

SUPREME COURT COPY

In the Supreme Court of the State of California

COPY

In re VICENTE BENAVIDES
FIGUEROA,

On Habeas Corpus,

CAPITAL CASE

Case No. S111336

Kern County Superior Court Case No. 48266
The Honorable James M. Stuart, Judge

RETURN TO ORDER TO SHOW CAUSE TO
RED-LINED COPY OF CORRECTED
AMENDED PETITION ("RCCAP")

SUPREME COURT
FILED

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DEATH PENALTY

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RETURN TO ORDER TO SHOW CAUSE

COMES NOW the Director of the Department of Corrections and Rehabilitation and states for a Return to the Order to Show Cause issued on September 17, 2014, as follows:

I. PROCEDURAL HISTORY AND BACKGROUND

A. Respondent admits that petitioner is in custody at San Quentin State Prison. Respondent denies that his confinement is unlawful.

B. – T.4. Respondent confirms that the account of procedural events set forth in the referenced paragraphs of the RCCAP is accurate.

T.5 In answer to the referenced paragraph, respondent lacks information sufficient to form a belief as to the facts asserted, and on that basis, respondent denies them. Respondent, however, confirms that HCRC investigator Kathleen Culhane committed multiple acts of perjury and forgery in service of her efforts to obtain judicial relief for death-sentenced prisoners. Respondent cannot know precisely what impelled HCRC to question the authenticity, accuracy, and reliability of, and ultimately withdraw from this Court's consideration, certain documentation previously submitted in support of petitioner's claims for relief, but respondent can confirm that this Court provided HCRC ample opportunity to address whatever problems HCRC perceived.

T.6 – 8. Respondent confirms that the account of procedural events set forth in the referenced paragraphs of the petition is accurate.

II. STATEMENT OF FACTS

Petitioner's statement of facts is argumentative and laden with legal characterizations. (RCCAP at pp. 8-14.) To that extent, respondent denies petitioner's recitation. An accurate account of the evidence adduced at petitioner's trial is set forth in *People v. Vicente Benavides* (2005) 35

Cal.4th 69 and in the respondent's brief filed in S033440; except to the extent described in the Court's decision or respondent's brief and not subsequently described otherwise, clarified, or amplified in this return or in any other pleading filed on behalf of the People of the State of California, respondent denies petitioner's account.

III. BASIS FOR JURISDICTION

Respondent confirms that this Court has jurisdiction to resolve the RCCAP.

IV. JUDICIAL NOTICE AND INCORPORATION

Respondent joins in petitioner's request that the Court take judicial notice of any and all documentation it deems relevant from the records of this matter and S033440.

V. SCOPE OF CLAIMS AND EVIDENTIARY BASES

Respondent denies that petitioner has not been provided a reasonable opportunity to investigate, develop, and present claims for relief.

VI. CLAIMS FOR RELIEF

A. Claim 1

Respondent denies that petitioner's trial was unfair or unconstitutional, but respondent also acknowledges that, as set forth more fully herein, the validity and at least the significance of some of the evidence presented at trial has been so undermined by subsequent revelations that petitioner, as a matter of state statutory right, is now entitled to limited relief. For a variety of reasons related mostly to the extraordinarily heroic and sometimes unavoidably improvised measures undertaken in the effort to save the life of Consuelo V. in 1991, many important details concerning the infliction of the fatal injuries to which she

eventually succumbed will likely never be confidently known by anyone except petitioner himself. Under the circumstances next described, respondent concedes that, pursuant to Penal Code section 1473, subdivision (b)(1), petitioner is entitled to the following relief:

i. the convictions for rape, sodomy, and lewd and lascivious acts with a child under 14 should be vacated;

ii. the three special circumstances corresponding to the aforementioned sex crimes should be vacated;

iii. the sentence of death should be vacated; and

iv. now that experts have recanted their opinion that Consuelo was vaginally and anally penetrated by a penis or foreign object, the factual premise for a felony-murder has been discredited, so petitioner's conviction should be reduced from first degree murder;

v. notwithstanding any evidence deemed "false" within the meaning of Penal Code section 1473, it is not reasonably probable the jury would have failed to convict petitioner of implied malice murder based on the other untainted evidence that he caused the catastrophic abdominal injuries that caused Consuelo's death, so this Court should reduce his conviction to second degree murder, allowing the People to accept judgment thereon or retry the matter.

1. Respondent acknowledges that Dr. James Dibdin's testimony about his autopsy findings is among the evidence now shown to be of such questionable reliability as to demonstrate petitioner's entitlement to the relief outlined herein. Respondent denies that any prosecution witness "falsified" any evidence. Further, in answer to Claim VI.A.1(a)-(d) of the RCCAP, respondent lacks information sufficient to confirm the particulars concerning any other matters or events in which Dr. Dibdin might have been involved, and on that basis denies those recitations.

2. In answer to the referenced paragraph 2 (Claim VI.A.2, RCCAP at pp. 23-24), respondent denies petitioner's characterization of the fairness of his trial, and specifically denies that the state "manufactured" any evidence. The sexual abuse allegations originated with the medical personnel who treated Consuelo. Dr. Anne Tait, the emergency room physician at the first hospital, Delano Regional Medical Center (DRMC), suspected physical abuse but did not have any indication to do any type of anal or vaginal examination. (17RT 3317-3318.) Dr. Leonardo Alonso, a two-year resident in the emergency room at the second hospital where Consuelo was treated, first suspected sexual abuse. (12RT 2452, 13RT 2683-2684 & Pet.'s RCCAP Exh. 144 at p. 6641 [two-year resident]; Pet's RCCAP Exh. 142 at p. 6633 [Defense expert Dr. Nat Baumer notes in a declaration that in his experience, "erroneous reports from one doctor can propagate further erroneous reports. Initial reports are often accepted as true without critical review of the evidence and Dr. Alonso's report may account for the erroneous conclusions in this case."])

3. Whether petitioner raped Consuelo, and the extent to which such an act might have any connection to the precise manner in which her fatal injuries were inflicted, will likely never be confidently known by anyone other than petitioner himself. (Claim VI.A.3, RCCAP at pp. 24-25.) Respondent denies that the prosecution "knew" any evidence presented at trial to be "false." Dr. Diamond, the only physician who examined Consuelo for evidence of suspected sexual abuse, and other experts have recanted their testimony that Consuelo was vaginally penetrated by a penis or foreign object. Evidence that supported some of the original opinions, including a specimen of Consuelo's pelvic floor that was removed from the body during the autopsy and preserved in formaldehyde at the coroner's office, has been destroyed. As will be discussed more fully below, Penal Code section 1473 now provides relief to a habeas petitioner whose

convictions were obtained by “false” evidence upon a showing an expert repudiated an opinion given at trial where the evidence is material to guilt or punishment. Under this new standard, respondent concedes that the evidence Consuelo had physical findings that were specific for vaginal penetration by a penis or foreign object has been so discredited that petitioner’s convictions for rape and for lewd and lascivious acts based on vaginal penetration by a foreign object should be vacated along with the related special circumstance findings. Respondent is not admitting that Consuelo was not sexually abused. Respondent has been informed by Dr. James Crawford-Jakubiak that the vast majority of children who are sexually abused have no physical injuries as a consequence of the abuse that happens. (Resp.’s RCCAP Exh. 19 at p. 6 [Decl. of Dr. James Crawford-Jakubiak].) Dr. Crawford-Jakubiak is board certified in Child Abuse Pediatrics. He has also been the Medical Director of the Center for Child Protection at UCSF Benioff Children’s Hospital in Oakland since 1997 and is the coordinator for the pediatric Sexual Assault Forensic Evaluation Team for Alameda County. (*Id.* at p. 1.)

4. Respondent denies that the state “manufactured” any trial testimony, medical or otherwise, and respondent denies that any state agent “knew” any evidence to be “false.” Respondent denies that the prosecution presented evidence that Consuelo had a tear to her rectum. (RCCAP at p. 28.) Dr. Diamond testified he understood there was no hole in the rectum (10RT 2085) and Dr. Shaw testified he did not detect any injury to the rectum during an anoscopy on November 20. (16RT 3189). Respondent denies Dr. Dibdin testified that slides of tissue from the anus, vagina and urinary bladder showed “tears” or that the prosecution knew such evidence to be “false” within the meaning of Penal Code section 1473. (RCCAP at p. 28, citing 11RT 2140.)

5-6. Whether petitioner sodomized Consuelo, and the extent to which such an act might have any connection to the precise manner in which her fatal injuries were inflicted, will likely never be confidently known by anyone other than petitioner himself. (Resp.'s RCCAP Exh. 19 at p. 6 [Decl. of Dr. James Crawford-Jakubiak].) Respondent denies petitioner's suggestion that the prosecution "knew" any evidence presented at trial to be false. Dr. Diamond and other experts who opined that Consuelo had been anally penetrated by a penis or foreign object have repudiated their testimony. As noted, some of the evidence upon which those opinions were predicated has been destroyed. While acknowledging that the evidence that showed Consuelo had physical findings that are specific for anal penetration has been undermined, respondent in no way concedes that Consuelo was not anally penetrated. Apparently the vast majority of children who are sexually abused have no physical injuries as a consequence of the abuse that happens. (Resp.'s RCCAP Exh. 19 at p. 6 [Decl. of Dr. James Crawford-Jakubiak]; accord Pet.'s RCCAP Exh. 148 at p. 9/6674 [Dr. Diamond explains that "[m]ost victims of anal trauma will remain free of any medical findings," quoting another expert retained by petitioner post-conviction, Dr. Astrid Heger¹].) Under Penal Code section 1473, a petitioner seeking habeas relief for "false" evidence need only show repudiated expert testimony that was material to guilt or punishment. Having met this showing, petitioner is entitled to have his convictions for sodomy and lewd and lascivious acts based on penetration of the anus by a foreign object reversed. The related special circumstance findings should also be vacated for the same reason.

¹ Astrid Heger, Examination and Evaluation of the Sexually Abused Child: A Medical Textbook and Photographic Atlas (1st ed. 1990), p. 82.)

While the precise manner in which Consuelo's catastrophic abdominal injuries were inflicted might never be known, respondent maintains that the evidence that showed petitioner was the person who inflicted those injuries was not tainted by "false" evidence. Respondent lacks information sufficient to form a belief as to what connection, if any, anal penetration might have to Consuelo's injuries, based on information provided by medical experts as discussed above. (Resp.'s RCCAP Exh. 19 at p. 6 [Decl. by Dr. James Crawford-Jakubiak].) Respondent acknowledges that there is considerable doubt whether the mechanism of injury of the pancreas, duodenum, and transverse colon as being due to penetrating trauma to the anus by a penis is anatomically or pathophysiologically possible. Multiple surgeons found the rectum and sigmoid colon to be intact. (Resp.'s RCCAP Exh. 18 at p. 11 [Decl. of Dr. Tracey S. Corey].)

7. Respondent lacks information sufficient to form any belief concerning the precise manner, or sequence in which, each of the injuries to Consuelo's ribs and abdomen were inflicted, and on that basis denies the assertions in the referenced paragraphs. (RCCAP at pp. 35-37.) Respondent also specifically denies that "[t]he prosecution and law enforcement deliberately fabricated" any evidence, including "Dr. Chabra's radiologic findings." (RCCAP at p. 36.)

8. Respondent lacks information sufficient to form any belief concerning the precise age of Consuelo's acute rib fractures – whether they occurred less than seven days before her death per Dr. Dibdin's testimony (11RT 2158) or "within a week or two" per Dr. Lovell's testimony (16RT 3102). On that basis she denies the assertions in the referenced paragraph. (RCCAP at p. 38.)

9. Respondent likewise lacks information sufficient to form any belief concerning the precise age of Consuelo's healing rib fractures –

whether they were three to four weeks old as asserted by Dr. Dibdin (11RT 2128) or up to two months old as described by Dr. Lovell. On that basis respondent denies the assertions in the referenced paragraphs. (RCCAP at p. 39.) Respondent also denies that any circumstantial evidence linking petitioner to Consuelo's prior rib injuries was false. Respondent further denies that "[t]he prosecution knew that Consuelo had many other injuries that could have accounted for the healing fractures which were totally unrelated to petitioner." (*Ibid.*)

10. Respondent denies that "[t]he State manufactured" false evidence bearing on suffocation. (RCCAP at pp. 39-40.) Respondent lacks information sufficient to form any belief concerning whether Consuelo's brain injuries were from suffocation. (*Ibid.*) A conflict of medical opinion between Dr. Bentson, a radiologist who interpreted the results of a head CT scan, and Dr. Vicent DiMaio, a forensic pathologist retained by the defense post-conviction, and trial expert Dr. Bentson on this point does not establish the prosecution testimony to be "false" within the meaning of Penal Code section 1473. (Compare 12RT 2405-2406 and Pet.'s RCCAP Exh. 81 at p. 5487.)

11. Respondent lacks information sufficient to form any belief whether Dr. Bentson's testimony that Consuelo suffered from multiple head traumas was false. (RCCAP at p. 41, citing Pet.'s RCCAP Exh. 81 at p. 5487 [Decl. by Dr. Vincent DiMaio].) Again, a conflict of opinion between medical experts does not show the prosecution's evidence to be "false" within the meaning of Penal Code section 1473.

12. Respondent lacks information sufficient to form any belief about the alleged "falsity" of Dr. Dibdin's testimony that Consuelo's head injuries were caused by Shaken Baby Syndrome. (RCCAP at p. 41, citing Pet.'s RCCAP Exh. 84 at p. 5518.) A conflict of opinion between medical

experts does not show the prosecution's evidence to be "false" within the meaning of Penal Code section 1473.

13. Respondent denies the "falsity" of evidence that Consuelo outwardly appeared to be a "completely normal" twenty-one-month old when her mother left her with petitioner on November 17, 1991. (RCCAP at pp. 43-43.) Respondent also denies that the prosecution "failed to disclose" any material evidence. Respondent denies that Consuelo's alleged clumsiness or her diaper rash caused her to become injured in any respect bearing on the subject of petitioner's prosecution. Respondent denies that any evidence adduced by the prosecution at trial constituted a "contrived foundation."

14. Respondent denies that petitioner is, or ever was, "denied access unlawfully to exculpatory material evidence" relating to semen.

15. Respondent denies that the testimony of California Highway Patrol Officer William Esmay was "false" within the meaning of Penal Code section 1473. Respondent denies that any reasonable juror would consider "automobile accident to be an alternative and equally reasonable explanation for Consuelo's injuries" or would have voted to acquit petitioner of murder.

B. Claim 13, subclaims (1)-(6)

1. Respondent denies that trial counsel Donnalee H. Huffman (Huffman) rendered constitutionally deficient performance or that she failed to conduct a reasonable investigation into Consuelo's injuries, analyze evidence, conduct interviews, and consult with experts. (Claim VI.M.1, RCCAP at p. 224.) Respondent denies that Huffman was deficient in her investigation and presentation of a car accident theory as a possible explanation for the injuries Consuelo suffered due to blunt force trauma to her abdomen, that Huffman failed to obtain, review and incorporate

relevant medical records, that Huffman was ineffective in her cross-examination of prosecution witnesses, and that Huffman failed to investigate possible bias on the part of non-testifying, non-percipient witnesses. (Claim VI.M.1, RCCAP at pp. 221-225.)

Respondent is informed and believes, based on Huffman's funding requests and declarations, and the trial testimony and declarations of other witnesses, that Huffman had a trial strategy to refute the prosecutor's theory that Consuelo's injuries and death were the product of a sexual assault. Respondent asserts that Huffman made reasonable tactical decisions regarding her investigation, choice of witnesses, and use of evidence, including medical records that counsel reviewed and provided to experts she had retained on behalf of petitioner. (See, e.g., 14RT 2823-2828 [Dr. Baumer]; Resp.'s RCCAP Exhs. 4, 9, 11, 12, 22, 23, 20 [Decl. of Donnalee Huffman] at p. 2, para. 8.) The medical experts agreed that Consuelo's abdominal injuries were due to sudden blunt force trauma. (14RT 2828; Pet.'s RCCAP Exh. 142 at p. 6628; Resp.'s RCCAP Exh. 18 at para 13; 10RT at pp. 2073, 2089-2090.) Respondent further asserts that Huffman in fact elicited evidence suggesting that Consuelo's injuries were not the product of a sexual assault but instead due to various medical procedures performed on Consuelo at DRMC and KMC. (See 13RT 2628-2629; 14RT 2828, 2870-2677, 2852; 16 RT 3118.) Respondent is informed and believes that Huffman knew that Diane Huddleston (see Pet.'s RCCAP Exh. 3 at p. 412) was not a percipient witness capable of testifying to any fact relating to petitioner's guilt, thus Huffman made a reasonable tactical decision not to expend resources on irrelevant information.

2. Respondent denies that trial counsel Huffman rendered constitutionally deficient performance because she failed to do any of the following: (a) conduct a reasonable investigation; (b) interview and secure testimony from nursing staff; (c) interview and adequately cross-examine

treating medical personnel; (d) challenge evidence purporting to establish that Consuelo had suffered trauma due to penetration of her vagina; (e) challenge and refute evidence purporting to establish that Consuelo suffered injury to her outer vaginal labia; (f) challenge evidence purporting to establish that Consuelo had suffered trauma due to penetration of her anus; (g) take reasonable and appropriate steps to engage and consult with experts, or that counsel failed to make proper use of those experts by providing them with readily available materials. (Claim VI.M.2, RCCAP at pp. 225-254.) As previously discussed, respondent admits that the evidence regarding the sexual assault, including evidence of vaginal and anal injury and penetration, cannot now be relied upon. (See *ante*, pp. 3-4.)

In light of respondent's concession that the evidence of vaginal and anal trauma attributed to sexual penetration cannot be substantiated, there is no need to evaluate the quality of Huffman's investigation and efforts to rebut that evidence because it would not alter the relief to which petitioner is already entitled. The evidence of injury due to sexual assault was material to the special circumstance allegations and the felony-murder theory, but not to the issue of second degree murder.

In any event, respondent denies that Huffman failed to investigate evidence regarding genital and anal injuries, and that Huffman failed to make reasonable efforts to secure the testimony of relevant witnesses regarding Consuelo's condition when she was first admitted to DRMC or her treatment at the hospital. (Claim VI.M.2 (a) and (b), RCCAP at pp. 225-226.) Respondent denies that Huffman was deficient in her investigation and examination of witnesses regarding Consuelo's treatment at DRMC, and denies that Huffman failed to elicit evidence regarding whether Consuelo showed signs of having suffered physical and sexual abuse. (Claim VI.M.2 (c), RCCAP at pp. 226-234.) Respondent lacks sufficient information to admit or deny whether Huffman interviewed non-

physician medical staff at DRMC, but is informed and believes that Huffman made a tactical decision to expend defense resources on physician witnesses. (Claim VI.M.2 (c), RCCAP at pp. 227-231.) Respondent denies that Huffman failed to investigate, cross-examine, or present testimony regarding the lack of evidence regarding vaginal penetration, or that Huffman erred by failing to move to strike the testimony of any prosecution witness. (Claim VI.M.2 (d), RCCAP at pp. 234-242.) Respondent denies that Huffman failed to present or counter evidence regarding alleged injuries to Consuelo's outer labia. (Claim VI.M.2 (e), RCCAP at pp. 242-243.) Respondent denies that Huffman failed to investigate or present evidence tending to negate or refute allegations that Consuelo suffered trauma due to anal penetration. (Claim VI.M.2 (f), RCCAP at pp. 243-249.) Respondent denies that Huffman failed to take reasonable and appropriate steps to engage and consult with experts, or that counsel failed to make proper use of those experts by providing them with readily available materials. (Claim VI.M.2 (g), RCCAP at pp. 249-252.)

Respondent is informed and believes that Huffman interviewed Dr. Tait (see Pet.'s RCCAP Exh. 76 at p. 5444); that Huffman made reasonable use of all medical records, including those from DRMC (14RT 2823 [Dr. Baumer]); that Huffman elicited testimony calling into question the existence of vaginal trauma prior to Consuelo receiving medical treatment (RT 3317-3319, 3327-3328; 14RT 2829; see 12RT 2458-2460; 13RT 2686, 2691, 2695-2696); and that Huffman engaged no less than three separate experts and secured two for use at trial. (14RT 2821 et seq.; 16 RT 3090; Resp.'s RCCAP Exhs. 6, 7, 8, 12, 21.) Notwithstanding respondent's subsequent concession that the sexual assault evidence cannot be relied upon, no evidence or opinion has undermined the fact that Consuelo's abdominal injuries were due to sudden blunt force trauma. (14RT 2828; Pet.'s RCCAP Exh. 142 at p. 6628; Resp.'s RCCAP Exh. 18 at pp. 7-8;

10RT 2073, 2089-2090 [Diamond].) Thus, based on what counsel knew at the time of trial, and reasonably should have known, the cause of death was due to injuries sustained from a sharp blow to the abdomen. (Pet.'s RCCAP Exh. 142 at p. 6628 [Decl. of Dr. Nat Baumer]; compare Resp.'s RCCAP Exh. 18 at para. 13 [Decl. of Dr. Tracey S. Corey]; see Resp.'s RCCAP Exh. 13 [Baumer Pretrial Statement]; 14RT 2828; 10RT 2073, 2089-2090; 12RT 2454-2460; 13RT 2520-2521.)

3. Respondent denies that Huffman failed to investigate, develop, and present evidence regarding a cause of death different from that offered by the medical examiner. (Claim VI.M.3, RCCAP at pp. 252-254.) Notwithstanding respondent's concession that the evidence of vaginal and anal injury due to sexual penetration was false, that false evidence did not render Huffman's performance deficient with regard to the cause of Consuelo's death. Respondent asserts that Huffman elicited testimony to dispute Dr. Dibdin's assertion that penetration of the anus caused Consuelo's internal injuries; Huffman elicited and confirmed testimony from other experts that Consuelo suffered the fatal abdominal injuries due to a sharp and sudden application of force from the front of her abdomen toward her back. (Pet.'s RCCAP Exh. 142 at p. 6628; Resp.'s RCCAP Exh. 13; 10RT 2068-2070, 2073, 2089; 12RT 2454-2468; 13RT 2520-2521; 14RT 2827-2828; 17RT 3318.)

Huffman thoroughly studied the medical records and conducted adequate investigation into the medical evidence. (Resp.'s RCCAP Exh. 20 at pp. 1-3 [Decl. of Donnalee Huffman].) Counsel tried to talk to medical personnel who testified prior to trial but they would not converse with her. Trial counsel consulted with experts, including pathologists Dr. Warren Spitz and Dr. F. Warren Lovell, as well as E.R. physician Dr. Nat Baumer. (*Id.* at p. 2.) Counsel prepared the defense experts for trial and provided the defense experts with medical records and everything they asked for.

Counsel consulted with experts to prepare her to cross-examine the prosecution's experts. (*Ibid.*) Respondent asserts that trial counsel reasonably relied on the defense experts. Respondent also alleges that any alleged deficiency in trial counsel's performance was harmless as to the jury's verdict of murder due to the overwhelming independent evidence that petitioner caused the catastrophic injuries that led to Consuelo's death.

4. Respondent denies that Huffman failed to counter the prosecutor's theory that Consuelo's rib injuries were due to squeezing. (Claim VI.M.4, RCCAP at p. 254.) Notwithstanding respondent's concession that the evidence of vaginal and anal injury due to sexual penetration cannot be relied upon, that evidence did not render Huffman's performance deficient with regard to the fact that Consuelo suffered fatal abdominal injuries. Respondent affirmatively alleges that Ms. Huffman thoroughly studied the medical records and conducted adequate investigation into the medical evidence. (Resp.'s RCCAP Exh. 20 at pp. 1-3.) Respondent asserts that Huffman elicited evidence showing that the rib fractures, like the fatal abdominal injuries, occurred due to some other mechanism, including a sharp and sudden application of force from the front of her abdomen toward her back. (Pet.'s RCCAP Exh. 142 at p. 6628; 12RT 2454-2468; 13RT 2520-2521; 14RT 2827-2828.) Respondent alleges that trial counsel conducted adequate investigation into the defense's car accident theory. (Resp.'s RCCAP Exh. 20 [Decl. of Donnalee Huffman].) In any event, the discredited evidence of injury due to sexual assault was material to the special circumstance allegation and felony-murder theory, but not to the issue of whether petitioner committed murder through the sudden and direct application of blunt force to Consuelo's abdomen, so it does not alter any relief to which petitioner is already entitled. (See Pet.'s RCCAP Exh. 142 at p. 6628; Resp.'s RCCAP Exh. 13; 10RT 2068-2070, 2073, 2089; 12RT 2454-2468; 13RT 2520-2521; 14RT 2827-2828; 17RT 3318.)

5. Respondent denies that trial counsel performed deficiently regarding the evidence of suffocation. (Claim VI.M.5, RCCAP at pp. 254-258.) Respondent alleges that trial counsel reasonably retained medical experts, provided them with reasonably necessary information, and reasonably relied on them to identify any weakness in the prosecution's theory of suffocation. Respondent also alleges that any alleged deficiency in trial counsel's performance was harmless as to the jury's verdict of murder due to the overwhelming independent evidence that petitioner committed the murder by means of sudden and blunt force to Consuelo's abdomen.

6. Respondent denies that trial counsel performed deficiently regarding the evidence of shaking. (Claim VI.M.6, RCCAP at pp. 258-259.) However, respondent alleges that trial counsel reasonably retained medical experts, provided them with reasonably necessary information, and reasonably relied on them to identify any weakness in the prosecution's theory of shaking. Respondent also alleges that any alleged deficiency in trial counsel's performance was harmless as to the jury's verdict of murder due to the overwhelming independent evidence that petitioner committed the murder by means of sudden and blunt force to Consuelo's abdomen.

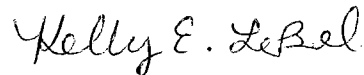
WHEREFORE, respondent respectfully submits that petitioner's convictions for rape, sodomy, lewd and lascivious acts with a child under 14, as well as the three-related sexual abuse special circumstance findings and the death sentence should be vacated. This Court should reduce petitioner's conviction for first degree murder to second degree murder, allowing the People to accept the judgment thereon or to retry the matter without a retrial. This is so because it is not reasonably probable that the jury would have failed to convict him of implied malice murder based on other untainted evidence that he violently assaulted Consuelo, inflicting the catastrophic abdominal injuries that caused her death. The petition for writ

of habeas corpus should be denied in all other respects and the order to show cause discharged.

Dated: June 12, 2015

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondent admits that expert opinion testimony that Consuelo had physical findings that were specific for vaginal and anal penetration by a penis or foreign object has been repudiated and is therefore “false” within the meaning of Penal Code section 1473. In addition, this evidence was material under Penal Code section 1473 to petitioner’s convictions for rape, sodomy, lewd and lascivious acts with a child under 14 years of age for anally or vaginally penetrating her with a foreign object, to the three related special-circumstance findings that petitioner committed the murder while engaged in a rape, sodomy, and lewd and lascivious acts, and to his sentence to death. Thus, the special-circumstance findings, petitioner’s capital sentence, and his convictions for rape, sodomy, and lewd acts should be vacated. Respondent also concedes that the cause of death cited by Dr. Dibdin (penile penetration of the anus, directing injuring the upper abdomen by severing the pancreas and duodenum) cannot be substantiated in light of the lack of injury to the rectum or the lower abdominal organs.

However, our inquiry does not end here in a case, such as this, where petitioner violently assaulted 21-month-old Consuelo, the daughter of his common-law wife. Setting aside Dr. Dibdin’s unsubstantiated cause of death, the repudiated evidence of sexual abuse and any other evidence that is deemed to be “false” within the statute, it is not reasonably probable that the jury would have failed to find petitioner violently, and with a conscious disregard for human life assaulted Consuelo in the abdomen, inflicting the injuries that caused her to die. Therefore, this Court should reduce petitioner’s conviction to second degree murder without granting him a retrial, allowing the People to accept judgment thereon or retry the matter.

Respondent further submits that petitioner has not met his burden of proving his other “false” evidence claims. He has not shown that the prosecution presented “false” evidence of prior sexual abuse. He has not proven that the head injury evidence was “false.” His assertion that Consuelo did not have any outward signs of physical, genital or anal trauma when her mother left her with petitioner on November 17, 1991, and that the prosecution suppressed the results of rape kit or untruthfully represented that no semen swab was taken are totally unfounded. Likewise, his contention that CHP Officer Bill Esmay’s testimony that there was no physical evidence of a car accident at the apartment complex was “false” and that Consuelo lacked indicia consistent with being a pedestrian hit by a car was “false” is also unfounded.

Even if petitioner had shown the above evidence to be “false” within the meaning of Penal Code section 1473, none of this evidence was material for the same reasons that Dr. Dibdin’s now undermined opinion about the cause of death and the repudiated anal and vaginal penetration evidence was not material.

II. PROCEDURAL HISTORY

On April 20, 1993, the Kern County District Attorney filed an information charging petitioner, Vicente Figueroa Benavides, with the following: in count I, murder (Pen. Code, § 187); in count II, rape (Pen. Code, § 261(2)); in count III, lewd and lascivious conduct on a child under 14 years (Pen. Code, § 288, subd. (a)); in count IV, sodomy on a person under the age of 14, who was more than 10 years younger than petitioner (Pen. Code, § 286, subd. (c)); in count V, intentionally causing permanent disability or disfigurement (Pen. Code, § 205); and in count VI, child endangerment (Pen. Code, § 273a(1)). It was further alleged in count I that petitioner committed three special circumstances, to wit: murder while

engaged in the commission of rape, in the commission of sodomy and in the commission of lewd and lascivious acts (Pen. Code, § 190.2, subd. (a)(17)(iii)-(v)). It was also alleged that petitioner inflicted great bodily injury with respect to counts II, III, and IV (Pen. Code, § 12022.8), causing these offenses to be serious felonies within the meaning of Penal Code section 1192.7, subdivision (c)(8). Counts II, III, and V were also alleged to be serious felonies (Pen. Code, § 1192.7, subd. (c)(3)). (1CT 253-258.) On December 20, 1991, petitioner pled not guilty to all counts, denied all allegations, and requested a jury trial. (1CT 259-260.)

After several continuances (1CT 263-266, 298-302; 2CT 303-304, 310-311, 318-319, 333-334, 340-341), the trial began on March 15, 1993.

Jury deliberation began April 19, 1993. The next day, the jury returned verdicts of guilty on each of the four counts remaining in the information. (2CT 533; 3CT 739-741.) The jury further found all of the allegations as to each count to be true. (3CT 739-741.)

The penalty phase began on April 22, 1993, and was concluded by a jury recommendation of death on the same day. (3CT 789, 800-806.) Sentencing was scheduled for May 20, 1993, but was continued to June 11, 1993, at petitioner's request (3CT 789, 800-806).

On June 11, 1993, the trial court denied petitioner's motions for new trial and for reduction of the sentence to life without possibility of parole. (3CT 887.) The trial court imposed the sentence of death as recommended by the jury for count I (murder). (3CT 905-911.) As to counts II-IV, the court imposed sentences of 13 years for each count and stayed execution of these sentences pursuant to Penal Code section 654. (3CT 874-875.) In addition, the court imposed certain registration, restitution, and testing conditions (3CT 874-875) and awarded petitioner credit for 858 days in custody (3CT 875).

On January 25, 2001, petitioner filed an automatic appeal. Respondent's brief was filed on September 27, 2001.

On November 12, 2002, petitioner filed a petition for writ of habeas corpus. On July 15, 2003, respondent filed an informal response. On February 20, 2004, petitioner filed an informal reply.

On November 30, 2004, petitioner filed supplemental allegations and exhibits 179-181 in support of the petition.

On February 17, 2005, this Court affirmed petitioner's convictions on automatic appeal.

On November 1, 2006, this Court granted petitioner leave to file an amended habeas petition based on the fraudulent work product of defense investigator Kathleen Culhane.

III. GUILT PHASE EVIDENCE

A. Prosecution Case

On March 22, 1991, Estella Medina and her nine-year-old daughter Christina and thirteen-month-old daughter Consuelo moved into an apartment with petitioner. (11RT 2177, 2277; 13RT 2542.) The apartment (number 155) was located on County Line Road in Delano. Petitioner's name was on the rental agreement for the apartment. (11RT 2277.)

On November 17, 1991, at about 6:40 p.m., Medina left her apartment to go to work. (13RT 2624.) Medina was a nurse's aid at Delano Regional Medical Center (hereinafter DRMC). (13RT 2545.) Medina left her daughters with petitioner. (13RT 2541-2542, 2545.)

Shortly thereafter, Christina asked for permission to go play with her friend Maribel at the playground in the apartment complex. (11RT 2181.) Petitioner told her to come back in 30 minutes. (11RT 2182.) Christina left the apartment and closed the front door behind her. (11RT 2183.) When Christina left the apartment, Consuelo was coloring at the kitchen table

(11RT 2182-2183) and petitioner was cutting onions to make himself some eggs for dinner (11RT 2187).

Christina reported that petitioner came outside about 15 minutes after she left and asked her to come home. (11RT 2182.)² Christina described petitioner as nervous and upset. (11RT 2186.) Christina followed petitioner back to the apartment into her mother's bedroom. (11RT 2183.) Consuelo had a bruise on her forehead and dry blood under her nose. (11RT 2184.) Petitioner held Consuelo and put rubbing alcohol on her forehead. (11RT 2184-2185.) Consuelo appeared to be wearing the same clothing she had on when Christina left the apartment. (11RT 2188.) Christina called her mother at work at 7:20 p.m. (11RT 2184; 13RT 2545.)

Medina drove home and found petitioner in their bedroom holding Consuelo. (13RT 2547-2548.) Medina testified that petitioner first told her Consuelo hit her forehead (which was bruised) on the door. (13RT 2548, 2589.) Later, he said he found Consuelo outside the door, lying on the sidewalk, vomiting, with blood on her nose. Medina remembered petitioner telling her he got Consuelo inside but could not recall if he said he sent her to her room or he put her in her room. (13RT 2548.)³

Medina drove Consuelo to Delano Regional Medical Center (DRMC), accompanied by petitioner and Christina. On the way to DRMC, petitioner told Medina to drive slowly. (11RT 2186.)

Consuelo was taken to DRMC, unconscious, with a report of a head injury. (12RT 2451-2452.) Later, that night she was transferred to Kern Medical Center (KMC) for more intensive care because she had extremely

² Maribel recalled petitioner coming outside and calling Christina five to ten minutes after they had started playing. (11RT 2273-2274.)

³ Christina heard petitioner tell Medina he picked Consuelo up and carried her to bed, and then summoned Christina. (11RT 2186-2187.)

low blood pressure, a very rapid heart rate, and her abdomen was distending rapidly, as if there were internal bleeding. (12RT 2452.)

Consuelo arrived in the trauma room at KMC at 10:30 p.m. Consuelo had “blown up” pupils, indicating massive head injury, and her abdomen was slightly distended. (11RT 2238, 2246.) She was in critical condition, so the nurses and doctors started immediate intervention. (11RT 2238.) Dr. Alonso, the emergency room doctor, described Consuelo as being on “death’s door.” (13RT 2695.) Charge nurse Betsy Lackie noted that Consuelo had a massive hematoma that was bigger than a nickel but smaller than a quarter on her vulva, which is the external genitalia to the left of the labia. (11RT 2242, 2249.) She also had internal tearing from the urethra to the vagina. (11RT 2239.) Dr. Leonardo Alonso noted that Consuelo had a very abnormal rectal exam with blood in her stools. (13RT 2685.) Typically, the muscle tone of the anus prevents one from being able to see inside the mucosa, but Consuelo’s anus was so swollen that the mucosa was visibly present. (13RT 2686.) Dr. Alonso was certain that Consuelo had been abused. (13RT 2686.) In three years in the emergency room, he had never seen a child who had been so badly abused as Consuelo. (13RT 2683.) Within 20 minutes, Consuelo’s abdomen was so distended that she looked like she was four months pregnant, probably as a result of internal bleeding. (11RT 2248.) Consuelo was taken to the operating room at 11:50 p.m. (11RT 2241.)

Dr. Jack Bloch, Chief of Surgery at KMC, operated on Consuelo. He removed fresh blood from the abdomen and found a hematoma in the colon. (12RT 2453, 2456.) Part of Consuelo’s duodenum (bowel) was broken in half over the spleen and her pancreas was broken in half over the spine. (12RT 2453-2454, 2456.) After the surgery, he contacted Medina and petitioner. Medina had a flat affect and “bizarre lack of concern,”

which was very unusual in his experience. (12RT 2464.) Petitioner refused to give his last name and exhibited little concern. (12RT 2464.)

Based on the surgical findings, pediatrician and child abuse expert Dr. Jess Diamond was asked to examine Consuelo. He saw her at 9:00 a.m. on November 18, 1991. (10RT 2046.) The exam lasted one hour. (10RT 2057.) Consuelo was unconscious and in critical condition. (10RT 2046, 2053.) Consuelo had a tube going down her airway to keep her breathing. (10RT 2049.) Dr. Diamond could not turn her over on her back or disturb the tubes on her face or her bandaged abdomen as that would have endangered her life. He examined her vagina and saw a tear at two o'clock. (10RT 2050.) He also examined her rectum and anus. She had a blue bruise on her perineum that was one-quarter of an inch in size from side to side, and one-eighth of an inch from top to bottom. (10RT 2000.) She did not have any rectal tone, meaning resistance, in the external sphincter muscle. Dr. Diamond was able to insert two fingers into the sphincter muscle, and when he withdrew them blood oozed out. (10RT 2050.) He found tears in the anal sphincter at six o'clock and nine o'clock. (10RT 2051.) These tears indicated that the victim had been anally penetrated. The object inserted exceeded the ability of the anus to expand to accommodate it, resulting in the tearing. (10RT 2051.)

Dr. Diamond gave his expert opinion that Consuelo was sodomized and that something entered her vaginal area, producing the two o'clock tear and the tear of the anterior vaginal wall. (10RT 2073.) He believed that Consuelo's internal injuries (to the pancreas and duodenum) were caused by external trauma to the abdomen (10RT 2073), such as a punch or a kick (10RT 2067). Bruising on the victim's inner lips and a tear to her frenum (the little piece of tissue under the upper lip that holds the upper lip against the gum) was consistent with someone having put a hand over her mouth. (10RT 2072.) Fractures along the spinal column to ribs eight through ten

on both the front and back side of Consuelo's body, were consistent with someone having grabbed her and squeezed her, while pulling the body backward. (10RT 2071.)

Consuelo became progressively worse in the intensive care unit at KMC. Her blood pressure was extremely low. KMC staff had difficulty getting oxygen into her blood stream, and there was a concern that her kidneys were not functioning because her urine output was very low. (12RT 2349.) Consuelo was transferred to UCLA Medical Center for more intensive care on November 19, 1991. (12RT 2341.)

When Consuelo arrived at UCLA Medical Center, her body was swollen all over. (12RT 2350, 2371-2372.) A nasogastric tube extended down her nose into her stomach, and an endotracheal tube extended from her mouth into her lungs. (12RT 2351, 2372.) She was on a respirator. (12RT 2363.) She was paralyzed. (12RT 2370-2371.) Blood oozed from her mouth, nose, anus and surgical sites. (12RT 2371.) Pediatric intensivist Dr. Richard Harrison was primarily responsible for her care for five days, starting from the date of her arrival until the day before she died. (12RT 2360.) Initially, Dr. Harrison tried to stabilize her so she could tolerate more abdominal surgery. (12RT 2354.) At some point he conducted an anal and vaginal exam. (12RT 2351.) He did not get to do an optimal vaginal exam because the tissue around her vagina was very swollen. (12RT 2392.) His findings on the anal exam were consistent with those of Dr. Diamond. He concluded that Consuelo had a lax sphincter tone which was basically non-existent. (12RT 2359.) Consuelo had surgery the second day she was at UCLA, but the doctors were unable to identify any specific site of bleeding in the abdomen; she seemed to be bleeding all over. (12RT 2354.) She underwent more abdominal surgery several days later, but she remained critically ill. (12RT 2355.)

On November 25, 1991, Consuelo died at UCLA Medical Center as a result of abdominal injuries. (12RT 2356, 2369.) The next day, forensic pathologist Dr. James Dibdin conducted an autopsy of the 21-month-old infant. (11RT 2112.) He testified that Consuelo died from a blunt force penetrating injury of the anus that caused lacerations of the anus and abdomen and damaged her pancreas and duodenum, as well. (11RT 2110, 2118, 2164.) Consuelo's anus was one inch in diameter, which is seven to eight times larger than normal. (11RT 2119.) Her anal injuries were consistent with penile penetration. (11RT 2167.) He also believed she was vaginally penetrated. The edges of her vagina were purple colored and bruised. (11RT 2124.) There was a one-half inch tear in the back wall of the vagina. (11RT 2122-2123.) She had a skin abrasion in the anal and vaginal area, meaning that the skin was rubbed off there. (11RT 2122.) The doctor opined that the skin was probably rubbed off by a penis because her back injuries were consistent with having been placed in the assailant's lap with her back toward him. (11RT 2144.) Dr. Dibdin observed fractures to ribs six through ten in the back of the chest near the spinal column and in ribs six through ten on the right near the front. He also observed a subdural hemorrhage, generalized brain swelling, and infarcts to the brain (meaning areas where the brain died due to insufficient blood supply). (11RT 2125.) Based on these injuries, Dr. Dibdin opined that Consuelo was shaken and that she was tightly gripped around the chest and had her body pulled backward during the assault. (11RT 2129.) He concluded that Consuelo's injuries were so severe that they would have prevented her from being able to get up. (11RT 2144.)

Medina was very protective of petitioner. At trial, outside the presence of the jury, the court found her to be hostile toward the prosecution. (13RT 2571.) Medina testified that she and petitioner had sexual intercourse the night of November 16, 1991, and they used a towel

to clean up afterwards. She claimed she had her period at the time. (13RT 2608-2609.) Medina allegedly did not recall her December 11, 1991, statement to District Attorney Investigator Gregg Bresson that she did not have her period on November 16. (13RT 2643.)

Medina did not tell her family that Consuelo had been physically and sexually abused. (14RT 2736.) Estella's sister, Diana Alejandro, first learned the truth from a nurse at KMC. (14RT 2734.) Estella's family visited Consuelo at UCLA Medical Center, and Medina continued to tell them that Consuelo had been hit in the head with a door. (14RT 2737.) Medina also failed to tell her oldest son, Rubin, the truth about how Consuelo was murdered. (14RT 2769.)

Medina stayed in contact with petitioner after he was arrested. She met with petitioner's defense attorney right after her daughter's death. (13RT 2587.) She visited petitioner four times while he was in jail (13RT 2551-2552), even after she read a copy of the autopsy report (13RT 2565), which concluded Consuelo had been sodomized and vaginally penetrated (11RT 2143). Medina did not recall asking petitioner to reconcile Consuelo's internal injuries with his account that she bumped her forehead on a door. (14RT 2891.) Medina also received telephone calls from petitioner while he was incarcerated. (13RT 2561.) Child Protective Services ultimately ordered Medina to stop having contact with petitioner if she wanted to retain custody of Christina. (13RT 2560.)

Estella's loyalty to petitioner was also evidenced by her failure to immediately contact law enforcement about a conversation she had with Christina on May 22, 1992. Christina told Medina that once, when petitioner watched her and Consuelo, petitioner went into their bedroom at night, took Consuelo, and kept her in his bedroom with the door locked all night. (13RT 2561.) Medina did not report this until July 9, 1992, when she was interviewed by Ray Lopez, an Investigator with the Kern County

District Attorney's Office. (13RT 2563.) Medina claimed that she telephoned the prosecutor to report it earlier, but he did not answer and she did not like to leave messages, so she allegedly hung up. (13RT 2564.) Medina also claimed to have reported what Christina told her to a social worker but subsequently admitted she had not. (13RT 2564.)

After petitioner was arrested and criminal charges were filed in this case, Medina dated Joe Avila, even though she knew him to be a registered sex offender. (13RT 2578-2579.) Medina brought Christina to Joe's residence on more than one occasion, and even let her spend the night there once, but never told her Joe was a registered sex offender. (13RT 2580-2581.)

1. Consuelo's previous injuries

Dr. Dibdin testified that Consuelo had prior injuries. Ribs eight and nine on the left side in the back of the chest were fractured. (11RT 2125.) He estimated these fractures to be three to four weeks old. (11RT 2128.) He also noted that Consuelo had areas of old healing injury in the vagina and anus. (11RT 2142-2143.)

On Halloween of 1991, Consuelo was physically ill when Diana Alejandro, her aunt, took care of her. Diana's children took Christina and Consuelo trick-or-treating at Diana's apartment complex. Consuelo was not feeling well and had a fever. Thirty minutes after the children left to go trick-or-treating, Consuelo returned to Diana's apartment crying. (14RT 2731.) Diana held Consuelo in her arms and tried to comfort her, but Consuelo repeatedly pushed her away. (14RT 2732.) Diana called Medina and asked what was wrong. Medina said that Consuelo had not been feeling well for the last couple of weeks. Consuelo had been throwing up. Medina planned to take her to Mexico for treatment when she got some

time off. Diana suggested that Medina not delay and take Consuelo to a doctor's office right away, but Medina did not respond. (14RT 2733.)

Medina told Investigator Lopez that Consuelo had started behaving strangely in October of 1991. (13RT 2585.) Consuelo was not eating very well. She did not laugh or play. She acted sad and just laid in bed. (13RT 2584.) At trial, Medina claimed she thought Consuelo's behavior could be attributed to teething, so she did not take her to a doctor. (13RT 2586.)

On September 24, 1991, Consuelo was treated by Dr. Chandra at DRMC for a fracture of the wrist bone. (14RT 2724, 2726.) Medina gave differing explanations for how Consuelo injured her wrist. She told Dr. Chandra that Consuelo fell and hurt her arm while playing in the yard the previous day. (14RT 2725-2726.) However, she told Virginia Uclaray, a registered nurse at DRMC, that she did not have any idea how Consuelo injured her arm. (13RT 2665.) On October 10, 1991, when Medina saw Dr. Seminario for Consuelo's baby wellness exam, Medina reported that Consuelo had fallen off a bed. (13RT 2656-2657.) At trial, she testified that Consuelo fell down at her sister (Consuelo's aunt) Dehlia's house. (13RT 2554, 2650.)

Consuelo had also suffered from several head injuries. On one occasion, Consuelo's head was pretty swollen. (13RT 2555.) Medina testified that Consuelo had fallen off a recliner in their living room and hit the front of her head on the sliding glass door. (13RT 2558, 2603-2604.) Medina could not recall if petitioner was in the living room at the time. (13RT 2603.) Medina claimed she did not take Consuelo to a doctor because she did not have health insurance. (13RT 2555.) Prior to trial, Medina had told Detective Valdez that Consuelo had fallen off the couch while trying to reach something on the wall. (13RT 2644.)

2. Petitioner's varying excuses for Consuelo's injuries

Petitioner told Medina that Consuelo hit her head on the door while following Christina. (13RT 2548.)

Petitioner told Francis Zapian, an emergency room technician at DRMC, that Consuelo ran after the oldest child and the door hit her. (14RT 2782.)

Medina told Eve Beerman, a social worker at UCLA Medical Center, that petitioner said Consuelo hit her head on the door and he found her outside on the cement, vomiting and bleeding from the nose. He allegedly told Consuelo to go to her bed and lay down. He summoned Christina later because Consuelo was not making any noise. (14RT 2765-2766.)

On November 18, 1991, Detective Al Valdez of the Delano Police Department interviewed petitioner at KMC at 4:30 a.m. Petitioner told him the following: Medina left for work at 6:35 p.m., and Christina asked for permission to go play with Maribel. (14RT 2744.) Consuelo followed Christina out the door, but Christina brought her back inside. Then, petitioner allegedly told Christina to take Consuelo with her. Christina supposedly said she did not want to and hurried out the door, and Consuelo attempted to follow. (14RT 2746.) Christina shut the door hard and quickly. Petitioner said he went to the kitchen to make eggs for dinner either after or just before the door shut. A minute later, he did not hear Consuelo making any noise, so he went to the living room to check on her. The door was partially ajar. He opened the door. (14RT 2747.) He saw Consuelo lying on her back, looking up. Her eyes were contorted and rolling. She had blood on her nose and mouth and was vomiting. (14RT 2748.) Petitioner picked her up, took her to her room, and cleaned her nose with tissue paper. (14RT 2750.) Petitioner claimed he cleaned up the vomit, but he could not remember at what point he did that. (14RT 2751.)

On the afternoon of November 18, 1991, after petitioner was arrested, he waived his *Miranda*⁴ rights and gave a tape recorded statement to Detective Valdez in Spanish at the police department. (14RT 2752-2753.) During the interview, petitioner was quiet and failed to make eye contact. His head was bowed down, and he stared at the floor. (14RT 2757-2758.) His statements were consistent with his previous statement, except he added the following: Consuelo had only been gone one minute between the time he heard the door close and the time he found Consuelo lying on her back outside the front door (15RT 3010), after he brought Consuelo into the house, he cleaned her up on his bed with toilet paper and a towel (15RT 3038). In addition, Detective Valdez asked when petitioner cleaned up the vomit outside the front door. Petitioner initially claimed he did not remember, but later said it was before he summoned Christina (15RT 3038).

3. Evidence from the crime scene

Petitioner's story that Consuelo hit her head on the front door while following Christina out the door did not match the physical evidence at the crime scene. (13RT 2548; 14RT 2782.) Investigator Brisson testified that the front door to apartment 155 opens inward, from right to left. (1RT 225-229.)

Petitioner's story that he found Consuelo bleeding from the nose and vomiting outside the front doorway and that he cleaned up the area, though he could not remember when, was also inconsistent with the physical evidence at the crime scene. (14RT 2748, 2751.) On November 20, 1991, criminalist Jeanne Spencer of the Kern County Regional Crime Lab did not find any blood or vomit outside the front doorway to apartment 155 or any

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436.

evidence that the area had been cleaned up. (11RT 2286, 2288.)⁵ She did find some vomit wrapped in tissue in the kitchen garbage can. (11RT 2288.) She examined it to check for dirt or gravel substance from outside that would be present had it been cleaned up from outside. Instead of dirt, she found carpet fiber in the vomit, consistent with the interior carpeting. (11RT 2291.) There was no rug outside the front door when Spencer was there. (11RT 2312.)

Spencer found a towel in the master bathroom that contained blood stains and semen stains mixed with blood stains. (11RT 2297.) Testing indicated that petitioner could have “donated” the semen on the towel. (11RT 2298.) Spencer could not estimate the length of time the semen was on the towel. She estimated it could have been there four to five days if the towel had been kept moist. (11RT 2316.)

Spencer obtained blood samples from petitioner, Medina and Consuelo to compare to the blood stains on the towel.⁶ Consuelo and petitioner had blood type O, and Medina had type A. (11RT 2296.) Spencer identified Consuelo’s blood on the towel. (11RT 2298-2299.)

⁵ Detective Nacua went to apartment 155 several times before Spencer did on November 20, 1991. On November 18, 1991, at 2:50 a.m., the apartment manager let him into the apartment so he could do a welfare check to look for Christina. (12RT 2422-2423, 2436.) Later that day at 11:50 a.m., Medina let him into the apartment when petitioner was not there. (12RT 2438.) He found a towel with blood in the master bathroom, uncooked eggs in a bowl on the kitchen counter, a coloring book on the kitchen table, a tissue with vomit in the kitchen garbage can, and some soiled Pampers (without any blood stains) in the garbage can. (12RT 2439.) He also found tissue with blood on it in the bathroom. (12RT 2441.)

⁶ Consuelo had a blood transfusion during her hospitalization. (11RT 2296.) Accordingly, Spencer assumed for analysis purposes that blood stains on Consuelo’s sweatshirt and jacket contained Consuelo’s blood and used that for the towel analysis. (11RT 2298.)

However, Spencer was unable to determine if the blood that was mixed with the semen sample was from Consuelo or Estella. (11RT 2299.)

On December 11, 1991, Medina told District Attorney Investigator Bresson that she did not have her period on November 16, 1991. (13RT 2643.) At trial, she testified she had sexual intercourse with petitioner on November 16, 1991, had her period at the time, and used a towel to clean up. (13RT 2608-2609.)

Spencer found other blood evidence in the apartment as well. She found bloody tissues in the waste basket in the bathroom, but testing proved to be inconclusive. (11RT 2305-2306.) She found a blood drop on the west wall of the master bedroom, near where the towel was found. (11RT 2304.) Testing proved to be inconclusive, either because there was not enough blood to test or the blood stain was old. (11RT 2305.) She also found blood stains on the closet wall or the door jam in the master bedroom (11RT 2304), on closets in the hallway (11RT 2311), and on a door jam leading into the first bedroom (11RT 2304). However, she did not test these stains because they appeared to be old. (11RT 2312.)

4. Petitioner's clothing and Consuelo's clothing

Spencer also examined the clothing petitioner was wearing when he was arrested. She did not find any semen or blood on his pants. There were spots of vomit on the right leg area and a few on the left leg area. (11RT 2303.) She did not find any fecal material on the front of his underwear and did not see blood or semen on it either. (11RT 2310.)

Likewise, Spencer examined the clothing Consuelo was wearing when she was taken to DRMC. Medina testified that a doctor in the emergency room at DRMC directed her to undress Consuelo. As she was taking off Consuelo's disposable diaper, the doctor told her to leave the diaper on. (13RT 2558.) Medina threw Consuelo's clothing onto the hospital floor.

(13RT 2627.) Estella's brother, Javier Alejandro, picked up Consuelo's clothing in a plastic bag from hospital personnel at DRMC. (12RT 2424, 2479.) Alejandro took the bag of clothing home. On November 18, 1991, at 9:05 a.m., Detective Jeff Nacua of the Delano Police Department picked up the bag of clothing from Alejandro. (12RT 2424, 2480.)

Spencer did not find semen on Consuelo's clothing. (11RT 2308.) There was no dirt or gravel on the clothing (11RT 2318) or in the bag containing the clothing (11RT 2327). Spencer found a pubic hair on Consuelo's jacket. (11RT 2320.) She compared it to one of petitioner's pubic hairs and the two were microscopically dissimilar. Spencer also noted that since Consuelo's clothing had been thrown onto the hospital floor, the pubic hair could have come from just about anywhere and there was no way to know how long it had been on the jacket. (14RT 2739.)

Spencer did not receive Consuelo's diaper for analysis. (11RT 2308.) Medina claimed she took off Consuelo's diaper in the emergency room at DRMC and did not see any blood or bowel movement. (13RT 2628.) Medina did not know what happened to Consuelo's diaper. (*Ibid.*)

5. Evidence rebutting the defense that Consuelo was hit by a car

During cross-examination, defense counsel asked two of Consuelo's treating physicians if her injuries could have been caused by a pedestrian-car accident. Dr. Diamond did not believe she was hit by a car. He has never seen a car accident cause the anal and vagina injuries Consuelo had. (10RT 2092.) Dr. Bloch agreed. He had never seen a child who had been run over as a pedestrian and who also had been vaginally and anally penetrated. (12RT 2468.) Dr. Bloch added that Consuelo did not have any external injuries from hitting pavement or being struck by a car. (12RT 2460.)

Bill Esmay of the California Highway Patrol is one of six officers state-wide on the Multi-Disciplinary Accident Investigation Team (MAIT). (15RT 2925, 2928.) During his ten years with MAIT, he has conducted over 50 accident investigations. (15RT 2931, 2936.) After conducting an investigation in this case, he concluded that Consuelo was not struck by a motor vehicle. His expert opinion was based on his examination of her clothing, her injuries, and his review of the apartment area. (15RT 2930.)

Starting with the clothing, Esmay had never seen a pedestrian who was hit by a car whose clothing did not show signs of the accident. (15RT 2940.) He also noted there were no scrape marks on the bottom of Consuelo's shoes, which he would expect to see if she had been moved off the pavement in a pedestrian-car accident. (15RT 2961.)

Esmay also discussed the types of injuries Consuelo would have incurred from a car collision. Assuming Consuelo were 34 inches tall and had been hit by a car, her center of mass would be below the height of the car bumper, which is anywhere from one to two feet off the ground. Thus, her body would have been projected forward and then rotated down underneath the car to the pavement rather quickly. (15RT 2931-2932.) This rotation movement would have damaged her clothing, upper torso and head, and caused road rash. (15RT 2932.) Esmay had never seen anal and vaginal tearing caused by a car accident. (15RT 2952-2953.)

Finally, Esmay described the location of the hypothetical car accident and its ramifications. The area around apartment 155 is paved, with the exception of some grass around the front of the apartment (15RT 2932), the area above the carports, and between the sidewalk and building (15RT 2934). So hypothetically, in order for Consuelo to have been struck out in the actual pathway of a car and land on a soft area, like grass, she would have to have been thrown up and over the carport or thrown under the carport onto the grass. Esmay explained that neither scenario could have

occurred in this case. When one is hit and thrown by a car, his/her body will stop before the car does, even if the driver brakes. Had Consuelo been thrown in a car accident, Esmay would expect the car to have ended up in the same position as Consuelo's body. (15RT 2935.) Hence, Consuelo could not have been struck and thrown onto the grass by any stretch of the imagination. (15RT 2936.) Esmay noted that the parking area is supported by a pole, which is next to the sidewalk. (15RT 2945.) He then considered another possible scenario: a backing-up type collision. He also rejected that scenario as unfeasible because the pole was not damaged, and it would have been bent had someone backed into a pole when a child was against it. (15RT 2946.) He would also have expected to see Consuelo underneath the vehicle when it stopped because she would stop more quickly than the car. (15RT 2949.) Assuming a car had backed into Consuelo and knocked her into a pole, he would expect Consuelo to have sustained minor to moderate injuries and her clothing would have been damaged, showing where the impact occurred. (15RT 2952, 2955.) Had a car pressed Consuelo against the pole, Esmay would also expect to see contusions and abrasions and other things in the area where the car touched the child. (15RT 2952.)

Estella's neighbors did not hear Consuelo scream or hear a car accident on November 17, 1991. Elena Carillo Alavarez and Javier Carillo Hernandez lived next door in apartment 154. (11RT 2225-2226, 2254.) They went to the grocery store between 6:00 p.m. and 7:00 p.m. (11RT 2256.) When they returned, they carried the groceries into the apartment. (11RT 2256.) By 7:00 p.m., they were at home watching television. (11RT 2255.) Elena testified that she would have heard a child screaming outside her apartment window, had that occurred. (11RT 2228.) They did not hear anything outside or from apartment 155. (11RT 2234, 2255.) Yvone Vasquez Figueroa lived next door in apartment 156. (11RT 2264.) She

was home sick that day. (11RT 2265.) She did not hear a child scream or detect any other noise coming from apartment 155. (11RT 2268.)

B. Defense Case

Nat Baumer, Director of the Emergency Room department at Ventura County Medical Center, testified on petitioner's behalf. (14RT 2821.) He hypothesized that Consuelo's head, chest, and abdominal injuries could have been sustained in a car accident, assuming her stomach hit the bumper. (14RT 2859.) However, he was unable to provide an explanation for her rib injuries under this scenario, and deferred giving an opinion on that to Dr. Lovell. (14RT 2836.) He admitted he did not have any expertise as to whether Consuelo would have fallen to the ground if hit by a car. (14RT 2860.) He also acknowledged that Consuelo would not have been able to get up and walk to her front door under this hypothetical, given the nature and extent of her injuries. (14RT 2864.) Baumer also conceded that Consuelo's injuries could not have been caused by her running into a door. (14RT 2865.)

Without saying that Consuelo was not sodomized, Baumer testified he was unable to reach a conclusion on that issue because the doctors did not conduct a chemical test to confirm the presence of semen. (14RT 2829.) When asked if profuse bleeding from the anus and vagina would impede such testing, he said he did not have expertise in that area and would have done the test anyway. (14RT 2855.) He also placed significance on Dr. Shaw's failure to detect lacerations during the anoscopy (14RT 2852) and on a report from a nurse at DRMC that indicated Consuelo had a "clean diaper" (14RT 2877), though he acknowledged poor training or the nature of the situation could have led the nurse to make a mistake in her notes (14RT 2880). Ultimately, Baumer concluded that the most likely scenario

to explain Consuelo's injuries is that she was "abused by someone in a rage." (14RT 2865.)

Petitioner testified at trial. Though he rented apartment 155 with Estella, he claimed he only lived there on her days off. (15RT 2983-2984.) He was not present when Consuelo broke her arm. (15RT 2985.) He was not present when Consuelo hit her head either; he was in the bedroom. (15RT 3046.) He denied ever taking Consuelo into his bedroom and closing the door. (15RT 2986.) He did not know how Consuelo incurred broken ribs or vaginal and anal injuries prior to November 17, 1991. Petitioner claimed he had not stayed with them since April or May of 1991. (15RT 3054.) Petitioner had watched Estella's daughters on prior occasions, but that was in April or May of 1991. (15RT 3044.) November 17, 1991, was the first date since then that he babysat them (15RT 2985), and that was the only time he was alone with Consuelo (15RT 3027). Medina was around the other times he had contact with Consuelo. (*Ibid.*) Petitioner did not harm or hit Consuelo on November 17, 1991, or any time before that. (15RT 3027, 3028.)

Petitioner's testimony about the events of November 17, 1991, varied from his previous statements in several respects. At trial, he said he "lost Consuelo" after Christina left the apartment. (15RT 3009.) He heard the door close when Christina left, but when he threw egg shells into the garbage, he allegedly noticed that the front door was open. (15RT 3048.) He professed not to have any knowledge about how much time elapsed between the time he left the kitchen and found Consuelo outside. (15RT 3010.) "After a while" he did not see her, and he found her outside. (15RT 3011.) When he found her, Consuelo was making sounds as if she was trying to say something. (15RT 3037.) Petitioner picked Consuelo up, with her face up. He could not explain how he got vomit on the lower half of his pant legs. (15RT 3034.) He took Consuelo inside and laid her on the

sofa in the living room. (15RT 3014, 3034.) Then, he went outside to call Christina, but she was on her way back. (15RT 3034.) He returned to the house, picked Consuelo up off the sofa, and took her to the bedroom and turned on the fan to give her some air. (15RT 3016.) Petitioner used toilet paper to clean the blood off of her. (15RT 3016-3017.) Petitioner claimed Christina used a towel to clean Consuelo, which was inconsistent with his previous statement that he used a towel to clean her. (15RT 3018.) Finally, he denied telling the detectives, Christina or Medina that Consuelo ran into a door, as he did not see her run into a door. He maintained that he initially told Detective Valdez he did not know what happened to her, whether she fell off a ladder or was hit by a car. (15RT 3019.) He claimed the audio tape did not record his suggestion that Consuelo was hit by a car because the detectives allegedly turned off the tape at some point during the interview. (15RT 3049.)

With respect to the discrepancies between his trial testimony and his previous statements, petitioner admitted that he did not tell the truth initially. He felt bad when he made the previous statements, and that made him “lie” about various things. (15RT 3032, 3057.) When asked about his tape recorded statement that he initially took Consuelo to the bedroom (not the sofa), he stated that the coffee and “pills” the police gave him were to blame for the inconsistency. (15RT 3075.)

Petitioner stated that he talked to his mother about Consuelo’s injuries. After he talked to defense counsel, petitioner told his mother that Consuelo had been run over by a car. (15RT 3058.) At trial, petitioner did not recall having told his mother that he had gotten a towel, picked Consuelo up, and taken her inside the apartment. He similarly lacked any recollection of having told his mother that he called Medina or that Consuelo had been run over by a car. (15RT 3061-3062.) However, he admitted he lied to his mother about the case. (15RT 3060.)

Four witnesses testified that petitioner is honest and non-violent. (16RT 3275, 3281-3282, 3292-3293; 17RT 3376.) Antonio Delatorre met petitioner in elementary school in Mexico. (16RT 3272-3273.) Delatorre moved to the United States 18 years ago. Since then, he had only seen petitioner occasionally when Duran went home to Mexico for vacation. (16RT 3273-3274.) The most recent contact he had with petitioner was five years ago. (16RT 3276.) Petitioner's second cousin, Guadalupe Benavides, had known petitioner over 40 years but had not been in contact with him in eight years. (16RT 3281.) When Guadalupe's daughter was six or seven years old, petitioner had contact with her. She never knew petitioner to have behaved inappropriately with her. (16RT 3282-3283.) Petitioner's nephew, Hector Figueroa, visited petitioner every three to four months during the past four years. (16RT 3292.) Before petitioner was incarcerated, petitioner saw Figueroa's two sons (then two years old and an infant) at family reunions. Figueroa never saw petitioner do anything wrong with them. (16RT 3295.) Petitioner told Figueroa he found Consuelo on the street and that she had been thrown in a car accident. (16RT 3296.) Finally, petitioner's cousin, Armando Benavides, grew up with petitioner and had known him 20 years. (17RT 3375.)

Pathologist Dr. Frederick Lovell, the previous Chief Medical Examiner in Ventura County from 1981-1993 and then medical consultant, was unable to determine if there had been penile penetration of Consuelo of such intensity that it would damage her internal organs. (16RT 3104.) He did not see any tears in Consuelo's vaginal or anal areas, only swelling. (16RT 3124.) He felt very definitely that anal and vaginal penetration had not caused Consuelo's injuries. (16RT 3126.) However, he acknowledged that nothing indicated Consuelo had not been molested; he just would have preferred to have swabs taken to confirm the presence or absence of semen. (16RT 3143.)

Dr. Ann Tait, the emergency room physician at DRMC, treated Consuelo the night of November 17, 1991. (17RT 3311-3313.) She did not remember if Consuelo had a diaper on or off, but stated that it would have been taken off by the nurses. (17RT 3315.) She did not know what happened to Consuelo's diaper because she initially treated Consuelo for a head injury and later suspected physical abuse, before Consuelo was transferred to KMC. (17RT 3319.) Given a choice between treating a patient and preserving potential evidence of child abuse, she emphasizes the patient's care. (17RT 3333.) She did not conduct a vaginal or anal exam of Consuelo. (17RT 3327.) She did not recall whether Consuelo was bleeding abdominally or not because there is always blood in the emergency room. (17RT 3320.) She did not tell Medina to remove Consuelo's clothing or to leave her diaper on. (17RT 3328.)

Estella's sister, Dehlia Alejandro Salinas, took care of Consuelo two to three times a week every two to three weeks. (17RT 3342.) She was hospitalized for having a nervous breakdown in 1985 and again in 1992. (17RT 3350.) She was babysitting when Consuelo hurt her arm. Consuelo had been playing outside on the swings. Dehlia did not see her get hurt but heard her crying and then saw her lying down on the porch. Consuelo's arm was sore to the touch. (17RT 3338.) She had also seen Consuelo with bumps on her head. Medina told her that Consuelo had pulled things off the dresser, bumping her head. (17RT 3347.) She recalled one or two occasions when Consuelo did not feel well and did not want to eat or play. (17RT 3342.) On November 17, 1991, Estella, petitioner, Dehlia and Consuelo went to K-Mart. (17RT 3340.) Consuelo was running around and did not complain when petitioner put her in her car seat. (RT 3340-3341.)

C. Prosecution Rebuttal Case

Dr. Anthony Shaw, Chief of Pediatric Surgery at UCLA Medical Center, performed surgery on Consuelo on November 20, 1991, and on November 23, 1991. (16RT 3157, 3159, 3183.) The first surgery was for exploratory purposes. He feared she would not survive unless he found something inside her abdomen that he could fix to reverse her condition. He performed an anoscopy at the conclusion of the surgery. He did not see tearing of the anus. (16RT 3162.) However, it would not surprise him to not have lacerations present in a child who had been anally abused, depending on the size of the object used and the force applied. (16RT 3189.) Had the lacerations been superficial, they could have also been effaced by the swelling in the area. (16RT 3163.) The second surgery was to evacuate the blood clotting and flow of blood in the abdominal area. (16RT 3183.) He did not find anything in Consuelo's medical records that was inconsistent with her having been sexually molested. (16RT 3163.)

IV. PENALTY PHASE EVIDENCE

A. Prosecution Case

Consuelo's aunt, Diana Alejandro, testified about the effect of Consuelo's death on her family. (19RT 3741.) She stated that her older sister (Dehlia Alejandro Salinas) had a nervous breakdown (*ibid.*)⁷ and that her youngest daughter still has nightmares (19RT 3742).

Consuelo's cousin, Darlene Salinas, testified that Consuelo's death affected her four-year-old daughter and eight-year-old daughter. Her daughters spent a lot of time with Consuelo. (19RT 3743.) They

⁷ Diana did not identify Dehlia by name. (19RT 3741.) However, Dehlia testified that she had a nervous breakdown when she testified at the guilt phase as a defense witness. (17RT 3342, 3350.)

affectionately referred to Consuelo by the nickname “Chiquita” because she was so small and petite. Consuelo was a joy to be around. Her family regrets not being able to see her ride a bicycle, or graduate from Head Start. Although she is gone, they will remember her every day. (19RT 3744.)

Consuelo’s cousin, Virginia Salinas, took care of Christina for about two months after Consuelo’s death when Christina was removed from her mother’s care. (19RT 3745-3746.) Christina was very emotional during the time she stayed with Virginia. She hugged and kissed Virginia’s four-year-old twins every night, like she used to do to Consuelo every night before they went to bed. (19RT 3746.) Christina told Virginia that she still thought about Consuelo. For example, Virginia recalled an occasion when Christina saw a picture of a rabbit in high grass, and Christina said it reminded her of Consuelo. Christina also told Virginia that a picture of a mother bear reading a bedtime story to a bear cub in bed reminded her of Consuelo because she used to read to her every night before they went to bed. (19RT 3746-3747.)

B. Defense Case

One of petitioner’s relatives, 46-year-old Dionicio Campos, grew up with petitioner in Mexico. (19RT 3753, 3755.) As a boy, he went to school with petitioner and saw him regularly. (19RT 3755.) At age 26, Campos married and moved away. (19RT 3754.) Between 1980 and 1991, Campos and petitioner resumed contact in the United States. Campos saw petitioner during the grape picking season, between June and November, during weekends and occasionally worked with him. (19RT 3756, 3758.) Campos has known petitioner to be a noble, calm person (19RT 3757) and a very hard worker (19RT 3758).

Delfino Trigo worked in the fields with petitioner as a seasonal farm worker between 1986 or 1987 and 1991. (19RT 3761-3762.) Petitioner

was a good worker and never was absent from his job. (19RT 3762.)
Petitioner was also a cooperative worker and Trigo never knew petitioner to be violent. (19RT 3763.) Having observed petitioner in both a work and social setting, Trigo believed petitioner was a good person. (19RT 3763.)

Both parties stipulated that petitioner did not suffer any prior felony convictions and there were no prior instances of violence or threats of violent conduct prior to this case. (19RT 3767.)

V. ARGUMENT

A. All Presumptions Favor the Judgment

Habeas corpus is an extraordinary remedy. (*In re Clark* (1993) 5 Cal.4th 750, 764, fn. 3.) Because a petition for writ of habeas corpus collaterally attacks a presumptively final criminal judgment, “the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them.” (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) “[A]ll presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, superseded by statute on other grounds as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) “Although habeas corpus thus acts as a ‘safety valve’ [citation] for cases in which a criminal trial has resulted in a miscarriage of justice despite the provision to the accused of legal representation, a jury trial, and an appeal, this ‘safety valve’ role should not obscure the fact that ‘habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment.’ [Citation.]” (*In re Reno* (2012) 55 Cal.4th 428, 450.)

Collateral attack by habeas corpus is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. (*In re Clark, supra*, 5 Cal.4th at pp.

766-767.) A habeas corpus petitioner “bears the burden of establishing that the judgment under which he or she is restrained is invalid. To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus.” (*In re Visciotti* (1996) 14 Cal.4th 325, 351, citations omitted.)

B. An Order to Show Cause Reflects a Preliminary Assessment that a Petitioner has Stated Facts which, if Proved, may Entitle Him to Relief

The function of the writ of habeas corpus or its alternate, the order to show cause, is to “institute a proceeding in which issues of fact are to be framed and decided.” (*In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4; *People v. Romero* (1994) 8 Cal.4th 728, 738.) The writ or order is the means by which issues are joined (through the return and traverse) and the need for an evidentiary hearing determined. (*People v. Romero, supra*, 8 Cal.4th at p. 739.)

Once the issues [are] joined ... the court must determine whether an evidentiary hearing is needed. If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing. Conversely, consideration of the written return and matters of record may persuade the court that the contentions advanced in the petition lack merit, in which event the court may deny the petition without an evidentiary hearing. Finally, if the return and traverse reveal that petitioner’s entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing. Because appellate courts are ill-suited to conduct evidentiary hearings, it is customary for appellate courts to appoint a referee to take evidence and make recommendations as to the resolution of disputed factual issues After the evidentiary hearing, the court ... will then either grant or deny relief based upon the law and the facts as so determined.

(*People v. Romero, supra*, 8 Cal.4th at pp. 739-740, internal citations omitted.)

The order to show cause directs the respondent to address the “claims raised in the petition and the factual bases for those claims alleged in the petition.” (*People v. Duvall, supra*, 9 Cal.4th at p. 475; *People v. Miranda* (1987) 44 Cal.3d 57, 119, fn. 37 [limiting issues in order to show cause was an implicit determination that defendant failed to make a prima facie case as to the other issues presented by petition].) In addition to stating facts, the return should also, ‘where appropriate, . . . provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed.’ [Citation.]” (*People v. Duvall, supra*, 9 Cal.4th at p. 476.)

C. False Evidence under Penal Code Section 1473

A writ of habeas corpus may be prosecuted where “false evidence that is substantially material or probative on the issue of guilt or punishment” was introduced against a person at trial. (Pen. Code, § 1473, subd. (b).) Effective January 1, 2015, “false evidence” was expanded to include “opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances. (Pen. Code § 1473, subd. (b)(1); Stats. 2014, ch. 623 (S.B. 1058), § 1.) Thus, under the current statute, a habeas petitioner need not show that the expert’s original opinion was “false,” meaning untrue; he need only show repudiated expert testimony.

False evidence is substantially material or probative “if it is ‘of such significance that it may have affected the outcome,’ in the sense that ‘with reasonable probability it could have affected the outcome....’ (*In re Wright* (1978) 78 Cal.App.3d 788, 814.)” (*In re Malone* (1996) 12 Cal.4th 935, 965-966.) “In other words, false evidence passes the indicated threshold if there is a ‘reasonable probability’ that, had it not been introduced, the result

would have been different.” (*Ibid*; *In re Richards* (2012) 55 Cal.4th 948, 961.) This is “the same as the reasonably probable test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*In re Richards*, at p. 961.) “It is dependent on the totality of the relevant circumstances. [Citation.] It is also, we believe, determined objectively. (Cf. *Strickland v. Washington* [(1984)] 466 U.S. [668,] 695 [dealing with ineffective assistance of counsel in violation of the Sixth Amendment].)” (*In re Malone, supra*, at p. 965-966, citing *In re Sassounian* (1995) 9 Cal.4th 535, 546.)

Notably, “a difference of opinion” or a witness’s “mistaken” testimony will not support a false evidence claim. (*People v. Wilson* (2008) 44 Cal.4th 758, 801; *In re Robbins* (1998) 18 Cal.4th 770, 800, fn. 24.) Petitioner must prove a false evidence claim by a preponderance of the evidence. (*In re Cox* (2003) 30 Cal.4th 974, 997-998.) If a habeas petitioner shows that the conclusion of a good faith expert is objectively untrue, the opinion is “false” under Penal Code section 1473. (*In re Richards, supra*, 55 Cal.4th at p. 963.)

1. **Within the meaning of the False Evidence Statute, evidence has been undermined or repudiated that was material to Petitioner’s convictions for rape, sodomy and lewd and lascivious acts with a child under 14, the special circumstances based on those crimes, his death sentence, and his conviction for first degree murder on a felony-murder theory**

- a. **Evidence of sexual abuse**

As discussed, Dr. Diamond has repudiated his prior opinion that Consuelo’s physical findings were specific for anal and vaginal penetration by a penis or foreign object. (Pet.’s RCCAP Exh. 149 at p. 2.) Respondent concedes this evidence is “false” within the meaning of section 1473, subdivision (e)(1). (RCCAP at pp. 25-33.) Because petitioner’s convictions for rape, sodomy and lewd and lascivious acts formed the basis

for the three special circumstances that were charged and found true by the jury, this evidence was material to punishment, and petitioner's death sentence should be vacated.

However, petitioner's conviction for murder should not be reversed on habeas. For the reasons set forth below in Argument C.2, setting aside any evidence deemed "false," under Penal Code section 1473, it is not reasonably probable the jury would have failed to convict petitioner of second degree murder for inflicting Consuelo's catastrophic and ultimately fatal abdominal injuries.

b. Evidence of prior sexual abuse

Petitioner further contends "Dr. Dibdin testified that Consuelo had tears in her anus, vagina, and urinary bladder of up to four weeks in age." (RCCAP at p. 28, claim A4, citing 11RT 2140.) Petitioner paraphrases the testimony as stating that these injuries were viewed microscopically in tissue slides. Petitioner then claims, "These tears 'weren't in one particular area,' according to Dibdin, but 'were depicted in several areas' in the anus, vagina, and urinary bladder." (RCCAP at p. 28, claim A4(b), citing 11RT 2140.)

Petitioner then alleges the prosecution knew there were no such injuries. (RCCAP at p. 28, claim A4(c), citing Pet.'s RCCAP Exh. 82 [Declaration by Dr. Dale Huff].) That no genital or anal trauma was noted at DRMC, the first hospital where Consuelo was treated for a head injury related to a report she had hit her head on the door, does not conclusively establish that there was no such trauma. It certainly does not show the prosecution to have produced testimony of sexual abuse that was "false" within the meaning of Penal Code section 1473, subdivision (b), particularly where hospital staff qualified their failure to detect anal trauma with the fact they were not looking for it. (See e.g. Pet.'s RCCAP Exh. 4 at

pp. 1681-1682, 1692 [Linda Roberts attempted to catheterize Consuelo and did not see anal or vaginal trauma but was not looking for signs of sexual abuse and never saw Consuelo's anus or rectum] & p. 1769 [When asked whether she saw trauma to the anal area, Fay Van Worth responded she "did not turn the victim over and look, but you know in a child that small, there was nothing obvious and gross."].) Respondent has already conceded that under the current state of the record petitioner's convictions for sodomy and lewd and lascivious acts, the related special circumstance findings, and his death sentence should be vacated based on our inability to substantiate that Consuelo was anally penetrated by a penis or any other object.

Moreover, Dr. Dibdin did not testify that tissue slides of the perineum showed "tears" in Consuelo's anus, vagina and urinary bladder. He testified that he looked at "sections of the anus, vaginal and urinary bladder" and there were "changes" there. (11RT 2140.) Thus, Dr. Huff's assertion that the tissue slides of the perineum did not show evidence of tears or scarring, new or old, does not support petitioner's Penal Code section 1473 "false" evidence claim.

Even if petitioner had shown "false" evidence of prior sexual abuse, that evidence was not material. For the reasons set forth below in Argument C.2, setting aside any evidence deemed "false," under Penal Code section 1473, it is not reasonably probable the jury would have failed to convict petitioner of second degree murder for inflicting Consuelo's catastrophic and ultimately fatal abdominal injuries.

c. Dr. Dibdin's opinion regarding the cause of death

There was no dispute that Consuelo died from blunt trauma to the abdomen. (10RT 2067 [Dr. Diamond]; 12RT 2369-2370, 2395 [Dr. Harrison], 2460 [Dr. Bloch]; 14RT 2895 [Dr. Nat Baumer].) Dr. Diamond and Dr. Bloch opined that the blunt trauma to the abdomen was external, such as from a punch or kick. (10RT 2067, 12RT 2460.)

Dr. Dibdin opined that Consuelo died from a blunt force penetrating injury of the anus that caused lacerations of the anus and abdomen and damaged the pancreas and duodenum in her upper abdomen. (11RT 2110, 2118, 2164.) On cross-examination, he stated that a blunt object penetrated the anus, went into the abdomen and "caus[ed] the stretching and tearing of the blood vessels in the abdomen and stretching and tearing of the various organs in the abdomen." He acknowledged there was no tear to the abdominal wall. (11RT 2168.) Dr. Dibdin was not asked whether the rectum was injured. But UCLA's Chief of Pediatric Surgery, Dr. Anthony Shaw, testified it was not (16RT 3189), and Dr. Diamond rejected Dr. Dibdin's opinion regarding the cause of death since he now understood there was no hole in the rectum (10RT 2085).

Dr. Rick Harrison oversaw Consuelo's care at UCLA Medical Center and did not know whether penile penetration caused the abdominal trauma or if anal injuries were important in causing death. (12RT 2369.) He deferred to the post-mortem findings since forensic pathologists specialize in determining the cause of death. (12RT 2394.)

Defense pathologist Dr. Frederick Lovell testified that anal penetration did not cause the abdominal trauma. (16RT 3126.) Dr. Bloch, Chief of Surgery at KMC and the only person who saw the full extent of Consuelo's abdominal injuries, also testified that Consuelo's internal injuries were *not* caused by anal penetration. (12RT 2460.)

Petitioner argues that Dr. Dibdin's testimony regarding the cause of death has been undermined within the meaning of Penal Code section 1473, subdivision (e)(1). (Pet.'s RCCAP Exh. 83 at p. 5511 [Decl. of Dr. Kennedy]; Pet.'s RCCAP Exh. 77 at p. 5449 [Decl. of Dr. Bloch]; Pet.'s RCCAP Exh. 79 at pp. 5466-5467 [Decl. of Dr. Harrison]; Pet.'s RCCAP Exh. 144 at p. 5545 [Decl. of Dr. Alonso].) Respondent agrees. (Resp.'s RCCAP Exh. 18 at p. 11 [Decl. of Dr. Tracey S. Corey]; Resp.'s RCCAP Exh. 19 at p. 6 [Decl. of Dr. James Crawford-Jakubiak].)

Nevertheless, Dr. Dibdin's unsubstantiated opinion regarding the cause of death should not warrant reversal of petitioner's conviction for murder. As discussed, it was undisputed that Consuelo died from abdominal trauma. Setting aside Dr. Dibdin's now undermined opinion about the cause of death, it is not reasonably probable that the jury would have failed to find petitioner guilty of second degree murder for violently assaulting Consuelo, inflicting the abdominal injuries from which she ultimately died, as is discussed in Argument C.2.

d. Head injuries⁸

Petitioner raises multiple false evidence claims concerning Consuelo's head injuries.

Dr. John R. Bentson, UCLA Medical Center's Chief of Neurology, testified that in reviewing a computer tomography (CT) scan of a normal brain, one sees almost an even density, with some areas being a little bit different than others. CT scans of Consuelo's brain from November 21, 1991, showed marked abnormalities. (12RT 2405-2406; see also People's Trial Exh. 34.) Dark areas in the back and in the front of the brain showed

⁸ False evidence claims A7-9 concern the rib and abdominal injuries and require a detailed discussion. For the sake of clarity, the return addresses those claims *after* claims A10-15.

brain infarcts (12RT 2408) or dead tissue (12RT 2406). It was undisputed that Consuelo had bilateral watershed occipital parietal brain infarcts. (12RT 2406.) The term “watershed” refers to an area of dead brain tissue between two main arteries in the brain. (12RT 2407.) Defense pathologist Dr. Lovell actually saw the infarctions in Consuelo’s brain, which had been preserved in formaldehyde at the coroner’s office but has since been destroyed. (16RT 3111-3112.)

Dr. Bentson opined that the brain infarcts were caused by a drop in the amount of oxygenated blood that goes to the brain. (12RT 2406.) Indeed, Consuelo needed surgery to stop the internal bleeding. (12RT 2471.) Dr. Bentson further opined that the brain infarcts were not caused by direct trauma (12RT 2406) or being struck in the head (12RT 2408). The defense experts agreed the infarcts were caused by loss of oxygenated blood secondary to the abdominal injuries. (16RT 3113 [Dr. Lovell]; 12RT 2832.) During cross examination, Dr. Bentson cited the following as other potential causes for brain infarcts: the heart stopping for a prolonged period of time (12RT 2409, 2410, 2413; 16RT 3112 [Dr. Lovell said the same]); dramatically low blood pressure (12RT 2413, 2414); anemia (12RT 2414); cessation of breathing for a period of time (12RT 2412), or anesthesia accidents during surgery (12RT 2413).

(1) Suffocation

When asked if the bilateral watershed brain infarcts “could possibly” have been caused by suffocation, Dr. Bentson responded affirmatively. (12RT 2406; see also 12RT 2410.) On cross-examination, Dr. Bentson clarified that the type of brain infarcts Consuelo exhibited result from a complete deprivation of oxygen for a period of at least six to eight minutes. (12RT 2416-2417.)

Petitioner contends the evidence that Consuelo could have been suffocated was “false” under Penal Code section 1473, subdivision (e)(1). (RCCAP at pp. 39-41, claim A10.) Respondent submits there was no evidence of suffocation. Consuelo was breathing when she was taken to the first hospital. (17RT 3327.) At most, petitioner has simply shown a conflict of opinion among medical experts as to the cause of the watershed brain infarcts. (Pet.’s RCCAP Exh. 81 at p. 5487 [Decl. of Dr. Vincent J.M. DiMaio] and Exh. 78 at p. 5459 [Decl. of Dr. Harrison].) That is insufficient to establish entitlement to habeas relief based on “false” evidence. (*People v. Wilson, supra*, 44 Cal.4th at p. 801.)

Even if this Court disagrees, any “false” evidence as defined by Penal Code section 1493 was not material to petitioner’s murder conviction. It had no bearing on other untainted evidence from which any reasonable jury would have convicted petitioner of second degree murder for assaulting Consuelo in the abdomen, an area known to contain vital organs.

(2) Brain swelling

Petitioner further alleges that Dr. Bentson falsely testified that swelling in the back of Consuelo’s head on both sides “seemed to be from different traumas.” (12RT 2417; RCCAP at p. 41, claim A11.) After defense counsel cross-examined Dr. Bentson about potential causes for the brain infarcts, the following question and response were given on redirect examination:

Q. I just have one question for you, doctor. The scalp edema that you saw on the film and that the defense counsel asked you about, it went all the way around. Would that have been caused by more than one blow?

A. Well the scalp swelling was mostly in the back of the head, but it was on both sides of the back of the head. And it *seemed to be* from different traumas, let’s say. Generally speaking when

we see this sort of thing we assume it came from more than one event.

(12RT 2417; emphasis added.)

Dr. Bentson's testimony was equivocal and seems to contradict his prior testimony that a strike(s) to the head did not cause the brain infarcts. (12RT 2408.) Post-conviction forensic pathologist Dr. Tracey S. Corey agrees the scalp swelling was not from trauma to the head, and that it is explained by the generalized severe edema of the child. (Resp.'s RCCAP Exh. 18 at p. 9 [Decl. of Dr. Tracey S. Corey].) Dr. Bentson has not recanted his testimony about Consuelo's rain injuries, and a conflict of opinion among experts does not entitle petitioner to habeas relief under Penal Code section 1473 unless he shows Dr. Bentson's testimony was objectively untrue, which he has not. (*People v. Wilson, supra*, 44 Cal.4th at p. 801; *In re Richards, supra*, 55 Cal.4th at p. 963.)

In any event, however, this evidence should not be deemed material to petitioner's murder conviction. It had no bearing on other evidence from which any reasonable jury would find him guilty of second degree murder for inflicting Consuelo's fatal abdominal injuries, as discussed in Argument C.2.

(3) Shaken Baby Syndrome

Finally, petitioner contends testimony by Dr. Dibdin that Consuelo's subdural hemorrhage, generalized brain swelling, and brain infarcts were indicative of Shaken Baby Syndrome was also "false." (11RT 2125, 2129; RCCAP at pp. 41-43, claim A12, citing Pet.'s RCCAP Exh. 84 at pp. 5516, 5517, 5521 [Decl. by Dr. Aaron Gleckman]; Pet.'s RCCAP Exh. 81 at p. 5487 [Decl. by Dr. Vincent DiMaio].) A difference of opinion among medical experts as to the cause of Consuelo's injuries does not entitle a habeas petitioner to relief for "false" evidence under Penal Code section

1473. (*People v. Wilson, supra*, 44 Cal.4th at p. 801.) However, if a habeas petitioner shows that the conclusion of an expert is objectively untrue, the opinion is “false” under the statute. (*In re Richards, supra*, 55 Cal.4th at p. 963.) Respondent lacks information sufficient to assess whether petitioner has proven his “false” evidence claim. (Resp.’s RCCAP Exh. 18 at p. 9 [Decl. of Dr. Tracey S. Corey].)

But, again, this evidence was not material to petitioner’s murder conviction even if it has been shown to be “false” within the meaning of Penal Code section 1473. Brain trauma was not cited as a cause of death. Setting aside this evidence, it is not reasonably probable the jury would have failed to convict petitioner of second degree murder where other untainted evidence showed he assaulted her in the abdomen with such force the pancreas and duodenum were severed, causing her death, as discussed in Argument C.2.

e. Evidence concerning Consuelo’s health prior to November 17, 1991

Petitioner alleges the People presented “false” evidence that Consuelo was healthy before November 17. (RCCAP at pp. 43-45, claim A13, referencing 10RT 2024 [prosecutor’s opening argument].) Respondent denies this allegation. Consuelo’s mother truthfully described Consuelo as healthy on the morning of November 17. (13RT 2543.) Consuelo did not have a bloody nose, bruised lip or forehead, or any injuries to her head or apparent rib injuries when Medina left her with petitioner. (13RT 2544.)

Petitioner relies on Medina’s testimony that Consuelo fell a lot, sometimes bruising herself, even when petitioner was not around. (2012 Inf. Reply at p. 65, citing 13RT 2587-2588.) But that does not bear on Medina’s testimony that Consuelo did not have any visible injuries or and

did not behave abnormally before Medina left her with petitioner on the night of the charged offense.⁹

Evidence of prior injuries sustained by Consuelo and the evidence, if any, linking petitioner to those prior injuries was not “false.” (2012 Inf. Reply at pp. 65-70.) Petitioner’s claim to the contrary is unsupported and should be rejected.

f. Semen swab

Dr. Diamond testified he did not take a vaginal or anal swab from Consuelo. (10RT 2083-2084.) Petitioner alleges the People either suppressed the results of a rape kit or presented false testimony (by Dr. Diamond) to justify the absence of a rape kit, which allegedly was not obtained because the prosecution knew the kit would produce exculpatory evidence. (RCCAP at p. 46, claim A14.) Petitioner’s claim is speculative, wholly unsupported, and must fail.

⁹ Petitioner further alleges that the prosecution failed to disclose evidence about Consuelo’s health prior to November 17, 1991. (RCCAP at pp. 43-45, claim A13.) Specifically, Consuelo fell down a lot. (Pet.’s RCCAP Exh. 4 at *id.* at p. 2422) [according to Medina] and p. 205 [Dehlia Salinas, Consuelo’s aunt, said Consuelo “bruised herself” particularly her knees from the falls].) In addition, Diane Alejandro, another aunt, related that Consuelo “was always rashed” when Consuelo lived at 1313 Albany (i.e. before she lived with petitioner at the Brandywine apartments) because the Alejandro family did not change her diaper (*id.* at p. 2287). Once, Medina sought medical treatment for Consuelo’s diaper rash on an unspecified date. (*Id.* at p. 2422.) None of this, of course, explains the injuries that killed Consuelo. The prosecution was not obligated to disclose this information as it was not material to the charges or to the injuries Consuelo suffered prior to September 24, 1991, and there is not a reasonable probability the result of the proceeding would have differed had it been disclosed. (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*).)

g. Evidence showing Consuelo was not a pedestrian hit by a car

Petitioner has not shown that Officer Esmay's testimony was "false" within the meaning of Penal Code section 1473 based on his failure to consider that "plant material" was detected on Consuelo's sweatshirt according to lab notes from criminalist Jeanne Spencer. (Pet.'s RCCAP at p. 47, 2012 Inf. Reply at p. 71.) Any plant material on the sweatshirt was de minimus, as evidenced by the fact it is not visible on photographs of the sweatshirt (Resp.'s RCCAP Exh. 2 [People's Trial Exhs. 73 & 74]) and was not denoted on Spencer's diagram of the front and back of the sweatshirt (Resp.'s RCCAP Exh. 7 at p. 3501.) The presence of plant material on the sweatshirt does not bear on Officer Esmay's testimony to the following: there was no physical evidence of a car accident at the apartment complex where petitioner and Consuelo lived, Consuelo's skin did not have abrasions or road rash, her clothing did not have gravel or tire marks, and had Consuelo truly been a pedestrian who was hit by a car, she would have been projected forward and then quickly rotated underneath the car to the pavement (not thrown near a grassy area as alleged in petitioner's changed account of where he allegedly "found" her after she was "missing" for a minute). The presence of plant material on the sweatshirt is also not material to petitioner's guilt of murder. As is discussed in Argument C.2, setting aside any evidence deemed "false," (Pen. Code, § 1473), it is not reasonably probable that the jury would have failed to find that petitioner violently, and with conscious disregard for human life, inflicted Consuelo's

catastrophic and ultimately fatal abdominal injuries. Thus, petitioner's "false" evidence claim fails.¹⁰

Petitioner also argues that the nondisclosure of Spencer's notes violated *Brady*. This claim was not in the RCCAP, so it is not properly before this Court. (RCCAP at p. 47.) Informal replies to informal responses cannot be relied upon to augment petitions. (*In re Clark, supra*, 5 Cal.4th at p. 798.) In any event, petitioner's claim lacks merit. Under *Brady*, a prosecutor must disclose material exculpatory evidence to the defense whether requested or not. (*In re Brown* (1998) 17 Cal.4th 873, 879.) Evidence that is in the hands of the prosecutor's office or in the possession of the police and others acting on the government's behalf must be disclosed. (*Ibid.*) But "not every nondisclosure of favorable evidence denies due process." (*Id.* at p. 884.) Nondisclosure constitutes a constitutional violation "only if it deprives the defendant of a fair trial.... [T]he conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." (*United States v. Bagley* (1985) 473 U.S. 667, 678; *Strickler v. Greene* (1999) 527 U.S. 263, 281-282.) Materiality "does not require the defendant to demonstrate by a preponderance of the evidence that disclosure would have resulted in an acquittal; instead, it is sufficient if there is a "... reasonable probability" of a different result had the suppressed material been properly disclosed. (*Brown, supra*, at p. 886.) Petitioner has not shown that Spencer's notes were exculpatory or suppressed. Any plant material on the sweatshirt was de minimus. Even if he could make these two showings, based on the facts discussed above, a

¹⁰ Respondent denies petitioner's assertion that the prosecutor knew or should have known that testimony by any of its witnesses, including CHP Officer Esmay, was "false." (2012 Inf. Reply at p. 72.)

failure to divulge this evidence would not be tantamount to a violation of petitioner's constitutional rights.

h. Rib injuries

Petitioner further contends that Dr. Dibdin "falsely" testified that the acute rib fractures were caused by squeezing and occurred on November 17, and that the healing fractures were three to four weeks old. (RCCAP at pp. 35-39, claims A7-9.) His claim is baseless and should be rejected.

(1) Clerical error regarding slides C23-27 on the manifest of tissue slides

Dr. Dibdin testified that in the back of Consuelo's chest, she had acute, or fresh, fractures in ribs six through ten near the spinal column on the right and left sides. In the front of her chest, she had acute fractures in ribs six through ten on the right side. (11RT 2125, 2128.) In addition, she had older healing rib injuries in the back of the chest, in ribs eight and nine on the left side. (11RT 2125, 2127.) Dr. Dibdin opined that the posterior fractures to the eighth and ninth ribs on the left side were three to four weeks old, based on a microscopic review of slides that contained small sections of the ribs where the breaks had occurred. (11RT 2126-2128.)

Petitioner contends Dr. Dibdin lied about the existence of the left posterior acute and healing rib fractures because the "Manifest of Microscopic Slides" in the autopsy report does not reference tissue from the left posterior ribs (Pet.'s RCCAP Exh. 8 at p. 3542; RCCAP at pp. 42-43; 2004 Inf. Reply at p. 41; 2012 Inf. Reply at p.53.) The Manifest states:

- C13 (R) Anterior 6th Rib
- C14 (R) Anterior 7th Rib
- C15 (R) Anterior 8th Rib
- C16 (R) Anterior 9th Rib
- C17 (R) Anterior 10th Rib

C18 (R) Posterior 6th Rib
C19 (R) Posterior 7th Rib
C20 (R) Posterior 8th Rib
C21 (R) Posterior 9th Rib
C22 (R) Posterior 10th Rib
C23 (L) Anterior 6th Rib
C24 (L) Anterior 7th Rib
C25 (L) Anterior 8th Rib
C26 (L) Anterior 9th Rib
C27 (L) Anterior 10th Rib

(Pet.'s RCCAP Exh. 8 at p. 3542.)

The slide manifest incorrectly states that slides C23-C27 relate to the left anterior ribs.¹¹ In fact, they pertain to the left *posterior* ribs. Dr. Dibdin testified there were healing injuries to the eighth and ninth left posterior ribs near the same area where there were acute rib fractures. (11RT 2125 see also Pet.'s RCCAP Exh. 8 at p. 2557 [testimony is consistent with autopsy report of acute fractures “in ribs six through ten bilaterally posteriorly adjacent to the spinal column, and anteriorly in ribs six through ten on the right...” and healing fractures in the eighth and ninth ribs on the left posteriorly].)

¹¹ Petitioner belatedly asserts without any support that the prosecutor failed to disclose the microscopic manifest. (2012 Inf. Reply at p. 54.) This claim was not raised before in the petition or RCCAP (RCCAP at pp. 35-38), so it is not properly before this Court. Informal replies to informal responses cannot be relied upon to augment or supplement petitions. (*In re Clark, supra*, 5 Cal.4th at p. 798.) In any event, his claim lacks merit. Petitioner has not adduced any evidence that the manifest of tissue slides was suppressed. Defense expert Dr. Frederick Lovell testified that he examined the tissue slides. (16RT 3095.) He would have been unable to decipher what he was looking at without the manifest that identified the contents of the slides.

Dr. Astrid Heppenstall-Heger (hereinafter Dr. Heger) alleges that Dr. Dibdin may have transposed the words anterior and posterior in the autopsy report. (Pet.'s RCCAP Exh. 170 at p. 13.) Her contention that Consuelo may have had bilateral breaks to ribs six through ten anteriorly and right posterior breaks to ribs six through ten is inconsistent with the autopsy report's finding that "upon reflecting the skin on the *back of the chest*, acute contusions are identified in the muscles overlying the sixth through tenth ribs bilaterally." (Pet.s' RCCAP Exh. 8 at p. 3557.) Thus, C23-27 really depicted left posterior ribs.

Regardless of which rib tissue is contained in slides C23-27, Consuelo's new rib fractures were extensive. (Pet.'s RCCAP Exh. 170 at p. 13 [Dr. Heger acknowledged the same in her declaration.]) Dr. Lovell reviewed tissue slides from the autopsy, and he did not dispute the number or location of the acute rib fractures that Dr. Dibdin identified. (16RT 3131.) Declarations petitioner submitted from two forensic pathologists, Dr. Vincent DiMaio and Dr. Aaron Gleckman, and an anatomic pathologist, Dr. Dale S. Huff, do not address the rib fractures. (Pet.'s RCCAP Exhs. 81, 84 and 82, respectively.)

Apparently Dr. Dibdin failed to confirm or deny the existence of a fracture to the eighth anterior rib that Dr. Seibly saw in a radiograph from November 18. Contrary to petitioner's assertion, this omission does not show Dibdin gave false testimony about the rib fractures either. (RCCAP at p. 35; 13RT 2515-2516, 2530, 2536-2537.) Dr. Seibly testified that the only way to know if there is a rib fracture is to look at the rib (13RT 2532), and he was not present at the autopsy (13RT 2530). Likewise, Dr. Dibdin's failure to denote the (healing) wrist fracture that Consuelo incurred on September 24, 1991, a matter upon which he was not questioned at trial, does not show that his findings regarding the ribs was false. (RCCAP at pp. 35-36; claims A7a(3)). Hence, petitioner's "false" evidence claim fails.

Finally, petitioner has adduced no proof that a supplemental report from Dr. Chabra on December 4, 1991, identifying healing fractures to right anterior ribs eight through ten and a recent displaced fracture of the eighth rib on the right (anterior or posterior) was fabricated to conform to Dr. Dibdin's findings.¹² (RCCAP at p. 36, claim A7a(4)(a); citing Pet.'s RCCAP Exh. 1 at p. 20 [December 4, 1991 Addendum Radiology Report of Dr. J. Chabra].) Dr. Chabra did not testify at trial and his reports were not admitted into evidence. (1Supp.CT 71-150 [Trial Exhibit List].) Thus, this claim also fails.

(2) Dr. Dibdin and Dr. Lovell's difference of opinion about when Consuelo suffered rib fractures

Petitioner further claims that Dr. Dibdin "falsely" approximated the age of Consuelo's acute rib fractures (RCCAP at p. 38, claim A8) and healing rib fractures (*id.* at p. 39, claim A9) because his opinion varied from Dr. Lovell's opinion. A conflict of medical opinion will not support a false evidence claim. (*In re Richards, supra*, 55 Cal.4th at p. 963.) Hence, this Court should reject this claim, as well.

(3) Squeezing as a mechanism for the rib fractures

Petitioner further alleges that Dr. Dibdin falsely opined that Consuelo's rib injuries were caused by abuse (squeezing). (RCCAP at p. 37.) Dr. Dibdin testified that *on Consuelo's back*, underneath the skin, there were "very dark red areas" in the muscles overlying the sixth through tenth ribs on both sides of the chest. (11RT 2125, 2131.) Defense expert

¹² When Dr. Chabra first reviewed the radiograph at KMC on November 17, 1991, he did not detect any rib fractures. (Pet.'s RCCAP Exh. 1 at p. 19.)

Dr. Lovell characterized the bruise on the right side of her back as “quite severe” and acknowledged there was probably a bruise on the left side of her back though it was not as distinct. (16RT 3107.) Based on the rib injuries and bruised muscles, Dr. Dibdin opined that Consuelo had been tightly gripped around the chest and had her body pulled backward during the assault. (11RT 2128-2129.) Dr. Diamond agreed. (10RT 2071.) Dr. Seibly agreed. (13RT 2523-2524; see also 13RT 2522, 2533, 2534.) Dr. Shaw agreed. (16RT 3187, 3191.) Dr. Bloch agreed squeezing could have caused the posterior rib breaks but opined that the body was not pulled backwards. (12RT 2462.) Defense experts Dr. Baumer and Dr. Lovell agreed it was possible that Consuelo had been squeezed tightly, thereby causing her rib injuries (14RT 2886; 16RT 3107-3108, 3131, 3136-3137).

But multiple experts testified there was more than one mechanism for the rib injuries. Dr. Bloch, Dr. Baumer, and Dr. Lovell all testified there was forceful blunt trauma to the abdomen from front to back. (12RT 2460; 14RT 2895; 16RT 3108, 3136.) Dr. Bloch explained that posterior bilateral rib breaks to ribs six through ten along the spine are uncommon in small children and indicative of some major force being applied to the lower chest. Posterior rib fractures are classic for a squeezing-type mechanism where somebody is holding a young child and in some instances a slightly older infant/early toddler, such as Consuelo. (12RT 2462.) With great violent squeezes, fingers are on one side of the chest, and palms on the other side of the chest. The squeezing mechanism pulls the front of the chest backward and the back of the chest forward and causes posterior rib fractures. (*Id.*; 16RT 3187, 3191 [Dr. Shaw].)

Child abuse expert Dr. Heger states she has never seen injuries caused by a person grabbing the child from behind, putting their hands around the chest and squeezing. (Pet.’s RCCAP Exh. 170 at p. 13.) Dr. James Crawford-Jakubiak disagrees. He explains that posterior (“back”) rib

fractures are very commonly associated with squeezing, and anterior (“front”) rib fractures are often associated with blunt trauma involving the front of the body. (Resp.’s RCCAP Exh. 19 at p. 10 [Decl. of Dr. James Crawford-Jakubiak].) As discussed in the preceding paragraph, Dr. Dibdin was not alone in his view that the rib injuries were caused by squeezing.

The fact Dr. Heger, like Dr. Bloch, disagreed about whether squeezing caused the posterior rib fractures does not render Dr. Dibdin’s testimony “false.” It is simply a conflict of opinion among the experts, which does not entitle petitioner to habeas relief. (*In re Richards, supra*, 55 Cal.4th at p. 963.)

Dr. Heger further claims it is impossible that an average adult would be able to exert enough pressure on the chest of a 21-month-old with their hands to cause bilateral acute rib fractures of 10 ribs on one side of the chest or back and five on the other. (Pet.’s RCCAP Exh. 170 at p. 13.) Dr. James Crawford-Jakubiak disagrees. He has seen many babies and toddlers who have suffered the same collection of significant injuries involving abdominal injury associated with rib fractures as were seen in this case. (Resp.’s RCCAP Exh. 19 at p. 10 [Decl. of James Crawford-Jakubiak].) Again, a conflict of opinion does not entitle petitioner to relief on a false evidence claim. (*People v. Wilson, supra*, 44 Cal.4th at p. 801.)

Literature that post-dated petitioner’s trial does not show Dr. Dibdin testified falsely either. Petitioner argues that Consuelo’s rib injuries could have resulted from being slammed face-down on a surface or hurled face-forward into a solid object. (RCCAP at p. 38, claim A7b(3); 2004 Inf. Reply at p. 44; Supp. Pet. at pp. 8-9, citing Pet.’s RCCAP Exh. 131 at p. 6453 [Mechanical Factors Associated with Posterior Rib Fractures: Laboratory and Case Studies, Paul K. Kleinman and Alan E. Schlesinger, *Pediatric Radiology*, 1997].) There was no evidence Consuelo was thrown by a car or slammed face-down. Esmay testified that if a 3,000-4,000

pound motor vehicle had struck 30-pound Consuelo, she would have been propelled in the direction the vehicle was moving and then rotated underneath it to the ground (15RT 2934), not thrown in the air (15RT 2951). Dr. Bloch also testified that Consuelo would have gone underneath the bumper if she had been hit (12RT 2469), and he maintained there was absolutely no evidence she was hit by a vehicle (12RT 2460).

Indeed, the article by Paul K. Kleinman and Alan E. Schlesinger upon which petitioner relies corroborates Dr. Dibdin's opinion that the rib injuries were from abuse. The article states:

However, when posterior rib fractures are encountered in an otherwise normal infant, with no history of a severe accidental event resulting in massive anterior compression of the chest, abuse should be presumed.

(Emphasis added; Pet.'s RCCAP Exh. 131 at p. 6454.) Here, there was no report of a car accident. Neighbors from two nearby apartments were home and did not see hear or see a car hit Consuelo. (11RT 2254, 2268.) Consuelo did not have scrapes, bruises or road rash consistent with having been hit a car (12RT 2460), and there were no skid marks or gravel on her undamaged clothing. (15RT 2940.) Experts testified that Consuelo's injuries would have prevented her from being able to get up and walk to the front door (11RT 2144, 14RT 2864), where petitioner allegedly "found" her on her back with "contorted" eyes and blood under her nose and mouth, according to his statement to police. (1CT 161-162.) There was no evidence of *any* "accidental event" that broke Consuelo's ribs. Medical experts agreed that her injuries were not caused by running into a door (14RT 2865, 17RT 3318) or being struck by a car. (10RT 2090, 2092, 12RT 2459-2460). Indeed, Dr. Lovell testified that any rib fracture in a child makes him suspect abuse (16RT 3133) and bilateral posterior rib fractures are usually caused by abuse (16RT 3135).

Thus, petitioner has not shown that the mechanism of injury cited by Dr. Dibdin (squeezing) for the (posterior) rib fractures was “false” within the meaning of Penal Code section 1473. Nor has he proven that a variance of opinion between Dr. Dibdin and Dr. Lovell about the ages of the acute rib fractures and of the healing rib fractures was “false” under the statute. Even if petitioner had shown “false” (Pen. Code, § 1473) rib evidence, which he has not, this would not entitle him to habeas relief. For the reasons set forth below in Argument C.2, setting aside any evidence deemed “false,” under Penal Code section 1473, it is not reasonably probable the jury would have failed to convict petitioner of second degree murder for inflicting Consuelo’s catastrophic and ultimately fatal abdominal injuries.

i. Abdominal injuries

The catastrophic nature of Consuelo’s abdominal injuries was not disputed. Her duodenum was broken in half over the spleen, and the pieces were lying on top on either side of the spine. The pancreas was also broken in half on top of the spine. (12RT 2454, 2456; see also People’s Trial Exh. 38 [diagram].) During surgery, Dr. Bloch found prior scarring and dense adhesions between the colon and the liver. (12RT 2456, 2457.) Consuelo’s injuries (old and new) were in the intrathoracic abdomen, an area that is protected and covered by the lower part of the chest. Injuries to that area require some kind of compression to the lower third of the anterior chest. (12RT 2465.) Two days after the first surgery, the spleen and part of the small intestine had died due to inadequate blood supply. (16RT 3158.)

Dr. Bloch opined that the compression that caused the abdominal injuries had to be front to back in order to transect the organs and break everything over the spine. (12RT 2460; see also 12RT 2465.) Moreover, it had to be very forceful compression blow trauma, like a punch or a kick, in

order to squash everything against the spine. (12RT 2460, see also 12RT 2462.) Dr. Diamond agreed. (10RT 2067.) Dr. Bloch explained that the organs that were injured are well protected; they are the most posterior organs in the abdomen. So they were damaged by some significant trauma, like a hard punch. (12RT 2461.) Dr. Harrison also opined that blunt force trauma caused Consuelo's abdominal injuries. (12RT 2369-2370.)

Petitioner alleges that Dr. Dibdin provided "false" testimony that Consuelo's abdominal injuries were caused by petitioner squeezing her. (RCCAP at p. 35, claim A7.) Respondent disputes petitioner's characterization of the testimony. Dr. Dibdin testified that the abdominal injuries were from blunt trauma. (11RT 2168.)

Dr. Heger, an expert retained by petitioner post-conviction, contends the abdominal injuries were not from squeezing alone. She states:

It is impossible, that a person, by simply gripping and squeezing the child would rupture the pancreas, duodenum, and mesocolon, and cause the massive internal damage observed during the laparotomy. The most logical explanation for these massive abdominal and rib injuries was compression of the chest by a large, heavy object such as the tire of a car.

(2012 Inf. Reply at p. 57, citing Pet's RCCAP Exh. 169 at p. 13.)

Dr. Heger's conclusion that Consuelo's internal organs were injured by being compressed by a tire also ignores all the evidence that the abdominal trauma was caused by more than one mechanism (squeezing). As discussed, multiple experts testified it was also caused by compression from front to back, such as a kick or punch. (10RT 2067, 12RT 2369-2370 & 2460-2462.)

Dr. Heger's opinion that the injuries were caused by a car ignores evidence that Consuelo did not have abrasions, road rash, or tread marks consistent with having been run over by a car (12RT 2460, 15RT 2934), that there was no dirt, gravel or plant material on Consuelo's clothing (see

e.g. People's Trial Exhibits 70-81; Pet.'s RCCAP Exh. 7 at pp. 3488, 3490-3506), that there was no physical evidence of a car accident at the apartment complex (15RT 2924-2964), that no one reported a car accident, and that neighbors in apartments 154 and 156 who were home and did not see or hear Consuelo get hit by a car (11RT 2254, 2268). Dr. Heger does not appear to have been provided an opportunity to review the foregoing evidence before rendering an opinion in the case. (Pet.'s RCCAP Exh. 170 at pp. 4-5 [Dr. Bloch's testimony, photographs of the victim's clothing, and testimony from Officer Esmay and neighbors at Consuelo's apartment complex are not among the materials purportedly reviewed by Dr. Heger].)

Finally, Dr. Heger's opinion is undermined by her failure to even acknowledge Consuelo's old abdominal injuries and old rib injuries. The evidence showed Consuelo suffered from prior adhesions between the colon and liver that were at least a month old. Dr. Bloch and Dr. Diamond each opined that the adhesions were from prior trauma. (10RT 2047-2048 [Diamond], 12RT 2457-2458 [Bloch].) Dr. Bloch also said Consuelo would have been physically ill from the injuries. (12RT 2458.) Their testimony correlated to evidence Consuelo was not eating well, did not want to play, just laid in bed, was vomiting, and acted strangely in October of 1991(13RT 2584-2585, 14RT 2733) and that Consuelo was vomiting and too sick to go trick-or-treating on Halloween (14RT 2731-2733). At trial, petitioner alleged he had not babysat Consuelo or Christina since April or May (15RT 3054), but he and Medina moved into the apartment together in March and his name was on the lease. (11RT 2177, 2277, 2542.) Dr. Heger's opinion that the abdominal and rib injuries likely resulted from a car accident is undermined by her failure to account for Consuelo's prior trauma, which was of the same nature as that inflicted November 17. (Resp.'s RCCAP Exh. 19 at p. 9 [Decl. of Dr. James Crawford-Jakubiak.]

Forensic pathologist Dr. Tracey S. Corey disputes Dr. Heger's opinion that Consuelo's abdominal and rib injuries were from a car. Dr. Corey explains that if Consuelo had been run over in that region of the body, she would expect the liver and perhaps the spleen to have been injured as well. The area of the abdomen that was injured is a relatively small surface area, concentrated in what is known as the epigastric region, in the midportion of the upper abdomen. (Resp.'s RCCAP Exh. 18 at p. 8.)

A declaration from Dr. Alonso, the resident who treated Consuelo in the emergency room at KMC, does not support petitioner's claim that Consuelo's abdominal injuries were from a car accident either. (2012 Inf. Reply at p. 57.) Notably, Dr. Alonso does not recant his testimony that Consuelo was physically abused. (Pet.'s RCCAP Exh. 144 at p. 3; 13RT 2686 [he was certain Consuelo had been abused].) He maintains that her severe abdominal injuries were not caused by hitting a door. (Pet.'s RCCAP Exh. 144 at p. 6.) True to his testimony that Consuelo was the most abused victim he had seen in three years in the emergency room (13RT 2683), in 2004, Dr. Alonso purportedly stated:

in my years of practice as an emergency room physician I do not recall seeing injuries this severe to abdominal organs as the result of child abuse. Typically when I see injuries of this severity, they are from a pedestrian being struck in a car accident, an injury from impact with a steering wheel or bicycle handlebars, or a fall from height.

(Pet.'s RCCAP Exh. 144 at p. 6.) But, there was no evidence Consuelo was a pedestrian who was hit by a car or was a passenger injured in a car accident. (12RT 2459; 15RT 2934.) No one contends she injured herself on a car steering wheel or handlebars. Also lacking was any evidence she fell from a height. Though petitioner suggested to police she may have fallen from a ladder (1CT 178), there was no evidence of a ladder anywhere

inside or outside the apartment, and Dr. Bloch testified that her injuries were not self-inflicted. (12RT 2460).

In sum, Dr. Dibdin never testified that Consuelo's abdominal injuries were caused by squeezing. Dr. Heger's opinion that a car caused the abdominal injuries is undermined by her failure to review photographs of the victim's clothing and pertinent testimony, including that of Dr. Bloch, Officer Esmay and Consuelo's neighbors. It is also contrary to KMC surgeon Dr. Bloch's opinion that there was no evidence that Consuelo was hit by a car, including no road rash. (12RT 2460.) This difference of opinion does not entitle petitioner to habeas relief. (*People v. Wilson, supra*, 44 Cal.4th at p. 801.)

- 2. Setting aside any evidence that is deemed "false" under Penal Code section 1473, it is not reasonably probable the jury would have failed to find that Petitioner violently, and with conscious disregard for human life, inflicted Consuelo's catastrophic and ultimately fatal abdominal injuries; thus, this Court should reduce his conviction to second degree murder**

Respondent has conceded that the now unsubstantiated evidence Consuelo was vaginally and anally penetrated with a penis or foreign object was both "false" within the meaning of Penal Code section 1473 and material as to the jury's special-circumstance findings and to its finding that the murder was first degree. However, this evidence is not material to petitioner's guilt for second degree murder. For the reasons set forth below, this Court should reduce petitioner's conviction from first degree murder to second degree murder, as it is not reasonably probable that the jury would have failed to convict of second degree murder, setting aside any "false" evidence. (*In re Malone, supra*, 12 Cal.4th 935, 965.) This is

“the same as the ‘reasonably probable’ test” set forth in *People v. Watson*, *supra*, 46 Cal.2d at p. 836. (*In re Richards*, *supra*, 55 Cal.4th 948, 961.)

Penal Code section 1484 provides that a court exercising habeas corpus jurisdiction over an inmate may “dispose of such party as the justice of the case may require.” Such authority is “analogous to that which an appellate court exercises under [Penal Code] section 1260 in modifying a judgment to reduce the degree of a crime.” (*In re Bower* (1985) 38 Cal.3d 865, 880.)

People v. Steger (1976) 16 Cal.3d 539 is instructive. In that case, the prosecution successfully argued to the jury that the defendant was guilty of first degree murder “entirely on a murder by torture theory.” (*Id.* at p. 549, fn. 5.) On direct appeal, this Court agreed with the defendant that “the evidence at her trial was insufficient to justify a jury instruction on murder by means of torture.” (*Id.* at pp. 542-543; see *id.* at p. 548.) This Court concluded, however, that “a new trial is not justified. There is overwhelming evidence that defendant is guilty of second degree murder.” (*Id.* at pp. 546, 553; see also *People v. Tubby* (1949) 34 Cal.2d 72, 79-80; *People v. Bender* (1945) 27 Cal.2d 164, 186-187 [overruled on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110].)

In this case, defense counsel requested jury instructions on second degree murder as a lesser included offense. (17RT 3472.) The trial court gave the standard instructions defining malice aforethought and second degree murder. (See 2CT 565-566 [CALJIC No. 8.11 – “Malice Aforethought – Defined”], 571 [CALJIC No. 8.31 – Second Degree Murder – Killing Resulting from Unlawful Act Dangerous to Life].)

Murder is an unlawful killing of a human being perpetrated with “malice aforethought.” (Pen. Code, § 187, subd. (a).) Second degree

murder is

the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder. [Citation.] Malice may be either express (as when a defendant manifests a deliberate intention to take away the life of a fellow creature) or implied. [Citation.] ‘Malice is implied when the killing is proximately caused by ““an act, the natural consequences of which are dangerous to life, which acts was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.””’ [Citation.] In short, implied malice requires a defendant’s awareness of engaging in conduct that endangers the life of another....’ [Citation.]

(*People v. Cravens* (2012) 53 Cal.4th 500, 507; see also *People v. Canizalez* (2011) 197 Cal.App.4th 832, 844.)

Setting aside any evidence deemed to be “false” within the meaning of Penal Code section 1473, there is no reasonable probability that the jury would have failed to convict petitioner of second degree murder based at least on implied malice. As previously discussed, there was no dispute that Consuelo died from blunt trauma to the abdomen. (10RT 2067, 12RT 2369-2370, 2395, 2460; 14RT 2895.) The violent and catastrophic nature of Consuelo’s abdominal injuries was not disputed. (12RT 2454, 2456.)

No reasonable juror would have doubted the intentional nature of petitioner’s infliction of the abdominal trauma. The first surgeon who operated on Consuelo, Dr. Bloch, explained that the compression that caused these injuries had to be front to back in order to transect the organs and break everything over the spine. (12RT 2460, 2465.) This trauma was from a very forceful compression blow, like a punch or kick. (12RT 2460, 2462.) Dr. Diamond agreed. (10RT 2067.) Dr. Bloch testified that he had seen the type of injuries Consuelo had in drivers who were in high speed car accidents who received the compression of the steering wheel against

their lower ribs. (12RT 2459.) Moreover, the injured organs were in the intrathoracic abdomen, which is well protected. (12RT 2460, 2465.)

It also not reasonably probable that the jury would have failed to find that petitioner knew of the dangerousness of his actions and acted with a conscious disregard for human life when he assaulted Consuelo. Petitioner struck this 34-inch tall, 21-month-old infant/toddler in the middle of the body, where all the vital internal organs are located. (11RT 2214-2215.) The lacerations of these organs, despite their protected location, in the intrathoracic abdomen shows the forceful nature of petitioner's assault. (11RT 2460-2461.)

Consuelo's prior abdominal trauma also shows that his violent assault on November 17 was perpetrated with a conscious disregard for her life. Specifically, when Dr. Bloch operated on Consuelo, he saw adhesions and scarring, which indicated there was prior blunt injury to the abdomen one to two months earlier. (12RT 2456-2457.) There was also evidence that Consuelo experienced severe nausea and vomiting around Halloween. (13RT 2584-2586; 14RT 2731, 2733.) Petitioner was on the apartment lease and lived with Consuelo and her family around this time, despite his self-serving testimony he had not babysat Consuelo between April or May and November 17. (11RT 2277; 15RT 2985, 3044.)

Even without the undermined evidence, it is not reasonably probable that the jury would have failed to conclude that petitioner was the person who inflicted Consuelo's fatal abdominal trauma. She was in his care when she suffered the injuries. There is no evidence she was in the presence of any other adult during this period. According to petitioner's own statements, Consuelo was only out of his sight for a minute. (14RT 2747, 15RT 3010; see also 3CT 889-890 [in denying petitioner's motion for new trial the trial court stated there was no evidence that Consuelo suffered injuries from anyone other than petitioner].)

Petitioner's failure to seek immediate medical care for this obviously ill child further shows it is not reasonably probable the jury would have failed to find he perpetrated the assault. After Consuelo was out of his sight for a minute and petitioner "found" her, he realized Consuelo was profoundly injured. She was vomiting, had blood under her nose and mouth, and her eyes were "contorted." (1CT 161-162.) Petitioner was unable to explain why he had vomit on the lower half of his pant legs. (15RT 3034.) Though petitioner knew about 911, he failed to make a 911 call (15RT 3842), nor did he ask for help from neighbors in two separate apartment units who were home at the time (11RT 2234, 2255, 2268). Rather, petitioner proceeded to destroy evidence of his crime. He wiped Consuelo's nose with toilet paper (14RT 2750) and purported to cleaned up blood and vomit (16RT 3038, 3042). When Medina drove Consuelo to the hospital, petitioner told Medina to drive slowly. (11RT 3186.)

Petitioner's numerous inconsistent statements about where he allegedly "found" Consuelo and how she was injured also show that any reasonable jury would have found him to be her assailant. Petitioner originally purported to have "found" Consuelo outside the doorway. (14RT 2748, 2751.) At trial, he claimed he found her outside the apartment on the grass by the walkway, closer to a carport. (15RT 3012.) Petitioner told Medina that Consuelo hit her head on a door. (13RT 2548.) At the first hospital he told Francis Zapien the same thing. (14RT 2782.) The next day, he told police that he did not know how Consuelo was injured. (14RT 2762; 15RT 3010.) He surmised she fell, perhaps from a ladder. (15RT 3049.) But, there was no evidence of any ladder inside or outside of the apartment. At trial, petitioner acknowledged he had told his mother that Consuelo had been hit by a car. (15RT 3058.) He admitted he had lied to her about this case. (15RT 3060.) He also acknowledged at trial that he lies when he feels bad. (15RT 3032, 3057, 3072.)

Moreover, the lack of evidence Consuelo ever left the apartment also proves it is not reasonably probable a jury would have failed to find petitioner inflicted Consuelo's fatal abdominal injuries. Her clothes did not have evidence of dirt or gravel or scrape marks. (12RT 2318, 13RT 2589, 15RT 2932, 2940 & 2961.) The vomit contained in tissues in the waste basket did not contain plant material; rather it contained carpet fibers (11RT 2285, 2291) and petitioner conceded there was no rug outside the apartment door (15RT 3033). There was no evidence of vomit or blood on the door step. (11RT 2291; 14RT 2751.) Neighbors carrying groceries inside sometime between 6:00 p.m. and 7:00 p.m. did not see Consuelo outside the apartment. (11RT 2256.) The only evidence Consuelo was hit by a door was petitioner's self-serving statements. (13RT 2548; 14RT 2782.) Christina testified she shut the door behind her on her way out and Consuelo was not outside with her or near the door. (11RT 2183.) Christina also testified that Consuelo was unable to open the door. (11RT 2195.) Moreover, the front door to the apartment opened inward, from right to left (11RT 225-229), so it would not have been moving toward Consuelo to hit her (11RT 225-229).

In sum, there is no reasonable probability the jury would have failed to find petitioner guilty of at least second degree murder for inflicting Consuelo's fatal abdominal injuries, setting aside any evidence deemed "false" under Penal Code section 1473. Thus, this Court should reduce his conviction to second degree murder, allowing the People to accept judgment thereon or retry the matter.

D. Ineffective Assistance of Counsel

In Claim 13, petitioner claims he did not receive the effective assistance of trial counsel. He essentially complains that trial counsel did not adequately challenge the credibility of the false evidence at issue in

Claim 1. To the extent that respondent has conceded that the evidence relied upon at trial to support convictions for rape, sodomy, lewd and lascivious acts, and felony-murder cannot be relied upon in Claim 1, petitioner's claim of ineffective assistance of counsel is moot because it would not expand the scope of the relief to which he is already entitled. Indeed, the standard for determining the appropriate relief for the ineffective assistance of counsel is essentially the same as the standard for determining appropriate relief for the admission of false evidence. In any event, respondent denies that trial counsel performed deficiently regarding the undermined evidence. And, just as respondent denied that the undermined evidence was substantially material to the jury's verdict that petitioner was guilty of second degree murder, so too does respondent deny that counsel's allegedly deficient performance regarding the same evidence was prejudicial as to the same aspect of the verdict.

As to the relatively few allegations of false evidence that respondent disputes in Claim 1, respondent denies that counsel's performance regarding such evidence fell outside the wide range of reasonable professional assistance under prevailing professional norms. So, too, does respondent deny that counsel's allegedly deficient performance was prejudicial as to any aspect of the judgment, much less as to the jury's verdict that petitioner was guilty of second degree murder. As a result, petitioner is not entitled to greater relief on his claim of ineffective assistance of counsel in Claim 13 than the relief to which he is already entitled on his claim of false evidence in Claim 1.

1. Standard for Ineffective Assistance of Counsel

"A [successful] claim of ineffective assistance of counsel involves two components, a showing the counsel's performance was deficient and proof of actual prejudice." (*Strickland, supra*, 466 U.S. 668; *People v.*

Ledesma (1987) 43 Cal.3d 171; *People v. Garrison* (1989) 47 Cal.3d 746, 786.) A habeas corpus petitioner must establish both elements by a preponderance of substantial, credible evidence. (*In re Lawley* (2008) 42 Cal.4th 1231, 1239-1240.)

A petitioner must demonstrate that “counsel’s representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms” (*In re Jones* (1996) 13 Cal.4th 552, 561.) To show prejudice under *Strickland* “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . . the defendant must demonstrate there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.)

“Judicial scrutiny of counsel’s performance must be highly deferential [A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” (*Strickland, supra*, 466 U.S. at p. 689.)

“Appellate courts reverse convictions on the ground of inadequate assistance of counsel only when the record affirmatively reveals that counsel had no rational tactical purpose for an allegedly incompetent act or omission. A reviewing court will not second-guess trial counsel’s reasonable tactical decisions.” (*People v. Garrison, supra*, 47 Cal.3d at pp. 783-784; internal citations omitted.) “In determining whether a trial lawyer performed in a manner to be expected of reasonably competent attorneys acting as diligent advocates, appellate courts should be cautious of the apparent intellectual acuity gained by hindsight. Although Monday

morning quarterbacking may be stimulating, it is inappropriate when judging lawyers who deal in the demanding and uncertain turf of the courtroom” (*People v. White* (1981) 118 Cal.App.3d at p. 778.)

It is therefore no surprise that not many applications claiming ineffective assistance of counsel are granted. “Nor will the court consider on the merits successive petitions attacking the competence of trial or prior habeas corpus counsel which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had trial counsel or prior habeas corpus counsel had similar advantages” (*Rose v. Superior Court* (2000) 81 Cal.App.4th 564, 571-572, citing *In re Clark, supra*, 5 Cal.4th at p. 780.)

The law does not demand perfect representation: “[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” (*Bell v. Cone* (2002) 535 U.S. 685, 702; *Kimmelman v. Morrison* (1986) 477 U.S. 365, 382; *Strickland, supra*, 466 U.S. at p. 689.)

“[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” (*Strickland, supra*, 466 U.S. at p. 697.)

2. Asserted errors by trial counsel

a. Failure to investigate alternative explanations for Consuelo's injuries

Petitioner contends that his trial attorney, Huffman, performed deficiently because she failed to conduct a reasonable investigation into the source of Consuelo's injuries, failed to rebut medical experts, failed to obtain all medical records, was ineffective in her cross-examination, and failed to develop her car accident defense. (Claim VI.M.1, RCCAP at pp. 221-225.) But, petitioner fails to establish that Huffman was deficient in challenging the cause of Consuelo's fatal injuries, or that she was deficient in failing to pursue and offer alternative explanations. Evaluating any alleged deficiency with respect to the evidence of sexual assault admitted at trial is moot and would not alter the relief to which petitioner is already entitled. However, petitioner has not established that Huffman was deficient in challenging the fact that Consuelo actually suffered abdominal injuries and that those injuries were due to appellant's criminal acts.

Notwithstanding respondent's concession regarding the repudiated evidence that Consuelo suffered anal and vaginal injuries from a sexual assault, there remains no dispute that Consuelo suffered from a sudden application of blunt force to the front of her abdomen, and that this force caused the transection of her duodenum and pancreas. (Pet's RCCAP Exh. 142 at p. 6628; Resp.'s RCCAP Exh. 18 at pp. 7-8 [Decl. of Dr. Tracey S. Corey]; 14RT 2827-2828; 10RT 2068-2070, 2073, 2089; 12RT 2454-2468; 13RT 2520-2521; 17RT 3318.) It remains undisputed that the window of time in which Consuelo could have suffered these injuries was no more than 15 minutes. Huffman offered a theory that an auto accident had caused the blunt force trauma to Consuelo's abdomen. Although Huffman lacked percipient witnesses to corroborate such an accident, medical testimony allowed for her theory. Petitioner's own expert, Dr. Baumer,

hypothesized that a car accident was a likely cause. (14 RT 2859.) Dr. Bloch confirmed that he could not rule out a pedestrian-vehicle collision and that he had seen similar abdominal injuries following high speed collisions due to compression by the steering wheel. (12RT 2459, 2468.) Further, although Dr. Baumer had not been able to explain Consuelo's rib injuries under the auto accident hypothesis, Dr. Seibly had testified that Consuelo's rib injuries were highly suggestive of blunt trauma from the anterior to posterior (front to back). (13RT 2513-2521.)

Huffman did challenge the medical examiner's testimony that Consuelo's abdominal injuries were the result of sodomy, but petitioner misapprehends the relevant fact. Other experts for the prosecution had already testified that assuming, as those witnesses did, that sodomy had occurred, sodomy was not the cause of Consuelo's abdominal injuries. (10RT 2089 [external trauma likely cause of abdominal injuries]; 12RT 2457-2460 [external trauma; abdominal injuries not caused by anal penetration]; 13RT 2518-2521.) In light of the evidence presented by the prosecutor, Huffman's decision to offer an alternate explanation that a pedestrian-vehicle collision occurred cannot be deemed as unreasonable in as much as it purported to explain the injuries Consuelo actually suffered.

Assuming arguendo that Huffman was deficient in failing to conduct further investigation into the car accident theory, or failing to offer some alternative explanation, other than the discredited sexual assault evidence, any deficiency was harmless as to the jury's verdict of second degree murder. Petitioner was alone with Consuelo for not more than 15 minutes once Christina left the apartment to play with a friend. In that time, Consuelo suffered the severe abdominal injuries as a result of a sudden application of physical force, such as a punch or kick, to her abdomen. Petitioner claimed that Consuelo had hit her head on a door. Petitioner also claimed that Consuelo wandered outside, and that he found her on the grass.

Yet as to these last two claims, there was no independent corroboration. Consuelo had no grass stains or dirt on her clothing, and investigators found no physical evidence suggesting that Consuelo had bled or vomited outside of the apartment. Even if Huffman had conducted additional investigation or offered additional medical testimony, petitioner was the only person with Consuelo during the time that she suffered her abdominal injuries, and those injuries were not caused by bumping into a door. As such, petitioner cannot show prejudice due to any deficiency by Huffman in her efforts to investigate or proffer evidence to suggest some alternate explanation for Consuelo's abdominal injuries.

b. Failure to investigate and present evidence to rebut the sex crime charges and special circumstances

Petitioner contends that Huffman rendered constitutionally deficient performance because she failed to investigate evidence regarding the alleged sexual assault, interview nursing staff, and adequately cross-examine prosecution witnesses. (Claim VI.M.2, RCCAP at pp. 225-252.) Respondent has already conceded that the evidence of sexual assault, including whether Consuelo suffered injury due to vaginal or anal penetration, was "false" within the meaning of Penal Code section 1473. However, respondent denies that Huffman was ineffective.

Huffman brought out evidence suggesting that Consuelo's alleged vaginal and anal injuries were not observed initially and could have been the result of medical intervention. (See 13RT 1628-2629; 12RT 2458-2460, RT 2686, 2691; 14RT 2828, 2852, 2870-2877; 16RT 3117-3119.) Further, regardless of the medical examiner's testimony purportedly confirming that vaginal and anal penetration had occurred, and that anal penetration caused Consuelo's internal abdominal injuries, Huffman and the prosecutor had each elicited testimony from other experts that, assuming that sodomy had

occurred, sodomy had not caused Consuelo's abdominal injuries. (10RT 2089 [external trauma likely cause of abdominal injuries]; 12RT 2457-2460 [external trauma; abdominal injuries not caused by anal penetration]; 13RT 2518-2521.)

Huffman in fact presented to the jury evidence of the very fact now conceded by respondent: Consuelo's fatal abdominal injuries were not caused by sexual assault or penetration of her vagina or anus. Petitioner fails to establish that Huffman was deficient.

c. Failure to investigate and show that the pathologist's opinion regarding the cause of death is anatomically impossible

Petitioner next contends he was denied effective assistance of counsel because counsel failed to investigate and present evidence that Dr. Dibdin's opinion regarding the cause of death was anatomically impossible. (RCCAP at pp. 252-254, claim M3; 2012 Inf. Reply at pp. 383-384.) As discussed *ante*, respondent acknowledges that Dr. Dibdin's opinion was undermined. (See Arg. (C)(1)(c).) Nevertheless, Dr. Dibdin's repudiated opinion should not warrant reversal of petitioner's conviction for murder. In light of respondent's concession that the evidence was undermined, evaluating the quality of trial counsel's response to the evidence is moot because such an evaluation would not alter the relief to which petitioner is already entitled. As previously discussed, Dr. Dibdin's opinion on the cause of death was material to the special-circumstance allegation, but not to the issue of whether the murder was of the second degree based on implied malice. For the same reasons, any alleged deficiency in the performance of trial counsel was prejudicial as to the special-circumstance allegation, but not to a conviction for second degree murder. As a result, petitioner's claim that he did not receive the effective assistance of counsel cannot alter the relief to which he is entitled.

In any event, petitioner fails to demonstrate that trial counsel's response to Dr. Dibdin's testimony regarding the cause of death deficiently fell outside the wide range of reasonable professional assistance under prevailing professional norms. Respondent submits that contrary to petitioner's assertion, defense counsel did present evidence refuting Dr. Dibdin's opinion on the cause of death. On cross-examination, Dr. Diamond conceded that when he testified at the preliminary hearing, he believed that tears to Consuelo's pancreas and duodenum had been caused by sodomy. (10RT 2073, 2085.) However, he now believed they were caused by external trauma, like a punch or kick. (10RT 2067.) Having learned that there was no tear of the anterior wall of the rectum, he did not believe they were injured as a result of sodomy, because a foreign object could not go through the anterior wall into the peritoneal cavity to produce the damage. (10RT 2085.) Had the injuries been caused by sodomy, the anterior wall of the rectum would have had to be ruptured or severed, and then the lower abdominal organs would have been pushed aside. (10RT 2068, 2093.)

In addition, Dr. Bloch testified on cross-examination that he did not believe that Consuelo's internal injuries were caused by anal penetration. In his experience, such injuries result from external blunt force trauma, such as a punch or kick to the stomach. (12RT 2460.) Defense expert Dr. Baumer also testified that in his opinion, Consuelo's abdominal trauma was not caused by anal penetration. (14RT 2860-2861.) Defense counsel questioned Dr. Lovell about the cause of death as well. After Dr. Lovell testified that he had looked at the specimen of Consuelo's groin that had been preserved at the Coroner's office, defense counsel asked if there had been penile penetration of such intensity that it would cause trauma to Consuelo's abdominal organs. Dr. Lovell said he was unable say for certain. He noted that there was a tear and a hemorrhage between the

rectum and the vaginal wall, about two to three inches up from the anus, but said “the rectum itself, the wall, was not perforated.” (16RT 3104.)

Petitioner also alleges that defense counsel unreasonably failed to cross-examine Dr. Dibdin about the cause of death given the absence of injuries to Consuelo’s lower abdominal organs. (RCCAP at p. 254.) Determinations “[a]s to whether certain witnesses should have been more rigorously cross-examined...are normally left to counsel’s discretion and rarely implicate inadequacy of representation.” (*People v. Cox* (1991) 53 Cal.3d 618, 622.) Counsel did cross-examine Dr. Dibdin about the cause of death (11RT 2166-2168); however, contrary to petitioner’s allegations (2012 Inf. Reply at pp. 383-384), the record is silent as to why trial counsel did not more rigorously cross-examine Dibdin as to the cause of death. When the record sheds no light on why counsel failed to act in the manner challenged, the reviewing court should not speculate as to counsel’s reasons. (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.) As a result, petitioner fails to demonstrate that counsel’s performance deficiently fell below the wide range of reasonable professional assistance under prevailing professional norms.

Moreover, even if counsel performed deficiently, the deficiency was harmless as to second degree murder because, as previously discussed, there was independent evidence overwhelmingly establishing that petitioner killed Consuelo, and did so with at the very least, implied malice.

d. Failure to show that compression by squeezing was not the only theory accounting for all of the rib and abdominal injuries

Petitioner alleges in his informal reply that trial counsel “fail[ed] to rebut the prosecution’s theory that child abuse accounted for the abdominal and rib injuries.” (2012 Inf. Reply at p. 384.) Petitioner did not raise this claim in the original petition (see RCCAP at p. 254, claim M4.) Informal

replies to informal responses cannot be relied upon to augment or supplement petitions. (*In re Clark, supra*, 5 Cal.4th at p. 798.) In any event, his claims lack merit because counsel did not fail to dispute the prosecution's theory that child abuse accounted for the abdominal and rib injuries.

In his corrected amended petition, without any discussion, petitioner simply asserts: "Rib and abdominal injury—Trial counsel unreasonably failed to show that compression by squeezing was not the only theory accounting for all the injuries as Dr. Dibdin testified." (RCCAP at p. 254, claim M4.) Now in his reply, petitioner asserts that counsel failed to rebut Dr. Dibdin's testimony regarding the rib fractures and squeezing. (2012 Inf. Reply p. 385.) He further incorrectly alleges that "counsel failed to show that the severity of the abdominal injuries is inconsistent with the typical injuries from child abuse." (2012 Inf. Reply p. 385.) Petitioner's argument is baseless and fails.

Contrary to petitioner's assertion, defense counsel introduced evidence to contradict Dr. Dibdin's testimony regarding the rib fractures and squeezing. Counsel presented Dr. Lovell's opinion testimony that the rib fractures were caused by a sharp blow over the front of the body, not by squeezing. (16RT 3108.) Defense counsel also presented evidence to contradict the prosecution's theory of child abuse. Dr. Baumer testified that Consuelo's rib injuries may have been caused by a car accident, by thrust, or by landing (14RT 2837). Moreover, petitioner's assertion that "counsel unreasonably failed to show that Dr. Dibdin never examined slides of the left posterior rib tissue"¹³ lacks merit. (2012 Inf. Reply at p.

¹³ Once again, petitioner belatedly asserts without any support that the prosecutor failed to disclose the microscopic manifest. (2012 Inf. Reply at p. 385; see also 2012 Inf. Reply at p. 54.) As discussed *ante*, this claim
(continued...)

385.) As discussed *ante*, there was no reason for Dr. Dibdin to have prepared slides of Consuelo's left *anterior* sixth, seventh, eighth, ninth and tenth ribs because those ribs were not injured. Rather, her right anterior ribs six through ten were injured. (11RT 2125; see also Pet.'s RCCAP Exh. 8 at p. 3557 [Autopsy report found acute fractures "in ribs six through ten bilaterally posteriorly adjacent to the spinal column, and anteriorly in ribs six through ten on the right..." and healing fractures in the eighth and ninth ribs on the left posteriorly].) Thus, Dr. Dibdin merely made a clerical error when he made reference on the slide manifest to slides of the left anterior ribs instead of the left posterior ribs. Therefore, defense counsel's performance was not deficient.

Furthermore, trial counsel consulted with defense experts on their findings regarding all the medical records, including the tissue slides and the autopsy report, and was obviously not informed of any issues. (Resp.'s RCCAP Exh. 20 at pp. 1-2 [Decl. of Donnalee Huffman].) Defense counsel was not a physician and reasonably relied on her experts to review the medical records, autopsy report, and other records in the case to inform her of any medical discrepancies. Notably, Dr. Lovell testified that he reviewed tissue slides from the autopsy. He did not dispute the number or location of acute rib fractures Dr. Dibdin identified. (16RT 3131.)

Petitioner further attempts to argue that defense counsel "failed to show that the severity of the abdominal injuries was inconsistent with an injury from child abuse" because she "failed to elicit information" from experts to "bolster[] her car accident theory." (2012 Inf. Reply at p. 387.) However, as discussed *ante*, there was absolutely no evidence of Consuelo

(...continued)

is not properly before this Court, and in any event, this assertion lacks merit. (See Arg. (C)(1)(h)(1), fn. 15.)

being hit by a car or any evidence of an “accidental event.” (See Arg. (C)(1)(h)(3).) Additionally, contrary to petitioner’s argument (2012 Inf. Reply at p. 388), the record is clear that outside the presence of the jury, defense counsel noted that she made a tactical decision not to “bring in an expert on fulcrum and pressure because that would have possibly been detrimental to the defense and not helpful.” (17RT 3512.)

Because defense counsel’s performance was not deficient or prejudicial, this Court should reject petitioner’s ineffective assistance counsel claim. Moreover, even if counsel performed deficiently, the deficiency was harmless as to the jury’s verdict of second degree murder because, as previously discussed, there was independent evidence overwhelmingly establishing that petitioner killed Consuelo with at least implied malice.

e. Failure to counter theory that Petitioner suffocated Consuelo

In Part 5 of Claim 13, petitioner claims that trial counsel performed deficiently because she “failed to investigate and present evidence to counter the prosecution’s theory of premeditated first degree murder premised on the theory that petitioner suffocated Consuelo.” (RCCAP at pp. 254-258.) As previously discussed, petitioner has not proven that Dr. Bentson gave “false” testimony. In any event, evaluating the quality of trial counsel’s response to the evidence is moot because such an evaluation would not alter the relief to which petitioner is already entitled. As previously discussed, Dr. Bentson’s testimony that Consuelo’s watershed brain infarcts could have been from suffocation was contrary to the evidence she was still breathing when her mother came home and took her to DRMC. Moreover, any alleged deficiency in the performance of trial counsel was not prejudicial as to second degree murder. As a result,

petitioner's claim that he did not receive the effective assistance of counsel cannot alter the relief to which he is entitled.

In any event, petitioner fails to demonstrate that trial counsel's response to the theory of suffocation fell outside the wide range of reasonable professional assistance under prevailing professional norms. Petitioner claims trial counsel did not adequately rebut the testimony that Consuelo's watershed brain infarcts were indicative of suffocation with evidence that "[b]rain infarcts are not caused by suffocation. A victim of asphyxiation will show no injuries to the brain at autopsy." (RCCAP at p. 255.) However, defense witness Dr. Lovell told the jury, "I don't think you see that pattern [of watershed brain infarcts] in suffocation." (16RT 3151.) He explained that suffocation "most generally affects a part of the brain called the basal ganglia down inside first" and that the cause of a watershed brain infarct "has to be blood supply cut off." (16RT 3151-3152.) An objectively reasonable defense attorney could have easily believed that Dr. Lovell's testimony at trial was sufficient to rebut the testimony from Dr. Bentson that Consuelo's watershed brain infarcts were indicative of suffocation.

Petitioner also claims trial counsel was constitutionally compelled to introduce evidence that "[i]f the child had been suffocated she would have been dead in three minutes and could not have survived without immediate resuscitation." (RCCAP at p. 255.) He relies on a declaration from Dr. Di Maio stating in pertinent part that "[a] child who is smothered will develop . . . a flat electroencephalogram (EEG) and cessation of respiration in 90 seconds. Respiration will not return spontaneously if the smothering is stopped. The child would die unless the child is immediately resuscitated." (Pet.'s RCCAP Exh. 81 at p. 5487.) Although the proffered declaration would tend to show that petitioner had not smothered Consuelo for 90 seconds, it has no tendency to rebut the suggestion that he smothered

her for a shorter period of time. An objectively reasonable defense attorney could have easily believed that evidence establishing that petitioner could have smothered Consuelo for any length of time up to 90 seconds would not have been helpful in rebutting the prosecution's theory of the case.

Petitioner further claims trial counsel performed deficiently by not introducing evidence to establish that the true cause of Consuelo's brain infarcts was either a cardiac arrest at DRMC or disseminated intravascular coagulation (DIC). (RCCAP at pp. 256-257.) He suggests that such evidence would have been available to counsel but for her lack of familiarity with the medical records and her failure to tell the defense experts about the cardiac arrest and DIC. (RCCAP at p. 257.) However, trial counsel declares that she gave Dr. Baumer "all of the medical records" (Resp.'s RCCAP Exh. 20 [Decl. of Donnalee Huffman]), and she cannot be faulted for relying on his expertise in reading, understanding, and appreciating the significance of the matters stated therein. As a result, petitioner fails to demonstrate that counsel's performance deficiently fell below the wide range of reasonable professional assistance under prevailing professional norms.

Moreover, even if counsel performed deficiently, the deficiency was harmless as to second degree murder because, as previously discussed, there was independent evidence overwhelmingly establishing that petitioner killed Consuelo with at least a conscious disregard for human life.

f. Failure to disprove shaking as the cause of Consuelo's brain injuries

In Part 6 of Claim 13, petitioner claims that trial counsel performed deficiently because she "failed to investigate and present evidence refuting the prosecution's theory that Consuelo's brain injuries were the result of her having been shaken by petitioner." (RCCAP at pp. 258-259.) As

previously discussed, Consuelo's brain tissue has been destroyed and respondent lacks information sufficient to assess whether Dr. Dibdin's opinion that Consuelo's subdural brain hemorrhage was indicative of her having been shaken was objectively untrue, rendering it "false" within the meaning of Penal Code section 1473. (*In re Richards, supra*, 55 Cal.4th at p. 963.)

However, petitioner fails to demonstrate that trial counsel's response to the evidence of shaking fell outside the wide range of reasonable professional assistance under prevailing professional norms. Petitioner observes that trial counsel had access to Dr. Dibdin's autopsy report, which stated that "[t]he presence of acute subdural hemorrhage is confirmed. The red blood cells are beginning to lose their definition and this would be consistent with an age of 3 to 6 days." (Pet.'s RCCAP Exh. 8 at p. 3560.) Petitioner now claims that he could not have caused the hemorrhage in light of its reported age. (RCCAP at pp. 258-259.) He also claims that the absence of bilateral retinal hemorrhages was inconsistent with Consuelo having been shaken at all. (RCCAP at p. 259.) However, the medical experts whom trial counsel retained had access to the autopsy report (Pet.'s RCCAP Exh. 80 at p. 5476 [Decl. of Dr. F. Lovell]; Pet.'s RCCAP Exh. 142 at pp. 6631-6632 [Decl. of Dr. Nat Baumer]), and trial counsel cannot be faulted for relying on their expertise in determining whether the absence of bilateral retinal hemorrhages and Dr. Dibdin's opinion regarding the subdural hemorrhage was consistent with his opinion that Consuelo "was probably shaken" (Pet.'s RCCAP Exh. 8 at p. 3561).

Moreover, even if counsel performed deficiently, the deficiency was harmless as to second degree murder. As previously discussed, it is not reasonably probable that the jury would have failed to find that petitioner violently assaulted Consuelo in the abdomen with at least a conscious disregard for human life.

CONCLUSION

In sum, petitioner has failed to prove that the following evidence was “false” under Penal Code section 1473: evidence that Consuelo suffered prior sexual abuse, that her head injuries were indicative of Shaken Baby Syndrome or from suffocation or multiple head traumas, that squeezing was a mechanism of injury for the posterior rib fractures or that Dr. Dibdin “falsely” approximated the age of Consuelo’s acute and healing rib fractures, that Consuelo did not have any visible injuries when her mother left her with petitioner on November 17, that Dr. Diamond failed to do a rape kit, and that she was not hit by a car. By contrast, respondent acknowledges that petitioner’s convictions for rape, sodomy, lewd and lascivious acts with a child under 14, and the related sex abuse special circumstance findings and the death sentence should be vacated because new information shows that the evidence relied upon to support them was “false” and material within the meaning of Penal Code section 1473. Nevertheless, it is not reasonably probable that, absent the refuted evidence, the jury would have failed to convict petitioner of second degree murder. Thus, this Court should reduce petitioner’s conviction to second degree murder, allowing the People to accept a judgment thereof or to retry this

matter. Respondent respectfully requests that this Court deny the petition for writ of habeas corpus in all other respects.

Dated: June 12, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RETURN TO ORDER TO SHOW CAUSE TO RED-LINED COPY OF CORRECTED AMENDED PETITION ("RCCAP")** uses a 13 point Times New Roman font and contains 28,051 words.

Dated: June 12, 2015

KAMALA D. HARRIS
Attorney General of California



KELLY E. LEBEL
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Benavides** No.: **S111336**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 15, 2015, I served the attached **RETURN TO ORDER TO SHOW CAUSE TO RED-LINED COPY OF CORRECTED AMENDED PETITION ("RCCAP") and EXHIBITS TO RETURN TO RED-LINED COPY OF CORRECTED AMENDED PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 15, 2015, at San Francisco, California.

Nelly Guerrero
Declarant


Signature