IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

In re DANIEL MASTERSON, on Habeas Corpus.	B_____ Related to People v. Masterson, B333069 Los Angeles Co. Superior Ct. No. BA487932

PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES

[Public – Redacts material from sealed record]

From the Judgment of the Los Angeles Superior Court
Hon. Charlaine Olmedo, Judge Presiding

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Daniel Masterson through his attorney Eric Multhaup petitions for a writ of habeas corpus to vacate his two convictions for rape and the accompanying judgment of 30 years to life. Petitioner Masterson is being held in custody by the Warden of the California Men's Colony in San Luis Obispo, California, in violation of his state and federal constitutional rights, and in violation of his statutory rights under the laws of the State of California. By this verified petition, petitioner alleges as follows.

INTRODUCTION

This habeas corpus petition contains 11 claims, significantly more than the number of claims generated in the great majority of criminal cases, including many other serious cases with life sentences like this one.

Most of these numerous claims are attributable to an unexpected and unreasonable failure of trial counsel to present

any of the mountain of exculpatory evidence that had been amassed by predecessor counsel. This breakdown occurred as follows. As of May 31, 2022, four months before trial, attorney Shawn Holley was petitioner's trial counsel of choice, with attorney Philip Cohen assisting her. In August 2022, attorney Cohen was thrust into the role of lead counsel when the court denied a continuance request by Holley due to her conflicting obligations in another case and she effectively withdrew.

Unbeknownst to petitioner at the time that Cohen became lead counsel, Cohen had a longstanding aversion to presenting affirmative defense evidence in the cases he tried. By all accounts (including his own), Cohen had a settled practice of cross-examining prosecution witnesses based on inconsistencies and implausibilities in their statements and testimony; making a personal assessment of whether he had established reasonable doubt through cross-examination; and if so, resting without presenting defense evidence.

Cohen adhered to that practice in this case, but did so without engaging in the due diligence necessary to make a reasoned choice of trial strategy. He personally spoke to only two of the more than 20 potential witnesses who had been strongly recommended by co-counsel Karen Goldstein and investigator Lynda Larsen. He wrote off the great majority of them without any personal contact, notwithstanding their manifestly exculpatory prior statements to the police and to investigators.

This failure of due diligence violated the well-settled principle of Sixth Amendment case law that an attorney must interview potential defense witnesses as a necessary foundation for making a reasoned decision about trial strategy. See Exhibit 12, Declaration of Jack Earley, and the case law contained therein, including Lord v. Wood (9th Cir. 1999) 184 F.3d 1083.[1]

The following summary conveys the extraordinarily exculpatory import of the witnesses who were available. As to complaining witness J.B., she told two of her female friends in the weeks and months after April 25, 2003, that her sexual relations with petitioner were "the best sex she had ever had" (DefWitness6) and "one of her best sexual experiences" (DefWitness7). JB also acknowledged her sexual relations with petitioner to other friends without any mention of coercion or rape (DefWitness3 and DefWitness4).

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[1] "We would nevertheless be inclined to defer to counsel's judgment if they had made the decision not to present the three witnesses after interviewing them in person. Few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial. A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty or biased and testifies to X may persuade the jury that not-X is true, and along the way cast doubt on every other piece of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story." 184 F.3d at 1095 (emphasis supplied).

In addition, on the evening in question,[2] there were two men who also spent the night at petitioner's residence, and who overheard J.B. and petitioner engaging in loud, enthusiastic and prolonged sexual relations (DefWitness2 and DefWitness10).

As to N.T., her close friend DefWitness8 gave a statement to a defense investigator in which she reported that N.T. had described her sexual relations with petitioner in a light-hearted and favorable manner. In addition, there were multiple witnesses who had reported that petitioner had an ongoing relationship with N.T. for some weeks, not merely the one occasion for which she claimed rape. By any standard, that was dynamite defense evidence.

Finally, there were expert witnesses who had been prepared and interviewed by co-counsel regarding helpful psychological and pharmacological testimony about memory formation and recollection and the effects of alcohol and drugs on memory.

All of these witnesses had been subpoenaed by investigator Larsen, but none were called. However, even without any defense evidence, the first jury went to the brink of acquittal, but hung with the vote in favor of acquittal on all three counts.

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[2] The events surrounding the incident occurred during the evening of April 24, and the sexual activity occurred in the early morning hours of April 25. For simplicity's sake, this petition uses the date "April 25" to include both the events leading up to the sexual activity itself.

The legal landscape changed dramatically for the retrial. The prosecution, recognizing that the complaining witnesses' testimony was by itself underwhelming, announced its intent to present a significantly more aggressive case.

The primary change was to prominently portray the Church of Scientology, of which petitioner was a member, as a villainous force that had discouraged the complaining witnesses from reporting their allegations of rape to the police in 2003, and that was actively harassing the complaining witnesses in retaliation for making their complaints in 2017.[3] To this end, the prosecution persuaded the court to reverse its prior ruling that excluded evidence about Scientology doctrine and practice, and instead to permit testimony from an anti-Scientologist that Scientology doctrine purportedly authorized, if not demanded, the harassment and bullying of the complaining witnesses. This

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[3] The actual tenets and practices of Scientology are not well known to the public at large. Judge O'Scannlain summarized them in Headley v. Church of Scientology (9th Cir. 2012) 687 F.3d 1173, 1174:

> Scientology teaches that man is an immortal spiritual being that, over time, becomes distressed as his mind experiences moments of pain or lowered consciousness. Scientology maintains, however, that man can overcome that distress – he can become "clear" – by using methods developed by Scientology founder L. Ron Hubbard. Scientology aims to disseminate Hubbard's teaching to "clear the planet" – that is, to help enough people to overcome spiritual distress to free the planet of crime, war, and irrationality.

evidence provided the foundation for the climax of the prosecution's closing argument, a Jeremiad against both petitioner and Scientology.[4]

Notwithstanding the prosecution's more aggressive approach, defense counsel announced that he was going to retry the case exactly as he had conducted the first trial. That decision was again made without the exercise of due diligence regarding the exculpatory value of the numerous available witnesses. For the retrial, counsel interviewed no additional witnesses, had no witnesses under subpoena, and presented no evidence. This was deficient performance under the standard of Strickland v. Washington (1984) 466 U.S. 668.

Not surprisingly, petitioner was convicted of two counts, and one count was mistried and dismissed. The two convictions are attributable to (1) the prosecution's more aggressive evidentiary presentation that focused on Scientology; (2) the complaining witnesses' inevitably enhanced capacity to parry Cohen's cross-examination at the second trial; and (3) counsel's failure to present any independent evidence to impeach the

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[4] "They were raped. They were punished for it. And they were retaliated against by their Church. As I mentioned, the Scientology law told them there is no justice for them. You have an opportunity to show these victims that there is. You have an opportunity to show these victims that there is justice. It does exist. There were no consequences for Mr. Masterson by this internal justice system from the Church. You have the opportunity to show Mr. Masterson that there are consequences for raping. They do exist." 34 RT 3411.

complaining witnesses or to develop any of the complementary avenues of defense that predecessor counsel provided to him. In sum, the jury saw only the tip of the iceberg of available defense evidence in the form of the complaining witnesses' inconsistent statements while the wealth of directly exculpatory evidence went unused for no viable tactical reason.

Counsel for petitioner recognizes that this Court might be initially skeptical that such a debacle could occur in a high profile case in which petitioner retained experienced attorneys. The debacle did occur through no fault of petitioner, who implored counsel to present at least a minimal modicum of defense evidence, but counsel refused. This petition contains eight separate ineffective assistance claims relating to a broad array of defense evidence that was not adequately investigated and/or presented. When viewed cumulatively, the prejudice from these multiple instances of deficient performance demonstrates that petitioner's convictions were a major miscarriage of justice.

The habeas corpus claims set forth in this petition are organized into four categories: claims relating to Count 1 (complaining witness J.B.); claims relevant to Count 2 (complaining witness N.T.); claims relating equally to both counts; and a claim of judicial bias.

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STATEMENT OF FACTS

The Statements of Facts in the Appellant's Opening Brief and in the Respondent's Brief reflect the evidence and events presented at the trial. This Statement of Facts contains a starkly different account of what occurred during the 20-year period from 2003 to 2023, an account that incorporates the extensive exculpatory evidence that was available for petitioner's defense. For the reader's convenience, this Statement of Facts is presented in narrative form and in chronological order. The declarations, transcripts and other documents that support these facts are cited in the individual claims and are attached as exhibits.

1. The background of petitioner and the complaining witnesses.

At the time of the incidents giving rise to the charges, petitioner was in his mid-20's and a successful television actor with excellent career prospects. From 1996 to mid-2002, he was in a committed relationship with and lived with C.B.,[5] the complaining witness in Count 3, on which the jury failed to reach a verdict. Between mid-2002 and mid-2004, he was single, dated various women, including J.B., a 29-year-old woman who had wealthy parents but no visible means of support; and N.T., a 23-year-old TV actress. All were members of the Church of Scientology (referred to as "COS" in this petition). In mid-2004,

[5] Petitioner refers to the complaining witnesses as "C.B.," "N.T.," and "J.B.," following the convention used in the appeal briefing.

petitioner met Bijou Phillips; courted and married her; had a daughter together; and lived monogamously with her until he was convicted and remanded.

2. Petitioner's September 2002 sexual relations with J.B.

In September 2002, petitioner had sexual relations with J.B. at his home. There ensued some ill feelings among J.B. and her friends because (1) she made an unfounded pregnancy claim shortly after the incident; and (2) she had gotten herself involved with petitioner in the immediate aftermath of his breakup with C.B. DefWitness4, petitioner's executive assistant and friend of J.B. at the time, was particularly vocal in her criticisms of J.B. for having sexual relations with petitioner, and then stirring up drama among their friends. J.B. characterized this sexual activity as consensual in her first two interviews with the police and with numerous friends, but by the time of trial, 20 years later, she claimed it had been a brutal rape.

3. J.B.'s allegation of rape on April 25, 2003.

J.B. has given numerous conflicting versions of what happened on April 25, 2003. See AOB, pp. 29-41. Here is her trial version. On April 24, 2003, a group that included petitioner, J.B., and others attended a birthday party for a mutual friend. Later that evening, petitioner hosted an informal after party at his home. J.B. was given a ride to petitioner's home by DefWitness1, petitioner's publicist.

At the after party, J.B. had a drink and got into petitioner's Jacuzzi. She stayed in for a considerable period of time and then

began to feel uncomfortable and woozy. She had DefWitness2, a friend of both her and petitioner, help her out of the Jacuzzi, where she had symptoms that included nausea, lightheadedness, blurred vision, and weakness. At that point, petitioner helped J.B. up to his bathroom; they showered together; and petitioner forced her to have sex.

4. The evidence refuting J.B.'s claim of rape, but not presented to the jury.[6]

J.B.'s conduct and statements before, during and after the April 25, 2003 incident refute her claim of rape, but none of that exculpatory evidence was presented to the jury.

J.B. confided to DefWitness1 en route to petitioner's home that her first sexual experience with petitioner was "the best sex I have ever had."

Next, at the time of the sexual activity, there were two other people spending the night at petitioner's residence, DefWitness10, petitioner's longstanding housemate, and DefWitness2, petitioner's longstanding friend. Both heard petitioner and J.B. engaging in loud, enthusiastic, and prolonged sexual activity.

Both DefWitness10 and DefWitness2 encountered J.B. the following morning. Both found her lounging amiably on petitioner's deck, smoking a cigarette and dressed in one of petitioner's bathrobes.

Finally, J.B. subsequently spoke to several friends after the incident and repeatedly described the encounter in terms incompatible with her trial claim of forcible rape.

[6] See Claim I, infra.

The first person she spoke to was DefWitness3, a longstanding friend of the B. family, who periodically did home improvement projects commissioned by J.B.'s father. When she returned to the B. residence during the day of April 25, she encountered DefWitness3 who was there working. They chatted, and J.B. said that she had spent the night with petitioner. DefWitness3 expressed concern over this because of the drama that had followed her first sexual encounter with petitioner. J.B. responded that her only concern was that DefWitness4 would be angry with her as she had been after the September 2002 incident. J.B. said nothing about rape of any kind.

In June 2003, J.B. was in New York working on a film project with DefWitness4. At one point, they had a personal conversation, and DefWitness4 asked J.B. what had happened with petitioner on April 25. According to DefWitness4, J.B. "tried to justify her behavior at Danny's house on April 24, '03, by saying that 'the jacuzzi made [her] really drunk', that she really hadn't been drinking heavily, but there was some physical reaction to the jacuzzi and the alcohol." J.B. made no reference to rape or forcible sex.

In July 2003, J.B. visited DefWitness6 and Lisa Marie Presley in New Hampshire. J.B. told them that her sexual activity with petitioner on April 25 was "the best sex she ever had," and gave a graphic description of what made it so good. 8 CT 2316.

In the summer of 2003, J.B. told her close friend DefWitness7 that her sexual relations with petitioner were "one of her best sexual experiences." All of these witnesses were subpoenaed for the first trial by investigator Lynda Larsen, but attorney Cohen neither called any of them nor cross-examined J.B. about her statements to them.

5. The COS follow-up to J.B.'s report about the April 25 incident.

J.B. filed a written report of the incident with the COS Ethics Officer in December 2003, and claimed that she was intoxicated and pressured at the time of the sexual activity on April 25, 2003. The Ethics Officer initiated an inquiry in accordance with COS policy that carried into 2004. J.B. actively participated in it, and when she was unsatisfied with some aspect of the inquiry, she appealed to higher COS authority. On January 13, 2004, she wrote a letter to the International Justice Chief ("IJC"), who is the Church officer responsible for overseeing the application of Scientology ethical tenets to staff and parishioners. She requested that the IJC convene a special board of inquiry to address her complaint.

In April 2004, petitioner and J.B. arranged for a mediation of their respective positions by a third party selected by her father. When that did not yield a resolution, J.B. wrote again to the IJC to inform him per COS policy that she intended to sue petitioner in civil court for damages. She also indicated that she was planning to file a complaint with the police. The IJC replied

in writing that she had fulfilled her duty to notify COS of her intent to sue petitioner.[7]

6. J.B.'s unsuccessful complaint to the LAPD in June 2004 that petitioner had raped her.

J.B. made a complaint to the LAPD on June 6, 2004, that petitioner had date-raped her in April 2003. There was no mention of a gun. Det. Deborah Myers interviewed five people who were identified by J.B. as having knowledge relevant to the incident.[8] Det. Myers forwarded a report to the District Attorney who, based on the witnesses' statements, declined to prosecute.

7. J.B.'s successful settlement of a threatened civil suit against petitioner for $400,000 in September 2004.

The following month, J.B. retained a plaintiff's attorney to threaten to sue petitioner civilly for rape unless petitioner made a sufficient financial settlement to procure her forbearance. On July 29, 2004, J.B.'s attorney sent petitioner a demand letter and a draft civil complaint. At that time, petitioner was under contract for the very successful television series "That '70s Show." Petitioner retained an entertainment law attorney who strongly

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[7] All of J.B.'s actual conduct is inconsistent with her trial testimony that COS staff continually attempted to repress her efforts to have her report investigated and addressed via the normal COS channels.

[8] The witnesses were DefWitness6, DefWitness4, DefWitness3, DefWitness2, and DefWitness1, all of whom had direct knowledge of some exculpatory information.

advised petitioner to make a settlement to avoid jeopardizing his multi-million-dollar contract.

The two attorneys convened a mediation, and on September 20, 2004, petitioner settled the threatened lawsuit for a $400,000 payment in exchange for, inter alia, a non-disclosure agreement by J.B. The transaction was viewed as business as usual in the entertainment industry by the experienced attorneys involved.

8. J.B.'s swindle of Michael Bennitt, 2002-2004.

During the same period of time that J.B. was embroiled with petitioner regarding the April 25, 2003 incident, J.B. was swindling a fellow Scientologist in his 30s named Michael Bennitt out of tens of thousands of dollars in cash and expensive gifts. Bennitt had met J.B. at a COS function, had fallen for her, and had accepted her sad (but false) story that she had been mistreated by her parents, and was the victim of other misfortunes of life, including bouts with leukemia and various other physical ailments.

Bennitt lived in Chicago and was a financially successful market trader. He carried on a long distance relationship with J.B. for two years, during which time he gave her access to his bank account and unrestricted use of a car and cellphone. They visited occasionally during this extended period. J.B. successfully fended off any physical intimacy with the excuse that her Scientology Ethics Officer had told her that she needed time to complete certain counseling programs before entering into an intimate relationship.

After petitioner paid J.B. the first installment of the civil settlement in fall 2004, J.B. no longer needed Bennitt's money, and she cut him loose. Bennitt realized that he had been duped, and that J.B. had been living a double life – one as his wounded platonic girlfriend and the other as an irresponsible party girl with indiscriminate sexual interests. He reported this experience to a Scientology Ethics Officer and expressed a negative opinion about J.B.'s character for truthfulness. None of this was presented to the jury in any form.[9]

9. N.T.'s allegation of rape in late 2003 and the evidence refuting it.

In late 2003, N.T. accepted an invitation to go to petitioner's house. She was actively looking for romance. The two had sexual relations, which N.T. described at the time in terms ranging from light-hearted and entertaining to disappointing in that petitioner had not called her afterward. In none of her conversations with family and friends did she suggest a forcible rape. Several witnesses observed that petitioner had a relationship with N.T. for some weeks. Thirteen years later, she claimed that there had been only one instance of sexual activity, and that it had been forcible rape.

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[9] See Claim I-C, infra

10. Petitioner's exemplary life, 2004-present.

In September 2004, petitioner met Bijou Phillips; married her; had a daughter; and has led a monogamous life ever since. Petitioner maintained his career in the entertainment field, and in addition engaged continually in philanthropic efforts, particularly with financial assistance for medically needy first responders in New York where he grew up. Notwithstanding the 2023 convictions, the outpouring of support for petitioner at the time of sentencing from scores of people of all walks of life attests that petitioner has always led an upstanding and socially productive life

11. J.B.'s long-running landlord scam, 2011-2016.

During the extended period that petitioner was leading an upstanding life, J.B. chose a very different path. By 2011, J.B. had married a third husband, Jared Georgitis, and the two launched a long-running and occasionally successful scam in which they would rent an upmarket property in LA; make exaggerated or entirely unfounded complaints to the landlord and to the Los Angeles Housing District about purportedly dangerous or defective conditions; stop paying rent; and eventually sue the landlord for damages of various kinds, with the hope of obtaining an insurance settlement.

Some insurance companies paid off, but some of the landlords fought back and obtained judgments against J.B. for non-payment of rent. When this source of income petered out, she turned her attention to petitioner and COS as alternative deep

pockets. Needless to say, the defrauded landlords formed very negative opinions of J.B.'s character for truth and veracity. See Claim I-C, infra.

12. N.T.'s self-description as an artist on social media.

As to N.T., her acting career concluded in 2003. Her last credit was for appearing in an episode of "Dead Zone" in 2003. She did not have a public presence from 2003-2016, but did hold herself out as an artist on social media.

13. The 2016 rape allegations orchestrated in conjunction with anti-Scientologist Leah Remini.

As some point in 2016, C.B., J.B., and N.T. began communicating with each other about their sexual experiences with petitioner. The content of these communications is unknown due to the court's ruling that denied the defense access to their social media discussions about petitioner. See AOB, ARG. IV.

At the same time, in November 2016, the first episode of an anti-Scientology television series, "Leah Remini: Scientology & The Aftermath," was aired. The series was developed by Leah Remini, a former Scientologist and actress who parted ways from the COS in 2013, and became an active anti-Scientologist. The complaining witnesses learned of the program and contacted Remini. Remini became the complaining witnesses' spokesperson, advocate, and liaison with the prosecution team.

At Remini's urging, they contacted the LAPD in December 2016. Det. Myape, the detective assigned to the case, spoke to Remini before interviewing any of the complaining witnesses. Det. Myape told Remini, "You're vital to this investigation"; asserted that she wanted to "shake this group down"; and characterized Scientology as an "abomination." Det. Myape proposed that she and Remini meet at a place where "you and I can like hash it out and figure out strategies."

There ensued multiple meetings and interviews involving the prosecution and the complaining witnesses. Remini acted as advocate for the complaining witnesses, and conveyed her views that COS was a nefarious and criminal entity. See Claim IV, infra. At the same time, Remini had a major financial stake in fomenting the police investigation and prosecution of petitioner, because her television series would attain increased credibility and profitability from the fact that the LAPD and District Attorney were investigating the claims.

14. The bias in the law enforcement investigation resulting from the prosecution's excessive entanglement with Leah Remini.

The LAPD investigation was compromised in many respects by the entanglement with Remini. Petitioner's first attorney, Tom Mesereau, had directly informed Det. Vargas on April 19, 2017, that Remini had previously exploited the LAPD to further her career in 2013 when she began her public anti-Scientology activities, and that she currently had a professional

and financial stake fomenting the LAPD's investigation of the rape allegations.

That warning went unheeded. Five days later on April 24, 2017, DDA Mueller and Det. Vargas conducted an interview of J.B. at which Remini appeared as J.B.'s support person. Remini took charge of the interview, insisted that law enforcement publicly declare their belief that J.B. was raped, and then intervened to answer any questions that related to J.B.'s credibility.

15. The complaining witnesses' civil suit against petitioner in August 2019.

On August 22, 2019, the three complaining witnesses filed a joint civil lawsuit for damages that alleged various incidents of harassment by the COS and/or petitioner in response to their 2017 accusations of rape. The civil complaint also set forth the rape allegations in graphic detail, apparently in the hope of amending the complaint to add causes of action for rape upon petitioner's conviction.[10] All three complaining witnesses testified at trial that their primary if not sole reason for filing the lawsuit was to stop the harassment that the LAPD had been unable to quell.

In fact, the lawsuit was filed as a tactical maneuver co-engineered by Remini and the complaining witnesses' lawyer to

[10] That is exactly what the complaining witnesses did following petitioner's convictions and the reopening of a one-year window to file otherwise time-barred civil causes of action for rape. See Appellant's Opening Brief, Argument II; and Claim III, infra.

provide legal cover for A&E to air the final episode of Remini's television series that focused on the allegations against petitioner. On August 26, the final episode aired, resulting in a tsunami of publicity for the complaining witnesses and a seven-figure financial windfall for Remini. As anti-Scientology blogger Tony Ortega succinctly put it, "[y]esterday's lawsuit filed by the accusers no doubt gives A&E some legal room to finally put their stories on the air." The jury heard nothing to rebut the complaining witnesses' false testimony that the civil suit was filed solely to end their suffering as victims of continuing harassment by the COS.[11]

16. The District Attorney's decision to file charges in the midst of a highly partisan election campaign.

Meanwhile, the decision whether to prosecute remained pending for two and a half years through 2019. In December 2019, Remini launched a public diatribe against then incumbent District Attorney Jackie Lacey for failing to prosecute petitioner. This occurred during the run-up to the hotly contested District Attorney primary election in March 2020. Remini and several other anti-Scientology bloggers proclaimed that petitioner would never be charged unless George Gascón was elected District Attorney. During the campaign, challenger Gascón made numerous references to Lacey's failure to charge petitioner and other entertainment figures being investigated for sexual

[11] See Claim V, infra.

misconduct. By June, Gascón was surging in the polls, and on June 17, 2020, Lacey personally announced to the public that petitioner had been arrested and charged.

17. Petitioner's development of very strong exculpatory evidence.

Petitioner had retained attorneys Tom Mesereau and Sharon Applebaum, both experienced southern California criminal defense attorneys. The case proceeded through preliminary hearing in May 2021 and toward trial in 2022. During that time, defense counsel conducted an extensive investigation and developed an extraordinary amount of exculpatory evidence as to all of the charges.

18. The change of counsel prior to the first trial and the failure to present any exculpatory evidence.

On May 31, 2022, petitioner designated attorneys Shawn Holley and Philip Cohen as his trial counsel. Attorneys Mesereau and Applebaum withdrew. 11 ART (8/23/24) 2718. All counsel agreed to a trial date of October 11, 2022. Petitioner expected Shawn Holley, a high profile and charismatic trial attorney, to be lead counsel.

In late July, attorney Holley filed a motion to continue the trial due to Holley's involvement in the ongoing arbitration on behalf of Dodgers' pitcher Trevor Bauer. That motion was summarily denied on August 12, 2022. Holley bowed out and Cohen became sole lead counsel.

There followed a flurry of activity in which investigator Lynda Larsen and assisting counsel Karen Goldstein organized and presented the previously accumulated exculpatory evidence to attorney Cohen for use at the trial.

That effort went nowhere. Cohen made it clear to all concerned that he rarely if ever put on any affirmative defense evidence. Rather, he explained that his standard practice was to cross-examine the prosecution witnesses and make his personal assessment of whether he had persuaded the jurors of reasonable doubt.

Notwithstanding Goldstein and Larsen's efforts, Cohen did not speak to <u>any</u> prospective defense witnesses prior to the beginning of trial and the filing of witness lists. During voir dire, Cohen spoke briefly with two potential witnesses at the behest of Goldstein and Larsen. He conducted no other investigation.

Cohen presented no witnesses at the trial, and the case was submitted to the jury on November 15 without any affirmative defense. On November 30, after numerous jury questions, the jury declared a deadlock on all three counts, with the last vote heavily in favor of acquittal.[12] In sum, the credibility issues carried petitioner to the brink of acquittal, and he would have very likely obtained an acquittal but for counsel's failure to exercise due diligence and make an informed decision whether to present an affirmative defense. That should have provided

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[12] Count 1 (J.B.), 10-2 not guilty; Count 2 (N.T.), 8-4 not guilty; and Count 3 (C.B.), 7-5 not guilty.

counsel with a renewed incentive to dig into the trove of exculpatory evidence and prepare an affirmative defense for the retrial. However, counsel announced in early 2023 that he was going to conduct the retrial exactly as he had conducted the first trial.

19. Counsel's failure to present any exculpatory evidence at the retrial.

The case was set for retrial in April 2023. The prosecution correctly recognized that the testimony of the complaining witnesses had been viewed as anemic at best by the first jury, and responded by adopting a plan to bolster their credibility with three types of new evidence: opinion testimony from an anti-Scientologist that Scientology doctrine discouraged and punished Scientology members from reporting crimes by other Scientologists to the police; testimony from an LAPD criminalist that raised the possibility that petitioner had roofied the complaining witnesses; and testimony from a different Evidence Code section 1108 witness than the one who had bombed so badly at the first trial. See AOB, pp. 50-51.

Notwithstanding the prosecution's clear intent to present a more aggressive case, and notwithstanding the efforts of petitioner and others who implored Cohen to present a defense case, Cohen did not interview any potential defense witnesses

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prior to the retrial; did not have any witnesses under subpoena; and did not present any defense.[13]

On May 31, 2023, the jury returned verdicts of guilty as to J.B. and N.T. The jury hung as to the charge related to C.B.

CLAIMS FOR RELIEF

CLAIMS RELATING TO COUNT 1 (J.B.)

I. PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESENT ANY OF AN UNPARALLELED TROVE OF EVIDENCE TO IMPEACH J.B.

A. Ineffective Assistance of Counsel ("IAC") for Failure to Present Testimony from Numerous Exculpatory Witnesses Regarding J.B.'s Conduct and Statements Before, During, and After the April 25, 2003 Incident that Impeach Her Claim of Forcible Rape.

1. Summary of facts.

a. The failure to present evidence that J.B. told both DefWitness1, the woman who drove J.B. to petitioner's residence on April 24, 2003, and DefWitness5 that her first sexual experience with petitioner was enjoyable, if not the best sex she had ever had.

At trial in 2023, J.B. testified that her first sexual activity with petitioner in September 2002 was rape. However, she had told a very different story to DefWitness1, the woman who drove her to petitioner's residence on the evening of April 24, 2003. DefWitness1 was employed by petitioner, and was an

[13] See Claims I-A through F; Claims II-A through D; and Claims III through VII.

acquaintance of J.B.'s. During the drive to petitioner's residence, DefWitness1 asked J.B. what was going on with her and petitioner. As DefWitness1 reported to LAPD Det. Deborah Myers in June 2004, J.B. replied that petitioner "is the best sex I have ever had." Exhibit 1, Transcript of DefWitness1 Interview. DefWitness1 told Det. Myers that she was "kind of floored" by this revelation, because she and J.B. were not close friends. DefWitness1 dropped J.B. off at petitioner's and left.

J.B. also told a different story to DefWitness5, a longstanding friend, during a conversation shortly after the 2002 incident. J.B. told DefWitness5 that she and petitioner had gotten drunk and had kinky sex, including anal sex. J.B. laughed about it, and said she would not mind doing it again. Exhibit 6, Declaration of DefWitness5.

b. The failure to present evidence that J.B.'s sexual encounter with petitioner was consensual from petitioner's housemate DefWitness10 and from DefWitness2, both of whom were at petitioner's residence at the time of the incident.

Counsel failed to present testimony of the two young men who were present at petitioner's home on the evening of April 24, 2003, DefWitness2 and DefWitness10. Both observed J.B. behaving inconsistently with her rape narrative over the course of the evening and into the next day.

DefWitness10 was petitioner's longtime housemate from 1995 to 2004. DefWitness10 was home on the evening of April 24, 2003. His bedroom was directly across from petitioner's bedroom.

During the night, he heard loud noises of sexual activity emanating from petitioner's bedroom, including the voice of a woman who sounded as though she was enthusiastically participating in sexual relations.

The following morning, DefWitness10 left for work some time after 9:30 a.m. On his way out, he saw J.B. lounging in petitioner's bathrobe and smoking, looking content.

On June 11, 2004, LAPD Det. Deborah Myers interviewed DefWitness2 after J.B. had made a complaint of rape to the LAPD.

DefWitness2 had been a friend of both petitioner and J.B. for several years as of April 25, 2003. On that night, he was at petitioner's residence, as was J.B. They talked amicably for a while, and then J.B. got in the Jacuzzi and spent a long time in it. She was topless and flirted with him some. As the other guests were leaving, DefWitness2 told J.B. that she had been in the Jacuzzi for more than an hour, and that she should get out because petitioner had asked him to turn off the Jacuzzi jets. J.B. got out and commented to DefWitness2 that she had a headache and was feeling nauseous.

Petitioner came down from his bedroom to see what was going on. DefWitness2 went to a guest room to sleep and heard the shower running in petitioner's bathroom. Later, he was trying to sleep when he heard a woman's voice upstairs in petitioner's bedroom engaging in sexual activity, and she "seemed to be like having a good time." Exhibit 2, Transcript of DefWitness2

Interview, June 11, 2004. Exhibit 46, Declaration of DefWitness2. He thought that it was not very smart for petitioner to have sex with J.B., because the previous time they did, there was a lot of drama afterward. The following morning, DefWitness2 went out on the deck, and J.B. was "sitting out there just smoking a cigarette and just hanging out." DefWitness2 gave her his opinion that she was behaving irresponsibly and would be viewed unfavorably by her friends. DefWitness2 suggested that she not see petitioner until she "kind of straightened stuff out." DefWitness2 did not see her again for several months. Id.

c. Failure to present evidence that J.B. described her sexual activity to DefWitness3 during the day of April 25, 2003, in a light-hearted manner.

DefWitness3, a friend of both J.B. and petitioner, gave a statement to Det. Myers on June 17, 2004. Exhibit 3, Statement of Witness DefWitness3, LAPD Follow-up Investigation. DefWitness3 had a longstanding friendship with the B. family, and his daughter attended the same school as J.B.'s daughter. On April 25, 2003, DefWitness3 was working on an outdoor construction project at the B. residence at the behest of J.B.'s father Bill. At one point, J.B. returned home, and they conversed. J.B. told him that the previous evening she had slept with petitioner, and that she was concerned that DefWitness4,

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petitioner's assistant, would be upset with her.[14]

DefWitness3 was taken aback by J.B.'s disclosure – "I can't believe you did that." In response, J.B. smiled and requested DefWitness3's advice "on what she should do about DefWitness4." In sum, the day after the incident, J.B. expressed concern about the potential social fallout from her having another sexual fling with petitioner, but made no complaint about the sexual activity itself.

d. The failure to present evidence of J.B.'s subsequent statements during the summer of 2003 that either flatly repudiated or were clearly inconsistent with her claim of forcible rape.

During the summer of 2003, J.B. had conversations with three friends on separate occasions regarding her sexual activities with petitioner. She told two of them that her sexual relations with petitioner were "the best she had ever had," and discussed her sexual activities with petitioner at length with a third woman but made no suggestion that it was anything other than consensual.

Witness DefWitness6 was the personal assistant to Lisa Marie Presley, a friend of J.B.'s and was acquainted with

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[14] DefWitness4 had been upset with J.B. for some time because of her disruptive behavior with petitioner and others, some of which was chronicled in a Knowledge Report of February 7, 2002 Exhibit 4, and another that she submitted on April 25, 2003. Exhibit 5. "A Knowledge Report" in Scientology lexicon is a report by a Church member that calls another member's unethical conduct to the attention of a Scientology Ethics Officer.

petitioner and his personal assistant. During the summer of 2003, DefWitness6 was working in New Hampshire. J.B. visited her and Lisa Marie there, and in the course of their conversations, J.B. told them that her two sexual encounters with petitioner had been the best sex she had ever had. DefWitness6 reported this conversation to Det. Myers in 2004, Exhibit 7, Transcript of DefWitness6 Interview, and has confirmed and expanded on that conversation in her declaration. Exhibit 8, Declaration of DefWitness6.

DefWitness7 became a close friend of J.B. after they met at a mutual friend's birthday party in the summer of 2003. At one point when they were exchanging confidences, J.B. told DefWitness7 that her sexual activities with petitioner were "one of her best sexual experiences." Exhibit 9, Declaration of DefWitness7.

During the fall of 2003, DefWitness7 developed an active dislike for petitioner because he warned her of J.B.'s toxic qualities, which offended her. In 2004 she parted company with J.B. due to J.B.'s dissolute lifestyle. She was never a friend of petitioner's.

In addition, J.B. had a candid conversation in June 2003 with DefWitness4 about her sexual activity with petitioner on April 25, 2003. J.B. acknowledged to DefWitness4 that she had sexual relations with petitioner on that evening but said nothing about it being nonconsensual. Exhibit 10, Transcript of Interview of DefWitness4, Exhibit 43, Declaration of DefWitness4.

2. The deficient performance.

The statements of all of the above-mentioned witnesses were contained in the files that trial counsel received from predecessor counsel. Counsel did not interview any of them until well after the defense witness list had been filed and the first trial had started. He had brief conversations with DefWitness2 and DefWitness6. The six witnesses who had been interviewed by Det. Myers in 2004 had given statements that were unqualifiedly exculpatory. Five of these were included on the proposed witness list circulated by attorney Goldstein prior to the first trial. See Exhibit 11, Goldstein Witness List. Counsel had none of these witnesses under subpoena for the second trial.

Counsel's failure to call any of the exculpatory witnesses cannot be attributed to an informed and reasonable tactical decision because counsel did not interview the great majority of the exculpatory witnesses. Counsel conducted cursory interviews during the first trial with DefWitness6 and DefWitness2 at the urging of co-counsel Karen Goldstein and investigator Lynda Larsen. Both DefWitness6 and DefWitness2's 2004 statements to the LAPD were clearly exculpatory. As set forth in Exhibit 12, Declaration of Jack Earley, counsel's failure to adequately apprise himself of the strength of the exculpatory evidence rendered him incapable of making a reasoned selection of trial strategy. See also Exhibit 59, Declaration of Eric Multhaup. The Sixth Amendment guarantee of the effective assistance requires that counsel directly evaluate the strength of potential defense

evidence as a necessary foundation for making any decision about trial strategy.

Lord v. Wood, supra, 184 F.3d 1083 reversed the denial of a habeas corpus petition where defense counsel was aware of three potential alibi witnesses who had made statements to the police, but made the decision not to call them without directly interviewing them. Rios v. Rocha (9th Cir. 2002) 299 F.3d 796, 808 granted habeas corpus for a similar failure to investigate and interview available witnesses:

> [W]e agree with the state court and hold that Castro's failure, in a first-degree murder trial, to interview more than one witness, when there were dozens of potential eyewitnesses available, before deciding to abandon a potentially meritorious defense constituted constitutionally deficient performance.

Howard v. Clark (9th Cir. 2010) 608 F.3d 563, 571, also granted relief for deficient performance in failing to interview a potentially helpful witness notwithstanding certain credibility issues. "Howard's attorney had a duty, at the very least, to apprise himself of Ragland's account of the shooting, even if he would later have decided based on the information he obtained not to put Ragland on the stand." The court added that "[t]o make an informed decision whether to call Ragland as a witness at trial, Howard's attorney was obligated to make an independent assessment of Ragland's account of the shooting and credibility as a witness."

Crisp v. Duckworth (7th Cir. 1984) 743 F.2d 580 found deficient performance where defense counsel relied on a witness

statement to the police rather than a direct interview in determining whether to call the witness – "We do not agree that police statements can generally serve as an adequate substitute for a personal interview." 743 F.3d 584.

The Sixth Amendment guarantee of the effective assistance requires that counsel directly evaluate the strength of the potential defense evidence as a necessary foundation for making any reasoned decisions about trial strategy.

3. The resulting prejudice.

Strickland v. Washington, supra, requires a defendant "must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" In re Gay, supra, 8 Cal.5th at 1086, citing Strickland, 466 U.S. at 694.

Counsel had available numerous witnesses to testify that J.B.'s conduct before, during, and after the sexual episode was incompatible with her long-delayed claim of rape. Most of these witnesses had previously given highly exculpatory statements to Det. Myers that persuaded the District Attorney not to prosecute. Their testimony at trial would have been highly likely to persuade the jury not to convict.

Moreover, the prejudice from this area of deficient performance must be considered in conjunction with prejudice accruing from counsel's deficient performance in other areas as

well. In re Gay, supra, stated that "[w]here, as here, counsel's performance has been shown to be deficient in multiple respects, we do not consider each error in isolation," but "instead consider the cumulative impact of the errors on the fairness of the trial." 8 Cal.5th at 1087. This petition contains multiple claims of deficient performance with regard to a range of potential avenues of defense, whose cumulative prejudice must be considered.

Finally, this is the antithesis of a case where the objective strength of the prosecution's case rendered harmless even multiple instances of deficient performance by defense. By any objective criteria, including the first jury's vote split strongly favoring acquittal, the prosecution's evidence in this case can at best be described as underwhelming.

B. IAC for Failure to Impeach J.B.'s Trial Testimony with Her Own Writings Regarding Her Sexual Activities with Petitioner.

1. Summary of facts.

a. J.B.'s acknowledgement in her June 2003 "O/W write-up" that her sexual relations with petitioner on April 25, 2003, were consensual.

As of early April 2003, J.B. had been the subject of multiple Knowledge Reports written by other Scientologists regarding her improper conduct in violation of Scientology ethics and norms, including excessive drinking and neglecting her child. These reports were written by people close to her – her mother (Exhibit 13, Ruth B. Knowledge Report) and her friends DefWitness6

(Exhibit 14, DefWitness6 Knowledge Report), and DefWitness4 (Exhibit 5, DefWitness4 Knowledge Report).

J.B.'s Ethics Officer, Julian Swartz, decided that J.B. needed to address the claims of misbehavior and arranged to meet with her in May 2003. The first stage of the procedure to address such a matter frequently entails the parishioner writing a candid account of their misbehavior, known in the Scientology lexicon as an "Overt/Withhold," or "O/W write-up."[15] In May 2003, he asked J.B. to prepare an O/W write-up regarding her recent violations of the COS Ethics Codes. The result was a typewritten document with J.B.'s name at the top, the date of June 2003, and written in the format prescribed for this type of document. Exhibit 15, J.B. O/W write-up, June 2003, p. 9. The document contained her descriptions of numerous incidents in which she described such ethics violations as drinking to the point of black-out; engaging in inappropriate sexual activities; buying alcohol for an under-aged relative; and neglecting her parental responsibilities. Included among these incidents is the following account of her April 25, 2003, sexual activity with petitioner, which she described as consensual. She employed Scientology terminology throughout this report, and counsel for petitioner has provided a translation to colloquial English in parentheticals.

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[15] The process of writing down one's misbehavior is viewed in Scientology practice as a therapeutic experience.

O: [overt] I set a bad example as a clear and contributed to another engaging in non survival activities.

T: [time] April 2[5]th around 3:00 am.

P: [place] in Hollywood at Danny's house.

F: [form] I went out with a group of friends, and we ended up at the end of the night at Danny's house. When I got there I poured a drink (Vodka and fruit punch). I was socializing with those there. (there were about 20 people there.) As I put my purse down on a chair, Danny slapped me in the rear. I gave him a dirty look and said "can you not!" Then I went about my comm cycle [conversation] with another. At one point Danny was originating some comm to me [catching up] and another about his trip he just arrived back from. He was saying that in the last few weeks he hadn't had anything to drink or 2d activities [dating] with anyone he came across. This is actually a notable ethics change on his part. Immediately I realized I had poured a drink with him when I arrived. I was getting a drink and he came over asked what I was drinking and poured himself a drink. I felt like a bad influence. I did not validate his ethics change or comment [failed to support petitioner's positive efforts], I actually questioned the 2d part of his statement [the part about not dating] in disbelieve [sic].

Later that night, both of us having drank for an hour or more, I noticed his flow get more solid [flirtation], as it does when he is restimulated on the 2d [sexually attracted] in my experiences with him. I let him 8c-push [guide/assist] me in the Jacuzzi. He was undressing me etc. I got out of the jacuzzi after he and others left the tub, but now due to 2 drinks and an hour in the hot jacuzzi (I have extremely low blood pressure) I was ill beyond believe [sic] and could not really see. DefWitness2 was there with me. I curled up in a

ball on the ground and waited for the intense illness to pass.

Then a minute later Danny came up to me I couldn't actually see him (only a little bit of a white robe) as my vision goes black when I overheat and my blood pressure gets low, so I asked DefWitness2 who was there. Danny answered and picked me off the floor. At this point I knew that this would likely lead into a 2D activity [sexual relations] between us. I knew I was drunk and he was too. I said no I am sick he said I will help you. At this point I was naked, and as he was carrying me away I thought it was a solution to the situation I was just in with DefWitness2 (he was attempting to touch me etc.) just before I got ill. I was not wanting to confront a long standing sit [situation involving on and off flirting] between DefWitness2 and I and with Danny carrying me away it handled that.

I went upstairs and threw up with Danny's help. After Danny picked me off the floor and went to put me in the shower I knew I should get out of his room then. As I turned to get out of the shower as he was stepping in now undressed. I decided at that point the hell with it and I would have sex with him and enjoy it even though it was a big violation of my own 2d ethics level etc. [violation of her moral code] I had sex with him and was drunk and engaged in 2d irregularities with him [unconventional sex].

I blacked out at one point. And when I came to I suddenly lost my non confront [sobered up] and caved in. [felt guilty] He told me to wait right there (I was in his bed) and he went out of the room (I believe for a glass of water or s/g) I went and hid in his closet til I knew he came back in and was in bed for awhile. We did not use a condom. While having sex, he proposed we do this again as often and whenever I wanted and I should tell him. I agreed to this. This

> was not us mocking up a 2d etc. [visualizing and creating a longer-term relationship]
>
> What I realize now is here he had just kept his ethics in for weeks on the 2d [stayed on the straight and narrow] and he had not been drinking and I just facilitated and contributed to his demise rather than validate and make it right.
>
> E: [event] I drank, was promiscuous, and contributed to another's demise as well as setting a bad example. Exhibit 15, p. 10 (emphasis supplied).

J.B.'s written account demonstrates that the April 25 incident was not forcible rape at all, but was a voluntary sexual fling, perhaps ill-advised but entirely uncoerced. It was directly exculpatory as to the issue of consent to the sexual relations.

b. J.B.'s acknowledgement that she authored the June 2003 "O/W write-up."

J.B. denied authorship of the O/W write-up when Det. Vargas questioned her about it on July 22, 2020. She also denied authorship when cross-examined about it at the preliminary hearing in May 2021.

However, she had long ago acknowledged authorship of the O/W write-up in her January 13, 2004, formal letter to IJC. Exhibit 16.

That letter includes the following passage – "I worked on my ethics cycle at AOLA in May and June and did an O/W write up." Exhibit 16 (emphasis supplied). Trial counsel could have confronted her at trial with the O/W write-up; J.B. would likely have denied writing it as she did in her interview with Det. Vargas at the preliminary hearing; and counsel could have

impeached her with her acknowledgement of authorship in the IJC letter.

c. J.B.'s description of her sexual activities with petitioner in a manner inconsistent with her subsequent claim of forcible rape.

In the January 13, 2004 IJC letter, J.B. described her April 25 sexual activity with petitioner in a manner that was inconsistent with a claim of forcible rape. She referred to a "rumor" circulating among her friends that she "was really drunk and passed out in his bed and that he had, being my friend, not taken advantage of me." She firmly asserted that "[t]he truth is uncontested by both Danny and I that he and I had sex that night," but without any reference to it being forcible rape at all, much less forcible rape with a gun.

d. J.B.'s acknowledgement that she did not make a report of rape to her Ethics Officer immediately upon her return to California in May, 2003.

At trial, J.B. testified that immediately upon return from her family trip to Florida in early May 2003, she made a report of rape to her Ethics Officer, i.e., a nearly contemporaneous report. However, the chronology she reported in the January 13, 2004 IJC letter is very different:

- In May and June, J.B. "worked on [her] ethics cycle at AOLA … and did an O/W write up." [No mention of a rape];

- In July, "[DefWitness4] and I got in comm and she asked me if I had sex with Danny as she realized she never asked me. I said I had." [No mention of a rape].[16]
- "About two weeks later [late July or early August] I told my MAA [Ethics Officer] how and what went down with Danny and I, the state I was in the fact I did not want him to carry me to his bathroom/ bedroom, the promise he made not to do anything to me other than help me throw up, and the physical portions of which I was conscious for. I had a bigger problem which was reporting it and the ensuing drama I would have to go thru."

The chronology in J.B.'s January 2004 IJC letter repudiates her testimony that she had made a contemporaneous report, and instead states that she first told her Ethics Officer that the incident was nonconsensual due to alcohol in late July/early August, some three months after the incident, a not-so-contemporaneous report.

e. J.B.'s acknowledgement that she wrote the Knowledge Report dated December 2003 during November and December 2003.

At trial, J.B. testified that she had written three reports during her counseling with Ethics Officer Julian Swartz in May/June 2003. 25 RT 2105. The first report was a short written statement to Swartz in which she summarized "what I had

[16] DefWitness4 confirmed the July 2003 conversation with J.B. in her June 2004 interview with Det. Myers. See Claim I, supra.

experienced" and "what my feelings were." 25 RT 2105. The second report was an "O.W. write-up." 25 RT 2106.[17] The third report was a Knowledge Report. 25 RT 2106. The only Knowledge Report attributed to J.B. is the one dated December 2003. Exhibit 17, J.B. Knowledge Report.

J.B.'s testimony that she wrote the Knowledge Report in May/June 2003, nearly contemporaneous with the incident, was rebutted by her January 13, 2004, letter to the COS International Justice Chief:

> In November I went in session, [counseling] this came up for me, and after being sent to ethics I wrote my report on Danny. That was in early December 2003. Since then this cycle has blown up and I could not imagine a worse scenario. Exhibit 16, IJC Letter Jan. 13, 2004.

This also refutes her trial testimony that her Scientology Ethics Officer discouraged her from making a report back in May and then forced her to write it in conformity with his admonitions. The December 2003 report was all J.B.'s handiwork that in fact <u>was encouraged</u> by her Ethics Officer in November 2003, per her January 13, 2004 letter.

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[17] There is only one O/W write-up extant, the one dated June 2003, Exhibit 15, which J.B. denied authorship of in her statement to Vargas and in her preliminary examination testimony, but which she acknowledged authoring in her January 13, 2004, IJC letter.

f. J.B.'s repeated use of the term "rape" and "rapist" in both her January 13, 2004 and her April 13, 2004 letters to the International Justice Chief.

J.B. testified that when she was writing the Knowledge Report, Swartz made it clear that she was not to "open up with or at any point use the word rape." 25 RT 2110. However, she wrote two letters to the IJC on January 13 and April 13, 2004. In the January 13 letter, she characterized her complaint as rape five times. Exhibit 16, J.B. Letter to IJC, Jan. 13, 2004. In the April 13 letter, she informed the IJC that she intended to sue petitioner for damages arising from the April 25, 2003 incident. In that letter, she used the term "rape" or "raped" six times and referred to petitioner as a "rapist." Exhibit 18, J.B. Letter to IJC, April 13, 2004.

The letters flatly rebut J.B.'s testimony that she was prohibited by COS law from accusing another Scientologist of rape in COS communications. 25 RT 2069 ("we don't say that word" ["rape"]). She used the term multiple times with impunity in her official communications with the International Justice Chief.

2. The deficient performance.

J.B.'s writings to various Scientology personnel between May 2003 and April 2004 starkly contradict her trial testimony and could have been used by counsel to impeach her with inconsistent statements that she authored. Trial counsel used none of it and could not have had a valid tactical reason for

failing to do so. Counsel's sole avenue of defense was to confront the complaining witnesses with their prior inconsistent statements that conflicted with their trial testimony. J.B.'s own written communications with COS staff impeached her trial testimony in a manner directly parallel to the impeachment based on her inconsistent statements to the police. Counsel had every incentive and opportunity to use her COS writings to impeach her, but failed to do so. Strickland v. Washington, supra.

3. The resulting prejudice.

The impeaching impact of the three documents discussed here would have significantly contradicted J.B.'s trial testimony.

The failure to have used these documents for impeachment enabled the prosecutor to argue without contradiction that the complaining witnesses were doubly victimized, first by petitioner and then by COS law:

> The Church taught his victims rape isn't rape. You caused this. And above all, you are never allowed to go to law enforcement. What better hunting ground? 33 RT 3259.

The big picture here is that impeachment by means of these three documents would establish that J.B. actively participated in the COS internal investigation, and when she thought the proceedings were not going her way, she pushed back aggressively and at times successfully. This refutes J.B.'s recurrent theme that she was bullied and re-victimized by COS throughout the internal investigation process. If counsel had availed himself of these documents, counsel could have argued to

the jury that J.B.'s claim of forcible rape was inconsistent with her own previous written statements. It would also have deterred the prosecutor's climactic argument to the jury that "the Scientology law told them there is no justice for them," but the jury has "an opportunity to show these victims that there is" by convicting petitioner. 34 RT 3411-3412.

In light of the strong impeaching import of these writings, counsel's deficient performance in failing to use them must undermine this Court's confidence in the fairness of the trial. Strickland v. Washington, supra.

C. Failure to Present the Testimony of Character Witnesses Regarding J.B.'s Poor Reputation for Honesty and Veracity throughout Her Life.

1. Summary of facts.

Throughout her adult life, J.B. exploited numerous people by means of lies and deceit to obtain monetary benefits for herself, generally by falsely portraying herself as a victim of some external force. Not surprisingly, many of the victims of J.B.'s scams formed negative opinions of her character for truthfulness and veracity, and the presentation of their opinions to that effect would have had considerable impeachment impact. See Evidence Code section 786, subd. (e) ["character for honesty or veracity or their opposites"].

Counsel for petitioner has selected three potential character witnesses as illustrative of the larger circle of people who also hold J.B.'s character for truthfulness in very low esteem.

a. Marty Kovacevich.

From 2011 to 2016, J.B. and her third husband Jared Georgitis engaged in a series of frauds against a succession of Los Angeles landlords. The two of them would rent a residence, sometimes under false pretenses; make numerous and contrived complaints of defective conditions to the Los Angeles Housing Authority; stop paying rent; and eventually sue the landlords. Sometimes the landlords' insurance companies made generous settlements, and sometimes the landlords fought back and won judgments of their own. By 2017, they had fleeced at least five landlords, all of whom hold an adverse opinion of J.B.'s credibility.[18]

One of them, Marty Kovacevich, fought back after dealing with J.B.'s false claims of defective residential conditions for a lengthy period. He had numerous encounters with her regarding fictitious claims of property defects, all dutifully investigated by the Los Angeles Housing Authority and found unsupported. When she eventually sued him, he counter-claimed, and after a drawn out legal battle, he won a judgment against her and Georgitis. During the course of this protracted dispute, Mr. Kovacevich formed the opinion that J.B.'s character for veracity was terrible. Exhibit 20, Declaration of Marty Kovacevich.

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[18] See Exhibit 19, Roster of J.B.'s landlord lawsuits.

b. Ruth Speidel.

Ruth Speidel, J.B.'s mother, was concerned about J.B.'s dissolute and irresponsible life as an adult single mother well before the April 25, 2003, incident with petitioner. See Ruth B. Knowledge Report, September 8, 2002, Exhibit 21. Nonetheless, Ms. Speidel did her best to support J.B., largely for the sake of her granddaughter, Brittany, who was being seriously neglected by J.B.

Over the years, Ms. Speidel has maintained as much contact with Brittany as she could. J.B. severed her relationship with her mother in 2018 after her mother confronted her for making false statements about the April 25, 2003 incident with petitioner and about COS involvement after the incident. Ms. Speidel would have testified that she discussed the April 25 incident with J.B. many times over the years, and never once did J.B. claim that petitioner displayed a handgun. Ms. Speidel would have further testified that in her opinion, J.B.'s character for truthfulness was terrible. Declaration of Ruth Speidel, Exhibit 22.

c. Michael Bennitt.

In 2002, J.B. was leading a dissolute life, neglecting her eight-year-old daughter, drinking too much, and living on and off with her parents. At one point in 2002, she was attending Scientology religious services in Clearwater, Florida, and met a fellow Scientologist named Michael Bennitt, who was a few years older and well-to-do. Bennitt became smitten with J.B. and

wooed her. J.B. responded by feeding him a contrived tale of hardship and woe on several fronts, including medical and financial, and portraying herself as a hapless victim of circumstances. Bennitt was a successful market trader in Chicago, and for approximately two years they had a long-distance relationship in which J.B. bilked him for tens of thousands of dollars in cash and gifts, as well as the use of a car and other amenities. J.B. avoided sexual relations with Bennitt by claiming that she was diligently working through Scientology counseling programs to improve her life and that she did not want to begin an intimate relationship with him until she attained a desired degree of character improvement.

This exploitive relationship continued until the fall of 2004 when J.B. settled her threatened lawsuit with petitioner and no longer needed Bennitt's financial assistance. She cut him loose. Bennitt woke up and realized that he had been scammed. He wrote a lengthy Knowledge Report in December 2004 in which he chronicled J.B.'s deceitful course of conduct and offered a scathing opinion of her character for dishonesty. The period of his involvement with J.B. overlapped with J.B.'s claim of rape by petitioner and her successful extraction of $400,000 from him. In sum, as a result of his two-and-one-half-year interaction with J.B., Bennitt formed the opinion that she had a poor character for truthfulness and veracity during the same timeframe that she threatened petitioner with a career-stopping civil lawsuit and

reaped a significant financial benefit. Exhibit 23, Michael Bennitt Knowledge Report.

2. The deficient performance.

Defense counsel was aware from the materials received from Mesereau that at least three people – Kovacevich, Speidel, and Bennitt – had formed negative opinions about J.B.'s character for truthfulness and veracity. Counsel failed to interview any of them and failed to make any other effort to develop a credibility attack based on J.B.'s bad reputation and character for truthfulness.

This was deficient performance in light of the case law that recognizes character evidence as an important vehicle to raise a reasonable doubt in a criminal prosecution. See Michelson v. United States (1948) 335 U.S. 469, 476 ["character is relevant in resolving probabilities of guilt," and "such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt"].

As noted above, Evidence Code section 786 expressly provides the admission of character evidence of "honesty or veracity, or their opposites" to "attack or support the credibility of a witness." Defense counsel squandered the opportunity to incorporate this type of impeaching evidence into the defense.

3. The resulting prejudice.

The presentation of evidence of J.B.'s bad character for veracity from Bennitt, Kovacevich, Speidel, and others would have been viewed as very strong impeachment for a number of

reasons. First, Kovacevich, the other landlords, and Bennitt had no acquaintance with petitioner or had any motive or incentive to assist him in his defense. Ruth Speidel and petitioner had been acquainted in the early 2000s, but became antagonists in December 2003. She had no ongoing contact with petitioner at the time of trial. Their testimony viewed cumulatively would have revealed J.B. as a deceitful scam artist throughout the great majority of her adult life.

Finally, the jury would have been given an important perspective regarding the numerous inconsistencies and alterations of her claim of rape over time. The prosecution characterized those inconsistencies and alterations as innocuous vagaries of human memory. The section 786 evidence would have provided an alternative explanation, i.e., the product of an innately bad character for truthfulness and veracity. The failure to investigate and present this evidence was prejudicial by itself and when viewed in conjunction with the other impeaching evidence that was similarly squandered. Strickland v. Washington, supra.

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D. Petitioner was Deprived of Due Process and a Fair Trial by Prosecutorial Misconduct in Presenting J.B.'s False Testimony that She was Bullied by the COS to Sign a Nondisclosure Agreement As Part of the 2004 Civil Settlement and By Ineffective Assistance of Counsel for Failure to Debunk the False Testimony.

1. Summary of facts.

In July 2004, a month after the District Attorney declined to prosecute J.B.'s claim of rape in April 2003, J.B. hired Daniel Noveck, a prominent plaintiff's attorney to draft a civil complaint against petitioner and threaten to file it unless petitioner made a suitable financial settlement. Exhibit 24, Demand Letter and Draft Complaint. Petitioner retained Marty Singer, an equally prominent entertainment attorney who strongly advised petitioner to make a settlement regardless of the merits of the accusation to avoid jeopardizing negotiations for an eight-figure television contract. J.B.'s attorney made a $2,000,000 demand; the parties engaged a mediator; and on September 20, 2004, the parties came to an agreement in which petitioner would pay J.B. $400,000 in return for a release of liability and a non-disclosure agreement ("NDA"). Petitioner successfully protected his thriving career, and J.B. walked away with $400,000. That is considered business as usual in the entertainment industry.

Thirteen years later, on January 26, 2017, J.B. was interviewed by Detectives Myape and Villegas, and she broached the 2004 mediation settlement, but described it in an altogether fabricated and self-serving manner. She claimed that she was

coerced into signing the settlement agreement by Scientology operatives who threatened to expel her from the Church if she refused. Exhibit 25, Transcript of J.B. Interview, pp. 185 et seq.:

> [J.B.]: He then – (UI). I go down with my lawyer and meet with his lawyer, Marty Singer, on a Saturday in Marty Singer's offices. (UI) Marty Singer (UI) no witnesses no nobody.
>
> Me and my stupid attorney, who I hate now – he's dead[19] – this guy who turns out doesn't know anything about law – and left me alone for two hours when I met with Marty. And I was waiting. And we come back, and I had to sign an agreement with him, right, and bring that to Julian[20] on Saturday. (UI). 6:00 at night. Either come in with your agreement, right, signed, or pickup you're declared.[21] You're choice, right?
>
> Det. Reyes: Uh-huh.

J.B. contended that she "didn't expect money," and that she "didn't make a demand for money." Exhibit 25, p. 186. The detectives apparently accepted this statement at face value in spite of its inherent implausibility that while she never expected money or asked for money, petitioner paid her $400,000.

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[19] To paraphrase Mark Twain, J.B.'s report of Noveck's demise was greatly exaggerated. Noveck was very much alive when Det. Vargas called him on September 18, 2018, and Noveck "stated that the COS was not involved." Exhibit 26, LAPD Chronology 2017-2021, compiled by Det. Vargas (hereafter "LAPD Chrono"), p. 31.

[20] Julian Swartz was J.B.'s Ethics Officer, whom she claimed delivered the threat to sign the NDA or be expelled.

[21] "Declared" is the Scientology term for "expelled."

As noted above, Det. Vargas subsequently elicited from attorney Noveck in 2018 that there was no COS involvement in the threatened civil suit and settlement, and that petitioner was eager to settle the dispute for business reasons unrelated to the merits of J.B.'s accusation. Exhibit 26, p. 31, LAPD Chrono.

In 2020, DDA Mueller called Marty Singer to testify at a criminal grand jury proceeding regarding the settlement, and Singer disclaimed any involvement by COS in the negotiations and settlement. 9 CT 2583-2585.

Notwithstanding the prosecution's knowledge that both attorneys had clearly stated that there was no COS involvement in the civil settlement and the NDA, the prosecution elected to make J.B.'s false claim of COS duress regarding the NDA an integral part of its case at both trials.

2. The prosecutorial misconduct in presenting false testimony.

a. The prosecutorial knowledge that J.B.'s claims of COS bullying and duress from 2017 through trial were false.

The prosecution knew from multiple sources that J.B.'s COS coercion scenario was a fiction. Det. Vargas had elicited from J.B.'s attorney Noveck that there was no COS involvement. DDA Mueller had elicited from Marty Singer at the grand jury proceeding that there was no COS involvement.

Det. Vargas called Noveck who confirmed that he negotiated the settlement that included the NDA but "stated the

COS was not involved." Exhibit 26, p. 31, LAPD Chrono (emphasis supplied).

Det. Vargas summarized Noveck's description of the process as follows:

> He stated he drafted a letter advising Mr. Singer of the forthcoming civil lawsuit. Mr. Singer requested a meeting. During a subsequent meeting with Masterson and JD-1, who were place in separate rooms, the parties involved reached an agreement. A civil suit was never filed by Noveck. Id.

Vargas further noted that according to Noveck, Masterson was concerned about a "moral clause" he had with the television production he was involved with at that time. He did not want to lose the lucrative eight-figure contract he then had. He was eager to settle and finalize the NDA. Ibid.

Moreover, DDA Mueller had been separately informed by petitioner's attorney Marty Singer that there had been no COS involvement in the civil settlement. DDA Mueller had called Singer as a witness at a grand jury proceeding in 2020, and Singer disclaimed any contact with anyone from COS in the course of the settlement proceedings. See People's Opposition to Third Party Lavely and Singer Professional Corporation Objection to Subpoena Duces Tecum, filed September 1, 2022, 9 CT 2583, 2585.

Thus, the prosecution was clearly informed that J.B.'s claim of coercion by the COS to sign the NDA was a fabrication. Nonetheless, the prosecutor elicited from her at both trials the

false version of the events that closely tracked her January 17, 2017, statement to Det. Myape.

b. The applicable law.

The knowing presentation of false testimony by the prosecution "cuts to the core of a defendant's right to due process." Haskell v. Green SCI (3rd Cir. 2017) 866 F.3d 139, 152. A constitutional violation occurs where the prosecution's case includes testimony that the prosecution knew or should have known was perjurious. United States v. Agurs (1976) 427 U.S. 97, 103 explained that the materiality standard for false testimony is lower, more favorable to the defendant, and more adverse to the prosecution as compared to the standard for a general Brady withholding violation.

Moreover, "[i]t is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt, 'because [a] lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.'" Napue v. Illinois (1969), 360 U.S. 264, 269-270. Accord: Glossip v. Oklahoma (2025) 604 U.S. 226; People v. Morrison (2004) 34 Cal. 4th 698, 716-717.

Det. Vargas affirmatively knew that J.B.'s testimony about the 2004 settlement proceedings was false, and that knowledge "applies to testimony whose false or misleading character would be evident in light of information known to the police involved in the criminal prosecution." People v. Morrison, supra. That

knowledge is fully attributable to prosecutor Mueller. Moreover, the prosecutor compounded the presentation of false testimony by arguing that it was true, and that J.B. had been victimized by Scientology when there was no Scientology involvement at all. 33 RT 3289.

3. The ineffective assistance of counsel in failing to rebut the false evidence.

Defense counsel's cross-examination of J.B. indicated an intent to suggest to the jury that J.B.'s receipt of $400,000 demonstrated a financial motive in her testimony. However, J.B. countered counsel's efforts at every turn and insisted that her signing the NDA was the result of COS coercion.[22] 27 RT 2367-2375. In the face of J.B.'s adamance in portraying herself as the victim of COS coercion, defense counsel had objective and independent evidence to demonstrate that J.B.'s coercion scenario was false, contrived, self-serving, and indicative of her poor credibility in general, but he failed to present it.

a. The failure to call Marty Singer, Daniel Noveck, and other relevant witnesses.

Defense counsel was clearly on notice of Singer and Noveck as powerful impeaching witnesses. He should have interviewed them; and he should have called them to testify to the absence of

[22] Counsel never asked J.B. the most salient question – "Couldn't the COS have obtained the identical result – ensuring that you did not publicly accuse petitioner of rape – by simply telling you that you would be expelled if you made a public accusation, rather than getting involved in an elaborate charade of a lawsuit?" Nor did counsel argue that obvious point to the jury.

any COS involvement in the September 2004 mediation and settlement. Cohen's co-counsel at the first trial was Karen Goldstein, and she sent him an email list of potential witnesses that included both Noveck and Marty Singer as potential witnesses. Exhibit 11, Goldstein Witness List.

Petitioner urged Cohen to call Singer to establish what actually happened with respect to J.B.'s threatened civil action; her grandiose seven figure demand for $2 million to settle; the absence of any COS involvement in the settlement negotiations; and the drafting of the NDA.

In addition, Singer would have testified that petitioner had sound business reasons to settle the case in 2004 notwithstanding his innocence, and that he (Singer) had strongly advised petitioner to do so, even though petitioner had a very strong defense against the allegations. That would have warded off an unfounded inference by the jury (that was subsequently drawn by the trial court) that petitioner's payment of $400,000 was a tacit admission of guilt.[23] Exhibit 27, Declaration of Martin Singer.

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[23] Judge Olmedo did make that unfounded inference of guilt at the time of sentencing:

> Shortly after the rape, you paid Jane Doe 1 approximately $400,000 to keep quiet about the charged sexual incident. And while some may argue that whether you believed her story was true or not, you just didn't want the bad publicity, she was seeking money from you, close to half a million

Defense counsel should also have called Noveck to confirm what he had previously told Det. Vargas, i.e., that there was no COS involvement in the September 2004 mediation and settlement. Moreover, Noveck had already told Det. Vargas that petitioner was eager to settle the dispute for business reasons unrelated to the merits of J.B.'s accusation.

Defense counsel called no one to rebut J.B.'s self-serving testimony.

b. The failure to argue the exculpatory impact of the evidence that was presented.

Trial counsel failed to argue the most obvious refutation of J.B.'s coercion scenario – that a person who has been bullied into doing an aversive act is not going to receive $400,000 from the bully. Bullies just do not compensate their victims. Counsel failed to make this obvious and potent argument to the jury. Instead, counsel made a couple of tepid references to the 2004 lawsuit threat and settlement in closing argument:

> dollars is an awful lot to pay for the silence about an incident that you claimed never happened. 44 RT 3720 (emphasis supplied).

The court's statement was misguided in a number of ways. First, petitioner never claimed that the incident "never happened," but claimed that it was another instance of consensual sexual intercourse. Second, the court's comment was made in ignorance of the fact that in the summer of 2004, petitioner was negotiating for a $16 million renewal contract for his television show, of which $400,000 is 2.5%, hardly onerous as a cost of doing business where there was $16 million at stake.

> But just so we're all on the same page about lawsuits, J.B., in 2004, makes a demand and she asks for money in return for not filing a lawsuit. 33 RT 3333.
>
> ***
>
> Finally, with respect to J.B., right around the time that she goes to LAPD in 2004, she also makes a demand through a lawyer – through a retained lawyer with a retainer agreement – makes a demand to Danny, basically, pay me money and I won't allege rape.
>
> What was going on with Danny in 2004? You heard this from, I believe, C.B., N.T. his career had been great. It was getting even greater.
>
> Ms. Anson: Objection; facts not in evidence.
>
> The Court: Sustained. Rephrase. 33 RT 3355.

Counsel then asked the rhetorical question, "Why is this [the settlement] important?" and then offered a very minor reason – because it constituted a civil settlement that contradicted the complaining witnesses' testimony that disputes between COS members were to be resolved through COS procedures only. 33 RT 3356.

Counsel failed to make the far stronger argument that J.B. had lied point-blank to the jury about being bullied by COS into signing the NDA. Counsel failed to argue that if the COS actually wanted to silence her, the COS would have told her simply and directly that she would be expelled if she publicly accused petitioner. Counsel failed to argue that COS had no reason to engage in an elaborate charade about a lawsuit and NDA settlement to obtain that result. At the same time, J.B. had

a financial motive from 2017 to the time of her testimony to call into question the validity of the NDA so that it would not interfere with her chances to recover civil damages a second time.

Those arguments would have called J.B.'s overall credibility into serious question, but counsel failed to make them. This omission enabled the prosecutor to argue that "[t]here is no evidence of any deliberate lying about anything significant in this case." 33 RT 3382. In fact, there was irrefutable evidence of deliberate fabrication on a subject that the prosecution clearly considered significant.

4. The Resulting prejudice from both constitutional violations.

In light of the unrebutted claims of COS bullying, some of the jurors may have wondered why petitioner would have paid J.B. $400,000 to forego making a public claim of rape against petitioner when, according to J.B., she had already been bullied into signing the NDA by COS. However, the prosecution glossed over that anomaly, and defense counsel failed to exploit it. Thus J.B. was permitted to falsely portray herself as the hapless victim of COS in 2004, a preview of her subsequent claims of victimization by COS in 2017 and thereafter.

Moreover, it was essential for the defense to establish that petitioner had pressing business reasons to settle the dispute, because otherwise the jurors were all too likely to infer that petitioner paid $400,000 to avoid a criminal prosecution, an implicit acknowledgement of consciousness of guilt, just as Judge Olmedo wrongly attributed to petitioner. See fn. 23, supra.

Under the rationale of Evidence Code section 780, subd. (i), CALCRIM 226 provides "If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says." Noveck's testimony would have been particularly persuasive. United States v. Powell (9th Cir. 1978) 587 F.2d 443, 447 ["[w]e think that the inability of defense counsel to secure the testimony of [complaining witness] Sullivan's lawyer at the trial was a miscarriage of justice, which requires a new trial"].

Rather than expose this Big Lie on J.B.'s part, counsel focused almost solely on inconsistencies between her several statements over the years, some of which were plainly trivial.[24]

The prosecution exploited J.B.'s false testimony about the events of 2004 to confirm that she was the hapless victim of petitioner and COS just as she was at the time of trial. This improperly bolstered her credibility and cast her as a sympathetic complaining witness:

> Look, you weren't supposed to do that [complain to the police]. This is bad. But, look, you enter into a settlement agreement and you sign this non-disclosure agreement, we won't declare you. She makes the decision – the hard decision to sign this NDA and she is paid $400,000.
>
> Now, this – this upset Jenn to her core. The organization that she trusted, that she believed in,

[24] The court repeatedly upbraided defense counsel for pointlessly questioning J.B. at undue length about such seeming trivialities such as the temperature of the water in the hot tub on April 25, 2003. 27 RT 2394.

> she now had a lot of skepticism for, a lot of distrust. And that distrust for Scientology and that organization seeped into other areas of authority like with law enforcement. 33 RT 3289.

What "hard decision?" To pocket $400,000? What "upset her to her core?" The massive infusion of money to her bank account?

Given the closeness of the case as set forth in the Opening Brief, counsel's failure to expose J.B.'s Big Lie and challenge her overall credibility deprived petitioner of a fair trial.

E. IAC for Failure to Investigate and Present Evidence that J.B. Had A Chronic Medical Condition that Explained the Cluster of Symptoms She Described At the Time of the April 25, 2003 Incident to Rebut the Prosecution's Argument that Petitioner Roofied Her.

1. Summary of facts.

In J.B.'s statements to the police and in her testimony at both trials, she described symptoms that she experienced after being in petitioner's hot tub on April 25, 2003. She claimed she felt extremely weak, woozy, and out of it with blurred vision. She attributed these symptoms to either alcohol furnished by petitioner and/or to a roofie-type drug that petitioner put in her drink. This testimony cast petitioner in the unfavorable light of a Bill Cosby-like sexual predator. However, embedded in J.B.'s statements was an alternative explanation for the symptoms that did not involve petitioner at all. This explanation was contained in J.B.'s first written description of her April 25 sexual activities with petitioner.

a. J.B.'s initial attribution of her April 25 symptoms to her anemia/low blood pressure condition.

The document titled O/W write-up and dated June 2003, Exhibit 15, contains J.B.'s first description of her compromised condition after drinking alcohol and spending an hour in the Jacuzzi:

> I let him 8c-push me in the Jacuzzi. He was undressing me etc. I got out of the jacuzzi after he and others left the tub, but now due to 2 drinks and an hour in the hot jacuzzi (I have extremely low blood pressure) I was ill beyond believe [sic] and could not really see. [DefWitness2] was there with me. I curled up in a ball on the ground and waited for the intense illness to pass. Then a minute later Danny came up to me I couldn't actually see him (only a little bit of a white robe) as my vision goes black when I overheat and my blood pressure gets low, so I asked [DefWitness2] who was there. Danny answered and picked me off the floor. Exhibit 15, J.B. O/W write-up (emphasis supplied).

b. J.B.'s confirmation of her low blood pressure/anemia condition in 2017.

In her July 22, 2020, police interview, J.B. confirmed that she had a longstanding low blood pressure condition, but then claimed that her low blood pressure symptoms had never been as severe as the symptoms she felt on the evening of April 24, 2003. Exhibit 28, p. 511.

2. The trial testimony of the prosecution's toxicologist.

Jennifer Ferencz testified that she is a criminalist who works in the LAPD toxicology unit. 30 RT 2817. The prosecutor

provided her with hypothetical facts that tracked J.B.'s testimony, and elicited the following:

> Q: Now based on that hypothetical, do you have an opinion whether the symptomatology in that – expressed by that person would be consistent or inconsistent with the alcohol alone?
>
> A: The hypothetical that you presented, that symptomatology is inconsistent with that amount of alcohol consumed.
>
> Q: And, again, what is your basis for that opinion?
>
> A: Again, having received training on the effects of alcohol in the human body. 30 RT 2837-2838.

3. Facts regarding J.B.'s medical condition that accounted for all of her symptoms.

J.B. was diagnosed early in life with a chronic condition of iron deficiency anemia. There are multiple causes of iron deficiency, some can be treated with iron supplements. However, J.B. had a very intractable form of anemia that was caused by a metabolic inability to absorb the iron contained in iron-rich foods. See Exhibit 22, Declaration of Ruth Speidel.

This type of iron deficiency anemia results in symptoms that include: low blood pressure, vision blurring, physical weakness, mental confusion, and sensitivity to heat. Declaration of Dr. Daniel Buffington, Exhibit 29.

J.B.'s mother became aware of J.B.'s anemia condition early in her life when it was diagnosed by their family doctor. However, the problem was intractable, and J.B. suffered symptoms when she over-exerted, was over-heated, or drank

alcohol. Ms. Speidel also noticed that J.B. had an additional symptom – that she bruised easily.

4. Deficient performance.

Counsel had every incentive and opportunity to investigate and present evidence of J.B.'s medical condition that provided an alternative explanation for the cluster of symptoms she described after being in petitioner's Jacuzzi on April 25, 2003. J.B. herself attributed her nausea and vision problems to that condition in her O/W write-up of June 2003, calling it "low blood pressure." Counsel failed to take the most immediate and obvious follow-up step of having an investigator contact J.B.'s mother to ask about J.B.'s medical ailments.

Defense counsel had a strong incentive to investigate J.B.'s medical records regarding a low blood pressure syndrome. First, petitioner denied giving J.B. or any of the complaining witnesses excessive alcohol or mind-altering drugs, but the prosecutor argued to the jury that petitioner must have given them mind-altering drugs to provoke the symptoms they described. J.B. was the first complaining witness to report them. By the time of the second trial, all complaining witnesses claimed virtually identical symptoms, as the prosecutor so vigorously argued to the jury. 34 RT 3398-3399. Counsel had an obvious incentive to debunk the roofie narrative, but failed to call the expert witness who was available to do just that.

Co-counsel Karen Goldstein had retained a pharmacologist, Dr. Daniel Buffington, as an expert witness, and he provided an

extensive and helpful analysis. He was listed as a defense witness, but was never called nor given an explanation why not. See Exhibit 29, Declaration of Dr. Daniel Buffington.

5. The resulting prejudice.

Had counsel obtained medical records regarding J.B.'s chronic iron deficiency, counsel could have repudiated J.B.'s claim that she was physically and mentally compromised on April 25, 2003, from drugs administered to her by petitioner. Defense counsel could have argued that J.B. may well have felt very weak and nauseous after being in the Jacuzzi for more than an hour, but that her symptoms were a transitory reaction that would have abated after throwing up and taking a shower to cool off. That would have called into question her testimony that she was too far under the influence of drugs to resist an unwanted overture. The prejudice from counsel's failure to investigate accrues to both convictions. A cornerstone of the prosecution's case at the retrial was that petitioner must have roofied all of the complaining witnesses to weaken their capacity to resist. This approach was clearly intended to bolster the prosecution's position that the undisputed sexual activity qualified as forcible rape, even though the evidence of force was marginal at best.

The prosecutor thus had an incentive to persuade the jury that all of the complaining witnesses were roofied, and to this end called criminalist Ferencz. In addition, the prosecutor emphasized to the jury the absence of any alternative explanations for the witnesses for the reported symptoms:

> You all, your common sense would tell you, without a toxicology report, without a toxicologist coming in here and take the stand to testify, you'd say to yourself, girls, you were drugged.
>
> Now, let's break it down a little bit. If that had been one young woman telling you that, you might say, well, this is an unusual circumstances. It was a one-off; right?
>
> Let's say all four of them came up or a large number of them came up and said, you know, I've been sick. I got medical conditions. I'm unhealthy. You might think differently. You might say, okay. There might be another reasonable explanation as to why you would be experiencing that.
>
> But you don't have four women coming to you with no other explanation, healthy, young, no medical problems;
>
> They have a relatively small amount of this drink and 20, 30 minutes later – all of them within 30 minutes are absolutely wrecked; unlike anything they've ever experienced before.
>
> How do you explain that? What is the reasonable explanation, and how many reasonable explanations are there? There is only one. These women were drugged. 34 RT 3398-3399 (emphasis supplied).

Counsel's failure to investigate and present evidence of J.B.'s medical condition provided the prosecution an open field to give the jury an incorrect and misleading rationale for accepting the roofie hypothesis.

Counsel's attempt to counter the roofie evidence was unsupported by any affirmative evidence, and focused on inconsistencies in the complaining witnesses' report of how much they drank:

> Unless we know for sure – and we don't – what the drinking pattern was, what the symptoms were, this inference, this conclusion that they must have necessarily been drugged just has no foundation to stand on. 33 RT 3361.

That is on its face a weak argument, when a very strong one could have been made. Based on the Declaration of Ruth Speidel (Exhibit 22) and the declaration of Dr. Buffington, the toxicologist (Exhibit 29), counsel could have argued that J.B. initially reported symptoms that were somewhat consistent with being drugged, but that were more consistent with an anemia-related low blood pressure episode.

Many years later, when the complaining witnesses came forward as a group, they merely had to confirm what roofie symptoms were by either talking with each other or consulting the Internet,[25] and claim them as their own. This would have been a compelling argument because neither N.T. nor C.B. made any reference to roofie-like symptoms in their initial and contemporaneous descriptions of their sexual activities with petitioner (another argument that was entirely available to defense counsel, but that he did not make).

In sum, counsel's failure to investigate and present evidence of J.B.'s medical condition made it all too likely that the jury accepted the prosecution's hypothesis of surreptitious

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[25] See, e.g., "Do You Think Your Drink Was Spiked? How to Recognize the Symptoms and Take the Right Steps," https://www.bu.edu/articles/2023/spiked-drinks/

drugging that compromised the complaining witnesses' capacity to resist. The failure to investigate and present this evidence must further undermine this Court's confidence in the guilty verdicts. Strickland v. Washington.

F. IAC for Failure to Impeach J.B. with the Inconsistent Statements in Her Civil Complaints Against Petitioner.

1. J.B.'s inconsistent allegations in the First Amended Complaint.

On February 28, 2020, the complaining witnesses filed a First Amended Complaint, 19 STCV29458. Paragraph 146 of the complaint alleges that while in petitioner's bedroom, "Jane Doe #1 attempted to make noise, but Masterson picked up a gun off of his nightstand, pointed it at her, and told her to be quiet" (emphasis supplied). Exhibit 30, Excerpts of Allegations in the First Amended Complaint). This starkly conflicts with her trial testimony that petitioner was alarmed by someone banging on the bedroom door, took a gun from the nightstand drawer, and then dropped it back into the drawer as soon as he knew who was at the door. This display of the gun lasted mere "seconds."[26]

Paragraph 147 of the complaint alleges that during the evening of April 24, 2003, "Defendant Masterson held Jane Doe

[26] "At one point, he pulled out this gun from that drawer. When there was someone banging on the door, he grabbed for a gun. It was on the right side of the bed. I saw it. He seemed agitated, alarmed. His energy I thought, oh, my god. Whatever is a threat at the door. He then responds to the voice and drops it back in the drawer." 25 RT 2027.

#1 down and anally assaulted her. Masterson only stopped when he heard a voice at the bedroom door and went to investigate." At neither trial did J.B. testify that she was anally assaulted during the April 25, 2003, incident. Rather, as set forth in detail in the Appellants Opening Brief at pp. 31-40, J.B.'s allegations regarding anal sex were strictly limited to the September 2002 encounter.

The First Amended Complaint eliminates any mention of anal contact during the September 2002 incident (Paragraphs 135-137) and transfers the entirety of the anal incident to April 25, 2003.

Paragraph 148 of the complaint alleges that "Jane Doe #l does not specifically recall when, but she recalls at one point escaping the bedroom and returning downstairs. She recalls Defendant Masterson and DefWitness2 grabbing her to bring her back up to Masterson's bedroom." This is the first time that J.B. has ever said anything to this effect. It is an entirely new allegation that surfaced 17 years after the incident. Exhibit 30, Excerpts of Allegations in the First Amended Complaint.

2. The deficient performance.

Defense counsel obviously knew of the pending lawsuit by the three complaining witnesses against petitioner because he attempted unsuccessfully to present evidence that the complaining witnesses had a financial motive to falsely testify against petitioner in the criminal trial to enhance their prospects for a lucrative outcome in the civil case. See AOB, Argument II.

Counsel had every incentive and opportunity to examine the factual allegations in the civil suit to see whether the allegations were consistent or inconsistent with the complaining witnesses' prior statements to law enforcement and their prior testimony. Prior to trial, the court itself included the allegations in the civil complaint in its enumeration of the various sources of impeachment available to the defense. 3 RT 169.

3. The resulting prejudice.

Petitioner recognizes that counsel's deficient performance in failing to use the civil complaint allegation for impeachment purposes may not by itself generate sufficient prejudice to meet the Strickland standard of prejudice. However, when considered in conjunction with the near total failure to provide an effective defense as set forth in the numerous other claims, the cumulative prejudice requires reversal. In re Jones (1996) 13 Cal.4th at 583.

CLAIMS RELATING TO COUNT 2 (N.T.)

II. PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO PRESENT EXTENSIVE AVAILABLE EVIDENCE TO IMPEACH N.T.

A. IAC for Failure to Present the Testimony of A Friend of N.T.'s About A Conversation in Which they Exchanged Reports of Their Respective Sexual Encounters.

1. Summary of facts.

Counsel failed to call DefWitness8, a friend and confidante of N.T.'s, to testify that on a social occasion they exchanged reports about their respective sexual experiences with

petitioner. N.T. described her "fling" with petitioner in a lighthearted manner, contained no suggestion of rape, forcible or otherwise. DefWitness8 was a longstanding friend of N.T.'s, notwithstanding N.T.'s erratic and sometime violent behavior, particularly when she was drinking. Exhibit 31, Declaration of DefWitness8.

2. The deficient performance.

Attorney Cohen had in the investigation file that he received from Mesereau a September 6, 2019, interview of DefWitness8, who had been a close friend of N.T.'s in 2003. DefWitness8 was re-interviewed by petitioner's investigator on September 14, 2022, and she reconfirmed that she and N.T. had discussed their respective experiences with petitioner. Exhibit 32, Declaration of Lynda Larsen. This conversation occurred after the two had not seen each other for a couple of years and had an "epic catch-up" at DefWitness8's residence.

During the same conversation, N.T. told DefWitness8 that she and her former boyfriend, Chris Watson, had had "crazy sex" outdoors on a stairway after they had broken up. This is the sexual encounter that she subsequently also characterized as a rape.

Defense counsel failed to interview DefWitness8 or otherwise consider her as a witness in spite of her clearly exculpatory statements. DefWitness8 would have provided a very valuable counterpoint to the witnesses called by the prosecution as to

statements N.T. made that purported to support N.T.'s credibility as "fresh complaints."

3. The Resulting Prejudice.

DefWitness8's testimony would have had a similar exculpatory effect as to the N.T. count that witnesses DefWitness6, DefWitness7, DefWitness5 and DefWitness1 would have had regarding the J.B. count. See Claim I-A, supra. DefWitness8 was a close friend of N.T.'s at the time of the conversation and had no ongoing ties to petitioner after the fling. Given those circumstances, the jury would likely have afforded her testimony considerable credence.

B. IAC for Failure to Present Evidence that Petitioner and N.T. Had An Ongoing Sexual Relationship that Lasted for Some Weeks, Not One Night as N.T. Claimed.

1. Summary of facts.

A core component of N.T.'s testimony was that she had one and only one sexual encounter with petitioner, i.e., a one-off event, and that it was a rape.

Counsel failed to present testimony of three witnesses who confirmed that petitioner and N.T. had an ongoing sexual relationship that lasted for a period of weeks, not one night as N.T. testified. These witnesses were DefWitness9, DefWitness10, and DefWitness3.

N.T. was living at DefWitness9's residence during 2003. She knew N.T. was having an ongoing relationship with petitioner. Subsequently, she ran into N.T. after they had gone their separate ways, and when they talked about petitioner, N.T.

had only positive things to say about him. Her good words about petitioner caught DefWitness9's attention because N.T. seldom if ever said anything nice about former boyfriends. N.T. never said anything about being raped or otherwise mistreated by petitioner.

After the allegations became public in 2017, N.T. told DefWitness9 that she didn't realize she had been raped until Leah Remini explained it to her. Exhibit 33, Declaration of DefWitness9.[27]

DefWitness10 was petitioner's longtime housemate from 1995-2004. He had previously dated N.T. several times, but it did not develop into a sustained relationship. At some point in the latter part of 2003, petitioner asked DefWitness10 if there would be any problem on DefWitness10's part if petitioner dated N.T., and DefWitness10 assured petitioner there would not be.

Subsequently, there was a period of two or three weeks when DefWitness10 encountered N.T. leaving petitioner's residence in the afternoon on multiple occasions. She never said anything about rape. Exhibit 34, Declaration of DefWitness10.

DefWitness3 was also acquainted with N.T. as a person in petitioner's social sphere. He saw N.T. at petitioner's residence many times, and recognized that they had an ongoing

[27] N.T. testified at the preliminary hearing in May 2021 that she did not realize her sexual encounter with petitioner was rape until 2011 when she read an anti-Scientology article in the New Yorker. 7 ART (8/23/24) 1639, May 20, 2021.

relationship for a time, "hooking up." Exhibit 35, Declaration of DefWitness3.

2. The deficient performance.

Counsel failed to interview DefWitness3 or DefWitness9 at all, and may have spoken briefly to DefWitness10 on other topics. DefWitness3 had been interviewed in 2004 by Det. Myers, and her report of the interview contains nothing that reflects adversely on his credibility. Exhibit 36, Report of Det. Myers' Interview with DefWitness3, June 2004, p. 6. Co-counsel Karen Goldstein included all three of them on her short list of witnesses that she prepared on September 14, 2022, and emailed to attorney Cohen. His failure to make a reasonable inquiry and determination whether to call them was deficient performance when viewed by itself and in conjunction with his failure to call any of the other exculpatory witnesses as to Count 2.

3. The resulting prejudice.

A core component of N.T.'s accusation was that she had one sexual encounter with petitioner when he asked her to come over one evening in late 2003. She claimed that petitioner had sexual intercourse with her against her will, even though she spent the night at petitioner's house and walked home the next morning. She asserted that was the only sexual activity she ever had with petitioner, and she remained angry with him for forcing himself onto her. The combined testimony of DefWitness9, DefWitness10, and DefWitness3 contradicted a core component of her story and substantially

undermined her claim of rape. Evidence that she had an ongoing relationship with petitioner for some weeks is completely incompatible with her testimony about a single instance of forced sex. Counsel's failure to apprise the jury of that evidence must undermine the Court's confidence in the outcome of the trial. Strickland v. Washington, supra.

C. IAC for Failure to Present Evidence that N.T. had Made A Formal Complaint to Law Enforcement in 2007 that She Had Been the Victim of Multiple Sex Offenses, but Made No Mention of Any Rape by Petitioner or By Her Former Boyfriend.

1. Summary of facts.

On January 27, 2017, N.T. was interviewed by Dets. Myape and Villegas. In the course of explaining to the detectives why she did not want to have sex with petitioner on their first date, she volunteered that she suffered from body shame that she attributed to being molested as a child.

> Another thing you should know about me is I have a lot of things – because I was molested a lot as a child. I have a lot of body shame. Exhibit 37, Transcript of N.T. Interview, pp. 21-22.

Det. Myape asked whether the molestation was ever reported to the police. N.T. replied that at the time she did not report it, but years later in 2007, the molester made an overture to her on social media, and she made a report at Rampart LAPD station. The detective she spoke to proposed that she initiate a sting conversation with the molester. N.T. had multiple conversations with the detective, but did not wind up making the sting call. At no point did she tell the Rampart detective that she

was raped twice in 2003, first by her longtime boyfriend Chris Watson, and then by petitioner.

2. The deficient performance.

Trial counsel had every incentive and opportunity to obtain N.T.'s 2007 police report and impeach her with it at trial. Counsel knew that two of N.T.'s friends and her mother were going to testify that N.T. had told them about the alleged rape, relatively close in time to that incident. Evidence that N.T. had made a police report in 2007 regarding earlier sexual abuse without making any references to her claims of rape at issue in this case supports an inference that no rapes occurred. See Kolov v. Garland (6th Cir. 2023) 78 F.4th 911, 921 [where an asylum seeker had a full opportunity to disclose certain instances of persecution in a formal immigration interview but did not, the failure to disclose supported an inference that his subsequent addition of the omitted instances to his claim was not credible]; People v. Brown (1994) 8 Cal.4th 746, 760 ["evidence of a victim's conduct following the alleged commission of a crime, including the circumstances under which he or she did (or did not) promptly report the crime, frequently will help place the incident in context, and may assist the jury in arriving at a more reliable determination as to whether the offense occurred," citing Evidence Code section 210 (emphasis supplied)].

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3. The resulting prejudice.

The prosecution called three witnesses to bolster N.T.'s credibility by testifying that N.T. had made some kind of complaint about her sexual activity with petitioner fairly close in time to when the activity occurred. Defense counsel cross-examined them with limited, if any, success.

Counsel failed to present affirmative evidence of N.T.'s failure to inform the Rampart detective of her claim of rape as an adult in the course of her multiple conversations with the detective about the recent re-appearance of her molester on social media. During the 2007 interview,[28] N.T. broached presumably all of the prior sexual offenses she believed were committed against her. Had this evidence been presented, counsel could have argued that as of 2007, N.T. did not view her 2003 sexual activity as rape, and the rape characterization was a recent development. The cumulative prejudice from counsel's failure to present the three pieces of exculpatory evidence must undermine this Court's confidence in the fairness of petitioner's conviction on Count 2.

D. IAC for Failure to Impeach N.T. with Inconsistent Statements in Her Civil Complaints.

N.T. testified that after she arrived at petitioner's residence, they sat on the couch in petitioner's living room and

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[28] I had a lot of trauma as a kid, and not just the sexual molestations, but – and he wasn't the only person who molested me. There were others – a couple other people. Exhibit 37, Transcript N.T. Interview, p. 71.

"were talking." 28 RT 2538. "We were speaking for a little bit, and then he got up and got me a drink in the kitchen." Ibid.

In the First Amended Complaint, N.T. alleged that "[i]mmediately upon her arrival, Daniel Masterson offered her red wine," Par. 240, a far more peremptory scenario. Exhibit 30, Excerpts of Allegations in the First Amended Complaint.

N.T. testified that after they walked around the residence, they went outside to the pool and Jacuzzi area. Petitioner told her to "take off your clothes now" because "you're getting in the water." 28 RT 2547. N.T. then reported a loss of consciousness before she got in the Jacuzzi:

> And then I have glimpses of in the Jacuzzi, a picture of myself and him, and then it goes black. And it's like – these are, like, flashes of no visual to visual and then visual. And sometimes the visual is blurry, but that's what it felt like.
>
> Q: Let me ask you: Did some of your clothing end up coming off?
>
> A: I think so. Yeah, something came off. I <u>don't know how</u>. Either he took it or I – I was really not – my awareness was not – I was in and out of, like, some kind of consciousness. It was not – I couldn't tell you how – which came off or how or whatever. 28 RT 2548-2549 (emphasis supplied).

In the First Amended Complaint, N.T. alleged that "Masterson ultimately did remove some articles of clothing that Jane Doe #2 was wearing," Par. 240. N.T.'s affirmative allegation that petitioner removed some of her clothing conflicts with her trial testimony that she had no recollection of how her clothing came off, and calls into question her veracity generally.

Counsel had every incentive to impeach N.T. with these additional variations of her story and to demonstrate through expert testimony that these variations defied fundamental and well-established psychological principles about human memory and recollection work. See Claim VI, infra.

CLAIMS RELATING TO BOTH COUNTS

III. IAC FOR FAILURE TO PRESENT EXPERT TESTIMONY TO EXPLAIN THE COMPLAINING WITNESSES' MUTUAL FINANCIAL MOTIVE TO COLLUDE TO SECURE PETITIONER'S CONVICTIONS ON MULTIPLE COUNTS OF FORCIBLE RAPE AS A PREREQUISITE TO ADD CAUSES OF ACTION FOR RAPE TO THEIR CIVIL SUIT.

A. Summary of Facts.

The complaining witnesses denied any pecuniary interest in the outcome of the criminal trial, 28 RT 2631, and the prosecutor adamantly argued to the jury that they had none. 34 RT 3411.

In fact, the complaining witnesses had a very substantial stake in ensuring that petitioner was convicted of multiple counts of forcible rape because those criminal convictions were necessary to reopen a civil statute of limitations window for them to sue petitioner and the COS for damages attributable to the rape.[29] The effect of multiple convictions of forcible rape would trigger a

[29] In addition, criminal convictions would have provided the complaining witnesses an evidentiary advantage in the civil case pursuant to Evidence Code section 1300.

one-year window under Code of Civil Procedure 340.3 for them to file a civil cause of action for rape.

Without multiple convictions of forcible rape in the criminal case, none of the complaining witnesses would have been able to pursue civil damages based on their claims of rape because of expiration of the civil statute of limitations.

The jury should have been informed of the complaining witnesses' significant financial motives to ensure criminal convictions so that the jury could accurately determine their credibility as to their claims of forcible rape.

Defense counsel made a nascent effort to apprise the jury of this motive by re-filing a motion prior to the second trial for the court to take judicial notice and inform the jury of Code of Civil Procedure section 340.3. The trial court refused to take judicial notice or otherwise apprise the jury of this provision of the Code of Civil Procedure. The court barred "any questions or testimony" concerning Code of Civil Procedure section 340.3. 15 ART (8/23/24) 3944. That denial was erroneous and infringed on petitioner's right to present a full defense, as set forth in Argument II in Appellant's Opening Brief. Counsel made no other efforts to apprise the jury of the complaining witnesses' direct financial interest in obtaining multiple convictions of forcible rape.

B. The Deficient Performance.

On this critical issue, counsel relied solely on the request to take judicial notice of Code of Civil Procedure section 340.3 as the evidentiary foundation for the bias argument. A reasonable

attorney would have mustered evidence to show the jury exactly how multiple criminal convictions of forcible rape were necessary to re-open the civil statute of limitations. The most obvious and effective means of making that presentation would be to retain an expert witness, such as a UCLA law professor, to provide the jury with the Big Picture as to how the convictions for forcible rape with a true finding on the Penal Code section 667.61 allegation related to C.C.P. section 340.3 with respect to re-opening the civil statute of limitations.

Expert testimony regarding a relevant point of law by a law professor or experienced practitioner is well-recognized as a legitimate and useful litigation tactic. Zissler v. Saville (2018) 29 Cal.App.5th 630, 636 ["Alan D. Wallace, an attorney and adjunct professor at UCLA and Loyola law schools, testified as an expert witness for appellant"]. Counsel here made no effort to obtain an expert to explain the interplay of the criminal and civil statutes of limitation as a basis for demonstrating the complaining witnesses' mutual and substantial financial interest in securing forcible rape convictions.

If counsel had been successful in obtaining judicial notice of section 340.3, counsel would have a partial foundation for the bias argument, see AOB, Argument II, while an expert witness could explain to the jury the larger context of re-opening of the civil statute of limitations.

Counsel has an obligation to investigate and present evidence of the complaining witnesses' financial stake in helping

the prosecution obtain a conviction. In this case, counsel presented this theory of impeachment to the trial court in conjunction with Motion for Judicial Notice of C.C.P. 340.3. When the court (erroneously) denied that motion, counsel had an obligation to pursue other types of evidence to inform the jury of the complaining witnesses' financial stake in the outcome of the criminal trial.

C. The Resulting Prejudice.

The test for determining whether the exclusion of impeachment evidence violates the Sixth Amendment right of confrontation is whether "the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility'." People v. Lucas (2014) 60 Cal.4th 153, 272.

Counsel's failure to present expert testimony deprived the jury of crucial information to establish a shared financial bias on the part of the complaining witnesses. Financial bias has long been recognized as a potent avenue of impeachment. People v. Lucas, supra, 60 Cal.4th at 272 ["We previously have noted that there may be no stronger witness bias than 'a financial interest in the outcome of the litigation contingent upon its terminating favorably for the party for whom [the witness] testified,'" quoting from Delaware v. Van Arsdall (1986) 475 U.S. 673, 680]. See AOB, p. 90.

Reynoso v. Giurbino (9th Cir. 2006) 462 F.3d 1099, 1117 granted habeas corpus relief for counsel's failure to investigate

and present evidence of the prosecution witnesses' knowledge of and interest in a reward offered for the conviction of the defendants. The Ninth Circuit found prejudice because the prospect of a post-conviction financial benefit provided the jury with a foundation from which to infer bias at the criminal trial. "Unlike the other evidence used to impeach the eyewitnesses – the two who claimed to have seen Reynoso at the scene of the murder – such as inconsistent statements and general attacks on their credibility, evidence of their financial motives would have established a real incentive to lie, explaining why their testimony may have been fabricated." 462 F.3d at 1117.

In the absence of expert testimony or other evidence that the complaining witnesses had a direct financial stake in securing at least two convictions in the criminal trial, the prosecutor forcefully argued that there was no evidence that the complaining witnesses had an ulterior motive to incriminate petitioner:

> To suggest, as the defense has, that there are some ulterior motives other than these victims just wanting to seek justice, the best way I can kind of describe it, is you know what, it's further blaming of these victims.
>
> Because there is no evidence – there is none at all – no reasonable evidence to suggest that there is any other motive other than wanting to have justice for everything they've gone through.
>
> Mr. Cohen: Misstates the evidence.
>
> The Court: Overruled. 34 RT 3411 (emphasis supplied).

In turn, defense counsel had no foundation from which to argue that the complaining witnesses had an immediate financial incentive to skew their trial testimony to secure petitioner's convictions. Counsel referred to money as a possible source of bias in the abstract but never connected the dots between criminal convictions and potentially lucrative civil causes of action for rape.

Reynoso v. Giurbino, supra, found prejudice in part because with evidence of the complaining witnesses' financial motive to secure criminal convictions, the jury would have gotten "a significantly different impression of the [witnesses'] credibility." People v. Lucas, supra, 60 Cal.4th at 272. The same prejudice occurred here. Under these circumstances, this Court cannot maintain confidence in the outcome of the trial. Strickland v. Washington, supra.

IV. IAC FOR FAILURE TO PRESENT EVIDENCE (1) THAT THE POLICE INVESTIGATION WAS BIASED DUE TO THE INAPPROPRIATE ENTANGLEMENT WITH ANTI-SCIENTOLOGIST LEAH REMINI; AND (2) THAT THE BIAS RESULTED IN A DEMONSTRABLY SHODDY AND DEFICIENT INVESTIGATION.

A. Summary of Facts.

1. Introduction and overview.

A longstanding avenue of defense available in a criminal prosecution is to present evidence that the prosecution conducted a shoddy and deficient investigation due to bias, negligence, or some other cause. "A common trial tactic of defense lawyers is to discredit the caliber of the investigation." Bowen v. Maynard

(10th Cir. 1986) 799 F.2d 593, 613. See Kyles v. Whitley, supra, 514 U.S. at 466 ["the defense…could have attacked the reliability of the investigation"]. Defense counsel are then able to argue that the deficiencies of the investigation should be viewed as a source of reasonable doubt as to the probative value of the prosecution evidence that was presented.

The record in this case reveals ample evidence that the law enforcement investigation was biased against petitioner from the outset due to the inappropriate entanglement by the police and prosecutor with anti-Scientologist Leah Remini. She was welcomed into the prosecution fold as an advisor, strategist, authoritative arbiter on the policy and practices of the COS, and advocate for the complaining witnesses. She was welcomed even though the LAPD knew that she had an ongoing vendetta against petitioner.[30] At the same time, the prosecution knew that her anti-Scientology television series would reap substantial publicity and financial benefits if petitioner were charged and convicted.

Petitioner's initial attorney, Tom Mesereau, explicitly brought Remini's self-interest motives to the attention of Det. Vargas early in the pretrial proceedings. On April 19, 2017, attorney Mesereau informed Vargas that there were media reports that Remini was involved in the police investigation, and that "Remini's anti-Scientology stance has fueled the investigation through her show on A&E." Exhibit 26, LAPD Chronology, p. 5. Mesereau informed Vargas that Remini had

[30] See Exhibit 39, Remini Texts to Det. Reyes, 12/22/2016.

previously used the LAPD to jump start her faltering career four years earlier by having her main contact in the LAPD, Det. Kevin Becker, file an unfounded missing person report on the wife of Scientology's leader – designed to smear the Church. The LAPD investigated the report and deemed it unfounded that same day, but it did generate considerable publicity for Remini.

Neither the police nor the prosecutor paid Mesereau any heed. To the contrary, five days later, DDA Mueller and Det. Vargas had an interview with J.B. to get "a gage of what kind of witness you are." Exhibit 38, Transcript of Interview, April 24, 2017, p. 1. Remini attended the interview and dominated the discussion, insisting on a show of commitment to J.B.'s claim of rape while intercepting questions addressed to J.B. that related to her credibility.

Not only could counsel have informed the jury of the inappropriate relationship with Remini, counsel could also have shown the jury that the overall prosecution was objectively deficient, attributable to the relationship with Remini, institutional negligence, or both.

2. Evidence of the prosecution's continuous and inappropriate entanglement with Leah Remini.

a. The prosecution's continuing and inappropriate entanglement with Leah Remini.

In 2016, the complaining witnesses made contact with each other about their sexual relations with petitioner some 13 years previously. C.B. and N.T. had not reported to the police that they had been raped.

At the same time, Leah Remini, a former actress and anti-Scientologist was developing a lucrative niche in the entertainment industry by producing a TV series called "Leah Remini: Scientology & The Aftermath." The premise of that series was to air the complaints of former Scientologists about their experiences as members.

The series first aired in November 2016, and came to the attention of C.B. She then made contact with Remini,[31] as did the other complaining witnesses. Remini told C.B. that she [Remini] would consider having C.B. on her show only if C.B. first made a formal complaint to her local police department, "like an initiation," Exhibit 42, p. 58, and C.B. did so. The Austin Police Department sent a copy of their report to the LAPD, and an investigation was opened. N.T. and J.B. both contacted Remini and the LAPD.

Before the LAPD had interviewed any of the three complaining witnesses, Remini initiated a call with Det. Myape,

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[31] C.B. Tweeted Remini November 8, 2016:

> @LeahRemini I just wanted to thank you for everything you're doing. Gave me strength to leave. You wouldn't believe what they did to me. ♥
>
> Remini replied:
>
> @ChrissieBixler If you like, you can email your story here and it can be looked into knowledgereports@hushmail.com. Exhibit 41, C.B. and Remini Tweets.

who had been assigned to the investigation. The transcript of that call demonstrates a mutual commitment from both of them to make Scientology a primary focus of the investigation, as excerpted below. After Remini gave Myape her disparaging description of Scientology, Det. Myape responded, "I think this case is – has the potential to become, you know, very big." Exhibit 45, p. 2. She explained that "because this involves a group that I've never dealt with, I'm going to reach out to more experts because I don't want – I want the case to be a solid case." Remini and Det. Myape then formed and confirmed their alliance:

> Leah Remini: Sure.
>
> Det. Myape: – and I want it to go forward and I want the DA's to file it. They are not going to file a case that they're not going to go – be able to walk in the court with.
>
> Leah Remini: Well, that's why I want to help you.
>
> Det. Myape: Okay.
>
> Leah Remini: – In any way that I can because you have to understand the inner workings of the organization which is what the FBI has tried and failed – because they don't – they don't usually contact people who know what they're talking about or to show them things that they need to arm themselves with.
>
> Det. Myape: <u>Right and you're vital to this investigation.</u>
>
> Leah Remini: <u>Well, I'm available to you for anything.</u>
>
> Det. Myape: <u>Awesome.</u> Id., p. 3. [emphasis supplied]

Myape replied that she was fully committed to Remini's agenda, and called Scientology and its practices an "abomination":

> Det. Myape: Yeah, you know what I'm going to do, because I've been thinking about reaching out to the FBI?
>
> Leah Remini: Yes.
>
> Det. Myape: And I want to. We have it at our level, at our division, robbery homicide division, we dealt with – we have agents that deal with this all the time, so I want to meet with them because this has the propensity to be big.
>
> Leah Remini: I agree.
>
> Det. Myape: And I want it to be big. I want to shake this group down.
>
> Leah Remini: I love you for this. I can't tell you how much this means to them, like it means everything.
>
> Det. Myape: Because this is so – like this is an abomination.
>
> Leah Remini: I agree. Id., p. 9 (emphasis supplied).[32]

At one point, Det. Reyes commented that disaffected Scientologists should file a "class action" against the COS. Id., pp. 10-12.

Remini had a direct financial interest in fomenting the LAPD investigation because she could use it to gain publicity and credibility for her TV series.

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[32] The audio recording of the phone call reflects that Det. Myape's manner and demeanor can only be described as gushing over Remini and her involvement in the case, not an appropriate tone for a putatively objective police detective.

The Remini-LAPD alliance was further forged at a January 3, 2017 meeting at the LAPD Hollywood Station between Remini and Dets. Myape and Vargas. The conversation focused on Remini's pejorative description of various alleged COS practices, which Remini characterized as "obstruction of justice." Exhibit 42, Transcript of Meeting with Remini and Dets. Myape and Vargas, p. 35.

b. The Mesereau wake-up call.

Three months later on April 19, 2017, Det. Vargas, recently promoted to lead investigator, met with petitioner's attorney, Tom Mesereau, who apprised him of Remini's background and her current personal and financial interests in (1) fomenting petitioner's prosecution; and (2) vilifying the COS. See Exhibit 26, LAPD Chrono, p. 7. Mesereau described her prior exploitation of the LAPD for publicity and profit, and her current activities as producer of a television series whose public popularity and its financial reward would be greatly improved if the LAPD stated that petitioner was under active LAPD investigation. This wakeup call fell on deaf ears.[33]

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[33] In addition, the prosecution had been independently informed of Remini's antagonism against petitioner personally. In early 2015, there was a documentary film called "Going Clear" shown at the Sundance festival that portrayed Scientology in a negative light. Petitioner was present at the Sundance festival, and gave a rebuttal interview to a reporter from PAPER Magazine. Petitioner described the benefits of practicing Scientology, and included some harsh language regarding naysayers who were excoriating Scientology without understanding it. This article

c. The prosecution's undeterred alliance with Remini.

On April 24, 2017, five days after Det. Vargas' meeting with Mesereau, DDA Mueller and Det. Vargas interviewed J.B. with Remini ostensibly present as J.B.'s support person. As Det. Vargas explained to J.B., "one of the things that this is useful for is it kind of gives him a gage what kind of witness you are." Exhibit 38, Transcript of J.B. Interview with DDA Mueller, Remini, and Det. Vargas, p. 1. That did not occur. Rather, Remini dominated the interview, repeatedly telling DDA Mueller and Det. Vargas how they should handle the prosecution; repeatedly answering law enforcement questions on J.B.'s behalf; and giving her anti-Scientologist views to supplement J.B.'s answers.

This interview bore no resemblance to a legitimate and objective police inquiry. It was a Leah Remini show. In the course of the 245-page interview transcript, Remini interceded 494 times. See Exhibit 38, Transcript of J.B., DDA Mueller, Remini, and Vargas April 24, 2017 Interview. Remini extracted a commitment from Mueller and Vargas that "[t]hey believe Jen," p. 4. Det. Vargas responded to J.B. "[Y]ou're not alone in this."

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came to Remini's attention, and petitioner became a particular focus of her anti-Scientologist zeal. In December 2016, C.B. forwarded to Det. Myape a post in which Remini lambasted petitioner. Thus, the LAPD was on direct notice that Remini was an antagonist of petitioner's with a particular grudge.

Remini interjected numerous comments about Scientology's purportedly repressive practices, pp. 177-181, and personally led J.B. through a repudiation of DefWitness6 2004 police report that contained J.B.'s statements that her sex with petitioner was the best she ever had, pp. 219-224.

In May 2017, at the request of Leah Remini, Mike Rinder, the co-producer of Aftermath, also met with Mueller and Vargas. Remini and Rinder held forth as to their belief that COS members would lie to police authorities and would destroy evidence to thwart a law enforcement investigation. Exhibit 44, LAPD Follow-Up Report. The collaboration continued through the time of trial.

Thus, notwithstanding Mesereau's direct warning to Det. Vargas that Remini was a publicity-seeking, anti-Scientologist with a significant financial stake in fomenting the prosecution of petitioner, the prosecution maintained its close relationship with Remini and her associate Rinder as valued assets on the prosecution team.

3. The objective deficiencies in the prosecution's investigation.

a. The failure to interview the great majority of exculpatory witnesses.

At the April 24, 2017, interview, DDA Mueller informed Remini and J.B. that the decision whether to file would be made "after looking at everything and talking to everybody." Exhibit 38, Transcript of J.B. Interview with DDA Mueller, Remini and Det. Vargas, p. 234.

That never occurred. Between the launching of the investigation and the filing of charges, the prosecution team interviewed 19 witnesses. This included only two of the six witnesses interviewed by Det. Myers in 2004 regarding the J.B. allegation – DefWitness4 and DefWitness2. DefWitness1, DefWitness6, and DefWitness3 had all provided highly exculpatory information in 2004, but were ignored in the investigation that led to charges in this case. In short, in 2004 Det. Myers was able to interview six key witnesses in a two-week period, but in the six years between 2017 and trial, the LAPD only interviewed two of them. [34]

The prosecution interviewed none of the exculpatory witnesses whose names Mesereau had provided to Det. Vargas on April 19, 2017. These witnesses included DefWitness10, DefWitness7, DefWitness6, and DefWitness5. All four had highly exculpatory information. Exhibit 26, LAPD Chrono, pp. 5-7. The purported LAPD investigation was an exercise in confirmation bias, not an independent and impartial inquiry. No evidence about these obvious and objective deficiencies in the investigation was presented to the jury.

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[34] The other 17 witnesses interviewed during the investigation were Leah Remini; C.B. (two times); J.B. (four times); N.T. (three times); Jimmy DeBello; Jordan Ladd; Damian Perkins; Ruth Speidel; Bobette Riales (two times); Rachel Dejneka; Rachel Smith; Tricia Vessey (two times); Joanne Berger; Alexandra Fincher; Robert Altman; Kathleen J.; and Diana Parker Crnojuzic.

Nor did the LAPD expend reasonable efforts to investigate red flag alerts regarding the credibility of the complaining witnesses. DDA Mueller and Det. Vargas were well aware that each of the three complaining witnesses had made multiple unfounded complaints of stalking or harassment, but that apparently did not affect the decision to use them.

b. The failure to investigate J.B.'s implausible denial of authorship of the June 2003 O/W write-up.

On July 16, 2020, attorney Mesereau had delivered to Det. Vargas a box of materials retrieved from J.B.'s car in 2004. The box contained certain documents and other effects that were indisputably J.B.'s personal papers, as well as the O/W write-up dated June 2003. That document contained the exculpatory bombshell in which J.B. described her April 25, 2003, sexual activity as entirely consensual on her part – "I decided at that point the hell with it and I would have sex with him and enjoy it even though it was a big violation of my own 2d ethics level, etc." See Exhibit 15, J.B. O/W write-up, p. 9.

On July 22, 2020, Det. Vargas and another officer went to J.B.'s residence at Mueller's request to ask her about the materials contained in the box, particularly the O/W write-up. This occurred approximately a month after charges had been filed, and should have given the prosecution a major concern about J.B.'s credibility.

Det. Vargas showed her the O/W write-up document and identified it as "the original that was found in the vehicle,"

Exhibit 28, Recording 34-3, pp. 485-486. When Vargas initially asked J.B. whether she had typed the document, she equivocated, "I don't know that I typed this." Exhibit 28, Recording 34-2, p. 475. She then asserted as a first line of defense that regardless of who created the document, it could not possibly have been found in her car because she would not have had access to it under Scientology policy. Exhibit 28, Recording 34-2, p. 475. That tack was manifestly unpersuasive, because Det. Vargas had verifiable information in the LAPD Chrono, Exhibit 26, pp. 84-86, that it had been found in J.B.'s car in 2004.

Her second line of defense was that while many of the events described in the document did occur as described, she did not author the document and the description of her sexual activities with petitioner on April 25, 2003 was not true. Exhibit 28, Recording 34-3, p. 519.

Later in the interview, Det. Vargas asked J.B. for her view on how the document could have gotten into her car. Having abandoned the "could not have been in my car" defense, she responded that it must have been written by the COS and planted in her car:

Q: How would a document like this end up in that box?

A: The Church put it there. Julian Schwartz helped – whoever is helping OSA put it there.

Q: And gave it to the defense?

A: Yeah. Yeah. Exhibit 28 Recording 34-3, p. 521.

That response was patently implausible for many reasons, but Det. Vargas never pursued them. Vargas should have

recognized that either (1) J.B. was flatly lying to him in her disavowal of having written the document and her disavowal of ever having seen it, Exhibit 28, Recording 34-3, p. 522; or (2) the Los Angeles investigator was lying about finding it in her car and removing it; or (3) the Los Angeles investigator was telling the truth about finding it in her car but somehow an operative of the COS had fabricated the document in 2004 and planted it in J.B.'s car before the investigator repossessed it. Given the manifest importance of the document to J.B.'s credibility about the April 25, 2003, incident, any reasonable police investigator would have drilled down to resolve this, but Det. Vargas did nothing in response to J.B.'s implausible story, other than elicit a reiteration of her denial of authorship. "So this is something you definitely did not write. Someone else did this; is that correct?" Exhibit 28, Recording 34-3, p. 500.

Det. Vargas later asked her again to confirm that she had never seen the document before and that she had not typed it, Exhibit 28, p. 531, which she did. He concluded with the comment, "I think we've addressed the issue that Mueller wanted us to confirm with you." Id. In sum, defense counsel had a trove of examples available to demonstrate the deficiencies in the prosecution's investigation.

B. The Deficient Performance.

Defense counsel was on notice of all these interactions between Remini, the complaining witnesses, the police, and the prosecution, but failed to apprise the jury that the excessive

influence that Remini had over the police and prosecutor resulted in an objectively deficient investigation that called into question the reliability of the prosecution's case. Counsel was further aware that the prosecution had not interviewed the great majority of the exculpatory witnesses. Counsel was aware of Det. Vargas's July 22, 2020, interview with J.B. about the June 2003 O/W Write-Up.

Any reasonable defense attorney would have presented this evidence to the jury and argued that the prosecution's case was compromised by the influence of Remini and the confirmation bias in the police investigation. Had counsel presented that evidence, counsel could have demonstrated that in 2004, a different LAPD detective conducted an independent investigation into J.B.'s original allegation and interviewed both J.B. and six witnesses with knowledge of the events and personalities involved. Based on that investigation, the prosecutor declined to file charges.

This challenge to the integrity of the prosecution investigation was complementary to and consistent with counsel's challenges to the complaining witnesses' credibility. Counsel made only one implicit jibe at the integrity of the investigation during argument:

> The other thing that was significant in this case, the government did not call the lead investigating officer. That's Detective Vargas. You heard that multiple times. In putting – thinking about that. In putting on their case-in-chief to prove this case beyond a reasonable doubt, the government did not call the

> lead investigating officer that has been on this case since 2017. 32 RT 3314.

That simple reference to Det. Vargas' absence as a prosecution witness falls far short of presenting affirmative evidence that the investigation was biased and shoddy.

Trial counsel thus squandered the opportunity to raise a reasonable doubt as to petitioner's guilt based on the prosecutorial alliance with Remini and the resulting shoddy investigation. See People v. Eubanks (1996) 14 Cal.4th 580, 596 ["A public prosecutor must not be in a position of 'attempting at once to serve two masters,' the People at large and a private person or entity with its own particular interests in the prosecution"].

C. The Resulting Prejudice.

Defense counsel had an unfettered opportunity to present to the jury the evidence of the influence of Remini over the investigation and the resulting biased and defective law enforcement investigation. Counsel could have presented a police practice expert and then argued to the jury that the deficiencies and biases in the prosecution's investigation precluded a finding of guilt beyond a reasonable doubt. See Exhibit 47, Declaration of Roger Clark.

Further, counsel could have argued that the prosecution knew that Remini and her associates had a significant self-interest in fomenting petitioner's prosecution, and yet actively welcomed her participation in preparing the case.

In the absence of that evidence, counsel had no foundation from which to argue to the jury that not only did the complaining witnesses lack credibility due to their ever-shifting statements, but also that the overall prosecution presentation lacked reliability because of the failure to make a thorough and impartial investigation. Kyles v. Whitley, supra.

V. IAC FOR FAILURE TO REFUTE THE COMPLAINING WITNESSES' TESTIMONY THAT THEIR OWN CIVIL LAWSUIT WAS FILED SOLELY FOR THE PURPOSE OF STOPPING A "CAMPAIGN OF TERROR" WAGED BY THE COS.

A. Summary of Facts.

1. The complaining witnesses' claim that their motive for filing the civil lawsuit was to stop a campaign of harassment.

The prosecutor elicited from each complaining witness that she was a victim of a COS-driven "campaign of terror,"[35] and that given the inability of the LAPD to stop the campaign, the three banded together to file a civil lawsuit for the primary if not sole purpose of stopping the harassment. J.B. and C.B. forcefully

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[35] J.B. testified as follows:

> Q. What was the reason for filing that lawsuit?
>
> A. There was no number of reports, no – nothing we could seemingly do to stop – like, stop this campaign of terror. Like, it was just getting bolder and bolder and bolder and bolder. 25 RT 2161.
>
> N.T. (28 RT 2629) and C.B. (22 RT 1597) echoed this testimony.

denied that they had any pecuniary interest in the lawsuit and adamantly asserted that the sole purpose in filing the lawsuit was to end the harassment. N.T. testified that the primary reason for filing the lawsuit was to stop the harassment, and that the prospect of damages was a secondary reason. 28 RT 2629-2630. The complaining witnesses' claims of a campaign of terror that was too powerful for the LAPD to stop were highly likely to elicit the jury's sympathy for themselves and elicit an antipathy toward petitioner and the COS.[36]

2. The clear evidence of an ulterior motive.

There was virtually uncontestable evidence that the complaining witnesses invented and testified to a self-serving and false explanation for why they filed their civil lawsuit in August 2019. The actual reason for filing the lawsuit at that time was to provide A&E, the network broadcasting Remini's show, with legal cover to air her final episode that focused on the rape allegations against petitioner.

The evidence of this self-interested and mercenary motive is as follows. In June 2019, Remini shot one final episode that related specifically to the rape claims against petitioner. On August 9, 2019, petitioner's civil lawyer received a request from A&E to comment on the allegations against petitioner for inclusion in the final episode. On August 12, counsel for

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[36] There was extensive evidence that the claims of harassment were completely unfounded, but the defense was precluded from presenting that evidence by the court's exclusionary ruling. See AOB, Argument VII.

petitioner responded with a cease and desist letter that warned A&E that there was nothing to "provide any protection to IPC (the executive producer of the series), Ms. Remini or AETN [A&E] if they produce and air the false and defamatory allegations about our client in any future episode of the Series." Exhibit 48, Andrew Brettler letter of Aug. 12, 2019; Exhibit 49, Declaration of Andrew Brettler.

That created a standoff. Remini and the complaining witnesses needed to induce A&E to air the final episode. They landed on the strategy of filing a tactical lawsuit so that A&E could have legal cover to air the episode.

Counsel for the complaining witnesses drafted a complaint that contained all of the rape allegations from 2003 in addition to the allegations regarding harassment in 2016-2019. Bixler v. Church of Scientology, et al., No. 19STCV29458; J.B., pp. 23-25; N.T., pp. 35-36; C.B., pp. 13-14.

The complaint was filed on August 22, 2019, and A&E aired the final episode four days later on August 26, 2019. The episode addressed both the rape and the harassment allegations. The complaining witnesses received extensive publicity about their accusations, and Remini received a very handsome paycheck. Exhibit 50, p. 1059, Aaron Smith-Levin blog of June 26, 2024.[37]

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[37] "Do you know what Leah Remini got for the episode that featured C.B. According to Tony Ortega, Leah Remini got $1 million for the episode that featured C.B. She

The timing of events – the August 12 cease and desist letter; the filing of the lawsuit on August 22, 2019; and the airing of the final episode on August 26 – strongly supports an inference that the purpose of the lawsuit was to facilitate the airing of the final Aftermath episode, not to push back against purported harassment. Even Remini sympathizer Tony Ortega recognized in his blog that "[y]esterday's lawsuit filed by the accusers no doubt gives A&E some legal room to finally put their stories on the air." Exhibit 51, p. 1061, Transcript of Tony Ortega's Blog.

The conduct of the complaining witnesses and their attorneys after the filing of the lawsuit provides virtually conclusive proof that the lawsuit was filed for mercenary reasons unrelated to the claims of harassment. The complaint was filed on August 22 without any accompanying request for a restraining order or injunction. If the complaining witnesses had in fact been motivated to obtain relief from harassment, they would have immediately applied for a TRO.

In fact, the complaining witnesses were well aware of the purpose of a TRO. Det. Vargas had repeatedly informed the complaining witnesses that a TRO was an available option to

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> also got an Emmy Award. Leah Remini should be kissing C.B.'s ass.
>
> * * *
>
> "By the way, when I say $1 million, I don't mean for the entire three seasons of the show. I mean, for one final episode."

pursue if they believed they were being harassed by the COS, Exhibit 52.

For example, Det. Vargas also told C.B. by text on September 12, 2018 that a restraining order "would be a good idea." Id., p. 1881. C.B. had previously obtained a restraining order to stop harassment relating to a disgruntled former employee in her husband's band. See Carnell (C.B.) v. Pridgen, LA Super. Ct. No. SS019039. She was thus familiar with the function of a restraining order when confronted with actual threats and harassment.

The 2019 lawsuit proceeded without any of the plaintiffs making any effort to obtain interim relief. The docket for Bixler et al. v. Church of Scientology International et al., 19 STCV29458 reflects that no pleadings were filed by either party for three months. On November 18, 2020, defendants filed motions to quash service of the complaint and to compel religious arbitration. As of August 22, 2020, a full year after the filing of the complaint, the complaining witnesses and their attorney had not filed any request for injunctive or other immediate relief from the claimed harassment.[38]

[38] The complaining witnesses never filed a request for injunctive relief. In the criminal case that was filed on June 17, 2020, the prosecutor requested and obtained a fairly standard protective order pursuant to Penal Code section 136.2 that enjoined petitioner personally from having contact with the complaining witnesses. 1 Aug. CT (06/05/24) 8-9.

B. The Deficient Performance.

The defense was permitted to question the complaining witnesses as to whether they were seeking damages in the civil lawsuit. 4 RT 247-248. However, that avenue of impeachment was inherently weak. Counsel informed the jury that the civil suit contained a request for monetary damages arising from the harassment claims. In response, the prosecutor argued forcefully (and correctly under the then extant record) that the complaining witnesses had no ulterior motive to testify falsely at the criminal trial. 34 RT 3411.

Counsel could have presented evidence and argued that the complaining witnesses disguised their immediate mercenary motives in filing the civil lawsuit, disingenuously claiming that their motivation was to counter the purported COS campaign of terror that LAPD was unable to stop. Counsel could have argued that the complaining witnesses' testimony about their motive for the civil lawsuit provided a basis for inferring that their testimony about forcible rape was equally false. See Evidence Code section 780(i); People v. Lawrence (2009) 177 Cal. App. 4th 547, 554 ["The instructions "allow[] the jury to disbelieve a witness who deliberately lies about something significant because experience has taught us that a deliberate liar cannot be trusted"].

Counsel could not conceivably have had a tactical reason not to investigate and present evidence of the actual reason for

filing the 2019 lawsuit to debunk the false and self-serving reason testified to at trial.

C. The Resulting Prejudice.

At trial, the complaining witnesses portrayed themselves as having been doubly victimized by both petitioner in 2001-2003 and by the COS in 2017 and thereafter. That was the narrative that the prosecutors argued to the jury. Defense counsel was unable to put a dent in this narrative. If the jury had been apprised that the complaining witnesses' testimony regarding the motive for filing the lawsuit was false, and that the lawsuit was actually a tactical maneuver concocted by Remini and the complaining witnesses to further their mutual self-interest, the jury would likely have made an adverse assessment of their overall credibility.

In the larger picture, there were two competing narratives regarding the credibility of the complaining witnesses, only one of which was presented to the jury. The prosecution presented evidence and argument that the complaining witnesses had come forward, albeit belatedly, to selflessly bring a serial rapist to justice at significant personal cost to themselves and their families. The defense narrative was that the complaining witnesses had come forward to catch the #MeToo wave and cash in through a civil lawsuit that was contingent on obtaining criminal convictions. That was not presented to the jury due to a combination of erroneous exclusionary rulings by the court and a pervasive failure by trial counsel to investigate and present

actual evidence of the complaining witnesses' mercenary motives. Under these circumstances, petitioner was deprived of due process and a fair trial. Strickland v. Washington, supra.

VI. IAC FOR FAILURE TO CONSULT WITH AND CALL AN EXPERT WITNESS TO REBUT THE TESTIMONY OF PROSECUTION EXPERT DR. BARBARA ZIV REGARDING RAPE TRAUMA SYNDROME AND TO EXPLAIN THAT THE CHANGES IN THE COMPLAINING WITNESSES' STORIES WERE INCOMPATIBLE WITH SCIENTIFIC KNOWLEDGE REGARDING THE PROCESSES OF MEMORY FORMATION AND RECOLLECTION.

A. Summary of Facts.

The prosecution elected to substitute Dr. Barbara Ziv as the rape trauma syndrome expert at the second trial and named her in the prosecution witness list. The defense witness list contained the same two psychologists from the first trial witness list, Drs. Mitchell Eisen and Scott Frasier, neither of whom Cohen had spoken to.

At the Evidence Code section 402 hearing, the prosecutor requested and received permission to elicit testimony from Dr. Ziv regarding "rape trauma syndrome and the impact of alcohol and drugs on memory," because those are areas that "fall outside the common knowledge of the jury." 11 CT 3183, Order of March 28, 2023.

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At trial, the prosecutor asked Dr. Ziv about the usual litany of rape trauma myths,[39] and then turned to the critical topic of memory formation and retention over time:

> Q: I want to also ask you with regard to the reporting, a victim of sexual assault coming forward to report to law enforcement. You've – well, with regard to testing the water, is there a – is there a difference if you have a victim giving multiple reports to multiple different interviewers over a period of time over different times? 23 RT 1805.

Given defense counsel's ultra-narrow focus on inconsistencies of the complaining witnesses over time, this area was of great importance to both parties. However, neither the court nor Dr. Ziv understood the question, and the prosecutor moved on.

Defense counsel did not ask Dr. Ziv any questions on cross to elicit testimony that the types of inconsistencies over time in the complaining witnesses' testimonies were starkly incompatible with well-established scientific and medical knowledge about how human memory works.

Defense counsel did not call either of the two mental state experts on the defense witness list. The defense thus squandered a significant opportunity to impeach the credibility of the

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[39] Dr. Ziv testified that there are common but counter-intuitive aspects of many rapes, including (1) most rapes are committed by acquaintances; (2) physical resistance occurs in only about 15% of rapes; (3) verbal resistance like screaming only occurs in 25-40% of rapes; (4) delayed reporting is the norm; and (5) continuing contact with the rapist directly or by device is common.

complaining witnesses by not consulting with a psychologist as to the points to be addressed in the cross-examination of Dr. Ziv; by not calling a defense expert to explain the shortcomings of her testimony; and by not calling a defense expert to explain that the evolving changes in the complaining witnesses' stories over time were incompatible with scientific knowledge regarding memory formation and recollection. That impeachment testimony was readily available. Exhibit 53, Declaration of Dr. Mitchell Eisen.

Dr. Eisen's most compelling point is that where a witness purports to give a full account of an event, free of fear, embarrassment, or any other compromising factors, and then later gives a different account of the event that includes additional information or conflicting information, the changes cannot be attributed to natural processes of memory formation and recollection. Rather, the changes are attributable to intentional conduct by the witness, usually an ulterior motive to alter the story for some kind of benefit. That was the crucial information that the defense had to convey to the jury, i.e., that the inconsistencies in the complaining witnesses' stories that appeared after the witnesses had made a full and unfettered statement to the police were likely contrived.

B. The Deficient Performance.

Defense counsel knew from the first trial exactly how the prosecutor would attempt to minimize the impeaching import of the inconsistencies in the witnesses' statements, and thus had every incentive to counter the prosecution's tactic with expert

psychological evidence. Counsel knew that his cross-examination and closing argument based solely on inconsistencies in the statements had been unpersuasive to several members of the first jury.

Defense was thus on notice for the second trial that the prosecutor would likely argue again that the inconsistencies in the witnesses' statements were innocuous by-products of normal memory formation and recollection. Counsel needed to present evidence counter to that argument.

Counsel's failure to prepare for Dr. Ziv's testimony is particularly problematic in light of Exhibit 40, attorney Cohen's March 29, 2023, declaration attached to the Petition for Writ of Mandate filed on April 12, 2023, Masterson v. Superior Court, B327794:

> In addition and in response to the Court's March 28 Order allowing Dr. Ziv to testify as a memory expert, the defense contacted its own "memory expert," Dr. Scott Frasier (who was listed as a defense expert in the first trial as well, as[sic] was prepped for same) and learned that he is unavailable for testimony from May 10, 2023 through June 10, 2023. Exhibit 40, Declaration of Philip Cohen, March 29, 2023.

Counsel added that "[t]his places the defense in a very difficult and potentially untenable position of having to secure and prepare an expert for testimony just a few weeks prior to trial." Counsel appeared to recognize the need for expert testimony but failed to do anything to satisfy that need.

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C. The Resulting Prejudice.

Dr. Mitchell Eisen, Professor of Forensic Psychology at California State University, Los Angeles, was ready and available to testify at the second trial, as were any number of other psychology experts who practiced in the Los Angeles area.

As set forth in his declaration, Exhibit 53, Dr. Eisen could have both rebutted various aspects of Dr. Ziv's testimony with recent research findings, and presented affirmative exculpatory testimony, as to why the complaining witnesses' changing stories over time could not be explained by any normal process of memory formation and recollection. Dr. Eisen clearly makes that point as to J.B., "since she had already gotten over her alleged reluctance to disclose the details of the assault long ago many years earlier, Rape Trauma Syndrome could not be used to explain why she now changed her memory report to include the new gun allegation." Exhibit 53, p. 5, para. 21.

From Dr. Eisen's testimony, counsel could have argued, and the jury could have inferred that the changes in the witnesses' testimony that tended to support a claim of forcible rape were the result of intentional alteration rather than normal memory blips.

None of the complaining witnesses claimed that they were self-censoring in their earlier statements to the police, and there was substantial evidence that they had an ulterior motive to change up their stories. Counsel failed to apprise the jury of the

psychological foundation to support the inference that they intentionally changed up their stories.

The arguments at the second trial mirrored the first trial. The prosecutor denigrated the inconsistencies as insignificant, while defense counsel argued to the contrary, but without any objective reference point to support the argument. Petitioner was thereby prejudiced.

VII. IAC FOR FAILURE TO CALL A WITNESS TO CHALLENGE AND REBUT THE TESTIMONY OF ANTI-SCIENTOLOGIST CLAIRE HEADLEY WHO TESTIFIED FOR THE PROSECUTION AS A PURPORTED EXPERT.

A. Statement of Facts.

As noted above, the prosecution re-grouped after the first hung jury, and obtained permission to present expert testimony that Scientology doctrine contains the repressive tenets that the complaining witnesses had described at the first trial. See Appellant's Opening Brief, Argument VI. The prosecutor's offer of proof was explicitly related to the Scientology "texts":

> Now, Ms. Headley would not be asked about her beliefs about Scientology. It would be extremely narrowly tailored, only to that there are texts that exist with certain language. She would not be testifying that these victims – why they believed the way they did or how they believed.
>
> That is up to the individual victims to testify about what their beliefs was, from reading these texts, from being shown these policies. But not to allow someone to testify that there are these policies or books or texts that exist puts it in the victims' hands to represent that themselves with no backing. 13 RT 671.

Judge Olmedo not only granted the prosecution's request, but also unilaterally expanded the scope of the negative Scientology evidence for use as direct evidence of petitioner's guilt, all of which was erroneous and prejudicial for the reasons set forth in Argument VI of the Opening Brief.

Judge Olmedo issued her ruling regarding Scientology evidence on March 28, 2023, see 11 CT 3199, and put the defense on notice of an escalated barrage of anti-Scientology evidence in the second trial. The court reversed its prior ruling that Claire Headley could not testify to COS tenets and practices. Headley is a disgruntled former member of the church who became an avowed anti-Scientologist after leaving the religion – hardly the qualifications for an independent expert.[40]

At the time of her testimony, she worked for the Aftermath Foundation, Remini's anti-Scientology entity. The only restriction Judge Olmedo placed on Headley's testimony was that she could not relate any of her own personal experiences as a Scientologist.

Shawn Holley suggested that Cohen consider calling Hugh Whitt, a longstanding Scientologist. Whitt had ample knowledge and personal experience to adequately explain Scientology's

[40] Headley had a history of bad blood with the COS. She and her husband had previously sued COS for false imprisonment and forced labor. The federal district court granted summary judgment in favor of COS, awarding COS court costs, and the Ninth Circuit affirmed. Headley v. Church of Scientology, supra, 687 F.3d at 1181.

actual teachings regarding internal dispute resolution practices, cooperation with civil and criminal authorities, and other topics that the complaining witnesses had broached in the first trial.

Cohen listed Whitt as a potential defense witness on the witness list filed on April 17, 2023, 11 CT 3256, and the subject matter of his testimony was described as "Scientology tenets, teachings and practices." Whitt was not called as a witness.

Headley testified on direct to her heretical beliefs about repressive Scientology policies and practices, but did not cite any texts, scripture, or other COS documents to support her assertions. Her primary assertions were as follows: (1) Scientologists must obey Scientology law rather than civil law if they conflict[41]; (2) Scientologists are not permitted to report crimes committed by another Scientologist to the police[42]; and (3) Scientologists are not permitted to use the word "rape" in their communications with Scientology ethics staff.[43]

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[41] "If there is a rule in Scientology that is directly in conflict with a law in the United States, …the Scientologist will follow the law of Scientology," 27 RT 2453.

[42] "It's a known policy that you do not call the police. There is – There is a – you would need to request specific authorization from the International Justice Chief to do so. 27 RT 2458-2459.

[43] "In 1997 a code was implemented where terms of a sensitive nature – such as rape, sexual assault, things of that nature – were no longer written in reports." 27 RT 2458.

At the conclusion of her direct, the prosecutor asked her why she was testifying, and she answered, "I'm here on my own volition to educate people on the policy and practices of Scientology as I experienced them through the very extensive work in the Sea Organization[44] and Religious Technology Center[45] for eight years, and that's my goal," 27 RT 2472 (emphasis supplied). There was no defense objection, notwithstanding Judge Olmedo's restriction that she not testify about her personal experience.

B. The Deficient Performance.

Prior to Headley's testimony, attorney Shawn Holley met with Hugh Whitt, a longstanding and active Scientologist who had been put forward as a possible witness to counter Headley's testimony. Holley asked Whitt about the meaning of a Scientology principle that had been the subject of controversy at the preliminary hearing. The Scientology text Introduction to Scientology Ethics stated that it was a suppressive act to "[d]eliver[] up the person of a Scientologist without justifiable defense or lawful protest to the demands of civil or criminal law." Whitt explained it was his understanding that the provision was a response to local authorities prosecuting Scientologists solely for the practice of their religion. In that context, Scientology ethics prohibited Scientologists from turning in their fellow

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[44] The Sea Organization is the Scientology religious order.

[45] Religious Technology Center is a separate Church of Scientology.

members to local authorities for prosecution based on their religion "without justifiable defense or lawful protest." It did not in any way prohibit a Scientologist from making a complaint to local authorities that another Scientologist had committed a crime. Other than that one substantive point, Holley did not discuss with Whitt any other aspects of his prospective testimony.

Headley was cross-examined by attorney Holley, but she did not confront Headley with the fact the actual Scientology scriptures and texts do not contain the policies that Headley ascribed to Scientology. She made no other challenge to the substance of Headley's testimony. Given the prosecutor's statement at the March 27, 2023 in limine hearing that "texts" would be the focus of her testimony, the failure of the prosecution to present any textual support for Headley's assertions provided a golden opportunity for the defense to impeach her.

Holley did elicit indicia of bias on Headley's part, including her employment at the Aftermath Foundation, founded by Leah Remini and Mike Rinder. That testimony supported an inference of potential bias on Headley's part, but did not directly rebut the substance of her testimony. Mr. Whitt could have provided that direct rebuttal. Exhibit 54, Declaration of Hugh Whitt.[46]

[46] There were other witnesses who also could have refuted Headley's testimony about Scientology practices. Ruth Speidel would have testified that in 2004, she and her then-husband

C. The Resulting Prejudice.

Had counsel consulted with or called a knowledgeable witness such as Mr. Whitt, counsel could have conclusively rebutted the first and most basic falsehood perpetrated by Headley regarding Scientology, i.e., that Scientologists were obligated to follow Scientology law when it conflicted with public law. A fundamental scripture in Scientology is the book Introduction to Scientology Ethics, which includes the express proviso that the "laws of the land" are paramount to Scientology law:

> Nothing herein shall ever or under any circumstances justify any violation of the laws of the land or intentional legal wrongs. Any such offense shall subject the offender to penalties prescribed by law as well as to ethics and justice actions. Introduction, 1998 edition.

Prejudice accrued because the jury was likely to dismiss the evidence of Headley's bias on the basis that any rational person would be hostile to Scientology in light of its purportedly pernicious tenets and practices as described by the complaining witnesses and reaffirmed by Headley.

(both practicing Scientologists) encouraged J.B. to report petitioner to the police, and that J.B. in fact made a report to law enforcement about petitioner with no repercussions from the Church. Declaration of Ruth Speidel. DefWitness4 would have testified (consistent with her statement to Det. Myers in 2004) that "if someone tried to commit a crime against me I would press charges against him." Exhibit 10, p. 36.

Without any countervailing testimony, the prosecutor emphasized Headley's testimony in closing argument and cited her erroneous description of Scientology scripture and tenets to portray the complaining witnesses in an unrealistically sympathetic and favorable light:

> [Headley] informed you about what Scientology believes, that Scientology law, their rules, their principles, they guide everything. They're the controlling factor. You must obey those rules over all other laws. And the victims, well, they can't be victims. And whatever they did, they caused it to themselves. The defendant, a celebrity in good standing, any complaint filed against him would be filed with a yawn; meaning, Scientology would discredit it and would investigate the people who made their allegations. Investigate the victims. This is how their mindset was. This is how they processed what happened to them. You didn't listen to Scientology rules and principles, the consequences were severe. You could be excommunicated. You lose your community. You lose your world. This was in the minds of the victims during and after these brutal attacks. 33 RT 3259-3260.

Had counsel adequately prepared to meet the testimony of Claire Headley, the jury would have been told there are no actual Scientology texts that support the derogatory version propounded by Headley. The jury was thus misled to petitioner's prejudice.

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VIII. PROSECUTORIAL MISCONDUCT IN ARGUING THAT SCIENTOLOGY LAW HAD DENIED JUSTICE TO THE COMPLAINING WITNESSES, AND INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT.

A. Summary of Facts.

The prosecutor artfully set up the conflict between Scientology law and American law and then used it to conclude his closing argument with an attack on Scientology law as inimical to American justice. He then urged the jury to right the wrong perpetrated by Scientology law by giving the complaining witnesses the American justice that they deserved, i.e., criminal convictions. "As I mentioned, the Scientology law told them there is no justice for them." 34 RT 3411 (emphasis supplied). The prosecutor could not have been clearer in accusing the Church itself of obstructing justice – "There were no consequences for Mr. Masterson from this internal justice system from the Church," 34 RT 3411. The prosecutor concluded by asking the jury to convict petitioner to afford the complaining witnesses the justice that had been denied to them by the Church – "Ladies and gentlemen, I ask that you give these victims the justice that they're looking for; that you find this defendant guilty of the charges of raping each one of these victims. Find him guilty and give them their justice." 34 RT 3412. Defense counsel made no objection.

B. The Prosecutorial Misconduct.

That concluding argument violated a major constitutional component of the First Amendment. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n (2018) 584 U.S. 617 reaffirmed that

the state "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."[47] Here, the prosecutor argued that "Scientology law" was an instrument of oppression that resulted in the obstruction of justice. This clearly "pass[ed] judgment" on Scientology's religious beliefs and practices in a very adverse manner, and more than merely "presuppose[d] the illegitimacy of those beliefs and practices," it affirmatively asserted their illegitimacy. The prosecutor then parlayed his denigration of Scientology law into a rationale for convicting petitioner as a Scientology member and an adherent of the beliefs and practices that the prosecutor vilified.

C. The Ineffective Assistance of Counsel.

Any reasonably competent attorney would have objected to this improper argument for conviction. Zapata v. Vasquez (2015) 788 F.3d 1106, 1116 ["Defense counsel's failure to object to this egregious misconduct [in closing argument] fell below an objective standard of reasonableness"].

D. The Resulting Prejudice.

The standards for determining prejudice from prosecutorial misconduct and from ineffective assistance are identical, i.e., whether the misconduct and/or deficient performance undermines the reviewing court's confidence in the outcome of the case. Strickland v. Washington, supra; Kyles v. Whitley, supra, 514 U.S. 419, 432; Davis v. Zant (11th Cir. 1994) 36 F.3d

[47] See Appellant's Opening Brief, Argument VI, pp. 139-144.

1538, 1545 ["Improper argument by a prosecutor reaches this threshold of fundamental unfairness if it is 'so egregious as to create a reasonable probability that the outcome was changed,'" i.e., is "sufficient to undermine confidence in the outcome"]. That standard is clearly met in this case because the prosecutor urged the jury to convict petitioner to compensate the complaining witnesses for their maltreatment by the COS. That interjected an improper plea for retribution as a basis for convicting petitioner independent of the strength of the evidence of guilt.

Zapata v. Vasquez, supra, found that the misconduct in closing argument had a greater likelihood of causing prejudice because, as in this case, the inflammatory remarks were made at the conclusion of the prosecutor's rebuttal – "The presentation of improper material at the end of trial 'magnifie[s]' its prejudicial effect because it is freshest in the mind of the jury when [it] retire[s] to deliberate." 788 F.3d at 1122.

The Ninth Circuit then found the improper argument to require reversal, notwithstanding counsel's failure to object:

> Considering the weaknesses in the prosecution's case and the seriousness of the misconduct, we hold not only that prejudice was established on the record, but also that the California Court of Appeal unreasonably determined Zapata was not prejudiced by his counsel's failure to object to the prosecutor's egregious remarks. 788 F.3d 1123.

The same conclusion is required here.

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IX. PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY THE COURT-IMPOSED RESTRICTIONS ON COUNSEL'S ABILITY TO INVESTIGATE AND IMPEACH KATHLEEN J.

A. Summary of Facts.

This claim expands upon Argument V in the Appellant's Opening Brief, p. 124, that the trial court erred in permitting the prosecution to present the testimony of Kathleen J. as an Evidence Code section 1108 witness without affording the defense sufficient amount of time to investigate and impeach her testimony. This claim focuses on the impeachment materials that counsel would have developed if afforded sufficient time.

Argument V of the AOB sets forth the chronology of the prosecution's March 6, 2023 disclosure of intent to call Kathleen J.; the March 10 motion to exclude; and the March 28 ruling that denied the motion. AOB, p. 124.

Kathleen J. was somewhat impeached at trial with recent inconsistent statements she had made to blogger Tony Ortega. Counsel was unable to muster any evidence that no sexual activity, much less a rape, ever occurred. Such evidence was available, but not within the time frame permitted by the trial court.

B. The Prejudice from the Continuance Denial.

1. The crux of Kathleen J.'s trial testimony.

The crux of Kathleen J.'s testimony was that in July 2000, she was involved in the production of a movie in Toronto called "Angel Eyes." She was a Canadian citizen and a resident of

Toronto. When the movie was completed, there was a "wrap party" at the Sutton Place Hotel. She attended with her husband and two stepdaughters. Coincidentally, petitioner was also in Toronto making a movie called "Dracula 2000," and he and the other cast members were billeted at the Sutton Place Hotel.

At one point during the evening, Kathleen J. and her family were invited to another party put on by people associated with "Dracula 2000." A central part of her testimony was that the actor Gerard Butler attended the second party, which was memorable to her and to her stepdaughters in light of his movie star fame. 31 RT 3097-98. She accepted a drink from a man she did not recognize and talked with him. She began feeling light-headed and nauseous, and told the man she wanted to go to the bathroom. He offered to show her where it was. Instead, he guided her into a bedroom and raped her while she was blacked out. She did not tell her husband because she was embarrassed.

Five months later in December 2000, she and her husband were at home watching "Dracula 2000" because it had been filmed in Toronto. When petitioner appeared on the screen, she had a strong reaction and began crying and shaking. She told her husband what had happened, but did not call the police because she felt it was "too late."

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2. The impeachment evidence that could have been developed.

a. The implausibility of Kathleen J.'s testimony that she and her step-daughters recognized actor Gerard Butler as a famous actor at a party at the Sutton Place Hotel.

As of July 2000, Gerard Butler was an actor entirely unknown in North America, who had just begun to land a few minor roles in American entertainment. Exhibit 55, Entertainment Weekly, November 17, 2000, "The making of 'Dracula' 2000' – Wes Craven's vampire film almost wasn't finished in 2000."[48] The article explained that Butler had some minor roles in movies that had been released in the UK, and that his goal in 2000 was expanding his acting career in the American market. In 2000 he was in two productions: a television series called "Attila" that was aired in 2001; and the role of Dracula in "Dracula 2000."

"Dracula 2000" was a low-budget, low-rent movie with no serious cinematic value. Butler was plucked out of obscurity while filming "Attila" in Lithuania to perform in "Dracula 2000."

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[48] "Finally, only two days before filming commenced, Weinstein signed off on Scottish actor Gerard Butler, who, as it happens, was in Lithuania playing Attila the Hun in a TV miniseries. With a little finagling, "Attila the Hun's" producers, happy that their hitherto unknown star had snagged a lead in a feature, agreed to revamp their schedule to get Butler out early; within a week, the actor was on a plane to Canada."

As of July 2000, if he had walked down the street in Los Angeles, or Toronto, or anywhere in North America, no one would have recognized him as a movie star because he was then "unknown" according to the Entertainment Weekly article.

These undisputable facts thoroughly undermine K.J.'s statements to the Toronto police and her trial testimony that the evening of the alleged rape was memorable to her because of Gerard Butler's presence.[49]

b. The exculpatory effect of Kathleen J.'s testimony that she did not recognize the person who gave her the drink as petitioner.

Kathleen J. testified that an anonymous man gave her a drink and then raped her. If petitioner had been at the party and had any interaction with Kathleen J., she would have very likely recognized petitioner as the character "Hyde" in "That '70s Show," because the show was very popular in Canada as well as in the United States.

The first season of "That '70s Show" aired on August 23, 1998, with 25 episodes. It was simultaneously broadcast on Canadian CHTV. The second season began on September 28,

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[49] K.J. told Toronto police detective Reeves that "I remember seeing Gerry Butler there," and "that was a big deal because my two stepdaughters were dying to meet him." Exhibit 56, p. 7, Transcript of K.J. Interview by Toronto Det. Reeves, October 21, 2021. When asked who hosted the party at which she claimed she was raped, she answered, "I know Gerry Butler was there 'cause he's like, right there, like he's, you know, like, he was like the main attraction." Exhibit 56, p. 64.

1999, ran for 26 episodes, and was also broadcast in Canada, including in the Toronto market. Exhibit 57, "That '70s Show" release dates.

Petitioner had already attained celebrity status in Canada as of July 2000 due to his acting role in "That '70s Show." It is highly improbable that he could have attended a large and movie-related party at that time and not been recognized as a well-known actor. Kathleen J. gave the impression that neither she nor her teenage stepdaughters recognized petitioner as the "Hyde" character at the party, strongly indicating that she never interacted with petitioner during July 2000.

If petitioner had spent time sitting on a couch with Kathleen J., he would have been the center of attention for at least some of the other 50-plus party goers.

c. The implausibility of Kathleen J.'s testimony that people associated with "Dracula 2000" would have hosted a lavish party during the middle of filming.

"Dracula 2000" began filming in Toronto on June 21, 2000, and shot all of the interior scenes there. When that portion of the film was completed, a sub-group of the cast and crew went to New Orleans for some on-location exterior scenes. There was no reason or likelihood that anyone associated with the film would throw a party midway through the filming.

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d. The implausibility of Kathleen J.'s testimony that she was raped in a Sutton Place Hotel room and then passed out there for several hours.

Kathleen J.'s testimony is implausible for another reason related to the layout of the hotel. Per Toronto Municipal Code at the time, every hotel bedroom had to have a self-contained bathroom. The Sutton Place Hotel complied with this regulation. Exhibit 58, Declaration of Investigator Brockbank.

Thus, the only way that any of the numerous party goers could go to the bathroom was to traverse a hotel bedroom. The party was described by Kathleen J. as a well-attended and bibulous event. It is implausible that a rapist could take an intoxicated victim into a hotel bedroom occupied by an unknown guest and rape her. It is even more implausible that Kathleen J. could have remained passed out on the bed in a state of disarray for five or so hours without being noticed by the room's occupant or a bathroom user. Certainly, a party goer would have responded to this spectacle by calling hotel security, waking her up, or both.

e. The implausibility of Kathleen J.'s testimony that she and her husband watched a video of "Dracula 2000" at their home in December 2000.

The release dates of all movies are recorded and tracked by an organization known as IMDb, an acronym for "Internet Movie Database." Exhibit 65. "Dracula 2000" was edited and finalized in Burbank, California, and was released in theaters on

December 22, 2000. The likelihood that Kathleen J. or her husband could have obtained a pirated copy of the movie within the first week of release is very low. The home release date for "Dracula 2000" was July 2021. Kathleen J.'s claim that she saw the movie at home around Christmas 2000 is implausible.

f. Petitioner's monogamous lifestyle in 2000.

Numerous witnesses could have confirmed that during petitioner's six-year relationship with C.B. from 1996-2002, he was entirely monogamous as a matter of principle and character. His housemate DefWitness10 and his close friend DefWitness2 would have confirmed this. Petitioner's character trait for fidelity in his committed relationships would have further rendered implausible K.J.'s testimony about a rape in 2000.

3. The exculpatory impact of the missing impeachment evidence.

The prosecution argued to the jury that Kathleen J.'s story of rape was "remarkably similar" to those of the other complaining witnesses. 33 RT 3301. The prosecutor summarized Kathleen J.'s testimony in graphic detail and concluded with the assertions that (1) Kathleen J. had no discernable motive to lie; and (2) the defense efforts to discredit her were patently feeble:

> Kathy J. is not involved in any lawsuit. She is not a Scientologist. She doesn't know these women. She's never spoken to them. What possible motive does Kathy J. have to come and testify about this horrific thing that happened to her? What's the motive? 33 RT 3304.

The prosecutor belittled the defense efforts to impeach her:

> This is what the defense gives you, a photograph of Jennifer Lopez and Leah Remini. Because what they're suggesting is that 21 years before she reports, while Kathy J. is working as a prop master for "Angel Eyes," she and Jennifer Lopez, what, have a conversation?
>
> There is no evidence of that. Then years later, there is a photo of Jennifer Lopez and Leah Remini and they're friends? There is no evidence of that.
>
> And that Leah Remini is some disgruntled Scientology person? No evidence of that. And that they all concocted this grand plan to get Kathy J. to say that the defendant raped her in 2000? It's ridiculous. 33 RT 3304-3305

Because her testimony likely contributed to the jury's conviction, petitioner is entitled to relief. Strickland v. Washington, supra.

X. PETITIONER WAS DEPRIVED OF DUE PROCESS BY THE PROSECUTION'S PRESENTATION OF FALSE TESTIMONY OF HARASSMENT BY THE COMPLAINING WITNESSES KNOWING THAT THE COMPLAINTS HAD BEEN INVESTIGATED BY THE LAPD AND FOUND UNSUBSTANTIATED.

A. Statement of Facts.

1. The proceedings regarding the admissibility of harassment evidence and the ineffective assistance of counsel for failure to rebut the false claims of harassment.

Prior to the first trial, the prosecution moved to introduce evidence from the complaining witnesses that they had been harassed by members of the COS. As the prosecutor explained, "witnesses who are testifying under certain fears or concerns, it's

important for the jury to hear that evidence so that they can make a determination of credibility." 14 ART (8/23/24) 3666-3667. The prosecutor advised the court that he intended to introduce five specific incidents of harassment, including (1) C.B.'s claim that the COS killed her dog; and (2) J.B.'s claim that the COS was going through her trash. 14 ART (8/23/24) 3667-3669.

The defense contended such evidence should be excluded because it was both false and highly inflammatory, and if offered would require extensive rebuttal that entailed undue consumption of time under Evidence Code section 352. 6 CT 1593-1602; 14 ART (8/23/24) 3660-3666. Defense counsel provided documentation that the LAPD had investigated the claims of harassment and had determined that there was no COS involvement in the incidents reported, and/or that the incidents did not constitute harassment by anyone. Counsel pointed out that C.B. reported to LAPD that COS operatives had strangled to death her pet dog, Ethel. However, C.B.'s prior Instagram posts made it clear that the dog had died of natural causes at a dog boarding facility where C.B. had boarded her dog. 6 CT 1598; 7 CT 1896.

The court resolved this dispute in a most prosecution-favorable manner, ruling that "[t]he People may present testimony that the victims generally felt they were subject to instances or a campaign of harassment or stalking that they felt was related to their cooperation with law enforcement in the rape case," but "the court will not allow the specific instances

themselves" to be introduced by the prosecution per Evidence Code section 352. 15 ART (8/23/24) 3952-3953. The court was unclear whether the defense was subject to similar restrictions. Id.

The complaining witnesses gave dramatic testimony that COS had launched a "campaign of terror" against them that was growing "bolder and bolder and bolder and bolder." 25 RT 2161 (J.B.). Complaining witness N.T. claimed she was "100 percent" certain that she was being harassed at the hands of COS. 28 RT 2629. Defense counsel made no effort to challenge or rebut this testimony.

2. The available evidence that refuted a claim of harassment by the COS or any other person or entity associated with petitioner.

The three complaining witnesses made a total of 40 separate claims of harassment to the LAPD. The great majority of them did not result in any action by the LAPD. Twelve of them resulted in formal DR reports.[50] See Exhibit 60, Chart of Harassment Claims. One of these was forwarded to the Los Angeles District Attorney for filing consideration, but it was rejected. Exhibit 61, p. 2, DA CPRA. One other was submitted to the Los Angeles City Attorney for filing, but it was also rejected. Exhibit 62, LA City Attorney CPRA. Many of the incidents were

[50] An LAPD "DR Report" is an official record of an investigation. COS was never a target or subject of any LAPD investigation.

not merely unsubstantiated, but were affirmatively determined to be not harassment.[51]

B. The Prosecutorial Misconduct.

Regardless of the court's ruling, the prosecution had a constitutional obligation not to present false evidence in the first place, and to correct it if it occurred anyway. Napue v. Illinois, supra, 360 U.S. 264; Glossip v. Oklahoma, supra, 604 U.S. 226. Notwithstanding that obligation, the prosecutor elicited testimony from the complaining witnesses that they had been harassed and stalked since they came forward, and that the harassment and stalking continued through the day of trial. 25 RT 2162.

The prosecutor asked the complaining witnesses why they had filed the 2019 lawsuit.

> Q: What was the reason for filing that lawsuit?
>
> A: There was no number of reports, no – nothing we could seemingly do to stop – like, stop this campaign of terror. Like, it was just getting bolder and bolder and bolder and bolder. 25 RT 2161-2162 (emphasis supplied).

At that point, the prosecutor was obligated to intervene and correct J.B.'s melodramatic fiction that a campaign of terror was occurring that the LAPD was impotent to quell. DDA Mueller

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[51] For example, J.B. complained that a Scientology operative had been searching through her trash for nefarious purposes. LAPD investigation established that there was a harmless woman in J.B.'s neighborhood who did engage in dumpster diving. Exhibit 60, Chart of Harassment Claims, p. 2.

knew very well that the LAPD had investigated many of the complaints raised by J.B., et.al., and had found none of them to be instances of harassment, much less part of a COS "campaign of terror" that was getting "bolder and bolder and bolder and bolder."

Glossip v. Oklahoma, supra, vacated a murder conviction and the accompanying death sentence because the prosecution's accomplice witness had lied at trial about the medical condition he had and the medications he was taking for it, and that false testimony was not corrected by the prosecutor. The Supreme Court noted that the false testimony was not directly relevant to guilt or innocence, but the prosecutor's failure to correct it was nonetheless a Napue violation because it was relevant to the witnesses' overall credibility. Glossip, supra, 604 U.S. 226, 2025 Lexis at 28 – "A lie is a lie, no matter what its subject," quoting Napue, 360 U.S. at 269.

Petitioner is also entitled to relief under Penal Code section 1473(b)(1)(A), which provides that habeas corpus relief may be sought where "[f]alse evidence that is material on the issue of guilt or punishment was introduced against a person…"

C. The Ineffective Assistance of Counsel.

Counsel had every incentive and opportunity to call Det. Vargas and elicit the absence of confirmation of any of the harassment and stalking claims. Counsel had rhetorically asked during closing argument why the prosecution had not called Det. Vargas. The prosecutor gave it right back to him:

> So Mr. Cohen had the opportunity, if he wanted to do so, if he felt that Detective Vargas had anything to contribute or anything to give to help his case, he has the same ability to subpoena witnesses as we do…and he didn't. 33 RT 3386.

Counsel's performance was deficient in failing to push back against the otherwise unrebutted harassment and stalking testimony. Strickland v. Washington, supra.

D. The Materiality of the False Testimony.

False testimony requires reversal of the conviction if it "may have had an effect on the outcome of the trial." Glossip at 26, quoting Napue at 272. The Supreme Court characterized this as a "materiality standard," and noted that "[e]vidence can be material even if it 'goes only to the credibility of the witness'," Glossip at 27, quoting Napue at 269. The Supreme Court's finding of materiality was as follows:

> [t]he jury could convict Glossip only if it believed Sneed. Had the prosecution corrected Sneed on the stand, his credibility plainly would have suffered. That correction would have revealed to the jury not just that Sneed was untrustworthy (as *amicus* points out, the jury already knew he repeatedly lied to the police), but also that Sneed was willing to lie to them under oath. Such a revelation would be significant in any case, and was especially so here where Sneed was already "nobody's idea of a strong witness." Glossip at 28.

The same analysis requires reversal here. Had Mueller corrected the complaining witnesses on the stand about their unsupported claims of a "campaign of terror," the jury could have inferred that they concocted a false story of harassment by COS

to portray themselves as hapless victims of both petitioner and COS. From that, counsel could have argued that they concocted false accusations of rape against petitioner to portray themselves as hapless victims for mercenary purposes.

Not only did the prosecutor fail to step up to the plate to rectify the unfounded testimony, but rather exploited it in closing argument:

> These four faces [the three complaining witnesses and Kathleen J.], they've told you what they've been through, what they've had to go through. For three of them, what they're essentially still suffering from at least up until the time they testified with regard to the harassment and stalking. 33 RT 3376.

Under these circumstances, the Due Process guarantee of the Fourteenth Amendment, the Sixth Amendment right to the effective assistance of counsel, and Penal Code section 1473 compel reversal of this conviction.

XI. PETITIONER WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PERVASIVE JUDICIAL BIAS DISPLAYED AT THE SECOND TRIAL.

A. Introduction.

Petitioner does not lightly make a claim of judicial bias, but it is unavoidable in this case. From the outset of the case, the court overstepped its judicial role and intervened in matters of COS doctrine and practices. See AOB, Argument VI. At the first

trial, the court's evidentiary rulings did not overall favor either party, and the jury viewed Judge Olmedo as even handed.[52]

The second trial was dramatically different. At the parties' request, the court revisited many of the first trial rulings, and (1) granted every prosecution request to change a prior adverse ruling, but (2) denied every defense request to change a prior adverse ruling. Moreover, the second jury viewed Judge Olmedo as biased in favor of the prosecution based on her manner and conduct in court.

Counsel for appellant has identified seven aspects of Judge Olmedo's conduct of the second trial and related proceedings that compel an inference of bias, as set forth below.

B. The Indicia of Bias.

1. The jurors' view of Judge Olmedo as biased in favor of the prosecution.

Following the convictions on May 31, 2023, attorney Holley conducted consensual interviews with certain members of the jury, including Juror No. 6. He described discussions among the jurors regarding Judge Olmedo's repeated interventions to curtail defense cross-examination. The jurors discussed their mutual perception that Judge Olmedo wanted to see petitioner get convicted, and that she was biased in favor of the prosecution. Exhibit 64, Declaration of Shawn Holley. That type of judicial

[52] The jury foreperson gave a post-verdict interview with anti-COS blogger Tony Ortega, and commented that Judge Olmedo was a "nice lady" who was "professionally courteous." Exhibit 63, p. 25, Transcript of Tony Ortega Interview.

favoritism has long been condemned. People v. Long (1944) 63 Cal. App. 2d 679, 685 ["Whether consciously or not, the judge aligned himself with the prosecution, and the jurors could not have failed to realize that he had done so"].

2. The objective disparity between Judge Olmedo's treatment of the prosecution and the defense regarding trial objections.

At both trials, the court sustained prosecution objections to defense questions at a far higher rate than defense objections to prosecution questions, as set forth in the following Table 1.

Table 1 – Comparison of Objections Sustained at the First Trial

Party & Attorney	Total # of Objections	Sustained	Overruled	Percentage Sustained
Defense-Cohen	316	112	204	35%
Defense-Goldstein	43	15	28	35%
Total Defense	359	127	232	35%
Prosecutor-Mueller	293	175	118	60%
Prosecutor-Anson	22	14	8	64%
Total Prosecution	315	189	126	60%

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Table 2 – Comparison of Objections Sustained at the Second Trial

Party & Attorney	Total # of Objections	Sustained	Overruled	Percentage Sustained
Defense-Cohen	149	58	91	39.0%
Defense-Holley	37	15	22	40.5%
Prosecutor-Mueller	105	68	37	64.7%
Prosecutor-Anson	83	68	15	82.0%

The court sustained a significantly higher percentage of prosecution objections compared to defense objections at both trials.

First Trial	Second Trial
% defense sustained – 35%	% defense sustained – 40%
% prosecution sustained – 60%	% prosecution sustained – 66%

These disparities are consistent with judicial bias, but not conclusive. The data does not convey the merits of the objections and, therefore, does not resolve the possibility that the defense consistently made a larger number of non-meritorious objections.

Stronger evidence of judicial bias is evident from the disparity between the percentages of sua sponte objections interjected by Judge Olmedo against the prosecution versus the defense. At the first trial, the percentage of Judge Olmedo's sua sponte objections against the defense was disproportionately high compared to sua sponte objections against the prosecution.

First Trial	Second Trial
% sua sponte objections against defense – 65%	% objections against defense – 78%
% sua sponte objections against the prosecution – 35%	% objections against prosecution – 22%

These disparities are strongly indicative of a pro-prosecution bias on Judge Olmedo's part. The alternative to the inference of bias is a thoroughly implausible scenario that the prosecution team was persistently asleep at the wheel at the first trial in terms of objecting to improper questions by the defense. Under that scenario, Judge Olmedo was forced by prosecutorial sloth, lassitude or indifference to intercede at much higher frequency to squelch improper defense questions to protect the integrity of the trial.

The counter scenario to an inference of bias becomes even more implausible at the second trial, where Judge Olmedo made more sua sponte objections in general and made a higher percentage of them against the defense. Either Judge Olmedo was biased against the defense, or the prosecution was even further in dereliction of duty at the second trial to warrant Judge Olmedo's higher rate of sua sponte objections against the defense, a highly implausible scenario.

This disparity is indicative of bias for an additional reason. If the prosecution was not sleep-walking through the trials, then it follows that the prosecutors did not view as objectionable the majority of questions that were the subject of Judge Olmedo's sua sponte objections. Her over-intervention to the benefit of the

prosecution violates the venerable principle of "party presentation," i.e., that a court is supposed to adjudicate metaphorical balls and strikes as pitched by both parties, not to step in as a pinch hitter for one of the parties. See Part B-5; infra.

3. The inconsistent application of a particular legal principle to the benefit of the prosecution.

This indicator of bias is apparent in Judge Olmedo's rulings regarding the use of police testimony to attack or bolster a witness's testimony. Judge Olmedo correctly identified and articulated the legal rule involved:

> The Court: Police officers cannot testify as to whether or not they believe any witness's testimony is credible or truthful.
>
> There is case law on point. Can't do it, will not allow you. So any question you intend to ask, do you think this was truthful, did you think that is truthful, the court will not allow and I'll interpose my objections. 31 RT 3015.

At the first trial, neither party asked any law enforcement officer to opine about witness credibility.

On direct at the second trial, Det. Myape acknowledged that despite the fact that she told the complaining witnesses not to communicate with one another, they repeatedly did just that. 31 RT 2995-2999. The prosecutor then elicited over defense objection Det. Myape's opinion that no contamination occurred – "I don't think that they colluded or contaminated each other's testimony." 31 RT 2998-2999.

That testimony was a clear violation of the proscription against a police officer opining affirmatively on the credibility of

a prosecution witness. That error was compounded when the court sustained a prosecution objection on cross:

> Q: [by defense counsel] Now, would it be accurate to say that you do not know whether any of the statements made to you by the Jane Does are truthful?
> [The prosecutor] Objection it's overbroad.
> The Court: It's an inappropriate question, so the objection is sustained. 31 RT 3006.

The court thus erroneously failed to enforce the prohibition against police officer vouching for the credibility of a prosecution witness when the prosecution had Det. Myape vouch that no contamination occurred. The court then erroneously invoked the prohibition against a police officer vouching when defense counsel attempted to elicit from Det. Myape that she "do[es] not know whether any of the statements made to you by the Jane Does are truthful." See AOB, Argument III.

In sum, Judge Olmedo failed to apply the prohibition against police vouching in a manner that benefited the prosecution and then misapplied it in a manner that was detrimental to the defense. These erroneous and irreconcilable rulings support an inference of judicial bias.

4. The court's grant of the prosecution's requests for more favorable rulings on evidentiary matters at the second trial while denying defense requests for more favorable rulings.

At the first trial, the court excluded prosecution evidence regarding tenets and practices of Scientology. Before retrial, the court reversed its ruling and agreed to the presentation of anti-

Scientology testimony. The rationale for this reversal was entirely unfounded. The court asserted in clear contravention of the record that the defense had claimed it was relying on a defense of consent prior to the first trial, but then during the first trial, the defense had shifted to a denial that the incidents never happened.[53] The court then asserted that "[t]he broad charge of fabrication in all aspects of the victims' testimony by the defense make Claire Headley's testimony far more probative than prejudicial." 15 RT 769.

The court's premise is roundly refuted by the record. Defense counsel argued only that the inconsistencies in the victims' statements and testimony called into question the truthfulness of their testimony that a forcible rape had occurred, not that they called into question whether any sexual activity at all had occurred. 20 ART (5/17/24) 2886-2887.

The court's ruling was not only predicated on a faulty premise, but also the conclusion drawn from that misunderstanding was devoid of logic.

There is no connection between the nature of defense presented and the admissibility of Headley's testimony, and the court failed to even tender one. The substance of Headley's

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[53] The court stated, "Only after the commencement of trial and through cross-examination of the victims did it become clear to the court, and confirmed by the defense, that the defense was now asserting that the questioned incidents had never occurred at all, rather than consisting of consensual sexual activity." 15 RT 768-769 (emphasis supplied).

testimony was that the COS promulgated various pernicious practices that discouraged the complaining witnesses from making a timely complaint to the police for a forcible rape. That testimony was to support the credibility of the complaining witnesses, which would have been equally under fire whether the defense was consent versus nothing happened.

The prosecution offered the Headley testimony for the purpose of bolstering the complaining witnesses' testimony. The court unilaterally expanded its permissible use to the core issue of "determining whether defendant committed the alleged crimes." 11 CT 3175 [Order of March 28, 2023]. That ruling effectively weaponized petitioner's Scientology beliefs for the prosecution to use in arguing petitioner's guilt.

The court's spurious rationale for the admission of the Scientology evidence and the unilateral expansion of the scope supports an inference of bias against both petitioner and Scientology.

5. The reiteration of rulings that disfavored the defense.

Judge Olmedo reaffirmed the denial of defense access to the complaining witnesses' communications with each other regarding petitioner on the ground, inter alia, that the defense already had amassed "an incredibly large amount of [impeachment] materials." 3 RT 169. The court's implication was

that the "incredibly large amount of [impeachment] materials" somehow reduced the defense need for the social media and other communications as an additional source of impeachment. That rationale is specious for a number of reasons.

These communications were qualitatively different than the other sources of potential impeachment. They contained communications among the complaining witnesses, not communications between a complaining witness and a third party. Their unique potential for impeachment should have been readily apparent to the court from the testimony by Det. Myape that she repeatedly warned the complaining witnesses that their continued communications among themselves could result in "contamination" and undermine their credibility. The defense sought access to the complaining witnesses' communications for the same reason that the prosecution did not want them to continue communications – the potential for impeachment.

Next, it is a non sequitur for the court to deny the defense access to a non-cumulative source of impeachment because the defense already had "an incredibly large amount of [impeachment] material," 3 RT 169, particularly where the first jury was leaning heavily toward acquittal. That incredibly large amount of impeachment material brought the first jury to the brink of acquittal. Additional non-cumulative impeachment would have likely provided the jury with the wherewithal to cross the brink and return a full acquittal. Barkauskas v. Lane (7th Cir. 1989) 878 F.2d 1031, 1034 ("the very abundance of other

impeaching evidence [against the principal witness] may have meant that [the undisclosed exculpatory evidence] would have pushed the jury over the edge into the region of reasonable doubt that would have required it to acquit").

6. The repeated violations of the principle of "party presentation."

"Party presentation" is a venerable doctrine repeatedly validated by the United States Supreme Court. "In our adversary system, … we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." Greenlaw v. United States (2008) 554 U.S. 237, 243-44. ["In our adversary system, in both civil and criminal cases, we follow the principle of party presentation," i.e., "we rely on the parties to frame the issues for decision"]. A component of this principle in the criminal justice system is that judges should not unilaterally resolve against a party's legal issues that the other party had not raised. "This confusion of roles would be inconsistent with the neutrality expected of the judiciary in our adversarial system of justice," Rose v. United States (D.C. 1993) 629 A.2d 526, 535.

The clearest instance of the court's violation of the principle of party presentation relates to the unilateral expansion of the scope of testimony from Claire Headley for use as direct evidence of petitioner's guilt. 11 CT 3175. That far exceeded the prosecution's request.

7. The improper intrusion into the adjudication of Scientology law, and the untenable determination that resulted.

a. The court's unconstitutional intrusion into Scientology doctrine and its misinterpretation of scripture at the preliminary hearing.

The issue of Scientology doctrine first arose at the preliminary hearing, held on May 18 – 21, 2021. The prosecution elicited testimony from complaining witness C.B. at the preliminary hearing on May 19 that her delay in reporting any sexual misconduct to the police was in obedience to Scientology doctrine that prohibited a Scientologist from reporting another Scientologist to law enforcement authorities. 6 ART (8/23/24) 1293. She claimed that when she brought her complaint to the attention of Church Ethics Officers, she was shown a passage in the Scientology text Introduction to Scientology Ethics that she understood to mean that Scientologists were prohibited from reporting other Scientologists to law enforcement for committing public crimes. Ibid. On cross, she was handed a copy of the Introduction to Scientology Ethics, and was asked to identify any textual support for her testimony. She was unable to do so.

The next day, the prosecutor referred C.B. to a 1965 policy letter that discussed suppressive acts, and that included the prohibition against "delivering up the person of a Scientologist without justifiable defense or lawful protest to the demands of civil or criminal law," and asked C.B. if this passage supported her understanding that reporting another Scientologist's crime to

the police was prohibited. She enthusiastically agreed. 7 ART (8/23/24) 1534.

On re-cross, counsel attempted to question C.B. whether the cited passage in fact prohibited reporting another Scientologist to the police:

> Q. Well, nowhere does it say reporting a Scientologist to the police is a suppressive act; correct?
>
> The Court: The court will interpret the pages that were just shown according to – the court will review it at the time that I make my decision. 7 ART (8/23/24) 1535 (emphasis supplied).

After argument, the court arrogated to itself the interpretation of a disputed passage in the ethics text:

> These exhibits [including the ethics text] indicate that the written doctrine of Scientology not only discourages but prohibits one Scientologist from reporting another Scientologist in good standing to outside law enforcement. This expressly written doctrine sufficiently explains to this Court the hesitancy and lateness in reporting the crimes charged to law enforcement and also explains the inconsistencies in the witnesses' testimony and the actions taken subsequent to the events that comprise the charges. 8 ART (8/23/24) 1860 (emphasis supplied).

The court's unconstitutional intrusion into the proper interpretation to petitioner's detriment supports an inference of judicial bias.

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b. The court's unconstitutional intrusion into Scientology doctrine at trial in the form of allowing the testimony of anti-Scientologist Claire Headley as a purported expert on Scientology doctrine.

The court perpetuated its unconstitutional intrusion into religious doctrine at trial by allowing prosecution witness Claire Headley to testify to her version of the meaning of Scientology doctrine, and then tasking the jury to make its own determination of the substance of Scientology doctrine. That error is argued in the Appellant's Opening Brief, Argument VI. The court's own untenable interpretation of Scientology followed by her delegation of the same determination to the jury supports an inference of judicial bias.

8. The court's pejorative and unfounded remarks about petitioner at sentencing.

Before imposing sentence, the court lectured petitioner that he had just been legitimately convicted of two forcible rapes, and that he should not view himself as victimized by the criminal justice system:

> You were convicted because each of the victims reported the rapes to someone shortly after the rapes occurred, also back in 2001 and 2003. Jane Doe 2 told her mother and friends; thus reporting the rape. Jane Doe 1 reported the rape to Scientology officials and also wrote letters to Scientology's International Justice Chief, reporting the rape.
>
> They also reported the rape to Los Angeles Police Department almost – approximately a year later. 44 RT 3720.

The court's lecture was founded on a mischaracterization of the record. Petitioner was convicted of two forcible rapes, and none of the complaining witnesses had reported a forcible rape anywhere near in time to the incident. And N.T. never reported a rape to the LAPD until 2017.

The court then referred to the 2004 civil settlement as further corroboration of petitioner's guilt:

> In addition, shortly after the rape, you paid Jane Doe 1 approximately $400,000 to keep quiet about the charged sexual incident. And while some may argue that whether you believed her story was true or not, you just didn't want the bad publicity, she was seeking money from you, close to half a million dollars is a lot to pay for the silence about an incident that you claimed never happened. 44 RT 3720.

This passage contains two clear indicia of Judge Olmedo's bias. First, without having any knowledge of the operative facts, she made an adverse inference against petitioner that his 2004 settlement indicated a consciousness of guilt, when the settlement was a standard business practice in entertainment circles, e.g., to pay an accuser a miniscule fraction of the accused's earning potential to avoid public disclosure and scandal. The court drew the worst possible inference against petitioner based on a superficial and incomplete knowledge of the facts.

The court also denigrated the defense attribution of a motive to lie to the complaining witnesses at the time of trial:

> So the argument that they only colluded with each other decades later after leaving Scientology to get

> money from you does not make sense in light of the earlier reporting, nor does it diminish the truth or impact of the earlier statements made at or near the time of the rapes when they had no motive to lie, retaliate or gain money. 44 RT 3721.

The court's reference to the complaining witnesses' "earlier report[s]" overlooks the salient fact that the earlier reports did not claim forcible rape. The court ignored the actual defense position that the complaining witnesses banded together in 2016 to upgrade their earlier reports to forcible rape to cash in via a civil lawsuit.

The court had excluded the defense proffer regarding the complaining witnesses' manifest motive to falsely claim forcible rape to re-open the civil statute of limitations. See AOB, Argument II. Her contention that the statements of the complaining witnesses at the time of the incidents – that do not allege forcible rape – negate the defense theory that they had a motive to fabricate charges of forcible rape in 2016 underscores her bias. The court's refusal to acknowledge the viability of the defense theory, after she had excluded evidence that confirmed the viability of the defense, clearly demonstrates bias.[54]

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[54] Even the prosecutor understood the theory of defense as it related to the complaining witnesses' financial motive to falsely testify against petitioner:

> Mr. Mueller: Okay. So the defense's position throughout this case thus far has been that, first of all, Jen B. case was initially declined, that Jen B. subsequently essentially colluded with the other

C. The Requirement of Reversal.

In sum, throughout the second trial and for the remainder of the superior court proceedings, Judge Olmedo demonstrated by her comments and conduct that she was biased in favor of the prosecution, in violation of petitioner's right to due process and an impartial judge.

The due process clause of the Fourteenth Amendment guarantees a criminal defendant, as any litigant, the right to a fair trial in a fair tribunal. In re Murchison (1955) 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623. If a habeas court determines that bias by a state judge resulted in a constitutional violation, then the court is required to overturn the state court decision. See Maurino v. Johnson (6th Cir. 2000) 210 F.3d 638, 645 ("Because judicial bias infects the entire trial process it is not subject to harmless error review"). Liteky v. United States (1994) 510 U.S. 540, 552, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994), explained that "the pejorative connotation of the terms 'bias' and 'prejudice' demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable." Id. at 552. See Alley v. Bell (6th Cir. 2002) 307 F.3d 380, 386.

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named victims in order to get her – to get the criminal case filing – get her case filed and to support their civil suit seeking monetary damages. 15 ART (5/17/24) 2262.

XII. CUMULATIVE PREJUDICE.

Petitioner has presented numerous claims of prejudicial error in the appeal, and has raised numerous claims of Sixth Amendment violations that must be viewed cumulatively with regard to the weakness of the prosecution's case. The factors weighing in favor of reversal are set forth in detail at AOB, pp. 94-96.

Presuming that this Court finds merit in at least some of the appellate arguments and some of the habeas claims, their combined prejudice must be weighed in the decision whether to grant relief. In re Reno (2012) 55 Cal.4th 428, 483 described the procedure for determining prejudice arising from a combination of an appeal and a habeas corpus proceeding. The two proceedings may be assigned different case numbers for administrative reasons, but they are complementary challenges to the same judgment, not ships passing in the night. In re Jones, supra, 13 Cal.4th at 583. See also Thomas v. Hubbard (9th Cir. 2002) 273 F.3d 1164, 1179.

CONCLUSION

WHEREFOR, for the foregoing reasons, petitioner requests that this Court issue an order to show cause and remand the matter to the superior court for an evidentiary hearing before a judge other than Judge Olmedo.

/ November 16, 2025 /eric s. multhaup/
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VERIFICATION

I am the attorney retained to prepare this habeas corpus petition on behalf of petitioner Daniel Masterson. I have reviewed the foregoing allegations, know their contents, and believe them to be true. I am making this verification in petitioner's stead because I conducted the investigation that developed the material facts alleged herein while petitioner was incarcerated.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, and that this declaration was executed on November 16, 2025 at Mill Valley, California.

/eric s. multhaup/

ERIC S. MULTHAUP

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I. PETITIONER'S COMPLIANCE WITH HABEAS CORPUS PROCEDURAL REQUIREMENTS.

Penal code section 1473, et seq. sets forth California habeas corpus procedure in general, and describes the commencement of the action by a verified petition, section 1474, a return by the custodian upon issuance of an order to show cause, section 1480, and a hearing. These general provisions have been supplemented by case law and court rules that provide more specific guidance. People v. Duvall (1995) 9 Cal.4th 464, 475 instructed that "[t]he petition should both (i) state with particularity the facts on which relief is sought [citations], [and] (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. [citations]." Petitioner has fulfilled that requirement, specifically alleging the areas in which counsel failed to investigate and present exculpatory evidence, and providing transcripts, documentary evidence, and declarations in support of those claims.

People v. Romero (1994) 8 Cal.4th 728 explained the obligations of a court presented with a habeas corpus petition within its original jurisdiction – "When presented with a petition for writ of habeas corpus, a court must first determine whether the petition states a prima facie case for relief—that is, whether it states facts that, if true, entitle the petitioner to relief – and also whether the stated claims are for any reason procedurally

barred." People v. Romero, supra, 8 Cal.4th at p. 737. "To assist the court in determining the petition's sufficiency, the court may request an informal response from the petitioner's custodian or the real party in interest." Ibid. Rule 4.551(b), Cal. Rules of Court, specifically authorizes the court to request an informal reply from the respondent or real party in interest.

Then, upon consideration of the informal response and petitioner's reply, "[t]he court must issue an order to show cause if the petitioner has made a prima facie showing that the petitioner is entitled to relief." Rule 4.551(c)(1). See also In re Hochberg (1970) 2 Cal.3d 870, 874.

The order to show cause also directs the respondent to address the "'claims raised in the petition and the factual bases for those claims alleged in the petition'." People v. Duvall, supra, 9 Cal.4th at p. 475. Petitioner has more than satisfied the prima facie showing requirement to qualify for an Order to Show Cause.

II. PETITIONER'S ENTITLEMENT TO RELIEF ON THE MERITS.

Petitioner has raised multiple claims based on three types of state and federal constitutional violations: (1) prosecutorial misconduct; (2) ineffective assistance of counsel; and (3) judicial bias. Petitioner has stated his claims with specificity, and has attached "copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." People v. Duvall, supra, 9 Cal.4th at 475. Based on this showing, he is entitled to an order to show cause and an evidentiary hearing.

CONCLUSION

WHEREFOR, for the foregoing reasons, appellant respectfully requests that this Court issue an order to show cause returnable before the Los Angeles County Superior Court.

Dated: November 16, 2025

/eric s. multhaup/

ERIC S. MULTHAUP
Attorney for
DANNY MASTERSON

CERTIFICATE OF COMPLIANCE

I certify that this Memorandum of Points and Authorities in Support of Petition for Habeas Corpus consists of 518 words.

Dated: November 16, 2025

/eric s. multhaup/

ERIC S. MULTHAUP

DECLARATION OF SERVICE

RE: In re Daniel Masterson on Habeas Corpus, B _____;
Court of Appeal No. B333069;
Los Angeles Superior Ct. No. BA487932

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 35 Miller Avenue, Suite 229, Mill Valley, California 94941. I served the attached:

PETITION FOR WRIT OF HABEAS CORPUS AND
MEMORANDUM OF POINTS AND AUTHORITIES

on the following individuals/entities by TrueFiling or by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
By TrueFiling

Clerk of the Superior Court
210 West Temple Street
Los Angeles, CA 90012

Daniel Masterson
[address withheld]

Los Angeles District Attorney
211 West Temple Street, 9th Floor
Los Angeles, CA 90012

I declare under penalty of perjury that service was effected on November 16, 2025 at Mill Valley, California and that this declaration was executed on November 16, 2025 at Mill Valley, California.

/eric s. multhaup/

ERIC S. MULTHAUP