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

JOSEPH HUNT,

Petitioner,

v.

TIM VIRGA, Warden,

Respondent.

Case No. CV 98-5280 RHW

PETITIONER'S NOTICE OF MOTION AND MOTION TO VACATE, ALTER, OR AMEND ORDER DENYING HIS FOURTH AMENDED PETITION; MEMORANDUM OF POINTS AND AUTHORITIES

Date: TBD
Time: TBD
Place: Ctrm. of the Hon. Robert H. Whaley

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TO: TIM VIRGA, RESPONDENT; AND ELAINE F. TUMONIS, DEPUTY ATTORNEY GENERAL, COUNSEL FOR RESPONDENT

PLEASE TAKE NOTICE that at a date and time to be determined by the Court, petitioner Joseph Hunt, by and through his counsel, will and hereby does move this Court, pursuant to Fed. R. Civ. P. 59(e), to vacate, alter, or amend the judgment ordered against him in this Court's Order Denying Petitioner's Fourth Amended Petition (doc. 261, hereinafter "Order"). As grounds therefor, he asserts that this Court overlooked matters or controlling decisions, which, if it had considered such issues, would have mandated a different result.

This motion is based on the instant Notice of Motion and Motion; the incorporated Memorandum of Points and Authorities, *infra*; Fed. R. Civ. P. 59(e); all relevant constitutional, statutory, and case-law authority; this Court's inherent and supervisory powers; this Court's files and records in this case; and such further argument, oral evidence, and documentary evidence as may be presented at the hearing on this motion.

Dated: February 27, 2013

Respectfully submitted,

/s/ Gary K. Dubcoff
Gary K. Dubcoff

Counsel for Petitioner
JOSEPH HUNT

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner neither sought nor desired his case reassigned to a judge who knew nothing about it, yet was bound, by Order of the Court of Appeals, to issue a decision within 6 months. Having been compelled to wait over 14 years for an adjudication of his habeas petition by the assigned magistrate judge, petitioner sought mandamus relief in the Court of Appeals. He requested the withdrawal of the reference to the magistrate and an adjudication within 6 months by the district judge who had years of familiarity with the action. Although his petition was granted, the Court of Appeals, *sua sponte*, reassigned the case to this Court, but, in so doing, it left the 6-month deadline in place. It comes as no great surprise, given this Court's coming cold to the case with its 14 years of federal litigation already under the bridge; a factually and procedurally complex case, with a voluminous record generated in state court; and the short deadline, that this Court would overlook critical matter and controlling decisions. The unusual circumstances, however, need not compel the wrong result. Rule 59(e) of the Federal Rules of Civil Procedure was designed as a failsafe measure to address just such a situation; it permits the righting of a wrong sooner rather than later. This Court should avail itself of the opportunity to alter its judgment upon due consideration of the matter and cases discussed herein, which were apparently overlooked in the Order.

Petitioner understands full well that that reconsideration of a prior order is an extraordinary remedy, but the circumstances that placed this Court in the position it was placed were nothing if not extraordinary. Had petitioner not been hamstrung at virtually every turn by the assigned magistrate judge, including the repeated striking of properly filed pleadings and repeated impositions of patently unreasonable page limitations, he could have provided better assistance to this Court to ensure that the clear errors manifested in the Order were avoided. Having been heretofore precluded from doing so, petitioner avails himself of the opportunity afforded him by Rule 59(e). The Order is manifestly unjust for the reasons stated herein, and it ought to be rectified.

BACKGROUND LEGAL PRINCIPLES

Fed. R. Civ. P. 59(e) simply provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." The Rule "has been interpreted as covering motions to vacate judgments, not just motions to modify or amend." *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 355 (9th Cir. 1993).

Under this provision, "It is appropriate for a court to alter or amend judgment [if the] court committed clear error or made an initial decision that was manifestly unjust." *Duarte v. Bardales*, 526 F.3d 563, 567 (9th Cir. 2008). "There may also be other, highly unusual, circumstances warranting reconsideration." *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (quoting treatise). In exercising that discretion, it "must strike the proper balance between two competing imperatives: (1) finality, and (2) the need to render just decisions on the basis of all the facts." *Edward H. Bohlin Co., Inc.*, 6 F.3d at 355; *see also Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. New York State Dep't of Envtl. Conservation,* 831 F.Supp. 57, 60 (N.D.N.Y. 1993) ("When considering a motion such as this, the Court is mindful that there is a strong interest in the finality of judgments. However, where the motion is timely and properly supported, the Court must carefully consider whether any manifest errors were made in the first instance"), *aff'd in part and rev'd in part on other grounds*, 17 F.3d 521 (2d Cir. 1994).

It is entirely appropriate to bring a Rule 59(e) motion in a habeas proceeding. *See, e.g., James v. Ryan*, 679 F.3d 780, 801 (9th Cir. 2012) (noting in habeas case that standard of review for denial of Rule 59(e) motion is abuse of discretion); *Martinez v. Johnson*, 104 F.3d 769, 771 (5th Cir. 1997) (same).

ARGUMENT

I. THIS COURT CLEARLY ERRED IN AFFORDING AEDPA DEFERENCE TO THE LOS ANGELES COUNTY HABEAS COURT'S 1996, AND THE CALIFORNIA COURT OF APPEAL'S 1998, DECISIONS

The Order is replete with deference to the state courts' decisions. Its clear error lay in its failing to come to grips with, and acknowledging the ramifications of, the denial of the California Supreme Court on August 9, 2000, which was issued in response to Hunt's final state petition that contained all of the claims raised in his Fourth Amended Petition addressed in the Order. That ruling read, in its entirety, as follows:

> 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.)

(Doc. 119 (order attached as exhibit).) *That is a procedural denial;* it is *not* an adjudication on the merits. Accordingly, as will be made clear herein, no AEDPA deference should have been accorded in the Order to either the LAC habeas court's July 12, 1996, decision (doc. 5, ex. B) or the state appellate court's January 15, 1998, decision (doc. 6, Ex. M).

A. Procedural Background

In a motion to dismiss petitioner's Fourth Amended Petition, respondent took the position in this litigation that the claims he raised in his state habeas petitions were procedurally defaulted precisely because of the decision of the state supreme court quoted above. According to respondent, that decision rested on independent and adequate state procedural grounds and, consequently, constituted a bar to federal habeas review. (Doc. 202 at 1-5.) Both Magistrate Judge Nakazato (doc. 207 at 3-6) and Judge Stotler (doc. 230 at 1-2) rejected that argument.

In addition, those judicial officers ruled, with respondent's concession, that the state supreme court's 2000 order exhausted Hunt's state habeas claims, brought following the denial of his direct appeal. (*See* doc. 207 at 24 (magistrate's noting respondent's

concession); *id.* at 3 nn. 2 & 3 (listing federal claims ultimately deemed not defaulted).) Those rulings followed their earlier rulings finding those claims had *not* been exhausted prior to the 2000 supreme court order. (*See* doc. 106 (magistrate's November 22, 1999, order finding analogues to those listed claims contained in First Amended Petition unexhausted as of date of order); doc. 188 at 2 n.1 (judge's affirming magistrate's order and listing those claims).) In light thereof, it is the law of the case that it was the 2000 denial of Hunt's final habeas petition, and no earlier state supreme court action, that exhausted those claims. *Cf. Handi v. Investment Co. v. Mobil Oil Corp.,* 653 F.2d 391, 392 (9th Cir. 1981) (noting that law of the case doctrine provides that decisions on legal issues made in a case should be followed absent certain exceptions inapplicable herein).

Thus, this much should be clear upon this Court's confirming that the claims exhausted by the California Supreme Court's August 9, 2000, Order are indeed Hunt's state habeas claims brought apart from his claims on direct appeal – the final reasoned state court decision addressed the claims underlying both the LAC habeas court's July 12, 1996, decision, and the state appellate court's January 15, 1998 decision, and was premised on procedural principles subsequently deemed not sufficiently independent or adequate to bar federal habeas relief. 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." As will now be explained, however, that decision left this Court with no state "adjudication on the merits" to which to defer.

B. The State Supreme Court's Procedural Denial Established the Absence of an "Adjudication on the Merits" on Hunt's Post-Appeal State Habeas Claims

The Order should have accorded AEDPA deference only to a state court "adjudication on the merits." *See* 28 U.S.C. § 2254(d) (providing that federal habeas gateway tests are applicable solely to "any claim that was adjudicated on the merits in State court proceedings"). Not only was the state supreme court's procedural ruling itself not

such an adjudication (*see, e.g., Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005) (noting that merits adjudication "is perhaps best understood by stating what it is not: it is not the resolution of a claim on procedural grounds")), but it also stripped that status from the LAC habeas court's July 12, 1996, decision and the state appellate court's January 15, 1998, decision. Accordingly, the standard of review employed in the Order to those decisions should have been *de novo.*

The Third Circuit succinctly stated the controlling law in addressing a habeas case in the same procedural posture as Hunt's (there, addressing a *Batson* claim initially brought in state court):

> The District Court incorrectly afforded AEDPA deference to the [state habeas] court's substantive resolution of the *Batson* claim. The District Court concluded that, although the Pennsylvania Supreme Court did not adjudicate the claim on the merits, the state courts – in this case, the [habeas] court – had resolved the claim on substantive grounds, and thus there was an "adjudication on the merits" under § 2254(d). *An "adjudication on the merits" can, of course, occur at any level of the state courts. When the state supreme court finally resolves a claim on procedural grounds, however, the substantive determination of a lower state court is stripped of its preclusive effect. A substantive determination that lacks preclusive effect is not an "adjudication on the merits."* As a result, the [state habeas] court's *Batson* ruling was not an "adjudication on the merits."

Williams v. Beard, 637 F.3d 195, 213 n.16 (3d Cir. 2011) (citations and parenthetical omitted; emphasis added). In light thereof, the *Williams* court held that, because "the Pennsylvania Supreme Court did not address this substantive determination, but instead resolved Williams' *Batson* claim on procedural grounds, … [n]o AEDPA deference is due by this Court." *Id.* at 213.

That holding is consistent with the Ninth Circuit's approach. In *Lambert v. Blodgett*, 393 F.3d 943 (9th Cir. 2004), the court wrote:

> [T]he text and structure of AEDPA, as well as our prior cases interpreting the statute, suggest that the phrase "adjudicated on the merits" was not used as a term of art unique to this context, but was understood to mean precisely what it does in nearly all modern legal contexts: a decision *finally* resolving the parties' claims that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.

Id. at 969 (citation, internal quotation marks, and ellipsis omitted; emphasis added.) It was precisely because the lower state court's substantive decision in *Williams* was not final, in light of the state supreme court's subsequent procedural ruling, that it was deemed not to be an "adjudication on the merits" for purposes of federal habeas review.

Thus, the California Supreme Court's 2000 procedural denial of Hunt's habeas petition, which was deemed in the course of the instant litigation to have exhausted all of his previously unexhausted habeas claims premised on matters outside of the state appellate record, stripped the lower state court's decisions of their status as "adjudications on the merits." *This should be non-controversial. See, e.g., Morris v. Malfi*, 449 Fed.Appx. 686, 686 (9th Cir. 2011) ("As the last reasoned decision of the state court dismissed his claim on procedural grounds, we review the … claim de novo."); *Thomas v. Horn,* 570 F.3d 105 (3d Cir. 2009) (holding that, where state trial court denied two of petitioner's three claims on the merits, but state supreme court dismissed all three claims on procedural grounds, state supreme court's decision superseded trial court's decision for purposes of determining whether there was a § 2254 merits adjudication); *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997) (holding AEDPA deference unwarranted where state trial court rejected on merits petitioner's claims presented for first time on collateral attack, but state court of appeals held that claims were procedurally barred, because state appellate court's procedural ruling was not "adjudication on the merits");

Richardson v. Hardy, 855 F.Supp.2d 809, 828 (N.D.Ill. 2012) (applying same principle, noting that state trial court's decision on merits of claim became "beside the point" once state supreme court decided claim on purely procedural grounds); *Nickerson v. Roe*, 260 F.Supp.2d 875, 891 (N.D.Cal. 2003) ("A federal district court … does not apply the standard of review set forth in section 2254 if the highest state court to offer a reasoned opinion rested its dismissal of the claim on procedural grounds. This is true even where a lower state court addressed the merits of a claim."), *overruled on other grounds by Lee v. Lampert*, 610 F.3d 1125, 1134 (9th Cir. 2010).

With respect to Hunt's habeas claims not premised on the state appellate record, it is *only* the state supreme court's procedural denial which should have been deemed material in the Order – it was *that* decision which was held to exhaust those claims. As noted in *Barker v. Fleming*, 423 F.3d 1085 (9th Cir. 2005), federal habeas courts do not review state court decisions "as a collective whole" (unless "the last reasoned decision adopted or substantially incorporated the reasoning from a previous decision"). *Id.* at 1092-93 (relying on the singular "a decision" language of § 2254(d)(1) and the Supreme Court's describing "AEDPA review as applying to a single state court decision, not to some amalgamation of multiple state court decisions").

That single decision has already been addressed in detail by Magistrate Judge Nakzato when he found it exhausted petitioner's previously unexhausted claims (doc. 207), in a ruling adopted by Judge Stotler (doc. 230). The Magistrate found the order to be an opaque, ambiguous, inadequate procedural denial that would not bar federal habeas review, and there can be no question but as to the correctness of that finding. (*See* doc. 207 at 3-5, and cases cited therein; *see also Bennett v. Mueller*, 322 F.3d 573, 584 (9th Cir. 2003) (rejecting district court's effort to parse or interpret California Supreme Court procedural denial to circumvent its facial ambiguity "based on a *post hoc* examination of the pleadings and record rather than the text" of the denial).)

Thus, although AEDPA deference to the state appellate court's decision on direct appeal was appropriate for Hunt's federal habeas claims that were initially raised in that

appeal, no part of that decision should play any role whatsoever in the adjudication of claims that postdated it. Indeed, Claims 1 and 2, petitioner's primary claims, have been so materially augmented since the decision on direct appeal that, in the final analysis, whatever deference is warranted to the initial state appellate court decision matters quite little.[1]

C. *De Novo* Review Applies to the Claims Deemed Exhausted by Magistrate Judge Nakazato and Judge Stotler Only by the State Supreme Court's 2000 Procedural Denial

Having stripped the lower state courts' decisions of their status as "adjudications on the merits," the California Supreme Court 2000 denial, being procedural, required the Order to apply *de novo* review to the claims addressed in those decisions, not the AEDPA deference it accorded them. *See, e.g., James v. Ryan,* 679 F.3d 780, 803 (9th Cir. 2012) ("[W]e find that the third [state habeas] court denied James's ineffective assistance of counsel claim as procedurally barred without adjudicating the merits. Because we find the state procedural bar inadequate to foreclose federal review, we review *de novo.*"); c*ompare Harrington v. Richter*, 562 U.S. __, 131 S.Ct. 770, 784-85 (2011) (holding that, where California Supreme Court issued "one-sentence summary order" denying habeas petition, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary").

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[1] This would be a different case had the California Supreme Court cited *only Waltreus* in its denial, that is, the bar against a petitioner's raising claims in a habeas corpus petition that were already decided on direct appeal. The United States Supreme Court has held that a denial based thereon is neither a procedural denial nor a denial on the merits, and consequently, it could be "looked through" to the last reasoned decision of a lower state court. *Ylst v. Nunnemaler*, 501 U.S. 797, 802, 805-06, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). As established by the case law authority cited in this subsection, however, the "look-through" doctrine cannot be applied to the opaque decision at issue herein.

In *Rogers v. Wong,* 637 F.Supp.2d 807 (E.D.Cal. 2009), for another example, the petitioner raised an ineffective assistance of counsel claim in the California Supreme Court. That court denied the claim with the following citations:

> *See In re Waltreus* (1965) 62 Cal.2d 218 [42 Cal. Rptr. 9, 397 P.2d 1001]; *In re Clark* (1993) 5 Cal.4th 750 [21 Cal.Rptr.2d 509, 855 P.2d 729]; *In re Robbins* (1998) 18 Cal.4th 770, 780 [77 Cal.Rptr.2d 153, 959 P.2d 311]; *In re Miller* (1941) 17 Cal.2d 734 [112 P.2d 10] *People v. Black* (2005) 35 Cal.4th 1238 [29 Cal.Rptr.3d 740, 113 P.3d 534].

Id. at 819. In light thereof, the federal habeas court refused to apply deferential review. *See id.* at 820 ("As it appears the California Supreme Court denied the petition for review on procedural grounds, this Court reviews Petitioner's claim *de novo.*") (citing *Pirtle v. Morgan,* 313 F.3d 1160, 1167 (9th Cir. 2002)).[2]

As noted, *supra,* the magistrate judge listed the claims that both he and, later, Judge Stotler, found to be unexhausted prior to the California Supreme Court's August 9, 2000, decision, but exhausted as a result thereof. (S*ee* doc. 207 at 3, nn. 2, 3.) These claims, which are the claims to which the Order should have properly applied *de novo* review, are the following: 1-1, 1-1.1, 1-1.3 to 1-1.8, 1-1.10, 1-1.12 to 1-1.18, 1-1.20 to 1-1.23, 1-2, 1-2.3(D), 1-2.3(F), 1-2.4, 1-2.6, 1-2.8, 1-2.10, 1-2.11, 1-2.13 to 1-2.15, 1-3.1, 2-1(A1), 2-1(B1), 2-1(B2.1 to B2.2), 2-1(B3.1 to B3.18), 2-1(B9.1), 2-1(B9.3 to B9.5), 2-1(B10), 2-2(A1 to A7) and 2-2(B4 to B15).

The Court should apply that standard now. Petitioner would only highlight a few of the most important ramifications of its doing so.

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[2] Petitioner cites these cases solely to cement the point that *de novo* review follows from a state supreme court's procedural denial. The fact that such cases may have involved *no* state court determination on the merits is no basis to distinguish them in light of the case law authority cited in the previous subsection.

1. *De Novo* Review Applies to Cumulative Error Analysis of Claims 1 and 2

Given the absence of a state court adjudication on the merits of Hunt's claim that he was prejudiced by the accumulation of errors underlying his first two claims, this Court should apply *de novo* review to that specific claim. *See, e.g., Cargle v. Mullin,* 317 F.3d 1196, 1205 (10th Cir. 2003) (absent "an antecedent state court decision on the same matter," "we approach the question of cumulative error as we would have prior to AEDPA's passage"); *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (*Strickland* prejudice can be established by the cumulative effect of "multiple deficiencies"); *Taylor v. Kentucky*, 436 U.S. 478, 487-88, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (conducting cumulative error analysis for due process violations).

Quite obviously, the 1993 state appellate court decision on direct appeal cannot supply a cumulative prejudice analysis to which this Court must defer as the most important allegations supporting Hunt's first two claims were not exhausted until August 9, 2000. *Cf. Bradley v. Duncan,* 315 F.3d 1091, 1100 (9th Cir. 2002) (holding that, where state appellate court failed to consider a theory of prejudice, review is *de novo*); *Stanley v. Schriro*, 598 F.3d 612, 622 (9th Cir. 2010) (holding that, where state clearly failed to adjudicate issue, review is *de novo*); *Brown v. Smith,* 551 F.3d 424, 428-29 (6th Cir. 2008) (holding IAC claim not "adjudicated on the merits" in state court because "counseling notes" that were basis of claim were not in record when the state court ruled).

2. *De Novo* Review Applies to the Deficient Performance Prong of Hunt's Ineffective Assistance of Counsel Claim

An amended Order should be entirely independent of the state courts' assessments of the quality of the representation provided petitioner at trial by his counsel Arthur Barens. That, most assuredly, is no loss to the cause of justice as virtually all of the putatively tactical justifications upon which the LAC habeas court relied were created out of whole

cloth by Barens in reaction to evidence that he conceded that he knew nothing about at the time of trial or were brazenly and transparently counterfactual.[3]

The Supreme Court and the circuit courts have uniformly admonished the lower courts to ignore *post hoc* "tactical" explanations offered up in response to ineffectiveness allegations. *Strickland* deference is only available to strategic choices that were *actually made* during trial. To the extent that an attorney was objectively unreasonable in failing to mount an investigation or to prepare for cross-examining the state's witnesses, his *post hoc*, self-serving conjectures as to what he would or would not have done at trial had he been diligent enough to know of the evidence in question are wholly irrelevant. *See, 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 informed, reasonably sound judgments."); *Wiggins v. Smith*, 539 U.S. 510, 526-27, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (noting, in refusing to defer to it, that proffered strategic decision on the part of trial counsel "resembles more a *post hoc* rationalization of counsel's conduct than an accurate description" thereof); *Kimmelman v. Morrison,* 477 U.S. 365, 383-85, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (rejecting *post hoc* justifications); *Duncan v. Ornoski,* 528 F.3d 1222, 1237, n.7 (9th Cir. 2008) (same); *Keith v. Mitchell*, 466 F.3d 540, 545 (6th Cir. 2006) (same); *Montgomery v. Uchtman*, 426 F.3d 905, 914 (7th Cir. 2005) (same).

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[3] The proof of these assertions is in the initial memorandum of points and authorities (doc. 4) filed by petitioner and ordered stricken by the Magistrate (*see* petitioner's motion under Rule 60(b)(2), to be filed shortly). Specifically, this Court can find the professional negligence analysis for: Claim 1-1.1 at 416(28) – 418(12); Claim 1-1.4 at 355(1-25), 493(18) – 494; Claim 1-1.6 at 344(9) – 346(18), 346(9) – 347(4); Claim 1-1.7 at 361(17) – 362(11), 491(18) – 493(15), 495(21) – 498(5); Claim 1-1.8 at 451(12) – 455(5), 461(2-25); Claim 1-1.10 at 295(12) – 297(18), 299(7-10); Claim 1-1.11 at 369 – 382(15); Claim 1-1.17 at 295(12) – 297(18), 299(7-10); Claim 1-2.4 at 331(21) – 333(13); and Claim 1-2.11 at 411(10) – 413(2).

3. *De Novo* Review Applies to the Prejudice Prong of Hunt's Ineffective Assistance of Counsel Claim

For the reasons already explained, an amended Order should also be unconstrained by the state court assessments of the strength of the state's case and their reliance on that perceived strength to make findings of lack of prejudice with respect to Claims 1 and 2-1. Moreover, the state appellate court's conclusion on direct appeal that the state's evidence of guilt was "overwhelming" remains relevant solely to those claims based entirely on the trial record, and the probative value of that conclusion is, as noted, *supra,* quite low in any event. All it does is establish the predicament in which Barens' representation left petitioner (as if that predicament needed further establishing). It says nothing about the extent to which the persuasive force of the state's case would have been diminished by the presence of reasonably competent counsel. *Cf. Holmes v. South Carolina,* 547 U.S. 319, 330, 126 S.Ct. 1727, 164 L.Ed.2d 503 (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 v. Payne,* 352 F.3d 1313, 1320 (9th Cir. 2003) (finding prejudice where, absent ineffective assistance there would have been "more equilibrium in the evidence presented to the jury"). The state appellate court's assessment of the trial evidence should play no role in an amended Order's *de novo* evaluations of prejudice relating to Claims 1 and 2, rather than the powerful role it played in the extant Order.

4. An Amended Order Should Be Uninfluenced by Credibility Determinations Rendered by the State Courts

Once the Order's analysis is untethered from the two lower state court decisions rendered irrelevant by the subsequent state supreme court procedural denial, it can better evaluate the only direct evidence before this Court regarding the credibility of Karen Marmor (Claim 1-1.7) and the Levin sighting witnesses (Claim 1-1.23), namely, the San Mateo juror declarations (doc. 10, Exs. 202-08). (*See* Section II, *infra*.) The Court also

has available to it, as a basis for consideration of credibility issues, the relevant transcripts of the San Mateo trial. (*See* doc. 238, lodged doc. D(6); doc. .250, lodged doc. 2.)

II. AS ESTABLISHED BY RECENT CIRCUIT AUTHORITY, THIS COURT CLEARLY ERRED IN RULING THAT ITS CONSIDERATION OF THE SAN MATEO JUROR DECLARATIONS WAS BARRED BY FED. R. EVID. 606(b)

A. The Lessons of *Miller v. City of Los Angeles*

While this case was under submission, the Ninth Circuit issued its decision in *Miller v. City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011), which made two points critical to the Order's proper consideration in the instant case of the San Mateo juror declarations. Writing for the panel, Chief Circuit Judge Kozinski first ruled that Fed. R. Evid. 606(b) did not bar evidence of the mental processes, opinions, and impressions of jurors when the jurors in question "returned no verdict," *i.e.*, participated in a trial ending in a hung jury. *See id.* at 1030 (Rule "bars only 'an inquiry into the validity of a verdict or indictment.' Juror statements would have been admissible because the jury here returned no verdict."). Second, he reasoned that a presumption should be levied against the plaintiff in that action because he failed to produce testimony or evidence from the jurors who participated in those aborted deliberations when the circumstances were such as to have made such evidence available to him. *Id.*

In light of *Miller v. City of Los Angeles*, the fact that the San Mateo jurors did not reach a verdict is pivotal. Rule 606(b) itself provides certain proscriptions against juror testimony where "an inquiry into the validity of a verdict" is being made, including any "juror's mental processes concerning the verdict." Thus, there must be a verdict on both sides of the rule in order to invoke its proscriptions, *i.e.*, not only must a verdict's validity be under challenge, but evidence from jurors who actually rendered "the verdict" must be offered.

Manifestly then, the exemption from Rule 606(b) cited by Chief Circuit Judge Kozinski in *Miller* for the impressions and opinions of jurors who did not render a

verdict applies herein. A verdict is the "formal decision" or "definitive answer" "given by the jury … to the matters … committed to" it. *See Black's Law Dictionary* (6th ed. 1990). It is particularly noteworthy that the word "verdict" is not defined as the formal decision of a single juror, but the dispositive decision of an entire jury. A hung jury is defined as "a jury [which] … cannot agree upon any verdict by the required unanimity." *Id.* This Court, of course, is bound to follow *Miller*. *See, e.g., United States. v. 5.935 Acres of Land, Tax Map Key (3)2-8-017-43, Honomu*, 752 F.Supp. 359, 361 (D.Haw. 1990) ("It is an elementary principle of federal jurisprudence that federal district courts must follow the rules of law announced by the appellate court in their circuit.").

An analysis of the legislative history, Advisory Committee Note, and decisional law published both before and after the adoption of Rule 606(b) supports the "*Miller*" Exception as described above, by validating the inference that the rule bars only an attempt to impeach "a verdict" using evidence from jurors who rendered the verdict.[4]

Consistent with all of the foregoing analysis are cases in which courts have found highly relevant, for *prejudice analysis*, mistrials caused by the inability of jurors to reach

[4] *See, e.g., McDonald v. Pless*, 238 U.S. 264, 269, 35 S.Ct. 783, 59 L.Ed. 1300 (1915) ("[T]he losing party cannot … use the testimony of jurors to impeach their verdict."); *id.* at 267 ("[T]he weight of authority is that a juror cannot impeach his own verdict."); *Mattox v. United States,* 146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917 (1892) (same); *Tanner v. United States*, 483 U.S. 107, 120, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) ("Let it once be established that verdicts … can be attacked and set aside on the testimony of those who took part in their publication" and the jury system might not survive it.) (quoting *McDonald*, 238 U.S. at 267-68); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1205 (5th Cir. 1989) (noting that Advisory Committee's Notes and legislative history support the view that Rule 606(b) was designed to prohibit an attack on a verdict by means of evidence provided by its authors); *United States v. Gonzales,* 227 F.3d 520, 523 (6th Cir. 2000) ("The Supreme Court has long adhered to the general rule that a juror is incompetent to impeach his or her verdict."); *United States v. Black,* 843 F.2d 1456, 1464 n.7 (D.C. Cir. 1988) (noting that, under *Tanner* and Rule 606(b), "a juror's affidavit or testimony is incompetent to impeach the verdict for internal error …").

a unanimous decision that occurred before a defendant was ultimately convicted.[5] After all, evidence of such mistrials is simply proof that one or more jurors held a very specific opinion, *i.e.*, that the prosecution had not proved its case beyond a reasonable doubt.

B. The Declarations Are Not Offered to Refute the Validity of the Verdict *Per Se*, But to Satisfy *Strickland's* Prejudice Test

The Order concluded:

> To the extent F.R.Evid. 606(b) prohibits a juror from testifying about his or her internal deliberations to impeach that juror's verdict, it clearly prohibits a juror giving testimony to challenge "the validity of a verdict" rendered by a jury in a different case.

(Order at 23-24.) Even assuming that the above analysis were correct (*but see* previous subsection), it is an observation that miscarries. Petitioner never offered the declarations to impeach the 1987 verdict. The San Mateo jurors, obviously, did not participate in that trial. They have nothing to say about it; they cannot impeach it. Rather, those declarations are offered in the context of the prejudice prong of *Strickland* analysis, *i.e.*, to prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This standard, like so many others, calls on a court "to make predictions about the likely actions of hypothetical 'reasonable' actors." *Schlup v. Delo*, 513 U.S. 298, 329 n.48, 115 S.Ct. 851, 130 L.Ed.2d 808 (1984). The question under the prejudice prong has nothing to do with the

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[5] *See, e.g., 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" between them and trial under review was counsel's ineffective assistance; relying on these "actual rather than hypothetical reference points"); *Bradley v. Duncan,* 315 F.3d 1091, 1099 (9th Cir. 2002) (*Brecht* prejudice standard was satisfied because "we need only look at the differing results of the two trials [the first of which ended in a hung jury) to find that the failure to … instruct [on entrapment] had a substantial and injurious effect on the verdict [because an entrapment instruction was given in the first trial].")

validity of the verdict rendered and everything to do with the assessment of whether there is a sufficient chance of a different result from mentally simulated "reasonable" actors at a hypothetical retrial. In conducting *Strickland* prejudice analysis, a court "should presume … that the judge or jury acted according to law," then make "[an] assessment of the likelihood of a result more favorable to the defendant" at a trial in which there is effective representation. *Strickland*, 513 U.S. at 694-95. Thus, prejudice analysis as defined in *Strickland begins* with the presumption that the verdict in place was valid. Under *Strickland*, one seeks a new trial not on grounds of invalidity of a verdict, but on grounds that the verdict, though valid, is "unreliable" due to the ineffective assistance of counsel. *See id.* at 696.

If *Strickland* prejudice analysis had to be simulated by a judge to the exclusion of input from jurors regardless of whether that exclusion falls under the terms of Rule 606(b), then the magistrate judge in *Luna v. Cambra*, 311 F.3d 954, 958 (9th Cir. 2002), *mandate recalled and reissued as amended,* 311 F.3d 928, erred in empaneling an "eight member advisory jury" to provide him findings regarding the credibility and substantive importance of various witnesses in the context of an IAC claim. If Rule 606(b) barred the use of such juror evidence, the Ninth Circuit would have criticized him for it and not reviewed *de novo* (*id.* at 959) the findings that the magistrate made in reliance upon that evidence.

C. The Order Appears to Adopt a Presumption Contrary to That Adopted in *Miller*

In discussing the San Mateo juror declarations, the Order highlights that "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." (Order at 22.) The clear inference from that highlighting is that the probative value of the declarations was somehow diminished thereby.

It is *respondent's* position, however, not petitioner's, that should properly be deemed to suffer from the absence of declarations from the four San Mateo jurors "who voted in favor of Petitioner's guilt." If any inference is to be taken from the lack of such declarations from those four, it should be that respondent's failure to furnish them suggests that, regardless of their conclusions as to petitioner's guilt regarding Eslaminia, they would not provide opinions helpful to respondent in the context of the disappearance of Ronald Levin. *See Miller v. City of Los Angeles*, 661 F.3d at 1030; *see also Taylor v. Maddox,* 366 F.3d 992, 1012 -13 & n.15 (9th Cir. 2004) (noting that state could have, but did not, call witnesses who, theoretically, would have been helpful to its case and citing the law and legal justification for levying the "missing witness" presumption against state); *Underwriters Laboratories, Inc. v. N.L.R.B.*, 147 F.3d 1048, 1054 (9th Cir. 1998) ("[W]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.") (citation omitted).

D. The San Mateo Juror Declarations Are Relevant Regardless of the Absence of "Complete Equipoise" Between the Issues and Evidence in Petitioner's Two Trials

The Order reflected an analysis avoided or neglected by respondent, *i.e.*, it relied on the *quantitative* differences between the state's "Levin" case at trial in 1987 and the state's topically related showing in 1992 (Order at 24 ("the Eslaminia jurors only heard from about one-half of the prosecution witnesses called by the prosecution in the Levin trial")) to opine on the lack of relevance of the San Mateo juror declarations. The Order, however, made no attempt to assess whether there was a *qualitative* difference between the two cases in terms of the Levin evidence, which should be, for purposes of a relevancy analysis, the only difference that matters.

As an illustrative example, the state's case in 1987 included seven witnesses from New York who testified to matters bearing on Pittman's (*i.e.*, petitioner's Levin-case

codefendant) June 1984 trip there. In contrast, the 1992 case included only three: Joe Vega, Richard Leibowitz, and Robert Ferraro. (Doc. 10, Ex. 201.) Petitioner, however, stipulated in his San Mateo trial to matters covered by the other four, *i.e.*, witnesses who could lay the foundation for records created by Pittman's New York trip. (*Id.* at 3.) The upshot was that petitioner's Eslaminia jury heard and saw a *substantively* identical presentation on this topic, including all of the evidence about the New York trip referenced in the state appellate court's 1993 opinion on the 1987 trial (*see* Order at 14(19) – 15(3)), though said fact is not reflected in the number of witnesses involved.

Similarly, the 1987 jury heard from five witnesses regarding petitioner's financial condition: Julius Paskan (RT 8978-9050); Steven Weiss (RT 9125-247); Alph Gore (RT 9249-81); Larry Maize (RT 9282-344); and Gene Vactor (RT 9400-24). None of these five testified in San Mateo. Yet, Lore Leis did. (Doc. 10, Ex. 201.) In both trials, Ms. Leis (petitioner's executive secretary circa 1983-84) testified that she was in charge of the accounting records for all of petitioner's investors. She described to both juries the amounts invested, refunded, and lost. Thus, the 1992 jury heard evidence that was qualitatively parallel to that in the 1987 trial, they just did not hear individual investors, *etc.*, discuss the situation piecemeal. Also, the San Mateo jurors heard from Chuck LeBeau, who described the extent of petitioner's legitimate trading losses in the Financial Futures markets. (Doc. 10, Ex. 201.) Larry Maize and Gene Vactor were sources of similar testimony. Finally, petitioner testified in San Mateo (doc. 10, Ex. 201) and thus the prosecutor was able to elicit evidence of his financial condition directly from petitioner. If petitioner had lied about any of it, presumably the state would have called those five, or any of them, by way of rebuttal.

Another illustration of the qualitative parallelism of the two proceedings is that the substance of three witnesses who testified in 1987 regarding fingerprints was presented to the 1992 jury by way of stipulations. (Doc. 10, Ex. 201 at 5(19-24) (covering the substance of the testimony of Wagenbreenter, Clason, and Kuhn).)

Next, there were witnesses the prosecution did not call in San Mateo because it had either suppressed impeaching *Brady* material in the context of the 1987 trial, or because the prosecution knew petitioner had developed effective impeaching evidence. For example, Steven Taglianetti, a BBC member, was called in 1987, but bypassed in 1992. It is not difficult to ascertain why. First, he had performed poorly in 1987. (*See* doc. 118 at 23-24.) Second, by 1992, the prosecution team knew that petitioner had potent material exposing the lies Taglianetti had told in 1987. They had seen petitioner destroy the credibility of Jerry Eisenberg, Taglianetti's crime partner, on cross-examination in 1992. (*See* Claim 1-1.2; *see also* doc. 250 (petitioner's lodging Eisenberg's 1992 transcript); doc. 4 at 316-26 (proving impact of impeachment on Eisenberg-Taglianetti axis).) Third, the prosecution knew that petitioner's impeaching evidence was true and that Taglianetti, like Eisenberg, would have to deny it, thus destroying his credibility. (*See Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co.*, 218 Cal.App.3d 1354, 1358, 268 Cal.Rptr. 16, 17 (1990) (recounting crimes committed by Taglianetti in 1985 consistent with the gravamen of Claim 1-1.2); *see also People v. Eisenberg,* 46 Cal.Rptr.2d 625, 628 (1995) (noting Eisenberg's indictment on 53 counts, including 3 counts of grand theft in amounts over $150,000; two counts of filing false or forged documents; and one count of perjury).

Similarly, the prosecution in 1992 did not call Gene Browning, an important witness in the 1987 trial, because Browning would have proved a liability in light of readily available impeaching evidence that Barens bypassed, but which the prosecution knew petitioner had subsequently developed. (*See* Claims 1-1.21, 1-1.22, 1-2.12; *see also United States v. Wells,* 394 F.3d 725, 727-28 (9th Cir. 2005) (noting that Browning was charged in 1990 with 5 counts, including conspiracy to manufacture and distribute methamphetamine, conspiracy to invest over $1,000,000 in drug profits, and making a false declaration, and that he entered a plea agreement); *see also United States v. Nowlin,* 1993 WL 51814, at *5 (9th Cir. 1993) (noting Browning's appearance before a grand jury in November, 1986, *i.e.*, before petitioner's 1987 trial).)

Other witnesses that testified for the prosecution in Los Angeles had backfired, providing a ready explanation for why they were not called in 1992. (*E.g.*, Steven Lopez, a BBC member, *see* doc. 118 at 24(8) – 25(8) (explaining the value of Lopez to the defense).) Still other witnesses were utterly trivial, like the police captain (William Cowlin) who testified that he revoked Levin's press credentials (after he realized that Levin was not actually a journalist), and Tere Tereba, a "friend" of Levin who turned out to have nothing of interest to say (other than that Levin had introduced himself to her at a high-society party, saying his occupation was "thief"), and four law enforcement employees from Arizona who supplied trivial background facts and custodian-of-record details regarding the "Arizona sighting."

The foregoing are just a few examples. The Order should not have drawn inferences against petitioner on matters which could not reliably be assessed without the benefit of briefing by the parties. Because respondent never mentioned this quantitative comparison, there was no need for petitioner to address it, even if he had the ability to respond mostly denied him by the unreasonable restrictions placed upon his filings throughout this case.

Further, if respondent could have made the argument that there was a qualitative difference between the Levin evidence in 1987 and 1992 that was not attributable to Barens' incompetence, presumably it would have. Since it did not, the Order should have invoked the sound presumption that respondent had a good reasons for *not* making the argument –namely, that it was unsustainable. *Cf. Taylor v. Maddox*, *Miller v. City of Los Angeles,* and *Underwriters Laboratories, Inc. v. N.L.R.B., supra.*

In fact, one can search the Statement of Facts adopted by this Court from the state appellate court's 1993 opinion in vain for any fact or witness among those that court evidently believed were consequential, which was not available to the San Mateo jury. (*See* Order at 7-20(5); *e.g.*, Carol Levin, Dean Factor, Len Marmor, and Mark Broder, covered the substance of Jerry Stone's 1987 testimony (*id.* at 14(7-11)), while Dean Karny covered the same facts regarding the $1.5 million check that Nabil Abifadel also

covered during the 1987 trial.) In sum, given respondent's failure to point to any meaningful difference between the two proceedings, the Order is not on firm ground assuming there was one. In fact, it was clear error for it to have done so.

Next, the Order overlooks the highly significant fact that, unlike this Court, the LAC habeas court, and the state appellate court, the San Mateo jurors *saw the state's star witnesses cross-examined by someone other than Barens – and found all of them wanting*. Specifically, they saw the credibility of Carol Levin, Dean Karny, Tom May, Jerry Eisenberg, Jeff Raymond, Evan Dicker, and Gene Browning thrashed absent the feckless gaffes (Claim 1-2.13) and unprofessional lassitude of Barens (*see, generally,* Claim 1). Moreover, the jurors were free to form opinions regarding Lynne Roberts, Carman Canchola, and Jesus Lopez uninfluenced by a judge who intervened heavily during their testimony in a self-described effort to see "justice done" (RT 8865, 9286-87) and to make sure that "nobody believe[d] their stories" (RT 9992(12-15)). (*See also* RT 11858 (trial judge's admitting that he never had "any occasion" to intervene on behalf of the defense); RT 6020 (judge's commenting that prosecutor was not aggressive enough); doc. 191 at 142(26) – 154 (listing partisan interventions of the judge against defense witnesses); doc. 118 at 34-59 (argument regarding judge's defense-case interventions).) Thus, neither the 1987 jury nor the LAC habeas court, this Court, or the state appellate court, whether in 1993 or 1998, is the rational choice for perspective on the overall balance of the evidence absent Barens' ineffectiveness. The San Mateo jurors are. *They* are the best evidence available to this Court, and that should be undisputable. The LAC habeas court did not witness any of the state's star witnesses testify, let alone see them impeached. The 1987 jury did not hear from the IAC-related witnesses. Neither this Court nor the state appellate court has seen a single witness testify. The declarations of the San Mateo jurors may not be perfect evidence of prejudice in light of the absence of "complete equipoise," but they are the best evidence on the subject available to this Court.

Even if one assumes that the Levin-related evidence at the two trials was materially dissimilar, it hardly means the declarations are valueless. Far from it. They *remain* the very best evidence before this Court as to the probative value jurors at a retrial would find in the IAC-related witnesses; how actual jurors would react to the proffered impeachment evidence; and whether the various witnesses were credible *per se*. If the two proceedings were qualitatively different, that only means that the declarations are not *conclusive* proof on the ultimate question, *i.e.*, whether there was prejudice in the aggregate, or cumulatively. Their opinions would still remain nonpareil, extraordinary, and highly probative evidence as to the credibility of individual witnesses and the value of various impeachments *per se*.

Thus, if this Court were disposed to assume that analytical vantage point, it would, for example, be compelled to find that Karen Marmor (Claim 1-1.7) testified credibly (based upon the reports of actual jurors who witnessed her do so), while reserving solely to itself the assessment of the ultimate impact of that credible testimony vis-à-vis the state's evidence that petitioner made inconsistent claims regarding the disposition and use of the "to do" lists.

E. Conclusion Regarding the Juror Declarations

As the Ninth Circuit put it in *Sassounian v. Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000), the thoughts and opinions of actual jurors can sometimes be "the most direct evidence of prejudice" theoretically available. As a result, the exclusion of such evidence can "lend[] an Alice in Wonderland quality" to a court's efforts to assess prejudice while ignoring such evidence.

To merely ignore the real-world evidence represented by the San Mateo juror declarations in favor of conjecture would indeed "lend[] an Alice in Wonderland quality" to the decision regarding petitioner's fate. The inherent magnanimity of American Justice and the high purpose of our laws would be balked – not furthered – by a willful refusal to recognize that real jurors actually found petitioner's evidence credible. Again, Rule 606(b) compels no such result. To hold that witnesses such as

Robbie Robertson, Nadia Ghaleb, Carmen Canchola, Jesus Lopez, Karen Marmor, Ivan Werner, Lynne Roberts (alibi), O.W. Holmes, and Joe Duran would be rejected by real jurors as trivial or incredible, or both – is in defiance of incontrovertible fact. And, so too with the evidence impeaching such prosecution stars as Karny, Tom May, Jerry Eisenberg, Evan Dicker, and Carol Levin.

The juror declarations are objective, reliable, admissible, relevant, unrefuted, and unmarginalized. Given that respondent failed to provide counter-declarations, any just resolution of this case must be consistent with them.

CONCLUSION

It was with great sorrow, as much for the American criminal justice system as for himself, that petitioner received the Order, which placed the imprimatur of a federal court on the travesty of a trial he was afforded by Judge Rittenband in Los Angeles in 1987. There is no fair or rational basis for a finding that the United States Constitution, even post-AEDPA, can be made to tolerate what occurred therein. Petitioner will supplement this motion with another two motions in the coming days – a motion for relief from judgment and a motion for additional findings. Although Rule 11(a) of the Rules Governing § 2254 Cases requires district courts to issue or deny a certificate of appealability in the order disposing of a § 2254 petition adversely to the petitioner, rather than waiting for the filing of a notice of appeal and a request for certificate of appealability,[6] the Order did not comply with that Rule. Petitioner, respectfully disagreeing with the Order's conclusions, will also ask this Court to treat the contentions contained in the three post-Order motions not only as predicates for the relief requested in each, but also as additional contentions for the issuance of a certificate of appealability should his motions not result in substantive

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[6] "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

relief. His heartfelt hope is that this Court acknowledges that the Order's conclusions, at minimum, are open to reasonable debate among fair-minded jurists.

Dated: February 27, 2013

Respectfully submitted,

/s/ Gary K. Dubcoff
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