Gary K. Dubcoff (SBN 168089)
E-mail: dubcoff@sbcglobal.net
2370 Market Street, #461
San Francisco, CA 94114
Telephone: (415) 934-8800
Facsimile: (415) 934-8800

Counsel for Petitioner
JOSEPH HUNT

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(SOUTHERN DIVISION)

JOSEPH HUNT, Petitioner, v. SCOTT KERNAN, Warden, Respondent.	Case No. CV 98-5280 AHS (AN)

PETITIONER'S REPLY TO RESPONDENT'S ANSWER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

TABLE OF ABBREVIATIONS

A Respondent's Answer (dkt. no. 237)

AM Respondent's Answer Memorandum (dkt. no. 237)

CCA California Court of Appeal

CT Clerk's Transcript (*see* dkt. no. 238, lodgment A)

DS Petitioner's Detailed Statement of Facts (dkt. no. 191)

Ex. Federal Habeas Petition Exhibit (dkt. nos. 5-11)

H.Ex. State Habeas Hearing Exhibit

HT Reporter's Transcript of State Habeas Hearing (*see* dkt. no. 238, Lodgment C)

RT Reporter's Transcript of Trial Proceedings (*see* dkt. no. 238, Lodgment B)

Supp. CT Supplemental Clerk's Transcript (*see* dkt. no. 238, Lodgment A)

Supp. RT Supplemental Reporter's Transcript of Trial Proceedings (*see* dkt. no. 238, Lodgment B)

NOTICE OF PENDING LODGMENTS

Petitioner intends to lodge with this Court as soon as possible remaining relevant documents, including, *inter alia,* reporter's transcripts of his cross-examinations of the BBC witnesses in the San Mateo trial, and the original subpoena duces tecum and return relating to Ex. 100 (Barens' ledger cards) (noted in Ex. 156, ¶ 47; *see also* dkt. nos. 34, 40, requesting Court take cognizance of these exhibits and that state admit authenticity).

I. Claims 1-3, Extant 2-1, 2-3, Extant 3-1, 6, 7

A. Gravamen of Claims: These cross-referenced claims, from various constitutional perspectives, presented the problem: on the eve of a capital case, the trial judge and one of the two defense attorneys reached a backroom deal. The attorney agreed that, in exchange for his receiving public payment of his fees, he would not challenge the judge's wish that his cocounsel not actively participate at trial. The judge, who had no legal authority to make such an order, committed constitutional error in doing so. Plus, he refused to hear objection from anyone unwilling to concede the defendant's interests, a second and compounding constitutional error. The lone attorney left the defendant was not an attorney within the meaning of the 6th Amendment, a third, albeit integrally related, error. He had already committed disbarment-grade acts, indeed felonies, to secure his public funding, and had trashed, in the process, his supreme duty of fidelity. By agreeing to sacrifice his cocounsel on the altar of self-interest, he abandoned his client's interests at this most critical stage. This attorney's crimes and grave ethical lapses changed everything, detrimentally pervading all that followed. DS 73-76.

B. Clearly Established Federal Law Flouted by Respondent and the CCA

1. Constructive Denial of Counsel/Counsel's Conflict of Interest: Constructive denial of the right to assistance of counsel violates the 6th Amendment. *Strickland v. Washington,* 466 U.S. 668, 692 (1984).[1]

Where a trial court fails to inquire into a potential conflict about which it knew or should have known, the 6th Amendment is violated where a division of loyalties adversely affected counsel's performance. *Mickens v. Taylor,* 535 U.S. 162, 172 n.5 (2002). This rule applies to a conflict "between the lawyer's own private interest and those of the client." *Plumlee v. Masto,* 512 F.3d 1204, 1210 (9th Cir. 2008) (*en banc*).

2. Judicial Refusal to Hear from Defendant or One Speaking for Him: A defendant has a right to be at a proceeding "whenever his presence has a relation, reasonably

[1] Pursuant to L.R. 11-3.9.3, Hunt includes the parallel citations to Supreme Court and California state cases in his initial citation to the cases in the Table of Authorities, *supra.*

substantial, to the fullness of his opportunity to defend against the charge." *United States v. Gagnon,* 470 U.S. 522, 526 (1985). This applies to any stage of a criminal proceeding that "is critical to its outcome, if [his] presence would contribute to the fairness of the procedure." *Kentucky v. Stincer,* 482 U.S. 730, 745 (1987).

3. Judicial Interference with Assistance of Counsel: "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland,* 466 U.S. at 686; *United States v. Cronic,* 466 U.S. 648, 659 (1984); *Herring v. New York,* 422 U.S. 853, 857 (1975) (state may place "no restrictions upon the *function* of counsel in defending a criminal prosecution") (emphasis added).[2]

4. Extrajudicial Source Bias: *Liteky v. United States*, 510 U.S. 540, 552, 555 (1994); *Peters v. Kiff,* 407 U.S. 493, 501-03 (1972); *Mayberry v. Pennsylvania.*, 400 U.S. 455, 465 (1970) (judge "personally embroiled with a lawyer" "unfit to sit in judgment").

C. Critical Facts Unrefuted by Respondent: The most telling portion of the voluminous record before this Court is that of the chambers conference that took place on January 29, 1987. Those pages, in and of themselves, go a long way toward establishing the constitutional errors upon which these claims rest. Indeed, the rest is commentary.

Four days before opening statements, Hunt learned that the judge had conspired with Hunt's lawyer, Arthur Barens, to arrange for his other lawyer, Richard Chier, to have "nothing to do actively in the trial" (RT 6007), that is, to not to speak in front of the jury (RT 6019, 6024).[3] The judge, this time on the record, goaded by Barens' feigned ignorance (DS 70-71), made official what he had tried to achieve covertly, namely, rescinding Chier's appointment as cocounsel under the state's capital-case statutory

---

[2] This general principle has been applied in a plethora of contexts. *See, e.g.*, *Geders v. United States*, 425 U.S. 80 (1976); *Glasser v. United States,* 315 U.S. 60 (1942).

[3] "Conspired" because they had initially tried to keep the matter entirely off the record, as evidenced by their meeting's taking place with no court reporter present, the omission of the curtailment of Chier's role from the order it generated (Supp. CT 57), and Barens' affirmative disinformation to Chier about Chier's status (Ex. 105, ¶ 2). DS 70-71.

scheme. RT 6009, 6021-22. Unbeknownst to Hunt, Barens had agreed to Chier's silence in exchange for his own appointment, permitting him to continue at public expense (RT 6003, 6015) (this, after another judge had refused to appoint him, finding he had to defend the case to its end based on his having been retained (RT 6010), and, indeed, after the trial judge himself had denied him appointment 17 days earlier (CT 1405)).[4]

When the *quid pro quo* agreement was revealed, the judge would not permit either the silenced Chier or Hunt to speak. RT 6008, 6025 ("Does the client have anything to say about this, Your Honor? The Court: No."). The attorneys had prepared the defense and divided up their labors on the assumption that each would fully participate. RT 6013-14. Barens, the lone defense attorney left to speak to the jury, reasserted at the chambers conference what he had informed Hunt before being retained, that he was unwilling to take on this complex case without "associate counsel of a co-counsel status" because he was unable to "prepare" or "execute" the trial on his own. RT 6005. The *DA* took a "firm" (RT 6021) contrary position. "Gravely concerned" (RT 6020), he objected on Hunt's behalf (RT 6021 ("I think that what is in the best interest of the defendant, is not for the Court to determine. . .")).[5] The judge, in response to the DA's attempt to protect Hunt's rights, evinced no recognition of the constitutional ramifications of his actions. RT 6021 ("I am running this trial, not you nor they [the defense])."[6] He repeatedly presented an ultimatum to Barens – proceed with the silenced Chier and keep your appointment or proceed in whatever way you think best without it. RT 6009-10, 6011, 6015, 6017-18. The choice Barens made was equally clear-cut. RT 6026.

D. Reply to Respondent's Reliance on the CCA Decision: The lone reasoned state court decision is that of the CCA on direct review. Respondent contends that the CCA

---

[4] Barens later explained, "I can't help myself when it comes to money." Ex. 105, ¶ 2.

[5] The state should be estopped from disputing the violation of Hunt's right to counsel, having previously taken the position that it *was* violated. *See, e.g., Whaley v. Belleque,* 520 F.3d 997, 1002 (9th Cir. 2008) (applying judicial estoppel doctrine).

[6] *See also* Supp. RT B190 ("The Court: Well, I control who is counsel here, right?").

reasonably found that the silencing of Chier did not violate Hunt's right to counsel because (1) he had no constitutional right to two appointed attorneys; (2) the action was not arbitrary since there was a valid reason for it, namely, Chier's "repetitive questioning during voir dire"; (3) all the judge did was refuse to expand Chier's role beyond that requested by Barens; and (4) the chambers conference was constitutionally adequate because of its substance and Hunt's physical presence. AM 38-39, 45, 48. Regarding prejudice, respondent contends generally that Barens provided a constitutionally adequate defense even without Chier's active participation (AM 4-21, 46) and, in any event, the overwhelming evidence of Hunt's guilt defeats all claims (AM 1-4).

The CCA's analysis – casting the issue as if all that were at stake were the judge's prerogatives under the state statutory appointment scheme for capital cases (Ex. A, 38-45) – did not apply the proper constitutional framework. The CCA reasoned that, because the trial judge acted within the discretion conferred upon him by that scheme, the constitutional right to assistance of counsel was not violated. Section 2254(d)(1) is satisfied for that reason alone. *See Frantz v. Hazey*, 533 F.3d 724, 734 (9th Cir. 2008).

The CCA decision was patently unreasonable even on its own state-law terms.[7] Without any basis in law whatsoever (and hence the failure to cite any), it took as given the notion that Chier's appointment as cocounsel under the state statutory scheme was somehow limited by the Barens declaration submitted in support of the request for that appointment (and then framed the issue, based thereon, as the judge's authority to refuse to *expand* Chier's role). The CCA, however, made all that up out of whole cloth – such a declaration carries no limiting import whatsoever.[8] The statute does not so provide (*see* Cal. Penal Code § 987(d)); not a single decision in the history of California so provides;

---

[7] Hunt knows it is not for this Court to examine state-law questions, yet devotes this paragraph to those questions to illustrate the core irrationality of the CCA's decision.

[8] If the CCA were correct about this and counsel should have known that Chier's role was delimited by Barens' declaration, it is odd that the trial judge did not understand it either, as proven by his demanding Chier's silencing as the *quid pro quo* for Barens'

and the order appointing Chier without qualification (CT 106) does not so provide.[9] *Nothing* was said about a limiting declaration or a refusal to expand in the trial court. *Cf. Lee v. Kemna,* 534 U.S. 362, 380, 387 (2002) (rejecting attempt to justify denial of motion on state procedural rules that were invoked for first time by state appellate court two and a half years after trial). The CCA also ignored the fact that Judge Rittenband, under state law, lacked the authority to revisit the Chier appointment order. *Cf. People v. Riva,* 112 Cal.App.4th 981, 991 (2003) (citing "general rule [that] one trial judge cannot reconsider and overrule an order of another trial judge," and supporting rationales).

More fundamentally for this Court's purposes under § 2254(d)(1), however, the CCA's reasoning is *irreconcilable* with the Constitution. It held that the judge acted within the bounds of his discretion in silencing Chier because "a court is not required to expand the duties of cocounsel beyond that set forth in the lead counsel's affidavit [simply] because counsel have taken it upon themselves, *without court authorization*, to privately add to or divide their respective duties in a manner inconsistent with the affidavit . . . ." Ex. A, 40 (emphasis added). Thus, the CCA reasoned that appointed defense counsel need "authorization" from the court in deciding to how to try their case, and specifically, as to who would speak for the defendant. That reasoning is utterly

---

appointment. RT 6003, 6007-08, 6010-11, 6015. How can that be explained if the scope of Chier's appointment *already* precluded his talking? Of course, as the history of Chier's participation between his appointment and his silencing demonstrates beyond cavil, he was talking throughout as unlimited co-counsel. Indeed, even if the Barens declaration carried some sort of limiting effect, the issue had long since been waived.

[9] It *should* hardly bear stating that had there been some statutory authority to confine the scope of Chier's appointment, and had that been the intent of the appointing judge, such limitation would have appeared in the order itself. It would have had to. Since when do affidavits from attorneys create obligations where court orders do not? *Cf. Center Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 750 (9th Cir. 1989) (affirming that warrant affidavit can cure overbreadth of warrant only if affidavit is incorporated by reference in warrant). If the declaration is dispositive, then *Barens* should not have been permitted to examine witnesses, because *Chier's* declaration in support of his appointment failed to specifically ask for authorization for that task. Supp. CT 19-20.

contrary to entrenched 6th Amendment principles (*see* section I.B.3, *supra*). An indigent defendant, unlike his counterpart who can privately retain counsel, may not possess the qualified right to *choose* his counsel (*United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006)), but there is *no* distinction between the two categories of defendants when it comes to their right to effective assistance of counsel (*Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). The judge could not silence retained cocounsel (*cf. Lainfiesta v. Artuz,* 253 F.3d 151, 154 (2nd Cir. 2001) (finding trial court's insisting which of defendant's two retained attorneys must conduct a single cross-examination violated defendant's 6th Amendment right to control defense));[10] the mere fact of Chier's prior appointment did not confer that power upon him.[11] *Cf. Ferri v. Ackerman,* 444 U.S. 193, 204 (1979) ("indispensable element" of defense counsel's duty to his client is "the ability to act independently of the Government"); *Polk County v. Dodson,* 454 U.S. 312, 321-22 (1981) ("[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages."); *Cuyler,* 446 U.S. at 344 ("court procedures that restrict a lawyer's *tactical* decision to put the defendant on the stand unconstitutionally abridge the right to counsel") (emphasis added).

Section 2254(d)(2) is also satisfied because the CCA made an unreasonable determination of fact when it found that the judge silenced Chier because of the manner in which Chier had "antagonized" potential jurors during voir dire. DS 89. All the CCA did was credit the judge's stated justification. That finding was defective because: (1) a judge's unsworn opinion "untested by the usual judicial procedures designed to ensure

---

[10] "Inherent in a defendant's right to control the presentation of his defense is the right to choose the counsel who presents it." *Id.*

[11] Ironically, California case law, ignored by the CCA, has long recognized the underlying constitutional principles. *See, e.g., People v. Crovedi,* 65 Cal.2d 199, 208 (1966) (for reasons rooted in 6th Amendment, "the state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best"); *Smith v. Superior Court,* 68 Cal.2d 547, 562 (1968); *Mowrer v. Superior Court*, 3 Cal.App.3d 223, 230 (1969).

accuracy" is itself not a factual determination (*Weaver v. Thompson,* 197 F.3d 359, 363 (9th Cir. 1999)); (2) the CCA employed no factfinding process of its own before reaching that conclusion (*cf. Nunes v. Mueller,* 350 F.3d 1045, 1055 (9th Cir. 2003) (no AEDPA deference due state court factfinding made without evidentiary hearing));[12] and (3) the conclusion was not supported by the record evidence because (a) the judge also admitted or implied that he was silencing Chier as a result of his advocacy in seeking the judge's disqualification (RT 4715, 5291, 6019, 8313, 10606); (b) the judge, despite direct requests, repeatedly refused to support his supposed justification of Chier's silencing with facts (RT 6008, 6022, 10606); (c) there is no indication in the record of any potential juror's being "antagonized" by Chier, whether by way of juror statements or contemporaneous attorney or judicial description; (d) the judge explicitly made the silencing of Chier a *quid pro quo* for Barens' appointment – if Chier's failings were truly the source of the silencing, there was no reason to link it to the Barens appointment; (e) the manner of Chier's voir dire was not different from that of the DA or Barens (DS 89-99); (f) the judge had denied Barens' appointment and made no effort to silence Chier before learning of Chier's effort to disqualify the judge, then reversed himself after learning of that effort; (g) the judge had shown, through a sickening pattern of abuse, an implacable hatred of Chier that was so patently not rooted in the quality of Chier's advocacy that the advanced justification for his silencing had to have been pretextual (*cf. Miller-El v. Cockrell,* 537 U.S. 322, 339 (2003) (credibility of proffered reasons for striking potential jurors measured by "how reasonable, or improbable" they are));[13] (h) the judge's hostility toward Chier *predated* the voir dire (DS 97-98) and included extra-judicial efforts to get Chier evicted from an apartment and fired from his job (DS 82);

---

[12] And, therefore, the court did not know, *inter alia*, that the judge had admitted to his friend that he was silencing Chier because Chier had irritated him (Ex. 106) and that his antagonism against Chier had its roots in an extrajudicial source (Ex. 103, ¶ 5).

[13] Could Chier's voir dire *possibly* serve to explain, even in combination with his other in-court behavior, such insulting comments as "I think he is a discredit to the profession"

(i) if Chier's representation were so detrimental to Hunt, the judge would not have offered to permit him to retain his cocounsel status should Barens opt to refuse his appointment; (j) Chier's alienating potential jurors, even if it were true, is not a sufficient ground for his removal. DS 98-99. Thus, the judge's stated reason for silencing Chier was plainly a cover for his true reasons. Even "partial reliance on an erroneous factual finding . . . highlights the unreasonableness of the state court's decision." *Wiggins v. Smith,* 539 U.S. 510, 528 (2003). Again, it is the CCA's uncritical acceptance that it is constitutionally permissible to interfere with counsel (after the jury is sworn, no less) based on even overly zealous or clumsy advocacy that is flatly contrary to precedent barring state interference with the tactical decisions of a defendant and his attorneys.

The CCA, with respect to three related constitutional problems, again reached legal conclusions that cannot survive § 2254(d). First, it did so with respect to the constructive denial of counsel. Barens' crimes, his grave acts of moral turpitude, and his abandonment of his client amounted to such constructive denial. DS 68-76. An advocate would have never ceded the constitutional issues, but would have diligently made a showing at every turn where the silencing of cocounsel impaired the defense. Barens did the opposite – he expressly *disclaimed* efforts to overcome the deal (*e.g.,* RT 8323), just as he shunned all defense challenges to the judge's misconduct (DS 75). *United States v. Swanson,* 943 F.2d 1070, 1075 (9th Cir. 1991) (applying *Cronic* where counsel "ceased to function" in "role of an active advocate"); *cf. Frazer v. United States,* 18 F.3d 778, 785 (9th Cir. 1994) (applying *Cronic/Swanson* principles in collateral proceedings).

A constructive denial of counsel is found in only a narrow spectrum of cases, but this case is so extreme that, however narrow that spectrum, forcing Hunt to trial with a disloyal, criminal, and incompetent advocate as his lone voice fits well within it. Barens repeatedly *admitted* he was incapable of trying the case with a silenced Chier. *See, e.g.*, RT 6005. Moreover, loyalty was his most fundamental duty. *Hulland v. State Bar*, 8

(RT 13282), "Shove it" (RT 15215), "Junior Miss" (RT 12498), "sleazy" (RT 14256), and "unscrupulous" (RT 14308)? Of course not. (For more of the same, *see* DS 83-87.)

Cal.3d 440, 448 (1972) ("When an attorney, in his zeal to insure the collection of his fee, assumes a position inimical to the interests of his client, he violates his duty of fidelity to his client."); ABA, Std. for Crim. Justice 4-3.5(a) (same concept). He also violated his obligation not to accept payment from anyone else (here, the state) unless "there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship." ABA, Std. for Crim. Justice 4-3.5(e)(ii).

Even more profoundly, Barens committed *felonies* to secure his appointment. He perjured himself regarding how much money he had received on Hunt's behalf and when he had received his last payments, and he failed to divulge the material fact that a negotiable note from a third party secured the balance owed him. DS 67-68. Indeed, Barens' entire third request for appointment was fraudulent because he premised it on Hunt's indigence, though Barens knew it was irrelevant because his contract for fees was with a third party, as he would later admit (Ex. 152, 17). Regardless, surely Hunt was minimally entitled by the 6th Amendment to a lawyer who did not commit *crimes* (especially where they created the very weapon that the judge wielded to cripple the defense).[14] *See also* Cal. R. Prof. Conduct 5-200 (counsel has duty to be truthful to a court); ABA, Model Rule of Prof. Conduct 3.3(a)(4)(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

The ethical breaches did not stop with the off-the-record deal, however. A brief comparison between how a lawyer providing the assistance required by the 6th Amendment would have behaved on the date of the chambers conference, and Barens' behavior, well illustrates constructive denial. An attorney within constitutional bounds would have told his client the truth and provided him the available options. DS 70,

---

[14] Since Barens' false statements were made as part of his effort to secure tens of thousands of dollars of public funds, he not only committed the crime of perjury (Cal. Penal Code, § 118a), but also grand theft (Cal. Penal Code, § 484(a) (penalizing "false or fraudulent representation or pretense"); *see also* § 487(a) (defining grand theft).

72, 75, 186; ABA, Std. for Crim. Justice 4-3.8 (counsel "should keep the client informed of the developments in the case" and "explain developments . . . to the extent reasonably necessary to permit the client to make informed decisions"); Cal. Bus. & Prof. Code, § 6068(m) (similar). Such an attorney would have explained that Hunt's right to his and Chier's services through the conclusion of trial had fully vested *prior* to their seeking appointment;[15] that Hunt thus had the right to counsel of his choice; that a waiver of such a fundamental right had to be knowing and intelligent; that the judge's refusal to hear from Hunt would defeat any claim of waiver; that Hunt could raise a valid choice of counsel objection;[16] that, regardless, the appointment was voidable because it was secured through fraud and could be undone upon disclosure of that criminality; that such disclosure would inevitably lead to his discharge (DS 187); and that, in any event, *Hunt* should discharge him because he had proven himself ethically unfit, having grossly violated his duty of loyalty to his client. In short, *everything* would have changed had

---

[15] Hunt had entered into an agreement with Barens for Barens and a cocounsel competent to defend a capital case to represent him at trial for a fee of $50,000 (Supp. CT 17, 43, 95-97); Barens had agreed to split the fee equally with Chier in exchange for Chier's agreement to act as cocounsel (RT 6004-05, 6012; Ex. 152, 16]); pursuant to that agreement, and prior to his own appointment, Chier appeared as counsel of record (*e.g.,* Supp. RT A1, A27, B1) and received fees from Barens (Ex. 100); and Barens received $42,500 of the agreed-upon fee and held a third-party promissory note covering the balance, upon which he had ceased to take action, when he applied for his appointment (Exs. 100, 101, 150). Thus, Barens' failure to fully collect on the note he had freely accepted as consideration did not diminish Hunt's power to insist on specific performance by Barens and Chier of their undertaking to represent him.

[16] The mere fact that counsel became unhappy with the deal they had struck and secured appointments from the court afterward changed nothing vis-à-vis Hunt's right to counsel of choice. At no time did he make a voluntary and intelligent waiver of that right – at no time did anyone deign to explain to him that the court's successive appointments of his (already-paid-for) attorneys were eroding, in stages, his right to control the presentation of his defense. *See Johnson v. Zerbst,* 304 U.S. 458, 464 (1938) (waivers of fundamental constitutional right must be knowing and intelligent and courts will indulge "every reasonable presumption against waiver"); *Barker v. Wingo,* 407 U.S. 514, 525-26 (1972) (no waiver on a silent record). DS 70-73.

Barens been such an attorney on January 29, 1987. Unfortunately for Hunt, he was not.

The CCA's conclusions also meet the § 2254(d) criteria in two other areas. After the "deal" (RT 10598), the judge's preventing Hunt or anyone unwilling to concede his interests from speaking at the subsequent chambers conference violated Hunt's rights to be present and to be heard. *See Bradley v. Henry,* 510 F.3d 1093 (9th Cir. 2007) (*en banc*) (granting relief where petitioner excluded from hearing regarding representation). The CCA disagreed. Ex. A, 170-73. Per respondent, Hunt's presence in chambers was the functional equivalent of being present when the deal was struck. AM 48.

Respondent is wrong. Hunt's personal presence would have stopped Barens' bartering in its tracks – there is no way Hunt would have permitted such a deal without his objection. There were other losses (DS 185-87), including the chance to explain the importance of Chier's active role to the defense and that, if the cost of Barens' appointment were Chier's silencing, Hunt would hold Barens to their bargain – that Barens would represent him through trial for the $50,000 in consideration (cash plus a negotiable, third-party promissory note) that Barens had *already* received. DS 68. He also would have served as a check on Barens' perjury. Barens would not have been able to misrepresent the facts regarding his retainer agreement and paid fees in Hunt's presence. Moreover, respondent ignores the fact that Barens was not advocating Hunt's interests at his off-the-record meeting with the judge, he was advocating his own. DS 68-70. Finally, Hunt's being physically present in chambers could not possibly cure any prejudice because he could not speak. *Cf. United States v. Mosquera,* 816 F.Supp. 168, 172 (E.D.N.Y. 1993) ("To be 'present' implies more than being physically present.").

In addition, Barens suffered an actual conflict of interest that adversely affected his performance, but the CCA held to the contrary on both questions (Ex. A, 47-48, 50-56). The Supreme Court holds that an actual conflict arises when, "during the course of the representation," the attorney's and defendant's interests "diverge with respect to a material factual or legal issue or to a course of action." *Cuyler,* 446 U.S. at 356 n. 3; *see also United States v. Hearst,* 638 F.2d 1190, 1193 (9th Cir. 1980); section I.B.1, *supra*.

Barens made a choice that advanced his financial interests. *Hunt's* interest, however, was in a fully participating Chier, who could bring his greater experience (DS 100; Exs. 103, 111) and preparation (DS 69-70) to bear whenever necessary or desirable, as Hunt could not have made clearer, promptly filing a writ petition (DS 71-72). Thus, Hunt's interests were pitted against Barens' by the very terms of the judge's proposition. This was a stark and actual conflict. *Cf. United States v. Marquez,* 909 F.2d 738, 741 (2nd Cir. 1990) (in *dicta,* noting there would have been an actual conflict (had the court not put a halt to it) where government sought to condition its return of confiscated funds to pay attorney's fees on attorney's agreement to set speedy trial date). In addition, once Barens broadly breached the rules of conduct, it created yet another conflict with his client. *United States v. Elliot,* 463 F.3d 858, 866 (9th Cir. 2006) (noting such conflict).

The adverse effect was equally stark. What Barens should have done was to unceasingly advocate for the full participation of Chier. Instead, he pronounced himself "satisfied" with Chier's silencing (RT 6026) and disavowed the related writ petition (RT 8323). He failed to immediately disclose his Faustian bargain to both client and co-counsel, prevented its timely disclosure through deceit (DS 70-71), failed to ask for a continuance in its wake, and failed to join efforts to overturn it, thereby defeating the steps taken to ameliorate this devastating blow delivered on the eve of trial. DS 73-76. Because of this conflict, Barens did not even add to the prompt effort to overturn the deal his personal statements that he felt coerced and unprepared to assume Chier's share of the defense burden, though he later found it useful in other contexts to admit precisely that. RT 6622, 10070-75, 10478, 11313-19, 13305-06; CT 1711; DS 69-70, 74-75.

Thus, this Court must evaluate *de novo* Hunt's claims because the § 2254(d) standards are met. Respondent relies on *ipse dixit* assertions of Barens' competence and the overwhelming evidence of guilt to argue the absence of prejudice. This Court need not reach those contentions because, for many reasons, prejudice must be presumed.

First, prejudice is presumed under *Cronic* where there is "the constructive absence of an attorney dedicated to the protection of his client's rights." *Swanson,* 943 F.2d at

1075. Barens was not such an attorney, and, remember, the trial judge explicitly refused to recognize Chier's standing as an attorney. DS 85-89, 100-02, 111.

Second, prejudice is presumed on account of the state inference with counsel's assistance. *Strickland,* 466 U.S. at 692; *cf. Walberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir. 1985) ("It is not right that the state should be able to say 'sure we impeded your defense – now prove it made a difference.'"). In the words of the prosecutor, "what is in the best interest of the defendant, is not for the Court to determine." RT 6021.

Third, prejudice is presumed under Supreme Court conflicts jurisprudence. *Mickens,* 535 U.S. at 173-74; *Cuyler,* 446 U.S. at 348-50. *Every* ramification of the conflict was bad for Hunt; for him, it contained no silver lining. DS 73-76.

Fourth, prejudice is presumed where *no* competent counsel could be effective. *Cronic,* 466 U.S. at 659-60. Barens, with stated plans to present only part of a capital case, suddenly had to take on all courtroom advocacy himself. What lawyer could do so?

Fifth, prejudice is presumed where there is no metric to measure it. *Gonzalez-Lopez*, 548 U.S. at 146 ("It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact . . . .") Here, the trial that took place, *shouldn't have*. Chier's choices as trial counsel are unquantifiable.

Sixth, the judge's campaign to stop Chier from whispering to Barens during trial, when Chier was Hunt's only conduit to Barens because Chier sat between the two at counsel table (*e.g.,* RT 12029), is grounds for presumptive prejudice. *Cf. Moore v. Purkett,* 275 F.3d 685, 688-89 (8th Cir. 2001) (*per se* prejudice where judge prohibited defendant from speaking quietly with counsel during trial). DS 85-89, 103-06, 122, 163.

Should the Court reject each and every one of these principles and find no structural, pervasive error, it must still reject respondent's contention regarding overwhelming evidence of guilt. Again, there are several reasons why this is so.

First, and most fundamentally, there are the declarations of the San Mateo jurors. In stark contrast to the state post-conviction courts, these jurors *saw* and *heard* all the important prosecution witnesses (Ex. 201, ¶¶ 5, 7, 8) – whose testimony provided the so-

called overwhelming evidence relied on by the state courts – found them incredible (Exs. 202-08), and believed Hunt not guilty of killing Levin (*id.*), conclusions made even more remarkable by the fact that they learned he had already been convicted of that crime (*id.*). *Cf. Riley v. Payne,* 352 F.3d 1313, 1324 (9th Cir. 2003) ("juries can be expected to be keenly interested in whether witnesses should be believed").

Moreover, none of the state courts that relied on the purportedly overwhelming proof of Hunt's guilt evaluated that evidence in light of all of the *defense* evidence that was introduced in San Mateo, but was absent in LA because of Barens' incompetence. The San Mateo jury heard from 44 defense witnesses addressing the alleged Levin killing (Ex. 201, ¶ 7), the LA jury, 4. The former jury found the defense case persuasive. The state courts' facile conclusion of "overwhelming evidence," in the absence of all consideration of defense evidence that could have been, but was not, presented in LA, requires *de novo* review of Claim 1. *Cf. Holmes v. South Carolina,* 547 U.S. 319, 330 (2006) ("The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."); *Riley,* 352 F.3d at 1320 (prejudice where, absent IAC, there would have been "more equilibrium in the evidence presented to the jury").

Respondent specifically contends that this Court is precluded from considering these essentially dispositive juror declarations under Fed.R.Evid. 606(b). AM 31 n.9. That rule, however, only precludes the use of a juror's testimony *to impeach that juror's verdict*. *See, e.g., United States v. Blackwell,* 469 F.3d 739, 769 (6th Cir. 2006). Hunt's proffer does not violate that rule; he proposes a permissible use. In *United States v. Barragan-Cepeda,* 29 F.3d 1378 (9th Cir. 1994), for example, the court found that the district court had wrongly relied on Rule 606(b) in refusing affidavits from two jurors who had served at a previous trial of the defendant, submitted to establish that an issue was decided in defendant's favor at the earlier trial. The court found the rule inapplicable because defendant "has not sought to impeach that [earlier] verdict." *Id.* at 1380.

Also instructive is *Luna v. Cambra,* 306 F.3d 954 (9th Cir. 2002), *as amended*,

311 F.3d 928. There, a magistrate judge of this district empaneled an eight-person advisory jury to "assess the credibility of witnesses and of trial counsel" who testified at a hearing on a state prisoner's IAC claim. *Id.* at 958. At the close of the hearing, the judge submitted interrogatories, eliciting their views as to the credibility and substantive value of the testimony, which the judge then adopted. *Id.* at 959. That judge understood that an 8-way deliberative process is an inherently more sound method of determining prejudice than is a judge's attempts to *imagine* the results such a process would produce.

Rule 606(b) was created in the service of important policy goals; it was, most definitively, not directed at the inherent value of such evidence. The Ninth Circuit noted the rule's exclusion of "the most direct evidence of prejudice . . . lends an Alice in Wonderland quality" to courts' efforts to assess prejudice. *Sassounian v. Roe,* 230 F.3d 1097, 1109 (9th Cir. 2000). Where no effort is being made to use jurors to impeach their own verdict, however, there is no reason to ignore this "most direct" evidence. The results of a parallel proceeding before a real jury are "a great deal more probative and convincing than the usual tools given to appellate courts on the issue of prejudice." *People v. Orgunmola,* 39 Cal.3d 120, 124 (1989) (result before other jury proved "the effect of the error with seeming laboratory precision"); *see also Ouber v. Guarino,* 293 F.3d 19, 33 (1st Cir. 2002) (finding prejudice because juries had deadlocked in petitioner's first two trials and only "substantial difference" with trial at issue was counsel's IAC; relying on these "actual rather than hypothetical reference points").

Second, another persuasive indicator of prejudice is the result of the trials of his codefendant Jim Pittman, who allegedly killed Levin. The state tried and failed twice to convict him. Ex. 209; Supp. RT B8, 3597-602. (Tellingly, when Pittman's case was tried before Judge Rittenband, the vote was 11-1 in favor of conviction; when another judge presided, the vote was 10-2 for acquittal.) Thus, in four trials in which the state sought to prove its theory of Levin's killing, the lone time it succeeded was here.[17] *Cf.*

---

[17] In fact, every one of the BBC prosecutions ultimately collapsed – the San Mateo case

Johnson v. Baldwin, 114 F.3d 835, 840 (9th Cir. 1997) (relying on outcome of codefendant's trial in IAC analysis, citing similar cases). Nobody has explained herein why evidence is so "overwhelming" as to render harmless all constitutional errors when the lone time it even proved *sufficient* to convict was in the presence of those errors. If "laboratory precision" in proving the effect of errors were required, this Court has it.

Third, the prosecutor himself articulated the prejudice. After the defense rested, he conceded the vulnerability of that case to the presentation of (what turned out to be readily available) exculpatory evidence. He told the court of his "great fear" that one more sighting witness would cause a "hung jury or worse." RT 13262. The Ninth Circuit plainly stated such admissions should carry great weight. *See Singh v. Prunty,* 142 F.3d 1157, 1163 (9th Cir. 1998) ("In the adversarial process, the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case.").

Fourth, in 1993, Zoeller, the case agent, conceded that, in light of the "five new witnesses who state that they have seen . . . Levin after his reported disappearance . . . [a] new trial would be hard to win without additional evidence of our own." Ex. 209, 3.

Fifth, the evidence was not overwhelming, from any vantage point, on the issue of *corpus delicti*, an essential, predicate question jurors had to answer before even getting to the evidence relied upon by the state courts and respondent to argue harmlessness. Nowhere is due recognition given to the evidence that several other people saw Levin alive, that he was researching Brazilian extradition treaties, that he sought advice on how to dye his hair on the day he went missing, that he was out on bail in a case charging him with 12 felonies and was aware he was about to be charged with more, that he faced lawsuits and other large claims, that he had spoken openly about fleeing, that he had control of large sums of money, *etc*.. *See* dkt. no. 79, 2-20. Thus, the state courts never addressed the question of whether there was a reasonable probability that, absent Barens' deficient performance, a reasonable juror would have voted to acquit in light of the

---

against Pittman and Reza Eslaminia ended in dismissal, and Dosti pled to time served for being an accessory after the fact.

corpus delicti rule before even evaluating the evidence that the state courts repeatedly cite (*e.g.,* Hunt's statements, the to-do list). The evidence was far from overwhelming on *that* preliminary, essential issue. *Cf. Riley,* 352 F.3d at 1323-25 (state court's failure to address all theories of prejudice unreasonable under § 2254(d)(1)); *Summit v. Blackburn,* 795 F.2d 1237, 1244-45 (5th Cir. 1986) (prejudice in light of *corpus delicti* rule).

Sixth, the silencing of Chier had an immediate and devastating impact on the defense. With the two cocounsel, there had been a defense strategy – the far more experienced Chier (DS 100; Exs. 103, 111), who was substantively lead counsel, was to examine "police officers, forensic experts, and things of that nature" (Ex. 152, 25), some of the BBC witnesses (*id.*), Hunt himself (DS 68), and present all of the defense case (DS 69), in addition to performing all of the law and motion work (*id.*). With one actively participating counsel, it became impossible to implement that strategy. The judge refused to recognize Chier as a lawyer for any purpose. DS 85-89, 110-11. Barens' perfidy irreparably damaged his relationship with Chier (DS 75), and, as noted above, Barens himself admitted he was unable to competently assume Chier's duties on top of his own. It showed throughout his abysmal performance at trial. DS 1-82, 111-19.

The second contention of respondent regarding lack of prejudice – Barens' competence – fails as convincingly as its first. The record before this Court reveals, *inter alia*, that Barens, at times relevant hereto, was in Cocaine Anonymous (HT 1611-12); was going through a messy partnership dissolution, which involved his confessing to theft and perjury (HT 2006-23); had been sued at least 15 times for professional negligence (HT 1620; Ex. 156, ¶ 46); had hidden from Hunt and the defense team investigator reports regarding "sightings" witnesses (*see* section II, *infra*); had failed to perform a pretrial investigation, including not interviewing a single prosecution witness (DS 1-3); had not read the transcripts of Hunt's codefendant's trial (DS 35); had a horrendous reputation in the legal community, including for his lack of professionalism, dishonesty, and, indeed, perjury, as could have been attested to by four highly respected attorneys (HT 907, 909, 914, 1618-20, 2025); had four professionals on the defense team

quit because of his grossly unethical conduct and incompetence (Exs. 107, 109, 111; HT 909, 1303-15);[18] was justifiably ridiculed for his incompetence by the judge (Ex. G; DS 123-28); had perjured himself in this and other cases (HT 1004-07, 1548-49, 2173-74; H.Ex. 309); violated a host of ethical and professional obligations in this case (HT 886, 905-09, 1004-07, 1297-98, 1303, 1307-15, 2167-68), and, as noted above, had committed a series of felonies to secure his appointment herein. Of course, his performance at trial was also woefully deficient in a great number of material particulars. DS 1-67.

Thus, this Court confronts errors that had a pervasive and prejudicial impact on the integrity of Hunt's trial. None of the state-court decisions identified the pivotal facts; all of their conclusions were inconsistent with controlling law.

II. Claim 1-1.23

A. Gravamen of Claim/Clearly Established Federal Law: Barens suffered an independent conflict with respect to the sightings witnesses. After the LA Times reported allegations made by Barens' former cocounsel Lewis Titus that Barens had suggested bribing people to claim they had seen Levin alive (Ex. 141), the prosecutor indicated that the matter "may be the subject of future litigation" (RT 2480). These events shook Barens to his core, once again causing him to place his own interests above those of his client and to abdicate his constitutional role. DS 18-31. Again, *Mickens v. Taylor,* 535 U.S. 162 (2002), among other cases, sets out the federal law on conflicts.

B. Reply to Respondent's Reliance on the State Court Decisions: Respondent relies on the decision of the LA Superior Court on habeas, which found no prejudice because the sightings witnesses who testified before it (Werner, Robinson, and Ghaleb) were not credible. AM 7. Respondent also contends that Hunt failed to show any prejudice from Barens' putative failure to properly question Canchola, and that he had tactical reasons not to call other sightings witnesses to which deference must be given. AM 7-8.

---

[18] "This was the only time in my career that I have had to quit a case due to what I perceived to be a grossly inappropriate and irresponsible orientation of the lawyer on the case towards his duties to his client." Ex. 107, ¶ 7.

All of respondent's contentions entirely miss the mark. The state hearing court did not address Claim 1-1.23 at all. The CCA, in 1998, reviewed the claim, but under the wrong standard, *i.e.*, *Strickland*, not *Cuyler*. Ex. M. All Hunt has to show is that Barens' and Hunt's interests diverged with respect to the handling of the sightings witnesses and that such divergence adversely affected Barens' performance, and this he has amply done. Barens expressly and repeatedly *stated* the actual conflict and directly tied it to the adverse impact. DS 18-31. He concealed evidence of other sightings witnesses from Chier and Hunt and refused to investigate them on his own. DS 18-31. His handling of the DA's disclosure of Robinson during deliberations is particularly appalling. DS 26-30.

One would be remiss, however, in not pointing out the obvious flaws in respondent's lack-of-prejudice arguments. The San Mateo jurors saw Robinson and Ghaleb examined and cross-examined and found them both to be not only credible, but persuasive. Ex. 204, ¶¶ 15-16; Ex. 205, ¶ 5; Ex. 206, ¶ 6; Ex. 207, ¶ 8; Ex. 208, ¶¶ 15-16. Indeed, they found the totality of sightings witness testimony powerful proof of Hunt's innocence (*e.g.,* Ex. 202, ¶ 16; Ex. 204, ¶¶ 15-18 ("very powerful"); Ex. 205, ¶ 5 ("largest impact"); Ex. 206, ¶ 6; Ex. 207, ¶ 8 ("I believe that Ron Levin is still alive") (emphasis in original); Ex. 208, ¶¶ 12-16 (repeatedly finding sightings witnesses "very credible"). Moreover, they heard important testimony from Canchola that supported her credibility, but which the LA jury had not heard because of Barens' efforts to be "real sanitary" with her. Ex. 204, ¶ 17 (San Mateo juror's noting Canchola had seen a scar that Levin had, finding this "a very important and telling aspect of the identification").

But the prejudice suffered by Hunt on account of Barens' abandonment is glaring even within the confines of the LA trial record. The DA, in his final closing argument, repeatedly hammered the defense for the manner in which it had handled the Arizona sightings witnesses, namely, with utter indifference (RT 13032-33, 13114), thereby visiting the sins of Barens upon Hunt. The DA capitalized appallingly (DS 171-74) on Barens' purposeful, conflict-motivated IAC, a paradigmatic indicium of prejudice (*see, e.g.*, *Duncan v. Ornoski*, 528 F.3d 1222, 1246 (9th Cir. 2008) (finding prejudice where

DA capitalized on counsel's IAC by using it to advantage in closing argument)), and he did it in a manner that did not implicate the *credibility* of the witnesses at all.

Finally, respondent's call for deference to Barens' purported tactical justifications – that calling sightings witnesses who saw Levin in LA would have undermined the defense theory that he had disappeared to avoid legal and financial trouble, and that calling less credible sightings witnesses would have undermined the impact of the better ones (AM 8) – must be rejected for several reasons. *First,* these purported justifications were made *without investigation.* DS 23-31. Barens made the decision not to call Robinson, for example, without interviewing him. The cases are legion holding that no judicial deference may thus be afforded. *E.g., Mayfield v. Woodford,* 270 F.3d 915, 927 (9th Cir. 2001) ("Judicial deference to counsel is predicated on counsel's performance of sufficient investigation and preparation to make . . . reasonably sound judgments."). Respondent's call for deference is misdirection – what is at issue is Barens' decision not to independently investigate the additional sightings witnesses (*after* he had already decided that sightings witnesses were to be a critical part of the defense – HT 1139-40), not his decision not to call them. *Second,* the stated justifications do not, and cannot, explain away Barens' *affirmative concealment* from his client and the defense team of the *existence* of additional sightings witnesses. DS 23-25. Only Barens' conflict explains that. *Third,* a strategy that Levin's being seen in LA would undermine the defense theory is objectively unreasonable in any event. *Cf. Hensley v. Crist,* 67 F.3d 181, 185 (9th Cir. 1995) (only objectively reasonable tactical decisions constitute effective assistance). Numerous reasons could have been readily posited for his return (if the prosecution indeed questioned its likelihood), based on both Levin's personal needs (*e.g.*, he needed more money, he came to see family or friends), and as a more abstract matter (suspects on the lam often routinely make contact with their former lives, a fact relied on by authorities searching for them). Besides, how could Barens know what corroborating evidence would emerge absent investigation? Also, whatever could be said about the objective unreasonableness of the strategy not to present sightings

witnesses who had seen Levin in the LA area, it was not *Barens'* reason, as conclusively established by the fact that one such witness, Waller, was presented in the penalty phase as a "lingering doubt" witness. Had he truly been pursuing his subsequently stated strategy, he would have done no such thing. This claim is reminiscent of *Lord v. Wood,* 184 F.3d 1083, 1093-96 (9th Cir. 1999) (failure to investigate three sightings witnesses).

III. Claims 1-1, Extant 1-2, 1-4, Extant 1-5, 1-6, 1-8: The CCA's, and hence respondent's, deference to Barens' strategic decisionmaking is plainly unreasonable because, first, contrary to established Supreme Court precedent (*e.g.*, *Wiggins,* 539 U.S. at 526-27; *Kimmelman v. Morrison,* 477 U.S. 365, 383-85 (1986)), in ascribing purported strategic decisions to trial counsel, the court created or adopted *post-hoc* rationalizations that were not accurate descriptions of trial counsel's contemporaneous decisionmaking process (doc. lodged 5/24/99, *see* dkt. no. 78, 30-47). *See Moore v. Czerniak,* 534 F.3d 1128, 1144 (9th Cir. 2008) (rejecting *post-hoc* justifications); *Duncan v. Ornoski,* 528 F.3d at 1237 n. 7 (same). Second, *Barens performed no pretrial investigation* (DS 1-3) – he was in no position to be making any strategic decisions. Yet, contrary to established Supreme Court precedent (*e.g.*, *Wiggins,* 539 U.S. at 521-23; *Williams v. Taylor,* 529 U.S. at 396; *Strickland,* 466 U.S. at 690 (1984)), in validating purported strategic decisions by Barens, the state courts did not first determine whether a constitutionally acceptable investigation had been performed such as could support such decisions. It was not. Indeed, the defense investigators *quit* precisely because of Barens' affirmatively defeating their efforts to conduct a "minimally acceptable investigation." DS 1.

Of course, the absence of investigation also is itself deficient performance. Barens took on the case in November 1984, but first hired guilt-phase investigators in April *1986*. Ex. 109, ¶ 1. So much for his duty to conduct a "prompt" investigation. ABA, Std. for Crim. Justice 4-4.1. The investigators quit in January 1987, again, because of the failure of attorney supervision that had defeated their investigative efforts. Ex. 109, ¶¶ 1, 4. Barens sought no continuance on account of the absence of investigation; he did not hire a replacement investigator until one week *after* opening statements. Ex.

110. This is structural error. *Cf. Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003) (absence of pretrial preparation reviewable under *Cronic*; habeas relief mandated). *A fortiori*, this is so in *a capital case*. *See Summerlin v. Schriro,* 427 F.3d 623, 638 (9th Cir. 2005) (in capital cases, counsel has duty to render "extraordinary efforts").

The results were predictable. Barens predicated his opening statement on the anticipated testimony of witnesses he had not interviewed and made unrealistic promises to the jury that went unfulfilled, including emphatic promises that Hunt would testify. DS 2, 65-67. *Cf. Ouber,* 293 F.3d at 35 (IAC based on "defense counsel's abandonment of the oft-repeated promise that the petitioner would testify, enunciated in his opening statement"). This was not Hunt's fault. DS 73-74. Barens failed to obtain a single document later introduced in evidence. DS 2-3. He neither read nor brought to court prior statements of the prosecution witnesses. Exs. 108, 113. His exams consisted primarily of open-ended questions on dangerous topics, with predictable results. DS 31-67. *Cf. Stouffer v. Reynolds,* 214 F.3d 1231, 1234 (10th Cir. 2000) (reversing in part on examination techniques less inept than Barens'). *See* section I.D, *supra.*

The superior court also applied the wrong standard to the prejudice prong of the *Strickland* analysis. It failed to analyze the impact of the cited performance deficiencies on a putative reasonable juror, instead substituting its own views (*see, e.g.,* HT 7/7/95 at 5 ("I remind you, I am the trier of fact. This is not going to be a situation where you are blowing smoke up a jury."); Ex. B, 17-18 (reflecting on how evidence impacted court's own sensibilities, rather than how it would impact reasonable juror). It also misapplied the prejudice prong when it (a) evaluated the sightings witnesses under the state's "new evidence of innocence" standard, applying a presumption at odds with *Strickland* (*see* Ex. A, 10, 20; *compare Strickland,* 466 U.S. at 694 (new evidence standard inconsistent with IAC standard); *Pirtle v. Morgan,* 313 F.3d 1160, 1174-75 (9th Cir. 2002) (contrasting state court's use of presumption in favor of verdict with *Strickland* analysis); and (b) refused to consider (HT 11, 911-12) the San Mateo declarations (Exs. 201-208).

The superior court's conclusions should also fail this Court's intrinsic review

(*Taylor Mattox*, 366 F.3d 992, 999-1000 (9th Cir. 2004)) because it credited Barens' *post hoc* justifications and refused to permit his impeachment with material evidence. *See* section I.D, *supra*. *Cf. In re Freeman,* 38 Cal.4th 630, 639-40 & n.5 (2006) (relying on such material evidence); *Lambert v. California,* 355 U.S. 225, 227 (1957) (since trial court refused offer of proof, reviewing court must assume truth of proffered facts).

Finally, the court refused evidence on six IAC sub-claims, then decided them against Hunt based on Barens' explanations. Ex. B, 29; HT 2206-09, 2226-29.

IV. Claim 2-2: "[A] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136-37 (1954). Even absent actual bias by a judge, due process is denied by "circumstances that create the likelihood or appearance of bias." *Peters,* 407 U.S. at 502 (noting broad scope of this "long-established" "rule").

Here, Hunt claims the judge abandoned impartiality, citing detailed proof. DS 120-162. Indeed, he claims that no published decision in the history of the country reveals a more extreme abandonment of the judicial role. Respondent counters that Hunt's citations to the record distort it; the judge's interventions did not evince bias; and the CCA reasonably found that the trial court's interventions did not prejudice Hunt. AM 32-38.

First, it was not until 1998 that the CCA confronted a claim equal in scope to Claim 2, and the CCA met it with a procedural denial. Ex. M, 13. Moreover, the CCA's 1993 prejudice analysis is inconsistent with governing law – judicial bias constitutes structural error (*Edwards v. Balisok,* 520 U.S. 641, 647 (1997)); the CCA applied the state miscarriage-of-justice standard (Ex. A, 182-87). Review must, therefore, be *de novo*. As an aid to this Court, however, Hunt will address the CCA's 1993 conclusions.

One thing remains obvious upon review of the record citations contained in the detailed statement supporting this claim, despite respondent's piecemeal attack on it – *every* juror understood that the judge desired them to convict. In any event, the CCA's conclusions are clearly erroneous when considered in light of Exs. 12A-12E, 103, and 106 (*see* DS 143-58), which establish the rampant, pernicious nonverbal misconduct of the judge, *which jurors interpreted as his prejudgment of Hunt's guilt,* and which also

establish that the judge's antagonism against Chier had an extrajudicial source.

The judge, *sua sponte,* used a newspaper article – which was not in evidence and which he mischaracterized – to communicate to the jury that the article *proved* that Lynne Roberts, a critical alibi witness, had perjured herself. DS 150-51. The undisputed facts show that the jury saw this article. Exs. 12B, ¶ 9; 12C, ¶ 9; 12E, ¶ 9; DS 150-51.

The judge said alibi witness Brooke Roberts appeared "completely coached." According to respondent, the jury did not hear that comment (AM 35), yet the record reveals Barens pleading with the judge, expressly noting that "the jury heard [the comment]." RT 11527. Neither the judge nor the DA disputed that observation. *Id.* Respondent's assertion of "fact," then, must be rejected. *Cf. Vinci v. United States*, 159 F.2d 777, 779 (D.C. Cir. 1947) (reviewing court must assume undisputed contemporaneous description in record is accurate). Moreover, this was not an isolated instance. *See* RT 11530 (judge's calling Brooke a "hatchet woman" loud enough for jury to hear); DS 149 (judge's insinuating before jury, without foundation, that Hunt was having affair with Lynne Roberts); DS 148 (judge's interrupting DA's cross of Brooke to leeringly comment, "Have you ever tried to shut up a woman when she's in the mood?").

The judge asked Brooke 3 times whether Hunt had discussed her testimony with her before she took the stand. RT 11788. The judge posed the same question to Lynne *4* times. RT 11842-44; DS 149. Less extreme judicial questioning premised the finding of constitutional error in *United States v. Tilghman,* 134 F.3d 414, 418-21 (D.C. Cir. 1998); *see also United States v. Fischer,* 531 F.2d 783, 786-87 (5th Cir. 1976) (judge's comment on credibility of defense mandated reversal where credibility critical).

Three defense witnesses subject to judicial assault in LA testified free from such onslaught in San Mateo – Lynne Roberts and the Arizona sightings witnesses. The San Mateo jurors viewed them as "credible," "good," and "honest." Exs. 204, 205, 207, 208. Had a single LA juror so concluded, she could not have voted to convict.

The judge repeatedly broke into the DA's direct to highlight points harmful to Hunt, and *admitted* such intent. RT 11858; DS 123-62. He barged into the DA's exam

of Karny to have him describe in greater detail the purported dismemberment of Levin's body, testimony that made Hunt out to be completely devoid of human feeling. RT 10955. *Cf. United States v. Saenz,* 134 F.3d 697, 708-09 (5th Cir. 1998) (judge who intervenes during direct demonstrates partiality). Relying on homosexual stereotypes supported by nonverbal histrionics, the judge attacked the Arizona sighting. DS 153. He also took the "to-do" list found at Levin's apartment – which, according to respondent, was "[t]he key evidence of Petitioner's guilt" (A 2) – had his clerk make a copy for each juror, ordered their distribution at the time of its introduction, and then, *as retribution for one of Chier's misconduct motions*, permitted the jurors to hold on to the copies for the duration of the trial. *N.b.*, it was the *judge*, not the prosecutor, who *sua sponte* came up with this brilliant plan. DS 154-57. Has this Court, in its experience with over 1,200 habeas petitions (dkt. no. 247, 3) or elsewhere, ever seen conduct from the bench that remotely approaches this in terms of such blatant, nauseating partisanship (*see also* DS 84 (judge twice admits desire to *assault* Chier))? One truly hopes not.

Conclusion: No omission from this reply is an abandonment of any claim; each is expressly reasserted. Because of the Court's stringent page limit, this reply could not meaningfully address the claim that most clearly mandates habeas relief, cumulative prejudice, a claim that must be addressed *de novo* since no state court performed such an analysis.[19] Hunt, of necessity, leaves it to this Court to perform the global evaluation that can yield but one result – the grant of habeas relief. There is no need for an evidentiary hearing – the dispositive facts are unchallenged and are actionable in their current form.

Dated: September 25, 2008

Respectfully submitted,

/s/ Gary K. Dubcoff
Gary K. Dubcoff

---

[19] *See Cargle v. Mullin,* 317 F.3d 1196, 1205 (10th Cir. 2003) ("we review . . . claim of cumulative error de novo, unconstrained by . . . § 2254(d) because the [state court] did not conduct the appropriate cumulative error review"); *Taylor v. Kentucky,* 436 U.S. 478, 487-88 & n. 15 (1978) (cumulative error analysis for due process claim).