

**RICHARD SUCH**  
**ATTORNEY AT LAW**

1120 College Avenue  
Palo Alto, CA 94306  
650-857-0129 email:  
wrichardsuch@gmail.com

November 28 2020

Jefferson Billingsley  
Humboldt County Counsel  
825 5th St., Room 110  
Eureka, CA 95501

Re: Claim of Eric Schwenk

Dear Mr. Billingsley:

I am enclosing a copy of the claim I made to the Board of Supervisors last week on behalf of Eric Schwenk.

Mr. Schwenk was sentenced in 2010 to 30 years in prison (reduced on appeal to 25), after having been convicted by a jury of two counts of violation of Penal Code section 288, subdivision (a). He was represented at trial by attorney Marek Reavis, then of the county's Conflict Counsel's Office. On May 29 of this year, Judge Edward Davila of the U.S. District Court granted Mr. Schwenk's petition for writ of habeas corpus, finding that he had been denied his constitutional right to the effective assistance of counsel by Mr. Reavis's failure to convey to him then Deputy District Attorney Kelly Neel's offer on October 2, 2008, of a 13-year sentence in exchange for a guilty plea. This was based on evidence of Mr. Reavis's inability to remember having conveyed that offer or other offers ranging from a minimum of 3 to a maximum of 16 and to make any record of having done so, apparently due to his mistaken belief that the offers were of little or no value because Mr. Schwenk would inevitably be recommitted for life as a "sexually violent predator" and his having failed to realize that Mr. Schwenk was facing the doubling of terms under the second-strike provisions of the Three Strikes Law.

Judge Davila ordered the District Attorney's Office to reinstate the 13-year offer, which it did and Mr. Schwenk accepted it on July 1, 2020, and he was re-sentenced to that term by Judge Christopher Wilson, who deemed the sentence to have been served, but Mr. Schwenk was not released until July 28, after having served 4311 days. The result was that he served at the very least 282 more days than he would have served (4029 days), but for Mr. Reavis's ineffective assistance and negligence. And he probably served appreciably more excessive time than that, given the clear evidence of Mr. Reavis's failure to convey offers of less time, such as District Attorney Paul Gallegos's offer on October 9, 2008, of an 11- to 13-year term, which Mr. Reavis rejected in the absence from the courtroom of Mr. Schwenk, or Mr. Gallego's later offers of one count, with a sentencing range of 3, 6 or 8 years, plus a 5-year prior-conviction enhancement, with "sentencing for the court" (i.e., a possible minimum 8-year sentence) or Deputy District Attorney Randy Mailman's offer of a plea to one count (with a maximum of 8 years) on February 19, 2009.

**RECEIVED**

NOV 30 2020

COUNTY COUNSEL  
HUMBOLDT COUNTY

I believe that a fair measure of Mr. Schwenk's damages from having to serve an excessive amount of time in prison would be \$125-140 per day. (Think how much I would have to pay you to spend 24 hours in a little room with a dozen relatively unpleasant men, particularly during a time of exposure to coronavirus infection, as Mr. Schwenk did at Avenal Prison this year, where he and 86.8% of the population suffered confirmed cases.) That would be at least \$35,250 (282 times \$125) and could be much more – e.g., the difference between the number of days that Mr. Schwenk actually served and an 8-year sentence, which is 1391 days (4311 days vs. 2920 days minus 438 days worktime credits = 2506 days) and at \$140 per day would be \$194,740.

At this time, I would ask you and the Board to carefully consider – and to respond to me before the end of the year – an offer to settle the matter for \$35,000. I would advise Mr. Schwenk to accept that amount at the low end of the county's liability in order to avoid his having to make a contingent fee agreement with local counsel in order to file suit.

If you would like to see the documentary evidence of the District Attorney's offers and Mr. Reavis's responses to them, I will send you copies.

Yours truly,

  
RICHARD SUCH

## COUNTY OF HUMBOLDT CLAIM FOR DAMAGES

CLAIMANT

Name: Eric Schwenk

The undersigned respectfully submits the following claim and information:

**1. Mailing address to which claimant desires notices to be sent, if other than above:**

Same as above

**2. Date, time and place of occurrences or transactions which give rise to this claim:**

Dates: (1) October 2, 2008 - September, 2009 – Failure to research, provide accurate advice as to “sexually violent predator” laws (Reavis)

(2) October 2, 2008 - June 17, 2010 – Failure to provide accurate advice as to effect of Three Strikes Law (Reavis)

(3) October 2-9, 2008 – Failure to convey 11-13 years offers (Reavis)

(4) January 15, 2009 – Failure to convey 8-13 years offer (Reavis)

(5) February 19, 2009 – Failure to convey 3-6-8 years offer (Reavis)

- (6) March 19, 2009 – Failure to convey 8-13 years offer (Reavis)
- (7) April 9-16, 2009 – Failure to convey 8-13 years offer (Reavis)
- (8) July 27, 2009 – Failure to convey 6-16 years offer (Reavis)
- (9) September 10, 2009 – Failure to convey 13-year offer (Reavis)
- (10) April 22 - September 24 - October 5, 2012 - February 28, 2013 – Failure to acknowledge above offers (Reavis)
- (11) April 23 - July 11 - August 17 -September 24, 2012 – Failure to disclose/acknowledge above offers (Firpo, Mailman)
- (12) February 18 - March 12, 2013 – Failure to acknowledge above offers (Gallegos)
- (13) October 3, 2018 - May 29, 2020 – Concealment of failure to convey offers by claims of having no recollection of them and false claims of having regular practice of conveying all offers (Reavis)

**3. Specify the particular act/omission and circumstances which you believe caused the injury and/or damage:**

Claimant Eric Schwenk was represented in Humboldt County Superior Court No. CR085455S by then Humboldt County Conflict Counsel's Office attorney (later Public Defender) Marek Reavis. The prosecutors were District Attorney Paul Gallegos and Deputy District Attorneys Kelly Neel, Ben McLaughlin, Randy Mailman, and Elan Firpo. On the dates specified in subparagraphs 2(1)-(9) above, those prosecutors (except Firpo) made the above offers, which are documented by emails between Mr. Gallegos and Mr. Reavis and notes in the District Attorney's file.

On information and belief: Mr. Reavis failed to convey any of the offers to claimant, who has so maintained since 2012. The reasons for Mr. Reavis's failures appear to have been (A) that he failed adequately to research and, therefore, misunderstood the provisions of the "sexually violent predator" ("SVP")

laws (Welf. & Inst. Code, §§ 6600 et seq.) to mean that, if claimant accepted any of the offers, he would inevitably be committed under those laws for life and (B) that he failed to appreciate the effect of claimant's being charged with a prior "strike" conviction under the Three Strikes Law that the admission or finding of the prior would be the doubling of the terms of claimant's sentence and thereby failed to advise claimant of that fact and mistakenly believed that he was subject only to terms of half the length that claimant received and that the offers, therefore, were only worth half as much as they actually were. After a first trial, which resulted in claimant's conviction of one count and a jury hung 9-3 for conviction of a second count, a new trial was granted, and Mr. Gallegos proposed that, instead of proceeding to a re-trial, claimant accept an upper, 8-year term for one count, plus 5 years for a prior-conviction enhancement (i.e., 13 years), but Mr. Reavis failed to see the high probability of conviction of both counts and, because of reason (B), failed to appreciate the value of that offer and failed to convey it to claimant or advise him to accept it.

The results of Mr. Reavis's failures were that claimant proceeded to a second trial, was convicted of two counts, and was sentenced to doubled terms, including two 5-year enhancements (the inapplicability of one of which Mr. Reavis failed to appreciate and to object to), for a total of 30 years (reduced on appeal to 25 years). At the sentencing hearing, the father of the alleged victim argued that claimant should receive a term longer than 16 years because he had been offered such a term (see subparagraph 2(8) above) and rejected it. This was the only hint in the record that any offer had been made. Claimant's undersigned attorney inquired of Mr. Reavis about such an offer and he replied that he could not remember that any offers were made. Claimant informed claimant's undersigned attorney that he had not been made aware of any offer.

Claimant's undersigned attorney was appointed by the Court of Appeal to represent claimant on appeal and habeas corpus, during which claimant's undersigned attorney inquired of the trial prosecutor, Deputy District Attorney Elan Firpo, and District Attorney Gallegos, whether such an offer had been made. They failed to respond to his repeated inquiries and failed to disclose that the additional offers (subparagraph 2(3)-(9)) were made, until after the Court of Appeal required the Attorney General to file a response to claimant's Petition for Writ of Habeas Corpus, whereupon they disclosed to a Deputy Attorney General the additional offers (except the offer of 11-13 years on October 9, 2008, which

Mr. Reavis rejected at a hearing on that date at which claimant was not present). The Court of Appeal nevertheless denied that Petition, without issuing an Order to Show Cause or ordering an evidentiary hearing as to whether the offers were made or conveyed. The California Supreme Court also summarily denied a Petition for Writ of Habeas Corpus.

In November 2014, claimant's undersigned attorney filed on claimant's behalf a Petition for Writ of Habeas Corpus in the U.S. District Court for the Northern District, No. 14-cv-04971-EJD. Judge Edward Davila issued an Order to Show Cause in July 2015. The attorney moved for an evidentiary hearing, which the judge granted in April 2018, limiting the issue to whether the 13-year offer of October 2, 2008, had been conveyed to claimant. (This was an "on the bus" ("OTB") offer, which means that, if claimant had accepted it, he would agree to "get on the bus" to state prison, without any opportunity to seek probation, and thus he could have been sentenced to that term on that date.) The federal court ordered discovery in September 2018, which was conducted in December 2018. An evidentiary hearing was held in April 2019, followed by briefing and oral argument. The court issued its decision on May 29, 2020, granting the Petition, finding that Mr. Reavis had violated his duty to convey the 13-year offer of October 2, 2008, that claimant probably would have accepted that offer and the trial court would have approved it, and that Mr. Reavis thereby failed to provide claimant with his constitutional right to the effective assistance of counsel. The court ordered the District Attorney to reinstate that offer. The state did not appeal. On July 1, 2020, the District Attorney renewed the offer, claimant accepted it, the court approved it, re-sentenced claimant to 13 years, and deemed that term to have been served. However, the court stayed claimant's release from prison for 45 days to permit the prison to conduct SVP evaluations, which ordinarily are conducted "at least six months prior to [a prisoner's] scheduled release from prison" (Welf, & Inst. Code, § 6601, subd. (a)(1)), and which were completed and claimant was released on July 28, 2020.

This relief was delayed for years by (A) the failure and refusal of District Attorney Gallegos and Deputy District Attorneys Firpo and Mailman to respond to my requests for documentation of the multiple offers and was delayed for 8 years – between September 24, 2012, when claimant's undersigned attorney first inquired of Mr. Reavis as to the existence of offers, and May 29, 2020, when Judge Davila issued his decision – and by (B) Mr. Reavis's claims that he had no recollection of

any offers, his false claims that there were no offers that were not conveyed and that he conveyed the offers because it was his regular practice to do so, his failure and refusal to admit that he had failed to convey the offers, and, therefore, his concealment of the fact that he had failed to do so. (Transcripts of Mr. Reavis's denials and failures to admit that he failed to convey offers at his deposition and in his testimony at the evidentiary hearing are attached hereto as Appendices A and B, respectively.)

Claimant's undersigned attorney believes that all of the reasons for the judge's finding that Mr. Reavis failed to convey the offer of October 2, 2008, apply to all of the other offers: primarily, his failure to have any recollection of having done so, his failure to make any record of his having done so, the lack of evidence of his having visited claimant in the jail between October 2 and 9, 2008, and the circumstantial evidence of his reasons for not conveying them (reasons (A) and (B) above). Incontrovertible evidence that he failed to convey Mr. Gallegos's offer (via Mr. McLaughlin) on October 9, 2008, of one count plus a prior (i.e., one count of 288 with a sentencing range of 3, 6, or 8 years, plus a 5-year enhancement for the prior, with an opportunity to argue for the middle, 6-year term – hence, of 11 to 13 years) is that the notes in the District Attorney's file show that Mr. McLaughlin informed Mr. Reavis of this offer and Mr. Reavis rejected it and that the court's minutes for that date show that claimant was not in court, so it could not have been conveyed to him.

**4. Name(s) of employee(s) of County of Humboldt that you believe caused the injury/loss:**

Please see subparagraphs 2(1)-(13) above: Marek Reavis, Paul Gallegos, Randy Mailman, Elan Firpo.

**5. Description of property damaged:**

NA

**6. Owner of property damaged:**

NA

**7. Description of personal injury (if no personal injury, please state “None”):**

Imprisonment for an excessive period is a “personal injury.”

**8. Name(s) of any other person(s) injured:**

NA

**9. Names, addresses and telephone numbers of witnesses, doctors, hospitals, etc.:**

NA

**10. Amount of reimbursement claimed, with computation. Please attach any supporting bills, receipts, or estimates of cost:**

Claimant was arrested on September 28, 2008. If he had accepted the 13-year offer of October 2, 2008, and – given the term of the offer that he agree to that term without an opportunity to argue for probation – had been immediately sentenced, he would have had 13 years, minus pre-sentence credit of 5 days, to serve or 4740 days. He was entitled under Penal Code sections 2933.1 and 2019 to 15% “work time” credits (which he, in fact, earned), which would have reduced that time by 711 days to 4029 days. As it happened, because of Mr. Reavis’s failure to convey that offer, he actually had served 702 days when he was sentenced on August 31, 2010, and thereafter served 3609 days from that date to July 28, 2020 – a total of 4311 days – 282 days more than he would have served if that offer have been conveyed. With effective assistance, he would have been released 282 days before July 28 – i.e., would have been released on about October 20, 2019 – and he was injured by Mr. Reavis’s ineffective assistance on that day and on every day thereafter until the end of July 2020.

Therefore, at a minimum, claimant served 282 days in prison which he would not have had to serve, but for Mr. Reavis’s ineffective assistance. But a strong case can be made – based on the documentary evidence of other offers and Judge Davila’s findings at to the evidence which supported his conclusion that Mr. Reavis failed to convey the offer of October 2, 2008 – that he also failed to convey offers under which claimant would have been sentenced to terms ranging from 3 to



11 years. If those offers had been conveyed, claimant would have served 3 years (1095 minus 15% = 931 days) to 11 years (4015 minus 602 = 3413 days), which are, respectively, 3380 and 898 fewer days than he actually served).

A fair measure of the amount of compensation to which a person is entitled for having served time in prison that he should not have had to serve is \$125-140 per day. (See Pen. Code, §§ 1205, subd. (a), and 4904; People v. Pinon (2016) 6 Cal.App.5th 956.) Therefore, the least amount of compensation that claimant is entitled to is \$35,250 (282 x \$125), and the most he may be entitled to is \$477,820 (3413 x \$140).

**11. Any additional information which may be helpful in considering this claim:**

The facts stated in paragraph 3 above are summarized in claimant's undersigned attorney's Proposed Findings of Fact and in Judge Davila's order of May 29, 2020, copies of which are attached as, respectively, Attachments A and B. The supporting documentation is referred to in the proposed and adopted Findings, which claimant's undersigned attorney can provide upon request.

WARNING! IT IS A CRIMINAL OFFENSE TO FILE A FALSE CLAIM (Penal Code Section 72; Insurance Code Section 556).

I have read the matters and statements made in the above claim and I know the same to be true of my own knowledge, except as to those matters stated upon information or belief and as to such matters I believe the same to be true. I certify under penalty of perjury that the foregoing is true and correct.

Signed this 18<sup>th</sup> day of November, 2020.

  
\_\_\_\_\_  
RICHARD SUCH, Attorney for Claimant