SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	Supreme Court No. S249274
Plaintiff and Respondent,	
v.	Court of Appeal No. E066388
KIMBERLY LOUISE LONG,	Superior Court No. RIF113354
Defendant and Petitioner.	

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Patrick F. Magers, Judge

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF FACTS

Petitioner asserts respondent's reliance upon the Court of Appeal's 2008 opinion in case number E039986 for the recitation of the facts of the underlying crime is improper, as the 2008 opinion was necessarily written in the light most favorable to the guilty verdict below. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Myers v.Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739; *In re S.C.* (2006) 138 Cal.App.4th 396; see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Moreover, respondent relies upon the 2008 opinion without acknowledging the fact the opinion necessarily relied upon crucial facts that have now been proven patently false. Indeed, the opinion in which the Court of Appeal "previously found the trial evidence supporting petitioner's guilt to be substantial" (ABOM, p. 68), was based on "facts" and "evidence" which petitioner proved to be false at the evidentiary hearing in question in this case, as will be explained, *post.*

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEAL REVERSING THE TRIAL COURT'S GRANT OF HABEAS RELIEF FAILED TO ADHERE TO THE CONTROLLING STANDARDS OF APPELLATE REVIEW

This Court has asked the parties to address, in relevant part, the following issue: "Did the decision of the Court of Appeal adhere to the controlling standards of appellate review?" In her brief on the merits (BOM), petitioner argued that the decision of the Court of Appeal reversing the trial court's grant of habeas relief failed to adhere to controlling standards of appellate review; namely, that the correct standard of review was not "de novo," as the Court of Appeal determined, but substantial evidence. (BOM, pp. 53-68.) In its answer brief on the merits (ABOM), respondent claims petitioner forfeited any argument challenging the "de novo" standard of review because it was "not disputed on appeal or raised in petitioner's petition for rehearing." (ABOM, pp. 22-25.) Respondent also claims that, although this Court identified the issue, petitioner has attempted to "gain a tactical advantage in this Court based on purported error in a complex 77 page opinion without permitting the court of appeal to address potential deficiencies in its opinion." (ABOM, pp. 23-24.)

As will be discussed below, this issue was disputed on appeal, one cannot forfeit a standard of review, and it was the Court of Appeal itself which should have addressed the deficiency in its ruling by applying the correct, controlling standard of review.

A. Petitioner Has Always Asserted That the "Substantial Evidence" Standard of Review Applies in this Case, Not the "De Novo" Standard

Respondent falsely asserts that petitioner did not "dispute" the de novo standard of review. (ABOM, p. 22.) Petitioner raised the standard of review in her respondent's brief below, specifically arguing the trial court's factual findings were supported by "substantial evidence," under the standard articulated in *In re Collins* (2001) 199 Cal.App.4th 1176, 1181 ("*Collins*"). (Respondent's Brief ("RB"), E066388, filed 3/10/17 pp. 54-55.) In applying that standard, for example, petitioner argued in both her respondent's brief and petition for rehearing that substantial evidence supported the trial court's factual finding that the victim was dead long before petitioner arrived home (RB, pp. 58-70; Pet. R'Hrg., pp. 13-20), contrary to the Court of Appeal's own factual determination. (See Opinion, pp. 48, 52 [making a factual determination that the actual time of death involved too broad of a range].) Petitioner also argued, contrary to the decision of the Court of Appeal (Opinion, pp. 37, 43, 61, 66.), that substantial evidence supported the trial

court's finding that petitioner did not change her clothing. (Respondent's Brief ("RB"), pp. 70-83; Pet. R'Hrg., pp. 32-37.) Although *Collins* also mentions "de novo" as a standard of review in the context of "constitutional rights *and* the exercise of judgment about the values underlying legal principles" (*In re Collins*, *supra*, 199 Cal.App.4th at p. 1181, italics added), that standard is inapplicable to the factual determinations made by the trial court as will be discussed more fully, *post.*

While one can find the term "substantial evidence" 26 times in petitioner's respondent's brief filed in the Court of Appeal, the term "de novo" appears a single time—when identifying standards of review articulated in *Collins*. (See RB, p. 54.) In her petition for rehearing, the term "de novo" is not mentioned at all, while "substantial evidence" is mentioned 11 times. Hence, it is clear that petitioner has always "disputed" the "de novo" standard of review and directed the Court of Appeal to the correct "substantial evidence" standard of review for factual determinations. Respondent is incorrect in arguing otherwise.

B. The "Substantial Evidence" Standard Is the Correct, Controlling Standard of Review in this Case

Collins sets forth the controlling standard of appellate review for claims involving ineffective assistance of counsel:

> This court applies the substantial evidence test to the trial court's resolution of pure questions of fact and independently reviews questions of law, such as the selection of the controlling rule. With respect to mixed questions of law and fact, this court reviews the trial court's application of law to fact under a deferential clearly erroneous standard if the inquiry is predominantly factual. But when the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, this court's review is de novo.

(*In re Collins*, *supra*, 199 Cal.App.4th at p. 1181.) Thus, the *Collins* court found the de novo standard of review appropriate where there was a constitutional challenge to the facial validity of a prison policy. (*Ibid.*) De novo review was appropriate because analysis of the issue "requires us to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests." (*Ibid.*) The same is not true here.

In an ineffective assistance of counsel claim, there is no such consideration of "abstract legal doctrines," "policy considerations," or "balanc[ing] of competing legal interests," as there was in *Collins*. Hence, courts have held that ineffective assistance of counsel claims, while technically mixed questions of law and fact, require the appellate court to apply the

substantial evidence standard of review. (See *People v. Callahan* (2004) 124 Cal.App.4th 198, 211; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 796 [in determining whether counsel's performance was deficient, appellate court must accept all factual and credibility findings made by trial court and supported by substantial evidence].)

> In determining whether counsel's performance was deficient, [an appellate court] must accept all factual and credibility findings that are supported by substantial evidence. [Citation.] Although the trial court's determination of deficient performance is a mixed question of fact and law [citation], we defer to that determination where, as here, it is 'predominantly factual or credibility based. [Citations.] (*People v. Callahan, supra*, 124 Cal.App.4th at p. 211.)

Accordingly the correct standard of review for an ineffective assistance of counsel claim is "substantial evidence." Only if the trial court's application of the facts to the law are clearly erroneous, can an appellate court reverse the grant of habeas relief. (*In re Collins, supra*, 199 Cal.App.4th at p. 1181.)

C. It Was the Duty of the Court of Appeal to Identify and Apply the Correct, Controlling Standard of Review, Irrespective of the Standards Articulated and Argued by the Parties

It is the Court of Appeal's obligation to identify and apply the proper standard of review. (See *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1125 ["*we* first determine the standard of review"], italics added; see also *Amado v. Gonzalez* (9th Cir. 2014) 758 F.3d 1119, 1133 fn. 9 [the court has "the obligation to apply the correct standard"]; *Worth v. Tyer* (7th Cir.2001) 276

F.3d 249, 262 fn. 4 ["the court, not the parties, must determine the standard of review"]; *State v. Philip Morris, Inc.* (Md. 2015) 123 A.3d 660 [it is the court, not the parties, that must determine the standard of review].) Here, the Court of Appeal was derelict in its duty to identify and apply the correct standard of review. It is, fundamentally, irrelevant to the Court of Appeal's ultimate determination whether the parties raised the appropriate standard of review.

D. A Party Cannot Forfeit a Controlling Standard of Review

Not a single California case stands for the proposition that respondent is suggesting—that a party can forfeit a standard of review by failing to dispute the standard applied by the Court of Appeal. (ABOM, pp. 22-25.) Nor would any such case exist in light of the duty of the Court of Appeal itself to identify the controlling standard of review. Although California has not addressed the issue, several federal and other state cases have held the exact opposite of respondent's argument. The Fifth Circuit has held "[a] party cannot waive, concede, or abandon the applicable standard of review." (*Ward v. Stephens* (5th Cir. 2015) 777 F.3d 250, 257 fn. 3.) The Ninth Circuit has held that the AEDPA standard of review cannot be waived, even if the correct AEDPA standard of review was not addressed by the parties in their briefs, reasoning that the court has "the obligation to apply the correct standard, for the issue is non-waivable." (*Amado v. Gonzalez* (9th Cir. 2014) 758 F.3d

1119, 1133 fn. 9.) The Seventh Circuit has determined that "the court, not the parties, must determine the standard of review, and therefore, it cannot be waived." (*Worth v. Tyer* (7th Cir.2001) 276 F.3d 249, 262 fn. 4.) And the Sixth Circuit has held "a party cannot 'waive' the proper standard of review by failing to argue for it." (*Brown v. Smith* (6th Cir.2008) 551 F.3d 424, 428 fn. 2, overruled on other grounds by *Cullen v. Pinholster* (2011) 563 U.S. 170 [131 S.Ct. 1388, 1400, 179 L.Ed.2d 557].) The State of Maryland has held that party cannot waive the proper standard of review by failing to argue it because it is the court, not the parties, that must determine the standard of review. (*State v. Philip Morris, Inc.* (Md. 2015) 123 A.3d 660.) And, the State of Illinois, in response to a similar argument raised by one of the parties, held: "There is not any case in Illinois which has held that a party waived the standard of review by failing to recite the standard in its brief. We find that International did not waive the standard of review." (*Zurich Ins. Co. v. Raymark Industries*, Inc. (Ill. 1991) 572 N.E.2d 1119, 1122.) Hence, the standard of review simply cannot be forfeited or waived, as respondent suggests.

Respondent appears to be confusing forfeiture of an *issue* with forfeiture of a *standard of review*. While the former may be waived, the latter cannot. This is because an "issue" is the disagreement about facts or legal

issues, i.e, whether defense counsel was ineffective. (See Black's Law Dictionary (11th ed. 2019), issue.) The "standard of review," on the other hand, is "[t]he criterion by which an appellate court exercising appellate jurisdiction measures the ... propriety of an order, finding, or judgment entered by a lower court." (Black's Law Dictionary (11th ed. 2019), standard of review.) In other words, the "standard of review" is the lens through which the appellate court determines whether or not the trial court erred. Thus, while an *issue* can be forfeited, application of the correct standard of review by the reviewing court cannot.

E. Assuming Forfeiture Applies, the Rational for Forfeiture Does Not Apply and this Court Has the Ability to Still Determine the Issue

Assuming arguendo without conceding the Court of Appeal's application of the appropriate standard of review could be forfeited, the rationale for forfeiture does not apply here. The reason that claims are generally forfeited are: (1) to give the prosecution the opportunity to cure any defect (*In re Seaton* (2004) 34 Cal.4th 193, 198); (2) to allow the court to correct errors (*People v. Romero* (2008) 44 Cal.4th 386, 411); and (3) to prevent gamesmanship by the defense (ibid.), i.e., gambling on an acquittal in the trial court secure in the knowledge the conviction will be reversed on appeal (*In re Seaton, supra,* 34 Cal. 4th at p. 198). However, if something occurred that gave the prosecution the opportunity to cure any defect and

allowed the court to correct the error, the rationale for forfeiture does not apply. (See *People v. Briggs* (1962) 58 Cal.2d 385, 410 [issue preserved for appeal "[e]ven if, ... the objection was not properly phrased, and even if it was not stated in the most precise terms...."].) By appropriately setting forth the standard of review in her respondent's brief and in challenging the Court of Appeal's application of the standard of review in her petition for rehearing, the Court of Appeal was on notice to cure any defect in its application of the standard of review, and thus the rationale for forfeiture does not apply here.

Moreover, this Court is empowered to decide issues necessary for the proper resolution of the case before it, whether or not raised in the courts below. (*Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1078, fn. 4), and may consider all issues fairly embraced in the petition for review, even if not precisely set forth in the petition. (*People v. Perez* (2005) 35 Cal.4th 1219, 1228.) Respondent's argument fails, as the issue of whether the Court of Appeal adhered to the controlling standard of appellate review is properly before this Court.

II.

WHEN APPLYING THE CORRECT, CONTROLLING STANDARD OF REVIEW, IT IS CLEAR THE TRIAL COURT'S FACTUAL FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND APPLICABLE LAW AND THE COURT OF APPEAL ERRED IN REVERSING THE GRANT OF HABEAS RELIEF

Respondent's second argument is that petitioner has failed to demonstrate that the Court of Appeal failed to adhere to the controlling standard of appellate review. (ABOM, pp. 25-54.) Respondent claims the trial court's "most significant factual findings and legal conclusions lack foundation." (ABOM, p. 50.) In addition, respondent claims a determination of a trial attorney's effectiveness is "not a mixed question of law and fact." (ABOM, p. 54.) Respondent is wrong.

A. Substantial Evidence Supports the Trial Court's Factual Findings

Respondent claims that there are "some factual findings that are completely unsupported by the record." (ABOM, p. 27.) Such is not the case.

1. The trial court's finding that Vomhof was not qualified to offer an opinion on time of death is supported by substantial evidence

Respondent claims the trial court was incorrect in determining that Vomhof was not qualified to offer an opinion on the victim's time of death. (ABOM, p. 50.) Respondent contends "Dr. Vomhof's CV *did tend to show* that he was qualified to provide an opinion on time of death." (ABOM, p. 51,

italics in original.) As detailed in petitioner's brief on the merits, however, the trial court made an extensive ruling with regard to Vomhof which was supported by substantial evidence. (BOM, pp. 37-38; 4 R.T. 735-737.) The issue is significant because defense counsel consulted Vomhof in his preparation of petitioner's case. If Vomhof was not qualified to render such an opinion, as the trial court found, then his consultation would have fallen below that of a reasonably competent attorney.

The evidence before the trial court regarding Vomhof's involvement in the case was the following: defense counsel consulted Vomhof, an accident reconstruction specialist with a Ph.D in biochemistry and physiology, regarding the force necessary to cause the injuries to Conde. (2 R.T. 197, 246.) When defense counsel discovered Vomhof purported to be a time of death expert, he spoke to him about that issue also. (2 R.T. 197.) Defense counsel asked Vomhof to consult with Lisa DiMeo, whom defense counsel had retained as a forensic specialist to review the crime scene photographs, and to review the file defense counsel sent her. Defense counsel was not certain which documents were provided to Vomhof. (2 R.T. 198.) He also was not sure what documents he provided to DiMeo, but generally it would have been police reports, photographs, and the autopsy protocol. (2 R.T. 198.) Defense counsel was not sure if Vomhof had reviewed the paramedic reports or coroner

report when defense counsel consulted him regarding time of death in this case, and he spoke to Vomhof once or twice on the phone, but did not remember what they discussed. (2 R.T. 199.)

Nevertheless, respondent appears to argue that merely because Vomhof listed on his CV that he could provide testimony regarding "Time and Cause of Death" that he was in fact somehow qualified to do so. (ABOM, p. 50.) However, as the trial court noted, the only evidence presented regarding Vomhof's alleged qualifications as a time of death expert was his CV. (Def. Exh.N.) The trial court found there was no information presented in Vomhof's CV which indicated he was qualified to perform a time of death assessment. (4 R.T. 735.) In his CV, Vomhof lists himself as holding a Ph.D in biochemistry and physiology; his CV does not reflect that Vomhof has a medical degree, let alone one in forensic pathology, nor any experience working for a medical examiner. (Def. Exh. N.) It is telling that in the totality of the argument regarding Vomhof, respondent never affirmatively argues that in fact Vomhof's degrees, education, or even work experience actually made him qualified to give an opinion as a time of death expert. (ABOM, p. 50) Instead, respondent merely states Vomhof "represented" that he had some sort of knowledge on "time of death" on his CV, and that Vomhof "represented" that he is a "forensic consultant" based on certifications in a number of fields.

(ABOM, p. 50.) Certainly, had respondent desired to prove that it was reasonable for defense counsel to have consulted Vomhof as a time of death expert, respondent could have subpoenaed Vomhof to testify and subjected Vomhof to a thorough examination of his actual credentials and his expertise regarding time of death. That respondent chose not do so is telling.

In addition, in *Strickland* expert Gary Gibson's opinion, time of death was so critical in this case, a reasonably objective defense attorney would have sought out a qualified time of death expert. (2 R.T. 305.) Gibson testified he did not believe Vomhof was qualified to give an opinion on time of death analysis because he is not a medical doctor, he did not have an affiliation with the medical examiners office of any kind, and that it was unreasonable for defense counsel to rely on Vomhof, who was hired as a biomechanical engineer, for a time of death opinion. (2 R.T. 304-305, 309.)

Accordingly, as Vomhof's self-serving CV was the only evidence presented regarding any of his possible qualifications, contrary to respondent's argument, the trial court's finding that Vomhof was not qualified to provide an expert opinion on time of death was supported by substantial evidence. The Court of Appeal failed to give these findings proper deference when it improperly reversed the trial court's ruling. (*In re Hardy* (2007) 41 Cal.4th. 977, 993.)

2. The trial court's finding that Drs. Hua and Bonnell provided credible and compelling testimony that the victims's time of death was at a time when petitioner had an alibi is supported by substantial evidence

Respondent's second issue with the trial court's factual findings is that the trial court was incorrect in determining that Drs. Bonnell and Hua both testified that the observed post-mortem changes could not have occurred in less than an hour. (ABOM, p. 51.) Respondent is wrong. This claim is not supported by the record, and is not an actual finding made by the trial court. Substantial evidence supports the trial court's actual findings with respect to the of death.

Three qualified forensic pathologists testified and provided their expert opinion regarding the victim Oswaldo Conde's time of death. Petitioner presented two qualified forensic pathologists who testified Conde's death occurred before 1:20 a.m., the time her alibi witness, Jeffrey Dills, claimed her dropped petitioner off at her house. Dr. Zhongxue Hua testified that, based upon all of the available evidence, including the post rigor and lividity observations made by the deputy coroner and the EMS workers who actually touched and examined Conde's body, it was not medically possible for Conde to have died at 1:20 a.m. or later (1 R.T. 137-138), the earliest time the prosecution could place petitioner on the scene. Dr. Harry Bonnell testified Conde's death was closer to 11:00 p.m. than 1:00 a.m., and that it was

medically impossible for Conde to have died at 1:20 a.m. or after. (1 R.T. 153, 175-176.) Further, the prosecution's witness, Dr. Joseph Cohen, testified that it was just as likely Conde could have died before 1:20 a.m. as after 1:20 a.m.—Dr. Cohen could not pin this time down with any degree of certainty. (3 R.T. 434.) Notably, however, Dr. Cohen essentially gave a 50% chance that the victim was dead at a time petitioner had an alibi. Where the standard of proof is "beyond a reasonable doubt," even this testimony from respondent's own witness would have assisted the defense case.

In determining the significance of the testimony of the forensic pathologists, the trial court stated the following:

> ... both forensic pathologists testified in this court that the victim's death occurred significantly earlier than 1:20 a.m., the earliest time the prosecution could place the petitioner at the scene. Their observations were based upon postmortem changes by the first responders as well as the deputy coroner's report – and that would be Mr. Gomes.
>
> Hearing their testimony, this Court finds both opinions to be credible, convincing, and compelling. Their testimony indicates such qualified medical opinions were available at the time of trial and defense counsel failed to seek out medical experts to address the issue. The Court finds that defense counsel's performance fell below an objective standard of reasonableness when he failed to consult and present the testimony of a qualified time of death expert.
>
> ... If such expert would have testified, it would have put the victim's time of death at a time when petitioner could not have committed the crime, if believed by the jury. Obviously, it's always a question of fact for the jury to either accept or reject

the testimony of an witness that testifies, including an expert. (4 R.T. 735-737.)

Thus, contrary to respondent's contention, the trial court did not find that "observed post-mortem changes could not have occurred in less than an hour" and correctly found that the forensic pathologists placed Conde's death at a time petitioner could not possibly have committed the crime.

Respondent also argues that a jury's disbelief of Dr. Hua's testimony would be appropriate because, "Dr. Hua expressly relied on the deputy coroner's observations at 5:03 a.m., (1 R.T. 117) and Dr. Bonnell testified that if an expert relied on the deputy coroner's observations at 5:03 a.m., the resulting opinion would be inaccurate." (ABOM, p. 52.) This argument neglects the totality of Dr. Hua's testimony regarding all of the sources of information Dr. Hua relied upon in making his time of death determination. Dr. Hua specifically testified that he relied upon many factors in determining the time of death, including the EMS reports and the deputy coroner's reports as two early pieces of available information. (1 R.T. 117.) Indeed, the prosecution's own time of death expert, Dr. Cohen, testified the coroner must have made his observations and performed his examination of the body between 5:03 a.m. and 7:13 a.m. (3 R.T. 419, 442, 448-450.), and Dr. Cohen also testified he relied upon the deputy coroner's report in forming his opinion regarding the time of death. (3 R.T. 415-416, 419-421.) Respondent's attempt

to in some way disparage Dr. Hua's testimony as unsubstantial must be disregarded.

Respondent also takes issue with the time of death evidence because petitioner claimed Conde was breathing when she arrived home. Respondent claims, "[n]ot to be forgotten are petitioner's own statements and testimony—as an experienced emergency room nurse—Ozzy was breathing at 2:09 a.m. when she summoned the police." (ABOM, p. 52.) Respondent's characterization of petitioner's statements and testimony regarding her observations, however, is inaccurate. In fact, petitioner repeatedly stated that she "thought" or "believed" Conde was breathing, but often said she could not remember due to her state of panic. (E039986 1 C.T. Supp. 9, 31, 141-143, 210, 213; 4 R.T. 642-643, 711-712, 734-735, 963.) She told officers during her initial police interview "I was just running around the house, because I thought he was breathing, like he's breathing he's got to be breathing, he has to be breathing" (E039986 1 C.T. Supp. 141), and when questioned by the prosecutor about seeing Conde's chest rising and falling, she said "I can't remember. I thought it was. I was so panicked" (E039986 4 R.T. 643). Petitioner never did actually check for any signs of breathing. (See E039986 4 R.T. 643 [petitioner did not listen to see if he was breathing, did not place her hand under his nose to see if he was breathing, etc.].) Even had petitioner thought Conde was alive when she arrived home, such a belief is plausible in

light of the fact that she was under the influence of alcohol and Vicodin. Hence, petitioner's statements that she thought Conde was breathing is not the type of reliable evidence which would cause an objectively reasonable trial attorney to not consult a qualified time of death expert.

Respondent also makes a number of tangentially related claims, which appear to have no relevance to the issue at hand. For example, respondent states "Dr. Bonnell even testified that providing an opinion on time of death is not practicing medicine" (ABOM, p.51), without explanation as to why this fact supports respondent's position. Further, respondent states again, without explanation as to how it is relevant to respondent's argument, that attorney Michelle Rogers "was able to adequately research time-of-death without the assistance of a medical doctor." (ABOM, p. 51.) Contrary to respondent's representation, Rogers did not testify she was able to adequately research time of death without the assistance of a medical doctor. (ABOM, p. 51.) Indeed, Rogers's testimony was that, based upon her review of the evidence as an attorney, she did not know enough about the issue, and would have to consult a qualified expert who specialized in time of death determinations in order to competently investigate this issue. (2 R.T. 374-376.)

The trial court's findings regarding the time of death evidence presented were clearly supported by substantial evidence, and the Court of Appeal erred when it failed to give these findings considerable deference and uphold these

findings. (*In re Hardy*, *supra*, 41 Cal.4th at p. 993.) Respondent's arguments to the contrary must be rejected.

3. The trial court's finding that the perpetrator would have blood on their person is supported by substantial evidence

Although respondent conceded, "if petitioner did not change her clothing, and there was no blood on her clothing, the inference could be that petitioner may not have committed the murder" (ABOM, p. 66), respondent claims the trial court was incorrect in determining that "there was no question that the perpetrator of this murder would have gotten blood on him or her" (ABOM, p. 52). Respondent claims that it "cannot be determined" whether the perpetrator of this crime would have necessarily had blood on their person. (ABOM, p. 53.) Again, however, respondent is wrong. Respondent's attempt to undermine the People's original theory and the trial court's finding that there was no question that the perpetrator of the crime would have gotten blood on him or her flies in the face of the actual evidence in this case.[1]

a. The criminalist's testimony at trial established the perpetrator would have had blood on their person

In support of its new "bloodless perpetrator" argument, respondent makes the completely baseless claim that the trial court's findings based upon

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1 The trial court's detailed ruling regarding petitioner's clothing is recited in petitioner's brief on the merits at pages 41-43.

criminalist Daniel Verdugo's testimony regarding the blood evidence are not supported by substantial evidence because Verdugo "perfunctorily testified" at trial. (ABOM, p. 66.) This is a misrepresentation of Verdugo's testimony. Any claim that Verdugo's testimony regarding the blood evidence was "perfunctory" is nonsensical. Verdugo's testimony is summarized below and establishes the perpetrator would have had blood on their person.

Verdugo found blood 360 degrees from where Conde's body was located and on every wall in the living room, but none on the ceiling. (E039986 3 R.T. 517, 519, 530; 4 R.T. 851, 867-868.) Because velocity was involved, there was a fine mist of blood not necessarily visible in the photos of the crime scene—there was a misting of blood on the table, blood on the curtains, the coffee table, the blinds, the television, a door behind the couch that led into the 65 garage, some baseball bats by the front door, and a washing machine inside the garage; Verdugo observed this blood spatter first-hand. (E039986 2 R.T. 411, 414; 3 R.T. 484-485, 495-498, S09, 524, 546-S48, 553; 4 R.T. 853; 1 C.T. 91-92, 102, 106.) Indeed, he photographed and measured the blood stains in the living room. (E039986 3 R.T. 516-517.)

The blood spatter patterns indicated to Verdugo that the weapon was swung in a horizontal fashion. (E039986 3 R.T. 520.) On the north wall directly behind Conde's body, Verdugo observed a combination of cast-off

blood and blood that indicated velocity. (E039986 3 R.T. 519.) Cast-off blood was on the walls furthest away from where Conde was sitting, and the south, west, and east walls. (E039986 3 R.T. 518-519.) There was also a velocity blood stain on the east wall to the left of Conde's body near a table. (E039986 3 R.T. 519.) He observed blood on the carpet and on some items on the floor. (E039986 3 R.T. 517.) Blood was found approximately thirteen feet away on a blind on the south wall. (E039986 3 R.T. 544.) More bloodstains were on the south wall and on the television. (E039986 3 R.T. 546.)

Verdugo believed Conde was probably struck more than once because there was cast off blood. (E039986 3 R.T. 548-549.) Because there was no blood spatter cast off on the ceiling, multiple implements may have been used by multiple perpetrators. (E039986 3 R.T. 549, 551.) Although there was cast off blood on every wall around Conde, Verdugo could not determine where the perpetrator or perpetrators stood at the time of the attack. (E039986 3 R.T. 551-552.) The blood found 360 degrees around Conde was consistent with use of a long implement, such as a golf club. (E039986 3 R.T. 552.)

Verdugo testified there was minimal disruption in the blood patterns, which meant that Conde was found in the same position where the incident occurred. (E039986 3 R.T. 520-522.) There did not appear to be any significant movement that was not explainable through bloodstain patterns.

(E039986 3 R.T. 521.) There was a small amount of blood on the inside front door, which indicated the door was closed when the assault occurred. (E039986 3 R.T. 497, 524.) Baseball bats by the front door had velocity blood spatter, and because there was no gap in the blood pattern behind the bats, this indicated they were in place when the blood landed there. (E039986 3 R.T. 522, 523.)

Inside the garage, there was blood on the washing machine and dryer and on bedding material inside the doorway. (E039986 3 R.T. 498.) Verdugo believed this blood was either caused by an impact to Conde near the washing machine, or projected blood from another area. (E039986 3 R.T. 555.) The blood pattern indicated the door which opened from the house to the garage was partially open during the assault. (E039986 3 R.T. 524-525.)

Verdugo testified that petitioner's motorcycle helmet was against the blood-spattered baseboard on the wall behind Conde's body. (E039986 3 R.T. 531, 536-538, 5 R.T. 924.) Verdugo visually checked the helmet for blood because of its proximity to the blood-spattered baseboard and wall, but did not see blood on the helmet. (E039986 3 R.T. 531, 536-538.) Verdugo did not collect the helmet because he did not have authority to do so, but he conducted tests on the helmet later and confirmed there was no blood on it. (E039986 3 R.T. 536-537.)

Verdugo testified the presence of the blood on the wall above respondent's helmet and the baseboard, but not on the helmet located in the same area, indicated if the helmet was there when the impact occurred, the assailant or assailants blocked the projection of blood spatter and would have blood on him or her. (E039986 3 R.T. 572, 575.)

The entirety of Verdrugo's testimony proves that, contrary to the respondent's claim that Verdugo's testimony was "perfunctory" and contrary to the prosecution's newly invented "bloodless perpetrator" theory, the crime scene was very bloody, and it would have been highly improbable if not impossible for the perpetrator to not have blood on them. In addition, respondent's argument fails to take into consideration the fact the trial court personally observed Verdugo testify not once, but twice, at both of petitioner's jury trials.

b. Because the perpetrator would have had blood on their person, the prosecution at trial theorized petitioner changed her clothing

Because the perpetrator of the crime necessarily had to have gotten blood on their person and, because petitioner had absolutely no blood on her, the prosecution at trial claimed she must have killed Conde, then changed her clothing before she called 911. (E039986 5 R.T. 1023-1024, 1032.) The prosecutor argued at petitioner's preliminary hearing, "that at some point in

time she *had to change* which might explain the absence of blood on her clothing." (E039986 P.H.T. 34-35, italics added.) Further, the allegation that petitioner changed her clothing was used by the prosecution to show a critical element of the crime. During argument after the preliminary hearing, the prosecutor argued, "[t]he fact that there's no other bloody clothing or things like that found are evidence of efforts to hide the crime, which is circumstantial evidence of a willful, deliberate, and premeditated act." (E039986 P.H.T. 112.) What is more, at trial, during closing argument, the prosecutor argued petitioner changed her clothing: "[w]ho can tell us that those were the clothes that she was wearing that day? You didn't hear any evidence other than from her. You've got to rely upon her again that those were the clothes that she was wearing that day." (E039986 5 R.T. 1023-1024.) "She had taken all that time to get the blood off of her, to make sure there was no blood on her, to clean up the scene . . . she had to clean up . . . to straighten up, to get rid of evidence." (E039986 5 R.T. 1023, 1032.) The prosecution even went so far as to argue that petitioner could have killed Conde and then jumped into the backyard Jacuzzi in order to get all the blood off of her. (E039986 R.T. 1107.) Accordingly, in upholding her conviction on direct appeal in case E039986, the Court of Appeal found "Defendant had been in the Jacuzzi at Dills's house earlier in the evening, so if she smelled of chlorine she

had an excuse. In addition, the only testimony regarding what defendant had been wearing the day of the murder was her own. She could have changed into anything in her closet in a very short period of time." (4 C.T. 845.)

Hence, it is clear that the prosecution through the trial proceedings and the direct appeal, conceded the perpetrator would have necessarily had the victim's blood on their person and, thus, argued, that petitioner changed clothing.

c. The prosecution's attempt to change its theory is improper and unsupported by the evidence

The prosecution's new theory of the crime—that the actual perpetrator of this very bloody crime scene would not necessarily have had blood on them (4 R.T. 705; ABOM p. 66), is not only improper at this stage, but does not affect the trial court's ruling. For one, petitioner has rebutted "scenarios which, if they had been presented at trial, might have tended to support a verdict of guilt." (*In re Hall* (1981) 30 Cal.3d 408, 423.) Second, the "bloodless perpetrator" theory is incredulous.

In support of the "bloodless perpetrator" theory, respondent argued during the evidentiary hearing that, because the helmet on the floor behind the loveseat where Conde's body was found did not have blood on it, then it was possible for the actual perpetrator also to not have blood on them. (4 R.T. 704-705.) This relied upon "support" for this new bloodless perpetrator theory in

fact demonstrates the fallacy of the prosecution's argument. Indeed, criminalist Verdugo's testimony proves the absolute opposite of the prosecution's claim—Verdugo testified the fact the helmet did not have blood on it, but the baseboard around the helmet was blood spattered meant that if the helmet was there during the attack, the assailant or assailants blocked the projection of blood spatter and ***would in fact had to have had blood on him or her***. (E039986 3 R.T. 572, 575.) Any argument respondent makes to claim that Verdugo's testimony supports its new "bloodless perpetrator" theory must be completely disregarded, as it is blatantly false.

Moreover, the Department of Justice report upon which respondent relies in an attempt to support the "bloodless perpetrator" theory in actuality does not support this position at all. (ABOM, pp. 52-53.) This report merely states that the DOJ criminalist was not provided sufficient information in order to reach any meaningful opinion as to whether there would be blood spatter on the assailant. Specifically, the report states:

> Many of the photographs dipict (sp) the victim on the living room couch. His head appears to be significantly below the top of the couch backrest and his feet are resting on the floor. Had the victim been in this position when attacked, the backrest would have prevented any blood spatters from reaching the north wall. This infers that the victim was not in this position when attacked. Many of the photographs dipict (sp) the victim's wounds. There appear to be at least two elongated bruises-abrasions on the right side of the fact, a laceration on the right eyebrow, and an extensive laceration on the right ear and

> the head behind the right ear. The weapon used to cause these wounds, the amount and direction of force applied, the exact positions of the victim and assailant during the attack, and information about any additional blood spattering in the room are unknown to the undersigned and *preclude rendering a meaningful opinion as to the presence or absence of blood spatter on the assailant.* (emphasis in original) (2 C.T. 347-348)

Respondent's reliance upon this report to support a theory the assailant did not necessarily have blood on their person, and respondent's rejection of the testimony of the criminalist who actually visited the crime scene and took photographs of the blood spatter, is erroneous and must be disregarded.

The same is true of respondent's allegation that defense counsel hired a crime scene expert to analyze the crime scene photographs and who did not render an opinion that the perpetrator necessarily would have gotten blood on him or her. (ABOM, p. 66.) This expert was never asked to render an opinion on the subject because defense counsel completely failed to investigate or consider the fact that petitioner did not change her clothing that night. (2 R.T. 194-195.)

Even more astounding is that, contrary to the position taken now in front of this Court, wherein respondent seemingly argues an alternative theory to the "bloodless perpetrator"—that it is possible petitioner changed her clothing (ABOM, p. 66), during the evidentiary hearing respondent in fact conceded petitioner had proven she did not change her clothing that night.

Specifically the prosecution stated, "I'm going to tell you right now its not the People's position that she changed her clothing. The People have seen additional evidence here that we weren't aware of before, but that's not inconsistent with her guilt." (4 R.T. 705.)

4. The trial court's finding with respect to Dills's out of court statements regarding petitioner's clothing were supported by substantial evidence

Respondent's third issue with the trial court's factual findings is that the trial court was incorrect in making a preemptive ruling on the admissibility of Dills's statements regarding petitioner's clothing. (ABOM, p. 54.) Respondent's argument entirely neglects to address the fact that defense counsel was found to be ineffective for failing to ask Dills about the clothing at the preliminary hearing and for failing to seek its admission after Dills's death at petitioner's trial. (4 R.T. 742-744.)

Defense counsel failed to question Dills about the clothing at the preliminary hearing and, therefore, failed to put Dills's statements into the record before he died. This failure was objectively unreasonable because, when the People later introduced the preliminary hearing transcript under Evidence Code section 1291, the description of the clothing was not part of the record. (2 R.T. 312.) The *Strickland* expert emphasized defense counsel's failure at the preliminary hearing was critical, because Dills was the primary

witness for the prosecution, he was the person who established the timeline, and yet his description of petitioner's clothing was never introduced to the jury through his preliminary hearing testimony because of defense counsel's failure to question him about the clothing. (2 R.T. 313-314.) At trial, it was not sufficient to only have petitioner testify as to what she was wearing that night because a defense attorney should always look for some independent evidence to corroborate the defendant's statements. (2 R.T. 314.) The *Strickland* expert testified that, had defense counsel performed as a reasonably competent attorney at the preliminary hearing, Dills's statements regarding petitioner's clothes would have come into evidence under Evidence Code section 1291 at her jury trial. (2 R.T. 312-314.)

Moreover, the *Strickland* expert testified that, at trial, an objectively reasonable competent attorney would have attempted via an in limine motion to introduce Dills's statements regarding petitioner's clothing into evidence. (2 R.T. 317.) Yes, the trial court who presided over petitioner's trials stated that, if the statements were found to be hearsay, they would be admissible under the due process exception found in *Chambers v. Mississippi, supra.* (4 R.T. 744-746.) Hence, this is not a situation where the parties do not know how the trial court would have ruled. Because defense counsel did not seek the admission of the statements, the trial court was precluded from admitting

a piece of evidence critical to petitioner's case.

Accordingly, based upon this substantial evidence, the trial court found defense counsel rendered constitutionally ineffective representation. Respondent is wrong in arguing otherwise.

B. Ineffective Assistance of Counsel Claims Are Mixed Questions of Law and Fact

Respondent claims "a determination of counsel's ineffectiveness is not a mixed question of law and fact." (ABOM, p. 54.) In support of this position, significantly, respondent string cites to three cases, none of which do not support respondent's position. (ABOM, p. 56; see *In re Ross* (1995) 10 Cal.4th 184, 201; *People v. Mayfield* (1993) 5 Cal. 4th 142, 199; *In re Marquez* (1992) 1 Cal.4th 584, 603.) Indeed, in the entirety of the cases cited by respondent to support its position, each case holds that the determinations regarding ineffective assistance of counsel are mixed questions of fact and law. (ABOM, pp. 55-56.)

A claim of ineffective assistance of counsel is necessarily predominantly factually or credibility based, and thus the reviewing court should give even more deference to the trial court's findings. "Although the trial court's determination of deficient performance is a mixed question of fact and law [citation], we defer to that determination where, as here, it is 'predominantly factual or credibility based. [Citations.] [Citation]'" (*People*

v. Callahan (2004) 124 Cal.App.4th 198, 211 ("*Callahan*").) In an attempt to distinguish *Callahan*, *supra,* from the present case, respondent asserts the ineffective assistance of counsel claim in *Callahan* was different than the ineffective assistance claim in the current case because *Callahan* "primarily involved fact and credibility determinations, and of course, it dealt with an evaluation of trial performance before judgment." (ABOM, p. 57.) An ineffective assistance of counsel claim necessarily involves analysis of the facts (defense counsel's performance) and application of those facts to the law (whether that performance was deficient and whether it prejudiced the petitioner). Respondent's attempt to distinguish the ineffective assistance claim in *Callahan* from the present case simply because it was raised via a motion for new trial in *Callahan* fails, as clearly the ineffective assistance claim in this case also primarily involved fact and credibility determinations, and dealt with an evaluation of trial performance and whether that performance prejudiced petitioner.

The *Callahan* court found deference must be given to the trial court's finding of ineffective assistance of counsel because of the trial court's ability to make "first-hand" observations in open court, which the trial judge was best positioned to interpret. (*Callahan, supra*, at p. 210, citing *Ault, supra*, 33 Cal.4th at p. 1267.) Without citation to the record, respondent makes an

entirely baseless claim—that the reasoning in *Callahan* does not apply to the current case because "Judge Magers—though the trial judge 11 years earlier, did not reach the conclusion of deficient performance and prejudice based on his observations of Keen during his representation of petitioner." (ABOM, p. 58.) Not only did Judge Magers preside over both of petitioner's jury trials and observe defense counsel's representation of petitioner "first-hand" during that time, but Judge Magers also presided over the week-long evidentiary hearing in this case, observed all of the witnesses presented at the evidentiary hearing, including defense counsel, and relied upon these "first-hand" observations in order to make the finding that defense counsel's performance at trial was prejudicially deficient. Respondent's unfounded argument that Judge Mager's findings were not based upon his "first hand" personal observations is nonsensical and should be disregarded by this Court.

Because of the trial court's unique positioning, were a reviewing court "to second-guess the trial court's findings in this regard, [it] would emasculate the constitutional protections conferred in the exercise of the trial court's duty to ensure that all criminal trials are conducted with solicitude for the essential rights of the accused." (*People v. Callahan, supra*, 124 Cal.App.4th at p. 211, internal citations omitted.) This is exactly what happened in this case. As explained in petitioner's opening brief on the merits, the Court of Appeal

failed to give due deference to the trial court's factual findings which were supported by substantial evidence and, by doing so, emasculated petitioner's constitutional protections. (BOM, pp. 58-99.)

Further, respondent's claim that "there were very few factual disagreements in the evidentiary hearing, and credibility was a very insignificant issue" (ABOM, p. 58), is belied by the actual record below. Indeed, if respondent's claims were indeed true, petitioner's claim would not have merited a contested evidentiary hearing with four full days of testimony from nine witnesses, each of which were challenged and cross examined thoroughly. (E066388 R.T. 83-675.) If respondent's claim were true, then the parties would have simply agreed to stipulate to the witness's testimony, submit the uncontested evidence in the form of declarations, and agreed to allow the trial court to make its ruling based upon these uncontested declarations. Respondent's claim that this case relied upon "the established and almost uncontradicted facts that needed to be evaluated on the basis of legal authorities" (ABOM, p. 58) is also disproved by the reality that the parties did stipulate to several facts and to the testimony of two witnesses,[2] but

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2 The parties entered into a stipulation regarding the DNA evidence (6 C.T. 1593-1595.), the testimony of forensic specialist Lisa DiMeo (6 C.T. 1596-1600), attorney Alissa Bjerkhoel (6 C.T. 1604-1607), and stipulated the trial court could take judicial notice of and consider the testimony, documents, and decisions in the record from petitioner's trial and post-conviction appeal

presented nine witnesses to whom the parties did not stipulate, and each of these nine witnesses's testimony was thoroughly contested. (E066388 R.T. 83-675.)

Additionally, respondent's claim that, unlike the defendant in *Callahan, supra,* here "Keen's actions did not leave petitioner without a defense" (ABOM, p. 59) and thus the Court of Appeal applied the correct standard of review in evaluating Judge Magers ruling is illogical. This is not a case where the evidence of the petitioner's guilt was so overwhelming or multilayered as to render defense counsel's failures harmless. Defense counsel's failure to present a time of death defense expert who would have testified the victim died before petitioner could have ever arrived home, and failure to present evidence which in fact proved petitioner did not change her clothing, and had no blood on her amidst an incredibly bloody crime scene, was nothing short of catastrophic to petitioner's defense. Accordingly, respondent's argument that this case only presented legal issues and, therefore, the Court of Appeal properly applied the de novo standard of review to this case must fail. (ABOM, p. 59.)

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and proceedings. (6 C.T. 1601-1603; 1 R.T. 176-178.)

C. Conclusion

As argued in petitioner's brief on the merits, this Court must uphold the trial court's ruling that defense counsel provided prejudicially ineffective assistance because the Court of Appeal failed to apply the proper standard of review to the mixed questions of facts and law when it applied the de novo standard of review. Because the Court of Appeal improperly applied the de novo standard of review, it failed to give proper deference to the trial court's factual findings which were supported by substantial evidence, and erred when it failed to apply the clearly erroneous standard of review to the mixed questions of law and fact.

Moreover, even if this Court were to find the Court of Appeal correctly chose to apply the de novo standard of review for mixed questions of law and fact, the trial court's order must still be upheld because the Court of Appeal erred in applying that standard. Specifically, the Court of Appeal did not adhere to the controlling standards of appellate review, and instead the appellate court incorrectly applied the de novo standard of review to the entirety of petitioner's claims (both the facts and the law), gave no deference whatsoever to the trial court's findings which were supported by substantial evidence, ignored uncontroverted facts which established defense counsel's ineffectiveness, misapplied applicable law, failed to view the evidence most

strongly in favor of the order appealed from, and failed to resolve any conflicts in favor of petitioner. (BOM, pp. 53-57, 69-100.) Accordingly, its decision overturning the trial court's grant of habeas relief must be reversed.

III.

THE TRIAL COURT CORRECTLY FOUND TRIAL COUNSEL'S PERFORMANCE WAS OBJECTIVELY DEFICIENT AND THAT PETITIONER WAS PREJUDICED BY THE DEFICIENCY

Respondent next claims that the trial court erroneously found defense counsel was prejudicially ineffective. (ABOM, p. 59.) Respondent claims that defense counsel's performance was constitutionally adequate (ABOM, pp. 61-65), and that any asserted failures did not prejudice petitioner. (ABOM, pp. 65-72.) Respondent makes this argument, despite the fact the trial court presided over both of petitioner's jury trials and the evidentiary hearing, and was thus intimately familiar with the evidence in this case, and without acknowledging the prosecution did not have an overwhelming strong case. Respondent's arguments fail, as the trial court's findings were clearly supported by the facts and the law.

A. The Trial Court Correctly Found Deficient Performance

The trial court, in granting habeas relief, properly found that defense counsel performed deficiently when he failed to present evidence establishing the victim's time of death was at a time when petitioner had an alibi and failed

to prove petitioner did not change her clothing where the perpetrator would have necessarily had the victim's blood on their person. (4 R.T. 735-737; 740-744.) Respondent's reasons to the contrary are unfounded.

1. Defense counsel deprived petitioner of a potentially meritorious defense

Respondent claims there are three scenarios in which trial counsel performs ineffectively—arguing against a defendant's interests by conceding guilt, failing to argue the only available defense, or offering an incoherent closing argument. (ABOM, pp. 61-62.) Because defense counsel did not commit one of these errors, respondent claims defense counsel was not ineffective. (ABOM, p. 62.)

However, the cases cited by respondent do not provide an exhaustive list of ways in which defense counsel may perform deficiently. For example, failing to assert appropriate objections may constitute ineffective assistance of counsel. (*People v. Lewis* (2001) 26 Cal.4th 334, 359; *People v. Pangan* (2013) 213 Cal.App.4th 574, 584; *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007.) And failing to present "a potentially meritorious defense" is considered ineffective. (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) The latter is what is at issue in the present case.

2. The trial court was correct in finding defense counsel was ineffective in failing to present time of death evidence

Respondent claims "it is unquestionable Keen consulted on time-of-death with Dr. Vomhof who held himself out as an expert on time-of-death, and Dr. Vomhof provided an opinion- likely similar to that of Dr. Cohen- that Ozzy's death could not be proven to have occurred prior to petitioner's arrival home at 1:20 a.m." (ABOM, pp. 62-63.) Respondent also claims that defense counsel adequately performed by simply relying on petitioner's claim that the victim was breathing when she arrived home and that, in the context of her statements regarding the victim breathing, it would be "risky" to present such a defense. (ABOM, p. 63.) However, as discussed above, Vomhof was not qualified to render such an opinion and petitioner's experts placed the victim's time of death at a time petitioner had an alibi, irrespective of whether, in her inebriated and panicked state, she "thought" Conde was breathing.

Given that the timing of the victim's death was critical to the defense, it was objectively ineffective for defense counsel to fail to present this defense. The prosecution's case hinged on the timing of Conde's death; if Conde was dead before Dills dropped petitioner off at her house around 1:20 a.m. as he claimed, she would have had no opportunity to kill Conde because she was with Dills at that time. So critical was the timing to the prosecution's case

that, when paramedic John Wilson testified Conde had been dead for longer than a matter of minutes, the prosecutor immediately asked, "Mr. Wilson, when you say the death did not happen within a matter of minutes, it's not one of your responsibilities to determine time of death; is that correct?" (E039986 2 R.T. 266.) Even in the absolute best case scenario for the prosecution, petitioner would have had a mere 49 minutes to kill Conde and so skillfully dispose of all evidence such that no physical evidence linking her to the crime was ever found. So short was this time frame that the Ninth Circuit Court of Appeals's concurring opinion noted "it would have been virtually impossible for the defendant to commit the crime. . ." (*Long v. Johnson*, *supra*, 736 F.3d at p. 897.) The time of death expert testimony completely destroyed the prosecution's theory that petitioner could be the killer because she had an alibi for the time in question.

The fact that petitioner thought Conde was breathing when she arrived home also should not have impacted defense counsel's decision not to present this defense. For one, those statements were equivocal. Second, Dr. Hua found petitioner's statement that the victim was still breathing as a less reliable form of evidence because she was heavily intoxicated at the time. (1 R.T. 115-116.) Petitioner's observation in the 911 call that Conde was breathing did not affect Dr. Bonnell's opinion because she may have been in shock and she was intoxicated. (1 R.T. 169.) The jury likewise, would have rejected

petitioner's statements as unreliable, especially in the context of scientific, medical testimony establishing the time of death much earlier than when petitioner arrived home. A body could not be breathing if there was objective signs of body decomposition (lividity and rigor), and there was more reliable, objective scientific information on which to base an opinion. (1 R.T. 115-116, 129, 143.)

Hence, failure to present the time of death evidence was deficient performance. The trial court was correct in deciding so and its decision was supported by substantial evidence.

3. Failure to prove up petitioner's clothing

With respect to the clothing, respondent first claims there was no hearsay exception to allow the admission of Dills's statements and that defense counsel did prove that petitioner did not have blood on her person. (ABOM, pp. 63-64.) The first problem with this argument is it completely ignores the claim an objectively reasonable defense counsel would have asked Dills about petitioner's clothing at the preliminary hearing, before he died, when no hearsay exception would have been needed. (2 R.T. 317) The second problem with this argument is it ignores the fact the original trial judge who would have been ruling on any in limine motions would have admitted the statement had defense counsel so requested. (4 R.T. 742-746.)

Respondent also claims defense counsel adequately elicited information that there was no blood on petitioner's clothing or other items she brought into the house. (ABOM, pp. 63-64.) The problem with this argument is that the prosecution claimed petitioner was a liar and the only evidence that she was wearing the same clothing prior to the murder came from her testimony alone. (See ABOM, p. 66.) This fact precisely demonstrates how utterly inadequate and prejudicial defense counsel's representation of petitioner was—had defense counsel performed adequately and competently, petitioner's defense as presented to petitioner's jury clearly would not have solely hinged on petitioner's uncoorborated statements as to what happened that night. Instead, her defense would have been based upon scientific time of death evidence presented by expert pathologists, and corroborating statements and evidence which proved her testimony was true that she did not change her clothes that night. The only reason the jury was provided petitioner's uncorroborated statements as her main defense was because of defense counsel's failures.

Respondent also claims that, even had the defense proved up petitioner's clothing, the prosecution would have used the DOJ report to show that the perpetrator of the crime may not have had blood on their person. (ABOM, pp. 64, 66.) As discussed above, however, this argument is not supported either by the DOJ report which simply concludes there is not enough

information to make that assessment, or by the actual evidence in this case elicited through criminalist Verdugo which established beyond any doubt that the perpetrator would have had blood on their person.

As for respondent's reliance on the Court of Appeal's conclusion that while the "best lawyer" or "most good lawyers" may have made an effort to introduce Dills's statements regarding petitioner's clothing, a "reasonable" lawyer at trial could have acted as Keen (ABOM p. 65), applicable law requires the court to evaluate ineffective assistance of counsel claims in light of the seriousness of the offense. (*In re Jones* (1996) 13 Cal.4th 552, 566; *In re Hill* (2011) 198 Cal.App.4th 1008, 1017). Because "[r]epresentation of an accused murderer is a mammoth responsibility," the "seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." (*In re Jones, supra*, 13 Cal.4th at p. 566.) And, the due process hearsay exception as promulgated by the United States Supreme Court in *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297] was applicable in this case, as the statements made by Dills to the police officers were similar to the statements that were allowed into evidence in *Chambers*. An objectively reasonable attorney, especially in a murder case where the stakes are astronomically high, should know how to argue all relevant and applicable exceptions to the hearsay rule.

Thus, the failure to prove petitioner's clothing at the preliminary hearing and at trial was objectively deficient performance, contrary to respondent's assertions. The trial court was correct in its finding and that finding was supported by substantial evidence.

B. The Trial Court Correctly Found the Deficient Performance Prejudiced Petitioner

Respondent claims the evidence against petitioner was "substantial," relying on the 2008 Court of Appeal opinion. (ABOM, pp. 70-71.) Reliance on this 2008 opinion is improper at this stage in the proceedings and, in light of all of the evidence and other opinions on the case finding the evidence the opposite of "substantial," petitioner was certainly prejudiced by defense counsel's failures. In addition, respondent's position fails to account for the fact that the trial court presided over both of petitioner's jury trials and the evidentiary hearing, and was thus intimately familiar with the evidence in this case. (ABOM, p. 86.) In view of the fact that the prosecution did not have an overwhelmingly strong case, the trial court properly found petitioner was prejudiced by defense counsel's failure to properly investigate or introduce time of death evidence, and properly found defense counsel's performance with regard to his failure to proffer evidence regarding petitioner's clothing was constitutionally inadequate and prejudicial. (4 R.T. 747-748.)

1. Respondent's reliance on the 2008 Court of Appeal opinion is inappropriate

In arguing that the evidence against petitioner was "substantial," respondent curiously relies upon the Court of Appeal's opinion in petitioner's first appeal from 2008 (Court of Appeal case no. E039986), instead of the actual 2017 Court of Appeal opinion which is relevant to the current proceedings before this Court. (ABOM pp. 68-72) Respondent relies upon the E039986 opinion without acknowledging the fact that, because petitioner challenged the sufficiency of the evidence, the Court of Appeal's 2008 opinion was necessarily written in the light most favorable to the guilty verdict below, where the reviewing court "must review the evidence in the light most favorable to the prosecution, and must presume every fact the jury could reasonably have deduced from the evidence." (*People v. Boyer* (2006) 38 Cal.4th 412 , 480; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739; *In re S.C.* (2006) 138 Cal.App.4th 396; see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Respondent has also failed to acknowledge that the Court's 2008 opinion necessarily relied upon crucial facts and evidence that have now been proven patently false.

For example, at trial, the prosecution repeatedly argued petitioner was a liar and must have staged the crime scene; in deciding the sufficiency of the

evidence in 2008, the Court of Appeal adopted these assertions. Part of this argument was the prosecution's assertion that petitioner lied about bringing her purse inside the house. (E039986 5 R.T. 1023 ["Yeah, I had my purse. Well, where is it? Look through the photos. It's not there. She's lying about that"].) Whether or not petitioner's purse was inside the house was a critical issue at trial for the prosecution. After all, if her purse was found inside, then her version of events was corroborated, lending credibility to her testimony, and undermining the prosecution's theory that she was a liar. If the purse was not inside the house, the prosecution could use the fact to argue petitioner was lying about what she did when she got home. At the evidentiary hearing, however, petitioner proved she did in fact bring her purse into the house as she has steadfastly maintained throughout the entirety of her case. (Def. Exh. K,L,V.) The Court's 2008 opinion could not have taken this fact into consideration, and respondent's reliance upon an opinion which was based upon facts which have now been proven false is improper.

In addition, at the evidentiary hearing petitioner also proved that she did not stage the crime scene by neatly placing her shoes by the door, as the prosecution argued and the Court of Appeal adopted in 2008. At the evidentiary hearing petitioner proffered several photographs of the crime scene which show objects at the crime scene, including the shoes, were moved

during the investigation, proving this supposed evidence of guilt is false. (Def. Exh. K, W, X.) This fact is crucial, because petitioner's statement that she "kicked" off her shoes was used repeatedly by the prosecution to cast doubt on her version of events and to paint her as a liar. (E039986 5 R.T. 1090 [Prosecutor: "she kicked off her shoes that landed so nicely . . "]; E039986 5 R.T. 1109 [Prosecutor: "The shoes kicked off by the door but set side by side, a mistake. But clearly consistent with the scene being set up."]; in 2008, the Court of Appeal relied upon the prosecution's theory in its evaluation of the evidence. (4 C.T. 843 ["Defendant testified that she kicked her shoes off as soon as she walked in the door (while it was still open) but the shoes were facing towards the door, not away from it"].) For respondent to cite to and rely upon a 2008 Court of Appeal opinion which relied upon "facts" now proven to be false demonstrates the further weakness of the prosecution's case, and the import of defense counsel's failures in his representation of petitioner.

2. In light of an objective review of the evidence, petitioner was prejudiced by defense counsel's failures

All petitioner is required to prove for the prejudice prong of an ineffective assistance of counsel claim is that the court no longer has "confidence" in her conviction. (*Strickland v. Washington*, (1984) 466 U.S. 668, 694; *In re Harris* (1993) 5 Cal.4th 813, 832-833; *People v. Bolin* (1998) 18 Cal.4th 297, 333.) Prejudice must be evaluated in the context of the

strength of the prosecution's case. (*Eggleston v. United States* (9th Cir. 1986) 798 F.2d 374, 376.) The evidence upon which petitioner's conviction has been upheld was slight, at best. It was a purely circumstantial case with no physical evidence tying her to the murder and no overwhelming evidence of guilt. There is an absolute lack of any forensic evidence connecting petitioner to the crime, despite the bloody disarray at the scene. There were no eyewitnesses to the crime, no confession, no murder weapon was found. Dills, the prosecution's star witness, and the only person who contradicted petitioner's timeline regarding events, died prior to trial. The reading of his preliminary hearing at trial rendered the jury unable to judge his demeanor and veracity, and precluded a thorough cross-examination based on all discovery in this case. And, post-conviction, several main items of evidence the prosecution used by the prosecution to paint petitioner as a liar are now known to be false—the purse and the shoes.

So weak was the prosecution's case that nine of the twelve jurors in petitioner's original trial voted for acquittal. (E039986 1 R.T. 4.) Further, the two alternate jurors in petitioner's second trial specifically stated they would have acquitted petitioner. (E039986 5 R.T. 1125; 2 C.T. 347, 355.) Even the trial court felt compelled to comment that, had petitioner's trial been a bench trial, it would have acquitted her. (E039986 5 R.T. 1148-1149.) This sentiment has been echoed by judges in petitioner's federal appeals. In its

December 2013 opinion on petitioner's federal sufficiency of the evidence claim, the Ninth Circuit Court of Appeals stated, "we might have entertained reasonable doubt if we were the jury, or we might have found the evidence to be insufficient if we were sitting as the reviewing court on direct appeal," and the concurring opinion noted, "I have grave doubts about whether the State has convicted the right person in this case. Those doubts stem from the fact that it would have been virtually impossible for the defendant to commit the crime." (*Long v. Johnson* (9th Cir. 2013) 736 F.3d 891, 895.) Hence, a modest amount of evidence raising reasonable doubt would have been enough to tip the scales in favor of a mistrial or even acquittal in this case.

Petitioner presented more than a modest amount of evidence at the hearing below. If defense counsel had properly consulted and presented a time of death expert opinion and proved up petitioner's clothing, the jury undeniably would have seen a drastically different, and an even more significantly weaker than it already was, prosecution case. Defense counsel's failure to present a time of death defense expert who would have testified the victim died long before petitioner could have ever arrived home, and failure to present evidence which in fact proved petitioner did not change her clothing, and had no blood on her amidst an incredibly bloody crime scene,

was nothing short of catastrophic to petitioner's defense. Considering the nature and extent of defense counsel's inadequate performance, and the evidentiary weaknesses in the prosecution's case, it does not follow that her trial would have yielded the same result had counsel competently performed his duties.

Respondent's contention that defense counsel's failures were not prejudicial because "[t]he issue here was not scientific evidence or blood spatter evidence, it was petitioner's credibility" (ABOM p. 72), also does not support the reversal of habeas relief, but rather demonstrates how utterly inadequate and prejudicial defense counsel's representation of petitioner was—had defense counsel performed adequately and competently, petitioner's defense as presented to petitioner's jury clearly would not have solely hinged on petitioner's uncoorborated statements as to what happened that night. Instead, her defense would have been based upon scientific time of death evidence presented by expert pathologists, and corroborating statements and evidence which proved her testimony was true that she did not change her clothes that night. The only reason the jury was provided petitioner's uncorroborated statements as her main defense was because of defense counsel's failures.

Respondent also claims that defense counsel's failures were not prejudicial because the lack of blood on petitioner is actually evidence of her

guilt. (ABOM, p. 67.) This argument is absurd on multiple levels. Based on respondent's argument, if a lack of blood on petitioner indicates her guilt, then the presence of blood on petitioner must indicate her innocence. Such an argument defies common sense. This is especially true in light of the fact that (1) petitioner admitted she did not render aid to Conde, therefore there is no inference she did so; and (2) the record reveals petitioner touched Conde only one time when she pulled him by his arm or hand, trying to wake him wake up. (E039986 4 R.T. 644-646, 702; C.T. Supp. 142, 217.) The record is clear that this was the only time she touched Conde:

PROSECUTOR: Other than grabbing his arm, what else did you do?

PETITIONER: Nothing. I couldn't help him.

(E039986 4 R.T. 713.) People's Exhibit 25 shows a lack of any significant amount of blood on Conde's right arm, meaning that petitioner would not have gotten any blood on her person by simply pulling Conde's arm. Respondent is so wedded to their theory that petitioner is the perpetrator, that they have blinded themselves to the absurdity of their arguments.

Respondent finally claims that petitioner should have helped Conde because she was a nurse (ABOM, p. 67), the inference being that she did not help him because she killed him. Irrespective of the obvious problems with such an argument—petitioner was intoxicated, medical professionals many

times are not allowed to administered aid to loved ones, and it was apparent to petitioner that Conde was past the point of being able to be helped, it bears mentioning what kind of nurse petitioner actually was. Petitioner was not a registered nurse. (E039986 5 R.T. 970.) She was a licensed vocational nurse. (E039986 5 R.T. 970.) Such nurses are only entry-level health care providers who are responsible for rendering basic nursing care; they must practice under the direction of a physician or registered nurse and do not care for people independently. (E039986 5 R.T. 971.) Such nurses have significantly less education, training, and responsibilities when it comes to treating trauma patients. (E039986 5 R.T. 970.) A vocational nurse, including petitioner, would not be experienced in dealing with critical care patients. (E039986 5 R.T. 970.) Further, petitioner had only been a nurse for a few years at the time of Conde's death. (E039986 5 R.T. 639.) Respondent's argument that the evidence presented at trial and the evidentiary hearing does not support the finding that trial counsel's deficient performance prejudiced petitioner is not supported by the actual evidence presented, and accordingly must fail.

C. Uncontroverted *Strickland* Expert Testimony Supports the Trial Court's Findings

In addition to the issues above, the Court of Appeal completely ignored uncontroverted *Strickland* expert testimony which established defense counsel performed deficiently. Respondent asserts "The court is not required to

consider the testimony of attorney expert witnesses (*Strickland* experts) nor are they required to allow such testimony. [citation]. And while a court may consider attorney expert testimony, it is not bound by it. [citation]." (ABOM, p. 65.) While this is certainly true as it pertains to the court which actually takes the evidence, this is no way can support the Court of Appeal's failure to consider the *Strickland* expert's testimony in this case, where the trial court *did* allow a uncontested Strickland expert to testify, and the trial court *did* consider the *Strickland* expert's testimony in its determination that defense counsel's failures prejudiced petitioner. Citation to these cases by respondent only works to highlight the Court of Appeal's failure to adhere to the proper standard of review, as the Court of Appeal failed to acknowledge petitioner presented uncontroverted *Strickland* expert testimony that defense counsel had no legitimate tactical reason for his failures, and that an objectively reasonable attorney would not have acted as defense counsel did in this case.

D. Conclusion

Considering the nature and extent of defense counsel's inadequate performance, the evidentiary weaknesses in the prosecution's case, the fact that the trial court sat through both of petitioner's trials and her evidentiary hearing, and the uncontradicted *Strickland* expert testimony, it does not follow that petitioner's trial would have yielded the same result had counsel

competently performed his duties. There is more than a reasonable probability that at least one juror would have harbored reasonable doubt with respect to petitioner's guilt but for the cumulative impact of defense counsel's numerous failings. (*Strickland, supra,* 466 U.S. at p. 694.) Counsel's errors undermine confidence in the outcome of the trial, and the trial court's judgment must be affirmed.

IV.

RESPONDENT'S ARGUMENT THAT THE COURT OF APPEAL'S OPINION IS CONSISTENT WITH THE LAW, THE FACTS AND THE APPROPRIATE STANDARDS OF REVIEW FAILS BECAUSE THE COURT OF APPEAL RELIED UPON ERRONEOUS OR INACCURATE FACTUAL FINDINGS AND INFERENCES, AND DID NOT PROPERLY APPLY PREVAILING LEGAL AUTHORITY

Respondent's final contention is that the Court of Appeal's opinion "is consistent with the law, the facts, and the appropriate standards of appellate review." (ABOM, p. 72.) It is not, for the reasons discussed above and the reasons delineated below.

A. The Court of Appeal's Opinion Regarding Time of Death

Respondent contends the Court of Appeal "summarized Keen's testimony as deciding not to rely on time-of-death evidence because such evidence could not narrow down the time-of-death to a period when petitioner was not at home." (ABOM, p. 73.) In fact, the Court of Appeal specifically

stated in its opinion, "In other words, Keen did not investigate and argue a time of death defense because experts would not be helpful in raising a reasonable doubt concerning the prosecution's theory of the case due to the 40- to 50-minute window of opportunity argued by the People." (Opinion, p. 48.) And respondent has failed to address petitioner's arguments set forth in her brief on the merits which establish that the Court of Appeal incorrectly interpreted the facts and incorrectly applied them to the law.

For example, in concluding that defense counsel rendered effective representation, the Court of Appeal claimed the actual time of death involved too broad of a range. (Opinion, pp. 48, 52.) This interpretation of the evidence and its significance is erroneous. Because petitioner had an alibi up until 1:20 a.m., a medical opinion placing the time of death before that time period (or even raising doubt about it) was all that mattered. Both Drs. Hua and Bonnell provided critical testimony that Conde was dead before 1:20 a.m. (1 R.T. 99, 110, 133-134, 138-140, 141, 145, 153, 154, 159, 175-176.) Hence, both Dr. Bonnell and Dr. Hua, definitely placed the time of death at a time when petitioner had an alibi, contrary to the Court of Appeal's erroneous holding.

Much of Dr Bonnell's and Dr. Hua's testimony went wholly unaddressed or even mentioned by the Court of Appeal's opinion. Further, contrary to the opinion which simply concluded time of death estimates

involve a "broad range" of time, the range of time, however broad, was at a time petitioner had an alibi. Even the People's expert, Dr. Cohen opined Conde could have died before or after 1:30 a.m., based on the medical findings. (3 R.T. 463.) This testimony, essentially giving a 50% chance to Conde having died when petitioner had an alibi, would certainly be enough to meet the reasonable doubt threshold in a murder case. (BOM, pp. 60-61.)

In concluding that defense counsel rendered effective representation, the Court of Appeal found defense counsel had a tactical reason for failing to present the testimony. (Opinion, pp. 48, 52.) Namely, because the time of death would be a broad range, and therefore, not helpful. (Opinion, pp. 48-52.) Also, because there was conflicting evidence about rigor mortis, a time of death expert giving a definitive time of death would not have been credible. (Opinion, p. 51.) Finally, the opinion found that, because Dr. Bonnell's opinion "failed to account for or disregarded evidenced relating to the post-1:30 timeframe," his testimony would not have been credible. (Opinion, p. 52.)

However the issue for the defense was not whether there was a broad range for the actual time of death. Rather, the issue was whether the defense could establish, or at least raise doubt that the death did not occur after 1:20 a.m. Both of the experts presented at the hearing below, who were found

credible by the finder of fact and who the Court of Appeal erroneously gave no deference to, provided that requisite information. Additionally the experts were free to rely on what information they deemed material and credible to their opinion, which they did. (See CALCRIM No. 332.) Certainly objective facts such as the state of decomposition of the body are more reliable than statements from witnesses in assessing time of death. If it were otherwise, then, hypothetically, a witnesses statement that she saw a victim alive and talking the prior day could somehow overrule scientific evidence that the victim's body had been decomposing for months. Further, because defense counsel did not even consult a qualified time of death expert, he was not even in a position to form a tactical reason for not pursing this line of defense. (*Jennings v. Woodford* (9th Cir.2002) 290 F.3d 1006, 1014 ["attorneys have considerable latitude to make strategic decisions about what investigations to conduct *once they have gathered sufficient evidence upon which to base their tactical choices*" italics in original].)

Hence, the theoretical tactical reasons discussed in the opinion and defense counsel's ill-informed personal opinion, not founded on adequate investigation, that time of death would encompass both the defense and prosecution theories was not a legitimate tactical reason to excuse his failures.

(See *Williams v. Taylor* (2000) 529 U.S. 362, 364 [the Court "rejected any suggestion that a decision to focus on one potentially reasonable trial strategy–in that case, petitioner's voluntary confession–was 'justified by a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background'"].)

Here, no adequate investigation was done into a time of death expert in this case and, thus, there was no basis for the Court of Appeal's contrived tactical reason on behalf of defense counsel. Further, there was uncontroverted *Strickland* expert testimony that an objectively reasonable attorney would have at least properly investigated the time of death defense before disregarding it. (See 2 R.T. pp. 305, 312-314, 317, 340.) These facts were wholly disregarded in the opinion. (Cf., *Hamilton v. Ayers* (9th Cir.2009) 583 F.3d 1100, 1129-1130 [the Ninth Circuit has held that a district court clearly erred in relying on testimony of defendant's counsel and rejecting testimony of *Strickland* expert re standard of care in 1982 in death penalty case]; see also *Allen v. Calderon* (9th Cir. 2005) 395 F.3d 979, 1001-1002 [Ninth Circuit cites to opinion of *Strickland* expert, who testified at the evidentiary hearing before the district court, for the standard of care].) Just as the Court of Appeal failed to address or even acknowledge the *Strickland* expert's testimony regarding the prevailing professional norms in a murder

defense in California, so too does respondent.

Moreover, respondent fails to address the fact the Court of Appeal's analysis of time of death was based upon a theory that defense counsel was actually aware of the range of times given by various qualified time of death experts, and that he then made an informed, tactical decision to pursue another defense. The substantial evidence in this case proved this simply is not true. (BOM, pp. 73-74.)

Respondent's argues that the Court of Appeal's finding that defense counsel's decision to not rely on time of death evidence was informed and could have been made by a reasonable attorney, and that this ruling was "unquestionably sound" given then evidence presented and because petitioner "maintained to law enforcement and in her testimony at two trials, that Ozzy was alive when petitioner got home from Dill's house." (ABOM, pp 74-75) However, as discussed above, respondent's characterization of petitioner's testimony regarding what she observed is inaccurate—she never unequivocally stated that he was breathing. And, in any event, this is hardly the type of evidence, as respondent purports, which would cause a reasonable trial attorney to not at a minimum first consult a qualified time of death expert, especially in light of the fact that all of the objective evidence, including the paramedic's observations and the coroner's report, would have lead a

reasonably competent defense attorney to consult a qualified time of death expert before deciding not to pursue a time of death defense.

Moreover, respondent fails to address petitioner's argument that the Court of Appeal erred because the substantial evidence presented demonstrated defense counsel could not have made a reasonably informed decision regarding a time of death defense because he admitted he failed to consult a qualified time of death expert before he made this decision. (BOM, pp. 70-73.) Respondent similarly fails to address petitioner's argument the Court of Appeal erred when it ignored uncontroverted facts which established defense counsel's ineffectiveness, namely, the testimony of *Strickland* expert Gary Gibson. (BOM, pp.77-78.) Further, respondent fails to address petitioner's assertion the Court of Appeal erred when it found defense counsel was objectively reasonable when he failed to investigate or present the time of death defense because the better strategy was to focus on a defense of third-party culpability. Respondent makes no attempt to address the fact the Court of Appeal's ruling logically fails because the defenses were not mutually exclusive. (BOM, pp. 80-82.) The lack of a response to petitioner's arguments effectively concedes the issues. (See *People v. Bouzas* (1991) 53 Cal.3d 467, 480 [respondent's failure to engage arguments operates as concession].)

The trial court's rulings regarding the time of death evidence presented were clearly supported by substantial evidence and relevant legal authority. The Court of Appeal's reversal of the trial court's decision relied upon erroneous or unsupported facts, its ultimate conclusion did not give proper deference to the trial court, and it was not supported by prevailing law.

B. The Court of Appeal's Opinion Regarding Petitioner's Clothing

Respondent contends the Court of Appeal properly reversed the trial court's ruling that petitioner was prejudiced as a result of defense counsel's failures to elicit or introduce evidence regarding the clothing that petitioner was wearing the night of the murder. (ABOM, pp. 75-83.) Tellingly, in the entirety of the discussion regarding the Court of Appeal's opinion, respondent fails to address petitioner's assertion the Court of Appeal failed to give deference to the trial court's factual finding that the perpetrator would have had the victim's blood on their person when the Court of Appeal found it was possible for the perpetrator to not have the victim's blood on their person. (BOM, pp. 83-85.) Respondent has not specifically addressed petitioner's argument on this point, and thus has effectively conceded the validity of petitioner's position. (See *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529; see also *California School Employees Assn. v. Santee School Dist.* (1982) 129 Cal.App.3d 785, 787 ["[T]he district

apparently concedes by its failure to address this issue in its appellate brief ..."].)

Respondent also completely fails to address petitioner's argument that the Court of Appeal's findings regarding defense counsel's performance at the preliminary hearing were not only factually inaccurate, but contradicted by the actual record. (BOM, pp. 86-88.) In the entirety of its argument, respondent does not dispute the fact the decision of the Court of Appeal actually relied upon the prosecution's argument about petitioner's underwear at the preliminary hearing, an argument which had absolutely no evidentiary support in the record, an argument which was abandoned by the prosecution after the preliminary hearing, and an argument which was actually stricken from the record before the preliminary hearing transcript was read to the jury. (4 C.T. 174-175.) Respondent entirely fails to address the fact the Court of Appeal relied upon a version of facts with no evidentiary support in the record in order to attempt to create a valid tactical reason for defense counsel's failure at the preliminary hearing. (BOM, pp. 86-88.)

Respondent likewise completely fails to address petitioner's assertion the Court of Appeal erred when it found defense counsel did not render ineffective assistance because: "there was no direct evidence offered by the prosecution that defendant was wearing different clothes, a reasonable attorney

could have decided not to seek admission of the hearsay statement." (Opinion, p. 63, emphasis added.) The opinion further found "the trial court fails to explain how the issue is significant, when the prosecution presented no evidence on this issue...." (Opinion, p. 66; BOM, pp. 88-89) By repeatedly relying upon the fact the prosecution presented no direct evidence regarding petitioner's clothes as somehow bearing importance of the relevancy of the evidence to the defense, the Court of Appeal circumvented what is the duty of defense counsel. That the prosecution presented no evidence regarding petitioner's clothes bears zero import on the relevancy and critical nature of the evidence for the defense case. What was relevant was defense counsel's duty to prove petitioner did not change her clothing. In its reliance upon an entirely irrelevant factor—that the prosecution did not present direct evidence of petitioner's clothing in finding defense counsel's decision to not seek to have the evidence admitted was objectively reasonable—the Court of Appeal failed to adhere to the controlling standards of appellate review. Respondent's failure to address the Court of Appeal's erroneous reliance upon an irrelevant factor acts as a concession of the issue.

As with the time of death issue, respondent entirely ignores the fact that the Court of Appeal opinion completely disregarded the substantial evidence presented which demonstrated an objectively reasonable defense

attorney in a murder case should know how to argue the admissibility of the statements in question. (BOM, pp. 90-91.) Respondent fails to address that the *Strickland* expert testified that an objectively reasonable attorney would have questioned Dills at the preliminary hearing about his statements regarding the clothing petitioner was wearing when he dropped her off at the house. Had defense counsel done so, Dills's statements would have come into evidence at petitioner's trial under Evidence Code section 1291. (2 R.T. 317.) What is more, respondent fails to address that the *Strickland* expert testified that a reasonably competent attorney would have attempted via an in limine motion to introduce Dills's statement regarding petitioner's clothes into evidence. (2 R.T. 317.) Respondent's failure to address the fact the Court of Appeal failed to adhere to the controlling standards of appellate review when it did not acknowledge or address the *Strickland* expert evidence at all when it reversed the trial court's findings on this issue acts as a concession of the issue. (See *Westside Center Associates v. Safeway Stores 23, Inc., supra*, 42 Cal.App.4th at p. 529.)

Respondent contends the Court's of Appeal's finding that defense counsel was objectively reasonable when he failed to move the trial court to admit Dill's statements because they were "hearsay evidence for which there is no exception for admissibility" is "obviously a correct conclusion based on the facts. [citation]" (ABOM, p. 78.) The trial court provided an advisory

explanation as to how Dills's statements could have in fact come before the jury if defense counsel had attempted to admit them into evidence—"in giving this case much thought, it occurs to the Court that there were two possible grounds for admissibility." (4 R.T. 744.) The trial court explained the statements could have either been admitted into evidence as non-hearsay circumstantial inference evidence, or admitted under the due process hearsay exception as contemplated by the United States Supreme Court in *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297]. (4 R.T. 744-746.)

Respondent's argument that the trial court was trying to hold defense counsel to a higher standard than Judge Magers himself because Judge Magers could not explain how the hearsay evidence could be admitted is without support in the record. (ABOM, p. 79.) The trial court specifically found that if the statements were found to be hearsay, they would be admissible under the due process exception found in *Chambers v. Mississippi, supra.* (4 R.T. 744-746.) Despite this finding, the opinion found "[d]efendant's argument places too great an expectation on the shoulders of a reasonable attorney. A reasonable attorney can be expected to make arguments that are within the law, but we do not expect a reasonable attorney to necessarily advance the law." (Opinion, p. 75.) Yet *Chambers v. Mississippi, supra,* was published in 1973.

Clearly, this is long standing, well known United States Supreme Court precedent, not an advance in the law. An objectively reasonable defense attorney in a murder case should know how to argue various aspects of a long standing Supreme Court case in a motion in limine. To find otherwise simply abrogates any duty of defense counsel to know how to litigate long standing evidentiary rules and laws.

Respondent contends "The court of appeal expressly found Keen's testimony about lacking tactical reasons was insufficient to carry petitioner's burden. The court of appeal observed that petitioner additionally had the burden to demonstrate Keen's actions 'were objectively unreasonable - why no reasonably competent attorney could have failed to question Dills or failed to move the trial court to admit Dill's statement." [citation] (ABOM, pp. 82-83.) Respondent makes this contention without addressing petitioner's argument that the Court of Appeal failed to adhere to prevailing standards of review when it failed to acknowledge or consider that the *Strickland* expert in this case testified that an objectively reasonable attorney would have questioned Dills about his statements regarding the clothes petitioner was wearing when he dropped her off at the house. If he had done so, Dills's statements would have come into evidence at trial under Evidence Code section 1291. (BOM, p. 90-92; 2 R.T. 317.) Further, the *Strickland* expert

testified a reasonably competent attorney would have attempted via an in limine motion to introduce Dills's statement regarding petitioner's clothing into evidence. (BOM, pp. 90-92; 2 R.T. 317.)

Moreover, respondent fails to address petitioner's assertion that the Court of Appeal failed to adhere to the controlling standards of appellate review when in the opinion, it improperly shifted the burden of proof onto petitioner, the prevailing party on appeal. (BOM, pp. 92-93.) Contrary to the Court of Appeal's finding, as the prevailing party below it was not petitioner's burden on appeal to prove that defense counsel was objectively ineffective, but rather it was respondent's burden, as the appealing party, to prove why defense counsel was in fact objectively reasonable when he failed to question Dills at the preliminary hearing and failed to attempt to prove up petitioner's clothes at trial. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The Court of Appeal's erroneous shifting of the burden of proof onto the prevailing party below demonstrates yet another manner in which the Court of Appeal failed to adhere to the controlling standards of review. Indeed, respondent follows the Court of Appeal's erroneous burden shifting when instead of actually acknowledging petitioner's argument and addressing its merits, respondent merely states "The court of appeal observed that petitioner additionally had the burden to demonstrate Keen's actions 'were objectively

unreasonable'....." and that "[t]his is a reasonable conclusion and supported by the authorities discussed above and in the court of appeal's opinion." (ABOM, pp. 82-83.) By merely pointing to the Court of Appeal's opinion in an attempt to support the Court of Appeal's opinion, respondent highlights the unequivocal weakness of respondent's arguments in this case.

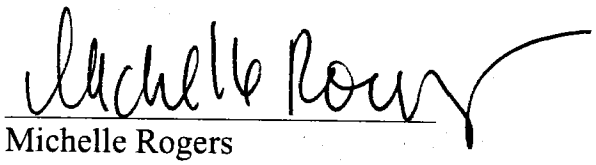
Respondent's argument that the Court of Appeal's opinion is consistent with the law, the facts, and the appropriate standards of review fails because the Court of Appeal relied upon erroneous or inaccurate factual findings and inferences, and did not properly apply prevailing legal authority.

CONCLUSION

For all the foregoing reasons, petitioner respectfully request this Court reverse the Court of Appeal's decision, and reinstate the trial court's judgment.

Dated: August 29, 2019

Respectfully submitted,



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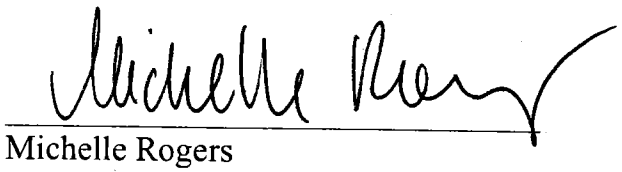
CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(l), I certify this brief contains 15,447 words, excluding the Table of Contents and Table of Authorities, according to the WordPerfect X7 word-processing program which generated this brief.

Date: August 29, 2019



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(Cal. Rules of Court, rules 1.21)

Case Name:

People v. Kimberly Louise Long

Supreme Court No. **S249274**
Court of Appeal No. **E066388**
Superior Court No. **RIF113354**

I, Xyra Jaime, declare: I am employed in the County of San Diego, CA. I am over 18 years of age and not a party to the within entitled cause; my business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939. I am familiar with the business practice for collecting and processing electronic and physical correspondence at Appellate Defenders, Inc. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

Furthermore I declare on **August 29, 2019,** I electronically served the attached document by transmitting a true copy via the Court's TrueFiling System. I additionally declare that because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, I placed a true and copy thereof enclosed in a sealed envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary course of business. I caused to be served the following document(s):

by placing a true copy of each document in a separate envelope addressed to each addressee, and I electronically served the attached document by transmitting a true copy via the Court's TrueFiling System, respectively as follows:

TrueFiling (E-Service)	***United States Postal Service***
1. Attorney General SDAG.Docketing@doj.ca.gov	4. Kimberly Louise Long 391 Cabrillo Circle Corona, CA 92879
2. Riverside County District Attorney Appellate-unit@rivcoda.org	5. Alissa Bjerkhoel 225 Cedar Street San Diego, CA 92101
3. Riverside County Superior Court appealsteam@riverside.courts.ca.gov	///
4. Court of Appeal Fourth District, Division Two https://tf3.truefiling.com	///

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on **August 29, 2019**.

Xyra Jaime
DECLARANT

SIGNATURE