No. 13-56207

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 REPLY BRIEF

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INTRODUCTION

Appellee's Brief (hereinafter "AB") states that the certified issue here is "whether trial counsel furnished ineffective assistance by failing to present additional evidence in support of petitioner's defense that the victim was still alive." (AB-1.) In Appellant's Opening Brief ("AOB"), habeas petitioner Joseph Hunt ("petitioner" or "Hunt") demonstrated how the failure of his trial counsel, Arthur Barens, to present that additional evidence constituted an adverse effect of Barens' conflict of interest, requiring a new trial without any further showing of prejudice. In the alternative, petitioner explained how, under a *Strickland* analysis,[1] Barens' performance was indeed prejudicial. Finally, petitioner demonstrated that AEDPA posed no obstacles for him as this Court's review of his claim must be *de novo*.

Respondent disputes Hunt on all of these points. Petitioner's positions are, however, based on the evidentiary record and supported by the law; respondent's are not. A new trial is clearly in order.

I. Respondent's Claim to "Overwhelming Evidence" Is Objectively Unreasonable

Respondent repeatedly argues that any deficiencies in petitioner's trial representation can be ignored because the state's evidence of petitioner's guilt was

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

"overwhelming." (AB-6, 9, 10, 14, 71, 98.) To begin, a claim of "overwhelming" evidence cannot defeat petitioner's claim of conflicted representation resulting in an adverse effect, because prejudice from such a conflict is presumed. *Mickens v. Taylor*, 535 U.S. 162, 173 (2002) (affirming that applicable standard "requires proof of effect upon representation but (once such effect is shown) presumes prejudice"). Furthermore, at the three trials other than petitioner's when the state presented its murder theory to a jury, none resulted in a conviction.[2] Thus, there is no historical vantage point from which it can be said that, absent Barens' ineffectiveness, a jury would have found the evidence against petitioner "overwhelming."

Although lacking direct evidence, respondent extols the state's case as rich in circumstantial evidence of petitioner's opportunity, motive, means, henchmen, admissions, philosophy, and plan to kill. (AB-6, 9-10, 14, 71, 98.) Yet, entirely unacknowledged, let alone addressed, is the thick stack of *Strickland* and trial evidence showing *that the purported victim* had opportunity, motive, means,

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[2] The state's case twice failed against petitioner's codefendant Pittman. Following a mistrial, he was retried after petitioner's trial to a 10-2 verdict in his favor. Murder charges against him were then dismissed. (ER-III-765; *see* CR-248-15.) The state's attempt to use its Levin evidence in San Mateo was also a fiasco. (*See* ER-III-768 to ER-IV-847.)

admissions, philosophy, and preparations and plan to abscond – all of that crowned with *direct evidence* from *six* eyewitnesses tending to prove *he in fact did so*. The state offered no direct evidence of foul play such as blood or bullets. Levin was a notorious conman, known for operating through false identities, who was out on bail, talking about fleeing, and seen by more than a half-dozen neutral witnesses thereafter. Immediately before his disappearance, Levin solicited hair-dyeing instructions and researched loopholes in the American/Brazilian extradition treaty. He reacted in panic to news that an accomplice turned state's evidence and proclaimed he would never go back to jail. The lead police investigator on the Levin case, contemplating a retrial for Hunt following a possible appellate reversal, opined to his superiors that "a new trial would be hard to win without additional evidence of our own." (ER-III-766.)[3] Most glaringly, the evidence as to *corpus delicti* could not even remotely be construed as overwhelming. (*See* AOB-39-40.)

Under *Strickland*, a new trial is in order if the deficiencies of trial counsel undermine confidence in the verdict. 466 U.S. at 693. The "undermine confidence" standard, which applies as well to the suppression of exculpatory

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[3] Contrary to respondent's contentions (AB-72 n.27), these comments of the case agent are admissible in this action as "party admissions" under Fed. R. Evid. 801(d)(2)(D). *E.g., English v. District of Columbia*, 651 F.3d 1, 7 (D.C. Cir. 2011) (holding internal police report party admission); *Singh v. Prunty*, 142 F.3d 1157, 1163 (9th Cir. 1998) (prosecutor's admissions).

evidence by the prosecution,[4] was addressed this month by the Supreme Court in *Wearry v. Cain*, __ S.Ct. __, 2016 WL 854158 (Mar. 7, 2006) (*per curiam*). There, the Court ordered a new trial because, even if "the undisclosed evidence might not have affected the jury's verdict," the Court had "no confidence" that the jury would have convicted had the evidence at issue in that case not been wrongfully suppressed. *Id.* at *4. Similarly, this Court can have no confidence that petitioner's jury would have convicted had his trial counsel presented the exculpatory evidence readily available to him, as he clearly should have done.

II. UNAMBIGUOUS, ENTRENCHED FEDERAL LAW REQUIRES *DE NOVO* REVIEW

As explained in the AOB, *de novo* review is required because the last reasoned state-court decision, that of the California Supreme Court (hereinafter "CSC"), was a procedural denial that cannot be "looked through." (AOB-17-22.) Respondent champions the district court's reasoning, which found the state decision "unexplained" and, as such, appropriately "looked through" (AB-31); that extra-circuit decisions holding otherwise are either "flawed" (AB-37), inapplicable (AB-35), or both; and that ruling in petitioner's favor would create a means for savvy petitioners to circumvent AEDPA's gateway requirements (AB-30-31). Respondent also suggests petitioner's argument regarding *de novo* review is "not

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[4] *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963).

cognizable on appeal" because it was only presented to the district court in a post-judgment motion. (AB-30, citing *Tong Xiong v. Felker*, 681 F.3d 1067 (9th Cir. 2012), and *Belgarde v. Montana*, 123 F.3d 1210 (9th Cir. 1997).)

A. Petitioner's Argument re *de Novo* Review Is "Cognizable on Appeal"

Respondent's forfeiture argument mixes apples and oranges. It is an unpled habeas *claim* that is not cognizable on appeal, as both *Tong Xiong* and *Belgarde* expressly held. Respondent fails to differentiate between arguments in support of a claim and the claim itself. Moreover, petitioner presented his argument regarding *de novo* review to the district court (CR-262-4-10), which considered and rejected it (ER-1-146-51). Nothing more is required. *See Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992) ("By filing a motion for reconsideration, Execuair gave the district court a clear opportunity to review the validity of its order.").

B. The California Supreme Court's Procedural Denial Mandates *de Novo* Review

1. Since the Supreme Court's Order Is a Non-Superfluous Procedural Denial, *de Novo* Review Is Apt Regardless of any Merits Adjudication in Lower State Courts

Respondent argues that, where a state's highest court's procedural denial follows a lower court's adjudication on the merits, federal habeas courts should look through the procedural denial. (AB-32-39.)

First, this Court has said otherwise. *See Seeboth v. Allenby,* 789 F.3d 1099, 1103 (9th Cir. 2015) ("[T]he Superior Court reached the merits .... Petitioner argues, however, that the [CSC] dismissed on a procedural ground. If that were so, then we would review Petitioner's claims *de novo*...").

Second, in every one of the following cases, a court in this Circuit refused to "look through" a state supreme court's procedural denial to a lower court's merits adjudication. *See Williams v. Clark*, 2015 WL 1046103, at *7 (E.D.Cal. Mar. 10, 2015) ("[B]y citing *In re Clark*, the [CSC] indicated ... state-law procedural principles. Thus, even though the superior court ruled on the merits of the claims, *de novo* review is proper."); *Mejia v. Foulk,* 2015 WL 391688, at*8-*9 (C.D.Cal. Jan. 28, 2015); *Berkley v. Miller*, 2014 WL 2042249, at *5 (C.D.Cal. Apr. 2, 2014); *McCoy v. Holland*, 2014 WL 2094314, at *8 & n.7 (C.D.Cal. Apr. 21, 2014) ("Because the [CSC] denied ... solely on procedural grounds [by citing *Clark*], AEDPA's deferential standard does not apply ... [despite a lower court's merits ruling]"); *Shannon v. Giurbino*, 2013 WL 4501479, at *7 (C.D.Cal. Aug. 22, 2013); *Gilbert v. McDonald*, 2013 WL 3941337, at *11 (E.D.Cal. Jul. 30, 2013) ("Because the [CSC] stated its reasons – procedural reasons, ... there was no 'unexplained' denial that would [justify]... the 'look-through' presumption."); *Nichols v. Clark*, 2012 WL 1019976, at *8 n.6 (C.D.Cal. Feb. 29, 2012).

In light of these cases, respondent's bald assertion – "[d]e novo review applies only to federal claims whose merits were *never* adjudicated in state court" (AB-28, emphasis in original) – is untrue. Moreover, because of the wealth of contrary authority, respondent's effort to distinguish on its facts one such authority – *Nickerson v. Roe*, 260 F.Supp.2d 875 (N.D.Cal. 2003) – (AB-36 n.11), is unavailing.

Third, since the filing of petitioner's AOB, yet another Circuit has held that it will not look through a procedural denial to a lower-court merits adjudication. *See Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450, 462-64 (6th Cir. 2015); *see also* AOB-20-21 (citing decisions to same effect from three other Circuits).

Respondent argues that extra-Circuit cases are irrelevant because of peculiarities in California's habeas system (AB-30, 34-36), but never explains why those methodological idiosyncrasies matter for present purposes. They do not. As the Supreme Court put it, "California's collateral review process functions very much like that of other states, but for the fact its timeliness rule is indeterminate." *Carey v. Saffold*, 536 U.S. 214, 222 (2002).

Fourth, respondent makes much of the fact that, in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the Supreme Court looked through a CSC denial citing *In re*

Waltreus, 62 Cal.2d 218, 225 (1965), and *In re Swain*, 34 Cal.2d 300 (1949). (AB-38-39; *see* 501 U.S. at 805.) As petitioner has already pointed out, however (AOB-21-22), the Court did so *only* because the order addressed a petition that had been entirely "superfluous," *i.e.*, it simply re-raised a claim that had already been presented to the state supreme court (501 U.S. at 799, 805). That is not the case herein.

The real significance of the "look-through" in *Ylst* is that it renders pointless the alarm sounded by respondent and the district court that a savvy petitioner could evade AEDPA deferential review simply by filing a redundant state petition. State untimeliness and successive-petition bars and the one-year term of limitations make such a gambit entirely unworkable.

It makes eminent good sense, as *Ylst* held, that, when "the last reasoned opinion on the claim explicitly imposes a procedural default, [to] presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." 501 U.S. at 803. That presumption reflects the way that the judiciary operates. On the other hand, the presumption for which respondent argues – that, when a lower court reaches the merits, but the higher court imposes a procedural bar, the latter silently considered the merits and tacitly adopted the lower court's reasoning – makes no sense at all.

Fifth, respondent's reliance on *Curiel v. Miller,* 780 F.3d 1201 (9th Cir. 2015) (AB-31-32), is similarly misplaced. That case addressed an entirely different question – whether a state petition was "properly filed" under 28 U.S.C. § 2244(d)(2). *Id.* at 1203. The CSC issued a procedural denial, citing *Swain* and *People v. Duvall*, 9 Cal.4th 464 (1995), and this Court found those citations "uninformative" as to whether the CSC had overridden the lower court's own procedural finding of untimeliness. 780 F.3d at 1204. That is a far cry indeed from addressing, let alone answering, whether procedural citations are "uninformative" as to the question presented herein, namely, whether the CSC's procedural citations constitute a procedural denial. Although the citations in this case are indeed ambiguous as to precisely *which* procedural principles were invoked against any given claim (which is why the district court found federal review not barred – ER-I-167), they are not ambiguous in the only sense that matters in § 2254(d) analysis, that is, they *indisputably* are procedural.[5] The district court so found. (ER-I-168 ("The Order invokes three procedural bars …").)

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[5] In *Curiel*, the two cases cited in the CSC's order addressed the failure to plead sufficient grounds to justify relief. 780 F.3d at 1204 n.2. Of course, the state-law procedural requirement of timeliness is one such thing that has to be pled. *In re Robbins*, 18 Cal.4th 771 (1998). It would have "strained credulity" to assert that, through such citations, the CSC had concluded that the petition *was* timely and thereby "overr[o]de" the lower court's contrary finding, 780 F.3d at 1205.

2. The California Supreme Court's Decision Is Not "Unexplained" – It Is a Non-Superfluous Procedural Denial

Respondent argues that the CSC decision at issue can be "looked through" per *Ylst* because it is not a "reasoned" decision, that is, it is unexplained. (AB-30-31.) How so? In *Ylst,* the Court was quite clear what it meant by an unexplained decision – "an order whose text or accompanying opinion does not disclose the reason for the judgment." 501 U.S. at 802; *see also id*. at 804 ("The essence of unexplained orders is that they say nothing."). In light of those definitions, it cannot be reasonably argued, let alone held (ER-I-148), that the CSC decision in this case was unexplained. It reads: "Petition for writ of habeas corpus is DENIED. (*In re Waltreus* (1965) 62 Cal.2d 218, 225; *In re Miller* (1941) 17 Cal.2d 734, 735; *In re Clark* (1993) 5 Cal.4th 750.)" (ER-II-262.) Certainly, if the CSC believed its citations said nothing, it would not have included them in its decision. Plainly, it was *not* a merits adjudication. *Cf. Walker v. Martin*, 562 U.S. 307, 310 (2011) ("A spare order denying a petition *without explanation or citation* ordinarily ranks as a disposition on the merits.") (emphasis added);[6] *Ylst*, 501 U.S. at 803 (describing order "imposing a procedural default" as a "reasoned opinion").

[6] Parenthetically, *Walker's* treatment of the *Clark*/*Robbins* citation establishes that such *combination* is *an explained decision*, and one sufficient to be an independent and adequate bar to federal review. 562 U.S. 307.

At least one court has held that the precise order at issue herein is procedural. *See Ochoa v. Uribe*, 2013 WL 866118, at *4 (C.D.Cal. Jan. 28, 2013) ("Because the claims were rejected with citations to *Clark*, *Waltreus*, and *Miller*, it appears that they were denied on procedural grounds rather than on the merits. Accordingly, the Court reviews the claims *de novo*."). Regardless, the citation to *Clark alone* suffices to establish that the decision was procedural. Not only has respondent's counsel *repeatedly* argued that it *is* procedural whenever doing so serves its strategic interests in other cases (*see, e.g.*, *Washington v. Virga*, 2015 WL 8479360, at *28 (E.D.Cal. Dec. 9, 2015); *Hayes v. Tilton*, 2011 WL 2580756, at *9 (S.D.Cal. Jun. 28, 2011)), but it previously has made that very argument *in this case*, when it argued that *Clark* unambiguously invoked California's timeliness bar. (*See* CR-202.)[7] This Court has accepted that argument in the past (*see, e.g., Alvarez v. Wong*, 425 Fed.Appx. 652, 652-53 (9th Cir. 2011); *Wafer v. Adams*, 2009 WL 1370799, at *1 (9th Cir. May 18, 2009)), as have many district courts (*see, e.g., Ingram v. Cate*, 2014 WL 3672921, at *16 (C.D.Cal. Jun. 12, 2014); *Katasse v. McDowell*, 2015 WL 9267051, at *5 (C.D.Cal. Sep. 23, 2015) ("[T]he

[7] Consequently, under equitable estoppel principles (*see, e.g., Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2008)), because respondent advanced a contrary position in the district court, he should be barred from now claiming that the CSC's decision was non-procedural.

[CSC] summarily denied [citing] ... *In re Clark*, 5 Cal.4th at 767–69. Therefore, the Court will review ... *de novo*.").

Unlike in *Seeboth*, where this Court was able to reliably conclude that the CSC's citation to *Duvall*, which included a pin cite to a specific page of that opinion, constituted a merits adjudication given the nature of the habeas claim (789 F.3d at 1103), no such conclusion can be drawn herein. *De novo* review is the consequence.

Finally, despite respondent's efforts to create ambiguity regarding this issue (AB-29 n.7), the subclaims brought herein *were never presented to the CSC* prior to the 2000 habeas petition that generated that court's procedural denial, *as the district court expressly ruled* (ER-1-195-98). The district court's Order expressly delineated the subclaims that it deemed unexhausted prior to Hunt's 2000 petition, *i.e.*, Grounds 1-1 (no investigation), 1-1.1 (Duran), 1-1.7 (Marmor), 1-1.15 (money), 1-1.23 (Ghaleb, Waller, Robinson, Nippers, Werner, Titus conflict-of-interest), 1-2.11 (Holmes), 1-3.1 (perjury), 1-2.10 (Reeves). (*See* ER-I-166, 185, 192, 202, 205, 215, 219, 232, 243, 246-48.)

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C. Even if the California Supreme Court's Procedural Denial *Could* Be "Looked Through," *de Novo* Review Is *Still* Mandated Due to the AEDPA-Disqualifying Flaws in the Decisions of the Subordinate State Courts

Respondent leaps from his "look through" argument to an assumption that deferential review under 28 U.S.C. § 2254(d) is mandated. Because the "look-through" contention is without merit, that should end the discussion. *De novo* review, however, is not just technically appropriate, it is also substantively just, for the following reasons:

First, under conventional *Strickland* prejudice analysis, the lower state courts were to ask whether "there is a reasonable probability that at least one juror would have struck a different balance" had trial counsel performed competently by presenting the additional exculpatory evidence. *Wiggins v. Smith* 539 U.S. 510, 537 (2003). If the state court conspicuously failed to rule from the vantage point of petitioner's jurors, its decision was "contrary to" *Strickland.* The Los Angeles Superior Court did just that. (Supplemental Excerpts of Record, hereinafter "SER," at 1 ("I remind you [habeas counsel], I am the trier of fact. This is not going to be a situation where you are going to [be] blowing smoke up a jury.").)

Second, the superior court made its credibility evaluations as to Marmor, Ghaleb, Robinson, and Werner in the context of a state-law standard requiring "conclusive" proof of innocence. (ER-II-285-93.) The California Court of Appeal

adopted those findings in the same context. (ER-II-266-67.) Credibility findings made in the context of an inapplicable legal standard, however, cannot properly be imported into *Strickland* analysis. *See, e.g., Taylor Maddox,* 366 F.3d 992, 1001 (9th Cir. 2004) (no AEDPA deference due "state court ... factual findings ... [made] under ... [in]correct legal standard"); *cf. Rogers v. Richmond,* 365 U.S. 534, 547 (1961) ("Historical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly ... furnish the basis for correct conclusions ... because a correct standard is later applied to them."). Yet, that is the very approach urged by respondent upon this Court. (*See* AB-16-17, 77-81, 83-84, 87-88, 99-102.)

Third, the superior court made no credibility findings at all with respect to Waller, Lopez, or Canchola. Lopez and Canchola testified in the guilt phase; Waller, the penalty phase. The jurors may well have developed misgivings about their guilty verdict after hearing from Waller, but lacked any means to express them other than to vote against a death sentence, which they did. Regardless, the superior court ignored the testimony of these witnesses in their entirety, an analytical flaw that disentitles its resulting decision to § 2254(d) deference. *See Taylor v. Maddox*, 366 F.3d at 1008 (ignoring "key aspects of record" defeats deference under § 2254(d)); *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (finding state-court decision unreasonable because, in part, it "ignored" relevant evidence); *Ali v. Hickman*, 584 F.3d 1174, 1193 (9th Cir. 2009) (same).

Fourth, the credibility and prejudice findings of the state courts (and their wholesale adoption by the district court below) reflect patently unreasonable binary thinking, rather than the relativistic, cumulative analysis that is demanded in application of the reasonable doubt standard. *Cannedy v. Adams*, 706 F.3d 1148, 1165 (9th Cir. 2011), elucidates the point. As this Court there noted, although a federal court may agree that the "no-credibility" finding of a state court as to an exonerating witness is within the "fair-minded jurist" range, this may do little more than "sidestep the critical question in determining prejudice: whether a fair minded jurist would fail to acknowledge at least a reasonable probability of a different outcome." *Id.* (proceeding to *de novo* review).

By parallel reasoning, it is objectively unreasonable for a court to tacitly assume only witnesses who struck it as having stand-alone credibility could matter. Twelve jurors would not engage in a pass/fail evaluation of the credibility of *each* sighting witness, assigning no weight to any witness they deemed insufficiently credible to *independently* raise a reasonable doubt. Rather they would evaluate them as a collective, mutually reinforcing, whole. They would also count as corroboration Levin's extradition-treaty research, his sudden and anomalous interest in hair dyeing, his panic over the prospect of prison, his rearrangement of bail conditions, the untraceable $503,000, *etc*. This is, after all, precisely how *real* jurors reacted. (ER-III-768 to ER-IV-847 (*e.g.*, ER-IV-835 (San Mateo Juror

Achiro remarking, "In my view, it is silly given all the evidence, to say I'm not going to believe Karen Marmor and 5 sightings witnesses because Mr. Hunt said he killed Levin. All those guys, and Levin too, pulled a lot of hoaxes, ... 'just saying it doesn't make it so.' I looked at the BBC and saw believable motives for Mr. Hunt to make that statement…")); AOB-38, 47, 52, 54, 58 n.16, 61, 63, 71-73.) No fair-minded jurist could ignore that a hung jury or an acquittal was *one* reasonably probable outcome from the presentation of the evidence trial counsel neglected.

Treating the state's case at trial as if it were built on the testimony of flawless witnesses, buttressed with inescapably correct inferences, is objectively unreasonable and contrary to *Strickland*. This bias was case-dispositive to the state courts. (*See, e.g.,* AB-8, 14, 27; ER-I-38-39, 53.) By way of irreconcilable contrast, this Court has a history of performing proper *Strickland* prejudice analyses, *i.e.,* which are both *relativistic* and *cumulative*. *See, e.g., Riley v. Payne*, 352 F.3d 1313, 1320 (9th Cir. 2003) (absent counsel's negligence, "more equilibrium in the evidence"); *Luna v. Cambra*, 306 F.3d 954, 966 (9th Cir. 2002), *as amended*, 311 F.3d 928 ("much more balanced picture"); *Lord v. Wood*, 184 F.3d 1083, 1094 (9th Cir. 1999) ("mutually reinforcing statements" of two people who claimed to have seen the murder victim after [her alleged death] "constituted strong evidence of Lord's innocence that trial counsel could have offered"); *Brown*

v. Myers, 137 F.3d 1154, 1157 (9th Cir. 1998) (additional "alibi witnesses ... altered significantly the evidentiary posture of the case").

Fifth, none of the state courts made a cumulative-prejudice determination coextensive with the certified claim, an independent shortcoming defeating deferential § 2254(d) review. *See Strickland*, 466 U.S. at 694-96; *Harris v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1991); *cf. Kyles v. Whitley*, 514 U.S. 414, 440 (1995) (same consideration in *Brady* context); *accord, Wearry v. Cain*, 2016 WL 854158, at *4.

Sixth, respondent concedes (AB-59, 109) that the state appellate court resolved the subclaims under the Titus conflict theory (Ghaleb, Nippers, Waller, Robinson, Werner) solely with a lack-of-prejudice finding. (ER-II-274.) That failure, like the superior court's, to first decide whether counsel's performance was deficient means that this Court's analysis of the first prong of *Strickland* must be *de novo*. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (*per curiam*).

Seventh, the credibility and prejudice findings of the state trial and appellate courts are likewise objectively unreasonable in that they ignore the actual opinions and deliberative orientation of real jurors who saw the witnesses. As an objective matter, the record contains evidence from *nine* triers of fact who made credibility and probative-value assessments of Ghaleb, Holmes, Duran, Robinson, and Marmor, after actually seeing them testify. Respondent argues that no one can

reasonably say that the opinions of *one* of them – the superior court judge who issued a habeas denial – were not fair minded. The fact that *eight* other triers of fact reached contrary credibility assessments establishes that no fair-minded jurist could deny there is a reasonable probability that at least *one* reasonable juror at a retrial would find petitioner's *Strickland* witnesses credible. That much should be obvious.

Eighth, the state courts entirely failed to address petitioner's *corpus delicti* theory of prejudice. The district court refused to address this theory, claiming petitioner untimely raised it in his traverse (ER-I-11, 153; CR-248-16), and respondent follows suit (AB-72-3).[8] Implicit in *Strickland*, however, is a <u>*sua sponte*</u> duty to view the evidence through the lens of the jury charge in conducting prejudice analysis, which, here, included the *corpus delicti* instruction (SER-68-69). *Cf. Summit v. Blackburn*, 795 F.2d 1237, 1244-45 (5th Cir. 1986) (finding prejudice in light of *corpus delicti* rule). The issue is properly before this Court as an inextricable aspect of *Strickland* prejudice review. C*f. Riley v. Payne*, 352 F.3d

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[8] Petitioner brought up this lacuna in the district court's findings in a post-judgment motion. (CR-264-3-11; *see also* CR-79.) Petitioner proved he used every tenable opportunity to alert that court to it. (CR-263.)

1313, 1323-25 (9th Cir. 2003) (state court's failure to address all theories of prejudice unreasonable under § 2254(d)).[9]

D. There Can Be No AEDPA Deference to the State Appellate Court's Decision on Direct Appeal Because It Did Not Address Factual Allegations Coextensive with the Certified Claim

Respondent seeks to convince this Court that it should defer to the 1993 decision affirming petitioner's conviction on direct appeal. That decision *antedates* the filing of the certified issue in state court.

Thus, the "overwhelming evidence" rhetoric that respondent draws (AB-5-6, 9) from the 1993 state appellate decision fails under § 2254(d)(2) review as an unreasonable determination of the facts. As established, *supra*, a state court's failure to consider the evidence supporting the certified issue precludes § 2254(d) deference.

The same reasoning applies to every other use proposed for the 1993 opinion or opinions of the trial judge. (AB-5-6, 9, 13, 47 n.15, 52, 72 n.27.) For example, the state appellate court asserted that the trial judge thought highly of Barens'

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[9] Respondent also argues that the state appellate court's 1993 opinion is relevant to this issue (AB-72 n.27; *see also* ER-1-153), but the treatment of the *corpus delicti* issue in the context of an appellate insufficiency claim cannot properly be imported into an analysis of the *Strickland* evidence's impact on reasonable jurors, for the reasons already stated. Assessing the unpresented *Strickland* evidence in light of the evidence adduced at trial, without consideration of the extra-judicial statements attributed to petitioner, a jury would, with reasonable probability, find neither the *corpus delicti* of robbery or murder sufficiently proven.

competence and preparation. (AB-5, 6; ER-II-500, 502; *but see* CR-6 (petition's Appendix G citing 157 examples of the trial judge's expressing utter contempt for Barens).) The district court allowed itself to be influenced by this positive assessment. (ER-I-42.) Yet, what would the trial judge have thought if he knew about Barens' perjury? (ER-III-606; CR-191-68; CR-248-9-11; CR-264-40-44, 46-49.) Strikingly, respondent has never denied Barens' case-related crimes. Moreover, neither the trial court nor the state court of appeal had before it the declarations of the members of the defense team describing Barens' wanton negligence. (ER-IV-923, 931-51.)

E. State Court Credibility and "Overwhelming Evidence" Suppositions Are Not "Fact-Findings" Reviewed Under §§ 2254(d)(2) or 2254(e)(1); They Are Reviewable Under § 2254(d)(1)

Respondent demands that this Court give state credibility and probative-value findings a presumption of correctness under § 2254(d)(2) or (e)(1), or both. (AB-7, 10, 27, 54, 72, 78, 79, 84, 87-88, 93, 96, 101-02.) But, "[i]n the end, weighing the prosecution's case against the proposed witness testimony is at the heart of the ultimate question of the *Strickland* prejudice prong, and thus it is a mixed question of law and fact not within the Section 2254(e)(1) presumption." *Ramonez v. Berghuis*, 490 F.3d 482, 490 (6th Cir. 2007); *see also Strickland*, 466 U.S. at 698 ("[B]oth the performance and prejudice components ... are mixed

questions of law and fact."); Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure*, § 20.3(d) at nn.32-43, 52, 85 (6th ed. 2014). Therefore, analysis of state-court *Strickland* witness-credibility and "overwhelming-evidence" findings are performed under § 2254(d)(1). *Cf. Simmons v. Beard*, 595 F.3d 223, 233 n.5 (3d Cir. 2009) (issue of materiality under *Brady* is a mixed question of fact and law not subject to § 2254(e)(1) presumption).

F. This Court Can Order the Grant of Habeas Relief on the Extant Record; No Admissibility Issues Preclude That Course

Respondent contends that petitioner's claims are backed in places by inadmissible evidence and hearsay. (AB-15, 48 n.16, 49 n.17, 50, 72 n.27, 75 n.29, 93 n.36.)

First, with the exception of the San Mateo juror declarations, respondent has forfeited such objections by failing to raise them below. This Court may, consequently, adjudicate the petition without any reservation as to the cognizability of the supporting exhibits. *Cf. Miller-El v. Dretke*, 540 U.S. 231, 257 n.15 (2005) (relying on evidence because, *inter alia*, "the state raised no objection [below] to receipt of the supplemental material").

Second, federal courts routinely resolve habeas petitions on documentary evidence. *See, e.g., Williams v. Woodford,* 384 F.3d 567, 599 (9th Cir. 2004) (as amended); *Matta-Balestros v. Henman*, 896 F.2d 255, 258-59 (7th Cir. 1990); *Downs v. Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000).

Third, respondent never asked for a federal evidentiary hearing. (*See* CR-237-4-5 (requesting opportunity to present additional "argument," not evidence). This matter rested with the district court for 16 years. If the state had foundational objections, it should have said so. (*See* CR-281-4-5 (state forfeited right to hearing).) *Cf. Williams v. Runnels*, 432 F.3d 1102, 1209-10 (9th Cir. 2006) ("it was the state's responsibility to create a record that dispelled the inference [arising from prisoner's evidence]").

Fourth, all of petitioner's exhibits filed in the district court were "*presented*" at all three levels of the California judiciary. This is not disputed, and this is all that § 2254(d) requires. Obviously, a state court cannot nullify evidence by failing to consider it. *Cullen v. Pinholster*, 563 U.S. 170, 180-81 (2011), is not to the contrary. *Taylor v Maddox*, 366 F.3d at 1000-04 (state court ignoring evidence loses entitlement to deference).

III. The District Court's Order Striking the San Mateo Juror Declarations Cannot Prevent This Court from Reviewing Them

Petitioner has already provided this Court, in his opposition to respondent's motion to dismiss/strike, a conclusive response to respondent's desperate efforts (AB-15-24) to have this Court close its eyes to the powerful San Mateo juror declarations because the district court ordered them stricken. Simply put, the district court could not create an exception to the plenary jurisdiction of this Court

by striking evidence. *See, e.g., Harrah's Entertainment v. Ace American Insurance Co.*, 100 Fed.Appx. 387, 394 (6th Cir. 2004) (rejecting argument that it lacked jurisdiction to review district court's order striking affidavits). "An appeal from a final judgment draws into question all earlier, non-final orders and rulings which produced the judgment." *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984); *cf. United States v. Lord*, 711 F.2d 887, 892 (9th Cir. 1993) (vacating order striking testimony); *India Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 900 (3d Cir. 1985) (ordering new trial due to erroneous order striking evidence).

A. The Juror Declarations Are Admissible

Contrary to respondent's argument (AB-20-23), the declarations of jurors from the 1992 San Mateo trial are not being used to "impeach" their verdict. Petitioner is not challenging the accuracy or authenticity of the San Mateo verdict (indeed, there was none), nor charging juror misconduct. *See Black's Law Dictionary* 678 (5th ed. 1979) (defining "impeach" as to "dispute, disparage, deny, or contradict"). He challenges something upon which the declarants did not deliberate as jurors: the competence of his trial counsel at his 1987 trial.

A case that respondent cites, *People v. Steele*, 27 Cal.4th 1230, 1261 (2002) (AB-21), perfectly illuminates why the declarations do not offend Fed. R. Evid. 606(b) or California Evidence Code § 1150(b). "This limitation prevents one juror

from upsetting a verdict of the whole jury by impugning *his own or his fellow jurors'* mental processes or reasons for assent or dissent." 27 Cal.4th at 1261 (emphasis added; citation omitted).

There is no "impugning" going on here – no attempt to use a San Mateo juror's mental processes to undermine *the resulting verdict*. Again, there *was* no verdict in San Mateo. (*See* AOB-71, citing *Miller v. City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011).) A review of the Advisory Committee Comment to Rule 606(b) reinforces the explanation provided in *Steele*. The commentary quotes the Senate Judiciary Committee Report on Rule 606(b): "permitting an individual to attack the jury verdict based upon *the jury's internal deliberations* has long been recognized as unwise by the Supreme Court." (Emphasis added). The intent behind these rules is to prevent harassment of jurors and verdict attacks based on the mental processes that gave rise to them. The San Mateo declarations offend neither rule. (AOB-71-73.)

B. The Juror Declarations Are Highly Relevant

Respondent emphasizes that the Los Angeles prosecutor called more Levin-case witnesses than the San Mateo prosecutor did (*e.g.*, AB-19), as if those numbers are material. Neither respondent nor the district court, however, pointed to a *single* inculpatory fact that was placed before the Los Angeles jury, but not

disclosed to the San Mateo jury. (AB-20-22.) In fact, *all* the testimony cited in respondent's brief comes from witnesses that testified at both trials.

The Levin-related witnesses not called in San Mateo were a collection of bank and brokerage account representatives, custodians of records, and such like. (CR-262-18-24.) *Nothing* they said figured into the district court's survey of the evidence. (ER-I-19-32.) Whatever these witnesses testified to of any importance was handled by stipulation in San Mateo. (ER-IV-829-41.) The record conclusively shows that the Los Angeles jurors had no more inculpatory evidence than did those in San Mateo.

IV. Respondent Relies on Objectively Unreasonable Credibility and Probative-Weight Findings

Of great importance, as noted, *supra,* the superior court made its credibility evaluations as to Marmor, Ghaleb, Robinson, and Werner in the context of a state-law standard requiring "conclusive" proof of innocence. (ER-II-285-93.) The state appellate court adopted those findings in the same context. (ER-II-266-67.) Credibility findings made in the context of an inapplicable legal standard, however, cannot properly be imported into *Strickland* analysis. *See, again, Taylor Maddox,* 366 F.3d 992, 1001 (9th Cir. 2004).

The points to be made about witnesses and evidence in the ensuing subsections were all presented to the district court. (*See* CR-263-13; CR 264-45;

CR-281-9-10.) They are offered here in rebuttal to the indicated arguments made in respondent's brief.

A. Karen Marmor

Karen Marmor, a former operations officer of a major bank, lived with her husband next door to Levin for years. (ER-III-652-54.) The significance of her testimony has been briefed. (AOB-58-61.)

The superior court indicated that the facts which Marmor recalled and to which she testified at petitioner's San Mateo trial were unavailable to her recall five years earlier, when petitioner's Los Angeles trial was held. (ER-II-293, 304.) That misstates her testimony. Marmor heard Levin was missing from her husband, Len. (SER-4.) She did not discuss with Len seeing the "to-do" list that she had seen in Levin's home before his death not because it was unavailable to her memory, but because she "didn't think it had anything to do with ... the case...." (SER-10; *see also* SER-6-7.) She rarely watched TV (SER-5-6), and was unaware the "to-do" list was evidence in the case. (SER-8.) Levin told her that the papers had to do with a movie script. (ER-III-660-63, 668-69.) Indeed, his stepfather, who found the list, also did not know what to make of it. (ER-V-1093.)

Marmor testified that she dismissed it from her immediate attention, not that she forgot. Indeed, when her husband heard of the Levin sightings in 1991, it "started [her] thinking that maybe all those things that [she] felt and saw and

thought were true. Because [she had] dismissed it after [her] husband came back from ... the trial...." (SER-9.) Thus, it is only a misreading of her testimony that could permit a finding that Marmor's relevant memories had been inaccessible to her. She expressly *denied* the insinuation that they were ever lost or inaccessible. (SER-14.)

Next, the superior court mistakenly ruled that Marmor's testimony had its genesis in "vivid dreams" and "flashbacks." (ER-II-288-89, 293.) The term "flashback" first came up during the state's cross-examination. Marmor testified that it "*was a poor word to use" to describe her recollections*. (SER-12.) As she described it:

> Q. How did these thoughts come to you?
>
> A. How do they come to me?
>
> Q. Yes.
>
> A. I don't know. How do thoughts come to anyone? You just all of a sudden start, you might be doing something and you remember a certain situation.

(SER-11.)

Contrary to the superior court, the San Mateo jurors deemed Marmor's testimony to merit great weight. (*See* ER-III-792-93 ("she appeared to be exactly the sort of person who would be sufficiently nosey to be looking at papers on Levin's desk.... Karen Marmor was a big factor in the deliberations...."); ER-IV-

812-13 (“cooperative,” “neutral,” “very important,” “believ[able)”; ER-IV-826-27 (“possibly the most important witness .... I trusted her. It really came down to the question of whom did I believe, Karen Marmor or Dean Karny. On this level, there really was no contest...”); ER-IV-795-96; ER-III-770 (“very credible”); ER-III-779.)

Finally, the superior court’s disbelief that Marmor was unaware of the details of the “high publicity murder trial in which her own husband was a witness” (ER-II-293) also cannot withstand reasonableness scrutiny. There simply was no evidence before that court about media coverage; indeed, the court refused to hear evidence on the subject. (SER-32-33; *cf. Hurles v. Ryan*, 752 F.3d 768, 790-91 (9th Cir. 2014) (rejecting state court’s “fact finding” based on hunch after refusing to take evidence).) Regardless, as she stated, Marmor was not a TV watcher. (SER-5-6.)

B. Ivan Werner

Respondent points out (AB-82-84) that the superior court disparaged Werner’s opportunity to observe Levin as “minimal contact with the man who was one of many at the funeral” (ER-II-291), but that was not Werner’s testimony at all. *He* testified that the *service* involved 45 or 50 people (SER-17), but he interacted with Levin before it began (ER-III-711-12). Levin was “one of the first

people there." (ER-III-711.) "I talked to him two or three different times...." (ER-III-712; SER-18.) They were only about a foot apart at the time. (ER-III-713.)

Werner paid unusual attention to Levin. Werner collected gold jewelry and discussed it with Levin. (SER-16, 18.) He found Levin's impeccably groomed hair, manicured fingernails, and distinguished appearance to be memorable. (ER-III-712, 723.)

Werner accurately detailed Levin's height, weight, beard, bearing, and hair color (ER-III-722-23). While they were speaking, Werner noticed yellow gold fillings in Levin's back teeth. (ER-III-719-20; *see also* ER-IV-1075 (Levin had gold fillings in 20 of his 32 teeth).) Crucially, Barens never learned of this detail, or any other aspect of Werner's testimony, because he never interviewed Werner. (ER-IV-934.) Neither did the police prepare or furnish Barens an interview report. Respondent does not contest these facts. (AB-82-84.)

Finally, the superior court, in dismissing Werner, relied in part on the "testimony of a manager of the funeral home," who found "no records exist which match the [cause of death in the] incident described by Werner." (ER-II-291.) The records that the custodian searched, however, would not have reflected the data that would be necessary to prove or disprove Werner's recollections. The custodian testified that, if they did not handle the cremation, their records would

not record the cause of death. (SER-34-35.) Werner testified that they did not handle the cremation in question. (SER-19.)

And, once again, the superior court's purported findings as to Werner's credibility were made in the context of a state-law claim of innocence, and thus say nothing in the *Strickland* context. (ER-II-285.)

C. Nadia Ghaleb

Ghaleb was the maître d' of Mr. Chow's, arguably the most fashionable restaurant in Los Angeles in the early 1980's, when she met Levin. (ER-III-689-90.) She held substantial positions in public-relations (ER-III-688) and in hotel and restaurant management in the 1970's and 1980's (ER-III-688-89.) To Ghaleb, Levin was an intriguing, memorable character. (ER-III-692; SER-15.) Many witnesses described his ostentatiousness. He had a Rolls-Royce (as a result of a fraud he perpetrated on his maid) and a chauffeur. (SER-47-55.5.) He associated with celebrities: Paul Morrissey, Bianca Jagger, Jesse Jackson, Andy Warhol, and Muhammad Ali. (SER-56-60; ER-IV-1028.) He "loved attention and loved to be seen" (SER-62), particularly by showing off his lavish lifestyle (SER-61, 64). He "flamboyantly" displayed an indictment returned against him. (SER-65.) In light of his character, Ghaleb's reaction upon seeing Levin – "Oh my god there's Ron Levin – I have not seen that guy for a long time" – made perfect sense.

As with Robinson and Werner, the superior court expressly made its Ghaleb findings in the context of the state-law actual-innocence standard, concluding: "Ghaleb's passing glance of a man getting into a car is not sufficient. She may think she saw Levin. However, the circumstances of the identification do not inspire great faith." (ER-II-292.) "Great faith" is required in the context of the state-law standard, but not under *Strickland* or the conflict standard.

Finally, consistent with the well-established pattern, the San Mateo jurors, contrary to the superior court, found Ghaleb impressive: "In her line of business she has to learn to recognize people quickly.... I found Ms. Ghaleb to be credible...." (ER-II-797.) Jurors Carsanaro and Sorelle agreed. (ER-III-773; ER-III-783.) Juror Creekmore ranked Ghaleb as the most important sighting witness. (ER-IV-816.)

D. John Duran

Respondent argues that this Court must defer to the superior court finding that Barens was not on notice of the need to interview Levin's hairdresser and was unaware of this witness, who did not come forward until after the trial. (AB-95-98.) Petitioner, however, gave Barens a memorandum which urged him to interview Levin's "hairdresser." (SER-2-3; H.Ex. 283.) Barens asked Levin's maid about whether Levin dyed his hair (ER-V-1020) and he asked Detective Zoeller about brownish stains in Levin's bathtub (ER-V-1213), matters not

addressed on direct examination. Taken together, these facts represent preponderating evidence[10] that Barens not only understood why he should interview Levin's hairdresser, but also felt that the hair-dye theory was worth pursuing.

Finally, and yet again, the superior court's assessment of the value of Duran appears objectively unreasonable in light of the San Mateo declarations. (AOB-58 n.16.) Duran made them wonder, "What is this guy planning?" (ER-IV-814.) Duran made "it all fit" by explaining the missing comforter and bathtub stain, and by powerfully revealing Levin's plan to abscond. (ER-III-77, 782-83, 791; ER-IV-803, 814, 818, 829-30, 835.)

E. Robbie Robinson

The superior court dismissed Robinson as "pathetic" and "lacking all credibility." (ER-II-290.) The court imagined it impossible that Levin, "a murder victim, in a high publicity case, [would appear] in broad daylight, on the crowded streets of Westwood." (*Id.*) It felt that Robinson's explanation for why he did not immediately come forward was dubious. (*Id.*) "Any reasonable defense counsel," in its view, would avoid calling such a witness. (*Id.* n.13.)

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[10] A habeas petitioner must establish his claim by a preponderance of the evidence. *See, e.g., Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002) (so stating).

First, the proper question for the superior court was whether any reasonable defense counsel would have declined *to interview* Robinson. As previously shown (AOB-46), Barens refused to interview Robinson before receiving the related discovery. *See Sanders v. Ratelle*, 21 F.3d 1446, 1456-57 (9th Cir. 1994) ("refusal to even listen to ... a key exculpatory witness ... cannot be deemed a reasonable strategy"). Chier's behavior, by contrast, is a compelling contemporaneous demonstration of how an unconflicted lawyer would behave *in situ*. *He* recognized the necessity of immediately interviewing Robinson, and objected to any other course as it was a "matter concerning [his] client's life" (ER-IV-946-47). *That* is how any reasonable defense counsel would have reacted.

Second, as to the time period when Barens declined to interview Robinson, his comments manifestly reflected his fear that Robinson might lead to more bad publicity for *him*, or inflame the authorities against him. (AOB-42-47.)

Third, as to the likelihood of Levin's making himself visible in Los Angeles, although he lacked training as a doctor, he famously walked into a cadaver room at UCLA posing as one, took up a scalpel, and proceeded to "autopsy" a cadaver. (ER-IV-1022.) He also posed as an attorney and a member of the Rothschild family. (ER-IV-1027, 1030.) He was known to state his occupation at Beverly Hills parties as "thief." (SER-63.) Not surprisingly, the San Mateo jurors felt Levin was outrageous and brazen enough to approach Robinson. (ER-III-783,

792.) Robinson's testimony was particularly impressive to these jurors because Levin was known to him, and he actually spoke to Levin. (ER-IV-773, 815.)

Fourth, as to whether Robinson's explanation for his delay in coming forward justified skepticism, some of the San Mateo jurors recognized the same issue. (*E.g.*, ER-III-797-98, 825.) Others sympathized with the trepidation Robinson felt over coming forward. (ER-IV-783, 792.) One juror regarded Robinson's eventual decision, even knowing it would cost him his job, as courageous and proof of sincerity. (ER-IV-815.) Once again, petitioner must highlight that jurors who benefited from a lengthy (ER-IV-807), 12-way, deliberative process provide an objectively superior *Strickland* perspective.

Fifth, as to the superior court's conclusion that no "reasonable defense counsel" would call Robinson" (ER-II-290 n.13), it made that finding though aware that petitioner had called Robinson in San Mateo with great success. (ER-III-773, 783, 792; ER-IV-797, 815, 818, 825.)

Sixth, Chier averred that he likely would have called Robinson. Again, Barens' contemporaneous statements demonstrate a personal agenda was driving his decision making. (AOB-28-52.) *Post hoc* tactical justifications about Robinson's credibility minted by Barens nine years later are irrelevant. Ineffective assistance of counsel has been found where counsel fails to exercise the option under state law to reopen testimony when witnesses arrive during closing

arguments. *E.g., Poindexter v. Booker*, 301 Fed. Appx. 522, 524, 531 (6th Cir. 2008). Significantly, the California standard for granting a new trial incorporates an element substantively identical to the *Strickland* "reasonable probability" test. *People v. Martinez*, 36 Cal.3d 816, 821 (1984).

F. Oliver Holmes

The prior court rulings and respondent conceded that the data from Holmes "would have been helpful" (ER-I-90; ER-II-70; ER-II-302-03; AB-91-93), but gave the subclaim no weight because "Petitioner has not shown he alerted Barens to the importance of Holmes' information in a meaningful and significant manner." (ER-I-91; *see also* ER-II-304.) They blame petitioner for Barens' failure to capitalize on Holmes, saying petitioner "was bombarding his counsel with thousands of lists of other information, and the information ... given about Holmes was quite limited." (ER-I-190; AB 92, 102.)

Barens, however, said of petitioner that, in twenty years, he never had a "finer example of cooperation from a defendant on every occasion at all times." (SER-70.) Furthermore, Barens admitted he had seen Detective Zoeller's report on Holmes. (ER-III-731.1-731.2; ER-IV-964-66 (Zoeller report).) Defense investigator Jensen testified he was directed to find Holmes shortly before he quit the case. (ER-III-741-42; ER-IV-969 (Jensen notes).)

The facts described in the Zoeller report provided *ample* justification for reasonable counsel to interview Holmes. That Levin learned on June 5, 1984, that his accomplice had "dimed" on him with respect to his criminal case, that he might leave that very night for New York, and that he urgently wanted his key back from Holmes (who needed the keys to help Levin prepare for trial), were sufficiently probative in themselves.

Respondent alleges the Jensens could not find Holmes, so Barens cannot be faulted. (AB-17, 91-93.) The Jensens' report showed that they had an address on him, stopped by once, no one was home, and they shortly thereafter quit Barens' employ. (ER-III-741-42; ER-IV-969.) The superior court refused to hear evidence on how simple it was to find Holmes. (SER-28-29.) The police interviewed him easily enough, and he was called in San Mateo.

Levin disclosed his intentions to others: Dean Factor and Karen Marmor. Factor said Levin remarked that, if his criminal case did not go well, he'd flee. (ER-IV-1022.) What Holmes' report added is that Levin *was taking affirmative steps*: he was actively researching arcane aspects of extradition treaties and the techniques of other fugitives. Holmes' testimony shows the condition precedent for flight specified to Factor had been fulfilled: Levin's case was going badly. *On June 5th*, Levin found out (*see* ER-III-644-48) that Neil Antin, his accomplice, had turned state's evidence.

Finally, and again, the San Mateo jurors were literally astounded by Holmes' testimony. (*See* AOB-55-56 (direct quotes).)

V. Petitioner's Reply to Respondent's Other Arguments

A. Respondent's "Mastermind" Theory for Explaining Away Barens' Negligence Regarding the Los Angeles Sightings Cannot Withstand Scrutiny

The superior court took no evidence and made no findings as to whether Barens had intentionally bypassed Los Angeles sightings. The state appellate court expressly resolved the eyewitness subclaims purely on lack-of-prejudice grounds. Thus, review in federal court on deficient performance for this and the other reasons stated above must be *de novo.*

Respondent is keen to persuade this Court, as he persuaded the district court, that Barens actually claimed he had made a strategic choice *in 1987* to present a defense theory that Levin was a "mastermind," who had successfully engineered his disappearance to avoid his problems. (AB-14, 28, 75-76, 84, 85; ER-I-77.) Then, assuming his own "mastermind" gloss was crucial, respondent posits that proving Levin was in Los Angeles would have been inconsistent therewith. (*Id.*)

First, the "mastermind" theory cannot justify the non-presentation of Robinson, Werner, Nippers, and Ghaleb *in a new-trial motion*, where the jury's perception of whether such evidence was consistent with Barens' rhetorical position would have been moot. (AOB-38, 41, 47, 49, 52-53.)

Second, the Supreme Court has been clear – perform a reasonable investigation, *then* pick your theory. It is inherently unreasonable to select a theory and then decline to *investigate* exonerating witnesses.

Third, the core premise of the defense was that Levin fled, not that he was a criminal genius. There is nothing inconsistent with the theory actually presented and the Los Angeles sightings, especially given the fact that Levin was not apprehended. The San Mateo jurors discerned no such problem. (*See* ER-III-771-73, 782-86, 790-92; ER-IV-796-97, 803-04, 812-18, 820, 825.)

B. The Irrelevancy of Barens' Penalty-Phase Performance

Respondent asserts that Barens' competence is proven by the penalty-phase result. (AB-5, 6, 49.) One has nothing to do with the other. "[E]ven an isolated error of counsel [may violate the right to effective assistance] if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

The same is true as to speculative inferences drawn from Barens' handling of "the lion's share" of the penalty-phase witnesses. (AB-5.) (*See* ER-IV-945; SER-71; RT B194 (Chier's wife almost died in labor in early May 1987; he was in round-the-clock attendance at her side for at least a week during the two-week penalty phase).)

C. Respondent Misleads Regarding Barens' Suppression of the Werner Sighting

Respondent argues that Barens did not keep from the defense team the contents of the prosecutor's letter of May 4, 1987, revealing the Werner sighting, and points to the reporter's transcript of May 6, 1987, as proof. (AB 82-83.) On that day, Barens referenced in court the Kentucky-jail sighting (SER-72-74), which was disclosed in the same letter. Chier, however, was with his wife in the hospital between May 2 and May 8, 1987. (ER-IV-945.) *Neither Chier nor petitioner was present when Barens addressed the court on May 4.*

D. Respondent Ignores Barens' Perjury

Respondent disputes petitioner's narrative that Chier and Barens' court appointments arose from dissatisfaction with their private retention contract. (AOB-3; AB-4.) Respondent asserts their appointments were occasioned by petitioner's indigence. As proof, he points to petitioner's declaration in support of their applications. (AB-5.)

The truth of the matter is that Barens slickly used petitioner's truthful declaration as a device to perpetrate a criminal fraud. He filed three false declarations, each swearing that he had only been paid $35,000 of the $50,000 fee; that he had not received any money on account after October 1985; and that he had no way of collecting the balance. (SER-80-84.) In point of fact, however, Barens

had received, according to his own records, $42,500 of that fee ($47,500 based upon the cancelled checks); had received two payments after October, one for $10,000 on January 27, 1986, and another for $2,500 on February 20, 1986 – *i.e.*, *the day before the declaration was signed*; and Barens held a $30,000 promissory note which secured the almost nominal balance. (SER-89-103; ER-IV-888-90.) Respondent has never denied Barens' perjury, nor that it was the very mechanism by which petitioner lost Chier's advocacy. (ER-IV-941, 948; CR-248-2-13 (explaining how this happened); CR-264-42-49).

E. Respondent's Conflict-Related Arguments Are Flawed

Respondent argues that the presumption of prejudice is clearly established by Supreme Court precedent only in the context of multiple representation. (AB-15, 55-56, 61-63.) Petitioner, however, invoked the presumption in the context of *de novo* – not AEDPA – review. (AOB-76.) Nonetheless, *Wood v. Georgia*, 450 U.S. 261 (1981), demonstrates application of the conflict-of-interest presumption in a context other than multiple representation of codefendants, *i.e.*, in the context of a conflict between an attorney's financial interest and those of his client. Further, the Supreme Court has recognized that a "significant conflict of interest" arises when a law firm's "interest in avoiding damage to its own reputation was at odds with [its client's] strongest argument – *i.e.,* that his attorneys had abandoned him." *Maples v. Thomas*, 132 S.Ct. 912, 925 n.8 (2012).

Thus, this Court would be on firm ground during *de novo* review in applying a presumption of prejudice. *See Plumlee v. Masto*, 512 F.3d 1204, 1210 (9th Cir. 2008) (*en banc*) (presumption applies to conflict "between the lawyer's own private interests and those of his client").

Respondent asserts that the conflict is conjectural, as did the district court. (AB-60-61; ER-I-73.) Not so. The existence and operation of the conflict has been proven out of Barens' own mouth; by the manner in which he shunned sighting witnesses, evincing great trepidation over merely interacting with Canchola, Lopez, Waller, and Robinson; and by the way he hid the very existence of other sighting witnesses (Werner, Ghaleb, Nippers) from his client, co-counsel, and investigator. (AOB-29-52.)

Next, respondent spreads before this Court the particulars of Barens' attack on the character of Titus, his co-counsel (AB-57) – as if all that were somehow relevant.[11] The question before this Court is not whether Titus was credible, but

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[11] In light of Barens' dishonesty in other respects, his on-the-record counter-attack on attorney Titus can scarcely be credited on the ground that he was then virtually "under oath" as an "officer of the court" (AB-50). Furthermore, respondent offers positive reputational evidence as to Barens that was not presented to the lower courts (AB-4-5), to counter bad reputation and case-related misconduct evidence that *was*. Likewise, when it comes to Titus, whose credibility is also not in issue, respondent finds nothing quite so important as case-*unrelated ad hominem* allegations (AB-56-57), including conduct 20 years after trial – pulled from a website of all things, and likewise making its first appearance in this litigation via Appellee's Brief (AB-57 n.22)!

whether his allegations created an "actual conflict of interest." " '[A]n actual conflict of interest' meant precisely a conflict that affected counsel's performance...." *Mickens v. Taylor*, 535 U.S. 162, 171 & n.5 (2002) (emphasis deleted). Petitioner has demonstrated an adverse effect using Barens' own words and an unrefuted chronicle of otherwise inexplicable conduct. (AOB-29-52, CR-191-18-31; CR-248-18-21; CR-264-49-56.)

F. Respondent's Argument About the American Express Transaction Avoids Petitioner's Contentions

The simple, unambiguous facts regarding the American Express charge of June 7, 1984, speak for themselves. A charge of $83.07 at a Brooks Brothers store was duly recorded on card 82028 on June 7, 1984, and assigned a reference number 2,965 transactions after charges made at the same store on May 7. The June 7 transaction appears on page 11 of the ensuing billing; the May 7 transactions, on page 1. The 82028 card was collected from Levin's flat, and only one such card was issued. The reference numbers and date/time of transactions are not inputted manually by store clerks, but assigned automatically through internal system software, thus eliminating the chance of human error. (AOB-66; AB-110-18.) Respondent admits these facts. (AB-110-13.)

The only practical argument made by respondent concerns whether a charge on 82028 would have been accepted on June 7, 1984. Here respondent both denies

and admits the relevant facts. He argues credit-card privileges were by then suspended (AB-108, 115-16), but admits in a footnote that the American Express representative Reeves testified that the temporary card was good through the end of June. (AB-116 n.43.) Thus, respondent's account of the facts confounds its argument.

Regardless, the validity of the date of the transaction is unquestionable, it having been internally generated by a networked computer system. Thus, the card was unquestionably presented *and accepted* by Brooks Brothers on June 7, 1984 – and it was found at Levin's house thereafter.

As evidence of Barens' preparation on this subject, respondent points to computer-generated tables regarding the Levin AMEX account that were utilized by Barens. (AB-114, 117.) Those, however, were generated by petitioner on his Apple Macintosh. (ER-IV-928.) Indeed, Barens *admitted* he never looked at the AMEX records prior to Reeves' appearance. (ER-IV-1067-70.) Respondent posits that Barens' admission was mistaken, noting that he *discussed* the bills with the conservator a week before Reeves testified. (AB-114.) These facts are not inconsistent. (*See* SER-67; ER-IV-1067-70.)

Finally, Reeves' opinion at trial was predicated on a hypothetical question. He was to assume that card 82028 never left Levin's apartment on June 7. (AB-112; ER-IV-1082-83.) Thus, Reeves was bound by the hypothetical to concoct a

counterfactual scenario. Barens, however, did not grasp that. Because of a lack of preparation, Barens missed the opportunity to introduce through the cross-examination of Reeves evidence that would have refuted the state's theory of the case.

G. Respondent Misuses the Arizona Sighting

The verdict is some evidence that the Arizona sighting by Canchola and Lopez, as presented by Barens, did not create a reasonable doubt as to petitioner's guilt. A different question arises, however, under proper application of *Strickland*: would the presentation of Waller, Werner, Ghaleb, and Robinson, in conjunction with Canchola and Lopez, have had a cross-corroborating effect? The San Mateo jurors certainly thought so. (ER-III-772-73, 784, 786, 792, 796-97; ER-IV-796, 816-17, 834-35.)

Moreover, Barens' failure to recognize the significance of Canchola's recollection of the skin anomaly or mark on the man's forehead (AOB-38) was alone prejudicial deficient performance. (*See* ER-IV-815, 823 (San Mateo jurors: scar recollection greatly enhanced sighting).)

Respondent reflexively argues that Levin had no scar, even while admitting Holmes testified that he did. (AB-16, 66 n.25 (barely perceptible triangular patch of scar tissue in center of forehead).) In the intense Arizona sun, Levin's scar

would have become more prominent, as the San Mateo jurors realized (ER-IV-824).

Finally, respondent contends that Barens' behavior re the Arizona witnesses was reasonable given attorney-client privileged communications. (AB-69-70 ("Counsel was not ineffective for not hurrying to Arizona to search for Levin when these witnesses came forward, because Petitioner told counsel he murdered Levin, giving counsel reason to believe such investigation would be fruitless.").) The facts surrounding the purported "confession" being alluded to here are quite bizarre.

A client who accuses his former attorney of negligence will be deemed by a tribunal to have made an "implied waiver of the attorney-client privilege, but only as to "communication[s] *relevant* to [the] issue of breach." Cal. Evidence Code § 958 (emphasis added); *see also id.* at § 954(c); Fed. R. Evid. 502(c) & (d); *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003); *In re Gray*, 123 Cal.App.3d 614, 615-16 (1981). In mid-1995, under no judicial compulsion, Barens improperly allowed himself to be interviewed by the prosecution and then furnished them with a declaration referring to petitioner's supposed admissions. (CR 11, Ex. 152; CR 238, Ex. I).[12] Barens later testified over objection that

petitioner had confessed to him early in the relationship (SER-22-23; ER-IV-735), but that, as he learned about petitioner's character, philosophy, and psychology (SER-25-27), he rapidly developed doubts about the veracity of these alleged admissions (SER-24-25). Barens eventually concluded that petitioner was innocent and that the confession was false. (SER-30-31.) Further, Barens testified that he believed Carmen Canchola, who claimed to have seen Levin in Arizona in September 1986, "was truthful in every respect and accurate." (ER-IV-736.)

The superior court later conceded that petitioner's alleged confession did not "directly affect any of the [IAC] issues." (ER-II-308 n.21.) Respondent concedes the same. (AB-13-14 (supposed admissions "did not directly impact the issues to be resolved").) Thus petitioner's assertion of privilege should never have been overruled. (SER-20-21.5.)

Moreover, Barens' "confession" testimony cannot be credited. The three defense investigators and the penalty-phase consultant confirm that the marching

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[12] *See* ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 10-456 (avail. at http://abanet.org/cpr/10-456.pdf). The committee cautioned that, even if the lawyer reasonably believes there is need to disclose client information to prevent harm to the lawyer through a finding of ineffective assistance of counsel, "it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable."

orders Barens gave them were uniformly predicated on a defense Levin had absconded and that petitioner maintained his innocence. (ER-IV-934, 936, 938.)

Finally, prejudice is plainly demonstrated in the manner in which Barens' "sanitary" tactics were exploited in the prosecutor's summation. (AOB-35-37, 73.)

H. Louise Waller Would Have Been Called as a Defense Witness in the Guilt Phase but for Barens' Conflict

Waller's account alone, when coupled with Barens' handling of her, carries a probative force sufficient to justify habeas relief.

Respondent argues Waller did not come forward in time to be used in the guilt phase. (AB-73-75.) *First*, the evidence before this Court proves by at least a preponderance (*i.e.*, the applicable burden) that Waller called Barens no later than late March 1987, three weeks before the April 22 verdict. Waller's first interview, however, was on April 22, conducted by Keith Rohman, the investigator for petitioner's codefendant Pittman. (ER-IV-907.) She saw Levin between February 16 and March 18, 1987. (ER-IV-908.) "About two or three days later," she saw a news report of the trial. "She [then] thought about coming forward for approximately a week and spoke with friends about what you should do. She then *called Barens' office*. No one returned her call for a week, but she was later contacted." (ER-IV-908, emphasis added.)

Waller was next interviewed on April 29, 1987, this time by Hap Lee, petitioner's investigator. (ER-IV-902, 904-05.) Waller testified that, a few days after seeing Levin, she called Chier and was contacted by Mr. Lee, and thereafter by another investigator. (AB-74; SER-75-77.) She testified that a week transpired between when she saw Levin and when she spoke to Chier. (SER-79.) Her testimony regarding this timeline was incorrect. The written reports of the investigators more reliably established the true timeline, both as to who first interviewed her, and when, and whom she contacted first, Chier or Barens. (*See* ER-IV-899-908.) Yet, even under her trial-testimony timeline, she contacted the defense a couple of weeks before the verdict.

The fact that her earliest recorded recollection was that she contacted Barens first, but Rohman interviewed her first, suggests that Barens referred the lead to Pittman's attorney Brodey. Barens admitted such a liaison during his deposition. (SER-37.) Barens got an independent party to investigate his client's case so no one could say he influenced her reportage. (AOB-45 (Barens' intimating similar concern with Robinson).)

Thus, it was Barens' "sanitary" delegation strategy that took Waller out of play during the guilt phase. Chier declares he would have used Waller during the guilt phase had he been told about her in time (ER-IV-848, 945-46), just as any reasonable defense counsel would have done.

I. The Unpresented Evidence of Levin's Untraceable $503,000 Is Material

Respondent makes two arguments with respect to the unpresented evidence of the large sum of money available to Levin at the time of his disappearance: the evidence was cumulative and petitioner's theory is conjectural. (AB-102-08.)

First, although there was indeed evidence regarding Levin's debts and income at trial, there was *none* about $503,000 being unaccounted for. The prosecution created a facade through the conservator and from a dozen representatives of Levin's banks and brokerage houses that Levin spent lavishly, and that what was left was $36,000. Levin's conservator claimed he had combed Levin's records for financial institutions and followed up with every one of them. (*E.g.,* SER-66.) Everything appeared neat and accounted for. (ER-V-1366-67.) The prosecutor derided Barens' argument that Levin had sources sufficient to amass an escape fund. (ER-VI-1409-10.)

It was, however, a false portrayal, made possible by Barens. Respondent's own expert concedes that Levin moved $503,000 from known accounts to places unknown. Three San Mateo jurors found the inferences drawn from such evidence to be highly exculpatory. (ER-III-781; ER-IV-825, 832.)

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J. Respondent's Notion that Barens Adequately Prepared by Working Through Others Is Refuted by the Record

Respondent argues that Barens did not work alone, but through cooperating personnel like Brodey and Chier. (AB-47-49.) Barens himself made a few vague assertions to this effect. (*Id*)

These are the facts:

1. There were only four defense witnesses: two alibi witnesses (who were relatives of the person who hired Barens) and the Arizona witnesses, who came via discovery. Thus, no witness was located through defense investigation or through Brodey.

2. Other than documents used in examining alibi witness Lynne Roberts, Barens did not introduce a single exhibit that was not part of discovery.

3. There is not a single reference in *any* Barens' cross-examination to a statement made by a witness to a defense investigator, whether one working for Brodey or Barens.

4. Although Barens claimed he had organized discovery and work product of about 10 boxes, and that it disappeared after he gave it to Bobby Roberts (AB-52), the evidence establishes this was just another one of his facile, but false, *post-hoc* representations. (SER-39-46) Although Brodey's investigator interviewed

150 people (ER-IV-959), not a single one of those reports was in Barens' records. (*Id.*)

5. When the prosecution rested, Barens admitted he had not interviewed any of the "12 to 13" defense witnesses his opening statement promised (CR 191-65-66; ER-III-605). He admitted ignoring discovery pertaining to over half the witnesses under the theory that Chier was to handle them; and his preparation for cross-examination consisted entirely of cram-sessions the night before a witness took the stand. (SER-85-86, 89.1-89.2; ER-IV-998, 1000, 1007; ER-V-1190, 1273-79; ER-VI-1381-82.)

6. Owing to Barens (ER-IV-945; CR-191-67-75; CR-248-2-13), cooperation with Chier had effectively ceased before trial even started (ER-V-1201 (Barens' declaring that he is "not assisted" by Chier); ER-V-1278-79 (Barens' saying he would not delegate preparation to Chier)).

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CONCLUSION

For all the foregoing reasons, and all those set out in the AOB, 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: March 28, 2016

Respectfully submitted,

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CERTIFICATION REGARDING BRIEF FORM

I, Dennis P. Riordan, hereby certify that the foregoing Appellant's Reply Brief is proportionately spaced, has a typeface of 14 points, and contains 11,160 words.

Dated: March 28, 2016

/s/ Dennis P. Riordan
Dennis P. Riordan

CERTIFICATE OF SERVICE

I, Dennis P. Riordan, hereby certify that I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 28, 2016.

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

/s/ Dennis P. Riordan
Dennis P. Riordan