No. 13-56207

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH HUNT,

Petitioner-Appellant,

v.

TIM V. VIRGA, Warden

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of California
District Court No. CV 98-5280 RHW

APPELLANT'S OPENING BRIEF

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INTRODUCTION

"Habeas corpus is a guard against extreme malfunctions in the state criminal justice systems...." *Harrington v. Richter*, 562 U.S. __, 131 S.Ct. 770, 786 (2011). Such malfunctions are most likely when a criminal prosecution attracts great notoriety and prejudicial publicity that subject a state judiciary to enormous public and political pressure to obtain and affirm a conviction, even at the cost of dispensing with the procedural rights guaranteed the defendant by the Bill of Rights. This is such a case.

Appellant/Petitioner Joseph Hunt (hereinafter "petitioner" or "Hunt") was charged with the murder of Ronald Levin. Under the appellation of the "Billionaire Boy's Club" case, the accusation generated an avalanche of sensational publicity, culminating in a television movie. Hunt's defense at his trial in Los Angeles County Superior Court was straightforward: Levin was not dead, but had absconded to avoid spending his next decade in prison.

On June 6, 1984, the day of his disappearance, Levin, a notorious con-man known to operate through several false identities, including those of doctor and lawyer (ER-IV-1032-33, 1037-43; ER-V-1224), went missing. He was, at the time, free on bail and facing 12 counts of grand theft with enhancements. (ER-IV-1053, 1060-62.) He had just learned that a close associate had agreed to cooperate

with the State against him, and that additional charges were about to be filed. (ER-IV-1065-66.) He spent $10,000 in fees taking a bail lien off his mother's home. (ER-IV-1054-59.) At his residence, there was no direct evidence of foul play: no blood, no bullets, no eyewitnesses, and, most notably, no corpse. (ER-V-1212-13.)

The salient jury issue was thus whether Levin was still alive and well after Hunt supposedly killed him. Hunt's lead counsel, Arthur Barens, was operating under a grave conflict of interest, however, which both had an adverse impact on his performance at trial and deprived Hunt of his constitutional right to effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 446 U.S. 335 (1980); *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, considerations wholly personal to Barens led him to decide that it was in his own interest not to effectively investigate and present the most compelling evidence of his client's innocence, namely, testimony from eyewitnesses who saw Levin alive after his purported murder.[1] Three of these witnesses knew the "victim" personally. One of the latter even spoke to him after the date on which the State claimed that Levin

[1] In fact, yet another sighting witness, who had known Levin personally, later emerged, having identified him in a restaurant on a Greek island before he recognized her and hurriedly fled. (ER-II-285-86, 292.) This witness, however, came forward past the time that Barens could have utilized her to Hunt's advantage. Not so the earlier six.

had been murdered. Having been denied the best evidentiary support for Hunt's defense that Levin was still alive, the jury convicted him of the charged murder.

There can be little dispute that Barens' misconduct in failing to zealously pursue his client's core defense violated the standards of representation demanded by the Sixth Amendment. The remaining issue is whether Barens' woeful performance requires that a new trial be ordered. The prosecutor's closing argument strongly claimed that Barens' omissions in presenting the "Levin-is alive" defense constituted affirmative proof of Hunt's consciousness of guilt, sealing the case for reversal under any applicable standard of review. But the record contains additional and invaluable confirmation of the devastating impact of Barens' malfeasance on the Levin verdict. Hunt was later tried in San Mateo County Superior Court on a charge of murdering a different individual, Hedayat Eslaminia, an accusation which the prosecution attempted to prove through reliance on the evidence admitted against Hunt in the Levin case. In that proceeding, however, the San Mateo jury heard the exculpatory eyewitness testimony the Levin jury had not. The San Mateo jury hung on the Eslaminia murder charge (8-4 in favor of acquittal (ER-III-765)), but, of great moment herein, many of those jurors later attested that they found wholly credible the evidence of the "post-murder" sightings of Levin. Stronger proof of prejudice can

hardly be imagined.

Additionally, unique factors distinguish this appeal from that following a run-of-the-mill denial of habeas relief to a state prisoner. *First*, and critically, this is not a case that simply runs aground on the shoals of the deferential gateway tests of 28 U.S.C. § 2254(d). Section 2254(d) deference to a state-court ruling is conferred only when the "last reasoned decision" of the state court was on the merits. Here, it was not. The relevant California Supreme Court decision was procedural.

Second, there are powerful case-specific reasons to view with skepticism and closely scrutinize the performance of the district court in this matter. The case lingered in the lower court for sixteen years before reaching here. That is largely because, on three previous occasions, this Court was required to act to correct clear errors by the court below. First, it reversed a dismissal on non-exhaustion grounds, *Hunt v. Pliler*, 336 F.3d 839 (9th Cir. 2003), *as amended*, 384 F.3d 1118 (9th Cir. 2004). Second, it granted mandamus and reassigned the case when the district court simply failed to address the matter for years after it was fully briefed by the parties, *In re Hunt*, no. 12-72357. And, third, after the newly assigned judge sought to block appellate review of petitioner's obviously "substantial" Sixth Amendment claim by denying a certificate of appealability, this Court issued

the required certificate.

Whether reviewed under *Cuyler* or *Strickland*, the deprivation of Hunt's Sixth Amendment right to counsel merits habeas corpus relief.

PREFATORY NOTE CONCERNING THE UNCERTIFIED ISSUES

Constrained by limitations on length, this brief will raise solely the certified issue as the basis for relief. In truth, there are multiple alternate grounds for vacating petitioner's conviction. The now-deceased trial judge, Lawrence J. Rittenband, wielded his judicial authority to settle a longstanding personal vendetta against one of Hunt's two attorneys, Richard Chier. (ER-IV-948-50 at ¶¶ 4-6.) Chier, a far more experienced criminal practitioner than Barens, had been appointed (by a judge other than Rittenband) to serve as second counsel in Hunt's capital trial. When Barens, who had initially been retained, also sought court appointment on the eve of trial, Rittenband, who had earlier denied that very request, reversed himself. In doing so, however, he conditioned the appointment, which eventually generated tens of thousands of dollars to Barens, on Barens' acquiescence in Rittenband's prohibiting Chier from presenting any aspect of Hunt's case to the jury (*see* ER-III-612-15).[2] Barens readily agreed to the *quid pro*

[2] In another notorious case, that of Roman Polanski, Rittenband was accused of gross judicial misconduct. The California Court of Appeal stated that it could not decide those allegations on the record before it, but added: "To the

quo (ER-IV-994 *et seq.*), later admitting, "I can't help myself when it comes to money" (ER-IV-944-45 at ¶ 2).

The ban on Chier's participation, announced only four days before opening statements, deeply divided Hunt's counsel (ER-III-606-10, 612-15) and placed his fate in the hands of Barens, even though Barens was admittedly unprepared to assume plenary responsibility for the defense. (ER-III-606-10.) Rittenband also intervened hundreds of times to emphasize inculpatory testimonial evidence and to make caustic comments about the defense theory, witnesses, and evidence. (*See* ER-III-615-18.) Never once, by his own admission (ER-V-1315), did he make such comments in a manner favorable to the defense. Although this judicial misconduct is not raised as a separate and independent ground for relief, the facts concerning it are discussed below when relevant to the Court's consideration of the certified claim.

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extent that these allegations are true – and from the documentary evidence filed with this court, it appears to this court that there is a substantial probability that a court conducting an evidentiary hearing would conclude that many, if not all, are true – they demonstrate malfeasance, improper contact with the media concerning a pending case, and unethical conduct." *See Polanski v. Superior Court*, 180 Cal.App.4th 507, 514, 102 Cal.Rptr.3d 696 (2009).

STATEMENT OF JURISDICTION

A. Statutory Basis of Subject Matter Jurisdiction of the District Court

The district court's jurisdiction was predicated upon 18 U.S.C. § 3231 and 28 U.S.C. §§ 1331 and 2254.

B. Appealability

The district court's judgment is a final judgment appealable under 28 U.S.C. §§ 1291 and 2253(a).

C. Timeliness

The district court's judgment was entered on February 1, 2013. (ER I-141.) Its order denying petitioner's post-judgment motions under Fed. R. Civ. P. 52(b), 59, and 60 was entered on July 9, 2013. (ER I-1.) Petitioner's notice of appeal (ER-III-505) was timely filed on July 10, 2013. *See* Fed.R.App.P. 4(a)(4)(A).

STATEMENT OF BAIL STATUS

Petitioner is in the custody of respondent.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

A panel of this Court granted a certificate of appealability ("COA") on the following issue: "whether trial counsel furnished ineffective assistance by failing to present additional evidence in support of appellant's defense that the victim was

still alive."

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

On April 22, 1987, a Los Angeles County jury found petitioner guilty of first-degree murder (California Penal Code § 187(a)) and robbery (§ 211), and found true a robbery-murder special circumstance (§ 190.2(a)(17)). On July 6, 1987, petitioner was sentenced to life without the possibility of parole. (ER-VI-1461.)

On November 23, 1993, the California Court of Appeal ("CCA") affirmed in an unpublished decision. (ER-II-314.) On March 17, 1994, the California Supreme Court ("CSC") summarily denied review.

On March 22, 1994, the CCA issued an Order to Show Cause ("OSC") in response to the habeas petition that had been filed in conjunction with the direct appeal. The OSC referred the case to the Los Angeles Superior Court ("LASC") to conduct an evidentiary hearing on various issues (commonly called a "reference hearing" in California). On July 12, 1996, the LASC denied relief. (ER-II-276.)

The several subclaims that comprise the certified issue were first raised in a supplemental petition filed in the superior court prior to its ruling. The court declined to reach them, finding the "issues were not within the scope of the OSC."

(ER-I-15 n.2; ER-II-274.)

Petitioner then raised those subclaims in a habeas petition filed in the CCA, which, on January 15, 1998, denied them on the merits. (ER-II-263.) He raised the issues again in a habeas petition filed in the CSC, which, on August 9, 2000, denied it, citing three procedural-default cases. (ER-II-262.)

On June 3, 1998, petitioner sought relief in the Central District of California under 28 U.S.C. § 2254. (CR 1.) Between that date and 2004, petitioner was forced to engage in a "torturous procedural hejira" that ultimately resulted in this Court's rejection of the district court's dismissal of his petition on non-exhaustion grounds. *Hunt v. Pliler*, 384 F.3d 1118, 1120 (9th Cir. 2004). On March 24, 2005, petitioner filed his fourth amended petition (ER-III-575), which became the operative petition (*see* ER-I-16). It included the subclaims that make up the certified claim herein. (ER-III-585-88, 590-92, 594-99, 602-03.) Pursuant to a court order, he also filed that day a supporting "Detailed Statement of Factual Allegations." (CR-191.) After the State filed a motion to dismiss (CR-202), the magistrate judge issued a report and recommendation, which, *inter alia*, concluded that the procedural citations in the CSC's denial were not "independent and adequate" grounds such as could bar federal review. (ER-I-166-69.) The district judge denied the State's objection to that conclusion. (ER-I-155-56.)

On August 1, 2008, the State, through the respondent, filed an Answer. (ER-III-506.) Respondent disclaimed therein the need to conduct an evidentiary hearing as to the credibility of the declarations submitted in support of the petition, solely expressing an interest in providing "additional … argument." (ER-III-521-22.)

After this fully briefed matter languished for four years before the magistrate judge to whom it had been referred by the district court, on August 2, 2012, this Court granted petitioner's mandamus petition (*In re Hunt*, no. 12-72357, doc. 11), ordering revocation of the reference to the magistrate judge and directing the district judge to decide the case within six months. Shortly thereafter, the Court, *sua sponte,* reassigned the case to a different district court judge.

On February 1, 2013, that replacement judge denied relief. (ER-I-141.) On July 9, 2013, he denied several post-judgment motions filed by petitioner, including one seeking the issuance of a COA. (ER-I-12.) Hunt filed a notice of appeal the following day. (ER-III-505.) On June 23, 2014, this Court granted a COA on the Sixth Amendment issue presented for review herein.

B. Statement of Facts

The district court's denial contains a lengthy quotation of the CCA's

statement of facts in its opinion on direct appeal. (ER-I-19-32.) That appellate decision, of course, antedated the presentation to the California courts of petitioner's subclaims on state habeas which are now before this Court. Accordingly, the quoted statement of facts was not written to provide context for the present claim. A more relevant statement of facts, *i.e.*, one directed to prejudice analysis on the certified issue, would include the following:

1. The Central Trial Issues

Hunt, then 24 years old, assembled several of his business associates in what would later be dubbed by the media as the "Billionaire Boys Club" ("BBC") and told them that he had "knocked off" Levin after forcing him to sign a $1.5 million check to one of the BBC Group's companies, Microgenesis, Inc. (ER-V-1101-04, 1168, 1254-55.) A list authored by Hunt was found at Levin's flat, and it appeared to reflect a series of tasks to be performed in the course of extorting assets from Levin, including killing his dog and digging a pit. (ER-V-1088-98, 1210.)

Construing the list in light of petitioner's claim of responsibility, the police theory as to Levin's disappearance developed. (ER-V-1210-11, 1217, 1220-22.) They theorized that Hunt, a victim of several of Levin's multi-million-dollar scams, had killed Levin after attempting to exact restitution from him. (ER-V-

1130-32, 1228-41, 1373-74; ER-VI-1375-76.) This theory was reinforced after the District Attorney's Office granted immunity to one of Hunt's close associates, Dean Karny. (ER-V-1242-46, 1252-53, 1257, 11260-61, 1267-71.) Karny claimed that he had been present when the list was written and that it represented steps petitioner planned to take prior to the murder of Levin. (*Id.*)[3]

A serious hurdle for the prosecution was convincing the jury that Hunt was telling the truth when he spoke of killing Levin. At least fifteen of the State's witnesses, including Karny, testified that petitioner manipulated them, often through elaborately persuasive, albeit false, stories of accomplishments and derring-do. (*E.g.,* RT 8081-83, 8119-24, 8131-33, 8372-73, 8581-82, 8628-30, 8646, 8816-17, 8876, 8979-80, 9282-85, 9365-67, 9437-38, 9449-52, 9689-91, 9988-89, 10052-53, 10791-93, 11060.) Moreover, petitioner was alibied by two witnesses. (RT 11549-57, 11795-807.)

Two other witnesses, Brooke Roberts and Steve Lopez, testified that the meeting in which petitioner boasted he had "knocked off" Levin was just theater, staged to intimidate a rival faction which was trying to wrest control of

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[3] The list said nothing about killing Levin (ER-V-1267), many of the listed tasks were unexecuted (*e.g.*, the list included killing Levin's dog, who remained alive and unhurt after Levin's disappearance), and none of the assets denoted in the list was taken. (ER-IV-1073-74; ER-V-1093.)

Microgenesis from petitioner. (RT 9923-28, 9932-34, 11574-84, 12968.) Hunt told Roberts and Lopez that the "knocked off" assertion was an opportunistic lie, meant to balk the shotgun-wielding rivals (ER-V-1181-82) long enough to allow a pending multi-million dollar deal to go through (ER-V-1169-80, 1289-99).

Nor were petitioner's fears unfounded. The rival group had their own "to do" list for the planned hostile takeover (ER-V-1291-96, 1300), a fact which they later admitted. (*See* ER-III-589, 593-94.) They burglarized the Microgenesis warehouse, using an acetylene torch to burn its locks (ER-V-1142) and stealing several hundred thousand dollars worth of equipment (ER-V-1135-41, 1183-85).

The State's case as to the believability of petitioner's claims and the meaning of the "to do" list found at Levin's flat soon faced an even greater challenge: six nonpartisan witnesses came forward to report to law enforcement authorities that they had seen Levin alive after his purported murder. The manner in which counsel handled these witnesses, and other available evidence supporting the defense that Levin was still alive, forms the gravamen of the certified issue.

2. The District Court Decision

The gist of the district court's denial with respect to the certified issue is the following:

> The Court has carefully reviewed these claims and has concluded that Petitioner has failed to show that the

> decisions were contrary to, or involved an unreasonable application of, clearly established Federal law or were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The evidence that Petitioner alleges should have been presented to the jury was cumulative, irrelevant, inadmissible, incredible, or unknown to counsel. Also, there were tactical reasons for not presenting this evidence to the jury. Petitioner has not demonstrated that if the jury had heard this evidence, the outcome of the trial would have been different.

(ER-I-39.)

SUMMARY OF ARGUMENT

The factual question at trial was whether the alleged victim was dead or had absconded to avoid prison.

The certified issue centers on attorney Barens' actions with respect to six exonerating eyewitnesses, who came forward to report they had seen the alleged murder victim alive. Counsel shunned these witnesses because he knew the prosecutor was investigating a plot he had reportedly hatched to procure exactly such evidence. The *Los Angeles Times* carried the story of his misconduct, identifying its source as a former co-counsel in the case. The fear of a widening scandal, disbarment, or worse motivated Barens to avoid contact with these eyewitnesses.

Magnifying the effect of counsel's conflict-driven actions was his failure to

investigate the alleged victim's pre-disappearance statements and actions. Although his client was facing the death penalty, Barens did not even begin to investigate until *after* the State rested its case, *i.e.*, approximately two and one-half years after he was retained. As a result, readily available evidence of the "victim's" intent and preparations to jump bail rather than face at least twelve pending grand-theft charges went undiscovered.

The outcome of this appeal will be influenced by five factors.

First, § 2254(d) deference does not apply. The "last reasoned decision" in state court was not "on the merits." Review will therefore be *de novo*.

Second, petitioner need not show counsel's conduct affected the outcome of the trial. Rather, under this Court's conflict-of-interest jurisprudence, he must show that an actual conflict existed in that Barens' conduct had an "adverse effect" on his representation of his client.

Third, the record contains *admissions* from Barens that he made crucial tactical decisions to protect himself. The existence of these admissions renders this conflict claim *sui generis*, and ultimately impregnable.

Fourth, the district court failed to come to grips with the foregoing factors. It improperly gave AEDPA deference to subordinate state-court rulings that preceded the last reasoned decision. It adjudicated the certified issue while acting

as if Barens' admissions simply did not exist. It ignored proof of prejudice in evaluating counsel's ineffectiveness, including admissions from the prosecutor and chief detective; dismissal of murder charges against petitioner's codefendant in the Levin case, Jim Pittman, after the jury deadlocked 10-2 to acquit Pittman in a separate trial informed by a competent defense investigation; and a set of declarations from jurors in the San Mateo case proving the credibility and exonerating impact of the evidence Barens shunned.

ARGUMENT

I. BARENS PROVIDED INEFFECTIVE ASSISTANCE WHEN HE FAILED TO SUPPORT THE DEFENSE HE WAS PURSUING WITH READILY AVAILABLE, COMPELLING EVIDENCE THAT AN UNCONFLICTED AND COMPETENT LAWYER WOULD HAVE PRESENTED

As the district court stated it, "the only significant issue to be resolved by the jury was whether Levin was dead or was in hiding." (ER-I-38.) That the jury believed the former is a testament not to the State's evidence, but to defense counsel's inept and compromised performance.

A. Standard of Review and Reviewability

1. *De Novo* Review of the District Court's Denial

This Court reviews *de novo* a denial of a § 2254 petition. *Deck v. Jenkins*,

768 F.3d 1015, 1021 (9th Cir. 2014).[4]

The habeas subclaims that comprise the certified issue are in Hunt's petition at subclaims 1-1(A), 1-1(B), 1-2(A-F), 1-1.1, 1-1.4, 1-1.7, 1-1.12 through 1-1.18, 1-1.23, 1-2.10, and 1-2.11. (ER-III-585-88, 590-92, 594-99, 602-03.) The district court denied them all. (ER-I-39 & n.8; 52 & n.18; 55; 58; 61-62; 68; 69; 73-77; 86-87, 90-91.)

2. *De Novo* Review of the Claim

AEDPA deference is due only a state-court decision that is an "adjudication on the merits." *See* 28 U.S.C. § 2254(d) (so providing); *see also Cone v. Bell*, 556 U.S. 449, 472 (2009) (merits denial a prerequisite); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) (same).

The last state decision in this case was the CSC's *procedural* denial of August 9, 2000 (hereinafter "the procedural denial"). It stated, in full:

> Petition for writ of habeas corpus is DENIED. (*In re Waltreus* (1965) 62 Ca1.2d 218, 225; *In re Miller* (1941) 17 Ca1.2d 734, 335; *In re Clark* (1993) 5 Ca1.4th 750.)

(ER-II-262.)

Upon the State's motion to dismiss based on an argument that the

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[4] That being so, petitioner need not fully address the errors committed by the lower court. *But see* petitioner's post-judgment motions (CR-262, 263, 264-1).

procedural denial rested on independent and adequate state grounds (CR-202 at 1-5), both the magistrate judge (ER-I-166-69) and district judge (ER-I-155-56) disagreed, finding the state-court order too ambiguous to bar federal review. (*Id.*) In addition, those judges ruled, with the State's concession, that the procedural denial exhausted the claims that were raised following the denial in 1993 of Hunt's direct appeal. (*See* ER-I-187 (magistrate's noting State's concession); *id.* at 3 nn. 2 & 3 (listing claims once deemed unexhausted, but then deemed ripe for adjudication); ER-I-215 (magistrate's original ruling finding equivalent claims in First Amended Petition unexhausted); ER-I-188 (judge's affirming that finding).) The claims deemed exhausted by the procedural denial include the subclaims underlying the certified issue.

A federal habeas court owes no substantive deference to a procedural denial. *See, e.g., Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014) (*en banc*) ("Under AEDPA, an adjudication on the merits is a decision finally resolving the parties' claims that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.") (citation, internal punctuation omitted).

Moreover, and crucially, the procedural denial stripped the "adjudication on the merits" status from the LASC's July 12, 1996, habeas decision and the CCA's

January 15, 1998, decision that preceded it. *See, e.g., Williams v. Beard*, 637 F.3d 195, 213 & n.16 (3d Cir. 2011) (holding no AEDPA deference due state court's substantive resolution of claim where state supreme court resolved issue on procedural grounds).

As this Court held in *Barker v. Fleming*, 423 F.3d 1085 (9th Cir. 2005), only "the last reasoned decision" is relevant to § 2254(d) analysis. *See id.* at 1092-93 (refusing to review state-court decisions "as a collective whole" unless "the last reasoned decision adopted or substantially incorporated the reasoning from a previous decision"); *see also Woolley v. Rednour*, 702 F.3d 411, 422 & n.1 (7th Cir. 2012) (same, citing *Barker*). The "last reasoned decision" that addressed claims coextensive with the certified claim was the procedural denial, as demonstrated by the district court's exhaustion rulings discussed, *supra*. The replacement district judge to whom the case was later assigned in 2012, however, decided that he was, nonetheless, free to "look through" that decision to the prior, substantive decisions of the lower state courts under the method described in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). (ER-I-4-9.) That judge justified this action by construing the procedural denial to be an "unexplained order," that is, one equivalent to the summary denial at issue in *Ylst*. It was, however, anything but.

The procedural denial cited three state-law procedural cases, and nothing

else. *Procedural denials are "reasoned decisions." See Ylst,* 501 U.S. at 799 (treating decision of CCA, which denied claim solely on procedural ground, as last reasoned decision); *Tong Xiong v. Felker*, 681 F.3d 1067, 1075 (9th Cir. 2012) (same). Accordingly, the district court had no authority to "look through" it. *Ylst* defined the term "unexplained denial," that is, the type of denial that *may* be "looked through," as "an order whose text or accompanying opinion does not disclose the reason for the judgment," *i.e.,* a summary denial. 501 U.S. at 802. The procedural denial herein provided its reasons for the judgment.

The fact that subordinate state courts may have reached the merits of the claim does not change the analysis where, as here, the last reasoned decision is on procedural grounds. *Williams v. Beard, supra,* 637 F.3d at 213, is but one of many cases to so hold. *See also Thomas v. Horn,* 570 F.3d 105 (3d Cir. 2009), *cert. denied*, 559 U.S. 1009 (2010) (where state trial court denied two of three claims on the merits, but state supreme court dismissed all three on procedural grounds, only the latter was relevant in determining whether there was § 2254 merits adjudication); *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999) (applying *de novo* review where trial court rejected habeas claim on merits and appellate court issued procedural denial, holding that latter precluded AEDPA deference); *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997) (similar); *Richardson v.*

Hardy, 855 F.Supp.2d 809, 828 (N.D.Ill. 2012) (applying same principle, noting that state trial court's decision on merits became "beside the point" once state supreme court ruled on purely procedural grounds); *Nickerson v. Roe*, 260 F.Supp.2d 875, 891 (N.D.Cal. 2003) ("[S]ection 2254 [does not apply] if the highest state court to offer a reasoned opinion rested its dismissal ... on procedural grounds. This is true even where a lower state court addressed the merits of a claim."), *overruled on other grounds by Lee v. Lampert*, 610 F.3d 1125, 1134 (9th Cir. 2010).

Thus, the procedural denial necessitates *de novo* review of the certified issue. *See, e.g., Morris v. Malfi*, 449 Fed.Appx. 686, 686 (9th Cir. 2011) ("As the last reasoned decision of the state court dismissed his claim on procedural grounds, we review the … claim de novo."); c*ompare Harrington v. Richter*, 562 U.S. __, 131 S.Ct. 770, 784-85 (2011) (presuming, where the CSC issued "one-sentence summary order" denying petition, that it "adjudicated the claim on the merits in the absence of any indication or *state-law procedural principles to the contrary"*) (emphasis added).

Nothing in *Ylst* is to the contrary. There, the CSC issued a denial on the basis of two procedural-default cases, and the Supreme Court "looked through" it to an earlier procedural denial on direct appeal, but it did so only because the

CSC's order was "superfluous," *i.e.,* the petitioner did not have to raise the claim *again* to preserve it for federal review, having already raised it on direct appeal. 501 U.S. at 799, 805. The facts *sub judice* are unlike those in *Ylst*. Here, according to the district court's own findings (ER-I-155, 164, 188, 215), the first and only denial of claims coextensive with the certified claim was the procedural denial. Thus, the procedural denial cannot be termed "superfluous."

Since the "last" and only "reasoned decision" on the certified issue was neither "superfluous" nor "unexplained," but one that imposed state procedural bars that do not foreclose federal review, *de novo* review is required.

B. Background Facts

1. Trial Counsel Arthur Barens

a. Personal Background

At the time he was retained to represent petitioner in his capital case, Barens was primarily a personal-injury lawyer. (ER-IV-868 at ¶ 55.) He was unqualified to try a capital case.[5]

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[5] His incompetence was manifest. (*See, e.g.*, ER-IV-1035, 1052, 1063, 1076, 1078; ER-V-1105, 1256, 1360 (demonstrating complete lack of understanding of hearsay rules); ER-IV-1035, 1079; ER-V-1121, 1166-67, 1218-19 (no understanding of Best Evidence Rule); ER-IV-1049, 1050-51, 1077; ER-V-1099-100, 1112, 1119-20 (no understanding with respect to function and necessity of making offers of proof regarding proffered evidence).

At the time of Hunt's trial, Barens was in Cocaine Anonymous. (ER-III-745; ER-IV-885.)[6] He had been sued over 15 times for professional negligence, and had a horrendous reputation in the legal community, including for incompetence and perjury – as could have been attested to by four highly respected attorneys at the reference hearing. (ER-III-729-31, 746-48; ER-IV-865 at ¶ 46.)[7]

b. Petitioner's Case

Incredible as it may sound in *any* criminal case, let alone a capital one, Barens performed *no* pretrial investigation. None of the prosecution witnesses were interviewed prior to their taking the stand; no defense witnesses were

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[6] To the extent he is able, petitioner includes in the accompanying Excerpts of Record ("ER") copies of all the pages of the three relevant reporters' transcripts – the 1987 Los Angeles trial (ER-IV-970 through ER-VI-1454), the 1992 San Mateo trial (ER-III-749-64), and the 1996 reference hearing (ER-III-630-748) – that he cites herein, which are referenced by their ER page numbers. With respect to the few other cited transcript pages, those are referenced, respectively, as "RT," "2RT," and "HT." Respondent lodged the relevant transcripts in the district court. (*See* CR-238 (Notice of Lodging) at B-D.)

[7] The state hearing court refused petitioner's offers of proof on Barens' professional reputation and specific instances of his perjury, so this Court must assume the truth of the proffered facts. *Lambert v. California*, 355 U.S. 225, 227 (1957). Parenthetically, those rulings were at odds with California and federal precedent. *See, e.g., In re Freeman*, 38 Ca1.4th 630, 42 Cal.Rptr.3d 850 (2006) (holding that attorney character and reputation evidence was highly probative in evidentiary hearing on ineffectiveness); *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004).

unearthed; not a single exhibit admitted at trial was the product of defense efforts. Barens did not obtain, let alone read, the transcripts of Hunt's codefendant's preliminary hearing and trial. He expressly admitted on the record that he could not find the time to even think about the defense case until after the prosecution rested. (*See* ER-V-1273-79; ER-IV-888 at ¶2 (the Roberts, two of the four defense witnesses, retained Barens (the other two were furnished by the police)), 923 at ¶ 2, 928-29 at ¶¶ 22-26, 934-40.) All these facts were alleged by petitioner. (CR-191 at 1-3.) The State never contested any of them. By way of objective contrast, the lawyer who successfully defended codefendant Pittman in a separate trial before a different judge had over 150 witnesses interviewed before trial. (ER-IV-959.)

The actions and statements of the other professionals on the Hunt defense team, that is, those in the best position to assess whether Barens was providing representation that comported with prevailing professional norms, speak volumes. Prior to trial, two attorneys and three investigators were retained by Barens. By the time of trial, *all* of them had concluded that Barens was *not* providing such representation. Four of them withdrew from the case for that very reason. (*See* ER-IV-931-32 at ¶¶ 1, 3, 936 at ¶¶ 1, 4, 939 at ¶ 7.) The fifth, Richard Chier, a certified criminal-law specialist, stayed on as (marginalized) co-counsel, but only

because Hunt begged him to. (ER-IV-946 at ¶ 4.)

Lewis Titus, a former lieutenant in the Sheriff's Office and an experienced capital defense attorney, resigned after the preliminary hearing in 1985, "quite alarmed about Mr. Barens' professional competence and ethics." (ER-IV-931-32 at ¶¶ 1, 3-5.) He found Barens "so poorly versed in criminal law" as to be "dangerous." (ER-IV-933 at ¶ 7.)

John and Martie Jensen, highly experienced guilt-phase investigators,[8] resigned on the eve of opening statements, finding the attorney "supervision of the case [] so unprofessional as to make it impossible ... to do even minimally acceptable investigation." (ER-IV-936 at ¶ 4.) It was the first and last time in their long careers they did so. (*Id.*) They found Barens' unresponsiveness particularly frustrating because they had "a wealth of viable leads" (*id.* at ¶ 6), lost because they could not obtain "the necessary logistical assistance and strategic direction" (*id.* at ¶ 5). Barens would not even return their calls, let alone supply "the factual and documentary support" they needed. (*Id.* at ¶ 7.)

Casey Cohen, a renowned specialist in penalty-phase investigation, who worked on approximately 110 special-circumstance cases (ER-IV-938 at ¶ 1),

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[8] As a team, the Jensens handled over 80 special-circumstance cases and 1,500 "class one felony" cases. (ER-IV-936 at ¶ 3.)

joined the defense team on June 5, 1986 (*id.* at ¶ 2). He quit on March 11, 1987, after concluding that Barens had a "grossly inappropriate and irresponsible orientation ... towards his duties." (ER-IV-939 at ¶ 7.) It was the only time in Cohen's career that he had to quit a case for such a reason. (*Id.*) Succinctly summing it up, Cohen concluded that Barens "did not know what he was doing." (ER-IV-938 at ¶ 5.)

Things went from bad to worse once trial began, in no small measure due to Barens' "grossly inappropriate and irresponsible orientation." He prepared for a trial in which his co-counsel Chier would be an equal participant. They had divided up the prosecution witnesses between them, and Chier was to take the laboring oar with respect to the defense case. (ER-IV-943-45 at ¶ 2, 998, 1007-09; ER-V-1190-95, 1273-79; ER-VI-1381-82, 1459-60.) Although Barens had been privately retained, he became unsatisfied with the fee agreement he had entered, and twice applied to the trial court for state appointment, only to be rebuffed each time. (ER-VI-1455-58.) On the eve of opening statements, he finally secured his appointment by surreptitiously agreeing to the trial court's demand – born of an extrajudicial animosity towards Chier (ER-IV-941-42 at ¶¶ 4-5, 948-50 at ¶¶ 4-6) – that, in exchange for his appointment, Barens would be the only one allowed to speak in the presence of the jury. (ER-IV-994-1019.)

2. The Discovery of the Conflict-Based Claim

In mid-1995, counsel appointed to represent Hunt at the reference hearing was reviewing the prosecutor's files when he discovered a letter dated May 4, 1987, subsequent to the jury's verdict but before sentencing in the Levin case. (ER-IV-921-22.) It was addressed to Barens, signed by the prosecutor, and stated:

> Three more people now claim to have seen Ron Levin alive. Ivan Werner says he saw someone who looked like Levin at a memorial service at the Westwood Village Mortuary in August 1986. He says Levin would have signed the guest book. Mr. Werner's work telephone is ... and his home telephone is .... [A] deputy jailer in Kentucky claims Levin was in his jail a few weeks ago ... and an anonymous female [] said she was at Nippers night club on April 24, 1987 and the owner pointed to a man on the dance floor and said it was Ron Levin[, who] goes there all the time.

(*Id.*)

Petitioner first learned of Werner in 1994 when Werner contacted hearing counsel. (ER-IV-925 at ¶ 9.) Werner had seen a newspaper article about the case. (ER-III-717.) He informed counsel that he had contacted the police years earlier, but nobody had ever gotten back to him. (ER-III 717-18.) Since Hunt and his state habeas counsel had never heard of Werner, they assumed they had stumbled upon a *Brady* claim, in that the prosecution had not delivered the letter-memo to Barens. (ER-IV-862-63 at ¶ 39G-H, 925 at ¶ 9.)

Asked about Werner, attorney Chier and H.K. Lee, the investigator whom Barens hired in the middle of trial, both said that this was the first they had heard of him. (ER-IV-934 at ¶ 3, 945-46 at ¶ 3.) But when Barens was ultimately deposed, he admitted having received the prosecutor's May 1987 letter. (ER-IV-882-83.)

The letter, and its suppression by Barens, raised numerous questions, including: why hadn't Barens interviewed Werner; what were the facts related to the Nippers sighting; and why were these sightings not disclosed by Barens to Hunt, co-counsel Chier, or defense investigator Lee? The investigation triggered by these questions not only answered them, but also uncovered Barens' broader abdication of his duties with respect to other sighting witnesses.

3. The *Los Angeles Times* Publicizes Barens' Plan to Fraudulently Obtain Sighting Witnesses

On November 25, 1986, the parties convened in the judge's chambers. The prosecutor had two bombshells for those assembled. First, two residents of Tucson, Arizona, had reported they had seen Levin in September 1986 (ER-IV-970), both of whom passed polygraph exams administered by the prosecution (ER-IV-982). Second, Lewis Titus, Barens' co-counsel at the preliminary hearing, had reported Barens to the authorities (*see* ER-IV-909-11 (investigator's report)), describing a plan by Barens to procure fraudulent sighting witnesses to report they

had seen Levin in Brazil. (ER-IV-972.) Barens was given copies of the Titus reports. (ER-IV-909-11, 990.)

Barens immediately agreed to a gag order, and his request that the record of the chambers conference be sealed was granted. (ER-IV-984.) When the order was lifted, the story appeared in the *Los Angeles Times*, where the essence of Titus' allegations was printed. (ER-IV-894.)

On December 9, 1986, the prosecutor announced that he did not then expect to call Titus as a witness, but preserved the option of doing so. (ER-IV-992-93.) He added that the Titus report as well as others "may be the subject of future litigation." (ER-IV-991.1)

C. Barens Makes Tactical Choices Adverse to Petitioner's Interests so as to Defuse the Titus Scandal

1. The Arizona Sighting Witnesses

a. The Tactic of "Mimicking" the Police Interview

The first evidence that the Titus allegations were influencing Barens' behavior to Hunt's detriment came some four months after the prosecutor made his veiled threat to prosecute him. The following colloquy took place on April 2, 1987:

> Barens: Your Honor, we are going to make as comprehensive a disclosure to the court as possible. Now I want to be candid in how we are going to

> approach this so you won't have any doubt ... in what we are going to do....[9] The District Attorney and a number of police personnel spent a number of hours with [the Arizona sighting witnesses] and made a tape recording of it.... All I am going to do is take her [one of those witnesses: Carmen Canchola] through the tape recording....
>
> The Court: Aren't you going to take her independently?
>
> Barens: All I am going to do is ask her stuff within the police material which had been given to me.

(ER-V-1317.)

> Barens: Well, Your Honor, let me say one thing clearly. I have never, ever spoken to this witness other than precisely what is on those tape recordings.

(ER-V-1342.)

> Barens: What I have done Judge, I have not even made up my [own] questions. I have used [the prosecutor's] questions and the other police's questions and I am mimicking and reading those questions from the tape.

(ER-V-1343.)

Barens revealed the motive behind his weirdly conceived and oddly pre-announced plan to turn his direct examination of Canchola into a re-enactment of her police interrogation:

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[9] Contrast this with Barens' earlier insistence that his "ethical" obligations prohibited him from foreshadowing the defense via offers of proof. (ER-IV-1068, 1071; ER-V-1199-201.)

> Barens: Your Honor, this is still on the Arizona people subject, Your Honor – well it occurred to me that Your Honor might wish to ask these witnesses some questions. During the polygraph examination, ... they were asked if they knew me or had even spoken to me or Mr. Chier or Mr. Hunt or Lou Titus, or you know, the folks that we know – you know, all kind of stuff.
>
> They said no. They passed the polygraph both times in that regard.
>
> Chier: In all regards.

(ER-V-1318-19.)

b. A Precursor to Disaster: Barens' "Sanitary" Tactics

The next proof of the tactical impact of the conflict surfaced when the judge took great umbrage over Canchola's testimony that she came forward because people were "being tried for a murder that they didn't commit." (ER-V-1331-36.) Although the prosecutor had not objected, the judge was incensed, commenting, "She had no business making a remark of that kind," and inquiring whether Chier had put her up to it. (ER-V-1337.) Barens rushed to his *own* defense:

> Your Honor, let me make that real clear, what transpired here. I met this person on Sunday [March 29, 1987] of this week for the first time in my life....

(*Id.*)

The judge next turned his wrath on the prosecutor, asking, "Why didn't you make an objection to have it stricken as expressing her belief as to guilt or

innocence?" (ER-V-1337.) The prosecutor replied that he saw nothing wrong with the witness' expressing her motivation for going to the police. (ER-V-1338.) Barens, oblivious to the fact that the judge was accusing everyone *but* him, rallied again to his own defense:

> Barens: Your Honor, excuse me, Your Honor made a statement, "Did I put her up to that, or did Mr. Chier?"
>
> The Court: I didn't ask you that. I asked you whether or not you knew anything about what she was going to say.
>
> Barens: I want to make it perfectly clear.
>
> The Court: I will take your word for it. You say no and that is enough.
>
> Barens: [The prosecutor] can tell the Court as to the tape recording, we do have a transcript of the tape recording.
>
> She said almost those exact words on her tape recording on November the 22nd....
>
> The Court: Don't worry when a question comes up, I always take your word for it. I did take your word for that with the charge which was made about your finding a witness in Rio.
>
> Barens: Yes with that Titus business.
>
> The Court. And I believed you. I told you that at that time. This is the reason that I didn't pursue it.
>
> Barens: *I have been real sanitary*, not even calling her or speaking to her until Sunday. Now when I met her Sunday, I told her that *I would not talk to her* except to

> ask her if she had .... [The court cut him off at this point.]

(ER-V-1339-40 (emphases added); *see also* ER-V-1320 ("And I made it a point not to speak to them by telephone or in person or anything else until Sunday of this week when they came to Los Angeles.").)

Likewise, in examining Canchola, Barens actually sought to co-opt her as a witness in *his* defense:

> Barens: All right Ms. Canchola, when was the first time in your life you ever spoke to me, either in person or on the telephone?
>
> Canchola: Not until this Sunday.
>
> Barens: Sunday, three days ago?
>
> Canchola: Yes.
>
> Barens: Prior to that, had you ever spoken to me on the telephone?
>
> Canchola: No, not at all.
>
> The Court: Have you ever spoken to anybody associated with the defense?
>
> Barens: Your Honor, we are getting to that, and –
>
> The Court: Get to it. You are talking about yourself. Let's talk about somebody else that she might have.

(ER-V-1352.)

c. Barens Disparages the Arizona Witnesses

The compulsion that Barens felt to distance himself from the Arizona witnesses was so strong that he disparaged them as "hostile" "to everybody." (ER-V-1320-21; *but see* ER-IV-891 at ¶ 5.) He added that "some of [Canchola's] answers, which I am sure [the prosecutor] will point [out] to the jury, vary at times."[10] (ER-V-1344; *but compare* ER-III-736 (Barens' testifying in reference hearing that Arizona witnesses "categorically [were] truthful in every respect and accurate").)

Thus, Barens, for his own perceived self-preservation, refused to promptly interview exculpatory witnesses and to stray on direct examination from the literal text of the related police interviews. As a result of the conflict generated by the Titus allegations, Barens was so afraid of being accused of ginning up evidence that he refused to ask a question that might elicit an exculpatory response beyond those found in the police-generated transcripts.

Indisputably, Barens made tactical decisions based on his own self-interest rather than his client's. He was daunted by the specter of post-trial proceedings that might lead to professional censure or worse. He was concerned about the

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[10] If there were indeed material inconsistencies, you would never know it from the prosecutor's cross-examination.

press and public's perception of him as a lawyer accused in the *L.A. Times* of plotting to procure a witness to spring his client. When engaged in examining precisely such a "made-to-order" witness, he elevated his own interests over those of petitioner. As will be seen, he did so at great cost to his client.

d. How the Prosecutor Used Barens' "Sanitary" Tactics to Break the Back of the Levin-Is-Alive Defense

The prosecutor made devastating use of Barens' conflict-driven treatment of the Arizona witnesses in his closing argument:

> Now, you have also heard throughout the trial, the notion that cases are not prosecuted in secret and that ... this information ... would have to be immediately disclosed to the defense in this case, which it was. The next week, ... it was disclosed.
>
> So now, put yourself in Joe Hunt's position *and in Arthur Barens' position*. You are innocent of a crime you didn't commit. No murder ever happened.
>
> And now, you are presented with evidence that says that the man you are alleged to have killed is in fact alive in Tucson, Arizona.
>
> You are given that information the 24th or 25th of November of 1986. What is your first reaction? What do you do? What is the very first thing that you are going to do?
>
> You hot-foot it down to Tucson, Arizona with as much manpower as you can muster. You send people all over the city and you find this guy. You didn't kill him and somebody says that he is alive. You are going to get to

Tucson immediately.

You are going to put flyers all over the city. You are going to take out ads in the paper. You are going to put things on television.

It is a life or death situation. Have you seen this man? We have to find this man. It is life or death. My life depends on it.

Do you see a word of that? Nothing. Not one finger was lifted. Not only that, they made a big point in saying they didn't talk to these people until March sometime. That is unheard of.

If you were charged with a crime that you didn't commit, that never occurred, what would you do? You would go there and you would find this guy, whatever it took. You would find him.

We tried to find him. We go to classic car places, wouldn't they?

Wouldn't they go to gay bars? Wouldn't they talk to people in the gay community? Wouldn't they put flyers up at the University of Arizona, across the street from the gas station?

Did they lift one finger? No. They want to come in here and say well, somebody saw an Esquire Magazine [article] and says that is it. Don't cross-examine her. That is enough. It doesn't make any sense. It doesn't make any sense at all.

And if there were any more room, I would put that in big. red letters on the bottom of that chart that says, "Joe Hunt's consciousness of guilt.

(ER-VI-1407-08 (emphases added).)

The next day, the prosecutor revisited his "big red letters" argument, honing it into an even more devastating rhetorical weapon. (ER-VI-1411.)

e. Absent the Prosecutor's Argument That Barens' Conduct Proved Petitioner Knew They Were Mistaken, the Arizona Witnesses Would Likely Have Been Deemed Credible

Carmen Canchola was a 23-year-old college student. (ER-V-1324-27.) Jesus Lopez, also in college and her boyfriend, was a manager at one of several McDonalds' franchises that Canchola's father owned. (ER-V-1353-54.) They reported seeing an impeccably dressed, meticulously groomed man, who was slender, about 6'1" tall, with piercing eyes and slightly effeminate mannerisms, at a gas station near the University of Arizona. (ER-V-1328-30.) Canchola and Lopez were each shown photo lineups totaling 12 photos, and each confidently identified Levin's photo as the man they saw. (ER-V-1345-51, 1355-59.) Their descriptions matched Levin to a "T." (Trial Exs. 152-54, E; ER-III-674-75, 691-92, 725; ER-IV-961; ER-V-1331.) Levin was 6 feet, one and one-half inches tall. (ER-IV-856 at ¶ 24.)

The prosecutor made no headway against Canchola and Lopez on cross. They were exactly what they appeared to be: conscientious, uninvolved witnesses trying to do the right thing. Furthermore, their identifications contained

compelling signs of reliability, right down to Canchola's observation that the man had a skin anomaly on his forehead. (ER-IV-815 at ¶ 17; ER-V-1329.) As was established at a later trial, Levin had a scar at that precise location (ER-IV-815 at ¶ 17), but Barens failed to recognize the significance of that critical, corroborating detail.

Had the case been submitted to the jury solely on Hunt's alibi and the testimony of the Arizona witnesses, he may very well have been acquitted, despite the efforts of the trial judge to avoid that outcome (*see* ER-III-615-18). When Canchola and Lopez testified in Hunt's 1992 trial in San Mateo County Superior Court (*see* ER-IV-837 at ¶¶ 2-4), no argument based upon Barens' "sanitary" tactics was available, and the jurors found them quite persuasive witnesses. (ER-IV-815 at ¶ 17 (Juror Creekmore: "I felt Ms. Canchola and Mr. Lopez were very believable. Mr. Lopez did not want to come forward. Ms. Canchola knew a lot of facts [about Levin's appearance] that were not in the *Esquire* article.... The scar was a very important and telling aspect of the identification."); ER-III-786 at ¶ 8 (Juror Sorelle: "I believe [Canchola and Lopez] saw Levin."); ER-III-772 at ¶ 13 (Juror Carsanaro: "Ms. Canchola was a very credible witness.").[11]

[11] The admissibility of these juror findings is a straightforward proposition. (*See* subsection I.E.2, *infra*.)

But for Barens' conflicted and inadequate representation, the Levin jury would likely have acquitted through the *corpus delicti* rule. The jury was instructed:

> No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of the trial.

(ER-VI-1416-17.) The jury was also told that the elements of murder were death and malice. (ER-VI-1418.) The jury would bear in mind that Levin disappeared while on bail and just ahead of the filing of other charges, after otherwise wasting $10,000 taking a bail lien off his mother's home. (ER-IV-1054-57, 1059.) There was also evidence before the jury that Levin was skilled at impersonating other people, having previously established false identities as a doctor, lawyer, and a Rothschild. (ER-IV-1022-33, 1037.) Excluding the statements attributed to petitioner as "admissions made ... outside of trial,"[12] the jury would have weighed an alleged crime scene, that is, Levin's flat, devoid as it was of any direct evidence of foul play. The chief detective on the case himself disclaimed an opinion as to Levin's fate until after he had heard about the statements attributed to Hunt. (ER-V-1203-08, 1220.)

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[12] The "to do" list was comprised of written statements made by petitioner "other than at his trial." (*See* ER-VI-1416-17.)

The "sanitary tactics" that Barens adopted were the very means by which the prosecution discredited the Arizona witnesses and likely avoided an acquittal based upon the *corpus delicti* instruction. *Cf. Summit v. Blackburn*, 795 F.2d 1237 (5th Cir. 1987) (reversing for ineffectiveness, finding prejudice in light of *corpus delicti* rule).

2. How Barens' "Sanitary" Tactics Cost Petitioner an Even Stronger Witness: Louise Waller

Louise Waller presented as an articulate, credible witness. She was a legal secretary for Sidley, Austin, and personally acquainted with Levin. (ER-IV-908.) She called Barens' office at least three weeks before the jury returned its guilty verdict to report having seen Levin in her office building on a weekend in February or March of 1987. (*Id.*) Yet, the first time she was interviewed was on April 22, 1987, the date that the jury returned its verdicts, and the interview was conducted by an investigator working for Pittman, Hunt's codefendant. (ER-IV-907.) Barens' own investigator did not interview Waller until one week later. (ER-IV-899.)

Levin had an office in the suite where Waller previously worked for over a year and a half. (ER-VI-1452-53.) She described him as about 6'2" tall, slim, with prematurely gray hair. (ER-VI-1453.) She was absolutely positive she had seen Levin; she recognized him instantly. (ER-VI-1454.)

Chier called Waller as a witness in the penalty phase.[13] Barens had not told him of Waller until the night before the guilt-phase verdict. (ER-IV-848 at ¶ 3.) Based on his subsequent contact with Waller, Chier was "certain" that he "would have called her ... in the guilt phase" "had [he] been aware of [her] ... prior to the verdict." (*Id.*) Hunt learned of the sequence of events involving Waller long after he was convicted. (ER-IV-862 at ¶ 39H.)

3. Barens Applies His "Sanitary" Tactics to a Fourth Sighting Witness: Robbie Robinson

Robbie Robinson first testified in 1992, during petitioner's trial in San Mateo. He later testified in the 1996 reference hearing in support of petitioner's state-law claim of factual innocence. If it had been up to Chier, Robinson would have been a guilt-phase witness in petitioner's 1987 trial. (ER-IV-848 at ¶ 1.)

Robinson was a police beat reporter for City News Service. (ER-III-674.) He had face-to-face dealings with Levin on at least six occasions. (ER-III-676-77.) In October 1986, Robinson spoke with Levin while waiting in a movie line in Westwood, a subdivision of Los Angeles. (ER-III-678, 685-86.) He testified that he was 100% certain that it was Levin. (ER-III-678-79.) Robinson was aware at

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[13] Petitioner made a motion to replace Barens before the penalty phase. The judge denied the motion, but compromised, removing the limits he had earlier placed on Chier's participation during the guilt phase.

the time that Levin was supposed to be missing, but had not heard that he was supposed to be dead. (ER-III-680.)

Robinson did not come forward until he heard the case was going to the jury (ER-III-683-84), the reasons for which he explained (ER-III-681-83, 706-09). He first appeared on the defense radar screen on Monday, April 20, 1997, at 4:23 p.m., two days before the verdicts, when the prosecutor disclosed his coming forward. The jury was deliberating and the parties were in chambers. (ER-VI-1419-20.) Under such circumstances, California law requires that due diligence be shown by a party if he wishes to move to reopen a case during deliberations upon the discovery of new evidence. *People v. Frohner*, 65 Cal.App.3d 94, 110, 135 Cal.Rptr. 153 (1976).

That Barens, in his handling of Robinson, gave preference to his personal agenda of containing the Titus scandal over the interests of his client is established by the in-chambers discussion prompted by Robinson's surfacing as a potential trial witness. Petitioner was not personally present during the chambers conference related to Robinson. (ER-IV-926 at ¶ 11.)

The record of that conference reveals the following: (1) the prosecutor had allowed a weekend and one full day of jury deliberations to go by without notifying the defense about Robinson (ER-VI-1419; ER-IV-896 (Robinson

reported sighting on April 17, 1987); ER-VI-1404.1-.2 (deliberations began on April 16 at 3:38 p.m.); (2) Chier's first reaction to the revelation of Robinson was to announce a desire to interview him, as any competent defense lawyer would do (ER-VI-1426); (3) the court, however, announced *its* intention to interview Robinson, to which Chier objected, contending that the defense should have the first opportunity (*id.*); (4) the court then expressed its displeasure with Chier's judicial misconduct motions and ordered Chier to be silent (*id.*); (5) Barens immediately acquiesced to both the silencing of Chier and the court's intention to interview the witness, whom neither party had yet indicated an intention to call (ER-VI-1426-27); (6) despite the pendency of the jury's continuing deliberations, Barens granted leave to the prosecution team to finish *its* interview process before notifying the defense "as to the availability of" Robinson, asserting it "appropriate" for them to first "complete their interviews sequentially" (ER-VI-1427-28); (7) Chier rebuked Barens, remarking, "They have had the man for four hours; don't you think it is our turn?" (*id.*); (8) the judge ordered Chier to keep his "mouth shut.... Whisper to [Barens]; don't put it on the record" (*id.*); (9) Barens told Chier, "we will discuss it further after the Judge has an opportunity to speak to the witness" (*id.*); (10) the judge told Barens to use his own judgment, and Barens assented (*id.*); (11) Chier then objected, saying, "your Honor, we don't

consent to your reading that [police] report" (ER-VI-1430; *see* ER-IV-896 (the report)); (12) in response, the judge ordered Chier to shut up and leave the room;[14] (13) Chier refused to leave, saying, "You are going to have to arrest me.... I have a right to be here in this matter concerning my client's life" (ER-VI-1430-31); (14) the judge ordered the bailiff to eject Chier, remarking that he would prefer it be done "forcibly" (*id.*); (15) Barens *apologized* for Chier's objection (ER-VI-1430) and later *withdrew* it (ER-VI-1440); (16) Barens made no objection to Chier's removal (ER-VI-1431); (17) with Chier gone, Barens suggested that the prosecutor run Robinson's rap sheet (*id.*); (18) next, Barens blessed the prosecutor's handling of Robinson, stating, "For the record, I think your office has proceeded legitimately throughout this matter" (*id.*); (19) yet to receive the discovery on Robinson, Barens further announced, "*I don't want the D.A.'s Office to think I am trying to make an issue out of this*" (ER-VI-1432), and then made two other remarks to the same effect (*id.*); (20) Barens described the Robinson sighting as "something that appears disconcerting at this juncture" (ER-VI-1432); (21) Barens then suggested that Robinson "be represented by counsel" (ER-VI-

[14] Earlier in the trial, the prosecutor had objected to the judge's seeing a police report related to the Arizona witnesses, without any remonstrance from the judge. (ER-IV-991.1-.2.)

1433);[15] (22) Barens offered no objection when the judge ordered Robinson not to speak to defense counsel unless he permitted it (ER-VI-1438); (23) Barens announced that he could not decide whether to call Robinson before he interviewed him (ER-VI-1439; *but compare* ER-VI-1444 (the following morning, Barens announced, before he interviewed him, that he will not call Robinson)); (24) Barens then agreed with the prosecutor that the jury should be instructed to disregard anything they had heard about Robinson (ER-VI-1445-46); (25) Barens asked to go off the record to explain his reasons for not wanting to talk to Robinson, despite the fact that he had not yet received the discovery on him (ER-VI-1447); (26) the prosecutor insisted they go back on the record (*id.*); (27) when the prosecutor indicated that he may decide to call Robinson to debunk him, Barens objected, saying, "now that compels me that I would have to do an interview on this man and a background check with this man and spend a lot of time with this man and dignify this man in a manner that I may not choose to do so" (ER-VI-1448-49); (28) a minute later, Barens further revealed his state of mind: "[Because that compels me to] encourage him further by being able *to tell people he has met with defense counsel* and all of that sort of thing." (ER-VI-1450

[15] Earlier in the trial, Barens had complained about how witnesses that were "lawyered up" (as he put it) were difficult to contact and interview. (ER-V-1193-94, 1196-97, 1276.)

(emphasis added)).

By 11:00 a.m. the next morning, Barens would advise the court that he would not call Robinson as a witness. (ER-VI-1447.) Yet, Barens would not receive copies of the police reports or polygraph exam on Robinson until two hours *later*. (ER-VI-1447.) Strikingly, neither Barens nor anyone else for the defense ever interviewed Robinson. (ER-IV-926 at ¶ 11, 946-47 at ¶ 4; ER-VI-1430-31.)

The fact that Barens dreaded any contact that would allow Robinson to tell others "he has met with" Barens demonstrates that factors other than the effective defense of his client were motivating his decision not to interview Robinson. He most certainly was not acting as must an advocate in a death-penalty case, scrutinizing the prosecutor's conduct to gain legal advantage, conscious of the fact that the jury might come in with a verdict at any moment, loathe to do anything that could be interpreted as a waiver, sensibly unwilling to make decisions absent knowledge of the available facts, and eager to capitalize on the emergence of a potentially outcome-determinative witness.

Post-trial, Chier reviewed the testimony of Robinson at the reference hearing and concluded that he would have called Robinson as a witness if he had been the one to decide. (ER-IV-848 at ¶ 1.) Chier recalled "wanting to ask for a

stay of deliberations while the Robinson matter was investigated." (ER-IV-946-47 at ¶ 4; *see also* ER-VI-1426 (Chier's desire to interview Robinson); ER-IV-934 at ¶ 2 (Chier's telling investigator that Levin sightings were "the highest investigatory priority").) Chier was "troubled when [he] learned that Barens had waived the right to interview or call Mr. Robinson without ever interviewing" him. (ER-IV-946-47 at ¶ 4.)

As a result of Barens' conflicted representation, petitioner lost yet another sighting witness, one completely independent of the Arizona witnesses and, this time, one personally acquainted with Levin who actually had *spoken* to him. The harm to petitioner, though obvious, is rendered incontrovertible by the impact Robinson had on the San Mateo jurors. (*See* ER-III-773 at ¶ 16 (Juror Carsanaro: "Mr. Robinson was a critical defense witness because he was very credible."); ER-III-783 at ¶ 8 (Juror Sorelle: "I felt Ron Levin was outrageous and brazen enough to approach Mr. Robinson ...."); ER-III-792 at ¶ 9 (Juror Morrow's averring that Robinson added to reasonable doubt); ER-IV-797-98 at ¶ 5 (Juror Saperstein's averring that the Robinson sighting had value because Robinson both saw and spoke to Levin); ER-IV-815 at ¶ 16 (Juror Creekmore: "Mr. Robinson was ... credible.").)

4. Barens Gives Yet Another Sighting Witness, Ivan Werner, the "Sanitary" Treatment

As previously noted, the prosecutor informed Barens by letter dated May 4, 1987, that three additional, potentially exonerating eyewitnesses had contacted his office. (ER-IV-921.) Petitioner had been convicted two weeks earlier, on April 22, 1987. Crucially, neither Chier, petitioner, nor investigator Lee was shown the May 1987 letter nor told of Ivan Werner, one of the sighting witnesses named in it. (ER-IV-862 at ¶ 39G, 934 at ¶ 3, 945-46 at ¶ 3.)

Werner, a funeral home director, saw Levin at a service held in 1985 or 1986. Levin and two or three other people arrived early, which gave Werner a chance to closely observe him. (ER-III-711-12.) The man Werner would later identify as Levin looked like "a diplomat." (ER-III-723.) Werner described him as being 6'1" or 6'2" (ER-III-721-22); with silver gray hair, "almost white" (ER-III-722); and effeminate in speech (ER-III-724). While they were speaking, Werner noticed yellow gold fillings in the man's back teeth. (ER-III-719-20.) Levin had gold fillings in 20 of his 30 teeth. (ER-IV-1075.)

In 1987, Werner saw an article on Hunt's trial; it was either ongoing or recently concluded. The article included a photo of Levin. (ER-III-714, 717-18.) Werner immediately called the police. Seven to ten days later, an officer called back and Werner related his information. The officer said that the police would

look into it, but Werner heard nothing further until 1994, when he saw something in the newspaper about the case and called petitioner's habeas attorney. (ER-III-715-17.)

The prosecutor was certain the letter of May 4, 1987 (ER-IV-921) was sent to Barens (ER-III-728); Barens admitted receiving it (ER-IV-882-83). Yet, he never contacted Werner. (ER-IV-913-14 at ¶ 2.) Barens was told of Werner in time to interview him and present him as a witness in support of a motion for new trial, but he failed to do so. Chier would have added Werner to the grounds for that motion. (ER-IV-945-46 at ¶ 3.)

5. Barens' "Sanitary" Tactics Result in the Complete Loss of the Opportunity to Investigate the Nippers Nightclub Sighting

Also mentioned in the May 1987 letter was the fact that Levin was seen at a nightclub called "Nippers." (ER-IV-922.) This sighting proved incapable of development due to the passage of time (ER-IV-857 at ¶ 29), the result of Barens' withholding the relevant information from the defense investigator (ER-IV-934 at ¶¶ 3, 5).

Every "sighting" that was reported came from otherwise disinterested witnesses, in sharp contrast to the immunized, distinctly interested BBC witnesses whom the State called. Every report turned out to have a substantial basis, save

one, *i.e.*, the "Kentucky" sighting (ER-IV-934-35 at ¶ 6). None of the sightings was recanted. None was refuted by hard evidence or other percipient witnesses. The Nippers sighting might well have been of equivalent value.

6. Barens Gives the "Sanitary" Treatment to Nadia Ghaleb

Nadia Ghaleb is yet another sighting witness whose potential value was lost as a result of Barens' Titus conflict. Barens admitted in his deposition that he was aware in 1987 of her exonerating report. (ER-IV-879-80.) Her first interview was performed by an investigator working for Jim Pittman, petitioner's codefendant, on May 11, 1987. (ER-III-740; ER-IV-870.) The report of that interview was supplied to someone working on Hunt's defense team within a "week or two." (ER-III-738-40.) That "someone" was Barens. As noted, he admitted seeing the report, while Chier was not apprised of the sighting at all (ER-IV-848 at ¶ 2). Petitioner did not learn about the Ghaleb interview until his post-conviction attorney obtained a copy of it years later from Pittman's attorney. (ER-IV-857 at ¶ 29.) Likewise, petitioner's defense investigator never heard of Ghaleb. (ER-IV-934 at ¶ 5.)

Barens admitted that he never interviewed Ghaleb. (ER-III-737.) His recollection was that he had heard of her during the penalty phase. (*Id.*)

Ghaleb was the maitre d' of Mr. Chow's, a celebrated restaurant in Los

Angeles in the early 1980's. (ER-III-690.) She also had held positions in public relations, and in hotel and restaurant management. (ER-III-688-89.)

The last time that Ghaleb saw Levin was shortly before the March 21, 1987, death of her close friend, Dean Paul Martin (Dean Martin's son). (ER-III-695, 698.) She had extensive contact with Levin over a period of 11 years. (ER-III-687, 693, 699-700.) She described him as "prematurely gray ... a striking feature. He was always well dressed ... on the tall side ... thin.... He had that very distinct face." (ER-III-692.)

She was in her car heading east on San Vincente Boulevard in the Westwood area of Los Angeles. (ER-III-694.) The traffic was congested and her car was moving slowly. It was about 8:30 a.m.:

> I was kind of traveling in stop and start traffic, and I looked over and I saw Ron Levin getting into a car and remarked to myself that, "There is Ron Levin. I haven't seen him for awhile." And it was one of those moments that evoked an era in my life. I just kind of thought about him in that period throughout the rest of my drive to work.

(ER-III-695.) Ghaleb had her eyes on Levin for 2-4 seconds. (ER-III-703-04.)

Ghaleb was watching the news of Dean Paul Martin's death on television when "they flashed this picture of Ron Levin. I was so surprised.... I looked at my assistant, I said: 'I can't believe this. This guy is not dead. I just saw him.' "

(ER-III-696.)

Ghaleb had 20/20 vision (ER-III-697) and was certain that she had an adequate opportunity to make a positive identification of Levin: "I clearly saw Ron Levin." (ER-III-701.) She recalled seeing his whole face. (ER-III-702.) She described Levin as "a very distinctive looking person," and never saw anyone else who looked like him. (ER-III-705.)

Again, the value of yet another independent sighting from an individual who personally knew Levin is plain not only in the context of the State's overall burden of proof, but also in the high probability of the jury's resolving the *corpus delicti* issue in petitioner's favor. (*See* ER-IV-815 at ¶ 15 (Juror Creekmore: "[S]he was sincere. On balance, she helped the Defense."); ER-IV-797 at ¶ 5 (Juror Saperstein: "I was convinced that she could see and recognize Ron Levin under the conditions she described. I found Ms. Ghaleb to be credible and I took her sighting seriously."); ER-III-783 at ¶ 8 (Juror Sorelle believed Levin was alive, citing Ghaleb as one of the "credible witnesses" leading her to so conclude); ER-III-773 at ¶ 15 (Juror Carsanaro: "I believe it is very possible to identify someone that you know in the matter of seconds as Ms. Ghaleb indicated.").

7. Other Exonerating Witnesses May Have Been Lost as a Result of Barens' Conflict

Barens ignored Werner; buried the Nippers' information; procrastinated

Waller into guilt-phase irrelevancy; feared contact with Robinson and thus eschewed the only objectively reasonable vantage point to assess his value as a guilt-phase witness; adopted his "sanitary" protocol with the Arizona witnesses; and suppressed the Ghaleb information, precluding her inclusion in the new-trial motion. So much of the foregoing came to light only because of Werner's persistence. If others did call Barens to report seeing Levin, one can be certain that Barens deflected them.

D. Barens Failed to Investigate and Introduce Evidence Beyond the Sighting Witnesses in Support of Petitioner's Defense That Levin Was Still Alive

1. Oliver Holmes

Barens neither interviewed nor called as a witness Oliver Holmes. Holmes, a former attorney, was Levin's friend and legal aide. (ER-III-630-36; ER-IV-964-65.) In early 1984, after Levin's arrest on 12 grand-theft charges, he sought Holmes' advice. Holmes told him he was "in serious trouble." (ER-III-635-36.) Levin specifically wanted to know whether an American could avoid extradition through bribery (ER-III-639-41, 647), remarking too that his own research had indicated there was a moratorium that preempted extradition from Brazil (ER-III-649-50).

On the day before his disappearance, Levin demanded that Holmes return

the key to Levin's house that had enabled Holmes to work on Levin's criminal case. (ER-IV-964-65.) Holmes had that key for months. (ER-III-642.) Levin made up a lie about his maid's losing his house keys to explain the demand. (ER-IV-965.) Levin was agitated. He had just learned that a close friend had betrayed him by providing information to the authorities. (ER-III-644, 647-48.) Taking the key, Levin said he might change his plans and leave for New York that very evening, *i.e.*, June 6, 1994. (ER-III-642-43, 646.) The last fact was significant because the prosecutor called two witnesses to testify that Levin had made plans to go with them to New York on the following day, but had stood them up. (ER-V-1370 (prosecutor's summation); ER-IV-1021, 1064.)

Barens was aware of Holmes. There were two multi-page, stand-alone police interview reports on him. (Hearing Exs. 216, 240.) Barens admitted seeing them. (ER-III-731.1-.2.) The prosecutor testified he disclosed all the discovery. (ER-III-726-27.) The Jensens, then the defense investigators, were aware of Holmes, and were tasked to interview him (ER-III-741-42; ER-IV-969), but they quit before doing so on account of Barens' bizarre behavior (ER-IV-936-37).

Thus, Barens did not make a reasoned decision to ignore Holmes, nor did he lack sufficient information to justify a decision to interview him. Rather, he failed to have interviewed a witness that was known by him to possess favorable

information – but a piece of his grossly incompetent management of the *entire* defense investigation. (*See* ER-IV-936-37.)

Although the Holmes police reports did not mention Levin's telltale interest in Brazilian extradition treaties, they did cover the other facts favorable to the defense theory that were described, *supra,* namely, that Levin had learned that a close friend had "dimed" on him in his criminal case, that he stated he might leave that very night for New York, and that he urgently demanded the return of his house key. These facts alone warranted the pretrial defense interview of Holmes that did not occur.

Although evidence of Levin's *motive* to flee was adduced at trial, there was *no* evidence of his making actual preparations to do so. The testimony of Holmes (and the other uncalled witnesses, John Duran (*see* subsection I.D.2, *infra*) and Karen Marmor (subsection I.D.3, *infra*)) would have revealed Levin's preparations to "go on the lam" – last-minute and highly provocative evidence. The trial record contains nothing remotely similar.

Again, the San Mateo jurors, who heard Holmes testify, reveal just how he would have affected the trial jury:

> Mr. Oliver Holmes testified that Levin had described to him how he had been researching the extradition treaty between Brazil and the United States. This had a big impact on me. Mr. Holmes even said that Levin had

> called the State Department to find out when the treaty went into effect, apparently being told that it did not do so for about a year. This was proof to me that Mr. Levin had been considering fleeing for sometime. I believe that he ultimately did so.

(ER-IV-826 at ¶ 8 (Juror Achiro).)

Juror Saperstein described Holmes as "a witness that helped change his mind [about petitioner's guilt]." (ER-IV-806 at ¶ 19.) Juror Carsanaro described Holmes as a "key witness." (ER-III-772 at ¶ 11.) Juror Creekmore found Holmes' testimony about Levin's research to be "glaring evidence of Levin's intentions [to flee]." (ER-IV-816 at ¶ 19.) Juror Sorelle described at length the powerfully exculpatory inferences she drew from Holmes' testimony. (ER-III-780 at ¶ 6(E)(3).)

2. John Duran

John Duran was Levin's longtime hairdresser. (ER-IV-961.) Levin visited him every two weeks throughout their relationship that had spanned some 12 years. (*Id.*) Duran was startled when, on the occasion of Levin's last visit to his hair salon, Levin inquired about dyeing his hair and beard brown. (*Id.*) Duran was shocked because he understood that Levin considered his gray hair to be his most striking feature. (*Id.*) Duran tried to talk Levin out of it. (*Id.*) When Levin remained adamant, Duran reluctantly offered to do it for him. (*See* ER-IV-829-31

at ¶ 11.) Levin refused the offer, but called back just before his disappearance, at which time he sought and obtained detailed instruction on how to dye his hair and beard. (ER-IV-961-62.) Testimony at trial established that brown stains were found in Levin's bathtub, which the police determined was not blood. (ER-V-1213.)

Absent Duran's testimony, the jury had no basis to draw the reasonable inference that Levin had dyed his hair just before fleeing, staining his tub in the process. As with Holmes, Barens was aware of the need to interview this witness. Petitioner gave Barens a memorandum dated July 31, 1985, which urged him to interview Levin's "Hairdresser." (H.Ex. 283.) Evincing Barens' knowledge of the significance of the issue, he (ineffectually) questioned Levin's maid about whether Levin dyed his hair. (ER-IV-1020.)

Again, there was no investigation in this case until after the prosecution rested its case-in-chief, a scant three weeks before conviction. (CR-191-1-3, 69-70; ER-IV-923 at ¶ 2, 928-29 at ¶¶ 22-26, 934-40; ER-V-1273-79; ER-VI-1381-82.) As a result, the jury neither heard that, on the eve of his disappearance, Levin was researching extradition treaties after learning that a close friend had turned state's evidence against him, nor that he was then making uncharacteristic, unprecedented inquiries about altering the color of his hair. The San Mateo jurors

could not have been clearer about the probative value of Duran's testimony.[16]

3. Karen Marmor

A third significant witness that Barens' non-investigation cost the defense was Karen Marmor, the wife of a prosecution witness, Leonard Marmor. Ms. Marmor lived next door to Levin. She was a former bank operations officer. (ER-III-651-54.)

She described Levin in the same manner as did all the sighting witnesses: tall, lean, meticulous, the best clothes, beautiful silver hair and beard, very intelligent, and very sophisticated. (ER-III-655-56.)

On an occasion, which she estimated as being about two to seven days before Levin's disappearance, Levin hailed Ms. Marmor as she was leaving her apartment, urgently asking her to come inside his place. (ER-III-657-58, 664-65.)

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[16] Juror Achiro described Duran's testimony as "powerful evidence" that helped convince her that "Levin had altered his appearance to make good his escape." (ER-IV-829-31 at ¶ 11; *see also* ER-III-751-57.) Juror Saperstein: Duran was "very important." (ER-IV-803 at ¶ 12.) Juror Sorelle: Duran "really swayed me. He was a very believable witness and very informative.... He was a very important witness." (ER-III-782-83 at ¶ 7.) Juror Carsanaro: "Mr. Duran was a very important witness." (ER-III-771-72 at ¶ 10.) Juror Creekmore: "I could not understand why Levin would want to [dye his hair] at home, it just wasn't his style.... [Duran's testimony] made me think, 'What is this guy planning?' " ... Detective Zoeller had seen a brown stain in the bath tub [*see* ER-V-1213] ... Given that Levin called Mr. Duran right before he disappeared it stands to reason that this was hair dye." (ER-IV-813-14 at ¶ 14.)

This was the last time she saw him. (ER-III-673.) He was very upset. (ER-III-659.) He said someone had just threatened him (ER-III-666-67) and told her that he was going to New York and might not return. She did not know how to take this because, with Levin, one never knew if he were serious or not. (ER-III-669-70, 672.) However, Levin seemed serious when he emphatically stated that he would not go back to jail, telling her that "you have no idea what they do to you in there." (ER-III-657.)

Their conversation was interrupted by Levin's talking on the telephone to someone about transferring money, possibly overseas. Waiting, Ms. Marmor picked up some yellow legal paper that was on Levin's desk. It was titled, "To Do" (ER-III-660) and said something about "kill dog" and "handcuffs." Levin pulled it away from her. (ER-III-660-61.) She then briefly examined what Levin told her was a script. Levin said that the list and the script were both parts of the same movie project that he was working on. (ER-III-662-63, 668-69.) The script had something to do with a trip to New York and a disappearance amidst a fake murder. Ms. Marmor did not have a clear recollection of the elements of the plot. (ER-III-671.)

There is little doubt that the "to do" list that Karen Marmor saw, with its references to "kill dog" and "handcuffs," was the selfsame "to do" list that was

found by Levin's stepfather in August 1984 at Levin's home (*see* ER-V-1088-90) and which became the centerpiece of the prosecution's case against petitioner. Not only was this list singled out by the trial judge, who, *sua sponte*, ordered distribution of individualized copies to each juror (ER-V-1118; ER-VI-1402), but the prosecution made billboard-sized posters out of it and the chief prosecution witness Dean Karny expounded from the stand for hours about its putative meaning. The prosecutor made much use of it in his closing arguments. (*E.g.*, ER-V-1371-72; ER-VI-1412-15.)

Ms. Marmor's testimony about having seen the list in Levin's control contradicted the truthfulness of what Karny alleged petitioner had told him about its purpose and use, namely, that petitioner wrote and used it in furtherance of a plan to rob and murder Levin. (ER-V-1242-43.) Karny also testified that petitioner still had the list at about 6:00 p.m. on June 6, 1984. (ER-V-1247-49.) If petitioner's jury had heard Ms. Marmor's testimony and given it any credence whatsoever, it *alone* would have been a sufficient basis for a reasonable doubt about petitioner's guilt.

Barens conceded in his reference-hearing testimony that someone on the defense team should have interviewed Len Marmor as he was Levin's *next-door* (ER-IV-1047) neighbor. (ER-III-732-33.) Barens also agreed that it "was

probably important" to interview Levin's neighbors. (ER-III-734.) Karen and Len Marmor were presumptively the most important neighbors not only because of their proximity, but also because Len was the only neighbor testifying for the prosecution, and he presented himself as Levin's closest confidant. (ER-IV-1044-48.)

Beyond that, however, petitioner, while housed in county jail, prepared a memorandum for Barens. (ER-III-743-44; H.Ex. 244.) It stated: "Lenny Marmor. Lenny was a frequent visitor to Levin's house. Lenny's wife hates Levin and knows where the skeletons are...." (H.Ex. 244 at 8.)

Thus, though understanding the importance of interviewing Levin's neighbors, Barens never did so. Once again, the San Mateo jurors, who heard the testimony of the defense witness bypassed by Barens, establish the gravity of that loss. Juror Creekmore:

> [Karen Marmor was] very important. I accepted her testimony.... I saw her as being fair and neutral.... I believed Karen Marmor [over Dean Karny]. It was an easy choice: a former bank officer vs. an immunized and self-admitted perjurer....

(ER-IV-812-13 at ¶ 11.) Juror Achiro: "Possibly the most important witness on the issue of what happened to Ron Levin was Karen Sue Marmor. She was great!

... [S]he was very straightforward...." (ER-IV-826 at ¶ 9.)[17]

4. Evidence That Levin Had a Half-Million Dollars to Fund His Flight

In its closing, the prosecution made much of the fact that some funds – up to $40,000 – were located in Levin's accounts after his disappearance, asking why a person who absconded voluntarily would do so without taking with him all the money he could. (ER-V-1364-69.) Had the jury been presented with evidence that Levin had available to him much larger sums of money that could not be accounted for in the wake of his disappearance, the prosecution's rhetorical flourish would have an obvious rejoinder. A con man who absconded with very substantial ill-gotten gains would leave a much smaller amount behind precisely to convince law enforcement authorities he had not voluntarily fled. Barens, however, failed to present ample evidence regarding Levin's illicit sources of income and a missing $500,000 that would have supported the defense that Levin was a fugitive, not a corpse.

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[17] *See also* Juror Saperstein: "I believed Karen Marmor.... Her testimony added to the reasonable doubt that I came to believe." (ER-IV-795-96 at ¶ 4.) Juror Morrow described Ms. Marmor as one of the "most significant witnesses on the Levin case," finding her credible. (ER-III-790-91 at ¶¶ 4-5.) He added: "I felt [Ms. Marmor] was a very credible witness on the stand.... [She] was a big factor in the deliberations and in my thinking." (ER-III-792-93 at ¶ 10.) Juror Carsanaro: "Ms. Marmor was "a very credible witness." (ER-III-770 at ¶ 6.)

In the state habeas proceedings, petitioner presented proof that, in 1983 and 1984, Levin defrauded Progressive S&L of $157,000, Merrill Lynch of $107,126, BPF Travel Company of $26,831, Thomas Cook Travel Company of $45,000, insurance companies of $500,000, camera companies of $700,000, and a medical doctor of the better part of $1.3 million. (CR 238, Lodgment D; CR 191 at 12-13.) The relevant facts and witnesses could easily have been developed by reviewing the file of Levin's conservator, who testified at the subsequent trial of Jim Pittman, petitioner's codefendant. (ER-IV-958.) The State never specifically disputed the adduced proof or the allegations based thereon, either in state or federal court. (CR 238, Lodgment J; ER-III-506 *et seq.*)

Indeed, the State essentially conceded the gravamen of this subclaim when it filed an expert reevaluation of the conservator's financial records in light of the evidence petitioner presented on habeas corpus. This expert concluded that the evidence disclosed $500,373.92 in "unexplained transfers" out of Levin's account. (ER-III-748.1-.2.) This sum was withdrawn from the Levin accounts that the conservator knew about, but was not paid to any traceable third party.

Although the probative value of Levin's missing $500,000 is plain on its face, a San Mateo juror made it even plainer, stating that the "money Levin left behind ... was not so much to be material to him" because Levin " took in close to

one million dollars in the 18 months before he fled...." (ER-III-781 at ¶ 6(E)(6).)

The evidence that Barens failed to develop would have supported an inference that Levin fled with (at least) the missing half-million. In the absence of this evidence, the prosecutor could and did argue persuasively that the money left in Levin's account proved that he was a victim of foul play.

5. The American Express Card Transaction

John Reeves worked for the security division of American Express and testified for the prosecution. He reported, *inter alia*, that Levin had a balance owed on his credit card of nearly $50,000 when he disappeared. (ER-V-1086-87.) Levin had charged nearly $24,000 in the previous month. (ER-V-1085.) There were scores of charges, but one deserved and received special attention – the June 7, 1984, charge at a Los Angeles Brooks Brothers clothing store for $83.07 (ER-IV-1081) on an American Express Card with the last five digits of 82028 (ER-IV-1082). That charge post-dated by one day the date on which the prosecution alleged Hunt murdered Levin.

The prosecution's theory was that this transaction actually occurred on *May* 7,1984, when Levin made three other charges at Brooks Brothers. (ER-IV-1081, 1083.) Responding to the prosecutor's leading questions, Reeves testified that the June 7th transaction that appeared on the credit-card statement more likely

occurred on May 7th. Because, "[i]n order to produce this date on this document it has to go through a minimum of 2 hands" (ER-IV-1083-84), the June 7th date could "easily" have been a mistake.

Barens admitted that he never looked at the American Express records prior to Reeves' taking the stand. (ER-IV-1067, 1070). As a result, a false picture of the *bona fides* of this June 7, 1984, transaction was presented to the jury, and important evidence that Levin survived the night of June 6, 1984, lost all force and effect.

First, Reeves, for whatever reason, testified incorrectly in Los Angeles. The information transmitted to American Express electronically is *not* retyped by two people. There was, consequently, no possibility of a key-punch error at their headquarters. Reeves admitted this during petitioner's 1992 trial in San Mateo, where he was called as a *defense* witness (ER-IV-841 at ¶ 7(29).) Brooks Brothers' computer network interfaced *directly* into the American Express computer systems. (*See* ER-III-758.)

Second, had Barens actually conducted an investigation, he would have learned that the June 7th date *had* to be accurate. Reeves explained that reference numbers are generated by the merchant. (ER-IV-1080.) The three May 7 transactions had reference numbers which were sequential, but the reference

number for the June 7th charge at Brooks Brothers was 2,965 transactions after the three charges that were made there on May 7th. (*See* ER-III-759-62.) The reference numbers are not inputted manually; the date was not inputted manually either, but derived from the system's internal clock/calendar. (*See* CR 10, Ex. 145.)

Third, had Barens bothered to actually look at the American Express bills, he would have seen that the three May 7, 1984, transactions were grouped together on page 1 of the 11-page American Express statement of June 12, 1984, while the June 7, 1984, transaction was on page 11 of that bill. Reeves testified in petitioner's 1992 trial that, under normal conditions, all electronic submissions are recorded during the cycle of the day they occur. (ER-III-763-64.) The June 7th transaction's position 10 pages apart from the May 7th transactions confirmed what the date and reference number indicated: the fourth transaction happened on June 7th, not May 7th.

It was the State's theory, built on the testimony of Dean Karny, that Levin died on the night of June 6, 1984. (ER-V-1249-51.) American Express issues only one card per card number. (ER-IV-1082.) The card in question was found at Levin's residence. (ER-V-1214-16, 1361; Trial Ex. 106.) The cross-corroborating evidence of the date and reference number on these American

Express records, therefore, strongly suggests that Levin did not leave, or die in, Los Angeles on the night of June 6, 1984. The truth about the Brooks Brothers charge could have provided confirmation of the sighting witnesses and supplied an independent basis for finding reasonable doubt by the jury.

E. The Conflict-Based Claim

The Supreme Court recognized in *Strickland* that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable" for purposes of ineffectiveness review. 466 U.S. at 688.

Standard 4-3.5(a) of the ABA Standards for Criminal Justice: Prosecution and Defense Function (3d ed. 1993), provides as follows:

> (a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

The commentary to that Standard states:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his or her client and free of any compromising influences.... The lawyer's own interests should never be permitted to have an adverse effect on representation of a client.

Barens, most assuredly, permitted his professional judgment to be affected

by his own personal interests, did not exercise that judgment solely for the benefit of petitioner, and permitted his personal interests to adversely affect his representation.

F. The Failure-to-Investigate Claim

Standard 4-4.1 of the ABA Standards for Criminal Justice: Prosecution and Defense Function (3d ed. 1993) provides:

> (a) Defense counsel should conduct a *prompt* investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case....

(Emphasis added.) The commentary to that Standard states, in part:

> Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial .... The lawyer needs to know as much as possible about the character and background of witnesses to take advantage of impeachment.... The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role.

The relevant case law only cements the point. *See, e.g., Correll v. Ryan*, 539 F.3d 938, 948-49 (9th Cir. 2008) (noting that "the traditional deference owed to the strategic judgments of counsel is not justified where there was not an adequate investigation 'supporting those judgments' ") (*quoting Wiggins v. Smith*,

539 U.S. 510, 521 (2003)); *Sanders v. Ratelle,* 21 F.3d 1446, 1457 (9th Cir. 1994) (defense counsel must investigate defendant's "most important defense").

The facts speak for themselves. Barens took on the case in November 1984 (ER-IV-889 at ¶ 4), but first hired guilt-phase investigators in April 1986 (ER-IV-936 at ¶ 1), hardly a fulfillment of his duty to conduct a "prompt" investigation. These investigators quit in January 1987 because Barens would not even return their calls, let alone provide them with documentary and strategic direction. (*Id.* at ¶¶ 1, 4.) Barens sought no continuance on account of the absence of investigation. Moreover, though he nominally hired a replacement investigator on February 11, 1987, one week after opening statements (ER-IV-934 at ¶ 1), by his own admission he took no action to develop the defense case until after the prosecution rested on March 24, 1987. (ER-V-1201, 1278-79; ER-VI-1381-82.) Inadequate in any circumstances, it is so, *a fortiori*, in a capital case. *See Summerlin v. Schriro*, 427 F.3d 623, 638 (9th Cir. 2005) (in capital cases, counsel has duty to render "extraordinary efforts").

G. The Prejudice

"The [Supreme] Court's … decisions applying *Strickland* show that ... defense counsel's conduct 'taken as a whole' must be considered in assessing prejudice." Blume & Seeds, "Reliability Matters: Reassociating *Bagley*

Materiality, *Strickland* Prejudice, and Cumulative Harmless Error," 95 J. Crim. L. & Criminology 1153, 1155 (2005) (citing *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000)).

Typically, in assessing prejudice, reviewing courts compare the actual trial with the hypothetical trial that would have taken place had counsel performed competently. Here, however, there is no need to hypothesize. The prejudice suffered by petitioner was demonstrated with laboratory precision at a *real* trial unaffected by Barens' incompetence. *Real* jurors reported their conclusions at such a trial and in so doing demonstrated the requisite prejudice in, literally, the clearest way imaginable.

The San Mateo prosecution was permitted to attempt to prove that petitioner not only committed the murder of Hedayat Eslaminia with which he was charged, but that he also murdered Levin. (ER-IV-837 at ¶ 4.) To do this, it not only retried the Los Angeles case, but it also informed the jury that petitioner had been *convicted* of that murder. (*See, e.g.,* ER-III-793 at ¶ 11.) *Nonetheless, representing himself*, Hunt not only defeated the San Mateo prosecution (the jury hung 8-4 in his favor (ER-III-765) and the State declined to retry him), but established to the satisfaction of at least *8* of the jurors (ER-IV-818 at ¶ 4) that Levin absconded.

Further, the San Mateo jurors saw Robinson and Ghaleb testify and found them both not only credible, but persuasive. (*See, e.g.*, ER-III-773 at ¶¶ 15-16, 783 at ¶ 8, 792 at ¶ 9; ER-IV-797-98 at ¶ 5, 815 at ¶¶ 15-16.) They found the totality of sighting-witness testimony powerful proof of petitioner's innocence. (*E.g.*, ER-III-772-73 at ¶¶ 12-16 (repeatedly finding sighting witnesses "very credible"), 783 at ¶ 8 ("*I believe that Ron Levin is still alive.*") (emphasis in original), 790 at ¶ 4 ("most significant"); ER-IV-797 at ¶ 5 ("largest impact"); 815 at ¶ 18 ("very powerful").) Also, they were alerted to a telltale aspect of Canchola's testimony that all but proved her reliability, but which the Los Angeles jury had not heard because of Barens' misdirected attention. (ER-IV-815 at ¶ 17 (juror's noting Canchola had seen a scar that Levin had, finding this "a very important and telling aspect of the identification").)

Although the reviewing courts have deemed the juror declarations inadmissible, they have clearly erred. This Court need look no further than *Miller v. City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011). Writing for the panel, then-Chief Judge Kozinski held that Fed. R. Evid. 606(b) did not bar evidence of the opinions and impressions of jurors when they "returned no verdict," *i.e.*, deadlocked. *Id.* at 1030 (holding Rule "bars only 'an inquiry into the validity of a verdict or indictment.' Juror statements would have been admissible because the

jury here returned no verdict."). Thus, the fact that the San Mateo jurors deadlocked is dispositive.

Consistent with *Miller* are cases in which courts have found highly relevant, for prejudice analysis, mistrials caused by jury deadlocks that occurred before a defendant was ultimately convicted. *See, e.g., Bradley v. Duncan*, 315 F.3d 1091, 1099 (9th Cir. 2002) (*Brecht* prejudice standard satisfied because "we need only look at the differing results of the two trials [the first of which ended in a hung jury]); *Ouber v. Guarino*, 293 F.3d 19, 33 (1st Cir. 2002) (finding prejudice because juries had deadlocked in petitioner's first two trials and only "substantial difference" was counsel's ineffective assistance; relying on these "actual rather than hypothetical reference points").

Second, petitioner never offered the juror declarations to impeach the 1987 Los Angeles verdict, an essential condition for invocation of this exclusionary rule. The San Mateo jurors, obviously, did not participate in that trial. They have nothing to say about it; they cannot impeach it. Rather, those declarations are offered for purposes of *Strickland's* prejudice standard. This standard, like so many others, calls on a court "to make predictions about the likely actions of hypothetical 'reasonable' actors." *Schlup v. Delo*, 513 U.S. 298, 329 n.48 (1984). The question under the prejudice prong has nothing to do with the validity of the

verdict rendered and everything to do with the assessment of whether there is a sufficient chance of a different result from mentally simulated "reasonable" actors at a hypothetical retrial.

As this Court put it in *Sassounian v. Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000), the thoughts and opinions of actual jurors can be "the most direct evidence of prejudice" theoretically available. The exclusion of such evidence can "lend[] an Alice in Wonderland quality" to a court's efforts to assess prejudice. *Id.*

To merely ignore the real-world evidence in favor of conjecture would indeed "lend[] an Alice in Wonderland quality" to the decision regarding petitioner's fate, *especially* since Rule 606(b) compels no such result. To hold that witnesses such as Robinson, Ghaleb, Canchola, Lopez, Karen Marmor, Werner, Holmes, and Duran would be rejected by real jurors as trivial or incredible, or both – is in defiance of incontrovertible fact.

The juror declarations are objective, reliable, admissible, relevant, unrefuted, and unmarginalized. And, although these declarations alone establish the requisite prejudice, the Los Angeles trial record contains proof of it as well. As noted, *supra,* the prosecutor in his closing argument repeatedly hammered the defense for the manner in which it had handled the Arizona sightings witnesses, namely, with utter indifference (ER-VI-1407-08, 1411), thereby visiting the sins

of Barens upon petitioner. The prosecutor expressly capitalized on Barens' purposeful, conflict-motivated ineffectiveness, a paradigmatic indicium of prejudice. *See, e.g., Duncan v. Ornoski*, 528 F.3d 1222, 1246 (9th Cir. 2008) (finding prejudice where just this happened).

Other telling indicators of prejudice exist. After the defense rested, the prosecutor conceded the vulnerability of his case to the presentation of (what turned out to be readily available) additional exculpatory evidence. He told the court of his "great fear" that one more sighting witness would cause a "hung jury or worse." (ER-VI-1447.) This Court has stated such prosecutorial admissions should carry great weight in this context. *See Singh v. Prunty*, 142 F.3d 1157, 1163 (9th Cir. 1998) ("In the adversarial process, the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case.").

In addition, the lead case agent conceded in 1993 that, in light of the "five new witnesses who state that they have seen ... Levin after his reported disappearance ... [a] new trial would be hard to win without additional evidence of our own." (ER-III-766.) Again, this is the opinion of a State representative intimately familiar with the evidentiary facts.

Given that the State has failed to provide any counter-declarations or evidence *whatsoever*, any resolution of this case must be consistent with the San

Mateo juror declarations.

H. Although Habeas Relief Is Warranted on Petitioner's Conflict-Based Claim Under a Straightforward *Strickland* Analysis, It Is Also Warranted Under Conflict Jurisprudence

Conflict-of-interest claims are a "specific genre" of ineffective-assistance-of-counsel claims. *United States v. Bruce*, 89 F.3d 886, 893 (D.C.Cir. 1996). In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Court held that a defendant must demonstrate only that an actual conflict adversely affected his lawyer's performance. *Id.* at 348. An actual conflict arises when the attorney's and defendant's interests "diverge with respect to a material factual or legal issue or to a course of action." *Id.* at 356 n. 3; *see also United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980). To establish adverse effect, a petitioner "need only show that some effect on counsel's handling of particular aspects of the trial was 'likely.' " *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992), *quoting Cuyler*, 446 U.S. at 350.

Accordingly, a petitioner need not prove that the lawyer's deficient performance affected the outcome of the case. *Cuyler*, 446 U.S. at 349-50. If a defendant makes the requisite showing of actual conflict and likely adverse effect, prejudice is presumed. *Miskinis*, 966 F.2d at 1268. That presumption of prejudice "extends to a conflict between a client and his lawyer's personal interest."

Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988). Further, given that review is *de novo*, petitioner need not demonstrate that there is a Supreme Court case which "clearly establish[es]" that the *Cuyler* standard applies to conflicts between an attorney's personal interests and those of his client. Circuit authority bolstered by ABA Standards defining that state of affairs as a conflict suffice.

Petitioner has demonstrated his entitlement to relief under the non-AEDPA conflict jurisprudence of this Court. He has shown that Barens' and his interests diverged with respect to the sighting witnesses and that such divergence adversely affected Barens' performance. Indeed, Barens expressly and repeatedly stated the actual conflict and directly tied it to the adverse impact. He concealed evidence of other sighting witnesses from his co-counsel, client, and investigator, and refused to investigate them on his own. His handling of the Werner letter and the prosecution's disclosure of Robinson during deliberations, described, *supra*, are particularly appalling proofs of the requisite adverse impact.

I. Reversal with Instruction to Grant Habeas Relief Is the Lone Appropriate Remedy

The State had a procedural opportunity in the district court to present a fact-based rejoinder to petitioner's presumptively true allegations, which *he* supported with fact-based declarations and other proof. It is far too late in the day for the State to attempt to rebut the overwhelming evidentiary showing in

petitioner's favor. *Cf. Nunez v. Mueller*, 350 F.3d 1045, 1054-56 (9th Cir. 2003) (similar evidentiary lapse by respondent); *Taylor v. Maddox*, 366 F.3d 992, 1012-13 & n.15 (9th Cir. 2004) (presumption arising from failure to present evidence). As stated in *Nunez*, where undisputed extra-record facts are "sufficient evidence to support [the] allegations," a habeas petitioner is entitled to relief. *Id.* at 1056. This Court should now grant it accordingly.

CONCLUSION

This Court should reverse the judgment of the district court and remand with instructions to order petitioner's release unless the State agrees to grant him a new trial within a reasonable period of time.

DATED: December 19, 2014

Respectfully submitted,

RIORDAN & HORGAN

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Dennis P. Riordan

By /s/ Gary K. Dubcoff
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JOSEPH HUNT

STATEMENT OF RELATED CASES

Appellant, pursuant to L.R. 28-2.6, states that he knows of no related cases pending in this Court.

CERTIFICATION REGARDING BRIEF FORM

I, Dennis P. Riordan, hereby certify that the foregoing Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points, and contains 16,977 words.

Dated: December 19, 2014

/s/ Dennis P. Riordan
Dennis P. Riordan

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: /s/ Jocilene Yue
Jocilene Yue