CALIFORNIA COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION FIVE

DANIEL LARSEN,

Petitioner & Appellant,

v.

VICTIM COMPENSATION & GOVERNMENT CLAIMS BOARD,

Respondent.

Appeal from the Superior Court of Los Angeles County
Hon. James C. Chalfant, No. BS170693

Appellant's Opening Brief

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CERTIFICATE OF INTERESTED PARTIES

This is the initial certificate of interested entities or persons submitted on behalf of Appellant Daniel Larsen.

The undersigned certifies that there are no interested entities or persons that must be listed in this Certificate under California Rules of Court, rule 8.208.

Dated: 3/6/20

By: */s/Benjamin I. Siminou*
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INTRODUCTION

This appeal follows a decision by the Victim's Compensation and Government Claims Board ("Board") denying compensation to Daniel Larsen, a wrongfully incarcerated person.

Larsen was convicted of carrying a concealed knife—and sentenced to 28 years to life in prison—based on testimony by two police officers who, upon responding to a call at a bar, claim they saw Larsen pull a knife from his waistband and throw it under a car in the bar's parking lot.

A federal court ordered Larsen's release after **13 years** in prison based on "extraordinarily exculpatory" eyewitness testimony that would have given "a reasonable juror ... serious doubts about [the officers'] version of the events." (AA 084.)[1]

James and Elinore McNutt were two of those "extraordinarily exculpatory" witnesses. Whereas the officers who testified against Larsen were over **20 feet away** and behind a chain-link fence (AA 061), Mr. McNutt was just **two feet** away from Larsen's companion, William Hewitt, when the police arrived. Mr. McNutt—himself a former police officer—"testified unequivocally" that it was *Hewitt*, not Larsen, who threw the knife. (AA 078.) Ms. McNutt was only "slightly farther away" and was also adamant Hewitt threw the knife while Larsen "just stood there with his hands at his sides." (AA 072, 081.)

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[1] References to the Appellant's Appendix are abbreviated as: **(AA [page].)** References to the administrative record are abbreviated as: **([volume] CALVCB [page].)**

The federal court also heard testimony from a third witness who testified that, shortly before police were called to the bar, a man matching Hewitt's description threatened him with an identical knife inside the bar while Larsen was "fifteen to twenty feet away." (AA 074.)

Weighing this evidence against the officers' testimony, the federal court concluded that "no reasonable juror" could have found Larsen guilty of possessing the knife (AA 086), and ultimately granted Larsen's petition for writ of habeas corpus.

Larsen filed a claim with the Board seeking $100 per day for the 4,963 days he spent in custody. (AA 187.) In reviewing that claim, the Board rejected most of the federal court's findings and concluded that "the weight of the evidence strongly suggests that Larsen is guilty." (AA 205.) The Board then denied Larsen's claim.

That decision must be reversed for three independent reasons.

First, in light of the federal court's finding that Larsen was factually innocent, Larsen was automatically entitled to compensation under California law.

Second, even if Larsen was not automatically entitled to compensation, the Board was nonetheless bound by factual findings the federal court made when it determined that Larsen was factually innocent.

Third, the Board abused its discretion in at least **eight** other ways wholly independent of its mishandling of the federal court's determination that Larsen was factually innocent. These eight errors also warrant reversal, particularly in the aggregate.

STATEMENT OF FACTS

The incident at the heart of this case occurred at the Gold Apple bar in Los Angeles in June 1998. (AA 190.)

Brian McCracken was among the patrons in the bar that evening. (AA 074.) While McCracken was sitting at the bar, a man suddenly approached him, brandished a knife, "and said 'you know, I could kill you right now.'" (AA 074.)

McCracken "was certain that the person with the knife in the bar was not [Daniel Larsen]." (AA 079.) Indeed, although "they were not close friends," McCracken "knew [Larsen] at the time." (AA 074.) And when the man with the knife threatened McCracken, McCracken saw Larsen elsewhere in the bar, sitting "fifteen to twenty feet away." (*Ibid.*)

And although McCracken remembered little about the man with the knife, "he was certain of his description of the knife itself," which he described as "double-edged, with a four to five inch long blade and a finger guard." (AA 075.)

Shortly after this encounter, a bartender approached McCracken and "told him that she had called the police." (AA 075.)

Sometime thereafter, **James McNutt** and **Elinore McNutt** arrived at the Gold Apple's parking lot. The McNutts had come there to meet Ms. McNutt's son (and Mr. McNutt's step-son), Daniel Harrison. (AA 067.) When the McNutts arrived, Harrison was "parked behind [them] and to the right." (*Ibid.*)

As Mr. McNutt exited his vehicle, he "heard a loud argument coming from near Harrison's car." (*Ibid.*) Mr. McNutt saw "[t]wo other people standing near Harrison's car," one of whom "was

standing next to the driver's door of Harrison's car." (AA 067.) The two people Mr. McNutt saw were Daniel Larsen and William Hewitt. Mr. McNutt focused on Hewitt—the man near Harrison's door—because Mr. McNutt thought he looked "hostile." (AA 068.)

Mr. McNutt's instincts were not entirely uneducated: As it happens, Mr. McNutt was a former police officer from North Carolina. (AA 067.) And his instincts were accurate: A prosecutor would eventually testify that, based on her investigation, Larsen and Hewitt "went to the Gold Apple Bar to beat up Daniel Harrison." (AA 122.) And Hewitt would later confirm that, "[a]t the time, [he] always carried some type of weapon with him." (AA 190.)

Concerned for his step-son's safety, Mr. McNutt "walked over to Harrison's car and stood by the front driver's side … approximately two feet away from [Hewitt]," and began arguing with him. (AA 067–068.)

While Mr. McNutt walked over to Harrison's car, Elinor McNutt "waited by the tailgate of her car." (AA 072.) Like Mr. McNutt, Mrs. McNutt's "attention was on [Hewitt] because the way he walked up to Harrison's car door concerned her." (AA 072.) During this time, Larsen was "standing by Harrison's car's taillights" while Mr. McNutt and Hewitt argued. (*Ibid.*)

After Mr. McNutt and Hewitt had been arguing for "approximately two minutes" (AA 068), a police car suddenly pulled into the parking lot.

What happened next is subject to dispute.

Thomas Townsend was one of two officers in the car. Although he could not remember whether he was the driver or the passenger (AA 063), Townsend claimed he "turned on the roof-mounted floodlights on his car, as well as the car's side spotlights and high beams" as they entered the parking lot. (AA 060.)

Although Larsen was among "ten [to] twenty people … in the parking lot" (AA 061), Townsend claims he specifically "saw [Larsen] crouch down, reach into the waistband of his pants and pull out an object." (AA 061.) Townsend claims he "could see both the entire throwing motion and the area where the object landed." (AA 061.) Townsend then exited the police car and "yelled at everyone to get down on their knees and put their hands on their heads." (AA 062.)

Michael Rex, the other officer in the car, echoed Townsend's narrative: According to Rex, as he and Townsend entered the Gold Apple's parking lot, he "focused on [Larsen] because he matched the particular description in the [911] call," which had reported "a white male wearing a green flannel shirt and armed with a handgun." (AA 064.) Rex believed "he saw [Larsen] reach into his waistband and pull out a shiny metal object" that was "five to six inches long." (AA 065.) According to Rex, "after pulling the object from his waistband, [Larsen] crouched down, bent at the knees, and threw the object under the car next to him." (*Ibid.*)

But the McNutts were adamant "that it was [Hewitt], not [Larsen], who threw the knife." (AA 084.)

Mr. McNutt—who, at the time, was "standing only two feet away from [Hewitt]" (AA 078)—testified that, "[w]hen the police arrived, '[Hewitt] turned around, took a few steps … [and] threw an item near the vehicle parked next to [Harrison's] vehicle.'" (AA 068.) Mr. McNutt testified that "[t]he object sounded metallic, and he believes that it was 'probably' a knife." (AA 068.) "After [Hewitt] threw the object, Mr. McNutt saw it under the vehicle" and said that "[i]t appeared to be ten or twelve inches long." (AA 068.)

Ms. McNutt corroborated Mr. McNutt's account: Ms. McNutt testified that "[w]hen the police arrived, … [s]he saw [Hewitt] reach into his clothing and throw an object under a car." (AA 072.) She also testified that the object "was metal and she heard a clank and a 'skidding … noise' when [Hewitt] threw it." (AA 072.) Ms. McNutt further testified that while Hewitt threw the object, Larsen "'just stood there' with his hands at his sides." (AA 072.)

After he saw Hewitt throw the long metal object, Mr. McNutt turned to walk away, but stopped when the officers told him to "freeze," after which he was handcuffed and frisked. (AA 069.) While searching Mr. McNutt's wallet, the police found "cards identifying Mr. McNutt as a former police officer and chief of police." (*Ibid.*) At that point, the officers "opened Mr. McNutt's handcuffs," "ordered Mr. McNutt to leave[,] and did not give him a chance to make a statement." (AA 069–070.) Mr. and Mrs. McNutt left the Gold Apple shortly thereafter. (AA 073.)

Townsend eventually went to search the parking lot. (AA 062.) While searching, Townsend found "a three to four inch long copper bar wrapped in cloth tape." (*Ibid.*) Townsend also found a

knife "underneath a pickup truck." (*Ibid.*) Townsend's description of that knife—"a knife with a double-edged blade" and "a finger guard for your hand" (AA 062, internal quotation marks omitted)—perfectly matched the knife Brian McCracken saw inside the Gold Apple earlier that night. Indeed, when shown a photo of the knife Townsend found, McCracken confirmed it appeared to be "the knife he saw in the Gold Apple bar." (AA 075.)

Townsend testified that "the knife he recovered at the scene was 'extremely sharp'" and "could easily 'poke through skin.'" (AA 062.) Because the knife was so sharp, Townsend had to take "precautions against the knife cutting through the evidence bag by wrapping the blade in tape." (AA062.)

Townsend "searched [Larsen]" at the scene, but "did not find any kind of sheath for a knife" on him. (AA 062) Townsend's partner, Rex, eventually "strip searched [Larsen] after taking him to jail." (AA065) "During the strip search, Rex did not find a sheath or any other protection for a knife, nor did he find any pull or tear marks on [Larsen]'s clothes." (AA 065; AA 182.)

Hewitt was not arrested. Hewitt's girlfriend at the time, **Jorji Owen**, would later state that "[w]hen Hewitt returned from the bar, he told [her] that [Larsen] 'had been arrested for possession of his (Hewitt's) knife.'" (AA 076.) Owen further indicated that "Hewitt sold his motorcycle to bail [Larsen] out of jail, because he felt responsible for [Larsen] being in jail." (*Ibid.*) According to Owen, "Hewitt felt responsible because the knife belonged to him and he had thrown it under a truck when the police arrived." (AA 076.)

STATEMENT OF THE CASE

A. Larsen's criminal trial

Larsen was charged with felony possession of a "dagger." (AA 094.)

At trial, the prosecution called three witnesses: Officers Townsend and Rex, and Detective Kenneth Crocker, the officer who booked Larsen at the police station. (AA 097.)

Townsend and Rex testified that they received a report of an assault with a deadly weapon at the "Gold Apple Bar." (AA 097.) , The report indicated there were "shots fired" and described the suspect as a man with a gun in a "green flannel shirt and a long ponytail." (AA 097.) Townsend and Rex testified that they saw Larsen pull a long, metal object from his waistband and throw it under a nearby car, an object they later determined was a knife. (AA 061–065.)

Crocker testified that, although Larsen had told police his name was "Anthony Vant," his true identity was Daniel Larsen. (AA 066.) Crocker also testified that police never attempted to pull fingerprints from the knife recovered at the bar. (AA 066.)

Larsen's counsel did not call any witnesses. Instead, he attempted to impeach the officers by pointing to inconsistencies in their testimony.

For example, "[i]n his arrest report, Townsend did not mention that knife was concealed." (AA 063.) And, at Larsen's first preliminary hearing, Townsend again "did not testify that the knife was concealed." (AA 063.) After the charges against Larsen were "dismissed for insufficient evidence of concealment, … the

prosecutor spoke with Townsend about the necessity for testimony about concealment." (AA 063.) Then, at a subsequent preliminary hearing when the charges were re-filed, "Townsend testified for the first time that [Larsen]'s shirt covered the knife." (AA 063.)

Also, although he was in fact the driver, "Townsend testified that he was the passenger in the police car" that night, and "made numerous references to being a passenger and observing the scene through the passenger window." (AA 063.)

The jury found Larsen guilty. Because of prior felony convictions, Larsen was sentenced to 28 years to life in prison. (AA 095.)

B. Direct appeal

Larsen appealed his conviction, claiming evidentiary errors and that his sentence was excessive. (AA 95, fn. 4.) This Court affirmed in an unpublished opinion. (See *People v. Larsen* (Jun. 1, 2000, No. B135015) [nonpub. opn.].) Larsen petitioned the California Supreme Court, which denied review. (See *People v. Larsen* (Aug. 9, 2000, No. S089656).)

C. State-court petition for writ of habeas corpus

In May 2005, Larsen filed a petition for habeas corpus in superior court asserting ineffective assistance of counsel. (AA 096.) In his petition, Larsen alleged his criminal defense attorney failed to find and call the McNutts as witnesses in order to establish that someone else was responsible for the knife. (*Ibid.*) The superior court denied Larsen's petition. (*Ibid.*)

Larsen sought review of his petition in this Court, which was summarily denied. (See *Larsen v. Superior Court* (Mar. 28, 2006, No. B189318).) Larsen then filed a petition in the California Supreme Court, which was also summarily denied. (See *In re Larsen* (July 25, 2007, No. S143901).)

D. Federal petition for writ of habeas corpus

Larsen filed a petition for writ of habeas corpus in federal court in July 2008. Larsen's operative petition asserted that his conviction "was unconstitutional because his trial counsel provided ineffective assistance by failing to locate, investigate, and bring to trial exculpatory witnesses and failing to present evidence of third-party culpability." (AA 046.) Larsen supported his petition with, among other evidence, declarations from the McNutts. (AA 183.)

1. May 2009 evidentiary hearing ("*Schlup* hearing")

The State moved to dismiss Larsen's petition, arguing that it was untimely under the federal Antiterrorism and Effective Death Penalty Act ("AEDPA"), which gave Larsen just one year to file a petition for writ of habeas corpus after his conviction became final in November 2000. (AA 046, 051.)

A federal magistrate addressed the motion to dismiss. Although the magistrate acknowledged Larsen's petition "was untimely by 2,441 days" (AA 053), the magistrate—citing *Schlup v. Delo* (1995) 513 U.S. 298 ("*Schlup*")—held "that a petitioner's sufficient showing of innocence can overcome a procedural bar" to a petition for habeas corpus. (AA 053.) Specifically, the magistrate held that, under *Schlup*, it could consider the merits of an

otherwise untimely petition for habeas corpus if Larsen showed "that a constitutional error at trial deprived the jury from considering evidence that would have established [his] innocence." (AA 053, citing *Schlup*, *supra*, 513 U.S. at p. 301.)

To that end, the magistrate held an evidentiary hearing in May 2009 to consider whether Larsen's new, exculpatory evidence was sufficient to establish his innocence under *Schlup*.

Larsen called three live witnesses at that hearing: James McNutt, Elinore McNutt, and Brian McCracken. Larsen also presented affidavits from William Hewitt and Jorji Owen, Hewitt's former girlfriend. The State did not call any witnesses at that hearing, but submitted transcripts of Townsend and Rex's trial testimony.

The magistrate summarized her factual findings from the May 2009 hearing in a report. (AA 045–AA087.)

There, the magistrate acknowledged Townsend and Rex's trial testimony that they saw Larsen pull an object consistent with a knife from his waistband and throw it under a nearby vehicle. (AA 060–065.)

But the magistrate also acknowledged the McNutts' contrary testimony that it was Hewitt—*not* Larsen—who threw that knife.

Here, the magistrate recounted Mr. McNutt's testimony that "[w]hen the police arrived, '[Hewitt] turned around, took a few steps … [and] threw an item near the vehicle parked next to [Harrison's] vehicle.'" (AA 068.) The magistrate noted Mr. McNutt's testimony that "[t]he object sounded metallic," "appeared

to be ten or twelve inches long," and "that it was 'probably' a knife." (AA 068.)

The magistrate also recounted Ms. McNutt's testimony that "[w]hen the police arrived, … [s]he saw [Hewitt] reach into his clothing and throw an object under a car." (AA 072.) Ms. McNutt testified that the object "was metal and she heard a clank and a 'skidding … noise' when [Hewitt] threw it." (AA 072.)

The magistrate also made specific findings that the McNutts were credible witnesses.

Here, the magistrate noted that the McNutts' "description of these events has remained consistent over the years," referencing the McNutts' written statements and declarations from 2001 through the May 2009 hearing. (AA 072, fn. 14.) The magistrate also referenced the fact that Mrs. McNutt "has had multiple back surgeries and suffers from fibromyalgia," which made it difficult for her to "sit[] for extended periods of time." (AA 071.) With that in mind, the magistrate specifically found that it was "unbelievable that the McNutts, despite Mrs. McNutt's medical problems that make it difficult for her to sit for an extended period of time, would travel long distances to give perjurious testimony on behalf of [Larsen], with whom they have no ties." (AA 082.) Ultimately, the magistrate described the McNutts as "two credible eyewitnesses that it was [Hewitt], not [Larsen], who threw the knife." (AA 084.)

The magistrate also addressed "the conflict in this case between the trial evidence [i.e., the officers' testimony] and the evidentiary hearing testimony [i.e., the McNutts' testimony]." (AA 079) In resolving that conflict, the magistrate made specific

findings that the McNutts were better positioned than Townsend and Rex to see who threw the knife.

First, the magistrate found that the McNutts were closer to events than the two officers. Here, the magistrate found that while the officers were "approximately **twenty-two feet** away from [Larsen]" (AA 061, boldface added), "Mr. McNutt was standing only **two feet** away from [Hewitt]" (AA 078, boldface added; see also AA 067 ["Mr. McNutt was standing approximately two feet away from [Hewitt]."] The magistrate also noted that "Mrs. McNutt was [only] slightly farther away" than Mr. McNutt. (AA 081.)

Second, the magistrate found that "Mr. and Mrs. McNutt had unobstructed views of both [Hewitt] and [Larsen], unlike Townsend and Rex." (AA 078.) Here, the magistrate found that while "[t]he McNutts had unobstructed, continuous views of [Larsen] and [Hewitt]" (AA 085), "Townsend and Rex … were looking through a chain link fence." (AA 078.) Moreover, the magistrate found that "Mr. McNutt was standing between [Larsen] and the police officers," further obstructing the officers' view. (AA 078.)

Third, the magistrate emphasized the McNutts' testimony that they recognized Hewitt from a past encounter. Specifically, Ms. McNutt testified that, a week prior to the events at the Gold Apple, Hewitt had briefly visited a home owned by a friend of her son, Harrison, where the McNutts were staying while they visited California. (AA 071.) Mr. McNutt also testified that he recognized Hewitt. (AA 067.) Given their familiarity with Hewitt, the

magistrate specifically found that the McNutts were "unlikely to confuse him with [Larsen]," (AA 081.) This stood in contrast to Townsend and Rex, neither of whom were familiar with Larsen or Hewitt. (AA 175:10–11.)

Ultimately, the magistrate found that "the McNutts were credible and persuasive witnesses" (AA 078), and that "the testimony received from the McNutts would be enough to erode the Court's confidence in the outcome of [Larsen]'s trail." (AA 083.)

Nonetheless, the magistrate also identified other exculpatory evidence in her report.

Here, the magistrate emphasized Brian McCracken's testimony that, shortly before the events in the parking lot, a man *who was not Larsen* had confronted him with a knife identical to that which the officers found in the parking lot. (AA 074–075.) The magistrate concluded that McCracken's testimony was "credible" and "provide[d] circumstantial evidence that [Larsen] was not the individual who possessed the knife." (AA 079–080.)

Ultimately, after "weighing the trial evidence with that presented at the Hearing," the magistrate concluded that she "lacks confidence in the outcome of Petitioner's trial." (AA 086.) The magistrate did not mince words: She characterized the McNutts and McCracken as "extraordinarily exculpatory witnesses" (AA 142), and that any "reasonable juror" who "heard the McNutts and McCracken testify … would have had serious doubts about Townsend and Rex's version of the events." (AA 084.)

Accordingly, the magistrate concluded that Larsen "satisfies the 'actual innocence' gateway set forth in *Schlup*" and therefore

"that the federal statute of limitations d[id] not bar the Petition." (AA 047, 086.) The district court ultimately adopted the magistrate's "findings, conclusions and recommendations," and thus denied the State's motion to dismiss. (AA 089–090.)

2. November 2009 evidentiary hearing

Having denied the State's motion to dismiss, the magistrate held a second evidentiary hearing in November 2009 "to allow presentation of evidence pertaining to [Larsen's] ineffective assistance of counsel claim." (AA 114.)

Larsen called just two witnesses: His former criminal defense attorney, Edward Consiglio, and a former federal public defender, Yasmin Cader, as an expert witness. (AA 114.)

Consiglio testified that, "before and during trial," Larsen "was adamant that he had not thrown the knife." (AA 118.) Consiglio also acknowledged that Larsen "may have told [him] that someone else had thrown the knife, possibly William Hewitt." (*Ibid.*) Nonetheless, Consiglio testified that he "made a decision to attempt to impeach the testifying officers rather than call[] any defense witnesses." (AA 117.)

Consiglio testified that Larsen first told him about the McNutts prior to sentencing. (AA 116.) Consiglio considered filing a motion for new trial on the basis of the McNutts' testimony, but ultimately chose not to because, in his view, the trial judge was biased. (*Ibid.*)

Larsen next called Yasmin Cader, a veteran public defender who had "represented clients in more than forty weapons possession cases." (AA 119.) Cader testified regarding what a

prudent defense attorney would have done in a case like Larsen's, testimony that contrasted with Consiglio's actions. (AA 118–121.)

The State called the deputy district attorney who prosecuted Larsen. (*Ibid.*) She testified that Consiglio initially advised her that "their defense was going to be that a guy named Hewitt was the one who tossed the weapon." (AA 121, internal quotation marks omitted.) She also testified that, based on her investigation, she "believed that [Larsen] and others went to the Gold Apple Bar to beat up Daniel Harrison," the McNutts' son/step-son. (AA 122.)

The magistrate related the foregoing in a report. (AA 092–151.) Citing *Strickland v. Washington* (1984) 466 U.S. 668, the magistrate noted that a claim for ineffective assistance of counsel requires both "[p]roof of deficient performance" by counsel and "[p]roof of prejudice" from that deficient performance, which itself "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial." (AA 131, internal quotation marks omitted, quoting *Strickland*, *supra*, 466 U.S. at p. 687.)

Regarding "the deficient[-]performance prong," the magistrate concluded "that [Larsen's] trial counsel rendered ineffective assistance and that the California courts incorrectly and unreasonably applied clearly established federal law in reaching a contrary result." (AA 133; see also AA 142–150.)

Regarding the prejudice prong, the magistrate observed that "demonstrating prejudice under *Strickland* requires a lesser showing than that required to pass through the *Schlup* actual innocence gateway." (AA 134.) Thus, because she "ha[d] already found that [Larsen] meets the more stringent *Schlup* test," the

magistrate stated that "it necessarily follows that he also satisfies the prejudice test under *Strickland*." (AA 134.)

"After considering all of the evidence in the record, including that presented in evidentiary *hearings*" the magistrate concluded that Larsen "clearly received ineffective assistance of counsel" and was "entitled to habeas relief." (AA 150–151, italics added.)

In June 2010—11 years after his conviction—the district court adopted the magistrate's "findings, conclusions and recommendations" and granted Larsen's petition for writ of habeas corpus. (AA 154.) The State was ordered to re-try Larsen within 90 days or release him from custody. (AA 153.)

E. Ninth Circuit appeal

Rather than release Larsen, the State appealed to the Ninth Circuit. In its appeal, the State presented two principal arguments:

First, the State argued that "the innocence exception recognized in *Schlup* was not available to excuse the untimeliness of a federal habeas petition." (*Larsen v. Soto* (9th Cir. 2014) 742 F.3d 1083, 1089, fn. 3.)

Second, the State challenged whether Larsen had, in fact, "presented compelling evidence that he is actually innocent" under *Schlup*. (*Larsen*, *supra*, 742 F.3d at p. 1086.)

The State's first argument was dead on arrival: While the appeal was pending, the U.S. Supreme Court held "that *Schlup*'s innocence exception to ordinary rules of procedural default is applicable 'when the impediment is the AEDPA's statute of

limitations.'" (*Larsen*, *supra*, 742 F.3d at p. 1089, fn. 3, quoting *McQuiggin v. Perkins* (2013) 569 U.S. 383, 384.)

Regarding the second argument, the Ninth Circuit acknowledged that "actual innocence" under *Schlup* is an "exacting standard" that "permits review only in the extraordinary case." (*Larsen*, *supra*, 742 F.3d at p. 1095, internal quotation marks omitted, quoting *Lee*, *supra*, 653 F.3d at p. 938.)

Nonetheless, the Ninth Circuit held that "Larsen has satisfied this demanding standard." (*Larsen*, *supra*, 742 F.3d at p. 1096.) As the Ninth Circuit explained, the fact "multiple credible witnesses saw a different person take the same actions that Larsen was accused of taking—throwing a metallic object under a nearby car—suggests that the police were mistaken about the identity of the person who threw the knife." (*Id.* at p. 1098.) Accordingly, the Ninth Circuit held "that Larsen has met the demanding *Schlup* standard" (*id.* at p. 1099), and affirmed the district court.

F. Larsen's release from prison

After the Ninth Circuit affirmed, the State chose not to re-try Larsen. Thus, in March 2014—over 13 years after he was incarcerated, and three years after he was granted habeas relief—Larsen was finally released from prison. (AA 187.)

G. Civil-rights action

In 2012, while the State's appeal was pending in the Ninth Circuit, Larsen brought a civil-rights suit against the City of Los Angeles, and Officers Townsend and Rex, alleging that was the target of a malicious prosecution. (AA 187.)

Townsend, Rex, Mr. McNutt, and Larsen all testified during the ensuing trial. (AA 187.) Ultimately, a jury concluded "that Larsen failed to prove, by a preponderance of the evidence, that either of the [police officers] maliciously prosecuted him or caused the malicious prosecution of him." (AA 190, internal quotation marks omitted.)

H. Federal motion for "finding of innocence"

In November 2015, Larsen filed a "Motion for Finding of Innocence" with the same federal court that had granted him habeas-corpus relief. Larsen's motion asked the court to "find by a preponderance of the evidence that [he] is actually innocent of his June 23, 1999 conviction for possession of a dagger." (6 CALVCB 4354.)

The State opposed that motion on procedural grounds, arguing that the court did not have "jurisdiction to entertain such a proceeding or grant the requested relief" nor "any authority ... to reopen the case." (6 CALVCB 4169.) Accordingly, the State argued that "Larsen's motion is constitutionally barred." (6 CALVB 4171.)

The federal magistrate agreed with the State: Noting that "[f]ederal courts are courts of limited jurisdiction," the magistrate agreed that it lacked jurisdiction to entertain Larsen's motion. (6 CALVCB 4360–4361.)

I. Board compensation claim

In September 2014, Larsen filed a claim with the Board, seeking "compensation as a wrongfully convicted person." (AA 191.)

The Board issued a proposed decision on October 24, 2016. (AA 162–175.) In it, the Board expressly stated "that the federal court's factual findings were not binding because no court had affirmatively found Larsen to be actually innocent." (AA 192.) Accordingly, the Board conducted a de novo review of "all of the evidence" (AA 192), and ultimately concluded that "Larsen has failed to meet his burden to prove by a preponderance of the evidence he did not commit the crime with which he was charged and convicted." (AA 175.)

Before the Board's proposed decision became final, this Court decided *Madrigal v. California Victim Compensation & Government Claims Board* (2016) 6 Cal.App.5th 1108. In *Madrigal*, this Court concluded that a district court's findings during "contested habeas corpus (and other postconviction relief proceedings)" are binding on the Board even if the proceedings "did not result in findings of actual innocence." (*Id.* at p. 1117.)

Following *Madrigal*, the Board retracted its proposed decision and replaced it with a new "Post-*Madrigal*" proposed decision. (AA 178–207.)

As before, the Board rejected Larsen's argument that the magistrate's finding he was "actually innocent" under *Schlup* was itself sufficient "to trigger an automatic recommendation for compensation under ... Penal Code section 1485.55." (AA 198.)

Moreover, although the Board acknowledged that, under *Madrigal*, it "is bound by the federal court's factual findings when granting a habeas petition, even if those findings do not establish actual innocence" (AA 197) the Board read *Madrigal* narrowly: In

the Board's view, "the binding determinations" under *Madrigal* "applie[d] solely to the federal court's findings in support of habeas relief and not to any other proceeding." (AA 200.) Thus, in the Board's view, "the factual findings by the magistrate judge when ruling on the statute of limitations defense under *Schlup* does [*sic*] not bind CalVCB." (AA 200.)

Accordingly, the Board set aside the magistrate's findings that the McNutts "both 'had unobstructed views of [Hewitt] and [Larsen]; unlike Townsend and Rex,'" and "that Mr. McNutt 'was standing only two feet away from [Hewitt] when [Hewitt] threw the object." (AA 201, brackets in original.)

Having disregarded the magistrate's findings that the McNutts had a better view of the events at issue than the officers, the Board indicated that, in its view, "that the officers were equally or even more persuasive" witnesses than the McNutts. (AA 201.) Accordingly, the Board once again concluded that Larsen "failed to prove by a preponderance of the evidence that he is innocent." (AA 197.) The Board's proposed decision became final in August 2017. (AA 178.)

J. Petition for writ of mandate in superior court

Larsen challenged the Board's decision by petition for writ of mandate in superior court. (AA 006.)

First, Larsen renewed his argument that the magistrate's finding that he was "actually innocent" under *Schlup* was tantamount to a finding he was "factually innocent," and therefore that he was entitled to automatic compensation under Penal Code section 1485.55. (AA 037–040.)

Second, Larsen argued that, even if he had to re-establish his innocence before the Board, the Board nonetheless "misapplied the law when it determined … it was not bound by the factual findings and credibility determinations rendered by the District Court." (AA 020.) Here, Larsen emphasized the magistrate's findings that the McNutts "had a clear and unobstructed view of both Hewitt and Larsen … throughout the incident." (AA 033.)

Third, Larsen also argued that the Board improperly "relied on evidence that was unsupported by the record and contrary to the factual findings and credibility determinations rendered by the District Court." (*Ibid.*)

The superior court did not address Larsen's argument that the Board erred in failing to find that he was automatically entitled to compensation under section 1485.55 in light of the magistrate's finding that he was "actually innocent" under *Schlup*.

The court also did not address Larsen's argument that the Board decision "was unsupported by the record and contrary to the factual findings and credibility determinations rendered by the District Court." (AA 033.)

The court *did* address Larsen's argument that the superior "erred when it concluded that it was not bound by the district court's factual findings and credibility determinations set forth in its *Schlup* hearing decision." (AA 369.) The superior court actually agreed with Larsen on that point, but nonetheless affirmed the Board's decision because, in the court's view, the decision was supported by "substantial evidence." (AA 372.)

The superior court entered judgment against Larsen. (AA 373.) This appeal followed.

STATEMENT OF APPEALABILITY

The judgment denying Larsen's petition for writ of mandate (AA 373–374) is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1).

Larsen's appeal was timely under Rule 8.104(a)(1) of the California Rules of Court: The judgment was entered on **March 24, 2019** (AA 373), and Larsen filed a notice of appeal less than 60 days later on **May 21, 2019.** (AA 378.)

STANDARD OF REVIEW

An agency's decision must be reversed if it is shown that it engaged in a "prejudicial abuse of discretion." (Code of Civ. Proc., § 1094.5, subd. (b).)

A "prejudicial abuse of discretion" is "established" where the agency "has not proceeded in the manner required by law." (*Ibid.*)

Whether an agency "has not proceeded in the manner required by law," is a question of law subject to de novo review, particularly where—as here—it involves questions of statutory interpretation. (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1113.)

ARGUMENT

The balance of this brief addresses three discrete arguments, any one of which warrants reversal of the Board's decision.

Part A explains that Larsen was automatically entitled to compensation under California law in light of the magistrate's determination that Larsen was "actually innocent" under *Schlup*. The Board's failure to recognize this fact was an abuse of discretion that warrants reversal.

Part B explains that, at a minimum, the Board abused its discretion when it refused to be bound by the factual findings supporting the magistrate's conclusion that Larsen was actually innocent under *Schlup*. These so-called "*Schlup* findings" were binding on the Board under California law, and the Board's failure to treat them as such warrants reversal.

Part C explains that the Board abused its discretion in at least **eight** other ways independent of the Board's mishandling of the magistrate's *Schlup* findings. While any one of those errors could independently warrant reversal, they certainly warrant reversal in the aggregate.

A. Larsen is automatically entitled to compensation in light of the magistrate's finding that he is "actually innocent" under *Schlup*.[2]

Under Penal Code section 1485.55, if after "a contested proceeding," a "court has granted a writ of habeas corpus," and "has found that the person is factually innocent," then "the [B]oard shall, *without a hearing*, recommend to the Legislature that an appropriation be made and the claim paid." (Pen. Code, § 1485.55, subd. (a).)

Thus, under section 1485.55, petitioners who meet the following three-element test are entitled to automatic compensation *without* a Board hearing:

- First, a court must have granted a writ of habeas corpus;
- Second, the same court must have found that the person is "factually innocent"; and
- Third, the proceedings had to be contested.

Here, there is no dispute a court granted Larsen's petition for a writ of habeas corpus. Nor is there any dispute that the habeas-related proceedings—including the *Schlup* hearing—were contested. The only question, then, is whether the court's finding that Larsen was "actually innocent" under *Schlup* qualifies as a finding that Larsen is "factually innocent" under section 1485.55.

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[2] This identical issue is currently pending before Division Four of this Court in *Souliotes v. California Victim Compensation Board* (No. B2955163). Much of the content in this section is derived from the Appellant's Opening Brief in that case.

There are at least three reasons to conclude that a *Schlup* "actual innocence" finding qualifies as a finding of "factual innocence" under section 1485.55.

First, a *Schlup* determination is undoubtedly a substantive, evidentiary finding that the petitioner is "innocent" in a factual sense.

As *Schlup* itself explained, its exception was designed to permit a court to hear an otherwise time-barred petition for writ of habeas corpus in cases in which "a constitutional violation has probably resulted in the conviction of one who is *actually innocent*." (*Schlup*, *supra*, 513 U.S. at p. 327, italics added, internal quotation marks omitted.)

To that end, *Schlup* requires a court "to evaluate independently all of the evidence, old and new, to determine whether that evidence may show that the petitioner is *factually innocent*." (*Doe v. Menefee* (2d Cir. 2004) 391 F.3d 147, 163.) Thus, "the Supreme Court has made clear that the term 'actual innocence' means factual, as opposed to legal, innocence." (*Johnson v. Hargett* (5th Cir. 1992) 978 F.2d 855, 859–860; see also *Bousley v. United States* (1998) 523 U.S. 614, 623 [holding that "'actual innocence'" under *Schlup* "means factual innocence'"]; *Fairman v. Anderson* (5th Cir. 1999) 188 F.3d 635, 644 [holding that *Schlup* "is confined to cases of actual innocence, where the petitioner shows, as a factual matter, that he did not commit the crime of conviction"].)

Notably, the federal courts conducting a *Schlup* analysis do not use the phrase "actual innocence" loosely. To the contrary,

"actual innocence" under *Schlup* is, as the name suggests, an "exacting," "demanding standard" that "permits review only in the extraordinary case." (*Larsen*, *supra*, 742 F.3d at p. 1095, internal quotation marks omitted, quoting *Lee*, *supra*, 653 F.3d at p. 938.)

Second, when viewed in context, the recent amendment to section 1485.55 suggests that the California Legislature intended to include *Schlup* "actual innocence" findings among the factual findings of innocence that qualify for automatic compensation.

Under the old version of section 1485.55, a petitioner was not entitled to automatic compensation absent evidence that pointed "unerringly to innocence." (Stats. 2013, ch. 800, § 3.) But in 2016, section 1485.55 was amended so that, instead of evidence that "points unerringly to innocence," it now requires a habeas court to find the petitioner "factually innocent" in order to qualify for automatic compensation.

The most logical inference from this change is that the California Legislature amended section 1485.55 specifically because it wanted to include innocence findings like *Schlup* actual/factual innocence findings. Any contrary conclusion would require one to assume that, in amending section 1485.55, the California Legislature inadvertently used a term of art ("factually innocent") that has a well-established meaning in the federal habeas context.

But elementary rules of statutory construction actually require the opposite conclusion—that the Legislature chose the phrase "factually innocent" with federal caselaw in mind. For one, the Legislature is presumptively "aware of existing judicial

decisions directly bearing on the legislation it enacted." (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1135.) Moreover, when the Legislature makes changes to a statute, it is presumed those changes had a purpose. (*Timers Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1324, 1337, internal quotation marks omitted.)

Third, the purpose behind the compensation statutes further supports the conclusion that a *Schlup* actual innocence finding qualifies for automatic compensation.

As this Court observed in *Madrigal*, the purpose behind the amendments to the compensation statutes was "to streamline the compensation process and ensure consistency between the Board's compensation determination and earlier court proceedings related to the validity of the prisoner's conviction." (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1118, italics added.)

Obviously, it is difficult to think of a proceeding more directly "related to the validity of the prisoner's conviction" than a *Schlup* hearing, in which a court "evaluate[s] independently all of the evidence, old and new, to determine whether that evidence may show that the petitioner is *factually innocent*." (*Menefee*, *supra*, 391 F.3d at p. 163, italics added.) [3]

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[3] The Texas Supreme Court's decision in *In re Allen* (Tex. 2012) 366 S.W.3d 696, supports this conclusion. Like California, Texas's compensation statute automatically awards compensation to individuals who, in the course of securing habeas relief, obtain "a court finding ... that the person is actually innocent of the crime for which the person was sentenced." (Tex. Civ. Prac. & Rem. Code, § 103.001(a)(2)(B).) In *Allen*, the Texas Supreme Court held that *Schlup* "actual innocence" findings were sufficient to trigger automatic compensation under Texas's version of section 1485.55. (*Allen*, *supra*, 366 S.W.3d at p. 707.)

B. The Board abused its discretion by refusing to be bound by the magistrate's *Schlup* findings.

If the magistrate's *Schlup* finding does not entitle Larsen to automatic compensation, at a minimum the *factual findings* underlying the magistrate's *Schlup* "actual innocence" finding were nonetheless binding on the Board.

Indeed, California law states that "factual findings made by [a] court ... in considering a petition for habeas corpus … shall be binding on … the Board." (Pen. Code, § 1585.5, subd. (c); see also Pen. Code, § 4903, subd. (b) ["In a hearing before the [B]oard, the factual findings and credibility determinations establishing the court's basis for granting a writ of habeas corpus … shall be binding on the … [B]oard."].)

Despite that clear directive, the Board stated that it was *not* bound by the magistrate's *Schlup* findings. (See AA 200 ["[T]he factual findings by the magistrate judge when ruling on the statute of limitations defense under *Schlup* do not bind CalVCB."].)

But as discussed below, *Schlup* findings are binding on the Board as a categorical matter under the logic of this Court's decision in *Madrigal*, *supra*, 6 Cal.App.5th 1108, and the letter and spirit of the governing statutes. Moreover, as the superior court found below, the *Schlup* findings in this particular case were binding under even a narrow reading of the governing statutes given that the magistrate expressly incorporated them by reference as a basis for granting Larsen habeas relief.

Ultimately, the Board's refusal to be bound by the magistrate's *Schlup* findings was an "abuse of discretion" that warrants reversal.

1. The Board abused its discretion by refusing to be bound by the magistrate's *Schlup* findings.

a. *Schlup* findings are binding on the Board as a general matter.[4]

The Board's refusal to be bound by the magistrate's *Schlup* factual findings was wrong for at least three reasons.

First, treating *Schlup* factual findings as nonbinding would turn this Court's decision in *Madrigal* on its head.

Madrigal involved a timely "habeas corpus petition due to ineffective assistance of counsel." (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1111.) Under *Strickland*, *supra*, 466 U.S. 668, an incarcerated person pursuing a timely federal habeas petition for ineffective assistance of counsel "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." (*Id.* at p. 693.) Instead, such a petitioner can secure habeas relief merely by showing "that a different result was reasonably probable if there had been effective assistance of counsel." (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1119.)

Because a finding that "a different result was reasonably probable" is not a finding of actual innocence, in *Madrigal* the Board concluded that such findings were not binding. (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1119.)

This Court disagreed, and held that the Board was bound by *any* factual findings made during "court proceedings *related to the*

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[4] This issue is also squarely before Division Four of this Court in *Souliotes v. California Victim Compensation Board* (No. B295163.).

validity of the prisoner's conviction." (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1118, italics added.) In this Court's view, a *Strickland* finding that "a different result was reasonably probable" was sufficiently "related to the validity of the prisoner's conviction" that the factual findings supporting that conclusion were binding on the Board. (*Ibid.*)

But as the magistrate here observed, "demonstrating prejudice under *Strickland* requires a lesser showing than that required to pass through the *Schlup* actual innocence gateway." (AA 134.) Under *Strickland*, the petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case" (*Strickland*, *supra*, 466 U.S. at p. 693), while under *Schlup* a petitioner must show "that it is more likely than not that no reasonable juror would have convicted him." (*Larsen*, *supra*, 742 F.3d at p. 1095, internal quotation marks omitted, quoting *Lee v. Lempert* (9th Cir. 2011) 653 F.3d 929, 932.)

Thus, on the spectrum of "court proceedings related to the validity of the prisoner's conviction" (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1118), a federal court's *Schlup* findings are actually *more probative* of a petitioner's innocence than *Strickland* findings. (See *Schlup*, *supra*, 513 U.S. at p. 327 [holding that "the petitioner is required to make a stronger showing than that needed to establish prejudice"]; see also AA 134, citing *Murden v. Artuz* (2d Cir. 2007) 497 F.3d 178, 184; *United States v. Pierson* (7th Cir. 2001) 267 F.3d 544, 552; *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 486, fn. 7 (dis. opn. of Kozinski, J.).)

Accordingly, if *Strickland* findings are binding on the theory that they sufficiently "relate[] to the validity of a prisoner's conviction" as this Court held in *Madrigal*, then it follows that *Schlup* findings should be entitled to at least as much weight, not *less*. And yet, the Board's approach—in which *Strickland* findings are binding but *Schlup* findings are not—does just the opposite.

Second, treating *Schlup* findings as nonbinding would be at odds with the text of the governing statutes.

Instructive here is Penal Code section 1585.5, which provides that factual findings a district court makes "*in considering a petition for habeas corpus*" are binding on the Board. (Pen. Code, § 1585.5, subd. (c), emphasis added.) The phrase "in considering a petition for habeas corpus" is broad language. And plainly read, it includes factual findings a federal court makes in considering whether it will entertain an otherwise time-barred petition for writ of habeas corpus.

Also instructive is Penal Code section 4903, which provides that "factual findings … establishing the court's basis for granting a writ of habeas corpus" are binding on the Board. (Pen. Code, § 4903, subd. (b), emphasis added.) This is also broad language. And plainly read, it likewise includes situations in which a federal court's basis for granting an untimely petition for habeas relief depends on a threshold "actual innocence" finding under *Schlup*.

Ultimately, as stepping-stones on the path to habeas relief, *Schlup* factual findings fall squarely within the broad language of the governing statutes.

Third, treating *Schlup* findings as nonbinding would also run counter to the purpose behind the governing statutes.

As this Court explained in *Madrigal*, a predicate assumption for the drafters of sections 1485.5 and 4903 was that "[a]ll material factual findings from the habeas proceeding would be binding on the board." (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1118, quoting Sen. Com on Public Safety, Analysis of Sen. Bill No. 618 (2013-2014 Reg Sess.), as amended April 15, 2013, p. 11.) But again, it is difficult to think of factual findings more "material" in this context than findings a federal court made in the course of independently reviewing "all of the evidence, old and new, to determine whether that evidence may show that the petitioner is *factually innocent*." (*Menefee*, *supra*, 391 F.3d 147, 163.)

Moreover, *Madrigal* emphasized that the Legislature enacted sections 1485.5 and 4903 "to streamline the compensation process and ensure consistency between the Board's compensation determination and earlier court proceedings related to the validity of the prisoner's conviction." (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1118.)

But rather than achieve consistency between "earlier court proceedings" and "the Board's compensation determination" that the Legislature sought by enacting sections 1585.5 and 4903, treating *Schlup* findings as nonbinding would foster *inconsistency* between those proceedings. This case illustrates that point:

As part of its *Schlup* inquiry, the magistrate made specific findings that the McNutts' testimony was more reliable than that of the officers. These findings included the fact that, unlike the

officers, the McNutts were both close to, and had unobstructed views of, the events at issue. (AA 067, 078, 081, 085.) Thus, after "weighing the trial evidence with that presented at the Hearing" (AA 086), the magistrate concluded that "a reasonable juror" who heard the McNutts' "extraordinarily exculpatory'" testimony (AA 142) "would have had serious doubts about Townsend and Rex's version of the events." (AA 084.)

By contrast, the Board—by categorially rejecting the magistrate's *Schlup* findings (AA 200–201)—believed "the officers were equally or even more persuasive" witnesses than the McNutts (AA 201), and ultimately concluded that "the weight of the evidence strongly suggests that Larsen is guilty." (AA 205.) This is precisely the inconsistency the Legislature sought to avoid when it enacted sections 1585.5 and 4903.

b. The *Schlup* findings were the basis for granting Larsen habeas relief.

The foregoing established that, as a matter of law, findings made during a *Schlup* "actual innocence" hearing are binding on the Board in a subsequent compensation proceeding under the broad language of Penal Code sections 1585.5 and 4903.

But even if this Court has misgivings about that premise as a general matter, there is no question that the *Schlup* findings in *this particular case* were binding on the Board. This is because the the *Schlup* findings were expressly referenced as the basis for granting Larsen habeas relief.

Indeed, the magistrate's April 2010 decision expressly referenced many of the salient facts from the *Schlup* hearing,

including the fact that "Townsend was approximately twenty-two feet away from [Larsen]," and was looking through "[a] chain-link fence" (AA 098), whereas "Mr. McNutt was standing approximately two-feet away from Hewitt." (AA 105.) As such, the Board's refusal to treat those facts as binding was erroneous even under its own narrow interpretation of the governing statutes.

More generally, *all* of the magistrate's *Schlup* findings are binding on the Board because the magistrate broadly incorporated those findings as the basis for her finding that Larsen was prejudiced by his counsel's ineffective assistance and was therefore entitled to habeas-corpus relief.

Indeed, the portion of the magistrate's April 2010 order addressing the "prejudice" element for habeas relief was titled, "The Court's prior determination that Petitioner satisfied the *Schlup* actual innocence standard also establishes the prejudice prong of the *Strickland* analysis." (AA 134, some capitalization omitted.)

And, in that portion of her order, the magistrate explained that "demonstrating prejudice under *Strickland* requires a lesser showing than that required to pass through the *Schlup* actual innocence gateway." (AA 134.) Thus, because the magistrate "ha[d] already found that [Larsen] meets the more stringent *Schlup* test," the magistrate summarily concluded that "it necessarily follows that he also satisfies the prejudice test under *Strickland*." (AA 134.) Accordingly, rather than repeat all of the findings supporting the magistrate's prior conclusion that Larsen satisfied the *Schlup* test, the magistrate simply stated that "[Larsen] has already

demonstrated prejudice under the *Strickland* standard," and cited her report pertaining to the *Schlup* hearing. (AA 136.)

Finally, the magistrate concluded her report by expressly noting that her ultimate conclusion that Larsen "clearly received ineffective assistance of counsel," and therefore that his "conviction violated the Sixth Amendment," was based on "all of the evidence in the record, including that presented in evidentiary *hearings*." (AA 150, italics added.)

As the superior court recognized, by "bas[ing] its ineffective assistance of counsel finding of prejudice on its earlier *Schlup* decision," this aspect of the magistrate's April 2010 order was "effectively an incorporation by reference of the ... court's *Schlup* hearing decision." (AA 369.) Accordingly, even the superior court acknowledged that "the Board was bound by the *Schlup* hearing findings" and therefore that "the Board erred when it concluded that it was not bound by the district court's factual findings and credibility determinations set forth in its *Schlup* hearing decision on the [State]'s motion to dismiss." (*Ibid.*)

2. The Board's refusal to be bound by the *Schlup* findings requires reversal.

An agency abuses its discretion when it "did not proceed[] in the manner required by law." (*Lamar Advertising Company v. County of Los Angeles* (2018) 22 Cal.App.5th 1294, 1300.)

Here, as just discussed, the magistrate's *Schlup* findings were *binding* on the Board, whether because *Schlup* findings are binding as a *categorical* matter, or because they were expressly cited as a basis for granting habeas relief in this case.

Thus, the Board abused its discretion when it asserted that "the factual findings by the magistrate judge when ruling on the statute of limitations defense under *Schlup* do not bind CalVCB." (AA 200.)

Although the superior court agreed that the Board abused its discretion by disregarding the magistrate's *Schlup* findings (AA 369), it nonetheless refused to reverse the Board's decision because, in the court's view, those findings did not prejudice the outcome. (AA 370–371.) In drawing *that* conclusion, the superior court stated that there was "substantial evidence" to support the Board's conclusion that Larsen was guilty. (AA 371.)

There are at least three problems with the superior court's analysis in this regard.

a. The superior court fundamentally misapplied the standards for abuse of discretion.

Although it acknowledged that the Board erred when it rejected the magistrate's *Schlup* findings, the superior court disregarded that fact because Larsen did not *also* show that the Board's resulting decision lacked "substantial evidence."

But under Code of Civil Procedure section 1094.5, a failure to "proceed[] in the manner required by law" and "findings [that] are not supported by substantial evidence," are *alternative* bases for establishing an abuse of discretion that warrants reversal of an agency decision.

This is clear from the text of section 1094.5, which lists these in *different subdivisions* as alternative avenues for establishing an abuse of discretion:

- Under subdivision (b), an "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law[.]"].

- Alternatively, under subdivision (c), "[a]buse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

For that reason, courts recognize that "[a]buse of discretion is shown if (1) the agency has not proceeded in a manner required by law, *or* (2) the determination is not supported by substantial evidence." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375, italics added.) Here, the superior court plainly erred by requiring Larsen to establish *both*.

b. Larsen was not required to show that the Board's abuse of discretion altered the outcome.

The superior court also erred in its predicate assumption that Larsen had to show he was "prejudiced" by the Board's abuse of discretion in order to vacate the Board's decision.

But although Code of Civil Procedure section 1094.5 speaks to a "prejudicial abuse of discretion," caselaw teaches that "[a] prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law." (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.) This is because "prejudice is presumed" when an agency "fails to comply with mandatory procedures." (*Joy Road Area Forest & Watershed Assn. v. California Department of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656, 673.)

Thus, the mere fact the Board violated California law by refusing the magistrate's *Schlup* findings is *itself* a basis to vacate the Board's decision; no "additional" showing of prejudice is required.

Madrigal is proof of this concept: This Court made absolutely no effort to determine whether the Board's refusal to be bound by a federal court's factual findings affected the outcome in that case. Instead, this Court left it for the Board to determine on remand "the precise effect of those findings in light of other evidence." (*Madrigal*, *supra*, 6 Cal.App.5th at p. 1119, italics added.)

c. The Board's refusal to be bound by the magistrate's *Schlup* findings was outcome determinative.

Even if Larsen had to show that he was prejudiced by the Board's refusal to be bound by the magistrate *Schlup* findings, he has done so.

The Board's central thesis was that "a finding of credibility does not equal accuracy." (AA 200.) Thus, the Board concluded that "[s]imply because the McNutts credibly testified that they saw Hewitt and not Larsen throw an object does not preclude CalVCB from determining that the McNutts may have been mistaken." (AA 200.)

But the magistrate's *Schlup* findings went far beyond finding that the McNutts were *credible*. The magistrate also made specific findings that the McNutts were, in fact, *more reliable witnesses* than the officers:

- First, the magistrate found *the McNutts were closer to the events than the officers*. Specifically, while the officers were "twenty-two feet away," Mr. McNutt "was standing only two feet away," and Mrs. McNutt "was [only] slightly farther away" than him. (AA 061, 078, 081.)

- Second, the magistrate found *the McNutts had a better view of the* events than the officers. Specifically, while "[t]he McNutts had unobstructed, continuous views" of events, "Townsend and Rex … were looking through a chain link fence," and were further obstructed by Mr. McNutt himself, who "was standing between [Larsen] and the police officers." (AA 078, 085.)

- Third, the magistrate found *the McNutts were less likely to be confused* than the officers. Specifically, whereas the officers were unfamiliar Larsen or Hewitt, the McNutts recognized Hewitt, a fact that made them "unlikely to confuse him with [Larsen]." (AA 081, 175:10–11.)

Any neutral party asked to resolve a conflict between "two equally credible witnesses providing varying accounts of an event" (AA 371), would break that tie in favor of witnesses who were much closer to, and had an unobstructed view of, the events at issue (i.e., the McNutts), over witnesses who were much farther away and whose view was obstructed (i.e., Townsend and Rex).

Not coincidentally, these were the very findings the Board disregarded on the theory that it was not bound by the magistrate's *Schlup* findings: "CalVCB is not bound by the magistrate judge's findings when ruling on *Schlup* that the McNutts … both 'had unobstructed views of [Hewitt] and [Larsen];

unlike Townsend and Rex,'" and "that Mr. McNutt 'was standing only two feet away from [Hewitt] when [Hewitt] threw the object." (AA 201, brackets in original.)

In short, the very observation by the Board that "credibility does not equal accuracy" (AA 200) is precisely why the Board's refusal to be bound by the *Schlup* findings was prejudicial to Larsen: The *Schlup* findings went beyond merely establishing the McNutts' credibility, and included factual findings that support the conclusion the McNutts' perception of events was more reliable than that of the officers. In view of those findings, it would have been entirely *unreasonable* for the Board to conclude "that the officers were equally or even more persuasive" eyewitnesses compared to the McNutts. (AA 201.)

C. The Board's decision contains at least eight errors independent of *Schlup*.

The Board's mishandling of the magistrate's *Schlup* findings was not its only error. In fact, the Board abused its discretion in at least **eight** other ways. Although any one of those errors should warrant reversal alone, they certainly do in the aggregate.

1. The Board questioned the magistrate's finding that the McNutts were credible.

In the Board's view, the magistrate's combined 101 pages of reports yielded just *two* binding findings. One was "the magistrate judge's factual determination … that 'the McNutts were credible and persuasive witnesses.'" (AA 200.) (Larsen will discuss the other in a moment.)

But rather than honor the magistrate's finding that the McNutts were "credible," the Board in fact questioned that finding. It did so on the basis of evidence that "Larsen ran in the same social circles as … the McNutts' sons." (AA 202.)

Here, the Board refers to the fact that, when these events took place, the McNutts were staying at home a friend of the McNutts' other son/step-son (and Daniel Harrison's brother) "Alfred." (AA 188.) According to the Board, prison records showed that "Alfred was a documented Neo-Nazi gang member." (AA 191.)

Because Larsen was himself a member of a Neo-Nazi gang, the Board suggested this evidence might show that "Larsen ran in the same social circles as … the McNutts' sons, and the McNutts' landlord, and, therefore, that any of these persons may have had a motive to lie on Larsen's behalf." (AA 203.)

But neither the "McNutts' sons" nor their "landlord" testified at any of the proceedings in this case. Thus, the Board's claim that they might have had a "motive to lie on Larsen's behalf" was only worth mentioning because, in the Board's view, it meant the *McNutts* might have had a "motive to lie on Larsen's behalf."

Why would the Board even indulge in the possibility that the McNutts might have a motive to lie if, in fact, the Board was bound by the magistrate's finding that the McNutts were *credible*?

The Board did so on the assumption that, when it granted Larsen's habeas relief, the magistrate was unaware that Larsen and the McNutts' "social circles" might have overlapped. (AA 185, fn. 10.)

But, in fact, the magistrate was well aware of any "overlap." Indeed, both Mrs. McNutt and Mr. McNutt specifically testified that they were familiar with Hewitt, Larsen's companion at the Gold Apple. (AA 067, 071.) As the McNutts' testified, Hewitt had come by the house where they were staying—i.e., the house owned by Alfred's friend—about a week before the events at the Gold Apple. (AA 067, 071.)

Ostensibly, the reason the magistrate was not troubled by that fact was because, whatever "social" overlap there was between Larsen and the McNutts' sons, it was—at least by June 1998—clearly not friendly. Indeed, the very deputy district attorney who prosecuted Larsen told the magistrate, under oath that, based on her investigation, she "believed that [Larsen] and others went to the Gold Apple Bar to beat up Daniel Harrison" (i.e., the McNutts' son/step-son and Alfred's brother). (AA 122.) Thus, far from having

a "motive to lie on Larsen's behalf," the McNutts actually had reason to believe Larsen wanted to harm their son/step-son, Daniel Harrison.

In short, the evidence the Board used to question the magistrate's credibility finding was neither new nor did it undermine the McNutt's credibility. The Board thus abused its discretion when it refused to actually recognize the magistrate's finding that the McNutts were credible witnesses.

2. The Board ignored Brian McCracken's testimony.

Aside from the magistrate's "factual determination … that 'the McNutts were credible" (AA 200), the *only* other finding the Board regarded as binding was the magistrate's finding that "McCracken truthfully testified that someone besides Larsen held a knife to his throat earlier that night." (AA 203.)

Even so, the Board ignored that evidence because, in the Board's view, McCracken's testimony "still does not preclude CalVCB from inferring that Larsen possessed" the knife in the parking lot. (AA 201.) Here, the Board speculated that Larsen might have had "a different knife, or possibly even the same one, later that evening while standing in the parking lot." (*Ibid*.)

There are several problems with the Board's response to McCracken's testimony.

First, the magistrate specifically found that McCracken's testimony "provide[d] circumstantial evidence that [Larsen] was not the individual who possessed the knife" (AA 079) and thus "cast doubt on whether [Larsen] was the person with the knife." (AA 080.) The Board was thus bound to give weight to McCracken's

testimony in resolving the conflict between the officers' and McNutts' version of events.

Second, the Board abused its discretion by "inferring that Larsen possessed a different knife, or possibly even the same one, later that evening while standing in the parking lot." (AA 201.) While the Board can draw inferences, it cannot "draw inferences from thin air." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 484.) And here, the *only* "evidence" to support either "inference" is that one of them would need to be true in order to square McCracken's testimony with the officers' claim that they saw Larsen throw an identical knife.

But the mere fact the Board can imagine ways in which it was *possible* for McCracken and the officers' testimony to both be true does not justify ignoring testimony that, to any reasonable juror, would provide "circumstantial evidence that [Larsen] was not the individual who possessed the knife" and thus "cast doubt on" the officers' narrative. (AA 079–080.)

The Board's failure to place any weight on McCracken's testimony is made worse by the fact that McCracken's description of his assailant matches the Board's own description of Hewitt. (Compare AA 075 ["Hewitt described the man in the bar with the knife as having a medium build and short brown hair."], with (AA 204, n.61 [Board describing Hewitt as "5 feet and 9 inches tall, 140 pounds, with ... brown hair."].)

Third, the Board's approach to McCracken's testimony is perhaps the most tell-tale indication that the Board applied the wrong standard in reviewing Larsen's claim.

Notable here is the Board's phrasing: The Board emphasized that McCracken's testimony "*does not preclude* CALVCB from inferring" Larsen is guilty. (AA 201, italics added.) Elsewhere, the Board emphasized that "it was *still possible* for Larsen to have thrown the knife in the manner described by Officer Rex and Officer Townsend" despite all the "binding factual findings." (AA 203, italics added.)

But contrary to the Board's apparent belief, its task was not to determine whether "it was *still possible*" for Larsen to have possessed the knife. (AA 203, italics added.) Rather, the Board's task was to determine which version of events was *more likely* in light of the evidence.

The Board's approach to McCracken in particular, coupled with its "still possible" language, suggests that it applied the wrong standard: Rather than assess whether Larsen established his likely innocence by a preponderance of the evidence, it appears the Board actually required Larsen to establish his innocence *beyond all reasonable doubt*. This, too, was an abuse of discretion. (Code. Civ. Proc., § 1094.5, subd. (b) [failure to "proceed[] in the manner required by law" is an independent abuse of discretion].)

3. The Board ignored forensic evidence the knife was not Larsen's.

The Board also failed to take into account the inconsistency between the officers' claim that Larsen kept a long, "extremely sharp" knife tucked in his waistband (AA 062), and the Board's finding that "[a] sheath was not discovered in Larsen's possession,

and Larsen's clothing did not appear to have any tears from the sharp knife." (AA 182.)

Of course, had Larsen's clothes showed damage consistent with a sharp knife, the Board would have seized upon that evidence as powerful corroboration of the officers' testimony. The Board cannot ignore the *absence* of any such marks simply because, to the Board's chagrin, it corroborates the wrong witnesses.

4. The Board drew improper inferences from the jury verdict in Larsen's civil-rights action.

In denying Larsen's claim, the Board placed heavy emphasis on the jury verdict in Larsen's civil-rights case against Townsend and Rex. The Board emphasized that this jury was the only one "to hear live witness testimony from Mr. McNutt and Officers Rex and Townsend" and it "unanimously ruled in favor of the officers." (AA 205.) On the theory that "the officers' credibility was necessarily an important factor in reaching the verdict" (AA 205), the Board concluded that "the jury's verdict in the civil rights litigation reflects an adverse finding of Mr. McNutt's credibility." (AA 201.)

But the Board was not free to draw inferences about the McNutts' credibility. Again, the Board was bound by the magistrate's finding that the McNutts were *credible*. (AA 200.)

Moreover, the jury's verdict does not "necessarily" reflect an adverse finding of Mr. McNutt's credibility. As the Board acknowledged, Larsen's civil-rights action alleged that Townsend and Rex *maliciously* caused him to be prosecuted. (AA 190.) Thus,

all the verdict reflects is the jury's belief that the officers did not "maliciously" arrest Larsen. (*Ibid*., italics added.)

Thus, it is entirely possible the jury believed Townsend and Rex were wrong, but had simply made an honest mistake. Indeed, as the magistrate explained, "The jury may not have concluded that Townsend and Rex were lying on the stand, but had the jury heard the McNutts and McCracken testify, a reasonable juror would have had serious doubts about Townsend and Rex's version of the events." (AA 084.)

Because the civil-rights jury could have reached the same verdict even if it believed the McNutts, the Board abused its discretion in assuming that the verdict "reflects an adverse finding of Mr. McNutt's credibility." (AA 201.) "If it appears that the facts and circumstances from which a conclusion is sought to be deduced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for." (*San Joaquin Grocery Co. v. Trewhitt* (1926) 80 Cal.App. 371, 375–376, quoting *Neal v. Chicago, R.I. & P.R. Co.* (Iowa 1905) 105 N.W. 197, 199.)

5. The Board placed undue weight on the officers' absence from the habeas hearings.

The Board appeared to tacitly concede that the magistrate viewed the McNutts as more persuasive than the officers, but the Board ultimately rejected that conclusion because "the officers never appeared before the magistrate judge, and, therefore, no such comparative assessment was possible." (AA 201.)

Accordingly, the Board believed that it was free to cast aside the magistrate's impressions of the relative strengths of the witnesses' testimony and reach a de novo conclusion "that the officers were equally or even more persuasive." (AA 201.)

First, the absence of live testimony from the officers during Larsen's habeas proceedings was the State's choice, not Larsen's. Accordingly, any doubts created by the State's failure to produce the officers should be resolved against the State, not Larsen.

Second, while it's true that the lack of live testimony from the officers might have hampered the magistrate's ability to judge their credibility, that point is moot here because, again, the magistrate took for granted that the officers testified truthfully. (AA 084 ["The jury may not have concluded that Townsend and Rex were lying on the stand, but had the jury heard the McNutts and McCracken testify, a reasonable juror would have had serious doubts about Townsend and Rex's version of the events."].)

The magistrate's impression regarding the relative strength of the McNutts' testimony versus that of the officers was *not* based on any comparative credibility determinations. Rather, consistent with the Board's own observation that "a finding of credibility does not equal accuracy" (AA 200), it was based on the magistrate's findings that the McNutts' *were closer to*, and *had a better view of*, the events than the officers.

Of course, *those* findings were based on objective facts readily apparent from the transcripts of the officers' trial testimony.

6. The Board erred in concluding that it was impossible for the officers to mistake Larsen for Hewitt.

The magistrate's findings in this case rest at least implicitly on the premise that, in the chaotic blur of their arrival—a blur that caused the driver of a police car to insist he was the passenger (AA 063)— Townsend and Rex, looking from some distance and with visual obstructions, simply "mistakenly identified Larsen as the person who threw the knife." (AA 204.)

In rejecting that theory, the Board relied at least in part on the belief that "Hewitt did not resemble Larsen at all." (AA 204.)

But the Board's own decision actually shows that, on the night in question, Hewitt and Larsen were, physically speaking, very similar. According to the Board, Larsen was "29 years old, 5 feet and 8 inches tall, between 130 and 160 lbs." (AA 204, n.61.) And, according to the Board, Hewitt was "27 years old, 5 feet and 9 inches tall, 140 lbs." (*Ibid.*) Thus, according to the Board, on the night in question, the two men differed by a mere two years in age, one inch in height, and—taking the average of the estimate of Larsen's weight—just five pounds. And as the Board notes, both men had "brown hair." (*Ibid.*)

The Board's other supposed "evidence" that the responding officers had not "falsely identified Larsen" is weak and nonsensical.

For example, the Board emphasized the fact that "[n]either officer had any idea who Larsen was." (AA 204.) But the officers' lack of familiarity with Larsen actually *bolsters* the theory that they confused Larsen and Hewitt. After all, a witness is far less likely to confuse two people when the witness is familiar with at

least one of them. The magistrate recognized as much when she noted that Ms. McNutt "had met [Hewitt] before and was unlikely to confuse him with [Larsen]." (AA 081.) Thus, the officers' apparent unfamiliarity with Larsen and Hewitt is a reason to *distrust* their observations, not a reason to embrace them.

Nor is it significant that "both officers continued their exemplary service as police officers for the next 13 years." (AA 204.) The premise that even honest police officers misperceive events is too obvious a principle to state. (AA 084 ["The jury may not have concluded that Townsend and Rex were lying on the stand, but had the jury heard the McNutts … testify, a reasonable juror would have had serious doubts about Townsend and Rex's version of the events."].) [5]

7. The Board engaged in speculation—and ignored its own factual findings—in rejecting the premise that the knife was Hewitt's.

The Board rejected the premise that the knife was Hewitt's in part because, in the Board's view, "it seems unlikely that Hewitt would have remained silent on the night of June 8, 1998, if Larsen had been arrested for Hewitt's own crime." (AA 205.)

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[5] For example, at Larsen's criminal trial, Officer Rex indicated that he "thought it was odd that [Larsen] was wearing a flannel shirt because *it was a warm night and no one else was wearing warm clothing*." (AA065, italics added.) Yet, Mr. McNutt testified that he "was wearing a Pittsburgh Steelers jacket because the night was cool" (AA 069), a fact the officers emphatically acknowledged at the time. (See AA 106 [Mr. McNutt's testimony that, upon arriving, the officers shouted, "You in the ... Pittsburgh Steelers jacket … freeze."].)

But the Board's conclusion that Hewitt would have volunteered to authorities that the knife was his is wholly speculative if not absurd. Indeed, given that Hewitt was himself a felon at the time (AA 191), the most logical inference to explain Hewitt's silence following Larsen's arrest is that, although he perhaps regretted Larsen's fate, he did not regret it as much as he feared going to jail himself.

The Ninth Circuit recognized the illogical nature of the Board's theory behind Hewitt's silence when it rejected the State's theory that Larsen may have waited to file his habeas petition until the statute of limitations had run out on the State's ability to charge Hewitt with possession of the knife. But as the Ninth Circuit explained, "it is inexplicable that Larsen would have willingly allowed the limitations period on his own habeas petition to expire while he remained incarcerated in order to spare William Hewitt from charges of carrying a concealed weapon." (*Larsen*, *supra*, 742 F.3d at p. 1094.) The Ninth Circuit's skepticism applies with equal force to the Board's assertion that Hewitt would have willingly exposed himself to prison in order to spare Larsen.

The Board's refusal to infer that the knife was Hewitt's is even more indefensible in light of other evidence in the record.

Notable here is the Board's own finding that, "[a]t the time, Hewitt always carried some type of weapon with him." (AA 190.) And yet, although Officer Townsend testified that "everybody [in the parking lot] was detained in handcuffs" (AA 062), there is no indication that officers found a weapon on Hewitt when he was handcuffed and, presumably, searched.

Also notable is the declaration of Hewitt's then-girlfriend, Jorji Owen, in which she stated that "[w]hen Hewitt returned from the bar, he told Owen that [Larsen] 'had been arrested for possession of his (Hewitt's) knife.'" (AA 076.) Owen further indicated that "Hewitt sold his motorcycle to bail [Larsen] out of jail, because he felt responsible for [Larsen] being in jail." (*Ibid.*) According to Owen, "Hewitt felt responsible because the knife belonged to him and he had thrown it under a truck when the police arrived." (AA 076.)

8. The Board improperly placed weight on the prosecution's claim it would have re-tried Larsen but for a change in the law.

The Board stated that its conclusion was "bolstered" by the fact that "the prosecutor tasked with retrying Larsen after the habeas proceeding fully intended to do so," and that "the only reason a retrial did not occur was because of a change in the Three Strikes Law that precluded a life sentence even if Larsen were convicted." (AA 205.)

But it is elementary that "[t]he fact that a criminal charge has been filed against the defendant is not evidence the charge was true," and finders of fact therefore cannot infer guilt "just because [the defendant] [has] been arrested, charged with a crime, or brought to trial." (CALCRIM No. 220 (Feb. 2013).) The Board violated that basic premise when it placed weight on the prosecutor's desire to re-try Larsen but for the change in the law.

Moreover, the Board's regulations provide that it may only consider "the decision of the prosecuting authority not to retry the

claimant for the crime" as "evidence that claimant is *innocent of the crime charged*." (Cal. Code Regs., tit. 2, § 641, subd. (a), italics added.) Thus, in actually holding the prosecutor's failure to re-try Larsen *against him*, the Board acted directly contrary to its own regulations.

CONCLUSION

Because a court determined Larsen was "factually innocent" during contested habeas proceedings, this Court should reverse the superior court's judgment and remand with directions to enter a new judgment that (1) vacates the Board's decision denying Larsen's claim, and (2) directs the Board to enter a new decision recommending that Larsen be compensated at the statutory rate for his time incarcerated.

At a minimum, in view of the evidence in this record, Larsen prays this Court will reverse the superior court's judgment and remand with directions to enter a new judgment that (1) vacates the Board's decision denying Larsen's claim, (2) directs the Board to enter a new decision finding that, on this record, Larsen is factually innocent, and (3) to hold a hearing solely to determine "whether [Larsen] sustained any injury as a result of his erroneous conviction and imprisonment." (AA 207.)

Dated: 3/6/20

By: */s/Benjamin I. Siminou*
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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that the foregoing document was produced on a computer in 13-point type.

I further certify that the brief is 12,981 words, as calculated by the word-processing program used to generate this document. This word count includes footnotes but excludes the material that may be omitted from the word count under rule 8.204(c)(3) of the California Rules of Court.

/s/Benjamin I. Siminou
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CERTIFICATE OF SERVICE

I, Benjamin I. Siminou, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to this action. My business address is 2305 Historic Decatur Rd., Suite 100, San Diego, California 92106.

On March 6, 2020, I served the **Appellant's Opening Brief** and **Appellant's Appendix** on all counsel of record via the Court's electronic filing system, operated by TrueFiling.

On the same date, I served a copy of **Appellant's Opening Brief** by first class U.S. mail on the Hon. James C. Chalfant at the following address:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 6, 2020, at Temecula, California.

/s/Benjamin I. Siminou
Benjamin I. Siminou