No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOE LOUIS ARMENTA

Petitioner,

v.

SCOTT KERNAN, Secretary of the California Department of Corrections

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME I

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APPENDIX INDEX

Volume I[1]

[1] Bates stamps have been added to these documents such that the pages within the tabs must are consecutively paginated. The Bates stamps appear at the lower right hand corner of the documents.

Tab 1

FILED

OCT 19 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, California Department of Corrections, Defendant-Appellee.	No. 16-55930 D.C. No. 5:15-cv-00415-DOC-RAO ORDER

Before: BEA and MURGUIA, Circuit Judges, and KEELEY,* District Judge.

Appellant's motion to recall and stay the mandate is DENIED (Doc. 37).

* The Honorable Irene M. Keeley, United States District Judge for the Northern District of West Virginia, sitting by designation.

Tab 2

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UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS, Respondent-Appellee.	CASE No. 16-55930 Dist. Ct. No. 5:15-cv-00415-DOC (RAO)

MOTION TO RECALL AND STAY THE MANDATE PENDING FILING OF A PETITION FOR A WRIT OF CERTIORARI

Counsel for appellant, Joe Louis Armenta (hereafter "counsel"), hereby moves the Court to issue an order to recall and stay the Mandate issued by this Court in this matter on September 28, 2018 for 90 days

pending the filing of a petition for writ of certiorari with the U.S. Supreme Court.

This motion is brought pursuant to the provisions of FRAP Rule 41(d)(2) and Ninth Circuit Court of Appeals General Order 4.6(d).

The motion is brought on the grounds that the filing of a petition for writ of certiorari to the U.S. Supreme Court will present substantial questions and there is good cause for a stay. The petition for writ of certiorari will not be frivolous and will not be filed for purposes of delay.

This motion is brought on the further grounds that appellant's counsel was unable to move to stay the Mandate prior to its issuance. This was due to time delays in communicating with appellant at the California Department of Corrections, in order to determine if appellant desired to have a petition for writ of certiorari brought on his behalf.

Counsel has not previously applied for the order sought by this motion.

Appellant Joe Armenta is not on bail. He is currently serving a determinate term of 62 years 8 months in prison, plus three consecutive indeterminate terms of life in prison, with an aggregate minimum parole period of 29 years.

THE CERTIORARI PETITION WILL PRESENT SUBSTANTIAL QUESTIONS

I

A SUBSTANTIAL QUESTION IS PRESENTED UNDER THE AEDPA REGARDING THE HOLDING OF *Deck v. Jenkins*, 814 F.3d 954 AND REGARDING THE PROCEDURAL DEFAULT RULE

Appellant has asserted that the prosecutor in his case engaged in actionable misconduct under the standards of the AEDPA by telling his jury in opening statement that appellant and his counsel were going to fabricate a defense. (PR pp. 8.)1/ As appellant has argued, this misconduct was just the beginning-- at the very beginning of trial-- of a vast expanse of relentless prosecutorial misconduct, much of it interwoven. (*Deck v. Jenkins*, 814 F.3d 954, 980 (9th Cir. 2014) [stringent AEDPA standard met under *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) and *Harrington v. Richter*, 131 S. Ct. 770 (2011) in a case where prosecutor's misstatements were not inadvertent or isolated: "the prosecutor's closing

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1 "PR" refers to appellant's petition for rehearing filed in this matter on May 25, 2018.

"Dec." refers to this Court's Memorandum Decision in this matter on May 18, 2018.

rebuttal argument were not mere 'stray words,' they were a direct response to the central theory of Deck's case."]; PR p. 9.)

In its opinion, this Court holds that the trial court's admonition to the jury cured any potential prejudice from the prosecutor's remarks, because the court instructed jurors that arguments of counsel were not evidence and because the jury was instructed to disregard the prosecutor's statements. (Dec. pp. 3-4.) Appellant has argued that this holding essentially adopts the dissent in *Deck v. Jenkins* as the holding of that case. According to the dissent in *Deck*, opinions of the U.S. Supreme Court dictate that there cannot be actionable prosecutorial misconduct under the AEDPA if jurors are properly admonished and instructed, in the wake of a prosecutor's misconduct. (*Deck*, at pp. 970-971, 990-992; PR p. 11.)

But, as appellant has argued, the Court's decision in the instant case fails to consider the interwoven prejudice as between the misconduct in opening statement and subsequent statements by the prosecutor during closing argument, wherein the prosecutor lied to jurors and essentially told them appellant and his counsel had fabricated a defense. (PR p. 9.)

This Court's decision holds that appellant's prosecutorial misconduct claim as to the prosecutor's statements during closing argument is procedurally barred. (Dec. pp. 7-8.) Appellant has argued that under the

construct created by the Court's decision, the interwoven prejudice at issue could never be considered under the procedural default rule. (PR p. 10.)

Appellant has argued that acceptance of the Court's construct would be an unwarranted and significant extension of the procedural default rule. (PR p. 10.)

Appellant has argued further that the extreme interwoven prejudice from the prosecutor's opening and closing statements cannot be obviated by the procedural default rule and that a finding that the jury was properly admonished and instructed is insufficient to overcome appellant's prosecutorial misconduct claim. (PR pp. 10-11.) In the final analysis, the jury was not admonished and instructed as to the prosecutor's closing statement misconduct.

Appellant respectfully submits here that this Court's decision expands the procedural default rule beyond parameters established by existing U.S. Supreme Court authority. Appellant additionally, and respectfully, submits that this Court's decision advances a reading of existing U.S. Supreme Court authority under the AEDPA that a cognizable prosecutorial misconduct claim does not exist if the jury is properly admonished and instructed.

For these reasons, appellant submits that his certiorari writ presents a substantial question and there is good cause to recall and stay the Mandate.

II

A SUBSTANTIAL QUESTION IS PRESENTED AS TO WHETHER CALIFORNIA'S BRIEFING RULE IS ADEQUATE AS A PROCEDURAL BAR, INSOFAR AS IT IS PURPORTEDLY FIRMLY ESTABLISHED AND REGULARLY FOLLOWED

Appellant has argued that the prosecutor in his case engaged in actionable misconduct under the standards of the AEDPA by misstating the law on knock-notice. (*People v. Hill*, 17 Cal.4th 800, 829-830 (1998) [it is improper for the prosecutor to misstate the law generally, and particularly to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements]; PR pp. 15-18.)

The state Court of Appeal conflated appellant's "unannounced entry" knock-notice argument with an "unlawful entry" knock-notice argument from the line of case authority represented by *Payton v. New York*, 445, 573, 616 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). From here, the state Court of Appeal found procedural default under California's Briefing Rule (California Rules of Court, Rule 8.204) for appellant's failure to brief the knock-notice issue under the *Payton* analysis.

This Court's decision follows the state Court of Appeal in ruling that knock-notice should have been briefed under the *Payton v. New York*-- "legality of the entry"-- analysis. (Dec. pp. 6-7.) But legality of the entry

was never the issue in this proceeding. The fact of an unannounced entry is the issue, and the fact that an unannounced entry violated Penal Code sections 844 and 1531, resulting in an eruption of violence, was the point of defense counsel's argument. An unannounced entry argument under Penal Code sections 844 and 1531 does not require extensive briefing and analysis under the *Payton v. New York* line of authority. Either the entry was announced under Penal Code sections 844 and 1531, or it was not.

Accordingly, appellant respectfully submits that the premise of the procedural default relied on by the state Court of Appeal and this Court is spurious. Ultimately, the state Court of Appeal simply misapplied Rule 8.204 in determining that appellant's knock-notice claim had been procedurally defaulted.

More importantly, appellant respectfully submits that this Court's holding that the procedural bar is adequate, "because it is firmly established and regularly followed" is not recognized in the case law issued from the Ninth Circuit Court of Appeals. (Dec. p. 6.) The Ninth Circuit has never made this holding in any previous published case. Appellant is unaware that the Ninth Circuit has even addressed Rule 8.204 in any published opinion. He is also unaware that any other Circuit Court of Appeals has addressed the briefing rule as grounds for procedural default in any published case.

Neither has the United States Supreme Court addressed Rule 8.204 in any decision, or made a finding that Rule 8.204 represents a procedural bar that is "longstanding, oft-cited, and shared by habeas courts across the Nation." (*Johnson v. Lee*, ___ U.S. ___, 136 S. Ct. 1802 (2016).) Thus, a question of first impression is presented in this case as to whether the procedural bar represented by Rule 8.204 is adequate.

For these reasons, appellant submits that his petition for a writ of certiorari presents a substantial question and there is good cause for to recall and stay the Mandate.

Respectfully submitted,

Dated: October 1, 2018.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 28 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOE LOUIS ARMENTA,

Petitioner - Appellant,

v.

SCOTT KERNAN, Secretary, California Department of Corrections,

Defendant - Appellee.

No. 16-55930

D.C. No. 5:15-cv-00415-DOC-RAO
U.S. District Court for Central California, Riverside

MANDATE

The judgment of this Court, entered May 18, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7

Tab 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 28 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOE LOUIS ARMENTA,

Petitioner - Appellant,

v.

SCOTT KERNAN, Secretary, California Department of Corrections,

Defendant - Appellee.

No. 16-55930

D.C. No. 5:15-cv-00415-DOC-RAO
U.S. District Court for Central California, Riverside

MANDATE

The judgment of this Court, entered May 18, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7

Tab 4

FILED

SEP 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, California Department of Corrections, Defendant-Appellee.	No. 16-55930 D.C. No. 5:15-cv-00415-DOC-RAO Central District of California, Riverside ORDER

Before: BEA and MURGUIA, Circuit Judges, and KEELEY,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Bea and Judge Murguia vote to deny the petition for rehearing en banc, and Judge Keeley recommends that en banc rehearing be denied. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Irene M. Keeley, United States District Judge for the Northern District of West Virginia, sitting by designation.

Tab 5

16-55930

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOE LOUIS ARMENTA

Petitioner-
Appellant,

v.

SCOTT KERNAN, Secretary of the California Department of Corrections

Respondents-
Appellees.

On Appeal from an Order Denying a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California
(District Court Case No. 5:15-cv-00415-DOC (RAO))

APPELLANT'S PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

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INTRODUCTION

Appellant, Joe Louis Armenta, through counsel, petitions for rehearing and rehearing en banc of the decision of this Court (DktEntry 31-1 [hereafter "Dec."]) of May 18, 2018, entering judgment in favor of Appellee and affirming the decision of the Federal District Court for the Central District of California.

A panel rehearing is appropriate when a material point of law was overlooked in the decision. (FRAP Rule 40(a)(2).) An en banc rehearing by this Circuit is proper when (1) the panel decision conflicts with a decision of the Supreme Court or a decision of this Circuit so that consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions or (2) the proceeding involves a question of exceptional importance. (FRAP Rule 35(b); 9th Cir. Rule 35-1.)

In the judgment of appellant's counsel, the panel's decision in this matter overlooks material points of law; does not address a resulting conflict with *Deck v. Jenkins*, 814 F.3d 954 (9th Cir. 2016) and *Melendez v. Pliler*, 288 F.3d 1120 (9th Cir. 2002) regarding appellant's prosecutorial misconduct claims; and presents a question of exceptional importance as to whether California's briefing rule (California Rules of Court, Rule 8.204) is adequate, insofar as it is purportedly firmly established and regularly followed.

Arguments Applicable to Petition for Rehearing En Banc (FRAP Rule 35; 9th Cir. Rule 35-1 to 35-3)

ARGUMENT

I

THE OPINION OVERLOOKS MATERIAL POINTS OF LAW, RESULTING IN A CONFLICT WITH THIS COURT'S DECISION IN *Deck v. Jenkins,* 814 F.3d 954, SO THAT REHEARING IS NECESSARY TO SECURE UNIFORMITY OF THIS COURT'S DECISIONS

The salient facts of this case are that the police conducted a probation search of appellant's home. During the initial part of the search, the police attempted to make a stealth entry at the rear of the home through a sliding glass window. But when they opened the window, a home alarm was sounded. Thereafter, appellant fired two to three warning shots from a lazar-sighted revolver, which ultimately precipitated the charges of attempt murder on police officers in this matter. (ER Vol. I, Tab 7 pp. 4-6; ER Vol. II, Tab 8 pp. 2-9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)1/

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1 "ER" refers to the Excerpts of Record filed in conjunction with Appellant's Opening Brief.

"CT" refers to the Clerk's Transcript of proceedings in the state trial court. (See, ER Vol. II, Tab 8; CT Vol. I; ER Vol. II, Tabs 9 & 10; CT Vol. II; ER Vol. II, Tab 11; CT Vol. III.)

(Continued…)

Appellant's trial defense was that he believed that it was Eastside Riva's gang members who had entered his home with the intent to kill him-- thus prompting him to fire warning shots. This defense was supported by appellant's trial testimony. The prosecutor had become personally aware of this defense through testimony provided at the preliminary hearing by Police Investigator LeClair. (ER Vol. II, Tab 8 pp. 2-4, 7-9; CT Vol. I pp. 30, 31, 38, 50-51, 80.)

During her opening statement at trial, the prosecutor told the jury that appellant and his counsel were going to fabricate a defense. Appellant's trial counsel interposed an objection and moved to strike the statement. The trial judge sustained the objection and granted the motion to strike. (ER Vol. III, Tab 16 p. 7; Augmented RT Vol. V p. 920.) Later, the trial judge denied the motion of appellant's trial counsel to make a finding of prosecutorial misconduct. At defense counsel's request, the court admonished the jury that the prosecutor's statement did not constitute evidence and should be disregarded. (ER Vol. I, Tab 5 p. 10-11.)

"RT" refers to the Reporter's Transcript of proceedings in the state trial court. (See, ER Vol. III, Tab 12; RT Vol. I; ER Vol. III, Tab 13; RT Vol. IV; ER Vol. III, Tab 14; RT Vol. VI; ER Vol. III, Tab 15; RT Vol. VII; ER Vol. III, Tab 16; RT Augmented Vol. V.)

"Opn." refers to the Opinion of the state Court of Appeal. (ER Vol. I Tab 7; CT Vol. III.)

The statement that appellant and his counsel were going to fabricate a defense was just the beginning-- at the very beginning of trial-- of a vast expanse of relentless prosecutorial misconduct, much of it interwoven. (*Deck v. Jenkins*, at 980 [stringent AEDPA standard met under *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) and *Harrington v. Richter*, 131 S. Ct. 770 (2011) in a case where prosecutor's misstatements were not inadvertent or isolated: "the prosecutor's closing rebuttal argument were not mere 'stray words,' they were a direct response to the central theory of Deck's case."].)

In its opinion in the instant case, this Court holds that the trial court's admonition to the jury cured any potential prejudice from the prosecutor's remarks, because the court instructed jurors that arguments of counsel were not evidence and because the jury was instructed to disregard the prosecutor's statements. (Dec. pp. 3-4.)

But the Court's decision fails to consider the interwoven prejudice as between the misconduct in opening statement and subsequent statements by the prosecutor during closing argument, wherein the prosecutor lied to jurors and told them that appellant had not indicated his fear of the Eastside Riva's to anyone prior to trial, or told anyone prior to trial that he thought it was the Eastside Riva's who had entered his home.

Contrary to this falsehood, appellant did indicate to Investigator LeClair on the day of the incident that he feared the Eastside Rivas and thought they had entered his home. (ER Vol. III, Tab 15 pp. 64-65; RT Vol. VII pp. 1612-1613; ER Vol. II, Tab 9 pp. 1-2, 3-4, 5-9, 10-14, 15-20; CT Vol. II pp. 367-368, 384-385, 388-392, 399-403, 429-434.) Furthermore, the fact that appellant had told LeClair he feared the Eastside Rivas, and thought it was them in his home, came out during the preliminary hearing in this matter. (ER Vol. II, Tab 8 pp. 1, 2-3, 4, 5-6, 7-8, 9; CT Vol. I pp. 30-31, 38, 46-47, 50-51, 80.)

This Court's decision holds that appellant's prosecutorial misconduct claim as to the prosecutor's statements during closing argument is procedurally barred. (Dec. pp. 7-8.) Appellant respectfully submits that under the construct created by the Court's decision, the interwoven prejudice at issue could never be considered under the procedural default rule.

But prejudice is prejudice. Prejudice cannot be procedurally defaulted if there is any valid claim to which it attaches. Therefore, interwoven prejudice emanating from a valid opening statement prosecutorial misconduct claim counts, whether or not a closing argument prosecutorial misconduct claim is procedurally barred. Furthermore, acceptance of the Court's construct would be a significant extension of the procedural default rule that is unwarranted in the circumstances of this case. The bottom line is that the prejudice from the misconduct in opening

statement, coupled with interwoven prejudice generated from the prosecutor's closing remarks, is extreme. Overall the prosecutor's arguments told the jury that appellant and his attorney were going to fabricate a defense-- and did fabricate a defense, because appellant never told anyone that he thought it was the Eastside Rivas who had entered his home. And as far as the jury knew, a defense was fabricated, because the trial judge would not set the matter right by providing jurors with the transcript of appellant's statements to LeClair. Ultimately, the interwoven harm here is "off the charts" prejudicial, because appellant and his attorney did not fabricate the defense and because the jury was unaware that the defense was not fabricated.

In the final analysis, the extreme interwoven prejudice from the prosecutor's opening and closing statements cannot be obviated by the procedural default rule. For this reason, a finding that the jury was properly admonished and instructed is insufficient to overcome appellant's prosecutorial misconduct claim before this Court. Appellant respectfully submits that such a finding flies in the face of the Ninth Circuit opinion in *Deck v. Jenkins, supra,* 814 F.3d 954, and essentially adopts the dissent in *Deck* as the holding of that case.

The Ninth Circuit Court of Appeal should grant en banc rehearing and determine whether the opinion in this matter conflicts with the published decision in *Deck v. Jenkins*.

II

THE OPINION OVERLOOKS MATERIAL POINTS OF LAW RESULTING IN A CONFLICT WITH THIS COURT'S DECISION IN *Melendez v. Pliler*, 288 F.3d 1120, SO THAT REHEARING IS NECESSARY TO SECURE UNIFORMITY OF THIS COURT'S DECISIONS

The Court's opinion holds that appellant's prosecutorial misconduct claim regarding the prosecutor's closing argument is procedurally barred because defense counsel failed to make a timely prosecutorial misconduct objection. (Dec. pp. 7-8.)

The Court relies on *Fairbank v. Ayers*, 650 F.3d 1243, 1256 (9th Cir. 2011) in support of its analysis. But, *Fairbank v. Ayers* is not on point. In *Fairbank v. Ayers*, the defendant's counsel never did make a prosecutorial misconduct objection to statements made by the prosecutor during closing argument.

The controlling authority here is *Melendez v. Pliler*, 288 F.3d 1120 (9th Cir. 2002). This case controls where there is an objection, but the objection is allegedly not timely. Under *Melendez v. Pliler*, California's Cotemporaneous Objection Rule is not adequate as a procedural bar, where defense counsel made a sufficiently complete and timely objection such that the trial judge is not precluded from giving it meaningful consideration. (*Id*., 1126, & fn. 7.)

In the instant case, defense counsel made a prosecutorial misconduct objection during jury deliberations and requested that the jury receive a transcript of appellant' statements to Investigator LeClair. The purpose of the objection and transcript request was to correct a critical falsehood advanced by the prosecutor during her closing statement. (ER Vol. III, Tab 15 pp. 53-60, 65; RT Vol. VII pp. 1601-1608, 1613.) This constituted a *prima facie* timely objection and request to admit transcripts under existing California case law and statutory authority directly on point. (*People v. Newton*, 8 Cal.App.3d 359, 381-384 (1970); see also, Pen. Code § 1093 and Pen. Code § 1094.)

Furthermore, the reliance of the state Court of Appeal and this Court on *People v. Jenkins*, 40 Cal.App.3d 1054 (1974) is inapt. *People v. Jenkins* is not on point, because it involved a bare bones late prosecutorial misconduct objection, without an accompanying request that the jury be given transcripts to correct a false statement by the prosecutor-- as in appellant's case and in *People v. Newton*. The State Court of Appeal's inapt reliance on *People v. Jenkins* has contributed to this Court's erroneous reliance on *Melendez v. Pliler*.

The Ninth Circuit Court of Appeal should grant en banc rehearing in this matter and determine if this Court and the state Court of Appeal failed to apply controlling authority from *Melendez v. Pliler*, *People v. Newton*, and Penal Code

sections 1093 and 1094 in conjunction with the issue of appellant's alleged procedural default on his prosecutorial misconduct claim.

III

THE OPINION OVERLOOKS MATERIAL POINTS OF LAW, AND PRESENTS A QUESTION OF EXCEPTONAL IMPORTANCE AS TO WHETHER CALIFORNIA'S BRIEFING RULE IS ADEQUATE, INSOFAR AS IT IS PURPORTEDLY FIRMLY ESTABLISHED AND REGULARLY FOLLOWED

The Merits

Appellant's counsel had argued to the jury that the police violated knock-notice when they made entry through the sliding glass door at the rear of appellant's home-- which set off an alarm. (ER Vol. I, Tab 7 p. 2; Opn. p. 2.)

In response, the prosecutor made the following argument during her closing statement:

> "Knock and announce is for those situations when officers walk up to somebody's house, kick a door open, with their guns blazing and someone is naked in the shower…" (ER Vol. I, Tab 7 p. 25; Opn. p. 25.)

This argument clearly misstates the law on knock-notice. Under California Penal Code sections 844 and 1531, the police have to knock and announce their presence before they can enter a home to conduct a search or make an arrest. Period.

Among the interests protected by the Knock Notice Rule under Penal Code sections 844 and 1531 is the preservation of human life, "because an unannounced entry may provoke violence in supposed self-defense by the

surprised resident." (*Hudson v. Michigan*, 547 U.S. 586, 594, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006); *People v. Murphy*, 37 Cal.4th 490, 495-496 (2005).)

Appellant's counsel interposed a prosecutorial misconduct claim in regards to the prosecutor's argument. (*People v. Hill*, 17 Cal.4th 800, 829-830 (1998) [it is improper for the prosecutor to misstate the law generally, and particularly to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements].) In addition to constituting misconduct, the prosecutor's argument was also highly prejudicial, as evidenced by the jurors request for read-back of LeClair's testimony concerning knock-notice. (ER Vol. II, Tab 10 p. 1; CT Vol. II p. 456; ER Vol. III, Tab 15 p. 52; RT Vol. VII p. 1600.) What the prosecutor's arguments accomplished was to confuse the jury on the simple and straight forward question of whether the officers violated knock-notice.

This Court's opinion holds that the state Court of Appeal reasonably applied federal law when it concluded that the prosecutor's statements were legally accurate. The Court cites to *Payton v. New York*, 445, 573, 616 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) in support of this conclusion. (Dec. pp. 6-7.)

The citation to *Payton v. New York* does follow the legality of the entry analysis of the state Court of Appeal, but legality of the entry was never the issue in this proceeding. The fact of an unannounced entry is the issue, and the fact

that an unannounced entry violated Penal Code sections 844 and 1531, resulting in an eruption of violence, was the point of defense counsel's argument.

Appellant's claim clearly constitutes actionable prosecutorial misconduct under the AEDPA in regard to the prosecutor's closing argument, which misstated the law applicable to the Knock-Notice Rule.

Procedural Default

In addition to denying appellant's prosecutorial misconduct claim on the merits, this Court's opinion finds procedural default under California's Briefing Rule. (Dec. p. 6.) California's Briefing Rule is codified under the provisions of California Rules of Court, Rule 8.204.

At the threshold, it is important to understand that the state Court of Appeal would find that Rule 8.204 was violated insofar as the Court of Appeal conducted an assessment of the knock-notice issue under the "legality of entry" analysis of cases like *Payton v. New York*, which concern the legality of entry, as opposed to an "unannounced entry," which violated the provisions of Penal Code sections 844 and 1531. An unannounced entry in violation of the provisions of Penal Code sections 844 and 1531 does not require briefing under a complex analysis applicable to the question of an illegal entry under *Payton v. New York*, 445. A *Payton v. New York* analysis simply is not required to understand that the

police in this case violated the provisions of Penal Code sections 844 and 1531 by failing to announce entry. With this in mind, it is readily apparent that the Court of Appeal's requirement that a *Payton v. New York* analysis be briefed in spurious in the extreme. From here, it is readily apparent that the state Court of Appeal's assertion of the procedural bar in that Court is spurious as well. Ultimately, the state Court of Appeal simply inaptly applied Rule 8.204 in determining that appellant's knock-notice claim had been procedurally defaulted.

As for the mechanics of the procedural bar, appellant respectfully submits that this Court's holding that the procedural bar is adequate, "because it is firmly established and regularly followed" is not recognized in the case law issued from the Ninth Circuit Court of Appeal. The Ninth Circuit has never made this holding in any previous published case. Appellant is unaware that the Ninth Circuit has even addressed Rule 8.204 in any published opinion. Neither has the United States Supreme Court addressed Rule 8.204 in any decision, or made a finding that Rule 8.204 represents a procedural bar that is "longstanding, oft-cited, and shared by habeas courts across the Nation." (*Johnson v. Lee*, ____ U.S. ____, 136 S. Ct. 1802 (2016).)

The Rule is applied in civil proceedings in the vast majority of cases. (See, annotations for Rule 8.204 and cases cited therein.) More often than not, the Rule is applied in the criminal context in a case like *People v. Stanley*, 10 Cal.4th

764 (1995), where the defendant fails to specify argument and authority as to why there is insufficient evidence to support a conviction. (*Id*. at p. 793.)

But the Rule cannot qualify as procedural default bar in this Court, because it is inconsistently applied. In fact, the Rule itself contains provisions for inconsistent application. Under subdivision (e), subsection (2), paragraph (C) of Rule 8.204, an appellate court can simply elect to disregard noncompliance with the rule-- as appellate courts often do. (See, *Nelson v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115, 1122 (2012); and see, *Liberty Mutual Insurance Company v. Kleinman et al.*, 149 Cal.App.2d 404, 406 (1957).)

Appellant further emphasizes that this is not a case where there are mere exceptions to Rule 8.204, coupled with discretionary application. (See, *Johnson v. Lee*, at 1806.) In the vast majority of cases, Rule 8.204 is simply not applied.

The Ninth Circuit Court of Appeal should grant en banc rehearing in this matter and determine whether the state Court of Appeal inaptly applied Rule 8.204 in determining that appellant's knock-notice claim had been procedurally defaulted and decide whether the procedural bar under Rule 8.204 is adequate in the Ninth Circuit.

Arguments Applicable to Petition for Panel Rehearing (FRAP Rule 40; 9th Cir. Rule 40-1)

IV

THE OPINION OVERLOOKS MATERIAL POINTS OF LAW IN REGARDS TO APPELLANT'S PROSECUTORIAL MISCONDUCT CLAIM FOR ELICITING FALSE INFORMATION ABOUT APPELLANT'S CRIMINAL RECORD

Appellant has advanced a prosecutorial misconduct claim based on the elicitation of false information from Agent Rudolph. (AOB pp. 28-29; ARB pp. 16-18.)2/

The Court's opinion rejects appellant's prosecutorial misconduct claim regarding the testimony of Agent Rudolph on grounds that he did not present false testimony. (Dec. p. 4.) But false testimony on the part of Agent Rudolph is not the claim advanced by appellant. Appellant respectfully submits that the false evidence analysis is a *straw man*. (ARB p. 17.)

Appellant has brought a prosecutorial misconduct claim based on the prosecutor's act of misleading the jury on the question of whether appellant was on probation for a firearms offense. The prosecutor elicited testimony from Agent Rudolph about whether appellant was on felony probation for a firearms

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2 "AOB" refers to Appellant's Opening Brief filed in this Court.

"ARB" refers to Appellant's Reply Brief filed in this Court.

offense around the time of the search. (ER Vol. III, Tab 13 pp. 17-18; RT Vol. IV pp. 927-938.) But it doesn't matter what Agent Rudolph knew or didn't know at the time of the search. The prosecutor knew at the time of trial that appellant was not on probation for a firearms offense, but nevertheless sought to mislead the jury into believing that he was on probation for a firearms offense, through the testimony of Agent Rudolph. This is prosecutorial misconduct. (*People v. Hill, supra*, 17 Cal.4th at 823 [a prosecutor's presentation of facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact"].)

The Court's opinion additionally asserts that the state Court of Appeal reasonably concluded that any prejudice regarding appellant's claim was cured, by the trial judge's admonition to the jury. (Dec. p. 4.) The trial judge instructed the jury that "as a matter of law" appellant was on probation for possessing metal knuckles, not firearms. (ER Vol. I, Tab 7 p. 16; Opn. p. 16.) Appellant respectfully submits that this assertion is contrary to the majority opinion in *Deck v. Jenkins, supra*, 814 F.3d 954, in the circumstances of this case.

If anything, the "as a matter of law" instruction given by the trial judge worsened the initial misconduct created by the prosecutor's attempt to mislead the jury. No juror would have obtained a clear understanding from the instruction that appellant was actually on probation for actually possessing metal knuckles,

rather than actually possessing a firearm. The presumption that the jury understood and followed the court's instruction is not dispositive, because the court's instructions did not address the legal nuance created by the prosecutor's efforts to mislead the jury. (See, *Deck v. Jenkins*, at 983.)

This Court should grant panel rehearing in this matter and consider the material points of law advanced by appellant herein.

V

THE OPINION OVERLOOKS MATERIAL POINTS OF LAW IN REGARDS TO APPELLANT'S PROSECUTORIAL MISCONDUCT CLAIM FOR VIOLATING THE COURT'S IN LIMINE RULING

Appellant has advanced a prosecutorial misconduct claim based on the prosecutor's violation of the trial judge's in limine ruling regarding the prior assault of an Eastside Riva gang member on him. (AOB pp. 29-33, 74-77; ARB pp. 19-22.)

This Court's opinion rejects appellant's prosecutorial misconduct claim and recasts the claim as a prohibited evidentiary challenge under the authority of *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). (Dec. p. 4-5.) Appellant respectfully submits that this prohibited evidentiary challenge analysis is a *red herring*. (AOB p. 76.)

The trial judge in this case made an in limine ruling limiting the evidence about the Eastside Riva's prior assault on appellant as follows:

> "MR BLUMENFELD: …. All I propose to say was that there was an assault on Mr. Armenta that resulted in the death of someone else. Mr. Armenta testified for the people in that prosecution. The individual who was convicted was Rudy Gil."
>
> THE COURT: All right. And I'll limit the references to that incident to the scope that you've just suggested, Mr. Blumenfeld, unless Mr. Armenta testifies more extensively… (ER Vol. III, Tab 12 p. 17; RT Vol. I p. 198.)

That in limine ruling was violated when the prosecutor elicited testimony from appellant on cross-examination that he had shot and killed an innocent bystander during the gang's assault on him. (ER Vol. III, Tab 14 pp. 2-3; RT Vol. VI pp. 1159-1160; see, i.e., *People v. Johnson*, 77 Cal.App.3d 866, 873-874 (1978) [a prosecutor who improperly cross-examines a defendant in order to place excluded, inadmissible, and prejudicial evidence before the jury is guilty of misconduct].)

Appellant has averred throughout the proceedings in this Court that the decision of the trial court and the state court of appeal, opining that the prosecutor did not violate the in limine ruling, is an unreasonable interpretation of the facts in light of the evidence presented in the state court proceeding. (28 U.S.C. § 2254(d); *Harrington v. Richter*, 131 S. Ct. at 783-784; *Lockyer v. Andrade*, 538 U.S. at 70-71; *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). (ARB p. 20.)

Estelle v. McGuire, 502 U.S. 62 is simply not on point with petitioner's prosecutorial misconduct claim, which is based on a prosecutor's elicitation of evidence that violates an in limine evidentiary ruling from the trial judge. Appellant has not challenged the state trial judge's evidentiary ruling as a part of his prosecutorial misconduct claim. To the contrary, appellant relies on the evidentiary ruling to support his prosecutorial misconduct claim. The fact that

the trial judge later backtracked from his initial evidentiary ruling to protect the prosecutor from appellant's prosecutorial misconduct claim is actually a part of the prosecutorial misconduct claim itself. The fact that the prosecutor blatantly violated the in limine ruling-- and that the trial judge backtracked from the ruling so he would not have to find prosecutorial misconduct-- is entirely consistent with the rest of the appellate record in this case.

Further, it is beyond question that the prosecutor's misconduct in violating the in limine ruling in this case had a substantial and injurious effect on the verdict within the meaning of *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Randomly informing the jury of the irrelevant fact that appellant killed an innocent bystander during a gang assault on him in a previous incident is as prejudicial as it gets. Beyond any doubt, the prosecutor's misconduct in violating the in limine ruling had a substantial and injurious effect on the verdict. (*Ibid*.)

This Court should grant panel rehearing in this matter and consider the material points of law advanced by appellant herein.

CONCLUSION

For all the reasons expressed herein, this Court should grant the request for a rehearing and rehearing en banc.

Dated: May 25, 2018.

/s/ Richard V. Myers
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Counsel for Petitioner- Appellant

CERTIFICATE OF COMPLIANCE

I, Richard V. Myers, certify that:

The attached Petition for Rehearing and Petition for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more and contains 4,126 words. The petition therefore complies with the type-volume requirements of Federal Rules of Appellate Procedure, Rule 32(c)(2) and Ninth Circuit Rule 40-1(a).

Dated: May 25, 2018.

/s/ Richard V. Myers
Richard V. Myers
Attorney for Petitioner-Appellant

NOT FOR PUBLICATION

FILED

MAY 18 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, California Department of Corrections, Defendant-Appellee.	No. 16-55930 D.C. No. 5:15-cv-00415-DOC-RAO MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted April 9, 2018
Pasadena, California

Before: BEA and MURGUIA, Circuit Judges, and KEELEY,** District Judge.

Joe Louis Armenta, a California state prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. After a jury trial, Armenta was convicted of four counts of attempted murder of a peace officer, *see* Cal. Pen. Code

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Irene M. Keeley, United States District Judge for the Northern District of West Virginia, sitting by designation.

§§ 187(a), 664(e)-(f); four counts of assault with a firearm on a peace officer, *see* Cal. Pen. Code § 245(d)(1); one count of unlawful possession of a firearm, *see* Cal. Pen. Code § 12021(a)(1); and one count of unlawful possession of ammunition, *see* Cal. Pen. Code § 12316(b)(1). In his habeas petition, and now on appeal, Armenta asserts that he was denied due process because of five alleged instances of prosecutorial misconduct—one during opening statement, two while presenting evidence, and two during closing argument. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we may grant relief only when a state court's adjudication of a claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

To prevail on a claim of prosecutorial misconduct, a petitioner must show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Prosecutorial misconduct warrants relief only if the alleged error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v.*

Abrahamson, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Here, none of the prosecutor's remarks, taken individually or together, constituted prejudicial misconduct under the Supreme Court's clearly established law.

1. During opening statement, the prosecutor accused the defense of fabricating stories to rationalize Armenta's behavior. The trial court admonished the jury that the prosecutor's statement did not constitute evidence and should be disregarded. Rather than determine whether the prosecutor engaged in misconduct, the California Court of Appeal[1] held that the trial court's admonition cured any potential prejudice from the prosecutor's remarks. This conclusion is not contrary to, nor an unreasonable application of, any clearly established federal law. *See, e.g.*, *Darden*, 477 U.S. at 181–82 (finding that prosecutors' improper comments during closing argument did not deprive petitioner of a fair trial because the trial court instructed jurors that arguments of counsel were not evidence); *Donnelly*, 416 U.S. at 644–45 (same, where jury was instructed to disregard prosecutor's improper statements during closing argument). Indeed, a jury is presumed to have understood and followed the trial court's instructions. *Weeks v. Angelone*, 528 U.S.

[1] Because the California Supreme Court denied Armenta's state court habeas petition without substantive comment, we review the California Court of Appeal's unpublished opinion as the "last reasoned decision" in the state proceedings. *Maxwell v. Roe*, 628 F.3d 486, 495 (9th Cir. 2010).

225, 234 (2000). Any risk of undue prejudice was further mitigated when the trial court sustained defense counsel's objection and struck the prosecutor's remarks from the record. *See Greer v. Miller*, 483 U.S. 756, 766 & n.8 (1987).

2. Armenta next contends that the prosecutor elicited false testimony about the nature of his prior conviction. Special Agent Rudolph, who participated in Armenta's arrest, testified that he had received information from other officers that Armenta was "on felony probation for a firearms offense." Defense counsel objected to Rudolph's testimony, since Armenta was on probation for possession of metal knuckles, not a firearm. The California Court of Appeal concluded that there was no prosecutorial misconduct because the prosecutor did not elicit false testimony. Rudolph honestly described his state of mind when he executed the arrest warrant, including what he knew about Armenta's criminal history. Moreover, even if Rudolph's testimony was false, the Court of Appeal reasonably concluded that any prejudice was cured by the trial court's admonition to the jury that Armenta was on probation for possession of metal knuckles. *See Greer*, 483 U.S. at 766 n.8. This conclusion is not contrary to, nor an unreasonable application of, any clearly established federal law. *See Darden*, 477 U.S. at 181–82; *see also Donnelly*, 416 U.S. at 644–45; *Weeks*, 528 U.S. at 234.

3. Armenta next argues that the prosecutor improperly elicited testimony about his encounter with an East Side Riva (ESR) gang member in 1999. At a pre-

trial hearing, the trial court issued an in limine ruling excluding any evidence that the victim of that encounter was a four-year-old minor. While cross-examining Armenta, the prosecutor elicited testimony that Armenta had fired a shotgun and killed an "innocent bystander" during the 1999 incident. Defense counsel objected, arguing that the prosecutor had violated the in limine ruling.

While a prosecutor's clear violation of a state trial court's in limine ruling constitutes prosecutorial misconduct for the purpose of habeas relief, *see Hardnett v. Marshall*, 25 F.3d 875, 877–78, 880 (9th Cir. 1994), here, the trial court found no violation of its limine ruling, and, instead, conceded that its in limine ruling was "unclear." Armenta's prosecutorial misconduct claim therefore requires us to interpret the trial court's evidentiary order, and in doing so to make our own findings on state law issues of admissible evidence. Habeas relief may not be granted on this basis. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"); *Leinweber v. Tilton*, 490 Fed. App'x 54, 57 (9th Cir. 2012) (citing *Estelle*, 502 U.S. at 63) ("[Petitioner] complains of instances in which the state trial court admitted prior bad act evidence over defense counsel's objection . . . . This contention does not address prosecutorial misconduct [for purposes of habeas relief] but rather goes to the state trial court's admission of that evidence, an issue of state law.").

4. Armenta next contends that, during closing argument, the prosecutor misstated the knock-and-announce rule for executing arrest warrants. The California Court of Appeal held that Armenta waived this allegation because he failed to comply with the court's briefing rule. California courts require every party to "support each point [in a brief] by argument, and if possible, by citation of authority." Cal. Ct. R. 8.204(a)(1)(B). If this requirement is not satisfied, "the court may treat [the point] as waived, and pass it without consideration." *People v. Stanley*, 897 P.2d 481, 497 (Cal. 1995). This rule is adequate, because it is firmly established and regularly followed. *See, e.g.*, *People v. Hovarter*, 189 P.3d 300, 333 (Cal. 2008). It also does not require state courts to inquire into federal law, and is therefore independent. *Coleman v. Thompson*, 501 U.S. 722, 734–35 (1991). Thus, Armenta's claim is procedurally defaulted, and he is not entitled to habeas relief on this claim. *See id*. at 729 ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.").

Additionally, even if Armenta had not procedurally defaulted this claim, Armenta fails to show that the prosecutor's closing argument misstated the knock-and-announce rule. The California Court of Appeal reasonably applied federal law when it concluded that the prosecutor's statements were legally accurate. *See* 18

U.S.C. § 3109; *Payton v. New York*, 445 U.S. 573, 616 (1980). Moreover, if the prosecutor had misstated the law on knock-and-announce, the California Court of Appeal reasonably concluded that there was no prejudice, because the trial court admonished the jury multiple times to rely exclusively on its instructions for the governing law. *See Boyde v. California*, 494 U.S. 370, 384 (1990) ("[A]rguments of counsel [that misstate the law] generally carry less weight with a jury than do instructions from the court.").

5. Finally, Armenta asserts that, during closing argument, the prosecutor misstated a fact when she said Armenta never informed anyone prior to trial about his fear of the ESR gang. The California Court of Appeal concluded that Armenta waived this allegation when defense counsel failed to timely object to the prosecutor's alleged misstatement of fact during closing argument.

To preserve a claim for appeal, California's contemporaneous objection rule (COR) requires a defendant to "make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety," unless doing so would be futile or an admonition would not cure the harm. *People v. Clark*, 261 P.3d 243, 327 (Cal. 2011) (internal citations omitted). The COR is controlling when an objection is "so obviously late as to preclude the trial judge from giving it meaningful consideration." *Melendez v. Pliler*, 288 F.3d 1120, 1126 n.7 (9th Cir. 2002). Here, defense counsel's objection was raised two days after closing

argument, when the jury had already begun deliberations. *See People v. Jenkins*, 40 Cal. App. 3d 1054, 1057 (1974) (finding defendant's objections and requests for admonitions untimely where not asserted until after jury deliberations had begun). Because the California Court of Appeal concluded that Armenta waived this claim by failing to object contemporaneously, in violation of the California COR, Armenta is not entitled to habeas relief on this claim. *Fairbank v. Ayers*, 650 F.3d 1243, 1256 (9th Cir. 2011) (independent state grounds bars federal courts from reconsidering issues in habeas review as long as the "state court explicitly invokes a state procedural bar rule as a separate basis for its decision.").

AFFIRMED.

Tab 6

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MAY 18 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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AFFIRMED.

Tab 7

FILED

APR 21 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LOUIS ARMENTA, Petitioner-Appellant, v. SCOTT KERNAN, Secretary, California Department of Corrections, Defendant-Appellee.	No. 16-55930 D.C. No. 5:15-cv-00415-DOC-RAO Central District of California, Riverside ORDER

Before: GOODWIN and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is granted with respect to the following issue: whether the prosecutor committed misconduct in violation of appellant's right to due process, including whether any portion of this claim is procedurally defaulted. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The opening brief is due July 18, 2017; the answering brief is due August 17, 2017; the optional reply brief is due within 14 days after service of the answering brief.

Counsel in this case may access the state lodged documents by logging into Appellate ECF and then choosing Reports > PACER Report.

The Clerk shall serve on appellant a copy of the "After Opening a Case - Counseled Cases" document.

If Scott Kernan is no longer the appropriate appellee in this case, counsel for appellee shall notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).