christie*, at p. 779.)

Under the strange circumstances of this case, we think it is more akin to *Bruner*. Judge Scrogin had already declared her disqualification *sua sponte* in any matters in which defendant Santana appeared as *counsel* because a reasonable person could

¹⁷ In *Christie*, the disqualification arose at the time the judge who would be ruling on a motion for nonsuit consulted with a disqualified judge, a fact not discovered until after the grant of nonsuit and dismissal of the action. (*Christie, supra*, 135 Cal.App.4th at pp. 773, 779.)

¹⁸ *Christie* acknowledged authority that considered the acts of a disqualified judge to be "voidable" because they would have been within the jurisdiction of the *court* if not the rendering judge. However, *Christie* adhered to the California Supreme Court's use of the term "void," and also noted that in any event there would not be any difference in outcome if the order under attack was not yet final (*Christie, supra*, 135 Cal.App.4th at pp. 779-780), such as the one we consider.

have doubts about her bias against him. This certainly would not be any less true in proceedings that would subject defendant Santana *personally* to criminal charges rather than a client of his. (Cf. *Woods v. Superior Court* (1987) 190 Cal.App.3d 885, 886-887 [party had two cases pending before same judge; even though peremptory challenge was timely in only one of the cases, would create appearance of impropriety to deny it in the other].) Like the unauthorized elisor in *Bruner*, the disqualified Judge Scrogin was without fundamental jurisdiction to impanel a grand jury to indict defendant Santana, and her actions toward that end were therefore void. The indictment is accordingly a nullity with respect to defendant Santana.

The People contend Judge Scrogin did not take any action in a "proceeding" to which the disqualification statutes apply. (Code Civ. Proc., § 170.5, subd. (f) [matters "tried or heard" by a judge].) They cite *Housing Authority of Monterey County v. Jones* (2005) 130 Cal.App.4th 1029 (*Jones*) as holding that "proceeding" has a narrow meaning. *Jones*, however, is contrary to their position. *Jones* held that, *regardless* of whether that narrow definition of "proceeding" applied to a superior court judge under Code of Civil Procedure section 170.1, subdivision (b) who was sitting on a panel of the appellate division that was reviewing a judgment in which that judge had ruled on pretrial motions, the broader provisions of section 170.1, former subdivision (a)(6)(C) (now (a)(6)(A)(iii)), governing the *appearance of impropriety*, would require disqualification even

if it were not the same proceeding on appeal. (*Jones, supra*, 130 Cal.App.4th at pp. 1040-1042.) Thus, *Jones* not only fails to include any basis for the People's claim that the impaneling of a grand jury or a ruling on contempt during grand jury proceedings is not a "proceeding" within the terms of the disqualification statute,¹⁹ *Jones* establishes a general basis to disqualify a judge for the appearance of impropriety *other than* the specific statutory circumstances.

The People also argue that Judge Scrogin was unaware that her self-disqualification regarding defendant Santana was at issue in the proceedings before the grand jury. It is highly unlikely that Judge Scrogin was unaware of the identity of the parties against whom the grand jury would be proceeding, given that a potential grand juror was excused on this basis. In any event, it is immaterial. It is the *objective* fact of the basis for disqualification and not the judge's subjective awareness that is key. (*Christie, supra*, 135 Cal.App.4th at pp. 773, 781 [party is still prejudiced regardless of fact that neither judge was aware of disqualified status of judge with whom judge ruling

¹⁹ The People elsewhere attempt to minimize the extent to which Judge Scrogin exercised discretion on the facts she elicited in voir dire to excuse various potential grand jurors for cause or hardship, or to rule on the contempt. Her role, however, was hardly "ministerial" on matters that were not "substantive." The People do not explain why an evaluation of facts during voir dire for purposes of *choosing the finders of fact* who then indicted defendant Santana, and compelling a witness against defendant Santana to testify on pain of contempt, do not amount to Judge Scrogin having "tried or heard" a matter. (Code Civ. Proc., § 170.5, subd. (f).)

on nonsuit consulted].) Equally without merit are the People's assertions that Judge Scrogin "plainly stated she could be fair and impartial" in ruling on the contempt (*Christie*, at pp. 773, 781 [judge's claim that conversation with disqualified judge did not have effect on ruling did not dispel appearance of impropriety]; *Jones, supra*, 130 Cal.App.4th at p. 1042 [judge stated she could decide appeal fairly; this did not dispel appearance of impropriety]), or that harmless error applies (*McCauley v. Superior Court* (1961) 190 Cal.App.2d 562, 565 [irrelevant that evidence at preliminary hearing before a disqualified magistrate was more than ample to hold defendant to answer]).

Finally, the People assert that defendant Santana did not comply with the procedures for *seeking the disqualification of a judge from continued* participation in a matter. (Code Civ. Proc., § 170.3, subd. (c)(1).) They do not supply any authority for applying these provisions to a judge who ruled on a *past* matter and who does not have any further involvement in the proceedings.²⁰

It is sufficient for us to conclude that Judge Scrogin was unauthorized to convene the grand jury that indicted defendant

²⁰ We note that the facts regarding disqualification in *Christie* arose in a motion for new trial (135 Cal.App.4th at pp. 772-773), although the opinion does not refute the People's proposition explicitly and therefore it is not part of the ratio decidendi. (*Honey Baked Hams, Inc. v. Dickens* (1995) 37 Cal.App.4th 421, 427.)

Santana, which nullifies its action against him. We therefore decline to consider separately the effect of her finding S.A. in contempt and directing her to testify. We shall accordingly grant defendant Santana's petition and issue a writ of prohibition directing the trial court to set aside the indictment against him in its entirety. In light of this disposition, we do not need to resolve his remaining arguments for setting aside the indictment.

II. Defendant Vasquez's Petition

A claim of instructional error or a claim that the prosecutor conducted the proceedings in a manner compromising the grand jury's independent evaluation of the evidence is a basis for setting aside an indictment (*Stark, supra*, 52 Cal.4th at pp. 405-407; *Backus, supra*, 23 Cal.3d at p. 393; *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1306-1307), where it is reasonably probable as a result that the grand jury may have indicted a defendant on less than probable cause (*Berardi v. Superior Court* (2007) 149 Cal.App.4th 476, 494-495).

As defendant Vasquez concedes, "there was evidence to support . . . theories of either corrupt conduct or innocent conduct. . . . Either S.A. innocently wanted a civil settlement and did not want the trauma of a criminal case of her own volition after being counseled on available lawful choices, or she was unlawfully 'persuaded' that she did not want to prosecute or testify" as a result of the offer of money. He thus does not dispute that probable cause for the latter exists,

citing the example of inducing a city council member with money to take the otherwise lawful action of voting on a matter in a manner that the inducer desires.

Defendant Vasquez argues that the combination of improper expert opinion testimony (e.g., asserting that S.A. could have been compelled to testify) and the absence of an instruction that S.A. had immunity from being jailed for a refusal to testify, resulted in a substantial impairment of the grand jury's ability to act independently in its assessment of probable cause to indict him for conspiring to obstruct justice and for the two charges of witness dissuasion. He also relies on the alternative formulation that this instructional lacuna made it reasonably probable the grand jury indicted him on something less than probable cause.²¹

Defendant Vasquez asserts that a "corrupt" motive on his part would not have been present if he had merely been acting to effect S.A.'s independent decision not to participate further in the criminal proceedings, regardless of pecuniary concerns,²² and to seek a settlement of her civil claims against Griesa. He argues that any pretrial noncooperation, like her desire to avoid testifying, would have been without any consequence in

²¹ Defendant Vasquez does not challenge the substance of the instructions to the grand jury in any other respect.

²² Again, had S.A.'s independent motive for not cooperating with the prosecution been for the purpose of seeking money, it would have been unlawful. (§ 153; *Pic'l, supra*, 31 Cal.3d at pp. 742-743.)

light of her ultimate immunity from the sanction of jailing if subpoenaed; "the acts of not wanting to prosecute and not wanting to testify were all wrapped up together, part of the same rights all . . . victims of sexual assault enjoy."²³ His claim of prejudice from the failure to instruct on this immunity, however, is adumbrative on the effect: "[I]f the grand jury had not been misled that it was improper for S.A. to refuse to cooperate with law enforcement, and properly instructed about the rights of a victim of sexual assault to refuse to cooperate in any prosecution of her alleged attacker, the jury might have refused to indict [him]."

As we understand defendant Vasquez, he is arguing that the grand jury, as a result of the expert testimony and the absence of an instruction on S.A.'s immunity from jailing for refusing to testify, would be led to the inevitable conclusion that the defendant attorneys were seeking the unlawful result of S.A.'s noncooperation *even if* it believed that the evidence showed this was simply furthering S.A.'s independent desires unmotivated by any financial gain. As a result, he argues there is a

²³ Defendant Vasquez also digresses at length on the straw issue that inducing a victim to request the prosecutor not to file any charges is not a crime because the ultimate decision is that of the prosecutor. (See *People v. Cribas* (1991) 231 Cal.App.3d 596, 608-610.) In light of the actions of the defendant attorneys in telling Detective Elliott that S.A. would not be available for further questioning, and the pledge in the settlement agreement that S.A. would not testify, this particular aspect of the settlement is surplusage in evaluating probable cause for the indictment.

reasonable probability that the grand jury indicted him on less than probable cause, because this set of circumstances would be lawful.

We initially note defendant Vasquez's claim of error does not distinguish between the charge of conspiring to obstruct justice and the charges of witness dissuasion. As a result, he does not explain why the posited errors are at all relevant to the latter. If the grand jury believed that defendant Vasquez did *not* induce S.A. to avoid cooperation with the criminal prosecution of Griesa, it would not have returned an indictment for trying to *prevent or discourage* a witness under section 136.1, regardless of the manner in which it was instructed or the opinions of the legal experts. We therefore reject his argument for setting aside those counts on this basis.

The People contend the immunity from being jailed is not relevant to obstruction, because it is concerned with the intent of defendant Vasquez. But this simply begs the question of the *nature* of the intent: to facilitate S.A.'s independent desire not to testify criminally (for reasons other than pecuniary reward) and to seek a civil settlement to keep that matter out of court as well, or to induce this result with the offer of the money.

More on point, however, is the People's assertion that immunity from being jailed for refusing to testify if subpoenaed to appear in court (the only mechanism for compelling cooperation during a criminal investigation) does *not* make the

refusal to cooperate *lawful*. It merely precludes one type of *sanction* for this behavior, which is otherwise subject to the quasi-criminal proceedings for contempt. (*Vallindras v. Massachusetts Bonding & Ins. Co.* (1954) 42 Cal.2d 149, 153, fn. 1.) Thus, even if the defendant attorney had been seeking only to give effect to S.A.'s independent decision (untainted with financial concern), this would still further a conspiracy to obstruct justice unlawfully, albeit one that could not result in S.A.'s own jailing. We therefore conclude the erroneous legal opinions and the failure to instruct on immunity from being jailed did not result in an indictment of defendant Vasquez for conspiracy to obstruct justice on less than probable cause.²⁴

III. The People's Appeal

Throughout their briefing in their appeal, the People claim there was sufficient evidence of defendant Vasquez seeking to

²⁴ At oral argument, the People presented what they described as "another . . . more straightforward reason" why an instruction on S.A.'s immunity from jailing was unnecessary, in addition to the "number of reasons" already presented in their briefs. The deputy attorney general asserted that the offenses involving S.A. did not come within the definition of "sexual assault" contained in the statute. (Code Civ. Proc., § 1219, subd. (c)(1).) As he candidly admitted, this argument did not appear anywhere in the People's extensive briefing on the issue. If it is improper to withhold an argument until a reply brief (*Beane v. Paulsen* (1993) 21 Cal.App.4th 89, 93, fn. 4; cf. *People v. Meyer* (2010) 186 Cal.App.4th 1279, 1282-1283 [forfeiture excused for good cause]), it is manifestly improper to raise it in the first instance at oral argument (see *People v. Pena* (2004) 32 Cal.4th 389, 403). As we have decided the issue in the People's favor, however, the forfeiture of this new arrow in their quiver is immaterial.

dissuade S.A. from *attending* any criminal proceedings with a bribe in violation of section 138, subdivision (a).²⁵ They then reiterate their argument made above in the context of the charge of conspiring to obstruct justice: "If the defendant [attorneys] were indeed paying S.A. to exercise her 'right . . . ,' they still would have been paying her to commit a contemptuous act," and "[w]hether or not S.A. incorrectly thought she had a 'right' not to testify, that fact does not lessen the corrupt intent on the part of the defendant [attorneys] to [interfere improperly] with the criminal justice process." They thus contend that the erroneous opinion testimony and the failure to instruct on immunity from jailing were irrelevant because, regardless of whether the intent not to testify arose in S.A., the offer of money would be for an unlawful (if unpunishable) act. We would be inclined to agree with the People, were it not for a more fundamental problem with the bribery count involving defendant Vasquez.²⁶

As we noted earlier (in pt. D. of the Factual and Procedural Background, pp. 22 & 23, *ante*), the trial court did not find that the settlement agreement had contemplated any refusal on S.A.'s part to *appear* at trial, merely the

²⁵ Given our direction that the indictment must be dismissed in any event in its entirety as to defendant Santana, we disregard the People's arguments involving him.

²⁶ Again, the People's new basis for arguing against an instruction on immunity (see fn. 24, *ante*) is forfeited, and the more fundamental flaw in the indictment on this count in any event relieves us of any obligation to respond to it.

expectation that she would exercise her "privilege" not to testify (phraseology that would not make any sense if she were going to refuse to appear in the first place). The statute under which the grand jury indicted defendant Vasquez, however, requires the offer of a bribe "upon any understanding . . . that the person shall not *attend upon any trial or other judicial proceeding.*" (§ 138, subd. (a), italics added.) We therefore solicited supplemental briefing on the issue of whether this charge could be sustained in the absence of any evidence of an agreement that S.A. would refuse to appear at any criminal proceedings against Griesa.

In sections 132 to 140, the Legislature established a "comprehensive statutory scheme for penalizing the falsification of evidence and efforts to bribe, influence, intimidate[,] or threaten witnesses" (*People v. Fernandez* (2003) 106 Cal.App.4th 943, 948), taking "pains to distinguish the various methods of influencing a witness and to establish a range of punishment for those offenses that reflects different levels of culpability" (*id.* at p. 950). We are thus required as a matter of statutory construction (in order to avoid rendering some of these provisions mere surplusage) not to make these distinctive provisions interchangeable. (*Fernandez*, at pp. 949-950; *People v. Womack* (1995) 40 Cal.App.4th 926, 931.) Section 137 is aimed at the evil of attempting to influence the testimony *in court* of

a witness,²⁷ whereas section 138 addresses efforts to prevent a witness from *appearing* in court. (*Fernandez, supra*, 106 Cal.App.4th at pp. 948-951; *Womack, supra*, 40 Cal.App.4th at pp. 930-931.)

In their supplemental response, the People do not dispute these propositions. They simply assert that we should *infer* that the settlement agreement sought to persuade S.A. not to appear at trial (presumably in defiance of a subpoena). We cannot infer what does not appear in the settlement agreement itself or in the testimony of *any* witness. All the evidence shows is an announced intent not to cooperate with the police or prosecutor, and to refuse to testify *if called at trial*. A refusal to *appear* at trial is simply the People's supposition. We therefore affirm the order dismissing the charge of bribery under section 138 as to defendant Vasquez on this basis.

DISPOSITION

We construe the motions for judicial notice in case No. C066219 as requests for incorporation of the materials by reference, and as thus construed grant the motions.

In case No. C066008, the petition of defendant Santana for a writ of prohibition is granted, and we thus direct the trial court to vacate its previous order as to defendant Santana and issue a new order setting aside his indictment in its entirety.

²⁷ This includes an agreement to withhold testimony entirely. (*Pic'l, supra*, 31 Cal.3d at p. 742, fn. 5.)

In case No. C066009, the petition of defendant Vasquez for a writ of prohibition is denied.

In case No. C066219, the People's appeal from the order setting aside the bribery count of defendant Vasquez is affirmed.

In case No. C066447, the People's petition for a writ of mandate is denied as duplicative of their appeal.

The stay of proceedings in case No. CRF-08-825, issued by this court on November 10, 2010, having served its purpose, is vacated upon the finality of this opinion.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

HULL, J.