No. 13-56207

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH HUNT,

Petitioner-Appellant,

v.

TIM V. VIRGA, Warden

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of California
District Court No. CV 98-5280 RHW

EXCERPTS OF RECORD - VOLUME I

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH HUNT,

Petitioner,

v.

TIM VIRGA, warden,

Respondent.

NO. CV-98-5280-RHW

ORDER DENYING PETITIONER'S MOTION TO VACATE, ALTER, OR AMEND ORDER DENYING HIS FOURTH AMENDED PETITION; MOTION FOR RELIEF FROM JUDGMENT; MOTION FOR AMENDMENT OF FINDINGS AND ADDITION OF FINDINGS

Before the Court are Petitioner's Motion to Vacate, Alter, or Amend Order Denying His Fourth Amended Petition, ECF No. 262; Motion for Relief From Judgment, ECF No. 263, Petitioner's Motion for Amendment of Findings and Addition of Findings, and For Amendment of Judgment in Light thereof, ECF No. 264-1, and Petitioner for Certificate of Appealability, ECF No. 265. A hearing on the motions was held on June 17, 2013, in Los Angeles, California. Petitioner participated telephonically and was represented by Gary Dubcoff. Respondent was represented by Elaine Tumonis.

A.

In his Motion to Vacate, Alter, or Amend Order Denying his Fourth Amended Petition, Petitioner argues, pursuant to Fed. R. Civ. P. 59, that the Court overlooked matters or controlling decisions, which, if it had considered such issues, it would have mandated a different result. Specifically, Petitioner argues the

following:

1. The Court erred in ruling that its consideration of the San Mateo Juror Declarations was barred by Fed. R. Civ. P. 606(b).
2. The Court erred in affording AEDPA deference to the Los Angeles County Habeas Court and the Court of Appeal decisions.

A motion under Rule 59(e) may be granted if: (1) the district court is presented with newly discovered evidence; (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law. *Ybarra v. McDaniel*, 656 F.3d 984, 998 (2011) (citations omitted). Rule 59(e) is an "extraordinary remedy, to be used sparingly in the interest of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

1. San Mateo Juror Declarations

In its Order Denying Petitioner's Fourth Amended Petition, the Court ruled that Petitioner's attempt to use the juror's declarations in support of his ineffective assistance of counsel claim was improper and barred by Fed. R. Evid. 606(b) and irrelevant and inadmissible under Fed. R. Evid. 401 and 402. The Court has reconsidered this issue and adheres to its prior ruling, but elaborates on the reasons for the ruling in light of its reconsideration.

The Levin trial took place in 1987 in Santa Monica, California. In 1992, Plaintiff represented himself in the defense of the murder of Hedayat Eslaminia, along with help from a lawyer in San Mateo, California. The testimony included evidence that was not presented at the 1987 Santa Monica trial. Many of the allegations of inadequate representation by counsel in the Santa Monica trial are based on evidence that was presented in the 1992 San Mateo trial. The allegation is that the jurors in the San Mateo trial was persuaded by the evidence, and therefore it was ineffective to not have presented the evidence in the Santa Monica trial.

In making his argument, Petitioner relies on Affidavits of jurors signed in

December, 1992 and January, 1993, to show the evidence was persuasive. The Affidavits cover witnesses and evidence that were presented to the LAC Habeas Court in 1996 on the issue of ineffective assistance of counsel. The LAC Habeas Court ruled that it would not consider the juror's declarations. RT, March 29, 1996, p. 11.

The relevance of the Affidavits rest on the San Mateo Juror's opinion that the testimony of a witness should or should not have been believed. That belief is based on a much different record than existed, or could have existed in 1987.

A few examples of the difference in the record before the two juries is instructive. The Affidavit of Juror Sandra Maria Achiro begins with a statement that witness Karny had lied on his bar application and that this evidence impressed the juror in weighing the credibility of Karny. The bar files were subpoenaed by counsel in the 1987 trial, but were found to be confidential by the trial judge and were not available for use in the trial. The California Court of Appeal found the bar application should have been disclosed and the failure to require disclosure was an abuse of discretion. ECF No. 5, Ex. A at 152-53. Obviously, counsel in the Santa Monica trial cannot be blamed for failing to use the file, yet the basis of the opinion of the juror on the credibility of Karny is based on that evidence.

Later in the Affidavit, the juror discusses her opinion of the testimony of Tom May and the persuasive impact on cross-examination of evidence of a movie contract that he had entered into that would motivate him to lie. Judge Czuleger found that counsel had tried to interview May before trial and that May would not talk to him. At trial, Judge Rittenband sustained objections to counsel's attempt to question May about the movie contract. As such, the juror in the San Mateo trial based her opinion on evidence that was not available to counsel or the jury in the Santa Monica trial.

The juror then states, "The most important witness on what happened to Ron Levin was Karen Sue Marmor." ECF No. 11, Ex. 202 at 6. Judge Czuleger also

heard her testimony and found that her testimony was based on "flashbacks," which triggered her memory years after the trial. He concluded that counsel could not be expected to anticipate that flashbacks years later would yield such testimony, and, in fact, found that her testimony "lacks all credibility." ECF No. 5, Ex. B, at 18, 28.

Other examples of the difference in the record that led the jurors to their conclusions are in each affidavit. Some affidavits reference evidence that was not available at the time of the Santa Monica trial, while others reference evidence that was found not to be credible by the LAC Habeas Court. Also, some of the evidence discussed by the jurors was found by Judge Czuleger to have been excluded by counsel for proper tactical reasons.

The Court believes the opinion of the San Mateo jurors is not admissible opinion testimony under any rule of evidence. The opinions of credibility of witnesses is based on a different record with different issues and different participants. The Affidavits reflect opinions that are the opposite of opinions that were reached by a trial judge listening to the same witnesses. The trial judge also had a different record than that considered by both juries.

The Court would have excluded the opinions of the jurors if called as witnesses because the bases of the opinions were not the same and would not be helpful to the fact finder in weighing the effect of the failure to call witnesses or use evidence in the first trial. The problems with the bases of the opinions of the jurors do not just affect the weight to be given the opinions; rather they compel the striking of the opinions.

Accordingly, the Court adheres to its prior order striking the affidavits.

2. AEDPA Deference

Petitioner argues the Court clearly erred in affording AEDPA deference to the 1996 LAC Habeas Court's and the 1998 California Court of Appeals' decisions. After Petitioner filed his federal habeas petition, he returned to the state

courts on February 23, 2000 and filed another state habeas corpus petition with the California Supreme Court. He did so "to obtain confirmation that all of his federal claims had previously been presented to that court and thus had been exhausted." *Hunt v. Pliler*, 384 F.3d 1118, 1121 (9th Cir. 2004). On August 9, 2000, the California Supreme Court denied Petitioner's habeas petitioner by order stating:

> Petition for writ of habeas corpus is DENIED. (*In re Waltreus* (1965) 62 Cal.2d 218, 225, *In re Miller* (1941) 17 Cal.2d 734, 735; *In re Clark* (1993) 5 Cal.4th 750).

Petitioner argues that because the California Supreme Court denied his fourth state habeas petition on procedural grounds, no AEDPA deference should have been accorded to other underlying state court post-trial decisions unrelated to the fourth petition. Petitioner states it was the 2000 denial of his final habeas petition that exhausted his state habeas claims, although this somewhat misstates the record.[1]

In its Motion to Dismiss, Respondent identified thirty-nine new claims presented in the Fourth Amended Petition. Magistrate Judge Nakazato separated these claims into two groups. With respect to the first group of belated new claims, he ruled they should all be dismissed, ECF No. 207 at 16, and Judge Stotler adopted this finding, ECF No. 230 at 8. With respect to the second group of belated new claims, Judge Nakazato dismissed the claims with the exception of Claims 2-1(B9.3(a)-(e), inclusive), 2-1(C12.1-C12.12, inclusive) and Claim 2-1(B13), ECF No. 207 at 8-9. With respect to Claim 2-1(B13), Judge Nakazato

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[1]Petitioner argues that both Magistrate Judge Nakazato and Judge Stotler "ruled, with respondent's concession, that the state supreme court's 2000 order exhausted [his] state habeas claims." ECF No. 262 at 4. In his order Magistrate Judge Nakazato noted that "all of the *new* claims in the FAP were exhausted by way of Hunt's 2000 Petition or *earlier state petitions*–a point Respondent acknowledges in his motion to dismiss." ECF No. 207 at 24. (Emphasis added).

noted this claim was being pled as an operative fact supporting the judicial misconduct claim identified as Ground 2-2. ECF No. 207 at 23.

In its Order, the Court conducted a *de novo* review of Claim 2-1 and concluded Petitioner failed to show he was prejudiced or the proceedings were fundamentally unfair, and failed to demonstrate that Judge Rittenband's conduct toward Chier was significantly adverse and fundamentally unfair as to warrant habeas relief. ECF No. 261 at 99. Also, it conducted Petitioner's equal protection claim *de novo*. Thus, for the new, previously *unexhausted* claims presented in the 2000 habeas petition where there was no underlying reasoned state court opinion, the Court did not apply the AEDPA deference.

Petitioner argues the Court erred in applying AEDPA deference to the remaining claims that were *exhausted* in previous habeas petitions in which the state courts issued reasoned opinions. The Court disagrees.

Petitioner's theory is based on his belief that the August 2000 California Supreme Court is not an unexplained order. The Court disagrees with this assertion. The U.S. Supreme Court has provided guidance on this issue. *See Ylst v. Nunnemaker*, 501 U.S. 797 (1991). There, the Supreme Court created the "look-through" rule, namely, where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. *Id.* at 803.

In *Ylst*, the defendant brought a claim on direct appeal that he was not given a *Miranda* warning. *Id.* at 799. He did not bring this claim before the trial court. *Id.* The California Court of Appeal rejected the claim based on the state procedural rule that "an objection based upon a *Miranda* violation cannot be raised for the first time on appeal." *Id.* The defendant then filed a petition for collateral relief in the California Superior Court, which was denied without opinion. *Id.* at 800. The defendant then filed a similar petition for relief in the California Court of Appeal, which was also denied without opinion. *Id.* Finally, the defendant filed a petition in

the California Supreme Court. *Id.* The California Supreme Court denied it with citation to *In re Swain* and *In re Waltreus.* No opinion or other explanation accompanied these citations.[2] *Id.* at 800.

The Supreme Court specifically looked at whether the California Supreme Court's unexplained order, denying his second habeas petition (based on the *Miranda* claim) constituted a "decision on the merits" of that claim sufficient to lift the procedural bar imposed on direct appeal. *Id.* at 802. The Supreme Court applied the "look through" rule and made the following observation:

> The essence of unexplained orders is that they say nothing. We think a presumption which gives them *no* effect–which simply "looks through" them to the last reasoned decision–most nearly reflects the role they are ordinarily intended to play.

Id. at 804.

Here, the California Supreme Court's August 9, 2000 Order is an unexplained order with respect to the previously exhausted claims, and thus, it is appropriate for the Court to look-through it to the reasoned earlier opinions. *See Ramsey v. Yearwood*, 2007 WL 1297001 (9th Cir. 2007) (holding that because the California Supreme Court denied petition without comment or citation, and the California Court of Appeal denied petition on procedural grounds, the California Superior Court's finding that the habeas petition failed "to state a prima facie claim" is the last reasoned decision on the merits); *see also Carter v. Chappell*, 2013 WL 1120657 (S.D. Cal. Mar. 18, 2013) (noting that for certain claims that were first raised on direct appeal and rejected in a reasoned decision prior to their subsequent summary denials on state habeas review, the court must "look through" the later summary denials on habeas review to the reasoned opinion issued on direct appeal). Petitioner concedes that if the California Supreme Court is an

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[2]The Supreme Court considered this an "unexplained order" and instructed that an unexplained order is an order whose text or accompanying opinion does not disclose the reason for the judgment. *Id.*

unexplained order, "it could simply be 'looked through."[3] ECF No. 262 at 5.

In his motion for reconsideration, Petitioner relies on non-Ninth Circuit decisions in support of his arguments. As Respondent points out, these cases do not provide guidance, given the different manner in which Pennsylvania and California have structured their resolution of state habeas cases.[4] Also, Petitioner did not present a Memorandum and Points of Authorities in support of his Fourth Amended Petition. Thus, he did not argue to the Court that *de novo* review was required. In his reply, filed after he retained counsel, Petitioner argued that the California Court of Appeal's decision did not survive § 2254(d) review, not that review under § 2254 was not appropriate. *See* ECF No. 248 at 5-6 ("The CCA, with respect to three related constitutional problems, again reached legal conclusions that cannot survive § 2254(d) . . . Thus, this Court must evaluate *de novo* Hunt's claims because the § 2254(d) standards are met.).

Under Petitioner's theory, any state prisoner could circumvent § 2254(d) by simply filing a successive habeas petition in the state courts after filing his or her § 2254 petition in federal courts. The California Supreme Court would deny the

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[3]Petitioner stated, "That final state decision was no mere unexplained order simply rejecting Hunt's state habeas claims on the same grounds as those relied on by the lower state courts. Had it been, it could simply be "looked through." ECF no. 262 at 5.

[4]As the United States Supreme Court explained:

> California's collateral review regime differs from that of other States in a second notable respect: All California courts "have original jurisdiction in habeas corpus proceedings," Cal. Const., Art. VI, § 10, thus "no appeal lies from the denial of a petition for writ of habeas corpus," *In re Clark*, 5 Cal.4th 750, 767, n. 7 (1993). "[A] prisoner whose petition has been denied by the superior court can obtain review of his claims only by the filing of a new petition in the Court of Appeal." *Ibid.* The new petition, however, must be confined to claims raised in the initial petition. *See In re Martinez*, 46 Cal.4th 945 (2009).

Walker v. Martin, 131 S.Ct. 1120, 1126 (2011).

petition, citing to *Miller* (indicating that the court is denying the petition for the same reasons it denied the previous one) or *Clark* (indicating the court will not consider repeated applications for habeas corpus presenting claims previously rejected; successive and/or untimely petitions will be summarily denied). Petitioner then would obtain *de novo* review of his claims, notwithstanding that a reasoned lower court decision, which would have exhausted the claims to permit federal review, was issued by the state court.

In supplemental briefing, Petitioner argues that if § 2254(d) does not apply and the Court conducts a *de novo* review of the other claims, section 2254(e) does not apply and the Court must conduct a *de novo* review of the facts. However, this argument contradicts the cases cited by Petitioner in support of his position that the 2000 California Supreme Court decision strips the substantive decisions by the lower courts. *See e.g. Thomas v. Horn*, 570 F.3d 105, 116 (3rd Cir. 2009) ("[T]he § 2254(e)(1) presumption of correctness applies regardless of whether there has been an 'adjudication on the merits' for purposes of § 2254(d)."). Petitioner also argues that notwithstanding his position that the court must conduct a *de novo* review of the facts, the Court should not conduct an evidentiary hearing; rather, the Court should make credibility findings based on the paper record before it. The Court declines to do so. It also declines to consider any new arguments presented in Petitioner's Motion for Reconsideration and Petitioner's Post-hearing Memorandum Responding to the Court's Question.

The Court applied *de novo* review for those claims in which there was not an adjudication on the merits, and applied the proper AEDPA deferential review for those cases in which the state court issued a reasoned opinion. Petitioner has not met its burden under Fed. R. Civ. 59(e) and his motion is denied.

B.

Petitioner argues that, pursuant to Fed. R. Civ. P. 60(b)(6), relief from judgment is warranted because Petitioner was not permitted to prosecute his case in

a proper fashion, ECF No. 263. The Court questions the propriety of this motion, given the mandate from the Ninth Circuit. Even so, the Court notes that Petitioner presented this argument before Judge Stotler in his Objections to Magistrate Judge Nakazato's Report and Recommendation RE Motion to Dismiss Claims From Fourth Amended Petition. *See* ECF No. 230. Judge Stotler overruled the objection. The Court has reviewed the prior Orders issued in this case, and could not find any order preventing Petitioner from filing a Memorandum of Points and Authorities in support of his Fourth Amended Petition. In the Order directing Petitioner to file his Fourth Amended Petition, Judge Keller did not impose any page limitations. *See* ECF No. 188. While Petitioner was limited in his Reply to 25 pages, this was reasonable, given that Respondent was limited to 50 pages, and Petitioner would not have been permitted to make any new arguments in his reply. Finally, Judge Nakazato's pretrial rulings did not prevent Petitioner from prosecuting his case, and these rulings do not provide extraordinary circumstances that would justify the Court to reconsider Petitioner's petition.

C.

Pursuant to Fed. R. Civ. P. 52(b), Petitioner asks the Court to amend its findings and make additional findings regarding his counsel, Arthur Barens, and Judge Rittenband.

"The primary purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court as a basis for the conclusions of law and judgment entered thereon." Wright and Miller, Fed. Pract. & Proc. § 2582. "A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a particular finding of fact or a conclusion of law." *Id.* Generally, the motion must raise questions of substance by seeking reconsideration of material findings of fact or conclusions of law. *Id*

Petitioner has not demonstrated any need to add or amend the Court's findings. Petitioner's disagreement with the findings is not a basis for a Rule 52(b)

motion. The Court declines to exercise its discretion to consider Petitioner's argument regarding the "corpus delicti" because he did not raise it until his reply. Petitioner had ample opportunity to present this argument to this Court as well as the state courts. It would be unfair to Respondent to now address Petitioner's arguments. Notably, the California Court of Appeal held there was ample evidence of the corpus delicti of murder even without the "to do" lists. Petitioner's arguments regarding specific claims of extrajudicial bias, pro-prosecution, the "secret-deal," and the conflict of interest with respect to the sighting witnesses are merely a repackaging of claims the Court has already ruled on and it declines to revisit them. Petitioner disagrees with the Court's interpretation of the facts and whether the record supports a finding of bias or conflict, but such is not the bases to add or amend the Court's findings.

D.

Petitioner asks the Court to issue a Certificate of Appealability as to Claims 1, 2, and 6 of his Fourth Amendment Petition, for all the reasons set forth in the Petition and the post-motions.

A prisoner appealing the district court's final order in a habeas corpus proceeding must first obtain a Certificate of Appealability ("COA") by making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). In doing so, the petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should be resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further." *Jones v. Ryan*, 691 F.3d 1093, 1100 (9th Cir. 2012) (citations omitted). "Thus not every issue raised in a habeas corpus petition earns an automatic right to appeal, an appeal may lie only for issues that are worthy of fair debate among reasonable judges." *Id.*

Here, Petitioner's request is conclusory and made without any specific argument. In reviewing the record, reasonable jurists would not believe that

Petitioner's constitutional rights were denied. Petitioner has not met his burden of showing the Court's assessment of the claims were debatable or wrong, or that another jurist would have ruled differently.

Accordingly, **IT IS HEREBY ORDERED**:

1. Petitioner's Motion to Vacate, Alter, or Amend Order Denying His Fourth Amended Petition, ECF No. 262, is **DENIED**.

2. Petitioner's Motion for Relief From Judgment, ECF No. 263, is **DENIED**.

3. Petitioner's Motion for Amendment of Findings and Addition of Findings and For Amendment of Judgment in Light thereof, ECF No. 264-1, is **DENIED**.

4. Petitioner's Request for Certificate of Appealability, ECF No. 265, is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide copies to counsel.

DATED this 9th day of July, 2013.

s/Robert H. Whaley

ROBERT H. WHALEY
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH HUNT, Petitioner, v. TIM VIRGA, warden, Respondent.	NO. CV-98-5280-RHW **ORDER DENYING PETITIONER'S FOURTH AMENDED PETITION**

Before the Court is Petitioner's Fourth Amended Petition, ECF No. 190, brought pursuant to 28 U.S.C. § 2254.

Petitioner is a state prisoner in the custody of Tim Virga, the current warden of the California State Prison, Sacramento.[1] In his Fourth Amendment Petition (FAP), Petitioner seeks federal habeas relief from his state custody arising from his 1987 conviction for first degree murder and robbery with special circumstances, and his related prison sentence of life without the possibility of parole.

A. Post-Conviction Proceedings

1. California Court of Appeal

Petitioner appealed his conviction and sentence to the California Court of Appeal, No. B029402. On appeal, Defendant argued that his trial was unfair because: (1) the trial court imposed unconstitutional limitations on one of his

[1]Pursuant to Fed. R. Civ. P 25(d), Warden Virga is substituted as the respondent in lieu of his predecessor, Scott Kernan, who was CSP-SAC's warden when Petitioner filed his Reply.

attorneys; (2) his lead attorney had a conflict of interest and was ineffective; (3) a juror committed misconduct; (4) numerous evidentiary rulings were erroneous and prejudicial; (5) evidence of the corpus delicti of robbery and murder was insufficient to support the judgment; (6) the prosecutor committed misconduct during final argument; (7) the court denied the defense access to key evidence; (8) the jury was not properly instructed; (9) the court improperly limited voir dire; (10) petitioner was not present during significant chambers and bench conferences; (11) petitioner's law clerk was banished from the courtroom; (12) the court violated court rules governing electronic media coverage of his trial; and (13) the trial judge was pro-prosecution and hostile to the defense. Petitioner did not argue that the evidence was insufficient to support the jury's verdict. He maintained, however, that his was a weak case based solely on circumstantial evidence without a body or bullets.

The Court of Appeal ruled on all of Petitioner's claims in an 188 page unpublished opinion. ECF No. 5, Ex. A. In denying his appeal, the Court of Appeal found that the prosecution presented overwhelming evidence that the defendant murdered Ronald George Levin on the night of June 6, 1984, even though the body was never found. ECF No. 5, Ex. A at 3.

2. State Habeas Petitions

While his direct appeal was pending before the California Court of Appeal, Petitioner filed two habeas petitions, B059613 and B059615. On the same date the Court of Appeal filed the opinion denying the appeal, ECF No. 5, Ex. A, it issued an Order to Show Cause on Petitioner's habeas petitions and a month later issued an Amended Order to Show Cause. ECF No. 6, Ex. F. In the Amended Order, the Court of Appeal denied on the merits various newly discovered evidence and ineffective assistance of counsel claims, denied Petitioner's request for reconsideration of claims rejected on appeal, and remanded the case to the superior court with instructions to review the remaining twenty-three claims, pursuant to

Rule 260.

The evidentiary hearing on the habeas petition was not assigned to Judge Rittenband, the original trial judge, because it was possible that Judge Rittenband would have to be a witness at the hearing based on Petitioner's allegations. ECF No. 6, Ex. F at 11.

The case was assigned to Los Angeles County Superior Court Judge Stephen Czulegar. After considering the record, argument, and briefing, Judge Czulegar concluded that seven of the twenty-three issues met the standards for holding an evidentiary hearing pursuant to Rule 260.[2] ECF No. 5, Ex. B. The seven issues focused on two areas. The first area was whether allegedly newly discovered evidence "casts a fundamental doubt on the accuracy and reliability of the jury's verdict." ECF No. 5, Ex. B at 2. This included evidence of sightings of Levin (the murder victim) and evidence concerning the finding of a seven page "to do" murder list. *Id.* The second area concerned claims of ineffective assistance of counsel, including trial counsel's alleged failure to discover and/or utilize available exculpatory information for the benefit of his client and whether there was a reasonable probability that the result of the trial would have been different had counsel acted differently. *Id.* at 3.

The evidentiary hearing lasted for thirteen days during which 30 witnesses testified. After the hearing, Judge Czulegar denied Petitioner's habeas petition. *Id.* He made the following ruling:

> Claims of newly discovered evidence, ineffective assistance or conflict of counsel, and failure by prosecution to disclose evidence, have not cast doubt on the accuracy and reliability of the trial proceedings. Nor can the Court say that but for claimed insufficiencies the results in the trial probably would have been different.

Id. at 1.

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[2]Although Petitioner filed a supplemental habeas petition raising new Ineffective Assistance of Counsel claims, Judge Czulegar did not hear these claims because they were beyond the scope of the Amended Order to Show Cause.

Specifically, he concluded that the "new" evidence lacked credibility and did not point unerringly to Petitioner's innocence. *Id.* at 10. He also concluded that Petitioner's trial counsel did not undermine the trial to the extent that it cannot be relied on as having produced a just result. *Id.* at 33. He noted that counsel had to contend with a strong prosecution case, a difficult client, and a difficult bench officer. *Id.* Judge Czulegar concluded by stating that he believed that Petitioner and his accomplice killed Levin, and that Petitioner was justly convicted of that crime. *Id.* at 38.

Petitioner appealed this Order, and the California Court of Appeal denied most of his claims on the merits, with the exception of certain judicial bias claims that were procedurally defaulted. ECF No. 6, Ex. M. Petitioner then filed subsequent habeas petitions with the California Supreme Court, which were denied.

3. Federal Habeas Petitions

On June 30, 1998, Petitioner, acting *pro se*, filed his Petition for Writ of Habeas Corpus in the Central District of California. The original petition was stricken by Magistrate Judge Nakazato. Subsequently, he filed a First, Second, and Third Amended Petition. He was given leave to file a Fourth Amended Petition to consolidate his claims. He did so on March 24, 2005. It is the Fourth Amended Petition that is before this Court.

In his FAP, Petitioner raises ten separately numbered claims or grounds for relief.[3] The FAP is also supported by a "Detailed Statement of Factual Allegations in Support of Fourth Amended Petition. ECF No. 191. In response to Respondent's Motion to Dismiss, Judge Stotler dismissed the following claims with prejudice:

> 1-2(A); 1-2.3(C), 1-5, 1-7, 2-1(C.12.13), 2-1(C12.14), 2-2 (B1), 2-2(B2), 3-1 (as to the trial judge's unidentified third refusal to conduct

[3]Ground 8 was subsequently dismissed pursuant to Petitioner's request. ECF No. 199.

an evidentiary hearing), 3-6, 3-7, 3-8, 3-9, and 3-10.

ECF No. 230.

B. Standard of Review

Under 28 U.S.C. § 2254, a federal court may not grant a state prisoner's application for habeas relief for any claim adjudicated on the merits in state court proceedings unless the adjudication of the claim resulted in a decision that was: (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. § 2254(d). Section 2254 "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, __ U.S. __, 131 S.Ct. 770, 787 (2011). A state court decision is "contrary to" governing Supreme Court law if it either applies a rule that contradicts the governing Supreme Court law or "confronts a set of facts . . . materially indistinguishable from a decision of [the Supreme Court] but reaches a different result." *See Brown v. Payton*, 544 U.S. 133, 141 (2005). What matters is whether the last reasoned *decision* reached by the state court was contrary to Supreme Court law, not the intricacies of the analysis. *Harrington*, 131 S.Ct. at 784.

A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). The state court's application must have been "objectively unreasonable, not just incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 65 (2003). A federal court may not second guess a state court's fact-finding process unless, after review of the state-court record, it

determines that the state court was not merely wrong, but actually unreasonable. *Id.* at 75. Moreover, a determination of a factual issue made by a state court is presumed to be correct. § 2254(e)(1). This presumption of correctness may be rebutted only by "clear and convincing evidence." *Harrington*, 131 S.Ct. at 786-87.

Petitioner is not entitled to habeas relief unless he can show that the alleged trial error had a substantial and injurious effect or influence on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Mancuso v. Olivarez*, 292 F.3d 939, 949 (9th Cir. 2002). Habeas relief cannot be granted unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents. *Harrington.* 131 S.Ct. at 786-87 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.). Recently, the Supreme Court reiterated that habeas relief is "difficult to meet" and the "highly deferential standard for evaluating state-court rulings demands that state-court decision be given the benefit of the doubt. *Cullen v. Pinholster*, __ U.S. __, 131 S.Ct. 1388, 1397 (2011).

C. The California Court of Appeal's Factual Determination

Petitioner is not raising an insufficient evidence claim and the parties agree an evidentiary hearing is not required. The court of appeal's factual determinations are presumed correct where Petitioner has not presented any clear and convincing evidence to the contrary. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Factual determinations by state court are presumed correct absent clear and convincing evidence to the contrary.").

The following is the statement of facts set forth in the California Court of Appeal's decision on direct appeal:

The plot to kill Ron Levin was testified to by Dean Karny who received immunity for his testimony. Defendant first became acquainted with Dean Karny and Ben Dosti in junior high school and became reacquainted with them in 1980 while Karny was a student at UCLA. Defendant impressed them as remarkably intelligent and well-established for a young man of their age. He told them how he had completed college by challenging exams at the University of Southern California, become the youngest person to ever pass the CPA exam and about his employment with Peat, Marwick & Mitchell as a commodities trader. Eventually, over the next few months, defendant, Karny, Dosti, and another friend of Karny's named Ronald Pardovich became best friends.

Defendant told his friends that someday he wanted to form a group of intelligent, capable, motivated people who could succeed in business, personal and social ventures without the type of constraints and intrigues usually associated with corporate structures.

In November 1980, defendant moved to Chicago in order to trade commodities on the floor of the Mercantile Exchange to raise money so that he could start the group. Karny, his parents, and others provided defendant with over $400,000 to invest in Chicago. While in Chicago, defendant maintained his close friendship with Karny, Dosti and Pardovich, and a new friend, Evan Dicker, whom he met through Karny and Dosti. At first it appeared that defendant was very successful at trading. However, by 1982 defendant had lost all the money. He returned to Los Angeles with only $4 in his pocket and moved in with Karny.

The idea of forming a social group of people who shared a common philosophical belief which would grow into a business venture remained alive. To get the group started, Karny, Dosti and Pardovich socialized, met people and brought their friends around to meet defendant and expose them to his ideas. By early 1983 about 10 people were involved. Defendant, Dosti and Karny were the leaders but defendant was the final arbiter and decision-maker. The members called themselves the "Boys" and considered themselves a mini-mafia. They held their first formal meeting, and named themselves the Bombay Bicycle Club or "BBC."[2]

[2] The group chose the name "Bombay Bicycle Club", after a bar and nightclub defendant frequented when he was in Chicago. The name "Billionaire Boys Club" was coined by the media.

The BBC's purpose was to make money through investing in commodities, cyclotron technology and arbitrage. A philosophy developed by defendant which he called the paradox philosophy bound the group together.[3]

[3] A number of BBC members in addition to Karny, including Evan Dicker, Tom May, Jeff Raymond and attorney Jerome Eisenberg, testified to the BBC's philosophy, goals, investments and defendant's eventual financial dealings with Ron Levin, its consequences and aftermath.

The paradox philosophy called for the group not to be bound by society's rules of law and religion. Members of the group would not

blindly follow any rule but would do what was "necessary under the circumstances." Survival of the individual was the sole end. However, disloyalty to defendant or the BBC led to expulsion. A belief in the paradox philosophy enabled a person to lie and to commit crimes; even murder would be justified by the paradox philosophy if it was convenient.

By June 1983, money was raised, offices were rented and business appeared to be prospering through defendant's commodity trading. Over the next year, a number of people were persuaded to invest hundreds of thousands of dollars in various BBC business enterprises and commodities accounts over which defendant had trading authority based upon defendant's promise that they would receive high rates of return with little risk.[4]

[4] Not surprisingly, defendant's philosophy of trading in the market was to capitalize on people's greed.

One investor, Steve Weiss, brought in his closest friends and relatives and they, alone, invested over $1.5 million.[5] On the surface the BBC looked highly profitable. Defendant personally began spending a great deal of money and he sent out financial statements and personal checks to investors indicating that they also were making huge profits on their investments.

[5] Apparently up to 75 people became investors, including David May, $80,000; Tom May, $80,000; Steve Lopez, $90,000; Alan Gore, $10,000; and Dr. Julius Paskan, $180,000. The Steven Weiss Family Trust invested $502,500 in 1983 and $1,075,730.52 in 1984.

Ronald George Levin came to defendant's attention early in 1983. Defendant was told that Levin was a "scammer" and couldn't be trusted but defendant wanted to find out for himself. When defendant eventually met Levin that summer, he formed the opinion that Levin was wealthy and he succeeded in getting Levin to place $5 million in a commodities trading account.[6]

[6] According to Levin's friends, Dean Factor and Len Marmor, Levin had the outward appearance of extreme wealth. He displayed bankbooks and checks with large amounts of money on them, including a $1 million check mounted on his wall. According to Marmor, Levin was without money most of the time. Levin typed up the bank books himself. He was a "con man" who actually bragged about "ripping people off."

The account was in Levin's name and defendant was given the authority to trade the account on Levin's behalf. They would split the profits.

Shortly thereafter, defendant announced to the BBC that in one day he had lost all the investors' money in the commodities market with the exception of the Levin account. Defendant told the BBC they need not worry. Defendant showed them a statement indicating that he had made a $7 million profit on the Levin account. Since defendant was entitled to one-half of the Levin profits, or $3.5 million dollars, he would reimburse the other investors for their losses and the BBC

was still going to have enough money to do all the other things they wanted to do.

By this time, the BBC's overhead expenses were approximately $70,000 per month, the other businesses were not making much money, and defendant was personally spending large sums of money, thus the profit from the Levin account was "a very big event." Everyone at BBC expected to get money from the Levin account.

Defendant tried to get the money from Levin, but Levin told defendant he could not pay defendant his percentage immediately because he had invested the money in a shopping center. However, according to Levin, the shopping center investment had increased defendant's $3.5 million investment to $13 million. Later, Levin told defendant that a Japanese company had offered to buy the shopping center bringing defendant's profit to $30 million.

Optimism over the money which would be forthcoming from the shopping center was high in October 1983. Defendant called a BBC meeting and announced how the profits from the sale of the shopping center would be divided. The largest portion was to go to defendant. Karny and Dosti would get $1 million each. BBC members, Tom May and Dave May, each would receive $700,000. But the money never materialized. Defendant finally learned that Levin was a conniver and a manipulator and that he had been the victim of an incredible hoax.

Levin, posing as a representative of Network News, had contacted Jack Friedman, a broker with Clayton Brokerage Company, in June 1983 and convinced Friedman that he was making a documentary movie, entitled "The Traders," in which various commodities' trading practices would be compared. Friedman's role was to set up a simulated trading account in which defendant's results as an outside trading advisor would be compared over a four to eight week span with the results of an in-house broker, a computer, and with merely throwing darts.[7]

[7] Levin led Friedman to believe that the movie would be shown as a five-part series on independent television stations throughout the country. Friedman would appear as the moderator, explaining how the trades were accomplished, thereby getting free publicity.

Levin told Friedman to make sure that defendant did not know the account was simulated, explaining that the emotional trading decisions would not be the same if the trader knew it was not real. Defendant was not to be told he was trading in a simulated account until the story was done.

When defendant called the brokerage house to begin trading, he was informed by Friedman that the equity in the Levin account was over $5 million. By the time Levin closed the simulated account on August 17, 1983, defendant believed he had increased the account to $13,997.448.46, reflecting a net profit of $18,320,649 and that the account was being closed so that the money could be used for a real estate transaction. Sometime in October or November 1983, Friedman told defendant that money was not real. Defendant gave Friedman the impression that he knew all along that it was just a movie, but within five hours after Friedman discussed with defendant the true nature of the account, Friedman received a phone call from Levin in which Levin screamed, yelled, and threatened Friedman for violating his

confidentiality. Friedman never heard from Levin again.

At about the same time that defendant learned of Levin's scam, Jim Pittman, known to the BBC members as Jim Graham, came into the picture. At first Pittman was to provide karate lessons to BBC members. As time went on, Pittman and Defendant grew very close. Pittman became a BBC member, was placed in charge of security and became defendant's bodyguard.[8]

[8] Pittman was known to be armed with a derringer strapped to his ankle, a pen gun, and a small black automatic pistol. BBC member Jeff Raymond and attorney Jerome Eisenberg had seen a silencer attached to the automatic pistol when Pittman test fired the gun at the BBC office in April 1984.

Defendant confronted Levin about the scam which Levin at first denied. Finally, Levin admitted to defendant that there was no shopping center and no money. However, Levin said he had used the statements from the phony trading account to con about $1.5 out of other brokerage houses and he would give defendant and the BBC $300,000 of that sum. However, Levin kept delaying in giving defendant the money which made defendant extremely angry. Defendant told Tom May he was going to get the money from Levin, "no matter what it took."

In the meantime, the real trading accounts of the other investors continued to lose huge amounts of money and the brokers were demanding additional funds from the investors to cover the accounts. By February 1984, $300,000 was no longer a large enough sum to solve the needs of the BBC and defendant no longer believed Levin was going to give him any money. However, it was apparent that defendant still believed Levin was wealthy and had really gotten $1.5 million from his scam. Defendant had seen stacks of bank passbooks reflecting large deposits at Levin's house. Defendant told Karny that he was going to find a way of getting that money from Levin. Defendant also told Karny that Levin was going to die one day. Defendant continued to socialize with Levin. As he explained to Karny, defendant was going to maintain a relationship with Levin so that he could find a good opportunity to kill him. By the end of April or the beginning of May 1984, defendant told Karny he had developed a plan to get the money from Levin and to kill Levin.

Defendant's plan called for defendant to go to Levin's house for dinner. Defendant would secretly arrange to have Pittman arrive at 9:45 p.m. Pittman was to pretend he was a mafia gunman.[9]

[9] When Pittman was arrested on October 22, 1984, he was carrying a gym bag full of books with titles like, "The Hitman, A Technical Manual for Independent Contractors" and "The Black Bag Owner's Manual, Part 2, The Hit Parade," and "Survival in the Slammer."

Upon Pittman's arrival, defendant would tell Levin that he, defendant, owed a lot of money to the underworld as a result of his Chicago trading losses and that he had been putting them off by telling them he was expecting a lot of money from Levin. Defendant wanted Levin to believe that he, defendant, also would be in trouble if he did not get the money from Levin. Defendant believed that the

appearance of Pittman, an enormous black man holding a gun who was unknown to Levin, would make the scenario work.

The date of June 6th was chosen because Levin was due to leave for New York the next morning. Defendant wanted to make it look like Levin had left on his trip, so that his disappearance would take longer to discover.

Defendant's plan first called for preparing the BBC in advance to believe that defendant involved in a business venture so that the BBC would not be surprised when it received money from Levin. Defendant drafted letters to leave in a file he planned to create at Levin's apartment to make it look like he and Levin were involved in a business transaction. According to Karny, defendant believed such letters would deflect suspicion from defendant, and in the event of a trial, that such letters would create a "reasonable doubt." Defendant also drafted an options contract between Levin and Microgenisis, one of the BBC companies, purporting to be the basis for the money defendant would receive from Levin. The amount of the option was left blank. Defendant would decide the amount of the option after he got to Levin's house when he determined how much money Levin had to transfer.

Defendant set forth his plan to kill Levin in a seven page outline of lists of things to do and reviewed the lists with Karny.[10]

[10] Defendant's management style was to give his people lists of things to do. Everything was organized in list-format.

Defendant explained some of the more cryptic items on the lists to Karny, such as one item that read, "Levin his situation." That meant defendant was going to explain to Levin his situation in such a way as to cause Levin to believe he was going to survive the ordeal on the theory that Levin would cooperate in signing the documents if Levin thought he was not going to be killed. An item reading, "kill dog (emphasis)," was in the event Levin would not cooperate.

Anyone who knew Levin knew that he really loved his dog. If Levin failed to cooperate, defendant planned to kill Levin's dog in such a grotesque way that Levin would be shaken up and more inclined to cooperate.

Another item on the list was "Jim digs pit." Defendant told Karny that Pittman was up in Soledad Canyon digging a pit to take Levin to after he was killed. Defendant had been helping Pittman dig the pit the day before and complained the ground was really hard.[11]

[11] Defendant knew the Soledad Canyon area extremely well, He grew up near there, and according to Tom May, it was defendant's favorite place in the world.

Items such as "get alarm code," "pack a suitcase," and "keys" were to make it look like Levin had left for his New York trip. Defendant was going to keep the keys in case he needed to return. Pittman was to go to New York and leave some of Levin's identification in a bar or an alley so that if anyone ever suspected that Levin had met with foul play, it would appear that it happened in New York rather than in Los Angeles.

Defendant's list reminded him to "create a file" so that people would draw the conclusion that there had been an actual business

transaction between him and Levin. Also on the list was a page entitled "at Levin's to do" with notes to "'close blinds, . . . [¶] [t]ape mouth, handcuff, put gloves on, have Levin sign agreements and fill in blanks, Zerox everything so he has copies, initialed copies.'"[12]

[12] Defendant even thought to make a note to "take holes with you" reminding him to take the paper caused by punching holes in documents. Karny thought that was a "nifty touch." The list was found by Levin's father in Levin's apartment and turned over to the police. The lists were in Defendant's handwriting and contained both Defendant's and Karny's fingerprints.

Defendant arranged his alibi in advance by telling Karny to take defendant's girlfriend, Brooke Roberts, and Jeff Raymond to the movies on the night of June 6th so that later they could say defendant was with them.[13]

[13] Roberts, testifying on behalf of defendant, confirmed on June 6, she had gone to the movies with Karny, Raymond, and Raymond's girlfriend, Renee. Defendant was having dinner with Levin to discuss a business deal and was supposed to get some money from him. However, defendant was already home, in his robe, and brushing his teeth when she got home from the movies at about 10 p.m. (It takes about one and one-quarter to one and one-half hour to travel from Beverly Hills to Soledad Canyon.) Defendant was excited about the check he had gotten from Levin and they called Roberts' mother to tell her about it. Mrs. Roberts remembered receiving such a call about that time but could not remember the date of the call.

At 7 a.m. on the morning on June 7, 1984, defendant awakened Karny and told Karny he had done it, that Levin was dead. He showed him a check for $1.5 million and the contract signed by Levin. Defendant was so excited about the check and contract he also woke up Jeff Raymond to show them to him. Defendant told Raymond that Levin was leaving for New York that very morning to see some Arab investors who wanted to buy the option. Then he went by Tom May's and showed him the check and contract and when he arrived at the office, he made copies of the check which he distributed to the BBC members.

Three days later, defendant met with Gene Browning, the inventor of a cyclotron, which was the subject of the option agreement defendant forced Levin to sign on June 6. Browning expressed concern about the capacity of the cyclotron to perform some of the processes called for in the contract. Defendant told Browning that was no particular problem because "Levin was missing and probably dead."

A few days later and in subsequent conversations, defendant described Levin's murder in detail to Karny. Defendant had picked up some take-out food from a restaurant and took it to Levin's house. Pittman arrived just as planned, pulled a gun on Levin, and Levin immediately said, "'I will do anything you want.'" Defendant told Karny he did not have to kill the dog because Levin cooperated so

quickly. Defendant told Levin his mafia story and asked Levin how much money he could be sure would clear his account. Levin said about "a million seven." Defendant decided to have Levin sign a check for "a million five," just to make sure the check would clear.

Defendant described how he was trying to get some other assets from Levin as well, but Pittman messed up his role of mafia enforcer. After getting the check signed, defendant turned to Pittman and said, "'Is that enough?'" Pittman was supposed to say, "'No. What else have you got?'" But instead, Pittman said, "'Yeah, that's fine.'" Defendant got upset that Pittman had blown it and Levin started to whimper because he had given up the possibility that he was going to survive. When defendant tried to get Levin to tell him the alarm code Levin was so scared and nervous he could not remember the sequence and it turned out to be wrong.

They took Levin into the bedroom, put him face down on his bed and, with a silencer attached to a .25 caliber pistol, Pittman shot Levin in the back of the head. Defendant described to Karny the sounds of Levin's last breath leaving his body. It was kind of like an explosive gasp. The blood started seeping out, so they quickly wrapped Levin in the bedspread. By accident they also wrapped the television remote control in the bedspread and took it with them. They carried Levin's body out to the car and put him in the trunk. Levin's body was heavy, they were exhausted and, in their haste to get the trunk closed, they closed part of the lid on his body and dented the trunk lid.

Levin's body was taken to the pit in Soledad Canyon. When they put Levin's body in the pit, defendant disfigured it by shooting the body so many times with a shotgun that it would not be recognizable even if it was found. Defendant told this tale to Karny in a matter - of - fact manner without any emotion other than laughing when he told Karny how, at one point, Levin's brain jumped out of his skull and landed on defendant's chest. Defendant thought that was "kind of neat in a weird way."[14]

[14] In mid-July 1984, defendant left a heavy cotton topcoat at Dicker's house. Defendant told Dicker it had Ron Levin's brains smeared on it. Dicker did not see any bloodstains on the coat, but when he reacted in disgust, defendant assured him it had been dry cleaned.

Levin's distinctive watch was thrown down a storm drain because it could be traced to Levin through his special jeweler.

Levin was discovered missing early in the morning on June 7, 1984. Blanche Sturkey, Levin's housekeeper and "girl Friday" was to pick Levin up at 7 a.m. that morning to drive him to the airport. She called Levin at 6 a.m. to make sure he was up. Levin did not answer the phone. Dean Factor and Michael Broder, who were traveling to New York with Levin, arrived at Levin's house at approximately 7 a.m. and were worried because Levin was not there. Levin's blinds were closed, his-alarm was not on which was very unusual, and his dog was acting peculiarly. When Sturkey arrived, she let them in with her key.

Sturkey, Factor and Broder searched the empty house and were puzzled by what they found. They thought it would have been very unusual for Levin to make plans and not show up. Levin's airline tickets and his new Luis Vuitton luggage were still in the house. A

black toiletries case with which he always traveled was still in the linen closet. One of the pillows, a sheet, and the bedspread from Levin's bed were missing. His bed had been remade with a guest-room comforter Levin never used on his own bed. The television remote control was missing, the dog was acting queer and had urinated in the house, take-out food cartons with only a few bites missing were left out, the jogging suit and robe Levin had been wearing the day before was missing but none of his other clothes were missing. His wallet, house and car keys were gone, but his car was still in the carport. Perhaps most peculiar, Levin had not called his answering service for messages.[15]

[15] According to Tere Tereba who had known Levin since 1971 or 1972, Levin was constantly calling in for messages. Levin carried a beeper and would even run out of movies or leave the table at a restaurant to get his phone messages. Jerry Stone ran Levin's answering service and testified that Levin's messages began accumulating at 9 p.m. on June 6, 1984. Among the accumulated message were four from defendant to Levin. Defendant told May he was calling Levin's answering service on a daily basis to keep up appearances.

Levin's mother was called to the house and Factor and Broder went to the Beverly Hills Police Station and told a detective that they suspected Levin had been murdered. They were told that unless there was blood on the walls, there was no reason to suspect murder and there was really nothing they could do.[16]

[16] The coroner explained that bloodstains would be minimal if a person was placed face down and shot in the back of the head with a small caliber pistol such as a .25 caliber. A small caliber bullet would remain inside the head and a silencer causes the gun to create a smaller entry wound. A pillow placed between the head and gun also decreases the size of the wound and soaks up blood.

Nevertheless, things were no longer going according to plan. Pittman left for New York as planned and checked into the Plaza Hotel on June 7th in Levin's name. But when he tried to pay his bill with Levin's credit cards, they were rejected. Pittman tried to sneak out of the hotel without paying the bill but was caught and arrested.

Defendant flew to New York and walked up to a criminal defense lawyer, Robert Ferraro, on the "stoop of the courthouse." Defendant told Ferraro he had a friend named Ron Levin whom he wanted to get out of jail. Defendant handed Ferraro a fee of $700, plus $2,000 for "Levin" when he was released and $2,000 for the Plaza Hotel, all in cash.[17]

[17] Pittman was released and ordered back for trial on August 14th. He failed to appear and a bench warrant was issued.

Defendant then flew on to London to stall making a payment to some investors.[18]

> [18] Telephone records, traveling receipts and defendant's passport seized from the BBC office verified a call from the New York Police Station and defendant's and Pittman's trips.

When he returned, Defendant learned Levin's check for $1.5 million was no good and he was hysterical.[19]

> [19] Defendant had opened an account at the World Trade Bank in an effort to expedite the cashing of Levin's check which was drawn on a Swiss bank account. Nabil Abifadel, the operations manager of the World Trade Bank, submitted the check to Credit Suisse in Zurich on June 8. On June 15, he received a telex from Credit Suisse stating the check was dishonored due to insufficient funds and a missing signature. Pittman arranged to have Levin's Swiss bank send new checks to Levin's post office box and defendant, Karny and Dosti practiced forging Levin's name. They took turns checking the mail box with the key taken from Levin but no checks were obtained. Defendant also gave Pittman $30,000 and sent him to Washington D.C. to see if Pittman could get the check cashed through his "underworld connections."

Roberts found defendant laying face down on his bed crying. Defendant told her he was upset because all of the BBC boys were going to laugh at him and he did not know what to do. He told Roberts he had called Levin on the phone and driven by Levin's house and could not get a hold of him. The pressure was increasing for money in the group. BBC members kept asking defendant, Karny and Dosti why the projects they were working on were not being funded and the reason for other cutbacks. Karny thought the organization and cohesiveness of the BBC was starting to fall apart and felt uncomfortable about deceiving his friends in the BBC. Karny told defendant that if the members really understood what they were trying to accomplish and the principles of the paradox philosophy, that they also would be able to understand the killing of Levin. It was agreed that a special meeting of the BBC would be called and only those members with a sufficient orientation in the paradox philosophy would be invited to attend.

Prior to the meeting, May asked defendant what was going on. Defendant replied: "'Look, Tom, you are going to find out sooner or later. I killed Ron Levin.'" Defendant told May he had committed the "perfect crime," and that he had killed Levin in New York. May thought this was just another one of defendant's lies until he attended the secret meeting of the BBC and heard defendant tell everyone he had killed Levin.

The meeting was held on June 24. Evan Dicker, Tom May, Steve Taqlianetti, Dean Karny and Brooke Roberts were present and described the meeting. Defendant explained to the group, which also included Pittman, Dosti, and John Allen, that none of the BBC companies was doing well financially and there was no money left. He discussed great wealth and the need to acquire it and to protect it, and that to achieve greatness in the world, you must sometimes transgress the law. The BBC was going to take bold steps. Those who

were unwilling to take the steps could remain with the BBC in some position of mediocrity, but they would never be able to achieve greatness. Defendant was going to discuss some sensitive things. Anyone could leave at that point in the meeting, but if they remained they would have to be responsible and "disciplined" about, what they heard. No one left.

Defendant, Karny, Dosti and Pittman exited the room and were gone for a few minutes. According to Karny, during that time they discussed whether they should actually tell the others about the Levin killing. Defendant, Karny and Dosti were committed to sharing it with the others, but Pittman had reservations. Pittman believed that no one could be trusted with that information and that someone would always talk. Eventually, Pittman came around. Karny and Dosti returned to the meeting and were joined by defendant and Pittman a couple of minutes later.

Defendant told the group, "'Jim and I knocked off Ron Levin.'"[20]

[20] Roberts testified she had overheard defendant and Karny making plans for the June 24 meeting. She heard Karny suggest that they tell the BBC that one of them had killed Levin. They finally settled on saying that defendant and Pittman had done the killing and to make it sound believable they would make up details. Roberts said she told defendant not to worry. Defendant had learned that the Mays or Raymond were going to steal the cyclotron machines, he did not want to lose the business, he could pay the money back through another deal, and so he was just going to say it was for effect.

Defendant explained that all of their money had been lost and that in order for the BBC to survive, he had to do away with Levin. Defendant assured the group that "it was a perfect crime" and "'there is no way in which we would be caught.'"

Defendant still held out some possibility that they were going to be able to get Levin's check cashed,[21]

[21] Dicker knew Levin's business practices and wondered how defendant got Levin to give the BBC a check for $1.5 million. About a week after the meeting Dicker questioned defendant about the check. Defendant said the check was signed under a great deal of duress. Dicker asked defendant what he had done with Levin's body. Defendant replied that he had disposed of it with acid. Raymond also questioned defendant about his worries. Defendant told Raymond, "'Well, don't worry because it was the perfect crime . . .[ ] they will never find the body.'"

they still had some money and resources and a lot of projects, and they would get back on their feet if everyone stayed together and worked hard. Before the meeting broke up, defendant threatened that if anybody talked to the police they would end up in the East River and become "fish bait."[22]

[22] Roberts heard defendant tell the group that he and

Pittman had "knocked off Levin." She thought all the boys, with the exception of Pittman, were enthusiastic. After the meeting, Pittman said to Roberts, "'You know, we didn't do that.'" Roberts assured Pittman she knew they had not done it and he replied, "'I don't think they believed us anyway'" and Roberts agreed. When Roberts was asked by Detective Leslie Zoeller if there had been a meeting where defendant had said he killed Levin, Roberts had lied to him and said no, because she was scared to death of the police. When she was questioned, about 20 policemen had arrived at her house, awakened her, refused to allow her any phone calls, and threatened to arrest her.

Notwithstanding that threat, Pittman had been right when he said someone would talk. The next day, Taglianetti resigned from the BBC and called his father and told him what he had learned. Then he called David and Tom May and learned they also had told their father. Raymond moved out of the BBC apartment house. He also called David May and told him defendant had said he killed Levin and arranged a meeting with the Mays. Tom May collected copies of the Levin check and contract and other documents to turn over to the police. It was agreed that the Mays would report the matter to the police through their attorney.[23]

[23] Dicker did not go to the police because of his loyalty to defendant and his belief in the paradox philosophy. Later he lied to the police and told them defendant had never told him about the Levin murder because he was afraid he might be considered an accessory after the fact. Finally, in November and December 1984, Dicker contacted an attorney and the police. Steve Lopez, who was not at the meeting, heard that defendant had told the BBC members he had killed Levin. Defendant admitted to Lopez he had said as much, but only to provoke a response to see how they would react and to make himself look like a tough guy. Lopez discontinued his involvement with the BBC.

Defendant became suspicious that someone was talking to the police. He confirmed it by breaking into David May's apartment where he heard a message from Detective Zoeller on the answering machine.[24]

[24] Defendant decided to blame the murder on David May or Jeff Raymond and discussed different schemes with Karny and Dicker. One scheme called for saying that David May had borrowed the BMW which had been used to transport Levin's body and had returned it late with the smell of vomit and the remote control in the back. They also discussed framing Raymond by planting the remote control on him, killing Raymond's girlfriend in a sexually gruesome way, telling people Raymond had disgusting sexual habits and getting defendant's girlfriend, Brooke Roberts to lie and say Raymond had sexually attacked her. But no one wanted to have

anything to do with that plan.

Defendant confronted the Mays and Raymond with this information and demanded that they call the police and say they had lied. Defendant also told them he had the pink slips to their cars and would exchange them for the documents they had given to the police. When they explained that was impossible, defendant threatened "to declare war" on them.[25]

[25] Defendant also told the Mays they were no longer BBC members, "much to [Tom May's] chagrin." To Raymond, defendant said that Levin was a very dear friend of his (defendant's) and he was really upset that he was missing. Defendant expressed the wish that Levin would be found and Raymond was not to say anything about defendant's "dear friend Levin." Defendant warned Raymond that "the D.A. doesn't make very much money and it would be very easy to persuade him to make it look like you (Raymond) might have something to do with Ron Levin's being missing."

Nevertheless, Tom May continued working with the police by removing documents from the BBC office and turning them over to the police.

Detective Zoeller of the Beverly Hills Police Department arrested defendant on September 28, 1984.[26]

[26] Defendant's briefcase was in his possession at the time of his arrest. When it was opened pursuant to a warrant, it revealed that, although over three months had passed since anyone had heard from Levin, defendant was still carrying around an original of the Levin option contract dated June 6, 1984.

Defendant waived his constitutional rights and responded to a number of the detective's questions about his financial dealings with Levin. Defendant appeared very confident and very sure of himself until Detective Zoeller confronted him with the seven pages of "things to do" which had been found at Levin's house. Defendant immediately stopped talking and went through the lists over and over, page by page, forwards and backwards, for seven to ten minutes without speaking. Detective Zoeller then asked defendant for the second time what he knew about the lists. Defendant stated, "I don't know anything about these," and the interview ended.

Defendant called Karny from the Beverly Hills jail and reminded him of the significance of the alibi they had arranged about going to the movies on June 6. After defendant was released from jail, defendant admitted to Karny how very surprised and shocked he was to see the lists, but he believed he had managed to mask his reaction. Thereafter, defendant and Karny had frequent discussions about the fake trail they had laid with regard to the crime, how brilliantly conceived and detailed their crime plan was and that if even a few of the BBC stuck to the story, a reasonable doubt would be created in the minds of the jury.[27]

[27] Defendant particularly enjoyed telling Detective Zoeller that he had not done very good police work.

Defendant expressed the belief that, because he had been released from jail, even the lists did not constitute sufficient evidence to prove the case against him.[28]

[28] Defendant was rearrested on October 22, 1984, and once again called Karny from the jail, this time to remind Karny that whether Karny liked it or not he was going to be involved with the testimony. Karny was warned to remember there was no meeting on June 24.

The lists contained a rough but inaccurate map of what appeared to be the Indian Canyon area of Soledad Canyon. Photographs of that area containing defendant's picture had also been seized from Pittman's residence. On October 19, 1984, Detective Zoeller drove up to Indian Canyon with Taglianetti and Tom May to look for Levin's body. Later, Zoeller made three or four more trips to the area in an unsuccessful effort to locate Levin's remains.

Defendant told Karny around the end of June that he had gone back to Soledad Canyon to see if the coyotes had dug up the body. Defendant found no trace of it.

The Department of Justice Missing Persons Unit did an investigation which included comparing Levin's "unique" dental records with unidentified deceased persons. They searched his Department of Motor Vehicles record and his criminal record. They found no trace of Levin either. At the time he disappeared, Levin left thousands of dollars in various bank accounts. Levin had purchased $25,000 in traveler's checks before he disappeared. He had paid off debts with some of the checks and deposited $10,000 of them in a Bank of America account. Thirty of those checks totaling $3,000 were never cashed: Other than earning interest, there was no activity on any of Levin's accounts after June 6, 1984.

Levin's mother never heard from him again after June even though Levin loved her dearly and had never let a day go by without talking to her. Levin's body was never found and Levin was never heard from again.[29]

[29] In September 1986, two people believed they saw Levin at a gas station in Tucson, Arizona. Carmen Canchola and Jesus Lopez pulled into the gas station and noticed a tall, attractive, older man pumping gas. The man was about six foot one, slender, with silver hair. His eyes were blue-gray and he had either a scar or a deep wrinkle on one side of one of his eyes. The man had a "mean" or "piercing" stare. He was wearing very nice, expensive looking clothes. He was with a man who was 15 to 20 years younger. The men appeared to be homosexuals. They drove off in a late 50's, early 60's silverish or pinkish-beige classic automobile. On November 20, 1986, Canchola saw a sketch of Levin in an Esquire magazine article about the "Billionaire Boys Club." She thought he looked familiar and after reading a description of Levin in the article, she came to believe it was Levin she saw in the gas station and went to the police.

Canchola was shown a photographic line-up and

> selected Levin's picture but was somewhat uncertain. When shown another line-up containing a photograph of Levin without a beard, she was 99 percent sure it was the person she had seen in the gas station. Lopez also selected a picture of Levin from the photographic lineup and was 65 percent sure it was the person he had seen in the gas station. When shown a second photograph of Levin by defense counsel he was 95 percent certain it was the man he had seen at the gas station.

ECF No. 5, Ex. A at 4-31.

D. Los Angeles County Habeas Court's Factual and Credibility Findings

As set forth above, the Los Angeles County Habeas Court (LAC Habeas Court) held an evidentiary hearing and made a number of factual and credibility findings from the record made at the hearing and the underlying trial record. In *Taylor v. Maddox*, the Ninth Circuit instructed that where the petitioner challenges the state court's findings based entirely on the state record, the reviewing court must be particularly deferential to the state-court judges. 366 F.3d 992, 1000 (9th Cir. 2004). Deference is necessary, especially in credibility findings, because a reviewing court, which analyzes only the transcripts is not as well-positioned as the trial court is to make credibility determinations. *Miller-El*, 537 U.S. at 339. If a petitioner does not raise an intrinsic challenge to the facts found by the state court, the state court's findings are "dressed in a presumption of correctness." *Id.*

In its Order Denying Writ of Habeas Corpus[4], Judge Czuleger made a number of factual and credibility findings, which address each of Petitioner's claims made at the evidentiary hearing and discussed in this Order. Petitioner has not argued that these factual findings are unsupported by sufficient evidence. Thus, the findings have a presumption of correctness. The findings resolve all of the claims involved in the evidentiary hearing on reasonable grounds.

E. Respondent's Evidentiary Objection to Hunt's Eslaminia Juror Declarations

The Court initially considers Respondent's evidentiary objection to six

[4]ECF No. 5, Ex. B.

declarations Petitioner has proffered in support of his habeas petition. The declarations are from six jurors from Hunt's 1992 trial for murdering Heydat Elsaminia that took place in San Mateo, California (collectively referred to as "Eslaminia juror declarations")[5] ECF No. 11, Exs. 202-208.[6]

In 1992, Petitioner was tried for Heydat's first degree murder before a San Mateo jury. Petitioner defended himself *pro se* but was ostensibly assisted by an attorney named William E. Gilg. ECF No. 11, Ex. 201. The trial court allowed the prosecution to show the jury that Petitioner had been convicted for Levin's murder in 1987; however, the jury was instructed they could only consider it as evidence of Petitioner's identity, intent, or motive regarding the allegations in their case if the State met its burden of showing beyond a reasonable doubt that Petitioner

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[5]Heydat was the father of Reza Elsaminia, a BBC member. On or about July 1984 (shortly after Levin was murdered on June 6, 1984), Reza, Petitioner, and Karny executed their plan to kidnap, kill, and extort money from Heydat. Petitioner, Reza, Pittman, and Arben Dosti were eventually charged with killing Heydat; Karny was granted immunity from prosecution for his participation in the 1992 Eslaminia trial in exchange for his testimony against Petitioner and the others. ECF No. 5, Ex. A at 109-110.

In 1988, Reza was convicted by a jury for conspiracy to commit grand theft and kidnaping, kidnaping for extortion and second degree murder of his father, however, the Ninth Circuit ultimately granted Reza's federal habeas petition because it found his jury considered prejudicial extrinsic evidence that had been inadvertently provided during their deliberations. *Eslaminia v. White*, 136 F.3d 1234 (9th Cir. 1998).

[6]Ex. 202, 203-Declarations of Sandra Achiro; Ex. 204-Declaration of Barry Creekmore, Ex. 205-Declaration of Dr. David Saperstein; Ex. 206-Declaration of Harry Morrow, Ex. 207-Declaration of Ardath Sorell; Ex. 208-Declaration of Joseph Carsanaro.

murdered Levin. *Id.*

To meet its burden, the State called 24 of the approximately 60 trial witnesses from the 1987 Levin trial to testify against Petitioner, including Karny, Tom May, Jerry Eisenberg, Evan Dicker, and Jeff Raymond. *Id.* Gilg states Petitioner called 44 defense witnesses (36 who did not testify in the 1987 Levin trial). *Id.* Between the prosecution and defense, a total of 31 Levin trial witnesses were called to testify. *Id.* Petitioner also introduced documentary evidence that was not used in the Levin trial. *Id.* The jury in Petitioner's 1992 Eslaminia trial ultimately hung, 8-4 in his favor. *Id.*

Petitioner did not provide declarations from any of the four Eslaminia jurors who voted in favor of Petitioner's guilt. Instead, the declarations are limited to six of the eight jurors who voted for acquittal. The declarations set forth the jurors' respective mental impressions, opinions, and conclusions formed during their deliberations about certain witness testimony and documentary evidence relating to Levin's murder, including certain testimonial and documentary evidence that was not used in Petitioner's 1987 trial for Levin's murder.

Petitioner attempts to use the Eslaminia juror declarations in some of his claims to impeach the Levin jury's guilty verdict and to question the competency of his counsel in the Levin murder trial. Fed. R. Evid. 1101(e) provides the Federal Rules of Evidence apply to habeas corpus petitions filed in federal court under 28 U.S.C. § 2254. *McDowell v. Calderon*, 107 F.3d 833 1351. 1368 (9th Cir. 1997) (pre-AEDPA case in which the Ninth Circuit determined a federal district court appropriately applied Rule 606(b) despite a potentially conflicting state-evidence rule). Fed. R. Evid. 606(b) governs the admissibility of juror testimony.[7]

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[7]Fed. R. Civ. P. 606(b) provides:
(b) During an Inquiry Into the Validity of a Verdict or Indictment.
(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's

Respondent asserts these declarations are irrelevant, inadmissible, and should be stricken pursuant to Fed. R. Evid. 606(b) and 1101(e). Petitioner argues that Fed. R. Evid. 606(b) "only precludes the use of a juror's testimony *to impeach that juror's verdict*[,]" and that he is proffering the declarations for a permissible use. Petitioner's contention is misplaced. By its express terms, Fed. R. Evid. 606(b) is not so limited. To the contrary, the rule imposes a general bar to using juror testimony to impeach "the validity of ***a*** verdict." Fed. R. Evid. 606(b) (emphasis added); *Tanner v. United States*, 483 U.S. 107, 121, 125-26 (1987). The rule expressly limits the use of juror testimony or affidavits to determining: "(1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form." Fed. R. Evid. 606(b).

Here, Petitioner is not using the Eslaminia juror declarations for any of the three authorized purposes set forth in Fed. R. Evid. 606(b)(1)-(3). Instead, he attempts to use the Eslaminia juror declarations, specifically, the Eslaminia jurors' respective thoughts, mental impressions, opinions, and conclusions about certain Levin-related witness testimony and documentary evidence they considered during their deliberations—that did <u>not</u> result in a verdict—to impeach a verdict rendered by a *different* jury, specifically the *Levin* jury. To the extent Fed. R. Evid. 606(b) prohibits a juror from testifying about his or her internal deliberations to impeach that juror's own verdict, it clearly prohibits a juror from giving testimony to

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vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
(2) Exceptions. A juror may testify about whether:
(A) extraneous prejudicial information was improperly brought to the jury's attention;
(B) an outside influence was improperly brought to bear on any juror; or
(C) a mistake was made in entering the verdict on the verdict form.

challenge "the validity of a verdict" rendered by a jury in a different case. This is particularly true where, as here, the issues and corresponding evidence in both cases were not in complete equipoise. As discussed above, the Eslaminia jurors only heard from about one-half of the prosecution witnesses called by the prosecution in the Levin trial, and the Eslaminia jurors' primary task was to determine whether Petitioner killed Eslaminia.

Consequently, Petitioner's attempt to use the Eslaminia jurors' declarations to impeach "the validity of a verdict" reached by the Levin jury is improper and barred by Fed. R. Evid. 606(b). Their thoughts, mental impressions, and conclusions about evidence they considered during their deliberations in the Eslaminia trial are also irrelevant and inadmissible in this case. Fed. R. Evid. 401; 402. The affidavits are also not probative of the competency of counsel in the Levin murder trial. Given the wide range of trial tactics and fact patterns involved in the defense of different cases, the tactics and results of one counsel compared to another is not admissible opinion or fact evidence.

Respondent's objection to the Eslaminia juror declarations is sustained, and his corresponding motion to strike these declarations is granted.

F. Fourth Amended Petition (FAP)

In his Fourth Amended Petition (FAP), Petitioner presents nine grounds for habeas relief: (1) Violation of Petitioner's rights to counsel and to the effective assistance of counsel (Sixth and Fourteenth Amendments); (2) Judicial Misconduct Grounds; (3) Due Process Grounds; (4) Jury Misconduct Ground (The "Recipe"); (5) Confrontation Clause claim (State Bar File); (6) Violation of Petitioner's Right to Be Present; (7) Equal Protection Ground (RE: Secret Deal); (8) Fifth Amendment ("Doyle-Error") Ground; and (9) Fifth Amendment ("Griffin" Error). ECF No. 190. A newly discovered evidence claim raised in the state habeas evidentiary hearing has not been raised in this court.

In addition to these broad claims, under Claim 1, Claim 2 and Claim 3,

Petitioner presents sub-claims and sub-sub claims. In many of the sub-claims, Petitioner merely identifies what he believes were errors or mistakes made during the pre-trial proceedings and the trial proceedings. In his petition, Petitioner did not attempt to argue how these alleged defects in the proceedings resulted in a violation of his constitutional rights, nor attempt to show how the state court's decisions on these claims were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or were based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Rather, the FAP reads like a laundry lists of things that Petitioner believes went wrong at his trial. As such, addressing Petitioner's claims was a daunting task.

In its response, the Government separated Petitioner's claims into broad categories and applied the proper standard for federal habeas review. The Court used these broad categories to first rule on Petitioner's claims globally and then, to aid further review, analyzed each claim individually. In doing so, the Court provided a cite in the state court proceedings where Petitioner presented the claim below, when the state court summarily ruled on Petitioner's claims.

Also, for some claims, the Court did not address the specific complaint, where the sub-sub-point was merely identifying instances in the record that supported Petitioner's general claim. For instance, in Claim 2-2, Petitioner lists sub-points, sub-sub-points and sub-sub-sub-points. The Court did not address each instance of alleged wrongs. Rather, the Court addressed Claim 2-2 on a macro-level based on allegations of pro-prosecution partisanship. Where the Court concluded that it was necessary to address a sub-point in depth, it did so.

1. Claims based on Petitioner's Theory of Defense

As required, the Court initially looked at these broad categories to determine if, without the alleged errors, the outcome of the trial would have been different. Numerous witnesses testified that Petitioner stated at different times that he had

killed Levin. He described in detail the method of killing, the motive, and the details. Petitioner did not testify so his defense theory is taken from the trial record. The theory was that Petitioner had reasons to lie about murdering Levin and that his statements that he had murdered Levin were not true. The defense contended that Ron Levin was not dead and therefore, Petitioner could not have committed murder. With Petitioner not testifying and explaining himself the reasons for his damning admissions of murder, the only significant issue to be resolved by the jury was whether Levin was dead or was in hiding. This defense theory was not an unreasonable tactical decision by Petitioner's counsel, as the lack of a body was the only thing missing from the state's case. Thus, the question to be answered on habeas review is whether the jury would have found the evidence of Levin's death to be insufficient if the alleged errors had not occurred.

Counsel began his closing argument paraphrasing Lord Hale, in which he was to have stated that he would never convict any person of murder or manslaughter unless the fact were proved to be done, or "at least the body had been found dead." (RT 12827.) He argued, "Find the money. Find Levin." (RT 12846.) "It was simulated money, brought to you by the same person who brings you simulated murder, Ron Levin." (RT 12884.) "It was a perfect crime because there is no crime. No crime." (RT 12887.) He also argued, "The issue is whether [Levin] is dead and the issue is whether Joe Hunt killed him that night. That is it. End of story." (RT 12850.) He asks, "What does Levin do? Levin disappears." (RT 12835.)

The jury rejected this theory, and the state courts uniformly found that the prosecution had presented overwhelming evidence that Petitioner murdered Levin on the night of June 6, 1984, even though Levin's body was never found. In fact, Petitioner explained to many persons why Levin's body would never be found, stating that he had buried it in a remote canyon. Petitioner gave multiple confessions to a number of persons that he killed and robbed Levin. There was a

written plan in Petitioner's handwriting to murder Levin. Moreover, he had motive, opportunity, and enterprise, along with the philosophy, a henchman, and the weapons to carry out his plan. In short, the state courts' conclusion that there was overwhelming evidence of Petitioner's guilt is not an unreasonable, incorrect, or erroneous conclusion.

In reviewing Petitioner's FAP, the Court has identified fourteen claims that relate directly to Petitioner's theory of defense.[8] Each of these claims were rejected by the California state courts. The Court has carefully reviewed these claims and has concluded that Petitioner has failed to show that the decisions were contrary to, or involved an unreasonable application of, clearly established Federal law or were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The evidence that Petitioner alleges should have been presented to the jury was cumulative, irrelevant, inadmissible, incredible, or unknown to counsel. Also, there were tactical reasons for not presenting this evidence to the jury. Petitioner has not demonstrated that if the jury had heard this evidence, the outcome of the trial would have been different. As such, the Court denies Petitioner's habeas petition with respect to these claims.

2. Claims Based On the Alleged Backroom Deal and Conflict of Interest

Unlike the original habeas petitions, an attorney filed Petitioner's reply brief, which identifies the gravamen of his claims as involving an alleged "backroom deal." ECF No. 248. The pejorative term "backroom deal" was, in fact, an in-chamber's meeting involving Judge Rittenband and counsel (Arthur Barens) that involved the terms and role of appointed counsel. Petitioner claims the hearing resulted in his counsel committing "felonies and grave ethical lapses," which

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[8]Claims 1-1.1; 1-1.11; 1-1.12; 1-1.13; 1-1.14; 1.1.15; 1-1.16; 1-1.17; 1-1.18; 1-1.19; 1-1-20; 1-1.23; 1-2.10; 1-2.11.

resulted in a denial of Petitioner's right to counsel, created a conflict of interest between his counsel, and was done in secret or without his knowledge. *Id.* at 1.

The Court of Appeal found Petitioner's contentions regarding the "backroom deal" meritless. ECF No. 5, Ex. A at 32. In doing so, it set forth the following factual circumstances leading to the appointment of Petitioner's counsel:

> Defendant had retained attorney Arthur Barens in March 1985 to represent him at trial for an agreed-upon fee of $50,000 plus expenses. Barens brought in attorney Richard Chier to assist him and paid for his assistance out of this fee. By October 1985, defendant had paid only $35,000 of the fee, and when no further funds were forthcoming, Barens filed a motion pursuant to section 987, subdivision(d) for the appointment of Chier as associate counsel.[30]
>
> > [30] Section 987(d) provides: " In a capital case, the court may appoint an additional attorney as cocounsel upon a written request of the first attorney appointed. The request shall be supported by an affidavit of the first attorney setting forth in detail the reasons why a second attorney should be appointed. Any affidavit filed with the court shall be confidential and privileged. The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation. If the request is denied, the court shall state on the record its reasons for denial of the request.
>
> In support of his motion, Barens submitted a declaration in which he explained that he bore the primary responsibility for preparing the defense and in that regard had reviewed a tremendous number of reports and other documentation pertaining to the case, consulted with the defendant, interviewed witnesses, researched points of law and spoken with other attorneys experienced in the defense of capital cases. Barens needed the assistance of Chier, a criminal law specialist who had been practicing for eighteen years in the following areas: the analyses of numerous complex factual and legal issues, assistance in preparing defenses to other crimes evidence which the People intended to offer pursuant to Evidence Code section 1101; evaluation of reports of statements of prosecution witnesses and follow-up interviews; interviewing defense witnesses, and organizing their prospective testimony, reviewing and organizing the testimony from the Pittman trial;[31] evaluating the complex evidentiary issues including corpus delicti issues and financial records of defendant's business dealings which provided the alleged motive for murder; preparation of pretrial motions; assistance in evaluating the need for expert testimony; and drafting interlocutory appellate motions in the event of adverse trial rulings.
>
> > [31] Pittman also was tried for Levin's murder in a separate proceeding. His trial began on May 8, 1985, and a mistrial was declared as a result of a deadlocked jury on

June 24, 1985. Pittman's retrial was then continued until after defendant's trial. Pittman subsequently pleaded guilty on November 10, 1987, to accessory after the fact in violation of section 32.

This motion was granted and Chier was appointed second counsel effective March 1, 1986. Thereafter, the court authorized payments to Chier at a rate of approximately $50 per hour.[32]

[32] Mr. Barens did not request payment of a specific hourly fee for Mr. Chier nor did the court's order set forth a specific hourly fee. Rather, the order stated that "payment to second counsel be and hereby is authorized as provided by the provisions of Section 987(d) of the Penal Code." However, subdivision (d) of section 987 does not provide for the payment of court appointed counsel. The payment provisions are found in section 987.2 which state the court appointed counsel " . . . shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county."

Jury selection began on November 5, 1986, with both counsel conducting the defense voir dire. Six weeks later, Barens filed a motion pursuant to section 987(d) to have himself appointed as additional counsel effective December 16, 1986. In support of his motion, Barens submitted a declaration in which he explained that the trial of the case was taking far longer than was originally anticipated and the defendant's inability to pay the balance of his fees or expenses was beginning to erode his effectiveness. Barens further declared that a court appointment would tend to ensure his continuing and regular presence throughout the trial and would minimize the number of other court appearances he would have to make during the course of the trial "in order to keep the economic ship of state afloat."[33]

[31]On December 17, 1986, Barens filled another motion requesting that he be appointed as additional counsel, this time pursuant to the provisions of section 987.2 In his declaration in support of this motion, Barens indicated his willingness to accept appointment at whatever rate the court deemed appropriate in accordance with the criteria contained in section 987.3. (remaining portion of footnote omitted).

A declaration by Chier was submitted in support of Baren's motion in which he reiterated the need for Baren's appointment and stated that Barens was a well respected member of the bar; was intimately familiar with every aspect of the prosecution; was experienced in defending persons accused of homicide; and had a good working relationship with the district attorney's office.

On January 15, 1987, the court appointed Barens to represent the defendant. Barens' compensation was set at $75 per hour and Chier's compensation was set at $35 per hour.[34]

[34]Initially on December 30, 1986, the court had denied Baren's request for court appointment. The subsequent order appointing Barens was ordered entered as of December 16, 1986 nunc pro tunc.

On January 29, 1987, a hearing was held to clarify Chier's role in the proceedings. Barens acknowledged that in seeking his own appointment, he had told the court that he needed a lawyer to help him in connection with the motions and preparation and that he had agreed to the court's limitations on Chier's participation. However, Barens requested reconsideration because the defendant was uncomfortable and had misgivings about not having two lawyers participating in his defense. Barens explained that he and Chier had prepared for trial on the basis of dividing the witnesses each would handle and, in addition, it was Chier who had the majority of contact with the defendant and had prepared the defendant to testify at trial.[35]

[35] In his written motion for clarification of the nature and extent of the participation the court intended to permit Chier during the trial, Barens informed the court that he, Chier and the defendant had been working together in harmony, with efficiency, and with specific divisions of labor. It had been agreed between them that Chier would handle all legal motions, legal objections, and other matters of law as well as examination and cross-examination of certain witnesses. Barens expressed apprehension that the court had circumscribed Chier's participation in the trial and thus defendant was being denied the effective assistance of both trial counsel.

The court found that the presumption in a death penalty case that second counsel was required had been overcome by Barens' experience and capability. The court further found that Chier was not needed; that Barens was fully competent to handle all examinations of witnesses himself; and that Chier's questioning of prospective jurors had antagonized and alienated the jurors and was a disservice to the defendant. Accordingly, the court ruled that Chier could fully assist Barens in all areas including arguing legal issues before the court but he must refrain from questioning witnesses and arguing in the jury's presence. If counsel was not willing to accept such limitations upon Chier, he could try the case without compensation from the county or state. Barens declined that alternative.[36]

[36] A petition for an emergency stay and writ of mandate to direct the court to permit Chier to fully participate as cocounsel was denied by the Court of Appeal on February 2, 1987. On that same date the jury was impaneled and the prosecution's first witness was called. Counsel's petition for review to the Supreme Court was denied on February 19, 1987.

ECF No. 5, Ex. A at 32-38.

In his direct appeal, Petitioner argued that the trial court interfered with the sanctity of the attorney-client relationship when, as a condition of appointing and

paying at government expense his lead attorney, the court simultaneously imposed limitations on his co-counsel's role and compensation, which effectively deprived him of his constitutional right to counsel. Petitioner also argued that the fee arrangement, which was negotiated without his knowledge, caused a conflict of interest between his two attorneys and himself, which, in turn, led to a denial of his right to effective assistance of counsel.

The Court of Appeal found that Chier was able to provide the assistance requested by Barens in his affidavit. *Id.* at 40. It concluded that the trial court was not required to expand all the duties of co-counsel beyond that set forth in the lead counsel's affidavit simply because counsel had taken it upon themselves, without court authorization, to privately add or divide their respective duties. *Id.* at 41.

The Court of Appeal noted that the trial court did not place any limitation upon Chier with respect to the examination of witnesses at the penalty phase. *Id.* at 39, no. 37. Yet, Chier cross-examined only 5 of the 25 prosecution witnesses and presented the direct testimony of only 3 of the 11 defense witnesses. *Id.*

The Court of Appeal also found that although the financial arrangement regarding their compensation created a *potential* conflict between their personal interests and that of their client, it was not an actual conflict as a matter of law. *Id.* at 48. It also found that even if there was an actual conflict, Petitioner failed to show how the conflict caused his counsel's representation to fall below an objective standard of reasonableness. *Id.* at 50. Specifically, Petitioner failed to show that his counsel was unprepared to examine any witnesses at trial, or that he was not prepared to adequately cross-examine Karny and Browning. *Id.* It discounted Petitioner's argument that he made the decision to not testify because Chier was unavailable to present Petitioner's testimony, given that Petitioner was informed of and waived his right to testify at the guilt phase and that both his counsel strongly indicated to him that he should not take the stand because he was subject to serious impeachment. *Id* at 55.

In order to establish a violation of Sixth Amendment rights, a defendant who raised no objection at trial must establish that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). The mere "possibility of conflict is insufficient to impugn a criminal conviction." *Id.* "A defendant who shows a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.* at 349-50. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. *Id.* at 350-51. Moreover, the conflict inquiry does not, and should not, entail weighing of professional ethical duties. *Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005)(*citing Mickens v. Taylor*, 535 U.S. 162, 175 (2002)).

The Court of Appeal's decision that the trial court's limitation of Chier's role as appointed co-counsel did not violate Petitioner's constitutional right to counsel was not an unreasonable application of clearly established Federal law.[9] In his reply, Petitioner argued that the court's limitation on Chier's appointed co-counsel role constituted judicial interference with his assistance of counsel. The cases he cites to in support of his position are inapposite. In those cases, the challenged interference had the effect of completely barring the defendant's sole counsel or entire defense team from engaging in certain basic defense activities.

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[9]To the extent that Petitioner is arguing that the trial court's limitation of Chier's role violated Cal. Penal Code § 987(d), he is not entitled to § 2254(d)(1) relief because violations of state law are generally not cognizable in a federal habeas corpus petition. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Additionally, Petitioner cannot convert a claim resting upon alleged violations of state law by recasting it as a federal due process claim. *Miller v. Stagner*, 757 F.2d 988, 993-94 (9th Cir. 1985).

None of the cases involved situations where, as here, the lead counsel, whom Petitioner himself had originally retained as his sole defense counsel and became court-appointed lead counsel when Petitioner stopped paying him, was not subject to any of the types of unacceptable limitations in *Strickland, Cronic, or Herring.*

The Court of Appeal's decision that Petitioner's counsel's acceptance of his appointment subject to the trial court's limitation on Chier's role presented a potential, but not an actual, conflict of interest was not contrary to, or an unreasonable application of clearly established Federal law. Nothing in the record supports the notion that Petitioner's counsel ever had an actual conflict of interest from his representation, nor does the record support Petitioner's allegations that a "secret deal" had been made. The deal that was presented by the trial court was a take it or leave it arrangement–either Barens "accept" the appointments subject to the trial court's limitations on Chier's involvement and compensation terms, or not be paid at all.[10] This was done in open court at the January 29, 1987 hearing. (RT. 6000-6026.) At the later hearing to reconsider the appointment limitations, Barens made a reasonable, good-faith effort to allow Chier's active participation.

Moreover, the LAC Habeas Court's perception and finding that Chier was antagonizing and alienating some jurors is supported by the record. A trial judge's determinations made during voir dire that are fairly supported by the record constitute factual findings that are entitled to a presumption of correctness under 28 U.S.C. § 2254, absent clear and convincing evidence that proves the trial judge's findings were wrong. *See Darden v. Wainright*, 477 U.S. 168, 175-77 (1986).

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[10]Indeed, Petitioner expressly noted and argued this on appeal, asserting that "the record of the crucial January 29, 1987 hearing, makes clear that the terms of the deal by which Barens obtained court appointment was dictated by the court." ECF No. 69, Ex. 1, Appellant's opening brief at 214, n. 156.

The record shows the trial judge was a perceptive jurist who was very attuned to what was going on in his courtroom. Contrary to Petitioner's assertion, the record shows that, well before voir dire began, Chier had an abrasive and antagonistic manner of interacting with the trial court. (RT 46; 67.)[11] The record cannot capture Chier's tone of voice or non-verbal actions but the nature of his statements certainly indicate Chier maintained an attitude that was abrasive and belligerent. For example, during the *Hovey* voir dire, the record shows Chier persisted in asking prospective jurors questions that were repetitive despite the trial court's repeated warnings to refrain. (RT at 1269.) Similarly, other parts of the record clearly demonstrate Chier's manner of conducting himself was annoying the trial judge and it is reasonable to presume the trial judge perceived it as having the same effect on some of the prospective jurors. (RT at 891.)[12] Further, the record

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[11]The Court: One at a time, will you? Don't butt in all of the time. He can handle himself very, very well, Mr. Chier. You are only co-counsel, here, who is assisting him.

Mr. Chier: I am only co-counsel? What does that mean?
The Court: Go ahead.

(RT 46.)

Mr. Chier: Why don't we just submit the issue of Mr. Hunt's guilty on the Pittman transcript?
The Court: If you make motions of that kind, I am going to see that you are out of this case. That is a stupid remark of you to make.
Mr. Chier: This case is different than any other case.
The Court: That is stupid. Who ever suggested that, that his guilt or innocence be submitted on the transcript?

(RT 67.)

[12]Mr. Chier: Would the court allow me follow-up questions with the jurors?
The Court: Just in case you don't know how, I am asking it. Go ahead.
Mr. Chier: Has anything the Court has just said biased you or caused you to believe that he is biased against me?

(RT 891.)

clearly shows when Chier disagreed with Judge Rittenband's rulings or remarks, he was no shrinking violet, often responding with defiant, in your face sarcastic comments. (RT at 925.)[13]

Petitioner has not met his burden of proffering any clear and convincing evidence that proves the habeas court's findings were wrong.

Accordingly, to the extent that Petitioner's remaining ineffective assistance of counsel claims are premised on the limitations placed on Chier at the guilt stage of the proceedings, or the alleged conflict of interest, Petitioner's claims are without merit.[14] The Court of Appeal's findings and conclusions on these claims are not an unreasonable determination of the facts or an unreasonable application of Federal law and Petitioner is not entitled to habeas relief.

3. Ineffective Assistance of Counsel Claims

A significant portion of Petitioner's FAP is devoted to identifying instances in which he alleges his counsel provided ineffective assistance of counsel.

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[13]Mr. Chier: I feel the way you have treated me in this case–

The Court: Then you can withdraw from it if you don't want to stay in the case.

Mr. Chier: On the contrary, Your Honor, I think you are so biased to me that it is you that should withdraw from the case.

The Court: I am not biased towards you or anything. I am just biased to the motions that you make, which are completely unfounded and everything else.

Mr. Chier: I think it is you that should withdraw form the case. You told me to shut up and I had no standing.

The Court: I want you to shut up because this is exactly what you are doing, you are deliberately trying to goad the court into making some kind of error and I want you to stop it.

(RT. 925.)

[14]1-3 through 1.3.7; 1-4; 1-8; 2-1(C7); 2-1(c9) through (C9.4); 2-1(C9.5) and (C10); 2-1(B9.1); 5; 7, Ground H.

Specifically, Petitioner alleges that his counsel failed to adequately investigate; failed to adequately prepare for trial; failed at trial to be his advocate; failed to present crucial witnesses; failed to impeach crucial witnesses; and failed to make a competent record for appeal.

To establish ineffective assistance of counsel, Petitioner must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced Petitioner. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 686. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington*, 131 S.Ct. at 788, *quoting Strickland*, 466 U.S. at 690.

To establish prejudice, Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 787. "A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id.* "It is not enough to show that the errors had some conceivable effect on the outcome of the proceedings." *Id.* "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91.

Counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (*citing Strickland*, 466 U.S. at 687-91)). This includes a duty to investigate the defendant's "most important defense"

and a duty to adequately investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine the confidence in the verdict. *Id.* (citations omitted). This duty is not limitless, however, and it does not necessarily require that every conceivable witness be interviewed. *Id.* Ineffective assistance of counsel based on a duty to investigate must be considered in light of the strength of the state's case. *Id.*

Generally, decisions regarding whether to call or impeach a witness involve trial strategy and a defendant's criticism of a tactic or strategy is rarely sufficient to support an inadequate representation claim. *Strickland*, 466 U.S. at 689. It is not the job of the reviewing court to second guess counsel's decisions, or apply twenty-twenty vision of hindsight. *Karis v. Calderon*, 283 F.3d 1117, 1130 (9th Cir. 2002).

Finally, it is important to remember that in reviewing ineffective assistance of counsel claims under § 2254(d), the pivotal question is whether the state court's application of the *Strickland* standard was unreasonable, not whether defense counsel's performance fell below *Strickland's* standard. *Harrington*, 131 S.Ct. at 785 ("Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)).

The state courts reviewed Petitioner's claims of ineffective assistance of counsel on direct appeal as well as in his habeas petitions.

On direct appeal, the California Court of Appeal addressed Petitioner's claims that his counsel was ineffective in making his opening statement, in his elicitation of Petitioner's request for counsel, in his failure to object to the gestures and other alleged judicial misconduct, in his failure to request limiting instructions, in his failure to renew objections to juror's misconduct, and in his failure to make appropriate evidentiary objections. ECF No. 5, Ex. A at 56-82. The Court of Appeal rejected all of these claims, finding that "each of these criticized actions relate to counsel's strategy and judgment which ordinarily is insulated from

scrutiny based upon the distorting effects of hindsight." *Id.* at 56. It found that Petitioner had failed to show that the outcome of the trial would have been different but for the alleged errors. *Id.* at 56-82.

In its Order to Show Cause, the California Court of Appeal denied Petitioner's ineffective assistance of counsel claims to the extent they were raised and rejected on appeal, and summarily denied the remaining claims for ineffective assistance of counsel.[15] ECF No. 6, Ex. F at 6, 10.

The LAC Habeas Court reviewed Petitioner's claim that his counsel failed to discover and/or utilize available exculpatory information.[16] After hearing evidence

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[15]Petitioner raised the following ineffective assistance of counsel claims in his Habeas Petition, B059613, that were summarily dismissed in the Court of Appeal's Order to Show Cause: (1) failure to review and use Dean Karny's prior testimony and statements, p. 134; (2) failure to review and use testimony of Gene Browning and Evan Dicker for impeachment purposes, p. 137; (3) failure to present evidence of Pittman's non-secretive activities in New York, p. 147; (4) failure to present evidence of reasons for Pittman's resistance, i.e. outstanding arrest warrants, p. 149; and (5) failure to present evidence as promised in opening statement regarding Progressive Savings lawsuit, p. 161.

[16]The LAC Habeas Court reviewed the following claims: (1) Karny's deposition in the Canter-Fitzergard lawsuit; (2) testimony of Neil Adelman regarding purchase of cyclotron attrition mills; (3) testimony of Oliver Wendell Holmes; (4) testimony of Karen Sue Marmor; (5) terms of Tom May's movie contract; (6) laboratory tests indicating the lack of blood in the BMW; (7) evidence that Levin discussed dyeing his hair with his barber; (8) documents in possession of Levin's conservator indicating a larger sum of money to finance a disappearance; (9) Levin's lack of familial ties and abuse of his dog; (10) evidence that Levin and Pittman had prior contacts; and (11) testimony that Levin's

and reviewing the pleadings, the LAC Habeas Court concluded that Petitioner had failed to show that "his trial counsel's representation so undermined the trial that it cannot be relied on as having produced a just result." ECF No. 5, Ex. B at 22-33. In doing so it noted:

> Was counsel's representation flawless? No, far from it. Were there errors and misjudgments? Yes. Would the results have been different but for these errors? Absolutely not. While counsel had a number of strategic failings, it is also important to note that he had to contend with a strong prosecution case, a difficult client, and a difficult bench officer. Under the circumstances of this case, his representation was legally sufficient and the Petitioner's claim to the contrary is without merit.

Id. at 33.

On habeas review, the Court of Appeal upheld the denial of habeas relief for each claim and summarily rejected Petitioner's additional ineffective assistance of counsel claims that he presented in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus.[17] ECF No. 6, Ex. M at 6-12.

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neighbor heard nothing unusual on the night of the crime and saw Levin's missing comforter in the trash can. ECF No. 5, Ex. B.

[17]Petitioner made additional Ineffective Assistance of Counsel claims in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, including: (1) failure to present evidence that Levin had been sexually victimized in jail and had vowed to never return, p. 70; (2) failure to interview and present the testimony of Daniel Wilson, p. 72; (3) failure to present Jonathan Hayes as a witness, p. 72, (4) failure to interview and present testimony of Jeffrey Melczer, p. 73; (4) failure to impeach Tom May with police report, p. 74; (5) failure to present John Martin, p. 75; (6) failure to obtain and use "Eisenberg Tape," p. 76; (7) failure to call Jerry Verplancke, p. 81; (8) failure to impeach Browning with perjury, p. 84; (9) failure to produce circumstantial evidence of credit card usage, p. 89; (10) failure to present Paul Edholm, p. 92; (11) failure to present Freddie Cano as alibi witness, p. 93; (12) inadequate cross-examination, p. 96.

Petitioner has not shown the state court's decisions regarding his ineffective assistance of counsel claims were an unreasonable determination of Federal law, or an unreasonable application of the facts. It is easy for Petitioner to second guess counsel's performance, especially in light of his hung jury in the Elsaminia case. But that is exactly what this Court is prohibited from doing. Petitioner's ineffective assistance of counsel claims challenge his counsel's trial strategy and tactics. The record demonstrates that his counsel was prepared and adequately represented Petitioner at the guilt phase of his trial and at the penalty phase of trial in which his counsel convinced the jury that the appropriate sentence was life without parole, as opposed to the death penalty.

Consequently, in reviewing counsel's performance in light of the overwhelming evidence, the Court cannot say that the state courts' uniformly held opinion that counsel's performance was constitutionally adequate was unreasonable. As such, Petitioner is not entitled to habeas relief on his ineffective assistance of counsel claims.[18]

4. Due Process and Other Constitutional Claims

Petitioner's remaining claims must be viewed in light of the overwhelming evidence of Petitioner's guilt. On direct appeal, the California Court of Appeal concluded that "the prosecution presented overwhelming evidence that the defendant murdered Levin on the night of June 6, 1984, even though Levin's body

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The LAS Habeas Court did not review these claims, but the California Court of Appeal reviewed the supplemental petition on the merits and concluded that Petitioner failed to meet his burden of showing that but for counsel's alleged errors the outcome of his trial would have been different. ECF No. 6, Ex. M at 12.

[18]1-1.2; 1.1-3; 1.1-4; 1.1-5; 1.1-6; 1.1-7; 1-1.8; 1.1-9; 1.1-10; 1-1.21; 1-1.22; 1-2.7; 1-2.3(B),(D)(E)(F); 1-2.4; 1-2.5; 1-2.6; 1.2.7; 1-2.8; 1-2.9; 1-2.12; 1.2-13; 1-2.14; 1.2.15.

was never found and notwithstanding defendant's evidence showing that Levin was facing criminal prosecution and civil lawsuits and may have hidden away a large sum of money giving him both a motive and the financial ability to disappear." ECF No. 5, Ex. A at 3. The court noted:

> During the three-month guilt phase of the trial, in which 60 witnesses testified for the People, the prosecution proved that defendant developed a written plan to rob and murder Levin and that defendant had the motive, the opportunity, the enterprise, the philosophy, a henchman, and the weapons to carry out his plan, all of which was corroborated by defendant's multiple admissions that he killed Levin. It is within this framework of strong and convincing evidence that we conclude that most of defendant's claims of error are without merit and where error occurred none were of a type which necessitates a reversal of defendant's conviction under federal or state constitutional principles.

Id. at 3-4.

Similarly, the LAC Habeas Court came to the same conclusion:

> The evidence at trial was plain. Petitioner planned the Levin murder. He had motive as well as opportunity to do it. He had been conned by a con man and that fraud was about to bring down his own schemes and organization. He had real animosity towards Levin. He told others that he would do the murder. He told others afterwards that he and Pittman had committed the crime. He flew to New York the day after the murder to rescue Pittman who had been arrested using Levin's credit cards. He attempted to hide his deeds, fabricate evidence and thereafter, he threatened those who might report his crime. In sum, the evidence against him was overwhelming.

ECF No. 5, Ex. B at 17.

The Court has carefully reviewed the record of the trial and evidentiary hearing and analyzed Petitioner's claims through the lens of the overwhelming evidence. The Court concludes that Petitioner has failed to show that he is entitled to habeas relief. The majority of the remaining issues are collateral to the inevitable reality that there was substantial evidence of Petitioner's guilt. Petitioner has not shown that if the remaining alleged errors had occurred, they had a substantial and injurious effect or influence on the jury's verdict. *See Brecht*, 507 U.S. at 637. He is not entitled to habeas relief on the remaining due process

and other constitutional claims.[19]

After reviewing the record, the Court is convinced Petitioner received a fair trial, and as such, he is not entitled to habeas relief.

G. Individual Analysis of Petitioner's Claims

Notwithstanding the above-findings in which the Court conclusively finds that Petitioner's habeas petition should be denied, for the sake of completeness, the Court will address each of Petitioner's claims individually.

1. Ineffective Assistance of Counsel

Petitioner argues his right to effective assistance of counsel was violated in several instances.

1-1. Constructive denial of the defense-investigation function

Petitioner asserts his right to effective assistance of counsel was violated because no appreciable investigation occurred until after the state rested on March 24, 1987. Petitioner alleges that his counsel failed to interview witnesses, failed to subpoena records, and neglected the investigation between April 1986 through March 24, 1987.

The California Court of Appeal summarily rejected this claim, finding that the claim did not have merit.[20] ECF No. 6, Ex. F at 10. The evidence that Petitioner contends would have been found from further investigation was presented to the habeas court. It found that the identified alleged errors would not have affected the verdict. *Id.*

Petitioner has not shown this decision was an unreasonable application of clearly established Federal law or based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The state

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[19]1-2.1; 1.2.2; 1.2.3(a); 1-6; 2-1, 2-2, 2-3, 3-1, 3-2, 3-3, 3-4, 3-5, 4, 5, 9, 10.

[20]Petitioner presented this claim in his Petition for Habeas Corpus B059613, pp. 121-24; 130-136.

court reasonably applied the standards set forth in *Strickland*.

In his sub-claims, Petitioner identifies the following "specific, material, and favorable evidence competent management of the investigation function would have yielded." ECF No. 190 at 8.

1-1.1 *Failure to investigate Levin's barber*

Petitioner argues his counsel was ineffective for failing to call John Duran regarding evidence that Levin dyed his hair on the night of his disappearance. The LAC Habeas Court concluded that this claim was immaterial. ECF No. 5, Ex. B at 31. It reasoned that Petitioner's counsel was not put on notice that such an investigation was necessary. *Id.* Levin's barber did not come forward with information that Levin was interested in dyeing his hair until years after the trial had been completed; the evidence at trial showed that Levin did not dye his hair, the stains in the bathroom were not sufficient to put counsel on notice, and such testimony would have contradicted Petitioner's witnesses who testified that they had seen Levin with his gray hair and beard. *Id.*

Petitioner has not shown this decision was an unreasonable application of clearly established Federal law or based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Counsel must be put on notice to investigate a particular matter, and the duty to investigate is dependent upon facts known to the attorney. *Crittenden v. Ayers*, 624 F.3d 943, 967 (9th Cir. 2010). As Duran admits in his proffered declaration dated May 15, 1990, it was not until "some time more than three months after Hunt's trial ended" that he first disclosed Levin's "confidential" hair dyeing inquiry to anyone. ECF No. 191, Ex. 4-A at 2.

1-1.2 *Failure to Obtain Tape of Eisenberg and Taglianetti*

Petitioner asserts his counsel was ineffective by failing to obtain and use a tape recorded 1984 conversation of BBC attorney Jerry Eisenberg, BBC member

Steve Taglianetti and Jim Pittman discussing their stolen-car ring that would have impeached the testimony given by Eisenberg and Taglianetti. At trial, Eisenberg testified that Pittman surreptitiously taped a conversation between Eisenberg and Taglianetti as they ran an errand, then gave that tape to Petitioner. (RT 10024-27, 10088-91, 10122-24, 10143-45.) Petitioner maintains using the tape would have bolstered Brooke Roberts' testimony that, at the June 24, 1984 meeting, Petitioner "opportunistically and falsely, claimed to be responsible for Levin's disappearance to intimidate the criminal factions within the BBC [Tom May, Taglianetti, etc.] and, thereby, to protect a pending multi-million dollar deal [the Microgenesis-UFOI cyclotron deal] that was being jeopardized by their machinations." ECF No. 190 at 10. Petitioner contends that, during his 1992 trial for the Eslaminia murder, his success in using the tape to impeach Eisenberg was so devastating the prosecutor abandoned his plan to call Taglianetti as a witness. He alleges Barens failed to send an investigator to pick up the tape recording "[p]urely out of sloth." *Id.* at 9.

The California Court of Appeal summarily rejected this claim, concluding that Petitioner had failed to show that but for the alleged professional errors, the outcome of his trial would have been different.[21] ECF No. 6, Ex. M at 12.

Petitioner has not shown this was an unreasonable application of Federal law or an unreasonable determination of the facts. Notably, at the evidentiary hearing before the LAC Habeas Court, counsel explained part of his defense strategy was to avoid using evidence that showed Petitioner had control and influence over other BBC members. (EHRT at 1054.) Using the tape would have confirmed Eisenberg's testimony about Pittman's loyalty to Petitioner and supported the prosecution's theory that Petitioner controlled BBC members by secretly tape

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[21]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 77-79.

recording their conversations to exert control over them. Petitioner's argument that the prosecutor abandoned his plan to call Taglianetti lacks foundation and is not relevant.

A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient. *Raley v. Ylst*, 470 F.3d 792, 799 (9th Cir. 2006). Counsel's tactical decision not to use the tape because he was concerned it would show Petitioner had control and influence over BBC was reasonable under the circumstances and well within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689-91. Moreover, a petitioner is not entitled to § 2254 relief unless the petitioner can establish prejudice from counsel's failure to impeach a witness. *Ortiz*, 149 F.3d at 933; *see also Davis v. Woodford*, 384 F.3d 628, 641–42 (9th Cir. 2004) (finding defense counsel's failure to impeach prosecution witness regarding his conviction of lying to a police officer did not prejudice defendant, and thus could not amount to ineffective assistance, where jury would not likely have decided differently had it known about the conviction).

1-1.3 *Failure to Call Freddie Cano*

Petitioner asserts his counsel was ineffective because he failed to call Freddie Cano, who would have corroborated Brooke and Lynne Roberts' alibi testimony. The California Court of Appeal summarily rejected this claim, concluding that Petitioner had failed to meet his burden that but for counsel's errors, the outcome of his trial would have been different.[22] ECF No. 6, Ex. M at 12.

Petitioner provided two exhibits to show that he had urged his counsel to present Cano's testimony: (1) his March 28, 1996 declaration, ECF No. 191, Ex.

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[22]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 93-95.

113; and (2) his undated, handwritten lists, ECF No. 191, Ex. 143. Neither Petitioner's declaration or the lists appear to even mention Cano's name. Moreover, Petitioner has not proffered a declaration from Cano that establishes that Cano would have testified at Petitioner's 1987 trial and sets forth with specificity the nature of Cano's contemplated testimony. The Court has reviewed the alleged testimony of Cano and does not find that it would have changed the result of the trial.

Petitioner has not shown that the Court of Appeal's decision was an unreasonable application of clearly established Federal law or based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. The presentation of witness testimony is essentially strategic and within the trial counsel's domain. *Gonzalez v. Knowles*, 515 F.3d 1006, 1015 (9th Cir. 2008). A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient. *Raley*, 470 F.3d at 799.

1-1.4 *Failure to Demonstrate that Levin and Jim Pittman Knew Each Other*

Petitioner asserts his counsel was ineffective for failing to demonstrate that Levin and Jim Pittman knew each other. The LAC Habeas Court held that the fact that one or possible two witnesses believed they had seen Levin and Pittman together before Levin's murder did not impeach Karny's testimony because Karny was "only reporting what Petitioner had told him," so that this information would not have affected Karny's credibility. ECF No. 5, Ex. B at 30-31.

Petitioner has not shown this decision was an unreasonable application of clearly established Federal law or based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. A petitioner is not entitled to § 2254 relief unless the petitioner can establish prejudice from counsel's failure to impeach a witness. *Ortiz*, 149 F.3d at 933.

1.1-5 *Failure to Show that Browning Committed Perjury*

Petitioner asserts his counsel was ineffective by failing to impeach Browning and show that Browning had perjured himself in his assertion that Petitioner had a $1.64 million judgment.[23] On direct appeal, the California Court of Appeal found that evidence of the judgment was admissible and reasoned that if it was error to fail to move to strike, it was only a minor consequential error. ECF No. 5, Ex. A at 84. In its habeas ruling, the California Court of Appeal summarily rejected the claim, concluding that Petitioner failed to meet his burden of showing that, but for counsel's errors, the outcome of the trial would have been different.[24] ECF No. 6, Ex. M at 12.

There is no prejudice if the failure to impeach a witness has little impact on a trial. *Horton v. Mayle*, 408 F.3d 570, 576-77 (9th Cir. 2005). Here, Petitioner has not shown that the outcome of the trial would have been different if Browning had accurately testified about the details of the judgment. First, Paragraph 6 of Petitioner's declaration (cited in support of this argument) fails to affirmatively show Petitioner or anyone else actually notified counsel about the purported impeachment evidence in a timely and meaningful manner.[25] *See* ECF 10, Ex. 113. Second, Petitioner argues that the files containing this information were available for review, but his counsel never showed any interest in reviewing the files. This

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[23]Petitioner maintains that the judgment was against Microgenesis, not Petitioner, and was for $400,000. ECF No. 191, p. 6.

[24]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 83-89.

[25]Petitioner provided a non-conformed copy of a complaint entitled *William E. Morton and P.M Recovery, Inc. v. Microgenesis of North American, Inc.*, filed in the District Court of Arizona, and a related conformed copy of the defendants' answer and counterclaims. ECF No. 191, Ex. 127.

statement, however, does not establish that his counsel was actually notified about the existence and significance of the Arizona *Microgenesis* case file.

Moreover, although Petitioner maintains that the Browning judgment was against Microgenesis and not him personally, in claim 1-1.22, he states that Microgenesis was a company that he wholly controlled. ECF No. 190 at 16. Also, at the evidentiary hearing before the LAC Habeas Court, the evidence was presented that showed that Microgenesis was a company that Petitioner established apart from the BBC. To the extent that Browning testified that the judgment against Microgenesis was a judgment against Petitioner, his testimony was technically wrong, but figuratively accurate. Finally, the difference in the amount of the judgment was of minor consequences and did not result in any prejudice because there was a substantial amount of other evidence that shows Petitioner had a financial motive to kill Levin because he and the BBC were in financial straits.

Petitioner has not shown the state courts' decisions involved an unreasonable application of clearly established Federal law or were based on an unreasonable determination of the facts. He has not shown that Browning's allegedly inaccurate testimony regarding the amount of the judgment had a substantial and injurious effect on the jury's verdict. A petitioner is not entitled to § 2254 relief unless the petitioner can establish prejudice from counsel's failure to impeach a witness. *Ortiz*, 149 F.3d at 933.

1-1.6 *Failure to Impeach Karny with his Cantor-Fitzgerald Brokerage Deposition Perjury*

Petitioner asserts his counsel was ineffective for failing to impeach Karny with his Cantor-Fitzgerald Brokerage deposition testimony. The LAC Habeas Court found that Petitioner's counsel had good reason not to use Dean Karny's perjurious testimony during cross-examination because Petitioner's deposition had also been taken in that lawsuit; Petitioner also lied under oath; and Petitioner had coached Karny as to what he should say during his deposition. ECF No. 5, Ex. B at

22. Not only did Petitioner suborned Karny's perjury, Petitioner's directions to Karny evidenced the control Petitioner exercised over others in the Billionaire Boys Club. On review, the California Court of Appeal agreed that Petitioner's counsel had valid tactical reasons not to use the information. ECF No. 6, Ex. M at 7.

Petitioner has not shown this was an unreasonable determination of the facts or an unreasonable application of Federal law. A petitioner is not entitled to § 2254 relief unless the petitioner can establish prejudice from counsel's failure to impeach a witness. *Ortiz*, 149 F.3d at 933. A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient. *Raley*, 470 F.3d at 799.

1.1-7 *Failure to Call Karen Sue Marmor*

Petitioner argues his counsel was ineffective for failing to call Karen Sue Marmor. The LAC Habeas Court found that Karen Sue Marmor's testimony had no credibility at all, concluding that her story of seeing the "to do" list was contrived; her recitations of conversations with Levin that indicated that he would flee were suspicious; and her explanations of vivid dreams years later that caused her to remember these new facts were "silly." ECF No. 5, Ex. B at 17-18. The Court did not believe her, or any part of her story. *Id.* In reviewing this finding, the California Court of Appeal found that the trial court correctly held that Petitioner did not meet his burden of showing that a new trial based on newly discovered evidence was required. ECF No. 6, Ex. M at 5. It also agreed with the trial court that Petitioner's counsel "could not be faulted for failing to call a witness at trial who lacks all credibility." *Id.* at 9.

Petitioner has not shown this was an unreasonable determination of the facts, or an unreasonable application of Federal law. Newly discovered evidence is a ground for habeas relief only when it bears on the constitutionality of an appellant's conviction and would probably produce an acquittal. *See Swan v.*

Peterson, 6 F.3d 1373, 1384 (9th Cir. 1993) (*citing Herrera v. Collins*, 506 U.S. 390, 400 (1993)).

1.1-8 *Failure to Call Neil Adelman*

Petitioner argues his counsel was ineffective for failing to call Neil Adelman to nullify the state's motive theory and to corroborate Brooke Roberts' testimony about Petitioner's state of mind in May and June, 1984. The LAC Habeas Court found that the entire Hunt/Kirkpatrick endeavor, of which Neil Adelman presumably played a key role, reeked of fraud and concluded that the venture sounded much like the other fraudulent activities of Petitioner and the Billionaire Boys Club in the early 1980's. ECF No. 5, Ex. B at 23. The Court concluded that Petitioner's counsel was wise to steer clear of it. The venture involved cyclotron attrition mill technology, which, when operational, would reduce a whole variety of materials placed in them to such a small dimension that it could be efficiently used for fuel or other commercial purposes. The entire deal was allegedly worth $200 million, even though Kirkpatrick, who was to purchase the technology, had virtually no money, was in bankruptcy, had substantial legal problems, and needed the approval of Canadian and U.S. authorities before he could enter any enforceable agreement. The California Court of Appeal found that this evidence would not have aided Petitioner's case and likely would have damaged it. ECF No. 6, Ex. M at 8.

Petitioner has not shown this was an unreasonable determination of the facts or an unreasonable application of Federal law. A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient. *Raley*, 470 F.3d at 799. An attorney is not ineffective for failing to use cumulative evidence. *Clabourne*, 64 F.3d at 1382. Moreover, Petitioner has not presented any evidence to challenge the court's factual findings.

1-1.9 *Failure to Subpoena Tim May's "Trash-Can Notes"*

Petitioner asserts his counsel was deficient in failing to subpoena Tim May's "trash-can" notes of his plans to steal Microgenesis' attrition mills. He argues that these notes could have been obtained and used to impeach May's trial testimony denying such plans as well as bolstering Brooke Roberts' testimony that "the discovery of this plan was one of the causes of the June 24, 1984 meeting."

In its Order to Show Cause, the California Court of Appeal summarily denied Petitioner's claim, finding that, even if this claim was true, there was not a reasonable probability that, but for the alleged professional errors, the results of the proceeding would have been different.[26] ECF No. 6, Ex. F at 10.

The Court of Appeal reasonably applied *Strickland's* prejudice prong in rejecting this claim. Petitioner failed to affirmatively prove prejudice by showing there is a reasonable probability the result of the proceeding would have been different if Barens had obtained and used any or all of the foregoing evidence—none of which would have reasonably undermined the overwhelming evidence of his guilt. Further, there is a reasonable explanation or tactical reason the foregoing evidence was not obtained or used by Barens for Petitioner's stated purposes. Tom May's purported notes to steal the attrition mills would not have impeached his testimony about Petitioner's admissions of killing Levin and disposing of his body that Petitioner made before and at the June 24 meeting, which was independently corroborated by other witnesses. Further, using May's purported notes to bolster Roberts' testimony ran the risk of drawing attention to the primary reason for the June 24 meeting—Petitioner's announcement of killing and robbing Levin. A petitioner is not entitled to § 2254 relief unless the petitioner can establish prejudice from counsel's failure to impeach a witness. *Ortiz*, 149 F.3d at 933. Finally, presenting this evidence to the jury would not have affected, influenced, or

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[26]Petitioner presented this claim in his Petition for Writ of Habeas Corpus - B059613, p. 73-74.

bolstered Petitioner's defense theory of no body–no murder.

1-1.10 *Failure to Subpoena and Use the Movie Deals*

Petitioner argues his counsel was ineffective for failing to subpoena and use the movie deals Tom May, Jeff Raymond, and Evan Dicker signed with ITC Productions to show bias on their part.

The LAC Habeas Court found that Petitioner's view that the contract called for May to be untruthful was speculative at best. ECF No, 5, Ex. B at 29-30. Moreover, the testimony given at trial was consistent with statements given earlier to the police prior to the contract being entered into by Tom May. *Id.* His testimony could have been reinforced with a prior consistent statement. The Court found no prejudice. The Court of Appeal adopted the trial court's conclusions that Barens had a valid tactical decision for not using the evidence. ECF No. 6, Ex. M at 10. Further, it concluded that even if the evidence had been presented, it would not have altered the outcome of Petitioner's trial and may even have damaged his case. *Id.*

Petitioner has not shown these decisions were an reasonable determination of the facts or an unreasonable application of Federal law. A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient. *Raley*, 470 F.3d at 799. Moreover, presenting this evidence to the jury would not have affected, influenced, or bolstered Petitioner's defense theory of no body–no murder.

1-1.11 *Failure to Use Investigate Evidence of Poor Relationship with Mother and Father*

Petitioner argues his counsel was ineffective for failing to introduce evidence that Levin's relationship with his mother and step-father was not as good as the family testified at trial. The LAC Habeas Court held that Petitioner's claim was meritless. ECF No. 5, Ex. B at 32. The Court reasoned that attacking a murder victim's family at trial by disparaging their deceased son was a potentially suicidal

tactic.

Petitioner has not shown this was an unreasonable determination of the facts or an unreasonable application of Federal law. A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient. *Raley*, 470 F.3d at 799. Moreover, presenting this evidence to the jury would not have affected, influenced, or bolstered Petitioner's defense theory of no body–no murder.

1-1.12 *Failure to Present Dr. Avery as a Witness*

Petitioner argues his counsel was ineffective for failing to call Dr. Avery, who would have testified that Levin swindled him for a million dollars and that Levin vowed to never return to jail because in 1979 he had been raped in jail. Petitioner maintains this testimony would have countered the prosecution's theory that Levin was indifferent to being imprisoned and did not flee to avoid prosecution as Petitioner contended.

The California Court of Appeal summarily denied Petitioner's claim, concluding that Petitioner failed to meet his burden of showing that but for his counsel's errors the outcome of the trial would have been different.[27] ECF No. 6, Ex. M at 12.

Petitioner has not shown this decision was an unreasonable determination of the facts or an unreasonable application of Federal law. Evidence at trial was extensive regarding Levin's debts and fraudulent activities. The jury was presented with evidence that at the time of his murder, Levin faced several counts of grand theft and a maximum possible jail sentence of eight years. Several witnesses testified that Levin told them about his pending criminal case. The proposed testimony of Dr. Avery would have been cumulative of Petitioner's other evidence

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[27]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 70-71.

showing that Levin was facing criminal prosecution and civil lawsuits and that he may have hidden away a large sum of money, which would give him both a motive and the financial ability to disappear. In light of the extensive evidence presented at trial, Petitioner's counsel did not perform ineffectively by failing present Dr. Avery as a witness, as such evidence would have been cumulative. An attorney is not ineffective for failing to use cumulative evidence. *Clabourne*, 64 F.3d at 1382.

Additionally, the presentation of witness testimony is essentially strategic and within the trial counsel's domain. *Gonzalez*, 515 F.3d at 1015; *see also Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (stating "[f]ew decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial."). Here, Petitioner has not produced a declaration from Dr. Avery to show that he would have testified at his trial for Levin's murder and that describes the specific nature of his proposed testimony. Morever, even assuming, without finding that he would have been available to testify at Petitioner's trial for Levin's murder, Petitioner has not affirmatively shown his proposed testimony would reasonably have changed the outcome by convincing the jury that Levin fled to avoid prosecution, especially in light of the overwhelming evidence of his guilt.

1-1.13 *Failure to Present Jonathon Hayes as Witness*

Petitioner asserts his counsel was ineffective for failing to present Jonathon Hayes as a witness to establish that Levin feared arrest for tax crimes, and he discontinued his initially vigorous effects to resolve this shortly before he disappeared. Petitioner asserts his counsel would have found Hayes had he reviewed the conservator's file and followed up on the other leads available to him.

The LAC Habeas Court reviewed Petitioner's claim that his counsel failed to obtain documents contained in Levin's conservator's possession. ECF No. 5, Ex. B at 31-32. It concluded that this information would have been cumulative of the other evidence presented to show that Levin had a motive to flee to avoid

prosecution. The Court of Appeal summarily denied Petitioner's claim, concluding that Petitioner failed to meet his burden of showing that, but for counsel's errors, the outcome of his trial would have been different.[28] ECF No. 6, Ex. M at 12.

Petitioner has not shown these decisions were an unreasonable application of clearly established Federal law or were based on an unreasonable determination of the facts as Petitioner has not shown that this evidence would have affected the outcome of the trial. The presentation of witness testimony is essentially strategic and within the trial counsel's domain. *Gonzalez*, 515 F.3d at 1015. An attorney is not ineffective for failing to use cumulative evidence. *Clabourne*, 64 F.3d at 1382. Moreover, Petitioner has not presented facts that would lead the Court to conclude that his counsel was put on notice and had a duty to review the conservator's file.

1-1.14 *Failure to Present John Martin as Witness*

Petitioner argues his counsel was ineffective for failing to present John Martin to testify that Levin had defrauded insurance companies of $500,000 and had been warned he would be eventually arrested. Petitioner asserts this information would have been found in the conservator's file.

As set forth above, the LAC Habeas Court rejected Petitioner's claim regarding Levin's conservator's files. ECF No. 5, Ex. B at 31-32. The Court of Appeal summarily denied Petitioner's claim regarding John Martin, concluding that Petitioner failed to meet his burden of showing that, but for counsel's errors, the outcome of his trial would have been different.[29] ECF No. 6, Ex. M at 12.

Petitioner has not shown the state courts unreasonably applied *Strickland* in rejecting this claim because it was cumulative of the other evidence presented that

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[28]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 72-73.

[29]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 75.

showed Levin had a motive to flee to avoid prosecution. Moreover, the presentation of witness testimony is essentially strategic and within the trial counsel's domain. *Gonzalez*, 515 F.3d at 1015. Petitioner has not presented facts that would lead the Court to conclude that his counsel was put on notice and had a duty to review the conservator's file. Petitioner has not shown this evidence would have affected the outcome of the trial.

1-1.15 *Failure to Present Evidence of Levin's Pre-Flight Income and Indebtedness*

Petitioner argues his counsel was ineffective for failing to present evidence of the true magnitude of Levin's pre-flight income and indebtedness. Petitioner argues that the jury was left with a false picture of Levin's means and motives to flee, and a distorted view of the importance to Levin of the comparatively paltry assets he left behind.

In its Order to Show Cause, the Court of Appeal summarily denied this claim, finding that Petitioner had not shown that, but for the alleged errors, the outcome of the trial would have been different.[30] ECF No. 6, Ex. F at 10.

As discussed above, the Court of Appeal reasonably applied *Strickland* in rejecting this claim because it was cumulative of the other evidence presented that showed Levin had a motive to flee to avoid prosecution. An attorney is not ineffective for failing to use cumulative evidence. *Clabourne*, 64 F.3d at 1382.

1-1.16 *Failure to Present Jeffrey Melczer as Witness*

Petitioner argues his counsel was ineffective by failing to call Jeffrey Melczer, one of Levin's civil attorneys, to show that Levin was aware of the FBI's criminal investigation into Levin's theft of $157,000 from Progressive Savings and Loan and other helpful facts.

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[30]Petitioner presented this Claim in his Petition for Writ of Habeas Corpus - B059513, pp. 32-59; 150-155.

The LAC Habeas Court recognized two reasons why Petitioner's counsel would not elicit testimony regarding Levin's awareness of the FBI's criminal investigation: (1) counsel was legitimately concerned that Petitioner might be vulnerable on the same issue, *i.e.* involvement with the Progressive Savings and Loan Fund; and (2) Levin's lack of honesty and integrity had been adequately laid out in the trial. ECF No. 5, Ex. B at 27. The Court also noted that the evidentiary hearing established there was not a great chance that Levin would be charged in the Progressive Savings matter. *Id.* The Court of Appeal agreed. ECF No. 6, Ex. M at 8.

Petitioner has not shown this was an unreasonable determination of the facts or an unreasonable application of Federal law. An attorney is not ineffective for failing to use cumulative evidence. *Clabourne*, 64 F.3d at 1382. The presentation of witness testimony is essentially strategic and within the trial counsel's domain *Gonzalez*, 515 F.3d at 1015. There was also sound tactical reasons for not using any evidence of Levin's Progressive Savings & Loan fraud because it would have implicated Petitioner. A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient. *Raley*, 470 F.3d at 799.

1-1.17 *Failure to Present Proof of Levin's Awareness of FBI Investigation*

Petitioner asserts his counsel was ineffective for failing to present evidence that Levin was aware of the FBI's investigation regarding Progressive Savings and Loan, which would support his theory that Levin had an incentive to flee. This is essentially the same argument presented in 1-1.16. The same reasons for rejecting that claim applies here.

1-1.18 *Failure to Produce Testimony from Edholm as Promised in Opening Statement*

Petitioner argues his counsel was ineffective for failing to call Detective

Paul Edholm to testify regarding Levin's alleged theft of $700,000 in property, and that he had put Levin on notice that additional charges might be filed against him.

On appeal, Petitioner pointed to ten promises made by his counsel during his opening statement. The California Court of Appeal found that counsel's decision to make an opening statement fell well within the range of reasonable professional assistance even though counsel did not present 100 percent of the evidence promised. ECF No. 5, Ex. A at 58. In its Order to Show Cause, the Court of Appeal summarily rejected Petitioner's claim regarding counsel's alleged failure to fulfill promises made in his opening statement.[31] ECF No. 6, Ex. F at 6. Additionally, the Court of Appeal summarily rejected Petitioner's claim that his counsel was incompetent for not calling Paul Edholm as a witness, concluding that Petitioner failed to meet his burden that, but for counsel's errors, the outcome of the trial would have been different.[32]

Petitioner has not shown this was an unreasonable determination of the facts or an unreasonable application of Federal law. The record demonstrates that the defense attempted to contact Detective Edholm, but he was not cooperative. In his declaration, Chier explained that Edholm later proved unhelpful, explaining the reason why he was not called. ECF No. 7, Ex. 1-A. Moreover, evidence that additional criminal charges might have been filed against Levin was cumulative. An attorney is not ineffective for failing to use cumulative evidence. *Clabourne*, 64 F.3d at 1382. Finally, presenting this evidence to the jury would not have affected, influenced, or bolstered Petitioner's defense theory of no body–no murder.

1-1.19 *Failure to Adduce Evidence of Levin's Regular*

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[31]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 92.

[32]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 92.

Workouts

Petitioner asserts his counsel was ineffective for failing to present evidence that Levin exercised regularly in order to corroborate Jesus Lopez's trial testimony that he saw Levin, who had muscle definition, in Arizona after June 6, 1984.

In its Order to Show Cause, the California Court of Appeal summarily rejected this claim on the merits, reasoning that even if found to be true, this evidence would not cast a fundamental doubt on the accuracy and reliability of the trial and did not point unerringly to Petitioner's innocence.[33] ECF No. 6, Ex. F at 10.

Petitioner has not shown this was an unreasonable determination of the facts or an unreasonable application of Federal law. Notably, the declarations submitted by Petitioner do not corroborate Lopez's description of Levin; neither declarant describes Levin as having muscle definition, and the health club manager declared the club did not have the relevant membership records available at the time of trial. Also, none of the Levin sighting witnesses at trial or at the evidentiary hearing described Levin as having muscle definition, and Lopez never positively identified Levin as the person he saw.

1-1.20 *Failure to Present Evidence that Levin Told Progressive S & L that he was Venture Capitalist Working for Microgenesis Project*

Petitioner argues his counsel was ineffective because he failed to present evidence that Levin told Progressive Savings and Loan he was a venture capitalist raising money for BBC and Microgenesis. Such evidence would have necessarily raised the Progressive Savings and Loan issue, which the LAC Habeas Court found counsel rightly avoided.

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[33]Petitioner presented this claim in his Petition for Writ of Habeas Corpus - B059613, p. 57-58.

1-1.21 *Failure to Prove Dr. Browning Perjured Himself About His Credentials*

Petitioner argues his counsel was ineffective by failing to impeach Dr. Browning with respect to his academic credentials.

The Court of Appeal summarily rejected this claim, concluding that Petitioner had failed to meet his burden of showing that, but for counsel's errors, the outcome of his trial would have been different.[34] ECF No. 6, Ex. M at 12.

Petitioner has not shown this decision was an unreasonable determination of the facts or an unreasonable application of Federal law. Counsel had a tactical reason not to attack Dr. Browning's credentials, as this would have undercut the defense theory that Petitioner's option contract with Levin regarding those mills was based on a legitimate business transaction. Additionally, if counsel would have attacked Dr. Browning's credentials, it would have suggested that Petitioner was also engaged in fraudulent activity regarding the same technology. "Mere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation." *Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980). A petitioner is not entitled to § 2254 relief unless the petitioner can establish prejudice from counsel's failure to impeach a witness. *Ortiz*, 149 F.3d at 933. Finally, presenting this evidence to the jury would not have affected, influenced, or bolstered Petitioner's ultimate defense theory of no body–no murder.

1-1.22 *Failure to Expose the Corrupt Motives, Perjury, and Criminal Tactics of "Browning Cabal"*

Petitioner argues his counsel was ineffective for failing to attack the credibility of Dr. Browning, Tom and David May, and Jeff Raymond by presenting to the jury Browning's loan application, which would demonstrate that

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[34]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 83-89.

these individuals stole the mills and sought to benefit from Petitioner's arrest, which would in turn, show why they went to the police.

The California Court of Appeal summarily denied this claim, ruling that Petitioner had failed to meet his burden that but for counsel's alleged errors, the outcome fo the trial would have been different.[35] ECF No. 6, Ex. M at 12.

Petitioner has not shown this was an unreasonable determination of Federal law, or an unreasonable application of the facts. For the reasons stated above (1-1.21), it was sound trial strategy to not expose Dr. Browning's fraudulent activity or the fraudulent activity of other members of the BBC. "Mere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation." *Gustave*, 627 F.2d at 904. Also, presenting this evidence to the jury would not have affected, influenced, or bolstered Petitioner's ultimate defense theory of no body-no murder.

1-1.23 *Conflict of Interest RE: Sighting Witnesses*

Petitioner argues his counsel was ineffective because a personal conflict kept him from aggressively pursuing or using certain Levin sighting witnesses to support the defense theory that Levin was still alive. Petitioner asserts his counsel's performance was hampered by his concern about his reputation, character and methods. Petitioner has not established the foundation that Barens was so motivated. Rather, he relies on speculation and conjecture surrounding a complaint by Lewis Titus, who was co-counsel to Barens at Petitioner's peliminary hearing, that Barens sought to procure witnesses to testify that they had seen Levin after June 6, 1984. Petitioner's theory is that Barens failed to procure additional sighting witnesses because he was fearful of bad press. Specifically, Petitioner complains about Barens' handling of Carmen Canchola, and his failing to investigate the

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[35]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 84-89; 96-101

Levin sightings by Louise Waller, Ivan Werner, Robbie Robinson and Nadia Ghaleb. Louise Waller was eventually called as a penalty-phase witness.

On habeas review, the California Court of Appeal summarily dismissed Petitioner's claim regarding his counsel's alleged conflict concerning his reputation, character and methods.[36] ECF No. 6, Ex. M at 12.

Petitioner called Robert Robinson, Ivan Werner, Nadia Ghaleb, Connie Gerrard, and Louise Waller to testify at the 1996 evidentiary hearing. The LAC Habeas Court concluded that the newly discovered evidence claim re: the sighting witnesses lacked merit because the testimonies given by these sighting witnesses, with the exception of Connie Gerrard, lacked credibility, and the testimony did not point unerringly to Petitioner's innocence.[37] Specifically, the Court made the following findings:

> Robert Robinson was a reporter for City News Service, who has since been fired and currently works as a security guard. Robinson knew Levin because Levin paid him for tips. Levin's partner was Gerrard's son-in-law. Despite being a reporter on the 'police beat' in Los Angeles, Robinson claimed not to know anything about Levin being the victim of a murder in the Billionaire Boys Club trial.
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> In October 1986, Robinson said that he saw Levin in Westwood. According to Robinson, Levin walked up to him one afternoon while in line at a movie theater and said, "Hi Robbie". Robinson knew Levin was missing but did not know he was supposed to be dead. He wanted to brush Levin off because he had heard that Levin was a "con" man.
>
> In April 1987, Robinson went to the District Attorney's office to report his sighting. He later gave the story of his sighting to a news competitor, the Associated Press, and was fired by City News Service for this and other indiscretions.

ECF No. 5, Ex. B at 12.

* * * * *

Robert Robinson, as a witness, was pathetic. Purporting to be a

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[36]Petitioner represented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 22-34.

[37]Petitioner has not challenged the LAC Habeas Court's findings regarding the credibility of these witnesses. Additionally, he has not identified or relied on Ms. Gerrard's testimony in support of his ineffective assistance of counsel claim.

professional journalist at the time, Robinson said that he had run into a murder victim, in a high publicity case, in broad daylight, on the crowded streets of Westwood. He feigned not knowing that Levin was dead, thinking he was only missing despite the fact that he was a "police beat" reporter and the high publicity Billionaire Boys Club trial was ongoing. Yet, despite realizing that this encounter with Levin was newsworthy, he did not follow up on it because of his "journalistic ethics."[12]

[12] These are the same ethics that had him selling news tips to Levin and probably Gerrard's son-in-law, while working for City News Service.

Months later, Robinson reported his sighting to the District Attorney's Office as the trial in Santa Monica was winding down. He then gave the story to a rival news agency.

This Court attaches no significance whatsoever to Robinson's testimony. His in-court testimony lacks all credibility and therefore does nothing to assist [Hunt]. For reasons that are not altogether clear, he seeks to involve himself in these proceedings.[13]

[13] Robinson's testimony was so lacking in credibility that any reasonable defense counsel would avoid calling such a witness, especially where unimpeachable sighting witnesses like those called at [Hunt's] trial were available.

Id. at 14-15.

Ivan Werner worked as a funeral director at Pierce Brothers Funeral Home in Westwood. In 1985 or 1986, he was working at a funeral when he saw a man he later identified as Levin. This man was attending the funeral for a decedent who had committed suicide. The man he identified as Levin was among approximately 50 others who were present for the service.

In 1987, during [Hunt's] trial, Werner saw a photograph of Levin in a newspaper. From that photograph, he says he recognized Levin as the man at the funeral and reported his sighting to the Beverly Hills Police Department.

Id. at 13.

* * * * *

Ivan Werner's testimony . . . does not assist [Petitioner]—but for a different reason [than for Robinson]. Werner said that he saw this man at a funeral for a person who had died under somewhat unusual circumstances in 1985. He had minimal contact with the man who was one of many at this funeral. Werner attended hundreds of funerals. Yet upon seeing a newspaper photo of Levin years later in 1987, Werner said that he was able to positively identify the man as being at a funeral two years earlier. The testimony is not credible and is further challenged by testimony offered by Respondent from the manager of the funeral home who checked the records of the funeral home. No records exist which match the incident described by Werner.

Id. at 16.

> Nadia Ghaleb met Levin in the early 1970's at a celebrity clothing store in Beverly Hills. She sensed, at the time, that he was a "con" man. She saw him around town on occasion. Prior to 1987, she remembered last seeing him at a restaurant in 1982.
>
> In approximately March 1987, she was driving eastbound one morning on San Vicente Boulevard in West Los Angeles when she looked out her car window to the right and saw Levin getting into a car in a parking lot. She said to herself, "there's Ron Levin" and continued on to work. She said that she did not know that Levin had been supposedly murdered nor of the Billionaire Boys Club trial that was ongoing in Santa Monica. She said that she did not follow the news. Only when she caught a story about a friend of hers, Dean Martin's son being killed, did she see a story about Levin's murder and realize that she had seen him earlier that day.
>
> Ghaleb told others that she had seen Levin alive, including a secretary for one of James Pittman's attorneys.

Id. at 11-12.

* * * * *

> Nadia Ghaleb's testimony is much like that of Werner's. Ghaleb had last seen Levin in 1982. In 1987, she was driving down the street when she glanced to her right. In a parking lot, getting into a car, she said that, to her surprise, she saw Levin for the first time in over five years. She said at the time, "Oh, my God, there's Ron Levin." This reaction from seeing Levin might be more credible had she been aware that, at that same time, [Petitioner] was on trial for his murder. However, she said she did not know of the Levin murder case. She only became aware of it when she saw a photo of Levin on the television news immediately following her sighting. Ghaleb's passing glance of a man getting into a car is not sufficient. She may think she saw Levin. However, the circumstances of the identification do not inspire great faith.

Id. at 16.

The Court of Appeal also concluded the newly discovered evidence claim re: the sighting witnesses lacked merit because the evidence did not "undermine the entire prosecution case and point unerringly to innocence or reduced culpability." ECF No. 6, Ex. M at 4-5. It also summarily denied Petitioner's claim regarding his counsel alleged conflict of interest.[38]

Petitioner has not shown that these rulings were an unreasonable determination of the facts or an unreasonable application of Federal law. The state courts reasonably found Petitioner failed to show he was prejudiced by his

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[38]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 22-33.

counsel's decision not to call Robinson, Werner, Ghaleb, and Waller (who testified at the penalty-phase) as defense witnesses during the guilt phase. A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient. *Raley*, 470 F.3d at 799.

Petitioner has not shown what evidence additional investigation or questioning of Canchola would have provided. Moreover, testimony from these witnesses that they saw Levin in Los Angeles, shortly after June 6, 1984, would have harmed the defense theory that Levin masterminded a disappearance in order to avoid legal and financial trouble.

Petitioner's argument that the failure to call these witnesses demonstrates a conflict on the part of his counsel is without merit. First, Petitioner has not shown his counsel had an actual conflict of interest. Second, based on the LAC Habeas Court findings as set forth above, Petitioner cannot show that he was prejudiced by showing that the outcome of the trial would have been different had his counsel called these witnesses. Finally, the presentation of witness testimony is essentially strategic and within the trial counsel's domain. *Gonzalez*, 515 F.3d at 1015.

1-2 Constructive Denial of the Trial-Preparation Function

Although Petitioner argues his counsel failed to learn the relevant law, this claim was dismissed by Judge Stotler. ECF No. 230 (dismissing Claim 1-2(A). Petitioner then asserts specific, material manifestations of his counsel's legal ignorance.

1-2.1 *Failure to Request Limiting Instruction regarding Pittman's Statements*

Petitioner argues his counsel was ineffective for failing to request CALJIC No. 6.24.[39] Petitioner argues that if the jury would have been given this instruction

[39]CALJIC No. 6.24 stated:

Evidence of a statement made by one alleged conspirator other than at this trial

it would have excluded from its consideration statements allegedly made by Pittman after the $1.5 million check was returned for non-sufficient funds. Petitioner argues that the pre-June 24th meeting could have reasonably been seen as an end of the alleged conspiracy.

On direct appeal, the Court of Appeal rejected this claim, holding that while the trial court should have given the instruction, the error was harmless because there was independent proof of a conspiracy to both murder and rob Levin in which Petitioner and Pittman were continuous participants. ECF No. 5, Ex. A at 73-74. Specifically, the court noted:

> [T]his case did not involve a 'murder conspiracy' which ended with the death of Levin. While revenge for the commodities trading hoax perpetrated upon defendant by Levin may have been inextricably entwined with the scheme, the primary goal of the conspiracy was to obtain from Levin by force and fear the $1.5 million which defendant believed Levin had acquired as a result of that hoax. Levin's death was necessary to facilitate the acquisition of the $1.5 million but the conspiracy did not end until the conspirators received the money or their efforts to do so were totally frustrated.

Id.

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shall not be considered by you as against another alleged conspirator unless you determine:

1. That from other independent evidence at the time the statement was made a conspiracy to commit a crime existed;

2. That the statement was made while the person making the statement was participating in the conspiracy and that the person against whom it was offered was participating in the conspiracy before and during that time; and

3. That such statement was made in furtherance of the objective of the conspiracy.

The word "statement" as used in this instruction includes any oral or written verbal expression or the nonverbal conduct of a person intended by that person as a substitute for oral or written verbal expression.

ECF No. 5, Ex. A at 72, n. 53.

The Court of Appeal concluded that independent proof of the conspiracy and Pittman's participation were presented to the jury. Therefore, the failure of the counsel to request, and the trial court's failure to give Instruction No. 6.24 was not prejudicial because it was not reasonably probable that a different result would have occurred had it been given. *Id.* at 75.

Petitioner has not shown this decision was an unreasonable determination of the facts or an unreasonable application of Federal law. Petitioner is not entitled to federal habeas relief even if the omission of the jury instruction is erroneous unless "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

The following evidence was presented to the jury aside from Pittman's testimony regarding the alleged conspiracy: (1) the to-do list (RT at 10270-71, 10908-22); (2) Karny's testimony regarding Petitioner's confession (RT at 10946-51); (3) Pittman's arrival in New York and Pittman's use of Levin's identification and credit cards (RT at 7629-45, 7700-23, 7787-92); (4) Petitioner flying to New York to bail Pittman out of jail (RT at 7742-49, 10980-81); (5) Petitioner attempting to cash the $1.5 million check (RT at 8268, 8272-73, 9858-59, 9895, 9938, 9996, 10051, 10111, 10943-46); and (6) Petitioner sending Pittman to Washington with $30,000 to get information from Pittman's "underworld" sources about how to cash the check. (RT at 10988-93.)

Petitioner has not established that the outcome of the trial would have been different had this instruction been given to the jury.

1-2.2 *Withdrawal of Limiting Instruction*

Petitioner argues his counsel was ineffective because he requested the withdrawal of CALJIC No. 2.50, which is an instruction limiting the jury's consideration of bad character evidence. On direct appeal, the Court of Appeal denied this claim, finding that trial counsel repeatedly objected to the admissibility of evidence of Petitioner's bad character, requested limiting instructions when the

evidence was admitted, and, at the end of trial, requested the evidence be stricken and that the jury be instructed to not consider it. ECF No. 5, Ex. A at 69. The Court concluded that since counsel believed the evidence was inadmissible for any purpose, "it seems reasonable to presume that if counsel proposed or acquiesced to a 'limiting' instruction the defense would be giving away one of their strongest appellate issues in the event of defendant's conviction." *Id.*

Petitioner has not shown this ruling was an unreasonable application of Federal law or an unreasonable determination of the facts, since the record reflects that counsel made a conscious and tactical decision to adhere to the position that the evidence should not have been admitted in the first place.

1.2-3 *Provided the Jury with Petitioner's Request for Counsel*

Petitioner argues his counsel was ineffective and unprepared for cross-examination when he opened the door regarding Petitioner's request for counsel when Detective Zoeller testified that Petitioner became silent when shown the to-do list during an in-custody interview.

Specifically, during his cross-examination of Detective Zoeller, Barens asked the detective to read the following part of his report of his custodial interview with Petitioner:

> Q: Now returning to the interview you had with Mr. Hunt and looking at your report, did Mr. Hunt ever tell you that he did not write the seven pages?
> A: No.
>
> The court: What, again, did he tell you about it?
>
> A: I asked him if he -- if he knew anything about them, and I asked him twice, with a span of approximately seven to ten minutes, and his response after the second question was, "I don't know anything about them."
> Q: By Mr. Barens: And the next thing, since we are on that here, why don't I just have you read from your report just so we will save a little time here, if you would? Although I don't see where you said you asked him twice, but it doesn't matter.
> A: It is on the prior page.
> Q: I guess if you could read for us -- I don't know, start with, you know, like the top line and just read

the rest of it.
A: (Reading:) "I.O. again asked the suspect, 'What do you know about these'" referring to the copies of the List.
"The suspect stated, 'I don't know anything about these.'"
Did you want me to continue, counsel?
Q: Right.
A: (Reading:) "The suspect stated, 'on an issue like this, I want to confer with my attorney.'"
Q: Thank you. Okay. So in that conjunction, is when the interview concluded?
A: That's correct.
(RT 10716-18.)

Counsel refused the prosecutor's demand to state on the record that this questioning was a specific, tactical decision on his part, stating: "I don't want to oblige him. The record speaks for itself." The trial judge subsequently ruled that Petitioner had waived any right to object to the admission of the foregoing part of Detective Zoeller's testimony, and had "opened the door" to the prosecutor's re-direct examination of the detective on this point. (RT 10718-20; 10746-48.) The trial judge also rejected Baren's subsequent, belated request for a curative instruction. (RT 10754.)

On direct appeal, the California Court of Appeal concluded that Petitioner's counsel made a strategic choice based upon his reasonable professional judgment that such information would dispel the inference that Petitioner's silence was an admission of guilt. ECF No. 5, Ex. A at 63. The Court of Appeal reasoned that "[a]s long as the record reflects a tactical decision as opposed to an ignorant blunder, our ignorance as to why counsel acted as he did cannot be a basis for inferring that he was wrong." *Id.* Ultimately, the Court of Appeal concluded that the record supported a finding that Petitioner's counsel made an informed tactical choice within a range of reasonable competence. *Id.*

Petitioner has not shown this was an unreasonable application of Federal law, or an unreasonable determination of facts. A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation

was constitutionally deficient. *Raley*, 470 F.3d at 799. The record shows that counsel prevented the prosecutor from eliciting this evidence, but then deliberately elicited the evidence himself, likely in an effort to rebut the detective's testimony that Petitioner had been stunned into speechlessness when he was shown the "to do" list. Counsel's tactical decision to elicit this evidence was reasonable under the circumstances and well within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689-91.

In his sub-subpoints Petitioner argues that counsel's billing records indicates that counsel failed to prepare for trial and that his counsel failed to maintain a trial file. On direct appeal, the Court of Appeal rejected Petitioner's claim that his counsel's preparation for trial was inadequate. ECF No. 5, Ex. A at 51. Specifically, the Court found that "[t]he record reflects no lack of preparation" and that "it is clear that [counsel] fulfilled his duty to his client by working diligently to be prepared." *Id.* At the evidentiary hearing, Petitioner's counsel indicated that after trial, he gave the trial files to one of Petitioner's supporters (EHRT at 990-91.) He also testified that the bills he submitted did not include all the work he performed on Petitioner's case. He estimated that he spent 20-30 percent more time than reflected on the billing. (EHRT at 1004-16.)

Petitioner has not shown the state courts' determination that his counsel was adequately prepared was an unreasonable determination of Federal law, or an unreasonable application of facts. Petitioner has not demonstrated that additional trial preparation would have changed the outcome of the trial.

1-2.4 *Failure to Present Scientific Evidence*

Petitioner argues his counsel was ineffective because he failed to use a criminalist's report showing that the trunk of the BMW allegedly involved in the murder tested negative for blood and vomit.

The LAC Habeas Court rejected this claim, noting that the evidence showed Petitioner and Pittman wrapped Levin's body in a bedspread before taking it into

the car, there was no evidence that blood would have seeped into the trunk, and there was no evidence of blood in Levin's apartment or anywhere else. ECF No. 5, Ex. B at 30.

Petitioner has not shown this decision was an unreasonable determination of the facts or an unreasonable application of Federal law. The decision to not use the report was clearly a tactical decision that is entitled to deference. At the evidentiary hearing, counsel testified that he did not believe the prosecution had proved that the BMW was used in the crime, and thus, there was no reason to present evidence that no blood had been detected in the trunk.

Moreover, Petitioner has not shown the outcome of the trial would have been different if this report had been presented to the jury.

1-2.5 *Failure to Use Transcripts to Show Dicker and Karny had Opportunity to Collude*

Petitioner argues his counsel was ineffective by failing to use transcripts to establish that Dicker and Karny had an opportunity to collude with respect to whether they should go to the police, which would have explained why their police interviews "meshed."

In its Order to Show Cause, the California Court of Appeal summarily denied this claim, finding that even if found to be true, there was not a reasonable probability that, but for the alleged professional errors, the results would have been different.[40] ECF No. 6, Ex. F at 10.

Petitioner has not shown this decision was an unreasonable determination of the facts or an unreasonable application of Federal law. The transcripts provided by Petitioner do not show that Dicker and Karny tried to provide consistent stories to the police. Rather, Dicker specifically testified at the Pittman trial that he and

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[40]Petitioner presented this claim in his Petition for Writ of Habeas Corpus - B059613, p. 66 and his Petition for Writ of Habeas Corpus - B110428, p. 403-404.

Karny did not "get their stories straight" so they could tell consistent accounts to the police.[41] ECF No. 9, Ex. 15-H at 17. Moreover, Karny's testimony was not only corroborated by Dicker's testimony, but by other extensive evidence presented at trial. A petitioner is not entitled to § 2254 relief unless the petitioner can establish prejudice from counsel's failure to impeach a witness. *Ortiz*, 149 F.3d at 933.

1-2.6 *Failure to Impeach Karny after Contradictions*

Petitioner argues his counsel was ineffective for failing to impeach Karny with prior inconsistent statements made at Pittman's preliminary hearing. Specifically, Petitioner identifies the following inconsistencies: statements regarding (1) whether he was definitely aware of a plan to kill Levin prior to June 1984, as opposed to being "vaguely aware"; (2) whether Pittman believed Karny was unaware of the Levin plot until after 6/19/1984 as opposed to the fact that Pittman briefed Karny on his Levin-related New York activities; (3) whether

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[41] Q Did you ever sit down with Mr. Karny and say, "Okay, Let's get our stories straight so that we can both go to the police and say the same thing."

A. No, we did not.

Q. Did you ever sit down and discuss with him the facts about what he was going to say and the facts about what you were going to say?

A. No, we did not.

Q. Did you discuss in general what it was or what approach you should take in going to the police?

A. Yes.

Q. And what was that?

A. To tell the truth.

ECF No. 9, Ex. 15-H at 17.

Karny saw Petitioner working on the lists found at Levin's on the night of 6/6/1984 as opposed to the fact that he could not positively identify the lists; and (4) whether Petitioner was at their apartment when Karny left to see a movie as opposed to the fact that Petitioner left the apartment before Karny left to see the movies.

On direct appeal, the Court of Appeal considered these claims in conjunction with Petitioner's corresponding ineffective assistance of counsel claim that, due to a conflict of interest, his counsel rendered ineffective assistance by failing to impeach Karny on the aforementioned points.[42] ECF No. 5, Ex. A at 53-54. The Court concluded that the inconsistencies identified by Petitioner had more to do with the difference in the way the questions were asked and the context in which they were asked at each hearing. The Court conducted an exhaustive evaluation of Barens' actual cross-examination of Karny's testimony, and it concluded that the record did not reveal any instance in which Barens was inept. *Id.* at 54.

Under *Strickland*, tactical decisions regarding the cross-examination of witnesses fall "within the wide range of reasonable professional representation." *United States v. Murray*, 751 F.2d 1528, 1535 (9th Cir. 1985). "Mere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation." *Gustave*, 627 F.2d at 904. A petitioner is not entitled to § 2254 relief unless the petitioner can establish prejudice from counsel's failure to impeach a witness. *Ortiz*, 149 F.3d at 933.

Petitioner has not shown this decision was an unreasonable determination of the facts or an unreasonable application of Federal law. Petitioner has not shown that even if these inconsistencies were exposed, the outcome of his trial would have been different. Moreover, the inconsistencies do not address or support Petitioner's ultimate defense theory–no body, no murder.

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[42]Petitioner also presented this claim in his Petition for Writ of Habeas Corpus - B059613, p. 61-67.

1-2.7 *Failure to Show the To-Do Lists were Strewn Across the Floor*

Petitioner argues his counsel was ineffective because he failed to adequately cross-examine Martin Levin, Levin's father. Petitioner relies on the fact that Mr. Levin testified at the later Eslaminia trial that he found the "to do" lists scattered across Levin's office floor, which Petitioner alleges was inconsistent with his testimony in the instant trial. Petitioner argues this testimony would have supported his theory (and bolstered Karen Marmor's testimony that she saw Petitioner's "to do" list on Levin's desk). Petitioner also argues his counsel was ineffective for failing to present Melczer's testimony that Martin did not mention the "to-do" lists.

In its habeas review, the Court of Appeal summarily rejected Petitioner's claim.[43] ECF No. 6, Ex. M at 12.

Petitioner has not shown this decision was an unreasonable determination of the facts or an unreasonable application of Federal law. Rather, the record demonstrates that this ruling was proper. First, Martin's purported testimony from the Eslaminia trial does not contradict his testimony at trial. He testified in this case that he found the "to-do" list on the floor at Levin's offfice. (RT at 7920-29). Further, it is entirely unreasonable to expect counsel to impeach Martin with allegedly inconsistent testimony that would be given at a later proceeding (in the Eslaminia case). Finally, counsel could not have been aware at the time of trial that Martin's testimony would have supported Marmor's testimony because Marmor did not come forward with her account until after the trial was over.

Similarly, Melczer's testimony would not have impeached Martin's testimony at trial, because at the time of the conversation with Melczer, Martin was

[43]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 55-56.

not aware the lists had any significance and had no reason to mention the lists. (RT at 7920-42.)

1.2-8 *Failure to Undercut State's Theory that Pittman went to New York to lay False Paper Trail*

Petitioner argues his counsel was ineffective for failing to undercut the state's theory that Pittman went to New York to lay a false paper trail by using Levin's credit cards. Petitioner's theory was that Levin asked Pittman to meet him in New York, and then stood him up, leaving Pittman holding the bag for the expenses. His theory was presented to the jury through Brooke Roberts' testimony. (RT 11565-67.) Petitioner also faults his counsel for failing to present Pittman's mother's testimony that Pittman visited her in a limousine as well as testimony from Frank Vassalo, who would have testified that Pittman had come to visit him in a chauffeured limousine. Petitioner argues it does not make sense that Pittman would visit friends and family if he was truly trying to keep a low profie and lay a false paper-trail.

The California Court of Appeal summarily rejected this claim presented in Petitioner's habeas petition.[44] ECF No. 6, Ex. F at 10.

Petitioner has not shown this was an unreasonable application of Federal law, or an unreasonable determination of the facts. Notably, Chier states in his declaration that at the time of Petitioner's trial, he was not aware of Pittman's activities in Delaware, which only came out in the subsequent Pittman trial. ECF No. 191, Ex. 1A. Moreover, it would have also been imprudent to use Pittman's Plaza Hotel limousine bills in an effort to suggest Pittman's main purpose in traveling to New York City was to visit his family and some friends living in Delaware and what appears to be the Southeastern part of Pennsylvania. The

[44]Petitioner presented this claim in his Petition for Writ of Habeas Corpus - B059613, p. 83.

limousine bills showed the trip to visit his son in Delaware was a 240 mile round-trip and the round-trip visit to his mother in Pennsylvania was a long trip that cost $500. Using the limousine bill to show Pittman's primary reason for the trip was to visit family and friends in Pennsylvania and Delaware might have provoked the jury to question why Pittman would stay in New York City in the first place. Moreover, if Pittman's main reason was to visit his family and friends, this evidence still fails to account for undisputed evidence that Pittman flew into New York City, checked into the Plaza Hotel using Levin's identity and two of Levin's credit cards, and planned to stay there for a week. In short, the attempt to use the limousine bills would have more likely hurt rather than helped Petitioner's defense. Finally, presenting an ulterior motive for Pittman's travels would not bolster Petitioner's theory of defense–that is, no body, no murder.

1.2-9 *Failure to Undercut the State's Theory by Presenting Pittman's True Motive for Avoiding Arrest in New York*

Petitioner argues his counsel was ineffective because he failed to present to the jury evidence that Pittman was wanted in Hampton, VA, on nine felony warrants for check fraud and grand-theft auto. He argues this evidence would have shed exculpatory light on several matters, including why Pittman resisted restraint at the hotel, why Pittman presented himself as Ron Levin in New York, why Petitioner came to his aid while traveling en route to London, and why Pittman failed to appear for the subsequent court hearing in New York.

In its Order to Show Cause, the California Court of Appeal summarily rejected this claim.[45] ECF No. 6, Ex. F at 10.

Petitioner has not shown this was an unreasonable application of Federal

[45]Petitioner presented this claim in his Petition for Writ of Habeas Corpus - B059613, p. 85-86; 147-150 and in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 74.

law, or an unreasonable determination of the facts. It would have been imprudent to use the police reports showing Pittman had outstanding Virginia arrest warrants as an explanation for Pittman's attempt to avoid being arrested in New York City. This same evidence would also have shown the jury that Pittman was a fugitive in addition to being a criminal, and that Petitioner's close relationship with a man like Pittman would have enabled the prosecutor to argue "birds of a feather, flock together." Finally, presenting an ulterior motive for Pittman's resistance at the hotel would not bolster Petitioner's theory of defense–that is, no body, no murder.

1-2.10 *Failure to Present American Express Records*

Petitioner claims that his counsel was ineffective because he failed to examine American Express records showing that Levin's credit card was used on June 7, 1984, which was after he was allegedly murdered. John Reeves, an American Express custodian of records testified that the records show that the bill was incorrect and that the charge was incurred on May 7, 1984. Petitioner argues his counsel should have examined the records, so he could have elicited testimony from Mr. Reeves that the transaction did in fact occur on June 7, 1984, just as he had done during the 1992 Eslaminia trial.

The Court of Appeal summarily denied Petitioner's claim, finding that even if found to be true, there was not a reasonable probability that, but for the alleged professional errors, the results would have been different.[46] ECF No. 6, Ex. M at 12.

Petitioner has not met his burden of showing this decision was an unreasonable determination of the facts, or an unreasonable application of Federal law. The Court has reviewed the transcript of the direct testimony and cross-examination of Mr. Reeves, and the record reflects that his counsel's handling of

[46]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 94-95.

this witness was not ineffective. First, with respect to the handling of the hypothetical,[47] his counsel properly objected and the objection was overruled.[48] (RT 7819.) Second, on cross-examination, Petitioner's counsel questioned Mr. Reeves regarding the bill and presented a recap of the billings, as well as computer produced documents that referenced certain invoices, indicating that his counsel prepared for the cross-examination (RT 7810-12.)

1-2.11 *Failure to Call Oliver Wendell Holmes*

Petitioner argues his counsel was ineffective because he failed to call Oliver Wendell Holmes, a friend of Mr. Levin, who would have testified to information that Mr. Levin was planning on leaving the country to flee Brazil in order to avoid criminal prosecution.

The LAC Habeas Court found that although this testimony may have helped petitioner, his counsel's failure to investigate further was not unreasonable, particularly in light of the manner in which Petitioner was bombarding his counsel with thousands of lists of other information, and the information that was given to his counsel about Holmes was quite limited. ECF No. 5, Ex. B at 27. The Court of

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[47]The following hypothetical was posed to Mr. Reeves by the prosecutor.

> Q: And if that credit card that bore the number 371351200182028 was found in Mr. Levin's apartment at some point after June the 7th and had been there ever since the morning of June 7 and had not left the apartment, would you have an opinion as to whether that magnetically generated statement that says June 7 was in error?

(RT 7819.)

[48]Mr. Barens:

> Your Honor, for the record, we would like to object to the hypothetical as assuming facts not in evidence or either just unknown.

(RT 7819.)

Appeal concluded that his counsel's conduct with respect to Mr. Holmes was not below the standard of reasonably effective representation. ECF No. 6, Ex. M at 9. Barens had little information on which to proceed, and in any event, the testimony would not have altered the outcome of Petitioner's trial. *Id.*

Petitioner has not shown this ruling was not an unreasonable determination of the facts or an unreasonable application of Federal law. Petitioner has not affirmatively shown he alerted Barens to the importance of Holmes' information in a meaningful and significant manner. He testified that he informed counsel that police reports mentioned Holmes's name, but the mere inclusion of Holmes' name in a police report was insufficient to put counsel on notice to investigate.

The state courts reasonably found Petitioner did not suffer any prejudice given that Holmes' testimony would have been cumulative of other evidence that showed Levin may have fled to avoid prosecution. *Clabourne*, 64 F.3d at 1382 (finding the "failure to present cumulative testimony does not amount to ineffective assistance.").

1-2.12 *Failure to Use Browning's Testimony to Expose Perjury*

Petitioner argues his counsel was ineffective when he failed to impeach Dr. Browning with his preliminary hearing testimony he gave in Pittman's case. In its Order to Show Cause, the California Court of Appeal summarily denied this claim, finding that even if found to be true, there was not a reasonable probability that, but for the alleged professional errors, the results would have been different.[49] ECF No. 6, Ex. F at 10.

Petitioner has not shown this decision was an unreasonable determination of the facts, or an unreasonable application of Federal law because counsel did impeach Dr. Browning on this point. His counsel elicited Browning's testimony that Petitioner said Levin was missing and probably dead, then impeached

[49]Petitioner presented this claim in his habeas petition - B050613, p. 137.

Browning by eliciting his admission that he had never, in prior depositions or testimony, made such a statement. (RT. 8205-06.)

1-2.13 *Cross-Examination of Raymond, Dicker, Tom May, Karny*

Petitioner argues his counsel was ineffective because he failed to properly cross-examine BBC members Jeff Raymond, Evan Dicker, Tom May and Dean Karny.

In its Order to Show Cause, the California Court of Appeal summarily denied this claim, finding that even if found to be true, there was not a reasonable probability that, but for the alleged professional errors, the results would have been different.[50] ECF No. 6, Ex. F at 10.

Petitioner has not shown this was an unreasonable application of Federal law, or an unreasonable determination of the facts. The manner of questioning witnesses is an art and not a science. The criticisms of the manner of examining these witnesses is classic after the fact observations. The record does not establish that counsel was ineffective or incompetent in the examination of witnesses.

1-2.14 *Failure to Use Police Report Against Tom May*

Petitioner argues his counsel was ineffective for failing to use a police report to prove Tom May's willingness to lie to secure Petitioner's arrest. Tom May had contacted the police and stated that Petitioner had broken into a trailer owned by Tom that was sitting on the property of the Shadow Valley Mining Company. He stated that Petitioner had taken a briefcase containing "three negotiable pink-slips to three vehicles" from Tom's trailer. Petitioner asserts that May lied about the ownership of the trailer; rather Microgenesis owned the trailer.

The Court of Appeal summarily rejected Petitioner's claim that his counsel

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[50]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 97-101.

was ineffective for failing to use the police report against Tom May to show that he lied about the ownership of the trailer.[51] ECF No. 6, Ex. M at 12.

The Court has reviewed the record and finds that the Petitioner's characterization of the police report and its use in evidence is not accurate. Moreover, it would have been little or no use in the cross examination as it related to collateral matters that would not have affected the jury's verdict. Contrary to Petitioner's assertions, neither the conclusory allegations in paragraph 3 of his 3/28/96 declaration or the two other exhibits he proffers in support of his claim of ownership prove he owned the trailer. Rather, the checks Petitioner claims were used to buy the trailers were signed by David May, Tom's twin brother, and do not clearly reflect the checks were for the trailer in question. Moreover, assuming his counsel was even aware of the Sept. 18, 1994 sheriff burglary report (a preliminary fact that Petitioner has not affirmatively proven), it was reasonable for the state court to find his counsel was not ineffective in deciding not to use the report because it was harmful to the defense to the extent it: (1) corroborated Tom May's testimony that Petitioner took the pink slips to Tom's cars and offered to trade them in return for documents Tom gave the police (RT at 8673-75); (2) referred to a witness who stated he saw Petitioner and Pittman enter the trailer and remove a briefcase and a shotgun, which the prosecution could have used to corroborate the other trial testimony that established Petitioner admitted using a shotgun to disfigure Levin's body so it would not be recognizable (RT at 10953-54), and that Petitioner and Pittman killed Levin just as Petitioner admitted; and (3) that the witness understood Pittman, who he referred to as Petitioner's bodyguard, was a possible fugitive wanted on East Coast criminal charges. *See* ECF No. 10, Ex. 129.

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[51]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 74-75.

Petitioner has not shown the state court unreasonably applied *Strickland's* prejudice prong in rejecting this claim because Petitioner has failed to affirmatively prove there is a reasonable probability that the result of his 1987 trial would have been different if Barens had used the burglary report to impeach Tom May.

1-2.15 *Failure to Use Rosenbraugh Police Report to Show Fabrication*

Petitioner argues his counsel was ineffective by failing to use another law enforcement report ("Rosenbraugh LAPD police report") to impeach testimony given by Jeff Raymond and Tom May about their meeting with Petitioner at the Charthouse restaurant.

At Petitioner's trial, Tom May and Jeff Raymond gave testimony that established when they met with Petitioner at the Charthouse, Petitioner wanted incriminating documents the May twins and Raymond had given to the police and their attorneys in exchange for the vehicle pink slips, which Petitioner had taken as bargaining chips. (RT. 8062, 8859.) Detective Zoeller later testified the documents he received from the May twins and Raymond included: (1) the $1.5 million dollar Levin check dated June 6, 1984, (2) a copy of the Levin option contract; (3) a letter dated June 7, 1984 authorizing Ben Dosti to negotiate the check; (4) minutes of a Microgenesis board meeting concerning the $1.5 million dollar Levin check. (RT at 10496-10498.) Petitioner maintains Barens could have "demolished the credibility" of Tom May and Jeff Raymond with the Rosenbraugh LAPD police report because it merely shows "Petitioner was merely offering the return of certain pink slips in exchange for David May's 'signature' on 'certain papers.'" ECF No. 191 at 64.

The California Court of Appeal summarily rejected Petitioner's claim.[52] ECF

[52]Petitioner presented this claim in his Petition for Writ of Habeas Corpus - B110428, p. 367-372.

No. 6, Ex. M at 12.

Petitioner has not shown this decision was an unreasonable application of Federal law, or an unreasonable determination of the facts because he has failed to affirmatively prove that there is a reasonable probability the result of his 1987 trial would have been different if Barens had used the Rosenbraugh LAPD police report. *Ortiz*, 149 F.3d at 933 (holding a petitioner is not entitled to § 2254 relief unless the petitioner can establish prejudice from counsel's failure to impeach a witness).

Contrary to Petitioner's assertions, this police report does not sharply contrast with the testimonies given by Tom May and Jeff Raymond. First, this report is a statement Detective Rosenbraugh obtained from Jeff Raymond—not Tom May—on December 7, 1984. ECF No. 10, Ex. 130. The report does not show May was present when Raymond was interviewed by Rosenbraugh. The report shows Raymond told Rosenbraugh the Charthouse meeting occurred during the end of July or beginning of August, 1984. Nothing in or about the report suggests Rosenbraugh included everything Raymond told him, that Rosenbraugh's account of what Raymond told him is completely accurate, or that Raymond would have conceded Rosenbraugh's report accurately accounts for what he said if confronted with it. Even assuming that Petitioner could prove the report contains an accurate, full account of what Raymond told Rosenbraugh, it does not contradict May's testimony or other evidence that showed Petitioner tried to coerce David or Tom to sign fabricated statements helpful to Petitioner as well as demanding the return of incriminating documents the Mays gave the police. (RT at 8060-63, 8137, 8150-51, 8673-75.)

Further, this police report corroborated other evidence that showed Petitioner took the pink slips from the Mays to use as leverage and to retaliate against the May twins and Raymond for reporting Petitioner's admissions of killing Levin and cooperating with law enforcement. This police report would not

have refuted the overwhelming evidence of Petitioner's admissions of killing Levin that were also corroborated by his own actions before and after he admitted murdering Levin. Finally, even assuming that Barens was aware of this police report, his decision not to use it is entitled to great deference and was a reasonable tactical decision because it tends to corroborate the other evidence that showed the cars documented by the pink slips belonged to the May twins, not Petitioner, and that they would not have reported Petitioenr's theft of the pink slips to the San Bernardino Sheriff and Los Angeles Police Department if they truly believed the cars belonged to Petitioner. A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient. *Raley*, 470 F.3d at 799.

1.2.H. *Failure of Counsel to Fulfill Opening Statement Promises*

Petitioner argues his counsel was ineffective when he "caused a decent-sounding opening statement to terribly backfire." ECF No. 190 at 28.

On appeal, Petitioner pointed to ten promises made by his counsel during his opening statement that went unfulfilled.[53] On direct appeal, the California Court of

[53]In his Opening Brief, Petitioner identified the following promises given in the opening statement that went unfulfilled: (1) Petitioner would testify; (2) a witness would testify he saw Levin the day before the alleged murder signing the Microgenesis agreement in Petitioner's office; (3) neighbors who would testify that they did not hear anything on June 6, 1984; (4) detective Edhom would testify that he had been monitoring Levin for years; (5) conservator would testify regarding 10-20 major lawsuits; (6) testimony that Levin was facing a high probability of conviction for stealing over a million dollars worth of equipment from a photographic facility; (7) testimony that Levin was a "wizard at bankruptcy fraud"; (8) testimony that any money Levin left behind would go to his mother; (9)

Appeal found that counsel's decision to make an opening statement fell well within the range of reasonable professional assistance even though counsel did not present 100 percent of the evidence promised. ECF No. 5, Ex. A at 58. In its Order to Show Cause, the Court of Appeal summarily rejected Petitioner's claim regarding counsel's alleged failure to fulfill promises made in his opening statement.[54] ECF No. 6, Ex. F at 6.

The Court has already addressed this claim in Sections F.3 and 1.1-18. Failure to produce a witness promised in opening statement may constitute ineffective assistance of counsel, if the promise was sufficiently "specific and dramatic" and the evidence omitted would have been significant. *See Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988).

Petitioner has not shown that the state court's determination that his counsel's statement fell within the range of professional competence was an unreasonable application of Federal law, or an unreasonable determination of the facts. Petitioner has not shown that even if counsel has presented 100 percent of the evidence promised, the outcome of his trial would have been different.

1-3 Failure of Counsel to be Petitioner's Advocate

Ground 1-3 alleges claims based on the "secret deal." As set forth above, the state courts rejected Petitioner's claim based on the "secret deal" and this court found that the state courts' rulings were proper and Petitioner could not meet his burden of proving any habeas relief based on the "secret deal." *See* Section F.2.

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testimony that the BBC boys would testify against Petitioner ridiculed him and made fun of him in school; and (10) testimony that Levin filed bankruptcy "involving hundreds and hundreds of people he had defrauded out of close to one million dollars. pp. 164-168.

[54]Petitioner presented this claim in his March 29, 1996 Supplement to or Petition for Writ of Habeas Corpus, p. 92.

Petitioner has not presented any additional arguments that have not already been addressed above. Thus, the Court will summarily address Petitioner's subpoints.

1-3.1 *Submission of Perjured Requests for Appointment*

Petitioner alleges that Barens submitted a perjured request for appointment in that he lied about the timing, nature, and amount of consideration paid by Petitioner and falsely asserted that his economic situation forced him to take other cases during the pendency of the trial. Petitioner has not demonstrated that even if this was true, this caused his counsel's representation to fall below an objective standard of reasonableness. Moreover, Petitioner has not established that the outcome of the trial would have been different but for the alleged conduct.

1-3.2 *Conflict of Interest Caused by Ultimatum*

Petitioner alleges that Barens actually represented his competing interests when he assented to the judge's off-the-record ultimatum regarding his compensation. Petitioner has not demonstrated that even if this was true, this caused his counsel's representation to fall below an objective standard of reasonableness. Moreover, Petitioner has not established that the outcome of the trial would have been different but for the alleged conduct.

1-3.3 *Conflict of Interest Caused by Petitioner's Absence*

Petitioner alleges that he was prejudiced because he was not present when Barens assented to the ultimatum without consulting with him or assuring his presence at the proceeding before accepting the compensation and appointment. Petitioner also presented this claim as a separate ground. *See* G.6.

Petitioner has not demonstrated that even if this was true, this caused his counsel's representation to fall below an objective standard of reasonableness. Moreover, Petitioner has not established that the outcome of the trial would have been different but for the alleged conduct.

1.3-4 *Failure to Inform Petitioner of Secret Deal*

Petitioner alleges that Barens demonstrated his competing interests by

failing to inform Petitioner and Chiers about the compensation and appointment. The record establishes the Petitioner was made aware of the terms of his representation. Petitioner has not demonstrated that even if his allegation was true, this caused his counsel's representation to fall below an objective standard of reasonableness. Moreover, Petitioner has not established that the outcome of the trial would have been different but for the alleged conduct.

1.3-5 *Conflict of Interest when Chier Attempts Reinstatement*

Petitioner alleges that Barens did not assist Petitioner's and Chier's efforts to reinstate Chier. Petitioner has not demonstrated that even if this was true, this caused his counsel's representation to fall below an objective standard of reasonableness. Moreover, Petitioner has not established that the outcome of the trial would have been different but for the alleged conduct.

1.3-6 *Compromised Chier's Challenge to Secret Deal*

Petitioner argues that Barens' treachery compromised the effectiveness of Chier's challenge to the appointment of Barens. Petitioner's arguments are based on speculation and conjecture. He has not shown the failure to ask for a continuance demonstrated or caused his counsel's representation to fall below an objective standard of reasonableness. Moreover, Petitioner has not established that the outcome of the trial would have been different but for the alleged conduct.

1.3-7 *Conflict of Interest by Failing to Ask for a Continuance*

Petitioner alleges that not asking for a continuance was a tacit, if not explicit, deal point between Barens and Judge Rittenband. Petitioner alleges that Barens could not ask for a continuance without endangering his financial interests. Petitioner's arguments are based on speculation and conjecture. He has not shown that the failure to ask for a continuance demonstrated or caused his counsel's representation to fall below an objective standard of reasonableness. Moreover, Petitioner has not established that the outcome of the trial would have been different but for the alleged conduct.

1-4 Failure to Make Competent Record of Judge's Misconduct

Petitioner argues his counsel failed to make a competent record of Judge Rittenband's misconduct. He argues his counsel should have filed a motion for mistrial, citing judicial misconduct.

The Court of Appeal on direct appeal held that his counsel's alleged lack of objections or failure to describe the judge's expressions and gestures for the record were not indicative of his counsel's incompetence. ECF No. 5, Ex. A at 64. The Court noted that the record indicated that counsel objected to the court's questioning of witnesses and to the court's demeanor during Roberts' testimony, and his counsel filed a motion for mistrial and motion for new trial, each containing descriptions of the court's demeanor. *Id.* at 64-65. The Court concluded that "counsel took appropriate steps to preserve objections when necessary and where no objections were made, we presume those decisions were based upon tactical considerations. The face of record does not demonstrate that counsel was incompetent." *Id.* at 67.

Petitioner has not shown this was an unreasonable application of clearly established Federal law or was based on an unreasonable determination of the facts.

1-6 Failure to Renew Request for Evidentiary Hearing Regarding Jury Misconduct

According to Petitioner, the underlying facts for this claim are presented in Ground 4 which is addressed later in this Order. Ground 4 involves the distribution of the "recipe." Petitioner states that his counsel was ineffective for failing to remind the Judge of his promise that he would talk to Juror Mikell about the circumstances of the composition and circulation of the recipe.

The California Court of Appeal found the distribution of the recipe by a juror to other jurors well before the case was submitted for jury deliberations did not reflect a bias against Petitioner. ECF. No. 5, Ex. A at 78. It reasoned that the

recipe was not the type of matter which is inherently prejudicial and its circulation among the jurors did not expose them to information that was not part of the trial record. Nor did the distribution of the recipe violate the juror's oath. *Id.* at 79. Ultimately, the Court of Appeal concluded that there was not a "strong possibility" that the misconduct was prejudicial or that Petitioner suffered "actual harm." *Id.* at 80. It also found the failure to make a renewed request for a hearing did not cause counsel's representation to fall below an objective standard of reasonableness, noting that counsel raised the juror misconduct issue three times by asking that Juror Mikell be questioned, moving for a mistrial, and raising the issue in a motion for new trial. ECF No. 5, Ex. A at 77-79.

Petitioner has not met his burden of showing this was an unreasonable determination of the facts, or an unreasonable application of Federal law. Petitioner cannot meet his burden of showing that counsel's failure to remind Judge Rittenband to speak with the juror amounts to ineffective assistance of counsel because he cannot show that even if his counsel had reminded Judge Rittenband to speak with the juror, this would have affected the outcome of the trial.

1-8 Conflict of Interest Re: Hillcrest Country Club

Petitioner maintains his counsel believed Judge Rittenband to be influential enough to bar his admission to the Hillcrest Country Club, and that is why he failed to create an adequate record regarding judicial misconduct.

In a 1995 Declaration, Arthur Barens declared:

> 15. I am familiar with the Hillcrest Country Club having been invited to lunch and social functions there. Hillcrest Country Club is primarily a golf club. I have no interest in the game of golf and consequently have never had any desire to become a member, I have never applied for membership in the Hillcrest Country Club and am not familiar with its application procedure. I only knew Judge Rittenband was a member of Hillcrest Country Club. I never had contact with the judge in that context.
>
> 16. I have read specific portions of Joe Hunt's (executed on July 5, 1991), Bobby Roberts's (executed June 25, 1991) and Daniel A. Dobrin's (executed July 8, 1991) declarations relating to Hillcrest Country Club; each of those declarations, in relevant part, is untrue. I remember two meetings that Bobby Roberts was present: (1) a

> meeting to discuss whether Joe Hunt would testify at trial. There was never a meeting where Hillcrest Country Club was discussed. Daniel Dobrin brought up the subject of Hillcrest Country Club to me and I told him that the allegations were not true. I have never told anyone including Joe Hunt, Bobby Roberts or Dan Dobrin that I wanted to become a member of the Hillcreast Country Club and was concerned that Judge Rittenband might prevent my application from being accepted because of my conduct during trial. Hunt never complained about my performance during the trial.

State's Lodged Exhibits, Ex. I (Evidentiary Hearing Exhibit 9)

The LAC Habeas Court held there was no evidence Petitioner's counsel had even applied for membership before, during, or after trial; Judge Rittenband was not on any of the club's membership review committees; and the record did not demonstrate "a trial counsel who pandered to the trial judge to gain personal favor." ECF No. 5, Ex. B at 34-35. It also found his counsel was "courteous but firm with the trial judge[,]" who "was often caustic, overly involved in questioning witnesses, and at times extremely hostile to [Chier,]"; he "did not roll over and play dead as [Petitioner] suggests; and he made "suitable objections, forcefully argued his points and, at times, received the wrath of the trial judge." *Id.* In reviewing this claim, the Court of Appeal concluded that rather than demonstrate a conflict of interest, the record demonstrates Petitioner's counsel aggressively represented Petitioner. ECF No. 6, Ex. M at 10-11.

Here, the record supports the state courts' decisions. Petitioner has failed to show the decisions were an unreasonable determination of the facts or an unreasonable application of Federal law.

2. Judicial Misconduct

Petitioner argues his rights under the Fifth, Sixth, and Fourteenth Amendments to Due Process and the effective assistance of counsel were violated by Judge Rittenband's judicial misconduct in (1) having an extrajudicial bias against Chier (Claim 2-1); (2) exhibiting a pro-prosecution bias and bias against Barens and Chier (Claim 2-2); and (3) interfering with the defense in ways that resulted in a constructive denial of counsel (Claim 2-3).

The following is the Court of Appeal's analysis of Petitioner's claim of judicial misconduct:

> Defendant cites instances too numerous to recount here in which he claims the court disparaged and derided the defense theory, defense witnesses and the defense attorneys and took over the examination of prosecution and defense witnesses by questions designed to elicit testimony adverse to the defendant.
>
> Respondent acknowledges that there were a few instances where the court's conduct "veered from its proper course," but urges us not to reverse defendant's conviction because in most of the instances of claimed judicial misconduct which were preserved for review by appropriate objection, the court was properly exercising its power to control and participate in the trial. Respondent further argues that any errors were harmless in that the record as a whole establishes that both sides were treated evenhandly. Much of the court's conduct toward cocounsel Chier was instigated by Chier's discourteous, disrespectful, and provocative behavior and/or did not take place in the jury's presence.
>
> There is support in the transcript for both positions. Our reading of the trial transcript reveals that the judge walked a very fine line between partisan advocacy and impartial intervention to see that a guilty defendant was not "wrongfully acquitted or unjustly punished." (Citation omitted). He did, indeed, interject himself into the trial. He thoroughly questioned both prosecution and defense witnesses and actively interposed his own objections to questions asked by both sides although far more frequently to defense questions. There were times when the judge's remarks in front of the jury were caustic, but we also note that most were the result of defense counsels' inappropriate comments, arguments or speaking objections which should have been made at side bench. The court made it abundantly clear in a number of chambers and bench conferences that he did not regard Chier as the lawyer in the case, that Chier's presence was totally unnecessary and a waste of taxpayer's money.[83]
>
> [83]The judge's disagreements with Chier were based upon Chier's abrasive and contentious demeanor, his interruption of discussions between the court and Barens, and upon his belief that Chier wrote frivolous motions vilifying the court and then violated the court's order against speaking to the press by handing the motions out to the press without showing them to Barens, serving them on the deputy district attorney or filing them in court.
>
> There are other times when the court was solicitous of Chier and listened courteously to his legal arguments. It is also clear the court held Barens in high esteem.

ECF No. 5, Ex. A at 182-84.

The Court of Appeal ultimately held there was no miscarriage of justice. *Id.* at 187.

The Due Process Clause guarantees a criminal defendant a "fair trial in a fair tribunal," before a judge with no actual bias against the defendant or interest in the outcome of his particular case. *Bracy v. Gramley*, 520 U.S. 899, 905 (1997) (*citing Withrow v. Larkin*, 421 U.S. 35, 46 (1975). To succeed on his judicial bias claims, Petitioner must "overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow*, 421 U.S. at 47. In the absence of evidence proving a judge's challenged rulings or remarks derived from an extrajudicial source or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are "critical or disapproving of, or even hostile to, counsel, the parties, or their cases." *Liteky v. United States*, 510 U.S. 540, 550-51, 555 (1994). Recognizing judges do not live in a vacuum and "[d]isinterestedness does not mean child-like innocence[,]" the *Liteky* court determined that the presence of an extrajudicial source does not necessarily establish bias and, conversely, the absence of an extrajudicial source does not necessarily preclude bias. *Liteky*, 510 U.S. at 551, 554.

The *Liteky* Court instructed:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. . . . Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, or of prior proceedings, do not constitute a basis for bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgments impossible. . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.

Liteky, 510 U.S. at 555-56.

Further, a claim of judicial misconduct by a state judge in the context of federal habeas review does not simply require the federal reviewing court to determine whether the state judge committed judicial misconduct. Rather, the question is "whether the state judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir.1995) (citations omitted). A state judge's conduct must be significantly adverse to a defendant before it violates constitutional requirements of due process and warrants federal intervention. *Id.* It is not enough that a federal court not approve of a state judge's conduct. *Id.* Objectionable as the conduct at issue might be, when considered in the context of the trial as a whole it may not be of sufficient gravity to warrant the conclusion that fundamental fairness was denied. *See, e.g., id.* at 741 (trial judge's "troubling" questioning of witnesses and expressions of "clear frustration and hostility" toward defendant did not warrant habeas relief); *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986) (judge's excessive questions and sarcastic comments did not amount to "extreme overstepping of his proper judicial role"—conviction affirmed); *Gayle v. Scully*, 779 F.2d 802, 807, 813 (2nd Cir. 1985) (trial judge's caustic, sarcastic comments and offensive conduct did not violate due process). Conclusory allegations unsupported by specific facts do not warrant habeas relief. *James v. Borg*, 24 F.3d 24, 26 (9th Cir. 1994).

Petitioner's judicial misconduct claims are reviewed in light of the foregoing principles.

2-1 <u>Trial Judge's Extra-Judicially-Rooted Antagonism for Chier</u>

Petitioner maintains Judge Rittenband harbored an extrajudical bias against Chier because of two encounters that occurred years before Petitioner was arrested for Levin's murder. Petitioner also identifies twelve "record facts supporting an

inference of [the judge's] extra-judicial source bias[55] and twelve facts demonstrating the impact of the judge's extra-judicial-source bias against Chier."[56]

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[55]Petitioner provides the following "record facts" he alleges identifies extra-judicial source bias: (1) personal insults and use of fighting words directed at Chier by the Judge, p. 83-84; (2) direct admission of a desire to assault Chier, p. 84; (3) insults directed at Chier's professional standing (slander) with the intention of demeaning and humiliating Chier, p. 85-87; (4) direct admissions from the judge of his desire to see Chier expelled from the case, p. 87-88, (5) the judge ejected Chier form the courtroom on four occasions, p. 88-89; (6) the judge threatened–baselessly–Chier with post-trial contempt proceedings on at least 11 occasions, p. 88, (7); demeaning Chier by depreciating his work-product, p. 88-89; (8) the judge's irrational and sustained attack on Chier during Hovey voir dire, p. 89-99; (9) the judge used trumped-up allegations of misconduct to publicly torment Chier, p. 99-110; (10) after the guilt phase, the judge admitted that he had no legal or ethical justification for appointing Barens, p. 110; (11) the judge was being manipulative when he asserted Barens was an excellent attorney; the truth was that he held Barens in contempt, p. 110; and (12) there was no justification in Chier's in-court conduct for the abuse the judge heaped on him, p. 110. ECF No. 191 at 83-110.

[56]Petitioner provides the following facts he alleges demonstrates the impact of the judge's extra-judicial source bias against Chier: (1) Chier was prohibited from presenting any part of Petitioner's case to the jury, p. 110; (2) though the record reflects words spoken and motions filed by Chier, the court ignored them all and refused to consider Chier as an advocate in the case, p. 111; (3) the judge curtailed Chier's productive involvement in Hovey voir dire and kept him from participating in general voir dire, p. 111; (4) denial of the January 29, 1987 Motion for Full "Keenan-Counsel" participation by Chier, p. 111; (5) exonerating

Petitioner presents two declarations in support of his claim: (1) a July 28, 1995 declaration from Chier, ECF No. 10, Ex. 103; and (2) a December 4, 1996 declaration from Donald R. Wager, Chier's friend, ECF No. 10, Ex. 106.

Chier's declaration identifies two prior encounters with Judge Rittenband. The first occurred in 1966 (about 19 years prior to his appearance in the instant case), in which Chier was unwilling to consider the judge's settlement proposals, which angered the judge. The second occurred in 1983 when Chier was renting an apartment owned by some of the judge's friends. The owners wanted to evict Chier because he invited his girlfriend to live with him. Chier refused and the owner enlisted the judge's help. The judge called Chier and asked him to move out, and Chier declined to do so.

Neither of these declarations set forth specific facts that establish any of the judge's challenged rulings or remarks concerning Chier were actually derived from the two encounters as opposed to facts or events that occurred in Petitioner's and the related-Pittman proceedings. Nor does the declarations set forth any specific facts that show any of the judge's rulings or remarks rendered Petitioner's trial fundamentally unfair. Although Chier speculates that Judge Rittenband harbored hostility towards him due to a personal vendetta, and the Judge's order limiting his role was revenge for these two prior encounters, there is nothing in the record that

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witnesses were lost, p. 111; (6) the failure of the defense to present, as had been promised by Barens in opening statement, Petitioner as a witness in the guilt-phase, p. 111; (7) the cut-off of funding to Chier and the defense, p. 112; (8) the denial of a governmental misconduct motion, p. 113; (9) the judge's actions sowed distrust and conflict within the defense camp, p. 113; (10) the writ challenging the secret deal was weakened, p. 114; (11) an unprepared and unskilled Barens botched the cross-examination of the key prosecution witnesses, p. 116; and (12) the defense case disintegrated under Barens' indifferent stewardship. ECF No. 191 at 110-119.

support his speculations.

Moreover, the record shows that Chier failed to identify any extrajudicial source of bias on the part of Judge Rittenband when he filed a motion to disqualify Judge Rittenband in December, 1986, over a year after his initial appearance in this case. Notably, the motion was made *exclusively* on the judge's ruling and remarks that occurred in court after jury selection began. Nothing was said at that time regarding any extrajudicial sources of bias. On the other hand, in support of that motion, Chier stated that he had made a number of appearances in the case, either along or with Barens, and had experienced "no incidents occurring which indicated in any way that the judge . . . harbored the extreme bias or prejudice" which he claims had recently manifested itself. ECF No. 6, Ex. K. By his own words then, Chier demonstrated that the two identified instances did not create will-ill on the part of Judge Rittenband; rather it demonstrated that Judge Rittenband was more than capable of remaining fair and impartial and did not have a deep-seated antagonism toward Chier that would make fair judgments impossible.

In his declaration, Donald Wager states that he is Chier's friend and strongly suggests that he and Judge Rittenband were very close, longtime friends. He states that Judge Rittenband told him that he detested Chier because of what he was told by his friends who owned the apartment building where Chier resided. He also states he paid a social visit to Judge Rittenband in his chambers during Petitioner's trial and Judge Rittenband was "irritated by Chier's presence as Petitioner's co-counsel and had arranged things so that Mr. Chier would keep his mouth shut during the proceedings." ECF No. 10, Ex. 106. Wager did not respond to the statements at that time, but informed Chier shortly thereafter.

Even if Wager's statements are true,[57] the declaration fails to set forth any

[57]Notably, Wager waited until Judge Rittenband passed away to make his sworn accusations.

specific facts that actually show or establish the judge's rulings or remarks about Chier stemmed from his personal dislike for Chier as opposed to facts or events that occurred during Petitioner's trial.

Petitioner also identifies numerous instances in the record he alleges demonstrates Judge Rittenband's bias toward Chier, including that Petitioner argues that Barens and the prosecutor could ask certain questions but Chier could not. Petitioner goes on to argue there was no justification in Chier's in-court conduct for Judge Rittenband's conduct toward Chier.

The record belies Petitioner's position. To the extent Judge Rittenband formed a negative opinion about Chier, it was because of Chier's stubbornly defiant behavior throughout the proceedings rather than any preconceived bias or prejudice. For instance, it was not the Judge Rittenband's prior dislike of Chier, but a gratuitous sarcastic statement by Chier that triggered a sharp response by Judge Rittenband before voir dire began. *See* Section F.2 Even so, Chier continued to participate without incident in the discussions about hardship and voir dire, even in Barens' absence. (RT at 67, 44-196.)

Petitioner's claim that "record facts" demonstrate extra-judicial-source bias is without merit. First, Petitioner's claim that Judge Rittenband expressed the desire to violently assault Chier mischaracterizes the record. Judge Rittenband ejected Chier from the courtroom because of Chier's disruptive behavior. The eviction occurred outside the presence of the jury and did not prejudice Petitioner because his other counsel remained in the courtroom. Second, the limitation on Chier only limited Chier to presenting witnesses at the guilt phase of trial. When given the opportunity to examine witnesses at the penalty phase, Chier cross-examined only 5 of the prosecution witnesses and presented the direct testimony of only 3 of the 11 defense witnesses. Third, as the Court of Appeal noted, the record reflects that much of Judge Rittenband's conduct toward co-counsel Chier was instigated by Chier's discourteous, disrespectful and provocative behavior. ECF

No. 5, Ex. A at 182-83.

The record demonstrates that many of the judge's most caustic remarks were triggered by Chier's inappropriate behavior. For instance, Petitioner challenges the trial court's conduct during a hearing in which attorneys representing CBS and ABC were discussing procedures for recording Karny's testimony. Chier's laughter was so loud the court reporter could not hear the proceedings. Judge Rittenband ordered Chier out of the courtroom for interrupting the proceedings (RT 10330-34), yet Petitioner cites this example as evidence of bias on the part of Judge Rittenband. Another example occurred when Judge Rittenband had to expressly request that Chier refrain from talking to Barens while he was doing so (*e.g.* RT 5613-14, 6024), and Chier repeatedly violated this request (*e.g.* RT at 5291, 5613, 7084.)

In most instances, Judge Rittenband's responses were provoked by Chier's inappropriate conduct in court, were not directed at Petitioner, and did not prejudice him, as they occurred outside the jury's presence. The record conclusively show that Judge Rittenband's opinions and remarks were derived from facts introduced, or events occurring in the course of Petitioner's criminal proceedings; therefore, they cannot form the basis for a finding of bias or prejudice from an extrajudicial source. The record establishes that Judge Rittenband's order limiting Chier's role was based upon his reasonable concerns about the manner in which Chier was conducting the *Hovey* voir dire. Under the circumstances, Judge Rittenband's limiting order and related remarks constitute ordinary courtroom administrative efforts. The record also shows the judge's disagreements with Chier and hostile remarks derived from Chier's in-court behavior,[58] which included what

[58]In one instance, Chier interposed an objection and when the court called him on it, Chier said, "You are a judge. You stop talking to me this way." (RT at 12027.) Judge Rittenband had Chier removed from the courtroom for his insolence,

the Court of Appeal reasonably characterized as Chier's "abrasive and contentious demeanor, his interruption of discussions between the court and Barens," his filing of what the judge perceived as "frivolous motions vilifying the court," and his violations of the court's order against speaking to the press. ECF No. 5 at 184, n. 83.

Finally, the majority of the contested remarks were not made in the presence of the jurors that ultimately served on the trial. In fact, the overwhelming majority of complained-of remarks by the trial court during the trial were made in chambers or bench conferences, outside of the jury's presence. As such, Petitioner cannot show that he was prejudiced or that the proceedings were fundamentally unfair. Petitioner has failed to demonstrate that Judge Rittenband's conduct toward Chier was significantly adverse and fundamentally unfair as to warrant habeas relief.

2-2 Pro-Partisanship and Open Bias against Defense Counsel

Petitioner argues that Judge Rittenband was bias against him and his counsel prior to his trial and acted as an advocate for the prosecution during the trial. On direct appeal, the Court of Appeal found that although the trial court's involvement in the trial and its questioning of witnesses was "unnecessary and harmless, when compared with the totality of the evidence elicited through the professional and thoroughly competent manner in which the case was handled by the deputy district attorney," they did not interfere with the jury's proper fact finding process, and there was nothing in the record to suggest the judge was biased or prejudiced against Petitioner. ECF No. 5, Ex. A at 186-187.

Petitioner principally claims certain remarks and actions of the judge showed he held a pro-prosecution, anti-defense bias against both of his counsel (Barens and Chier). More specifically, Petitioner alleges the trial record shows the

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Barens objected and then proceeded with the examination, and Chier was permitted to return a short time later. (RT at 12027-29; 12048.).

judge admitted his bias by: "[s]tat[ing] he was convinced of Petitioner's and Pittman's guilt[;]" "remark[ing] he would take the testimony of any member of the Roberts family 'with a grain of salt[;]'" "upbraiding the prosecutor for not being aggressive enough[;]" "admitting during the defense case that all of his interventions during the trial had been for the purpose of enhancing the State's case;" and "loathing Chier." ECF No. 190 at 39.

Petitioner also claims that Judge Rittenband "out prosecut[ed] the Prosecutor" by distributing to each juror a copy of the "To Do" list. With respect to this claim, the Court of Appeal found that the court's distribution of the "To Do" lists to the jury "violated no rules, did not show bias . . . and no prejudice resulted." ECF No. 5, Ex. A at 105.

The parts of the record Petitioner cites in support of these allegations reveal Petitioner's allegations are frivolous because the judge never made the alleged admissions. Rather, the cited portions of the record expose Petitioner's allegations as being conclusory, misconstruing the record, or taking the judge's remarks or rulings out of context. For example, as for Petitioner's allegation that the judge admitted "[s]tat[ing] he was convinced of Petitioner's and Pittman's guilt[,]" the cited portions of the record actually disclose the judge's remarks consisted of, among other things, noting both cases involved the same murder (RT 53), recalling the evidence in the Pittman case showed that, after Petitioner admitted killing Levin to his inner circle of BBC members, Petitioner told them to keep quiet or the same thing might happen to them (RT 497-8), referring to Levin as the "decedent" on two occasions but promptly apologizing and referring to Levin as "the missing person," (RT 7451, 10524), and recalling Karny testified about the reason he sought immunity after seeing a police report for the Eslaminia murder. (RT 11308.)

Likewise, the record establishes Petitioner's allegation that the judge prejudged the Roberts family is taken out of context in that Petitioner fails to mention the record shows the judge stated he would consider statements given by

the police officers and the Roberts family with a "grain of salt," expressly emphasizing he did not "want to prejudge anything." (RT at 5588.) Petitioner's examples are insufficient to demonstrate a pro-prosecution bias.

The judge's challenged words and actions were wholly based upon facts introduced or events that occurred in the course of the Petitioner or related Pittman proceedings, and do not constitute grounds for bias or prejudice because they fail to display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Liteky*, 510 U.S. at 555.

Petitioner alleges other evidence to show that the judge admitted his bias by telling Barens (in a purported off-the-record conversation before the State rested in the guilt phase) that "he hoped Petitioner would receive the death penalty." ECF No. 360 at 39. However, as Respondent correctly observes, this claim was not raised in the state courts and, even if it was, this other evidence is inadmissible, unreliable hearsay evidence consisting of a 1995 statement made by a defense investigator named C. Cohen, (ECF No. 10, Ex. 107), who simply describes the content of a 1987 handwritten note he cannot even recall making and ostensibly jotted to himself. In this regard, Respondent's request to strike this evidence pursuant to Fed. R. Evid. 602, 802, and 1101 is granted.

As part of this claim, Petitioner further alleges "[t]he judge conducted himself throughout the trial as an advocate for the prosecution." His examples, however, do not establish that he is entitled to relief; rather his claims based upon these "factual allegations" are conclusory, misconstrue the record, or take the record out of context. The instances include situations where (1) the court properly made a statement to the jury out of concern that defense counsel had insinuated that the court's questions were improper (RT at 9826-27); (2) the court issued a neutral, clarifying question, followed by colloquy with counsel (RT at 11209-10); (3) the court cautioned the prosecutor of suggesting answers (not Barens as Petitioner alleges) (RT at 12250); (4) the court properly responded to Barens'

speaking objection during the court's questioning of Jesus Lopez (RT at 12274); (5) the court's statement that Brooke Roberts appeared to have been coached was made out of the jury's presence (and not prejudicial to the jury) (RT at 11527-28); and (6) the court properly asking a clarifying question to a bank employee regarding dates. (RT at 7005.) *See Duckett*, 67 F.3d at 741 (holding that the trial judge acted properly to clarify the evidence for the jury, notwithstanding the fact that his questions may have permitted a witness to emphasize testimony helpful to the prosecution, or elicit answers detrimental to the defense).

Finally, Petitioner suggests th4at Judge Rittenband's treatment of witnesses was a factor in Petitioner not testifying. The record is clear that Petitioner waived his right to testify, and the testimony at the evidentiary hearing indicates there were multiple reasons why Petitioner did not testify, including Petitioner's performance during a practice cross-examination and counsel's concern that he would come across to the jury as a liar and a con man. (EHRT at 1239, 1267-68.) Petitioner's contention that he did not testify because of Judge Rittenband is not credible.

Petitioner has failed to demonstrate that Judge Rittenband's conduct was significantly adverse and fundamentally unfair as to warrant habeas relief.

2-3 Judicial Interference with the Defense Function

Petitioner provided nine instances in which he believed Judge Rittenband engaged in judicial interference: (1) giving the ultimatum given to Barens; (2) refusing to permit Chier to present any part of Petitioner's defense; (3) refusing to recognize Chier's advocacy on legal matters;(4) suppressing communication through Petitioner's attorneys (5); threatening contempt and using intimidation and humiliation tactics; (6) ejecting Chier from the Robinson-sighting proceedings; (7) cutting-off funds to the defense; "red-lining" Chier's bills and reducing Chier's

pay; (8) ejecting the defense law clerk from the courtroom;[59] and (9) disparaging and slandering Chier and Barens.

Petitioner has cited these same instances in connection with various other claims of constitutional violations, and the Court has addressed Petitioner's claims with respect to these instances in various sections throughout this Order.[60] Habeas relief is not warranted because Petitioner has not shown that Judge Rittenband's conduct was significantly adverse to warrant the conclusion that fundamental fairness was denied.

3. Violations of Fifth and Fourteen Amendment Right to Due Process[61]

3-1 Procedural Due Process - Limitation on counsel

Petitioner presents a procedural due process claim relating to the trial court's order limiting Chier's co-counsel role. Petitioner argues that the trial court refused

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[59]Judge Rittenband excluded a law student/defense law clerk from the courtroom because "he had violated a restraining order by making disparaging remarks about the judge to a woman who appeared to be a member of the press." The Court of Appeal found that, though a lesser remedial measure might have sufficed, it resulted in no denial of Petitioner's right to a public trial, and any error was harmless beyond a reasonable doubt." ECF No. 5, Ex. A at 176.

[60]Petitioner restates the following claims: Grounds 1-1(C); 1-1.23e; 1-3; 1-3(2); 1-3.2; 1-4; 2-1(B4.3); (B5); (B9); (B9.2)(in part); (B9.3); (B9.4) and (B9.5); 2-1(C1-C2); 2-2(B3); and 2-2(B8.5).

[61]The following claims were dismissed by Judge Stotler: 3-6 (Prosecutorial misconduct related to paradox-philosophy); 3-7 (Failure to instruct on the *animus-Furandi* element of robbery; 3-8 (Failure to instruct the jury on robbery allegations re: void instrument); 3-9 (Lack of sufficient evidence of robbery conviction); 3-10 (defects in the accusatory pleading). ECF No. 230.

to explain, hear objections, or allow an evidentiary hearing on its decision to limit Chier's role.

On direct appeal, the Court of Appeal noted that "defendant was fully aware of the basis upon which his attorneys were appointed to represent him and the compensation they were to receive well before the evidentiary phase of the trial began." ECF No. 5, Ex. A at 172. It concluded that Petitioner failed to meet his burden of showing that his presence was necessary, beneficial or useful to the proceedings. *Id.*

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Here, the record demonstrates that Judge Rittenband gave Petitioner the opportunity to challenge its disputed limitation order on at least two separate occasions: (1) the January 29, 1987 hearing, and (2) the March 16, 1987 hearing on Petitioner's Motion to Allow Both Counsel Deliver Closing Argument. Petitioner was allowed to file written motions that gave him an opportunity to make objections and arguments with respect to Judge Rittenband's limitation order. Judge Rittenband held hearings on both motions, and provided explanations for its rulings on the record at the corresponding hearings.

The record shows that no party requested an evidentiary hearing on the court's limitation order. During the March 17, 1987 hearing, the record shows that Chier made an impromptu oral motion for another hearing to the extent the trial court's limitation order was based upon a finding that he was ineffective or inadequate. The trial court denied Chier's request after explaining it did not want to have any further hearing and inviting Chier to appeal. As the Court of Appeal correctly observes in its opinion, Petitioner further challenged the trial court's limitation order by filing emergency petitions with the Court of Appeal and California Supreme Court, which were denied.

Here, the record demonstrates that Petitioner was given the procedural

process that he was due. He is not entitled to any federal habeas relief on this claim.

3-2 Introduction of Irrelevant Information Related to Other Murder Case

Petitioner argues his due process rights were violated by the introduction of irrelevant information related to the Eslaminia murder case then pending against him.

The California Court of Appeal made the following findings with regard to Petitioner's claim that his federal due process rights were violated by the admission of evidence that showed Petitioner and Karny were co-defendatns in the Eslaminia murder case, which Petitioner asserts was irrelevant.

> Defendant, Pittman, Dosti and BBC member, Reza Eslaminia, were charged with the kidnapping and death of Eslaminia's father in Northern California. Karny's grant of immunity encompassed both the Levin and Eslaminia cases. Defendant moved for an order allowing him to impeach Karny with evidence that he had received immunity in the Eslaminia homicide but excluding evidence that Defendant was also charged in the Eslaminia case on the ground that "other crimes evidence," is inadmissible under Evidence Code sections 1101, subdivision (b) and 352.
>
> The prosecution vigorously opposed admission of the Eslaminia immunity agreement unless the jury learned that Karny's immunity involved testifying against Hunt in that case as well. It feared that if the jury was led to believe that Karny was involved in a homicide not involving [Hunt], it would infer that Karny acted independently of [Hunt] in this case and murdered Levin himself. This implication was contrary to the prosecution's case which was based upon evidence that [Hunt] was the leader of the BBC and that Karny and the other members acted only under [Hunt's] direction and influence.[62]
>
> [62]During the penalty phase, Karny testified members of the BBC concocted a plan to kidnap Eslaminia's father to force him to turn over his fortune, estimated at $30 million, and then to kill him. Karny testified that Defendant coordinated all of the details of the plan and volunteered to be the "master of torture" because he did not believe the others had the emotional constitution to handle the type of torture which would be necessary to force Eslaminia to part with his fortune. Eslaminia suffocated to death in [the] trunk being used to transport him from northern to southern California.
>
> The court ruled that if the defense chose to cross-examine Karny about his grant of immunity in the Eslaminia case, the prosecution could ask Karny on redirect examination who the parties

> in that case were and their relationships. However, the prosecution was precluded from going into the facts of the Eslaminia case.
>
> ***
>
> Notwithstanding the court's ruling, defendant chose to thoroughly cross-examine Karny regarding his immunity in the Eslaminia case. That the jury learned that defendant also was a defendant in that case was not an abuse of discretion.

ECF No. 5, Ex. A at 110-111.

"Under AEDPA, even clearly erroneous admissions of evidence that render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not forbidden by 'clearly established Federal law,' as laid out by the Supreme Court." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). "The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process." *Id.* at 1101. "Although the Court has been clear that a writ should issue when constitutional errors have rendered the trial fundamentally unfair, it has not yet made a clear ruling that admission of irrelevant or overly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Id*. (citations omitted). Consequently, in the absence of any Supreme Court precedent, a state court's rejection of a federal due process claim challenging the admission of irrelevant or overly prejudicial evidence does not constitute an unreasonable application of clearly established Federal law that would warrant relief under § 2254(d)1). *Id.* (*citing Carey v. Musladin,* 549 U.S. 70, 77 (2006)).

Further, under Ninth Circuit precedent, the erroneous admission of evidence violates due process "[o]nly if there are *no* permissible inferences the jury may draw" from it. *Jammal v. Van de Kamp,* 926 F.2d 918, 920 (9th Cir. 1991) (emphasis in original). It is also clearly established that evidentiary errors are subject to harmless error review set forth in *Brecht*, which forbids a grant of habeas relief for a trial-type error unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 736-38.

The Court of Appeal concluded that the evidence was admissible to rebut the improper inference which the prosecution correctly feared would flow from a redacted immunity agreement. ECF No. 5, Ex. A at 112. The Court of Appeal found that the trial court properly balanced the relevant and prejudice to both sides and issued a ruling consistent with the rules of evidence. *Id.* It also noted that the jury was instructed that the evidence that Petitioner was charged with murder in the San Mateo County was received for the limited purpose of providing a complete record of the immunity agreement and could not be considered for any other purpose. *Id.*

Petitioner has not shown the Court of Appeal's decision was contrary to, or an unreasonable application of, clearly established Federal law that would warrant relief. The trial court's decision that evidence that Petitioner was involved in the Eslaminia murder was relevant and permissible to rebut Petitioner's attempt to convey the false, misleading inference that Karny received immunity for a separate, unrelated murder that did not involve Petitioner was reasonable. There was no due process violation because the trial court gave an appropriate limiting instruction. *Boyde v. Brown*, 404 F.3d 1159, 1173 (9th Cir. 2005). Moreover, even if the admission of the evidence was erroneous, Petitioner has failed to show that this evidence had a "substantial and injurious effect or influence in determining the jury's verdict," especially in light of the overwhelming evidence of guilt. *Brecht*, 507 U.S. at 736-38.

The Court of Appeal's decision was also a reasonable determination of the facts. After the trial court ruling, Petitioner's counsel thoroughly cross-examined Karny, getting Karny to admit that, in exchange for his testimony in both the Levin and Eslaminia murder cases, he had been given immunity from prosecution for both murders and assistance in his application to the California bar.

3-3 <u>Introduction of Irrelevant Bad-Character Evidence Regarding Petitioner and co-Defendant Pittman</u>.

Petitioner argues his due process rights were violated when irrelevant bad character evidence regarding Petitioner and his co-Defendant Pittman was introduced to the jury.

The Court of Appeal rejected Petitioner's claims of evidentiary errors with respect to the following evidence, finding that few of Petitioner's claims had merit, and where errors occurred, they were harmless:[62]

> (1) Tom May's testimony about Petitioner's history of telling lies[63] was relevant to explain why May did not initially believe Petitioner or go to the police when Petitioner told May that he killed Levin a week before the June 24, 1984 BBC meeting, and that "[t]he evidence buttressed rather than prejudiced the defense assertion that defendant's multiple confessions to Levin's murder was a hoax or just another one of defendant's "stories";[64]
>
> (2) evidence of Pittman's possession of two books explaining how to commit murder was relevant to show Pittman had the knowledge and ability to kill another human being and it corroborated testimony that Petitioner admitted Pittman was the shooter;[65]
>
> (3) Pittman's possession of a number of guns was relevant and admissible under state law to show these guns could have been used in Levin's murder;[66]
>
> (4) Petitioner's claim that Pittman was exhibited to the jury in jail "blues" was not established by the record and, even if true, was not prejudicial because the defense argued "Pittman was in custody awaiting trial" during closing argument, Pittman was exhibited for identification purposes and to corroborate testimony given by a Plaza Hotel employee (that Pittman had the power and strength to break through the door of his room to retrieve his luggage when his fraud was discovered and that it took five security guards to prevent

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[62]ECF No. 5, Ex. A at 82.

[63]May testified he initially believed Petitioner was lying about murdering Levin because Petitioner had previously told May other childhood stories that seemed unbelievable; for example, May testified Petitioner had told him a fortune teller had told him he was evil, that he used to torture and kill cats in his neighborhood, and that he killed a couple of Mexicans who attacked him one day when he was walking home school. *Id.* at 88.

[64]*Id.*

[65]*Id.* at 91.

[66]*Id.* at 92.

Pittman's escape from the hotel, which itself was "consciousness of guilt" evidence that was relevant to rebutting the defense assertion that Pittman was in New York using Levin's credit cards with Levin's permission), Pittman did not testify, and his brief exhibition was not in a context that would inflame the jury (who was also instructed not to consider whether other persons were being prosecuted for Levin's murder);[67]

(5) paradox philosophy evidence was relevant and admissible to show Petitioner's state of mind and to explain his acts and conduct, and it was also relevant for a host of other reasons (to explain how the BBC functioned, who was selected to attend the June 24 meeting and Petitioner's confession to the members, the role of other BBC members in the murder and its aftermath, and it was even helpful to the defense view that Petitioner's June 24 confession was a story to hold the BBC together rather than the truth);[68] and

(6) evidence of Petitioner's improper and fraudulent financial dealings was relevant to prove Petitioner's increasing debts and shrinking financial support had reached crisis proportion and that only the infusion of huge sums of money could alleviate the crisis, which provided Petitioner with a motive to kill Levin.[69]

Because the Supreme Court has never squarely addressed the question of whether the admission of irrelevant or overly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ, the state court's rejection of this claim is not contrary to, or an unreasonable application of Supreme Court precedent. *Holley*, 568 F.3d at 1101. Further, to the extent that Petitioner is alleging that the challenged evidence constitutes improper propensity evidence, no Supreme Court precedent has held that the introduction of prior bad act evidence to show criminal propensity violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991) ("we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."); *see also Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008) (rejecting habeas petitioner's challenge to the introduction of propensity evidence, where petitioner could point to no Supreme Court precedent

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[67] *Id.* at 94-95.

[68] *Id.* at 97-100.

[69] *Id.* at 102-105.

establishing the introduction of otherwise relevant propensity evidence violated the Constitution).

3-4 Lack of Unanimity Instruction on Robbery Allegation

Petitioner alleges that his due process rights were violated when the jury was not given an unanimity instruction on the robbery allegation because the jury could have found Petitioner guilty of robbery based on the taking of the $1.5 million check from Levin, or upon taking Levin's credit cards.

On direct appeal, the California Court of Appeal rejected this argument, finding that "[f]rom opening statement to closing argument, the prosecution relied on only one act–the forcible taking of the $1.5 million check, as the basis of the robbery charge." ECF No. 5, Ex. A at 165.

"The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Walker v. Endell*, 850 F.2d 470, 475 (9th Cir. 1987) (*citing Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The omission of an instruction is less likely to be prejudicial than a misstatement of the law. *Id.* Even if the omission may have been erroneous, Petitioner is not entitled to federal habeas relief unless "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147.

In making its ruling, the Court of Appeal stated: "Our search of the transcript reveals no instance in which the prosecutor argued or that the defendant believed that, in the alternative, the taking of Levin's credit cards also could be construed as the basis of the robbery charge." ECF No. 5, Ex. A at 165. Petitioner has not cited to any portion of the record that contradicts this conclusion. As such, Petitioner has not met his burden of showing that the state court's decision was an unreasonable application of the facts, or an unreasonable determination of Federal law.

3-5 DA's summation of Failure to Present Evidence of Arizona Search

Petitioner argues his due process rights were violated by the prosecutor's summation about Petitioner's failure to present evidence of a search for Levin in Arizona.

During his summation, the prosecution stated:

> Now, you have also heard throughout the trial, the notion that cases are not prosecuted in secret and that Carmen was told in Tucson, that when we get this information which we now had November 22nd, it would have to be immediately disclosed to the defense in this case, which it was. The next week, the 22nd being a Saturday, it was disclosed.
>
> So now, put yourself in Joe Hunt's position and in Arthur Barens' position. You are innocent of a crime you didn't commit. No murder ever happened and now, you are presented with evidence that says that the man you are alleged to have killed is in fact, alive in Tucson, Arizona. You are given that information on the 24th or the 25th of November of 1986. What is your first reaction? What do you do? What is the very first thing that you are going to do?
>
> You hot-foot it down to Tucson, Arizona with as much manpower as you can muster. You send people all over the city and you find this guy. You didn't kill him and somebody says that he is alive. You are going to get to Tucson immediately.
>
> You are going to put fliers all over the city. You are going to take out ads in the paper. You are going to put things on television.
>
> It is a life or death situation. Have you seen this man? We have to find this man. It is life or death. My life depends upon it.
>
> Do you see a word of that? Nothing. Not one finger was lifted? Not only that, they made a big point in saying that they didn't talk to these people until March sometime. That is unheard of.
>
> If you were charged with a crime that you didn't commit, that never occurred, what would you do? You would go there and you would find this guy, whatever it took. You would find him.
>
> We tried to find him. We go to classic car places, wouldn't they?
>
> Wouldn't they go to gay bars? Wouldn't they talk to people in the gay community? Wouldn't they put fliers up at the University of Arizona, across the street from the gas station?
>
> Did they lift one finger? No. They want to come in here and say, well, somebody saw an Esquire Magazine and says that it is it. Don't cross-examine her. That is enough. It doesn't make any sense. It doesn't make any sense at all.
>
> And if there were any more room, I would put that in big red letters on the bottom of that chart that says, "Joe Hunt's Consciousness of Guilt," right after the big thing on the bottom that says what Joe Hunt did when he saw these seven pages that Detective Zoeller showed him.

(RT 13032-13034.)

* * * * *

> There are things that Mr. Barens didn't say in his argument. We talked a few days ago about things Mr. Hunt did as far as his consciousness of guilt.
>
> And there is no place on there left to write in big, big, red letters, "Not sending anyone to Arizona to find the man who is alive" that he is charged with killing.
>
> We should put it in big red letters across the thing. But i[t] offends my sense of order.

(RT 13114.)

On direct appeal, the California Court of Appeal found these comments neither improper nor a violation of *Griffin* because the prosecutor's remarks were not directed at Petitioner's failure to testify. ECF No. 5, Ex. A at 139-140. Rather, it concluded the comments were proper because, to the extent Petitioner cross-examined prosecution witnesses and called defense witnesses to provide an alternative explanation for incriminating evidence, the prosecutor was permitted to comment on Petitioner's failure to present other evidence that showed or explained his abject failure to follow up on the Levin's Arizona sighting if Petitioner truly believed Levin was still alive, like the defense argued. *Id.* at 140-41.

The United States Supreme Court has long asserted "that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Further, on federal habeas review, it is clearly established that, in evaluating a prosecutorial misconduct claim directed at a prosecutor's comments in closing argument, "it 'is not enough that the prosecutors' remarks were undesirable or even universally condemned[;]'" rather, "the relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).Thus, "the first issue is whether the prosecutor's remarks were improper and, if so, whether they infected the trial with unfairness." *Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005).

Further, in determining whether a prosecutor's challenged comment rendered a defendant's trial constitutionally unfair, *Darden* provides federal habeas courts several factors to consider, including: (1) whether the comment was responsive to earlier defense arguments; (2) whether the prosecutor's comment manipulated or misstated the evidence; (3) whether the comment implicated other specific rights of the accused such as the right to counsel or the right to remain silent; (4) whether the trial court instructed the jury that their decision was to be made on the basis of the evidence alone and the arguments of counsel were not evidence; and (5) the weight of the evidence against the defendant. *Darden*, 477 U.S. at 181-82.

The *Darden* Court held the prosecutors' challenged remarks did not deny the defendant a fundamentally fair trial because the evidence showed the prosecutor did not manipulate or misstate any evidence; the challenged comments did not implicate the defendant's other constitutional rights; many of the remarks were responsive to comments made by the defense; the jurors were instructed their decision "was to be made on the basis of the evidence alone" and "the arguments of counsel were not evidence[;]" strong evidence of the defendant's guilt had been presented during the trial; and defense counsel turned many of the prosecutors' remarks against them in defense counsel's rebuttal. *Id.* at 181-82.

Likewise, here, the prosecutor's challenged remarks were not improper, and did not deprive Petitioner of a fair trial because: (1) the remarks were made in the prosecutor's closing rebuttal and responsive to aspects of Barens' closing argument[70]; (2) the remarks occupy less than two and one-half pages of the 66 pages covering the prosecutor's closing rebuttal, which occurred on two days (April 15 and 16, 1987) of the three-month guilt phase of the trial, in which 60

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[70]*Compare* RT 12822-13014 (Barens' closing argument) *and* RT 13015-13081 (the prosecutor's rebuttal)).

witnesses testified for the People; (2) the remarks did not manipulate or misstate the evidence; (3) contrary to Petitioner's assertion, the remarks did not violate *Griffin* because the remarks were directed at the failure of the defense to provide an explanation for certain evidence, not Petitioner's failure to testify; (4) the trial court gave the jury both oral and written appropriate curative instructions (e.g., the statements of counsel were not evidence (RT at 13197), a defendant has a constitutional right not to testify and that no inferences could be drawn from the fact the defendant did not testify (RT at 13208), and their decision was to be made solely on the basis of the evidence received and the court's instructions (RT at 13222)); and (5) the overwhelming evidence of Petitioner's guilt, which as previously discussed included evidence of his multiple express admissions of killing Levin that were corroborated by evidence of his motive, actions and conduct.

Petitioner has not shown that the state courts' rejection of this claim was not contrary to, or an unreasonable application of, Supreme Court precedent, or that it was based upon a reasonable determination of the facts for the following reasons. The Court finds these factors were more than sufficient to establish that the challenged remarks were not improper and did not violate Petitioner's right to a fair trial. *See Darden*, 477 U.S. at 181-82.

4. Juror Misconduct - Distribution of Recipe

Petitioner argues that shortly after the trial judge distributed a copy of the 7-page "to do" list to the jury, Juror Linda P. Mickell distributed to all jurors a document she called "Recipe of the Week," which Petitioner maintains reflected a belief that he was a financial swindler with whom association could be fatal.[71]

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[71]The text of the "recipe" is as follows:

Recipe of the Week.:
Stir Fried Inverted Butterflies
(Also known as Mu Shu Porkbellies or Commodity Chop Suey)

1. Invert a butterfly in frying pan.
2. Add some diced porkbellies and Swiss frankfurters.

Defense made a motion for mistrial and a motion for new trial in response to the Recipe, but both were denied.

The California Court of Appeal found that the distribution of the recipe by a juror to other jurors well before the case was submitted for jury deliberations did not reflect a bias against Petitioner. ECF No. 5, Ex. A at 78. It found that the recipe was not the type of matter which is inherently prejudicial and its circulation among the jurors did not expose them to information that was not part of the trial record. Nor did the distribution of the recipe violate the juror's oath. *Id.* at 79. Ultimately, the Court of Appeal concluded there was not a "strong possibility" that the misconduct was prejudicial or that Petitioner suffered "actual harm." *Id.* at 80.

Under the Sixth Amendment, Petitioner has a federal constitutional right to an impartial jury in which the jury verdict is based on evidence produced at trial. *Turner v. Louisiana* 479 U.S. 466, 472-73 (1965). On habeas review, Petitioner is entitled to habeas relief only if it can be established that the alleged trial error had a substantial and injurious effect or influence on the jury's verdict. *Brecht*, 507 U.S. at 637. The potential for prejudice is heightened when a juror interjects into the deliberations "objective extrinsic facts" regarding the accused because that juror becomes an unsworn witness who is not subject to either confrontation or cross-examination. *Mancuso v. Olivarez*, 292 F.3d 939, 950 (9th Cir. 2002) (citation omitted).

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3. Simmer over low heat for 10 minutes.
4. A little margin <u>may</u> be called for to prevent shrinkage.
5. Add 1 can Hunt's tomato sauce and generous amounts of spice.
6. Simmer over low heat for an additional hour.

This dish may be served over rice, over noodles, or over the counter.
It is best prepared ahead of time - it is a futures dish.
Serves 4-6 financially secure people who want to gain.
(Low in calories and nutritional value - it is not advised for people with a <u>faint</u> of heart condition).

L.P.M

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Petitioner has not shown the Court of Appeal's ruling was an unreasonable determination of the facts or an unreasonable application of Federal law. Here, the recipe was not "objective extrinsic facts" that was presented to the jury for its deliberation. Also, Petitioner has failed to show the juror's actions in distributing the recipe had a substantial and injurious effect on the jury's verdict.

5. **Violation of Confrontation Rights By Refusal to Give Defense Access to Karny's State Bar File (Ground 5)**

Petitioner argues his right to confrontation under the Fifth, Sixth, and Fourteenth Amendment was violated by the trial judge's refusal to give the defense access to Karny's state bar file.

In reviewing this claim on direct appeal, the California Court of Appeal presented the following facts:

> The defense served a subpoena duces tecum upon the State Bar of California seeking any documents relating to Karny which could lead to Karny's impeachment or which tended to show a bias, interest or motive on his part to give false testimony against defendant. The State Bar turned over two of its files which contained matters already made public but claims its remaining five files were confidential and privileged.

ECF No. 5, Ex. A at 148.

The Court of Appeal conducted its own *in camera* review of files 3 through 6.[72] *Id.* It found the vast majority of the information contained in these files was

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[72]File 7 was not transmitted to either the LAC Habeas Court or the Court of Appeal and the State Bar withheld it pursuant to the attorney-client privilege because it contained confidential communications between the State Bar's attorney and the State Bar's Subcommittee on Moral Character and its Committee of Bar Examiners. On appeal, neither Petitioner nor the State argued Petitioner's right to discovery outweighed the State's attorney-client privilege. Accordingly, the Court of Appeal found that the trial court did not abuse its discretion in refusing to grant Petitioner's request for information contained in file 7. ECF No. 5, Ex. A at 156-157.

acquired in confidence and therefore was properly withheld pursuant to the official information privilege, attorney-client privilege, or attorney-work product doctrine. *Id.* at 149-157. In contrast, it found Karny's verified bar applications in file 4 contained information about Karny's past residences and employment history that was subject to "a lower degree of confidentiality." *Id.* at 152.

During Petitioner's trial, Karny testified about his relationships with certain BBC entities, and that he resided in two apartments with Petitioner. However, in his verified bar applications, Karny did not disclose his relationship with any BBC entities or list the addresses of the apartments he shared with Petitioner as part of his past residences; the Court of Appeal found the trial court abused its discretion in refusing to disclose the information. *Id.* at 153.

Nevertheless, the Court of Appeal found Petitioner did not sustain any prejudice because:

> [e]vidence that Karny lied to the State Bar in hopes of hiding his involvement with the BBC to gain admission to the State Bar, is unlikely to have altered the jury's view of his credibility. Karny had been exposed to substantial impeachment and the jury was instructed to view his testimony with greater care than the testimony of other witnesses. Cross-examination of Karny regarding false statements on his bar application is unlikely to have persuaded the jury that Karny was not privy to inside information about the BBC as [Petitioner] now suggests on appeal. Karny's close identification with [Petitioner]] and the BBC was corroborated by a number of witnesses including defense witness, Brooke Roberts.

Id. at 153-154.

The state court's rejection of Petitioner's cross-examination claim relating to Karny's State Bar records was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, as set forth in *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). The *Ritchie* case involved circumstances that were conceptually similar to those involved here, where the defendant, like Petitioner, argued the trial court violated his Sixth Amendment right to cross-examine the state's star witness by refusing to give him access to confidential state records, which the state refused to produce pursuant to a state privilege. *Id.*

In that case, the Supreme Court acknowledged "the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Id*. at 51-52. But because "the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination[,]" the *Ritchie* Court held:

> The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. . . . In short, the Confrontation Clause only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."

Ritchie, 480 U.S. at 53 (emphasis in original).

Here, Petitioner has not alleged or shown the trial court prevented Barens from cross-examining Karny and the record shows, during his trial, Petitioner had repeated opportunities to cross-examine Karny without limitation. Further, the trial court actually conducted an *in camera* inspection of Karny's state bar file. Although the Court of Appeal ultimately concluded the trial court abused its discretion under state law in denying Petitioner access to Karny's state bar applications, this state law violation does not warrant federal habeas relief, *see Estelle*, 502 U.S. at 67-68, and Petitioner cannot transform this state law violation into a federal claim by simply labeling it as a Confrontation Clause violation, which still would not warrant any relief in light of *Ritchie*. *See Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997). Moreover, even assuming without finding the trial court's refusal to give Petitioner access to Karny's state bar applications did violate the Sixth Amendment, this trial error was harmless for the reasons found by the Court of Appeal. Finally, presenting this evidence to the jury would not have affected, influenced, or bolstered Petitioner's defense theory of no body–no murder.

6. **Violation of Right to Be Present at Critical Stages of Proceedings (Ground 6)**

Petitioner argues his right to be present at critical stages of the trial under the Fifth, Sixth, and Fourteenth Amendments was violated when he was not present during the meeting in which Barens' appointment was discussed. Specifically, he asserts his absence at the in-chambers conference held on January 15, 1987, where the trial court granted Barens' motion to be appointed counsel, violated his right to be present at critical stages of his trial.

The constitutional right to be present at every "critical stage" of the trial is based upon the Sixth Amendment Confrontation Clause, as well as the Fifth Amendment Due Process Clause, in situations where the defendant is not actually confronting witnesses or evidence against him. *Kentucky v. Stincer*, 482 U.S. 730, 736-748 (1987); *see LaCrosse v. Kernan*, 244 F.3d 702, 707-08 (9th Cir. 2001) (finding the Supreme Court's limitation of right to be present at "critical stages of the trial" clearly shows "a criminal defendant does not have a fundamental right to be present at *all* stages of the trial."). "[A] defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *United States v. Gagnon*, 470 U.S. 522, 526 (1985). But due process does not require the defendant to be present "when presence would be useless, or the benefit but a shadow." *Snyder v. Massachusetts*, 291 U.S. 97, 106-07 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964).

Further, the right to be present during a critical stage of the proceedings is subject to harmless error analysis. *Rushen v. Spain*, 464 U.S. 114, 118 n.2 (1983) (holding a violation of a defendant's due process right to be present at critical stages of trial is subject to harmless error analysis and finding defendant's absence from undisclosed, unrecorded *ex parte* communication between the judge and a juror concerning possible juror impartiality harmless); *United States v. Madrid*,

842 F.2d 1090, 1093 (9th Cir. 1988) (holding *Rushen* firmly establishes that a defendant must demonstrate "actual prejudice" resulting from an *ex parte* contact between judge and a juror to receive a new trial).

On appeal, the Court of Appeal rejected Petitioner's claim because: (1) Petitioner was fully aware of the basis upon which his attorneys were appointed to represent him and the compensation they received well before the evidentiary phase of the trial began; (2) the judge's attitude toward Chier was evident before, during, and after the guilty verdict; yet, Petitioner made it clear that he wished to retain the services of Chier; (3) Barens' representation was competent and did not undermine the functioning of the adversarial process for the reasons previously discussed; (4) Petitioner had failed to meet his burden of showing his presence at the hearing would have been useful, or a benefit to him and his counsel, and that his absence denied him due process; and (5) Petitioner had failed to meet his burden of showing his absence prejudiced his case or denied him a fair and impartial trial. ECF No. 5, Ex. A at 172-173.

Petitioner has not cited, and this court has not found, any United States Supreme Court opinion that squarely holds a hearing on an already-retained defense counsel's motion to become defendant's appointed counsel constitutes a critical stage of a trial requiring a criminal defendant's presence. Further, it does not appear the Supreme Court has ever clearly established that a criminal defendant's absence from an *ex parte* hearing on his retained counsel's motion to become defendant's appointed counsel violates the defendant's right to be present under the Fifth Amendment Due Process Clause or Sixth Amendment Confrontation Clause. Because there is no clearly established Federal law that squarely addresses this issue or provides a categorical answer, the state court's rejection of this claim for the reasons given by the California Court of Appeal was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, and it was based upon a reasonable determination of the facts.

Further, even assuming, without finding, Petitioner had a right to be present, the state court reasonably found Petitioner had failed to show prejudice. Indeed, the record establishes the full terms of the trial court's 1/15/87 order granting Barens' motion for appointment were subsequently disclosed 14 days later during the hearing on Chier's motion for clarification, where all counsel, including Chier, and Petitioner were present. As previously discussed, the record reflects the trial court steadfastly rejected all of Barens' good-faith, vigorous arguments seeking a reconsideration of the trial court's order limiting Chier's co-counsel role, and that Barens succeeded in having the trial court change its order to allow Chier to argue motions to the court outside of the jury's presence. (RT at 6019.) The record also shows the trial court specifically rejected Chier's request that he and Petitioner be heard, thereby establishing neither Petitioner's nor Chier's presence at the January 15 hearing would have made any difference. (RT 6000-6026.)

7. **Violation of Equal Protection by Restrictions of Chier's Role (Ground 7)**

Petitioner alleges his Fourteenth Amendment Right to Equal Protection was violated by the restrictions placed on Chier's role.[73] Petitioner alleges that he was

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[73]Petitioner's opening brief does not show he raised this equal protection claim to the California Court of Appeal, and it does not appear that the Court considered such a claim. Although the caption of his March 1997 Petition for Writ of Habeas Corpus - B110428 reads: Petition for Writ of Habeas Corpus Re: Violation of the Suspension Clause of the California and U.S. Constitutions, Denial of Due Process and Equal Protection, Infringement on Petitioner's Liberty Interest, Judicial Misconduct, Ineffective Assistance of Counsel, and Other Claims of Constitutional Error, Petitioner did not identify a specific claim for equal protection in his briefing.

Thus, his equal protection claim appears to be unexhausted despite

treated differently than other, better funded defendants.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The first step in the equal protection analysis is to identify the state's classification of a protected group and assign the appropriate standard of scrutiny. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). Strict scrutiny is applied to suspect classifications or fundamental rights, such as race, ancestry, privacy, or voting. *Hoffman v. United States*, 767 F.2d 1431, 1434-35 (9th Cir. 1985).

Petitioner has not alleged or shown he is a member of a recognized protected class or group within the meaning of clearly established Federal law construing the Equal Protection Clause. Nor has he demonstrated that the trial court's reason for restricting Chier's role was based upon Petitioner's membership in a recognized protected class, and that the trial court otherwise discriminated against him or others similarly situated within the meaning of the Equal Protection Clause. By failing to make these requisite threshold showings, Petitioner's equal protection

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Respondent's assertion that it appears all of the claims in the FAP that were not dismissed by the court's 6/17/08 Order are exhausted. ECF No. 237 at 2. Although this claim is unexhausted, the Court may still consider and deny it on the merits. *See* § 2254 (b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005) (holding court may deny on the merits an unexhausted claim, but only where "it is perfectly clear" that the claim is "not even a colorable federal claim."). However, this claim will be reviewed *de novo* since it was not adjudicated on the merits by the state courts. *Pirtle v. Morgan*, 313 F.3d at 1160, 1167 (9th Cir. 2002).

claim fails to raise a colorable federal claim, and it also fails to show a real possibility of a constitutional error that would entitle him to any federal habeas relief.

8. **Fifth Amendment (Doyle Error) (Ground 9)**

Petitioner argues his Fifth Amendment right against self-incrimination was infringed upon when the trial judge and the prosecutor committed a *"Doyle"* error. Specifically, he argues that Judge Rittenband's pointed questioning of Detective Zoeller on the subject of Petitioner's questioning of his *Miranda* rights during a custodial interview violated his Fifth Amendment rights and this violation was compounded by the prosecutor's exploitation of the testimony during his closing argument.

On direct appeal, Petitioner argued he was prejudiced because his attorney failed to renew his request for a *Doyle* instruction. The Court of Appeal held that this contention was "totally without merit" because the record demonstrated that at the conclusion of the case, counsel requested a detailed instruction with respect to this issue. ECF No. 5, Ex. A at 71.

Under *Doyle*, a prosecutor cannot seek to impeach a defendant, who testifies at trial, with exculpatory testimony about his post-arrest silence following the issuance of *Miranda* warnings. *See Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976). The rationale for this rule "rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." *See Wainright v. Greenfield*, 474 U.S. 284, 291 (1986). *Doyle* is inapplicable here because Petitioner's *Doyle* claim is not directed at evidence of his silence that was used to impeach him. Indeed, Petitioner was never cross-examined by the prosecution because he never testified in his own defense. Further, the evidence of Petitioner's purported silence that is the focus of his *Doyle* claim came from testimony given by Detective Zoeller, which was elicited on his cross-examination by Petitioner's

counsel.

During the custodial interview, Petitioner waived his constitutional rights and agreed to speak to Detective Zoeller. (RT at 10540-43.) He then became silent during the interview and requested counsel. (RT at 10553-54, 10672, 10716-17.). Neither *Doyle* nor any other Supreme Court precedent has squarely addressed, or categorically answered, the precise question raised here—whether *Doyle's* holding applies where the defendant, not the prosecution, elicits his post-arrest, post-*Miranda* invocation of his right to remain silent by cross-examining a hostile witness rather than the defendant himself. Consequently, § 2254(d)(1) bars relief because the state court's rejection of Petitioner's *Doyle* claim was not contrary to, or an unreasonable application of, clearly established Federal law. *Wright v. Van Patten*, 552 U.S. 120, 123-26 (2008).

Further, to the extent Petitioner appears to claim evidence of his false denial of any knowledge about the seven page "to do" list in response to the detective's question violated his Fifth Amendment right against self-incrimination as construed by *Miranda* and Doyle, Petitioner's claim lacks merit. It is clearly established that, after being properly advised of his or her constitutional rights, an accused person may voluntarily, knowingly and intelligently waive his or her rights and make incriminating statements, and the admission of such incriminating statements does not violate either *Miranda* or *Doyle*. *See Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (holding a defendant may voluntarily, knowingly and intelligently waive constitutional rights); *Anderson v. Charles*, 447 U.S. 404, 408 (1980) (per curiam) (declining to extend *Doyle*, and holding *Miranda* waiver occurred, where the defendant gave a post-arrest, post-*Miranda* statement to police that was inconsistent with his trial testimony; "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent.");

Berghuis v. Thompkins, __ U.S. __, 130 S. Ct. 2250, 2260-64 (2010) (holding a defendant's post-arrest, post-*Miranda* incriminating statement made nearly three hours into his custodial interrogation was admissible, and that defendant voluntarily and knowingly waived his right to remain silent despite being "largely silent" during his interrogation and only offering intermittent answers to the officers' non-coercive questions.) That is what happened here.

Consequently, *Doyle* is inapposite. Further, Petitioner's *Doyle* error claim is directed at one question the trial judge posed to Detective Zoeller after Barens had already elicited the foregoing testimony from the detective. Specifically, the trial judge asked the detective whether he asked Petitioner about any of the items on the seven page "to do" list; the detective responded by stating he never got to that point because, as he had testified earlier, Petitioner stated that he wanted to confer with his attorney after Petitioner lied about not knowing anything about the seven page "to do" list. (RT 10746.) Again, *Doyle* is inapplicable because the testimony had previously been elicited by Petitioner's counsel during his cross-examination of the detective—not the prosecution.

As part of this *Doyle* claim, Petitioner also claims the prosecutor "exploited" Detective Zoeller's testimony during his summation, citing RT 13127 and 13129. However, contrary to Petitioner's assertion, neither these pages nor any other pages of the reporter's transcript show the prosecutor even alluded to the part of the detective's testimony about Petitioner's request to speak with his counsel, let alone exploit this testimony. In his rebuttal closing, the prosecutor did refer to the manner in which Petitioner falsely responded to Detective Zoeller about his lack of knowledge regarding the lists, but he did not comment on Petitioner's subsequent request to confer with his attorney or ensuing silence therefrom. (RT 13119.)

Doyle is also inapplicable because this is not a situation where the detective questioned Petitioner about the seven page "to do" list in a relentless and coercive manner despite Petitioner's repeated and unambiguous refusals to answer the

detective's overbearing questions, and then the prosecutor used Petitioner's incriminating statement or clearly expressed right to remain silent to impeach Petitioner's defense testimony. *See Hurd v. Terhune*, 619 F.3d 1080, 1089 (9th Cir. 2010) (holding *Doyle* error occurred where state court allowed prosecution to impeach defendant's testimony based upon his unambiguous, repeated post-arrest, post-*Miranda* refusals to re-enact his wife's shooting during a coercive custodial interrogation, and prosecution extensively used the defendant's refusals as affirmative evidence of guilt throughout trial). Indeed, as already discussed, the record shows Petitioner voluntarily, knowingly, and intelligently answered the detective's questions about Levin's financial dealings in a coy and confident manner until he was confronted with his seven page "to do" list and asked if he knew anything about the lists, which Petitioner falsely denied after taking several minutes to think about and form his voluntary and knowingly false answer.

Finally, Petitioner is not entitled to relief because a *Doyle* error is a "trial type" error, such that habeas relief may not issue unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 622, 629. In *Brecht*, the Supreme Court held a *Doyle* error was harmless where: (1) the prosecutor's references to the defendant's post-*Miranda* silence were infrequent, comprising less than two pages of the 900-page trial transcript; (2) the errors were immersed with the prosecutor's extensive and permissible references to the defendant's pre-*Miranda* silence; and (3) the errors were immaterial in light of the otherwise "overwhelming "evidence of guilt." *Id.* at 639. The same is true here. Even assuming, without finding, that a *Doyle* error occurred, the record shows the error was harmless because: (1) the references to Zoeller's testimony were immersed with the extensive and permissible references to Petitioner's prior repeated, unequivocal, pre-*Miranda* <u>admissions</u> of killing Levin; (2) the extent of the trial judge's disputed question and the related detective's response represent a very small portion of a very expansive record; (3) the record

fails to show the prosecution expressly and extensively used Petitioner's invocation of his right to remain silent as affirmative evidence of his guilt; and (4) the extent of the other evidence of Petitioner's guilt was overwhelming and included his own, repeated, pre-*Miranda*, express admissions that he killed Levin. The evidence of Petitioner's guilt was so overwhelming that, after hearing testimony from approximately 60 witnesses during the three month guilt phase, the jury took only two days to return a guilty verdict against Petitioner.

Petitioner has not shown the state court's rejection of his *Doyle* error claim was contrary to or an unreasonable application of clearly established Federal law, and that it was based upon an unreasonable determination of the facts. Petitioner is not entitled to habeas relief on this claim.

9. **Fifth Amendment (Griffin Error) (Ground 10)**

Petitioner asserts the prosecutor, in his rebuttal closing argument, violated his Fifth Amendment right against self-incrimination and committed a *Griffin* error by arguing there was no reasonable explanation for certain items of evidence, by commenting upon Barens' failure to explain other items of evidence, and by arguing about the failure of the defense to offer evidence of a search for Levin in Arizona despite the so-called Levin sightings.

The California Court of Appeal concluded that the prosecutor's argument was not a commentary on Petitioner's failure to testify. ECF No. 5, Ex. A at 141. The Court reasoned that comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses does not amount to a *Griffin* error. *Id.*

A prosecutor is forbidden from commenting on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615 (1965); *Hovey v. Ayers*, 458 F.3d 892, 912 (9th Cir. 2006) (holding *Griffin* and Due Process Clause bar a prosecutor from commenting on a defendant's decision not to testify in a state criminal trial). The Ninth Circuit has recognized "[t]he test to determine the existence of a *Griffin*

violation is 'whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify.'" *United States v. Mende*, 43 F.3d 1298, 1301 (9th Cir. 1995)(citation omitted). Under this standard, "'a prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, as long as it is not phrased to call attention to defendant's own failure to testify.'" *United States v. Mayans*, 17 F.3d 1174, 1185 (9th Cir. 1994) ("Thus courts have maintained a distinction between comments about the lack of explanation provided by the defense, and comments about the lack of explanation furnished by the defendant."); *see also Lincoln v. Sunn*, 807 F.2d 805, 810 (9th Cir. 1987) ("Courts have distinguished between those cases in which the defendant is the sole witness who could possibly offer evidence on a particular issue, and those cases in which the information is available from other defense witnesses as well.").

Additionally, a prosecutor may properly reply to the arguments made by the defense, so long as the comment is not manifestly intended to call attention to the defendant's failure to testify, and is not of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify. *United States v. Bagley*, 772 F.2d 482, 494-95 (9th Cir. 1985). Accordingly, where the prosecutor's reference to a defendant's opportunity to testify is a fair response to a claim made by the defense, no *Griffin* error occurs. *United States v. Robinson*, 485 U.S. 25, 32 (1988).

Griffin errors are subject to harmless error review, and "[r]eversal is warranted only "'where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is evidence that could have supported acquittal.'" *Hovey*, 458 F.3d at 911-12 (citations omitted). A *Griffin* error may be deemed harmless even in the absence of a curative instruction. *Id.*

In this case, the prosecutor's comments about the defense's failure to

provide a reasonable explanation for the evidence did not constitute a *Griffin* error. Petitioner has failed to show the prosecutor's disputed remarks were phrased so as to comment on his failure to testify. The record shows the prosecutor's comments constitute permissible comments on the defense's failure to present exculpatory evidence rather than an impermissible comment on Petitioner's failure to testify. Additionally, the challenged comments were not fundamentally unfair because they were reasonable comments about the trial evidence, not misstatements about the burden of proof.

Accordingly, Petitioner's *Griffin* claim has no merit. Petitioner has not shown that the Court of Appeal's rejection of this claim was contrary to, or an unreasonable application of, clearly established Federal law, or based upon an unreasonable determination of the facts.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Petitioner's Fourth Amended Habeas Petition is **DENIED**.

2. Judgment shall be entered in favor of Respondent and against Petitioner.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, provide copies to counsel and Petitioner, and **close the file**.

DATED this 1st day of February, 2013.

s/Robert H. Whaley

ROBERT H. WHALEY
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH HUNT,

Petitioner,

v.

TIM VIRGA, warden,

Respondent.

NO. CV-98-5280-RHW

ORDER DENYING PETITIONER'S MOTION TO VACATE, ALTER, OR AMEND ORDER DENYING HIS FOURTH AMENDED PETITION; MOTION FOR RELIEF FROM JUDGMENT; MOTION FOR AMENDMENT OF FINDINGS AND ADDITION OF FINDINGS

Before the Court are Petitioner's Motion to Vacate, Alter, or Amend Order Denying His Fourth Amended Petition, ECF No. 262; Motion for Relief From Judgment, ECF No. 263, Petitioner's Motion for Amendment of Findings and Addition of Findings, and For Amendment of Judgment in Light thereof, ECF No. 264-1, and Petitioner for Certificate of Appealability, ECF No. 265. A hearing on the motions was held on June 17, 2013, in Los Angeles, California. Petitioner participated telephonically and was represented by Gary Dubcoff. Respondent was represented by Elaine Tumonis.

A.

In his Motion to Vacate, Alter, or Amend Order Denying his Fourth Amended Petition, Petitioner argues, pursuant to Fed. R. Civ. P. 59, that the Court overlooked matters or controlling decisions, which, if it had considered such issues, it would have mandated a different result. Specifically, Petitioner argues the

following:

1. The Court erred in ruling that its consideration of the San Mateo Juror Declarations was barred by Fed. R. Civ. P. 606(b).
2. The Court erred in affording AEDPA deference to the Los Angeles County Habeas Court and the Court of Appeal decisions.

A motion under Rule 59(e) may be granted if: (1) the district court is presented with newly discovered evidence; (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law. *Ybarra v. McDaniel*, 656 F.3d 984, 998 (2011) (citations omitted). Rule 59(e) is an "extraordinary remedy, to be used sparingly in the interest of finality and conservation of judicial resources." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

1. San Mateo Juror Declarations

In its Order Denying Petitioner's Fourth Amended Petition, the Court ruled that Petitioner's attempt to use the juror's declarations in support of his ineffective assistance of counsel claim was improper and barred by Fed. R. Evid. 606(b) and irrelevant and inadmissible under Fed. R. Evid. 401 and 402. The Court has reconsidered this issue and adheres to its prior ruling, but elaborates on the reasons for the ruling in light of its reconsideration.

The Levin trial took place in 1987 in Santa Monica, California. In 1992, Plaintiff represented himself in the defense of the murder of Hedayat Eslaminia, along with help from a lawyer in San Mateo, California. The testimony included evidence that was not presented at the 1987 Santa Monica trial. Many of the allegations of inadequate representation by counsel in the Santa Monica trial are based on evidence that was presented in the 1992 San Mateo trial. The allegation is that the jurors in the San Mateo trial was persuaded by the evidence, and therefore it was ineffective to not have presented the evidence in the Santa Monica trial.

In making his argument, Petitioner relies on Affidavits of jurors signed in

December, 1992 and January, 1993, to show the evidence was persuasive. The Affidavits cover witnesses and evidence that were presented to the LAC Habeas Court in 1996 on the issue of ineffective assistance of counsel. The LAC Habeas Court ruled that it would not consider the juror's declarations. RT, March 29, 1996, p. 11.

The relevance of the Affidavits rest on the San Mateo Juror's opinion that the testimony of a witness should or should not have been believed. That belief is based on a much different record than existed, or could have existed in 1987.

A few examples of the difference in the record before the two juries is instructive. The Affidavit of Juror Sandra Maria Achiro begins with a statement that witness Karny had lied on his bar application and that this evidence impressed the juror in weighing the credibility of Karny. The bar files were subpoenaed by counsel in the 1987 trial, but were found to be confidential by the trial judge and were not available for use in the trial. The California Court of Appeal found the bar application should have been disclosed and the failure to require disclosure was an abuse of discretion. ECF No. 5, Ex. A at 152-53. Obviously, counsel in the Santa Monica trial cannot be blamed for failing to use the file, yet the basis of the opinion of the juror on the credibility of Karny is based on that evidence.

Later in the Affidavit, the juror discusses her opinion of the testimony of Tom May and the persuasive impact on cross-examination of evidence of a movie contract that he had entered into that would motivate him to lie. Judge Czuleger found that counsel had tried to interview May before trial and that May would not talk to him. At trial, Judge Rittenband sustained objections to counsel's attempt to question May about the movie contract. As such, the juror in the San Mateo trial based her opinion on evidence that was not available to counsel or the jury in the Santa Monica trial.

The juror then states, "The most important witness on what happened to Ron Levin was Karen Sue Marmor." ECF No. 11, Ex. 202 at 6. Judge Czuleger also

heard her testimony and found that her testimony was based on "flashbacks," which triggered her memory years after the trial. He concluded that counsel could not be expected to anticipate that flashbacks years later would yield such testimony, and, in fact, found that her testimony "lacks all credibility." ECF No. 5, Ex. B, at 18, 28.

Other examples of the difference in the record that led the jurors to their conclusions are in each affidavit. Some affidavits reference evidence that was not available at the time of the Santa Monica trial, while others reference evidence that was found not to be credible by the LAC Habeas Court. Also, some of the evidence discussed by the jurors was found by Judge Czuleger to have been excluded by counsel for proper tactical reasons.

The Court believes the opinion of the San Mateo jurors is not admissible opinion testimony under any rule of evidence. The opinions of credibility of witnesses is based on a different record with different issues and different participants. The Affidavits reflect opinions that are the opposite of opinions that were reached by a trial judge listening to the same witnesses. The trial judge also had a different record than that considered by both juries.

The Court would have excluded the opinions of the jurors if called as witnesses because the bases of the opinions were not the same and would not be helpful to the fact finder in weighing the effect of the failure to call witnesses or use evidence in the first trial. The problems with the bases of the opinions of the jurors do not just affect the weight to be given the opinions; rather they compel the striking of the opinions.

Accordingly, the Court adheres to its prior order striking the affidavits.

2. AEDPA Deference

Petitioner argues the Court clearly erred in affording AEDPA deference to the 1996 LAC Habeas Court's and the 1998 California Court of Appeals' decisions. After Petitioner filed his federal habeas petition, he returned to the state

courts on February 23, 2000 and filed another state habeas corpus petition with the California Supreme Court. He did so "to obtain confirmation that all of his federal claims had previously been presented to that court and thus had been exhausted." *Hunt v. Pliler*, 384 F.3d 1118, 1121 (9th Cir. 2004). On August 9, 2000, the California Supreme Court denied Petitioner's habeas petitioner by order stating:

> Petition for writ of habeas corpus is DENIED. (*In re Waltreus* (1965) 62 Cal.2d 218, 225, *In re Miller* (1941) 17 Cal.2d 734, 735; *In re Clark* (1993) 5 Cal.4th 750).

Petitioner argues that because the California Supreme Court denied his fourth state habeas petition on procedural grounds, no AEDPA deference should have been accorded to other underlying state court post-trial decisions unrelated to the fourth petition. Petitioner states it was the 2000 denial of his final habeas petition that exhausted his state habeas claims, although this somewhat misstates the record.[1]

In its Motion to Dismiss, Respondent identified thirty-nine new claims presented in the Fourth Amended Petition. Magistrate Judge Nakazato separated these claims into two groups. With respect to the first group of belated new claims, he ruled they should all be dismissed, ECF No. 207 at 16, and Judge Stotler adopted this finding, ECF No. 230 at 8. With respect to the second group of belated new claims, Judge Nakazato dismissed the claims with the exception of Claims 2-1(B9.3(a)-(e), inclusive), 2-1(C12.1-C12.12, inclusive) and Claim 2-1(B13), ECF No. 207 at 8-9. With respect to Claim 2-1(B13), Judge Nakazato

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[1]Petitioner argues that both Magistrate Judge Nakazato and Judge Stotler "ruled, with respondent's concession, that the state supreme court's 2000 order exhausted [his] state habeas claims." ECF No. 262 at 4. In his order Magistrate Judge Nakazato noted that "all of the *new* claims in the FAP were exhausted by way of Hunt's 2000 Petition or *earlier state petitions*–a point Respondent acknowledges in his motion to dismiss." ECF No. 207 at 24. (Emphasis added).

noted this claim was being pled as an operative fact supporting the judicial misconduct claim identified as Ground 2-2. ECF No. 207 at 23.

In its Order, the Court conducted a *de novo* review of Claim 2-1 and concluded Petitioner failed to show he was prejudiced or the proceedings were fundamentally unfair, and failed to demonstrate that Judge Rittenband's conduct toward Chier was significantly adverse and fundamentally unfair as to warrant habeas relief. ECF No. 261 at 99. Also, it conducted Petitioner's equal protection claim *de novo*. Thus, for the new, previously *unexhausted* claims presented in the 2000 habeas petition where there was no underlying reasoned state court opinion, the Court did not apply the AEDPA deference.

Petitioner argues the Court erred in applying AEDPA deference to the remaining claims that were *exhausted* in previous habeas petitions in which the state courts issued reasoned opinions. The Court disagrees.

Petitioner's theory is based on his belief that the August 2000 California Supreme Court is not an unexplained order. The Court disagrees with this assertion. The U.S. Supreme Court has provided guidance on this issue. *See Ylst v. Nunnemaker*, 501 U.S. 797 (1991). There, the Supreme Court created the "look-through" rule, namely, where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. *Id.* at 803.

In *Ylst*, the defendant brought a claim on direct appeal that he was not given a *Miranda* warning. *Id.* at 799. He did not bring this claim before the trial court. *Id.* The California Court of Appeal rejected the claim based on the state procedural rule that "an objection based upon a *Miranda* violation cannot be raised for the first time on appeal." *Id.* The defendant then filed a petition for collateral relief in the California Superior Court, which was denied without opinion. *Id.* at 800. The defendant then filed a similar petition for relief in the California Court of Appeal, which was also denied without opinion. *Id.* Finally, the defendant filed a petition in

the California Supreme Court. *Id.* The California Supreme Court denied it with citation to *In re Swain* and *In re Waltreus.* No opinion or other explanation accompanied these citations.[2] *Id.* at 800.

The Supreme Court specifically looked at whether the California Supreme Court's unexplained order, denying his second habeas petition (based on the *Miranda* claim) constituted a "decision on the merits" of that claim sufficient to lift the procedural bar imposed on direct appeal. *Id.* at 802. The Supreme Court applied the "look through" rule and made the following observation:

> The essence of unexplained orders is that they say nothing. We think a presumption which gives them *no* effect–which simply "looks through" them to the last reasoned decision–most nearly reflects the role they are ordinarily intended to play.

Id. at 804.

Here, the California Supreme Court's August 9, 2000 Order is an unexplained order with respect to the previously exhausted claims, and thus, it is appropriate for the Court to look-through it to the reasoned earlier opinions. *See Ramsey v. Yearwood*, 2007 WL 1297001 (9th Cir. 2007) (holding that because the California Supreme Court denied petition without comment or citation, and the California Court of Appeal denied petition on procedural grounds, the California Superior Court's finding that the habeas petition failed "to state a prima facie claim" is the last reasoned decision on the merits); *see also Carter v. Chappell*, 2013 WL 1120657 (S.D. Cal. Mar. 18, 2013) (noting that for certain claims that were first raised on direct appeal and rejected in a reasoned decision prior to their subsequent summary denials on state habeas review, the court must "look through" the later summary denials on habeas review to the reasoned opinion issued on direct appeal). Petitioner concedes that if the California Supreme Court is an

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[2]The Supreme Court considered this an "unexplained order" and instructed that an unexplained order is an order whose text or accompanying opinion does not disclose the reason for the judgment. *Id.*

unexplained order, "it could simply be 'looked through."[3] ECF No. 262 at 5.

In his motion for reconsideration, Petitioner relies on non-Ninth Circuit decisions in support of his arguments. As Respondent points out, these cases do not provide guidance, given the different manner in which Pennsylvania and California have structured their resolution of state habeas cases.[4] Also, Petitioner did not present a Memorandum and Points of Authorities in support of his Fourth Amended Petition. Thus, he did not argue to the Court that *de novo* review was required. In his reply, filed after he retained counsel, Petitioner argued that the California Court of Appeal's decision did not survive § 2254(d) review, not that review under § 2254 was not appropriate. *See* ECF No. 248 at 5-6 ("The CCA, with respect to three related constitutional problems, again reached legal conclusions that cannot survive § 2254(d) . . . Thus, this Court must evaluate *de novo* Hunt's claims because the § 2254(d) standards are met.).

Under Petitioner's theory, any state prisoner could circumvent § 2254(d) by simply filing a successive habeas petition in the state courts after filing his or her § 2254 petition in federal courts. The California Supreme Court would deny the

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[3]Petitioner stated, "That final state decision was no mere unexplained order simply rejecting Hunt's state habeas claims on the same grounds as those relied on by the lower state courts. Had it been, it could simply be "looked through." ECF no. 262 at 5.

[4]As the United States Supreme Court explained:

> California's collateral review regime differs from that of other States in a second notable respect: All California courts "have original jurisdiction in habeas corpus proceedings," Cal. Const., Art. VI, § 10, thus "no appeal lies from the denial of a petition for writ of habeas corpus," *In re Clark*, 5 Cal.4th 750, 767, n. 7 (1993). "[A] prisoner whose petition has been denied by the superior court can obtain review of his claims only by the filing of a new petition in the Court of Appeal." *Ibid.* The new petition, however, must be confined to claims raised in the initial petition. *See In re Martinez*, 46 Cal.4th 945 (2009).

Walker v. Martin, 131 S.Ct. 1120, 1126 (2011).

petition, citing to *Miller* (indicating that the court is denying the petition for the same reasons it denied the previous one) or *Clark* (indicating the court will not consider repeated applications for habeas corpus presenting claims previously rejected; successive and/or untimely petitions will be summarily denied). Petitioner then would obtain *de novo* review of his claims, notwithstanding that a reasoned lower court decision, which would have exhausted the claims to permit federal review, was issued by the state court.

In supplemental briefing, Petitioner argues that if § 2254(d) does not apply and the Court conducts a *de novo* review of the other claims, section 2254(e) does not apply and the Court must conduct a *de novo* review of the facts. However, this argument contradicts the cases cited by Petitioner in support of his position that the 2000 California Supreme Court decision strips the substantive decisions by the lower courts. *See e.g. Thomas v. Horn*, 570 F.3d 105, 116 (3rd Cir. 2009) ("[T]he § 2254(e)(1) presumption of correctness applies regardless of whether there has been an 'adjudication on the merits' for purposes of § 2254(d)."). Petitioner also argues that notwithstanding his position that the court must conduct a *de novo* review of the facts, the Court should not conduct an evidentiary hearing; rather, the Court should make credibility findings based on the paper record before it. The Court declines to do so. It also declines to consider any new arguments presented in Petitioner's Motion for Reconsideration and Petitioner's Post-hearing Memorandum Responding to the Court's Question.

The Court applied *de novo* review for those claims in which there was not an adjudication on the merits, and applied the proper AEDPA deferential review for those cases in which the state court issued a reasoned opinion. Petitioner has not met its burden under Fed. R. Civ. 59(e) and his motion is denied.

B.

Petitioner argues that, pursuant to Fed. R. Civ. P. 60(b)(6), relief from judgment is warranted because Petitioner was not permitted to prosecute his case in

a proper fashion, ECF No. 263. The Court questions the propriety of this motion, given the mandate from the Ninth Circuit. Even so, the Court notes that Petitioner presented this argument before Judge Stotler in his Objections to Magistrate Judge Nakazato's Report and Recommendation RE Motion to Dismiss Claims From Fourth Amended Petition. *See* ECF No. 230. Judge Stotler overruled the objection. The Court has reviewed the prior Orders issued in this case, and could not find any order preventing Petitioner from filing a Memorandum of Points and Authorities in support of his Fourth Amended Petition. In the Order directing Petitioner to file his Fourth Amended Petition, Judge Keller did not impose any page limitations. *See* ECF No. 188. While Petitioner was limited in his Reply to 25 pages, this was reasonable, given that Respondent was limited to 50 pages, and Petitioner would not have been permitted to make any new arguments in his reply. Finally, Judge Nakazato's pretrial rulings did not prevent Petitioner from prosecuting his case, and these rulings do not provide extraordinary circumstances that would justify the Court to reconsider Petitioner's petition.

C.

Pursuant to Fed. R. Civ. P. 52(b), Petitioner asks the Court to amend its findings and make additional findings regarding his counsel, Arthur Barens, and Judge Rittenband.

"The primary purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court as a basis for the conclusions of law and judgment entered thereon." Wright and Miller, Fed. Pract. & Proc. § 2582. "A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a particular finding of fact or a conclusion of law." *Id.* Generally, the motion must raise questions of substance by seeking reconsideration of material findings of fact or conclusions of law. *Id*

Petitioner has not demonstrated any need to add or amend the Court's findings. Petitioner's disagreement with the findings is not a basis for a Rule 52(b)

motion. The Court declines to exercise its discretion to consider Petitioner's argument regarding the "corpus delicti" because he did not raise it until his reply. Petitioner had ample opportunity to present this argument to this Court as well as the state courts. It would be unfair to Respondent to now address Petitioner's arguments. Notably, the California Court of Appeal held there was ample evidence of the corpus delicti of murder even without the "to do" lists. Petitioner's arguments regarding specific claims of extrajudicial bias, pro-prosecution, the "secret-deal," and the conflict of interest with respect to the sighting witnesses are merely a repackaging of claims the Court has already ruled on and it declines to revisit them. Petitioner disagrees with the Court's interpretation of the facts and whether the record supports a finding of bias or conflict, but such is not the bases to add or amend the Court's findings.

D.

Petitioner asks the Court to issue a Certificate of Appealability as to Claims 1, 2, and 6 of his Fourth Amendment Petition, for all the reasons set forth in the Petition and the post-motions.

A prisoner appealing the district court's final order in a habeas corpus proceeding must first obtain a Certificate of Appealability ("COA") by making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). In doing so, the petitioner must "show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should be resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further." *Jones v. Ryan*, 691 F.3d 1093, 1100 (9th Cir. 2012) (citations omitted). "Thus not every issue raised in a habeas corpus petition earns an automatic right to appeal, an appeal may lie only for issues that are worthy of fair debate among reasonable judges." *Id.*

Here, Petitioner's request is conclusory and made without any specific argument. In reviewing the record, reasonable jurists would not believe that

Petitioner's constitutional rights were denied. Petitioner has not met his burden of showing the Court's assessment of the claims were debatable or wrong, or that another jurist would have ruled differently.

Accordingly, **IT IS HEREBY ORDERED**:

1. Petitioner's Motion to Vacate, Alter, or Amend Order Denying His Fourth Amended Petition, ECF No. 262, is **DENIED**.

2. Petitioner's Motion for Relief From Judgment, ECF No. 263, is **DENIED**.

3. Petitioner's Motion for Amendment of Findings and Addition of Findings and For Amendment of Judgment in Light thereof, ECF No. 264-1, is **DENIED**.

4. Petitioner's Request for Certificate of Appealability, ECF No. 265, is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide copies to counsel.

DATED this 9th day of July, 2013.

s/Robert H. Whaley

ROBERT H. WHALEY
United States District Judge

C:\Temp\notesD30550\reconsider.ord.wpd

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JOSEPH HUNT, Petitioner, v. SCOTT KERNAN, warden Respondent.	Case No. CV 98-5280 AHS (AN) ORDER APPROVING AND ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AS AMENDED

Pursuant to 28 U.S.C. § 636, the Court has conducted a *de novo* review of the file, including the Magistrate Judge's related Report and Recommendation regarding Respondent's Motion to Dismiss Claims From Fourth Amended Petition ("R&R") (docket item #207), petitioner Joseph Hunt's Revised Objection to the R&R (docket item #214), and his related Supplement thereto (docket item #221).

IT IS ORDERED that:

1. In light of *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064, 2078 (2006), which was decided shortly after the R&R was issued, the R&R is deemed to be amended by deleting the sentence that begins with "Moreover" on page 12, line 26, and ends at page

13, line 1 ("Amended R&R").[1/] The Amended R&R is approved and adopted in every other respect, and Hunt's supplemental objection (Supplement at 3:7-4:5) to the foregoing sentence based upon *House* is denied as moot.

2. Hunt's Revised Objection to the Amended R&R purports to raise five objections. The Court makes the following findings and rulings with respect to these objections:

a. Objection #1

The Magistrate Judge found the motion to dismiss should be granted against claims 1-7, 3-7, 3-8, 3-9 and 3-10. [Amended R&R at 10:15-16:16.] The Magistrate Judge found these five new claims were time-barred (a point Hunt concedes), and that Hunt's failure to proffer any post-trial "new reliable evidence" showing he is actually innocent of robbing his victim also barred this Court from reaching the merits pursuant to *Schlup's* miscarriage of justice-actual innocence gateway. [*Id.*] By way of his first objection, Hunt principally contends the Magistrate Judge erred because his particular procedural gateway claim is made pursuant to *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639 (1986) and *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (1998), not *Schlup*.

[1/] In discussing the miscarriage of justice exception-actual innocence gateway, the Magistrate Judge stated, "Moreover, *Schlup's* 'more likely than not' standard appears to be superseded by the 'clear and convincing' standard within § 2254(e)(2) as amended by AEDPA -- a point recognized by Hunt." [R&R at 12:26-13:1 (note 10 omitted).] In *House*, the Supreme Court found the AEDPA's clear and convincing standard does not replace the *Schlup* "more likely than not" standard. *House*, 547 U.S. at 537. However, it is important to note the Magistrate Judge's analysis of Hunt's actual innocence claim is unaffected by *House* and remains valid because he ultimately applied the correct "more likely than not" standard in considering this issue. [*Id.*, 13:2-16:16]

According to Hunt, "*Schlup* is the controlling case when a prisoner seeks to use newly discovered, extra-record, evidence as a procedural gateway." [Supplement at 2:5-7.] Hunt further maintains that, in contrast to *Schlup*, *Carrier* and *Bousley* allow him to rely upon the existing record, and "are the leading U.S. Supreme Court cases when a prisoner is using the unaugmented record on appeal to establish that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" [Revised Objection, Objection #1 at 1:27-2:1; Supplement at 2:8-14.]

An examination of *Carrier*, *Bousley*, *Schlup*, and *House* disclose Hunt's first objection lacks merit, and that his attempt to distinguish *Schlup* from *Carrier* and *Bousley* is misplaced.

Contrary to Hunt's assertion, *Carrier* also requires a miscarriage of justice-actual innocence gateway claim to be supported by "new evidence"; indeed, *Schlup* makes it eminently clear that its central holding -- that a petitioner seeking to have procedurally defaulted claims heard on the merits pursuant to the actual innocence gateway must be supported by "new reliable evidence . . . that was not presented at trial" -- is based upon the *Carrier* standard and its requirement of "new evidence." *Schlup*, 513 U.S. at 323-24.[2/]

[2/] Specifically, *Schlup* explains:

> The *Carrier* standard requires the habeas petitioner to show that "a constitutional violation has probably resulted in conviction of one who is actually innocent." 477 U.S., at 496. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him *in light of the new evidence*. *Schlup*, 513 U.S. at 328 (emphasis added).

Likewise, Hunt's reliance upon *Bousley*, and his effort to distinguish it from *Schlup*, is misplaced for two reasons.

First, and foremost, *Bousley* is inapplicable and materially distinguishable because the petitioner had not raised an actual innocence claim. Instead, the main issue in *Bousley* was whether a petitioner should be given the opportunity to raise such a claim because, while the appeal of the denial of his federal habeas petition was still pending, the United States Supreme Court issued an opinion that clarified the criminal statute which the petitioner's guilty plea had been based upon in a manner that raised a serious question about whether the petitioner's plea was voluntary and intelligent.

Specifically, in *Bousley*, the petitioner pled guilty to using a firearm in violation of 18 U.S.C. § 924(c)(1). However, five years later, the United States Supreme Court decided *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501 (1995), which held "that § 924(c)(1)'s 'use' prong requires the Government to show 'active employment of the firearm'" "but does not include mere possession of a firearm." *Bousley*, 523 U.S. at 616, 617. Meanwhile, in his pre-*Bailey* federal habeas petition pursuant to 28 U.S.C. § 2241, the petitioner challenged "the factual basis for his guilty plea on the ground neither the evidence nor the plea allocution" showed he used a firearm. *Id.* at 617-18. The petitioner eventually appealed the district court's dismissal of his § 2241 petition. While that appeal was pending, the Supreme Court decided *Bailey*.[3/] *Id.* at 618. Significantly, the *Bousley*

[3/] *Bousley* explained that *Teague v. Lane*, 489 U.S. 288, 109 S. (continued...)

Court emphasized that it granted certiorari "to resolve a split among the Circuits over the permissibility of post-*Bailey* collateral attacks on § 924(c)(1) convictions obtained pursuant to guilty pleas[,]" *Id.* at 618. Given the unique circumstances occasioned by its decision in *Bailey*, *Bousley* held that, "although this [involuntary plea] claim was procedurally defaulted, petitioner may be entitled to hearing on the merits of it *if he makes the necessary showing to relieve the default.*" *Id.* at 616 (emphasis added).

Second, *Bousley* clearly establishes that, in order to make the necessary showing pursuant to the miscarriage of justice-actual innocence gateway, the petitioner must comply with the standard set forth in *Carrier* and *Schlup*, which required the petitioner to "establish that the constitutional error in his plea colloquy 'has probably resulted in the conviction of one who is actually innocent[,]'" and that "[t]o establish actual innocence, petitioner must demonstrate that, 'in light of all the evidence, . . . it is more likely than not that no reasonable juror would have convicted him.'" *Id.* at 623 (expressly quoting and citing *Carrier* and *Schlup*). As already discussed, *Schlup* expressly holds the evidence must include "new reliable evidence." *Schlup*, 513 U.S. at 324. Further, in *House*, which was decided after *Bousley*, the Supreme Court reaffirmed that a credible gateway claim "requires new reliable evidence." *See House*, 547 U.S. at 537-538.

[3/] (...continued)
Ct. 1060 (1989) did not govern since it only applies to procedural rules and, in *Bailey*, the Court simply "decided the meaning of a criminal statute enacted by Congress." *Bousley*, 523 U.S. at 620.

To recap, *Carrier* and *Bousley* do not support Hunt's first objection. *Carrier*, *Schlup*, *Bousley*, and *House* consistently establish that the miscarriage of justice-actual innocence gateway requires a petitioner to proffer new reliable evidence that was not presented at the underlying criminal trial, and that "[a] petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt -- or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538.[4/] Hunt's reliance upon *Bousley* is misplaced because that case is distinguishable and still requires an actual innocence claim to be supported by new reliable evidence as dictated in *Schlup* and *House*. The Supreme Court's evolving focus on "new reliable evidence" not presented at a petitioner's trial is no accident. Absent such new reliable evidence, a federal habeas court does not need to engage in speculation to what a hypothetical, reasonable juror would do based upon the existing record. This is because the reviewing court already knows twelve real jurors actually found the existing record established the petitioner was guilty beyond a

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[4/] This part of *House* also disposes of another argument Hunt raised as part of his first objection -- that, "while the actual innocence issue can now be decided in [his] favor, it is procedurally premature to decide that issue against [him] at this time" because all of the relevant state court records have not been lodged. [Revised Objection at 17:15-21.] Further, under Ninth Circuit law, a district court is not required to fully develop the factual record unless the petitioner raises a credible actual innocence claim by proffering new reliable evidence in accordance with *Schlup*. *See Sistrunk v. Armenakis*, 292 F.3d 669, 673 n.4 (9th Cir. 2002) (affirming district court's rejection of petitioner's actual innocence claim, and noting the rejection of such a claim would be proper based solely upon the proffered new evidence).

reasonable doubt. Hunt ignores this rather obvious point in making his first objection.

The Court finds the other parts of Hunt's first objection are facially without merit for the reasons already stated in the Amended R&R. Based upon the foregoing, and for the reasons set forth in the Amended R&R, Hunt's first objection is overruled.

b. Objection #2

As part of his second objection, Hunt contends the Magistrate Judge erred in finding his original petition, which is 70 pages in length not including the related 662-page memorandum, was prolix and failed to give respondent fair notice in the manner required by Fed. R. Civ. P. 8(a) and Habeas Rule 2(c). Hunt's contention suggests his original petition must have given fair notice because Respondent filed an Answer to it in response to an "OSC" issued by the magistrate judge originally assigned to this case. [Revised Objection at 21-1-9.] The record discloses Hunt's suggestion is inaccurate and misleading. The so-called OSC, which was not issued by the current magistrate judge, discloses that order was filed on July 2, 1998 (docket item #13) ("7/2/98 Order") and directed Respondent to file an Answer responding to three specific questions, *without addressing the merits within twenty days after the order was issued*. [7/2/98 Order at 1:23-2:6.]

Significantly, the 7/2/98 Order directed Respondent to file a separate Return for the purpose of addressing the merits of Hunt's claims (and, if necessary, the issue of exhaustion) no later than thirty days after the filing of the Answer. [*Id.* at 2:15-27.] On July 22, 1998, Respondent filed his 2-page Answer in accordance with the 7/2/98 Order without addressing the merits or conceding

the original petition gave him fair notice. [Answer (docket item #15).] Coincidentally, on the same date Respondent filed his Answer, the original magistrate judge issued an order of self-recusal "due to a conflict of interest" and then the case was randomly reassigned to the currently assigned magistrate judge. [7/22/98 Order (docket item #17).] On August 10, 1998 -- before the Return was to be filed -- the currently assigned magistrate judge issued an order that vacated the 7/2/98 Order and directed Hunt to file a first amended petition due to the aforementioned problems. [8/10/98 Order (docket item #20).] Based upon the foregoing and reasons set forth in the Amended R&R, Hunt's second objection is overruled in its entirety.

c. Objections ##3, 4 & 5

The third and fourth objections are overruled because they lack merit for the reasons already expressed in the Amended R&R.

By way of his fifth objection, Hunt asserts there is no reason for a fifth amended petition even if some claims are deemed untimely. [Revised Objection at 25:20-25.] The Court construes the fifth objection as a request to have Respondent address the merits of those claims raised in the fourth amended petition that are not dismissed by way of this Order, and the request is granted.

2. The motion to dismiss is granted in part in that claims 1-2(A), 1-2.3(C), 1-5, 1-7, 2-1(C12.13), 2-1(C12.14), 2-2(B1), 2-2(B2), 3-1 (only as to the trial judge's unidentified third refusal to conduct an evidentiary hearing), 3-6, 3-7, 3-8, 3-9, and 3-10 of the fourth amended petition and related detailed statement are dismissed with prejudice for the reasons stated in

the Amended R&R; the motion to dismiss is denied in part with respect to the other claims that are challenged and identified in the motion to dismiss.

3. The matter is referred back to the Magistrate Judge for further proceedings. Respondent is directed to proceed with filing and serving an Answer that addresses the merits of the surviving claims of the fourth amended petition in the time and manner directed by the Magistrate Judge. The Clerk of the Court shall serve a copy of this Order on all counsel or parties of record.

Dated: June 17, 2008

ALICEMARIE H. STOTLER
CHIEF U.S. DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH HUNT, Petitioner, v. SCOTT KERNAN, warden Respondent.	Case No. CV 98-5280 WDK (AN) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE MOTION TO DISMISS CLAIMS FROM FOURTH AMENDED PETITION

I. INTRODUCTION AND SUMMARY

This Report and Recommendation is submitted to the Honorable William D. Keller, Senior United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

Before the Court is Scott Kernan's[1/] ("Respondent") motion to dismiss various claims in petitioner Joseph Hunt's Fourth Amended Petition ("FAP"), which is brought pursuant to 28 U.S.C. §2254. By way of this §2254 action, Hunt seeks federal habeas review of his 1987 conviction and related prison sentence of life without the possibility of parole for the murder and robbery with special circumstances of Robert Levin.

[1/] Kernan represents that he is the current warden of the California State Prison-Sacramento, where Hunt is currently housed. Accordingly, as Hunt's immediate custodian, Kernan is substituted in as the respondent pursuant to Fed.R.Civ.P. 25(d)(1).

The FAP was filed on March 24, 2005, in response to the Court's 01/26/05 Order (docket #188). It generally raises ten numbered grounds for habeas relief that broadly identify the constitutional violations allegedly committed by the trial judge, the prosecutor, the jury, or Hunt's attorneys. However, grounds 1, 2, and 3 are split into numerous sub-grounds, which the Court will refer to as "claims" for sake of continuity. These claims contain operative facts, most of which are numbered or labeled in a progressive outline fashion that link the claim to one of the ten general grounds.

For example, Ground 1 is an ineffective assistance of counsel ("IAC") claim where Hunt broadly asserts his Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated. He then follows with claims setting forth the operative facts that are generally identified in a manner that makes it clear these claims are linked to Ground 1 (e.g., "Ground 1-1, Ground 1-1.1, etc.). [FAP at 8:1-3.] Hunt has separately asserted the FAP "contains 100 [of these] constructs of fact and law which could be pled as separate claims." [Application supporting FAP at 2:9-10 (docket #189).]

The FAP is supported by a 189-page "Detailed Statement of Factual Allegations in Support of Fourth Amended Petition" ("DS") that substantially repeats the FAP's ten grounds verbatim, sets forth the operative facts in more detail and, in most cases, cites to the state petition where the claims were raised. [DS (docket #191).]

In his motion to dismiss, Respondent argues the FAP raises a substantial number of new claims that are procedurally defaulted or time-barred. Respondent also argues that one claim is non-cognizable, and that a number of claims must be dismissed because they are conclusory, duplicative, or do not identify the state petitions where they were raised in violation of the Court's order relating to the FAP. Hunt has filed an Opposition to the motion to dismiss and Respondent waived filing a reply.

The parties are familiar with the underlying background facts and proceedings, which the Ninth Circuit has aptly characterized as a "tortuous procedural hegira." *Hunt v. Pliler*, 384 F.3d 1118, 1120 (9th Cir. 2004) ("*Hunt II*"). Accordingly, only the facts and procedural history that are helpful to explaining the Court's ruling will be discussed.

For the reasons reported below, the Magistrate Judge recommends the motion to dismiss be denied in part and granted in part.

II. DISCUSSION

A. Claims Alleged to be Procedurally Defaulted

Respondent asserts Hunt has procedurally defaulted on raising thirty-one IAC and judicial misconduct claims.[2] He also contends Hunt is procedurally barred from obtaining federal habeas review on a separate group of judicial bias claims, which he asserts are "physically impractical and extremely difficult" to review at this time but "may be more effectively reviewed in the course of addressing the claims on the merits."[3]

Respondent asserts the claims alleged to be procedurally barred were not raised on direct review. He also asserts that, in the pending action, Hunt raised these claims in his first amended petition and, on November 22, 1999, this Court found these claims were unexhausted.[4] On February 23, 2000, Hunt returned to the state court and filed a fourth state habeas petition (case number S086122) with the California Supreme Court ("2000 Petition") to exhaust the new claims. On August 8, 2000, the state high court denied the 2000 Petition in an order citing *In re Waltreus*, 62 Cal.2d 218, 225, 42 Cal.Rptr. 9, (1965); *In re Miller*, 17 Cal.2d 734, 735, 112 P.2d 10 (1941); and *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509 (1993). This order does not identify which procedural bar was invoked against any particular claim; nor does the order have a pinpoint page cite to *Clark's* untimeliness holding. Respondent has not alleged or shown that *Waltreus* and *Miller* are adequate and independent procedural bars. Nonetheless, Respondent asserts Hunt is

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[2] The IAC claims are 1-1, 1-1.1, 1-1.3, 1-1.4, 1-1.5, 1-1.6, 1-1.7, 1.1.8, 1-1.10, 1-1.12, 1-1.13, 1-1.14, 1-1.15, 1-1.16, 1-1.17, 1-1.18, 1-1.20, 1-1.21, 1-1.22, 1-1.23, 1-2, 1-2.3(D), 1-2.3(F), 1-2.41-2.6, 1-2.8, 1-2.10, 1-2.11, 1-2.13, 1-2.14, 1-2.15, 1-3.1. The judicial misconduct claims are 2-1(A1), 2-1(B8.1), and 2-1(B8.10).

[3] Respondent asserts these claims "appear to include, but are not necessarily limited to," the following: 2-1(B1), 2-1(B2.1)-(B2.2), 2-1(B3.1)-(3.18), 2-1B(9.1), 2-1(B9.3), 2-1(B9.4), 2-1(B9.5), 2-2(A1)-(A7), and 2-2(B4-B15). [Motion at 48:12-49:22.]

[4] After *Hunt II*, the Court re-examined the first amended petition and, on January 26, 2005, an order was issued that again found these particular claims were unexhausted.

procedurally barred from obtaining federal habeas review of the new claims by virtue of the California Supreme Court's invocation of *Clark*. Respondent reasons that *Waltreus* and *Miller* are procedural bars that can only be invoked against previously raised claims, therefore, logic dictates the *Clark* citation can only apply to the unexhausted new claims in the 2000 Petition. He also asserts *Clark's* timeliness bar is an independent and adequate procedural bar to federal habeas review of the disputed new claims. [Motion at 19:19-27.]

The Court finds Respondent's procedural default argument is not persuasive because it is based upon two incorrect premises -- (1) the California Supreme Court's order is not ambiguous and (2) the *Clark* citation is not ambiguous and constitutes an independent and adequate procedural bar. Under the law of this Circuit, a state court order that invokes more than one procedural rule to deny a habeas petition with multiple claims is deemed to be ambiguous if the order does not specify which procedural rule was applied to a specific claim, and does not bar federal habeas review if any one of the procedural rules is not an adequate and independent bar. *Washington v. Cambra*, 208 F.3d 832, 833 (9th Cir. 2000). A state court order denying a multi-claim habeas petition without expressly identifying which procedural bar was invoked against a specific claim is ambiguous despite any determination that can be logically deduced or extrapolated. Indeed, the Ninth Circuit has made it clear that federal courts cannot engage in this type of divine interpretation. *See Koerner v. Grigas*, 328 F.3d 1039, 1049-53 (9th Cir. 2003) (holding district court erred in finding a habeas claim was procedurally barred where the state high court's opinion was ambiguous because it did not specify which claims were denied pursuant to procedural rule as opposed to other reasons that were mutually inconsistent); *Valerio v. Crawford*, 306 F.3d 742, 744 (9th Cir. 2002) (*en banc* opinion holding district court erred by finding Nevada Supreme Court invoked a procedural bar to deny 11 of the 18 claims raised in a habeas petition where the state high court's order "fail[ed] to specify which claims were barred for which reasons."); *Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1131 (9th Cir. 1996) (holding district court properly found California Supreme Court order was ambiguous and did not bar federal habeas review where the order did not specify which of

the 39 claims were rejected under *Waltreus* as opposed to the claims rejected under the *Harris/Dixon* procedural rules).

Here, the California Supreme Court order denying the 2000 Petition is clearly deemed to be ambiguous under *Washington*. The order invokes three procedural bars without expressly stating which bar was invoked against a specific claim in the 2000 Petition. Respondent does not contend *Waltreus* is an adequate and independent procedural bar and for good reason -- the Ninth Circuit has made clear that the *Waltreus* rule, under which a state court will not review in a habeas petition any claim raised on direct appeal, is not a state procedural default sufficient to bar federal habeas review. *Hill v. Roe*, 321 F.3d 787, 789 (9th Cir. 2003); *Forrest v. Vasquez*, 75 F.3d 562, 564 (9th Cir.1996). Respondent has not alleged nor shown *Miller*[5] is an adequate and independent procedural bar, and there does not appear to be a published Ninth Circuit opinion supporting this proposition. Accordingly, the order does not bar federal habeas review because it is ambiguous and invokes two procedural bars that are not adequate and independent. *Washington*, 208 F.3d at 833; *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996) ("[A] procedural default based on an ambiguous order that does not clearly rest on independent and adequate state grounds is not sufficient to preclude federal collateral review.").

Additionally, Respondent's contention that *Clark* could only apply to the unexhausted new claims, and that it is an adequate and independent bar, is presumptuous due to the absence of a pinpoint cite to *Clark's* timeliness holding. Consequently, it is possible the California Supreme Court cited *Clark* for one of the many other principles discussed in that case. Indeed, given that the California Supreme Court has issued orders denying habeas petitions with clear pinpoint cites to *Clark's* untimeliness bar in other cases, its apparent decision not to do so here tends to signal that *Clark* was possibly cited for another reason, perhaps to even bolster its citations to *Waltreus* and *Miller*.

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[5] The Ninth Circuit has held a *Miller* citation "signals that the [California Supreme] Court is denying *the petition* for the same reasons that it denied the previous one." *Kim v. Villalobos*, 799 F.2d 1317, 1319 n. 1 (9th Cir. 1986) (emphasis added).

Accordingly, the Court finds Respondent's argument that Hunt is procedurally barred from seeking federal habeas review of the new claims to be unpersuasive.

The motion to dismiss should be denied as to the claims Respondent contends are procedurally defaulted.

B. Claims Alleged to be Time-Barred

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became effective and its amendments imposed a one-year statute of limitations period on state prisoners seeking federal habeas review of their underlying state conviction and sentence. 28 U.S.C. §2244(d)(1). AEDPA's one-year limitations period begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." §2244(d)(1)(A). However, prisoners like Hunt, whose underlying state convictions became final on direct review before AEDPA's enactment date, were given a one-year grace period from April 24, 1996, to bring a federal habeas petition. *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001) (AEDPA's grace period for challenging convictions finalized before AEDPA's enactment date ended on April 24, 1997). Further, AEDPA's limitations period is statutorily tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." §2244(d)(2). In order to qualify for statutory tolling for the time the prisoner is pursuing collateral review in the state courts, the relevant state habeas petitions must be constructively filed <u>before</u>, not after, the expiration of AEDPA's limitations period. *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001), *cert. denied*, 538 U.S. 949, 123 S.Ct. 1627 (2003); *Green v. White*, 223 F.3d 1001, 1003 (9th Cir. 2001) (state petition filed a month-and-a-half after limitations period expired did not warrant statutory tolling).

Respondent argues that thirty-nine claims in the FAP must be dismissed because they are time-barred by AEDPA's one-year limitations period. [Motion to Dismiss ("MTD") at 6:3-19:1.] These claims fall into two distinct groups that are described more fully below. Respondent argues the claims in both groups do not relate back to Hunt's first amended

petition pursuant to Rule[6] 15(c) because the operative facts differ in time and type from those supporting the grounds in the first amended petition. Therefore, Respondent argues all of the new claims are time-barred pursuant to *Mayle v. Felix*, 545 U.S. ---, ---, 125 S.Ct. 2562, 2572, 2574 (2005).

As a prefatory matter, Hunt argues the motion to dismiss these allegedly time-barred claims can be summarily denied since Respondent's argument is based upon Hunt's first amended petition, not his "original petition." Hunt frames this threshold issue by asking, "what was the original pleading in this case? Was it the 25-page First Amended Petition and its 50-page supporting Memorandum that were filed on August 31, 1998 -- or was it the 70-page federal petition and its 662-page supporting Memorandum filed on June 30, 1998?" [Opposition at 23:13-17.] He argues that, for purposes of Rule 15(c), his initial petition still constitutes his "original pleading" despite being stricken and replaced by his first amended petition. [Opposition at 25:4-9.]

At first blush, Hunt's opposing argument appears to make sense given that Rule 15(c) expressly refers to the "original pleading." However, Hunt's argument is flawed because it rests upon the mistaken premise that his original pleading gave Respondent fair notice of his claims and defenses thereto. It did not. Although the Rules adopt a flexible pleading policy, particularly for *pro se* litigants, a pleading must still give fair notice by stating the factual and legal elements of each claim in a short, plain, and succinct manner. *See* Rule 8(a); Rule 2(c) of the Rules Governing Habeas Corpus Cases Under Section 2254 ("Habeas Rule 2(c)"); *Felix*, 125 S.Ct. at 2566 (in ordinary civil proceedings, Rule 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, but Habeas Rule 2(c) requires a petitioner to provide "a more detailed statement" that must "specify all the grounds for relief available to the petitioner [and] state the facts supporting each ground"); *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Hunt's 70-page initial petition and its 662-page supporting Memorandum presented his

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[6] "Rule" refers to the Federal Rules of Civil Procedure.

original claims in a prolix, complex manner that was entirely inconsistent with the "short and plain" statement required by Rule 8(a) or the more detailed statement required by Habeas Rule 2(c); Hunt compounded the problem by failing to use the Court-approved petition form in violation of Habeas Rule 4(d) and the Local Rule 83-16.1 of this Court. The combined effect of these problems made the task of identifying Hunt's claims, let alone their supporting operative facts, unreasonably difficult, time-consuming, and deprived Respondent fair notice. Accordingly, the initial petition and related memorandum of points and authorities were stricken and Hunt was granted leave to file the first amended petition and the related 50-page memorandum in the time and manner required by the Court. [8/10/98 Orders (AN)(docket #s 19-20).] Under the circumstances, the first amended petition is properly and equitably construed as a *nunc pro tunc* amendment to the original petition that relates back to, and preserves the filing date of, the stricken initial petition. *Anthony v. Cambra*, 236 F.3d 568, 573-74 (9th Cir. 2000), *cert. denied*, 533 U.S. 941 (2001). Further, Respondent properly treated Hunt's first amended petition, not the initial petition, as the operative pleading for purposes of the Rule 15(c) analysis since its sole function was to replace his 732-page initial petition with a pleading that raised the claims in a relatively more plain and concise manner so that Respondent had fair notice of the claims and defenses thereto. *See Baldwin v. County Welcome Center v. Brown*, 466 U.S. 147, 150 n.3, 104 S.Ct. 1723 (1984).[7]

Consequently, in determining whether any of the FAP's disputed new claims are time-barred, Hunt's first amended petition shall be treated as his original pleading and, for purposes of Rule 15(c), it shall be deemed to share the same filing date as the initial petition. Further, pursuant to the prison mailbox rule, Hunt is deemed to have constructively filed his initial petition on the date he delivered it to prison officials for mailing to the Clerk's Office.

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[7] Hunt's reliance on *Baldwin County* is misplaced. [Opposition at 24:6-23.] Hunt also benefits from this approach; to the extent his initial petition and memorandum raised claims in a prolix and complex manner through separate documents totaling 732 pages, arguably none of the challenged claims in his fourth amended petition relate back to his original pleading since it is difficult, if not impossible, to readily determine if the claims in both pleadings are united or tied to a common core of operative facts.

Houston v. Lack, 487 U.S. 266, 270-71, 108 S.Ct. 2379 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). Hunt's initial petition shows that he signed and dated it on June 19, 1998, but he has not attached a proof of service or declaration showing the date that it was actually delivered to prison authorities for filing with the Clerk's Office. Nonetheless, the Court will give Hunt the benefit of doubt by presuming his constructive filing date is June 19, 1998.

Respondent asserts that, assuming Hunt is entitled to statutory tolling under §2244(d)(2), AEDPA's one-year limitations period started on April 15, 1998.[8] Hunt does not dispute Respondent's calculation and the Court finds that it appears to be correct. Consequently, Hunt had until April 15, 1999, to file his initial petition with this Court. Because he constructively filed his initial petition on June 19, 1998, the first amended petition is deemed to be timely filed since it shares the same constructive filing date as the initial petition.

Hunt did not file his pending FAP raising the disputed new claims until March 25, 2005 -- nearly six years after the end of AEDPA's limitations period. Moreover, these claims were not even raised in the state courts until Hunt filed his previously mentioned 2000 Petition with the California Supreme Court on February 23, 2000 -- 314 days after the limitations period had run.[9] Consequently, the question presented is whether the new claims in the FAP are still timely because they relate back to first amended petition (which

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[8] The relevant procedural history is discussed in the Motion at 8:16-10:14.

[9] Hunt is not entitled to statutory tolling for the 2000 Petition or any other successive petitions because these petitions constitute belated, separate rounds of state collateral review that do not toll the statute. *See Carey v. Saffold*, 536 U.S. 214, 219-23, 122 S.Ct. 2134 (2002) (holding, absent undue delay, a California prisoner is normally only entitled to "one full round" of collateral review that statutorily tolls the limitations period from the time a California prisoner files his first state habeas petition until the California Supreme Court rejects the final habeas petition of the one full round); *see also* CAL. CT. R. 29.4(b)(2)(C); *Corjasso v. Ayers*, 278 F.3d 874, 880 n.1 (9th Cir. 2002) (orders of the California Supreme Court denying habeas petitions are final upon filing). Further, the habeas petitions filed after the expiration of AEDPA's limitations period do not toll or revive the limitations period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (state habeas petition filed after expiration of AEDPA's limitations period does not revive limitations period).

is deemed to have the same filing date as the initial petition) or can still be considered on the merits for some other reason.

In *Felix*, the Court expressly rejected as too broad the Ninth Circuit's view that, for purposes of relation back under Rule 15(c), "same conduct, transaction or occurrence" means "same trial, conviction, or sentence." *Felix*, 125 S.Ct. at 2573-75. Instead, the *Felix* Court held that a new habeas claim in an amended habeas petition "does not relate back (and thereby escapes AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Id.* at 2566. Stated another way, relation back under Rule 15(c) is only allowable "when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in 'both time and type' from the originally raised episodes." *Id.* at 2571.

As discussed above, the thirty-nine claims in the FAP that Respondent contends are time-barred fall into two distinct groups.

1. First Group of New Claims

The first group has six claims (1-7, 3-7, 3-8, 3-9, 3-10 and 8). [MTD at 10:15-11:15.] The Court has already granted Hunt's request to voluntarily dismissed claim 8. [*See* 8/5/05 Order (docket (#199).] Hunt also concedes the remaining five claims (1-7, 3-7, 3-8, 3-9 and 3-10) are untimely under *Felix*. [Opposition at 39:3-4.] These five untimely new claims are only directed at his robbery conviction, not his conviction for Levin's murder. The gravamen of these new robbery-related claims is that Hunt's constitutional rights were violated because: (1) the trial court failed to instruct the jury on the *animus furandi* (intent to steal) or claim of right defense to robbery; (2) the trial court failed to instruct the jury that a robbery conviction cannot be based upon the taking of a void instrument of negligible value and failed to instruct on the claim of right defense; (3) there was insufficient evidence to support the robbery conviction based upon the lack of Hunt's *animus furandi* to commit a robbery; (4) the information was defective to the extent it did not allege the item actually taken was of negligible value or allege facts negating the claim of right defense to robbery;

and (5) his trial counsel rendered ineffective assistance by failing to raise the foregoing points in as a defense to the robbery charge. [*See* Motion at 10:17-11:15 (summarizing claims with citations to the FAP and DS).] Hunt nevertheless argues the Court should still reach the merits of these admittedly untimely claims because he is entitled to equitable tolling on actual innocence grounds or, alternatively, the claims should be considered under the miscarriage of justice exception of *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995). [*Id.* at 39:3-42:26.]

Hunt's arguments are not persuasive.

"[E]quitable tolling is justified in few cases," and "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). Moreover, the United States Supreme Court recently held that, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, ---, 125 S.Ct. 1807, 1814 (2005).

The first *Pace* element requires a prisoner to show that he acted as diligently as reasonably could have been expected under the circumstances. *Spitsyn*, 345 F.3d at 802; *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999) (the petitioner has the burden of demonstrating that external forces, rather than his own lack of diligence, account for his failure to file a timely claim). "'[I]f the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken.'" *Spitsyn*, 345 F.3d at 802 (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2nd Cir. 2000)).

The second *Pace* element requires the prisoner to show that "extraordinary circumstances beyond [the] prisoner's control make it impossible to file a petition on time." *Brambles v. Duncan*, 412 F.3d 1066, 1069 (9th Cir. 2005) (quoting *Miles*, 187 F.3d at 1107). "[T]he prisoner must show that the 'extraordinary circumstances' were the but-for and proximate cause of his untimeliness." *Allen v. Lewis*, 255 F.3d 798, 800-01 (9th Cir.

2001), *amended on other grounds by Allen v. Lewis,* 295 F.3d 1046 (9th Cir.2002) (en banc). Extraordinary circumstances only exist when *wrongful* conduct makes it impossible for the prisoner to make a timely filing, *Shannon v. Newland*, 410 F.3d. 1083, 1090 (9th Cir. 2005), and "[e]ach of the cases in which equitable tolling has been applied have involved wrongful conduct, either by state officials or, occasionally, by the petitioner's counsel." *Id.* A prisoner's illiteracy or ignorance of the law do not constitute extraordinary circumstances. *See Hughes v. Idaho State Board of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy and legal ignorance do not constitute insufficient cause to avoid procedural bar). Hunt has not satisfied either of the *Pace* elements, therefore, he cannot salvage these untimely new robbery-related claims based upon equitable tolling principles.

Alternatively, Hunt is not entitled to tolling or an exemption from AEDPA's one-year limitations period under *Schlup's* actual innocence gateway. Under *Schlup's* gateway, a petitioner's procedurally barred claim may be considered on the merits if the claim of actual innocence is sufficient to implicate a fundamental miscarriage of justice. *See Majoy v. Roe*, 296 F.3d 770, 775-76 (9th Cir. 2002). To make a showing of actual innocence, the petitioner must show that "in light of all the evidence, including evidence not introduced at trial, 'it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.'" *Id.* (quoting *Schlup*, 513 U.S. at 327, 115 S.Ct. 851). Moreover, "[t]o be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new *reliable* evidence ... that was not presented at trial." *Schulp*, 513 U.S. at 324 (emphasis added). The new reliable evidence must demonstrate the petitioner's factual innocence, not just his "legal" innocence as a result of a legal error. *Id.* at 321, 329.

As a prefatory matter, neither the Supreme Court nor the Ninth Circuit have expressly decided whether AEPDA's one-year limitations period set forth in §2244(d) may be overridden by a showing of actual innocence. *Majoy* 296 F.3d at 776. Moreover, *Schulp's* "more likely than not" standard appears to be superseded by the "clear and convincing"

standard within §2254(e)(2), as amended by AEDPA -- a point recognized by Hunt.[10/] However, as explained below, even assuming, without finding, that *Schlup's* standard still applies, Hunt has not established, and cannot establish, that a miscarriage of justice will occur if the Court does not consider his new robbery-related claims.

Hunt asserts that he previously made an "extensive prima facie showing of actual innocence" in three prior filings with the Court (docket #79, 125, and 146) and he reasserts the arguments raised in these prior filings. [Opposition at 41:10-11.] The Court has reviewed Hunt's prior filings and finds none of his actual innocence arguments establish that there is any new reliable evidence that shows it is more likely than not that no reasonable juror would have convicted him of robbing Levin.

Specifically, Hunt's principal *Schlup* arguments are raised in his "motion under the miscarriage of justice exception for adjudication on the merits of all the grounds of the second amended petition" that was filed with this Court on January 18, 2001 (docket #146) ("MOJ Motion").[11/] Hunt's MOJ motion demonstrates that his *Schlup* claim pertaining to his new habeas claims attacking his robbery conviction is not based on new reliable evidence that was not introduced at his underlying trial. On the contrary, this motion establishes that Hunt's *Schulp* claim is wholly based upon his subjective re-interpretation of evidence that was admitted in the guilt phase of his trial and his post-conviction discovery of ancient legal theories supporting his belated new robbery related claims. [*See* MOJ Motion at 4:27-18:20 (facts); 18:22-22:10.] As discussed above, a *Schlup* claim must be based upon new reliable evidence establishing petitioner's factual innocence, not just his "legal" innocence as a result of a legal error. *Schulp* 513 U.S at 321, 329.

[10/] Opposition at 40:7-13 (Hunt asserts the "application of section 2254(e)(1) to the *Schulp/Bousley* miscarriage of justice exception would have the effect of requiring Petitioner to demonstrate innocence by 'clear and convincing evidence.' Yet, the Supreme Court has determined that the correct burden of proof is 'more likely than not innocent' -- and, expressly, not the 'clear and convincing' standard. *See*, *Schulp v. Delo*, 513 U.S. 298, 323-9 (1995).").

[11/] The MOJ Motion was denied as moot since Hunt's motion for leave to file the second amended petition was denied. [1/31/01 Minute Order (AN) (docket #149).]

Further, Hunt's own account of the trial evidence in question also shows his *animus furandi* defense lacks merit. As discussed in the very case Hunt relies upon in support of this claim, "[t]he claim-of-right defense provides that a defendant's *good-faith belief*, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." *People v. Tufunga*, 21 Cal.4th 935, 938, 90 Cal.Rptr.2d 143 (1999) (emphasis added). [*See* MOJ Motion at 18:21-19:11.] However, the evidence Hunt relies upon establishes that he did not possess a good-faith belief that he had a right or claim to any property that he took from Levin by the time he committed the robbery and murder. Hunt's *animus furandi* defense is premised upon the notion that Levin owed Hunt $3.5 to $4.0 million dollars as a "commission" for profits that Hunt ostensibly generated for Levin as an outside commodities advisor regarding a commodities account Levin ostensibly held at Clayton Brokerage that was managed by Jack Friedman, a Clayton stock and commodities broker. As Levin's outside advisor, Hunt placed the trades with Friedman for execution. However, Levin's Clayton account was not real. Hunt claims the trial evidence shows that, "[a]t some point prior to Thanksgiving Day, 1983, while talking with Hunt over the telephone, Friedman stated that the money Hunt had been trading in Levin's account was not real" and the account was an incredible hoax by Levin. [MOJ Motion at 10:19-22.] Hunt knew Levin was a "con-artist" from the first time he was introduced to Levin by Simi Cooper, a one-time BBC member, and that Levin's reputation as a con man was constantly reinforced thereafter. [*Id.* at 8:8-10.] Moreover, the trial evidence showed that, by the time Hunt formed his intent to rob and kill Levin sometime in April or May of 1984, continuing up through the time the jury found Hunt and Pittman robbed and killed Levin on June 6, 1984, neither Hunt nor any other reasonable person could have maintained a good-faith belief that Hunt was entitled to commissions for trading Levin's bogus commodities account because there were never any real profits, which the jury obviously found Hunt knew prior to forming his intent to rob and kill Levin.

Likewise, there is no merit to Hunt's argument that his untimely robbery-related claims are exempt from AEPDA's limitations period on the theory that he is actually

innocent of robbing Levin because the $1.5 million dollar check he took from Levin was of little or no value due to insufficient funds and Levin's lack of an endorsement. [MOJ Motion at 18:15-20; 21:13-22:10.] Hunt's legal theory is based upon *People v. Dadmun*, 23 Cal.App. 290 (1913) and *People v. Sewall*, 90 Cal.App. 476 (1928), which he cites for the proposition that a void instrument has little or no value, therefore, it cannot serve as the basis for robbery. [Opposition at 21:20-26.] However, both of these decisions are factually distinguishable and otherwise overshadowed by the California Supreme Court's later decision in *People v. Simmons,* 28 Cal.2d 699, 705, 172 P.2d 18, 21 (1946). In *Simmons*, the California Supreme Court expressly rejected Simmons' argument that his robbery conviction should be reversed because the property taken from the victim -- a pack of cigarettes -- arguably had no value whatsoever; the state high court held, for purposes of Cal. Penal Code §211, "robbery does not depend upon the value of the property taken. The other elements being present, the crime is made out even though the property taken be of slight value." Also, on July 12, 1996, Los Angeles Superior Court Judge Stephen Czuleger issued an order denying one of Hunt's state habeas petitions that establishes the evidence introduced at Hunt's trial showed the jury had a basis for finding that, in addition to robbing Levin of the $1.5 million dollar check, Hunt and Pittman also robbed Levin of "linens from his bed[12], television remote controller, wallet, and key." [7/12/96 Order Denying Writ of Habeas Corpus, LASC Case No. A 040435 ("7/12/96 Order"), at 3:19-4:1; 7:14-16 (4/12/99 motion to dismiss (docket #98), Ex. J thereto).] Judge Czuleger also found the trial evidence established the following:

> Also, on June 7, 1984 [the date Levin was found missing], Pittman checked into the New York Plaza Hotel in Levin's name. He was arrested when he

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[12] No further description of the bed linens is given. However, Hunt states "[a]t trial, [Levin] was described as a striking and fastidious man who dress[ed] impeccably [and] lived in a spacious, luxuriously appointed apartment at 143 S. Peck Drive in Beverly Hills. A Rolls Royce, a BMW, a maid and a chauffeured car were at his disposal." [MOJ Motion at 4:27-9:5 (citations to reporter's transcript omitted).] Under the circumstances, Hunt's own emphasis on Levin's materialistic lifestyle indicates the jury could have reasonably found that it is highly unlikely Levin slept on cheap sheets and, even if he did, his bed linens had some value.

tried to pay the bill with Levin's credit cards. Petitioner flew to New York and hired a lawyer to get Pittman out of jail. Three days later, Petitioner met with Gene Browning, the inventor of the cyclotron . . . and told him that "Levin was missing and probably dead."

[7/12/96 Order at 7:18-24.] Judge Czuleger's foregoing findings clearly establish that the jury had a basis for finding that the robbery was not, as Hunt appears to suggest, limited to the $1.5 million dollar check, but that it also included other items that had some value. Under AEDPA, Judge Czuleger's factual determinations are presumed to be correct and Hunt "has the burden of rebutting the presumption of correctness by clear and convincing evidence." §2254(e)(1). Hunt has not met his burden.

Because Hunt's admittedly untimely, robbery-related new claims are not based upon new reliable evidence and his newly discovered archaic legal theories do not support his actual innocence claim, his *Schlup* claim fails in the first instance. Therefore, the Court's failure to consider these untimely new claims would not result in a miscarriage of justice.

Accordingly, the motion to dismiss should be granted in part against the first group of belated new claims (1-7, 3-7, 3-8, 3-9 and 3-10).

2. Second Group of New Claims

The second group of allegedly time-barred claims has thirty-three claims (claims 1-2(A), 2-1(B9.3(a) - (e), inclusive), 2-1(C12.1 - C12.14, inclusive), 1-2.3C, 1-5, 2-2(B1), 2-2(B2), 3-1[13/], and 3-6). [MTD at 13:14-19:1.] Respondent argues all of these new claims are based upon operative facts that differ in time and type from the operative facts supporting the claims in the first amended petition. Accordingly, Respondent argues these new claims do not relate back to the first amended petition and are time-barred under *Felix*. Hunt disagrees. After making a comparative review of the operative facts supporting the second group of new claims with the operative facts supporting the claims raised in the first

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[13/] The MTD simply identifies this claim as Ground 3. However, a comparative review of this claim as it is described in the MTD and Hunt's fourth amended petition (and related DS) establish that it is more properly identified as Claim 3-1. [*Compare* MTD at 17:5-12 *with* FAP at 42:12-16 *and* DS at 167:9.]

amended petition, the Court makes the following findings:

a. Claim 1-2(A)

In this claim, Hunt fundamentally alleges that Arthur Barens, one of his trial attorneys, violated his Sixth and Fourteenth Amendment rights to effective assistance of trial counsel by failing to adequately prepare for trial due to his "failure to learn the relevant law." [FAP at 20; DS at 31.] The Court finds the operative fact for this particular IAC claim -- Baren's failure to learn the relevant law -- is conclusory, obtuse, and fails to constitute the type of "more detailed statement" required by Habeas Rule 2(c). *Felix*, 125 S.Ct. at 2566. Further, its operative fact differs in time and type from Hunt's numerous other IAC claims raised in the fourth amended petition that do relate back to the first amended petition because they are based upon a common core of operative facts that expressly identify the same, specific instances of Barens' alleged lack of familiarity with specific substantive and procedure laws. In other words, this broadly-stated, conclusory IAC claim appears to be an attempt by Hunt to raise an IAC claim that is not tied or united to a common core of operative facts supporting the IAC claims in his first amended petition.

The motion to dismiss should be granted against claim 1-2(A).

b. Claim 1-2.3(C)

In this claim, Hunt contends Barens rendered ineffective assistance because he read verbatim a closing argument drafted by Hunt instead of writing his own argument. [FAP at 21, DS at 34.] Respondent correctly asserts that Hunt did not raise this specific claim in his first amended petition, and that it is not tied to a common core of operative facts expressly identified in the first amended petition. Hunt attempts to overcome this defect by arguing his more general complaint about Barens' failure "to maintain a litigation file or otherwise systematically prepare" constitutes a common core of operative facts. It does not because, as discussed above, *Felix* requires a habeas petitioner to set forth a "more detailed statement" of his claims. Accordingly, claim 1-2.3(C) is based upon operative facts that are not expressly tied or united to any operative facts in the first amended petition.

The motion to dismiss should be granted against claim 1-2.3(C).

c. Claim 1-5

In this claim, Hunt asserts Barens rendered ineffective assistance by failing to object to alleged prosecutorial misconduct described in Claim 3-5, where Hunt asserts the prosecutor allegedly committed a *Griffin*[14] error during closing arguments by commenting on Hunt's failure to search for Levin in Arizona after his post-disappearance, alleged sighting by two witnesses (by not searching for Levin after learning he had been seen alive, Hunt manifested his consciousness of guilt and knowledge that Levin had been murdered just as Hunt had admitted to Karney). Respondent asserts that, although the prosecutorial misconduct claim was raised in the first amended petition, Claim 1-5 was not and that its operative facts differ from those in the first amended petition. Hunt argues "[i]n terms of Rule 115(c), both [Claims] 1-5 and 3-5 fret about the fact that the jury was allowed to hear and consider the same misconduct[, and t]hey differ only in the matter of how blame is assigned. Put another way, Ground 1-5 does not 'assert[] a new ground fo relief supported by facts that differ in both time and type from those the original pleading set forth.'" [Opposition at 29:17-25.]

The Court finds Hunt's opposing argument is flawed because it is based upon his failure to recognize the subtle, materially distinct differences between the operative facts supporting each of these claims. The operative fact of the IAC claim set forth in Claim 1-5 is *Barens' failure to object* to the prosecutorial misconduct arising from the alleged *Griffin* error. In contrast, the operative facts supporting his prosecutorial misconduct claim for the alleged *Griffin* error in Claim 3-5 consists of *the prosecutor's alleged comments about Hunt's failure to search for Levin in Arizona following his post-disappearance sighting.* Consequently, Claims 1-5 and 3-5 are not united by a common core of operative facts, therefore, Claim 1-5 does not relate back to the first amended petition and is time-barred.

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[14] *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965). *Griffin* holds that a prosecutor may not suggest to the jury that it may treat the defendant's silence as substantive evidence of guilt; references by the prosecutor which stop short of suggesting an inference of guilt from the defendant's silence are innocuous, particularly where the prosecutor's comment was a fair response to remarks by defense counsel. *Id.*; *United States v. Robinson*, 485 U.S. 25, 26, 32, 108 S.Ct. 864 (1988).

The motion to dismiss should be granted against claim 1-5.

d. Claims 2-1(B9.3(a) - (e), inclusive) and 2-1(C12.1 - C12.14, inclusive)

Respondent argues, without specificity, that these judicial misconduct claims relate to issues that are time-barred for the same reason that Claim 1-2(A) is time-barred.

Aside from claims 2-1(C12.13 and C12.14), Hunt opposes and responds to Respondent's argument by way of a table that identifies: (1) each of the disputed claims, (2) the page(s) of the DS where the operative facts ostensibly appear, and (3) the corresponding page(s) in the first amended petition and/or the accompanying first amended memorandum where the common core of operative facts were initially raised. Based upon the Court's comparative review of the first amended petition and the pending FAP, the Court finds that, except for claims 2-1(C12.13 and C12.14), the operative facts of claims 2-1(B9.3(a) - (e), inclusive) and 2-1(C12.1 - C12.12, inclusive) are tied to a common core of operative facts supporting the claims Hunt has identified in the first amended petition and/or its accompanying first amended memorandum.

The motion to dismiss should be denied as to claims 2-1(B9.3(a) - (e), inclusive) and 2-1(C12.1 - C12.12, inclusive) and granted against claims 2-1(C12.13 and C12.14).

e. Claims 2-2(B1) and 2-2(B2)

By way of these two claims, Hunt asserts the trial judge violated his constitutional rights by acting as an advocate for the prosecution. The operative fact for claim 2-2(B1) is that, during a pre-trial hearing, the trial judge furnished one of the state's witnesses (Mr. Livesay) with additional justifications for imposing the death penalty. [FAP at 39; DS at 121:23-122:7.] The operative fact for claim 2-2(B2) is that, during jury selection, the trial judge uniformly intervened to rehabilitate prospective jurors supporting the death penalty but never did the same for death penalty opponents. [*Id.*] Respondent argues Hunt failed to raise these judicial misconduct claims in the first amended petition and the judicial misconduct claims in the first amended petition are based upon different operative facts. [MTD at 16:21-17:4.] Hunt concedes claim 2-2(B1) was not raised in his first amended petition or the related first amended memorandum. [Opposition at 31:12-16.] Hunt's

opposing arguments also establish the same is true for claim 2-2(B2). Moreover, as to claim 2-2(B2), Hunt's opposing arguments demonstrate the judicial misconduct claim in his first amended petition, which he relies upon to oppose Respondent's *Felix* argument, is principally based upon a different operative facts -- the trial judge's alleged bias towards Chier (Hunt's other co-counsel) during the *Hovey* voir dire. [*Id.* at 31 1/2:1-19.] Therefore, these two claims do not relate back and are time-barred.

The motion to dismiss should be granted against claims 2-2(B1) and 2-2(B2) .

f. Claim 3-1

In this claim, Hunt asserts the trial judge "silence[d]" Chier from actively participating as his co-counsel based upon his improper finding that Chier's manner of questioning certain prospective jurors during the *Hovey* voir dire was offensive, and that the trial judge violated Hunt's Fifth and Fourteenth Amendment rights to due process by failing to explain his decision, failing to hear objections, and failing to conduct an evidentiary hearing despite alleged requests to do so on three occasions. [FAP at 42:12-16; DS at 167:1-9.] Respondent argues this claim was not raised in the first amended petition. Respondent also asserts that, although Hunt's first amended petition raised a claim directed at the limitations the trial judge placed on Chier's role as appointed co-counsel (Claim 7(1)), in this particular judicial bias claim Hunt did not contend the trial judge erred by refusing to conduct a hearing on his decision to limit Chier's role. [MTD at 17:5-12.] Hunt disagrees, arguing the due process violation implicit in the trial judge's refusal to hold "the requested hearing on the judge's allegation that Chier offended jurors during *Hovey voir dire*" is "directly alleged at FAP Ground 5(1)" and in his related first amended memorandum at 11:24-27. [Opposition at 32:9-12.] A comparative review of Claim 3-1 with Ground 5(1) of Hunt's first amended petition and his first amended memorandum establish that Claim 3-1 is partly based upon a common core of operative facts, specifically, the trial judge's alleged refusal -- on *two* cited occasions -- to explain or allow a hearing on his decision to limit Chier's role because of the trial judge's finding that Chier conducted his *Hovey* voir dire in an offensive manner. [*See* First Amended Memorandum at 11:25-27.]

Accordingly, as to claim 3-1, the motion to dismiss should be denied in part as to the trial judge's two alleged refusals that are expressly identified in Hunt's prior pleadings and it is granted in part as to the unspecified third refusal.

g. Claim 3-6

The gravamen of this prosecutorial misconduct claim is that, during closing argument, the prosecutor violated Hunt's constitutional rights by arguing that Barens was influenced by Hunt's manipulative, do whatever it takes, ends justify the means "Paradox Philosophy" and, as a result, Barens was nothing more than Hunt's "alter-ego or puppet," "that the entire defense case was a manifestation of paradox philosophy 'in its grandest form,'" and that Hunt "manipulate[d] the events in the courtroom using paradox philosophy to try to get 'away with murder' and to make the jury 'look like fools.'" [DS at 174:12-26.] Hunt argues these closing arguments were improper and prejudicial because his argument that Barens' had fallen under Hunt's spell was not supported by any evidence and "could only be interpreted as an expression of his personal opinion regarding Barens' character, [Hunt's] relationship with counsel, [Hunt's] role in the defense, and the merits of the defense case." [*Id.* at 174:27-175:22.]

Respondent contends claim 3-6 is untimely and barred by *Felix* because it was not raised in Hunt's first amended petition, was belatedly raised for the first time in his 2000 Petition and does not relate back to the prosecutorial misconduct claims raised in his first amended petition. [MTD at 17:13-21.] In his Opposition, Hunt maintains this claim relates back to Ground 5(5) of his first amended petition and a reference to the trial transcript that he cited in his first amended memorandum. [Opposition at 32:14-33:2.] However, Ground 5(5) of the first amended petition reveals the operative facts of this ground consist of "the introduction of irrelevant bad character evidence regarding petitioner and his codefendant, Pittman (i.e. testimony regarding 'paradox philosophy,' petitioner's financial misconduct, the 'Rambo' story, the villager's story (RT 10969-70), Trial Exh. 85 (Pittman's 'Bag of Books'), Pittman displayed in jail clothes to the jury (RT 7548-55), Pittman's gun collection." [First Amended Petition at 9:25-10:5.] It is self-evident that the operative facts

of Ground 5(5) differ in time and type from the operative facts supporting claim 3-6. Therefore, claim 3-6 does not relate back to the first amended petition and it is time-barred.

The motion to dismiss should be granted as to claim 3-6.

C. Claim Alleged to be Noncognizable

Respondent principally argues that claim 2-2(B13) is non-cognizable on federal habeas review and should be dismissed because it only raises an evidentiary error based upon state law. [Motion at 49:24-50:19.] However, Respondent concedes that this claim is included as part of Ground 2-2, which Hunt broadly described in both his FAP and DS as follows:

> Ground 2-2: THE JUDGE'S BLATANT PRO-PROSECUTION PARTISANSHIP, AND OPEN BIAS AGAINST BARENS AND CHIER, VIOLATED PETITIONER'S 5TH, 6TH AND 14TH AMENDMENT RIGHTS TO DUE PROCESS, COUNSEL, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND A FAIR TRIAL BEFORE AN IMPARTIAL TRIBUNAL.

[See FAP at 38:24-28,40:25-27; DS at 120:1-4159:10-160:28.]

In his Opposition, Hunt concedes that, "standing alone, Ground 2-2(B13) would not state a federal claim[,]" but he proceeds to argue that it is cognizable as a piece of circumstantial evidence of the trial judge's pervasive bias supporting the judicial bias claim described as Ground 2-2. [Opposition at 37:24-28.]

A federal court may entertain an application for a writ of habeas corpus by a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Alleged violations of state law are not cognizable in a federal habeas corpus petition. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475 (1991); *see also*, *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990) (holding incorrect state court evidentiary rulings, in and of themselves, cannot serve as a basis for habeas relief unless federal constitutional rights are affected), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 974 (1991). Consequently, in §2254 proceedings, a state prisoner may not challenge an evidentiary ruling based on a violation of the state's evidence code because the

state court's failure to comply with a state evidentiary rule is irrelevant and not a sufficient basis for granting federal habeas relief. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). However, an evidentiary ruling that is alleged to be erroneous and shown to have rendered a trial so fundamentally unfair that it violated the petitioner's federal due process is cognizable. *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998).

Although Hunt may literally be describing or referring to claim 2-2(B13) as a free-standing sub-claim, there is no question that, in the totality of the circumstances, it is being pled as an operative fact supporting the judicial misconduct claim identified as Ground 2-2. Indeed, there is no doubt this is the fair and just construction when the FAP and DS are considered in conjunction with the well-settled principle of liberally construing *pro se* pleadings. Further, as shown above, Hunt has clearly asserted a violation of his federal constitutional rights in Ground 2-2 -- a point acknowledged by Respondent. Accordingly, the Court finds that, although claim 2-2(B13) does not state a freestanding cognizable claim, it is cognizable to the extent it is being pled as an operative fact in support of Ground 2-2. It remains to be seen whether Hunt has shown that this particular operative fact, or any of the many other operative facts supporting Ground 2-2, actually rendered his trial so fundamentally unfair that his due process rights were violated. *Id.*

The motion to dismiss should be denied as to claim 2-2(B13).

D. Claims Alleged to be Conclusory and Duplicative

Respondent contends there a number of Hunt's claims that must be dismissed because they are conclusory insofar as they are unsupported by any citations, discussion, or argument, or because they are only supported by cross-references to other grounds or claims. [MTD at 50:23-51:25.] After examining each of these disputed claims, the Court rejects Respondent's argument. The problem with Respondent's argument is that it is similar to the argument made with respect to claim 2-2(B13). Each of the challenged claims are actually separate prongs of operative facts supporting the IAC claims described as Grounds 1, 2, 2-1, and 2-2, each of which identify specific federal rights that were allegedly violated.

In this section of the motion to dismiss, Respondent also argues that a number of

claims should be stricken for failing to comply with the Court's order directing Hunt to identify the state petitions where the claims were arguably exhausted. [*Id.* at 51:26-52:4.] However, the Court included this directive so it could promptly resolve any possible disputes that might arise about the exhaustion of any new, unfamiliar claims that had not been raised in the 2000 Petition. However, all of the new claims in the FAP were exhausted by way of Hunt's 2000 Petition or earlier state petitions -- a point Respondent acknowledges in his motion to dismiss. [*See* MTD at 6:9-11; 8:11-15; 9:19-10:7.] As the Ninth Circuit observes in its opinion, Hunt also filed the 2000 Petition with the California Supreme Court "to obtain confirmation that all of his federal claims had previously been presented to that court and thus had been exhausted." *Hunt*, 384 F.3d at 1121. Finally, the Court finds that Hunt has generally complied with the Court's order and, in the few instances where he admittedly did not provide citations, he has provided a good-faith reason for his omission in his Opposition. Meanwhile, Respondent has not alleged nor shown -- and the Court cannot find -- that any of the claims in question are unexhausted or, alternatively, that Respondent has been prejudiced by Hunt's few instances of non-compliance.

Accordingly, the motion to dismiss should be denied with respect to the claims Respondent contends are conclusory, duplicative, or not supported by citations to the state petitions where the claims were raised.

III. CONCLUSION

Based upon the foregoing, it is recommended that the motion to dismiss be granted in part against claims 1-2(A), 1-2.3(C), 1-5, 1-7, 2-1(C12.13), 2-1(C12.14), 2-2(B1), 2-2(B2), 3-1 (only as to the trial judge's unidentified third refusal to conduct an evidentiary hearing), 3-6, 3-7, 3-8, 3-9, and 3-10 in the FAP and DS, and denied in part as to the other claims identified in the motion to dismiss.

DATED: March 31, 2006

ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

ORIGINAL

FILED
CLERK, U.S. DISTRICT COURT
JAN 26 2005
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
JAN 27 2005
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

SCANNED

Priority ✓
Send ✓
Enter ✓
Closed
JS-5/JS-6
JS-2/JS-3
Scan Only

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH HUNT, Petitioner, v. CHERYL PLILER, warden, Respondent.	Case No. CV 98-5280 WDK (AN) ORDER REVIEWING PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S MEMORANDUM AND ORDER OF NOVEMBER 22, 1999 FOLLOWING REMAND

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

I. BACKGROUND

After the United States Supreme Court vacated the Ninth Circuit's prior decision in *Hunt v. Pliler*, 336 F.3d 839 (9th Cir. 2003) ("*Hunt* I"), the Ninth Circuit remanded the case to this Court. *Hunt v. Pliler*, 384 F.3d 1118, 1126 (9th Cir. 2004) ("*Hunt* II"). *Hunt* II directs this Court to make a *de novo* review of the magistrate judge's memorandum and order of November 22, 1999 ("November 22, 1999 Order") that found petitioner Joseph Hunt's First Amended Petition ("FAP") was subject to dismissal as a mixed petition because certain claims were unexhausted. *Hunt* II further directs that, "[i]f the court determines the [FAP] to be mixed, the court should notify Hunt that it will dismiss the petition unless Hunt dismisses the unexhausted claims." *Id.* The Court

makes the findings and conclusions discussed below after reviewing *de novo* the November 22, 1999 Order and Hunt's Objection thereto filed on December 20, 1999 ("1999 Objection").

II. DISCUSSION

A. The FAP and the November 22, 1999 Order

The FAP has thirteen separately numbered grounds for habeas relief pursuant to 28 U.S.C. § 2254. However, the operative facts for grounds 5, 7, 9, and 11 are set forth in separately numbered subparts, which are construed and treated as individual claims. Respondent moved to dismiss the FAP as a mixed petition which Hunt opposed.

In his November 22, 1999 Order, the magistrate judge found the FAP contained a substantial number of unexhausted grounds[1/] because both the federal legal theory and operative facts for each ground had not been fairly presented in any one of the three petitions for review that Hunt had then filed with the California Supreme Court. Accordingly, the magistrate judge found the FAP was a mixed petition and he "recommend[ed] that Respondent's Motion [to Dismiss] be granted and that the action be dismissed without prejudice" if Hunt did not file a motion for leave to file a second amended petition that only raised exhausted claims. [November 22, 1999 Order at 2:20-3:1.]

B. Exhaustion Principles

The exhaustion doctrine requires every cognizable federal habeas claim be "fairly presented to the highest court of the state." [November 22, 1999 Order at 6:24-7:1, citing *Duncan v. Henry*, 513 U.S.

[1/] The magistrate judge found the following grounds were unexhausted: 1, 5(1), 5(2), 5(6), 7(2)(ii), 7(2)(iii), 7(2)(vii), 7(2)(viii), 7(3), 7(4), 9(2), 9(3), 9(12), 9(13), 9(14), 9(16), 9(17), 9(18), 9(22), 9(23), 9(24), 9(25), 9(26), 9(27), 9(28), 9(29), 9(30), 9(31), 9(32), 9(33), 9(34), 9(35), 9(36), 9(37), 9(39), 9(41), 9(42), 9(43), 9(47), 9(48) and 10. He found 9(15) was partially unexhausted.

364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995).] A claim is not fairly presented unless the petitioner has identified *both* the operative facts and federal legal theory for each federal habeas claim being asserted. *Id.*; *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982). The November 22, 1999 Order shows the magistrate judge found the FAP was mixed after applying the exhaustion principles set forth in *Duncan* and *Anderson*, both of which are still good law.

Moreover, in 2004, the United States Supreme Court and the Ninth Circuit, respectively, issued three opinions that clarify and highlight several exhaustion principles set forth in prior cases that apply here: *Baldwin v. Reese*, 541 U.S. 27, 124 S.Ct. 1347, 1349, 158 L.Ed.2d 64 (2004); *Castillo v. McFadden*, 370 F.3d 882 (9th Cir. 2004); and *Casey v. Moore*, 386 F.3d 896 (9th Cir. 2004).

First, these opinions make it clear that, in order to exhaust a federal claim, the prisoner must first give the State a fair opportunity to correct an alleged violation of the prisoner's federal rights by fairly presenting the claim at each level of the state's direct appeal process; it is insufficient to raise a federal claim for the first time in a petition or brief filed with a state supreme court with powers of discretionary review. *Baldwin*, 124 S.Ct. at 1349; *Casey*, 386 F.3d at 916.[2/] Second, "a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court

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[2/] *Casey* also emphasized that, "[e]ven before *Baldwin*, we have had held that to exhaust a habeas claim, a petitioner must properly raise it *on every level of direct review*." *Casey*, 386 F.3d at 916 (emphasis added), *citing Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir. 1992)(federal claims "not raised on every level of direct review, or were raised for the first time on habeas" were unexhausted).

opinion in the case, that does so." *Baldwin*, 124 S.Ct. at 1351 (holding ineffective assistance of appellate counsel claim was unexhausted for purposes of federal habeas review where petition filed with state supreme court did not expressly mention the federal legal theory and operative facts supporting this claim); *Castillo*, 370 F.3d at 887 (under *Baldwin*, a federal habeas claim must be raised "within the four corners of the appellate briefing" presented to each level of the state's appellate courts on direct review). Third, the federal claim must expressly identify the *federal* legal theory it is based upon, *Baldwin*, 124 S.Ct. at 1351. "'[G]eneral appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial,' do not establish exhaustion." *Castillo*, 370 F.3d at 886, 889-90; *Casey*, 386 F.3d at 913. Nor does a "conclusory, scattershot citation of federal constitutional provisions, divorced from any articulated federal legal theory[;] . . . . .[e]xhaustion demands more than drive-by citation." *Castillo*, 370 F.3d at 889-90. Finally, a claim is unexhausted if the stated federal legal theory is not expressly linked to, or supported by, any operative facts, which must also be set forth in the petition or brief. *See Baldwin*, *id.*; *Castillo*, 370 F.3d at 887.

With the foregoing exhaustion principles in mind, the Court now turns to the task of reviewing Hunt's 1999 Objection to the November 22, 1999 Order.

C. Hunt's 1999 Objection

Hunt's 1999 Objection is divided into three sections. Section I consists of an overview of the contentions set forth in Sections II and III. Section II contains what Hunt refers to as "thematic contentions," which are, in turn, directed at what Hunt characterizes

as "eight, central, philosophic differences between him and the Magistrate Judge" pertaining to the exhaustion requirements. [1999 Objection at 6:22-24 & 8:1] Section III sets forth Hunt's substantive "non-thematic" contentions to some, but not all, of the grounds in the FAP which the Magistrate Judge found were unexhausted ("disputed claims") in his November 22, 1999 Order.

In his overview, Hunt explains that "[a]lmost all of the [1999] Objection concerns only one of the three PFRs[3/] filed with the CSC in [his] case, i.e., PFR#3[,]" and that "[he] intended PFR#3 to exhaust available remedies as to certain 'Supplemental Claims' [[4/]] and 'IAC Claims' [[5/]] of federal constitutional error presented in Volumes II and III" of the state habeas petition that he filed with the California Court of Appeal on March 20, 1997 ("1997 CCA petition"). [*Id.* at 3:17-22.] According to Hunt, his 1997 CCA petition was "...472 pages long, 1 1/2 spaced -- the equivalent of 640 pages at normal double spacing. It was backed with over 60 exhibits, comprising almost 2,000 additional pages." [*Id.* at 17:14-19.] Hunt's 1997 CCA petition is a good example of why *Baldwin* holds that claims are unexhausted if the federal legal

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[3/] "PFR#3" is Hunt's abbreviated reference to the third petition for review that he filed on January 23, 1998, with the California Supreme Court, which Hunt also abbreviates as "CSC." For sake of continuity and brevity, the Court shall also refer to Hunt's third petition for review as "PFR#3."

[4/] The Supplemental Claims are grounds 5(1), 5(2), 7(2)(ii), 7(2)(iii), 7(2)(vii), 7(2)(viii), 7(3), 7(4), 9(12), 9(13), 9(14), 9(16), 9(17), 9(18), 9(20), 9(26), 9(29), 9(30), 9(31), 9(33), 9(39), 9(41), 9(42), and 9(43). These claims are identified in Table #2 at pages 22-23 of Hunt's 1999 Objection. The magistrate judge found only ground 9(20) was exhausted. Also, Table #2 does not identify the four subparts for ground 7(2) which set forth the operative facts.

[5/] The IAC Claims are grounds 9(15), 9(22), 9(24), 9(25), 9(28), 9(34), 9(35), 9(36), 9(37), and 9(48). These claims are set forth in Table #3 at page 35 of Hunt's 1999 Objection.

theory and operative facts of purported federal claims are not fairly presented in the petition or brief filed with the reviewing state court. In any event, the magistrate judge found the disputed claims, which included all but one of the Supplemental[6] and IAC Claims, were unexhausted because Hunt never fully raised both the federal legal theory and operative facts for each claim in at least one of his petitions for review.

1. Hunt's eight "thematic contentions"

Hunt's thematic contentions, which are prolix and nearly incomprehensible, lack merit for the following reasons.

As a preliminary matter, Hunt argues the Court should rule on his eight thematic contentions before considering his substantive, non-thematic contentions. Hunt asserts that proceeding in this fashion will make the disposition of his substantive contentions "far more manageable" because, if the Court agrees with his thematic contentions, most or all of his substantive contentions to the Magistrate Judge's non-exhaustion findings should be sustained. [*Id.* at 6:22-26.]

The Court believes Hunt's requested, two-step approach manifests a lack of faith in the strength of his substantive contentions. In short, if Hunt's substantive contentions had merit, then there would be no need to raise, let alone consider, his thematic, "philosophic differences" with the Magistrate Judge's non-exhaustion rulings. Further, as discussed below, a review of Hunt's eight thematic contentions confirms they are nothing more than a prolix attempt by Hunt to finesse, rationalize, or seek excuse for his own recognition that he did not fairly present his disputed claims to the California

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[6] Hunt includes ground 9(20) as a Supplemental Claim even though the magistrate judge found this ground was exhausted.

Supreme Court in any one of his three petitions for review.

a. Thematic Contention #1

Specifically, in his first thematic contention, Hunt contends the judicial bias claims raised in grounds 5(1) and 5(2) are exhausted even though he expressly concedes that the magistrate judge was correct in finding that Hunt did not raise the operative facts for these claims in his first and second petitions for review. [1999 Objection at 8:7-11.] Hunt nevertheless maintains that he exhausted ground 5(1) by raising an "equivalent" claim "at pages 424 to 428" of his 1997 CCA petition. Likewise, he contends that the operative facts for ground 5(2) were set forth at pages 424 to 461 of his 1997 CCA petition, and that he fairly presented the operative facts to the California Supreme Court by incorporating them by reference into his third petition for review. [*Id.*, 8:25-17.] But Hunt proceeds to argue that, "[i]f [he] had explicitly and thoroughly restated the factual and legal allegations presented to the CCOA[7/] related to Grounds 5(10) and 5(2) in PFR#3, there would have been two possible outcomes[.]" [*Id.* at 10:12-15 (emphasis in original).] Hunt's argument reveals his own recognition that he never fairly presented these claims to the California Supreme Court in PFR#3. Last, in his concluding argument for this contention, Hunt maintains these grounds are exhausted because it is not his fault that "the CSC declined to make an order enabling them to be reached on the merits." [*Id.* at 15:3-17.] Hunt's final argument misses the point -- because these claims were never fairly presented in his petitions for review, the California Supreme Court never had a fair opportunity to reject them in the first instance, on procedural grounds or the

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7/ "CCOA" is Hunt's abbreviated reference to the California Court of Appeals.

merits. Accordingly, Hunt's first thematic contention is overruled.

b. Thematic Contention #2

In his second thematic contention, Hunt argues that all of his aforementioned Supplemental Claims are exhausted because the refusals of the superior court and California Court of Appeal to consider these claims left him without any means of having them reviewed on the merits, and that the only way to obtain such a merit review was through the issuance of an order to show cause. Hunt further asserts that he concluded that filing PFR#3, not a habeas petition, was the most expeditious manner[8] to obtain a merit review of his Supplemental Claims, and that using a petition for review would also allow him to avoid "'wasteful[ly] rebriefing' the 'argument and authorities' in support of his supplemental claims[.]" [1999 Objection at 19:7-18.] However, Hunt proceeds to assert the foregoing and other reasons "led

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[8] As explained in the November 22, 1999 Order, before Hunt filed his 1997 CCA petition, Hunt appealed his underlying conviction to the California Court of Appeal and concurrently filed a prior habeas petition. In connection with the prior habeas petition, the California Court of Appeal issued an order to show cause ("OSC") in November 1993, which was modified in December 1993. The OSC directed the superior court to conduct an evidentiary hearing on some, but not all, of the claims that Hunt had raised in the earlier habeas petition. The scope of the OSC did not embrace the Supplemental Claims or IAC Claims. On January 5, 1994, Hunt responded by filing a second petition for review with the California Supreme Court, which challenged the scope of the OSC. On March 17, 1994, the California Supreme Court summarily denied Hunt's second petition for review without comment or citation to case authority. As a result of the OSC, the superior court held an evidentiary hearing beginning in March 1996 to resolve seven of the 23 issues it had been directed to resolve. On July 12, 1996, the superior court issued its order denying the habeas petition. Hunt responded by filing his massive 1997 CCA petition, which the California Court of Appeal denied in a 13-page order on January 15, 1998. Thereafter, on January 23, 1998, Hunt filed "PFR#3" in the California Supreme Court, asserting that: (1) the superior court committed various errors in connection with the evidentiary hearing, (2) the superior court erred by refusing to consider his supplemental habeas petition and (3) the State's legal standard as applied by the lower courts in reviewing his habeas claims was erroneous. [November 22, 1999 Order at 5:1-6:13.]

[him] to choose to file a PFR, why he felt justified in referring to ranges of pages and exhibits in the briefing before the CCOA as the evidence that he had pled a prima facie case, and why he concluded that there was no point in reiterating the claims verbatim." [1999 Objection at 21:1-6 (emphasis added).] He also quotes the part of PFR#3 where he referred the California Supreme Court to the Supplemental Claims. Also, the following quoted portion of Hunt's PFR#3 establishes that he did not fairly present his Supplemental Claims to the state high court because he just referred to these claims in a broad, conclusory manner:

> Procedurally speaking all of petitioner's supplemental claims are sound.[footnote 7 omitted] The operative facts were properly pled in the underlying petitions.[footnote 8 omitted] In addition, all of the claims presented a prima facie case of prejudice.
>
> * * * * *
>
> To remedy this mistake this Court should direct the issuance of an OSC on all claims described in Section II of the [1997 CCA petition] at pages 262-462.

[PFR#3 at 13(Respondent's Motion to Dismiss, Exhibit L at 466)(emphasis added).][9] The magistrate judge's finding that Hunt did not fairly present his Supplemental Claims to the California Supreme Court in the foregoing manner was correct. Moreover, the United States Supreme Court's opinion in *Baldwin* forecloses any remaining doubt that Hunt failed to exhaust his Supplemental Claims by simply referring the state high court to find and read them in two hundred pages from his 1997 CCA

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[9] In omitted footnotes 7 and 8, Hunt cites to the pages of his 1997 CCA petition and a 1996 habeas petition where the supplemental claims were ostensibly presented.

petition. Accordingly, Hunt's second thematic contention is overruled.

c. Thematic Contention #3

In his third thematic contention, Hunt argues grounds 7(2), 7(3), and 7(4) were exhausted because "[a]ll the aspects of these claims which the Magistrate Judge has found to be unexhausted were presented to the CCOA in the extensive passages referenced in Table #2 [which identifies the 21 Supplemental Claims]." [1999 Objection at 25:6-28.] He also argues these claims were exhausted because the California Court of Appeal denied these claims on the merits,[10] but did so citing the wrong legal standard. Hunt's third thematic contention suffers from the same defect as his first and second thematic contentions -- his failure to fairly present these claims to the California Supreme Court in PFR#3 by simply referring to his 1997 CCA petition. Accordingly, Hunt's third thematic contention is overruled.

d. Thematic Contention #4

In his fourth thematic contention, Hunt argues he exhausted the IAC Claims because these ten claims, like his Supplemental Claims, were raised in his 1997 CCA petition and referred to in PFR#3. [1999 Objection at 28:11-15; 35:8-28.] Hunt also concedes that his mere reference to these claims in PFR#3 violated Rule 28(e)(5) of the California Rules of Court ("CRC"), requiring all arguments and authorities to be included in the petition and forbidding the practice of incorporating these matters by reference. However, he asserts "it is not unreasonable to believe" the California Supreme Court considered

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[10] In denying his 1997 CCA petition, the California Court of Appeal's order expressly states that, "[i]n the interests of judicial economy, we have reviewed the supplemental petition on the merits and conclude that [Hunt] has failed to meet his burden of showing that but for counsel's alleged errors, the outcome of his trial would have been different."

these claims by "silently granting" his concurrently filed application to waive any technical defects with his PFR#3. [Id. at 28:11-32:19.] Hunt argues his foregoing assumption -- that the California Supreme Court silently granted his request to waive CRC Rule 28(e)(5)'s incorporation by reference ban --is more reasonable than the magistrate judge's contrary finding because, under CRC Rule 18, a reviewing court "may," on its own motion, with or without notice, order the defective brief to be returned or stricken, or "disregard defects and consider the brief as if it was properly prepared." [*Id.* at 32:21-35:5.] Hunt maintains the California Supreme Court must have disregarded the CRC Rule 28(e)(5) defect since it did not expressly order his petition to be returned or stricken. [*Id.* 29:28-32:19.]

Hunt's implied waiver argument lacks merit. As the magistrate judge found, Hunt's argument is foreclosed by the Ninth Circuit's decision in *Gatlin v. Madding*, 189 F.3d 882 (9th Cir. 1999). *Gatlin* held CRC Rule 28(e)(5) expressly prohibits the incorporation by reference of authorities or arguments from another document, and the question of whether it has been consistently enforced is irrelevant in the context of whether a petitioner has properly exhausted his state court remedies for purposes of federal habeas review. *Gatlin*, 189 F.3d at 888. The IAC Claims, like the Supplemental Claims, were not among the nine appellate issues that Hunt expressly raised for review in PFR#3. [PFR#3 at 1-9 (Respondent's Motion to Dismiss, Exhibit L at 4454-55).] Based upon *Baldwin* and *Castillo*, the Court finds that Hunt did not exhaust or fairly present the IAC Claims in PFR#3 by making an obtuse reference to where they could be found in his 1997 CCA petition. Accordingly, Hunt's fourth thematic contention is overruled.

/ / /

e. Thematic Contention #5

In his fifth thematic contention, Hunt principally argues that the Supplemental and IAC Claims were exhausted, and that he gave the California Supreme Court "a 'fair opportunity' to reach them," because, "[b]y filing an application for waiver of, inter alia, [CRC] Rule 28(e)(5) and referencing ranges of pages related to the 'Supplemental Claims' and 'IAC Claims,' [he] ensured that the CSC would read the underlying claims of the March 20, 1997 habeas petition." [1999 Objection at 48:2-4, 26-28.]

The Court finds Hunt's fifth thematic contention is nothing more than a composite of parts of his prior thematic contentions, and that it suffers from the same primary problem -- his failure to recognize that he did not fairly present these claims to the California Supreme Court by incorporating them by reference. Hunt's fifth thematic contention is overruled for the same reasons previously stated.

f. Thematic Contention #6

In his sixth thematic contention, Hunt contends the IAC Claims are exhausted because, in PFR#3, "he broadly challenged the fact findings of the lower courts as being 'clearly erroneous.'" [1999 Objection at 50:17-18.] More specifically, Hunt asserts "[t]he federal nature of these 1[0] IAC Claims was clearly before the CSC" because "[t]he *Strickland*[*v. Washington*, 466 U.S. 668, 687-688 (1980)] standard is referenced on 7 pages of the [third] PFR and the opinion of the CCOA, which was attached to the PFR as required by [CRC] 28(e)(6), blatantly pursues its analysis of the 1[0] claims under the Sixth Amendment and the *Strickland* standard." [*Id.* at 50:19-23.]

The problem with Hunt's sixth thematic contention is Hunt ignores that, in PFR#3, he expressly raised nine issues for review that were

directed at the California Court of Appeal's refusal to expand the scope of its OSC to include certain claims that Hunt wished to pursue, claims which included the IAC Claims, and various alleged errors committed by the superior court in relation to the evidentiary hearing. The IAC Claims were discussed in the California Court of Appeal's order denying Hunt's 1997 CCA petition, but Hunt did not expressly raise them for review in PFR#3. By failing to identify the IAC Claims as part of the specific issues for review in PFR#3 and broadly referring to them without discussing the merits, Hunt actually failed to present these claims at all, let alone "fairly present" them to the California Supreme Court for merit review and exhaustion purposes. *Baldwin*, 124 S.Ct. at 1351; *Castillo*, 370 F.3d at 887; *Gatlin*, 189 F.3d at 888. Accordingly, Hunt's sixth thematic contention is overruled.

g. Thematic Contention #7

In his seventh thematic contention, Hunt argues that, by denying his request to represent himself during the evidentiary hearing that was part of his concurrent, post-conviction collateral attack, the State waived its right to raise exhaustion as an affirmative defense for the purpose of this action. [1999 Objection at 52:21-55:14.] Hunt's argument lacks merit for two reasons. First, the federal habeas statute expressly provides that "[a] state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. §2254(b)(3). There is nothing in the record showing the State has made such an express waiver. On the contrary, Respondent's motion to dismiss makes it eminently clear that the State has not waived the exhaustion requirement. Second, to the extent the state trial court erred in refusing to allow Hunt to represent himself

during the evidentiary hearing, that error is not cognizable because it is well-settled that errors during state collateral proceedings are not addressable in federal habeas corpus proceedings. *Franzen v. Brinkman*, 877 F.2d 26 (9th Cir.), *cert. denied*, 493 U.S. 1012 (1989). Accordingly, Hunt's seventh thematic contention is overruled.

h. Thematic Contention #8

In his eighth thematic contention, Hunt argues IAC claims 7(2) through 7(5)[11], 9(1) through 9(48), and Claim 10 are "exempt" from the exhaustion requirement because, despite his protests, the state courts decided the foregoing claims in a "piecemeal" manner. [1999 Objection at 56:1-28.] There is no merit to this contention. The state courts decided the foregoing claims in a piecemeal fashion because that is precisely the way in which Hunt presented them to the state courts for review. In the process, Hunt not only did so in a manner that ignored state procedural rules, but he also failed to comply with federal laws that dictate the manner in which a claim must be presented to the state courts in order to obtain federal habeas relief. Hunt cites no authority for his novel proposition that a prisoner is exempt from complying with the federal exhaustion requirements under these circumstances, and the Court finds he is unable to do so because there is no such authority. Hunt's eighth thematic contention is overruled.

2. Hunt's "Non-Thematic" Contentions

Hunt's substantive, "non-thematic" contentions, which are set forth in Section III of his 1999 Objection, are identified by the ground or grounds in question. Hunt did not raise any substantive

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[11] Ground 7(5) was not even challenged by Respondent nor found by the magistrate judge to be unexhausted. Presumably, Hunt is referring to ground 7(4) since it, not ground 7(5), is one of the Supplemental Claims that the magistrate judge did find to be unexhausted.

contentions as to the following disputed claims which the magistrate judge found were unexhausted: grounds 9(22), 9(23), 9(24), 9(26), 9(27), 9(28), 9(34), 9(35), 9(36), 9(37) and 9(48). Accordingly, Hunt has waived substantive objections to these claims.

a. Ground 1

Ground 1 consists of an instructional error claim based upon the trial court's failure to give a unanimity instruction. The magistrate judge found this claim was unexhausted because it is exclusively based upon a state legal theory, and that the California Court of Appeal only addressed this state claim in the context of the robbery charge without mention of a federal legal theory. Hunt argues this ground was exhausted because it was raised in footnote 36 of his first petition for review, which also cited to three federal cases. [1999 Objection at 58:4-59:7.]

This claim is part of the lengthy and final thirty-sixth footnote on the last page of the first petition for review. The footnote is a compendium of several separate and distinct claims, four of which consist of separate and distinct instructional error claims that are raised collectively in part 3 of footnote 36. The unanimity instructional error claim is one of the four instructional error claims. As the magistrate judge observed, the claim in its entirety is stated as follows: "Erroneous jury instructions rendered the trial fundamentally unfair, including . . . c) lack of unanimity instruction, thereby infringing on appellant's right to a unanimous verdict (*People v. Diedrich* (1982) 31 Cal.3d 263, 280-281) . . . ." Significantly, unlike the unanimity instructional error claim, the other three instructional error claims are expressly and exclusively linked to federal cases. At the end of the instructional error claim,

Hunt does cite to three federal cases, however, he does not link, explain, or show how these cases support any of these four distinct claims. Further, *Diedrich* does not discuss the failure to give a unanimity instruction as a federal constitutional deprivation. Under the circumstances, it appears the three federal cases were actually cited in further support of the three instructional error claims that were based upon a federal legal theory, not the unanimity instructional error claim which is expressly and exclusively based upon state law. Regardless, as discussed above, the Ninth Circuit has made it clear that a parting, "conclusory, scattershot citation of federal constitutional provisions, divorced from any articulated federal legal theory," does not satisfy the fair presentation requirement of the exhaustion doctrine. *Castillo*, 370 F.3d at 889. "Exhaustion demands more than drive-by citation." *Id.*

Accordingly, this ground is unexhausted. The Court finds Hunt's substantive contention to the magistrate judge's nonexhaustion finding lacks merit, therefore, it is overruled.

b. Grounds 5(1) & 5(2)

With respect to grounds 5(1) and 5(2), Hunt argues that "[a] finding in [his] favor as to [thematic] Contentions 1, 2, 4, 5, <u>or</u> 7 would justify rejection of the Magistrate's nonexhaustion recommendations as these grounds." [1999 Objection at 59:10-12 (emphasis in original.] Hunt then proceeds to argue that "[t]he Magistrate's error, following Respondent's lead, is that he did not read the transcript pages and exhibits referenced in the first two petitions for review." [*Id.* at 60:8-10.] As discussed above, the Court overruled all of Hunt's thematic contentions. The Court's explanation for rejecting Hunt's thematic contention to these grounds applies with

equal force to Hunt's substantive contention to grounds 5(1) and 5(2). Therefore, this contention is overruled.

c. Ground 5(6)

In Ground 5(6), Hunt asserts his due process rights were violated because, during closing argument, the prosecutor commented on Hunt's failure to present evidence of a search for Levin in Arizona. The magistrate judge found this prosecutorial misconduct claim was unexhausted because, in raising this claim in footnote 36 of his first petition for review, Hunt did not cite to the Fourteenth Amendment, and that Hunt's citation to *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475 (1991), was inadequate to alert the California Supreme Court to the federal legal theory since *McGuire* involved a due process challenge to a jury instruction, not prosecutorial misconduct. In his substantive contention, Hunt argues his citation to *Estelle* was sufficient because "*Estelle* twice cites *Donnelly* [*v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974)] as the source of [the] fundamental unfairness/due process standard[, and that] Donnelly itself pointedly resolves a summation misconduct claim under the same 'fundamental unfairness' standard it just applied to a jury instruction. . . . Thus, steering the CSC to the Estelle standard was the same as steering them to the Donnelly standard." [1999 Objection at 65:10-27.]

The Court agrees with Hunt on this contention. Although *Estelle* involved a due process challenge to a jury instruction, not prosecutorial misconduct, both of these types of violations rely upon the same federal legal theory - the due process clause of the Fourteenth Amendment. Further, unlike his unanimity instructional error claim, Hunt did identify the operative facts for this claim. Accordingly, Hunt's contention to this part of the magistrate judge's

November 22, 1999 Order is sustained, and the Court finds this claim is exhausted.

d. Grounds 7(2), 7(3) & 7(4)

In his substantive contention for these grounds, Hunt maintains the Court should sustain his objection to the magistrate judge's finding that these claims were unexhausted if the Court sustained thematic contentions 2, 3, 4, 5, 7, or 8. [1999 Objection at 66:18-20.] The Court overruled these thematic contentions for the reasons stated above, reasons which apply equally to Hunt's substantive objections. Thus, Hunt's substantive objections to these grounds are overruled.

e. Supplemental Claims plus Grounds 9(15) and 9(47)

Hunt argues that all of his Supplemental Claims, plus grounds 9(15) and 9(47),[12] should be considered exhausted "only if this Court agrees with [thematic] contention 2, 4, 5, 7, or 8 - or believes that these Contentions cumulatively establish that the CSC received a fair opportunity to reach the claims." [1999 Objection at 67:15-19.] As discussed above, the Court has rejected each of these contentions. Since each of these contentions lack merit on an individual basis, the same holds true when they are accumulated.

Additionally, with respect to grounds 9(29), 9(41), 9(42) and 9(43), Hunt contends these grounds are also exhausted because he cited *Strickland* in PFR#2 and PFR#3, thereby identifying the federal legal theory for these claims. [1999 Objection at 67:21-69:22.] However, Hunt's substantive contention misses the point. Ground 9(29) was found to be unexhausted because of Hunt's failure to link the federal legal theory to the operative fact. [November 22, 1999 Order at 30:5-18.]

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[12] Hunt mistakenly asserts these two grounds are listed in Table #2. [1999 Objection at 67:11 & 13.]

Likewise, grounds 9(41), 9(42) and 9(43) were also unexhausted because PFR#3 only alluded to these ineffective assistance of counsel claims by referring to his 1997 CCA petition, and Hunt's two earlier petitions did not identify the operative facts, that is, the identities of the witnesses and their potential statements. Hunt's substantive contentions to these claims are overruled.

f. Various IAC Claims

Hunt contends grounds 9(22), 9(24), 9(25), 9(28), 9(34), 9(35), 9(36), 9(37), and 9(48) "should be considered exhausted if this Court agrees with [thematic] Contention 4, 5, 6, 7, or 8 -- or if this Court believes that these contentions cumulatively establish that the CSC received a fair opportunity to reach the claims." [1999 Objection at 69:26-70:5.] The Court overruled each of these thematic contentions for the reasons discussed above and, as already mentioned, no synergistic effect takes place when objections that lack merit on an individual basis are combined. Hunt's substantive contentions to these claims are overruled.

g. Ground 9(2)

In ground 9(2), Hunt contends Barens failed to maintain a litigation file or to otherwise systematically prepare, which resulted in poor cross-examination, lost impeachment opportunities, and a stunted defense. The magistrate judge found this claim was unexhausted because Hunt did not raise these operative facts in his petitions to the California Supreme Court. Hunt argues this ground was exhausted because a passage from his second petition for review principally directed at Barens' alleged failure to investigate mentioned the word "preparation," and because this ground "was extensively and directly covered in the 1991 habeas petition filed before the CCOA, i.e, the

petition that gave rise to PFR#2." [1999 Objection at 70:8-71:18.] Hunt's contention lacks merit. The aforementioned passage from Hunt's PFR#2 did not fairly present the operative facts for ground 9(2). Indeed, Hunt's contention establishes that, at best, he only raised this ground in his 1991 habeas petition filed with the California Court of Appeal, not the California Supreme Court. Accordingly, Hunt's substantive contention to this ground is overruled.

h. Ground 9(3)

In ground 9(3), Hunt contends that Barens failed to assist Chier in trying to overturn the limitations on Chier's role during the trial. The magistrate judge found this claim was unexhausted because it was not presented in any of Hunt's petitions for review. Hunt argues this ground was "explicitly exhausted" in two paragraphs of his first petition for review that broadly describe Chier's unsuccessful effort to obtain a writ to overturn certain restrictions the trial court had placed on Chier's role as Baren's second chair. Hunt argues, "[t]aken as a whole, and read in context, these two paragraphs "ask[ed] the CSC to consider both Barens' and Chier's ineffectiveness with respect to the writ petition." [1999 Objection at 71:20-72:3.] He also argues this ground was exhausted because, in PFR#3, he referred to an exhibit consisting of a declaration from Chier wherein Chier states that Barens refused to assist in the writ. [*Id.* at 72:9-12.] The two paragraphs in Hunt's first petition for review and his indirect reference to Chier's declaration in PFR#3, taken together, did not fairly present ground 9(3) to the California Supreme Court. Further, the references to Chier's efforts to obtain a writ were presented as background material for a completely different claim. Accordingly, the Court finds Hunt's contention to this ground lacks merit and it is overruled.

i. Grounds 9(23), 9(32), & 9(45)

The magistrate judge found these grounds were unexhausted because the operative facts were not raised in any of Hunt's petitions for review. Hunt disagrees, arguing the magistrate judge erred by "not giving force and effect to the references to exhibits" to his petitions for review, and by essentially failing to consider certain parts of these exhibits in conjunction with specific sentences extracted from his petitions for review that pertain to similar issues. [1999 Objection at 72:13-15; 73:18-20; 74:11-13.] The Court finds these grounds were unexhausted because Hunt did not fairly present the operative facts to the California Supreme Court by making obtuse references to exhibits where these operative facts were buried. A prisoner does not provide the state with a fair opportunity to consider an alleged violation of federal law by requiring a busy state reviewing court to first hunt for the operative facts in exhibits and then divine a petitioner's intended federal claim from references to federal cases cited in support of similar but different claims. Hunt's substantive contentions to these grounds are overruled.

l. Ground 10

In Ground 10, Hunt alleges his Sixth Amendment right to effective assistance of counsel was violated by "by the degree of Barens' moral turpitude, apathy, and incompetence. . . ." In addition to relying on the facts asserted in support of grounds 7(2), 7(3), 7(5), 8 and 9, some of which, as discussed above, are unexhausted, Hunt also asserts that Barens had a reputation for self-dealing and dishonesty, that he billed the County for expenses Hunt had already paid, and that other members of the defense team wished to resign because of Barens' behavior. The magistrate judge found this claim was unexhausted

because, although Hunt asserted similar facts as to Barens' "character for self-dealing" and "dishonesty," the claim asserted in state court did not directly challenge Barens' performance at trial as does the pending claim. Hunt argues the claim is exhausted because, in PFR#3, he cited the California Supreme Court to various exhibits where the operative facts could be found, and directed the state high court "to a list of 'examples' (or evidence) offered in support of the 'arguments and authorities' presented in PFR#3, through an appropriate citation to files of the CCOA." The Court finds Hunt failed to exhaust this specific claim by failing to fairly present this claim to the California Supreme Court by fairly presenting both the federal legal theory and operative facts, together, in one petition for review. Once again, Hunt erroneously attempts to satisfy the fair presentation requirement through indirect references or citations to exhibits and other lower court records where the operative facts may be found. Accordingly, Hunt's contention to this ground is overruled.

C. Hunt's 2001 Objections relating to the Magistrate Judge's order denying him leave to file the Proposed Second Amended Petition

Although *Hunt* II does not expressly require the Court to do so, the Court has also reviewed *de novo*: (1) Hunt's February 23, 2001 Objection to the magistrate judge's January 31, 2001 order denying him leave to file the proposed second amended petition that Hunt lodged with the Court on January 18, 2001 ("February 23, 2001 Objection") and (2) Hunt's May 4, 2001 Objection to the magistrate judge's report and recommendation filed on March 26, 2001, in which Hunt also takes issue with the magistrate judge's order denying him leave to file the proposed second amended petition. The February 23, 2001 Objection and May 4, 2001 Objection shall collectively be referred to as Hunt's 2001

Objections.[13]

In terms of how to best proceed, a substantial amount of time has passed since Hunt lodged his proposed second amended petition on January 18, 2001. As mentioned in *Hunt* II, the second amended petition ostensibly includes all but one of the claims set forth in his pending FAP that were previously found to be unexhausted, plus a number of new claims that were also raised in the 2000 state habeas petition that the California Supreme Court denied on August 9, 2000. Further, the Court is concerned that *Baldwin*, *Castillo*, *Casey*, and other applicable exhaustion cases that have been issued since Hunt lodged his second amended petition may have a bearing upon whether all of the claims raised in the second amended petition are exhausted. If that is the case, Respondent would undoubtedly file another motion to dismiss the second amended petition as mixed.

Accordingly, in order to provide Hunt with an opportunity to

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[13] On October 21, 2004, Hunt lodged an update to his Objections ("Update") which the Clerk is directed to file. In his Update, Hunt states that, with the exception of objection 7, he stands on objection nos. 1-6, 8 and 9 of his Objections. [Update at 5:16-7:1; 10:26-27.] The objections are: (1) the magistrate judge's recommendation to dismiss the petition with prejudice is unfounded (Objection 1); (2) the magistrate judge's non-exhaustion findings are erroneous because the California Supreme Court's 08/09/00 order confirms that grounds 1 through 9, inclusive, and 14 were exhausted before Hunt commenced this action, and confirms and proves his claims are exhausted because further state remedies are unavailable to him; he also asserts the magistrate judge's assessment of the 08/09/00 Order is based upon a misapplication of *Brown v. Maass*, 11 F.3d 882 (9th Cir. 1993), *appeal after remand*, 46 F.3d 1139 (9th Cir. 1995) (Objections 2, 3 & 4); (3) most of the magistrate judge's non-exhaustion arguments are wrong because the allegedly unexhausted elements were incorporated by reference in a petition for review (Objection 5); (4) even if grounds 1 through 9 and 14 of his proposed second amended petition are unexhausted, he is still entitled to have them addressed on the merits under Fed.R.Civ.P. 15(c)(2) (Objection 6); (5) dismissing the second amended petition is improper absent an adjudication of the merits of his motion under the miscarriage of justice exception (Objection 8); and (6) the Court should review and adjudicate his objections of December 20, 1999, and February 28, 2001 (Objection 9).

reexamine his proposed second amended petition to determine if every claim is properly exhausted or contains unexhausted claims that must be deleted before proceeding further, IT IS HEREBY ORDERED THAT:

Hunt shall have sixty (60) days from the date of this Order to: (1) re-examine each federal claim set forth in his proposed second amended petition to determine if each claim is still exhausted in light of *Baldwin* and the aforementioned exhaustion cases and, if so, file and serve a request for leave to have it filed; or alternatively, (2) file a fourth amended petition that only raises federal claims that have been properly exhausted, including any federal claims that he may have properly exhausted after the proposed second amended petition was lodged. The new amended petition must be prepared using the Court's-approved habeas form and, for continuity, it shall be labeled as Hunt's "Fourth Amended Petition."[14] Further, each ground must be separately numbered and it must cite to the portions of Hunt's state briefs or petitions where the federal legal theory and operative facts of the ground were raised on direct and collateral review, and it must do so in a manner that will enable Respondent and the Court to readily determine whether each ground was fairly presented to the state courts in the manner required by *Baldwin* and the aforementioned exhaustion cases. If a ground is based upon multiple factual predicates that are set forth in separately numbered subparts, the page(s) of the specific state court petition(s) where each factual predicate was raised shall be cited in brackets immediately following each factual predicate.

Regardless of whether Hunt elects to stand on his proposed second

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[14] Hunt also lodged a proposed third amended petition at the same time he lodged the second amended petition. The third amended petition deleted all of the disputed claims which the magistrate judge found were unexhausted.

amended petition or files a new fourth amended petition, Respondent shall have sixty (60) days from the date the proposed second amended petition is filed or the fourth amended petition is served, to file and serve a response. A motion to dismiss on the ground that the operative petition is mixed must identify each allegedly unexhausted claim and explain why each claim is unexhausted. If Respondent contends that a claim is time-barred, the Respondent must discuss why *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004), *cert. granted*, *Mayle v. Felix*, --- U.S. ---, --- S.Ct. ---, 2005 WL 32975 (January 7, 2005) is inapplicable. Likewise, if Respondent contends Hunt has procedurally defaulted on a claim, then Respondent must do so in the manner required by *Bennett v. Mueller*, 322 F.3d 573 (9th Cir.), *cert. denied*, 124 S.Ct. 105 (2003).

Regardless of whether Hunt elects to stand on his proposed second amended petition or file a new fourth amended petition, the action is referred to the magistrate judge for further proceedings when the operative petition is filed.

The Court finds that proceeding in the foregoing manner is fair, just, optimizes judicial economy, and is the most efficient way of putting this case back on track. It provides Hunt with an opportunity to delete any remaining unexhausted claims and raise all of his exhausted grounds for federal habeas relief in a fresh petition that may include any grounds omitted from his proposed second and third amended petitions that may now be timely under *Felix* <u>and</u> are properly exhausted under current law. [Update at 4:6-21.] It gives Respondent an opportunity to determine promptly whether the grounds in Hunt's operative amended petition are exhausted under current law, timely under *Felix* as Hunt contends, or subject to other procedural defenses Respondent may have and raise in an appropriate challenge. Proceeding

in this manner moots Hunt's 1999 Objection to the November 22, 1999 Order as well as his 2001 Objections to the magistrate judge's orders denying him leave to file the proposed second amended petition. Accordingly, the 1999 Objection and 2001 Objections are denied as moot.

Last, but not least, in accordance with *Hunt* II, Hunt is warned that, if he does not elect to file his second amended petition or file a fourth amended petition that is free of unexhausted claims within the time required by this Order, the FAP will be dismissed as a mixed petition with the attendant consequence that, if he later refiles, his claims will be time-barred absent any basis for tolling.

DATED: January 25, 2005

WILLIAM D. KELLER
UNITED STATES DISTRICT JUDGE

NOTICE PARTY SERVICE LIST

Case No. CV 98-5280-WDK(AN) **Case Title** JOSEPH HUNT v. CHERYL PLILER, Warden

Title of Document Order Reviewing Petitioner's Objections to Magistrate Judge's Memo and Order

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	Beck, Michael J (Clerk, MDL Panel)
	BOP (Bureau of Prisons)
	CA St Pub Defender (Calif. State PD)
	CAAG (California Attorney General's Office - Keith H. Borjon, L.A. Death Penalty Coordinator)
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	Catterson, Cathy (9th Circuit Court of Appeal)
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Initials of Deputy Clerk JG

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Docket #106

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JOSEPH HUNT, Petitioner, v. CAL TERHUNE, DIRECTOR OF CDC, et al., Respondents.	Case No. CV 98-5280-WDK(AN) MEMORANDUM AND ORDER RE RESPONDENT'S MOTION TO DISMISS THE FIRST AMENDED PETITION

I. Proceedings

On August 31, 1998, Joseph Hunt ("Petitioner"), a state prisoner proceeding *pro se*, filed a First Amended Petition for Writ of Habeas Corpus ("First Amended Petition") and a First Amended Memorandum of Points and Authorities ("First Amended MP&A"). The First Amended Petition raises numerous claims for federal habeas corpus relief relating to Petitioner's April 22, 1987 conviction following a jury trial in Los Angeles County Superior Court case number A090435 for first degree murder committed pursuant to a special circumstance and robbery. [First Amended Petition ¶¶ 2a-e.] Petitioner was sentenced to a term of life without the

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possibility of parole in state prison. [*Id.* ¶¶ 2e-f.]

On April 15, 1999, Respondent filed a Motion to Dismiss the First Amended Petition ("Motion") contending that many of Petitioner's claims are not exhausted. Petitioner filed his Opposition to the Motion in three parts: the first paper, filed on May 24, 1999, is styled as "Petitioner's Opposition to Respondent's Motion to Dismiss" ("Opposition I"); the second paper, filed on May 24, 1999, is styled as "Petitioner's Opposition to Respondent's Motion to Dismiss under the 'Miscarriage of Justice' Exception to the Procedural Default Rule" ("Opposition II"); and the third paper, filed on June 29, 1999, is styled as "Supplement to Petitioner's Opposition to Respondent's Motion to Dismiss (in Light of the U.S. Supreme Court's Decision in *O'Sullivan v. Boerckel*)" ("Opposition III"). On July 30, 1999, Respondent filed a Reply.[1]

On September 3, 1999, Petitioner was permitted to file a Supplemental Brief addressing the Ninth Circuit's recent decision in *Gatlin v. Madding*, 189 F.3d 882 (9th Cir. 1999). On September 23, 1999, Respondent filed a Reply to Petitioner's Supplemental Brief ("Supplemental Reply").

For the reasons discussed below, the magistrate judge finds that some of the challenged claims are not exhausted and will recommend that Respondent's Motion be granted and that the action be dismissed without prejudice unless Petitioner timely elects to voluntarily dismiss the unexhausted claims by serving and filing a Motion for Leave to File a Second Amended Petition containing only

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[1] Petitioner's request to file a "rebuttal" to Respondent's Reply was denied, and his rebuttal papers were ordered stricken from the record. [*See* August 26, 1999 Civil Minutes & Order Striking Filed Document from the Record.]

exhausted claims consistent with this Memorandum and Order.

II. Factual Background and Procedural History

A. Summary of the Facts

In the early 1980s, Petitioner and his friends formed an investment group which they referred to as the "BBC."[2] [Motion, Ex. E at 108-190.][3] A number of people were persuaded to invest significant sums of money in various BBC enterprises and commodities accounts. [*Id.*, Ex. E at 110.] Petitioner had trading authority over the accounts and, over time, eventually either spent or lost all of his investors' funds, with one exception, that of Ron Levin. [*Id.*, Ex. E at 110-111.]

Levin had invested $5 million in one of Petitioner's commodities trading accounts. [*Id.*, Ex. E at 111.] The account showed a profit of $7 million, half of which was owed to Petitioner. [*Id.*] The BBC believed they would be able to use the money from Levin's account to cover their losses and pay their expenses. [*Id.*, Ex. E at 111-112.] As it turned out, however, Levin had no money and the huge profit in his account was actually the result of a hoax Levin played on Petitioner. [*Id.*, Ex. E at 112-113.]

After Petitioner learned of the hoax and confronted Levin, Levin promised to give the BBC $300,000 which he claimed to have

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[2] The BBC was an acronym for the "Bombay Bicycle Club," a bar and nightclub whose name the group adopted. [*See* Motion, Ex. E at 109 n.2.] The media later referred to the BBC as the now infamous "Billionaire Boys Club." [*Id.*]

[3] For purposes of the pending Motion only and for ease of review, the factual account of the events leading to Petitioner's conviction is derived from the California Court of Appeal's November 23, 1993 decision on direct appeal. [*See* Motion, Ex. E at 101-291.]

obtained from other brokerage houses. [*Id.*, Ex. E at 114-115.] Levin kept putting Petitioner off, and Petitioner told BBC member Tom May that Petitioner would "get the money from Levin, 'no matter what it took.'" [*Id.*, Ex. E at 115.]

Levin disappeared after June 6, 1984, and his body has yet to be found. According to various witnesses at trial, Petitioner concocted a scheme to get money from Levin and kill him with the help of Jim Pittman. [*Id.*, Ex. E at 115-117.] Petitioner's plan was set forth in a seven-page "to do" list. [*Id.*, Ex. E at 117.] Petitioner shared his plan with boyhood friend and BBC member Dean Karny. [*Id.*, Ex. E at 117-119.] On the morning of June 7, 1984, Petitioner called Karny and told him that Levin was dead, and Petitioner later showed Karny a $1.5 million check and contract signed by Levin. [*Id.*, Ex. E at 120.]

Shortly thereafter, Pittman was arrested in New York after he tried to sneak out of a hotel without paying the bill. [*Id.*, Ex. E at 124-125.] Pittman had checked into the hotel under Levin's name and tried to use his credit cards to pay the bill, but the cards were rejected. [*Id.*, Ex. E at 124.] A short time later, Petitioner discovered that Levin's check for $1.5 million was not good. [*Id.*, Ex. E at 125.]

On June 24, 1984, Petitioner held a meeting with other BBC members and informed them that there was no money left. [*Id.*, Ex. E at 127.] Petitioner also told the group that he and Pittman had "'knocked off Ron Levin.'" [*Id.*, Ex. E at 128.] Some of the BBC members later went to police, and Petitioner was arrested on September 28, 1984. [*Id.*, Ex. E at 129-131.]

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B. Summary of State Court Procedural History

On November 23, 1993, the judgment of Petitioner's conviction was affirmed by the California Court of Appeal. [*See* Motion, Ex. E at 101-291.] On January 5, 1994, Petitioner filed a petition for review in the California Supreme Court ("first petition for review"). [*Id.*, Ex. H at 303-342.] On March 17, 1994, the first petition for review was summarily denied without comment or citation to case authority. [*Id.*, Ex. H at 302.]

Petitioner sought habeas corpus relief concurrent with his appeal. His habeas petition to the California Court of Appeal resulted in the issuance of an order to show cause on February 23, 1993, which was modified on December 21, 1993. [*See id.*, Ex. F at 292-297 & Ex. G at 298-301.] The orders directed that some, but not all, of the issues raised by Petitioner be addressed in the state superior court. [*Id.*]

On January 5, 1994, Petitioner filed another petition for review in the California Supreme Court ("second petition for review"), which challenged the scope of the order to show cause. [*Id.*, Ex I at 344-390.] On March 17, 1994, the California Supreme Court summarily denied the second petition for review without comment or citation to case authority. [*Id.*, Ex. I at 343.]

As a result of the order to show cause, the state superior court held an evidentiary hearing beginning in March 1996 to resolve seven of the 23 issues it had been directed to resolve. [*See id.*, Ex. J at 392-393.] On July 12, 1996, the state superior court issued an order denying the habeas petition. [*Id.*, Ex. J at 391-428.]

On March 20, 1997, Petitioner filed a habeas petition in the

California Court of Appeal.[4] On January 15, 1998, the state court of appeal filed a 13-page order denying the petition. [*Id.*, Ex. K at 429-442.] Thereafter, on January 23, 1998, Petitioner filed a petition for review in the California Supreme Court ("third petition for review"), asserting that various errors had occurred in the evidentiary hearing. [*Id.*, Ex. L at 444-509.] The third petition also challenged the evidentiary hearing court's refusal to address claims raised in a supplemental habeas petition and challenged the State's legal standard as applied by the lower courts in reviewing Petitioner's habeas claims. [*See id.*] On April 15, 1998, the California Supreme Court summarily denied the third petition for review without comment or citation to case authority. [*Id.*, Ex. L at 443.]

III. Discussion

A. Exhaustion Standard

Respondent primarily contends that the First Amended Petition should be dismissed because it is a mixed petition containing both exhausted and unexhausted claims. [Motion at 21-71.]

A federal court will not grant a state prisoner's petition for writ of habeas corpus unless it appears the prisoner has exhausted available state remedies. 28 U.S.C. § 2254(b) & (c); *Duncan v. Henry*, 513 U.S. 364, 365-366, 115 S.Ct. 887, 130 L.Ed.2d 865, *rhg. denied*, 514 U.S. 1032, 115 S.Ct. 1344, 131 L.Ed.2d 245 (1995). Exhaustion requires that the petitioner's claims be fairly presented to the highest court of the state. *Duncan v. Henry*, 513

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[4] Only a portion of the apparently voluminous March 20, 1997 habeas petition has been presented to this Court. [*See* Petitioner's Lodgment # 1 (containing Volume 3 of his March 20, 1997 habeas petition), filed herein on October 26, 1998.]

U.S. at 365-366. A claim is fairly presented if the state prisoner has described in the state court proceedings *both* the operative facts and the federal legal theory on which his federal habeas claim is based. *Id.; Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982).

Furthermore, federal courts are expressly prohibited from *granting* a petition for writ of habeas corpus unless

> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(a)(1).[5]

Respondent's contentions concerning each of the allegedly unexhausted claims are discussed below on a claim-by-claim basis.

B. <u>Analysis of Challenged Claims</u>

1. <u>Ground 1</u>

Petitioner contends that his federal due process rights under the Fourteenth Amendment were violated by the trial court's failure to give an unanimity instruction on the robbery allegation in light of the two qualifying acts, taking Levin's credit cards and taking the $1.5 million check. [First Amended Petition at 6.] Respondent asserts that ground 1 is not exhausted because Petitioner raised the claim only in broad terms in a footnote in his first petition

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[5] However, "[a]n application for a writ of habeas corpus may be *denied* on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2) (emphasis supplied).

for review on direct appeal without specifying that the claim related to the robbery charge. [*See* Motion at 27-30.]

The claim was presented to the California Supreme Court as follows: "Erroneous jury instructions rendered the trial fundamentally unfair, including . . . c) lack of unanimity instruction, thereby infringing on appellant's right to a unanimous verdict (People v. Diedrich (1982) 31 Cal.3d 263, 280-281). . . ." [*Id.*, Ex. H at 341 n. 36(3)(c).] The issue had been addressed by the California Court of Appeal in relation to the robbery charge, but without mention of a federal constitutional provision. [*See id.*, Ex. E at 267-268.] Similarly, the case cited by Petitioner, *Diedrich*, does not discuss the failure to give a unanimity instruction as a federal constitutional deprivation. Accordingly, because Petitioner failed to present the federal legal theory associated with ground 1 to the California Supreme Court, this claim is not exhausted.

2. <u>Ground 2</u>

Petitioner contends that his Sixth Amendment right to a fair and impartial jury was violated by a juror's distribution of a "recipe of the week" to other jurors. [First Amended Petition at 6-7; First Amended MP&A at 44-47.] Respondent asserts that this claim was not exhausted. [Motion at 31-34.]

Both the facts and legal theory of ground 2 were presented to the California Supreme Court in Petitioner's second petition for review.[6] [*See id.*, Ex. I at 376-377.] The claim was also raised

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[6] Although Respondent is correct in asserting that the second petition for review sought to expand the issues adjudicated in the Court of Appeal's order to show cause, the second petition for review nonetheless discussed both the facts and legal theories associated

in Petitioner's first petition for review as "prejudicially denying [his] right to a fair and impartial jury trial. (*McDonough Power Equipment, Inc. v. Greenwood* (1982) 464 U.S. 530, 556; U.S. Const., Sixth amend. . . .)." [*Id.*, Ex. H at 333 & n.29.] It is of no moment here that a portion of the claim was presented in a footnote, since presentation of the claim is all that is required for purposes of exhaustion. Accordingly, ground 2 is exhausted.[7]

3. Grounds 3(1) and 3(2)

In grounds 3(1) and 3(2), Petitioner contends that his Fifth Amendment privilege against self-incrimination was violated two ways: first, when the trial court's and the prosecutor's actions emphasized Petitioner's assertion of his *Miranda* rights during a custodial interview, and, second, when the prosecutor argued in rebuttal that certain evidence, statements and actions of Petitioner were not explained by defense counsel. [First Amended Petition at 7.] Respondent contends these claims are not exhausted. [Motion at 35-37.]

Petitioner raised both claims in a footnote in his first petition for review as follows:

> 1. Counsel's defalcations, combined with the court's pointed questioning of Detective Zoller about appellant's decision to ask for legal counsel, denied appellant his

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with many of Petitioner's claims and required consideration of the merits of the claims to determine whether the requested relief should be granted.

[7] In a footnote cross-referencing ground 2, Respondent contends that ground 9(11) is also unexhausted to the extent that it is based on ground 2. [Motion at 31 n.8.] Having determined that ground 2 is exhausted, the magistrate judge further concludes that ground 9(11) is similarly exhausted.

constitutional rights under Doyle v. Ohio (1976) 426 U.S. 610 and its progency.

. . .

4. The prosecutor's repeated reference to appellant's failure to testify through the ruse of attacking alleged deficiencies of appellant's attorney's closing argument violated appellant's rights under Griffin v. California (1965) 380 U.S. 609, 615 and its progency.

[Motion, Ex. H at 341 n.36.]

Both claims plainly reference the relevant facts and federal legal theories now being asserted in grounds 3(1) and 3(2) of the pending First Amended Petition; therefore, the claims are exhausted.

4. Ground 5(1)

In ground 5(1), Petitioner contends that his Fourteenth Amendment right to due process was violated because the trial judge was biased against defense attorney Chier, which caused the judge to limit Chier's role during the trial, and that the bias arose, in part, from an extrajudicial source. [First Amended Petition at 9; First Amended MP&A at 1-24.] Petitioner further asserts that "[t]he extrajudicial roots of the trial judge's bias against defense counsel Chier are described in Exhibits 103 and 106." [First Amended MP&A at 1.] Exhibits 103 and 106 assert facts concerning several encounters between Chier and the trial judge before Petitioner's trial which resulted in the trial judge's intense dislike for Chier. [*See* Exhibits Offered in Support of Memorandum of Points and Authorities for Petition ("Exhibits"), Volume # 6, Exs. 103 (Declaration of Richard Chier) and 106

(Declaration of Donald R. Wager), filed herein on June 30, 1998.]

Respondent essentially concedes that the general nature of the claim was raised in Petitioner's first petition for review on direct appeal as a violation of Petitioner's federal due process right and his right to the effective assistance of counsel, but argues that some of the specific facts now being asserted were never presented to the state supreme court. [*See* Motion at 37-39.] In particular, Respondent contends that Petitioner failed to exhaust the following factual assertions: (1) that Barens was unprepared for trial, (2) that the trial judge had formed an opinion of Chier long before trial began, (3) that the trial judge's view that Chier had antagonized jurors during *Hovey* voir dire was inaccurate, and (4) that the appellate court's finding that the trial judge held Barens in high esteem was not well founded. [*Id.* at 37-38 (citing First Amended MP&A at 5 n.1-3, 6-7, 11-14, 17-20).]

Although Petitioner raised a judicial bias claim in both of his first and second petitions for review, he failed to allege the specific facts noted above in connection with the claims. [*See* Motion, Ex. H at 315-316, 319, 322 & n.12, 327 & Ex. I at 373-375.] Similarly, neither Exhibit 103 nor 106, nor any of facts asserted therein, was presented to the California Supreme Court. Consequently, because ground 5(1) relies on newly-asserted facts of an "extrajudicial source" of the trial judge's bias, this claim is not exhausted.[8]

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[8] Respondent purposely refrained from challenging various of Petitioner's Exhibits as unexhausted due the burden associated with reviewing the voluminous exhibits and in light of the possibility that the Motion might be granted. [Motion at 25 n.4.] Respondent,

5. Ground 5(2)

In ground 5(2), Petitioner contends that his due process rights were violated by the trial judge's pro-prosecution bias. [First Amended Petition at 9; First Amended MP&A at 47-50.]

Respondent contends that the following factual assertions are not exhausted: (1) the trial judge threatened defense counsel with contempt, (2) the trial judge gave an improper instruction on the court's role, (3) the trial judge referred to Levin in the past tense and to the case as a "murder," (4) the trial judge questioned witness Steve Lopez to show that Petitioner's statement that he was kidding around when he said he killed Levin was "stupid" and unbelievable, and (5) the trial judge made inappropriate facial gestures during the testimony of Lynne Roberts and Brooke Roberts which were observed by a juror. [Motion at 39-40.]

None of the factual assertions noted above were referred to in petitioner's state petitions. Although Petitioner referred to the trial judge's "pejorative gestures" in his first and second petitions for review, he did not specifically connect such gestures with the testimony of Lynne Roberts and Brooke Roberts as he seeks to do now. [*See id.*, Ex. H at 318 & Ex. I at 373.]

Petitioner argues that because the trial record is replete with instances of bias that it was unnecessary, and virtually impossible, for him to cite them all in his petition to the California Supreme Court. [Opposition I at 86-87.] Petitioner further argues that these facts were "fairly included" in his petition by reference to the opening brief he filed in the

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however, expressly reserved the right to raise the issue of exhaustion as it relates to the exhibits in the future. [*Id.*]

California Court of Appeal and supplemental claims petition to the California Court of Appeal. [*Id.* at 88 n.33.]

"California Rule of Court 28 expressly prohibits the incorporation by reference of authorities or arguments from another document." *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999). Rule 28(e)(5) provides, in pertinent part, that "[t]he petition shall be a single document[,] . . . [and that] [n]o authorities or argument may be incorporated by reference from another document into the petition." Rule 28(e)(5), Cal. Rules Sup.Ct. & Cts. of Appeal.

Petitioner points out that, in regard to the third petition for review, he specifically moved the California Supreme Court to waive "any technical insufficiencies" noted in the petition. [Supplemental Brief at 1-2.] Thus, Petitioner argues, it must be presumed that his application was granted, and that the California Supreme Court waived compliance with Rule 28(e)(5) since his petition was not returned by the court as defective. [*Id.* at 4-5.]

Respondent contends that Petitioner's argument is nonsensical since it would permit a petitioner "blithely to ignore any and all procedural rules simply by asking to do so." [Supplemental Reply at 2-3.]

full compliance w/Rule

Although this latest argument is limited to the claims incorporated by reference to Petitioner's appellate briefs in his third petition for review, it is, in any event, misplaced. As the *Gatlin* court stated, "[w]hile the consistency of a state court's enforcement of its procedural rules is relevant in determining whether a petitioner has procedurally defaulted his claim, . . . it is irrelevant in this context, which pertains to the distinct

question whether [the petitioner] has exhausted his state court remedies." *Gatlin v. Madding*, 189 F.3d at 888-889. Absent an order or decision expressly waiving compliance with Rule 28(e)(5), this Court will not presume that the California Supreme Court considered any issue of law or fact incorporated by reference in any of the three state petitions for review.

Accordingly, because some of the factual bases now being asserted in support of ground 5(2) were not presented to the California Supreme Court, the claim is not exhausted.

6. Ground 5(4)

In ground 5(4), Petitioner contends that his due process rights were violated by the "media circus" in the courtroom during the trial. [First Amended Petition at 9.]

Petitioner raised this issue in his first petition for review on direct appeal as follows: "Repeated violations of rules covering courtroom filming violated appellant's constitutional right to a trial in a sober, dignified environment." [Motion, Ex. H at 341 n.36(5).] In addition, Petitioner cited two Supreme Court cases, *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) and *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), both of which relate to the prejudicial impact on a defendant's constitutional right to a fair trial occasioned by media coverage of their criminal trials. [*See id.*]

Despite the cases cited and Petitioner's reference to his constitutional rights, Respondent characterizes the claim raised in state court as merely challenging "the violation of state rules regarding filming in court." [Motion at 41.] The magistrate judge disagrees and finds that ground 5(4) is exhausted.

7. Ground 5(6)

In ground 5(6), Petitioner contends that his due process rights were violated by the prosecutor's comments during closing argument about Petitioner's failure to present evidence of a search for Levin in Arizona. [First Amended Petition at 10.]

In his first state petition for review, Petitioner contended that prejudicial federal constitutional error occurred based upon "the prosecutor's reference to appellant's failure to put on evidence of a search for Levin in Arizona was misconduct which rendered the trial fundamentally unfair." [Motion, Ex. H at 341 n.36(4).] Petitioner also cited *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), in support of this claim. [*Id.*]

Respondent argues that the citation to *McGuire* was inadequate to put the California Supreme Court on notice as to the federal legal theory underlying Petitioner's claim. [Motion at 42.] As Respondent correctly points out, *McGuire* involved a due process challenge to a jury instruction, not prosecutorial misconduct. In contrast, Petitioner raised his claim in the first petition for review in conjunction with his Fifth Amendment claim of *Griffin* error, and it was only discussed in the context of *Griffin* on direct appeal in the California Court of Appeal's opinion. [*See id.*, Ex. H at 341 n.36(4); *see also id.*, Ex. E at 242-244.] Since Petitioner did not cite the Fourteenth Amendment, nor any federal law relating to *prosecutorial misconduct* in support of the claim in his first petition for review, ground 5(6) is not exhausted.

8. Ground 5(8)

In ground 5(8), Petitioner contends that his Fourteenth

Amendment due process rights were violated because the California Court of Appeal used his extrajudicial statement (Trial Exhibit 55) in 1993 to uphold the corpus delecti finding with respect to the robbery allegation in violation of state law. [First Amended Petition at 10.]

In his first petition for review, Petitioner claims, as a subsidiary of his contention that use of the statement created a conflict in state law, that "the appellate court's finding of corpus delecti and use of the statement in support of the corpus delecti was such a marked deviation from evidentiary principles as to violate appellant's right to fundamentally fair application of state evidentiary rules." [Motion, Ex. H at 340.] Following this assertion was a citation to *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). [*Id.*, Ex. H at 340-341.]

Respondent asserts the claim is not exhausted and contends that "[t]he citation to *Estelle* would have given the state supreme court no meaningful guidance as to the basis for [Petitioner's] federal constitutional claim." [Motion at 43-44.] To the contrary, *McGuire* is noted for the principle that a state evidentiary ruling may violate a defendant's federal due process right if the ruling was so prejudicial that it rendered the proceedings arbitrary and fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. at 68. This plainly appears to be the crux of Petitioner's federal claim. Accordingly, ground 5(8) is exhausted.

9. <u>Ground 7(2)</u>

In ground 7(2), Petitioner contends that his Sixth Amendment right to the effective assistance of counsel was violated by a conflict of interest created by the terms of defense counsel

Barens' appointment to represent Petitioner. [First Amended Petition at 10-11.] Petitioner asserts numerous factual bases in support of this claim in 11 subclaims denoted as 7(2)(i) through 7(2)(xi). [*See id.; see also* First Amended MP&A at 25-33.]

Respondent contends that the following factual bases now being asserted in support of ground 7(2) were not presented to the California Supreme Court: (1) Barens told Chier that he was motivated by greed, (2) Barens was wealthy and perjured himself regarding payments received from Petitioner, (3) Barens postponed work on the defense case until the People rested, (4) Barens believed good cause existed to disqualify the trial judge for bias, and (5) Barens did not work as hard as he claimed. [Motion at 45.]

Petitioner asserts that the factual bases for his "cash for silence" conflict of interest claim are exhausted because they were presented in his appellate briefs and petitions. [*See* Opposition I at 95-97.] However, none of his petitions for review to the California Supreme Court set forth the factual allegations noted above in connection with a conflict of interest claim. As previously concluded by the magistrate judge, Petitioner's mere reference to briefs and/or petitions filed in the lower courts was inadequate to exhaust the operative facts and legal theories associated with his claims. Accordingly, the facts concerning Barens's alleged greed, wealth, perjury, postponement of work, and belief that good cause existed to disqualify the trial judge (described in the First Amended Petition as grounds 7(2)(ii), (iii), (vii), and (viii)), were not exhausted. In the event Petitioner elects to file a second amended petition, he may reallege ground 7(2) only if he omits any reference to the

unexhausted operative facts noted herein.

10. Ground 7(3)

In ground 7(3), Petitioner contends that his Sixth Amendment right to the effective assistance of counsel was violated by a conflict of interest that arose after Barens was publicly accused of plotting to procure witnesses who would claim to have seen Levin alive and was thereafter inhibited from investigating or presenting legitimate witnesses who claimed to have seen Levin. [First Amended Petition at 11; First Amended MP&A at 34-37.]

Respondent contends that Petitioner failed to raise this claim in his petitions to the California Supreme Court, and Petitioner's related claim in his third petition for review was raised in a different context. [Motion at 47.]

Petitioner's third petition for review essentially raised a due process challenge to the state court's refusal to grant Petitioner a hearing on his supplemental habeas claims, the exclusion of evidence at the state evidentiary hearing, and the findings and conclusions of the lower courts following the evidentiary hearing. [*See* Motion, Ex. L at 444-509.] In challenging the standard of review applied by the lower court to his conflict of interest claim, Petitioner stated only that "Barens withheld from [other members of the defense team] his knowledge of 5 eyewitness reports that Levin was alive. . . ." [*Id.*, Ex. L at 495.]

Even if the Court were to construe the third petition for review as raising the same legal theory asserted in ground 7(3), pointedly, Petitioner failed to set forth the operative facts he now asserts for Barens's failure to divulge the existence of such

witnesses. Accordingly, ground 7(3) is not exhausted.

11. Ground 7(4)

In ground 7(4), Petitioner contends that he received ineffective assistance of counsel based on a conflict of interest arising out of the trial judge's threats and sanctions against defense counsel in "revenge" for counsel's assertions of judicial bias and misconduct. [First Amended Petition at 11-12.] Petitioner further contends that the trial judge's conduct violated Petitioner's due process rights. [*Id.* at 12.]

Respondent contends that the facts asserted in support of this claim were previously asserted by Petitioner in the context of a judicial bias claim, but not in support of a conflict of interest claim and, therefore, ground 7(4) is not exhausted. [Motion at 47-48.]

Petitioner contends that the facts were raised and exhausted in his state court petitions. [Opposition at 102-103.] The reduction in Chier's hourly rate was raised in connection with Petitioner's conflict of interest claim in the first petition for review. [Motion, Ex. H at 329 n.23.] However, Petitioner misses the point; none of the other key facts now being asserted by him--that Chier was threatened with ejection from the courtroom and threatened with contempt, or that payment to both attorneys was withheld from November 1986 to May 1987, or that Chier was told that he would not be paid for work done on the subject of misconduct--were presented to the California Supreme Court in connection with Petitioner's conflict of interest claim.

A claim has not been fairly presented if facts alleged in federal court fundamentally alter the nature of the claim that was

presented to the state's highest court. *See Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994); *see also Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Furthermore, the federal habeas claim may not be supported by additional facts that put the claim in a significantly different and stronger evidentiary posture from the claim that was presented to the state court. *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988)(per curiam)(internal citations and quotations omitted). The additional facts that were not asserted in state court alter the strength of Petitioner's conflict of interest claim. Accordingly, ground 7(4) is not exhausted.

12. Grounds 9(1) - 9(48)

In grounds 9(1) through 9(48), Petitioner asserts 48 separate groups of factual bases in support of his claim that defense counsel Barens rendered ineffective assistance in violation of Petitioner's Sixth Amendment rights. [*See* First Amended Petition at 12-13.] In his first petition for review, Petitioner made several assertions contending that defense counsel rendered ineffective assistance. [Motion, Ex. H at 19-20.] Petitioner also raised an ineffective assistance of counsel claim in his second petition for review. [*Id.*, Ex. I at 363-368.]

Respondent contends that many of the factual bases now being asserted in support of ground 9 were not presented to the California Supreme Court in connection with the ineffective assistance of counsel claim presented there. [*Id.* at 48-69.] Each of the challenged sub-claims are discussed below.

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a. Ground 9(1)

In ground 9(1), Petitioner makes the broad and general allegation that Barens failed to manage the case, to investigate and interview witnesses, and to develop impeachment materials. [First Amended Petition at 12-13.] This general claim was exhausted in Petitioner's first and second petitions for review. [*See* Motion, Ex. H at 330-331 & Ex. I at 363-368.]

b. Ground 9(2)

In ground 9(2), Petitioner contends that Barens failed to maintain a litigation file or to otherwise systematically prepare, which resulted in poor cross-examination, lost impeachment opportunities, and a stunted defense case. [First Amended Petition at 13.] Petitioner failed to assert these facts in his petitions to the California Supreme Court, and, therefore, ground 9(2) is not exhausted.

c. Ground 9(3)

In ground 9(3), Petitioner contends that Barens failed to assist Chier in trying to overturn the limitations on Chier's role during the trial. [First Amended Petition at 13.] This allegation was not raised in any of the petitions for review to the California Supreme Court. Accordingly, ground 9(3) is not exhausted.

d. Grounds 9(6) and 9(7)

In ground 9(6), Petitioner contends that he was prejudiced by Barens' failure to make a record of the trial judge's nonverbal misconduct, and in ground 9(7), he further contends that Barens failed to object to the trial judge's verbal misconduct. [First Amended Petition at 13.] Both grounds 9(6) and 9(7) were presented to the California Supreme Court and are exhausted. [*See* Motion,

Ex. H at 331 & Ex. I at 367.]

e. Ground 9(9)

In ground 9(9), Petitioner contends that Barens "fail[ed] to request a limiting instruction concerning Pittman's post 6-18-84 statements (CALJIC 6.24) that the alleged conspiracy ended when the $1.5 million check bounced." [First Amended Petition at 14.] In his first petition for review, Petitioner asserted that Barens "fail[ed] to request CALJIC limiting instruction 6.24 with regard to the extrajudicial statements of Pittman (AOB 189-190)."[9] [Motion, Ex. H at 331.] In his second petition for review, the claim was raised in an even more cursory fashion as a "failure to request limiting instructions." [*Id.*, Ex. I at 367.]

The issue of Pittman's statements was addressed by the California Court of Appeal in the context of whether defense counsel should have requested an instruction to limit the use of Pittman's statements. [Motion, Ex. E at 175-179.] The court explained that the instruction "would have precluded the jury from considering any statements made by Pittman unless the jury found the existence of a conspiracy and that such statements were made in the course of the conspiracy." [*Id.*, Ex. E at 175.]

To the extent Petitioner's claim, as raised here and in the California Supreme Court in his first petition for review, challenges the failure to request the limiting instruction, it is exhausted, since the more specific factual assertion as to a particular statement by Pittman does not alter the fundamental

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[9] As previously concluded, Petitioner's reference to his appellate brief was not adequate to exhaust the specific facts now being asserted.

nature of the claim. *See Chacon v. Wood, supra*, 36 F.3d at 1468; *see also Vasquez v. Hillery, supra*, 474 U.S. at 260. Accordingly, ground 9(9) is exhausted.

f. Ground 9(12)

In ground 9(12), Petitioner cites various examples in contending that Barens' performance was deficient in cross-examining witnesses Dicker, Raymond, May and Karney. [First Amended Petition at 14-15.] Respondent asserts that this claim was not raised in any of the petitions for review to the California Supreme Court. [Motion at 52.] Having reviewed the petitions and Petitioner's opposing papers, the magistrate judge agrees with Respondent and concludes that ground 9(12) is not exhausted.

g. Ground 9(13) and 9(14)

In ground 9(13), Petitioner contends that Barens failed to impeach Tom May with Deputy Durbin's report, and in ground 9(14), Petitioner contends that Barens failed to impeach Tom May and Jeff Raymond with Officer Rosenbraugh's report. [First Amended Petition at 15.] The two reports are set forth in Petitioner's Exhibits 129 and 130. [*See* Exhibits Volume # 6, filed on June 30, 1998.]

Petitioner contends that the claims were part of his "supplemental claims" raised in his March 20, 1997 habeas petition to the California Court of Appeal. [Opposition I at 112.] He also makes a general contention that the claims were presented to the California Supreme Court in his third petition for review. [*Id.*] However, Petitioner failed to point out any specific reference to the reports in his third petition for review and the Court has found none. Accordingly, because the facts associated with grounds 9(13) and 9(14), including Petitioner's Exhibits 129 and 130, were

not presented to the California Supreme Court, the claims are not exhausted.

h. Ground 9(15)

In ground 9(15), Petitioner contends that Barens failed to impeach Tom May, and by extension Raymond and Dicker, with evidence of a movie deal to show that May had a strong financial interest in Petitioner's conviction and was concerned about his own reputation. [First Amended Petition at 15.] In his second petition for review, Petitioner asserted that Barens was ineffective for failing to investigate and discover evidence about May's movie deal. [*See* Motion, Ex. I at 365.] However, Petitioner did not allege any facts about Raymond or Dicker in regard to a movie deal. Thus, ground 9(15) plainly is not exhausted as to these latter witnesses.

Respondent argues that the claim is not exhausted in any sense because Petitioner's petition for review did not contest the failure to impeach May, but focused instead on the failure to discover evidence of May's movie deal. [Motion at 54.] Petitioner asserts that Respondent "attempts to split the same hair," and appears to contend that the failure to impeach May with the movie deal indicates that Petitioner was prejudiced by the failure to discover that the movie deal even existed. [Opposition I at 113 n.50.]

A failure to investigate or discover a fact implies a failure to use such fact to an accused's benefit at trial. Because the factual basis underlying ground 9(15) does not fundamentally alter the nature of Petitioner's claim--that Barens should have used evidence of May's movie deal at trial to show May's possible bias against Petitioner--the claim is exhausted, but only as it relates

to May. Accordingly, if Petitioner elects to file a second amended petition reasserting this claim, he should omit any reference to Raymond and Dicker.

i. Grounds 9(16), 9(17) and 9(18)

In ground 9(16), Petitioner contends that Barens failed to investigate Browning's claims about his academic achievements and titles and that Barens failed to impeach Browning with the "true record."[10] [First Amended Petition at 15-16.] In ground 9(17), Petitioner asserts that Barens failed to impeach Browning in regard to his claim that he owned $600,000 of BBC attrition mills, and in ground 9(18), Petitioner claims that Barens failed to impeach Browning with evidence disproving his assertions that he had obtained a $1.6 million judgment against Petitioner. [*Id.* at 16.]

In his first petition for review, Petitioner contended that defense counsel failed to impeach Browning with his inconsistent preliminary hearing testimony in regard to his statement at trial that Petitioner said Levin was missing and "probably dead." [Motion, Ex. H at 330 n.24.] That claim is currently raised in the pending First Amended Petition as ground 9(19).[11] In his second petition for review, Petitioner simply contended that counsel was ineffective for "fail[ing] to impeach . . . Browning with prior testimony and statements (CT 132; RT 8203; CT 372-373, 406)." [*Id.*, Ex. I at 367.] The lack of any specificity in Petitioner's

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[10] Gene Browning, inventor of the cyclotron, apparently testified during the evidentiary hearing as part of an attempt by Petitioner to show that the BBC was involved in negotiations over the sale of $200 million of cyclotron attrition mill technology at the time of Levin's disappearance. [*See* Motion, Ex. J at 413-414.]

[11] Respondent does not contend that ground 9(19) is unexhausted.

claim to the state supreme court about what particular prior statements should have been used to impeach Browning renders grounds 9(16), 9(17) and 9(18) unexhausted.

j. Ground 9(20)

In ground 9(20), Petitioner contends that Barens failed to use the "Eisenberg Tape" to impeach Eisenberg and corroborate Brooke Robert's testimony. [First Amended Petition at 16.] In his second petition for review, Petitioner argued that defense counsel failed to impeach Eisenberg with evidence of his participation in a car theft ring. [Motion, Ex. I at 358, 365.]

Respondent contends that the claim is not exhausted since it is not clear whether the "Eisenberg Tape" constitutes evidence of Eisenberg's involvement in a car theft ring. [*Id.* at 57.] After reviewing Petitioner's Exhibits 114 and 115, it appears that the pending allegation essentially involves the same facts asserted in state court. Accordingly, ground 9(20) is exhausted.

k. Ground 9(21)

In ground 9(21), Petitioner contends that Barens failed to show that Karney and Dicker discussed their stories and made a "mutual cooperation pact" before going to police. [First Amended Petition at 16.] In his second petition for review, Petitioner contended that defense counsel failed to discover "Dicker's collusion with Karney" and cited two exhibits which were apparently attached to the petition. [Motion, Ex. I at 365.] One of those exhibits, Exhibit 15-I, was filed in this Court in Petitioner's

Exhibits Volume # 5.[12] Exhibit 15-I is a transcript of Karney's testimony in a different proceeding where he discusses talking to Dicker about going to the police. Accordingly, ground 9(21) is exhausted.

l. Ground 9(22)

In ground 9(22), Petitioner contends that Barens failed to present evidence of forensic tests done on the BMW's trunk carpet. [First Amended Petition at 17.] Respondent contends that these facts were asserted in the California Supreme Court under a different legal theory. [Motion at 58.]

In his second petition for review, Petitioner noted that the facts about the laboratory tests on the trunk carpet had been considered below in connection with his ineffective assistance of counsel claim and argued that the evidence "should also have been considered as evidence tending to undermine the People's case after Petitioner's threshold showing of innocence." [*Id.*, Ex. I at 359.] Accordingly, because the legal theory now being associated with the trunk carpet tests is different than that asserted in the state supreme court, ground 9(22) is not exhausted.

m. Ground 9(23)

In ground 9(23), Petitioner contends that Barens failed to impeach Karney with four specific inconsistent statements provided in discovery. [First Amended Petition at 17.] Petitioner asserted somewhat similar claims in his first and second petitions for review, but without reference to any of the four specific

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[12] Neither the Court nor Respondent was provided with a copy of Petitioner's Exhibit 15-G, which is the other exhibit cited in support of ground 9(21). [*See* Motion at 58 n.18.]

statements upon which his pending claim rests. [*See* Motion, Ex. H at 330 & n.24 & Ex. I at 358-359, 365, 367.] Accordingly, ground 9(23) is not exhausted.

n. Ground 9(24)

In ground 9(24), Petitioner contends that Barens was aware of and failed to impeach Karney with his perjurious "1983 Cantor deposition." [First Amended Petition at 17.] In his second petition for review, Petitioner raised the issue of Karney's deposition testimony in a wholly different context. Petitioner contended that, in addition to considering the evidence on the issue of ineffective assistance of counsel, the appellate court should have broadened the order to show cause to consider Karney's deposition testimony as "other" evidence tending to establish Petitioner's innocence. [*See* Motion, Ex. I at 359.] Accordingly, because Petitioner failed to raise the facts in state court in conjunction with the legal theory now being asserted in this Court, ground 9(24) is not exhausted.

o. Ground 9(25)

In ground 9(25), Petitioner contends that Barens failed to question John Riley and Len Marmor and thereby obtain proof that Pittman had contact with Levin before June 6, 1984. [First Amended Petition at 17.]

In the introduction to his first petition for review, Petitioner stated "habeas evidence showed that two individuals--including a prosecution witness in the trial below--could place Levin and Pittman together before Levin's demise." [Motion, Ex. H at 315.] These particular facts were not otherwise raised in connection with any legal theory to state a claim. Petitioner

asserted similar facts in his second petition for review in connection with his contention that such evidence was "improperly excluded from the category of 'new evidence' in the OSC. . . ." [*Id.*, Ex. I at 360-361.]

Accordingly, because the facts associated with ground 9(25) were not raised in the state supreme court in conjunction with the legal theory now being asserted, the claim is not exhausted.

p. Ground 9(26)

In ground 9(26), Petitioner contends that Barens failed to call Verplancke of Progressive Savings and Loan as a witness to show that Levin had previously asserted that he was a venture capitalist working on BBC's milling project. [First Amended Petition at 17-18.] Petitioner failed to asset these facts in support of an ineffective assistance of counsel claim in any of his three petitions for review. Accordingly, ground 9(26) is not exhausted.

q. Grounds 9(27) and 9(28)

In ground 9(27), Petitioner contends that Barens failed to call Karen Marmor, Levin's neighbor, to testify about seeing the "to do" list on Levin's desk and about being told by Levin that he was going to New York and might never return. [First Amended Petition at 18.] In ground 9(28), Petitioner contends that Barens failed to present evidence contradicting the prosecution's evidence of a close relationship between Levin and his family. [*Id.*]

Petitioner asserted similar facts in his second petition for review, but only in the context of his claim that the order to show cause should have been expanded to include consideration of "other" evidence of his innocence. [Motion, Ex. I at 360, 371.]

Accordingly, because the legal theory associated with the factual bases asserted in grounds 9(27) and 9(28) was not presented to the state supreme court in conjunction with these facts, the claims are not exhausted.

r. Ground 9(29)

In ground 9(29), Petitioner contends that Barens failed to call Dr. Avery to testify that Levin cheated Dr. Avery out of $1 million and told Dr. Avery about being raped in jail. [First Amended Petition at 19.]

In Petitioner's second petition for review, he contended that Barens failed to discover evidence of "Avery's testimony re Levin's debts" and "Avery's testimony re Levin's fear of returning to prison." [*See* Motion, Ex. I at 365.] While the latter allegation is arguably sufficiently similar to Petitioner's current assertion about Levin's vow not to return to jail, the non-specific reference to Levin's "debts" plainly was not sufficient to exhaust the assertion that Avery was cheated out of $1 million by Levin. Accordingly, ground 9(29) is not exhausted.

s. Grounds 9(30) and 9(31)

In ground 9(30), Petitioner contends that Barens failed to present evidence through tax attorney John Hayes of Levin's fear of arrest for tax crimes and of his abrupt discontinuation of efforts to resolve his tax debts shortly before June 6, 1984. [First Amended Petition at 19.] In ground 9(31), Petitioner contends that Barens also failed to call John Martin to show that Levin knew he was being investigated for defrauding insurance companies out of $500,000. [*Id.*]

Respondent contends that these claims are not exhausted since

neither witness' name was mentioned in any of the three petitions for review. [Motion at 63.] The magistrate judge has reviewed each of the petitions for review and found no specific reference to witnesses John Hayes or John Martin in connection with Petitioner's ineffective assistance of counsel claims. Accordingly, grounds 9(30) and 9(31) are not exhausted.

t. Ground 9(32)

In ground 9(32), Petitioner contends that Barens failed to call Detective Edholm to testify about Levin's theft and conversion of property worth several hundred thousand dollars. [First Amended Petition at 19.] The second petition for review made no mention of theft or conversion, but merely asserted that Barens was ineffective for failing to discover evidence of Edholm's knowledge about Levin's debt. [Motion, Ex. I at 365.] Accordingly, because Petitioner now asserts facts which were not presented to the state supreme court, ground 9(32) is not exhausted.

u. Grounds 9(33) and 9(34)

In ground 9(33), Petitioner contends that Barens failed to call Jeffrey Melczer to show that Levin knew an FBI investigation regarding Progressive Savings and Loan was underway, that Levin claimed to own an option purportedly transferred to his father, and that Levin's father did not mention the "to do" list to Melczer. [First Amended Petition at 19.] In ground 9(34), Petitioner contends that Barens failed to offer other available evidence to show Levin's awareness of the FBI investigation into Progressive Savings and Loan. [*Id.* at 19-20.]

In his second petition for review, Petitioner contended that Barens failed to discover evidence of "Martin Levin's testimony re

the conspicuous scattering of the seven page 'recipe for murder[.]'" [Motion, Ex. I at 365.] Petitioner did not mention Melczer in regard to the "to do" list or the Progressive Savings and Loan investigation. Similarly, Petitioner failed to allege that Barens did not offer other available evidence to show Levin's awareness of the investigation in support of his ineffective assistance of counsel claims in any of his petitions for review to the California Supreme Court.[13] Accordingly, grounds 9(33) and 9(34) are not exhausted.

v. Ground 9(35)

In ground 9(35), Petitioner contends that Barens failed to present evidence of "the magnitude of Levin's pre-disappearance illicit income and indebtedness." [First Amended Petition at 20.]

In his second petition for review, Petitioner contended that Levin's indebtedness created a motive for him to disappear and was evidence supporting Petitioner's innocence. [Motion, Ex. I at 358, 360 & n.8.] Petitioner also contended that counsel was ineffective for failing to present "Edholm's and Avery's testimony re Levin's debts." [*Id.*, Ex. I at 365.] However, Petitioner did not challenge, as he now does, Barens' performance on the basis that he failed to present evidence of Levin's "illicit income." Accordingly, ground 9(35) is not exhausted.

w. Ground 9(36)

In ground 9(36), Petitioner contends that Barens failed to

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[13] In his second petition for review, Petitioner only contended that "the FBI's investigation of Levin's Progressive Savings involvement and liability for $153,000 bank fraud" should have been considered along with other evidence tending to establish Petitioner's innocence. [Motion, Ex. I at 359-360.]

call Oliver Holmes to show that Levin planned to flee to avoid prosecution. [First Amended Petition at 20.]

In his first petition for review, Petitioner mentioned Holmes in the introduction, but did not assert any facts involving Holmes in support of an ineffective assistance of counsel claim. [*See* Motion, Ex. H at 313.] In his second petition for review, Petitioner mentioned Holmes in connection with Levin's plan to flee as evidence supporting Petitioner's claim of innocence, but these facts were not asserted to show Barens rendered ineffective assistance of counsel. [*See id.*, Ex. I at 360.] Accordingly, ground 9(36) is not exhausted.

x. Ground 9(37)

In ground 9(37), Petitioner contends that Barens should have called John Duran, Levin's barber, to testify that Levin had asked for directions on dyeing his hair. [First Amended Petition at 20.]

In the introduction to his first petition for review, Petitioner mentioned that Levin's hairdresser gave Levin instructions on how to dye his hair at home, but Petitioner failed to assert these facts in support of an ineffective assistance of counsel claim. [*See* Motion, Ex. H at 314.] In his second petition for review, Petitioner only asserted the hair-dyeing facts as additional evidence of his innocence. [*See id.*, Ex. I at 360.] Accordingly, ground 9(37) is not exhausted.

y. Ground 9(38)

In ground 9(38), Petitioner contends that Barens failed to elicit testimony from Martin Levin, similar to his preliminary hearing testimony, about finding the "to do" list strewn across Levin's office floor. [First Amended Petition at 20-21.]

In his second petition for review, Petitioner contended that counsel was ineffective for failing to discover "Martin Levin's testimony re the conspicuous scattering of the seven page 'recipe for murder'. . . ." [Motion, Ex. I at 365.] After reviewing page 4 of Petitioner's Exhibit 204, it appears that the facts now being asserted are the same facts that were asserted in the second petition for review. [*See* Exhibits Volume #7, Ex. 204.] Accordingly, ground 9(38) is exhausted.

z. Ground 9(39)

In ground 9(39), Petitioner contends that Barens failed to sufficiently question John Reeves to show that Levin's American Express card transaction actually occurred on June 7, 1984, rather than on May 7, 1984 as Reeves speculated. [First Amended Petition at 21.] Petitioner did not assert these facts in any of his petitions for review, and ground 9(39) is not exhausted.

aa. Ground 9(40)

In ground 9(40), Petitioner contends that Barens failed to discover evidence showing Levin's "penchant for athletics." [First Amended Petition at 21.] Petitioner made a similar assertion in his second petition for review wherein he contended that counsel was ineffective for failing to discover evidence of "Levin's use of an athletic facility to support evidence of Levin's post June 6, 1984 viability." [Motion, Ex. I at 365.] Accordingly, ground 9(40) is exhausted.

bb. Grounds 9(41), 9(42) and 9(43)

In ground 9(41), Petitioner contends that Barens failed to call a "Levin-sighting" witness, Louise Waller, to testify during the guilt phase of the trial. [First Amended Petition at 21.] In

ground 9(42), Petitioner similarly contends that Barens failed to call Robinson as a witness, and, in ground 9(43), Petitioner contends that Barens failed to present evidence of Robinson's sighting of Levin as well as sightings by Ivan Werner, Nadia Ghaleb and "Nippers" in connection with a motion for new trial. [*Id.* at 21-22.]

Respondent contends that Petitioner failed to mention "Nippers" in any of the petitions for review and that Petitioner discussed the other witnesses in an entirely different context in his third petition for review. [Motion at 66-67.] Since the third petition for review did not assert an ineffective assistance of counsel claim and these witnesses are not mentioned in either of the earlier petitions, grounds 9(41), 9(42) and 9(43) are not exhausted.

cc. Ground 9(44)

In ground 9(44), Petitioner contends that Barens failed to corroborate Brooke Roberts' testimony by questioning Tom May and Jeff Raymond about "Tom's 'trash can notes' of a plan to steal the BBC's attrition mills." [First Amended Petition at 22.] In his second petition for review, Petitioner contended that defense counsel was ineffective for failing to discover "the May brother's trash can notes re their plan to trash the BBC." [Motion, Ex. I at 365.] Thus, ground 9(44) is exhausted.

dd. Grounds 9(45) and 9(46)

In ground 9(45), Petitioner contends that Barens failed to present evidence via witnesses Casson, Frank Vassalo, and the limousine driver to show that Pittman used his own name during his Plaza Hotel limousine trips in New York. [First Amended Petition

at 22.] In ground 9(46), Petitioner further contends that Barens failed to present evidence of Pittman's outstanding Virginia warrants to explain his resistance to being detained by hotel personnel in New York. [*Id.*]

In support of his ineffective assistance of counsel claim in his second petition for review, Petitioner asserted that defense counsel failed to discover evidence of "Pittman's conspicuous visit to New York and his outstanding Virginia arrest warrants." [Motion, Ex. I at 365.] The reference to Pittman's "conspicuous" visit was not sufficiently specific to exhaust the particular facts now being asserted in support of ground 9(45), and this claim is not exhausted. However, Petitioner's explicit reference to Pittman's outstanding warrants adequately exhausted the facts now being asserted in support of ground 9(46).

ee. <u>Ground 9(47)</u>

In ground 9(47), Petitioner contends that Barens failed to call Eddie Cano to establish at what time La Scala restaurant stopped serving take-out food. [First Amended Petition at 22-23.] Petitioner failed to assert this claim in any of his petitions for review, and, therefore, ground 9(47) is not exhausted.

ff. <u>Ground 9(48)</u>

In ground 9(48), Petitioner contends that Barens failed to call Neil Adelman to testify about Petitioner's belief in May and June 1984 that multi-million dollar payments would be forthcoming from the Kilpatrick/VFOI deal. [First Amended Petition at 23.]

In his second petition for review, Petitioner contended that "former BBC attorney Neil Adelman's testimony that Hunt reasonably believed up to $220 million was about to come in from BBC cyclotron

sales, evidence that defeated the inference he was desperate for money in June 1984," was improperly excluded from the order to show cause as it constituted "other" evidence tending to establish Petitioner's innocence. [Motion, Ex. I at 359.] Since these facts were not raised in conjunction with Petitioner's ineffective assistance of counsel claim, ground 9(48) is not exhausted.

13. Ground 10

In ground 10, Petitioner contends that his Sixth Amendment right to the effective assistance of counsel was violated "by the degree of Barens' moral turpitude, apathy, and incompetence. . . ." [First Amended Petition at 23-24.] In addition to relying on the facts asserted in support of grounds 7(2), 7(3), 7(5), 8 and 9, some of which have been found to be unexhausted, Petitioner further asserts that Barens had a reputation for self-dealing and dishonesty, that he billed the County for expenses Petitioner had already paid, and that other members of the defense team wished to resign because of Barens' behavior. [*Id.* at 24.]

In his third petition for review, Petitioner argued that his due process rights were violated because the evidentiary hearing court refused to hear evidence offered to rebut the presumption of deference applied to Barens' tactical choices. [*See* Motion, Ex. L at 478-480.] Although Petitioner asserted similar facts as to Barens' "character for self-dealing" and "dishonesty," the claim asserted in state court did not directly challenge Barens' performance at trial as does the pending claim. Accordingly, ground 10 is not exhausted.

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D. Availability of State Court Remedies

Respondent asserts that Petitioner may still be able to exhaust his unexhausted claims by filing a petition for writ of habeas corpus in the California Supreme Court provided that Petitioner can adequately explain and justify his delay in raising the claims. [Motion at 71-72.]

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of [28 U.S.C. § 2254], if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). "Section 2254(c) directs federal courts to consider whether a habeas petitioner has 'the right under the law of the State to raise, by any available procedure, the question presented.'" *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1728, 1734, 144 L.Ed.2d 1 (1999). "The exhaustion doctrine, in other words, turns on an inquiry into what procedures are 'available' under state law." *Id.* A petitioner must present his claims to the state supreme court even if that court's review is discretionary. *Id.* at ---, 119 S.Ct. at 1732-1733.

Petitioner contends that state remedies are no longer available for him to exhaust because he cannot explain and justify his failure to raise the claims in his earlier petitions and that "[i]t would be pathetic to even try." [Opposition I at 1-3.] Respondent asserts that, if Petitioner is correct, then he has forfeited those claims and is absolutely barred from obtaining review of their merits here. [Reply at 10.]

As in *O'Sullivan* where review by the Illinois Supreme Court was found to be discretionary, so is review by the California

Supreme Court. *See* Cal.R.Ct. 29.2(a)(the court "may review and decide any or all issues in the cause"). Because California's "'established, normal appellate review procedure is a two-tiered system,'" state prisoners are required to exhaust their claims in a petition for review to the California Supreme Court. *Gatlin v. Madding*, *supra*, 189 F.3d at 888 (citing *O'Sullivan v. Boerckel*, 526 U.S. at ---, 119 S.Ct. at 1732 & Cal.R.Ct. 28(b)).

Petitioner argues that he "cannot be faulted for any insufficiency of his presentation of any of the federal grounds that he reasonably believed to be barred by Rule 29(a)." [Opposition III at 11.] To the contrary, *O'Sullivan* now makes clear that as long as a state prisoner had the *opportunity* to raise the claims, but failed to do so, the claims will not be deemed exhausted.[14] *Cf. Swoopes v. Sublett*, --- F.3d ---, 1999 WL 988250 (9th Cir. (Ariz.), Nov. 2, 1999)(holding that post-conviction review before the Arizona Supreme Court is unavailable within the meaning of *O'Sullivan* where the State of Arizona has expressly "declared that its 'complete round' [of the appellate review process] does not include discretionary review before the Arizona Supreme Court"). This is particularly true in this case, since some of Petitioner's unexhausted claims could have been raised in

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[14] If Petitioner has correctly assessed his chances of obtaining review of the merits of any future habeas petition he might file in the California Supreme Court, then his failure to exhaust his state remedies arguably has resulted in a *de facto* procedural default of the unexhausted claims. However, the application of any such anticipated procedural bar to the unexhausted claims at this time would be premature, since a procedural default involves the application of a state procedural rule barring review of the merits of defectively presented claims. For obvious reasons, Petitioner's unexhausted claims cannot be viewed as defectively presented since they were never presented to the state's highest court in the first instance.

Cf. no [illegible] to [illegible] [illegible] remedies.

the California Supreme Court in a petition for writ of habeas corpus.

Because Petitioner failed to exhaust some of his claims, and because he failed to show that there was an absence of an available State corrective process, this Court is precluded from reviewing the merits of Petitioner's unexhausted claims. Generally, "[a] district court must dismiss habeas corpus petitions containing both exhausted and unexhausted claims." *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988); *Rose v. Lundy*, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). However, a petitioner may, as an alternative to dismissal, "amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims." *Rose v. Lundy*, 455 U.S. at 520.

Accordingly, unless Petitioner elects to move for leave to file a Second Amended Petition containing only exhausted claims, this Court will be required to dismiss the entire action without prejudice.[15]

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[15] The magistrate judge expresses no opinion as to whether Petitioner is entitled to relief on the unexhausted claims. Petitioner risks forfeiture of the unexhausted claims under 28 U.S.C. § 2244 (governing second or successive petitions) and Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts (governing abuse of the writ) if he elects to file a Second Amended Petition containing only exhausted claims and later attempts to file a second federal habeas action after exhausting his state remedies.

It is further noted that dismissal of the pending action without prejudice will not result in a subsequent petition being dismissed as a successive petition under 28 U.S.C. § 2244(b). *See In re Turner*, 101 F.3d 1323 (9th Cir. 1997), *as amended*. However, such a dismissal could result in application of the statute of limitations under 28 U.S.C. § 2244(d)(1) to bar review of any later-filed federal habeas petition. *See Sperling v. White*, 30 F.Supp.2d 1246, 1253 (C.D.Cal. 1998)(the time during which a prior habeas petition was pending in the federal district court does not toll the limitations period); *Jones v. Morton*, --- F.3d ---, 1999 WL 970797 (3rd Cir. (N.J.), Oct. 25,

E. Procedural Default

Respondent makes an additional argument that Petitioner procedurally defaulted grounds 2, 5(1), and 7(2) because he failed to raise the claims to the California Supreme Court on direct appeal. [Motion at 73-81.] Petitioner contends that the claims are not procedurally defaulted. [Opposition I at 73-74, 81-83, 101-102, 118-121.]

In the order to show cause, the California Court of Appeal, citing *In re Jackson*, 3 Cal.4th 578, 586 n.2 (1992) and *In re Waltreus*, 62 Cal.2d 218, 225 (1965), denied some of Petitioner's claims because Petitioner's habeas claims had been raised and rejected on appeal.[16] [*See* Motion, Ex. F at 296.] The claims deemed to be procedurally defaulted were listed as follows:

> (1) that defendant was deprived of the effective assistance of counsel due to (a) the court imposed limitations on cocounsel, Richard Chier; (b) a conflict of interest by lead counsel, Arthur Barens, allegedly caused by the financial arrangements imposed by the court; (c) failure to disclose said financial arrangement to cocounsel and defendant; (d) counsel's alleged failure to fulfill promises made in his opening statement; (e)

1999)(same); *see also Dictado v. Durcharme*, 189 F.3d 889 (9th Cir. 1999)(tolling during state collateral review is not available if a state petition is denied for procedural reasons since such petition would not be considered to have been "properly filed").

[16] Because Petitioner's second petition for review to the California Supreme Court was denied without comment or citation to case authority, the last "reasoned" decision of the claims which Respondent contends were procedurally defaulted was the preceding decision of the state court of appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

counsel's elicitation of defendant's request for counsel; (f) counsel's alleged failure to object to gestures and other judicial misconduct; (g) failure to impeach witnesses, Karny and Gene Browning, with prior testimony and statements; (h) failure to request limiting instructions; (i) failure to renew his request for a hearing regarding a juror's misconduct; (j) failure to make evidentiary objections; and (k) failure to request a continuance prior to trial; (2) allegations of judicial bias and misconduct; (3) juror Linda Mickell's alleged misconduct; and (4) the court's refusal to order disclosure of Karny's state bar application.

[*Id.*, Ex. F at 296-297.]

The California Supreme Court has explained that "[b]y citing *Waltreus* in our summary denial orders, we have intended to communicate that because the issue was previously raised and rejected on direct appeal, and because petitioner does not allege sufficient justification for the issue's renewal on habeas corpus, the issue is procedurally barred from being raised again." *In re Harris*, 5 Cal.4th 813, 825, 21 Cal.Rptr.2d 373, 377 (1993), *as modified* (footnote omitted). By citing *Waltreus* in Petitioner's case, the California Supreme Court was clearly indicating that Petitioner failed to provide sufficient justification for it to reconsider the merits of claims which had already been considered and rejected on direct appeal.[17]

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[17] In addition to *Waltreus*, the state court of appeal cited *Jackson*, which cites *Waltreus* for the principle that certain of the claims were being denied on the ground they were raised and rejected on appeal. . . ." *In re Jackson*, 3 Cal.4th 578, 585 n.2, 11

not decided

Generally, a citation to *Waltreus* alone is inadequate to bar federal review. *See Forrest v. Vasquez,* 75 F.3d 562, 564 (9th Cir.), *cert. denied*, 519 U.S. 832, 117 S.Ct. 101, 136 L.Ed.2d 55 (1996)("a *Waltreus* citation is neither a ruling on the merits nor a denial on procedural grounds")(citing *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)). "[F]ederal courts 'look through' a denial based on *Waltreus* to previous state court decisions." *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. at 805-806).

In *Forrest*, the Ninth Circuit looked through a *Waltreus* citation denying a habeas petition to the state supreme court's prior unexplained order denying the petitioner's application for relief from default after he failed to meet the time requirements for filing a petition for review under Rule 28(b) of the California Rules of Court. *Forrest v. Vasquez, supra*, 75 F.3d at 563-564. The court found that the "nature" and "surrounding circumstances" of the unexplained order denying relief from the default clearly showed the basis of the decision was procedural default. *Id.* at 564. The court determined that it would not look past the state supreme court's unexplained order denying the petitioner's application for relief from default since the reason for the denial was obviously procedural. *Id.*

Respondent contends that Petitioner's presentation of grounds 2, 5(1), and 7(2) is analogous to *Forrest*. [Motion at 76-81.] Ground 2, which challenges a juror's distribution of a "recipe of

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Cal.Rptr.2d 531 (1992), *as modified on denial of r'hg, cert. denied sub. nom, Jackson v. California*, 508 U.S. 941, 113 S.Ct. 2419, 124 L.Ed.2d 641 (1993).

the week" to other jurors, was raised in both the first and second petitions for review. [*See* Motion, Ex. H at 333 n.29 & Ex. I at 376-377.] Because Petitioner did not omit the claim from his petition to the California Supreme Court on direct appeal, the reasoning of *Forrest* does not apply, and ground 2 is not procedurally defaulted.

Similarly, the exhausted portion of ground 5(1) was raised by Petitioner to the California Supreme Court on direct appeal in his first petition for review. [*Id.*, Ex. H at 315-316, 319, 322 & n.12, 327 & n.20.] Accordingly, in the event Petitioner files a second amended petition omitting the unexhausted facts currently asserted as part of ground 5(1), the Court will not be precluded from reviewing the merits of this claim.

Petitioner also raised a conflict of interest claim in his first petition for review, albeit without reference to many of the facts now asserted as part of ground 7(2). [*See id.*, Ex. H at 328-330.] Accordingly, in the event Petitioner files a second amended petition omitting the unexhausted facts currently asserted as part of ground 7(2), the Court will not be precluded from reviewing the merits of this claim.

Furthermore, even if the challenged claims had not been raised in the first petition for review, federal habeas review of the claims would not be precluded. As Petitioner argues, in light of the California Supreme Court's decision in *In re Robbins*, 18 Cal.4th 770, 77 Cal.Rptr.2d 153 (1998), *r'hg denied*, the citation to *Waltreus* did not necessarily constitute an independent state ground, since before *Robbins*, the California Supreme Court would consider the merits of a federal constitutional claim under a

"fundamental constitutional error" exception before applying a procedural bar to claims that were or should have been raised on direct appeal. [*See* Opposition I at 82, 118-119.] Thus, as the Ninth Circuit recently explained, because the California Supreme Court's citation of the such procedural rules to deny a habeas claim involved an antecedent determination of federal law, it was not an independent basis for denying review and did not amount to a procedural bar. *Park v. California*, 164 F.3d 1226, 1230-1232 (9th Cir. 1999).

F. Failure to State a Federal Claim

Respondent argues that grounds 11, 12 and 13 should be dismissed because errors in state post-conviction proceedings are not cognizable in federal habeas proceedings. [Motion at 81-87.]

In ground 11, Petitioner challenges the state court's application of California's "new evidence of innocence habeas remedy" as violating the Fourteenth Amendment. [First Amended Petition at 24.] In ground 12, Petitioner contends that his rights under the Fourteenth Amendment were violated during the state evidentiary hearing when the hearing judge refused to consider "the proffered testimony or declarations of jurors from petitioner's 1992 trial in San Mateo County. . . ." [*Id.* at 25.] In ground 13, Petitioner similarly contends that his constitutional rights were violated when his request to represent himself during the evidentiary hearing was denied. [*Id.*]

Petitioner wisely "concedes respondent's argument." [Opposition I at 121.] It is well settled that alleged procedural errors in the state post-conviction review process, and even the refusal to appoint counsel, are not redressable through habeas

corpus proceedings. *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir.), *cert. denied sub. nom, Franzen v. Deeds*, 493 U.S. 1012, 110 S.Ct. 574, 107 L.Ed.2d 569 (1989); *Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998), *cert. denied*, --- U.S. ---, 119 S.Ct. 1777, 143 L.Ed.2d 806 (1999); *see also Pennsylvania v. Finley*, 481 U.S. 551, 556-559, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)(right to counsel does not extend to collateral post-conviction proceedings). Accordingly, if Petitioner elects to file a second amended petition, grounds 11, 12 and 13 must be omitted.

III. <u>Conclusion and Order Re Further Proceedings</u>.

For the foregoing reasons, IT IS ORDERED:

1. If Petitioner wishes to proceed with this matter, he shall have until **December 17, 1999** (1) to file a Motion for Leave to File a Second Amended Petition along with a Proposed Second Amended Petition containing only exhausted claims consistent with this Memorandum and Order <u>OR</u> (2) to file a Request for Voluntary Dismissal of the Action Without Prejudice Pursuant to Fed.R.Civ.P. 41(a)(1)(i).

2. If Petitioner elects to file a Motion for Leave to File a Second Amended Petition, the Proposed Second Amended Petition shall be labeled as "Proposed Second Amended Petition" and with the case number CV 98-5280-WDK (AN).

The Proposed Second Amended Petition must be a separate, complete, and independent document; it must not refer to the First Amended Petition or any attachments or previously filed papers and must be understandable without looking at the previously filed petitions. In other words, Petitioner must start over as if the prior petitions had never been written. Petitioner may, however,

refer to his previously filed Exhibit Volumes # 1 through # 7 to the extent that any exhibit referred to in the Proposed Second Amended Petition has been exhausted in the California Supreme Court in connection with the same claim.

The Proposed Second Amended Petition shall be submitted on the petition forms approved by and supplied without charge by the Clerk's office, as required by Local Rule 26.1 of the Local Rules for the United States District Court for the Central District of California. The Proposed Second Amended Petition may be handwritten; however, it must be single-sided, consecutively paginated, and **shall not exceed 50 pages.** The Clerk of the Court shall forward a copy of the petition forms approved by this Court along with a copy of this Memorandum and Order to Petitioner.

Petitioner is advised and warned that his failure to timely file a Motion for Leave to File a Second Amended Petition and Proposed Second Amended Petition or a timely Request for Voluntary Dismissal by December 17, 1999, shall be construed as either his consent to dismissal of the action for failure to prosecute or the disobedience with a Court Order warranting the dismissal of the action with prejudice pursuant to Fed.R.Civ.P. 41(b).

DATED: November 19, 1999

ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE

cc: JUDGE KELLER
All Parties

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on December 19, 2014 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: /s/ Jocilene Yue
Jocilene Yue