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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD I. FINE,)	No. CV 09-1914-JFW(CW)
)	
Petitioner,)	REPORT AND RECOMMENDATION OF
)	UNITED STATES MAGISTRATE JUDGE
v.)	
)	
SHERIFF LEROY D. BACA, et al.,)	
)	
Respondents.)	
_____)	

This Report and Recommendation is submitted to the Honorable John F. Walter, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. The petition for habeas corpus relief should be denied and this action dismissed with prejudice.

I. PRESENT PROCEEDINGS

The pro se petitioner, Richard I. Fine, is in the custody of the Sheriff of Los Angeles County, at a Los Angeles County jail facility, under a judgment and order of contempt and a remand order (imposing coercive civil contempt under Cal. Code of Civ. Proc. § 1219(a)) both issued on March 4, 2009, by Hon. David P. Yaffe, Judge of the Superior

1 Court, in California Superior Court, Los Angeles County, Case No.
2 BS109420.¹ Petitioner challenged the contempt proceeding and sought
3 state court remedies in a habeas petition to the California Supreme
4 Court (No. S170933), which was summarily denied on March 5, 2009.
5 [Habeas Petition at Pet. Ex. E, summary denial listed on docket, No.
6 S170933, on California Appellate Courts website.]²

7 The present Petition for Writ of Habeas Corpus by a Person in
8 State Custody (28 U.S.C. § 2254) was filed in this court on March 19,
9 2009 (as docket no. 1). On April 21, 2009, Respondent Sheriff Baca
10 filed a motion to dismiss (docket no. 12), simply arguing that the
11 Sheriff, although Petitioner's actual custodian, has acted under order
12 of the superior court, and is not the real party in interest. An
13 answer, addressing the merits of Petitioner's claims, was filed on May
14 1, 2009 (docket no. 15), on behalf of Judge Yaffe and the Superior
15 Court, Los Angeles County, as Respondents and Real Parties in
16 Interest. Petitioner has filed two responses to the answer (docket
17 no. 22, filed May 8, 2009, and docket no. 24, filed May 14, 2009).

18 A challenge to the legality of custody pursuant to a civil
19 contempt order by a state court appears to be properly raised in
20

21 ¹ The "Remand Order" and the Judgment and Order of Contempt re
22 Richard I. Fine ("Judgment & Order") are both attached as Exhibit
23 ("Ex.") A to the Declaration of Kevin McCormick in Support of Response
24 of the Superior Court of California, County of Los Angeles ("McCormick
Decl."), docket no. 16, filed May 1, 2009; the Judgment & Order is
also attached as Ex. C. to the present Petition ("Pet.").

25 ² Because Petitioner's state habeas actions were filed before
26 March 4, 2009, in an attempt to stay judgment, rather than afterwards
27 in an attempt to reverse it, it is not clear whether Petitioner has
28 properly exhausted state court remedies on his present claims for
federal habeas corpus relief. However, because Respondents have not
raised the exhaustion issue, substantial time has already elapsed,
Petitioner has sought expeditious resolution, and Petitioner's claims
all fail, this court should decide the case on its merits.

1 federal district court in a habeas petition under 28 U.S.C. § 2254.
2 Duncan v. Walker, 533 U.S. 167, 176-77, 121 S. Ct. 2120, 150 L. Ed. 2d
3 251 (2001). The present petition has been sufficiently briefed and is
4 ready for decision.³

5 **II. STANDARD OF REVIEW**

6 Review of the Petition in this case is governed by provisions of
7 the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").
8 Under AEDPA, a federal court may not grant habeas relief on a claim
9 adjudicated on its merits in state court unless the adjudication
10 "resulted in a decision that was contrary to, or involved an
11 unreasonable application of, clearly established Federal law, as
12 determined by the Supreme Court of the United States," or "resulted in
13 a decision that was based on an unreasonable determination of the
14 facts in light of the evidence presented in the State court
15 proceeding." 28 U.S.C. § 2254(d).

16 "Clearly established Federal law" means "the governing legal
17 principle or principles set forth by the Supreme Court at the time the
18 state court renders its decision." Lockyer v. Andrade, 538 U.S. 63,
19 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). A decision by a
20 state court is "contrary to" clearly established Supreme Court law if
21 it "'applies a rule that contradicts the governing law set forth in
22 [Supreme Court] cases'" or if it reaches a result different from
23 Supreme Court precedent on "materially indistinguishable" facts.
24 Price v. Vincent, 538 U.S. 634, 640, 123 S. Ct. 1848, 155 L. Ed. 2d

25
26 ³ Del Rey Shores Joint Venture and Del Rey Shores Joint Venture
27 North, Real Parties in Interest in the underlying state civil case,
28 have also sought to intervene in the present case and file pleadings,
and Petitioner has opposed this. The magistrate judge has not relied
on those proposed pleadings in this Report and Recommendation, and the
pleadings on file suffice for disposition.

1 877 (2003)(quoting Williams v. Taylor, 529 U.S. 362, 405-06, 120 S.
2 Ct. 1495, 146 L. Ed. 2d 389 (2000)); see also Frantz v. Hazey, 533
3 F.3d 724, 734 (2008)(en banc)(state court decision which uses "the
4 wrong legal rule or framework" constitutes error under "contrary to"
5 prong of § 2254(d)(1)).

6 A decision involves an "unreasonable application" of federal law
7 "'if the state court identifies the correct governing legal principle
8 from [the Supreme Court's] decisions but unreasonably applies that
9 principle to the facts of the prisoner's case.'" Chia v. Cambra, 360
10 F.3d 997, 1002 (9th Cir. 2004)(quoting Andrade, 538 U.S. at 75). A
11 federal habeas court may not grant a petition simply because a state
12 court's application of governing law was incorrect or erroneous;
13 "[r]ather, in order for the writ to issue, the state court's
14 application of clearly established federal law 'must [have been]
15 objectively unreasonable.'" Id. (quoting Andrade, 538 U.S. at 76);
16 see also Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004)
17 ("objectively unreasonable" standard also applies to state court
18 factual determinations).

19 In reviewing a state adjudication, a federal habeas court looks
20 to the last reasoned state decision as the basis for the state court's
21 final judgment. Barker v. Fleming, 423 F.3d 1085, 1091-92 (9th Cir.
22 2005)(citing Ylst v. Nunnemaker, 501 U.S. 797, 803-804, 111 S. Ct.
23 2590, 115 L. Ed. 2d 706 (1991); Avila v. Galaza, 297 F.3d 911, 918
24 (9th Cir. 2002)). When, as here, no state court decision articulated
25 a rationale for judgment, a federal habeas court must independently
26 review the record to determine whether the state court adjudication
27 was contrary to, or an unreasonable application of, controlling law.
28 Allen v. Ornoski, 435 F.3d 946, 955 (9th Cir. 2006); Delgado v. Lewis,

1 223 F.3d 976, 981-82 (9th Cir. 2000). Although the federal habeas
2 court independently reviews the record, it must "still defer to the
3 state court's ultimate decision." Allen, 435 F.3d at 955 (quoting
4 Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)).

5 In the present action, Petitioner challenges the superior court's
6 contempt judgment. When he challenged that judgment in the court of
7 appeal and the state supreme court, those courts summarily denied
8 relief. This court cannot "look through" these summary denials to
9 find a rationale for adjudication in the superior court's contempt
10 judgment, because that is the very judgment being challenged in the
11 present petition, and not a later judgment offering a rationale for
12 upholding it. Instead, this court must independently review the
13 record to determine whether the final state court adjudication was
14 contrary to, or an unreasonable application of, Supreme Court law.

15 **III. THE STATE COURT CONTEMPT PROCEEDING**

16 On June 14, 2007, Petitioner Fine, as counsel of record,
17 initiated the underlying state civil action (Case No. BS109420) by
18 filing a petition for writ of mandate on behalf of the Marina Strand
19 Colony II Homeowners Association ("Marina Strand"), and naming the
20 County of Los Angeles ("County") as respondent and Del Rey Shores
21 Joint Venture and Del Rey Shores Joint Venture North as real parties
22 in interest ("Real Parties"). [Judgment & Order at 2, 5.] The action
23 was assigned to Judge Yaffe. [Id. at 5.] On September 13, 2007, the
24 County and Real Parties moved to dismiss under California Public
25 Resources Code section 21167.4 (requiring the petitioner in such an
26 action to request a hearing within ninety days of filing the petition
27 or be subject to a motion to dismiss). [Id.] On October 10, 2007,
28 Petitioner Fine, on behalf of Marina Strand, filed a motion for relief

1 from dismissal based on Petitioner Fine's own affidavit of attorney
2 fault. [Id.] In the affidavit, Petitioner Fine stated under oath
3 that he had miscalculated the time to file. [Order Striking Notice of
4 Disqualification ("Order Striking Notice"), McCormick Decl. Ex. B, at
5 1.]

6 Meanwhile, on October 12, 2007, the State Bar Court (in an
7 administrative action not related to Case No. BS109420) recommended
8 that Petitioner Fine be disbarred and ordered him involuntarily
9 enrolled as an inactive member of the State Bar.⁴ [Judgment & Order
10 at 5.] After this, the hearing on the motions in Case No. BS109420
11 was continued to allow Marina Strand to obtain new counsel. [Id.]

12 On January 8, 2008, Judge Yaffe granted both the motion to
13 dismiss and Marina Strand's motion for relief. [Id.] Judge Jaffe
14 also ordered Petitioner Fine to pay fees and costs, noting that "Code
15 of Civil Procedure section 473(b) mandates that the court also order
16 the attorney at fault to pay reasonable compensatory legal fees and
17 costs to opposing counsel or parties." [Order Striking Notice at 1.]⁵
18 The Real Parties then filed a memorandum of costs, and Petitioner Fine

19
20 ⁴ The entry on the California State Bar's website for Richard
21 Isaac Fine, #55259, states that he is ineligible to practice law as of
22 October 17, 2007, and was disbarred as of March 13, 2009. The entry
23 includes an Opinion by the Review Department of the State Bar Court,
No. 04-O-1436, dated September 19, 2008, upholding the October 17,
2007 decision, and stating that the disciplinary action was based on
five cases other than Case No. BS109420 (but showing a similar pattern
of conduct). [See also McCormick Decl. Ex. C.]

24 ⁵ California Code of Civil Procedure section 473(b) provides:
25 "[T]he court shall, whenever an application for relief is made [in
26 timely fashion], is in proper form, and is accompanied by an
27 attorney's sworn affidavit attesting to his or her mistake, ... vacate
28 any ... dismissal entered against his or her client, unless the court
finds that the ... dismissal was not in fact caused by the attorney's
mistake, ... The court shall, whenever relief is granted based on an
attorney's affidavit of fault, direct the attorney to pay reasonable
compensatory legal fees and costs to opposing counsel or parties."

1 filed two motions to tax. [Judgment & Order at 5.]

2 On February 19, 2008, Petitioner Fine filed a document in which
3 he attempted to disqualify Judge Yaffe and all judges of the Los
4 Angeles Superior Court.⁶ [Order Striking Notice at 1-2.] In an order
5 filed March 18, 2008, Judge Yaffe ordered the disqualification
6 stricken (1) as giving insufficient notice, (2) because it was not
7 filed by a party or [current] attorney for a party, (3) because a
8 challenge may only be made against a presiding judge and not all
9 judges, (4) because it was untimely, and (5) because it "disclosed on
10 its face no legal grounds for disqualification." [Id. at 2.] Judge
11 Yaffe advised Petitioner that the strike order could only be reviewed
12 if he sought a writ of mandate from the court of appeal within ten
13 days. [Id. at 2-3.] Instead, Petitioner filed another notice of
14 disqualification on March 25, 2008. [Judgment & Order at 6; Order
15 Striking Notice at 3.] Judge Yaffe issued a final order striking both
16 notices on March 27, 2008. [Order Striking Notice, passim.]

17 On April 10, 2008, a hearing was convened on Petitioner's motions
18 to tax costs, but when he refused to proceed, claiming that Judge
19 Yaffe had been disqualified, the motions were taken off calender.
20 [Judgment & Order at 6.] On April 11, 2008, Petitioner filed another
21 notice of disqualification, but a copy was not properly served on
22 Judge Yaffe. [Id.] On June 16, 2008, Petitioner Fine filed a
23 memorandum claiming other costs, purportedly on behalf of Marina
24 Strand. [Id.]

25 Petitioner Fine was ordered to appear for a judgment debtor
26

27 ⁶ Petitioner's theory -- that Judge Yaffe and all judges of the
28 Los Angeles Superior Court should be disqualified because they
received illegal benefits from the County -- is discussed below.

1 examination before Commissioner Murray Gross. A series of judgment
2 debtor examinations were held (on June 18, 2008, August 25, 2008,
3 October 15, 2008, and December 29, 2008), at which Petitioner refused
4 to answer questions or produce documents in response to subpoenas,
5 even though Commissioner Gross overruled Petitioner's objections.
6 [Id. at 6-7.]

7 On November 3, 2008, the Real Parties applied for an order to
8 show cause re contempt against Petitioner Fine. [Id. at 2.] Judge
9 Yaffe issued an order to show cause on November 3, 2008, and set trial
10 for December 22, 2008. [Id.] The order to show cause set forth
11 sixteen charges [Id. at 2-4], which were reorganized for trial as the
12 following five charges:

- 13 (1) "Failing to answer questions and produce documents at the
14 Judgment Debtor Examinations despite valid service of a subpoena
15 and being lawfully ordered to do so by Commissioner Gross . . ."
- 16 (2) "Attacking the integrity of this court, the Los Angeles Superior
17 Court in general and the State Bar Court . . ."
- 18 (3) "Making repeated Motions for reconsideration in violation of
19 [Code of Civil Procedure] § 1008 . . ."
- 20 (4) "Practicing law, and/or holding himself out as entitled to
21 practice law in the State of California when he was not entitled
22 to practice law in the State of California . . ."
- 23 (5) "Lying about his status with the State Bar in pleadings filed in
24 this court and in oral arguments made before this court . . ."

25 [Id. at 4.]

26 Trial was held before Judge Yaffe on December 22, 24, 26, and 30,
27 2008, and January 8, 12, and 22, 2009. [Id.] The Real Parties
28 appeared, through counsel, as accusing parties, and Petitioner Fine

1 appeared pro se. [Id.] Petitioner was advised of his right to
2 counsel and his right against self-incrimination; he waived the former
3 and asserted the latter. [Id.]

4 Judge Yaffe's findings of fact, conclusions of law, and judicial
5 findings are included in the Judgment & Order of March 4, 2009. [Id.,
6 passim.] Judge Yaffe found Petitioner guilty of contempt, beyond a
7 reasonable doubt, on charges one and four, and not guilty on charges
8 two, three, and five. [Id. at 11-12.] On charge one Judge Yaffe
9 found that Petitioner wilfully disobeyed Commissioner Gross's orders
10 and subpoenas on multiple occasions. [Id.] On charge four Judge
11 Yaffe found that Petitioner practiced law and held himself out as
12 practicing law, in violation of California Business & Professions Code
13 sections 6006, 6125, and 6127(b), when he filed a memorandum of costs
14 (purportedly on behalf of Marina Strand), continued to issue
15 subpoenas, and continued to maintain a website for his legal
16 practice.⁷ [Id. at 6, 8, and 12.]

17 Judge Yaffe pronounced sentence on March 4, 2009. [See
18 "Sentencing Transcript," McCormick Decl. Ex. D.] On charge one, Judge
19 Yaffe sentenced Petitioner to be confined in the county jail until he
20 complied with Commissioner Gross's orders, and ordered him to pay
21 attorney's fees to the accusing parties. [Judgment & Order at 13-14.]
22 On charge four, Judge Yaffe imposed a fine of \$1,000, or five days in
23 county jail consecutive to the custody on charge one. [Id. at 14.]
24 Only the sentence for civil contempt under California Code of Civil
25 Procedure section 1219(a) is referenced in the order remanding

26
27 ⁷ A website for "Law Offices of Richard I. Fine & Associates" is
28 still open at www.richardfinelaw.com, and gives no indication that
Petitioner has been disbarred. The website includes, inter alia, the
claim that Richard Fine is Consul General for the Kingdom of Norway.

1 Petitioner to the custody of the Sheriff. [Remand Order, McCormick
2 Decl. Ex. A.] There is nothing in the record to show whether or not
3 Petitioner has paid the fine on the criminal contempt, and nothing in
4 the record to indicate that he has been ordered jailed for failure to
5 pay the fine.

6 At the sentencing hearing Petitioner indicated that he would go
7 on refusing to answer Commissioner Gross's questions until his habeas
8 corpus actions (including the present case) were "entirely finished,"
9 but would answer the questions if he lost in the habeas proceedings.
10 [Sentencing Transcript at 9-11.] To date, Petitioner has not complied
11 with the contempt order and remains in custody at Los Angeles County
12 Jail for civil contempt.

13 **IV. PETITIONER'S PRESENT GROUNDS FOR RELIEF**

14 In the present petition, Petitioner asserts five grounds on which
15 he seeks release from the custody imposed under the contempt judgment,
16 as follows:

- 17 1. "Judge Yaffe violated Petitioner's due process rights by judging
18 his own unlawful criticized action."
- 19 2. "Denial of right to an 'impartial adjudicator' because Judge
20 Yaffe was 'personally embroiled' in the proceeding."
- 21 3. "Denial of right to jury trial despite criminal charges being
22 included in [the] order to show cause re contempt."
- 23 4. "Denial of right to impartial prosecutor because attorneys
24 appointed to prosecute contempt had financial interest in
25 enforcing underlying judgment."
- 26 5. "Decision was based on an unreasonable determination of the facts
27 in light of the evidence under 28 U.S.C. [§] 2254(d)(2)."

28 [Pet. at 5-6.] These are the only grounds for relief asserted in the

1 petition itself, and are discussed in detail below.

2 **V. DISCUSSION**

3 **A. GENERAL ISSUES ON CIVIL AND CRIMINAL CONTEMPT**

4 Actions which may constitute contempt of court under California
5 law are listed at California Code of Civil Procedure section 1209. A
6 contempt committed in the immediate presence of a court may be
7 addressed summarily. Cal. Civ. Pro. Code § 1211. When an alleged
8 contempt did not occur in the presence of the court, the court may
9 issue an order to show cause, hold a trial, and issue a judgment. Id.
10 §§ 1211-1218.

11 There is a significant distinction between civil contempt and
12 criminal contempt. See Witkin, California Procedure, Fourth Edition,
13 Vol. 3, Actions, § 18. "Whether contempt is civil or criminal depends
14 on the purpose and character of the sanction imposed." Kirkland v.
15 Legion Ins. Co., 343 F.3d 1135, 1140 (9th Cir. 2003).

16 "If its purpose is to punish a past violation of a court
17 order the contempt is criminal. If its purpose is remedial,
18 i.e. to compensate for the costs of the contemptuous conduct
or to coerce future compliance with the court's order, the
contempt order is civil."

19 Id. (quoting Portland Feminist Women's Health Ctr. v. Advocates for
20 Life, Inc., 877 F.2d 787, 790 (9th Cir. 1989)). Both civil and
21 criminal contempt remedies are properly within a judge's powers so
22 long as they are "exercised consistently with state and federal law."
23 See Illinois v. Allen, 397 U.S. 337, 345, 90 S. Ct. 1057, 25 L. Ed. 2d
24 353 (1970).

25 In Petitioner Fine's contempt proceeding, he was charged with and
26 tried for both civil and criminal contempt, and was convicted on one
27 count of each. [See Judgment & Order, passim.] Charge one (failure
28 to comply with Commissioner Gross's orders, on which the superior

1 court ordered Petitioner jailed until he complies and to pay
2 attorney's fees) falls under civil contempt. [See Judgment & Order at
3 13-14.] On the other hand, charge four (unauthorized practice of law,
4 on which the superior court imposed a fine of \$1,000 or a further five
5 days in jail) falls under criminal contempt. [Id. at 14.]⁸

6 As noted above, under the terms of the remand order, Petitioner
7 is now in custody on the civil contempt only. [Remand Order,
8 McCormick Decl. Ex. A.] As to the criminal contempt, Petitioner
9 appears to face the hypothetical possibility of further confinement if
10 he fails to pay the fine imposed by the court. However, the present
11 record does not indicate that any such custody has yet been ordered.
12 Petitioner is not now in custody on a sentence for criminal contempt,
13 and cannot use this federal habeas corpus proceeding to challenge
14 either the imposition of a fine or the possibility that an additional
15 term of jail time may be imposed if he does not pay the fine. See
16 Dremann v. Francis, 828 F.2d 6, 7 (9th Cir. 1987)(per curiam)
17 (imposition of fine does not satisfy "in custody" requirement of 28
18 U.S.C. § 2254(a) even if incarceration may later be imposed for
19 failure to pay); United States v. Kramer, 195 F.3d 1129, 11 (9th Cir.
20 1999)(analogous issue in 28 U.S.C. § 2255 motion challenging
21 restitution).

22 **B. GROUND THREE -- NO TRIAL BY JURY**

23 Under Ground Three, Petitioner contends that his bench trial for
24 contempt violated the Sixth Amendment right to trial by jury in all
25

26 ⁸ On a finding of civil contempt, consisting of failure to
27 perform an act a person is still capable of performing, a court may
28 order the person jailed until the act is performed. Cal. Civ. Pro.
Code § 1219. On a finding of criminal contempt, a California court
may, generally, impose a fine of not more than \$1,000, or a jail term
not exceeding five days. Id. § 1218(a).

1 criminal prosecutions. [Pet., Addendum to ¶ 7 at 5-6.]

2 The Sixth Amendment right to trial by jury applies to state
3 criminal proceedings. See Duncan v. Louisiana, 391 U.S. 145, 149, 88
4 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). However, the right to trial by
5 jury only applies to prosecutions for serious crimes, not petty
6 offenses. See Blanton v. North Las Vegas, 489 U.S. 538, 542, 109 S.
7 Ct. 1289, 103 L. Ed. 2d 550 (1989); Duncan, 391 U.S. at 159-61. For
8 example, any crime punishable by a sentence greater than six months
9 requires trial by jury. Blanton, 489 U.S. at 556; Duncan, 391 U.S. at
10 161-62. For crimes punishable by a sentence of no more than six
11 months, the right to trial by jury only attaches if additional
12 penalties are so severe that the legislature clearly determined that
13 the offense was a serious crime. See United States v. Nachtigal, 507
14 U.S. 1, 5-6, 113 S.Ct. 1072, 122 L.Ed.2d 374 (1993)(no jury trial when
15 maximum penalty was six months in jail and \$5,000 fine or five years
16 probation); United States v. Ballek, 170 F.3d 871, 87 (9th Cir. 1999)
17 (no right to jury trial when court ordered six months in jail and
18 \$50,000 in restitution).

19 A defendant in a criminal contempt proceeding may also be
20 entitled to a jury trial, but the same criterion of seriousness
21 applies. See United Mine Workers v. Bagwell, 512 U.S. 821, 826-27,
22 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994)(right to jury trial when
23 criminal contempt involves imprisonment for more than six months);
24 but see Muniz v. Hoffman, 422 U.S. 454, 475-76, 95 S. Ct. 2178, 45 L.
25 Ed. 2d 319 (1975)(no right to jury trial when contempt involves
26 imprisonment for no more than six months).

27 Here, Petitioner specifically claims that he was entitled to
28 trial by jury because the charges against him included a criminal

1 charge of unauthorized practice of law under Cal. Bus. & Prof. Code
2 section 6126 (unauthorized practice of law as a misdemeanor or
3 felony). The record does not support this claim. In the contempt
4 proceeding, Petitioner was actually charged (and found guilty and
5 sentenced) under Bus. & Prof. Code section 6127 (unauthorized practice
6 of law as contempt of court) and not section 6126. [Judgment & Order
7 at 3, 10, 12, and 14.] Furthermore, Petitioner was charged, found
8 guilty, and sentenced for criminal contempt under Civ. Pro. Code
9 section 1218(a), allowing a maximum penalty of a \$1,000 fine and five
10 days in jail. In Petitioner's case, however, Judge Yaffe imposed a
11 fine of \$1,000 or five days in jail. The record does not indicate
12 that the alternative jail time has been imposed, or that Petitioner is
13 now in custody for failure to pay the fine.

14 Thus, Petitioner was not charged with a serious crime or a
15 serious criminal contempt, and is not now in custody under a criminal
16 contempt judgment. Accordingly, the Sixth Amendment right to jury
17 trial does not apply in his case.⁹ Therefore, the claim in Ground
18 Three is without merit, and state court adjudications rejecting it
19 were neither contrary to nor an unreasonable application of clearly
20 established federal law.

21 **C. GROUNDS ONE AND TWO -- TRIAL BEFORE JUDGE YAFFE**

22 The contempt proceeding was brought as a bench trial before Judge
23 Yaffe, presiding judge in the underlying state civil action, pursuant
24 to Civ. Pro. Code sections 1211-1219 and Los Angeles County Superior
25 Court Rules 2.5(j) and 9.7. Under Grounds One and Two Petitioner
26

27 ⁹ Petitioner does not assert that he was entitled to a jury
28 trial on the civil contempt charges, and there is no right to a jury
trial on civil contempt. See Shillitani v. United States, 384 U.S.
364, 365, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966).

1 claims that, because his contempt trial was held before Judge Yaffe
2 rather than another judge, he was denied the right to an impartial
3 adjudicator under the Fourteenth Amendment. [Pet., Addendum to ¶ 7 at
4 4-5.] Under Ground One, Petitioner contends that Judge Yaffe was
5 properly challenged and should have recused himself in the underlying
6 action. [Id. at 4.] Under Ground Two, Petitioner contends that Judge
7 Yaffe should not have presided over the contempt proceeding because of
8 "personal embroilment" in the action. [Id. at 5.]

9 **1. Petitioner's General Contention**

10 Petitioner claims that he has properly challenged the judges of
11 the Los Angeles Superior Court in general, and Judge Yaffe in
12 particular, for taking unconstitutional payments from Los Angeles
13 County while hearing cases in which the County is a party. [Pet.,
14 Addendum to ¶ 7 at 4.] Petitioner's claims are premised on a practice
15 under which Los Angeles County (and other California counties) has
16 provided additional benefits to judges beyond their state salaries.
17 [Pet., Addendum to ¶ 7, pp. 1-3.] Petitioner contends that judges who
18 have received this extra compensation tend to be biased in favor of
19 the County and that it is improper for them to preside over cases in
20 which the County is a party. [Id.; see also Sentencing Transcript at
21 17-25.] Petitioner argues that his position has been vindicated by
22 the California Court of Appeal in Sturgeon v. County of Los Angeles,
23 167 Cal. App. 4th 630, 84 Cal. Rptr. 3d 242, rev. denied (2008).
24 [Pet., Addendum to ¶ 7, pp. 4-5.]

25 The underlying action in Sturgeon was a taxpayer suit challenging
26 Los Angeles County's practice of providing additional benefits to
27 superior and municipal court judges beyond their state salaries.
28 Sturgeon, 167 Cal. App. 4th at 635. In essence, the County has

1 provided judges with medical and retirement benefits equal to those it
2 provides its own employees. Id. at 635-36. The taxpayer plaintiff
3 challenged the legality of these benefits under numerous provisions of
4 the state constitution and statutes. Id. at 636. The trial court
5 denied the plaintiff's claims, granting summary judgment in favor of
6 the County, and the plaintiff appealed. Id. at 637.

7 The court of appeal rejected plaintiff's arguments that the
8 additional benefits are an unconstitutional gift of public funds under
9 Cal. Const., Art. XVI, section 6, or a waste of public funds under
10 Cal. Civ. Pro. Code section 526a. Id. at 637-39. The court of appeal
11 also found that such benefits were consistent with and, in fact,
12 authorized by the Lockyer-Isenberg Trial Court Funding Act of 1997,
13 Cal. Gov. Code section 77000 et seq., in which the state assumed
14 responsibility for funding trial courts that sit in counties. Id. at
15 639-642. However, in light of Cal. Const. Art. VI, section 19, which
16 provides that the state legislature "prescribe compensation for judges
17 of courts of record," the court of appeal found that the legislature
18 could not delegate to the counties its duty to prescribe compensation,
19 as it appeared to have done. Id. at 635, 642-630.

20 The court of appeal recognized that there were valid reasons for
21 the County to provide additional benefits to judges, and that the
22 legislature had recognized this by providing a credit to counties for
23 judicial benefits and ensuring that judicial benefits would not be
24 decreased as a result of reorganization of the courts. Id. at 630.
25 However, the court of appeal also found that the constitutional duty
26 to prescribe judicial compensation under Art. VI, section 19, means
27 that the legislature must set statewide policy on the issue. Id. The
28 legislature may not leave it to counties to determine how to provide

1 additional benefits to judges; instead, the legislature must "consider
2 the specific issue and, at a minimum, establish or reference
3 identifiable standards." Id.

4 Effective May 21, 2009, the California legislature took note of
5 the Sturgeon opinion, and enacted legislation explicitly extending
6 existing county-provided benefits for judges, establishing standards,
7 and specifically providing as follows (in section 5):

8 Notwithstanding any other law, no governmental entity,
9 or officer or employee of a governmental entity, shall incur
10 any liability or be subject to prosecution or disciplinary
11 action because of benefits provided to a judge under the
 official action of a governmental entity prior to the
 effective date of this act on the ground that those benefits
 were not authorized under law.

12 2009 Cal. Legis. Serv., 2nd Ex. Sess., Chap. 9 (S.B. 11). Thus, the
13 state legislature has reaffirmed the practice in question, set
14 standards, and provided immunity to governmental employees who might
15 otherwise be subjected to suit, prosecution, or disciplinary action on
16 the grounds that the prior county benefits for judges were illegal.

17 Petitioner is correct that the court of appeal found that the
18 manner in which the County previously provided additional benefits to
19 judges was unconstitutional; however, the same court found nothing
20 unconstitutional in a policy under which counties provide such
21 benefits, so long as the state legislature specifically authorized it
22 and set standards. Although the court of appeal found the county
23 policy, as practiced, unconstitutional on narrow grounds, neither that
24 court nor any other legal authority has suggested that judges who
25 received the additional benefits committed any impropriety or
26 exhibited the reality or appearance of bias as a result. Furthermore,
27 as Petitioner has acknowledged, the legislature has now made the
28 judges and all other government employees involved in the prior

1 practice legally immune. There is thus no basis in law for
2 Petitioner's contention that all judges who have ever received these
3 county-provided benefits must be precluded, as necessarily biased,
4 from participating in cases in which the county in question is a
5 party.¹⁰

6 **2. Ground One: Judge Yaffe's Failure to Recuse Himself**

7 Under Ground One, Petitioner claims specifically that he properly
8 challenged Judge Yaffe (for taking unconstitutional payments from Los
9 Angeles County while hearing a case in which the County was a party),
10 and that Judge Yaffe should have recused himself as presiding judge in
11 the underlying action. [Pet., Addendum to § 7 at 4.] However, these
12 contentions fail in light of the history of the underlying case.

13 Petitioner initiated the underlying state action on June 14,
14 2007, by filing a petition in superior court in Los Angeles County
15 which named Los Angeles County as respondent. [Judgment & Order at 2,
16 5.] There is no indication in the record that Petitioner sought, at
17 that time, to disqualify Judge Yaffe, or Los Angeles superior court
18 judges in general, based on allegations that they received improper
19 payment from the County. On September 13, 2007, the opposing parties
20 moved to dismiss the underlying action (for failure to file a timely
21 request for hearing), and on October 10, 2007, Petitioner filed a
22 motion to relieve his client, Marina Strand, from dismissal based on
23 Petitioner's affidavit (acknowledging that the delay was his fault).
24 [Id. at 5.] There was still no attempt to disqualify Judge Yaffe.

25 On October 12, 2007, the State Bar Court ordered Petitioner

26
27 ¹⁰ On Petitioner's logic, one might as well argue that all state
28 judges should be precluded from hearing cases involving the states,
and that all federal judges should be precluded from hearing cases
involving the federal government.

1 involuntarily enrolled as an inactive member of the bar, requiring his
2 removal as counsel for Marina Strand. [Id.] On January 8, 2008,
3 Judge Yaffe granted Marina Strand's motion for relief from dismissal,
4 but also, as required by state law, ordered that Petitioner pay fees
5 and costs as, by his own admission, the attorney at fault. [Order
6 Striking Notice at 1.]

7 It was not until February 19, 2008, that Petitioner first
8 attempted to disqualify Judge Yaffe. [Id. at 1-2.] Judge Yaffe
9 ordered the request for disqualification struck on several grounds,
10 including the dispositive ground that Petitioner, who was neither a
11 party nor current attorney of record for a party, had no standing to
12 disqualify the presiding judge. [Id. at 2.] Petitioner (who
13 continued to lack standing to do so) filed another request for
14 disqualification on March 25, 2008, and Judge Yaffe finally struck
15 both requests on March 27, 2008. [Id. at 3.]

16 Thus, although Petitioner portrays himself as a crusader against
17 biased judges, the record indicates that he was content to litigate
18 his case against the County in front of Judge Yaffe, without
19 attempting to disqualify him, for over a year, until (1) Judge Yaffe
20 ruled against Petitioner's personal financial interest, and (2)
21 Petitioner no longer had standing to seek disqualification.¹¹ On this
22 record, there is no merit in Petitioner's claim that he was denied his
23 right to an impartial adjudicator in the contempt proceeding because
24 Judge Yaffe was disqualified and should have recused himself in the
25 underlying action. Therefore, state court adjudications rejecting
26

27 ¹¹ The State Bar Court Opinion cited above (No. 04-0-1436, dated
28 September 19, 2008), indicates a repeated pattern in which Petitioner
only attempted to disqualify judges once they ruled against him on
matters involving payments by or to him.

1 this claim were neither contrary to nor an unreasonable application of
2 clearly established federal law.

3 **3. Ground Two: Judge Yaffe's "Personal Embroilment"**

4 Under Ground Two, Petitioner claims that Judge Yaffe should not
5 have presided over the contempt proceeding because he was "personally
6 embroiled" in the dispute; in support, Petitioner relies on and quotes
7 language from the Supreme Court's holding in Mayberry v. Pennsylvania,
8 400 U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971). [Pet., Addendum
9 to ¶ 7 at 5.]

10 In Mayberry, the Court reviewed a case in which a criminal
11 defendant, representing himself, repeatedly displayed outrageously
12 contemptuous behavior during a twenty-one day trial. 400 U.S. at 455-
13 462. After the defendant was convicted, and before imposing sentence
14 on that conviction, the trial judge found him guilty of one or more
15 acts of criminal contempt on eleven days, and sentenced him to one to
16 two years imprisonment on eleven counts of contempt, for a total of
17 eleven to twenty-two years. Id. at 455. On review, the Court found
18 that, under the circumstances, criminal contempt was one appropriate
19 remedy (among several possible remedies). Id. at 463. However, the
20 Court observed that, when a trial judge does not immediately act to
21 impose sanctions for contempt, and "where the marks of the contempt
22 have left personal stings," "it is generally wise" for the judge in
23 question to refer trial on the contempt to another judge. Id. at 464-
24 65. The Court further observed that, at times, a judge may become so
25 "personally embroiled" with a lawyer in a trial "as to make the judge
26 unfit to sit in judgment" on a contempt charge against that lawyer.
27 Id. at 465. The Mayberry Court continued as follows: "The vital point
28 is that in sitting in judgment on such a misbehaving lawyer the judge

1 should not himself give vent to personal spleen or respond to a
2 personal grievance." Id. (quoting Offutt v. United States, 348 U.S.
3 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)).

4 The Mayberry Court noted that not every attack on a judge
5 disqualifies him from sitting on a contempt proceeding, citing a case
6 in which the Court held that, although a lawyer's remarks were
7 "disruptive, recalcitrant and disagreeable commentary," they were not
8 "an insulting attack upon the integrity of the judge carrying such
9 potential for bias as to require disqualification." Id.

10 (quoting Ungar v. Sarafite, 376 U.S. 575, 584, 84 S. Ct. 841, 11 L.
11 Ed. 2d 921 (1964)). Nevertheless, the Court found that the
12 contemptuous utterances of the pro se defendant in Mayberry were the
13 sort of insults that were apt to strike "at the most vulnerable and
14 human qualities of a judge's temperament." Id. at 466 (quoting Bloom
15 v. Illinois, 391 U.S. 194, 202, 88 S. Ct. 1477, 20 L. Ed. 2d 522
16 (1968)). For example, the defendant called the judge a "dirty
17 sonofabitch," a "dirty tyrannical old dog," a "stumbling dog," and a
18 "fool"; said that the judge was running a Spanish Inquisition; and
19 told the judge to "Go to hell," and to "Keep your mouth shut." Id.
20 Accordingly, the Mayberry Court held that, under the circumstances in
21 that case, the defendant "should be given a public trial before a
22 judge other than the one reviled by the contemnor." Id.

23 In Petitioner's case, neither Petitioner nor Judge Yaffe behaved
24 like the antagonists in Mayberry. The record shows that Judge Yaffe
25 gave Petitioner ample warning about possible contempt sanctions for
26 his actions, held a lengthy trial on the issue, came to a moderate and
27 reasonable conclusion (acquitting on three charges and convicting on
28 two), conducted the sentencing in a calm and measured way, imposed an

1 appropriate sentence for civil contempt (confinement until Petitioner
2 complies with simple legal orders he has conceded he is capable of
3 complying with), and imposed a statutorily proper fine for criminal
4 contempt (as opposed to the sentence of eleven to twenty-two years in
5 prison in Mayberry). Similarly, Petitioner did not display towards
6 Judge Yaffe the sort of personal vituperation shown by the defendant
7 in Mayberry. Instead, Petitioner simply maintained (as he continues
8 to maintain) his legal position (on disqualification of judges
9 receiving county benefits but hearing cases involving a county) based
10 on which he refused (and continues to refuse) to comply with orders he
11 considers illegal. Petitioner maintains this argument, categorically,
12 with respect to all judges who have ever received the county benefits
13 in question, and has not made any specific and distinct personal
14 attack on Judge Yaffe.

15 Petitioner makes the conclusory allegation that "Judge Yaffe was
16 emotionally involved in vindicating his hurt feelings and anger
17 against Petitioner." [Pet., Addendum to ¶ 7 at 5.] However, there is
18 no evidence in the record that Judge Yaffe showed hurt feelings or
19 anger toward Petitioner, or that he became so "personally embroiled"
20 in the case that he could not preside over the contempt proceedings
21 without bias or an appearance of bias. On the contrary, the record
22 shows that Petitioner, although obstinate and recalcitrant, was not
23 personally offensive or insulting and that Judge Yaffe was patient and
24 professional in dealing with Petitioner while carrying out his
25 judicial duties and vindicating the proper authority of his court.
26 Therefore, Petitioner's claim in Ground Two is also without merit, and
27 state court adjudications rejecting it were neither contrary to nor an
28 unreasonable application of clearly established federal law.

1 **D. GROUND FOUR -- PROSECUTION BY OPPOSING COUNSEL**

2 Under Ground Four, Petitioner claims that he was denied the right
3 to an impartial prosecutor under the due process clause of the
4 Fourteenth Amendment when the contempt claim against him was
5 prosecuted by attorneys who had a financial interest in enforcing the
6 underlying judgment. [Pet. at 6; Pet., Addendum to ¶ 7 at 6-7.] In
7 support, Petitioner cites Young v. United States ex rel. Vuitton et
8 Fils S.A., 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987). In
9 Young, the Court held that when a federal district court decides to
10 try a party for criminal contempt for violation of an injunction, that
11 court may request that the United States Attorney prosecute, or may
12 appoint private counsel to prosecute, but may not appoint counsel for
13 a party that is the private beneficiary of the court order allegedly
14 violated by the contemnor. Young, 481 U.S. at 800-09, 815.¹²

15 Petitioner's case is distinguishable from Young. For one thing,
16 Young involved a federal district court, its inherent authority to
17 initiate contempt proceedings, the application of the Federal Rules of
18 Criminal Procedure in a criminal contempt proceeding, and the Supreme
19 Court's supervisory authority over the federal courts. Young, 481
20 U.S. at 793-809. Petitioner's case involves a state court, and
21 Petitioner asserts a due process violation under the Fourteenth
22 Amendment. However, the Young Court did not conduct a constitutional
23 analysis, or extend its holding to the conduct of criminal contempt
24 proceedings in state courts. Petitioner has not cited, and the
25 magistrate judge is not aware of, any authority for the proposition
26

27 ¹² In contrast to the rule limiting the right to jury trial to
28 serious contempts, the Young Court did not limit this prohibition to
serious contempts. Id. at 809 n.20.

1 that the federal constitution prohibits the prosecution of a criminal
2 contempt proceeding in state court by opposing counsel.

3 Furthermore, as discussed above, Petitioner is in custody on a
4 civil contempt judgment, not a criminal contempt judgment, and his
5 challenge in this habeas corpus proceeding is limited to the legality
6 of the custody for civil contempt. Even in federal court, the right
7 to an independent prosecutor in contempt proceedings recognized in
8 Young, applies only to criminal contempt and not civil contempt. See
9 Portland Feminist Women's Health Center v. Advocates for Life, Inc.,
10 877 F.2d 787, 790 (9th Cir. 1989).¹³

11 Accordingly, Petitioner has not shown that his custody under a
12 state civil contempt judgment violates any federal constitutional
13 right to an independent prosecutor. Therefore, his claim in Ground
14 Four is without merit, and state court adjudications rejecting it
15 were neither contrary to nor an unreasonable application of clearly
16 established federal law.

17 **E. PURPORTED GROUND FIVE**

18 Under "Ground Five," Petitioner states as follows: "Decision was
19 based on an unreasonable determination of the facts in light of the
20 evidence under 28 U.S.C. [§] 2254(d)(2)." [Pet. at 6; Pet., Addendum
21 to ¶ 7 at 6-7.] This does not assert a separate ground for federal
22 habeas corpus relief. At most, it amounts to the contention that
23 state court decisions rejecting Petitioner's other claims were "based
24 on an unreasonable determination of the facts in light of the evidence
25

26 ¹³ A civil contempt proceeding is, in essence, an alternative
27 remedy by which a successful litigant may obtain enforcement of
28 certain kinds of judgments. Witkin, California Procedure, Fourth
Edition, Vol. 3, Actions, § 18. It is therefore appropriate that such
a proceeding be prosecuted by opposing counsel.

1 presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).¹⁴
2 However, as discussed above, the applicable law, and the factual
3 record available to the state courts on reviewing Petitioner's claims,
4 reasonably support the following conclusions: (1) Petitioner is now in
5 custody on civil contempt only, not criminal contempt; (2) Judge Yaffe
6 struck Petitioner's requests for disqualification based on procedural
7 defects and lack of standing; (3) the record does not show that Judge
8 Yaffe was biased when he ordered Petitioner jailed for civil contempt;
9 and (4) the record does not show any impropriety in prosecution of the
10 contempt proceeding by opposing counsel. The state courts' rejection
11 of Petitioner's claims follows from the above conclusions, and
12 Petitioner has not shown that any of those conclusions are based on an
13 unreasonable factual determination. Therefore, Petitioner has not
14 shown that this court should set aside the state courts' adjudication
15 pursuant to 28 U.S.C. § 2254(d)(2).

16 **VI. RECOMMENDATION**

17 It is therefore recommended that the court issue an order: (1)
18 approving and accepting this Report and Recommendation; and (2)
19 denying the petition and dismissing this action with prejudice.
20

21 DATED: June 12, 2009
22

23 /s/
24 CARLA M. WOEHRLE
25 United States Magistrate Judge
26

27 ¹⁴ Like 28 U.S.C. § 2254(d)(1), § 2254(d)(2) limits the power of
28 a federal habeas court to set aside the decision of a state appellate
or habeas court; it does not define a ground for federal habeas relief
based on an unreasonable factual determination at trial.