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6	UNITED STATES DISTRICT COURT	
7 8	EASTERN DISTRICT OF CALIFORNIA	
9	PAUL C. BOLIN,) Case No. 1:99-cv-05279 LJO
10	Petitioner,) <u>DEATH PENALTY CASE</u>
11	vs. KEVIN CHAPPELL, as Acting Warden of San) ORDER DENYING RESPONDENT'S) SECOND MOTION FOR
12	Quentin State Prison,) RECONSIDERATION OF ORDER) GRANTING PETITIONER A LIMITED
13	Respondent.) EVIDENTIARY HEARING
14 15		HEARING DATE: APRIL 15, 2013 VACATED
15	This matter is before the Court on the renewed motion for reconsideration filed by Respondent	
17	Kevin Chappell, as Acting Warden of San Quentin State Prison (the "Warden") on March 15, 2013. The	
18	opposition from Petitioner Paul C. Bolin ("Bolin") has been scheduled for April 1, 2013. The Court,	
19	however, is able to resolve this motion without input from Bolin and without argument.	
20	Relying on <i>Walker v. Martel</i> , F.3d, 2013 WL 848293 (9th Cir. Mar. 7, 2013), and <i>Premo</i>	
21	v. Moore, U.S. , 131 S. Ct. 733 (2011), the Warden argues this Court improperly supplanted the	
22	presumed prejudice analysis of Styers v. Schriro, 457 F.3d 1026 (9th 2008) for the prejudice requirement	
23	of Strickland v. Washington, 466 U.S. 668 (1984). Utilizing one of two correct avenues for determining	
24	a different outcome in the proceedings, the Warden argues the matter must be resolved against Bolin	
25	without a hearing. First, the Warden argues is that "there is no evidence indicating that the jurors who	
26	served on Petitioner's jury could not be fair and impartial." Second he maintains that because both the	
27	guilt phase and penalty phase prosecution cases were so strong the ultimate verdicts of guilt and death	
28	would not have been different.	

The Warden is mistaken on two fronts. First, the Court has not overlooked *Strickland* prejudice
by ordering an evidentiary hearing. Rather the determination of whether there is presumed prejudice
occasioned by pretrial publicity will inform *Strickland* prejudice. Second, the Warden is focused on the
incorrect stage of the proceedings for determining whether there would be a different outcome in the
proceedings.

The issue here is whether, because of ineffective assistance of counsel, Bolin was deprived of 6 7 his Sixth Amendment right to an impartial jury. This right to an impartial jury, in turn, is considered 8 "fundamental" to our system of justice. See United States v. Montes, 628 F.3d 1183, 1187 (9th Cir. 9 2011). And because the right to an impartial jury is fundamental to our system of justice, it is not subject 10 to harmless error analysis. Rose v. Clark, 478 U.S. 570, 578 (1986) (holding that harmless error analysis 11 "presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument 12 before an impartial judge and jury"). That is, deprivation of the right to be tried by an impartial jury is 13 structural error.

14 The *Strickland* prejudice prong that must be established in this case is whether it is reasonably 15 likely that venue from Kern County would have been changed had Bolin's attorneys renewed the motion 16 so that Bolin could be tried by an impartial jury. The Warden is mistaken to jump all the way to the 17 ultimate outcome of the case. His approach ignores the importance and fundamental nature of an 18 impartial jury. The claimed deficient attorney performance affects this fundamental right. Therefore 19 the *Strickland* prejudice prong also must focus on this right. The Supreme Court's opinion in *Moore*, 20 supra, 131 S.Ct. 733, bears out the notion that a different outcome in the proceeding doesn't necessarily 21 call for assessing the relative merits of the prosecution case. In that case, the threshold for Strickland 22 prejudice was described as whether but for counsel's errors, the petitioner would have pleaded not guilty 23 and insisted on going to trial. Id. at 743.

In Bolin's case, the Court does not yet know whether there is a reasonable probability venue would have been changed had counsel renewed the motion because the matter of presumed prejudice among the jurors has not been determined. In the evidentiary hearing order, the Court found that Bolin had made out a prima facie case of "presumed prejudice" of the prospective (and actual) jurors and that because of this presumed prejudice, his attorneys should have renewed the change of venue motion. The

1	issue of "presumed prejudice" is what the Court will decide following the evidentiary hearing. Only	
2	then, can the Court determine whether there is a reasonable probability venue would have been changed	
3	had Bolin's attorneys renewed the motion.	
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5	The Warden's second, renewed motion for reconsideration of the August 12, 2012 order granting	
6	Bolin a limited evidentiary hearing IS DENIED. The hearing set for April 15, 2013 IS VACATED.	
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8	IT IS SO ORDERED.	
9	Dated: March 21, 2013	
10	/s/ Lawrence J. O'Neill Lawrence J. O'Neill United States District Judge	
11	Office States District Judge	
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