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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MANUEL MURILLO, Defendant and Appellant.	B275294 (Los Angeles County Super. Ct. No. BA429656)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose Sandoval and Douglas Sortino, Judges. Affirmed.

Buckley & Buckley, Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Acting Supervising Deputy Attorney General, Eric J. Kohm and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

A jury acquitted defendant and appellant Manuel Murillo (defendant) of attempted murder and failed to reach a verdict on charges of assault with a firearm and mayhem. The People retried defendant on the latter two charges, and he was found guilty of both offenses. We consider whether Murillo's convictions must be reversed because the trial court denied his request to select the attorney he retained to represent him during the first trial as his court-appointed attorney for the second trial. We also consider whether there was substantial evidence on which the jury could have appropriately relied to find defendant was the person who shot the victim.

I. BACKGROUND

A. Defendant's First Trial

The Los Angeles County District Attorney charged defendant with attempted murder in violation of Penal Code sections 664 and 187, subdivision (a),[1] assault with a firearm in violation of section 245, subdivision (a)(2), and mayhem in violation of section 203—all predicated on a shooting that took place on August 5, 2014. The district attorney also alleged various sentence enhancements relating to defendant's use of a firearm, gang membership, infliction of great bodily injury, and prior convictions.

Defendant's mother retained private attorney Michael Duggan (Duggan) to represent defendant. In August 2015, a jury acquitted defendant of attempted murder. The jury could not

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[1] Undesignated statutory references that follow are to the Penal Code.

reach a verdict on the other two charges, and the court declared a mistrial.

B. Defendant's Second Trial

1. Appointment of counsel

The prosecution elected to retry the charges on which the jury hung, and neither defendant nor his mother could afford to pay Duggan for the second trial. Defendant was accordingly considered indigent, and he filed a motion on August 31, 2015, asking the trial court to designate Duggan as his court-appointed attorney for the retrial.

In addition to this case, in which Duggan had represented defendant since first being arraigned on the charges, defendant's motion explained Duggan had represented defendant in a 2010 robbery case and had represented some of defendant's family members in unrelated matters. The motion asserted defendant and Duggan had "a long and established close working relationship" and that Duggan "ha[d] acquired an extensive background in the multitude of various legal and factual matters which will be relevant for upcoming proceedings such as gang allegations requiring [a] defense expert, identification issues requiring [a] defense expert, and extensive written discovery and recorded statements."

At a hearing on September 15, 2015, Duggan asked the trial court to rule on the motion he had filed to be appointed as defendant's attorney. The trial court responded, "I will rule on that, and unfortunately I have to deny that motion. Sorry." The court said it was "hand[ing the case] to the public defender and the public defender will determine if they have any conflict and we'll just take it from there."

The following day, the court was advised both the public defender and the alternate deputy public defender had conflicts. James Cooper III (Cooper), a bar panel attorney, was appointed to represent defendant. Neither at that hearing nor at any other time before the jury's guilty verdicts did defendant object to Cooper's appointment or ask the court to reconsider its decision not to appoint Duggan as his attorney for the retrial. Nor did defendant seek review of the trial court's decision by way of a petition for writ of mandate in this court.

2. Trial

Defendant was retried in March 2016 on the assault with a firearm and mayhem charges. The evidence presented by the prosecution (the defense put on no evidence during its case-in-chief) was as follows.

Victim Danny Moran (Moran) was jogging home from work on a pedestrian and bicycle pathway along the Los Angeles River in an area known as Frogtown. Moran saw a group of youths ahead of him—one young woman and several young men.

Defendant separated himself from the group, came up alongside Moran, and repeatedly asked Moran where he was from. Moran understood defendant to be asking what gang he (Moran) was affiliated with. As defendant continued to repeat the question, Moran sought to defuse the situation, responding, "if you're asking me because of my tattoos, these are my daughters' names."

Defendant continued to walk beside Moran, and Moran eventually told defendant and the others in the group to "have a good night." Moran walked away from the group at a brisk pace and did not look back. When he was about 50 feet away from

where he parted from defendant, he heard a sound "like a firecracker"; he also heard someone yell "[l]et's go," and then the sound of people running.

Moran took off running toward his house and noticed his left leg was not responding normally. He discovered he had been shot in the left thigh and he was unable to make it home. Paramedics arrived to tend to Moran, and he subsequently spent a month in the hospital, underwent multiple surgeries, and suffered permanent damage and scarring. He did not see who shot him.

Police officers assigned to investigate the shooting, Detective Ryan Lamar (Detective Lamar) and his partner Detective Juan Aguilar, learned a woman named Kristine Valladares (Valladares) may have been present at the time of the crime. She lived on Denby Street, near where the shooting took place. Through use of a ruse, the detectives arranged a meeting with Valladares, and when she arrived, they placed her in handcuffs and took her to a police station. The detectives interviewed Valladares at the police station (by that point, they had removed her handcuffs).

During the interview, Valladares told the detectives she was walking by the Los Angeles River when she saw defendant approach Moran. She said defendant was with two other men, "Rocky" and someone she did not recognize. Valladares said defendant asked Moran where he was from, and Moran "kind of laughed like 'Are you serious?'" Moran "just kept walking and just kept ignoring" defendant.

Valladares said after Moran walked away, defendant was "pacing back and forth, like he was thinking about doing it or not, because he seemed like he got frustrated or like he seemed like

he felt dumb or something . . . ." Valladares saw defendant "lift[ ] his hand up, and he shot something, and I didn't know it was a gun. Like I turned around, well I was watching, but I had looked away for a split sec, and I had like, I had seen the sparks from his hand, but—and I heard the sound like a firecracker, and I was like there's no way I just witnessed that, but that was the first time I've ever, ever heard like a gun shot." Moran then started running, as did defendant and the others in his group. Valladares said she thought she saw defendant put a gun back in his pocket.

Valladares told the detectives she was certain defendant was the shooter because she was standing just 15 feet away from him when the shooting occurred and she recognized him from the neighborhood. She said she knew defendant was a member of the Frogtown gang because he had claimed membership in Frogtown to one of her friends before.

During the interview, Valladares expressed concern that talking to the police would endanger her own safety and her family's safety. She indicated her fear kept her from reporting the shooting when it happened.

The police arrested defendant two days after interviewing Valladares. Officers had previously shown Moran a six-pack photospread in which he did not identify defendant, but after defendant's arrest, the detectives again showed Moran a photospread and this time he positively identified defendant. Moran wrote the following comments on the police form used to show him the photospread: "The picture of the guy in [picture] #5 [defendant] is the same person that was shown to me on 9-18-14 and in that picture he was the person in picture #2 the reason was because I was afraid at that moment and I was still inside

the neighborhood and now I moved out and I feel more safe and I feel more comfortable [to] identify this person [as] the same person that was talking to me on 8-5-14 at river bike path and asking me if I was a gang member." When Moran testified at trial, he said he was certain defendant was the person who approached him that night.

Valladares's testimony at trial diverged in some significant respects from what she previously told the police. Valladares testified she saw defendant approach Moran, but she claimed she did not stop to watch what was going on. She admitted she heard the interaction between defendant and Moran, explaining that defendant asked Moran where he was from, Moran told defendant he was not gang affiliated, "chuckled," and kept walking. Valladares testified she thought the altercation was over when she heard a sound like a "firecracker" and saw "sparks" in her "peripheral vision." But Valladares said her back was turned to defendant and the rest of the group at the time of the shooting; she testified she never saw a gun or anyone extend an arm, just sparks in her peripheral vision.

The prosecutor played a recording of Valladares's September 2014 police interview in which she said defendant was the shooter. Valladares acknowledged her memory at the time of the interview was probably better than at the time of the trial. She insisted, however, that when she initially identified defendant as the shooter, she was merely making an "assumption" based on the fact that she saw sparks and felt "under pressure" when she spoke to the police, whom she feared would take her into custody. Valladares conceded she had to be compelled to testify as a witness at trial and was afraid. She no

longer lived on Denby Street, but she was still worried about retribution by members of the Frogtown gang.

In an effort to further establish the changes in Valladares's account of events were attributable to her fear of testifying against defendant, the prosecution also introduced into evidence Facebook messages exchanged between Rocky (one of the men with defendant at the time of the shooting) and Valladares four days after she spoke to the police, as well as recordings of phone calls between defendant, Rocky, and others that took place while defendant was in custody.

In the Facebook messages, Rocky wrote to Valladares on September 23, 2014, stating: "there's a rumor going around the hood saying u snitching on the homie is it true? Valladares responded, "Fuck no dude wtf do I have to do with whatever [you] guys do." Valladares asked Rocky, "Who brought my name into it?" and he responded, "Idk how ur name was brought up but people are talking about u saying ur dropping dime on the homie." Later that same day, Rocky wrote, "Well . . . I just hope and pray ur not snitching if ur not snitching u don't have nothing to worry about." Valladares wrote back that she "want[s] nothing to do with this," to which Rocky responded, "Then just don't say nothing u don't know nothing den[y] everything." Rocky told her, "Don't worry about it if you didn't snitch but if you did u fucked up big time."

Three days later, Rocky sent Valladares another message stating, "I need to talk to you in person." When Valladares asked what for, Rocky said, "U will find out when u come." Valladares testified Rocky's statements made her worried she would "get ambushed" if she went to talk to him. She told Rocky she did not want to be involved anymore, to which he replied, "Ok then

snitch ....." Valladares admitted the police asked her about defendant and Rocky, but she told Rocky she "said that I barely know you guys and idk what's going down with u guys." Rocky replied, "What ever ur time will come." Valladares then asked, "Is that a threat?" and Rocky responded, "No ....snitch but karma is a bitch that's all I can say....."

The recorded jail calls that the prosecution introduced into evidence occurred later, in October 2014. In one of the calls, defendant told Rocky, "Hey, uh, that—that girl on Denby too. You know what's up. You know what time it is." "All right," Rocky responded, and he added, "Yeah, you know me homie. I keep it gangsta." In a later jail call, defendant said to another of his friends, "you guys know the one—that girl that lives on Denby, right? You know her." When the friend on the call responded affirmatively, defendant told him, "Yeah, um, someone needs to go, you know?" Defendant explained, "I can't say much, man. I can't say much through here, man. Just trying to be subliminal . . . ."

3. Verdict and sentence

The jury found defendant guilty of assault with a firearm and mayhem. With respect to the former, the jury found defendant personally and intentionally used a firearm within the meaning of section 12022.5, subdivision (a), and personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). With respect to the mayhem charge, the jury found defendant personally and intentionally used a firearm, causing great bodily injury, within the meaning of section 12022.53, subdivision (d), and personally and intentionally discharged a firearm within the meaning of section 12022.53,

subdivision (c). The jury also found defendant committed both offenses for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C). Defendant admitted he had a prior conviction that qualified as both a "strike" conviction (§§ 667, subds. (b)-(i), 1170.12) and a serious felony for purposes of section 667, subdivision (a)(1). The trial court sentenced him to 56 years to life in prison.

II. DISCUSSION

Defendant argues the trial court's response when asked to rule on his motion to appoint attorney Duggan ("[U]nfortunately I have to deny that motion. Sorry.") indicates the court mistakenly believed it had no discretion to grant the motion. Defendant further argues, in the alternative, that if the court understood it had discretion, its ruling "was not substantively valid given the facts and circumstances of this case." Even accepting defendant's initial characterization of the court's response, the court's decision was correct: it was obligated to deny the motion when defendant asked for a ruling because the applicable California statute requires courts to "first utilize the services of the public defender" to represent defendant (§ 987.2, subd. (e)) and the public defender had not by then declared a conflict or indicated unavailability. Defendant's alternative argument, which assumes the trial court did exercise discretion in deciding not to appoint Duggan, also fails because the record shows there was no prejudicial abuse of discretion.

Defendant's second contention of error—that there was insufficient evidence for the jury to find he was the shooter—fares no better. Valladares's identification of defendant as the

shooter, plus the evidence presented that would explain Valladares's partial recantation of her prior statements, plus Moran's identification of defendant as the person who confronted him with the gang challenge immediately before the shooting, constitute ample evidence supporting the jury's verdicts.

A. The Denial of Defendant's Motion to Appoint His Prior Retained Attorney Was Not Error, Let Alone Prejudicial Error

A criminal defendant's right to counsel is secured by both the federal and state constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) An indigent defendant has a right to effective counsel, but not to a particular attorney of his or her choosing. (*Caplin & Drysdale, Chartered v. United States* (1989) 491 U.S. 617, 624 [Sixth Amendment "guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts"]; *People v. Noriega* (2010) 48 Cal.4th 517, 523 [California Constitution "'does not give an indigent defendant the right to *select* a court-appointed attorney'"] (*Noriega*).)

Section 987.2 establishes a procedure for trial courts to follow in assigning counsel to indigent defendants in Los Angeles County. Subdivision (e) of the statute provides: "In a county of the first, second, or third class, *the court shall first utilize the services of the public defender to provide criminal defense services for indigent defendants*. In the event that the public defender is unavailable and the county has created a second public defender and contracted with one or more responsible attorneys or with a

panel of attorneys to provide criminal defense services for indigent defendants, and if the quality of representation provided by the second public defender is comparable to the quality of representation provided by the public defender, the court shall next utilize the services of the second public defender and then the services of the county-contracted attorneys prior to assigning any other private counsel. Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest. *In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the second public defender or a county-contracted attorney after making a finding of good cause and stating the reasons therefor on the record*." (§ 987.2, subd. (e) (emphasis added).)

At the September 15, 2015, hearing in the trial court, Duggan (who was then still acting as defendant's lawyer) reminded the court he had "filed that ex parte motion to be appointed" and told the court he was "asking . . . for a ruling on that." At that time, there was no reason to believe the public defender would be unable to take defendant's case; it was not until the following day that the court determined the public defender had a conflict that would preclude appointment. Thus, even if we interpret the court's statement that it "unfortunately . . . ha[d] to deny that motion" to mean the court believed it had no discretion to grant the motion, the court was not wrong at the time it ruled. It was obligated to assign the case to the public defender's office absent a conflict or unavailability. (*Joshua P. v. Superior Court* (2014) 226 Cal.App.4th 957, 964 ["[S]ection 987.2 'clearly limits the authority of the court to compensate assigned counsel to situations in which there is no

public defender, or the public defender is unable because of a conflict of interest or other reasons to act'"]; *Williams v. Superior Court* (1996) 46 Cal.App.4th 320, 326 [section 987.2 "allows for a deviation in the requisite order of appointment of the second public defender or the county-contracted attorney, but not for the requirement that the public defender be utilized first"] (*Williams*); see *Harris v. Superior Court* (1977) 19 Cal.3d 786, 796 [defining judicial discretion as the power of decision exercised "to the necessary end of awarding justice based upon reason and law but for which decision there is no special governing statute or rule"] (*Harris*); but see *People v. Lancaster* (2007) 41 Cal.4th 50, 71, fn. 6 [noting our Supreme Court has not decided whether *Harris* permits the appointment of private counsel even when the public defender is available to represent the defendant] (*Lancaster*).)

At no time after learning of the public defender's conflict did defendant object to the appointment of Cooper or renew his motion to appoint Duggan. Indeed, Duggan, who was present in court when the trial judge notified the parties the public defender had declared a conflict, told the court he "[would not] be keeping the case" and planned "to talk to the [bar panel attorney currently in the courthouse] to see if he's going to take it." By acquiescing in the trial court's prior ruling notwithstanding the new facts that were then before the court (the disqualification of the public defender), defendant has no grounds to seek reversal on appeal. (*Lancaster*, *supra*, 41 Cal.4th at pp. 70-71 [no basis for reversal where the defendant was informed his preferred attorney would be appointed only if the public defender found a conflict and defendant never made a proper request for the attorney's appointment]; compare *Harris*, *supra*, 19 Cal.3d at pp.

790-791 [reversal of a counsel appointment order in a case where the defendants persisted in objections after trial court initially appointed attorneys other than their preferred counsel].)

Even assuming for argument's sake that defendant had renewed his motion to appoint Duggan as his attorney after learning of the public defender's conflict, and further assuming it would have been an abuse of discretion to deny such a renewed motion,[2] defendant's claim on appeal would still fail for lack of a

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[2] Arguing in the alternative, defendant contends that insofar as the trial court's ruling on his motion was a discretionary decision, it was an abuse of discretion to deny the motion. When ruling on a defendant's request to appoint a specific preferred private attorney, the trial court "considers subjective factors such as a defendant's preference for, and trust and confidence in, that attorney, as well as objective factors such as the attorney's special familiarity with the case and any efficiencies of time and expense the attorney's appointment would create." (*People v. Alexander* (2010) 49 Cal.4th 846, 871 (*Alexander*); accord, *People v. Chavez* (1980) 26 Cal.3d 334, 345-346 (*Chavez*); *Harris*, *supra*, 19 Cal.3d at pp. 795-796 [a court will consider a defendant's preference for a particular attorney but the decision of who to appoint "rests wholly within the sound discretion of the trial court"]. While it is undeniable that appointing Duggan would likely have resulted in certain efficiencies, it would be difficult for defendant to show the trial court abused its discretion in deciding to appoint Cooper nevertheless. (*People v. Cole* (2004) 33 Cal.4th 1158, 1187 [no abuse of discretion where (a) the depth of relationship between the defendant and preferred counsel was not comparable to that in *Harris*, (b) the defendant's appointed attorney did not actively seek to withdraw or support appointment of the preferred counsel, and (c) there was no indication of disagreement among the defendant and the appointed attorney regarding trial tactics or the defense to be presented].)

showing of prejudice.[3] (*Chavez*, *supra*, 26 Cal.3d at p. 348; see *Noriega*, *supra*, 48 Cal.4th at p. 525 [assessing whether erroneous removal and replacement of counsel was prejudicial under the test announced in *People v. Watson* (1956) 46 Cal.2d 818].) The relationship between defendant and Duggan is not of comparable depth as the relationship between the *Harris* defendants and their preferred attorneys, especially concerning what *Harris* describes as the "subjective" dimension of the relationship. (*Chavez*, *supra*, at p. 348; *Harris*, *supra*, 19 Cal.3d at p. 793 [the defendants had come to regard their preferred attorneys as "true champions of their cause" and had no such confidence and trust in the "two 'strangers'" the court appointed].) In addition, defendant has not contended that Cooper, the attorney who represented him at trial, was "anything but fully competent," nor has defendant identified any evidence of "disagreement or lack of rapport" between Cooper and himself during the trial court proceedings. (*Chavez*, *supra*, at pp. 348-349.)

We additionally find it significant, as did the *Chavez* court in its discussion of prejudice, that defendant did not seek immediate writ review of the trial court's decision to deny his motion to appoint Duggan. (*Chavez*, *supra*, 26 Cal.3d at p. 348, fn. 4 [noting that the defendant in that case did not seek pretrial review of the trial court's action, in contrast to the defendants in *Harris* who "promptly challenged the court's ruling through pretrial writ proceedings"].) At least some of the benefits to be gained from a discretionary decision to appoint a defendant's

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[3] Defendant invites us to reconsider the "*Harris* error standard of prejudice." We respectfully decline.

preferred attorney—for instance, the efficiencies of time and expense that may result from the attorney's special familiarity with the case (*Alexander*, *supra*, 49 Cal.4th at p. 871)—are irretrievably lost once the attorney actually appointed has taken the case to trial. It will accordingly be more difficult to demonstrate prejudice in a case like this, where defendant opted not to pursue an available avenue for immediate relief under cases like *Harris* and *Williams* and instead asserted the court's appointment decision was prejudicial error only after learning the jury had convicted him. For this reason and the reasons already discussed, we conclude any error in denying the motion to appoint Duggan was not prejudicial.

B. There Was Sufficient Evidence Identifying Defendant as the Shooter

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] Our review must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.) "[T]he relevant inquiry on appeal is whether, in light of all the evidence, '*any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citation.]" (*Ibid*.)

Considering all the evidence in this case, a reasonable jury could have found beyond a reasonable doubt that defendant shot Moran. Six weeks after the shooting, Valladares unequivocally

identified defendant as the shooter. The detectives asked her, "who was [the] shooter," and she identified defendant. When they asked if she was close enough to "know that it was . . . [defendant] doing the shooting," she responded, "Oh, yeah" and explained she was just 15 feet away from defendant at the time. She told the officers she saw defendant lift his hand and then saw sparks coming from his hand at the same time she heard gunfire.

Even though Valladares retreated from those statements when she testified at trial, the jury was permitted to consider her prior statements as substantive evidence. (Evid. Code, § 1235; *People v. Wilson* (2008) 43 Cal.4th 1, 20-21 [where there is evidence witness made prior inconsistent statement, jury may credit the prior statement over witness's trial testimony]; *Chavez, supra*, 26 Cal.3d at p. 360 [prior inconsistent statement of witness who testifies at trial may be used as substantive evidence].) There was also strong evidence that Valladares changed her story not because she was uncertain about her prior identification, but because she was concerned Rocky and defendant's other friends would retaliate against her if she incriminated defendant at trial. That fear for her safety is, of course, good reason why the jury could have reasonably chosen to believe her prior statements over her trial testimony. (See, e.g., *People v. Cuevas* (1995) 12 Cal.4th 252, 276-277 [witnesses' testimony they believed it was wrong to testify against a rival gang member supported conclusion that witnesses "were telling the truth when they made their out-of-court statements to police officers [identifying defendant] and that they recanted those statements in court for gang-related reasons"]; *Chavez*, *supra*, at p. 364 ["unlike [other] cases in which the record contained no

concrete basis to credit the witness' prior identification over his trial testimony, the prosecution in the instant case presented evidence which both explained and discredited the witness' inconsistent testimony at the time of trial"].)

As our Supreme Court has explained, "[i]dentification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. [Citation.] Moreover, a testifying witness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court." (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) That holding of course applies to Valladares's prior identification of defendant, and Moran's trial testimony provides yet further evidentiary support for the identity finding the jury necessarily made. Moran testified defendant was the only person from the group who approached him, and Moran explained defendant issued a gang challenge just before the shooting. Thus, even if Moran did not actually see the shot fired, the jury reasonably could think it likely defendant was the shooter; when combined with Valladares's out-of-court identification of defendant as the shooter, that is more than sufficient evidence to support the jury's finding of guilt.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.