ORIGINAL

No. 23-5143

FILED
JUN 13 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Lonnie L. Kocontes — PETITIONER
(Your Name)

vs.

People of California — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

California Crt of Appls, Fourth District, Division Three
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lonnie L. Kocontes BN8076
(Your Name) Richard J. Donovan Prison

480 Alta Rd
(Address)

San Diego, CA 92179
(City, State, Zip Code)

None
(Phone Number)

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List of Parties

All parties appear in the caption of the case on the cover page.

QUESTION(S) PRESENTED

See attached

Kocontes v. California

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Their Views, And Widespread Masking Even In Deliberations, Which Surely Inhibited Communications.

Q7: Petitioner's 6th Amend. Right To A Public Trial Was Violated By The Trial Court's Failure To Ensure That Persons Without Internet Access Had A Location To View The Livestream, Failure To Post A Notice About How To Access The Livestream At The Closed Courthouse Entrance, And Failure To Identify The Persons At The Entrance Who Would Purportedly Tell Members Of The Public About The Livestream Website. 37

Authorities

Pgs:

Cases:

Authorities (ctd)

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Kocontes v. California

1. Questions Presented

1. Whether California violated due process by asserting territorial (subject matter) jurisdiction over an alleged homocide on a Bahamian-flagged cruise ship off the coast of Italy that never ported in the U.S. based on a 1905 statute entitled, "Performance of an act in this state culminating in a crime in another state," when the only legislative history is a note by the Legislature's administrator that precisely tracks the title, and a trial judge of the same court had already rejected jurisd.

2. Does the grant of Congressional authory in Art I, Sec. 8, Cls. 10, U.S. Const. to "[D]efine and punish piracies and felonies committed on the high seas" preempt California from exercising jurisdiction over the above-described allegation, or does the victim's California residency allow state court jurisdiction under a "detrimental effects" analysis? (An issue related to Strassheim v. Daily (1911) 221 U.S. 280, 285 and Morrison v. Nat'l Australia Bank Ltd. (2010) 561 U.S. 247, 257.)

3. Does the U.S.' entry into international treaties that grant exclusive jurisdiction to the ship's flag state over on-board conduct at sea preempt California from asserting jurisdiction over an alleged homocide on a foreign-flagged ship irrespective of whether Petitioner has standing to assert rights under the treaties? (See Skiriotes v. Florida (1941) 313 U.S. 69, 74.) (Decided before the treaties at issue here existed.)

4. Whether law enforcement violates the 5th and 14th Amends. or the 6th Amend. and invades the defense camp when it solicits information from a private investigator who it knows has participated in meetings with defense counsel and participated in

defense activities, or may law enforcement rely solely on the investigator's claims that he was never actually retained?

5. If it is established that law enforcement has intentionally solicited defense information from an investigator working on the accused's behalf, is prejudice established from just obtaining privileged information, and if not, is any use of that information constitutional? (An issue left open in Weatherford v. Bursey, 429 U.S. 545, 554 (1977), resulting in a split in the circuits.)

6. Whether due process and the right to counsel were violated when a 30+ day trial is interrupted for 2½ months due to the onset of a pandemic and reconvened at the trial court's insistence to complete the defense case-in-chief under the following conditions: (1) everyone in the courtroom were to socially distance (6 ft apart) at all times, which included the defendant and his counsel, who were separated by a plastic screen, preventing communication (even holding up a note was impossible because a juror seated in the front row of the gallery may have seen it); thus, only two jurors were in the jury box, while one was in the well. The other nine were interspersed throughout the gallery, increasing the distance between some jurors and the witness stand by as much as 27 feet and causing periodic interruptions when jurors had to raise their hands to signal that counsel was blocking their view; only the two jurors in the box were elevated; (2) everyone was required to mask at all times except counsel interrogating and the witness; (3) exhibits, including documents, could only be handled by plastic gloves, and no jurors could handle any; (4) deliberations occurred in an empty courtroom with masking, social distancing, and only

one juror allowed to handle exhibits (gloved) and operate equipment such as audio playback and overhead projection?[1]

7. Is the right to a public trial denied when pandemic restrictions close the courthouse to everyone but litigants, counsel, witnesses, jurors, and court staff, so the trial is "live-streamed to the internet, but no public viewing location is provided, and it was unclear how the public could learn of the livestreaming, although the court claimed that members of the public who appeared at the courthouse wanting to oberve the trial would be told about the livestream (no evidence of any posted notice was inserted into the record, nor were any courthouse staff who were to inform the public identified)?

2. List Of Parties

All parties appear in the caption on the cover page.

3. Opinions Below/Appendices

The opinion of the highest state court to review the merits appears at Appendix A, the decision of the California Court Of Appeals, 4th District, Division 3 for Orange County California. This opinion is reported at 86 Cal. App. 5th 787. The California Supreme Court declined to review the case on March 15, 2023, as shown in Appendix B. The jurisdictional order of the Orange County Superior Court at issue is attached as Appendix C.

4. Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

[1] A defense motion for mistrial or continuance after the 73 day break was denied.

5. Constitutional And Statutory Provisions Involved

(a) The following constitutional provisions are at issue:

(i) Art. I, Cls. 10: The Congress shall have the power to... Define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.

(ii) Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(iii) Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(iv) Amend. XIV: Section 1. All persons born or naturalized in in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(b) The following statutory provision is at issue:

(i) California Penal Code § 778a: "Act Within This State Culminating In Crime In This Or Another State; Kidnaping.

(a) Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state.

(b) Whenever a person who, within this state, kidnaps another person within the meaning of Sections 207 and 209, and thereafter carries the person into another state or country and commits any crime of violence or theft against that person in the other state or country, the person is punishable for that crime of violence or theft in this state in the same manner as if the crime had been committed within this state.[2]

(c) An additional Constitutional Provision at issue:

(v) Art VI, Cls. 2: This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

② As originally enacted in 1905, the text was soley subd. (a); (b) was added in 1991.

6. Provisions Of International Treaties At Issue

(a) The United States has entered into the following international treaties at issue in Petitioner's preemption claim:

(i) The Geneva Convention On The High Seas Act Of 1958, Art. 6, §1, which provides in pertinent part that, "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas." (Petitioner is in a prison that does not allow internet access and therefore cannot provide the full text of the treaty, which is available at https://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf) The United States is a party to this and the next treaty. (See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21)

(ii) The United Nations Convention of The Law Of The Sea (UNCLOS) of December 10, 1982, Part VII, Arts. §§ 91 and 92 provide that "[s]hips have the nationality of the State whose flag they are entitled to fly" and "save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas." (For the full text see https://www.un.org/depts/los/convention_agreements/texts/unclos/part7.htm)

7. Statement Of The Case

Petitioner Lonnie Kocontes was convicted in June 2020 of first degree murder for financial gain after a jury trial in the Orange County California Superior Court. He was accused of murdering his ex-wife, Micki Kanesaki, while on a Mediterranean cruise that began and ended in Spain. The only connection to the U.S. was the couple's Calif. residency. The cruise ship was flagged in the Bahamas. Lonnie is an American citizen. Micki's citizenship is unknown, but she was born in Japan. Lonnie's trial involved 44 examinations over 7 weeks, but after 5 weeks and completion of the D.A.'s case-in-chief, the COVID pandemic interrupted the trial for 2½ months. Upon resuming conditions were much different (infraat).

This was the third criminal case by Orange County against Lonnie for Micki's death. The first was dismissed in May 2013 by Judge William Evans, holding that Cal. Penal Code § 778a (a) did not extend territorial (subject matter) jurisdiction to crimes culminating outside the U.S. (Case# 13CF0463.) The D.A. immediately refiled to keep Lonnie jailed. (Case# 13CF1773.) This allowed the D.A. to convene a secret grand jury without the customery notice to defense counsel and get the case before the master calendar, supervising Judge, Greg Prickett, a former prosecutor overseeing the grand jury.[1] Judge Prickett insisted on keeping the identical motion to dismiss granted before, even though Cal. Rules of Crt 4.115 (a) and 10.951 (a) require cases involving dispositional hearings to be assigned to trial depts. Before Prickett denied the motion Evans had granted, the D.A. appealed Evans' dismissal, to prevent it from becoming final for collateral estoppel purposes. (Prickett's order is Appendix C.)

When the prosecution abandoned its appeal 1½ years later (after Lonnie paid thousands to oppose it), Lonnie sought appellate habeas relief on collateral estoppel. The Court of Appeal denied habeas. (See 244 Cal. App. 4th 1229, revw denied and ordered not published 2016 Cal. LEXIS 3782.

Lonnie and Micki married in 1995, after meeting at O'Melveny & Myers where she was a legal secretary. Micki left work permanently in 1996 after developing rheumatoid arthritis in her fingers. Her sole source of income the last 10 yrs. of her life was disability insurance ($2800/mo.)

In 2000, Lonnie was accused of consensual sex with a minor (17RT 2927) (Eventually Lonnie obtained a $1 million defamation judgment against her.) Concerned that this was a shake down, Lonnie and Micki divorced to shield assets. But it also affected their relationship, so they continued to live together platonically as roommates, both dating.

In 2002 Lonnie began dating Amy Nguyen, an older student (3 yrs. his junior). They married in July 2005 and Lonnie moved out of the home he owned with Micki, buying a new home for Amy and him. Lonnie had paid off the house he owned with Micki using proceeds from selling stocks he owned with his father. After marrying Amy and living with her, it quickly became apparent that they were incompatible. Amy would not accept that Lonnie needed to continue contact with Micki about their house, and the new couple argued frequently over Amy's desire to spend ever-increasing amounts of money. After 2½ months of marriage, Amy had revenge sex with an old boyfriend. So

[1] Master calendar judges arraign & assign cases to trial depts.

Lonnie returned to his home with Micki and divorced Amy in Sept. '05. He and Micki decided to resume an intimate relationship at that time and began several months of counseling. They continued to have issues, however, as Micki had depression going back to 1997 when she had to abort a 5-month fetus after learning it had Down's Syndrome, following 2 miscarriages. Micki's depression would manifest in angry, sometimes violent outbursts when she would drink even a moderate amount of wine.

Lonnie and Micki confided in Lonnie's long-time friend and p.i., Bill Price, who suggested that they take a cruise like he and his paramour, Susan McQueen, also a p.i., did. Price admitted at trial that Lonnie was not enthusiastic about Price's suggestion (18RT 3070).[2] Lonnie and Micki eventually took Price's suggestion and booked a Mediterranean cruise. Neither had cruise experience, and contrary to the appellate opinion, there was no trial evidence showing Lonnie knew the ship was "a converted carferry with non-existent security systems" (Appx. A at 122). In fact, Price told Lonnie that "there were cameras on cruises" (17 RT 3004). On the 3rd day of the cruise, Lonnie awoke at 4:30 A.M. to find Micki gone and her bed still made. After he unsuccessfully searched and reported her missing, Lonnie got a call that night from the American Consulate at Lonnie's hotel explaining that the Italian Coast Guard called off the search for the day, and "It would be a miracle if the body were found." Thereafter, Price told Lonnie to return home, which Lonnie did the next day. (17RT 3029-3030.) Price described Lonnie's demeanor in their calls as upset and distraught (17 RT 3026-27).[3] Remarkably, a scientific research ship found Micki's body in international waters (12 RT 2048). The Italian pathologist who did the autopsy opined that Micki was murdered by mechanical strangulation, although he noted blunt force trauma to the head (13 RT 2189, 2261, and 8 CT 1732). Although his report discussed an attempted sexual assault due to bruising in the thigh, at trial the pathologist insisted there was no evidence of sexual assault. The defense pathologist rejected strangulation, noting the hyoid bone would usually break, especially in women over 50 like Micki with decreased bone density. She concluded the sole cause of death was blunt force trauma to the head (20 RT 3526-27, 3533-34 & 3628). Significantly, all of the pathologists, including the local ME, agreed that death occurred shortly after a meal from undigested food in the stomach. The autopsy said within 30 minutes. (13 RT 2245-46, 2248-50, 2270-72, and 2315-16).

The D.A's theory was that Lonnie and Micki returned from dinner to their cabin shortly after 9:00 P.M. with a bottle of wine when Lonnie struck Micki on the head with the wine bottle, strangled her, then threw her dead body off the balcony. This theory would have explained the undigested food, but it cannot be reconciled with other known facts.

Lonnie's statement has never waivered from the truth about that night and his explanation has been identical over an interview with Italian police, two FBI interviews the second of which

③ The ship's captain claimed Lonnie's demeanor was "very cold" (11 RT 1815-16).

② Citations are to the record on appeal (Appendix A) unless otherwise stated, and to a summarily denied Writ petition (#50582, 4th DCA, Div. 3). But due to prison limits, Petitioner has no access to the entire record, so citations are limited.

lasted several hours, and 14 secretly-recorded phone calls with Micki's niece. They went to the formal restaurant for an 8:30 P.M. reservation. Micki ordered a bottle of wine and according to the waiter each drank one glass. (See 4th DCA, Div. 3 case # 50582,④ Vol. 5, Exh. 48 at COA 1084.) They returned to the cabin, dropped off the wine bottle and went to the casino. At about 10 they went to the room where an 11 PM comedy show was scheduled, which had live music. (See #50582, Exh. 48 at COA 1088, statement of the theater waiter who offered drinks at the show and recalled seeing the couple.) They left a few minutes before midnight and upon reaching the cabin, Lonnie took a prescription Ambien® as he was still having time-zone adjustment issues. They were going on an excursion in the morning so Lonnie needed sleep. They then finished the wine and Micki said she "might" need an Ambien® also, but Lonnie did not see her take one. (See 24 RT 4216-19; 11 RT 1855; Exh. 48 at COA 1080 and Exh. 34 at COA 957.) [The bottle of 30 was new and only held 28 when the Italian police seized it. (Exh. 48 at COA 1086.) Although the autopsy report said testing of "blood, urine, and bile" for "pills and other drugs confiscated," he did **not** test for Ambien® (aka zolpidem).⑤ (Only Ambien®, ibuprofen, and vitamins were seized.)] As Lonnie was falling asleep, Micki said she was going to the [24 hr.] buffet for herbal tea, which she often drank at home before retiring; the last thing Lonnie said to Micki was "Hurry back" (Exh. 34 at COA 958).

After the cruise, Lonnie hired attorneys Jennifer Keller and Kay Rackauckas to find out what was being done to investigate Micki's death, as well as his friends, investigators Bill Price, a former D.C. cop/DEA task force member,⑥ and his partner Susan McQueen. Price told Lonnie to hire McQueen formally but not him, and to pay him separately, as his FBI contacts would not give him inside information if Price were formally Lonnie's investigator. Lonnie subsequently paid Price by wire transfer and check, but after Price was questioned about those payments by the FBI, he insisted that Lonnie pay in cash (30 RT 5414-15 and 30 RT 5456-59). After Lonnie was charged criminally, he learned in discovery that Price lied to the FBI about these payments, claiming that the Fall 2006 wire transfer he received was actually a mutual client's settlement payment ($11,500), and a check from Lonnie in January 2007 was repayment of a cash loan Price made to Lonnie while Micki was still alive. Price ultimately charged Lonnie six figures for investigative work while he simultaneously kept the FBI informed about all of the investigative activities he and McQueen were performing on the case. After the FBI seized Lonnie's assets, Price had at least 9 documented contacts with the FBI. (See e.g., #50582, Exhs. 12, 33, 43, 45, and 49; stipulation at trial showing Price's FBI contacts on 11/12/08, 11/18/08, 12/11/08, 12/18/08, 1/12/09, 4/6/09, 5/21/09, 7/27/09, and 5/25/11. (See 31 RT 5522-5523. Price admitted that "I was asked by Stokes and Simpson [Agents] that if any information came to my privy I should contact them" (3CT 18 487-88). Price claimed at trial that all money he got from Lonnie was turned into cash, so that Lonnie could use it to bribe Nguyen, which Price dubbed

④ A summarily denied writ petition from the denial of Lonnie's motion to dismiss under Penal Code §995.

⑤ The autopsy report is in case #50582, Vol. 4, Exh. 18; the quote is at COA 789.

⑥ Price was a prosecution witness who began working as a double agent for the FBI immediately after Lonnie's assets ($2 million) were seized by the FBI in Nov. 2008, claiming every thing he owned were proceeds of Micki's murder.

his "laundering money" for Lonnie (RT 18: 3122). This was the first he made this claim. (6a)

In August 2006, Bill, McQueen, and both attorneys took the same cruise that Lonnie and Micki took at Lonnie's expense. According to a 2/26/13 interview of ship's Captain Dodds, two months after Micki's death he was approached by an American who held himself out as an "ex-FBI agent" working on Lonnie's behalf investigating Micki's death. The captain had "an uneasy feeling" about the men and his team, so he did not give them any information. (See #50582, Vol. 5 of 9, Exh. 36 at COA-1032.) Dodds accurately assessed that they were "not able to obtain any useful information." (Id.)

The case was quiet for over two years after this first trip by Lonnie's investigators. Before this trip, other than Lonnie's 2 interviews, the only other documented FBI interviews were of Bill and Susan McQueen in July '06. In this interview, Bill described Lonnie as having "earned the majority of what they had" (Id. Vol 3, Exh. 9 at COA-572), that Micki was "depressed" over "a miscarriage" (Id. COA-582), and, even though Micki sometimes became violent when drinking, "Lonnie cared about Micki, even after all this nonsense" (Id. COA-594). Bill also said Lonnie divorced Amy because "Amy had a relationship with some other male" (COA-613), that Lonnie and Micki "had good days when she wasn't drinking" (COA-616), the only reason Bill and Susan didn't go on the cruise with Lonnie and Micki was because Susan's mother was in the hospital (COA-620-21), Bill told Lonnie to leave Italy after the American Consulate telephoned Lonnie at his hotel and said that Micki's body was lost at sea (COA-625), that Micki's larger diamond ring was missing and Lonnie was concerned that she may have been murdered in a robbery (COA-633), and, "Lonnie has never, in all the time I met (sic) him, advocated that he wanted to, should, or would do anything to her" (COA-640).

Then in December '06, Amy Nguyen, represented by public defender Dean Stuart, testified before a federal grand jury. She said that she knew nothing about the cruise beforehand, she and Lonnie argued frequently over her desire to spend money and his talking to Micki, and the break-up occurred when she had revenge sex with an old boyfriend.

In November 2008 the FBI seized nearly all of Lonnie's assets ($1.3 million in cash and a lis pendens on his $600K home) after Lonnie consolidated all of his cash at a bank recommend by Bill Price, who introduced Lonnie to the banker. This seizure prompted Price to begin working as a double agent for the FBI. On 11/7/08 Price called the new case agent, Rick Simpson, to offer his assistance. Simpson immediately arranged to go to Florida to interview Price, writing, "Bill Price is Kocontes' most trusted friend.... Price will be asked to assist the government in obtaining

(6a) Price was kept informed by his O.C. Sheriff's contacts that Lonnie was accused by a jailhouse snitch of not only admitting to paying two people to murder Micki, but also wanting to bribe witness Amy Nguyen. After the snitch struck a deal for early release in exchange for his →

evidence of the murder" (50582, Vol. 5, Exh. 33 at COA 939-40). From 2008-2011, Price had at least 8 documented contacts with the FBI, primarily initiated by him. (RT 18, 3092) During that same period, Price went on multiple investigative trips with McQueen for which Lonnie paid him tens of thousands of dollars. Lonnie also paid all of their travel expenses from the first trip to Italy in August '06 on.

In December 2008 Price and McQueen met with the lawyer in Los Angeles who Lonnie retained shortly after the asset seizure, Mark Werksman. In his 2/4/2014 declaration, Werksman described Price: "Mr. Price described himself as a retired law enforcement officer with significant federal criminal law enforcement experience and extensive ties to the FBI. From my conversation with Mr. Price, it was apparent and obvious that he was a private investigator who worked in tandem with Susan McQueen and that he was acting as a private investigator for Lonnie Kocontes regarding the death of Ms. Kanesaki and the government's investigations.... On December 9, 2008, Bill Price and Susan McQueen came to my office in Los Angeles to meet and discuss Mr. Kocontes's case and to formulate a strategy for the ongoing defense of Mr. Kocontes.... that meeting took approximately 3 hours" (#50582, Vol. 5, Exh. 29 at COA-922).

At trial, Price testified to a number of conversations with Lonnie for the purpose of indicating Lonnie's guilt. For example, he claimed that Lonnie said he left Amy Nguyen not due to her affair, but to avoid having to "split or lose his money." (RT 17, 2996) Price also claimed Lonnie asked questions about the extradition policies of foreign countries (RT 17, 2949); that Lonnie had Amy give him her computer hard drive so he could destroy it (RT 17, 2950-51); that Lonnie sent him an e-mail accusing the FBI of lying to Price about Lonnie to turn Price against Lonnie and impliedly threatening legal action against the FBI (RT 17, 2955 and People's trial exh. 36); that after Lonnie was sued by a former client and Price jokingly suggested taking the client on a cruise Lonnie replied that he "used to have connections with people who could take care of that" (RT 17, 2969); Price denied talking to the ship's captain, at first claiming that all he did was "just listen" (RT 17, 3036), but when confronted with photos of him on the ship he had to admit to taking measurements with a shoe of such items as balcony height (17RT 3038); Price admitted to discussing investigative strategy with defense counsel Werksman in December '08 after seeing e-mails from Werksman and invoices for Price's travel/food Werksman paid (RT 17, 3051-55); Price also acknowledged that he had "a number of

future testimony, the snitch was interviewed by defense investigator Widman, to whom he admitted he had fabricated his entire story. Nonetheless, the prosecution was allowed to put on his false testimony at trial, even after initially representing it would not call him in this case. The trial court did nothing even after Widman testified to his admissions.

conversations" with Lonnie that he reported to the FBI (17 RT, 2948); Price also claimed Lonnie said he was concerned about what Nguyen would tell defense counsel Keller, so Lonnie "limited Amy's access to attorney Keller (RT 17, 2956).

In January '09, shortly after meeting Werksman, Price and McQueen interviewed Nguyen. Price told FBI agent Simpson that Lonnie wanted "to find out what Amy said to the federal grand jury" (#50582, V. 5, Exh. 43 at COA-1068) [This conflicts with Price's story about Lonnie's statement upon their return]. While Price claimed that McQueen initially met with Nguyen alone, Nguyen testified that she met with both of them initially before Price recorded McQueen asking leading questions designed to incriminate Lonnie. Nguyen supposedly told McQueen that Lonnie said before the cruise that he hired "Bill's people" to go on the cruise and "throw Micki off the boat" as Bill had "mob connections." Towards the end of the recording Bill Price tells Amy Nguyen that Lonnie divorced her, "Because he wanted the money.... He wanted her because she had the money" (#50582, V. 1, Exh. 3 at COA-149). Price testified that upon returning from the interview he confronted Lonnie with the recording, to which Lonnie responded that Nguyen already told the grand jury she knew nothing so no one would believe her new story (RT 18, 3081). [In fact, as Lonnie testified, Price and McQueen said Amy told the grand jury she knew nothing about the cruise beforehand. Lonnie did not learn of the existence of the Nguyen recording until November 2012 when the federal court ordered the AUSA to produce it in the civil asset forfeiture case (#50582, V. 5, Exh. 31 at COA-934). Price falsely testified at trial that he told Lonnie he was providing the Nguyen recording to the FBI—an incredible claim considering that Price and McQueen continued to go on investigative trips for Lonnie, including multiple trips to Italy, e.g., in the Spring of 2009 to obtain the autopsy report (#50582, Vol. 5, Exh. 45 at COA-1072). Price made other incredible claims at trial, such as saying that Lonnie was paying Amy's public defender when she testified before the federal grand jury to find out what Amy told them. (See RT 18, 3138.)

Despite the assistance of Bill Price as an FBI informant for 3 years, on 11/20/2012 the federal court granted summary judgment against the U.S. in the asset forfeiture case. (USDC, Central Dist. Cal. #'s SACV 09-04381 & SACV 09-00716.) The AUSA sought to file the 2009 Nguyen recording under seal, ex parte, acknowledging that it "may be privileged." That request was denied and the U.S. ordered to give the defense a copy. In its summary judgment the court wrote: "While suspicion naturally would focus on the domestic partner in a case such as this, suspicion is not enough to survive summary judgment. When all is said and done, the government has presented nothing more than allegations and speculation to support its claim that Kocontes murdered Kanesaki, which is insufficient to create a genuine issue of material fact." (Order Granting Summary Judgment at 28.)

Although this order was an exhibit to Lonnie's motion to dismiss the indictment and writ petition after denial thereof, no California court recognized its duty to give full faith and credit to a federal judgment unless it has been overturned or vacated (the summary judgment remains intact).

The summary judgment evoked a flurry of activity by the Orange County Dist. Attorney. Desperate to get Nguyen to repeat her recorded accusations to law enforcement, in February 2013 Nguyen was served with a state grand jury subpoena, the sole purpose of which was to thrust her in a room at the courthouse with Bill Price so he could pressure her into repeating the recorded statements that McQueen led her to say on the recording. Initially, Nguyen denied knowing Price, or that she had consented to the recording (#50582, Vol. 3, Exh. 7 at COA-481-82). The D.A. was secretly recording and monitoring this ambush by Price, during which it became clear that Price had previously denigrated Lonnie to her in an effort to convince her of Lonnie's guilt. For example, Bill Price, in reminding her about a statement regarding her son, said, "you didn't know until I told you [about Lonnie purportedly lying about helping her son when he was arrested] (Id. at COA 484). Price also convinced Nguyen that she made statements in the recording she never made, such as the claim if she repeated her accusations, such as to the federal grand jury, Lonnie would kill her, which Price twisted into Lonnie said "I (Price) would kill you.... It's on the tape and it does say that" (Id. COA 492). Nguyen's response to this claim by Price was, "But you said the tape wasn't clear.... you said after that time [the Jan. '09 recording] (COA 494). Price then insisted, "They [O.C. Sheriff] enhanced it. (Id.)⑦ During Price's 3-hour harange of Nguyen, he told her numerous lies about Lonnie, including: (1) Lonnie threatened to take McQueen's investigative license when Price told him the recording would be sent to the FBI; (2) When Price confronted Lonnie with the recording Lonnie said he would just call Nguyen and tell her to say Price was "making it all up" (COA-488, 486 & 500) [at trial Price claimed Lonnie was unconcerned because Nguyen already told the federal grand jury she knew nothing and would not be believed]; (3) that Price "kicked Lonnie out of his [Price's] house" when he returned from recording Nguyen and had "not spoken to Lonnie since" (COA 491-92); (4) Lonnie called Nguyen a "whore who loved to get tapped in the ass" (COA 491); and, (5) Lonnie "raped a 15 year old girl and this poor girl was damaged" (COA 501). [Before Lonnie's assets were seized Price signed a 10/17/2007 affidavit that Price did timed-driving studies showing Lonnie could not have been with the girl in a motel when she claimed and still made a court appearance and Lonnie had no registration there (#50582, Vol. 5, Exh. 29 at COA 919)] Lonnie also got a $1 million judgment against the

⑦ The D.A. produced a recording labeled "enhanced" version of the Nguyen recording that was identical to the "unenhanced" version, i.e., airplane noise made significant portions unintelligible. The D.A. was allowed to play the recording at trial.

girl of which he recovered $60,000 from insurance. (Id.)

During Price's ambush of Nguyen, he used several other coercive tactics: (1) telling her "If you run into financial problems, I will come to your aid. I'm a very wealthy person" (COA-493); (2) Lonnie failed a polygraph [re: Micki's murder]" (COA 491); and, (3) implying she would be prosecuted if she did not support his version of events, "I'll get everything you want I promise because guess what, not only do I want them to give it to you, I want it for myself. Amy you followed my cue [which must refer to the 2009 recording], if we're straight enough with them we'll walk out of this thing" (COA 493). Price's lies and these manipulations were criminal (Cal Penal Code § 133 - Deceiving witness to affect testimony; P.C. § 137 - Influencing testimony/information given to law enforcement (bribery is a felony). The D.A. and lead investigator — both of whom were promoted after bringing this case — were monitoring Price and Nguyen but did nothing. They never asked how Price influenced Nguyen's story. And at trial, Price, the ex-DEA cop, had the audacity to feign ignorance of the U.S.' reward program connected to witnesses who aid civil asset forfeitures.

Lonnie was arrested within three days of Price's ambush of Nguyen, following which she gave a statement to the D.A. and lead investigator. After Lonnie filed a motion to dismiss challenging territorial jurisdiction, Nguyen testified before Judge Evans at the evidentiary hearing to determine if Lonnie's California activities were sufficient to warrant jurisdiction, i.e., activities in furtherance of the crime that were more than "de minimis" as required by People v. Betts (Cal. 2005) 34 Cal. 4th 1039. She testified again before a grand jury about 2 weeks later. A chart showing the many inconsistencies in her multiple statements and pre-trial testimony appears at Appx 1 to 4th DCA, Div. 3 case # 50582, Vol. 1 at 3. She continued that pattern at trial. For instance, up until trial she claimed that she lied to the federal grand jury because Lonnie threatened to have "Bill's people" kill her "and make it look like an accident." But at trial she said that when she appeared before that grand jury "we were back on good terms" so she lied "just to make him [Lonnie] look good."

8. Reasons To Grant The Petition

Q1: The State Of California Lacked Territorial (Subject matter) Jurisdiction Over An Alleged Homocide On A Foreign-Flagged Ship On The High Seas, Both As A Matter Of Statutory Construction And Due Process, Especially When One Superior Court Judge Effectively Overrules Another Superior Court Judge Who Has Already Dismissed The Same Charge For Lack Of Such Jurisdiction As A Matter Of Law/ Statutory Interpretation.

Judge Evans' dismissal of case #1 was based on the legislative purpose behind Penal Code § 778a (a) (when passed there was no subd. (b), which was added in 1991 to address the jurisdictional problem of inter-country kidnapping, i.e., when a kidnapping victim in Calif. is taken to Mexico and there becomes the victim of additional crimes. Section 778a in its current form and as it existed in 2006 reads:

> 778a. Act Within This State Culminating In Crime In This Or Another State; Kidnapping. ⑧
> (a) Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state.
> (b) Whenever a person who, within this state, kidnaps another person within the meaning of Sections 207 and 209, and thereafter carries the person into another state or country and commits any crime of violence or theft against that person in the other state or country, the person is punishable for that crime of violence or theft in this state in the same manner as if the crime had been committed in this state.

This section in its original form when recommended to the Legislature by the Code Commissioner in 1905 consisted solely of subd. (a) and was titled "Performance Of An Act In This State Culminating In A Crime In Another State." The Code Commission was created in 1870 to revise existing statutes, correct errors, and to "recommend all such enactments

⑧ The 4th DCA, Div. 3 disputed Lonnie's claim that "'the title of a statute and heading of a section' are 'tools available for the resolution of doubt' about the meaning of a statute." Almendariz-Torres v. U.S (1998) 523 U.S. 224, 234 (citations omitted). The 4th DCA also relied on the heading in the West's version of the statute. But the Deering's cited here is the official code. (See the introduction to any Deering's Code Volume.)

as shall, in the judgment of the Commission, be necessary to supply the defects of and give completeness to the existing legislation of the State." Keeler v. Superior Court (1970) 2 Cal. 3d 619, 629. The proposed statute (§778a) appears on pg. 692 of the 1905 bill (4CT 743). In the margin the Code Commissioner explains the purpose of the bill as "Performance of an act in this state culminating in a crime in another state." (Id.) (The title of the section as it first appeared in the 1906 Penal Code.) The Code Commissioner's note was printed at the bottom, stating, "This section is designed to provide for the punishment of persons who in this state do an act culminating in the commission of a crime in another state." The Code Commisioner's notes are entitled to "substantial weight in construing statutes." Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 249. That court further explained:

> This is particularly true where the statute proposed by the Commission is adopted by the Legislature without any change whatsoever and where the commission's comment is brief, because in such a situation there is ordinarily strong reason to believe that the Legislators' votes were based in large measure upon the explanation of the commission proposing the bill." Id. at 250.

Also, the 1991 amendment adding subd. (b) shows that the Calif. Legislature intended to expand jurisdiction to only a narrow category of crimes: those that began with a kidnapping in California and culminated in additional crimes of theft or violence in a foreign country, typically in Mexico. If subd. (a) had the expansive meaning of the phrase "without this state" ascribed to it by Superior Court Judge Prickett when he overruled Judge Evans of the same court, i.e., anywhere outside California, there would have been no need for subd (b). In affirming Prickett's ruling, the 4th DCA rendered subd. (b) complete surplusage. California follows the universal rule that, "Where (sic) a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed." People v. Cottle (2006) 39 Cal. 4th 246, 254. But

the 4th DCA rejected the argument that subd. (b)'s use of "another state or country" reflected the Legislature's intent to expand jurisdiction to crimes culminating in foreign countries only in kidnapping cases. (See Appendix A at 34.) Misunderstanding, and taking out of context, the phrase the "Legislature's addition of section 778a, subdivision (b) in 1991 did not affect" subd. (a), which appeared in People v. Morante, the 4th DCA asserted that the Legislature had no intention to limit subd. (a) when it added subd. (b). (Id.) In Morante, the Calif. Supreme Court overruled its 1953 decision that required an actual attempt to commit a crime in California before a charge of conspiracy to culminate a crime in another state could be brought jurisdictionally. 20 Cal. 4th 403, 429 ("[W]e must take account of the circumstance of 'the ever-increasing frequency of criminal acts and transactions which transcend artificial, historical boundaries between states.'" (Morante involved a conspiracy to distribute cocaine in other states, but with all coordination being done by telephone from California.

The comment in Morante about subd. (b) not having an "affect" on subd. (a) had nothing to do with how to interpret "without this state in subd. (a); rather, the comment came in the context of Morante's argument that the 1991 amendment adding subd. (b) did nothing to overturn the high court's 1953 decision requiring an actual attempt before conspiracy to commit a crime in another U.S. state that occurs here in Calif. may be charged here. Id. at 429. In other words, the amendment did not reveal legislative acquiescence in the old rule applied to charge conspiracies to commit crimes in other U.S. states, and therefore the Morante court was free to change its rule by applying section 778a(a). Morante did not address whether subd. (a) applies to inter-country crime or discuss the legislative history/purpose behind subd. (a)'s passage in 1905.

California also follows the universal rule that, in statutory interpretation, "our fundamental task here is to determine the Legislature's

intent so as to effectuate the law's purpose." Heckart v. A-1 Self Storage, Inc. (2018) 4 Cal. 5th 749, 757. But here the 4th DCA ignored the legislative history, the legislative purpose reflected in the history, and the title of the statute ("Act within this state culminating in crime in this or another state; kidnapping"). Instead, the court over-simplified the analysis by relying solely on its view that all an appellate court needs to do is determine the "plain meaning" of a statute, and if it finds one that ends the analysis, period. (Appx. A at 32-33.) However, California law has never applied the plain meaning rule without regard to the clear purpose of the Legislature or common sense concerning the potential ramifications of "plain meaning" application. For example, in rejecting the "plain meaning" of an election confirmation statute, the Cal. Supreme Crt explained:

> The 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [citation] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [citations] An interpretation that renders related provisions nugatory must be avoided. [citation]

Lungren v. Deukmejian (1988) 45 Cal. 3d 727, 733. This rule is often explained as one of latent ambiguity when the literal construction would cause an unitended expansion of a statute beyond that intended. E.g., Bruce v. Gregory (1967) 65 Cal. 2d 666, 674 ("[W]ords will not be given their literal meaning when to do so would evidently carry the operation of the enactment far beyond the legislative intent and thereby make its provisions apply to transactions never contemplated by the legislative body"); Moreover, given the original title of the statute and its retention to this day in the official code, there is also a patent ambiguity. E.g., Siskiyou County Farm Bureau v. Dept. Of Fish & Wildlife (2015) 237 Cal. App. 4th 411, 433 (A patent ambiguity "arise[s] from the face of [the statute]".... whereas a latent ambiguity "requires a provisional examination of extrinsic matters").

The allowance of jurisdiction here conflicts with the historical interpretation of subd. (a) in People v. McDonald (1938) 24 Cal. App. 2d 702. The relevant facts of McDonald are indistinguishable from this case. McDonald was charged with "contracting an incestuous marriage" with his minor daughter and statutory rape. California asserted jurisdiction over the incestuous marriage, which occurred in Arizona, under section 778a [now subd. (a) of it]. The 4th DCA expressly rejected the assertion that merely forming criminal intent in California and then traveling to a foreign jurisdiction to culminate the crime was sufficient for territorial (subject matter) jurisdiction:

> It is true it was in Indio that the parties formed the intention of marrying. They boarded a train there and went to Phoenix. They returned to Indio and resumed cohabitation until Marjorie [the man's daughter] ran away. This is the only evidence that would tend in any way to give a California court jurisdiction over a prosecution for the incestuous marriage.

Id. at 708. Here, the allegation was Lonnie formed the intent to murder Micki in California, traveled overseas to commit the crime, and returned to California. In a case much closer in time to the passage of 778a such as McDonald, the importance of precedent is heightened. Gonzalez v. Dept. Of Correcs. & Rehab. (2011) 195 Cal. App. 4th 89, 94 ("The court [when construing a statute] should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction.

In 1905, with no air travel and the automobile in its infancy, the state legislatures did not contemplate the issue of inter-country crime. "At common law, courts applied a narrow principle of territorial jurisdiction in criminal cases and, with some exceptions, a particular crime was viewed as occurring in only one location, conferring jurisdiction over the offense upon only a single state." People v. Betts (2005) 34 Cal. 4th 1039, 1046. Betts reconfirmed the rule

announced in Morante, but again it addressed inter-state crime, and had no ocassion to consider the legislative history of section 778a(a) or its potential application to a crime committed outside the U.S.

This Court long ago held that due process is violated when a criminal defendant is convicted in the absence of subject matter jurisdiction. E.g., Ex Parte Siebold (1880) 100 U.S. 371, 375 (noting that lack of personal or subject matter jurisdiction are the only grounds cognizable on a habeas petition). In Siebold, this Court denied habeas relief, allowing the convictions of state election judges under federal law to stand because, even though Maryland and the U.S. are separate sovereigns, "where the subject matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive." Id. at 385. Although it concluded that the states and Congress had concurrent authority to regulate elections, any conflict in such laws must be resolved in favor of federal law, which is of "paramount authority and obligation." Id. at 399.

But a split in the circuits has developed when the basis for challenging subject matter jurisdiction is a matter of state law only.[9] In Lowery v. Estelle, the 5th Circuit held that a lack of jurisdiction under state law is a federal due process violation. 696 F.2d 333, 337 (1983). The 8th Circuit agrees. E.g., Bocook v. Huffman (S.D. Ohio 2000) 2000 U.S. Dist LEXIS 23891 *10 ("Respondent next argues that Petitioner has presented a question of state law, regarding interpretation of a state statute... which is not appropriate for federal review. This court does not agree. Petitioner argues his constitutional rights were violated because the trial court lacked subject matter jurisdiction because no hearing was conducted under Oregon Rev. Code § 313.19") (citing Houser v. U.S. (8th Cir. 1974) 508 F.2d 509, 512); cf. Schloman v. Moseley

[9] Although Petitioner also claims that the U.S. Constitution and certain maritime treaties bar Calif. from asserting jurisdiction here, this split could also be resolved in this case.

(10th cir. 1972) 457 F.2d 1223, 1227 (military court martial), cert denied 413 U.S. 919 (1973); Yellowbear v. Wyoming Atty Gen. (10th cir. 2008) (asserting exclusive federal jurisdiction over "Indian Country") 525 F.3d 921, 924. On the other hand, the 2nd Circuit rejected any possibility of habeas relief if jurisdiction was challenged based solely on state law. U.S. ex rel Harrington v. Mancusi (2nd Cir. 1969) 415 F.2d 205, 209 ("[N]o federal court has to our knowledge ever granted a writ where a state court's asserted lack of jurisdiction resulted solely from the provisions of state law"); see also U.S. ex rel Roche v. Scully (2nd cir. 1984) 739 F.2d 739, 741-42. The 4th Circuit essentially follows the view of the 2nd, although it leaves open an unlikely exception. Wright v. Angelone (4th cir. 1998) 151 F.3d 151, 158 ("While it is axiomatic that we may grant the writ of habeas corpus on the ground of lack of jurisdiction in the sentencing court... nothing in Hailey [Hailey v. Dorsey (4th cir. 1978) 580 F.2d 112] suggests that when the alleged defect is based solely upon an interpretation of state law that we may resolve the issue contrary to the highest state court absent a showing of a 'complete miscarriage of justice.'") As the 2nd Circuit observed in 2011, "The Supreme Court has not had occasion to say how far a state may go in expanding its criminal jurisdiction." Carvajal v. Artus (2nd cir. 2011) 633 F.3d 95, 111 (Refusing to consider a jurisdictional challenge when New York held that Carvajal constructively possessed cocaine in New York even though he and it were seized in California merely because he telephoned co-conspirators in New York, concluding that Carvajal failed to present his objection in constitutional terms and was therefore procedurally defaulted under AEDPA). This case presents an opportunity to address the aggressive and unforeseeable expansion of state court criminal jurisdiction.

Lastly, another reason that Judge Prickett's ruling on jurisdiction in this case violated due process is that he effectively overruled Judge Evans' ruling that section 778a(a) did not afford jurisdiction as a matter of statutory jurisdiction in the first case charging the identical crime. (See Appdx. C.) California forbids one superior court judge overruling another judge of the same

court. E.g., In Re Alberto (2002) 102 Cal. App. 4th 421, 427 ("For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court"); see also People v. Goodwillie (2007) 147 Cal. App. 4th 695, 713. To evade this salutary rule, the 4th DCA engaged in the fiction that Judge Prickett did not really overrule Judge Evans because "they presided over different causes," a distinction without a difference that put form over substance.[10] (See Appx. A at 28, para 2.) The evils engendered by allowing this practice are on full display here. The prosecutor was allowed to refile, and by obtaining the indictment, judge shop to the supervising master calendar judge overseeing the grand jury, Judge Pricket, a former prosecutor himself. He proceeded to keep the Petitioner's dispositive demurrer and motion to dismiss for lack of territorial jurisdiction and deny it, when he was required by two different court rules to refer it out to a trial judge. Cal. Rules Crt. 4.115 (a) and 10.951 (a). Allowing such prosecutorial manipulation destroys public perception of judicial fairness, especially when the prosecution had the remedy of appeal. Here the prosecutor appealed to prevent the dismissal of case#1 from becoming final and therefore collateral estoppel on the issue, but after getting the desired ruling from Prickett, she eventually abandoned the appeal, but not until after Lonnie spent tens of thousands of dollars opposing the appeal. Petitioner was eventually forced to trial with a burned-out public defender after expending all his resources when private counsel was allowed to withdraw.

The unwritten rule that forbids a judge of the same court from over-

[10] The 4th DCA also asserted Judge Evans sat as a "magistrate." He was acting as a trial judge hearing a dispositive motion. See Cal. Rule Crt. 4.115 (a).

turning another judge of that court was eloquently delineated by the 8th Circuit Court Of Appeals in Shreve v. Cheesman (8th Cir. 1895) 69 F. 785, 790:

> It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action.

Petitioner requests that this Court establish this principle as a matter of due process, except where the original judge who made the ruling at issue is unavailable or the legislature authorizes an exception for a specific reason. Here, Petitioner requested that master calendar/supervising Judge Prickett assign his duplicative demurrer and motion to dismiss to Judge Evans, but that request was denied. (See Transcript of 6/17/13 hearing before Prickett, filed in 4th DCA, Div. 3, Case # G0-51809, depublished opinion reported previously at 244 Cal. App. 4th 1229 (2016).)

Q2: (1) Art I, § 8, Cls. 10 of the U.S. Constitution Grants Congress The Exclusive, Right And Authority to "Define and Punish Piracies And Felonies Committed On The High Seas" As Reflected In The Articles Of The Confederation, Congressional Enactments, And Federal Common Law, Preempting California's Exercise Of Jurisdiction Here.

When the Constitutional Convention met on July 16, 1787, it agreed without opposition "that the national legislature ought to possess the legislative rights vested in Congress by the Confederation." (See U.S. v Flores (1933) 289 U.S. 137, 147 n. 2.) Article IX of the Aticles of Confederation provided that, "the United States, in Congress assembled, shall have the sole and exclusive right and power... of appointing courts for the trial of piracies and felonies committed on the high seas [...]" (Id.) Although "jurisdiction in admiralty and maritime cases was distributed between the Confederation and the individual States," Art. IX made it clear that, when felonies on the high seas were alleged, the national legislature had the exclusive regulatory power since its inception. Although not directly related to the two questions presented in Flores, supra, the exclusive nature of federal jurisdiction in matters of admiralty was

explained in detail as a matter of historical fact: "The two clauses [Art. III §2 and Art. I §8 Cls. 10] are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the States, was transferred to the national government." Id. at 149.

Furthermore, the criminal statute at issue in Flores, 18 U.S.C. § 272, contained an oft-repeated phrase that would be rendered superfluous if the States, by virtue of employing the phrase "without this state" in a jurisdictional statute, have the power to create territorial jurisdiction over crime occurring any-place outside the state. Section 272 provided in pertinent part:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed: First: When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state... Id. at 145 n.1

If the States shared the power to define and punish felonies on the high seas, there would have been no reason for Congress to include the phrase "and out of the jurisdiction of any particular state" as no admiralty/maritime crime would ever be out of the state's jurisdiction.

Indeed, taken to its logical limit, if California is allowed subject matter jurisdiction over any homocide anywhere, so long as premeditation occurred in California, this state has broader admiralty jurisdiction than the United States, as federal statutes at least require some connection to the U.S. greater than simply having been in the U.S. and having premeditated a crime that occurred on the high seas. For example, that statute at issue in Flores required that the vessel involved belong to the U.S. or one of its citizens. Another example of such a required connection is 18 U.S.C. § 7. Petitioner is not aware of any federal admiralty statute that would allow jurisdiction solely because the defendant had been present in the U.S. and planned a crime to be committed on a foreign-flagged vessel with no connection to the United States.

Consider the following scenario, which, under the "plain meaning" ascribed to Cal. Penal Code §778a(a) by the 4TH DCA, Div. 3, would give Orange County territorial jurisdiction: Two Mexican nationals with work permits in the U.S., a married couple, bring their 10 year-old son with them to visit Disneyland in Anaheim, Orange County. While at the amusement park, the boy misbehaves and the father says to the mother, "I'm going to kill that kid when we get home. This comment is overheard by a park employee who calls the police. The police respond, interview the father, write an incident report and take no action after the father says he was just angry and had no intention of actually harming his son. The same day that the family returns to Mexico the father literally beats his son to death. When the father is charged with murder, he flees to the U.S., entering California legally on his work permit. He is arrested in Orange County on the Mexican warrant, but instead of honoring the extradition demand Orange County charges the father with first degree murder with a special circumstance of torture so the D.A. can seek the death penalty Mexico does not have. After California refuses extradition, Mexico retaliates by refusing to extradite a Mexican cartel member charged in the U.S. with murdering a DEA agent in Mexico.

The chaos and international tension that will be caused if California is allowed to assume Art. I §8 powers should not be dismissed. If California now has super admiralty jurisdiction over all crime on the high seas by anyone of any nationality who conceptualized the crime while present there, what stops California from developing its own liberal rules of naturalization, allowing immigrants to become "citizens" of California and refusing to allow federal enforcement of U.S. immigration laws against these "naturalized" citizens of the state? Or, because Mexico refuses to stem the flow of fentanyl into the state,

may California declare war against Mexico and send its national guard troops into all border areas to interdict shipments destined for California using lethal force against anyone who tries to resist them?

The need to carefully consider which powers granted to the federal government may properly be shared with the states, both practically and as a matter of original intent, was thoughtfully analyzed in Day v. Buffington (C. Mass. 1871) 7. F. Cas. 222, 226:

> cases arise where it is held that the mere grant of power to Congress unaccompanied by any legislation under the grant does not imply a prohibition on the states to exercise the same power. Such cases, however, are not numerous, and whenever the nature of the power granted or the terms in which the grant is made are of a character to show that the framers of the Constitution intended that it should be exclusively exercised by Congress, the subject is completely taken away from the state legislatures as if the Constitution contained an express prohibition to that effect.

The Day court concluded that "most of the powers conferred upon the government of the United States are exclusive[.]" Id. at 229. See also Taylor v. United States (2016) 579 U.S. 301, 311-12, (J. Thomas, dissenting) (Detailing the limits of Congressional authority over crime, but noting the plenary power granted to Congress under Art. I §8).

Q2 (2) California Cannot Justify Its Assertion Of Jurisdiction On The High Seas By Relying On Public Policy Justifications Such As The "Detrimental Effects" Theory, Which Were Never Considered By The Legislature, And Do Not Apply Here.

Judge Prickett sought to justify his ruling that section 778a(a) gave California jurisdiction by rewriting the legislative history and purpose, announcing that "The determining factor in territorial jurisdiction is whether the connection between the crime and the prosecuting state is strong enough so that prosecuting an offense committed outside its borders is reasonable." (Appdx. C at 15.) He cited a single case to support this assertion, U.S. v. Layton (1981) 509 F. Supp. 212, 215-16, aff'd US. v. Layton, 855 F. 2d 1388 (9th Cir. 1988), overruled on other grounds, Guam v. Ignacio, 10 F. 3d 608, 612 n. 2 (9th Cir. 1993). Layton

involved the conspiracy and murder of a U.S. congressperson in Guyana. Although no extra-territorial state created subject matter jurisdiction, the court applied common law jurisdiction under a "detrimental effects" theory, i.e., the murder detrimentally impacted the government's ability to function. The detrimental effects theory originated in Strassheim v. Daily (1911) 221 U.S. 280. Michigan prosecuted an agent for an Illinois company who conspired to sell the state used equipment as if new. This Court allowed jurisdiction "although he had never set foot in the state until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect." Id. at 285.

But just 11 years later this Court explained that crimes against private parties that do not affect governmental operations "must be committed within the territorial jurisdiction of the government where it may properly exercise it." U.S. v. Bowman (1922) 260 U.S. 94, 98. Crimes falling within this jurisdictional rule included murder. Id. In Bowman, four defendants conspired while on the high seas and in Brazil to defraud an American company in which the U.S. held stock. Because § 35 of the U.S. Crim. Code did not mention the high seas, defendants contested jurisdiction. They lost because § 35 fell within "criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the government's right to defend itself against... fraud, wherever perpetrated." Id.

Even assuming that Ms. Kanesaki's death had a detrimental effect on a California resident, that is not governmental harm within the detrimental effects theory.[11] She was not a government official, or even a governmental employee. Her death, while tragic, did not impact governmental functions.

Lastly, Judge Prickett sought to justify jurisdiction on international law principles that were never contemplated by California's 1905 Legislature and are inapplicable because they are based on prosecution of inter-country crime in which a national government exercises jurisdiction, not a political subdivision usurping its nation's exclusive power. All of Judge Prickett's post-legislative policy rationales stand in stark contrast to the express purpose for which section 778a was enacted: to address inter-state crime in the then-continental U.S. Ignoring that purpose, his policy pronouncements are judicial legislation interjecting his view of what the Legislature would have done had it considered the issue of detrimental effects. Such judicial speculation-made jurisdiction through "detrimental effects" was rejected in Morrison v. Nat'l Australia Bank Ltd. (2010) 561 U.S. 247, 260-61. The bank alleged securities fraud when its foreign-traded shares lost value, allegedly from inflated valuation of a U.S. business it bought. This Court, applying the presumption against extraterritoriality, held that the Securities Exchange Act did not create jurisdiction because no U.S. exchange-traded shares were involved. This Court criticized the Circuit court's in which it sought to determine whether Congress would have wanted extraterritorial jurisdiction to apply based on an "effects test," i.e., "whether the wrongful conduct had a substantial effect in the U.S., or upon U.S. citizens." This approach was described as "judicial-speculation-made-law." That same description applies here.

[11] The only trial testimony about impact of Ms. Kanesaki's death was from her niece, a Florida resident.

Q3: The U.S. Entry Into Two International Treaties Giving The Flag-Ship Country Exclusive Jurisdiction Over On-Board Crimes While On The High Seas Preempts California's Exercise Of Jurisdiction Here Under Art. VI, Cls. 2 of The Const., Which Makes Such Treaties The Supreme Law Of The Land.

Both treaties that the U.S. has entered into contain identical language giving the flag country exclusive jurisdiction over all matters occurring on board while on the high seas (see text, pg. (vi) supra). When these treaties have been asserted as a bar to U.S. jurisdiction, the debate often focuses on whether the applicable language is self-executing. E.g. U.S. v. Postal (5th cir. 1979) 589 F.2d 862. There, the U.S. Coast Guard boarded a foreign-flagged vessel in a manner violating the Geneva treaty (no hot pursuit), seizing drugs. The court analyzed the question of self-executing language as one of contractual intent between nations. Id. at 876. Recognizing that "The self-execution question is perhaps one of the most confounding in treaty law," the court did a tortured analysis of various countries' practices and laws to avoid holding that the exclusive-jurisdiction clause was self-executing. It did so even though, "On its face, this language would bear a self-executing construction because it purports to exclude the exercise of jurisdiction by foreign states in the absence of an exception embodied in treaty (sic)." Id. at 877. The knowledge that the illicit drugs were intended for U.S. consumption makes the Postal result understandable, it relied heavily on result-oriented reasoning. But it correctly observed that Congress, which has a role in passing a treaty, also has the power to enact laws violating one. Id. at 878 n. 25. But because no such conflicting statute existed, the Postal court could not rely on that observation. In this case, there is no question that a conflicting federal statute, 18 U.S.C. § 1111, gives the U.S. criminal jurisdiction, had the U.S. decided to prosecute. Additionally, Art. 6, Cls. 2 of the Const. makes treaties "the Supreme Law of the Land." California, having no power to modify a U.S. treaty, should adopted the meaning of § 778a(a) intended by the Legislature, avoiding the violation of international law embodied in the treaty. See e.g., Murray v. Schooner Charming Betsy (1804) 6 U.S. 64 ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); U.S. v. Vasquez-Velasco (9th cir. 1994) 15 F.3d 833, 839 ("[I]n the absence of an explicit Congressional directive, courts do not give extraterritorial effect to any statute that violates principles of international law"). Here, California acted as if it were an independent sovereign nation free to violate international law. U.S. v Yousef (2d Cir '03) 327 F3d 56, 86.

Califoria justified rejecting both of Petitioner's preemption arguments (exclusive Congressional power and treaties) by asserting its general police powers. Those state powers have never been held to operate world wide. Moreover, the 4th DCA refused to consider the 30+ pages of argument in Petitioner's reply brief on the issue, claiming it was "a new gloss on the argument." (Appx. A at 36 n. 16). There was no "new gloss." The opening brief's 6th argument was "The Supremacy Clause (Art VI) And Art I § 8, Cls. 10 of The U.S. Const. Preclude A State From Exercising Jurisdiction Over An Alleged Crime Occurring On The High Seas... On A Non-U.S. Flag Ship."

The 4th DCA also relied on a single case to disregard the treaties, Skiriotes v. Florida (1941) 313 U.S. 69. The court interpreted Skiriotes as a blanket ruling denying all private parties standing to assert treaties. But the issue here is not standing. Petitioner is not seeking to enforce the treaties and be prosecuted in the Bahamas. Rather, the issue is whether a treaty can limit a state's power under the Supremacy Clause. And although the 4th DCA relied on California precendent, that does not bind this Court, nor is it more persuasive than federal appellate precedents. (See Appx A at 39.)

The 4th DCA's reliance on Skiriotes was misplaced because there is no indication that the anti-smuggling treaties at issue had anything to do with international law principles such as law of the flag state. The issue in Skiriotes was whether Florida could enforce a misdemeanor violation for using diving equipment to harvest sponges commercially. The crime occurred more than 3 miles but less than 9 miles off the gulf coast by a Florida resident using a Florida-licensed boat. Florida claimed Congress recognized its 9-mile coastal border when it joined the Union. This Court did not decide the border issue, but only that the statute was not in conflict with federal law.

Skiriotes does not support the one-paragraph, superficial treatment the 4th DCA gave the treaty issue. Relying on U.S. v. Bowman, the Skiriotes court explained that the Florida law was "a criminal statute dealing with conduct injurious to the government and capable of perpetration without regard to particular locality." Id. at 78. (Bowman expressly noted that murden was **not** that type of crime.) Moreover, Skiriotes, pointing to the boat's Florida registration, noted that "a vessel at sea is regarded as part of the territory of the State." Id. (12)

Contrary to the 4th DCA's view, the maxim that a treaty overrides conflicting state law is well established. E.g., 1A Sutherland Statutory Construction § 32:6 (7th ed. 2020) ("The power of a treaty to override conflicting state law, based on the Supremacy Clause, is well settled") (citing in n.5 a string of U.S. Supreme Court cases going as far back as Ware v. Hylton (1796) 3 U.S. 199). And as recently as 1953, this Court explained: "This Court has said that the law of the flag supercedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty." Lauritzen v. Larsen (1953) 345 U.S. 571, 585 (Denying negligence jurisdiction under the James Act to a Danish seaman living in New York who joined a Danish ship in New York and was injured on board while in a Havana, Cuba port). Furthermore, this Court has dismissed criminal cases involving treaty violations because, by entering into a treaty, the U.S. "had imposed a territorial limitation upon its own authority." Cook v. U.S. (1933) 288 U.S. 102, 121. Similarly, California courts dismissed criminal cases charging alcohol smuggling for treaty violations even before Cook. U.S. v. Schouweiler (S.D. Cal. 1927) 19 F.2d 387 and U.S. v. Ferris (N.D. Cal. 1927) 19 F.2d 925.

(12) Florida has stretched Skiriotes into legislation invading the exclusive Congressional power under Art. I, § 8, Cls. 10 re: cruise ships originating in Florida. See State v. Stepansky (Fla. 2000) 761 So.2d 1027.

The 4th DCA also mistakenly invoked the presumption against preemption, claiming again that the state's historical police powers justified its application. (Appx. A at 37-38.) But that presumption does not apply when the federal government has historically regulated the field to a significant degree. U.S. v. Locke (2000) 529 U.S. 89, 108:

> An assumption of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.... The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the state is a valid exercise of its police powers.

As shown above, California encroached on Congress' exclusive power to define and punish felonies on the high seas and refused to recognize its obligation to recognize treaties under the Supremacy Clause. Petitioner prays that this Court will correct this, preventing more violations.

Q4: Law Enforcement Violates the 5th, 6th, and 14th Amends. By Soliciting Privileged Information From An Obvious Defense Investigator And Calls Him At Trial.

As shown in the statement of the case, Bill Price functioned as a defense investigator from August 2006 when he went on the cruise with defense counsel until 2011. And contrary to the prosecutor's representations to the trial court, she knew Price was revealing privileged defense information, including conversations with Petitioner and defense activities. Price testified to a number of these conversations at trial for the purpose of incriminating Petitioner.

The prosecutor knew that Petitioner's lawyer, Mark Werksman considered Price part of the defense team from FBI reports in which Price told the case agent "Werksman indicated he views Price as part of the defense team. Werksman intends to argue that Kocontes' conversations with Price are privileged." (#50582, Vol. 3, Exh. 12 at COA 672). Although Price claimed he told Werksman he was not Petitioner's investigator, Werksman's declaration (an exh. to the 995 motion to dismiss) and Price's inability to tell the same lie twice reveal otherwise. E.g., on 11/18/08 Price told the FBI Petitioner's attorneys Keller/Rauckakus "purposely did not hire Price because they viewed him as a witness" (#50582, V. 5, Exh. 49 at COA 1093). But when Price testified at trial, he said Werksman "structured it" so Price would not be an investigator so Price could be "an expert witness." (See Appx E for a copy of the Werksman Declaration.) The prosecutor had all of Bill Price's inconsistent and at times incredible stories to the FBI and her own investigators, yet she did nothing at trial to correct Price's perjury, just like she did nothing to stop him from committing felonies to coerce Nguyen to tell the story she needed to establish jurisdiction when she arranged the 2013 ambush at the courthouse.

On 2/13/2013, "at the request of Deputy District Attorney Susan Price, I [D.A. Investigator Robert Erickson] telephoned Bill Price.... I reiterated to Bill Price that it was imperative that he refrain from telling DDA Price or anyone on the OCDA investigative team, any information that he may have obtained while accompanying

his partner and ex-defense investigator, Susan McQueen on any trips associated with the investigation of Micki Kanesaki's death." (#50582, Vol. 5, Exh. 46 at COA-1074.) (This admonition would obviously include the recording of Amy Nguyen made by Price in which McQueen leads Nguyen to say that Petitioner told her before the cruise he would have "Bill's people throw Micki from the boat." Yet at trial, then-promoted Assistant D.A. Susan Price played that recording for the jury.)

Two days after D.A. Investigator Erickson admonished Bill Price not to reveal defense information, OCSD Investigators Voght (now promoted to Sgt. Voght) and Quinlantan, on 2/16/2013, met Price at his home for a pre-arranged interview in which they requested and obtained details about the January 2009 trip to interview Nguyen and the recording of her, as well as Petitioner's conversations with McQueen and Bill Price thereafter upon returning to Florida. Price claimed Petitioner told McQueen she should not tell his lawyer (Werksman) about the interview before leaving, and initially when Price confronted Petitioner about implicating Price, Petitioner denied it, but "after McQueen told him she also heard it, he admitted it." (#50582, Vol. 5, Exh. 44 at COA-1070-71.) Thus, after giving lip service to protecting Petitioner's privilege, Orange County lawenforcement intentionally invaded it. A review of Bill Price's trial testimony shows that ADA Susan Price fully exploited that invasion.

Before trial, Petitioner's private defense counsel moved to dismiss the indictment because of the intentional invasion of the defense and violation of privilege, pointing out that California follows the rule that "the investigator is a person encompassed by the [attorney-client] privilege, he stands in the same position as the attorney for purposes of the analysis and operation of the privilege[.]" People v. Meredith (1981) 29 Cal. 3d 682, 690 n. 3. This motion was filed on 6/21/2017 and asserted violations of the 5th, 6th and 14th Amends. (See 18 CT 4504.) This motion was denied without an evidentiary hearing on 9/5/2017 (1 CT 113, a

and Petitioner has identified examples of privileged conversations with Price, which if they actually occurred, Price testified about and tended to incriminate Petitioner, all of which occurred long after Price began investigating in August 2006 when he, McQueen, and Petitioner's took the same cruise as Petitioner and Micki Kanesaki. (See Appdx. A at 58 and Petitioner's AOB at 105-133 and reply at 120-138.)

In Weatherford v Bursey, this Court rejected the argument that any time a prosecutorial agent obtains defense information, a Sixth Amend. violation is automatically established. (1977) 429 U.S. 545, 552 ("[W]hen conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial"). Weatherford, an undercover agent, met with Bursey and his counsel to discuss defense strategy, but Weatherford never communicated any of that information to his supervisor or prosecutors, nor did he testify about it when unexpectedly testified at trial. Id. at 548. Accordingly, no 6TH Amend. violation was found. But this Court rejected the government's claim that, whenever a third party obtains defense information, the risk of disclosure to authorities is on the criminal defendant. So while it is clear some prejudice was required to make out a 6TH Amend. violation, the Weatherford court had no occasion to define the contours of the form or degree of prejudice required:

> Had Weatherford testified at Bursey's trial as to the conversations between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case. Id. at 554.(13)

Here, it makes no difference whether Bill Price was hired or paid as an investigator. There is no question that he was a government agent developed by FBI agent Rick Simpson to maintain contact with Petitioner. (See Price's grand jury testimony in June 2013 – "I was asked by [FBI Agent] Stokes and by Simpson that if any information came to my privy, that I should contact them and let them know." 3CT 487-88.)

(13) See also U.S. v. Morrison (1981) 449 U.S. 361

copy of which is in Appdx C at the end). The motion was denied on the grounds that Bill Price told prosecutors he was not a defense investigator and the recording of Amy Nguyen was not work product, i.e., Judge Stotler already so ruled.

The 4TH DCA, in reviewing this issue, conflated this motion with a separate motion for invasion of the defense camp based on the placement of Petitioner in the same county jail cell as a snitch working for the sheriff's dept. named Anthony King. (See Motion To Dismiss For Interference With Defendant's Right To Counsel, Improper Infiltration Of The Defense Camp, And Outrageous Government Conduct filed 3/18/15; 13 CT 3081.) The superior court conducted a four day evidentiary hearing on the snitch motion under Massiah v. U.S. (1964) 377 U.S. 201. In its opinion the 4TH DCA criticized Petitioner's briefing on the "background facts" concerning the Bill Price and earlier infiltration motion as "deficient and confusing to say the least." (Appdx. A at 55.) The 4TH DCA then gives the wrong filing date of the infiltration motion as 6/21/17, the correct date for the Bill Price motion, and criticizes Petitioner's counsel for citing exclusively to the exhibits from the Penal Code §995 motion denied by Judge Stotler years earlier. (Appdx A at 55.) Apparently the 4TH DCA mistakenly believed that, as a result of the four-day evidentiary hearing, Judge King concluded implicitly that Price was not a defense investigator. (See Appdx. A at 57, last para, "Substantial evidence supports Judge King's implicit conclusion Price was not Kocontes's investigator.") But Kocontes was never granted an evidentiary hearing on the Bill Price motion, so Judge King could not have made an implicit conclusion about Price's status. And although the 4TH DCA criticizes the briefing for purportedly not specifying what privileged statements Bill Price divulged, Petitioner's briefing explained at length how first the FBI groomed Price as a law enforcement agent and then documented Price's conversations with Petitioner on such subjects as how Petitioner met witness Brentnell (a polygraph administrator and licensed P.I. friend of Bill's who Petitioner hired to do a polygraph and claimed at trial that Petitioner said he "just grabbed Kanesaki by the ankles and flipped her overboard"), the Nguyen interview by McQueen

The prosecution not only exploited Bill Price's knowledge of defense activities and his communications with Petitioner about Ms. Kanesaki's death and Petitioner's reaction to the investigation of it, but it also used Price to flip Amy Nguyen from a defense witness to a prosecution witness in the ambush meeting at the courthouse in February 2013. (See pgs. 14-16, supra.) The D.A. and lead Sheriff's investigator monitored that meeting in real time, but did nothing to intervene when Bill Price committed several crimes such as offering a bribe and lying to influence Nguyen's testimony/statement to law enforcement. And from the comments Nguyen made, it was clear Price had previously had similar coercive conversations with her, such as at the January 2009 meeting before Price turned on his recorder.

Petitioner asserts that using his defense investigator to spy on Petitioner over a three-year period, including regular reports about defense investigative actions and conversations with Petitioner and his counsel, then allowing Price to commit crimes to convince the only witness who could create evidence needed for jurisdiction and fully exploiting the fruits of that criminal conduct, is outrageous government conduct violating the 5th and 14th Amends. as well as a 6th Amend. violation of the right to counsel.(14)

This Court has never identified the types of conduct that would qualify as sufficiently outrageous government conduct to violate due process, other than to require that it be sufficiently egregious that it "shocks the conscience." Rochin v. California (1952) 342 U.S. 165, 172 (Forcibly pumping the defendant's stomach to retrieve heroin he swallowed was sufficiently shocking.) Ironically, other California courts have adopted a liberal view of conduct sufficiently shocking to warrant dismissal on due process grounds. E.g., Boulas v Superior Court (1986) 188 Cal.App. 3d 422 (Intentional interference with counsel of choice); Morrow v. Superior Court (1994) 30 Cal. App. 4th 1252 (D.A. used her investigator to intentionally spy on defendant's conversations with his attorney in the courtroom;

(14) Petitioner brought a separate motion to dismiss on federal due process grounds over the ambush meeting on 6/21/2017 that was also denied without an evidentiary hearing. (1CT 113, Appdx C.)

People v. Velasco-Palacios (2015) 235 Cal.App.4th 439, 445-46 (D.A. altered an interrogation transcript to show a confession that would justify a life sentence, then gave it to defense counsel in the midst of plea negotiations to pressure the defendant to take a deal). Yet here, the 4th DCA turned a blind eye to the prosecution's pattern of exploiting its knowing invasion of defense information and illegal witness tampering that it coordinated, all to enable Bill Price to obtain a substantial, six-figure reward if the feds wrongfully manage to forfeit Petitioner's assets and the prosecution to wrongfully convict a high value, attorney/target.

California purports to hold its prosecutors to the highest standard when the protection of a criminal defendant's constitutional rights is involved. E.g., Morrow, supra, 30 Cal.App.4th at 1254 ("The prosecutor is not only the defendant's adversary, but is also the guardian of the defendant's constitutional rights"). Unfortunately, that maxim is not applied in Orange County.

Q5: The Substantial Risk Of Prejudice When Confidential Defense Information Is Intentionally Obtained And Communicated To The Prosecution By Its Agent Warrants Dismissal Because The Extent To Which The Information Was Used To A Defendant's Detriment May Never Be Known And Any Lesser Remedy Will Not Deter Such Prosecutorial Misconduct.

Although not all of the lower federal courts use all of the factors, several circuits interpret Weatherford to require analysis of 4 factors when assessing an alleged 6th Amend. violation asserting an invasion of the defense camp: (1) was trial evidence produced directly or indirectly by the intrusion; (2) was the intrusion by the government intentional; (3) did the prosecution receive otherwise confidential information about trial preparations or defense strategy as a result of the intrusion; and, (4) were the overheard conversations and other information used in any other way to the substantial detriment of the defendant? U.S. v. Kelly (D.C. Cir 1986) 790 F.2d 130, 137. The Kelly court did not, however, determine the weight to be given to each

factor, or whether any one would suffice to establish a 6th Amend. violation. Instead, it remanded for a new trial preceded by evidentiary development and a ruling on the 6th Amend. issue. Id. at 138. But the Kelly court did not discuss a civil case involving a civil rights claim under 42 U.S.C. §1983 in which a D.C. panel held that "mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant." Briggs v. Goodwin (D.C. Cir. 1983) 698 F.2d 486, 494-95.

Rather than adopt a per se rule such as the Briggs court did, the First Circuit focuses on actual prejudice regardless of the nature of the invasion, but once a defendant makes a prima facie showing, the burden of proof shifts to the prosecution to show that the illicitly-obtained information was not used to the defendant's detriment. U.S. v. Mastroianni (1st Cir. 1984) 749 F.2d 900, 908. The Ninth Circuit also uses a similar approach, but to make a prima facie showing, the government agent "must have acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged information."(15) Both the 9th and 4th Circuits have discussed the four Kelly factors seriatim, implying that each factor is independently sufficient to establish a violation. E.g., Clutchette v. Rushen (9th cir. 1985) 770 F.2d 1469, 1471-72, cert. denied 475 U.S. 1088; U.S. v. Brugman (4th Cir. 1981) 655 F.2d 540, 546. The Second Circuit appears to focus on whether the intrusion by law enforcement was intentional, and if so it would follow the per se rule, but if unintentional or justified a showing of actual prejudice is required by the defense. U.S. v. Ginsberg (2nd Cir. 1985) 758 F.2d 823, 833. On the other hand, the Third Circuit rejected the argument that Weatherford requires a defendant to show prejudice in all cases. U.S. v. Levy (3rd Cir. 1978) 577 F.2d 200, 209-210. The Levy Court explained:

> We think that the [Weatherford] Court was suggesting by negative inference that a 6th Amend. violation would be found where, as here, defense strategy was actually disclosed or where, as here, the government enforcement officials sought confidential information. Id. at 210. Dismissal was held to be the only appropriate remedy. Id.

The Tenth Circuit adopted a very similar approach to the 3rd Circuit, but stopped

(15) U.S. v. Danielson (9th cir. 2003) 325 F.3d 1054, 1071. Danielson did not discuss the four factors of Kelly.

short of mandating dismissal because it could not determine dve to the inadequacy of the state court's fact-finding procedures whether the taint could be neutralized for a retrial. Shillinger v. Haworth (10TH Cir. 1995) 70 F. 3d 1132, 1142:

> [A] prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the 6TH Amend. rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the 6TH and 14TH Amends., we believe that absent a countervailing state interest, such an intrusion must constitute a per se violation of the 6TH Amend. Id.

While the Fourth Circuit and Eighth Circuits tend to follow approaches similar to the Ninth, the Eighth Circuit appears to place added emphasis on the defendant's burden to prove specific prejudice. U.S. v Crow Dog (1976 8th cir) 532 F. 2d 1182, 1198. And both the Eighth and Sixth Circuits would require an intentional intrusion as well as a specific showing of prejudice. U.S. v. Singer (8TH Cir. 1986) 785 F. 2d 228, cert. denied 479 U.S. 883; U.S. v. Steele (6TH Cir 1984) 727 F. 2d 580, 586, cert. denied 467 U.S. 1209 ("Even when there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted.

Petitioner submits that in the case of an intentional intrusion that produces privileged defense communications or information, prejudice should be presumed for two reasons. First, it is often difficult to know and prove how the access to privileged information was used to a defendant's detriment. For example, when Bill Price provided the recording of Susan McQueen's interview of Amy Nguyen from January 2009, only a few months had passed since the opportunistic seizure of Petitioner's money (because it had been put entirely in one account). The sudden flurry of activity there after showed that the FBI's investigation was far from over. Price's information, including his lies to make Petitioner seem guilty like an interest in extradition treaties, not wanting his lawyer to be told about investigative tasks, and admitting to having told Nguyen the things she reported to McQueen, may have caused the FBI to eliminate looking at any other suspects, and encouraged the civil forfeiture AUSA to pursue a case in which the court concluded had no basis but suspicion. Had

Petitioner had access to the money still held by the federal government, he could have gone to trial with counsel of his choice in this state criminal prosecution.

The second reason to presume prejudice from an intentional intrusion is that otherwise the prosecution has perverse incentives to cheat, but simply be careful not to get caught, or have plausible deniability if they are caught. The only way to effectively deter intentional intrusion is if the prosecution knows that rules like harmless error will not save their ill-gotten convictions. If a court can identify all of the prejudice and structure a new trial so that any taint is eliminated, dismissal need not always result from a per se rule of violation when intentional intrusion occurs.

As far as a 5th and 14th Amends. violation based on the egregiousness of the prosecutorial invasion, the test announced by this Court in Rochin, i.e., the "shock the conscience" test, the very subjectivity of it has militated against relief in nearly all cases since Rochin. Petitioner submits that more objectively workable test would be to require some illegal, i.e., action violative of existing law, conduct as part of the prosecution's or its agent's actions or unethical conduct under applicable rules of practice. When prosecutors violate the law intentionally or purposefully violate their ethical duties, that should shock the conscience because it damages public confidence in the fairness of the criminal justice system generally, and by definition creates an unfair advantage in the specific case.

In this case, not only did the prosecution team know that Bill Price was feeding them privileged information and communications, but when their own efforts to secure Nguyen's cooperation failed they arranged for Price to ambush her at the courthouse where was under subpoena and unable to leave, and commit several crimes of witness tampering while they sat idly listening to it unfold. Afterward, being all too happy with the outcome, they never even tried to find out the extent to which Price's improper influence colored her story, or if he employed the same techniques in 2009 when they met.

Q6: Petitioner's Rights To Due Process And Effective Assistance Of Counsel Were Violated When The Trial Court Insisted The Trial Resume Only Two Months Into The Pandemic Under Dramatically Different Conditions Than Those Enjoyed By The Prosecution In Its Case-In-Chief, Including A Plastic Barrier Preventing Petitioner From Communicating With Counsel During Trial, Social Distancing That Increased The Distance Jurors Were From Witnesses As Much As 27 Feet And Sometimes Blocked Their Views, And Widespread Masking Even In Deliberations, Which Surely Inhibited Communication.

"Even in a pandemic, the Constitution cannot be put away and forgotten." Roman Catholic Diocese Of Brooklyn v. Cuomo (2020) __ U.S. __, 141 S. Ct. 63, 68.

The prosecution began its evidence on 2/10/2020 and rested on 3/4/2020, after calling 18 witnesses. (11 RT 1804, 18 RT 3291.) The defense began its evidence on March 9th. (19 RT 3304.) But on 3/16/20, trial was suspended due to the COVID-19 pandemic and a shelter-in-place order effective county wide and on 3/19/20 the Governor issued a state-wide order. (21 RT 3797, 3808.) On 3/23/2020 the Chief Justice Of California suspended all jury trials for 60 days. (see Appdx. D, order of 3/23/20 at 2, para. 1.) On March 30, the Chief Justice ordered the 60 days to run from the last day on which the statutory deadline in the Penal Code would run. (See Appdx. D, Order of 3/30/20 at 3, para B and A.3.) Because Petititioner had waived the statutory deadline and had indicated his intent to do so until normal trial procedures resumed, this order effectively authorized an extension of whatever length necessary to restore normal procedures. On 4/29/20, the Chief Justice extended criminal trials by an additional 30 days. (Appdx. D, Order of 4/29/20 at 3, para. 1.)

Trial resumed before the jury after a 10-week break on 5/28/20, with Petitioner as the first witness (23 RT 3981, 3989). On May 26th, the trial judge outlined how the courtroom would be configured to accommodate social distancing and safety procedures surrounding masking, handling exhibits with gloves, emphasizing

the use of the overhead projector as no exhibits would be handled by jurors, all participants would enter and exit the courtroom single file and 6 feet apart, etc. Only the examining attorney and the witness were excused from masking, and only while the examination was underway. (See 22RT 3815-3908.) The configuration put 7 jurors and the 4 alternates in the gallery, behind the bar and counsel, all spaced six feet apart. If all jurors were in the box as usual, the distance from the witness stand to the farthest juror (seat 1.) was 17 feet. The jury box is also elevated. But when trial resumed, jurors 6-12 and all 4 alternates were distributed throughout the gallery in floor-level seats. The distance from the witness to these jurors ranged from 27 to 45 feet. Petitioner and his counsel were required to sit 6 feet apart, masked and separated by a plastic, clear screen. Jurors 1-4 were in the box; #5 was in a chair in the well in front of the box, roughly in the center. Jurors 6-9 were in the first row of the gallery, with #'s 7 and 8 directly behind counsels' tables. The judge estimated #6 to be 28 feet from the witness, #7 to be 27 feet, #8 to be no more than 29 feet, and #9 to be 32 feet. (22RT 3847; also see court exh. #11, in Appdx. F.) Jurors 10 and 11 were 3 rows behind the bar; #12 was in the 4th row back, which the judge estimated to be about 35 feet from the witness (22RT 3847). The alternates, who were not ultimately needed, were estimated to be 34-45 feet from the witness stand (22RT 3848).

Defense counsel objected that the jurors in the first gallery row could see any notes that Petitioner would write and see interactions between her and Petitioner in ways box jurors could not (22RT 3876-77). Because of Petitioner's hearing loss (22RT 3857), some of these jurors would be able to hear any attempts at oral communication with Petitioner, and they could see defense counsel's computer screen (22RT 3877, 3886-87). Although counsel were told to avoid blocking jurors' views, problems with both witness views and hearing occurred. On 3 instances, jurors in the gallery could not hear, and #3 finally had to send a note to the judge about it (24RT 4167). Juror #8 was unable to see the witness, as well as #3 (24RT 4255, 4592). Juror #12 could not hear some rebuttal testimony (30RT 5411). Obviously, the ability of gallery jurors to hear, see, and assess witness credibility without distraction was impaired.

Defense counsel moved for a mistrial, or alternatively a continuance before testimony resumed, particulary given her inability to communicate with Petitioner when other witnesses testified (22RT 3856). Also, the configuration restricted her movement during examination due to line-of-sight issues in a way the prosecution was not (22RT 3857). Counsel pointed out that jurors are in the box in part to keep them separate from everyone else,

and even though the courthouse was closed to the public, Micki Kanesaki's family were in the gallery and interaction with/observation of them would be likely to occur (22 RT 3858). Counsel summed up her argument by pointing to the fundamental unfairness in forcing Petitioner to testify under these conditions when all of the prosecution's witnesses testified under normal conditions: "[T]he crux is the drastic change in how the case will be done between the prosecution's key witnesses and [Petitioner]. There is no way that this can be a fair balance in how these witnesses are being evaluated, not because of anybody's fault, just because that's when this started and that's where we are. [Petitioner] shouldn't have to pay the price for that." (22 RT 3859.) The court denied the mistrial motion and implicitly refused to grant a continuance (22RT 3908).

The trial judge's desire to complete the trial from an administrative viewpoint is understandable; the prosecution had spent tens of thousands of dollars bringing witnesses from overseas, and weeks of scarce court days had been expended. But those concerns cannot overcome the obvious prejudice that resulted from: (1) the impairment of over half the jurors' ability to clearly receive the testimony and fully observe the witnesses so as to adequately assess credibility; (2) the elimination of any communication between Petitioner and his counsel during the testimony of other witnesses, preventing any ability of Petitioner to aid in his own defense during such testimony; (3) the unfairness inherent in the difference in conditions between the prosecution's key witnesses' testimony and Petitioner's testimony; and (4) the atmosphere of fear, anxiety, and stress that pervaded society during the early months of the pandemic as death tolls and infection rates steadily rose, especially considering that many of the jurors were retirees who were particularly vulnerable to infection and even death by virtue of age (and any unknown underlying conditions). Significantly, the court never inquired if any jurors felt that they were unable to competently serve due to added health concerns from the pandemic, or even if any believed that the combination of delay and pandemic stress would negatively affect their ability to recall or weigh prior evidence. The goal was simply get the trial completed no matter what it took.

The Confrontation Clause grants the accused more than just the opportunity to face his accusers. It includes the "opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Ohio v Roberts (1980) 448 U.S. 56, 64. And an important aspect of making that

credibility determination is the ability to closely observe and hear the witness, taking into account all of their sensory impressions. As Judge Learned Hand observed, "The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may and indeed should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have tipped the scale." Dyer v. MacDougall (2nd Cir. 1952) 201 F.2d 265, 269. The impairment to the gallery jurors' ability to use the "whole nexus of impressions" that they normally would have had in the box was significant, especially given the added distance, the sometimes blocked, unelevated view, the difficulty hearing and the constant stress of being exposed to a potentially fatal, contagious disease. The stress of being in public during a pandemic with so little information about transmission methods and in the wake of the Governor's shelter-in-place order negatively affected everyone, including Petitioner, who testified for 5 days, mostly cross-examination. At one point, he felt ill while testifying and was ordered back to the jail for medical evaluation.

Appendix G shows a chart that was published daily showing the daily counts of COVID cases (new) and deaths in Orange County. Any juror who read the local O.C. Register would have likely seen it, or heard the same information on local television news. The second chart shows the incidence of O.C. jail cases where Petitioner was held. By mid-July it had infected nearly 10% of the jail population, as prisoners were unable to socially distance, "masks" consisted of torn-up bed sheets with fiber counts so low they were translucent, and the deputies who served as guards mostly refused to wear masks. The local Sheriff informed the head of the health dept. that he would not enforce her public mask mandate.

Also, Petitioner's right to communicate with counsel was eliminated by the trial judge's safety precautions. Counsel objected, pointing she and Petitioner were completely barred from communicating when testimony occurred because they were required to socially distance and jurors sitting behind them could see any notes passed. (22 RT 3856-7.) Masks also inhibited communication, even during breaks. The ability of a criminal defendant to communicate with counsel during trial is "one of the defendant's primary advantages of being present at the trial." Illinois v. Allen (1970) 397 U.S. 337, 344. California recognizes the constitutional importance of this right, but chose to ignore it here for expediency. E.g., People v. Romero (1984) 153 Cal. App. 3d 757, 761

("It is the defendant's ability to instantaneously communicate with counsel upon a spontaneous understanding of testimony and the proceedings which must be protected.")

The masking and social distancing, without an alternative meanings of communiting such as microphones and ear pieces, was the equivalent of shackling Petitioner: "The Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. [Citations] The use of physical restraints diminishes that right. Shackles can interfere with the accused's ability to communicate with his lawyer." Deck v. Missouri (2005) 544 U.S. 622, 631.

Unlike Orange County, the federal courts did not rush to resume jury trials after the pandemic started. In the Central District of California, the Chief Judge suspended all jury trials on 3/23/20. See C.D. Cal. Order of the Chief Judge 20-042. After interim suspensions, the Chief Judge indefinitely suspended jury trials. C.D. Cal. General Order 20-09, 8/20/20 ("Until further notice, no jury trials will be conducted in criminal cases"). Other districts followed suit. E.g., U.S. v. Woolard (W.D. Wash. 11/5/20) 2020 U.S. Dist. LEXIS 207436, *5-6, 2020 WL 6528865, ("The arrival of the COVID-19 pandemic would have made any jury trial impossible from March to the present day," citing General Order 11-20 dated 7/30/20).

When trials did resume in the federal system, the courts insured that safety protocols did not interfere with the defendants' constitutional rights. E.g., U.S. v. Barrow (D.D.C. 8/13/21) 2021 U.S. Dist. LEXIS 152420 * 12-15, 2021 WL 3602859. In Barrow, the court restricted courtroom access to the jury, counsel and witnesses, required masking and social distancing, as well as livestreaming, much like occurred here. But unlike this case the defendant and his counsel had the use of an intercom that was wireless to allow instantaneous communication. And to accommodate the public, the livestream was also sent to another courtroom in the same building, dubbed the "overflow courtroom." Extra precautions included requiring participating counsel to confirm that they were vaccinated. Thus, the harmful omissions that took place in Petitioner's trial were contemplated and prevented in Barrow.

Q7: Petitioner's 6TH Amend. Right To A Public Trial Was Violated By The Trial Court's Failure To Ensure That Persons Without Internet Access Had A Location To View The Livestream, Failure To Post A Notice About How To Access The Livestream At The Closed Courthouse Entrance, And Failure To Identify The Persons At The Entrance Who Would Purportedly Tell Members Of The Public About The Livestream Website.

Before the pandemic, the trial court had allowed NBC video cameras and a photographer with the O.C. Register in the courtroom during trial (22 RT 3817). But when trial resumed in May 2020, that permission was revoked. NBC was granted leave to record from the livefeed, which is normally not permitted (22 RT 3820-21).

According to the trial judge the courtroom could accommodate 140 in the capacity, but with social distancing only 24 people, aside from staff. With all participants and the two Kanesaki family members, the total was 22. The prosecution was granted one "support person" (Sgt. Voght, a rebuttal witness who had already testified). (22 RT 3817-19.) While the trial judge asserted that left one public seat, how any member of the public would get in was never explained as the courthouse was closed to everyone except parties with scheduled hearings, witnesses, jurors, and counsel with hearings scheduled. (22 RT 3840.) The trial judge cited "Emergency Rule 3 of the [California] Judicial Council" as authority for him "to deny access to the public."

"The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions[.]" In Re Oliver (1948) 333 U.S. 257, 270 n. 25. In Waller v. Georgia, this Court identified four criteria that must be met to justify complete closure of a trial or a portion of it: (1) there must be "an overriding interest that is likely to be prejudiced"; (2) the closure must be narrowly tailored, i.e., "no broader than necessary to protect that interest"; (3) "the trial court must consider reasonable alternatives to closing the proceeding"; and, (4) the trial court "must make findings adequate to support the closure" and allow a reviewing court to determine whether the closure was proper. Waller v. Georgia (1984) 467 U.S. 39, 48. When there is a contemporaneous objection to the closure, which there was here, the error is structural and requires reversal. Weaver v. Massachusetts (2017) _ U.S. _, 137 S.Ct. 1899, 1910-12.

The 4TH DCA recharacterized this closure as only "partial" to deny the claim. It also erroneously stated that 8 public seats available. (See Appdx. A at 101, 102.) The courthouse was closed to the public. No one who did not have business was allowed in. Whether there were 1 or 100 seats open is irrelevant to the issue because the public could not get in. The only way the public could access the trial was through livestream on the court's website, but there were no notices posted on the courthouse door, no documentation as to the unidentified person who would supposedly tell inquiring public at the door the website address or even how or when those instructions were given, and most important, no place for members of the public who had no internet access or access fast enough to go to watch it. Even if the public had been informed of the livestream and how to access it, there was an entire segment of the population – those public members without the resources to access the livestream for whom the closure was complete and absolute. And in reality,

the entire public was excluded because the complete absence of any proof that concrete steps were taken to inform the public of the livestream revealed that its main purpose was to allow NBC to complete its Dateline recording, while creating the illusion of public access. This was a complete closure for a significant period of the trial, including the entirety of Petitioner's testimony.

Here, both the 3rd and 4th Waller criteria were violated, as well the 2nd. The closure was not narrowly tailored. Indeed, if there really were 8 public seats available, then the courthouse should have been opened to the public so that courthouse spectators and the media could spontaneously enter to observe a portion of the trial as often occurs in high profile trials. The court did not consider reasonable alternatives, whether that be a continuance as Petitioner requested, or designating an empty courtroom as a public, livestream viewing location. With the courts essentially closed, there were many empty courtrooms that could have accommodated social distancing for public observers. Nor were the court's findings sufficient to justify the closure. Merely citing an emergency rule and noting the need for safety precautions due to the pandemic is not sufficient; if masks and social distancing were enough to protect the jurors, litigants and witnesses, it would have been enough to protect the public also.

The Barrow case discussed above at 48 reveals how federal trials during the pandemic protected the right to a public trial. First, the court waited until more was known about transmission of the virus and it was determined safe to reopen the courthouse. Second, an overflow courtroom where the public could watch the livestream. And for those unable to make it to the court, and could not access livestream, a telephone access was established to at least allow the public to hear the proceedings. 2021 U.S. Dist. LEXIS 152420*15. The Alabama federal courts followed a very similar practice, also using an overflow courtroom for public livestream access. E.g., U.S. v Richards (M.D. Alabama 2020) 2020 U.S. Dist. LEXIS 158887; U.S. v. Bledson (M.D. Alabama 2021) 2021 U.S. Dist. LEXIS 56860.

Other federal courts not only used overflow courtrooms for livestreaming, but creatively remodeled courtrooms to allow social distancing while still allowing jurors to remain in close proximity to witnesses. For instance, the District of Idaho placed socially-distanced jurors throughout the well and moved counsel and their tables into the gallery. U.S. v. Babichenko (D. Idaho 2020) 508 F. Supp. 3d 774, 777. This adaptation would have avoided the many problems created in this trial caused by substantially increasing jurors' distance from witnesses and blocking their view.

This Court has never adopted the distinction between a complete and partial closure that the 4TH DCA relied upon in denying this claim. But with the technology available today, there is no need to eliminate all public access to any portion of a criminal trial, even during a pandemic. The only possible exception would be the portion of a trial involving secret intelligence information or other data, the disclosure of which could threaten national security.

Conclusion: This case presents a number of issues that would allow the Court to clarify areas of the law in which there are definite splits of authority among the various federal circuits, as well as define the parameters of constitutional provisions significantly impacting concepts of federalism and the impact of state actions on foreign relations in an ever-increasingly symbiotic world.

Finally, this case was not the epitome of overwhelming guilt as described by the 4TH DCA. The fact that the FBI, with the full resources of the federal government, could not survive a civil standard of proof on summary judgment in its asset forfeiture case, speaks volumes about the actual strength of the case when rules of evidence are followed and competent counsel are at the helm. No forensic evidence, eye witness, or witness without significant motive to lie connect Petitioner to Micki Kanesaki's death. Significant evidence supporting the fact that Micki was seen alive by crewmembers at least as late as 11:00PM was never introduced at trial. This corroberated Petitioner's explanation that she left the cabin about 12:30AM and went to the buffet, where she apparently ate, which is why she had undigested food in her stomach. When the locale medical examiner was asked what if Micki had eaten again after the 8:30PM dinner, his response was, "Then all bets are off!" Petitioner prays that this Court will intervene and prevent the continuation of this miscarriage of justice.

Dated: ~~June 13, 2023~~
July 5, 2023

Respectfully submitted,
Lonnie Kocontes
Lonnie Kocontes
Petitioner, In Propria Persona