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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT NO. 101 HON. J. STEPHEN CZULEGER, JUDGE

IN RE)
JOSEPH HUNT)
ON HABEAS CORPUS)

NO. A 090435

REPORTER'S DAILY TRANSCRIPT
VOLUME 14
MONDAY, JULY 8, 1996
PAGES 2248 THROUGH 2344, INCL.

COURT OF APPEAL - SECOND DIST.
FILED
JUL 11 1997
Z. HERRERA
Clerk
Deputy Clerk

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AND
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COPY

M. HELEN THEISS, CSR, #2264
PAUL RUNYON, CSR, #8797
OFFICIAL COURT REPORTERS



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M A S T E R I N D E X

CHRONOLOGICAL INDEX OF WITNESSES

HEARING:

PETITIONER'S WITNESSES DIRECT CROSS REDIRECT RECROSS DIRE VOL VOIR

(NONE)

RESPONDENT'S WITNESSES DIRECT CROSS REDIRECT RECROSS DIRE VOL VOIR

(NONE)

REBUTTAL:

(NONE)

LEGEND:

ALPHABETICAL INDEX OF WITNESSES

PETITIONER'S WITNESSES DIRECT CROSS REDIRECT RECROSS DIRE VOL VOIR

(NONE)

RESPONDENT'S WITNESSES DIRECT CROSS REDIRECT RECROSS DIRE VOL VOIR

(NONE)

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M A S T E R I N D E X

EXHIBITS

PETITIONER'S EXHIBITS	FOR		IN		WITHDRAWN OR	
	IDENTIFICATION		EVIDENCE		REJECTED	
	VOL.	PG.	VOL.	PG.	VOL.	PG.

(NONE)

RESPONDENT'S EXHIBITS	FOR		IN		WITHDRAWN OR	
	IDENTIFICATION		EVIDENCE		REJECTED	
	VOL.	PG.	VOL.	PG.	VOL.	PG.

(NONE)

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M A S T E R I N D E X

EXHIBITS

PETITIONER'S EXHIBITS	FOR IDENTIFICATION VOL. PG.	IN EVIDENCE VOL. PG.	WITHDRAWN OR REJECTED VOL. PG.
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(NONE)

RESPONDENT'S EXHIBITS	FOR IDENTIFICATION VOL. PG.	IN EVIDENCE VOL. PG.	WITHDRAWN OR REJECTED VOL. PG.
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(NONE)

1 1 LOS ANGELES, CALIFORNIA, MONDAY, JULY 8, 1996

2 9:05 A. M.

3 DEPARTMENT NO. 101

HON. J. STEPHEN CZULEGER, JUDGE

4
5 APPEARANCES:

6 THE DEFENDANT, JOSEPH HUNT, WITH HIS COUNSEL,
7 MICHAEL CRAIN, BAR PANEL APPOINTMENT; AND ROWAN
8 KLEIN, BAR PANEL APPOINTMENT; ANDREW MC MULLEN,
9 DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY;
10 IMOGENE KATAYAMA, DEPUTY DISTRICT ATTORNEY OF LOS
11 ANGELES COUNTY, REPRESENTING THE PEOPLE OF THE
12 STATE OF CALIFORNIA.

13
14 (PAUL RUNYON, OFFICIAL REPORTER, CSR #8797.)

15
16 (M. HELEN THEISS, OFFICIAL REPORTER, CSR #2264.)

17
18 THE COURT: IN THE MATTER OF JOSEPH HUNT
19 HABEAS CORPUS, THE RECORD WILL REFLECT BOTH COUNSEL ARE
20 PRESENT, PETITIONER IS PRESENT.

21 BEFORE WE BEGIN CLOSING ARGUMENT, THERE HAS
22 BEEN A REQUEST FOR ELECTRONIC MEDIA COVERAGE. I WAS
23 INCLINED TO SIGN THAT. I THOUGHT THE OBJECTION DURING THE
24 HEARING WAS THE TESTIMONY OF WITNESSES, WHICH I THOUGHT
25 WAS APPROPRIATE. THEREFORE, I DID NOT ALLOW THE FILMED
26 COVERAGE.

27 COUNSEL, WISH TO BE HEARD ON THE ISSUE?

28 MR. KLEIN: WE STILL OBJECT.

2
1 THE COURT: ANYTHING YOU WANT TO ADD FOR THE
2 RECORD?

3 MR. KLEIN: NO.

4 THE COURT: PEOPLE?

5 MR. MC MULLEN: SUBMITTED.

6 THE COURT: I HAVE SIGNED THE ORDER. I WILL ALLOW
7 THE COVERAGE AT THIS POINT. IT IS CLOSING ARGUMENT AND
8 MATTERS OF LEGAL ISSUES AS OPPOSED TO THE FACTUAL
9 TESTIMONY AND APPEARANCES OF THE WITNESSES.

10 I HAVE READ AND -- THE PETITIONER'S OPENING
11 BRIEF, THE RESPONDENT'S REPLY AND PETITIONER'S RESPONSE TO
12 THE RESPONDENT'S REPLY. IT'S WITH PETITIONER, THE CLOSING
13 ARGUMENT.

14 MR. CRAIN: YES, YOUR HONOR. THANK YOU.

15 YOUR HONOR, AS YOU KNOW, THIS IS A -- A
16 UNIQUE CASE, I THINK, IN THE ANNALS OF CALIFORNIA
17 JURISPRUDENCE. I'M NOT HERE TO REITERATE ALL THE POINTS
18 THAT HAVE BEEN MADE IN THE BRIEFS. I THINK THEY COVER IT
19 WELL.

20 I DO WISH TO ADDRESS THE COURT RATHER BRIEFLY
21 ON SOME OF THESE -- ON SOME OF THESE MATTERS, AND IT'S A
22 UNIQUE CASE, I THINK, AS THE COURT KNOWS, BECAUSE IT'S A
23 CASE IN WHICH THE ALLEGED VICTIM, WE BELIEVE, HAS BEEN
24 SHOWN NOT TO HAVE BEEN A VICTIM, THAT THERE WAS NO MURDER
25 IN THE CASE.

26 UNLIKE ANY OTHER OF THOSE CASES IN CALIFORNIA
27 HISTORY WHERE IT WAS A NO BODY TYPE OF CASE, NO ONE HAS
28 TESTIFIED SUBSEQUENT TO THE TRIAL THAT THEY HAVE SEEN THE

3

1 SUPPOSED VICTIM ALIVE ON DATES AND YEARS FOLLOWING THE
2 TRIAL, AND CERTAINLY NOT PEOPLE WHO IN FACT KNEW THE
3 VICTIM AND WERE NOT MERELY STRANGERS WHO MADE SOME SORT OF
4 IDENTIFICATION ON THE BASIS OF SEEING SOMEONE FOR THE
5 FIRST TIME.

6 AS THE COURT KNOWS, AND THIS IS PRELIMINARY,
7 I'M NOT TELLING YOUR HONOR ANYTHING YOU DON'T ALREADY
8 KNOW, BUT JUST TO PERHAPS EMPHASIZE, WHAT THIS COURT IS
9 BEING ASKED TO DO, OF COURSE, IS NOT TO SAY TO MR. HUNT,
10 "MR. HUNT, YOU ARE FREE TO LEAVE. JUST WALK OUT. THE
11 CASE IS OVER BY SEEKING THE RELIEF YOU SEEK."

12 THE RELIEF WE SEEK IS NOTHING MORE THAN A
13 FAIR TRIAL IN WHICH MR. HUNT WITH COMPETENT COUNSEL, WHICH
14 HE DID NOT HAVE IN THE FIRST TRIAL, WOULD BE ALLOWED TO
15 PRESENT THE EVIDENCE THAT THE SANTA MONICA JURY NEVER
16 HEARD IN 1987, THAT PEOPLE SUCH AS THE WITNESSES THAT HAVE
17 BEEN PRESENTED TO THIS COURT SAW MR. LEVIN ALIVE, SOMEONE
18 WHO THEY KNEW WELL. THAT'S ALL WE'RE SEEKING HERE.
19 THAT'S ALL THE LAW REQUIRES OF THIS COURT IN GRANTING THE
20 PETITION.

21 AS I SAID IN THE BRIEFS, I THINK THIS IS AN
22 OPPORTUNITY, AS THIS CASE PROVIDES, FOR THE COURT TO
23 DEMONSTRATE TO THE -- TO THE WORLD IN FOLLOWING THE LAW,
24 WHICH IS ALL I ASK THE COURT TO DO, THAT OUR SYSTEM DOES
25 IN FACT WORK.

26 OCCASIONALLY WE SEE REMINDERS OF THIS, AND I
27 WANT TO TALK A FEW MOMENTS ABOUT THE IN RE JONES CASE,
28 WHICH THE CALIFORNIA SUPREME COURT A WEEK AGO JUST ISSUED

3
1 A DECISION IN, A UNANIMOUS DECISION INVOLVING INCOMPETENCE
2 OF COUNSEL, WHERE I NOTICE THAT CASE WAS PENDING FOR SOME
3 TEN YEARS BEFORE THE COURT DETERMINED THAT THAT LITIGANT,
4 TOO, HAD BEEN DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO
5 COMPETENT COUNSEL. AND THEY AGAIN DID NOT SAY, "WELL, YOU
6 CAN GO HOME NOW." BUT THEY SAID TO THE DISTRICT ATTORNEY,
7 "YOU CAN NOW RETRY HIM, AND THIS TIME HE COULD GET A
8 CONSTITUTIONALLY PROPER TRIAL."

9 I KNOW THAT THIS COURT IS AWARE THAT THIS IS
10 A CASE THAT OVER THE PAST -- MORE THAN A DECADE HAS
11 AROUSED A GREAT DEAL OF PUBLIC INTEREST AND PUBLIC
12 CURIOSITY ABOUT THE CASE, AND I THINK THAT STAYS WITH US
13 TODAY. NOT THAT THAT IS SOMETHING FOR THE COURT TO BASE
14 ITS DETERMINATION ON ONE WAY OR THE OTHER, BUT I THINK IT
15 SHOWS THE UNIQUENESS OF THIS CASE. IT'S NOT MERELY AN
16 UNUSUAL CASE. I THINK IT'S -- IT'S A UNIQUE ONE.

17 I THINK THAT THE BRIEFS THAT WE FILED ON
18 BEHALF OF PETITIONER HAVE CLEARLY, I BELIEVE, SET FORTH
19 THE RECORD IN THE CASE THAT'S BEFORE THIS COURT. I THINK
20 HAVE CLEARLY SET FORTH AND ATTEMPTED TO CLEAR UP ANY
21 CONFUSION REGARDING ISSUES WHICH MAY HAVE ARISEN DURING
22 THE COURSE OF THE HEARING.

4
23 I RECOGNIZE THAT THE COURT HAS READ THE
24 BRIEFS, AND AGAIN, THIS IS NOT GOING TO BE A MINUTE
25 EXPLORATION OF EACH DETAIL IN THE CASE, BUT I DO BELIEVE
26 THAT ANY QUESTIONS THAT THIS CASE MAY HAVE RAISED OR ANY
27 POINTS THAT THE DISTRICT ATTORNEY'S OFFICE MAY HAVE RAISED
28 ARE MET AND DEALT WITH AND EXPLAINED IN THOSE TWO BRIEFS

4
1 THAT WE FILED.

2 THE COURT: LET ME ASK YOU, DO YOU THINK THE
3 WERNER, GHALEB AND ROBINSON SIGHTINGS ARE NEWLY DISCOVERED
4 EVIDENCE --

5 MR. CRAIN: WHICH ONES?

6 THE COURT: WERNER, GHALEB AND ROBINSON. ARE
7 THOSE -- IS THAT NEWLY DISCOVERED EVIDENCE AS DEFINED BY
8 GONZALEZ AND SOME OF THE OTHER CASES?

9 MR. CRAIN: TO ANSWER THE COURT'S QUESTION, GERRARD
10 IS CLEARLY NEWLY DISCOVERED. WE TAKE THE --

11 THE COURT: DID I SAY GERRARD?

12 MR. CRAIN: YOU DID NOT SAY GERRARD.

13 THE COURT: OKAY.

14 MR. CRAIN: I'M SAYING FOR CLARITY'S SAKE THAT I
15 THINK EVERYONE HERE WOULD CONCEDE THAT THAT IS NEWLY
16 DISCOVERED EVIDENCE. IT WAS EVIDENCE THAT WAS NOT IN
17 EXISTENCE. THE SIGHTING OF LEVIN IN MYKONOS WAS NOT IN
18 EXISTENCE UNTIL AFTER THE TRIAL HAD BEEN OVER FOR SOME SIX
19 MONTHS.

20 WITH REGARD TO THE OTHER WITNESSES THAT THE
21 COURT IS INQUIRING ABOUT, IT'S OUR POSITION -- OUR
22 POSITION IS TWOFOLD ON THAT ONE. IT IS NEWLY DISCOVERED
23 EVIDENCE BECAUSE I THINK THE RECORD READ FAIRLY SHOWS THAT
24 NONE OF THIS EVIDENCE WAS -- IT WAS NOT PRESENTED DURING
25 THE TRIAL ITSELF.

26 THE COURT: BUT WAS COUNSEL MADE AWARE OF IT?

27 MR. CRAIN: WELL, I DON'T -- WITH REGARD TO --

28 THE COURT: TRIAL COUNSEL, I MEAN.

4
1 MR. CRAIN: WITH REGARD TO THE GHALEB TESTIMONY, I
2 THINK THE RECORD IS -- IS AMBIGUOUS, BUT I DON'T THINK IT
3 SUPPORTS A FINDING THAT BARENS HIMSELF WAS MADE AWARE OF
4 IT UNTIL AFTER THE CASE HAD ALREADY BEEN SUBMITTED TO THE
5 JURY ON THE GUILT PHASE.

6 I THINK THAT IN TERMS OF WHETHER SOMETHING IS
7 NEW EVIDENCE, THE PROPER WAY TO LOOK AT IT IS IN TERMS OF
8 WHETHER IT WAS THERE, TRIAL COUNSEL HAD IT AT THE TIME OF
9 THE -- THAT THE LITIGATION OF THE ISSUE OF GUILT OR
10 INNOCENCE WAS BEING PRESENTED.

11 THE COURT: YOU HAVE REACHED THE POINT, THEN, THAT
12 I HAVE A QUESTION ABOUT. IF COUNSEL BECOMES AWARE OF
13 NEWLY DISCOVERED EVIDENCE DURING THE PENALTY PORTION OF
14 THE TRIAL, CAN -- CAN PETITIONER THEN LATER SAY THAT IT IS
15 IN FACT NEWLY DISCOVERED EVIDENCE WHEN IN FACT THE JURY
16 TRIAL IS NOT YET COMPLETED? I CAN'T FIND ANYTHING ON THAT
17 ISSUE.

18 MR. CRAIN: I THINK YOU'RE RIGHT. IT IS NOT AN
19 ISSUE THAT'S BEEN CLEARLY RESOLVED. I WOULD SAY THIS,
20 THOUGH, I THINK IT'S AKIN TO COUNSEL FINDING OUT OR NOT
21 FINDING THAT EVIDENCE AFTER A CONVICTION IS IN BUT BEFORE
22 THE MOTION FOR NEW TRIAL IS MADE.

23 ALTHOUGH THE STANDARD, AS I SAID, IN HALL IS
24 DIFFERENT IN TERMS OF IT DOESN'T TALK ABOUT -- IT DOES NOT
25 ADD THE SAME STANDARD AS 1181 DOES IN TERMS OF DILIGENCE
26 OF COUNSEL. IT'S SOMEWHAT OF A GRAY AREA, BUT I THINK IN
27 TERMS OF A DEATH PENALTY CASE COUNSEL CERTAINLY, IF HE
28 COMES ACROSS NEW EVIDENCE THAT -- THAT HE SHOULD HAVE

4

1 PRESENTED, CRITICAL EVIDENCE SUCH AS THIS WHICH SHOULD
2 HAVE BEEN PRESENTED AT THE GUILT PHASE AFTER THE JURY HAD
3 BEGUN DELIBERATIONS ON THE GUILT PHASE, HE CAN ASK TO
4 REOPEN THE TRIAL.

5 THE JUDGE CAN RULE THAT IT CAN BE REOPENED.
6 I DON'T THINK THAT IS IN DISPUTE IF THE JURY HAS NOT
7 REACHED A CONVICTION.

8 IN ANY CASE, WHERE THERE IS A MOTION FOR NEW
9 TRIAL PENDING, HE CAN BRING THAT TO THE ATTENTION OF THE
10 COURT, BUT I WANTED TO --

11 THE COURT: THERE WAS A SIGHTING WITNESS THAT DID
12 TESTIFY DURING THE PENALTY PHASE.

13 MR. CRAIN: IT WAS MRS. WALNEER.

14 THE COURT: RIGHT.

15 SO CLEARLY COUNSEL IS AWARE THAT THERE WAS
16 THE ABILITY TO PRESENT, TRIAL COUNSEL WAS AWARE THAT THERE
17 WAS THE ABILITY TO PRESENT SIGHTING EVIDENCE DURING THE
18 PENALTY PHASE OF THE TRIAL.

19 I GUESS MY QUESTION IS IT MAY GO TO THE ISSUE
20 OF INCOMPETENCE OF COUNSEL, BUT CAN YOU RAISE NEWLY
21 DISCOVERED EVIDENCE WHEN THERE'S AT LEAST SOME EVIDENCE
22 THAT COUNSEL WAS AWARE DURING THIS TRIAL OF THE EXISTENCE
23 OF WERNER, GHALEB AND ROBINSON?

24 MR. CRAIN: I THINK IN TERMS OF LOOKING AT IT IN
25 TERMS OF NEW EVIDENCE IT HAS TO BE ONE OR THE OTHER. I
26 THINK THE EVIDENCE REALLY WAS THAT BARENS DID NOT BECOME
27 AWARE OF GHALEB UNTIL IT APPEARS THAT THE GUILT PHASE
28 EVIDENCE WAS ALREADY IN AND THE JURY WAS -- THEY ARE

4 1 DELIBERATING OR WAS ABOUT TO DELIBERATE.

2 BUT, NEVERTHELESS, CLEARLY IT WOULD SEEM TO
3 ME THAT IF COUNSEL IS AWARE IN A CASE WHERE -- SUCH AS
4 THIS WAS, WITH THE SET OF FACTS THAT WE HAD AND THE
5 EVIDENCE ABOUT RON LEVIN AND THE FACT THAT NO ALLEGED
6 MURDER VICTIM WAS EVER -- WAS EVER FOUND, COUNSEL'S
7 FAILURE TO DO SOMETHING ABOUT IT IN TERMS OF GETTING THAT
8 EVIDENCE BEFORE THE JURY SO THEY COULD DELIBERATE ON IT IN
9 TERMS OF DECIDING GUILT IS INCOMPETENCE PER SE. WHAT MORE
10 CAN THERE BE?

11 THE COURT: WHAT ABOUT --

12 MR. CRAIN: PARDON ME.

13 THE COURT: WHAT ABOUT WERNER AND ROBINSON, THEN?

14 MR. CRAIN: WERNER AND ROBINSON, THE FACT IS THAT
15 IN BOTH OF THESE INSTANCES -- FOR EXAMPLE WITH ROBINSON, I
16 THINK THE EVIDENCE IS CLEAR THAT BARENS WAS MADE AWARE OF
17 IT AND DID NOTHING ABOUT IT. NEVER INTERVIEWED ROBINSON.
18 ROBINSON CAME TO THE COURTHOUSE. ROBINSON TALKED TO THE
19 DISTRICT ATTORNEY, AND BARENS SAT ON HIS HANDS.

20 THE COURT: SO CAN YOU CLAIM THAT THAT IS NEWLY
21 DISCOVERED EVIDENCE?

22 MR. CRAIN: WELL --

23 THE COURT: IT MAY GO TO THE ISSUE OF INCOMPETENCE
24 OF COUNSEL, BUT IS IT NEWLY DISCOVERED?

25 MR. CRAIN: I WANTED TO SAY -- I SAID THERE ARE TWO
26 POINTS HERE, IF I MAY, JUST TO ASSIST THIS DISCUSSION.

27 THE SECOND POINT IS UNDER HALL. THE HALL
28 STANDARD IS QUITE CLEAR THAT ONCE NEWLY DISCOVERED

5

1 EVIDENCE IS PRESENTED IN THE CASE THE PETITIONER ON HABEAS
2 CORPUS HAS A LEGAL RIGHT TO PRESENT ANY OTHER EVIDENCE
3 TENDING TO SHOW INNOCENCE THAT IS NOT NEWLY DISCOVERED
4 EVIDENCE BUT WHICH IS NOT CUMULATIVE.

5 SO UNDER HALL -- I THINK IT'S SOMETHING THAT
6 THE COURT NEED NOT REALLY CONCERN ITSELF WITH IN TERMS OF
7 THE LABEL AS TO ROBINSON, GHALEB AND WERNER, WHETHER IT'S
8 NEW EVIDENCE OR NOT NEW EVIDENCE BECAUSE UNDER HALL IT'S
9 ADMISSIBLE EVIDENCE, AND IT'S EVIDENCE THAT THE COURT HAS
10 TO CONSIDER IN DECIDING WHETHER OR NOT THE STANDARD OF IN
11 RE GONZALEZ, PEOPLE VERSUS GONZALEZ IS MET.

12 THE PEOPLE TOOK THE POSITION, WHICH I WOULD
13 TRUST THE COURT DISPOSES OF AS QUICKLY AS IT SHOULD, THAT
14 SOMEHOW THE EVIDENCE, ALTHOUGH -- AS CONSIDERED UNDER
15 HALL, IS CUMULATIVE. I MEAN, THAT'S PREPOSTEROUS.

16 CUMULATIVE EVIDENCE OBVIOUSLY WOULD BE IF 10
17 WITNESSES WERE BROUGHT IN TO ESTABLISH A POINT THAT ONE OR
18 TWO COULD MAKE AS TO THE SAME EVENTS AT THE SAME TIME.

19 BUT THESE WITNESSES ALL SAW LEVIN AT
20 DIFFERENT TIMES AND DIFFERENT PLACES AND EVEN DIFFERENT
21 YEARS. IT'S NOT CUMULATIVE EVIDENCE IN THE LEGAL SENSE.
22 I THINK THAT IS SORT OF -- IT'S AN ABSURDITY REALLY.

23 THE COURT: WELL, YOU COULD HAVE CUMULATIVE
24 EVIDENCE.

25 MR. CRAIN: YOU COULD.

26 THE COURT: LET'S ASSUME YOU ONLY HAVE ONE SIGHTING
27 WITNESS. YOU HAD THREE SIGHTING WITNESSES IN MR. HUNT'S
28 SANTA MONICA TRIAL. LET'S ASSUME TEN YEARS AFTER THE FACT

5
1 SOMEONE COMES UP WITH ANOTHER SIGHTING. ISN'T THE FACT
2 THAT IT IS CUMULATIVE A FACTOR IN DECIDING WHETHER OR NOT
3 IT'S SUFFICIENT EVIDENCE TO GIVE A NEW TRIAL?

4 MR. CRAIN: AS I SAID IN THE BRIEFS, I THINK IT
5 WOULD BE CUMULATIVE EVIDENCE IF MR. HUNT WERE SEEKING
6 TO -- SOMEONE ELSE, SAY THE GAS STATION ATTENDANT FROM
7 ARIZONA AT THIS POINT TO SAY LIKE, "I WAS THERE LIKE
8 LOPEZ AND CANCHOLA AND I ALSO SAW THE MAN IDENTIFIED AS
9 MR. LEVIN."

10 THAT WOULD APPEAR TO BE CUMULATIVE EVIDENCE.

11 WE CITED THE AUTHORITY CITING WHAT CUMULATIVE
12 IS. I DON'T THINK THAT'S A FAIR READING OF WHAT
13 CUMULATIVE IS. IF YOU HAVE A WITNESS WHO SEES THE
14 PURPORTED DECEASED ALIVE AT A DIFFERENT TIME, LOCALE, A
15 DIFFERENT PLACE, THAT'S A COMPLETELY SEPARATE PIECE OF
16 EVIDENCE WHICH SHOWS UNDER IN RE HALL THAT THE -- THAT
17 THE -- THAT THE PETITIONER IS FACTUALLY INNOCENT.

18 I DON'T THINK IT'S CUMULATIVE. I DON'T THINK
19 THE COURT WOULD BE ABLE TO PROPERLY CONSIDER THAT. THAT'S
20 MORE FULLY SET FORTH IN TERMS OF THE PLEADING, IN TERMS OF
21 THE CASE AUTHORITY ON THAT. I WON'T TAKE THE COURT'S TIME
22 TO THUMB THROUGH IT, BUT IT'S THERE.

23 I THINK THAT, AS I SAY, I THINK IN TERMS OF
24 WHETHER OR NOT THIS IS CONSIDERED -- CLEARLY GERRARD, WHO
25 THE PEOPLE HAVE PROPERLY, IT SEEMS TO ME READING THEIR
26 PLEADING, CONCEDED IS A CREDIBLE WITNESS, THAT'S NEW
27 EVIDENCE. THAT IS NOT IN DISPUTE.

28 THE COURT: GERRARD IS YOUR BEST WITNESS. WHY

5 1 DON'T YOU TALK ABOUT MS. GERRARD.

2 MR. CRAIN: WELL, FIRST OF ALL, MR. HOLMES, WHO
3 KNEW MR. LEVIN WELL, AS I SAID IN THE BRIEFS, IS SOMEONE
4 WHO SAID THAT RON LEVIN IS SOMEONE WHO IS EASILY
5 RECOGNIZABLE.

6 I DON'T KNOW WHAT THE COURT WANTS TO HEAR AT
7 THIS POINT. THIS IS SOMEBODY WHO KNEW HIM WELL, KNEW HIM
8 OVER AN EXTEND PERIOD OF TIME. TESTIFIED UNDER OATH THEY
9 WERE POSITIVE. DESCRIBED HIM TO A T. SAID HE WAS THE
10 MAN.

11 AS I SAID, THERE'S A CERTAIN AMOUNT, IT SEEMS
12 TO ME, OF HYPOCRISY WHERE, AS I SAY, THE PRISONS OF THE
13 STATE ARE FILLED WITH LIKE IN THE PEOPLE VERSUS ALLEN CASE
14 WHERE SOMEONE IS CONVICTED ON A VERY SKETCHY I.D. BY A
15 STRANGER WHO IS ROBBED UNDER DUBIOUS CIRCUMSTANCES,
16 DARKNESS, STOCKING MASK, GUN IN THE FACE, THAT SORT OF
17 THING, AND, YOU KNOW, THE DEFENSE ATTORNEY DOES HIS BEST
18 TO GET UP AND ARGUE, TO ARGUE THAT SOMEHOW THAT IS A
19 REASONABLE DOUBT HERE WHICH IS POOH POOHED BY THE DISTRICT
20 ATTORNEY'S OFFICE AND THE JURY AND THE APPELLATE COURTS
21 AND THE PERSON IS SITTING THERE DOING UMPTEEN NUMBER OF
22 YEARS, IF NOT LIFE, IN STATE PRISON.

23 AND HERE WE HAVE A WITNESS ON A PREPONDERANCE
24 OF EVIDENCE STANDARD WHO KNEW THE ALLEGED DECEASED WELL,
25 SAID THAT SHE SAW HIM, SAID THAT SHE WAS POSITIVE, AND
26 UNDER THE APPLICATION OF 2.92 OF CAL JIC TO HER TESTIMONY,
27 THE EVIDENCE IT WOULD SEEM TO ME IS OVERWHELMING.

28 THE COURT: WELL, THE DIFFERENCE -- THAT HAS FACIAL

6
1 APPEAL, BUT THE DIFFERENCE IN THAT ARGUMENT IS IF YOU, AS
2 THE DEFENSE LAWYER, HAD EVIDENCE THAT THE VICTIM WASN'T
3 DEAD YOU WOULD INTRODUCE IT, BUT CLEARLY THERE WAS
4 EVIDENCE THAT MR. LEVIN WAS DEAD THAT WAS INTRODUCED
5 DURING THIS TRIAL. ALTHOUGH IT HAS FACIAL APPEAL, THERE
6 IS EVIDENCE TO THE CONTRARY.

7 MR. CRAIN: WELL, THE COURT SAYS THERE IS EVIDENCE.
8 I MEAN, AS THE COURT WELL KNOWS, THIS WAS A CIRCUMSTANTIAL
9 EVIDENCE CASE OF SOMEONE WHO, NUMBER ONE, WAS -- IF NOT
10 THE LEADING CON MAN IN THIS STATE, WAS CERTAINLY ONE OF
11 THE MAJOR COMPETITORS IN THE FIELD --

12 THE COURT: HE WOULD BE IN TOUGH COMPETITION WITH
13 MR. HUNT ON THAT, BUT IT'S NOT COMPLETELY CIRCUMSTANTIAL
14 EVIDENCE. I MEAN, HOW MANY -- I DIDN'T COUNT THEM. WAS
15 IT SIX PEOPLE THAT MR. HUNT CONFESSED TO AND SAID THAT, "I
16 WENT OUT AND I KILLED LEVIN WITH MR. PITTMAN."

17 MR. CRAIN: YOU KNOW, YOUR HONOR --

18 THE COURT: THERE IS DIRECT EVIDENCE.

19 MR. CRAIN: YOU KNOW, YOUR HONOR, THAT -- THAT -- I
20 DON'T KNOW TO WHAT EXTENT THIS COURT HAD AN OPPORTUNITY TO
21 CONSIDER THE TESTIMONY AT THE SECOND TRIAL IN SAN MATEO
22 WHERE MR. HUNT SPENT THREE WEEKS ON THE WITNESS STAND AND
23 THE SCOPE OF THE BBC, THE FACTIONS WITHIN THE BBC, THE
24 ISSUES OF THE MAY BROTHERS AND THEIR COHORTS ATTEMPTING TO
25 BREAK THE B.B.C. INTO FACTIONS FOR THEIR OWN FINANCIAL
26 PROFIT, AND MR. HUNT'S TESTIMONY AND EXPLANATION AS TO WHY
27 THOSE STATEMENTS WERE MADE, FOR WHATEVER IT'S WORTH, WERE
28 ACCEPTED BY EIGHT MEMBERS OF THAT JURY, PERHAPS ALL 12.

6
1 IT MAY HAVE BEEN THAT THE OTHERS HAD SOME OTHER PROBLEM
2 WITH THE EVIDENCE IN THE CASE. BE THAT --

3 THE COURT: HOLD ON. I'M REALLY NOT CONCERNED WITH
4 THE SAN MATEO TRIAL. I'M CONCERNED WITH THE SANTA MONICA
5 TRIAL. AND THE SANTA MONICA TRIAL HAD EVIDENCE OF FIVE OR
6 SIX INDIVIDUALS COMING IN AND TESTIFYING THAT MR. HUNT
7 CONFESSED TO THEM THAT HE HAD KILLED LEVIN. THAT IS A
8 PIECE OF EVIDENCE THAT YOU CAN'T SIMPLY SAY, "WELL, IT'S
9 CIRCUMSTANTIAL EVIDENCE, DISREGARD IT." IT IS EVIDENCE
10 THAT THE COURT HAS TO CONSIDER.

11 MR. CRAIN: THERE WAS EVIDENCE -- IT WAS A
12 CIRCUMSTANTIAL EVIDENCE CASE, AND THERE WAS EVIDENCE THAT
13 AT THE JUNE 24TH MEETING MR. HUNT MADE THOSE STATEMENTS.
14 THAT'S TRUE.

15 THERE WAS ALSO EVIDENCE PRESENTED THAT --
16 THAT SHOULD HAVE BEEN PRESENTED THAT MR. LEVIN, AS I SAID,
17 WAS A CON MAN; THAT MR. LEVIN HAD A MOTIVE TO FLEE, MANY
18 MOTIVES TO FLEE; THAT MR. LEVIN HAD THE FINANCIAL
19 WHEREWITHAL TO FLEE; AND THAT MR. LEVIN IN FACT DID FLEE.
20 SO, YOU KNOW, THAT'S SORT OF -- ALL PART OF THE MIX, I
21 SUPPOSE.

22 BUT GOING BACK TO GERRARD, I MEAN, THE FACT
23 IS HERE: IS THIS LADY, WHO HAS TESTIFIED NOW NOT ONLY AT
24 THE SAN MATEO TRIAL BUT HAS TESTIFIED HERE IN FRONT OF
25 THIS COURT -- I MEAN, THE PEOPLE HAVEN'T SHOWN ONE REASON
26 OTHER THAN AN IFFY DIXIT ARGUMENT AS TO WHY HER TESTIMONY
27 SHOULD BE REJECTED. I MEAN, THIS IS A PREPONDERANCE OF
28 EVIDENCE STANDARD. WE'RE NOT HERE TO PROVE THE ACCURACY

6

1 OF AN IDENTIFICATION BEYOND A REASONABLE DOUBT. I THINK
2 WE HAVE PERSONALLY, BUT THAT'S NOT THE ISSUE.

3 THE COURT: DO YOU AGREE WITH THEIR COMMENT IN
4 THEIR PAPERS THAT IF I FIND THAT MS. GERRARD DID SEE
5 MR. LEVIN I MUST GRANT THE PETITION, BUT IF I FIND THAT
6 SHE BELIEVES THAT SHE SAW MR. LEVIN THEN THERE'S MORE OF A
7 QUESTION AND I NEED TO EVALUATE THE EVIDENCE MORE
8 THOROUGHLY?

7

9 MR. CRAIN: WELL, I THINK CLEARLY IF THE COURT
10 FINDS THAT SHE SAW MR. LEVIN THAT IS THE END OF THE ISSUE.
11 CLEARLY THE PETITION HAS TO BE ISSUED.

12 THE COURT: WHAT IF I BELIEVE THAT SHE THINKS SHE
13 SAW LEVIN, WHAT DO I DO WITH THAT?

14 MR. CRAIN: WELL, I THINK THE COURT HAS TO MAKE A
15 DETERMINATION AS TO WHETHER OR NOT -- CLEARLY SHE DOES
16 THINK THAT SHE SAW LEVIN, BUT IT GOES BEYOND THAT. I
17 THINK THE COURT HAS TO FIND ON THE RECORD HERE -- I MEAN,
18 THE COURT -- I THINK THE STANDARD IS -- HAVE WE
19 ESTABLISHED THIS PARTICULAR FACT BY A PREPONDERANCE OF THE
20 EVIDENCE. AND BY A PREPONDERANCE OF THE EVIDENCE DID SHE
21 SEE RON LEVIN?

22 THE COURT: IF I FIND THAT, I BELIEVE THAT SHE DID
23 SEE LEVIN, DO I THEN LOOK AT THE TRIAL EVIDENCE AND
24 BALANCE THAT TRIAL EVIDENCE VERSUS HER SUBJECTIVE BELIEF
25 THAT SHE SAW LEVIN?

26 MR. CRAIN: WELL, FIRST OF ALL, I THINK THE WAY THE
27 O.S.C. IS WRITTEN IS THAT THE O.S.C. -- AND I THINK THAT
28 THE LAW IS THE COURT IS REQUIRED TO LOOK AT THE GERRARD

7
1 TESTIMONY WITH REGARD TO LEVIN BY ITSELF, AND I THINK
2 THAT'S WHAT THE COURT HAS TO DO.

3 THE COURT: BUT HOW DO I MAKE THAT EVALUATION?
4 LET'S ASSUME THAT I HAVE A QUESTION WHETHER GERRARD
5 ACTUALLY SAW LEVIN, BECAUSE IF I FIND THAT GERRARD SAW
6 LEVIN, PETITION IS GRANTED. BUT LET'S SAY I HAVE A
7 QUESTION. THAT QUESTION IS I THINK OBJECTIVELY -- I
8 SHOULD SAY I THINK SUBJECTIVELY THAT GERRARD SAW LEVIN.
9 WHAT THEN DO I DO WITH THAT EVIDENCE?

10 MR. CRAIN: IF THE COURT THINKS THAT SHE
11 SUBJECTIVELY SAW LEVIN?

12 THE COURT: RIGHT. BUT I DON'T BELIEVE THAT LEVIN
13 IS ALIVE.

14 MR. CRAIN: WELL, OF COURSE, FIRST OF ALL, THE
15 QUESTION IS NOT WHETHER LEVIN IS ALIVE AT THIS PARTICULAR
16 MOMENT, BUT WHETHER LEVIN WAS ALIVE AFTER JUNE 6TH, 1984.

17 THE COURT: SURE, RIGHT.

18 MR. CRAIN: I THINK THE COURT HAS TO MAKE -- MAYBE
19 WE ARE NOT -- MAYBE WE'RE SAYING THE SAME THING BUT IN
20 DIFFERENT WORDS. I THINK THE COURT HAS TO -- FIRST OF
21 ALL, I THINK THE O.S.C. DIRECTS THE COURT TO LOOK AT HER
22 TESTIMONY BY ITSELF AND MAKE THAT DETERMINATION. TO MAKE
23 THE DETERMINATION AS TO WHETHER OR NOT A PREPONDERANCE OF
24 THE EVIDENCE -- IT IS ESTABLISHED THAT SHE SAW RON LEVIN.
25 I THINK THAT IS THE ISSUE. PERHAPS I'M MISSING THE
26 COURT'S --

27 THE COURT: I UNDERSTAND YOUR POSITION.

28 MR. CRAIN: BUT IN TERMS --

7
1 THE COURT: YOU ARE SAYING THAT I LOOK AT THAT, AND
2 I LOOK AT NONE OF THE OTHER EVIDENCE.

3 MR. CRAIN: OBVIOUSLY THE COURT IS GOING TO BE THE
4 ONE THAT MAKES THIS DECISION. I CAN ONLY LOOK AT WHAT I
5 BELIEVE TO BE THE LANGUAGE OF THE O.S.C. TO SAY THAT I
6 THINK THE COURT HAS TO DO IT WITHOUT EVALUATING THE OTHER
7 EVIDENCE IN THE CASE.

8 BUT ALSO IF THE COURT WERE TO LOOK AT IT IN
9 THE CONTEXT OF THE OTHER EVIDENCE IN THE CASE, I THINK THE
10 COURT HAS TO LOOK AT THE EVIDENCE THAT WAS NOT PRESENTED
11 BECAUSE THAT PART IS BOUND UP WITH THE I.A.C. ISSUE.

12 I DON'T THINK THE COURT CAN FAIRLY APPROACH
13 ITS TASK BY SAYING, "I'LL LOOK AT THE EVIDENCE THAT WAS
14 PRESENTED IN A TRIAL WHERE THE MAIN PROSECUTION THRUST IN
15 ITS FINAL ARGUMENT AND IT'S PRESENTATION TO THE JURY WERE
16 NEVER ADDRESSED BY DEFENSE COUNSEL DUE HIS INCOMPETENCE."

17 I DON'T THINK THE COURT CAN TAKE A PARTIAL,
18 MISLEADING AND UNFAIR VIEW OF WHAT WAS PRESENTED AT TRIAL
19 IN TERMS OF ATTEMPTING TO SOMEHOW DETERMINE WHETHER OR NOT
20 MS. -- MRS. GERRARD'S TESTIMONY WAS CREDIBLE.

21 I DON'T KNOW IF I'M MAKING --

22 THE COURT: I UNDERSTAND WHAT YOU ARE SAYING. YOU
23 ARE SAYING THAT PETITIONER WASN'T GIVEN A CHANCE TO FULLY
24 EXPLORE OR ATTACK THE WITNESSES BECAUSE HIS COUNSEL WAS
25 INCOMPETENT IN THE SANTA MONICA TRIAL.

26 ASSUMING FOR THE MOMENT I LOOK AT THE
27 EVIDENCE WITH ALL OF ITS WARTS. THAT IS, THERE MAY HAVE
28 BEEN SOME FALLING DOWN. THE O.S.C. DIRECTS US TO CONSIDER

7
1 "NEWLY DISCOVERED EVIDENCE THAT RON LEVIN IS STILL ALIVE
2 AND ADDITIONAL IMPEACHMENT EVIDENCE WHICH CASTS DOUBT ON
3 THE ACCURACY AND RELIABILITY OF THE JURY'S VERDICT THE
4 DEFENDANT MURDERED LEVIN."

5 IT SEEMS TO ME BY SAYING THAT THE COURT HAS
6 TO CONSIDER THE ACCURACY AND RELIABILITY OF THE JURY'S
7 VERDICT THAT DEFENDANT MURDERED LEVIN WHAT I AM BEING
8 ASKED TO DO IS LOOK AT ALL OF THE EVIDENCE IN THE CASE AND
9 DECIDE WHETHER, IF I BELIEVE MS. GERRARD BELIEVES SHE SAW
10 LEVIN, THAT IS SUFFICIENT TO OVERCOME THE OVERWHELMING
11 EVIDENCE, AS DESCRIBED BY THE COURT OF APPEALS, AGAINST
12 MR. HUNT.

13 YOUR RESPONSE.

14 MR. CRAIN: WELL, MY CONCERN WAS, IN THINKING ABOUT
15 WHAT WOULD BE DISCUSSED TODAY, WAS THAT THE COURT WOULD
16 SEIZE ON THIS -- THIS LINE THAT THE COURT OF APPEAL USED
17 TO SOMEHOW FACTOR IT INTO THE EQUATION, BUT -- IT MAY HAVE
18 A CERTAIN TEMPTATION, BUT I TRUST THAT IN THE FINAL
19 ANALYSIS THIS COURT WON'T DO IT FOR THE VERY REASONS THAT
20 I SAY.

21 THE COURT OF APPEAL IN ITS USE OF THAT TERM
22 WAS TALKING ABOUT THE DIRECT APPEAL ONLY. JUST LIKE THE
23 CALIFORNIA SUPREME COURT WAS TALKING ABOUT THE DIRECT
24 APPEAL IN THE RECENT JONES CASE THAT WAS DECIDED A WEEK
25 AGO. IT WAS IN THE "DAILY JOURNAL" ON JULY 1ST. WHEN IT
26 CAME TO LOOKING AT THE CASE ON HABEAS CORPUS, IT'S A
27 DIFFERENT THING.

28 SO THAT -- YOU KNOW, IT WOULD HAVE BEEN EASY

8

1 FOR THE COURT TO SAY, "WELL, WE MADE ALL THESE COMMENTS IN
2 THE DIRECT APPEAL OPINION ABOUT THE STRENGTH OF THE
3 EVIDENCE." I MEAN, THE COURT OF APPEAL ON THE DIRECT
4 APPEAL HAD -- HAD A DIFFERENT PICTURE OF THE CASE THAN
5 THIS COURT HAS BEEN GIVEN. THIS COURT HAS BEEN GIVEN A
6 PICTURE NOT ONLY MIXED WITH TESTIMONY BY WITNESSES WHO SAW
7 LEVIN AFTER THE DATE OF THE SUPPOSED MURDER, BUT ALSO A
8 TRIAL RECORD, AS I SAID, THAT WAS WOEFULLY INCOMPLETE
9 WHERE THE DISTRICT ATTORNEY WAS ABLE TO GET UP AND SAY,
10 YOU KNOW, "BARENS SAYS THIS. WHERE IS THE EVIDENCE OF
11 THIS? BARREN SAYS THAT. WHERE IS THE EVIDENCE OF THAT?
12 WHERE IS THE EVIDENCE OF LACK OF FINANCIAL MOTIVE? WHERE
13 IS THE EVIDENCE THAT KARNY IS A LIAR? HE HASN'T SAID ONE
14 WORD ABOUT THESE THINGS."

15 I THINK TO TAKE THE EVIDENCE THAT WAS
16 PRESENTED ON THE DIRECT APPEAL AND SOMEHOW USE THAT AS A
17 FACTOR IN THE EQUATION IN DECIDING WHETHER OR NOT SOMEONE
18 LIKE MS. GERRARD, WHO KNEW MR. LEVIN SO WELL, SAW HIM
19 FACE-TO-FACE AND HAS SAID UNDER OATH HERE AND IN SAN MATEO
20 THAT THAT SHE'S ABSOLUTELY POSITIVE THIS IS THE MAN SHE
21 SAW, IS NOT THE LEGAL APPROACH THAT THE COURT SHOULD TAKE.

22 THE COURT: SO YOUR POSITION IS I SHOULD IGNORE THE
23 TRIAL EVIDENCE IN EVALUATING MS. GERRARD'S TESTIMONY.

24 MR. CRAIN: I'M SAYING, FIRST OF ALL, AS I SAID, I
25 BELIEVE UNDER THE O.S.C. I THINK THE COURT HAS TO TAKE
26 MS. GERRARD'S TESTIMONY AND VIEW IT BY ITSELF.

27 I'M SAYING, SECONDLY -- YOU WILL HAVE THE
28 FINAL CHOICE, I'M SAYING THAT I DON'T THINK YOU SHOULD,

8

1 BUT IF YOU DO CHOOSE TO DO IT, I THINK IT WOULD BE
2 IMPROPER FOR THE COURT TO MERELY LOOK AT THE TRIAL
3 EVIDENCE THAT WAS PRESENTED TO THE JURY, IGNORING THE
4 OTHER EVIDENCE THAT SHOULD HAVE BEEN PRESENTED.

5 OF COURSE, THAT NOT ONLY INCLUDES THE ISSUES
6 THAT WERE PRESENTED BY WAY OF THE EVIDENTIARY HEARING IN
7 THE COURT, BUT ALL OF THE OTHER 16 ISSUES THAT THE COURT
8 OF APPEAL WANTED TO THE COURT TO TAKE EVIDENCE ON OR AT
9 LEAST TO THE HOST OF OTHER I.A.C. ISSUES THAT THE COURT OF
10 APPEAL ADDRESSED IN ITS O.S.C --

11 THE COURT: SHOULD I BE CONCERNED THAT
12 MRS. GERRARD WORKED FOR MR. ROBERTS, WHO WAS A CLOSE
13 ASSOCIATE OF THE DEFENDANT; THAT MS. GERRARD'S DAUGHTER
14 AND SON-IN-LAW WERE IN BUSINESS WITH MR. LEVIN; AND THAT
15 THERE IS SOME RELATIONSHIP HERE WITH MR. ROBINSON AS WELL?

16 MR. CRAIN: NOT WITH MR. ROBINSON.

17 THE COURT: WELL, ROBINSON --

18 MR. CRAIN: ROBERTS.

19 THE COURT: ROBINSON IS HAVING SOME BUSINESS
20 CONCERNS WITH GERRARD'S DAUGHTER AND SON-IN-LAW --

21 MR. CRAIN: ON SOME YEARS EARLIER.

22 THE COURT: RIGHT.

23 GERRARD'S SON-IN-LAW AND DAUGHTER ARE HAVING
24 BUSINESS DEALINGS WITH MR. LEVIN. MR. GERRARD,
25 MS. GERRARD'S HUSBAND, HAS BUILT A POOL FOR MR. ROBERTS.
26 MR. ROBERTS DECLARED BANKRUPTCY, AND MR. GERRARD NEVER
27 GOES AFTER THAT MONEY BASED ON A PROMISE THAT HE WOULD
28 LATER GET SOME MONEY OUT OF THE BANKRUPTCY. ARE THESE

8

1 THINGS I SHOULD BE CONCERNED ABOUT?

2 MR. CRAIN: I THINK IF THE COURT CHOOSES TO LOOK AT
3 THE RECORD -- I MEAN, I HAVE TO LAUGH, YOUR HONOR. WITH
4 ALL DUE RESPECT TO THE COURT, BECAUSE I HAVE TRIED CASES
5 FROM THE DEFENSE SIDE SO MANY TIMES, AND IN MY DAYS IN THE
6 PUBLIC DEFENDER'S OFFICE HAD THOSE CASES WHERE, YOU KNOW,
7 YOU TRY TO FIND SOMETHING THAT MAYBE ONE PERSON ON THE
8 JURY WILL SAY, "OH, YEAH, THERE'S REALLY SOMETHING TO
9 THIS," AND FIND A REASONABLE DOUBT.

10 I THINK THAT THESE SORTS OF THINGS ARE THE
11 TYPE OF REASONABLE DOUBT ARGUMENTS THAT DESPERATE DEFENSE
12 ATTORNEYS MAKE IN OVERWHELMING IDENTIFICATION CASES. I
13 MEAN, THE FACT IS IN THIS CASE THAT -- THE REASON THAT
14 MRS. GERRARD KNEW MR. LEVIN WAS BECAUSE SHE HAD BEEN WITH
15 HER -- HER -- HER DAUGHTER AND SON-IN-LAW IN THE WORKPLACE
16 SETTING. THAT'S HOW SHE KNEW MR. LEVIN.

17 I MEAN, THAT'S HOW I KNOW MR. MC MULLEN. I
18 DON'T KNOW HIM SOCIALLY. I KNOW MR. MC MULLEN BECAUSE WE
19 APPEAR IN THE COURTHOUSE TOGETHER.

20 I MEAN, THAT JUST HAPPENS TO BE A FACT THAT
21 SEVERAL YEARS BEFORE THERE WAS A CONNECTION IN THE NEWS
22 BUSINESS BETWEEN SOME OF THESE PEOPLE. I MEAN, YOU KNOW,
23 WHAT I AM SAYING IS THAT -- IT IS SORT -- IT'S A
24 TREMENDOUS STRETCH, A TREMENDOUS STRETCH TO ATTEMPT TO
25 FIND SOMETHING SINISTER HERE WHERE IT DOESN'T EXIST.

26 EVEN THE PEOPLE HAVE NOT MADE THIS PARTICULAR
27 ARGUMENT. THEY HAVE CONCEDED MS. GERRARD IS A CREDIBLE
28 WITNESS.

9

9
1 AS TO MR. ROBERTS, MR. GERRARD SOME YEARS
2 BEFORE, MANY YEARS BEFORE, HE BUILT A SWIMMING POOL FOR
3 MR. ROBERTS, AND I DON'T UNDERSTAND EXACTLY WHAT THE FACT
4 THAT HE CHOOSE NOT TO PURSUE HIS BANKRUPTCY -- BUT SOUGHT
5 TO OBTAIN A SETTLEMENT BY OTHER MEANS HAS TO DO WITH THIS.
6 I THINK SOME PEOPLE MIGHT THINK THAT'S SOUND BUSINESS
7 PRACTICES IN ORDER TO KEEP YOUR REPUTATION IN THE
8 COMMUNITY AND GET OTHER CLIENTS IN THAT YOU GAVE A BREAK
9 TO SOMEONE AT A TIME WHEN THEY HAD A FINANCIAL PROBLEM
10 RATHER THAN HONING IN LIKE A BLOOD THIRSTY WOLF AND
11 DRAGGING THEM INTO THE BANKRUPTCY COURT.

12 ALL OF THESE THINGS ARE MORE THAN JUST A
13 STRETCH, YOUR HONOR. THEY GO BEYOND WHAT I THINK ANY --
14 THE LITIGANTS HERE BELIEVE IS THE CASE, THAT MRS. GERRARD
15 IS A CREDIBLE WITNESS AND HER HUSBAND IS A CREDIBLE
16 WITNESS AS WELL.

17 THE COURT: I THOUGHT IT'S A LITTLE INTERESTING
18 THAT HE NEVER FILES A MECHANIC'S LIEN AGAINST THE
19 PROPERTY. I THROW THAT OUT IN TERMS OF HOW I SHOULD
20 CONSIDER THAT.

21 MR. CRAIN: MAYBE HE'S A POOR BUSINESS MAN, LIKE I
22 AM, BECAUSE I KNOW THAT, YOU KNOW, WHEN I GET STIFFED BY
23 CLIENTS I DON'T USUALLY HAVE COLLECTION AGENCIES PURSUE
24 THEM AND TRY TO DRIVE THEM INTO -- INTO -- CAUSE THEM MORE
25 FINANCIAL PROBLEMS THAN THEY ALREADY HAVE.

26 THE COURT: EVER KNOW A BUILDER WHO DIDN'T FILE A
27 MECHANICS LIEN WHEN THE BILL ISN'T PAID? IT'S A ONE PAGE
28 DOCUMENT.

9

1 MR. CRAIN: I HAVE HEARD OF THAT.

2 THE COURT: MR. ROBERTS IS ONE OF THE BIGGEST
3 SUPPORTERS OF MR. HUNT.

4 MR. CRAIN: I THINK, ALSO, THAT THE RECORD IS THAT
5 THESE EVENTS OCCURRED QUITE SOME TIME BEFORE ANY OF THE
6 EVENTS THAT -- THAT ARE INVOLVED IN THIS CASE. I THINK IT
7 WAS SOMETIME BACK IN THE 1970S WHEN THIS TOOK PLACE. SO I
8 REALLY DON'T SEE HOW THAT COULD BE USED AS SOME SORT OF
9 SUSPICIOUS FACTOR.

10 THE COURT: THAT'S WHY I'M TOSSING IT OUT. HOW
11 SHOULD I DEAL WITH IT?

12 MR. CRAIN: I THINK THE COURT SHOULD, LIKE THE
13 PEOPLE HAVE DONE, GIVE IT NO WEIGHT WHATSOEVER. I THINK
14 THE COURT SHOULD LOOK AT THIS LADY'S TESTIMONY AND THE
15 FACT THAT SHE WAS HERE FOR QUITE SOME PERIOD OF TIME. THE
16 FACT THAT HER TESTIMONY IS CORROBORATED. I MEAN, HER IN
17 LAWS -- HER DAUGHTER AND HER SON-IN-LAW, YOU SAW THEM.

18 I MEAN, MR. TUR IS A REPUTABLE REPORTER IN
19 THIS COMMUNITY. HE IS ON THE AIR. I SUPPOSE THAT IS
20 OUTSIDE THE RECORD. THEY WERE STRAIGHTFORWARD WITNESSES
21 HERE. THESE ARE NOT DUBIOUS PEOPLE. THESE ARE NOT PEOPLE
22 FROM THE CRIMINAL ELEMENT. THESE ARE CITIZENS IN OUR
23 SOCIETY.

24 THERE IS -- THIS IS A WOMAN WHO IS NOT --
25 DOES NOT RELISH THE LIMELIGHT. THAT IS FOR SURE. THESE
26 ARE NOT PEOPLE LIKE IN THE O. J. SIMPSON CASE OUT SELLING
27 THEIR STORY AS SOON AS THEY EMERGE FROM THE GRAND JURY
28 ROOM AND THINGS OF THAT NATURE. THESE ARE CREDIBLE

9
1 WITNESSES. THE PEOPLE SAY THEY'RE CREDIBLE OR AT LEAST
2 THEY CONCEDE THAT AS TO GERRARD AND GHALEB.

3 THE COURT: ALL RIGHT.

4 MR. CRAIN: I WANTED TO -- AND AGAIN, I THINK THE
5 FACT IS THAT -- I JUST WANT TO SAY ONE LAST THING. THAT
6 IT'S INTERESTING THAT MR. HOLMES, WHO KNEW MR. LEVIN SO
7 WELL, DESCRIBED HIM AS EASILY RECOGNIZABLE. I MEAN, THIS
8 IS NOT A CASE OF SOME WELL-INTENTIONED PERSON MAKING A
9 MISTAKE.

10 I THINK THAT THIS IS -- YOU KNOW, THIS IS NOT
11 LIKE THE ARGUMENT THAT WAS MADE BY THE DEFENDANT'S
12 ATTORNEY IN PEOPLE VERSUS ALLEN WHERE, YOU KNOW, THE
13 ROBBERY TOOK PLACE IN THE DARK WITH A GLIMPSE OF A
14 STRANGER IN A STOCKING MASK AND THINGS LIKE THAT.

15 SO I HOPE -- TO SOME EXTENT I HAVE ANSWERED
16 THE CONCERNS THAT THE COURT HAS. I JUST THINK THAT -- THE
17 COURT'S LAST CONCERN IS -- WITH ALL DUE RESPECT, SOMETHING
18 THAT MAY BE OF PASSING INTEREST, BUT AN IRRELEVANCY.
19 NOTHING HAS BEEN SHOWN OF IT. NOTHING WAS MADE OF IT,
20 AND, YOU KNOW, IT'S STRONG DIRECT EVIDENCE THAT THE
21 DECEASED WAS NEVER A DECEASED BECAUSE THERE WAS NOT A
22 MURDER.

10
23 AGAIN, I DO ASK THE COURT, IF YOU CHOOSE TO
24 EVALUATE THIS VERY LOW PREPONDERANCE OF THE EVIDENCE
25 STANDARD BY SOMEHOW FACTORING IN EVIDENCE IN THE CASE, I
26 TRUST THAT THE COURT WILL CONSIDER WHAT THE EVIDENCE IN
27 THE CASE COULD HAVE AND SHOULD HAVE BEEN AS WELL AS MERELY
28 THE EVIDENCE THAT WAS PRESENTED AT TRIAL BECAUSE I THINK

10

1 OTHERWISE THERE IS A -- A DISTORTION.

2 I DON'T THINK THAT REALLY -- TO BOIL IT DOWN
3 TO JUST LAYMEN'S TERMS, I JUST DON'T THINK THAT IS A DOING
4 OF JUSTICE. TO SOMEHOW QUESTION THE -- THESE SIGHTINGS
5 WITNESSES BY MERELY LOOKING AT IT THROUGH A GLASS DARKLY
6 OR LOOKING AT A -- LOOKING AT A VERY DISTORTED RECORD WHEN
7 THE RECORD SHOULD HAVE BEEN SO MUCH DIFFERENT AND GREATER
8 THAN IT WAS.

9 I WANTED TO TALK ABOUT SOME OF THE I.A.C.
10 ISSUES FOR A MOMENT, UNLESS THE COURT HAD A COMMENT.

11 THE COURT: I WAS GOING TO COMMENT THE NEWLY
12 DISCOVERED EVIDENCE WITNESSES FALL INTO TWO CATEGORIES.
13 THOSE THAT APPEAR TO HAVE CREDIBILITY AND THOSE THAT
14 APPEAR TO HAVE NO CREDIBILITY AT ALL. THAT'S WHY I'M
15 FOCUSING, FOR EXAMPLE, ON MS. GERRARD.

16 MR. CRAIN: CLEARLY, RECOGNIZING THE SIGNALS THE
17 COURT WAS SENDING ON THE LAST DAY OF THE EVIDENTIARY
18 HEARING, THE COURT'S QUESTION IN WHICH THE COURT
19 DIFFERENTIATED MS. GHALEB AND MS. GERRARD FROM THE OTHER
20 WITNESSES, I DON'T -- WELL, I THINK IN THE -- IN THE
21 WRITTEN PLEADING I THINK WE HAVE TAKEN SOME PAINS TO
22 ATTEMPT TO SHOW THE COURT THAT WHATEVER DIRECTION IT MAY
23 HAVE BEEN GOING VIS-A-VIS ROBINSON, WERNER, AND MRS.
24 MARMOR, THAT THE COURT SHOULD -- I KNOW THE COURT -- I
25 WOULD ASSUME CERTAINLY HAS NOT MADE UP ITS MIND TO HOW ITS
26 GOING TO RULE PRIOR TO THE ARGUMENTS AND THE SUBMISSION OF
27 THE CASE, BUT I GOT THE COURT'S DRIFT THE LAST DAY OF THE
28 HEARING, BUT I TRIED TO -- TO SHOW THE COURT THAT WHATEVER

10

1 CONCERNS THE COURT MAY HAVE HAD ABOUT ROBINSON, IF THE
2 COURT CONSIDERS WHAT HAS BEEN SAID IN THE BRIEFS WITH
3 REFERENCE TO ROBINSON, WERNER AND MRS. MARMOR THAT THE
4 COURT SHOULD NOT HAVE THOSE CONCERNS. IF THE COURT DOES,
5 OF COURSE, YOU ARE THE TRIER OF FACT HERE. THE COURT
6 SHOULD NOT. I THINK WE HAVE DEALT WITH IT AT LENGTH HERE.
7 PROBABLY IT'S NOT NECESSARY OR ADVISABLE TO TAKE UP THESE
8 THREE WITNESSES.

9 THE COURT: OKAY.

10 MR. CRAIN: I DON'T WANT TO BEAT A DEAD HORSE.

11 THE COURT: I UNDERSTAND.

12 MR. CRAIN: I DON'T THINK IT SHOULD BE A DEAD
13 HORSE, BUT I THINK IF THE COURT FAIRLY CONSIDERS THE
14 ARGUMENTS THAT BOTH SIDES HAVE MADE ABOUT THESE WITNESSES,
15 I THINK THE COURT SHOULD COME TO THE SAME CONCLUSION AS WE
16 HAVE IN TERMS OF THEIR CREDIBILITY AS WELL.

17 THE COURT: YOU HAVE DONE THE BEST YOU CAN ON
18 PAPER. ROBINSON HAS NO CREDIBILITY AT ALL. HE IS A LIAR.

19 MARMOR HAS VERY LITTLE, IF ANY, CREDIBILITY.
20 THAT IS BASED ON HER TESTIMONY AND THE WAY THEY PRESENTED
21 THEMSELVES AND THE NATURE OF THEIR TESTIMONY.

22 AS I SAID, THE GERRARD ISSUE IS ONE THE
23 PROSECUTION NEEDS TO BE CONCERNED ABOUT, AND I'LL ASK THEM
24 TO ADDRESS THAT.

25 MR. CRAIN: WITH REGARD TO THE I.A.C. ISSUES, FIRST
26 OF ALL, SPEAKING OF LIARS, I THINK THAT MR. BARENS IS A
27 LIAR, YOUR HONOR. I THINK HE LIED UNDER OATH. HE LIED
28 PRIOR TO TAKING THE STAND IN THIS CASE. I THINK HE LIED

10

1 TO THIS COURT. I THINK IF ANYTHING THAT IS SYMBOLIC OF
2 THIS, IT'S THIS HOLIER-THAN-THOU, SANCTIMONIOUS POSE, THIS
3 DISGUISE THAT HE PUT ON IN FRONT OF YOUR HONOR SITTING
4 JUST FIVE FEET AWAY WITH THE -- HIS GREAT CONCERN THAT HE
5 NOT HAVE TO IN ANY WAY, SHAPE OR FORM BREACH THE
6 ATTORNEY/CLIENT PRIVILEGE.

7 AND ONLY, YOUR HONOR, UNDER -- AS HE PUT IT,
8 PARAPHRASING -- BUT IT SOUNDED SOMETHING VERY CLOSE TO
9 THIS, "BUT WITH THE UTMOST RELUCTANCE WILL I CARRY OUT
10 YOUR ORDER THAT I REVEAL ATTORNEY/CLIENT PRIVILEGED
11 MATERIALS."

12 AND THEN WE COME TO FIND OUT THE NEXT DAY
13 THAT HE'S OUT YAKING IT UP WITH THE DISTRICT ATTORNEY'S
14 INVESTIGATOR TWO AND A HALF WEEKS EARLIER. A MATTER
15 WHICH, OF COURSE, CAME TO LIGHT ONLY BY ACCIDENT WITHOUT
16 ANY -- ANY OF THIS CONCERN WHATSOEVER, THIS UTMOST
17 RELUCTANCE THAT HE -- THAT HE EXPRESSED ON THE WITNESS
18 STAND.

19 I MEAN, THIS IS A GUY WHO DESPITE HIS POSE,
20 HIS -- THE THREE-PIECE SUIT, THE WATCH CHAIN, THE DEEP
21 VOICE, THE F. LEE BAILEY IMPERSONATION --

22 THE COURT: NOT SURE THAT ONE WORKS ANYMORE.

23 MR. CRAIN: WELL, I THINK THAT, YOU KNOW, TWO PEAS
24 IN A POD, PERHAPS, BUT -- THIS IS A MAN WHO SHOULD BE
25 GIVEN NO CREDIBILITY WHATSOEVER BY THIS COURT. I MEAN, HE
26 TRIED TO DUPE THE COURT. HE'S TRIED TO DUPE EVERYBODY.
27 HE'S GOT DIFFERENT STORIES ALL OVER THE PLACE, AS ARE SET
28 FORTH IN THE PLEADING HERE ABOUT WHAT HE DID DO, WHAT HE

11

11

1 DIDN'T DO, WHAT HE WAS THINKING. HE CHANGED HIS STORY. I
2 MEAN --

3 THE COURT: IF HE WAS TRYING TO SHAFT HIS FORMER
4 CLIENT, WHY WOULD HE ADD ON THE COMMENT AT THE END, "BUT I
5 DIDN'T BELIEVE HIM"? IN OTHER WORDS, AFTER MR. HUNT
6 CONFESSED TO HIM ABOUT BEING INVOLVED IN THE LEVIN MURDER,
7 WITHOUT BEING ASKED MR. BARENS THREW ON, "BUT I DIDN'T
8 REALLY BELIEVE HIM."

9 MR. CRAIN: BECAUSE, YOUR HONOR, MR. BARENS IS --
10 IS TRYING TO WALK SOME SORT OF TIGHTROPE HERE. I MEAN,
11 THE FACT IS THAT WHEN HE HAD HIS -- HIS SECRET POWWOW WITH
12 THE DISTRICT ATTORNEY'S INVESTIGATOR IN WHICH HE BREACHED
13 THE ATTORNEY/CLIENT PRIVILEGE WITHOUT THE NECESSITY OF ANY
14 COURT ORDER WHATSOEVER, IT FOLLOWED PRACTICALLY ON THE
15 HEELS OF THE PLEADING THAT WE FILED ON MARCH 29TH OF THIS
16 YEAR IN WHICH WE ALLEGED, BASED ON THE TESTIMONY OF HIS
17 FORMER ASSOCIATE, MR. TITUS, A FORMER LIEUTENANT IN THE
18 SHERIFF'S DEPARTMENT, THAT MR. BARENS HAD COOKED UP A PLOT
19 WHICH WENT NOWHERE TO SUBORN PERJURY IN MR. HUNT'S TRIAL
20 AND SOME OF THESE OTHER DEALINGS.

21 I KNOW THE COURT DIDN'T WANT TO DEAL WITH
22 THOSE ISSUES AND SAW THEM AS OUTSIDE THE -- DESPITE THE
23 TWO MONTHS OF WORK THAT WAS REQUIRED FOR ME TO PUT IN ON
24 IT, BUT BE THAT AS IT MAY, I KNOW THE COURT DIDN'T WANT TO
25 LITIGATE THOSE ISSUES, BUT THE FACT IS THAT -- THAT
26 PLEADING CAME TO THE FORE AND WAS FILED WITH THE --
27 THAT -- IT WAS NOT LONG AFTER THE PLEADING ON MARCH 29TH
28 THAT ACCUSED MR. BARENS OF NOT ONLY INCOMPETENCE OF

11

1 COUNSEL BUT OF BEING A SUBORNER OF PERJURY AND MISLEADING
2 THE COURT IN MAKING FALSE FINANCIAL REPRESENTATIONS IN
3 ORDER TO SECURE THE APPOINTMENT AT TAXPAYER'S EXPENSE FROM
4 JUDGE RITTENBAND.

5 I THINK MR. BARENS SAW HIMSELF IN A
6 PRECARIOUS SITUATION WHERE HE DIDN'T KNOW IF THE COURT
7 WOULD OPEN THE SCOPE OF THIS HEARING. WHAT BETTER WAY TO
8 PROTECT HIMSELF THAN TO SAY THIS.

9 IN TERMS OF WHY HE QUALIFIED IT, I MEAN, THIS
10 IS A GUY WHO --

11

12 (PAUSE.)

13

14 MR. CRAIN: I MEAN, WHY AT THE ONE TIME DID HE SAY
15 THAT HE WOULDN'T HAVE USED CERTAIN EVIDENCE AND AT ANOTHER
16 TIME ON CROSS-EXAMINATION SAY, "WELL, I WOULD HAVE," AND
17 OFFERED A JUSTIFICATION FOR IT OR VICE VERSA? WHY AT ONE
18 TIME WOULD HE SAY HE NEVER WAS AWARE OF CERTAIN EVIDENCE
19 AND ANOTHER TIME SAY, "WELL, I WAS AWARE OF IT, BUT I
20 DIDN'T WANT TO USE IT"?

21 I MEAN, THE MAN IS A LIAR. BUT I GUESS MAYBE
22 THE ANSWER IS HE'S JUST NOT A VERY SKILLED ONE. I MEAN,
23 THE FACT -- THE FACT IS HOWEVER HE COUCHED IT OR QUALIFIED
24 IT HE IS TELLING YOU UNDER OATH SITTING THERE LOOKING YOU
25 IN THE EYE, "OH, YOUR HONOR, I JUST DON'T WANT TO BREACH
26 THIS ATTORNEY-CLIENT PRIVILEGE. PLEASE DON'T MAKE ME DO
27 IT, YOUR HONOR. YOU'LL HAVE TO DRAG ME KICKING AND
28 SCREAMING, BUT OF COURSE I WILL FOLLOW THE COURT'S ORDER,"

11 1 WHEN A FEW WEEKS BEFORE HE IS HAVING A SECRET MEETING WITH
2 THE D. A.'S INVESTIGATOR AND TELLING HIM ALL THE SAME
3 STUFF? THAT IS THE MARK OF A DISHONEST PERSON.

4 YOU KNOW, I THINK BASICALLY WHAT HE -- WHAT
5 HE SAW -- HE PLAYED THIS GAME AND THESE THREATS IN THE
6 DEPOSITION AND THE INTERROGATORIES AS SORT OF A -- AN
7 EXTORTIONIST'S GAME TO MR. HUNT AND HIS COUNSEL. "YOU
8 GUYS BETTER DRAW THE LINE HERE. YOU GUYS BETTER NOT TRY
9 TO EXPAND THIS HEARING, OR I'LL COME UP WITH SOMETHING TO
10 THROW THE COURT'S INTEREST IN ANOTHER DIRECTION."

11 THE COURT: WHY DIDN'T HE MAKE A CALL TO YOU GUYS
12 AND SAY THAT TO YOU, THAT "I AM GOING TO LAY OUT YOUR
13 CLIENT"?

14 MR. CRAIN: I THINK THIS HE IS A LITTLE TO SLICK
15 FOR THAT. THIS IS A GUY WITH THE WATCH CHAIN AND
16 THREE-PIECE SUIT. I DON'T THINK HE'S STUPID.

17 THE COURT: MR. CRAIN, YOU ARE BEGINNING TO SOUND
18 LIKE A PROSECUTOR HERE. NEXT THING YOU ARE GOING TO SAY
19 IS MR. BARENS IS FROM OUT OF TOWN.

20 MR. CRAIN: I HOPE I HAVEN'T BEEN ONE IN THIS CASE.
21 MAYBE A FUTURE CAREER.

22 I ALSO WANTED TO SAY THAT I -- I WANTED TO
23 ADDRESS SOME OF THE ISSUES SPECIFICALLY BUT BRIEFLY, AS I
24 TRIED TO POINT OUT IN THE PLEADING, THE MAN GAVE
25 INCONSISTENT ANSWERS. HE DIDN'T PREPARE THE CASE. HE
26 DIDN'T KNOW THE CASE. HE WASN'T ABLE TO REFUTE THE -- THE
27 DISTRICT ATTORNEY'S KEY EVIDENCE IN THE CASE, AS
28 MR. WAPNER POINTED OUT TIME AND TIME AGAIN TO THE JURY.

12

1 I THINK IT'S -- IT SHOULD BE QUITE CLEAR BY
2 NOW THE FACT THAT THE SUPREME COURT JUST SAID IN THE TROY
3 LEE JONES CASE, IN THE HABEAS CORPUS THAT THEY DECIDED A
4 WEEK AGO, THAT TACTICAL AND STRATEGIC DECISIONS YOU
5 CAN'T -- YOU CAN'T JUDGE A DECISION AS TO WHETHER IT'S
6 TACTICAL OR STRATEGIC WHERE THE ATTORNEY DIDN'T
7 INVESTIGATE THE CASE AND DIDN'T HAVE THE INFORMATION UPON
8 WHICH TO MAKE A DECISION.

9 BARENS HAS NO CREDIBILITY, SHOULD HAVE NO
10 CREDIBILITY WITH THIS COURT. BUT ANY OF BARENS' DECISIONS
11 WERE NOT MADE ON THE BASIS OF INFORMED INVESTIGATION. SO
12 THEREFORE, HIS JUSTIFICATIONS CAN'T BE FACTORED INTO THE
13 CASE WHERE HE SAYS, "WELL, I WOULDN'T HAVE DONE THIS.
14 SURE, I DIDN'T KNOW ABOUT IT, BUT IF I HAD KNOWN ABOUT IT,
15 I WOULDN'T HAVE DONE A CERTAIN THING." THAT'S A VIOLATION
16 OF WHAT THE SUPREME COURT HAS CONSISTENTLY SAID. "YOU
17 CAN'T JUSTIFY THE ATTORNEY'S DECISIONS WHEN HE DOESN'T
18 INVESTIGATE THE -- THE CASE." I THINK MAYBE JONES IS
19 SENDING A MESSAGE --

20 THE COURT: ASSUMING THAT COUNSEL WAS DEFICIENT IN
21 SOME ASPECTS IN TERMS OF THE INVESTIGATION, THE QUESTION
22 THEN BECOMES: WHAT IS THE EVIDENCE THAT COUNSEL SHOULD
23 HAVE LEARNED ABOUT AND UTILIZED, AND HAD IT BEEN UTILIZED
24 WOULD IT HAVE MADE A DIFFERENCE?

25 MR. CRAIN: YES. JUST BRIEFLY, THE COURT
26 LIMITED -- IT DOESN'T NEED TO BE SAID ANYMORE --

27 THE COURT: PROBABLY NOT.

28 MR. CRAIN: -- THE ISSUES UPON WHICH WE COULD

12

1 PRESENT EVIDENCE. BUT I THINK AS TO THOSE ISSUES THE
2 COURT HAS -- HAS SEEN FROM THE PLEADINGS THAT THESE WERE
3 KEY ISSUES IN THE CASE. I MEAN, THE KARNY -- KARNY WAS
4 THE STAR WITNESS IN THE CASE.

5 AT THE CONCLUSION OF THE CASE JUDGE WAPNER --
6 THEN PROSECUTOR WAPNER, TOLD THE JURY AS WE HAVE SET
7 FORTH, I WON'T TAKE THE COURT'S TIME, BUT IT'S ALL IN
8 THERE, ALL THE PAGE REFERENCES, TOLD THE JURY THAT KARNY
9 WAS UNTOUCHED AS A WITNESS, THAT HIS CREDIBILITY WAS
10 COMPLETELY INTACT.

11 THE JURY KNEW THAT HE HAD AN IMMUNITY
12 AGREEMENT, BUT THE IMMUNITY AGREEMENT SPELLED RIGHT OUT
13 THAT HE WAS REQUIRED, AS THEY ALL DO, THAT HE WAS REQUIRED
14 TO TELL THE TRUTH, AND THERE WAS SOMETHING IN THERE THAT
15 HE HAD BEEN A FORMER, BUT NOT CURRENT ADHERENT OF THE
16 PARADOX PHILOSOPHY, WHICH, IF ANYTHING, SPELLED OUT FOR
17 THE JURY EXACTLY WHAT MR. WAPNER WAS ATTEMPTING TO CONVEY
18 TO THEM, THAT KARNY WAS A CREDIBLE PERSON.

19 THIS IS A PERSON WHO USED TO BELIEVE A
20 PHILOSOPHY THAT WE HAVE SHOWN TO THE JURY IS DISCREDITED
21 AND CAUSES PEOPLE TO NOT TELL THE TRUTH, BUT HE'S REJECTED
22 IT. HE'S MOVED BEYOND THAT. HE IS NOW AN HONEST PERSON.

23 HERE WAS CRITICAL EVIDENCE THAT THIS GUY
24 WAS -- WAS A PERJURER UNDER OATH IN A DEPOSITION IN A
25 CIVIL PROCEEDING. I MEAN, YOU HAVE PROSECUTED CASES.
26 WHAT WOULD YOU LIKE TO HAVE BETTER, SHORT OF A VIDEOTAPE
27 OF THE DEFENDANT COMMITTING THE CRIME, THAN EVIDENCE THAT
28 HIS STAR WITNESS IS A CONVICTED PERJURER, IS AN ADMITTED

12

1 PERJURER? WHAT MORE WOULD YOU WANT?

2 THE COURT: THE QUESTION IS NOT WHETHER YOU OR I
3 WOULD HAVE USED THE EVIDENCE. THE QUESTION IS WAS IT
4 WITHIN THE REASONABLE RANGE OF COMPETENT COUNSEL'S
5 CHOICES.

6 COUNSEL TESTIFIED, AS HE DID HERE, AND
7 MR. HUNT ALSO TESTIFIED THAT MR. HUNT ENCOURAGED, COUCHED
8 AND HELPED MR. KARNY TO PERJURE HIMSELF. ISN'T IT
9 LEGITIMATE THAT COUNSEL WOULD CHOOSE NOT TO BRING THAT IN
10 WHERE IT WOULD ALSO IMPLICATE HIS OWN CLIENT INVOLVED IN
11 THE SUBORNATION OF PERJURY? IT'S NOT WHETHER YOU OR I
12 WOULD HAVE DONE --

13 MR. CRAIN: YOUR HONOR, THE ONLY FAIR READING OF
14 THE RECORD IN THIS CASE IS AS SET FORTH IN QUITE A BIT OF
15 DETAIL, I THINK, IN THE TWO BRIEFS THAT WE FILED. I WOULD
16 ASK THE COURT TO -- RATHER -- I DON'T WANT TO TELL YOU HOW
17 TO DO YOUR BUSINESS OBVIOUSLY, BUT I WOULD HOPE THAT THESE
18 BRIEFS AND THE COURT'S DETERMINATION OF -- I GATHER YOU
19 ARE NOT GOING TO RULE FROM THE BEACH TODAY.

20 THE COURT: I TOLD YOU I WOULD WRITE AN OPINION.

21 MR. CRAIN: THAT IN WRITING THE OPINION I WOULD
22 HOPE THAT THESE BECOME USEFUL TOOLS TO THE COURT, THAT
23 THEY POINT OUT THE RECORD TO THE COURT, THAT THEY POINT
24 OUT ANSWERS TO THE QUESTIONS THAT THE COURT HAS, THINGS
25 THAT I MAY HAVE OVERLOOKED TODAY OR THINGS THAT I MAY NOT
26 BE VERBALLY ARTICULATING, AND THAT THEY NOT LIE ON THE
27 SHELF GATHERING DUST.

13

28 THE COURT: I HAVE COMPLETELY ABSORBED THESE

13

1 THINGS. I HAVE BEEN WORKING ON THIS THING FOR OVER A WEEK
2 NOW. I HAVE GONE BACK WHERE I THOUGHT THERE WAS QUESTIONS
3 TO YOUR ORIGINAL PETITION AND LOOKED AT HOW THE ISSUE WAS
4 FLESHED OUT THERE.

5 MR. CRAIN: WITH REGARD TO THIS PARTICULAR ISSUE OF
6 WHETHER A COMPETENT COUNSEL WOULD HAVE USED THIS EVIDENCE
7 OR MERELY BURIED IT SOMEWHERE THAT THE PROSECUTION'S STAR
8 WITNESS WAS A PERJURER UNDER OATH, I CAN'T IMAGINE ON THIS
9 RECORD ANY -- EVEN THE LEAST COMPETENT ATTORNEY THAT I CAN
10 THINK OF, I WON'T MENTION ANY NAMES, BUT THE MOST MARGINAL
11 ATTORNEY WOULD USE THIS EVIDENCE ON THIS RECORD.

12 I MEAN, THIS WAS A RECORD WHERE MR. HUNT HAD
13 BEEN TRASHED UP AND DOWN BY -- BY THE PROSECUTION, BY
14 EVIDENCE THAT JUDGE RITTENBAND ADMITTED. I MEAN, EVERY --
15 EVERY MISDEED THAT MR. HUNT HAD BEEN THOUGHT TO HAVE EVER
16 COMMITTED WAS BROUGHT BEFORE THE JURY.

17 I INVITE THE COURT TO GO BACK AND LOOK AT ALL
18 THE EVIDENCE THAT WAS PRESENTED AT THE TRIAL. I MEAN,
19 MR. HUNT WAS -- WAS SHOWN, OFTEN BY MR. BARENS BY THE WAY,
20 TO BE MANIPULATIVE, TO BE CONTROLLING, TO HAVE ENGAGED IN
21 FRAUDULENT ACTIVITY. NONE OF THESE THINGS WERE IN
22 DISPUTE.

23 THERE WAS EVIDENCE ABOUT MR. HUNT WHERE ONE
24 OF THE WITNESSES RAN OFF AT THE MOUTH ABOUT -- WHEN HE WAS
25 YOUNG A FORTUNE TELLER TELLING HIM BAD THINGS ABOUT
26 HIMSELF.

27 I MEAN, THERE WAS NOTHING ABOUT -- ABOUT
28 MR. HUNT IN TERMS OF WHETHER OR NOT MR. HUNT HAD ENGAGED

13

1 IN, YOU KNOW, FRAUDULENT TYPE ACTIVITIES OR BEEN A
2 MANIPULATOR THAT THE JURY DIDN'T HEAR ABOUT. THEY HEARD
3 ALL OF THIS STUFF.

4 THEY HAD -- THEY HAD THIS IMPRESSION OF HIM
5 THAT WAS PRESENTED NOT ONLY BY THE PROSECUTION BUT
6 BY MR. HUNT'S OWN ATTORNEY HIMSELF REPEATEDLY WITH HIS
7 INCOMPETENT CROSS-EXAMINATION OR HIS OPENING OF AREAS
8 WHICH ALLOWED MR. WAPNER TO COME BACK AND STICK THE SWORD
9 INTO HIS CLIENT AGAIN.

10 THERE WAS NO DOWNSIDE TO BRINGING OUT THAT
11 KARNY WAS A PERJURER EVEN IF IT WERE SHOWN THAT MR. HUNT
12 MANIPULATED HIM, BECAUSE THAT'S WHAT THE JURY COULD HAVE
13 EXPECTED, BUT IT DID SHOW THAT MR. KARNY, A STAR WITNESS,
14 HAD NO APPRECIATION FOR THE OATH AND NO APPRECIATION FOR
15 TELLING THE TRUTH IN A LEGAL PROCEEDING. AND THAT,
16 THEREFORE, MR. KARNY WAS SOMEBODY, AS -- AS SHOULD HAVE
17 BEEN SHOWN, WAS SOMEBODY WHO WAS IN IT FOR HIMSELF.
18 WHATEVER WORKED FOR HIM, EVEN IF IT MEANT LYING UNDER OATH
19 IN A LEGAL PROCEEDING, HE WAS GOING TO DO IT. THE JURY
20 DIDN'T KNOW THAT.

21 THE D.A. SAID, YOU KNOW, "OUR WITNESS, HE'S
22 OUR STAR WITNESS. HIS CREDIBILITY IS UNTOUCHED HERE.
23 BARENS HASN'T LAID A GLOVE ON HIM."

24 THAT WAS PRETTY KEY EVIDENCE IN THE CASE.
25 FOR ME HAVING BEEN A DEFENSE ATTORNEY, KNOWING A LOT OF
26 DEFENSE ATTORNEY'S, SOME OF MY BEST FRIENDS ARE DEFENSE
27 ATTORNEYS, I THINK IT WOULD BE A COMMON CONSENSUS OUT
28 THERE THAT THIS IS SHOCKINGLY INEPT REPRESENTATION, THE

13

1 FAILURE TO USE IT ON THE RECORD. THIS IS CRITICAL
2 EVIDENCE. THERE WAS NO DOWNSIDE TO IT.

3 AS TO THE KILPATRICK EVIDENCE, I KNOW THE
4 COURT ASKED THE QUESTION ON THE LAST DAY OF THE
5 PROCEEDINGS AS TO WHETHER OR NOT THE COMPLEXITIES OF IT IN
6 SOME WAY SHOULD HAVE WEIGHED IN TO IT. IT ONLY BECAME
7 COMPLEX BECAUSE WE WERE ATTEMPTING TO SHOW THE COURT THE
8 ENTIRE PARAMETERS OF IT, AND WERE ATTEMPTING TO DESCRIBE
9 TO THE COURT THE AMOUNT OF MATERIAL THAT WAS AVAILABLE TO
10 MR. BARENS. IF HE HAD ANY TROUBLE AT ALL IN DETERMINING
11 WHAT THIS EVIDENCE WAS ALL ABOUT, THERE WERE LETTERS,
12 THERE WERE BUSINESS RECORDS, THERE WERE ACCOUNTING
13 RECORDS. THERE WERE ALL KINDS OF DOCUMENTS. BUT, YOU
14 KNOW, I DON'T KNOW IF THE COURT STILL HAS ANY INTEREST IN
15 WHETHER OR NOT -- IT WAS --

16 THE COURT: THERE WAS AN AWFUL LOT OF EVIDENCE IN
17 THIS TRIAL, THE SANTA MONICA TRIAL, OF HOAXES GOING ON.
18 B.B.C. WITH ALL OF THEIR FRAUDULENT ACTIVITIES CONCERNING
19 COMMODITIES TRADING, ALL THE ACTIVITIES OF MR. LEVIN.
20 MR. LEVIN WAS CERTAINLY DIRTIED UP SUBSTANTIALLY IN THAT
21 TRIAL. THERE WAS SCAMS ONGOING.

22 HERE YOU WALK IN WITH ALL THIS EVIDENCE THAT
23 GETS PILED UP ABOUT ALL THESE PROPOSED AGREEMENTS, ALL
24 UNSIGNED, BANKRUPTCY PROCEEDINGS THAT MR. KILPATRICK NEEDS
25 TO GET OUT OF SO HE CAN DO A DEAL WITH A CANADIAN COMPANY
26 AND HE NEEDS ASSETS TO SELL TO THE CANADIAN COMPANY. THE
27 COMPLEXITY OF IT BEGINS TO SOUND LIKE A HOAX.

14

28 WHEN YOU GET TO THE POINT OF TRYING TO PULL

14

1 THIS ALL TOGETHER TO SHOW IT IS SOMETHING, IT'S ALMOST YOU
2 TRIED TOO HARD. MAYBE IT IS NOT REALLY THERE.

3 MR. CRAIN: WELL, WHAT I THINK THE COURT SHOULD --
4 HOW THE COURT SHOULD LOOK AT THIS ISSUE IS, FIRST OF ALL,
5 ONE OF THE KEY ASPECTS OF THE PROSECUTION'S CASE AT TRIAL
6 WAS THE FINANCIAL MOTIVE, AND AS WE POINTED OUT IN THE
7 PLEADING, MR. WAPNER ARGUED AGAIN AND AGAIN, HE MADE A
8 BIG -- A BIG TO-DO WITH THE FINANCIAL MOTIVE AND HOW IT
9 WASN'T REBUTTED BY BARENS. IT WAS A KEY ISSUE IN THE
10 CASE, AND IT WAS UNREBUTTED BY BARENS.

11 BARENS DIDN'T KNOW WHO ADELMAN WAS. HE
12 TESTIFIED TO THAT, AS I RECALL, AND HE DIDN'T CALL --

13 THE COURT: HE MAY HAVE SAID THAT HE MAY HAVE HEARD
14 THE NAME.

15 MR. CRAIN: HE MAY HAVE HEARD THE NAME, BUT HE MAY
16 HAVE SEEN HIM IN THE HALLWAY OR SOMETHING LIKE THAT, BUT
17 THE FACT IS HE WAS AN ATTORNEY FOR THE B.B.C. AND THE
18 RECORD IS QUITE CLEAR THAT HIS -- HIS EXISTENCE AND
19 PRESENCE WAS MADE AWARE TO MR. BARENS BY MR. HUNT.

20 AGAIN, THIS IS ONE OF THOSE THINGS WHERE
21 BARENS -- ALL HE HAD TO DO WAS CALL MR. ADELMAN TO THE
22 WITNESS STAND. HE WAS THERE, AND HE WOULD HAVE -- AS
23 HE -- I MEAN, ADELMAN'S TESTIMONY IN THIS COURT DID NOT
24 TAKE ANY INORDINATE AMOUNT OF TIME. AS A MATTER OF FACT,
25 IT WAS QUITE BRIEF.

26 THE COURT: CLEARLY IT WOULD HAVE OPENED UP THE
27 WHOLE ISSUE OF WHETHER THIS WAS A LEGITIMATE SALE OF 200
28 MILLION DOLLARS WORTH OF CYCLOTRONIC MILLS --

14

1 MR. CRAIN: THERE ARE SEVERAL POINTS HERE. I THINK
2 IT'S MORE -- NOT TO TAKE OUR EYE OFF OF THE BALL HERE AND
3 TO FOCUS ON WHAT REALLY MATTERS. AS I SAID, NUMBER ONE,
4 IT WAS KEY EVIDENCE AND IT WAS UNMET.

5 NOW, ANY DEFENSE ATTORNEY WORTH HIS SALT IN A
6 MURDER CASE, PARTICULARLY A CASE LIKE THIS WITH THIS
7 BIZARRE RON LEVIN CHARACTER AND ALL THE EVIDENCE
8 SURROUNDING HIM, ANY ATTORNEY WORTH HIS SALT IS GOING TO
9 ATTEMPT TO REFUTE A CRITICAL PIECE OF PROSECUTION EVIDENCE
10 AND NOT JUST STAND THERE. IT'S LIKE GOING INTO THE RING
11 AND LETTING YOUR OPPONENT PUMMEL YOU UNTIL YOU ARE KNOCKED
12 OUT FOR THE COUNT.

13 HE DIDN'T DO ANYTHING. IT WASN'T AS IF -- HE
14 DIDN'T HAVE A CHOICE IN TERMS OF COMPETENCE OF COUNSEL.
15 HE HAD TO REFUTE THE FACTS THAT THE PROSECUTION WAS
16 SHOWING BY ITS EVIDENCE THAT -- THAT THE B.B.C. NEEDED
17 MONEY. THAT'S NUMBER ONE.

18 THE EVIDENCE WAS AVAILABLE AND COULD HAVE
19 BEEN PRESENTED. ADELMAN IS SPECIFICALLY MENTIONED IN THE
20 O.S.C.. THAT EVIDENCE COULD HAVE BEEN PRESENTED THROUGH
21 NEIL ADELMAN. THIS IS A MAN WHO TESTIFIED HE HAD
22 EXPERIENCE IN A PREVIOUS 100 MILLION DOLLAR DEAL.

23 HE COULD HAVE LAID OUT THE FACTS, AND HIS
24 COUNSEL TO MR. HUNT AND HIS ADVISE TO MR. HUNT AS TO
25 THE -- THE ONLY QUESTION WAS DID MR. HUNT HAVE A BELIEF
26 THAT -- THAT SHOULD HAVE BEEN PRESENTED TO THE JURY, DID
27 MR. HUNT HAVE A BELIEF THAT THAT MONEY WAS GOING TO
28 RESOLVE ANY FINANCIAL PROBLEMS THAT THE B.B.C. MAY HAVE

14

1 HAD.

2 WE HAVE ALSO HEARD TESTIMONY IN THIS HEARING
3 THAT THERE REALLY WEREN'T THESE FINANCIAL PROBLEMS. BE
4 THAT AS IT MAY, THE PROSECUTION'S VERSION OF THE CASE WAS
5 THAT THERE WAS FINANCIAL MOTIVE WHICH THEY ARGUED AGAIN
6 AND AGAIN AND AGAIN AND POINTED OUT THAT NOBODY SAID
7 ANYTHING TO THE CONTRARY HERE. BARENS DIDN'T SAY A WORD.

8 NUMBER ONE, HE SHOULD HAVE FOUND OUT WHO
9 ADELMAN WAS, AND HE SHOULD HAVE CALLED ADELMAN, WHO HAD
10 EXPERIENCE IN THESE TYPE OF CASES, AND CALLED HIM TO THE
11 FORE THAT THERE WAS A DEAL IN THE WORKS. "I TOLD HUNT IT
12 LOOKED GOOD." THIS IS THE BASIS OF MR. ADELMAN'S
13 TESTIMONY, NOT WHETHER THE MACHINE WORKED OR DIDN'T WORK,
14 AS I POINTED OUT.

15 I HOPE THE COURT RECALLS IT IN THE PLEADINGS
16 THAT THERE WAS EVIDENCE PROVIDED BY THE PROSECUTION. IN
17 THE OPENING STATEMENT MR. WAPNER SAID THAT THE MACHINE IS
18 VALUABLE. THERE WAS TESTIMONY FROM A MR. BROWN, THERE
19 WAS -- A PROSECUTION WITNESS. THERE WAS TESTIMONY FROM
20 MR. LOPEZ, WHO WAS A PROSECUTION WITNESS. THERE WAS OTHER
21 EVIDENCE IN THE CASE THAT -- YOU KNOW, THAT IT WAS A
22 VALUABLE THING.

23 THE NEXT THING IS THAT -- YOU KNOW, I THINK
24 IT'S A -- IT'S A FALSE ISSUE. IT'S REALLY A RED HERRING.
25 IN ANY EVENT, WHETHER THE MACHINE WORKED OR DIDN'T WORK OR
26 WHETHER KILPATRICK WAS ATTEMPTING TO RIP OFF MR. HUNT OR
27 VICE VERSA. I MEAN, IT DIDN'T MATTER. I HAVE SAID THIS
28 IN THE PLEADING. I HOPE -- IT DIDN'T MATTER.

15

15

1 THE QUESTION WAS, WAS THERE A BELIEF THAT
2 MONEY WAS GOING TO COME INTO THE COFFERS. THAT'S WHAT IT
3 WAS ALL ABOUT. I MEAN, SURE, IT WOULD HAVE BEEN BETTER
4 IF -- IF THE JURY WERE TO CONCLUDE, "YEAH, THIS LOOKED
5 LIKE A LEGITIMATE DEAL," BUT THE FACT IS -- THIS COURT HAS
6 HEARD THAT KILPATRICK WAS A CON MAN. HE IS A CONVICTED
7 CON MAN. HE WAS BROUGHT OVER HERE FROM THE FEDERAL
8 PRISON.

9 I DON'T KNOW IF I AM MAKING MYSELF CLEAR.
10 IT'S A RED HERRING WHETHER OR NOT THE DEAL WAS VALUABLE OR
11 NOT.

12 THE COURT: LET'S ASSUME FOR A MOMENT THAT THE
13 FACTS WERE CHANGED AND MR. ADELMAN WAS A DRUG MIDDLE MAN
14 AND MR. ADELMAN WAS GOING TO SAY, "I WAS ABOUT TO PUT
15 TOGETHER A TWO HUNDRED MILLION DOLLAR COCAINE DEAL.
16 MR. HUNT HAD NOTHING TO WORRY ABOUT, HE WOULD HAVE TWO
17 HUNDRED MILLION ON HIS BOOKS."

18 COUNSEL COULD SAY, "I DON'T WANT TO DIRTY MY
19 CLIENT WITH A TWO HUNDRED MILLION DRUG DEAL."

20 COULDN'T COUNSEL ALSO SAY, "I DON'T WANT TO
21 DIRTY UP MY CLIENT WITH A TWO HUNDRED MILLION DOLLAR HOAX.
22 GIVEN THE FACT HE'S ALREADY ENGAGED IN FRAUDULENT ACTIVITY
23 THAT ONE COULD MAKE THINGS WORSE."

24 MR. CRAIN: IT WAS NOT GOING TO BE WORSE. WITH
25 REGARD TO KARNY, THE PROSECUTION HAD PRACTICALLY FROM THE
26 CRADLE ON HAD DREDGED UP BEFORE THE JURY EVERY -- EVERY
27 CONCEIVABLE MISDEED IN TERMS OF FINANCIAL DEALINGS THAT
28 MR. HUNT HAD EVER BEEN INVOLVED IN. I TOLD YOU -- ALSO

15

1 IT'S JUST AMAZING, IT WENT SO FAR AS TO HAVE ONE OF THESE
2 B.B.C. WITNESSES TALK ABOUT THIS FORTUNE TELLER WHEN
3 MR. HUNT WAS YOUNG. THERE WAS NOTHING -- THE JURY ALREADY
4 KNEW THIS STUFF ABOUT MR. HUNT. THEY SHOULD HAVE KNOWN
5 THERE WAS CONTRACTS IN THE WORKS.

6 I MEAN, KILPATRICK FINALLY ACKNOWLEDGED
7 DECLAN O'DONNELL. WE POINTED OUT THE PAGE REFERENCES IN
8 HERE TO THE EVIDENTIARY HEARING RECORD. I MEAN, THEY --
9 THEY FINALLY ADMITTED OR PARTICULARLY KILPATRICK FINALLY
10 ADMITTED, IT WAS LIKE PULLING TEETH, THAT THE DEAL, AS FAR
11 AS HE WAS CONCERNED, WASN'T THAT FAR OFF ANY WAY. I'LL
12 DIG THAT OUT IF THE COURT WANTS TO SEE IT, BUT IT'S RIGHT
13 IN THERE THAT HE TESTIFIED TO THAT. O'DONNELL TESTIFIED
14 TO THAT.

15 AGAIN, IT IS A SMOKE SCREEN. IT'S A RED
16 HERRING WHETHER OR NOT IT WAS OR WASN'T. THE WORST -- THE
17 WORST SCENARIO THAT -- FIRST OF ALL, ADELMAN WAS NOT A
18 DRUG DEALER. HE WAS AN ATTORNEY.

19 OKAY.

20 I MEAN, HE WAS A REPUTABLE ATTORNEY, NOT SOME
21 DRUG DEALER WHO WAS TALKING ABOUT HIS CLIENT SELLING
22 DRUGS. HE WAS AN ATTORNEY WHO WAS PREPARED TO TESTIFY
23 THAT ON THE BASIS OF ONGOING NEGOTIATIONS WITH KILPATRICK
24 THAT HAD BEEN GOING BACK MANY, MANY MONTHS THAT THE DEAL
25 WAS IN THE WORKS. HE BELIEVED THAT, AND HE TOLD HIS
26 CLIENT THAT. HE HAD EXPERIENCE; SO HIS BELIEF WOULD BE
27 SOMETHING THAT SOMEBODY WOULD ACCEPT AND RELY UPON. THAT
28 WAS THERE.

15
1 SO THE -- THE WORST -- AS I SAID, THERE WAS
2 EVIDENCE IN THE CASE THAT THE PROSECUTION PRESENTED THAT
3 THESE MILLS WERE VALUABLE, VIABLE, BLAH, BLAH, BLAH. THE
4 WORST SCENARIO WOULD HAVE BEEN THAT THE JURY MIGHT
5 CONCLUDE OR -- THE JURY MIGHT CONCLUDE THAT MR. HUNT WAS
6 BEING DUPED BY MR. KILPATRICK, THE CON MAN. MR. HUNT HAD
7 A BELIEF THAT MONEY WAS GOING TO BE COMING IN, BUT IN
8 TRUTH AND IN FACT IT WASN'T GOING TO BE COMING IN, AND HE
9 JUST DIDN'T KNOW ABOUT IT. BUT THAT WAS IMPORTANT
10 EVIDENCE TO REFUTE THE FINANCIAL MOTIVE EVIDENCE OF THE
11 PROSECUTION, WHICH WENT UNREBUTTED.

12 THE WORST THING, THE WORST SCENARIO COULD
13 HAVE BEEN THE -- THE JURY MIGHT HAVE THOUGHT MAYBE HUNT
14 WAS TRYING TO -- WAS TRYING TO DECEIVE KILPATRICK, BUT,
15 YOU KNOW, THEY'D ALREADY HEARD THAT MR. HUNT HAD BEEN
16 DECEPTIVE IN OTHER INSTANCES, AND THE QUESTION WAS, "WELL,
17 DID MR. HUNT THINK HE WAS GOING TO BE GETTING HIS HANDS ON
18 KILPATRICK'S MONEY? KILPATRICK HAD MONEY. THE EVIDENCE
19 BY O'DONNELL WAS KILPATRICK WAS A GUY WITH LOTS OF MONEY.

20 THE COURT: WE LOOKED AT THE BALANCE SHEETS, BUT IT
21 DIDN'T HAVE MUCH ON IT. THERE WAS VERY LITTLE IN HIS
22 COMPANY. HE HAD LOTS OF PAPER ASSETS, INCLUDING THE
23 BIGGEST ONE BEING THE ATTRITION MILLS --

16
24 MR. CRAIN: YOU KNOW, THERE IS -- I REMEMBER THAT,
25 BUT I THINK -- I WOULD ASK THE COURT TO GO BACK AND LOOK
26 AT MR. O'DONNELL'S AND MR. KILPATRICK'S TESTIMONY IN TERMS
27 OF WHAT HIS OVERALL ASSETS WERE, NO MATTER WHAT KIND OF
28 FORM THEY MAY HAVE BEEN IN.

16

1 DECLAN O'DONNELL TESTIFIED THAT KILPATRICK
2 WAS A MAN WHO EXUDED MONEY. HE WAS A SKILLED OPERATOR, A
3 MAN SOME 30 YEARS OLDER THAN MR. HUNT WHO HAD ALL THESE
4 BUSINESS OPERATIONS, OWNED A TOWN IN CALIFORNIA, HAD ALL
5 THESE COAL RESOURCES THAT HE OWNED. HE WALKED --

6 THE COURT: MR. KILPATRICK IS ALSO A SCAM ARTIST.

7 MR. CRAIN: HE'S A SCAM ARTIST. HE WALKED AND
8 TALKED MONEY. SO, YOU KNOW, IT MAY HAVE BEEN, AS I SAY,
9 THE -- THERE WERE MANY SCENARIOS THAT COULD HAVE RESULTED
10 FROM THE KILPATRICK EVIDENCE BEING INTRODUCED TO THE JURY
11 IN A -- IN A LIMITED FORMAT MERELY TO SHOW THAT THERE WERE
12 ONGOING NEGOTIATIONS BETWEEN THESE TWO INDIVIDUALS,
13 MR. HUNT AND MR. KILPATRICK.

14 AND THE WORST FORMAT FOR MR. HUNT, THE JURY
15 WOULD HAVE THOUGHT MAYBE MR. HUNT WAS TRYING TO DECEIVE
16 MR. KILPATRICK BECAUSE HE BELIEVED MR. KILPATRICK HAD LOTS
17 OF MONEY BECAUSE THAT'S THE WAY MR. KILPATRICK PRESENTED
18 HIMSELF, BUT AT LEAST IT WOULD HAVE REFUTED THE FINANCIAL
19 MOTIVE THEORY OF THE PROSECUTION. IT WOULD HAVE SHOWN THE
20 JURY A REASON THAT MR. HUNT WAS EXPECTING TO GET HIS HANDS
21 ON MONEY. I HAVE SET THIS OUT -- I HOPE I'M MAKING MYSELF
22 CLEAR.

23 THE COURT: UNDERSTOOD.

24 MR. CRAIN: THAT'S WHY, YOUR HONOR, WHY THERE WAS
25 NO REASON WHY ANY COMPETENT ATTORNEY WOULD NOT PUT THIS
26 EVIDENCE BEFORE THE JURY. HIS CLIENT HAD ALREADY BEEN --
27 YOU KNOW, IN THE VERNACULAR, AGAIN, TRASHED BY THE
28 PROSECUTION. IT DIDN'T MATTER WHETHER OR NOT THE JURY SAW

16

1 THAT SOME SO HOAX WAS INVOLVED. I DON'T THINK THEY WOULD
2 HAVE. I DON'T THINK THEY WOULD HAVE. IF THEY DID, IT
3 WOULDN'T HAVE MATTERED.

4 IT SURE WOULD HAVE MEANT THAT MR. WAPNER
5 COULDN'T SAY AGAIN AND AGAIN, "WE HAVE SHOWN THAT HE
6 NEEDED MONEY. THAT'S WHY HE KILLED LEVIN. WHAT DID
7 BARENS SAY ABOUT IT? HE HASN'T TOLD YOU A WORD. HE HAS
8 NOT GIVEN YOU ANY REASON TO REFUTE THIS."

9 THAT'S WHERE IT HURT. THAT'S WHY WE POINTED
10 OUT THAT THOSE WERE SIGNIFICANT ISSUES AND NOT OUT ON THE
11 PERIPHERY. THESE ISSUES THAT HE DIDN'T PRESENT EVIDENCE
12 ON BECAUSE OF HIS INEPTNESS AND HIS FAILURE TO PREPARE THE
13 CASE WENT TO THE HEART OF THE PROSECUTION'S CASE AGAINST
14 MR. HUNT.

15 CREDIBILITY OF THE STAR WITNESS, THE
16 FINANCIAL MOTIVE, JUST BRIEFLY, THE -- THE F.B.I.
17 EVIDENCE. I MEAN, THIS WAS AVAILABLE TO MR. WAPNER.

18 I HAVE KNOWN MR. WAPNER, PARENTHETICALLY, FOR
19 A LONG TIME. I HAVE TRIED CASES AGAINST HIM. I HAVE
20 NEVER THOUGHT ANYTHING BUT THE HIGHEST OF HIM AS A
21 PROSECUTOR.

22 HE TESTIFIED HE HAD AN OPEN DOOR POLICY, AN
23 OPEN BOOK POLICY WITH REGARD TO DISCOVERY. HE TESTIFIED
24 THAT HE THOUGHT WHEN HE CAME ON THE CASE IN THE FALL OF
25 1984 THAT THE DEFENSE HAD THESE MATERIALS. HE CONTINUED
26 TO BELIEVE THAT THE DEFENSE HAD THESE MATERIALS AND THESE
27 MATERIALS WERE AVAILABLE TO THEM.

28 YOU KNOW, THE D.A.'S OWN EVIDENCE SHOWS THAT

16

1 THERE IS A HALF MILLION DOLLARS OUT THERE UNACCOUNTED FOR.
2 I KNOW WE WEREN'T ABLE TO PRESENT ANY EVIDENCE ON IT, BUT
3 THAT'S ONE ISSUE I'LL TAKE A REPRESENTATION ON IT AS FAR
4 AS IT GOES. THERE'S A HALF MILLION DOLLARS THAT LEVIN HAD
5 SOME CONNECTION WITH THAT NOBODY CAN ACCOUNT FOR.

6 THE RECORD IS -- WE HAVE ATTEMPTED TO SHOW IS
7 THAT THIS IS A GUY WHO -- WHO WAS MAKING PLANS TO FLEE,
8 HAD REASON TO FLEE. AND I DON'T KNOW, LIKE I SAY, MOST
9 PEOPLE -- PARTICULARLY A GUY WITH A RAP SHEET LIKE THIS,
10 WHO WAS WELL-KNOWN TO DETECTIVE ZOELLER, WELL-KNOWN TO
11 THE -- TO THE FEDERAL SIDE OF THINGS, WHEN SOMEBODY LIKE
12 THAT HEARS THAT THE F.B.I. IS -- IS BREATHING DOWN HIS
13 NECK, I CERTAINLY THINK THAT IS SOMETHING THAT THE JURY IS
14 GOING TO WANT TO HEAR ABOUT IN TERMS OF IMPETUS TO LEAVE
15 TOWN.

16 BUT, OF COURSE, HERE IS SOMETHING -- ALTHOUGH
17 THE EVIDENCE WAS AVAILABLE TO BARENS, HE DID NOTHING ABOUT
18 IT. IT WAS SIGNIFICANT EVIDENCE. THE PROSECUTION, AGAIN,
19 IN ITS FINAL ARGUMENT POINTED OUT HOW SIGNIFICANT IT WAS
20 THAT BARENS HAD FAILED TO SHOW THE JURY ANY EVIDENCE OF
21 MOTIVE EXCEPT WHAT HE CHARACTERIZED AS A TWO-BIT STATE
22 CASE FOR GRAND THEFT PENDING IN SANTA MONICA INVOLVING THE
23 PHOTOGRAPHIC EQUIPMENT.

17

24 SO HE SAYS, YOU KNOW, BARENS SAID HE FLED AND
25 HE HAD A REASON TO FLEE. "WHAT HAS HE SHOWN TO YOU,
26 LADIES AND GENTLEMEN? THE ONLY THING HE'S SHOWN TO YOU,
27 LADIES AND GENTLEMEN, IS THIS LITTLE BITTY CASE OVER HERE
28 IN THE SANTA MONICA COURTHOUSE."

17
1 IN FACT -- IN FACT, THIS IS A MAN WHO HAD, AS
2 WAS SHOWN IN PART IN THE RECORD, THERE WAS THIS LETTER TO
3 JUDGE STEVENS, THERE IS EVIDENCE THAT THIS IS A GUY WHO
4 FEARED A RETURN TO PRISON. HE HAD A BAD TIME THERE. THE
5 COURT HEARD THAT FROM MS. MARMOR. THERE'S OTHER EVIDENCE
6 OUT THERE, PERHAPS I'M NOW SPEAKING OUTSIDE THE RECORD,
7 THAT MR. LEVIN HAD THIS FEAR. CLEARLY THE JURY SHOULD
8 HAVE HEARD THAT HE WAS UNDER INVESTIGATION BY THE F.B.I.

9 WITH REGARD TO HOLMES, I MEAN HOLMES WAS
10 AGAIN MENTIONED IN ONE OF DETECTIVE ZOELLER'S POLICE
11 REPORTS. THIS WAS NOT SOME -- YOU KNOW, ANYBODY -- IF YOU
12 WERE ASSIGNED TO DEFEND A CASE LIKE THIS, I WOULD THINK
13 THAT THE FIRST THING YOU WOULD DO OR I WOULD DO OR
14 MR. MC MULLEN OR ANYBODY WHO WAS GIVEN THAT RESPONSIBILITY
15 WOULD BE TO INTERVIEW PEOPLE WHO CLOSELY KNEW RON LEVIN TO
16 FIND OUT HIS CUSTOMS, HIS HABITS, THEIR -- THEIR LAST
17 DEALINGS WITH THEM. WHAT APPEARED TO BE ON HIS MIND.
18 WHAT PROBLEMS HE WAS HAVING. DID HE TALK ABOUT THINGS
19 THAT RELATED TO A DEPARTURE FROM THE SCENE? THOSE ARE THE
20 KINDS OF THINGS THAT YOU WOULD DO. THEY WEREN'T DONE
21 HERE.

22 MR. HOLMES AS -- AS WERE THE MARMORS, BUT
23 MR. HOLMES WAS A LOGICAL PERSON THAT ANY DEFENSE ATTORNEY,
24 HIS FIRST DAY OUT OF LAW SCHOOL, HIS FIRST CASE, WOULD
25 CONDUCT THAT SORT OF INQUIRY. HE HAD HOLMES' NAME IN A
26 POLICE REPORT IN WHICH HOLMES MADE THE STATEMENT THAT
27 BARENS -- THAT LEVIN WAS TALKING ABOUT POSSIBLY LEAVING
28 THE NIGHT OF JUNE 5TH. THERE WAS NO FOLLOW-UP. THE

17

1 EVIDENCE WAS THERE.

2 AND AGAIN, THERE WAS IMPORTANT EVIDENCE IN
3 TERMS OF THREE THINGS. ONE, THE POSSIBLE EARLIER
4 DEPARTURE.

5 TWO, THE INTEREST IN EXTRADITION, AND LEVIN'S
6 OWN INVESTIGATION THAT ONE COULD SUCCESSFULLY GO TO BRAZIL
7 AND NOT BE EXTRADITED BECAUSE OF THE STATUS OF THE TREATY
8 IN EFFECT AT THAT TIME. THE FACT THAT FOREIGN OFFICIALS
9 COULD BE PAID OFF IN ORDER TO PRESERVE ONE'S SECURITY AND
10 SANCTUARY IN A FOREIGN COUNTRY, AND THE FACT THAT NEIL
11 ANTON HAD SUDDENLY, THIS SUPPOSED CLOSE FRIEND OF
12 MR. LEVIN'S, HAD GIVEN INCRIMINATING INFORMATION TO THE --
13 TO THE POLICE ABOUT MR. LEVIN.

14 AND THE COURT WILL ALSO RECALL MR. HOLMES
15 TESTIFYING THAT MR. LEVIN WAS IN A VERY AGITATED STATE
16 WHEN HE SUMMONED HIM OVER THERE AT THE DROP OF A HAT. SO
17 THAT WAS, AGAIN, IMPORTANT EVIDENCE.

18 WAPNER, AGAIN, POINTED OUT THAT BARENS HAD
19 NOT SHOWN ONE SINGLE REASON TO JUSTIFY WHY THE MAN WOULD
20 SUDDENLY LEAVE TOWN, AND THE EVIDENCE WAS THERE.

21 I'LL TRY TO WRAP THIS UP HERE, BUT I HAVE SET
22 FORTH IN THE PLEADINGS ABOUT THE MARMOR EVIDENCE. I
23 RECOGNIZE WHAT THE COURT HAS SAID. I WOULD ASK THE COURT
24 TO -- TO REREAD OR REEVALUATE WHAT WAS SAID ABOUT HER.

25 BUT AGAIN, THE LIST WAS ANOTHER KEY PIECE OF
26 PROSECUTION EVIDENCE, AND THIS WAS SOMETHING THAT WAS
27 READILY DISCOVERABLE BY ANY COMPETENT ATTORNEY. I MEAN,
28 HERE WAS THE NEXT-DOOR NEIGHBOR. IN FACT, MR. HUNT,

17 1 ACCORDING TO UNREBUTTED TESTIMONY, HAD GIVEN MR. BARENS
2 HIS REQUEST THAT HE INTERVIEW MRS. MARMOR, AND, LIKE
3 EVERYTHING ELSE, MR. BARENS DIDN'T DO THAT.

4 YOU KNOW, YOUR HONOR, I RECOGNIZE THIS IS A
5 HABEAS CORPUS PROCEEDING, AND I KNOW THE COURT WILL TO THE
6 BEST IT CAN, AND WE'RE ALL HUMAN BEINGS HERE, BUT WHAT WE
7 ARE TALKING ABOUT IS HAVING 12 CITIZENS IN THE JURY BOX
8 HEARING THE EVIDENCE. WHATEVER THIS COURT'S EVALUATION
9 ABOUT MRS. MARMOR MAY BE, I DO BELIEVE THAT ANY -- ANY
10 DEFENSE ATTORNEY REPRESENTING MR. HUNT IN THE SANTA MONICA
11 TRIAL AFTER THE MOST MARGINAL EXAMINATION WOULD CALL
12 MRS. MARMOR TO THE WITNESS STAND. THERE WAS NO DOWNSIDE
13 TO THIS.

14 MRS. MARMOR HAS TESTIFIED THAT -- IF HER
15 TESTIMONY RAISED A REASONABLE DOUBT WITH THE 12 JURORS
16 THAT THIS LIST WAS IN MR. LEVIN'S RESIDENCE PRIOR TO JUNE
17 6, 1984, THEN THAT ASPECT OF THE PROSECUTION'S CASE WOULD
18 HAVE BEEN BLOWN TO BITS. IT WASN'T A MATTER OF PROVING BY
19 A PREPONDERANCE OF THE EVIDENCE, AS THIS COURT IS
20 REQUIRING OR THE LAW REQUIRES US TO DO AS TO HER
21 TESTIMONY, BUT TO CALL HER BEFORE A JURY AND LET THE 12
22 JURORS DECIDE, "DOES THIS RAISE A REASONABLE DOUBT AS TO
23 THIS LIST TESTIMONY," BECAUSE WITHOUT IT MR. WAPNER,
24 AGAIN, WAS TO POINT OUT, AS HE DID TO THE JURY, THAT THIS
25 EVIDENCE WAS UNREBUTTED. IT WAS UNMET. IT WAS
26 UNCHALLENGED.

18 27 SO THERE COULD BE NO -- NO REASON FOR ANY
28 ATTORNEY SAYING, "WELL, YOU KNOW" -- I MEAN, WE TAKE OUR

18

1 WITNESSES AS WE FIND THEM. SOME ARE STRONGER THAN OTHERS.
2 CERTAINLY AS A PROSECUTOR I THINK YOU'D RATHER CALL SOME
3 SIGNIFICANT MEMBER OF THE COMMUNITY AS YOUR WITNESS RATHER
4 THAN AN INFORMANT WHO MADE A DEAL. SOMETIMES THAT'S WHAT
5 YOU HAVE TO DO. YOU HAVE TO CALL THOSE WITNESSES.

6 BUT THERE COULD BE NO REASON IN TERMS OF
7 COMPETENCY OF COUNSEL FOR NOT CALLING MRS. MARMOR TO THE
8 WITNESS STAND. HE SHOULD HAVE KNOWN ABOUT HER. HE COULD
9 HAVE GOT THIS INFORMATION. HE NEVER WENT OUT AND
10 INTERVIEWED HER.

11 SO UNDER JONES AND MAZINGO AND FIELDS HE
12 CAN'T JUSTIFY THIS AS SOME TACTICAL OR STRATEGIC DECISION
13 THAT HE MADE BECAUSE HE DIDN'T DO ANYTHING. HAD HE -- HAD
14 HE BROUGHT HER FORWARD I BELIEVE THAT THE JURY -- YOU
15 KNOW, HE WOULDN'T HAVE HAD TO PROVE HER TESTIMONY BY A
16 PREPONDERANCE. IT'S A REASONABLE DOUBT ISSUE.

17 IT CERTAINLY WOULD HAVE MET AND RAISED --
18 REASONABLE DOUBT AS TO THE -- THE EXISTENCE OF THE LIST
19 AND WHERE IT WAS OR WASN'T ON JUNE 5TH OR JUNE 6TH. SO
20 THAT IS WHY ON THESE MATTERS THAT THE COURT TOOK EVIDENCE
21 ON, THESE WERE SIGNIFICANT FAILURES. THESE WERE
22 PREJUDICIAL FAILURES.

23 I POINTED OUT, YOUR HONOR, I THINK IT'S CLEAR
24 THAT THE LAW IS, AS I'M SURE THE COURT, I HOPE, WOULD
25 AGREE, THAT THE SECOND PRONG DOES NOT REQUIRE -- IN FACT
26 STRICKLAND MAKES THAT CLEAR. THE SECOND PRONG DOES NOT
27 REQUIRE US TO PROVE BY A PREPONDERANCE OF THE EVIDENCE
28 THAT -- THAT THERE WOULD HAVE BEEN A DIFFERENT OUTCOME IN

18 1 THE CASE. THE 9TH CIRCUIT, THE 8TH CIRCUIT, MOST OF THE
2 FEDERAL CIRCUITS THAT HAVE DEALT WITH THE ISSUE HAVE SAID
3 THAT STRICKLAND'S SECOND PRONG IS A REASONABLE
4 POSSIBILITY. THAT'S WHAT INNOCENCE MEANS. THAT'S ALL WE
5 HAVE TO PROVE.

6 I DON'T THINK THAT ANYBODY COULD ARGUE THAT
7 ON THE POINTS WE RAISED -- THAT THE COURT PERMITTED
8 EVIDENCE ON, THESE FIVE ISSUES WHERE BARENS DIDN'T KNOW
9 ANYTHING ABOUT IT.

10 "I DIDN'T DO ANYTHING ON IT. I'M NOT SURE
11 WHO ADELMAN WAS. I NEVER READ THE DEPOSITION. I GUESS I
12 DIDN'T LOOK AT THE F.B.I. REPORTS. I MIGHT HAVE HEARD THE
13 NAME HOLMES. I'M NOT REALLY SURE."

14 THERE IS NO QUESTION THAT JUST LIKE IN THE IN
15 RE JONES CASE, WHICH THE CALIFORNIA SUPREME COURT JUST
16 DECIDED, THIS IS A COMPLETE FAILURE OF INVESTIGATION AND A
17 MEETING OF PRONG ONE.

18 CLEARLY, THERE IS A REASONABLE POSSIBILITY
19 THAT THIS TRIAL WOULD HAVE HAD A DIFFERENT OUTCOME HAD
20 THESE KEY PIECES OF PROSECUTION EVIDENCE BEEN MET.

21 DID THE COURT HAVE SOME QUESTION?

22 THE COURT: I WAS LOOKING FOR A NOTE THAT I HAD ON
23 THAT ISSUE. I DON'T HAVE IT UP HERE.

24 MR. CRAIN: I JUST WANTED TO WRAP UP HERE, IF I
25 MAY. I APPRECIATE THE COURT'S CONSIDERATION HERE.

26 THE COURT: YEAH.

27 MR. CRAIN: ON THESE OTHER ISSUES, YOUR HONOR, I
28 GUESS WE HAVE -- A DIFFERENT VIEW OF WHAT THE LAW IS. WE

18
1 HAVE SET IT FORTH IN THE PLEADING ABOUT THE DENIAL OF THE
2 OPPORTUNITY TO PRESENT EVIDENCE, BUT BE THAT AS IT MAY, WE
3 ARE HERE, WE ABIDE BY THE COURT'S RULING. WE'RE STUCK
4 WITH IT. WE WEREN'T ABLE TO PRESENT EVIDENCE ON THESE
5 OTHER ISSUES.

6 I DON'T REALLY KNOW WHAT -- WHAT THE COURT
7 LEGALLY AND PROCEDURALLY CAN DO. I DON'T THINK THE COURT
8 CAN SUMMARILY DENY THEM. I MEAN, UNDER IN RE FIELDS IT'S
9 QUITE CLEAR THAT THESE ISSUES OF FACT HAVE TO BE
10 DETERMINED BY EVIDENCE IN ACCORDANCE WITH THE EVIDENCE
11 CODE. SO I DON'T THINK THE COURT CAN RULE AGAINST
12 MR. HUNT ON THEM BY SIMPLY ACCEPTING COUNSEL FOR THE
13 DISTRICT ATTORNEY'S CONCLUSIONARY REPRESENTATIONS OR THEIR
14 HEARSAY DECLARATION DECLARATIONS, WHICH WE OBJECT TO IN
15 THE ABSENCE OF EVIDENCE.

16 BE THAT AS IT MAY, BECAUSE WE DISCUSSED
17 EARLIER WITH REGARD TO ISSUE NO. 1, IF THE COURT WERE TO
18 CHOOSE TO FACTOR IN THE OTHER EVIDENCE IN THE CASE IN
19 TERMS OF MAKING ITS EVALUATION AS TO THE WEIGHT TO BE
20 GIVEN TO THE SIGHTING WITNESS' TESTIMONY, I MEAN, THERE --
21 THERE WERE MANY OTHER AREAS OF SIGNIFICANCE HERE THAT --
22 THAT WE BELIEVE THE COURT SHOULD CONSIDER AND CAN'T -- I
23 THINK USE THEM TO MR. HUNT'S DETRIMENT IN SOME WAY WHERE
24 HE HASN'T HAD AN OPPORTUNITY TO DO IT. I THINK OF THE
25 EVIDENCE, FOR EXAMPLE, THE TOM MAY THING --

19
26 THE COURT: I HAVE TO TELL YOU THAT THE EVIDENCE IN
27 TERMS OF THE OTHER ISSUES WILL BE VIEWED TO THE BENEFIT,
28 IF AT ALL, OF MR. HUNT. THAT IS, I WILL LOOK AT IT

19 1 COLLECTIVELY, ALL THE EVIDENCE AS IT RELATES TO THE
2 INEFFECTIVE ASSISTANCE OF COUNSEL, TO SEE WHETHER ALL THE
3 EVIDENCE THAT'S BEEN PRESENTED IN THE PETITION IN ADDITION
4 TO THAT WHICH I TOOK ON THE INEFFECTIVE ASSISTANCE OF
5 COUNSEL MEETS THE STANDARD.

6 I DON'T THINK I SHOULD LOOK AT THE SPECIFIC
7 ISSUE AND SAY, "NO, IT DOESN'T MAKE ON THAT AND THEN DOWN
8 TO THAT WITH THE SECOND AND THIRD?" I THINK I SHOULD LOOK
9 AT IT COLLECTIVELY.

10 MR. CRAIN: I AGREE WHOLEHEARTEDLY. I THINK IF
11 THERE WAS ANY DOUBT UP UNTIL LAST WEEK ABOUT IT, IN THE
12 JONES CASE THE CALIFORNIA SUPREME COURT MADE THAT QUITE
13 CLEAR, THAT THE COURT IS REQUIRED TO LOOK AT THE EFFECT OF
14 INCOMPETENCE OF COUNSEL ERRORS IN A CUMULATIVE FASHION. I
15 APPRECIATE -- I APPRECIATE THAT.

16 WELL, YOU KNOW, JUST AT THE CONCLUSION OF THE
17 SECOND PLEADING WE SUMMARIZED SOMETHING LIKE, I DON'T
18 KNOW, 14 THINGS THAT BARENS DIDN'T DO THAT WERE UNMET,
19 THAT THE PROSECUTION HIT -- HIT ONE HOME RUN AFTER THE
20 OTHER IN ITS FINAL ARGUMENT IN NOT ONLY MAKING THE POINT,
21 BUT IN POINTING OUT THE DEFENSE DIDN'T DO ANYTHING TO
22 REFUTE IT. BARENS DIDN'T READ THE TOM MAY MOVIE CONTRACT.
23 HE IS GIVEN INCONSISTENT ANSWERS ON THAT.

24 I THINK AT ONE POINT HE SAID HE WAS NOT AWARE
25 OF IT, BUT AT ANOTHER POINT IN THE TRIAL HE MADE SOME
26 PATHETIC ATTEMPT TO CROSS-EXAMINE WHETHER OR NOT THERE WAS
27 SUCH A CONTRACT. OF COURSE, HUNT READ IT, BUT HE DIDN'T
28 KNOW THERE WAS A --

19
1 THE COURT: DO YOU REALLY THINK JUDGE RITTENBAND
2 WOULD LET HIM GET INTO IT? DIDN'T SOUND LIKE JUDGE
3 RITTENBAND WANTED ANYTHING TO DO WITH THAT OTHER THAN THE
4 QUESTIONS HE PUT TO MR. MAY.

5 MR. CRAIN: I KNEW JUDGE RITTENBAND QUITE WELL. I
6 HAVE TRIED MANY CASES IN HIS COURT. I WAS HIS RIGHT-HAND
7 MAN, SO TO SPEAK, WHEN I WAS IN THE PUBLIC DEFENDER'S
8 OFFICE. I DON'T THINK THE QUESTION IS NECESSARILY, "WOULD
9 JUDGE RITTENBAND HAVE LET HIM DO IT?" BUT THE QUESTION
10 IS, "WHAT WOULD HAVE BEEN LEGALLY ADMISSIBLE?"

11 THE FACT IS -- HE MIGHT HAVE. I MEAN,
12 RITTENBAND -- JUDGE RITTENBAND -- EXCUSE ME -- WAS A MAN
13 WHO -- WHO HAD A GREAT INTEREST IN THE FIELD OF
14 ENTERTAINMENT AND SHOW BUSINESS AND ENTERTAINMENT LAW. HE
15 KEPT A LARGE SCRAPBOOK OF ALL HIS INTERACTIONS WITH PEOPLE
16 IN THAT WORLD.

17 FROM A LEGAL ASPECT I BELIEVE THAT JUDGE
18 RITTENBAND WOULD HAVE -- WOULD HAVE LET IN EVIDENCE
19 THAT -- THAT SHOWED -- THAT SHOWED THAT -- THAT A WITNESS
20 HAD A FINANCIAL STAKE IN THE WAY HE SHADED HIS TESTIMONY
21 IN TERMS OF A CONTRACT OR A T.V. DEAL. IF NOT, HE WOULD
22 HAVE BEEN -- HE WOULD HAVE BEEN LEGALLY WRONG.

23 BUT THE FACT IS BARENS WAS UNABLE TO DO
24 ANYTHING ABOUT IT BECAUSE HE NEVER READ THE CONTRACT, AS
25 HE -- AS HE -- AS HE TESTIFIED.

26 WITH REGARD TO THE BMW, I STILL DON'T
27 UNDERSTAND THE PROSECUTION'S ARGUMENT. JUDGE WAPNER --
28 PROSECUTOR WAPNER ARGUED THIS IS THE MURDER CAR. THIS WAS

19

1 THE CAR THAT WAS USED TO TRANSPORT LEVIN.

2 THE ABSENCE OF ANY BLOOD, WHICH COULD HAVE
3 BEEN SHOWN BY BARENS, WAS NEVER SHOWN. THEY HAVE GOT AN
4 ARGUMENT THAT'S AN ABSURDITY ON ITS FACE. THAT'S LIKE
5 SAYING THAT A DEFENSE ATTORNEY COULD HAVE SHOWN THAT THE
6 MURDER WEAPON DIDN'T HAVE THE -- HAVE THE DEFENDANT'S
7 FINGERPRINTS ON IT WHEN THE PROSECUTION IS CLAIMING THAT
8 HE'S THE ONE WHO FIRED THE SHOT. THAT'S THE KIND OF THING
9 THAT A DEFENSE ATTORNEY SHOWS THE JURY. I BELIEVE BASED
10 ON COMMON SENSE AND EXPERIENCE THOSE ARE THE KINDS OF
11 THINGS THAT JURORS FIND REASONABLE DOUBT IN.

12 WITH REGARD TO BARBER AND MARMOR, AGAIN,
13 THESE ARE -- THESE ARE THE SORTS OF PEOPLE THAT ANYBODY
14 TAKING A CASE LIKE THIS, A DISAPPEARING CON MAN, ARE GOING
15 TO TALK TO THE -- TO THE WITNESSES. THEY'RE GOING TO TALK
16 TO PEOPLE WHO KNEW HIM.

17 THERE IS EVIDENCE ABOUT -- IN THE TUB
18 SUGGESTING THAT SOME DYE HAD BEEN USED. IT'S CLEARLY THE
19 SORT OF THING YOU WOULD SEEK OUT. IT'S NOT SOME
20 FAR-FETCHED INVESTIGATION OFF INTO LEFT FIELD. NOT SOME
21 SEARCH FOR ALIENS IN SPACESHIPS OR ANYTHING LIKE THAT.

20

22 IT'S JUST THE FIRST THING YOU DO WHEN YOU SIT
23 DOWN TO OUTLINE A CASE AND YOU THINK WHAT KIND OF
24 INVESTIGATION SHOULD I DO HERE. THOSE ARE THE PEOPLE YOU
25 SEEK OUT.

26 OSTROVE. BARENS, AGAIN, HE DIDN'T GIVE
27 OSTROVE A THOUGHT ANY MORE THAN HE DID BARBER,
28 MR. DURAN, LEN MARMOR, WHO HAD SEEN PITTMAN.

20
1 THE PEOPLE APPEARED NOT TO UNDERSTAND THAT.
2 THE FACT THAT PITTMAN HAD BEEN SEEN WITH LEVIN SHOWED THE
3 ABSURDITY OF KARNY'S CLAIM.

4 KARNY HAD THIS SCENARIO AS TO HOW THE DEAL
5 WAS SUPPOSED TO HAVE GONE DOWN AND SO FORTH. IF PITTMAN
6 KNEW LEVIN, THAT STORY MAKES NO SENSE. LEN MARMOR WAS A
7 PROSECUTION WITNESS AT TRIAL. HE COULD HAVE LENT STRENGTH
8 TO THE DEFENSE.

9 GOING --

10 THE COURT: WHY DON'T YOU WRAP UP QUICKLY.

11 MR. CRAIN: WELL, CRITICAL EVIDENCE THAT THE --
12 THERE WAS \$500,000 OR MORE OUT THERE SOMEWHERE, AND LIKE I
13 SAY, THEIR ARGUMENT APPEARS TO BE, "WELL, MAYBE IT WENT
14 INTO A BOTTOMLESS PIT. SO THERE IS NO NEED FOR BARENS TO
15 INTRODUCE THAT AT TRIAL."

16 THAT IS PREPOSTEROUS. THAT SHOWS HOW THE MAN
17 COULD HAVE FINANCED HIS GETAWAY AND DEPARTURE.

18 FINALLY, WITH REGARD TO THE FAMILY TYPES, THE
19 COURT PREVIOUSLY, WHEN WE WERE FIRST GETTING INTO THE
20 CASE, MADE A COMMENT WHICH I WOULD NORMALLY AGREE WITH.
21 YOU DON'T ATTACK -- IN A NORMAL CASE, YOU DON'T ATTACK THE
22 PURPORTED DECEDENT'S MOTHER JUST TO ATTACK HER.

23 THAT'S THE SORT OF THING IN THE PENALTY TRIAL
24 WHERE SOMEBODY IS PUTTING ON VICTIM IMPACT EVIDENCE. YOU
25 DON'T DO THAT BECAUSE IT'S STUPID AND DOESN'T MAKE ANY
26 SENSE.

27 HERE A KEY PIECE OF THE PROSECUTION'S
28 EVIDENCE WAS THAT RON LEVIN LOVED HIS DEAR MOTHER AND HIS

20
1 LITTLE DOG AND HIS FATHER. THE FACT IS, AS WAS
2 DEMONSTRATED AT THE SAN MATEO TRIAL, THE RELATIONSHIP
3 BETWEEN MR. LEVIN AND HIS MOTHER WAS ANYTHING BUT THAT.
4 IT RESEMBLED MORE THE MOMMY DEAREST SCENARIO THAN THE
5 BELOVED MOTHER, WHICH IS HIS MOTHER'S PORTRAIT THAT
6 MR. WAPNER WAS ABLE TO PRESENT BECAUSE, AGAIN, THAT WAS
7 UNREBUTTED EVIDENCE.

8 LEVIN RIPPED OFF HIS PARENTS FINANCIALLY.
9 THERE WAS EVIDENCE OF THAT. THERE WAS OTHER EVIDENCE THAT
10 HIS FONDNESS FOR HIS LITTLE DOG WAS ALSO A SHAM. SO THOSE
11 WERE THE KIND OF THINGS THAT ANY COMPETENT ATTORNEY IS
12 GOING TO BRING BEFORE THE JURY.

13 ONE AFTER ANOTHER TO -- YOU KNOW, THE
14 PROSECUTION, HERE IS THEIR POSITION. WE ARE UP TO BAT
15 NOW, AND ONE AFTER ANOTHER THESE THINGS ARE GOING TO FALL
16 DOWN LIKE DOMINOES IN A PRESENTATION THAT ANY COMPETENT
17 DEFENSE ATTORNEY COULD GIVE IN HIS FINAL ARGUMENT.

18 SO I APPRECIATE THE COURT'S CONSIDERATION
19 HERE. I DON'T KNOW WHAT OTHER QUESTIONS THE COURT MAY
20 HAVE.

21 THE COURT: I HAVE ASKED THEM.

22 MR. CRAIN: I WOULD ASK A BRIEF RESPONSE IF THE
23 DISTRICT ATTORNEY ADDRESSES THE COURT.

24 THE COURT: I WILL GIVE YOU CLOSING REMARKS.

25 MR. CRAIN: I DO TRUST THAT THE COURT -- I KNOW THE
26 COURT -- THERE IS A VERY -- THERE IS NO CASE LIKE THIS
27 CASE. THERE IS NO CASE WHERE PEOPLE WHO HAVE KNOWN THE
28 SUPPOSED MURDER VICTIM HAVE COME INTO COURT NOT ONCE BUT

20
1 TWICE AND TESTIFIED AND BEEN SUBJECTED TO
2 CROSS-EXAMINATION AND SO FORTH, AND THEY'RE POSITIVE UNDER
3 OATH. THEY KNEW THE MAN, THEY SAW THE MAN, THEIR
4 TESTIMONY HAS BEEN CONCEDED TO BE CREDIBLE.

5 HIS REPRESENTATION, MR. HUNT'S REPRESENTATION
6 BY MR. BARENS, I THINK, COMPARED TO THE REPRESENTATION
7 GIVEN BY MR. JONES, WHO JUST GOT SEVEN VOTES ON THE
8 CALIFORNIA SUPREME COURT, THE REPRESENTATION THAT HE GOT
9 IS JUST AS BAD, IF NOT WORSE. IT'S APPALLING AND IT'S
10 SHOCKING, AND I DON'T THINK THAT THIS COURT SHOULD ALLOW A
11 MAN THAT CAME INTO TO THIS COURT AND TRIED TO PULL THE
12 WOOL OVER THIS COURT'S EYES, I HOPE UNSUCCESSFULLY, SHOULD
13 BE GIVEN ANY CREDENCE WHATSOEVER.

14 I THINK THAT -- THAT'S ALL WE'RE ASKING FOR
15 IS A TRIAL WHERE HE GETS AN ATTORNEY WHO IS AN ATTORNEY,
16 WHO DOES WHAT DEFENSE ATTORNEYS ARE ETHICALLY SUPPOSED TO
17 DO AND IS ABLE TO CALL THESE WITNESSES AND LET THE JURORS
18 DECIDE FOR THEMSELVES WHAT THEY THINK OF THE STRENGTH OF
19 THE EVIDENCE, THE SIGHTING EVIDENCE AND THE OTHER
20 EVIDENCE.

21 THANK YOU, YOUR HONOR.

22 THE COURT: ALL RIGHT. THANK YOU.

23 LET'S TAKE A 15-MINUTE RECESS. GIVE THE
24 COURT REPORTER A CHANCE TO GET BACK TOGETHER. SEE
25 EVERYONE BACK IN 15 MINUTES.

26
27 (RECESS.)
28

1 THE BAILIFF: REMAIN SEATED, COME TO ORDER, THIS
2 COURT IS AGAIN IN SESSION.

3 THE COURT: IN THE MATTER OF THE JOSEPH HUNT HABEAS
4 CORPUS, THE RECORD WILL REFLECT ALL COUNSEL ARE PRESENT,
5 PETITIONER IS PRESENT.

6 MR. MC MULLEN, YOU ARE ARGUING ON BEHALF OF
7 THE RESPONDENT?

8 MR. MC MULLEN: YES, YOUR HONOR.

9 THE COURT: YOU MAY PROCEED.

10 MR. MC MULLEN: THANK YOU, YOUR HONOR.

11 JUST TO START OFF, TO SET THE STAGE, YOUR
12 HONOR, IT IS THE PEOPLE'S POSITION THAT THE JUDGMENT IN
13 THIS CASE IS PRESUMED VALID, AND THAT PETITIONER HAS
14 FAILED TO OVERCOME THAT PRESUMPTION IN THESE PROCEEDINGS.

15 ONE THING WE WANT TO STRAIGHTEN OUT RIGHT OFF
16 THE BAT IS IT IS NOT OUR POSITION, WE HAVE NEVER, THE
17 PEOPLE HAVE NOT CONCEDED THE CREDIBILITY OF ANY OF THE
18 SIGHTING WITNESSES. I WANT TO MAKE SURE THAT THE RECORD
19 IS CLEAR ON THAT POINT.

20 THE COURT: WHAT DO YOU THINK ABOUT CONNIE GERRARD?

21 MR. MC MULLEN: IT IS OUR POSITION THAT SHE IS
22 NOT -- SHE IS NOT A CREDIBLE WITNESS.

23 WHAT'S IMPORTANT, ALSO, IN EVALUATING THE
24 SIGHTING WITNESSES, AND YOU TOUCHED UPON THIS WITH
25 MR. CRAIN, AND THAT IS THE CLEAR LANGUAGE IN THE NEWLY, IN
26 THE AREA OF NEWLY DISCOVERED EVIDENCE, IS THAT THE
27 CREDIBILITY MUST UNDERMINE THE ENTIRE PROSECUTION'S CASE
28 IN POINT UNERRINGLY THE PETITIONER'S INNOCENCE.

1 WHAT IS IMPLICIT IN THAT IS THAT THE COURT
2 REVIEWS THE PROSECUTION'S CASE, AND SO WHEN YOU MEASURE
3 THE NEW EVIDENCE, THE SIGHTING EVIDENCE, IF YOU WILL, YOU
4 MUST MEASURE IT AGAINST THE STRENGTH OF THE PROSECUTION'S
5 CASE PRESENTED AT TRIAL.

6 AND THE COURT OF APPEAL, AS YOUR HONOR HAS
7 POINTED OUT IN PRIOR PROCEEDINGS, NOTED IN THEIR OPINION
8 THAT THE EVIDENCE OF THE GUILT OF PETITIONER DURING THE
9 TRIAL WAS OVERWHELMING. IN FACT, THE JURY CAME BACK VERY
10 QUICKLY WITH A VERDICT IN THIS CASE, FAST FOR ANY MURDER
11 CASE, FAST FOR A NO BODY MURDER CASE. EVIDENCE OF
12 MR. LEVIN'S MURDER WAS VERY STRONG, AND SO --

13 THE COURT: WHAT IF I BELIEVED HER, BELIEVE THAT
14 SHE SAW LEVIN ALIVE?

15 MR. MC MULLEN: IF YOU BELIEVE, AS POINTED OUT IN
16 OUR BRIEF, IF YOU BELIEVED THAT SHE SAW LEVIN IN GREECE,
17 THEN AS IS POINTED OUT IN RESPONDENT'S BRIEF, YOU WOULD
18 NEED TO ISSUE THE WRIT.

19 THE COURT: WHAT IF I BELIEVED THAT SHE BELIEVED
20 IT?

21 MR. MC MULLEN: THAT IS, IF YOU BELIEVED THAT SHE
22 BELIEVED SHE SAW RON LEVIN, THEN IT IS OUR POSITION THAT
23 THAT EVIDENCE IS NOT THE TYPE OF EVIDENCE THAT WOULD
24 UNDERMINE THE PROSECUTION'S CASE.

25 THE COURT: IS THAT FOR ME TO DECIDE, OR IS THAT
26 FOR A JURY, A NEW JURY TO DECIDE?

27 MR. MC MULLEN: THAT IS FOR YOU TO DECIDE.

28 THE COURT: BASED ON WHAT STANDARD?

1 MR. MC MULLEN: BASED ON THE STANDARD AS ENUNCIATED
2 IN IN RE HALL, WHICH IS CITED FOR YOUR HONOR ON PAGE TWO
3 OF RESPONDENT'S BRIEF. THAT'S THE NEWLY DISCOVERED
4 EVIDENCE STANDARD.

5 IT IS THE PEOPLE'S POSITION THAT WITH RESPECT
6 TO WERNER AND NADIA GHALEB AND ROBBIE ROBINSON THAT IS NOT
7 NEW EVIDENCE. AND I THINK WHAT'S IMPORTANT IN THE
8 ANALYSIS, WHAT WE BELIEVE IS IMPORTANT IN THE ANALYSIS OF
9 THIS IS THAT ARTHUR BARENS HAD AN OPPORTUNITY TO EVALUATE
10 THE CREDIBILITY OF THOSE WITNESSES AND MAKE A DECISION ON
11 WHETHER OR NOT TO PRESENT IT.

12 MR. BARENS TESTIFIED DURING THE COURSE OF THE
13 HEARING THAT HE WAS CONCERNED -- HE FELT THAT CARMEN
14 CANCHOLA AND JESSE LOPEZ WERE STRONG WITNESSES AND HAD A
15 LOT OF CREDIBILITY, AND HE WAS CONCERNED ABOUT MAKING,
16 ABOUT DIMINISHING THE SIGHTING TYPE EVIDENCE THAT HE
17 PRESENTED DURING THE TRIAL, AND SO, THEREFORE, WOULD NOT
18 HAVE PUT CERTAIN OF THE SIGHTING WITNESSES ON BECAUSE IN
19 HIS OPINION IT WOULD HAVE DIMINISHED THE CREDIBILITY OF
20 THE SIGHTINGS IN GENERAL.

21 THE COURT: WHAT ABOUT GHALEB? WOULDN'T THAT HAVE
22 BEEN A GOOD WITNESS TO PUT ON?

23 MR. MC MULLEN: IT IS OUR POSITION THAT NADIA
24 GHALEB IS NOT CREDIBLE, AS HAS BEEN ARTICULATED IN
25 RESPONDENT'S BRIEF FOR A NUMBER OF REASONS, BUT TO POINT
26 OUT, SHE HAD A VERY QUICK OPPORTUNITY TO, SPLIT-SECOND
27 OPPORTUNITY TO VIEW THE PERSON SHE SAW THERE AT THE -- ON
28 SAN VICENTE. IT IS AT A TIME WHEN EITHER THE TRIAL WAS IN

1 PROGRESS OR AROUND THE TIME OF THE TRIAL.

2 IT IS INCONCEIVABLE THAT RON LEVIN, IF HE
3 WERE ALIVE, WOULD HAVE BEEN THERE AND LOOKING THE WAY RON
4 LEVIN ALWAYS LOOKED, WHICH IS INCONSISTENT WITH THE
5 PETITIONER'S POSITION IN THE PAST, THAT HE WOULD HAVE
6 ALTERED HIS APPEARANCE, AND THAT ALSO GOES TOWARDS SOME OF
7 THE CREDIBILITY TOWARDS CONNIE GERRARD'S SIGHTING.

8 WITH RESPECT TO YOUR HONOR'S OBSERVATION
9 ABOUT MR. GERRARD INSTALLING THE POOL FOR BOBBY ROBERTS,
10 IT IS THE PEOPLE'S POSITION THAT YOU CAN USE ANY EVIDENCE
11 THAT IS PRESENTED DURING THE HEARING TO EVALUATE THE
12 CREDIBILITY OF WITNESSES, AND CERTAINLY THAT WOULD BE
13 SOMETHING THAT YOU COULD CONSIDER IN EVALUATING THE
14 CREDIBILITY OF THE WITNESS.

15 THE COURT: DO YOU THINK THAT REALLY AFFECTS CONNIE
16 GERRARD'S TESTIMONY?

17 MR. MC MULLEN: WELL, THAT'S THE DIFFICULT THING
18 ABOUT THIS TYPE OF EVIDENCE. IT MIGHT GO TOWARDS SOME
19 SORT OF A FINANCIAL BIAS OR SOME SORT OF A BIAS. THERE IS
20 NO, AS YOUR HONOR KNOWS, THERE IS NO CLEAR CONNECTION MADE
21 BETWEEN REALLY THE INSTALLATION OF THE POOL, FAILURE TO
22 FILE A MECHANIC'S LIEN AND THEIR TESTIMONY. IT IS THERE
23 FOR WHAT IT IS.

24 THE COURT: SO YOU ARE SAYING I SHOULD DISREGARD
25 IT?

26 MR. MC MULLEN: NO, I DON'T THINK SO. THE PEOPLE'S
27 POSITION IS THAT YOU SHOULD NOT DISREGARD ANY EVIDENCE
28 THAT WAS PRESENTED DURING THE HEARING. YOU NEED TO USE IT

1 ALL AS A PART OF YOUR EVALUATION.

2 THE COURT: HOW DOES THAT HELP ME EVALUATE CONNIE
3 GERRARD'S TESTIMONY?

4 MR. MC MULLEN: WELL, WHEN YOU DISCUSS THIS ISSUE,
5 YOU NEVER ADDRESSED CONNIE GERRARD'S TESTIMONY PER SE.
6 YOU JUST BROUGHT IT UP. I DON'T KNOW HOW IT COULD BE USED
7 OTHER THEN PERHAPS SOME SORT OF FINANCIAL BIAS -- MAY I
8 HAVE A MOMENT?

9 THE COURT: OKAY.

10

11 (PAUSE.)

12

13 MR. MC MULLEN: WITH RESPECT TO THE COURT'S
14 QUESTION WITH REGARD TO CONNIE GERRARD'S TESTIMONY, AGAIN,
15 IT HAS BEEN ARTICULATED, WRITTEN IN OUR BRIEF WITH RESPECT
16 TO WHAT HER -- THE CREDIBILITY PROBLEMS ARE WITH HER
17 TESTIMONY.

18 TO HIT ON SOME OF THE HIGHLIGHTS, THOUGH, IT
19 IS -- IT SEEMS INCREDIBLE TO THE PEOPLE THAT SOMEONE LIKE
20 CONNIE GERRARD, FIRST OF ALL, WHO KNEW RON LEVIN ON SOME
21 LEVEL, KNOWS THAT HE IS SUPPOSED TO BE DEAD AND SEES HIM
22 IN GREECE ON A VACATION, THAT IT IS INCONCEIVABLE THAT SHE
23 WOULDN'T SAY ANYTHING TO HIM.

24 SECOND OF ALL, IT IS INCONCEIVABLE THAT UPON
25 RETURNING THAT SHE WOULDN'T NOTIFY THE AUTHORITIES ABOUT
26 THIS, HAVING KNOWN RON LEVIN AND FELT THAT SHE SAW HIM.
27 SHE TELLS HER DAUGHTER AND HER SON-IN-LAW, WHO IT IS
28 INTERESTING TO NOTE ARE IN THE JOURNALISM FIELD, AND TAKES

1 THAT NO FARTHER, AND THOSE ARE THE MAIN PART -- THAT IS
2 THE INCREDIBLE PORTION OF HER TESTIMONY.

3 THE COURT: LOTS OF PEOPLE DON'T WANT TO GET
4 INVOLVED.

5 MR. MC MULLEN: THAT'S CORRECT. LOTS OF PEOPLE
6 DON'T WANT TO GET INVOLVED, BUT WE ARE TALKING ABOUT THE
7 MURDER OF SOMEONE SHE KNEW, AND SHE KNOWS TO BE A CON
8 ARTIST. SHE EVENTUALLY DOES GET INVOLVED. IT SEEMS TO ME
9 THAT IF SHE DIDN'T WANT TO GET INVOLVED SHE WOULDN'T HAVE
10 TOLD ANYBODY, AND IT IS INCREDIBLE TO ME, AGAIN, IT IS
11 INCREDIBLE TO THE PEOPLE THAT SHE WOULDN'T EVEN APPROACH
12 RON LEVIN AND ASK HIM ABOUT WHY HE WOULD BE THERE IN
13 LIGHT --

14 THE COURT: IS IT YOUR POSITION THAT SHE IS LYING?

15 MR. MC MULLEN: HER TESTIMONY IS NOT CREDIBLE. IT
16 IS NOT, NOT CREDIBLE.

17 THE COURT: WHY? CLEARLY HER TESTIMONY IS MUCH
18 DIFFERENT THAN THAT OF MR. ROBINSON, WHO IS INCREDIBLE.

19 MR. MC MULLEN: YES. YES.

20 THE COURT: THERE WAS SOME CONSISTENCY IN HER
21 TESTIMONY.

22 MR. MC MULLEN: YOU KNOW, SOME OF THE THINGS THAT
23 ARE INCREDIBLE ABOUT HER TESTIMONY SHE GIVES AN EXCUSE
24 THAT SHE DIDN'T GO -- FIRST OF ALL, IF YOU REMEMBER HER
25 TESTIMONY, SHE WAS QUITE TAKEN WHEN SHE SAW RON LEVIN, IT
26 WAS -- IT EVOKED QUITE A REACTION ON HER PART. SHE
27 MENTIONED IT TO HER HUSBAND IMMEDIATELY. SHE EVEN TALKED
28 TO THE KEEPER OF THE RESTAURANT THERE.

1 SHE GIVES AN EXCUSE THAT SHE DIDN'T WANT TO
2 GO APPROACH LEVIN BECAUSE HE WAS ON THE LAM; SHE HAD SOME
3 KIND OF FEAR OF HIM, AND THERE IS NO -- THERE WAS NOTHING
4 THAT SHE COULD ARTICULATE WHY SHE WOULD BE AFRAID OF HIM.
5 THERE IS NOTHING THAT HE DID IN THE PAST OTHER THAN TO SAY
6 THAT HE WAS A CHARACTER.

7 THE COURT: WELL, IF HE WAS ALIVE AND HE IS KNOWN
8 NOW TO HAVE SET SOMEBODY UP TO TAKE THE FALL AND HE IS
9 CONVICTED OF MURDER, ONE MIGHT HAVE A LITTLE CONCERN ABOUT
10 INVITING THE PERSON OVER TO ONE'S TABLE TO HAVE A GLASS OF
11 WINE.

12 MR. MC MULLEN: TRUE. BUT I DON'T THINK SHE GOES
13 THAT FAR. MY RECOLLECTION OF HER TESTIMONY WAS THAT SHE
14 DIDN'T -- IT WASN'T IN HER STATE OF MIND THAT SHE THOUGHT
15 THAT SHE HAD SET SOMEONE UP FOR MURDER.

16 THE COURT: SHE KNEW ABOUT THE CASE.

17 MR. MC MULLEN: SHE KNEW ABOUT THE CASE.

18 THE COURT: SHE KNEW THAT SOMEONE HAD BEEN CHARGED
19 WITH MURDERING LEVIN. AND IF MR. LEVIN WAS IN FACT ALIVE
20 AND WAS HIDING OUT, SOUNDS LIKE SHE KNEW THAT MR. LEVIN
21 WAS SETTING SOMEBODY UP TO TAKE THE FALL FOR MURDER.

22 MR. MC MULLEN: WE WOULD AGREE WITH YOUR HONOR THAT
23 SHE CERTAINLY IS MORE CREDIBLE THAN ROBBIE ROBINSON, AND
24 AT THE MOST I THINK IT COULD BE SAID THAT SHE BELIEVES
25 THAT SHE SAW RON LEVIN.

26 THE COURT: HOW DO I DISREGARD THAT? HOW DO I SAY,
27 "MR. HUNT LET'S -- THIS APPEARS TO BE A CREDIBLE WITNESS
28 YOU HAVE HERE, BUT YOU DON'T GET A NEW TRIAL"?

1 MR. MC MULLEN: WELL, FIRST OF ALL, HER TESTIMONY
2 IS CUMULATIVE. THERE WAS SIGHTING WITNESSES PRESENTED
3 DURING BOTH PHASES OF THE TRIAL.

4 THE COURT: WHERE IS THE CUTOFF FOR CUMULATIVE?
5 COUNSEL FOR PETITIONER ARGUE, "WELL, IF THEY BROUGHT THE
6 GAS STATION ATTENDANT IN, THAT WOULD BE CUMULATIVE." I
7 WOULD AGREE WITH THEM.

8 WHERE DOES THE EVIDENCE BECOME CUMULATIVE?
9 IF A WITNESS CAME IN AND SAID, "I DUG UP THE BODY OF
10 MR. LEVIN," YOU WOULD CERTAINLY WANT TO USE THAT IN A
11 RETRIAL. IF SOMEBODY CAME IN AND SAID, "I AM MRS. LEVIN.
12 I JUST MARRIED HIM LAST WEEK IN LAS VEGAS. HERE IS THE
13 PHOTOGRAPH OF THE WEDDING," WOULD YOU SAW THAT'S
14 CUMULATIVE?

15 MR. MC MULLEN: WELL, CUMULATIVE CAN HAVE A COUPLE
16 OF DIFFERENT CONNOTATIONS, BUT IN THE CONTEXT OF NEWLY
17 DISCOVERED EVIDENCE IT IS CLEARLY AN ADDITIONAL SIGHTING
18 WITNESS, IS CUMULATIVE EVIDENCE OF ANOTHER SIGHTING OF RON
19 LEVIN.

20 THE COURT: SURE. WHERE IS THE LINE? WHERE IS THE
21 BRIGHT LINE? WHERE DO I DRAW IT?

22 MR. MC MULLEN: I DON'T BELIEVE THERE IS A BRIGHT
23 LINE TEST IN THIS. THE CASES DON'T SEEM TO SPEAK DIRECTLY
24 TO IT.

25 THE COURT: SO WHAT DO I LOOK FOR FOR GUIDANCE,
26 THEN, IN DECIDING IF THIS IS SUFFICIENT OR NOT?

27 MR. MC MULLEN: WHAT YOU LOOK TO IS BASED UPON, I
28 THINK, PART OF YOUR EVALUATION IN THE NEWLY DISCOVERED

1 EVIDENCE, AS I SAID BEFORE, IN ANALYZING THE NEW EVIDENCE,
2 YOU HAVE TO COMPARE IT TO WHAT THE CASE WAS, THE ORIGINAL
3 TRIAL WAS AND THE STRENGTH OF THE CASE, AND IT IS
4 IMPORTANT TO NOTE THAT THERE WERE WITNESSES WHO TESTIFIED
5 TO HAVING SEEN RON LEVIN ALIVE, AND I THINK THAT GOES INTO
6 YOUR CONSIDERATION AS TO WHAT IMPACT DOES CONNIE GERRARD'S
7 BELIEF THAT SHE SAW RON LEVIN HAVE, DOES IT UNDERMINE THE
8 ENTIRE PROSECUTION'S CASE IN POINT UNERRINGLY TO THE
9 PETITIONER'S INNOCENCE.

10 THE COURT: WHAT IF BARENS HAD NOT PUT ON ANY
11 SIGHTING EVIDENCE, HE ONLY RELIED ON EVIDENCE OF
12 MR. HUNT'S GIRLFRIEND SAYING, "WE WERE AT THE MOVIES THAT
13 NIGHT," OR, "MET AT THE MOVIE," OR WHATEVER IT WAS, BUT HE
14 HADN'T OFFERED ANY SIGHTING EVIDENCE, WOULD THE STANDARD
15 BE THE SAME?

16 MR. MC MULLEN: THE STANDARD AS FAR AS -- WELL,
17 PETITIONER'S POSITION WOULD BE STRONGER BECAUSE IT WOULD
18 CERTAINLY NOT BE CUMULATIVE, BUT THE STANDARDS WOULD BE
19 THE SAME AS FAR AS YOUR ANALYSIS OF THE EVIDENCE AS IT
20 RELATES TO THE ORIGINAL PROSECUTION AND WHETHER OR NOT IT
21 UNDERMINES THE CASE.

22 THE COURT: SO IS IT RELEVANT THAT I ANALYZE THE
23 DEFENSE EVIDENCE AT ALL?

24 MR. MC MULLEN: YES. IT IS RELEVANT THAT YOU
25 ANALYZE THE ENTIRE TRIAL TO GET AN UNDERSTANDING, TO GAIN
26 AN UNDERSTANDING OF THE STRENGTH OF THE CASE AND HOW THE
27 CASE, THE TOTAL PICTURE OF THE CASE FROM BOTH SIDES.

28 THE COURT: HAVING DONE THAT, LET'S ASSUME FOR A

1 MOMENT ARGUENDO THAT I AGREE WITH THE COURT OF APPEAL THAT
2 THE EVIDENCE IS OVERWHELMING. WHAT DOES THAT GET YOU?
3 HOW MUCH ADDITIONAL NEWLY DISCOVERED EVIDENCE WOULD
4 OVERCOME A DESCRIPTION OF THE TRIAL EVIDENCE AS BEING
5 OVERWHELMING?

6 MR. MC MULLEN: MORE. IT MAKES PETITIONER'S
7 BURDEN, IF YOU WILL, MORE DIFFICULT. THE STRONGER THE
8 PROSECUTION'S CASE IS AT THE TRIAL, IF IT WOULD HAVE BEEN
9 A MUCH WEAK -- FOR EXAMPLE, IF IT WOULD HAVE BEEN A MUCH
10 WEAKER CASE IN TERMS OF EVIDENCE OF THE MURDER OF RON
11 LEVIN, THE ANALYSIS IS A DIFFERENT KIND OF ANALYSIS
12 BECAUSE IT WOULD BE EASIER TO UNDERMINE THE PROSECUTION'S
13 CASE THAT WAS WEAKER THAN AS OPPOSED TO ONE THAT IS
14 STRONGER.

15 THE COURT: SO IF MS. GERRARD CAME INTO COURT,
16 TESTIFIED ABOUT THAT MEETING IN MYKONOS AND SAID, "BY THE
17 WAY, HERE IS A PICTURE OF THE THREE OF US SITTING AT A
18 TABLE TOGETHER," AND MR. LEVIN IS SITTING IN THE MIDDLE OF
19 THEM, HOW DO YOU DEAL WITH THAT?

20 MR. MC MULLEN: WE WOULD WANT TO LOOK AT THE
21 PHOTOGRAPH. I MEAN --

22 THE COURT: THE PICTURE OF MR. LEVIN APPEARS TO BE
23 A PICTURE OF MR. LEVIN. IN OTHER WORDS, IT IS ADDITIONAL
24 EVIDENCE TO SUPPORT MRS. GERRARD'S TESTIMONY. IF WE
25 ASSUME IN PART OF YOUR HYPOTHETICAL, IF WE ASSUME THE
26 AUTHENTICITY OF THE PHOTOGRAPH, IF IT IS A PICTURE OF
27 LEVIN, CLEARLY THE PETITIONER WINS, BUT IT IS A
28 PHOTOGRAPH, LOOKS LIKE MR. LEVIN.

1 MR. MC MULLEN: WELL, DEPENDING ON THE PHOTOGRAPH,
2 DEPENDS ON WHAT THE PHOTOGRAPH LOOKS LIKE, IT WOULD TEND
3 TO CORROBORATE HER TESTIMONY IN ONE WAY OR ANOTHER.

4 THE COURT: WHAT I AM TRYING TO GET AT, YOU HAVE A
5 PIECE OF TESTIMONY THAT HAS, LET'S ASSUME FOR THE MOMENT,
6 HAS CREDIBILITY. HOW DO I EVALUATE THAT PIECE OF
7 TESTIMONY VERSUS THE TESTIMONY AT TRIAL IN CONCLUDING
8 WHETHER OR NOT THIS DEFENDANT GETS A NEW TRIAL? IN OTHER
9 WORDS, WHERE IS THE LINE? HOW MUCH IS NECESSARY?

10 MR. MC MULLEN: WELL, IT IS OUR POSITION WHEN THE
11 PROSECUTION'S CASE IS STRONG, WHEN THE EVIDENCE OF THE
12 MURDER IS OVERWHELMING, IT TAKES A LOT TO UNDERMINE THE
13 CONFIDENCE.

14 PERHAPS WHAT THE COURT NEEDS TO DO, AND
15 HAVING THE TRIAL, THE STATE OF THE TRIAL IN MIND, IS DOES
16 THE EVIDENCE THAT WAS PRESENTED TO YOU WITH RESPECT TO THE
17 NEW EVIDENCE DOES IT SHAKE YOUR CONFIDENCE IN THE VERDICT?
18 DOES IT REALLY SHAKE THE FOUNDATION OF THE VERDICT?

19 AND IT IS OUR POSITION THAT THIS IS THE --
20 FIRST OF ALL, THE PROSECUTION'S CASE WAS VERY STRONG AT
21 TRIAL.

22 SECONDLY, THERE WERE -- THERE WAS EVIDENCE
23 PRESENTED BY THE DEFENSE OF RON LEVIN BEING SIGHTED; SO IT
24 IS CUMULATIVE FROM THAT STANDPOINT.

25 THE COURT: SO WOULD THE RESULT BE DIFFERENT HAD
26 CONNIE GERRARD TESTIFIED?

27 MR. MC MULLEN: MAY I HAVE A MOMENT?

28 THE COURT: YES.

1 (PAUSE.)

2
3 MR. MC MULLEN: THE STANDARD THAT YOUR HONOR IS
4 TALKING ABOUT IS A PREPONDERANCE OF THE EVIDENCE. IF YOU
5 LOOK TO PETITIONER'S EVIDENCE, AND IF THEY HAVE PROVED BY
6 A PREPONDERANCE OF THE EVIDENCE THAT CONNIE GERRARD SAW
7 RON LEVIN IN GREECE AFTER JUNE 6, 1984, THAT IS THE
8 STANDARD, BUT IT NEEDS TO BE MEASURED AGAINST THE STRENGTH
9 OF THE PEOPLE'S CASE AS IT WAS PRESENTED. THE STRENGTH OF
10 RON LEVIN'S MURDER.

11 THE COURT: ALL RIGHT.

12 MR. MC MULLEN: WITH RESPECT TO -- DID YOUR HONOR
13 HAVE ANY MORE QUESTIONS WITH RESPECT TO THE SIGHTING
14 WITNESSES?

15 THE COURT: NO. GO AHEAD.

16 MR. MC MULLEN: WITH RESPECT TO ISSUE 2 AND
17 STARTING OFF, FIRST OF ALL, IT IS THE PEOPLE'S POSITION
18 WITH RESPECT TO ALL OF THE INEFFECTIVE ASSISTANCE OF
19 COUNSEL ISSUE THAT ALL OF THEM CAN BE RESOLVED FAVORABLY
20 IN TERMS OF THE PEOPLE'S POSITION IN THE CASE ON THE
21 SECOND STRICKLAND VERSUS WASHINGTON PRONG, THAT IS THERE
22 IS NO PREJUDICE. AND MOST OF THEM --

23 THE COURT: ARE YOU CONCEDED THAT THERE WAS ERROR?

24 MR. MC MULLEN: NO.

25 THE COURT: NO. NO.

26 MR. MC MULLEN: THAT WAS MY NEXT BREATH. MOST OF
27 THEM, THEN, WE ALSO BELIEVE THAT ARE REASONED TACTICAL --
28 THEY ARE REASONABLE TACTICAL DECISIONS THAT WERE MADE WHY

1 CERTAIN EVIDENCE WAS NOT USED.

2 WITH RESPECT TO THE IMPEACHING OF DEAN KARNY
3 WITH RESPECT TO THE CANTOR-FITZGERALD DEPOSITION, AS YOUR
4 HONOR HAS POINTED OUT, THIS SEEMS TO BE A VERY REASONABLE
5 DECISION THAT ARTHUR BARENS MADE IN NOT USING THIS
6 DEPOSITION. HUNT TOLD BARENS THAT HE HAD COACHED KARNY TO
7 LIE. THE EVIDENCE WOULD HAVE TENDED TO SHOW THAT HUNT WAS
8 FINANCIALLY DESPERATE. AND HE COULD BE MOTIVATED BY
9 FINANCIAL NEED.

10 AND IT IS CLEAR THAT BARENS EVALUATED THE
11 NEGATIVE IMPACT THAT THAT WOULD HAVE HAD, USING THAT
12 DEPOSITION WOULD HAVE HAD ON HIS DEFENSE, THAT THAT
13 OUTWEIGHED THE IMPEACHMENT VALUE THAT EVIDENCE HAD.

14 HE DID ELICIT EVIDENCE FROM VARIOUS WITNESSES
15 THAT HUNT HAD MISSTATED FACTS, BUT IF YOU REMEMBER DURING
16 THE HEARING HIS -- BARENS EXPLAINED THAT WHAT HE WAS
17 TRYING TO DO IS SHOW THAT HUNT WOULD DO ANYTHING THAT TO
18 ACHIEVE WORTHWHILE GOALS. HE WANTED THE JURY TO BELIEVE
19 THAT HUNT WAS LYING WHEN HE CONFESSED TO ALL THE PEOPLE
20 FOR THE LEVIN MURDER, THAT WAS HIS REASONING.

21 THE COURT: HOW MANY PEOPLE DID HUNT CONFESS TO IN
22 THE TRIAL?

23 MR. MC MULLEN: I AM SORRY?

24 THE COURT: HOW MANY PEOPLE DID HUNT CONFESS TO
25 TESTIFIED IN THE TRIAL? THAT IS SOMETHING I HAVE BEEN
26 WANTING TO LOOK AT, AND I HAVEN'T HAD A CHANCE. I THOUGHT
27 YOU MIGHT KNOW THE ANSWER.

28 MR. MC MULLEN: I CAN GIVE YOU A PARTIAL ANSWER.

1 THE COURT: IF YOU DON'T HAVE IT, THAT'S ALL RIGHT.

2 MR. MC MULLEN: WE KNOW EVAN DICKER, TOM MAY, DEAN
3 KARNY, TO MENTION A FEW RIGHT OFF THE BAT. THERE MIGHT
4 HAVE BEEN SOME OTHERS THAT TESTIFIED THAT DON'T COME TO
5 MIND RIGHT NOW.

6 THE COURT: ALL RIGHT.

7 MR. MC MULLEN: I THINK THAT'S COVERED IN OUR
8 BRIEF, THOUGH.

9 THE COURT: NOT THE NUMBER. MAYBE I AM WRONG.

10 MR. MC MULLEN: THERE IS A LISTING.

11 THE COURT: YES, THERE IS.

12 MR. MC MULLEN: THERE IS A LISTING OF PEOPLE THAT
13 HAD CORROBORATED DEAN KARNY'S TESTIMONY IN THE BRIEF.

14 AND, AGAIN, GOING THEN TO THE
15 CANTOR-FITZGERALD DEPOSITION, THIS IS CUMULATIVE
16 IMPEACHMENT EVIDENCE AT BEST. KARNY WAS GIVEN IMMUNITY ON
17 TWO MURDERS, THAT'S VERY STRONG IMPEACHING EVIDENCE.

18 OBVIOUSLY HE HAD A LOT OF MOTIVE TO TESTIFY
19 IN A CERTAIN WAY BECAUSE OF THOSE DEALS, AND THAT WAS
20 BROUGHT FORTH TO THE JURY, AND HE WAS ALSO A FORMER
21 PRACTITIONER OF THE PARADOX PHILOSOPHY.

22 AND, AGAIN, KARNY'S TESTIMONY WAS
23 CORROBORATED BY A NUMBER OF WITNESSES: EVAN DICKER, TOM
24 MAY, STEVE TAGLIANETTI, RICHARD LEBOWITZ, JOE VEGA, ROBERT
25 FERRARO AND LES ZOELLER HIMSELF.

26 THE SECOND ISSUE ON ISSUE 2, INEFFECTIVE
27 ASSISTANCE OF COUNSEL, THE CYCLOTRON ISSUE AND THE PROBLEM
28 WITH THIS TYPE OF EVIDENCE, YOUR HONOR WAS ASKING SOME

1 QUESTIONS THAT I THINK WERE PROBING IN THAT THIS EVIDENCE
2 HAD A GREAT POSSIBILITY OF BACKFIRING IF IT WOULD HAVE
3 BEEN PRESENTED BY THE DEFENSE.

4 I DON'T THINK IT IS FAIR TO SAY THAT NEIL
5 ADELMAN WOULD HAVE TESTIFIED. ONCE NEIL ADELMAN WOULD
6 HAVE TESTIFIED THE DOOR WOULD HAVE BEEN OPEN AND FRED
7 WAPNER, NO DOUBT, WOULD HAVE PUT ON A LOT OF OTHER
8 TESTIMONY SUCH AS YOUR HONOR HAS HEARD HERE THAT THAT HAD
9 THE GREAT RISK OF PAINTING THAT WHOLE NEGOTIATION PROCESS
10 FOR CYCLOTRON AS A HOAX.

11 BARENS TESTIFIED DURING THE HEARING HE WAS
12 CONCERNED AT SOME POINT THAT FULL CIRCLE, THE NEGOTIATIONS
13 FOR THE CYCLOTRON GOES BACK TO RON LEVIN, AND THE CHECK HE
14 WROTE AND THE OPTION AGREEMENT, AND HE WAS AFRAID OF THAT.
15 I THINK THAT'S A LEGITIMATE CONCERN.

16 HE WAS ALSO CONCERNED THAT THIS WAS THE TYPE
17 OF EVIDENCE THAT WOULD HAVE PAINTED HIS CLIENT AS BEING
18 INVOLVED IN A GRANT HOAX, PLUS IT IS EXTREMELY COMPLEX,
19 VERY VOLUMINOUS TYPE EVIDENCE THAT THEY WOULD HAVE BEEN
20 GOTTEN INTO, AND PROBABLY HAD MORE OF A CONFUSING EFFECT
21 ON THE JURY THAN ANYTHING THAT WOULD HAVE BEEN HELPFUL.

22 THE COURT: DO YOU THINK HE DID ENOUGH
23 INVESTIGATION INTO THAT TO COME TO THAT CONCLUSION IT WAS
24 A REASONED CHOICE ON HIS PART?

25 MR. MC MULLEN: IT IS NOT ALTOGETHER CLEAR FROM THE
26 HEARING. IT DOESN'T APPEAR THAT HE -- IT DOESN'T APPEAR
27 THAT HE DID ON THE SURFACE. HOWEVER, I THINK THE COURT
28 NEEDS TO RECOGNIZE THAT THIS IS A CASE THAT GOES BACK

1 QUITE A BIT IN TIME FOR MR. BARENS TO REMEMBER EXACTLY. I
2 THINK MEMORIES DO FADE. I AM SURE HE HAS HANDLED MANY
3 OTHER CASES SINCE THAT POINT IN TIME. SO TO REMEMBER
4 EXACTLY WHAT HE DID OR HE DID NOT DO IN PREPARATION FOR
5 TRIAL, I THINK IN ALL FAIRNESS TO MR. BARENS IS PROBABLY A
6 DIFFICULT THING TO DO.

7 WE ALSO KNOW --

8 THE COURT: IT SEEMS PRETTY CLEAR THAT HE GOT A
9 GENERAL OVERVIEW OF IT FROM HIS CLIENT, MR. HUNT, AND THEN
10 CAME TO A CONCLUSION THAT IT WAS A SCAM. HE DIDN'T WANT
11 ANYTHING TO DO WITH IT. THE QUESTION IS WHETHER HE DID
12 SUFFICIENT INQUIRY TO MAKE A REASONED DECISION. IT
13 CHANGES THE STANDARD SLIGHTLY IF COUNSEL KNEW, IS AWARE OF
14 FACTS, ANALYZES THOSE FACTS AND THEN COMES TO THE
15 CONCLUSION THAT IT IS NOT AN AVENUE THAT COUNSEL SHOULD
16 PROCEED ON. THAT IS ONE THING. IF COUNSEL MAKES NO
17 REASONABLE INQUIRY AND, THEREFORE, IS IGNORANT OF THE
18 FACTS, IT IS DIFFERENT.

19 MR. MC MULLEN: THAT'S CORRECT.

20 MAY I JUST HAVE A MOMENT?

21

22 (PAUSE.)

23

24 MR. MC MULLEN: IT IS HARD TO DETERMINE JUST HOW
25 MUCH INVESTIGATION HE DID BASED UPON WHAT HE SAID. HE
26 WASN'T SURE HE WAS AWARE OF THE NEGOTIATIONS. WE DO KNOW,
27 THOUGH, THAT HIS CLIENT PROVIDED HIM WITH A LOT OF
28 INFORMATION, A LOT OF DOCUMENTARY INFORMATION WITH RESPECT

1 TO THE NEGOTIATIONS AND CYCLOTRON IN GENERAL.

2 AND I THINK WHAT'S IMPORTANT, THOUGH, IS -- I
3 THINK, THE PEOPLE'S POSITION IS THAT THERE WAS REALLY NO
4 PREJUDICE IN THIS TO THE EXTENT HE NEGLECTED IT ENOUGH OR
5 NOT GOING TO THE SECOND PRONG IN STRICKLAND.

6 CLEARLY, THE PRESENTATION OF THIS EVIDENCE
7 WOULD PROBABLY BE HARMFUL TO HIM RATHER THAN HELPFUL; SO
8 CERTAINLY IT CAN'T BE SAID TO PREJUDICE HIM. THERE WAS NO
9 MONEY FORTHCOMING, AGREEMENTS WERE NEVER SIGNED.

10 THE COURT: WELL, THERE WAS ONE AGREEMENT SIGNED.

11 MR. MC MULLEN: 1983.

12 THE COURT: NOVEMBER OF '83.

13 MR. MC MULLEN: BUT NO MONEY FLOWED BETWEEN 1983
14 AND INTO 19 -- WELL, EVER FROM THAT AGREEMENT.

15 AGAIN, NEXT WITH RESPECT -- JUST A COUPLE OF
16 OTHER THINGS TO POINT OUT THE CYCLOTRON. IT IS QUITE
17 CLEAR THAT DURING THE HEARING THAT KILPATRICK TESTIFIED
18 THAT NO MONEY WOULD BE FLOWING FOR TWO YEARS OUT OF THAT
19 DEAL. THERE WAS NO FORMAL AGREEMENT THAT WAS SIGNED BY
20 JUNE 6TH, AND THE ONLY WORKING MILL THAT WAS IN EXISTENCE
21 WAS NEVER USED IN MR. MORTON'S BUSINESS, THAT TESTIMONY
22 CAME OUT. AND THEN LEVIN --

23 THE COURT: HOW ABOUT COUNSEL FOR PETITIONER'S
24 ARGUMENT THAT IT DOESN'T MATTER WHETHER OR NOT IT ACTUALLY
25 WAS A WORKING MILL, WHETHER OR NOT THEIR DEAL ACTUALLY
26 WOULD HAVE GONE THROUGH. THERE WAS MONEY TO PAY FOR IT.
27 THE QUESTION IS DEFENDANT'S STATE OF MIND AT THE TIME,
28 THAT IS IF HE HAD BEEN TOLD BY ADELMAN OR OTHERS THAT,

1 "HEY, YOU ARE ABOUT TO MAKE THIS MONEY," DOES IT REALLY
2 MATTER THAT THE WHOLE THING MAY HAVE BEEN A HOAX?

3 MR. MC MULLEN: YES, IT DOES. FIRST OF ALL, YOU
4 HAVE TO GET -- ONE WOULD HAVE TO GET PETITIONER'S STATE OF
5 MIND IN FRONT OF THE JURY, AND I DON'T KNOW, IT IS QUITE
6 SPECULATIVE.

7 THE COURT: "MR. ADELMAN, DID YOU TELL MR. HUNT
8 THAT YOU WERE ENTERING INTO NEGOTIATIONS?

9 "YES.

10 "WHAT WAS THAT FOR?

11 "\$2,000,000.

12 "WHEN WAS THIS GOING TO COME ABOUT?

13 "WE WERE IN THE MIDDLE OF NEGOTIATIONS. WE
14 HAD TO HAVE IT CONCLUDED WITHIN," WHATEVER PERIOD OF TIME.

15 "THANK YOU VERY MUCH."

16 STATE OF MIND IS NOW -- IT IS NOW EVIDENCE OF
17 STATE OF MIND, THAT IS, FACTS WILL REMAIN KNOWN TO THE
18 PETITIONER THAT HE WOULD HAVE KNOWN AT THE TIME THAT HE
19 ALLEGEDLY KILLED LEVIN.

20 MR. MC MULLEN: THE PROBLEM WITH IT BEING A HOAX AT
21 THAT POINT, IF EVIDENCE IS PRESENTED THAT THE WHOLE
22 NEGOTIATIONS WERE A HOAX AND THINGS ARE NOT COMING
23 FORWARD, IT WOULD BE QUITE CLEAR THAT IT WAS AN
24 UNREASONABLE EXPECTATION THAT THERE WOULD BE MONEY COMING.

25 IT DOESN'T SERVE TO DEFUSE THE PROSECUTION'S
26 ARGUMENT THAT THERE WAS FINANCIAL NEED BECAUSE THERE
27 CERTAINLY WAS STRONG EVIDENCE PRESENTED AT TRIAL OF THAT.

28 WITH RESPECT TO THE F.B.I. INVESTIGATION,

1 THIS WAS A REASONED DECISION NOT TO GET INTO THIS AREA.
2 HIS CLIENT WAS INVOLVED IN THE F.B.I. INVESTIGATION, AND
3 HE DIDN'T WANT TO HAVE IN FRONT OF THE JURY THE SUGGESTION
4 THAT HIS CLIENT WAS INVOLVED IN THAT SORT OF A CRIMINAL
5 BEHAVIOR AND INVESTIGATION.

6 CERTAINLY SO THE DANGER OF GOING INTO THAT
7 AREA WAS THAT IT COULD CAUSE PROBLEMS FOR HIS CLIENT, SO
8 NOT TO GO INTO IT IS A REASONABLE DECISION, ESPECIALLY IN
9 LIGHT OF THE FACT THAT THERE WAS A LOT OF EVIDENCE
10 PRESENTED AT TRIAL TO LEVIN'S MOTIVE TO FLEE, AND IN FACT,
11 THERE HAS BEEN -- THERE WAS EVIDENCE PRESENTED THAT HE HAD
12 AN OPEN PENDING FELONY PROSECUTION AGAINST HIM OUT OF
13 SANTA MONICA.

14 CLEARLY THAT'S STRONGER IMPEACHMENT EVIDENCE
15 THAN A CRIMINAL INVESTIGATION THAT IS QUITE SPECULATIVE AS
16 TO WHERE THAT WAS GOING TO, THERE WAS ACTUALLY GOING TO BE
17 A PROSECUTION. WHERE THE SANTA MONICA FELONY WAS A CASE
18 THAT WAS PENDING AGAINST HIM, WAS HANGING OVER HIS HEAD,
19 THAT IS CERTAINLY STRONGER EVIDENCE OF A MOTIVE TO FLEE.

20 WITH RESPECT TO THE HOLMES TESTIMONY, THERE
21 IS NO REASON PRESENTED THAT WOULD LEAD BARENS TO HOLMES
22 WITH RESPECT TO THE SUBJECT OF THE EXTRADITION LAWS OF
23 BRAZIL. THAT IS NOT MENTIONED IN LES ZOELLER'S REPORT.
24 HOLMES WAS THERE THE DAY BEFORE LEVIN WAS MURDERED, BUT
25 WHAT'S -- AND BARENS SAID HE WOULD HAVE USED THIS
26 TESTIMONY IF HE WOULD HAVE KNOWN ABOUT IT, BUT CLEARLY IT
27 IS QUESTIONABLE IN MY MIND WHETHER IT WOULD EVEN BE
28 ALLOWED TO BE PRESENTED IN TRIAL. BUT GETTING BACK TO IT,

1 EVEN IF BARENS WOULD HAVE TALKED --

2 THE COURT: WHY WOULDN'T IT HAVE BEEN PRESENTED
3 THAT THE VICTIM WAS -- AN ARGUMENT WOULD BE MADE THE
4 VICTIM WAS MAKING INQUIRIES ABOUT EXTRADITION LAW WITH A
5 FOREIGN COUNTRY?

6 MR. MC MULLEN: BUT A COUPLE OF THINGS. FIRST OF
7 ALL, IT IS EXTREMELY SPECULATIVE. THE TIMING OF THOSE
8 DISCUSSIONS IS NOWHERE NEAR CLOSE IN TIME TO WHEN THE
9 MURDER OCCURRED. AND SECONDLY --

10 THE COURT: WHEN DID THE CONVERSATION TAKE PLACE?

11 MR. MC MULLEN: WELL, EARLIER IN THE YEAR THERE
12 WERE A COUPLE OF DISCUSSIONS. IT IS CLEAR THAT THEY WERE
13 SEPARATE TO -- THEY DIDN'T OCCUR THE NIGHT WHEN, WHEN
14 HOLMES TALKED TO LEVIN, I THINK IT WAS JUNE 5TH, WHERE
15 LEVIN SAID, "I AM GOING TO NEW YORK. I MIGHT" -- EXCUSE
16 ME. THIS WOULD HAVE BEEN ON THE 6TH, THEN. "I AM GOING
17 TO NEW YORK. I MIGHT LEAVE TONIGHT." IT WASN'T IN THE
18 CONTEXT OF THAT. IT WAS WAY BEFORE.

19 AND THE WAY HOLMES DESCRIBES THE CONVERSATION
20 WITH RESPECT TO BRAZIL HE WASN'T ASKING HOLMES FOR ADVICE
21 ON THE EXTRADITION LAWS. HE WAS BASICALLY INFORMING HIM.
22 IT WAS A DISCUSSION ABOUT THIS JOURNALISTIC STORY HE WAS
23 INVOLVED IN. IT IS QUITE SPECULATIVE WHETHER THAT WOULD
24 MEAN HE IS GOING TO BRAZIL OR PLANNING TO LEAVE.

25 SECONDLY, IF HE IS GOING TO DISAPPEAR, IT
26 SEEMS UNREASONABLE THAT HE WOULD TALK TO PEOPLE ABOUT
27 WHERE HE WAS GOING TO GO TO, BUT THAT WASN'T -- THERE IS A
28 CLEAR DISTINCTION IF LEVIN IS TALKING ABOUT A STORY HE IS

1 WRITING ABOUT.

2 AS FAR AS HOLMES TELLING OR -- EXCUSE ME --
3 LEVIN TELLING HOLMES WHETHER HE MIGHT BE LEAVING FOR NEW
4 YORK THAT NIGHT BUT HE WAS GOING THE NEXT DAY, CLEARLY
5 FROM A PREJUDICIAL STANDPOINT IT REALLY -- IT DOESN'T DO
6 ANYTHING FOR THE PETITIONER'S CASE AT TRIAL.

7 AND THERE IS A LOT OF -- THERE IS A LOT OF
8 ARGUMENT MADE ABOUT HIM, THAT IS LEVIN, ASKING FOR HIS KEY
9 ON THAT NIGHT. AND IT SEEMS INCONSISTENT THAT HE WOULD
10 ASK FOR HIS KEY. IF HE WAS GOING TO DISAPPEAR THE NEXT
11 DAY, HE WOULDN'T REALLY CARE ABOUT COMING BACK. IT IS NOT
12 CONSISTENT WITH A DISAPPEARANCE THEORY.

13 AND SO THIS EVIDENCE, CERTAINLY, THERE IS NO
14 PREJUDICE INVOLVED. IT DOESN'T RISE TO THE LEVEL OF
15 BREACHING A CONFIDENCE IN THE PROSECUTION'S CASE.

16 WITH RESPECT TO KAREN SUE MARMOR, HER
17 TESTIMONY SEEMS INCREDIBLE, BUT AS FAR AS BARENS BEING
18 MADE AWARE OF IT, THERE IS A BIG QUESTION IN MY MIND IN
19 THAT SHE DIDN'T -- IT DIDN'T COME TO HER MEMORY UNTIL
20 SEVERAL YEARS LATER; SO IT IS QUESTIONABLE EVEN IF BARENS
21 WOULD HAVE TALKED TO HER THAT HE WOULD HAVE BEEN ABLE TO
22 GET THAT INFORMATION FROM HER.

23 SECONDLY, WITH RESPECT TO THE PREJUDICE OF
24 THAT EVIDENCE, A LOT IS MADE BY PETITIONER THAT DISCOVERY
25 OF THE LIST PRIOR TO JUNE 6TH WOULD HAVE JUST BLOWN THE
26 PROSECUTION'S CASE TO BITS, AND THE PEOPLE STRONGLY
27 DISAGREE WITH THAT. EVEN IF YOU ASSUME THE LIST WAS
28 THERE, IT DOESN'T DIMINISH ITS POTENTIAL OR ITS USE AS A

1 LIST OR RECIPE FOR MURDER, WHETHER IT WAS LEFT THERE THE
2 DAY BEFORE OR THE NIGHT OF. CERTAINLY IN A THEORY THAT
3 THE LIST WAS TO --

4 THE COURT: WELL, A KILLER DOES NOT STOP BY THE
5 APARTMENT OF THE VICTIM AND SAY, "BY THE WAY, HERE IS A
6 LIST. I AM GOING TO MURDER YOU TOMORROW. KEEP IT AROUND.
7 I MAY NEED IT WHEN I COME BACK." RIGHT?

8 MR. MC MULLEN: THAT'S TRUE, BUT IF IT IS AN
9 ONGOING TOOL TO COERCE MONEY OUT OF THE VICTIM ANOTHER
10 LIST, ANOTHER DUPLICATE COULD HAVE BEEN BROUGHT OVER THE
11 NEXT DAY.

12 THE COURT: A BIT OF A STRETCH, ISN'T IT?

13 MR. MC MULLEN: IN ANY REGARD, YOUR HONOR, IT IS
14 OUR POSITION THAT, AGAIN, THAT THE JUDGMENT IS PRESUMED
15 VALID, AND THE PETITIONER HAS FAILED TO OVERCOME THAT
16 PRESUMPTION.

17 DOES THE COURT HAVE ANY OTHER QUESTIONS?

18 THERE IS ONE OTHER THING.

19 THE COURT: WHAT IS THE STANDARD IN YOUR MIND TO
20 FIND THAT THE PREJUDICE IS SUFFICIENT TO CAUSE A NEW
21 TRIAL? COUNSEL SAYS IT IS A REASONABLE POSSIBILITY, THAT
22 IS THE STANDARD. AND HOW DO I JUDGE THAT? HOW MUCH IS
23 REASONABLE POSSIBILITY?

24 MR. MC MULLEN: WELL, AGAIN, THE STANDARD IS A
25 PREPONDERANCE OF THE EVIDENCE, AND THEY ARE BASICALLY
26 UNDER THE CASES THAT WE HAVE CITED IN OUR BRIEF, IN THE
27 PEOPLE'S BRIEF, BASICALLY THERE IS -- THERE IS BASICALLY
28 TWO COMPONENTS IN AN ANALYSIS WHERE YOU WOULD ULTIMATELY

1 GET TO THE END RESULT THAT COUNSEL'S ASSISTANCE WAS SO
2 DEFECTIVE THAT A REVERSAL WOULD BE REQUIRED.

3 THE COURT: BUT IT IS BASED ON THE REASONABLE
4 POSSIBILITY THAT THE TRIAL WOULD HAVE BEEN DIFFERENT HAD
5 COMPETENT COUNSEL USED THE EVIDENCE THAT IS AT ISSUE.

6 THE QUESTION I HAVE FOR YOU IS GIVE ME SOME
7 DEFINITION OF REASONABLE POSSIBILITY. HOW DO I JUDGE
8 THAT? HOW MUCH IS REASONABLE POSSIBILITY? DO I LOOK AT
9 THAT IN CONJUNCTION WITH LOOKING SOLELY AT THE EVIDENCE IN
10 THIS HEARING? DO I LOOK AT IT IN CONJUNCTION WITH THE
11 EVIDENCE AT TRIAL? WHAT AM I LOOKING FOR WHEN I AM
12 LOOKING FOR THE REASONABLE POSSIBILITY THAT THE RESULT MAY
13 HAVE BEEN DIFFERENT?

14 MR. MC MULLEN: WELL, A REASONABLE PROBABILITY IS A
15 PROBABILITY SUFFICIENT TO UNDERMINE THE CONFIDENCE IN THE
16 OUTCOME. SO AGAIN, WHAT YOU NEED TO DO IS ANALYZE --

17 THE COURT: MY CONFIDENCE IN THE OUTCOME. IN OTHER
18 WORDS, WHOSE CONFIDENCE? THE PUBLIC'S CONFIDENCE IN THE
19 OUTCOME? PETITIONER CERTAINLY HAS NO CONFIDENCE IN THE
20 OUTCOME.

21 MR. MC MULLEN: CERTAINLY, WE THINK IT IS YOUR
22 CONFIDENCE, YOUR ANALYSIS OF THE TRIAL, AND WHETHER TAKING
23 IN MIND WHAT COULD HAVE BEEN DONE WHETHER -- IF THAT WOULD
24 HAVE BEEN DONE, DOES THAT BREAK YOUR CONFIDENCE IN THE
25 VERDICT IN THIS CASE.

26 THE COURT: ALL RIGHT.

27 ANYTHING ELSE?

28 MR. MC MULLEN: THERE IS ONLY ONE THING I WANTED TO

1 POINT OUT THAT I NEGLECTED TO. AT A POINT IN TIME
2 COUNSEL -- JUST FOR THE RECORD I WANT TO MAKE THIS
3 CLEAR -- REFERRED TO A MEETING, A SECRET MEETING WITH
4 BARENS. THERE WAS NO SECRET MEETING. THERE WAS JUST A
5 PRE-HEARING INTERVIEW OF ARTHUR BARENS WITH RESPECT TO
6 ARTHUR BARENS BREACHING THE ATTORNEY-CLIENT PRIVILEGE.
7 IT HAS BEEN SINCE THE VERY BEGINNING OF THIS CASE WHEN THE
8 ISSUES OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE RAISED.
9 THERE IS AN IMPLIED WAIVER OF THAT ATTORNEY-CLIENT
10 PRIVILEGE, AND IN FACT, MR. HUNT IN OPEN COURT HERE GAVE
11 AN EXPLICIT WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE, AND
12 SO THEREFORE --

13 THE COURT: WHAT IMPACT IS THAT? IF I FIND THAT IN
14 FACT PETITIONER TOLD BARENS, "I KILLED LEVIN," WHAT IMPACT
15 DOES THAT HAVE ON THESE ISSUES?

16 MR. MC MULLEN: WELL --

17 THE COURT: YOU SAY IT HAS NO IMPACT ON ISSUE 1 AT
18 ALL.

19 MR. MC MULLEN: THAT'S CORRECT.

20 THE COURT: SO IT ONLY GOES TO ISSUE 2, WHETHER
21 THERE A FACTOR UPON WHICH TRIAL COUNSEL RELIED IN MAKING
22 THE DECISIONS THAT TRIAL COUNSEL DID DURING THE TRIAL.

23 MR. MC MULLEN: YES. THAT'S OUR POSITION.

24 THE COURT: OKAY.

25 HOW DOES THAT AFFECT THE DECISION MADE HERE
26 BY MR. BARENS? ASSUMING FOR THE MOMENT I FIND TO BE TRUE
27 THAT PETITIONER DID TELL HIS ATTORNEY THAT HE WAS INVOLVED
28 IN THIS MURDER, HOW DOES THAT IMPACT ON THE DECISION MADE

1 HERE BY MR. BARENS, IF AT ALL?

2 MR. MC MULLEN: AT MOST IT SEEMS TO ME ON THE OTHER
3 ISSUE THAT WE HAVE TALKED ABOUT REGARDING INEFFECTIVE
4 ASSISTANCE OF COUNSEL, FOR EXAMPLE, LET'S GO THROUGH IT.
5 ON CANTOR-FITZGERALD IT DOESN'T SEEM TO HAVE ANY AFFECT;
6 IT DOESN'T SEEM TO HAVE ANY AFFECT ON THE CYCLOTRON;
7 DOESN'T SEEM TO HAVE ANY AFFECT ON THE F.B.I. ISSUE; IT IS
8 QUESTIONABLE THE AFFECT ON THE HOLMES ISSUE; IT COULD VERY
9 WELL HAVE AN AFFECT ON THE KAREN SUE MARMOR ISSUE, AND
10 THIS WAS EXPLORED AT THE HEARING WITH MR. BARENS ON THE
11 WITNESS STAND IN THAT HE FELT THAT HE MIGHT HAVE SOME
12 PROBLEM PUTTING THAT TESTIMONY ON, THAT TESTIMONY OF KAREN
13 SUE MARMOR ON IN LIGHT OF WHAT HIS CLIENT HAD TOLD HIM,
14 AND --

15 THE COURT: EXCEPT FOR MARMOR WHETHER OR NOT
16 PETITIONER CONFESSED TO HIS ATTORNEY IS PRETTY MUCH
17 IRRELEVANT TO THESE PROCEEDINGS.

18 MR. MC MULLEN: YES. IT IS SOMETHING TO BE
19 CONSIDERED IN THE ACTIONS THAT ARTHUR BARENS DID WITH
20 RESPECT TO INVESTIGATION AND DECISIONS HE MADE CERTAINLY.

21 THE COURT: DOES IT ALSO AFFECT HOW I EVALUATE THE
22 PETITIONER'S TESTIMONY? IN OTHER WORDS, PETITIONER TOOK
23 THE STAND AND SAID, "BARENS LIED." IF I FIND THAT NOT TO
24 BE THE CASE, THAT BARENS TOLD THE TRUTH, ISN'T THAT
25 SOMETHING THAT I SHOULD USE IN EVALUATING HIS TESTIMONY?

26 MR. MC MULLEN: ABSOLUTELY. IT DOES GO TO A
27 CREDIBILITY ASSESSMENT, YES, OF THE TWO WITNESSES AT
28 LEAST.

1 ANYTHING ELSE?

2 THE COURT: NO.

3 MR. MC MULLEN: MAY I HAVE A MOMENT?

4 THE COURT: YES.

5

6 (PAUSE.)

7

8 MR. MC MULLEN: JUST BRIEFLY, YOUR HONOR, TO GO
9 BACK, YOU HAD ASKED WHAT THE STANDARD WAS WITH RESPECT TO
10 NEWLY DISCOVERED EVIDENCE, AND WHAT'S IMPORTANT IS THAT
11 THE STANDARD WAS ENUNCIATED IN PEOPLE'S VERSUS GONZALEZ,
12 WHICH IS WHAT IS CITED IN THE ORDER TO SHOW CAUSE.

13 THANK YOU.

14 THE COURT: MR. CRAIN, GIVE YOU ONE LAST WORD.

15 MR. KLEIN: I THINK MR. CRAIN WANTS TO SAY A COUPLE
16 OF WORDS WHEN I AM DONE. I WAS GOING TO RESPOND TO
17 MR. MC MULLEN.

18 THE COURT: DO I NEED TO HEAR FROM BOTH OF YOU?

19 MR. KLEIN: I KNOW YOU DON'T WANT TO.

20 MR. CRAIN: I WILL BE VERY BRIEF, YOUR HONOR. I
21 NEED --

22 THE COURT: IF YOU PROMISE BREVITY.

23 MR. KLEIN: I AM GOING TO BE A COUPLE OF MINUTES.

24 THE COURT: ALL RIGHT.

25 MR. KLEIN, GO AHEAD.

26 MR. KLEIN: THANK YOU.

27 CONCERNING THE COURT'S QUESTION ON ISSUE NO.
28 1 ABOUT WHAT, HOW THE COURT EVALUATES THE SIGHTING

1 WITNESSES IN LIGHT OF THE PROSECUTION'S THEORIES, I WANTED
2 TO REFER THE COURT TO THE LANGUAGE IN IN RE HALL, WHICH IS
3 AT PAGE 423 OF THE HALL DECISION WHERE IT TALKS ABOUT THE
4 VIRTUAL IMPOSSIBILITY OF THE DEFENSE DISPROVING EACH
5 THEORY UPON WHICH THE PROSECUTION RELIED OR EVEN NEW
6 THEORIES THAT THE PROSECUTION HAD NOT PRESENTED. SO THAT
7 THIS IS NOT SOMETHING THAT WE WOULD HAVE TO DISPROVE AS
8 PART OF THE NEW EVIDENCE THAT WE HAVE PRESENTED TO THE
9 COURT.

10 IN THE CONTEXT OF THE GERRARD SIGHTING, I
11 WANT TO REMIND THE COURT, AGAIN, THAT IT IS NOT JUST ONE
12 SIGHTING WITNESS; IT IS ALSO MR. GERRARD WHO ALSO
13 IDENTIFIED MR. LEVIN. THE ACTION --

14 THE COURT: WELL, HE WENT BACK AND FORTH ON THAT.
15 HE WAS NOT AS CLEAR ON IT.

16 MR. KLEIN: THAT'S TRUE.

17 THE COURT: HE SAID SOMETHING LIKE, "NOW, I KNOW
18 WHO IT WAS." THEN HE WAS SHOWN A PICTURE DURING THE
19 INVESTIGATION, AND HE IDENTIFIED THE PICTURE AS BEING THE
20 PERSON THAT HE SAW IN THE RESTAURANT THAT DAY IN MYKONOS.
21 I LOOKED AT THE TRANSCRIPT, THOUGH, I THINK ON REDIRECT,
22 HE BACKED OFF AGAIN. SO HE IS NOT A REAL STRONG WITNESS.
23 HIS STRENGTH IS THAT IT IS A CONSISTENT -- HE OFFERS
24 CONSISTENCY TO MS. GERRARD'S TESTIMONY.

25 MR. KLEIN: THAT WAS THE OTHER POINT. HE WAS -- HE
26 CORROBORATES WHAT SHE SAYS SHE SAW THEN. I THINK THE
27 ACTIONS OF MR. LEVIN AS TO WHAT HE DID WHEN MRS. GERRARD
28 SAYS THAT SHE THINKS HE SAW HER. HE IMMEDIATELY LEAVES

1 THE RESTAURANT. THAT WOULD ALSO CORROBORATE HER TESTIMONY
2 THAT SHE SAW MR. LEVIN THAT DAY IN THE RESTAURANT.

3 AND I THINK THE COURT HAS TO COMPARE THE
4 SIGHTINGS MADE BY THE GERRARDS WITH THE SIGHTING WITNESS
5 THAT WAS PRESENTED AT TRIAL, THE ARIZONA SIGHTING. THESE
6 WERE NOT INDIVIDUALS THAT KNEW MR. LEVIN BEFORE, WHEREAS
7 CONNIE GERRARD KNEW MR. LEVIN, AND SO THAT MAKES HER
8 IDENTIFICATION THAT MUCH STRONGER AND THAT MUCH MORE
9 CREDIBLE.

10 SO I THINK THAT THAT ADDS WEIGHT TO WHAT WE
11 PRESENTED HERE IN TERMS OF CONVINCING THE COURT THAT WE
12 MET OUR BURDEN ON THAT ISSUE.

13 THE COURT: SO YOU AGREE WITH RESPONDENT THAT I
14 HAVE TO LOOK AT ALL OF THE EVIDENCE PRESENTED AT THE TRIAL
15 TO COME TO THE CONCLUSION WHETHER THE EVIDENCE PROVED IN
16 THESE PROCEEDINGS UNDERMINES THE ENTIRE STRUCTURE OF THE
17 PROSECUTION'S CASE?

18 MR. KLEIN: WELL, WHAT I AM SAYING IS, YOUR HONOR,
19 THAT IF YOU LOOK AT WHAT YOUR HONOR SAID THE PROSECUTION'S
20 CASE WAS, WHICH WAS THE, QUOTE, "DIRECT TESTIMONY, THE
21 DIRECT CONFESSION BY MR. HUNT TO KILLING MR. LEVIN AND HIS
22 ADMISSION TO A NUMBER OF INDIVIDUALS," AND COMPARE THAT TO
23 THE NEW EVIDENCE WHICH WE HAVE PRESENTED, WHICH IS
24 ACTUALLY A DIRECT SIGHTING OF MR. LEVIN, THE EVIDENCE IS
25 MUCH STRONGER IN TERMS OF THE TESTIMONY OF MS. GERRARD
26 CORROBORATED BY ALL THESE OTHER INDIVIDUALS THAT SHE SAW
27 MR. LEVIN, AND THAT WOULD UNDERMINE OR RAISE A REASONABLE
28 DOUBT AS TO THE LEGITIMACY OF MR. HUNT'S SUPPOSED

1 CONFESSION.

2 I MEAN NOBODY DISPUTES THE FACT THAT MR. HUNT
3 MADE THE STATEMENT ON JUNE 24TH. THE ISSUE IS WHY DID HE
4 DO IT. WHAT WAS THE EXPLANATION FOR IT? AND WE NOW HAVE
5 PRESENTED THE COURT WITH AN EXPLANATION THROUGH MR. HUNT'S
6 TESTIMONY HERE; SO WE WOULD HAVE IN ESSENCE REBUTTED THE
7 THEORIES THAT THE PROSECUTION RELIED ON IN THEIR CASE IN
8 SANTA MONICA.

9 MOVING ON TO THE OTHER ISSUE THE COURT WAS
10 CONCERNED ABOUT, WHETHER MR. BARENS WAS TELLING THE TRUTH,
11 AND THE COURT ASKED MR. CRAIN A QUESTION ABOUT, "WELL,
12 GEE, IF MR. BARENS WERE TELLING THE TRUTH, WHY WOULD HE GO
13 ON TO SAY THAT HE DIDN'T BELIEVE MR. HUNT WHEN MR. HUNT
14 SUPPOSEDLY CONFESSED TO HIM?"

15 IF THE COURT REMEMBERS IN OUR BRIEF, WE MADE
16 IT CLEAR TO THE COURT THAT AN ATTORNEY CAN ETHICALLY
17 PRESENT A DEFENSE AS LONG AS IT IS SOMETHING THAT HE
18 BELIEVES TO BE TRUE. IF MR. BARENS GOT UP AND TESTIFIED
19 IN FRONT OF THIS COURT THAT HE BELIEVED WHAT MR. HUNT HAD
20 SUPPOSEDLY TOLD HIM, THEN HE WOULD HAVE PUT HIMSELF IN AN
21 UNTENABLE SITUATION WHERE THE DEFENSE THAT HE HAD
22 PRESENTED AT TRIAL, WHICH WAS THAT MR. HUNT DIDN'T DO IT,
23 AND THAT RON LEVIN WAS ALIVE; SO HE KNEW HE COULDN'T DO
24 THAT, BUT I THINK WHAT THE COURT SHOULD DO IS EVALUATE
25 WHAT MR. BARENS DID, AND THE COURT LOOK AT THE CHRONOLOGY
26 OF EVENTS WITH THE DEPOSITION, THE INTERROGATORIES, THE
27 FILING OF THE SUPPLEMENTAL PLEADING THAT WE FILED ON MARCH
28 29TH.

1 THE COURT: MR. BARENS CLEARLY WAS PLAYING COY.

2 MR. KLEIN: IT IS MORE THAN THAT, YOUR HONOR. HE
3 WAS TRYING TO COERCE MR. HUNT INTO NOT GOING FORWARD WITH
4 ANY AND ALL ALLEGATIONS AGAINST HIM. AND WHEN MR. HUNT
5 FILED THE ADDITIONAL PLEADING ON MARCH 29TH, THAT'S WHEN
6 HE WENT THROUGH WITH THE LAST STEP AND SAID, "OKAY, I AM
7 JUST GOING TO PLAY HARDBALL WITH MR. HUNT," AND HE COMES
8 UP WITH THIS FANTASTIC LIE THAT MR. HUNT ALLEGEDLY
9 CONFESSED TO HIM WHEN HE VERY WELL KNEW THAT THIS WAS THE
10 INFORMATION THAT WE WERE SEEKING EARLIER ON. I CAN'T
11 STRESS ENOUGH TO THE COURT IT IS OUR POSITION THAT THE
12 COURT SHOULD PUT NO WEIGHT ON ANY OF THE EVALUATIONS THAT
13 MR. BARENS PURPORTEDLY MADE CONCERNING TACTICAL DECISIONS
14 IN THIS CASE.

15 IF THE COURT RECALLS, MR. BARENS WAS ASKED
16 WHO WAS NEIL ADELMAN. HE SAYS HE WAS ONE OF THE WITNESSES
17 THAT TESTIFIED AT THE SANTA MONICA TRIAL. WELL, WE
18 ENTERED INTO A STIPULATION WITH THE COURT'S ASSISTANCE
19 THAT MR. ADELMAN DID NOT TESTIFY IN THE SANTA MONICA
20 TRIAL. SO I MEAN, HE WAS GOING TO SAY WHATEVER HE WANTED.
21 IT DIDN'T MATTER THAT, THAT HE WAS UNDER OATH AND HIS
22 EXPLANATIONS WERE WHATEVER THEY WERE AT THE TIME THAT YOU
23 ASKED HIM THE QUESTION AND THEN IT WAS SOMETHING DIFFERENT
24 SOME OTHER TIME.

25 BUT IN TERMS OF ANY INVESTIGATION INTO THIS
26 CASE, IT IS OBVIOUS THAT HE DIDN'T DO ANY INVESTIGATION.
27 HE DIDN'T EVEN KNOW THAT THE F.B.I. WAS INVESTIGATING RON
28 LEVIN CONCERNING PROGRESSIVE SAVINGS & LOAN, AND IT IS

1 OBVIOUS THAT THAT MATERIAL WAS AVAILABLE TO HIM.

2 IT IS OBVIOUS THAT WHATEVER DECISION HE MADE,
3 HE HAS MADE CONCERNING MICROGENESIS, ANY EXPLANATION THAT
4 HE GAVE THIS COURT IS A FALSE ONE BECAUSE THE COURT IS
5 AWARE THAT THIS CAME UP REPEATEDLY DURING THE TRIAL. THE
6 ISSUE WAS BROUGHT UP BY MR. BARENS IN CROSS-EXAMINATION.
7 SO THE DOWNSIDE DID NOT EXIST. IT WAS ONLY THE UPSIDE,
8 WHICH WAS TO PRESENT EVIDENCE TO SHOW THAT THE FINANCIAL
9 MOTIVE DID NOT EXIST.

10 LASTLY, YOUR HONOR, IN TERMS OF HOW THIS
11 COURT SHOULD EVALUATE THESE TWO CLAIMS, THE COURT IS AWARE
12 THAT MR. PITTMAN WITHOUT THE BENEFIT OF ALL THIS NEW
13 EVIDENCE THAT WAS PRESENTED IN THESE PROCEEDINGS HAD TWO
14 HUNG JURIES. THE COURT IS AWARE THAT A JURY HEARD ALL OF
15 THIS EVIDENCE AND WAS UNABLE TO AGREE THAT MR. HUNT WAS
16 CULPABLE IN SAN MATEO. THESE ARE LIKE EXPERIMENTS OF WHAT
17 COULD HAVE HAPPENED.

18 THE COURT: I CANNOT EVALUATE THAT BECAUSE I HAVE
19 TO PRESUME THAT THE VERDICT IS APPROPRIATE HERE, THEN WE
20 GO FROM THAT.

21 MR. KLEIN: THEN I REFER THE COURT TO, ON ISSUE
22 NO. 1 THAT WE DO NOT HAVE TO REBUT EACH AND EVERY ISSUE,
23 BUT IF THE COURT -- AND I THINK THE COURT HAS TO FIND THAT
24 MRS. GERRARD IS A CREDIBLE WITNESS.

25 WE HAVE MET OUR BURDEN BY A PREPONDERANCE,
26 AND THAT A SIGHTING WITNESS VERSUS A STATEMENT BY MR. HUNT
27 THAT HE CONFESSED TO THE CRIME THAT WOULD GIVE THE JURY
28 REASONABLE DOUBT THAT MR. HUNT IS NOT GUILTY OF THE CRIME.

1 AND ALL OF THE, ALL OF THE NEW EVIDENCE THAT
2 WE HAVE DISCOVERED IN THE I.A.C. CLAIM CLEARLY WOULD
3 BENEFIT MR. HUNT AND WOULD RAISE A REASONABLE DOUBT AS TO
4 THE OUTCOME, AND THAT'S WHAT THE COURT SHOULD LOOK TO IS
5 WHAT A JURY WOULD DO WITH ALL THIS NEW EVIDENCE. WOULD
6 THE JURY HAVE A REASONABLE DOUBT THAT MR. HUNT IS GUILTY?
7 AND I BELIEVE THAT THE JURY WOULD HAVE SUCH A REASONABLE
8 DOUBT.

9 THANK YOU.

10 THE COURT: ALL RIGHT.

11 MR. CRAIN, YOUR FINAL THOUGHTS.

12 MR. CRAIN: YES, YOUR HONOR. THANK YOU. AND I
13 WILL BE BRIEF ALSO.

14 THESE ARE JUST MORE OR LESS ODDS AND ENDS
15 THAT HAVE COME UP DURING THE COURSE OF THIS MORNINGS
16 PROCEEDINGS, AND ONCE AGAIN I EMPHASIZE IN THE SECOND
17 BRIEF THAT WE FILED THAT THE UTMOST CONCERN, I THINK, TO
18 ALL OF US SHOULD BE THAT WE HAVE AN UNDERSTANDING OF THE
19 RECORD AND A GRASP OF THE ACCURACY OF THE RECORD VERSUS
20 INACCURACY OF IT.

21 I BELIEVE THAT WE DO. I BELIEVE AND TRUST
22 THAT THE COURT DOES AND WILL CONTINUE TO DO SO. I DO NOT
23 BELIEVE THAT THE PROSECUTION DOES, AND THE DANGER IN THIS
24 IS THAT THE PROSECUTION IS ABLE TO MAKE AN ARGUMENT THAT
25 REALLY BOILS DOWN TO A CARELESS EVALUATION OF THE RECORD.
26 IT MAY HAVE SOME SORT OF SUPERFICIAL APPEAL IF ONE IS NOT
27 FAMILIAR WITH THE RECORD.

28 FOR EXAMPLE, JUST ONE EXAMPLE I THINK SHOULD

1 SUFFICE HERE WITH REGARD TO THE ISSUE ABOUT THE KILPATRICK
2 NEGOTIATIONS. THE PROSECUTION THROWS OUT BUZZ WORDS OR
3 SOME ATTEMPT TO RESPOND TO THE COURT'S, PERHAPS, PLAYING
4 DEVILS ADVOCATE. "WHAT WAS A HOAX," AND THIS AND THAT.

5 I THINK THE COURT HAS EVIDENCED BY ITS
6 STATEMENTS THIS MORNING THAT IT APPRECIATES OUR CONTENTION
7 THAT IT DIDN'T MATTER HOW IT WAS, BUT I WOULD LIKE THE
8 COURT TO LOOK AT THE EVIDENCE THAT WAS PRESENTED BOTH TO
9 THE JURY AND AT THE EVIDENTIARY HEARING WITH REGARD TO THE
10 NEGOTIATIONS, FOR EXAMPLE, AS SET FORTH AT ABOUT PAGE 35
11 TO 38 OF PETITIONER'S OPENING BRIEF.

12 AND IT IS DESCRIBED, AGAIN, IN THE REPLY
13 BRIEF THAT THE TESTIMONY OF MR. KILPATRICK, FOR EXAMPLE,
14 THAT THE DEAL HE BELIEVED WAS A VIABLE ONE WOULD BE OUT OF
15 THE WAY, THAT THE MERGER WAS IMMINENT, MR. O'DONNELL'S
16 TESTIMONY TO THAT EFFECT.

17 IT IS EASY TO FORGET THOSE THINGS. IT IS
18 EASY TO CAST THE EVIDENCE THAT WAS PRESENTED AT THE
19 EVIDENTIARY HEARING IN A MISLEADING LIGHT, BUT I ASK THE
20 COURT TO LOOK AT THE SUMMARY OF THE EVIDENCE ON THIS, IN
21 PETITIONER'S OPENING BRIEF AT, I THINK AT AROUND 34 TO 38,
22 THE TESTIMONY OF MR. KILPATRICK AND 1747 AND 1848 TO 62,
23 MR. O'DONNELL'S TESTIMONY.

24 THE OTHER EVIDENCE THAT WE HAVE POINTED OUT
25 ABOUT THE VIABILITY OF THE MILLS, THAT'S AN ISSUE THE
26 COURT HAS TO MAKE A DETERMINATION OF, BUT IT SHOULD, AND I
27 TRUST WILL, MAKE A DETERMINATION ON AN INFORMED
28 UNDERSTANDING OF THE RECORD, NOT ON BASIS OF THE PEOPLE'S,

1 I AM SURE, WELL-INTENTIONED BUT SHOCKINGLY UNINFORMED
2 EVALUATION OR REPRESENTATIONS THAT SOMEONE DIDN'T REPORT
3 THE SIGHTING, WHICH WE POINTED OUT WAS IN DIRECT CONFLICT
4 WITH THE EVIDENCE.

5 THIS WAS A TROUBLESOME THING BECAUSE IT IS
6 EASY TO -- THERE HAS BEEN A LOT OF EVIDENCE AND IT IS EASY
7 TO PERHAPS GET LOST IN IT, BUT ANOTHER'S OPEN SHOOT OF
8 THIS PARTICULAR EXAMPLE IS THIS, THIS BUNK ABOUT SOMEHOW
9 BARENS THOUGHT IF HE PUT ON KILPATRICK EVIDENCE IT MIGHT
10 HAVE FOCUSED IN ON LEVIN AND THE \$1.5 MILLION CHECK.
11 WELL, AS WE HAVE TRIED TO POINT OUT IS LIKE COMPARING
12 APPLES AND ORANGES. THERE IS TWO DIFFERENT THINGS, THEY
13 ARE UNRELATED.

14 THE COURT: I AGREE.

15 MR. CRAIN: I APPRECIATE THAT.

16 AND WHAT THE KILPATRICK EVIDENCE WENT TO IS
17 WHETHER OR NOT THERE WAS GOING TO BE EVIDENCE OF FINANCIAL
18 MOTIVE THAT WAS REFUTED OR LEFT TO STAND ON ITS OWN
19 UNREBUTTED AND UNCHALLENGED. THAT'S WHAT IT CAME DOWN TO.

20 SO ANYWAY, ANOTHER POINT IS MR. MC MULLEN, I
21 THINK, EITHER MISSPOKE OR HAS A LACK OF APPRECIATION FOR
22 WHAT THE STRICKLAND STANDARD IS. AT ONE POINT HE CALLED
23 IT A PREPONDERANCE OF THE EVIDENCE. STRICKLAND ITSELF
24 SAYS IT IS NOT A PREPONDERANCE OF THE EVIDENCE, AND THAT'S
25 WHY THEY QUALIFIED THE REASONABLE PROBABILITY AS THEY DID,
26 AND THAT TERMINOLOGY IS CLEARLY BY THE NINTH CIRCUIT AND
27 ALL THE OTHER CIRCUITS THAT HAVE DEALT WITH THE ISSUE HAS
28 SAID IT IS A REASONABLE POSSIBILITY. I THINK THAT'S THE

1 STANDARD I TRUST THIS COURT WILL FOLLOW.

2 WITH REGARD TO THE COURT OF APPEAL'S
3 STATEMENT ABOUT THE STRENGTH OF THE EVIDENCE, WHAT THE
4 COURT OF APPEAL'S OPINION ESSENTIALLY DID WAS TO LOOK AT
5 THAT EVIDENCE, AS MR. WAPNER DID IN HIS PRESENTATION AND
6 HIS FINAL ARGUMENT TO THE JURY. BASICALLY THEIR
7 EVALUATION OF THE EVIDENCE WAS THE SAME AS MR. WAPNER'S
8 EVALUATION OF THE EVIDENCE.

9 AND, OF COURSE, WHEN THE CRITICAL COMPONENTS
10 OF THE PROSECUTION'S CASE WERE NOT MET AS TO FINANCIAL
11 MOTIVE AND THE CREDIBILITY OF THE STAR WITNESS AND SO
12 FORTH, OF COURSE, SOMEONE MAY WANT TO PUT THAT KIND OF
13 CAST ON IT. BUT THAT'S WHERE A DEFENSE ATTORNEY'S ROLE
14 SHOULD HAVE BEEN MET, AND THAT'S WHERE IT WASN'T.

15 SO THAT'S WHY I SAID INITIALLY THIS MORNING
16 QUITE SOMETIME AGO THAT IF THE COURT IS INCLINED TO
17 EVALUATE THE TESTIMONY OF THE SIGHTING WITNESSES BY
18 LOOKING AT THE EVIDENCE IN THE CASE, I THINK IT IS
19 INCUMBENT UPON THE COURT IN ITS EVALUATION TO CONSIDER THE
20 EVIDENCE THAT WAS THERE THAT COULD HAVE BEEN OFFERED TO
21 REBUT THESE POINTS AND NOT SIMPLY TO LOOK AT THE
22 PRESENTATION THAT WAS BASICALLY SOMEONE GOING INTO, INTO
23 BATTLE WITH HIS HANDS TIED BEHIND HIS BACK.

24 WITH REGARD TO THE QUESTION THAT'S COME UP
25 ABOUT IF -- I DON'T THINK THE COURT -- I THINK THE COURT
26 IS ON THE RIGHT TRACK ABOUT MR. BARENS' LACK OF
27 CREDIBILITY, AND I HAVE BEEN BLUNT ABOUT IT. MR. KLEIN
28 HAS BEEN BLUNT ABOUT IT. I THINK THE MAN HAS LIED TO THE

1 COURT. BUT, YOU KNOW, THE LAW IS UNDER LEDESMA THAT EVEN
2 IF THIS STORY OF BARENS' WERE TRUE, HE WAS IN NO WAY
3 EXCUSED FROM CARRYING OUT THE INVESTIGATION THAT HE WAS
4 REQUIRED TO CARRY OUT.

5 IN FACT, LAST WEEK IN THE JONES CASE THE U.S.
6 SUPREME COURT SAID THAT THE NATURE OF THE CHARGES IS ONE
7 OF THE FACTORS THAT THE COURT HAS TO CONSIDER IN
8 EVALUATING THE COMPETENCE OF THE TRIAL COUNSEL, AND IN THE
9 CASE OF A MURDER THE COURT PLACES A HIGHER DUTY UPON THE
10 ATTORNEY IN TERMS OF WHAT HE IS REQUIRED TO DO THAN IN
11 OTHER TYPES OF CASES. AND IN FACT, THEY REFERRED TO THE
12 REPRESENTATION OF SOMEONE CHARGED WITH MURDER AS A MAMMOTH
13 RESPONSIBILITY. AND SO THAT'S PART OF THE FACTOR.

14 THE COURT ALSO NOTED IN ITS COMMENTS DURING
15 THE COURSE OF THIS HEARING THAT THESE THINGS THAT WERE
16 BROUGHT TO LIGHT ABOUT MR. BARENS WERE UNREFUTED BY HIM.
17 WE WOULD LIKEN THAT TO AN ADOPTIVE ADMISSION. IT WAS
18 OBVIOUS TO THE COURT, IT WAS OBVIOUS TO US MR. BARENS
19 DIDN'T REFUTE ANYTHING. MR. BARENS CHOSE TO REMAIN SILENT
20 IN THE FACE OF THE ACCUSATIONS AGAINST HIM AND THE
21 TESTIMONY ABOUT WHAT INFORMATION HE WAS GIVEN BY HIS OWN
22 CLIENT.

23 AND, FINALLY, I DON'T REALLY -- I GUESS IT IS
24 NOT RIGHT TO GO OUTSIDE THE RECORD TO TALK ABOUT --

25 THE COURT: THEN DON'T.

26 MR. CRAIN: OKAY. THEN I WILL CONFINE IT TO JUST
27 LOOKING AT THE RECORD ITSELF OF AN ATTORNEY WHO GOES
28 BEFORE A JURY AS MR. BARENS DID AND TELLS THEM IN HIS

1 OPENING STATEMENT, "MR. HUNT WILL TESTIFY, MR. HUNT WILL
2 EXPLAIN EVERYTHING." CLEARLY AT THAT POINT HE EITHER HAS
3 AN I.Q. OF RECORD LOW PROPORTIONS AND SHOULDN'T BE
4 PRACTICING LAW, OR ELSE HE -- IT IS HARD TO UNDERSTAND
5 THAT EXCEPT AS A SYMBOL OF HIS GROSS INCOMPETENCY. HOW
6 COULD ANYBODY DO THAT? IT IS SYMPTOMATIC OF THE
7 SLOPPINESS AND CARELESS EFFORT THAT MR. BARENS PUT INTO
8 THE CASE.

9 THE COURT: OF COURSE, MR. HUNT CHOOSE NOT TO
10 TESTIFY.

11 MR. KLEIN: PARDON ME?

12 THE COURT: I THINK THERE IS A WAIVER WHERE
13 MR. HUNT WAS ASKED BY JUDGE RITTENBAND, "YOU ARE NOT GOING
14 TO TESTIFY; IS THAT CORRECT?"

15 MR. HUNT SAID, "THAT'S CORRECT."

16 SO THAT'S MR. HUNT'S FINAL DECISION.

17 MR. CRAIN: THERE WAS A WAIVER BY MR. HUNT WHO AT
18 THAT TIME WAS 24 YEARS OLD, REPRESENTED BY TRIAL COUNSEL.
19 BUT HOW COULD TRIAL COUNSEL HAD PLANNED OUT A CASE WHERE
20 HE EVER GETS INTO THAT SITUATION?

21 AND, OF COURSE, FROM TIME TO TIME, YOU KNOW,
22 LIKE WITH THE KAREN MARMOR EVIDENCE HE USES SOMEHOW THIS
23 PURPORTED ETHICAL CONCERN THAT HE HAD, WHICH IS ABOUT AS
24 LEGITIMATE AS THE ETHICAL CHARADE HE WENT THROUGH IN FRONT
25 OF THIS COURT, BUT AS WE DEMONSTRATED IT IN NO WAY
26 PREVENTED HIM FROM INTRODUCING THAT EVIDENCE.

27 THE COURT: IF I FIND THAT PETITIONER DID IN FACT
28 MAKE A CONFESSION TO HIS ATTORNEY, DOES IT REALLY MAKE A

1 BIT OF DIFFERENCE IN THIS CASE?

2 MR. CRAIN: IT DOESN'T MAKE A BIT OF DIFFERENCE.
3 THE PEOPLE HAVE LEGAL PROBLEMS ON ISSUE NO. 1.

4 THE COURT: EXCEPT IF I FIND THAT TO BE TRUE, HOW I
5 WOULD JUDGE PETITIONER'S TESTIMONY? BECAUSE I WOULD THEN,
6 IF I FIND THAT TO BE TRUE, I FOUND THAT PETITIONER LIED IN
7 THE COURSE OF THESE PROCEEDINGS.

8 MR. CRAIN: WELL, I DON'T THINK THE COURT SHOULD
9 FIND THAT MR. -- FIRST OF ALL, THE WHOLE THING SMACKS, IT
10 HAS AN AIR OF UNREALITY THAT MR. BARENS IS GOING TO GO
11 DOWN. THE WHOLE THING HAS A PECULIAR RING TO IT. I
12 MEAN --

13 THE COURT: MUCH OF THIS CASE DOES.

14 MR. CRAIN: WELL, MR. HUNT DOES GIVE THE COURT A
15 VERY CREDIBLE SHOWING OF THE WORK THAT HE DID ON THE CASE
16 IN AN ATTEMPT TO GET A NOT INTERESTED DEFENSE ATTORNEY TO
17 KNOW WHAT THE CASE WAS ALL ABOUT WHEN HE TESTIFIED, "I
18 TOLD MR. BARENS ABOUT THIS EVIDENCE OR THAT EVIDENCE.
19 PLEASE EXPLORE THIS. THIS IS SOMETHING ELSE." IT WAS ALL
20 CORROBORATED BY EXTENSIVE WRITTEN DOCUMENTATION FOR THIS
21 COURT'S BENEFIT AND CONSIDERATION.

22 WE HAVE HERE MR. BARENS. MR. HUNT SAYS, "I
23 DIDN'T DO IT." MR. BARENS SAYS, "THERE WERE NO WITNESSES
24 TO THIS PURPORTED CONVERSATION, AND IT NEVER HAPPENED
25 AGAIN." HE IS IN CONFLICT. HE HAS GIVEN INCONSISTENT
26 STATEMENTS IN THE RECORD AS TO WHETHER HE EVER TOLD ANYONE
27 ABOUT THIS, AND THEN HE SAYS, "WELL, I DIDN'T BELIEVE IT."

28 I MEAN, I WOULD REALLY THINK THAT THE COURT

1 WOULD BE VERY HARD PRESSED AND WOULD BE ACTING IN A WAY
2 THAT IT REALLY SHOULDN'T TO PUT ANY CREDIBILITY WHATSOEVER
3 IN TERMS OF THIS STORY THAT MR. BARENS AND USED IT IN SOME
4 WAY TO MR. HUNT'S DETRIMENT. I DON'T THINK THE COURT IN
5 ITS FINAL ANALYSIS WILL DO THAT. I HOPE I AM RIGHT.

6 BUT, YOU KNOW, I THINK WHEN THE COURT SHOULD
7 WONDER, "WHAT IN THE WORLD IS GOING ON HERE WHEN AN
8 ATTORNEY COMES INTO MY COURT AND PUTS ON THIS POSE THAT HE
9 DID, THIS SANCTIMONIOUS POSE, "OH, PLEASE, YOUR HONOR,
10 ONLY IF YOU ORDER ME TO DO IT," WHEN HE -- TWO WEEKS AGO
11 HE IS OUT WITH THE D.A. INVESTIGATOR? WHAT'S GOING ON?

12 THE COURT: IT WAS BEING SLUNG BOTH WAYS. IT WAS
13 GETTING PRETTY DEEP IN HERE BETWEEN PETITIONER AND
14 MR. BARENS.

15 WHY DON'T YOU WRAP UP.

16 MR. CRAIN: THE FINAL THING I WOULD LIKE TO SAY
17 ABOUT THIS CASE. THERE WAS OTHER ISSUES THAT I THINK ARE
18 TROUBLESOME, ARE TROUBLESOME TO ANYONE IN OR OUT OF THE
19 SYSTEM, WHO LISTENED TO THIS CASE. THE ALLEGATIONS THAT
20 THE TRIAL ATTORNEY HAD A CONFLICT OF INTEREST, WHICH I
21 BELIEVE WE COULD HAVE PROVEN IF GIVEN THE OPPORTUNITY, AND
22 THE OTHER ISSUE INVOLVING BRADY MATTERS, WHICH I WILL
23 STATE AGAIN INVOLVED PERSONS CONCERNED WITH THE
24 PROSECUTION OTHER THAN FRED WAPNER.

25 BUT THESE ARE SIGNIFICANT TROUBLESOME ISSUES
26 THAT SURROUND THIS CASE THAT DID MORE THAN SIMPLY GAIN THE
27 INTEREST OF THE COURT OF APPEAL, BUT GOT THE COURT OF
28 APPEAL TO THINK THEY WERE SO SIGNIFICANT THAT IT ISSUED

1 THE ORDER THAT IT DID. IT IS A TROUBLESOME CASE WHEN YOU
2 HAVE THE KIND OF CREDIBLE EVIDENCE THAT HAS BEEN
3 PRESENTED.

4 I APPRECIATE THE COURT'S CONCERN HERE, AND
5 AGAIN, ALL THAT WE ASK IS THAT THIS COURT EVALUATE IT IN
6 SUCH A WAY THAT I THINK WILL -- DOES REQUIRE THE ISSUANCE
7 OF THE WRIT SO THAT MR. HUNT CAN HAVE A TRIAL BEFORE 12
8 PEOPLE FROM THIS COMMUNITY IN LOS ANGELES THAT CAN HEAR
9 THE CASE AND MAKE FOR ONCE AND FOR ALL A PROPER
10 DETERMINATION ON THE COMPLETE RECORD OF THIS CASE. THAT
11 HASN'T HAPPENED.

12 AND I THINK IT IS APPALLING TO MOST OF US TO
13 LOOK AT THIS CASE THAT SOMEONE IS CURRENTLY SERVING A
14 SENTENCE ON THIS RECORD WITH THIS KIND OF REPRESENTATION
15 WHEN THIS EVIDENCE HAS BEEN PRESENTED THAT PEOPLE WHO KNEW
16 MR. LEVIN SO WELL HAVE COME IN AND CREDIBILITY TESTIFIED
17 THAT THEY SAW HIM YEARS AFTER THE TRIAL.

18 SO ALL WE WANT IS FOR 12 JURORS TO BE ABLE TO
19 HEAR THIS EVIDENCE AND LET THEM DECIDE.

20 THANK YOU.

21 THE COURT: ALL RIGHT.

22 THANK YOU. I WILL TAKE THE MATTER UNDER
23 SUBMISSION. AS I INDICATED TO COUNSEL, I WILL ISSUE A
24 WRITTEN OPINION IN THIS CASE. MY HOPE, IT IS MANDATED
25 THAT I WILL HAVE IT DONE WITHIN THE NEXT TWO WEEKS, MAYBE
26 SHORTER.

27 AS COUNSEL IS AWARE, I AM OUT OF -- SITTING
28 OUT OF COUNTY BEGINNING A MONTH FROM NOW. I HAVE ANOTHER

1 HABEAS CORPUS THAT, ACTUALLY THEY ARE DOING CLOSING
2 ARGUMENTS FRIDAY. I HAVE TO WRITE AN OPINION FOR THE
3 SUPREME COURT ON THAT. THEN I HAVE SEVERAL OTHER MATTERS.

4 SO I AM HOPING WITHIN TWO WEEKS -- I AM
5 HOPING THIS WEEK I WILL HAVE SOMETHING DONE. THERE IS AN
6 AWFUL LOT OF MATERIAL. I WISH I HAD MORE TIME, BUT I
7 DON'T HAVE THE TIME. BUT I WILL GET SOMETHING OUT.

8 ANTICIPATING IF THE PETITION IS GRANTED, THE
9 PEOPLE WILL TAKE A WRIT, AND IF DENIED THAT --

10 MR. KLEIN: THEY HAVE A RIGHT TO APPEAL.

11 THE COURT: -- THEY HAVE A RIGHT TO APPEAL.

12 MR. KLEIN: THEY HAVE A RIGHT TO APPEAL.

13 THE COURT: YOU HAVE TO FILE A PETITION FOR NEW
14 HABEAS CORPUS, BUT MR. HUNT SHOULD BE PACKING UP AND BE
15 READY TO GO BACK TO THE DEPARTMENT OF CORRECTIONS. SO HE
16 SHOULD BE AWARE OF THAT.

17 AND GET YOUR FINAL BILLINGS IN BECAUSE ONCE I
18 AM DOWN IN ORANGE COUNTY I WON'T HAVE ACCESS TO ANYTHING.
19 SO I NEED ALL YOUR STUFF THIS WEEK, NOT THIS WEEK WITHIN
20 THE NEXT WEEK OR TWO.

21 ANYTHING FURTHER?

22 THANK YOU, COUNSEL.

23 THE MATTER IS SUBMITTED.

24 MR. CRAIN: THANK YOU, YOUR HONOR.

25

26

27

28