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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 FOR AMENDMENT OF FINDINGS AND ADDITION OF FINDINGS, AND FOR AMENDMENT OF JUDGMENT IN LIGHT THEREOF; MEMORANDUM OF POINTS AND AUTHORITIES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

Cases **Page**

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

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. 52(b), to amend its findings and make additional findings in its Order Denying Petitioner's Fourth Amended Petition (doc. 261, hereinafter "Order") and to amend the judgment accordingly. As grounds therefor, he asserts that the Order contains manifest errors of fact and law, which should be corrected forthwith.

This motion is based on the instant Notice of Motion and Motion; the incorporated Memorandum of Points and Authorities, *infra*; Fed. R. Civ. P. 52(b); 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: March 1, 2013

Respectfully submitted,

/s/ Gary K. Dubcoff
Gary K. Dubcoff

Counsel for Petitioner
JOSEPH HUNT

MEMORANDUM OF POINTS AND AUTHORITIES

The Order contains manifest errors of fact and law. Overarchingly, it treats the instant case like a garden-variety habeas case in which claimed constitutional violations simply run aground on the shoal of deference to state courts. *Nothing*, however, should serve to deny the grant of habeas relief herein. Hunt's case is without parallel in the manner in, and extent to, which a state criminal defendant's rights have been trampled. Reviewing courts have, this far, responded by turning a blind eye thereto, but they have only done so by ignoring the facts and the law that mandate relief. To the extent the Order engages those facts and law, petitioner will contend that it does so erroneously and specifically explain wherein he believes the errors lay. He will also take note of the plethora of facts that, as they did before the state courts, passed unnoted in the Order, but which, if acknowledged, should command the entry of altered and additional findings.

BACKGROUND LEGAL PRINCIPLES

Fed. R. Civ. P. 52(b) provides, in relevant part: "On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings – or make additional findings – and may amend the judgment accordingly." "The purpose of Rule 52(b) is to allow a court to correct manifest errors of law or fact…." *Gutierrez v. Ashcroft*, 289 F.Supp.2d 555, 561 (D.N.J. 2003); *accord, Pro Edge L.P. v. Gue,* 377 F.Supp.2d 694, 698 (N.D.Iowa 2005) (citing cases). It is intended to give district courts the opportunity to reconsider and correct its own mistakes in the period immediately following the entry of judgment and to, thereby, avoid an appeal to correct them. *EEOC v. Custom Companies, Inc.,* 2007 WL 1810495, at *1 (N.D.Ill. 2007).

As with Hunt's other post-Order motions, he is entitled to file a motion under Fed. R. Civ. P. 52(b) in a habeas case. *See Browder v. Director, Dept. of Corrections of Illinois* 434 U.S. 257, 270, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) (holding Rule 52(b) applicable in habeas corpus proceedings); *Gutierrez v. Ashcroft*, 289 F.Supp.2d at 561 ("[A] motion to amend the findings of fact and to amend the judgment is appropriate in habeas proceedings, where the legal analysis may depend upon the underlying facts in the case.").

ARGUMENT

I. THE ORDER FAILED TO ADDRESS PETITIONER'S *CORPUS DELICTI* THEORIES OF PREJUDICE

A. The Omitted Finding

Petitioner's jury received this instruction:

> CALJIC 2.72: No person shall be convicted of a criminal offense unless there is *some proof* of *each element* of the crime *independent of any admissions made by him outside of this trial*.

(Emphases added.)

Petitioner's reply to respondent's answer (doc. 248), filed September 25, 2008, contained this argument:

> [T]he 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 *corpus delicti* rule before even evaluating the evidence that the state courts repeatedly cite (*e.g.,*

> Hunt's statements, the to-do list [*see, e.g.,* doc. 5, Ex, A at 185]). The evidence was far from overwhelming on *that* preliminary, essential issue. *Cf. Riley [v. Payne],* 352 F.3d [313,] 1323-25 [(9th Cir. 2003)] (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).

(Doc. 248 at 16–17.)

At the time that this case was submitted, the record contained more extended arguments on the subject. One was referenced in the above-quoted passage, *i.e.,* document 79 at pages 2-20. The other, contained in Hunt's initial memorandum of points and authorities (one of the subjects of his Rule 60(b) motion (doc. 263)), contains 24 pages in support of his two *corpus delicti* prejudice theories. (*See* doc. 7 at 625–26, 640-61.)

Under the instruction given the jury, the *corpus delicti* of murder requires "some proof" of the two elements of murder, *i.e.*, a killing, performed with malice aforethought (*cf. People v. Manson,* 71 Cal.App.3d 1, 43, 139 Cal.Rptr. 275 (1977) ("death and death by criminal means")). The *corpus delicti* of robbery, *under CALJIC 2.72*, requires "some proof" "of each element" of robbery. *See, e.g., People v. Weaver,* 26 Cal.4th 876, 929, 111 Cal.Rptr.2d 2 (2001). The elements of robbery under California law are: (1) taking of personal property in the possession of another; (2) from his person or immediate presence; (3) against his will; (4) by force or fear. Cal. Penal Code § 211; *see also* doc. 79 at 9 (making this point).

In the course of the evaluation of the strength of the state's case by the two state courts that wrote "reasonable decisions" on "the merits" of petitioner's habeas claims, *nothing was ever said* about the impregnability of the state's *corpus delicti* showing *as to either the robbery or the murder charge*. Moreover, the aspects of the state's case that the state courts found so compelling demonstrate that they had everything to do with

petitioner's extrajudicial admissions, and therefore nothing to do with the potentially dispositive preliminary question of *corpus delicti*. (*See, e.g.*, doc. 5, Ex. A at 185, ¶ 2 (state appellate court's 1993 decision); *id.*, Ex. B at 17(14)–18(2) (LAC habeas court's 1996 decision); doc. 6, Ex. M (state appellate court's 1998 adoption of LAC habeas court's findings).[1]

The Order should be amended to add findings addressing petitioner's *corpus delicti* theories of prejudice, and those findings should reflect the points made herein with respect thereto.

B. The Terms of CALJIC 2.72, and Not California's Test on Appeal for the Sufficiency of Evidence of *Corpus Delicti*, Must Be the Basis for *Strickland* Prejudice Evaluation

In assessing whether either petitioner's robbery or murder conviction, or both, should be vacated on grounds that it is "reasonably probable" that a jury would acquit absent the alleged ineffectiveness on the part of his trial counsel, it would be facile, but incorrect, to decide that question from the vantage point of California decisional law, which essentially provides that the evidence establishing *corpus delicti* may be slight, or a mere *prima facie* showing. Sufficiency claims are always evaluated in the lenient terms of whether *any* rational factfinder *could* have made make the finding in questions. *See, e.g.*, *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Schlup v. Delo*, 513 U.S. 298, 330, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (*Jackson* standard "focuses on whether any rational juror could have convicted").

All that matters in the context of *Strickland* prejudice analysis, however, is whether there is a "reasonable probability" of a different outcome, an assessment that can only be made in context of the law *as the jury received it.* CALJIC 2.72 says

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[1] As petitioner has contended (doc. 262), *even if* those courts had addressed the *corpus delicti* theories of prejudice on both the murder and robbery convictions, this Court would still be precluded by the terms of 28 U.S.C. § 2254(d) from taking cognizance of them as those courts did not issue "adjudications on the merits" within the meaning of that statutory provision.

nothing about "slight evidence." Indeed, rather than minimizing the burden, it admonishes the jurors that they must find "some *proof*" of *corpus delicti*. Absent more particularized instruction, they could only have understood that to mean some "proof" sufficient to establish *corpus delicti* "beyond a reasonable doubt," as that was the only definition of proof they were given, and the only description they had of the prosecution's burden with respect to any fact upon which its case depended. *See* CALJIC 2.93. Thus, viewing CALJIC 2.72 and 2.93 in juxtaposition, the jurors would have reasonably concluded that the prosecution had to prove *corpus delicti* beyond a reasonable doubt.

It is black-letter law, of course, that "juries are presumed to follow their instructions." *See, e.g., Richardson v. Marsh,* 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). *Strickland's* prejudice standard is framed in terms of whether 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) (emphasis added). The proceeding in question was held with that instruction; *ipso facto*, it is that instruction that must serve as the lens through which prejudice is assessed.

C. The Effect of the "To-Do Lists" on *Strickland* Prejudice Evaluation

First, guided by CALJIC 2.72, the most natural conclusion for the jurors to draw was that they could not consider the "to-do" lists when assessing *corpus delicti*. After all, CALJIC 2.72 enjoins them from considering "*any* admissions made by [the defendant] outside of this trial." (Emphasis added.) CALJIC 2.72 does not specify that it is only excluding *verbal* admissions. Moreover, although one might argue that an exception should be carved into the exclusion if the admissions in question are not considered in terms of who authored them, or for the limited purpose of showing nefarious agency separate and apart from the identity of the author, *no such exceptions are present in the text of CALJIC 2.72.* The instruction does not except out-of-court admissions that have circumstantial implications bearing on agency; indeed, it

specifically excludes admissions which were made out of court bearing on any element of the charged crimes.

Second, assuming *arguendo* that a reasonable jury would consider those lists as admissible in the *corpus delicti* determination, though they might have carried the issue for the prosecution in the context of the 1987 trial evidence, they would not do so in the context of petitioner's IAC-related evidence. So much of the justification for the dire construction given to those "to-do" lists lies in the extrajudicial admissions attributed to petitioner. Thus, the question becomes: how would the sightings witnesses (Claim 1-1.23) and such witnesses as Karen Marmor (Claim 1-1.7) be viewed by a reasonable juror who had either never been exposed to those admissions or who had conscientiously set them aside so as to properly apply CALJIC 2.72? All of the judges who have reviewed petitioner's case post-conviction have *expressly* allowed their views on the persuasiveness of evidence of petitioner's admissions to color their perception of the credibility of witnesses who swear to facts inconsistent with the Levin-is-dead scenario. (*See, e.g.,* doc. 5, Ex. A at 185, ¶ 2); *id.*, Ex. B at 17(14) – 18(2).)

Petitioner urges this Court, should it decide to address this issue, to armor itself against making the same error in logic. As noted, *supra*, juries are presumed to follow their instructions. Karen Marmor, a former bank manager and the wife of a *prosecution* witness, was a presumptively credible source. (*See* Claim 1-1.7.) Although this Court is precluded under § 2254(d) from considering the LAC habeas court's scathing remarks on her credibility (*see* doc. 262), petitioner has supplied argument demonstrating that those findings were "clearly erroneous" (doc. 4 at 358-68), not to mention wholly inconsistent with the admissible (*see* doc. 262 at 14-24) findings of actual jurors who heard her testify (doc. 11, Exs. 202-08). The material question is how reasonable jurors would have applied CALJIC 2.72 if they knew these facts:

1. Levin told a bank officer that he was raising venture capital for Microgenesis (Claim 1-1.20);

2. Levin's palm and fingerprints were on the Microgenesis file in Levin's small office (RT 10431, 10436-37);
3. Levin had a habit of writing large, worthless checks (RT 7383, 7389-90, 7400-02);
4. The "to do" lists were found strewn across the floor of Levin's small office (Claim 1-2.7);
5. Levin told two witnesses a day before he disappeared that he might advance his plans and leave for New York that night (Claim 1-1.7 (Karen Marmor); 1-2.11 (O.W. Holmes));
6. Levin sought advice on how to dye his hair on the day before he disappeared (Claim 1-1.1);
7. Levin found out that "Neil Antin" had snitched on him as to other, not yet charged, criminal conduct, the day before he disappeared, and he was panicked by the revelation (Claims 1-1.7; 1-2.11);
8. Levin was out on 12 felony counts when he disappeared;
9. For a year or so prior to his disappearance, Levin spoke of attending medical school in Granada (RT 6459, 6576);
10. Shortly before he disappeared, Levin restructured his bail arrangements on the 12 pending charges, at considerable cost, so as to free his parents of potential liability should he skip out, despite the fact that the existing bond was fully paid for (RT 6790-803);
11. Someone bought fresh underwear using Levin's American Express Card at Brooks Brothers in Los Angeles the morning after he disappeared (*see* Claim 1-2.10 (describing why this is important));
12. Levin was researching Brazilian extradition treaties right before he disappeared, explaining that it was a journalistic interest; but he was not a journalist (Claim 1-2.11; RT 7298-313, 8898-942; HT 249 (Levin used a false cover as a journalist as a front to perpetrate con schemes));

13. Out of the blue, on the day before he disappeared, Levin asked an attorney, to whom he had given a key to his house months earlier, to give the key back, making a great show of urgency and using a false excuse (Claim 1-2.11);
14. Levin was aware of the pendency of other criminal investigations and had taken at least $500,000 that could not have been accounted for after his disappearance (Claim 1-1.13 to 1-1.18);
15. Levin was raped in jail in 1979 and vowed never to go back (Claim 1-1.12);
16. Levin was unmarried, gay, without a "significant other in his life," and had victimized his own mother and maid, among countless others, through various scams (Claim 1-1.11; RT 6431-36);
17. There was no signature on the $1.5 million check drawn on Levin's empty Swiss Bank Account (RT 7490, 8616-18, 9102, 10273-77; Trial Ex. 95 (thus undercutting any inference that Levin was forced to sign the check, an indispensable aspect of the prosecution's robbed-the-check theory);
18. Two worthless Swiss Bank cashier's checks were found at Levin's, one for $500,000 and one for $980,000 – in addition to bank passbooks with phone balances running into the millions (RT 7389, 7429, 7489-90);
19. While Pittman had two of Levin's overdrawn credit cards, he made no secret of his true identity while using them in New York, and the Virginia warrant for his arrest for grand-theft auto explained why he would not want to be arrested quite apart from anything having to do with Levin (Claim 1-2.8; 1-2.9);
20. Many of the items on the "to do" list were clearly not performed, *e.g.*, it says "kill dog," but the dog was unhurt; and
21. Six different citizens unrelated to petitioner, including three who actually knew Levin on a personal basis before he disappeared (*viz.*, Waller, Ghaleb, and Robinson – none of whom were called in the 1987 trial), and one of whom described Levin right down to his gold teeth (*viz.,*Werner), believed they saw Levin after his disappearance (Claim 1-1.23).

With respect to the *corpus delicti* of robbery, no reasonable juror could possibly find, in light of the above evidence, that the $1.5 million check (which the Order (at 110) found to be the only conceivable predicate to the robbery findings by the jury) – a check which lacked a signature and was drawn on an account with $4.00 in it (RT 7396, 7490, 8616-18, 9100-02, 9112-15, 10273-77, 10983-84, 11205-08, 11216-19; Trial Ex. 95) – was taken from Levin's "immediate presence," against his will, by "force or fear." Cal. Penal Code § 211 (robbery). As noted above, Levin told a bank officer at Progressive Savings and Loan he was a "venture capitalist" raising money for Microgenesis. (Claim 11.20.) His palm prints were found on the contract-related file in his office. It was his *modus operandi* to write large, worthless checks. The jury heard that, twice before, Levin had pulled multi-million dollar scams on petitioner, scams that turned out to be based upon fictional sums and fictional assets. (*See* Order at 8–10 (state appellate court's summarizing the facts related to the phone brokerage and nonexistent real estate scams).) Further, the jury heard that Levin had bounced a six-digit check to Progressive Savings and Loan, had a fake million-dollar check mounted on the wall (*id.* at 8), and possessed a dizzying array of fake bank books and drafts involving six and seven figure scams (RT 7389, 7429, 7489-90). In short, there was nothing irregular about Levin's signing a contract with Microgenesis and giving worthless, though nominally large, consideration in connection with it. Such a contract would become just another 'prop' in his extensive fraudulent armamentarium. As the jury learned, Levin's game was to acquire such props and then use them to cozen people who did not have personal knowledge of the context in which they arose.

D. Conclusion as to the *Corpus Delicti* Theories of Prejudice

There is *far* more than a "reasonable probability" that the jury would have acquitted petitioner on both the robbery *and* the murder counts in light of CALJIC 2.72 had it not been for the ineffective assistance of trial counsel. Indeed, when one actually considers the non-statement evidence in the case, one is left with an open-and-shut case

of flight to avoid prosecution. Paraphrasing the California Court of Appeal's observation about the overwhelming evidence in the case:

> That [Levin] had the motive, the opportunity, the enterprise, the philosophy and the tools [to flee] is corroborated by [Levin's] multiple admissions of [having formed such a plan, dozens of circumstances demonstrating that he acted upon it, and the testimony from several non-partisan witnesses who confirmed, by seeing him after he 'pulled up stakes,' that he did in fact skip bail]. In short, the evidence [that Levin fled to avoid prosecution] was overwhelming.

(Doc. 5, Ex. A at 185.)

The robbery aspect of this prejudice determination is separate and apart from the murder aspect. Importantly, though, *both* prejudice theories must be decided under the applicable *de novo* standard. (*See* doc. 262 at Section I; *cf. Summit v. Blackburn*, 795 F.2d at 1244-45 (finding reasonable likelihood of a different outcome because of IAC bearing on the *corpus delicti* determination).)

II. THE NEED TO MAKE ADDITIONAL FINDINGS AND AMEND THE EXTANT FINDINGS REGARDING CLAIMS 1 AND 2

A. Introduction

In Section I of document 262, petitioner demonstrated that an overarching error was made in the Order in the identification of the "last reasoned decisions" with respect to large swaths of Claims 1 and 2. Given that error, and given the fact that there is a powerful and extensive body of extra-record facts offered in support of those claims, there is no relevant "merits" decision for either of them. Accordingly, this Court is not bound to reject legal theories simply because they are unsupported by "clearly established" United States Supreme Court precedent as is otherwise required by

§ 2254(d). *See, e.g., Harrison v. McBride,* 428 F.3d 652, 665 (7th Cir. 2005) ("In the absence of an adjudication on the merits, we employ the general standard as set forth in 28 U.S.C. § 2243, which requires us to 'dispose of the matter as law and justice require.' "). This means the overturning of a state conviction can be predicated on federal circuit law, which is controlling in this context. *See* R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure,* § 32.1 at 1564, nn. 2-8 (2005).

Regardless of whether this Court made findings of its own with respect to Claims 1 and 2 or interwove such findings with those of the California judiciary, all of them should be amended. All were conceived and applied within a general architecture supplied by the state court decisions of 1993, 1996, and 1998. It follows that, if there are major flaws of design and omission in those state court findings, this Court's findings should be amended in light thereof. Petitioner will now make that demonstration.

B. Argument in Favor of Additional and Amended Findings With Respect to Claims 1 And 2

> "He who the sword of heaven will bear should be as holy as severe." W. Shakespeare, *Measure for Measure*, Act 3, Scene 2.

The state appellate court in 1993 looked no further than the trial record. The LAC habeas court in 1996 went a little further, but only so far as to consider a dozen IAC sub-claims, and then with the indefensibly pedantic limitation that they would be viewed in isolation from the body of evidence bearing on Barens' credibility, character, and abandonment of the defense investigatory function. The state appellate court in 1998 refused to consider what was later defined as Claim 2, and expressly limited its review of Claim 1 to whether the conduct therein deserved reversal under *Strickland*, eschewing petitioner's theories under the conflict and *per se* standards of reversal. (Doc. 6, Ex. M at 12.)

Those three decisions have become wholly irrelevant, and petitioner urges this Court to look beyond the Potemkin-Village façade of a judge and a defense attorney conscientiously working together to "see justice done." (*See* doc. 118 at 13, 20; RT 8864-65, 9826-27.) An amended Order should confront, and make findings with respect to, the venality of the motives of Judge Rittenband and Arthur Barens.

Were this Court to make additional findings on Claims 1 and 2, it would, perforce, have to grapple with the effect, as a matter of law, of respondent's submission of its position on the trial record. Respondent's answer is unsupported by any extra-record facts to rebut those presented by petitioner. Respondent has disclaimed the need to conduct an evidentiary hearing as to the credibility of petitioner's declarants, solely expressing an interest in providing "additional … argument." (Doc. 237 at 4–5.) In *Nunes v. Mueller*, 350 F.3d 1045, 1054-56 (9th Cir. 2003), our Circuit demonstrated the dispositive effect that a concession of this magnitude can have, both in terms of obviating AEDPA deference (if it is a relevant consideration) and as to whether a prisoner has carried his burden of persuasion. As *Nunes* noted, where undisputed extra-record facts are "sufficient evidence to support [the] allegations," a habeas petitioner is entitled to relief. *Id.* at 1056. Moreover, the well-established presumption against a party who fails to rebut dispositive facts, or to request an evidentiary hearing to challenge the credibility *per se* of their sources, dovetails nicely with the opinion in *Nunes*.

As noted in document 263, there is already available to the Court discussions of the facts and arguments unique to petitioner's post state-appeal petitions, left unaddressed in the Order. (*See* docs. 3, 4, 7 at 16-17(4), 38-73, 95-208, 239-311, 314-42, 348-465, 490-500, 571(13) – 572(8), 573(13-25).)

C. Claim 2-1: Judicial Bias Against Chier

When assessing judicial bias, "circumstances and relationships must be considered." *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954).

Not at some remote point in time, but at the very time of petitioner's trial, Judge Rittenband "complete[ly]" and fixedly "detested Mr. Richard Chier," explaining "that his opinion was formed" (doc. 10, Ex. 106) on what he perceived was opprobrious conduct by Chier in 1983 when Chier lived in an apartment building owned by "very, very, close friends of the judge (*id.*, Exs. 103; 106 at ¶¶ 4, 5). The judge had personally intervened in that landlord-tenant dispute, twice calling Chier, advising that Chier should cooperate with the demand he "vacate," "upbraid[ing] Chier for the distress" he was causing the judge's friends, and raising the specter of blackening Chier's "reputation" as retribution should Chier refuse to comply. The judge punctuated his second call by referring to the power he had as "the Senior Judge in the West-District." (*Id.*, Ex. 106 at ¶ 6.) *See* Cal. Code of Judicial Ethics, Canon 2(B)(2) ("A judge shall not lend the prestige of judicial office … to advance the … personal interests of the judge or others."); *Doan v. Comm. on Jud. Performance,* 11 Cal.4th 294, 340, 45 Cal.Rptr.2d 254 (1995) (removing judge from office in part because of her "lending the prestige of her office to advance the private interest of others").

It is also uncontested that, in the late 1960's, Judge Rittenband had called the head of a law firm about Chier's conduct in a case that was then before the judge, referring to Chier as "a little punk," and asking that Chier be fired. *See* Cal. Code of Judicial Ethics, Canon 3(B)(11) ("A judge shall not … use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity."); *see also In re Rasmussen,* 43 Cal.3d 536, 537-38, 236 Cal.Rptr. 152 (1987) (publicly censuring judge in part for demeaning a man at a sporting event based upon judicially acquired data). Judge Rittenband's serious breach of judicial ethics occurred after Chier's refusal, in an off-the-record colloquy, to allow the judge to dictate Chier's decisions on matters which were wholly the prerogative of Chier and his client. This same tendency to ignore the prudential and constitutional limitations on his role was much on display during petitioner's trial. (*See, e.g.,* RT 6020(21-28) (advising prosecutor that he had "an obsession about any kind of error"; that he had "been leaning over backwards" and had

"never taken any position which was a firm one");[2] RT 6021-22, 6025(1-3) (indicating that he was "running this trial" and had decided it was in petitioner's best interest that Chier be silenced); *see also* Claim 2-2 via doc. 118 at 2-83 (judge's invading the prosecutorial function).[3] Of course, this is the same judge who was disgraced for his off-the-record malfeasance in *Polanski v. Superior Court, Polanski v. Superior Court*, 180 Cal.App.4th 507, 512, 514, 102 Cal.Rptr.3d 696 (2009).

The Order found that "the record shows that, well before voir dire began, Chier had an abrasive and antagonistic manner of interacting with the trial court. (RT 46, 67.)" (Order at 34.) "Chier persisted," the Order went on, "in asking prospective jurors questions that were repetitive," and there were remarks on the record that "demonstrate Chier's manner … was annoying the trial judge and it is reasonable to presume the trial judge perceived it as having the same effect on some of the prospective jurors. (RT 891." (*Id.*) These findings should be amended for several reasons.

First, petitioner does not dispute that Chier disliked the judge and was at times outraged at the judge's treatment of him and petitioner. (*See* doc. 10, Ex. 103 at ¶ 7.) There are a handful of examples, no more than five or six, where Chier appears to be the first to verbalize distemper, but not everything said by the judge and Chier is on the record. It should be apparent that not every hostile remark of the judge was transcribed.

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[2] A judge's urging a prosecutor to more aggressively prosecute is judicial misconduct. *See Ryan v. Comm. on Judicial Performance,* 45 Cal.3d 518, 535, 247 Cal.Rptr. 378 (1988).

[3] For example, the judge, *sua sponte*, made sure that *each juror* was given, and allowed to retain, his or her own copy of the state's evidentiary centerpiece, *viz.,* the "to-do" lists. (*See* doc. 191 at 154-57.) The judge also *independently* developed and displayed evidence to impeach defense witnesses Brooke and Lynne Roberts. (*See id.* at 150-51 (newspaper article); RT 11781-83 (checks the judge had seen in the course of pretrial hearing).) *Cf. United States v. Vespe,* 868 F.2d 1328, 1340-42 (3d Cir. 1989) (suggesting it would be misconduct for judge to personally investigate); *United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir. 1998) (judge's providing written transcripts "may place undue emphasis" on them).

(*See, e.g.,* RT 12495 ("The Court: Shut up, you miserable …," the court reporter noting the rest of that sentence was "unintelligible").) Petitioner also admits that Chier's remark at RT 67 (quoted in the Order at 34) reads as intemperate on his part – if read alone.[4] However, the issue is not whether Chier was biased against the judge, but

[4] If this Court were to take a closer look at what it terms provocation or "insolence" (Order at 98, n.58) on the part of Chier, it will see that the record supports an entirely different view. For example, Chier's remark, "You are a judge; you stop talking to me this way," does not hang in mid-air, though that is its appearance as quoted in the Order. Rather, it follows the judge's snidely remarking, "There is a lawyer [*viz.,* Barens] doing the objecting." (RT 12027.) Given that the judge had publicly defamed Chier's standing as a lawyer on more than twenty previous occasions, Chier's reaction was not insolence, but an appropriately phrased rebuke to a judge who was so "embroiled in controversy" that he was repetitively committing serious misconduct. (*See* doc. 191 at 85-87 (judge's insulting Chier's standing as a lawyer); *see also* RT 2083-A (remarking as Chier rose to speak to a prospective juror, "the worst is yet to come"); doc. 191 at 83-113 (documenting the entire campaign of harassment and vituperation against Chier, temporally and casually tied to Chier's judicial-misconduct/bias motions); *cf. In re Rasmussen*, 43 Cal.3d at 538 (finding judge committed misconduct with "petty harassment" of attorney who filed affidavit of prejudice); *Roberts v. Comm. on Judicial Performance*, 33 Cal.3d 739, 747, 190 Cal.Rptr. 910 (1983) (judge's overly aggressive and threatening behavior toward prosecutor who sought judge's removal was "impermissible personal involvement in the litigation"); Cal. Code of Judicial Ethics, Canon 3(B)(4) (judge shall be "dignified" and "courteous" to lawyers); *Gonzalez v. Comm. on Judicial Performance,* 33 Cal.3d 359, 371, 188 Cal.Rptr. 88 (1983) (finding judge committed misconduct by engaging in insulting or derogatory speech). Shortly before this, Judge Rittenband had remarked in the jury's presence that the trivial service of carrying an exhibit to Barens was Chier's "greatest help" in the whole trial. Next, the Order cites RT 925 (Order at 35) as an instance of Chier's choler. In that passage, however, Chier properly identifies the Due Process Clause violation on which Claim 2-1 is based, *viz.,* the judge's failure to withdraw given the degree of antagonism he felt for Chier. It was precisely that antagonism that led the judge to later silence Chier, as averred by Mr. Wager, reporting the judge's admissions to him. (Doc. 6, Ex. 106.) The judge was, *indisputably,* "embroiled in controversy" with Chier, and under a long line of case law authority, including the cases referenced herein – *Taylor*, *Offutt*, *In re Murchison*, and *Mayberry* – he should have withdrawn. Next, the Order cites RT 67 (Order at 34) as evidence of Chier's unprovoked challenges to the judge's impartiality. Again, that is inaccurate. This remark came on the heels of the judge's remonstration

whether the judge's undisputed, implacable hatred of Chier (doc. 10, Ex. 106) – which was fully formed "long before proceedings commenced in the case of People v. Hunt" (*id.*), and undiminished as proceedings commenced (*id.*) – coupled with Chier's conduct in petitioner's case, "so embroiled [the judge] in controversy that he could not hold the balance, nice, clear and true between the State and the accused" (*Taylor v. Hayes*, 418 U.S. 488, 501, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974) (citation and internal quotation marks omitted)) on the subject, *inter alia*, of Chier's role in the trial. *Cf. Tejkeda v. Dubois*, 142 F.3d 18, 22-24 (1st Cir. 1998) (noting that trial judge and counsel were "like immiscible liquids – they simply could not tolerate each other," and holding that acrimonious exchanges between the two out of the presence of the jury violated right to effective counsel because of deleterious impact on counsel's performance).

Even assuming Chier engaged in conduct with "contemptuous [overtones] though short of personal attack" (*Taylor v. Hayes*, 418 U.S. at 501), or "unseemly conduct," it is plain that Judge Rittenband's life history with Chier had "left personal stings" so deeply felt that the judge was unquestionably the wrong person to decide whether petitioner should lose Chier as an advocate four days before opening statements in a capital case,

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over the pointlessness of litigating an issue for the record in this case after it had been unsuccessfully argued in the earlier trial of petitioner's codefendant. The judge ultimately had to be prevailed upon by *the prosecutor* before he would agree to hear the motion. Finally, as for the passages cited in the Order at page 98(11-12), in terms of the standard of review set in such cases as *Taylor v. Hayes*, the salient fact is that the judge's rebukes of Chier for whispering are occurring in the context of a maelstrom of inappropriate judicial consternation over Chier's filing of motions/writs challenging the judge for bias and misconduct. (*See, e.g.,* RT 4715, 5291, 8138, 8313, 9342, 10606, 13290-91; doc. 191 at 100-03.) That the judge was injudiciously overwrought to the point of irrationality on account of those motions can hardly be gainsaid. Despite abundant record evidence to the contrary, he remarked that every one of Chier's motions was "spurious" and "frivolous." (RT 8138, 9342, 13279.) He called the motions "scurrilous." (RT 13290-91; *compare* doc. 191 at 100-03 (discussing merits of Chier's legal work). The Order's description of the in-court interactions between Judge Rittenband and Chier is highly misleading and should be amended. It is *not* a fair or accurate description of what took place in that courtroom.

for a stated reason upon which he refused to hear argument or take evidence. (*See Mayberry v. Pennsylvania,* 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); Claim 3-1 (judge refuses hearing: RT 6008(20-25), 6022(14-17), 10600(10-15), 10606(12-15).)

The paramount concern in Claim 2-1, which is about the judge's failure to recuse himself, and which is subject to the *per se* standard of reversal, is:

> not only whether there was actual bias [on the judge's part], but [ ] whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the Court and the interests of the accused.'

Taylor v. Hayes, 418 U.S. at 501. The necessity of reversing for circumstances that evince "an appearance of bias" is said to be a "stringent rule." *In re Murchison,* 349 U.S. 133, 153, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Moreover, due process in this sense is deemed violated by any procedure which would offer a possible temptation to the average man to allow his decisions to be colored by bias. *McGautha v. California,* 402 U.S. 183, 265-66, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), *overruled on other grounds in Crampton v. Ohio*, 408 U.S. 941 (1972); *see also Jones v. Luebbers*, 359 F.3d 1005, 1013 (8th Cir. 2004) (noting that standard requires reviewing court to posit that judge at issue has psychological frailties of average human being).

Further, claims like 2-1 are adjudicated with a presumption in mind. "[W]hen the trial judge is discovered to have some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume the process was impaired." *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1987). This presumption was expatiated upon in *Berger v. United States,* 255 U.S. 23, 36, 41 S.Ct. 230, 65 L.Ed. 481 (1920):

> The remedy by appeal is inadequate [when a judge who should have recused himself fails to]. It comes after the trial, and if prejudice exists, it has worked it evil, and a judgment of it in

> a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a predisposition of a mind in which there is a personal ingredient.

Id. at 36.

The injustice, if not folly, of parsing a record created by an experienced judge for a frank admission that he is basing particular decisions on a personal bias is one reason why the *per se* standard is applied to claims like 2-1. *See, e.g., Sims v. Rowland,* 414 F.3d 1148, 1153 (9th Cir. 2005) (affirming that *per se* standard applies to claims of judicial bias); *accord*, *Summerlin v. Stewart*, 267 F.3d 926, 955 (9th Cir. 2001); *Harrison v. McBride*, 428 F.3d 652, 659 (7th Cir. 2005).

Although the Order cites instances during *Hovey* juror voir dire in which Judge Rittenband rebuked Chier (Order at 34-35), the presumption (*id.* at 34(11)) obviously assigned in favor of believing that the judge's flashes of irritation with Chier were truly reactions to such peccadilloes as "repetitive" questioning (*id.* at 34(8)), or laughing in court (*id.* at 98(5)), is inconsistent with the aforecited Supreme Court authority. Moreover, it does not withstand rational scrutiny. The record is replete with evidence that the judge *actually* thought Barens was a buffoon (*see* doc. 6, Ex. G (RT excerpts overwhelmingly proving that this was so), but he never insulted Barens' professionalism because to do so would have been to reveal the fraudulence of the order silencing Chier. Any objective reading of the record proves this is so.

The due process violations arising from the trial judge's failure to recuse himself, choosing instead to limit Chier's role to suit his spleen, has always been the essence of Claim 2-1. (*See* doc. 25 at 1(1-4), 3(3-13), 8(6-19), 9(19) – 11(13), 17(14) – 23(13) & n.9; doc. 190 at 35(25) – 38(23); doc. 191 at 82-119; doc. 248 at 2(5-13) (citing *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), and *Mayberry*), 6(17) – 8(10), 23(8-11); *cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) ("The Question presented is whether the Due Process

Clause of the 14th Amendment was violated when a justice of the Alabama Supreme Court declined to recuse himself ….”); *Nakell v. Att’y Gen’l of North Carolina*, 15 F.3d 319, 325 (4th Cir. 1994) (due process not violated when judge continued to hear case after holding defendant in contempt because judge did not become embroiled in personal controversy with defendant); *Marshall v. Jerricao Inco,* 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in … criminal cases.”)

So then, did “personal stings” “so embroil [Judge Rittenband] in controversy” with Chier that he silenced Chier out of wrath, or to make good the threat of reputational retribution he had made to Chier in 1983? *Of course* they did, as amply proven by evidence found both in and outside of the record on appeal, and the Order’s findings should be amended to reflect that fact.

Mr. Wager averred that Judge Rittenband told him during trial that “he was irritated by the presence of Mr. Chier ... and that he had arranged things so that Mr. Chier would keep his mouth shut during the proceedings.” (Doc. 10, Ex. 106.) Given that Mr. Wager is a former prosecutor and was a close personal friend of the judge (*id.*), this direct admission is the best evidence of extrajudicial source bias imaginable. By light of the Due Process Clause and the Sixth Amendment, the judge’s “irritat[ion]” with Chier should have played no role in the decision to limit his role. It is noteworthy that the judge in his personal conversation did not justify his ruling in terms of his solicitude for the quality of petitioner’s representation, as he made a consistent showing of doing when he was on the record. (*See* doc. 191 at 89(22) – 90(5), 167(1-9).) Given that the judge, obviously, knew that he loathed Chier for reasons that predated the trial (doc. 10, Ex. 106), his failure to disclose that enmity and its roots, and to recuse himself, was misconduct. *See* Cal. Code of Judicial Ethics, Canon 3(E):

> (1) A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.
>
> (2) In all trial court proceedings, a judge shall disclose on

> the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.

With respect to the record evidence of bias against Chier, a description of it can be found at document 3, pages 38 to 56. (*See also* doc. 191 at 82-109.) Therein, this Court will find evidence that Judge Rittenband repeatedly lambasted Chier for asking precisely the same *Hovey* voir dire questions that passed without comment when asked by both Barens and the prosecutor. Moreover, the precise questions Chier asked have been specifically upheld as proper by the California Supreme Court. *See People v. Cash,* 28 Cal.4th 703, 720, 122 Cal.Rptr.2d 545 (2002) (citing cases); *compare* doc. 191 at 89-98; doc. 3 at 38-56; *see especially* doc. 191 at 99(11-17) (citing instances where Chier "conditionally" passed for cause, after the judge made erroneous rulings on the scope of questioning).

The unrebutted analysis petitioner has provided demonstrating that the trial judge's substantive criticism of Chier's voir dire questions was pretextual, and a crudely designed cover for his seething hatred (doc. 191 at 89-99), is bolstered by a large body of evidence proving other, demonstrably pretextual, attacks on Chier (*see, e.g.,* doc. 191 at 99-110). In the context of claims of racial discrimination via peremptory challenges, the Supreme Court has developed a rigorous methodology for exposing pretextual justifications.[5] That methodology is instructive herein.

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[5] *See, e.g., Williams v. Runnels,* 432 F.3d 1102, 1108 (9th Cir. 2006) ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."); *Miller-El v. Cockrell,* 537 U.S. 322, 331-32, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (performing "comparative analysis" along the lines of what petitioner supplied at doc. 191 at 89-99); *Miller-El v. Dretke,* 545 U.S. 231, 246, 125 S.Ct. 1327, 162 L.Ed.2d 196 (2005) ("More powerful than these bar statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."); *id.* at 248 (fact that reason given for objecting to one juror "also applied to … other

Once one has taken cognizance of the 157 occasions upon which Judge Rittenband expressed contempt for Barens' trial tactics and skills (*see* doc. 6, Ex. G), one becomes persuaded that the judge's praise of Barens (*see id.,* Ex. H (excerpts of all instances in which the judge praised Barens)) was pretextual, *i.e.*, a counter-factual cover story manufactured to insulate his decision to silence Chier from criticism on appeal. (*See* doc. 191 at 108-110(10-14); *see also id.* at 103(4) – 106(6) (Barens' knowledge of applicable law greatly limited).)

Second, though there are several examples of Chier's being indignant with the judge, there are literally scores of heretofore unacknowledged outbursts where the judge slandered Chier's professional standing and leveled personal attacks against his character and manhood that were far beyond all bounds of propriety. (*See* doc. 191 at 84(17) – 89.) Some were even framed in scatological terms. (*See, e.g.*, RT 15215 ("shove it"), RT 13169 ("go in the bathroom; that is appropriate [for you]"].) Some suggest that the judge was so overwrought that he wanted to see Chier come to personal harm. (Doc. 191 at 84; RT 13245 (judge's stating he would "like to" eject Chier "forcibly"); RT 10333-34 (telling bailiff to "take him by the back of the neck if you have to"); *cf. Offutt v. United States,* 348 U.S. at 16 n.2 (citing trial judge's statement to counsel, "If you say another word I will have the Marshal stick a gag in your mouth" as evidence that judge was embroiled to the point of bias).)

In the words of the LAC habeas court, the judge was "often caustic, overly involved in the questioning of witnesses, and at times extremely hostile to" Chier. (Doc. 5, Ex. B at 34(20-26); *cf. Offut*, 348 U.S. at 16-17 (approving of the description of the lower court which spoke of "the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at

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panel members, most of them white, none of them struck, is evidence of pretext"). Similarly, that Judge Rittenband continually belittled and berated Chier for not knowing how to conduct voir dire, telling him the questions he asked were substantively all wrong, is evidence of bias and pretext because the same questions went without judicial remonstration when posed by Barens and the prosecutor. (*See* doc. 191 at 89-99.)

times hostility, though under provocation," which "demonstrated a bias and lack of impartiality").

It is through the lens of opinions such as *Taylor v. Hayes, Offutt, In re Murchison, Liteky, and Mayberry* that the Order should have viewed such remarks from Judge Rittenband as: "I don't want him in this courtroom"; "[it] would be better even if we can get him out of here"; "this is why I told you [Barens] I didn't want this man on this case didn't I?"; "I think he is a discredit to the profession"; "I don't want to subject you [Barens] to any more of this abuse from this so-called lawyer"; "I am talking about that alleged lawyer"; "I don't recognize him as a lawyer in this case"; "big mouth"; "shut up you miserable [unintelligible]"; "unscrupulous"; "sleazy"; "junior miss"; "you are not a lawyer"; "this lawyer, so-called"; and "shove it." (*See* doc. 191 at 83-90 (providing RT cites]; *compare Ungar v. Sarafite,* 376 U.S. 575, 587-88, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964) (holding due process did not require reversal for failure of trial judge to recuse himself on grounds of personal bias against an attorney because "[n]either in the courtroom nor in the privacy of chambers did the judge become embroiled in intemperate wrangling with Petitioner"); *id.* at 586 ("The judge dealt firmly with Ungar, but without animosity, and Petitioner's final intemperate outburst provoked no emotional reflex in the judge.").

Third, there is a substantial body of evidence demonstrating that Judge Rittenband almost ceaselessly attempted to manufacture some pretextual basis to hold Chier in contempt. (*See, generally*, doc. 191 at 99-110 (providing examples).) For example, he repeatedly railed against Chier for failing to attach the entire 27-page transcript of the 1/29/87 "Clarification" hearing (doc. 6, Ex. N (RT 6000-26)) as an exhibit to the petition Chier filed with the California Supreme Court challenging the order silencing him. The judge waxed hyperbolic as to the deceitfulness of that omission. Chier, however, had attached a ten-page excerpt, which was as much as the Supreme Court's rules then allowed for an exhibit, and notified that court that the entire transcript was available with the record sent up from the Court of Appeal on the matter. (*See* doc. 191 at 106-08

(evidence and citations).) Thus, Chier's compliance with the rule limiting an exhibit to no more than ten pages was met with fiery judicial polemics that were wholly unfounded; hence, either evidence of a pretextual gambit, or that the judge was overwrought, so personally embroiled as to see everything Chier did through a warped lens of congealed malice. (Doc. 191 at 99-110.)

Fourth, the judge's malevolence was manifested in words that were several orders of magnitude more intemperate than those which Chier chose. As proven, the judge *insulted* Chier personally and professionally, again and again. These humiliating insults were often made in open court, *i.e.,* in the presence of the press at this high profile trial. (Doc. 5, Ex. A at 177-81.) Although Chier expressed indignation over the judge's attempts to "see justice done" by assuming the mantle of a second, and decidedly more hawkish, prosecutor, and for the insults leveled at Chier, it was Chier's right to do so. (*See* doc. 191 at 100(15) – 103(3).) The judge really *was* biased against him and really *did* act as a second prosecutor at trial. (*See* doc 118 at 2-81.)

California Code of Judicial Ethics, Canon 3(B), states:

> (4) A judge shall be patient, dignified, and courteous to … lawyers … with whom the judge deals in an official capacity ….
>
> (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as bias or prejudice, including but not limited to bias or prejudice based upon race, sex, … [or] sexual orientation …"

Amended findings should compare that standard to RT 11760 ("Have you ever tried to shut up a woman when she is in the mood") – a remark made to the jury in reference to Brooke Roberts, an alibi witness. (*See also* doc. 191 at 152(28) –153(17); doc. 5, Ex. A at 65 (state appellate court's remarking that judge committed misconduct

in his gender and sexual orientation stereotyping); *Gonzalez v. Comm. on Judicial Performance,* 33 Cal.3d 359 (censuring judge for similar remarks); doc. 7 at 567-70 (recounting judge's gay-stereotype outbursts).)

Yet, despite all that he had heard, not once did Chier tell Judge Rittenband that *he* was a discredit to *his* profession, or that other judges were "ten times" the judicial officer he was; nor did he call the judge "junior miss," or tell him to "shove it," let alone muse on the delight he would feel if he could see the judge come to violence. That degree of malevolent expression was the exclusive domain of the trial judge.

There are many parallels between the circumstances in this case and those of *Taylor v. Hayes*, 418 U.S. 458. As in the case at bar, the judge there demeaned the lawyer's professional standing and threatened him with contempt. (*See* doc. 191 at 88(23-27), 99-110, 163-66 (the judge baselessly threatened Chier with contempt 11 times); *cf. Wenger v. Comm. on Judicial Performance,* 29 Cal.3d 615, 175 Cal.Rptr. 420 (1981) (censuring judge, in part, for raising unfounded threats of contempt), *disapproved on other grounds by Doan v. Commission on Judicial Performance*, 11 Cal.4th 294 (1995); *Ketscher v. Superior Court*, 9 Cal.App.3d 601, 88 Cal.Rptr. 357 (1970) (an indirect contempt finding may not be based upon an oral ruling of the court); *In re Blaze,* 271 Cal.App.2d 210, 76 Cal.Rptr. 551 (1969) (contempt based on violation of a court order is invalid unless the underlying order is itself valid).

While the *Taylor v. Hayes* Court "assumed for the purpose of this case that each of the charged acts [by the attorney] was contemptuous" (*id.* at 502), it, *nonetheless,* found due process required the judge to recuse himself, rather than to adjudicate the contempt charges against Taylor (*id.* at 503). *Cf. Offutt*, 348 U.S. at 13 ("Defense attorney's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other."). Again, the extensive line of Supreme Court authority of which *Taylor* is a part is on point because petitioner alleges in Claim 2-1 that the Due Process Clause and his right to control retained counsel was violated by

the judge's failure to recuse himself rather than to rule on Chier's participation in the case.

Nor, in assessing who provoked whom, can it be ignored that, on the *undisputed facts* before this Court, Chier held the highest ranking possible for competence and professionalism, was a certified criminal law specialist, and had never been cited for contempt by any judge over the course of a multi-decade career. (*See* doc. 191 at 100-01 (citations to these record and extra-record facts).) Indeed, Chier's uneventful participation in the penalty phase belies the judge's stated reason for sidelining Chier in the guilt phase, *i.e.*, that there was something inherently prejudicial to petitioner's cause in Chier's style of advocacy.[6]

In terms of the standard set by such cases *as Offutt, Taylor, Mayberry, etc*., the multitude of instances in which Judge Rittenband was patently overmastered by a spontaneous upwelling of wrath towards Chier should be dispositive. This Court should amend its findings to acknowledge those instances, and assess them. As it stands, there is not one such instance mentioned in the Order.[7]

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[6] The Order twice referred to Chier's limited role in the penalty phase as evidence that Chier was not primary or essential in the guilt phase. (Order at 31(12-15), 97(22-26).) That inference is faulty. Unless Barens misled the court throughout the trial, Chier's planned role in the guilt phase was, substantively, that of lead counsel. (*See* doc. 191 at 69(12) – 70.)

[7] And the list seems to go on endlessly. (*See, e.g.,* RT 4715 (judge's telling Chier during a motion hearing "to shut up," then explaining his order with, "he made it a point to go up to the Court of Appeal"); RT 5291(taunting Chier during motion hearing, "take it up to the Court of Appeal"); RT 8138 (taunting Chier after denying one of his motions, "make another motion now"). Another example is when the judge flew into a rage and ordered his clerk to literally throw in the trash a judicial misconduct motion filed by Chier. (See doc. 191 at 109(9-13) & doc. 6, Ex. J (settled statement regarding judge's order to trash motion); *cf. Fletcher v. Commission on Judicial Performance,* 19 Cal.4th 865, 905-06, 81 Cal.Rptr.2d 58 (1998) (improper for judge to react malevolently to recusal motions critical of him). Next, like the judge who presided over the trial reversed on ground of bias in *Harrison v. McBride,* 428 F.3d 652 (7th Cir. 2005), who "refused to compensate" counsel for the defense for the recusal and judicial misconduct

Moreover, the Order contains manifest error, justifying the amendment of its ruling on Claim 2 as a whole, in placing reliance on the 1993 opinion of the state appellate court. Petitioner's reply to respondent's answer cautioned against such action (doc. 248 at 23(18-22)), explaining that that court had decided a purely trial-record-based precursor to some aspects of that claim under California's miscarriage-of-justice standard, to which it adverted no less than four times. (Doc. 5, Ex. A at 182, 185(¶ 2), 186(¶ 1), 187(¶ 3).) That was not the applicable standard. Judicial misconduct like prosecutorial misconduct can be subject to the catch-all-else standard of "fundamental fairness" (Order at 93(2-21)), but when the evidence of judicial misconduct is offered to support an inference of bias, justifying recusal, or demonstrative of an abandonment of

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motions he filed, characterizing all the motions as "completely false and meritless … [and filed] for the sole purpose of delaying this trial" (*id.* at 665), Judge Rittenband expressed precisely those sentiments, though with far greater frequency, in the record of petitioner's trial. (*See* doc. 191 at 100(15) – 103(3), 108-110(7), 163-166(4).) There is a "settled statement (doc. 6, Ex. J) proving that the judge ordered one motion critical of him trashed, which makes extremely troubling the fact that another such motion disappeared later in the trial under circumstances supporting a strong inference that the judge intercepted and trashed it as well (doc. 191 at 108(4)–110(7)). Even more disturbing is the fact that the judge found cause to eject Chier from the mid-deliberations hearing about Robinson coming forward with an eyewitness account that Levin was alive (RT 13245-46), no more than a couple of minutes after the judge characterized an "omnibus" judicial misconduct motion as an attempt to circumvent the gag order, and vowed "to deal with you [Chier] at a later time" (RT 13241(22)). The temporal connection between those two events certainly does not comport with the "appearance of justice." The harm to petitioner was grievous. Barens was driven by a conflict regarding sightings witnesses (Claim 1-1.23) and admitted he was leery for personal reasons of associating with anyone like Robinson who claimed to have seen Levin, while Chier asserted that, had it been up to him, Robinson would have been called as a guilt-phase witness. (RT 13265(1-6); *see generally* doc. 191 at 26(10) – 30(24) (Barens' conflict as demonstrated in the hearing from which Chier was ejected); doc. 11, Ex. 163 (Chier's declaring that he would have called Robinson).) Finally, the facts that the judge almost ceaselessly threatened Chier with contempt and ejected him on four occasions from the courtroom, while never actually bringing contempt charges, is yet more evidence supporting the lone reasonable inference, that bias overmastered the judge's judicial instincts. (*See* doc. 191 at 88(21-27), 106-110(7), 163-165(11).)

the judicial role, it is the *per se* standard of reversal which governs the claim. *See Sims v. Rowland,* 414 F.3d at 1153; *Summerlin v. Stewart*, 267 F.3d at 955; *Harrison v. McBride*, 428 F.3d at 659. Moreover, the assignment of a "presumption of integrity" to the proceedings (Order at 92(9)) is inconsistent with the law governing extra-judicial source bias claims and claims alleging that a judge should have recused himself, as has been explained, *supra*. The presumption actually runs *counter* to the state once a *prima facie* showing of extrajudicial taint has been made. *See*, *e.g., Vasquez v. Hillery*, 474 U.S. at 263.

Manifest error also appears in the Order where it made Chier's failure to "identify any extrajudicial source of bias on the part of Judge Rittenband when he filed a motion to disqualify [the judge] in December of 1986" part of the *ratio decidendi* justifying denial of Claim 2-1. (Order at 96(2-15).) Petitioner's claim is not one of ineffective counsel for failing to raise the issue of the judge's preexisting hatred of Chier. It is, rather, a Fourteenth Amendment Due Process Clause claim based on the judge's failure to recuse himself for having such a high degree of pre-existing antagonism against Chier as to make fair judgment impossible, and for acting on that bias and silencing Chier.

Finally, the Order miscasts petitioner's prejudice theory for Claim 2-1. It is not merely, as the Order posited (at 99(6-12)), that the judge's bias against Chier directly affected the jury, but that due process was violated by circumstances in which a judge, who confessed to a bitter hatred against a lawyer that arose independently of the trial in question, silenced that lawyer four days before opening statement in a complex death-penalty trial, in a way that enmeshed the lawyer's co-counsel in a blatant conflict-of-interest, for a stated reason which does not withstand scrutiny, and upon which the judge refused to take evidence or hear argument. That the decision was made in an unreported chambers conference, and with no apparent consideration of, or inquiry concerning, the planned role that the silenced lawyer was to have during the imminent trial, and with no

written order to document that event[8] – again in a death-penalty trial – are circumstances that reveal the *mala fide* basis of the action.

The Order contains an impossible finding: "The record conclusively shows that Judge Rittenband's opinions and remarks were derived from facts introduced, or events occurring in the course of Petitioner's criminal proceedings; therefore, they cannot form the basis for a finding of bias or prejudice from an extrajudicial source." (Order at 98.) That finding is manifestly erroneous because a person's stated justifications for his conduct can never be "conclusive" proof of his actual motivations. The Order's approach to the legal question at the heart of Claim 2-1 is an inversion of the approach

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[8] Focusing solely on the fact that the "secret deal" ended up being placed on the record (see doc. 6, Ex. O (RT 6000-26)), would cause one to miss how recklessly inappropriate the initial off-the-record, deal-making session between Barens and the judge was. Barens made a futile effort to paint his actions as a pragmatic response to an ultimatum delivered by the judge (*see* doc. 8, Ex. 11-A), but his actions during that period cannot be justified. For, if Barens truly had his client's interests uppermost in his mind, as he claims (*id.*), he would have placed the judge's ultimatum on the record at the earliest opportunity. That, of course, is not what he did. (*See* doc. 10, Ex. 105 at 1-2; doc. 8, Ex. 1-A at 1-2 & Ex. 1-B at 1-2; doc. 191 at 70(18)–71(22).) Moreover, it is obvious from reading RT 6000-26 that Barens did not raise any objection whatsoever to the terms of the deal in the unreported conference during which it was struck. In that passage, the judge clearly conveys his surprise at Barens' change of heart, and at Barens' description of the many disadvantages arising from the deal. The only reasonable inference from that surprise is that Barens had earlier agreed to the deal without reservation, demur, or qualm, and that could only be for one reason – it was financially advantageous to him. That is the only plausible explanation for why Barens, in a death-penalty case, and knowing those facts which he purported to know during the January 29, 1987, hearing on the subject, would have signed his name to such a contract of adhesion, without objection, and without demanding that it be placed on the record. Only avarice could explain why Barens would assent to the judge's terms, but find himself unable to confess what he had done to either Chier or his client. Yet, those are the undisputed facts before this Court. There is nothing from Barens denying his post-revelation confession (*viz.,* "I cannot help myself when it comes to money" – doc. 10, Ex. 105), nor does he dispute that he failed to inform petitioner and Chier after the deal

demanded by the Supreme Court. "When the trial judge is discovered to have some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume the process was impaired." *Vasquez v. Hillery*, 474 U.S. at 263. Thus, the fact that Judge Rittenband often espoused justifications for why he was tormenting Chier proves nothing. "[N]othing can be more elusive of estimate or decision than predisposition of a mind in which there is a personal ingredient." *Berger v. United States,* 255 U.S. at 26.

The trial record did not disprove, conclusively or otherwise, what the judge admitted to his longstanding friend Mr. Wager, nor disprove what Chier asserted in his declaration. In the final analysis, as dictated by the Supreme Court, who was at fault is irrelevant:

> The question with which we are concerned is not the reprehensibility of [the attorney's] conduct and the consequences which he should suffer. Our concern is with the fair administration of justice. The record discloses not the rare flare up, not a show of evanescent irritation – a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the [attorney]. There was an intermittently continuous wrangle on an unedifying level between the two.

Offut v. United States, 348 U.S. at 17.

As to the finding that "[t]he record establishes that Judge Rittenband's order limiting Chier's role was based upon his reasonable concerns about the manner in which Chier was conducting the *Hovey* voir dire" (Order at 98), petitioner has already said a

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was struck. Even if had made such a claim, the motion he filed makes plain that he did not. (*See* doc. 6, Ex. O, a copy of which is attached hereto.)

great deal. It is striking, however, that the Order finds it reasonable for a judge to unilaterally silence one of the two defense attorneys in a capital case, without making any inquiry whatsoever as to that lawyer's planned role in the presentation of the defense case, *with the trial already in progress*. Amended findings should recognize that, even if Chier was abrasive of his questioning of certain jurors, it was done in the context of individual, sequestered, *Hovey* voir dire, where abrasive questioning of death-prone jurors may very well have been a valid tactical approach. (*See* doc. 191 at 98(20)–99(17) (making this point).) Amended findings should not conclude, either explicitly or implicitly, that a trial judge has the discretion to silence a defense attorney right before opening statements, over the objections of his client, on what could have been no more than a guess that jurors probably did not find him to be a likeable chap. Amended findings should not let pass without opprobrium the trial judge's finding that petitioner would better be served if Barens represented him, citing the mountain of evidence establishing that Barens was a perjurer, a poseur, a scoundrel, a traitor, and a very poor defense attorney indeed.

The extant Order's findings are contrary to the evidence and to the usual presumptions, *viz.*, that jurors will follow their instructions and not make findings based upon passion or prejudice; that intentional tactical decisions of attorneys should not be second-guessed; and that an attorney who had reached the acme of his profession, as Chier had, is being forever taken to be a braying jackass and a "discredit to his profession" for the simple reason that a judge who detested him repeatedly said so.

D. Claim 2-2: Judicial Assumption of the Prosecutorial Function

The Order never once in its 129 pages acknowledges that *anything* – anything whatsoever – was amiss during petitioner's trial, or in Barens' conduct therein, not even his undisputed perjury. (Order at 86.) Indeed, the Order characterized all the Claim 2-2 allegations as "frivolous, … conclusory, misconstruing the record, or … out or context." (*Id.* at 100.) These findings are manifestly wrong, and should be amended forthwith.

In support of Claim 2-2, petitioner offered hundreds of mutually reinforcing facts. (*See* doc. 191 at 120-62; *see also* doc. 118 (memorandum arguing the related facts and the law).) The Order fails to contest all but one (Order at 102(2-3)) of the hundreds of examples of judicial questioning of witnesses that evinced, on the part of the trial judge, an abandonment of the judicial role and the assumption of a dual role as second prosecutor and judge. The *lone* instance of partisan questioning which the Order chose to address – "the court's statement that Brooke Roberts appeared to have been coached" – is dismissed as occurring "out of the jury's presence," and, thus, "not prejudicial to the jury." (Order at 102.) The Order's analysis is not well taken, even in connection to the one example it chooses to openly contest(!)[9] The larger point, however, is that Judge Rittenband broke into the witness examinations of Brooke Roberts some *twenty-three* times, and into the examinations by the parties of the other defense witnesses on *scores* of additional occasions – and always in a way that was unremittingly antagonistic to the defense. (*See* doc. 191 at 34-60.)

Questioning witnesses with the demeanor and method of an "advocate" was the basis of reversal in several cases, including *Lyell v. Renico*, 470 F.3d 1177, 1186-89 (6th Cir. 2006); *United States v. Filani*, 74 F.3d 378 (2d Cir. 1996); *United States v. Tilghman,* 134 F.3d 414 (D.C. Cir. 1998); and *United States v. Saenz,* 134 F.3d 697 (5th Cir. 1998). It is difficult to understand why the very judicial conduct that was seen as so deplorable in those cases was transmogrified in the Order into something "frivolous."

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[9] Petitioner alerted the Court to the fact that, at RT 11527, Barens said, "That is a good comment in front of the jury that the jury heard, immediately after the judge said, "She looks at you as if she has been completely coached." (Doc. 118 at 36-37 (providing the passage).) Neither the judge nor the prosecutor disputed Barens' observation (nor would they as the judge sat just a dozen or so feet from the jury box). Petitioner's reply to respondent's answer cited *Vinci v. United States*, 159 F.2d 777, 779 (D.C. Cir. 1947), for the proposition that a reviewing court must assume an undisputed contemporaneous description in the record is accurate. (Doc. 248 at 24.) The Order's finding the opposite, then, is a manifest error of both fact and law.

In fact, the justification for granting relief in petitioner's case *dwarfs* that of any other case, including the four just cited, not only because of the unmatched pervasiveness of the judge's interference whenever the defense was making any headway, but because petitioner does not merely rely on "the cold black and white of a printed record [as to] how the trial judge's questioning of a witness affected the jury" (*Filani*, 74 F.3d at 386).

Also supporting Claim 2-2, but ignored in the Order, are declarations from trial watchers and participants regarding the trial judge's pervasive non-verbal expressions of scorn for the defense case and for Barens, and the judge's "barely self-contained" delight whenever evidence favoring the prosecution was being received. (*See* doc. 191 at 77-78(17); *see also* doc. 9, Exs. 12-A, 12-C to 12-E (declarations regarding non-verbal misconduct); CT 1373, 1390, 1476, 1708 (Chier's motions describing that behavior); doc. 6, Ex. L (same).) Just like the California judiciary had done, the Order did not address the significant, extra-record evidence backing Claim 2-2. For example, Barens signed a statement declaring:

> On at least six occasions during testimony of defense witnesse[s] Brooke Roberts, Lynne Roberts, Carmen Canchola and Jesus Lopez … the court made facial gestures including smirks, rolling of the eyes, sour faces and other facial expressions strongly suggestive of an attitude of disbelief or incredulity on the court's part toward said witnesses' testimony.

(Doc. 9, Ex. 12-B at ¶ 12.)

Barens' declaration contains much more of the same, as do the other sworn statements offered in support of the Claim. All of that behavior was misconduct. *See* Cal. Code of Judicial Ethics, Canon 3(B)(5). In light of that unacknowledged showing, the finding that petitioner's Claim 2-2 allegations are "frivolous" and "conclusory" should be re-examined and amended.

"Additional findings" are also appropriate. It is unfair for the Order to dismiss Claim 2-2 as "frivolous" and "conclusory" when such findings are backed only by a medley of cherry-picked tidbits taken "out of context." After the verdict, observers who watched the trial, with no ties to petitioner, wrote letters of protest, which became part of the record through the efforts of Chier. (*See* doc. 7 at 592; doc. 191 at 162; CT 1719-22 (the letters).) This is what those individuals said:

> This is America and what I've seen is not fair …. Why did the judge appoint himself prosecutor and jury?

(CT 1720, from Maria Orosco.)

> I have never seen such outrageous behavior displayed in a courtroom before. I watched in horror as Joe Hunt was stripped of his rights to a fair and impartial trial.

(CT 1721, from Bruce Williams.)

> I watched in horror as Judge Rittenband continuously insulted and humiliated the defense attorneys … Judge Rittenband had referred to Ron Levin as the deceased? … Obviously he has made up his mind that Joe Hunt is guilty.

(CT 1722, from Julianna A. Saford.)

> I was really shocked by the behavior of the judge … the judge rolled his eyes, scowled or gave the courtroom a look of "come on now, you really don't expect the court to really believe what you're saying."

(CT 1719, from Zinika Mundo.)

The authors of those letters saw the trial. This Court did not "see" it at all. The trial transcripts are, of course, completely devoid of intonation and non-verbal signals, and it is impossible to gauge from them whether the trial judge's words – as, for example, when he corrected his remarks terming Levin the "deceased" or describing the case as about a "murder" – conveyed the retraction of inadvertent slips of the tongue, or,

instead, were saturated with sarcasm. If the declarations are to be believed, and they stand unrebutted, it was the latter. Thus, it is erroneous for the Order to describe the evidence supporting Claim 2-2 as "frivolous," "conclusory, misconstruing the record, or … out of context." (Order at 100.) Those individuals who wrote the above-quoted letters, who had no personal stake in the matter, did not believe the facts underlying the allegations girding Claim 2-2, which they had personally observed, were "frivolous." They, rather, were shocked and saddened by what they *saw*. Thousands of cases have been reversed for errors amounting to a small fraction of what occurred in petitioner's.

In *Lyell v. Rencio,* 470 F.3d 1177, it was held that the trial judge "made a fair trial impossible" by "sua sponte interrupting the prosecution to assist it, sua sponte interrupting defense counsel's questioning in a way that undermined his presentation of the case (frequently during the cross-examination of the central witness in the case), failing to interrupt in a like manner during the prosecution's questioning (at least in a way that undermined its case), stat[ing] or imply[ing] her disapproval of [the defense] theory …, making clear her disapproval of defense counsel … [and] issu[ing] a contempt order against Lyell's counsel in front of the jury." The reversal granted in *Lyell*, on a more modest showing in each of the above-described categories, should alone demonstrate that there is nothing "frivolous" about Claim 2-2.

Perhaps the main fault lay in the Order's unstated assumption that the human beings on the jury were incapable of discerning affiliation and intent from the mountain of direct and indirect clues the judge gave them, including the non-verbal ones. It is simply not responsive to Claim 2-2 to point to a dozen instances where the two-dimensional paper record reflects the judge's retracting biased comments, or at one point chiding the prosecutor for asking a repetitive question, or instructing the jury that he did not mean to imply anything whatsoever at any point during the trial. *See Quercia v. United States,* 289 U.S. 466, 472, 53 S.Ct. 698, 77 L.Ed. 1321 (1933) (holding jury instruction that trial judge's "opinion of the evidence was not binding on the jury" and that jurors should vote as they please, did not cure the prejudice of judge's biased

intervention in the case). It is the effect of *the entire course of conduct* which either demonstrates that a jury would reasonably perceive the judge to advocate conviction, or not.

The proper resolution of Claim 2-2 also lies in the rule prohibiting a judge from "adding" to the evidence against a defendant. (*See* doc. 191 at 150(11)–152(20) (referring to a newspaper article as showing an alibi witness was lying); *see also* RT 11781-83 (judge's introducing his own evidence to impeach the other alibi witnesses); RT 6831 (judge's prefacing a question to a witness by saying, "It has been established in this case that [Levin] … had no money of his own" – doc. 118 at 4 & n. 1); RT 11366(16-20) (judge's eliciting facts regarding the death of Hedayat Eslaminia beyond the scope of direct and cross, and, indeed, beyond the scope set by the court's own ruling thereon – *see* doc. 191 at 141(19)-142(23), 167(10-28); doc. 7 at 578-80, 597-602 (presenting the issue); RT 10164-70 (judge's converting prosecution witness Eisenberg into expert on contracts (like the one between petitioner and Microgenesis), then seeking to elicit inculpatory opinions from him, though this area was not explored by the parties – *see* doc. 191 at 139 n.5; doc. 118 at 25-27(13); *cf. Quercia*, 289 U.S. at 470-71 ("In commenting upon testimony [the judge] may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it."); *Smolniakova v. Gonzales,* 422 F.3d 1037, 1054 (9th Cir. 2005) (holding immigration judge had evinced prejudicial bias by acting "as a prosecutor anxious to pick holes in the Petitioner's story").)

As the Supreme Court has remarked in many different cases and contexts:

> It is obvious that under any system of jury trial the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.

Quercia, 289 U.S. at 470 (quoting *Starr v. United States*, 153 U.S. 614, 626, 14 S.Ct. 919, 923, 38 L.Ed. 841 (1894); *Hickory v. United States,* 160 U.S. 408, 421-23, 16 S.Ct.

327, 40 L.Ed. 474 (1896) ("great care should be exercised" by a judge not to "mislead" or "be one-sided")).

The simple fact is, "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Turner v. Louisiana,* 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) (citations and internal quotation marks omitted). By failing to consider the trial record on what is a *bias* claim, not a judicial misconduct claim, the Order manifestly erred. The Order amplified that error by failing to consider the evidence outside the trial record regarding the trial judge's non-verbal behavior, thereby failing to take into account the "environing atmosphere." By confining its analysis to a rebuttal of such instances as petitioner cited to show that the judge made statements consistent with prejudgment, and failing to consider the inferences reasonable jurors would naturally and ineluctably draw from the hundreds of pro-prosecution interventions during the testimony of witnesses, the extant Order failed to adjudicate the gravamen of Claim 2-2. By factoring in a presumption regarding the regularity of the proceedings, when Supreme Court doctrine contrarily requires a recognition that the "lightest word or intimation" of a judge "may prove controlling," the Order reasoned within the wrong analytical framework.

Finally, this Court should reconsider the propriety *vel non* of declaring "frivolous" and "conclusory" a claim so richly supported by indicia of abandonment of the judicial role, and therefore of prejudice. Petitioner refers not just to the declarations of non-verbal partisanship,[10] not just to the unusual confirmation of a communicated

[10] The Order rejected the trial judge's *sua sponte* distribution of the "to do" list as evincing prosecutorial zeal. Relying on the state appellate court's 1993 opinion, it reasoned that, since California law did not prohibit each juror from possessing a copy nor allowing it to be the only exhibit retained by the jury throughout the trial, the incident did not support an inference of bias, or an inference regarding the transmission thereof. (Order at 100.) The Order, however, has embraced a *non sequitur*. It is not the event *per se* that support those inferences, it is the fact that *the judge* – not the prosecutor – instigated it. The prosecutor initially protested the judge's scheme by pointing out that he had blown the lists up to poster size. (RT 7927; CT 1428.) Moreover, the Order and

partisanship available through the letters written by common citizens who attended the trial; not just to the Supreme Court's views on the "controlling" weight jurors give to the "slightest intimation" of a judge; and not just to the inescapable and unacknowledged fact that not one of the judge's interventions with a witness was to establish a fact favorable to the defense. Petitioner refers to the following as well:

> 1. In a trial that Judge Rittenband did not preside over, actual jurors found petitioner's alibi witness (Lynne Roberts) and the Arizona-sighting witnesses (Canchola and Lopez) highly credible (*see* doc. 191 at 151(15-25), 153(21)–154(2) (excerpts from San Mateo juror declarations));
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> 2. Jim Pittman (petitioner's codefendant) received an 11 to 1 jury division in favor of conviction when his case was tried in front of Judge Rittenband, but an 8 to 4 vote to acquit (doc. 11, Ex. 156 at ¶ 41) when his case was tried in 1988 before a different judge (*cf. Johnson v. Baldwin,* 114 F.3d 835, 840 (9th Cir. 1997) (relying on outcome of codefendant's trial in IAC prejudice analysis, citing similar cases));
>
> 3. The case was very close on the issue of *corpus delicti* (*see* Section I, *supra*), a topic upon which the judge's interventions were particularly prejudicial (*see* doc. 7 at 656(26)-657(22));

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the state appellate court decision upon which it was based fail to reach the core of the sub-claim because neither read the record in light of the account of the non-verbal behavior of the judge, as documented by extra-record evidence. (*See* doc. 191 at 156(27)–157(5) (quoting that evidence).) Neither does the Order or the state appellate court decision take due cognizance of the judge's decision to renege on his pledge to retrieve the lists from the jurors, a decision which came in the context of a veritable maelstrom of judicial outrage over a judicial bias mistrial motion filed by Chier. (*Id.* at 156-57.) Thus, the state law question upon which the Order's analysis turned should not have been deemed dispositive. Quite the contrary.

4. Even with Barens' treachery and dereliction, the silencing of Chier, and the judge's prosecutorial zeal, the jury deliberated for about 25 hours over a 7-day period, which included a weekend (*cf. Parker v. Gladden,* 385 U.S. 363, 365, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (finding 26-hour deliberation in a homicide establishes case was close); *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980) (observing, in the context of four-month trial, "it doesn't seem possible that the jury would have deliberated nine hours over several days if the jury did not have serious questions as to the credibility of the eyewitnesses"]; *Lawson v. Borg*, 60 F.3d 608, 612-13 (9th Cir. 1995) (five-day deliberation shows evidence of guilt was not overwhelming)); and

5. The chilling effect the judicial temperament had on defense-camp thinking about whether petitioner should testify.[11]

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[11] The Order (at 102) flatly rejected this theory of prejudice, seemingly on the ground that it was clearly not the *only* reason. Petitioner, however, never alleged otherwise. His contention, rather, was that it was an important factor among several. (*See* doc. 191 at 162(8-11) (judge's bias as a factor); 111(20)–112(14) (judge's decision to silence Chier a factor); 73(28)–74 (Barens unprepared to assume Chier's role taking petitioner on direct-examination).) All of the factors in that complex decision come back to the trial judge. Moreover, it hardly stretches credulity to suggest that the judicial rampage during the testimony of the four defense witnesses had a chilling effect. Indeed, it is the lone reasonable inference. *Something* happened late in the trial to derail the plan to have petitioner testify, as Barens was still claiming he would in late March 1987, *i.e.*, at the end of the state's case. (*See* RT 11423-28; RT 13320(15-26), 13326-29, 13335(22)–13336(19) (in a post-verdict hearing, petitioner tells the judge that his conduct affected the decision not to testify).) As the Supreme Court wrote in *Allison v. United States,* 160 U.S. 203, 207, 16 S.Ct. 252, 40 L.Ed. 395 (1895), "Such a privilege [for the accused to testify in his own defense] would be a vain one if the judge, to whose lightest word the jury properly enough may give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability."

E. Claim 1-3: The "Secret Deal" Conflict of Interest and Judicial Interference With Privately Retained Counsel

In Claim 2-1, petitioner asked whether it mattered in the context of a case like *Taylor v. Hayes, Offutt, In re Murchison*, and *Mayberry v. Pennsylvania*, that the deal silencing Chier coincided with expostulations of outrage from the judge regarding writs and motions filed by Chier challenging the judge for bias and misconduct. (*See, e.g.,* RT 4715, 5291; CT 57.) Claim 1-3 looked at the controversy from a different angle. Here, petitioner raised questions such as these:

Does it matter that his right to manage the roles of the previously retained team of Chier and Barens was breached without anyone obtaining a knowing and intelligent waiver from him? (*See* doc. 248 at 9(20)–10(28).) Barens and Chier received $50,000 in consideration for their trial services, including a $30,000 promissory note. By the time that Barens started trying to off-load the cost of Chier onto the public sector, the unpaid balance on that promissory note was down to $7,500. As demonstrated by the facts recited in petitioner's reply to respondent's answer (doc. 248 at 10 n.15), having accepted a third-party's promissory note as consideration, Barens and Chier's recourse was against the maker of the note, a multi-millionaire who had posted $2,000,000 in collateral for petitioner's bond. (*Id.*) Their situation with respect to their client, however, was that their services to him at trial were paid-in-full the moment they accepted that third-party note. Yet, no one seems to have informed petitioner of this fact, not the trial court, and certainly not Barens. Instead, motions in the trial court's file show that Barens prepared a declaration for petitioner to sign in support of Barens' appointment which declared petitioner's indigence, a factor wholly irrelevant since it was not petitioner, but Bobby Roberts, who was beholden to Barens for the balance of his fees. (*Id.*; *see also* doc. 191 at 68; doc. 3 at 104(14)–109(15) (narrating the relevant events with citations to evidence outside the trial record); *see also* RT 13323(27)–3324 (petitioner's telling trial court during a pre-penalty-phase hearing that, though he is indigent, money is available for him to hire new lawyers through friends of his).) Thus,

Barens involved his client in a scheme to defraud the state by means of an artfully drawn but truthful declaration he had petitioner sign, and a declaration of his own (not one from Chier), which was knowingly perjured as well as deceitfully incomplete. It is crucial to recognize that the same pack of Barens-coined lies was used both to justify Chier's appointment and Barens'. Does it not speak volumes about the sort of "representation" that petitioner received at Barens' hands that Barens would use a truthful but spurious declaration of indigency that he had prepared for his client's signature to work a con-scheme on the judiciary, and that it had the effect of passing control over who would speak for petitioner to the trial court? Does it matter that the record contains no indication that, in the course of this fraud on petitioner and the judicial system, petitioner made a knowing and intelligent waiver of the right he had by virtue of having privately retained counsel to decide who would speak for him? *See Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *United States v. Gonzales-Lopez*, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (holding it *per se* reversible error for court to interfere with choices of privately retained counsel); *Faretta v. California*, 422 U.S. 806, 820 & n.27, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (counsel cannot waive right to counsel of choice; only client can); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (waivers of fundamental rights must be knowing and intelligent and courts will indulge "every presumption against waiver"); *Barker v. Wingo*, 407 U.S. 514, 525-26, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1982) (no waiver may be inferred from a silent record); doc. 191 at 70-73; *Lainfiesta v. Artuz*, 25 F.3d 151, 154 (2d Cir. 2001) (finding *per se* reversible error when a trial court intervened to decide which of defendant's two retained attorneys would conduct a specific cross-examination); RT 6008, 6025 (Chier's asking, "Does the client have anything to say about this? Your Honor?" to which Judge Rittenband responds, "No.").)

Moreover, even if the hypothetical is indulged that petitioner was a knowing and willing accomplice in Barens' scheme to off-load his cost of having associated in Chier, it does not avail the state. Petitioner had a right to constitutionally sound representation

under the Sixth Amendment; no waiver can be deemed "knowing and intelligent" in the constitutional sense if it was induced by an attorney who sought it in connection with a scheme to defraud the public exchequer through multiple brazen acts of perjury.

The Order failed to address the above theory, though it was pressed in the reply to respondent's answer. (*See* doc. 248 at 3(6-21), 8(26)–11(22), 12(26)–13(17); *see also* doc. 191 at 1(1-2), 68(26)–72(22), 76(16-24), 162(15-23).) Additional findings are therefore required.

All Barens had to do was refuse the deal, refuse the money to which he had no right, and perform on the fully-paid-for contract he had with his client; had he done so, Chier would not have been silenced. (*See* RT 6015(1-11), 6017(24)–6018(4) at doc. 6, Ex. N (indicating that, if Barens wants to back out, he and Chier will lose county money and their roles will revert to what they were before the deal, *i.e.*, Chier would be able fully participate in the trial).) Notably, the trial court expressly refused to permit petitioner to express his position on what Barens, his privately-retained attorney, should do. This error, and petitioner's absence from the original deal-making session, is the basis for Claim 6. (*See* doc. 248 at 11(2-22); doc. 191 at 70(13-17), 185(4) –187(9).)

The Order includes these statements: "Petitioner failed to show how the conflict caused his counsel's representation to fall below an objective standard of reasonableness" (Order at 31(20-21)), and failed to show that "counsel actively represented competing interests (*id.* at 32(7)); it further opined that "the record [does not] support Petitioner's allegations that a 'secret deal' had ever been made" (*id.* at 33(10-11)). As to the latter conclusion, it appears that the Order contemplated only the deal "done in open court at the 1/29/87 hearing." (*Id.* at (10-16), 87(2).) In connection with Barens' perjury, the Order ruled that petitioner failed to show that it "caused his counsel's representation to fall below an objective standard of reasonableness." (*Id.* at 86(8-9).)

These findings should be amended because they do not reflect the relevant facts, either because of their misplaced reliance on the state appellate court's 1993 decision

(*see* doc. 262), or because of the briefing limitations imposed on the parties (*see* doc. 263), or both.

First, Barens' perjury and related crimes (*see* doc. 248 at 9 n.14) were *inherently* conduct falling "below an objective standard of reasonableness." *Cf. In re Aguilar,* 34 Cal.4th 386, 18 Cal.Rptr.3d 874 (2004) (holding attorney in contempt for breaching duty not to lie to court); *Best v. State Bar of Cal.*, 57 Cal.2d 633, 637, 21 Cal.Rptr. 589 (1962) (ordering disbarment in part based on lies similar to Barens'); Cal. Business and Professions Code § 6068 (unlawful to lie to a court); Cal. Penal Code §§ 118a, 487 (perjury and grand theft statutes, respectively); *etc.*

Second, Barens' failure in the month following the making of the deal to disclose it to either Chier or petitioner went unacknowledged in the Order. (*See* doc. 191 at 70(18)–71.) This, too, is inherently conduct "falling below an objective standard of reasonableness." After all, Barens had unilaterally signed off on a deal that reduced Chier's hourly pay by 30%, deprived his client of Chier's advocacy, while, concomitantly, requiring Barens to assume Chier's planned role as lead advocate during trial (doc. 191 at 69(12)–70(12)), and which Barens later admitted was flatly contrary to the terms of his contract with his client (*see* RT 6005(10)–6006(1), 6013(25)–6014(1), 6014(2)–6015(2), 6016(3-6)) – a client who had paid in full for his services (doc. 248 at 10 n.15; doc. 191 at 68).

The Order should not have found such behavior "objectively reasonable." Barens would later admit that he and Chier had prepared for trial on the assumption that Chier would present the entire defense case, including petitioner's testimony; handle all of the argument on points of law; *and* cross-examine half the state's witnesses. (*See* doc. 191 at 69(12)–70(12).) Barens later conceded that he had not even read the voluminous discovery related to Chier's witnesses and that he was wholly unfamiliar with the witnesses Chier planned to call in the defense case. (*Id.*) How *could* it have been "objectively unreasonable" to assent to the judge's terms in an (1) unreported conference; (2) in a capital case; and then (3) fail to disclose the game-changing event to

co-counsel and client? Further, how could it be "objectively reasonable" when Barens ultimately confessed that he made the deal, not to benefit the client, but, instead, because "I can't help myself when it comes to money." (Doc. 6, Ex. 105 at 3 (¶ 1).) The idea that Barens had a noble motivation for committing perjury and defrauding the public is risible on its face. Moreover, unrebutted extra-record evidence, as yet unacknowledged in the Order, or by any reviewing court for that matter, vaporizes the notion that Barens was forced to commit perjury and fraud to avoid bankruptcy during the unanticipated demands of the case. Significantly, the idea that he faced bankruptcy if he was not appointed, or even severe financial distress, is something imputed by the state appellate court to him. Actually, however, he only said that the alleged uncollectibility of the supposed $15,000 balance on the contract with his client threatened his "economic ship of state" (CT 17, 43) and could force him to take on other responsibilities during the pendency of the trial. He chose an assertion that was sufficiently ambiguous so as to avoid a direct lie about his financial condition, and for good reason. He was a very wealthy man. (*See* doc. 11, Ex. 156 at ¶ 55.) If respondent had evidence to the contrary, this Court can rightly presume he would have presented it. See *Underwriters Laboratories, Inc. v. N.L.R.B.*, 147 F.3d 1048, 1054 (9th Cir. 1988).

There was a spate of facts offered to the LAC habeas court that provides the proper context from which to evaluate, not only the effusive praise cannily lavished on Barens by the trial judge whenever the decision to silence Chier was implicated (*see* doc. 6, Ex. H (collection of all RT excerpts in which the judge praised Barens)), but also whether Barens really was the traitorous four-flusher that petitioner maintains he was. Two attorneys representing petitioner offered to prove to the LAC habeas court that Barens had admitted committing theft and perjury in connection with the dissolution of a legal partnership, was in Cocaine Anonymous, had been sued at least 15 times for professional negligence, and had a horrendous professional reputation, as would be attested to by four lawyers of preeminent reputation, if that court would just agree to hear their testimony. (*See* doc. 248 at 17(17-28); doc. 7 at 483(4)–487(4) (describing

evidence and citing record); *see also Lambert v. California*, 355 U.S. 225, 227, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (since trial court refused offer of proof, reviewing court must assume truth of proffered facts); *cf. In re Freeman*, 38 Cal.4th 630, 42 Cal.Rptr.3d 850 (2006) (holding that character evidence, including reputational evidence, is highly probative and admissible in connection with the professional negligence inquiry at an evidentiary hearing being held to assess IAC claim).)

Amended findings should also reflect that it has been inescapably proven, without rebuttal, that Barens made up out of whole cloth much of what he swore to post-trial in connection with petitioner's case. (*See* doc. 7 at 452(12)–455(5), 461(2-25), 490-500 (Claim 1-1.18); *see also* doc. 4 at 344(9)–346(18), 346(9)–347(4) (Claim 1-1.6); doc. 4 at 369(18-23), 374-381(13) (Claim 1-1.11); doc. 4 at 392(4)–394(7), 394(26)–396(28) (Claim 1-1.17).)

The finding that petitioner has not demonstrated that Barens' representation was "objectively unreasonable" also stumbles against a small mountain of evidence demonstrating that, through a combination of shiftlessness and callous disregard, *no appreciable investigation occurred until after the prosecution rested*, on March 24, 1987. (*See* doc. 191 at 8(5-20); 69(17-29); *see also* RT 6622, 10070-75, 10478, 11313-19, 13305-06, and CT 1711 (Barens confesses as much in the course of seeking continuances).) That finding also founders against declarations establishing that *all four members of the defense team wanted to quit, and three actually did so*, excepting Chier, who stayed on only because petitioner begged him to do so. (*See* doc. 10, Exs. 107, 109, 110, 111, 105 (¶ 4).) Moreover, all four of these seasoned professionals averred that they never before quit a case out of concerns arising from a lawyer's bizarrely inappropriate orientation to his duties. (*Id.*) Is that not evidence of sufficient quality and relevance that the Order, disposing of an ineffectiveness claim based on failure to investigate, should somehow factor into its analysis? It is error to decide the claim adversely to petitioner in its absence.

Next, Barens' co-counsel at petitioner's preliminary hearing, Lewis Titus, contacted the prosecution out of fear that Barens had acted on a plan to procure fraudulent sighting witnesses, as Barens had hatched such a scheme in Titus' presence. This was an allegation that Barens never actually denied, but Titus swore was true. (*See* doc. 6, Ex. 111; doc. 191 at 18(22)–19(15) (detailing facts).)

The Order asks what was "objectively unreasonable" about Barens' assenting to the deal to silence Chier in exchange for his appointment. The proper answer, which should be reflected in the amended findings sought by the instant motion, is: everything. The Order asks where is the evidence of an "adverse effect" or that Barens "actually represented" competing interests? The proper answer, which, again, should be reflected in an amended Order, is: everywhere. If Barens did not "actively represent competing interests," if he was not burdened with an "actual conflict," if money did not corrupt his professional judgment, then:

1. Why did he perjure himself?
2. Why, in a capital case, did he not immediately insist that the judge's ultimatum (doc. 6, Ex. 11-A) be put on the record?
3. Why couldn't he admit to Chier and his client what he had done?
4. Why, a month after the deal was struck, did he sign and submit a motion professing himself "mystified" and "bewildered" as to the role that the judge planned to allow Chier at trial?[12]
5. Why, given Barens' self-confessed state of unpreparedness to assume Chier's duties, did he not object to the deal when it was first proposed?
6. Why didn't he ask for a continuance for that purpose?

[12] *See* doc. 191 at 70(18)–71(22); *see also* doc. 6, Ex. O (Barens' "Clarification" motion of January 28, 1987 (CT 59-67). Amended findings should take into account the breathtaking duplicity underlying this motion. A copy is attached hereto as Exhibit 1 to facilitate that task.

7. Why didn't he ask to consult with his client before making the deal in light of his later assertions to the effect that the deal was inconsistent with the basic understanding between him and the client?

8. Why didn't he make any of the arguments made on January 29, 1987, when the matter was first proposed?

9. Why, when cornered by Chier, did Barens respond to Chier's demand for an explanation as he did?

10. Why didn't he seek his client's consent since his services at trial were already at the command of his client by means of a private contract?

11. Why, when it became clear that his client was outraged, didn't he confess his perjury and *mala fide* motives as compelled by his ethical and constitutional duties, so that his client, thus fully informed, could assess his legal alternatives to the judge's order silencing Chier? (*See* doc. 248 at 9(20)–11(1) (explaining this theory of prejudice).)

The eleven points made above are the very picture of a lawyer "actually representing competing interests." The account thus given is rife with the very "adverse effects" of an "actual conflict" that is the polestar of the Supreme Court's conflict jurisprudence (and, since the claim is not subject to AEDPA, review by this Court is not limited to Supreme Court precedent, but may turn on circuit-level precedent).

Petitioner was profoundly affected, but he need not prove prejudice under *Strickland* or *Brecht*, because Barens' spree against the canons of professional ethics resulted in the loss of Chier's services (which was an incalculable harm). *See United States v. Gonzales-Lopez*, 548 U.S. at 146; *but see* doc. 191(22)–119 (describing some of the prejudicial ramifications). The *Strickland* standard is also inapplicable because the appointments fraudulently obtained by Barens had the effect of transferring the power

over who would speak for petitioner to the trial court. That petitioner preferred Chier's services to Barens, especially after Barens' perfidy, is proven by the vigor of petitioner's subsequent actions. (*See* doc. 6, Ex. 105 at ¶ 4); doc. 191 at 71(14-19), 76(16-2), 113(10)–114(22), 114(13)-22.)

Furthermore, the trial judge knew, or should have known, that the deal created an "actual conflict" for Barens based upon Barens' duplicitous "Clarification" motion (doc. 6, Ex. O, a copy of which is attached hereto as Ex. 1), and the apparently inconsistent position that Barens took once his client learned of the deal (*see* RT 6000-25). The conflict was inherent in the very terms of the "cash for silence" deal. (*Id.*)

The Order should add findings as to what constitutionally acceptable counsel would have done. Minimally, he would have advised petitioner of available legal alternatives at every stage and consulted with his paid client as to his wishes. He would not have compromised petitioner's rights to control his and Chier's roles without obtaining a knowing and intelligent waiver. He would not have perjured himself to obtain an appointment. He would not have concealed the deal from either Chier or petitioner. He would not have conceded Chier's fees without consulting with Chier. He would not have allowed, in this capital case, such a deal to be made in secret, *i.e.*, in an unreported conference with only the judge present. And, when the deal was revealed, he would have fully informed the client of the various legal strategies to unwind it (*see* doc. 248 at 9(20)–11(1) (describing two such strategies)), including how the client could use Barens' perjury and his private retention of Barens to overturn the deal. (*See id.*; *see also Argersinger v. Hamlin*, 407 U.S. 25, 31, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (explaining why a defendant needs such advice); *Kimmelman v. Morrison*, 477 U.S. 365, 380 n.5, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (defendants require the "guiding hand" of counsel at every step).)

There is no exception to the Sixth Amendment guarantee of effective representation pertaining to defendants who have the misfortune to be represented by crooks. Of course, such counsel has a duty to disclose his criminality. Petitioner did not

lose his right to sound, honest, legal advice the moment Barens began to perjure himself. The Sixth Amendment does not exclude disbarment-grade acts from its ambit.

This whole discussion has turned on extra-record facts that were never disputed or rebutted by respondent. Respondent offered no counter declarations. Thus, the outcome here is compelled in just the same way that the evidentiary omission of the State of California in *Nunes v. Mueller,* 350 F.3d at 1054-56, compelled the order vacating the conviction in that case. All inferences and presumptions run against the party that fails to controvert facts that were within the scope of its power to controvert. Barens obviously made himself available and "useful" to the state throughout the evidentiary hearing. He gave them declarations and participated in a deposition attended by both parties – those things are part of the LAC habeas court record, and are exhibits to the federal petition. Yet, this Court does not have a declaration from Barens contradicting the key facts. What it does have is a copy of Barens' own accounting ledger showing receipt of the payments from friends of petitioner, copies of the cancelled checks and the promissory note involved, *etc*. In light thereof, the Order's findings should be amended to reflect those extra-record facts and to justify the grant of Claim 1-3.

F. Claim 1-1.23: Barens' Sighting Witness Conflict of Interest

The Order asserts reliance on both the state appellate court's 1998 decision and the LAC habeas court's findings. (*See* Order at 62(3-5), 62(6)–65(2), 65(12-15).) In document 262, petitioner showed that was error. This Claim must be reviewed on the merits, and no part of an amended Order's assessment should be based upon the findings of these courts, including their credibility assessments.

Moreover, the extant Order appears to reflect an incorrect assumption. Neither the LAC habeas court nor the state appellate court made any findings regarding the sightings witnesses in the context of the prejudice tests set forth in either *Strickland* or *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). Had those courts applied *Mickens*, they would never have reached the question of the credibility of those witnesses, as the issue would have been irrelevant. The prejudice inquiry under *Mickens*

goes no further than to assess whether a conflict actually affected Barens' conduct. Thus, to satisfy *Mickens*, it would be enough to establish that Barens "actively represented competing interests," *i.e.*, that his behavior with respect to the sightings witnesses reflects the gravitational pull of his own interests.

Petitioner had a Sixth Amendment right to have an *advocate* develop, assess, and deploy the sightings evidence, with zealous attention to promoting petitioner's interests. The Supreme Court through its conflict-of-interest jurisprudence has always held that such a right is insufficiently vindicated by a prejudice standard that requires a defendant to prove that his attorney's conflict affected the outcome. Thus, with respect to the credibility of these witnesses, neither this Court's views nor those of the state courts matters. It is enough that Barens' "sanitary" behavior and disinclination to investigate their reports can be tied directly to the conflict through his own admissions. (*See* doc. 191 at 18-32.)

Since the instant Claim must be reviewed under the *de novo* standard, the question of whether Supreme Court precedent "clearly establishes" that the conflict-of-interest standard articulated in *Culyer v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), specifically applies to a situation in which an attorney's personal interests diverge from his client's, is moot. It is enough that circuit court authority requires an amended Order to so find. *See*, *e.g., Bonin v. Calderon,* 59 F.3d 815, 825 (9th Cir. 1995); *Quintero v. United States*, 33 F.3d 1133, 1135 (9th Cir. 1994); *United States v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991) ("In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition."); *Plumlee v. Masto*, 512 F.3d 1204, 1210 (9th Cir. 2008) (defining a conflict of interest to include "an incompatibility between … the lawyer's own private interest and those of his client").

Next, the Order notes, "A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient." (Order at 65(2-4).) However, the evidence backing the claim is to the effect that Barens did not exercise the sort of tactical or strategic thinking which is presumed reasonable under *Strickland*. *Barens' own admissions* demonstrate that the way the prosecutor, the trial court, the press, and the public viewed him with respect to the Levin-sighting witnesses was uppermost in his mind, or at the very least a factor that adversely affected his representation of petitioner. (*See* doc. 190 at 17-20; doc. 191 at 18-31.) The Order finds that petitioner relies on "speculation and conjecture" to prove this Claim. That finding should be amended precisely because Barens admitted the whole thing.

The requisite "adverse effects" from Barens' "actively representing" his own competing interests are many:

> 1. He adopted what he, himself, described as a "sanitary" protocol for his interactions with the Arizona-sighting witnesses. He described this protocol as one in which he strictly limited his out-of-court interaction with the witnesses to one meeting, the Sunday before they took the stand, at which he further limited himself (as bizarre as it sounds) to asking them *only* those questions which had already been posed to them by the police. That's when Barens, pressed why he was behaving so strangely, referred to the "Titus business."
>
> 2. When the Arizona witnesses were on the stand, he continued to apply his "sanitary" protocol, and *by his own admission* limited himself to asking them, again, only those questions that the police had already put to them.
>
> 3. When, during deliberations, the prosecutor disclosed that another sighting witness (Robbie Robinson) had come forward, Barens declared that he found the report "disconcerting," then

explained that he was averse to investigating the sighting because any contact he had with Robinson would "dignify" him and lead people to gossip about Robinson's interaction with Barens.

4. Barens decided not to call Robinson though Barens had not interviewed him, seen the bulk of the related discovery, deployed an investigator to see if there was any chance of finding independent corroboration, or consulted with Chier or petitioner about the decision.

5. Although Barens was contacted by another sighting witness, Louise Waller, over a week before the guilt-phase verdict, he did not tell Chier about her until the night before the verdict. By the time Chier and the defense investigator (who had been hired in mid-February, and put to work in late March 1987) contacted her, it was too late to do anything except call her has a "lingering doubt" witness in the penalty phase.

6. Barens' behavior also betrays the adverse effect of his preeminent concern for his own interests in relation to sighting witnesses in the way that he ignored and suppressed a letter that was sent to him by the prosecutor on May 4, 1987. The letter described a sighting by Ivan Werner at a night club called "Nippers." Barens never told anyone associated with the defense about the letter; it was not discovered until 1995 when habeas counsel reviewed the prosecutor's files. Barens subsequently admitted having received the letter. Nothing was done to investigate either sighting until 1995, when Werner was interviewed, but it proved to be too late to turn up any leads on the "Nippers" sighting.

7. Barens' behavior also shows the adverse effect of the conflict in relation to the Nadia Ghaleb sighting of Levin. He was told of the witness before petitioner was sentenced, but he neglected to mention it to Chier, petitioner, or the defense investigator.

The net effect of Barens' disloyalty was that Robinson and Waller did not appear as guilt phase witnesses; Werner, Ghaleb, and the Nippers sighting were not raised in the new trial motion along with Waller, who was; and Barens preeminently represented his own interests, not petitioner's, when it came to the preparation and witness examinations related to the Arizona sighting.

If Barens had independently questioned Canchola, he could have developed an aspect of her sighting that would have vastly increased its persuasiveness, *i.e.*, that she recalled seeing a disfiguring mark on the forehead of the man she identified as Levin. Levin had such a mark. The considerable impact of that observation on a fair-minded evaluation of her credibility is shown by the declarations of the San Mateo jurors, who heard petitioner elicit this fact during his "non-sanitary" examination of Canchola. (*See* doc. 248 at 19(18-21) (making this prejudice observation).)

It is simply inaccurate to label the basis of Claim 1-1.23 "speculation" and "conjecture" when the claim is founded on Barens' own confessions regarding his state of mind and the preeminence of that "Titus business" in his thinking. All the citations to extra-record and record evidence backing the above-listed "adverse effects" can be found in document 191 at pages 18 to 32.

In any event, the Order cannot fairly characterize this claim as a "disagreement with counsel's tactical decisions …" The declarations backing the claim prove that Barens did not investigate these sightings, *even though he was presenting a sightings-witness, Levin-is-still-alive, defense*. Moreover, it is simply inaccurate for the Order to postulate that Barens made a *decision* to avoid evidence from people who saw Levin in Los Angeles. (*See* Order at 65(5-9).) Louise Waller, whom the defense called during the penalty phase, claimed to see Levin in Century City, just a couple miles away from

where he once lived. If a strategic decision had indeed been made to avoid evidence of such sightings, she would not have been called. Also, Waller claimed to have seen Levin in March 1987. (RT 14942 *et seq*.) Werner claimed to have seen Levin in Westwood in August 1986. (Doc. 10, Ex. 133.) Robinson claimed to have seen Levin in October 1986. (HT 404-590.) Nadia Ghaleb reported seeing Levin near Westwood in March 1987. (HT 433-511.)

Thus, the Order contains a manifest error of fact when it described these witnesses by saying, "they saw Levin, in Los Angeles, shortly after June 6, 1984 …." (Order at 65(7).) Rather, they all claimed to have seen him at least two years later. In fact, the Waller and Ghaleb sightings both occurred within a couple of miles of each other, and both in March of 1987, so those sightings are mutually reinforcing. *Cf. Lord v. Wood*, 184 F.3d 1083, 1094 (9th Cir. 1999) (holding that the "mutually reinforcing statements" of two people who claimed to have seen the murder victim after the date that the defendant was said to have killed her constituted "strong evidence of Lord's innocence that trial counsel could have offered"). Similarly, the Werner, August 1986, Westwood sighting tends to reinforce the Robinson, October 1986, Westwood sighting. *Id.* Of course, though ignored in the extant Order, it should not be forgotten that the prosecutor himself expressed what he called his "great fear" that, if the jury was exposed to one more believable sighting witness, it would cause a "hung jury or worse." (RT 13262.)

Next, an amended Order, applying the *Strickland* standard to this Claim, should not conflate the professional negligence and prejudice aspects of the Claim. There is simply no way that Barens, who just sat on these sightings reports as they came in, can pass the *Strickland* deficient-performance test. He was negligent. The declarations supporting the claim prove that neither the investigator nor anyone else was enlisted to interview the witnesses. Moreover, and notably, Chier presented Waller's testimony at the penalty phase. Chier also declares that he was never told about the Werner, Ghaleb, and Nippers sightings and that, if it had been up to him, Robinson would have been called.

Thus, an amended Order should find that Claim 1-1.23 is very well evidenced, starting with Barens' own admissions as to how the "Titus business" was dominating his thinking and adversely affecting his willingness "to dignify" such witnesses by meeting with them. (*See* doc. 191 at 30 (the excerpt of Barens' remark in question).)

> It is well established that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Although judicial scrutiny of counsel's performance must be highly deferential, we have found counsel to be ineffective where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so.

Avila v. Galaza, 297 F.3d 911, 918-919 (9th Cir. 2002) (citations, internal quotation marks, and text alterations omitted). Of course, the duty is only heightened when, in a capital case, it involves the defendant's "most important defense." *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001).

Barens was investigated by the District Attorney's Office after a report was made to it that he had plotted to "procure" witnesses who would falsely claim to have seen Levin alive. The allegations were reported in the *Los Angeles Times*, together with Barens' responses to them. On December 9, 1986, the prosecutor said that he did not expect to call Titus as a witness, but ominously indicated that the matter "may be the subject of future litigation" (RT 2480). Barens, fearing further official investigation into the allegation and additional adverse publicity, became disinclined to investigate, interview, associate with, and present legitimate witnesses of that type, though, again, *it was the very defense he was presenting*. An amended Order should recognize this.

Barens is on record in 1996 as saying that he believed that Carmen Canchola (Arizona sighting) "was truthful in every respect and accurate." (RT 1139(22)–1140(10).) He is on record as defending the strategic and tactical appropriateness, and value, of calling sightings witnesses as "lingering doubt" witnesses in the penalty phase.

(RT 13300-01, 13313-15, 13479, 14927-28.) The motion for new trial authored by Chier cited the Waller sighting as one reason, among others, for vacating petitioner's conviction. (CT 1702.) Furthermore, Barens testified in 1996 that he believed the reports of petitioner's guilt were "untruthful." (HT 1126-27, 1139-40.) Thus, his failure to promptly interview such witnesses as Louise Waller (of whom he had heard over a week before the guilty phase verdict) is "unfathomable" save in connection with the demonstration of divided loyalties made in Claim 1-1.23. *See Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994) (failure to investigate information that showed another person was responsible for the murder was "unfathomable" and showed "a gargantuan indifference" to the fate of the client). When Waller was interviewed, the interviewer gave a highly favorable account of her credibility. (*See* doc. 10, Ex. 138.) Again, Chier said he would have used Waller in the guilt phase had he known of her at the time. (*Id.*, Ex. 163.)

The observations of the LAC habeas court regarding the intrinsic credibility, or the credibility *per se*, of the sightings witnesses did not include any such finding on the Waller sighting. Thus, even if those findings were considered, and even assuming that the *Strickland* standard, rather than that of *Mickens*, applied, its findings would still not be dispositive.

Finally, should this Court, upon renewed reflection, find itself gravitating towards conclusions similar to those of the LAC habeas court with respect to the credibility of any of these witnesses, it should remember two things: (1) the San Mateo jurors *saw them testify* and found them highly credible, thus rendering the LAC habeas court's observations to the effect that no one could possibly find them credible, simply absurd; and (2) a systematic refutation of the LAC habeas court's evaluation of the witnesses can be found in document 7 at pages 165-78.

CONCLUSION

Petitioner did not receive a fair trial, and an amended Order should so find. Barens was extolled by the trial judge, who said he had "never known a lawyer more

diligent, faithful, and competent than" Barens. During the course of the trial, he praised Barens as "10 times the kind of lawyer" that Chier was, and "infinitely" superior to Chier. (RT 10609.) The judge was just as effusive in his praise immediately after petitioner was convicted. (RT 13282, 13317, 13370.) That a jurist of Judge Rittenband's years, who had watched Vincent Bugliosi prosecute Charles Manson in his courtroom, and no doubt many other great attorneys unknown to us now, could be believed in the Order while saying such things is a finding that should be corrected.

Petitioner catalogued 157 instances in which the judge ridiculed or rebuked Barens during the trial. (*See* doc. 6, Ex. G; *see also* doc. 191 at 123(2)–135.) The examples of the judge's true disdain for Barens, and the extent to which Barens richly deserved professional disdain, range across the entire gamut of fault that a lawyer, in theory, might possess. Within them, the judge harshly rebuked Barens for his tactics, ridiculed him for his fecklessness, scorned him for his lack of knowledge of law, and lampooned his diction and word choice. The judge frequently questioned Barens' integrity and motives. There are literally scores of occasions on which the judge opined that Barens had done nothing on cross-examination but "waste" the jury's time. (*See, e.*g., RT 10376 ("What is all that crap about?"); RT 7593 ("I think this whole line of inquiry is completely worthless and useless."); RT 6542 (telling Barens he is going on "*ad nauseum*"); *see also* doc. 191 at 125 (citing twenty more examples).) The truth of the judge's real assessment of Barens was sacrificed, however, to the judge's all-consuming need to punish Chier. The judge praised Barens only at such junctures of the trial when it was necessary to do in order to protect the record being made against Chier. The judge's finding the *Keenan* presumption in favor of appointment of a second attorney in a capital case "overwhelmingly overcome" (RT 6022) is, in a word, ridiculous. The judge made no inquiry concerning Barens' state of preparation, his expected schedule over the next five months, or his ability to assume Chier's witnesses. The judge made the deal with Barens without hearing the first thing about any of that. The judge did not ask Barens to describe his past experience with capital cases (he had

none – *see* Ex. 107 at ¶ 5) or ask Barens to respond to Chier's statement that Barens did not know what was "going on legally" (RT 6024). The judge did not ask what it would entail for Barens to take over Chier's planned role with respect to petitioner's direct examination. (RT 6005. 6016.) The judge was not even sure that Barens had personally read the discovery in the case, though he should have asked – Barens hadn't. (*See* Claim 1.) The judge had only seen Barens conduct *Hovey* voir dire, a process in which Barens was heaped with praise for asking the same questions for which Chier was pilloried. The Order's giving deference to a "perceptive jurist" like this, so as to defeat the petitioner's claims of bias, is Kafkaesque. It is because that finding is so divorced from the obvious reality of the situation that it ought to be amended.

Moreover, an amended Order should add findings regarding exactly who this Barens was. In the fullness of time, exposed by a mountain of extra-record evidence, it has been revealed that Barens had so alarmed the other professionals who had worked with him at various times on the case that they all quit, citing his bizarrely inappropriate orientation to his ethical and contractual responsibilities (save Chier, whose remaining with the case, most assuredly, did not reflect a contrary view of Barens). Barens, by his own admission, did not begin to work on the defense case until after the state rested. He did not interview a single prosecution witness; he neither read the discovery in the case nor the transcript of petitioner's codefendant's previous trial. He is a perjurer and a thief – he defrauded his own client, his co-counsel, and the public treasury in a way that was profoundly inimical to his client's interests. We know that his client, operating from a jail cell in San Mateo, was able to mount an effective defense to the Levin-related charges, amassing over forty witnesses that Barens, due to sloth and *mala fide* motives, knew nothing of.

The extant Order found the trial judge was "a perceptive jurist who was very attuned to what was going on in his courtroom." (Order at p. 34(1).) An amended Order should find otherwise. That "perceptive" jurist deemed Chier a complete incompetent and jackass, though Chier was an AV-rated, criminal-law specialist (as opposed to

Barens who was primarily a civil attorney), who had never been held in contempt in a twenty-year career, nor, indeed, suffered any professional censure of any sort.

Petitioner must ask: was it "perceptive" and "attuned" of Judge Rittenband to give petitioner's defense over to Barens when Barens couldn't help himself when it came to money (doc. 6, Ex. 105)? Was it "perceptive" to rebuke Barens for implying witness Tom May's movie deal gave him ulterior motives? (Claim 1-1.10; doc. 191 at 135-37.) Was it "perceptive" to defend Taglianetti, a car thief, from impeachment designed to reveal his lies? (Claim 1-1.2.) Was it "perceptive" to use Eisenberg, later revealed to be an errant perjurer and the butt of a 52-count criminal indictment, a man with a malicious agenda against petitioner, as an expert witness on contracts? (Claim 1-1.2; doc. 191 at 4-5, 139.) Was it "perceptive" to batter alibi witness Lynne Roberts with implications of perjury *incorrectly* drawn from a newspaper article? (Doc. 191 at 150-52.) Was it "perceptive" to extol Barens as the most "faithful, diligent, and competent" attorney he had ever seen, when Barens was suppressing sightings witnesses (Claim 1-1.23), and had sold out his client for the proverbial thirty-pieces of silver (Claim 1-3). Was it?

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Respectfully submitted,

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