IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ___

In re SCOTT LEE PETERSON, Petitioner On Habeas Corpus.	Case No. Related to California Supreme Court Case Nos. S132449 (Automatic Appeal) and S230782 (Habeas Corpus) San Mateo County Superior Court Case No. SC055500A The Honorable Anne-Christine Massullo, Judge

PRO SE PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR APPOINTMENT OF COUNSEL

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TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT:

Petitioner Scott Lee Peterson, proceeding pro se, by this verified Petition for Writ of Habeas Corpus, petitions this Court for a writ of habeas corpus, moves for appointment of counsel and funding to develop his claims, and sets forth the following facts and causes for the issuance of the writ:

I. INTRODUCTION

In April 2003, Scott Peterson was charged with the capital murder of his wife Laci and his unborn son Conner. The state's theory had three components: (1) Scott killed Laci and Conner at their home in Modesto on the evening of December 23 or the morning of December 24, (2) Scott took Laci's body to the Berkeley Marina on December 24 and (3) Scott then put the body in the San Francisco Bay.

Under the state's theory, the bodies remained in the bay until a storm dislodged them on April 12, 2003, and they washed ashore over the next two days.

In contrast, the defense theory on these three points was very different: (1) Laci and Conner were alive on December 24 when Scott drove to the marina, (2) Scott did not transport Laci's body to the marina on December 24 and (3) Scott did not put Laci in the bay. Scott has at all times prior to trial and since maintained his innocence.

To prove how and where and when the crime occurred, the state called more than 150 witnesses in its case-in-chief. There was no direct evidence supporting the three parts of the state's case or

otherwise linking Petitioner to the charged crimes. Thus there were no eyewitnesses, no confessions, and no forensic evidence from the crime scene linking Petitioner to the killings. Absent such evidence, to establish the three parts of its case the prosecution therefore relied on three forms of forensic evidence: (1) expert testimony about fetal development, (2) expert testimony on dog scent evidence and (3) expert testimony about the movement of bodies in San Francisco Bay.

The fetal development evidence was introduced to support the first part of the state's case. The state offered an expert in fetal growth who testified that by examining Conner's leg bone, he could tell Conner was killed on either December 23 or 24. The dog scent evidence was introduced to prove the second part of the state's case. The state offered testimony from a dog trainer that her trailing dog alerted on Laci's scent at the Berkeley Marina, showing that Scott transported the body there on December 24. Finally, the testimony about the movement of bodies in water was introduced to prove the third part of the state's case. The state offered testimony from a hydrologist that Laci was placed in the bay precisely where Scott told police he had been fishing.

The trial court commented on this evidence after the state

rested, accurately noting the state had presented no evidence showing either how or where the crime occurred:

> "There is no evidence in this case how this crime was committed. There is no evidence in this case where it was committed." (108 RT 20163.)

To its credit, the state did not dispute this finding. To the contrary, during closing arguments, the state itself went a step further, candidly conceding that it also could not prove when the crime had happened:

> "I can't tell you when he did it. I can't tell you if he did it at night. I can't tell you if he did it in the morning." (109 RT 20200.)

Despite the undisputed absence of any evidence as to how, where or when the crime occurred, the state asked a jury to convict Scott Peterson of murder and sentence him to die. Ultimately, the jury did just that.

It is probably fair to say that there are not many cases in the history of California where the state obtained a guilty verdict and death sentence for murder absent evidence of how, where or when the murder occurred. Nevertheless, Petitioner does not dispute that there may be situations where a death verdict is warranted

despite the absence of such evidence. But at the very least, a verdict under such circumstances raises a legitimate question as to how a jury could arrive at such a result.

Here, the answer may in part lie in the community in which the case was tried, and the manner in which the jury was selected. The Peterson trial generated an extraordinary amount of publicity. The trial judge noted that he had never seen anything like this case, and the prosecution itself conceded that this case generated more publicity than even the

O.J. Simpson case. Hundreds of people showed up at the police station the night Scott Peterson was arrested, many screaming "murderer;" according to the police, their main concern was that Scott "didn't get lynched . . . ." (9 CT 3341.) More than a thousand prospective jurors were subsequently called for jury duty; the jury voir dire showed that virtually every one of them had been exposed to publicity about the case.

Nor was there any dispute that the publicity was extraordinarily prejudicial to the defense. Before hearing even a single witness, nearly half of all prospective jurors admitted they had already decided Scott Peterson was guilty of capital murder. And in what may be a first for the American system of justice,

outside the courthouse in which the parties would try to select a fair jury, a radio station posted a large billboard which had a telephone number for people to call in and vote:

The publicity continued throughout trial. A mob estimated at more than 1,000 people gathered at the courthouse to await the guilt phase verdict. After the guilty verdict was announced, the 12 jurors departing to await the beginning of the penalty phase -- and decide whether Scott would live or die -- were met with wild applause and cheering.

Judge Girolami, the experienced Stanislaus County judge who presided over pretrial hearings, observed, "[i]n my over 30 years in this community, I've not seen anything like the publicity generated by this case." Judge Delucchi, the trial judge and also a respected, veteran jurist, agreed:

> "I've never seen anything like it before I can't account for the reaction of the public to this case." And as noted, the prosecution itself acknowledged that the pretrial publicity "surpassed the Manson case and the O.J. Simpson case."

Because of the publicity, the parties used a detailed jury questionnaire to aid the voir dire process. Over repeated and strenuous defense objection, prospective juror after prospective juror was discharged simply because they wrote in their questionnaires that they were opposed to the death penalty. No questioning of these jurors was allowed even though every one of these jurors also stated in their questionnaire that they would consider death as an option in the case notwithstanding their views on the death penalty. Instead, each of the jurors was discharged because -- in the trial court's stated view -- "if you don't support the death penalty you cannot be death qualified."

Petitioner presented numerous reasons to the court on appeal as to why the guilt and penalty phase verdicts in this case need to

be reversed, and in August of 2020 the California Supreme Court vacated Petitioner's sentence of death due to a Witherspoon error during voir dire.

Petitioner's initial habeas petition to the California Supreme Court brought numerous claims as well. The habeas investigation revealed that Petitioner's right to a fair trail was compromised by a juror who failed to disclose on her jury questionnaire that she had been the victim of a crime, that she had been involved in lawsuits, and that she had participated in a trial as a party or as a witness. (See Claim One of In re Peterson, California Supreme Court Case No. S230782.)

Petitioner's initial habeas petition also included claims that the state's forensic evidence was false. The state's fetal growth expert reached his conclusion by relying on a formula created by Dr. Phillipe Jeanty. The conclusion coincided directly with the state's theory of the case. But no one at trial consulted with Dr. Jeanty himself. Dr. Jeanty would have testified that the state's expert applied the wrong formula to the wrong bones and, not surprisingly, came out with the wrong result. In fact, proper use of Dr. Jeanty's formula directly supports the defense theory of the case. (See Claim Two of In re Peterson, California Supreme Court

Case No. S230782 .)

The state's canine scent detection expert testified that a trailing dog detected Laci's scent at the Berkeley Marina. Again, while this evidence coincided perfectly with the prosecution's theory that Scott took Laci's body to the marina, it too turns out to be false. As discussed below, the country's leading experts on canine detection have made clear that this witness's testimony was based on nothing more than the dog handler's unscientific and unreliable interpretation of the dog's body position and gait. (See Claim Four of In re Peterson, California Supreme Court Case No. S230782.)

The state's expert on the movement of bodies in the bay testified that the bodies were placed in the bay near Brooks Island, where Scott was fishing. This testimony also coincided perfectly with the prosecution's theory of the case. Yet, this testimony also turns out to have been fundamentally flawed. In fact, the bodies may have been deposited at two very different points in the bay, including in a tidal creek near a freeway. The state's contrary evidence was yet again false. (See Claim Six of In re Peterson, California Supreme Court Case No. S230782.)

While the state alone is responsible for this repeated

presentation of false evidence, defense counsel had a role to play as well. Not only was this evidence false, but defense counsel failed to challenge the veracity of any of this evidence with qualified experts of his own. Counsel could and should have presented substantial evidence to expose the falsity of the state's case. (Claims Three, Five and Seven of People v. Peterson, California Supreme Court Case No. S132449.)

Unfortunately, defense counsel did not just fail to challenge the prosecution's case; he failed to support his own defense theory with readily available evidence. To prove the defense theory that Laci was alive when Scott left home to go fishing, counsel promised the jury it would hear from several witnesses who saw Laci in Modesto after Scott left. According to counsel, this evidence would prove that Scott was "stone cold innocent." The assumption on which this promise was based was entirely correct: if Laci was alive when Scott drove to the Berkeley Marina then Scott was indeed "stone cold innocent."

But counsel never delivered on his promises. Although counsel promised to produce several witnesses who saw Laci alive and walking her dog after Scott left to go fishing, he never called a single one. Counsel's broken promises deprived Scott of the

effective assistance of counsel. (See Claim Eight.) In fact, these witnesses presented an entirely credible timeline for when they saw Laci. But the jury heard from none of them.

Instead, in view of counsel's broken promises, the jury -- not without reason -- concluded that Scott was "stone cold guilty." (See Claim Nine of In re Peterson, California Supreme Court Case No. S230782 .)

But this was not the only evidence counsel neglected to introduce to prove Laci was alive after Scott left home, and was therefore, in counsel's own words, "stone cold innocent." Thus, counsel failed to introduce evidence that would have corroborated the testimony of the neighbors who saw Laci walking her dog. This evidence included statements from Steven Todd -- a man who was burglarizing the house directly across the street from the Peterson's at the very time Laci disappeared (after Scott had left to go fishing) -- and who told acquaintances that Laci confronted him and he verbally threatened her. If indeed Laci confronted Todd, then Scott is innocent since he was well on his way to Berkeley at that time. Yet although Todd's statements were provided to the defense in pre-trial discovery, the jury never heard them. (See Claim Ten In re Peterson, California Supreme Court

Case No. S230782.)

The claims in Petitioner's initial habeas petition resulted in the California Supreme Court issuing an Order to Show cause on October 14, 2020 for Claim One that Juror No. 7 committed prejudicial misconduct by not disclosing her involvement with other legal proceedings. An evidentiary hearing followed and Petitioner was denied relief on August 20, 2023.

Petitioner files this timely petition to renew the claim that Petitioner's constitutional rights were violated by juror Richelle Nice's misconduct in providing false answers during voir dire that concealed her bias against Petitioner. The court below erred in denying relief on this claim, and this Court should grant that relief, because Petitioner carried his burden of demonstrating by a preponderance of evidence that Ms. Nice committed misconduct by giving false answers during jury selection, and respondent failed to carry its heavy burden of rebutting the presumed prejudice to Petitioner stemming from this misconduct.

The Superior Court properly concluded that Ms. Nice had indeed committed misconduct. Although specifically asked to do so in question 54a, Ms. Nice did not disclose her involvement in several lawsuits. And although specifically asked in question 74,

Ms. Nice did not disclose that (1) she had been the victim of (and witness to) numerous crimes, and (2) her live-in boyfriend had been the victim of (and witness to) numerous crimes.

The lower court, however, erred in concluding that respondent had met its substantial burden of rebutting the presumption that Petitioner was harmed by this misconduct. As discussed in detail in Claim 1, Ms. Nice asserted that she did not disclose the lawsuit she filed seeking a restraining order against Marcella Kinsey – the ex-girlfriend of her boyfriend Eddie Whiteside – because it did not cross her mind as it did not involve money or property. But this explanation is flatly inconsistent with Ms. Nice's failure to disclose a subsequent civil lawsuit she filed against Ms. Kinsey that *did* involve money. Ms. Nice's explanation for not disclosing the crimes Ms. Kinsey committed against her – that she did not view them as crimes or herself as a victim – is inconsistent not only with her candid admission that Ms. Kinsey's acts were indeed criminal, but with her contemporaneous actions in calling police to report the crimes when they occurred. Her explanation that Ms. Kinsey's acts subjected her merely to "minor indignities" is inconsistent with her own definition of the term "minor indignity." Her explanation that she did not disclose an

incident in her home that concluded with the arrest of Mr. Whiteside for domestic violence because, in fact, he was innocent is inconsistent with her actions at the time, his actions at the time, the charges brought against him, and all the documentary evidence regarding the offense.

Ms. Nice's overall claim that she simply did not remember these incidents at the time she filled out her questionnaire is implausible, given the closeness in time of the events to the trial, the length of time over which they occurred, and the significant impacts they had on her life. Moreover, the likelihood of bias is confirmed by her announcement, before deliberations began, that Petitioner "should . . . pay for killing the 'Little Man'." Thus, respondent did not carry its burden of rebutting the presumption that Petitioner's constitutional rights were violated by Ms. Nice's misconduct. The Superior Court erred in concluding the opposite, and this Court should grant relief on this claim.

The additional claims in this petition bring newly discovered evidence that Laci was alive when Scott left home on December 24, 2002. Evidence that Laci Peterson witnessed the burglary of a neighboring home, confronted the burglars by threatening to call the police. They then killed her and, after learning Scott, the

primary suspect, had been fishing in the San Francisco Bay, dumped her body there.

As previously noted, the jury in Petitioner's case did not hear from eyewitnesses who saw Laci; the jury did not hear that Laci witnessed the burglary across the street; the jury heard false evidence about the date of the burglary; and the jury did not hear this new evidence that establishes the actual innocence of Scott in the murder of Laci Peterson.

Petitioner is entitled to relief.

II. JURISDICTION AND GOOD CAUSE FOR FILING IN THIS COURT

1. Mr. Peterson is unlawfully confined and restrained of his liberty at Mule Creek State Prison, Ione, California by Jeffrey Macomber, Secretary, California Department of Corrections and Rehabilitation and Patrick Covello, Acting Warden, Mule Creek State Prison.

2. Mr. Peterson is confined pursuant to the judgment in San Mateo County Superior Court Case Number SC055500A, rendered on March 16, 2005.

3. Petitioner was charged in Stanislaus Superior Court with the December 2002 murders of his wife Laci and their unborn child, Conner, in violation of Penal Code section 187. (9 CT 3284; 1 Supp. CT 4-5.) The information added a multiple

murder special circumstance in violation of section 190.2, subdivision (a)(3). (9 CT 3284.)

4. Petitioner pled not guilty and was tried by jury. Petitioner was convicted of one count of first-degree murder and one count of second-degree murder. The multiple murder special circumstance allegation was found to be true. Petitioner was sentenced to death.

5. Petitioner appealed his conviction to the California Supreme Court (Case No. S132449), which affirmed Petitioner's conviction but reversed the imposition of the death penalty. (See *People v. Peterson* (2020) 10 Cal.5th 409.)

6. The Stanislaus County District Attorney initially stated they would retry Petitioner for the Death Penalty, but reversed their decision on May 28, 2021, after Petitioner requested informal discovery from the District Attorney. Petitioner was sentenced to Life Without the Possibility of Parole on December 8, 2021.

7. While his direct appeal was pending, Petitioner timely filed a petition for habeas corpus that raised, among other claims, juror misconduct (Case No. S230782.). On October 14, 2020, the California Supreme Court issued an order to show cause on the ground that Juror No. 7 committed prejudicial misconduct by not disclosing her prior involvement with other legal proceedings, including but not limited to having been the victim of a crime, and denied relief on Petitioner's other habeas corpus claims raised in the Initial Petition.

8. After an evidentiary hearing and briefing by both

parties on the juror misconduct claim, the San Mateo County Superior Court denied relief on December 20, 2022.

9. This petition is filed within 120 days of the date the Superior Court denied relief. *See Robinson v. Lewis*, 9 Cal.5th 883, 901 (2020) (holding that a new petition filed within 120 days of denial of relief on a previous petition is presumptively timely).

10. This Petition is necessary because Mr. Peterson has no other plain, speedy, or adequate remedy at law for the substantial violations of his constitutional rights as protected by the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; state statutes, rules, and regulations; and international human rights law as established in treaties, customary law, and under the doctrine of *jus cogens*, in that the full factual bases for these claims lie wholly or significantly outside the certified record or the claims involve allegations detailing the inadequacy of trial counsel's representation.

11. Other than the automatic appeal (Case No. S132449) and Initial Petition, no other applications, petitions, or motions have been made with respect to Mr. Peterson's detention and restraint.

III. FORM, DOCUMENTATION, AND INCORPORATION BY REFERENCE

1. Given the length and complexity of this petition, Petitioner requests leave to file this petition in its present format,

along with Form HC-001, for good cause shown. Rules of Court Rule 8.380, subdivision (a). Petitioner has verified this petition.

2. Petitioner is incarcerated and unable to submit the majority of documents supporting his claims for relief, Rules of Court Rule 8.380, subdivision (b), and therefore requests that those documents be submitted to this Court on his behalf. With the exception of the documents submitted with this petition and the briefing in the San Mateo County Superior Court in relation to the evidentiary hearing, all other relevant documents are contained in the Clerk's Transcript and Reporters transcript of the following related cases: *People v. Peterson*, California Supreme Court Case No. S132449; *In re Peterson*, California Supreme Court Case No. S230782; and *People v. Peterson*, San Mateo County Superior Court Criminal Case No. SC055500A. Petitioner requests that the record in these cases be submitted to this Court on his behalf.

3. Petitioner hereby requests that this Court incorporate by reference the certified record on appeal and all of the briefs, motions, orders, and other documents and material on file in People v. Peterson, California Supreme Court Case No. S132449; In re Peterson, California Supreme Court Case No. S230782; and People v. Peterson, San Mateo County Superior Court Criminal Case No. SC055500A. See In re Reno, 55 Cal.4th 428, 444, 484 (2012) (holding habeas petitioner need not request judicial notice of all documents from prior proceedings because courts routinely consult prior proceedings irrespective of formal requests).

4. Mr. Peterson incorporates by reference all exhibits filed

in support of this Petition and his Initial Petition, along with the facts contained in those exhibits, and re-alleges the material in those documents to avoid wholesale repetition of all facts contained therein, while allowing their consideration as if each of the facts and conclusions in the exhibits was repeated in each relevant allegation in this Petition. *In re Fields*, 51 Cal.3d 1063, 1070 fn.2 (1990); *In re Rosenkrantz*, 29 Cal.4th 616, 675 (2002).

IV.PROCEDURAL HISTORY AND FACTUAL OVERVIEW

A. Procedural History

1. Trial

1. On December 3, 2003 the Stanislaus County District Attorney filed a two-count information against petitioner Scott Peterson, charging him with the December 2002 murders of his wife Laci and their unborn child, Conner, in violation of Penal Code section 187. (9 CT 3284; 1 Supp. CT 4-5.) The information added a multiple murder special circumstance in violation of section 190.2, subdivision (a)(3). (9 CT 3284.)

2. Petitioner pled not guilty and denied the special circumstance allegation. (9 CT 3284.) On January 9, 2004, the state filed its "Penal Code Section 190.3 Notice Regarding Aggravating Evidence." (10 CT 3691-3693.)

3. Trial was originally set for Stanislaus County. Prior to trial, Petitioner filed a motion to change venue alleging that prejudicial publicity about the case rendered a fair trial impossible in Stanislaus County. (9 CT 3324-3393.) In its written

papers, the state conceded that the "pretrial publicity has been geographically widespread and pervasive" but nevertheless opposed the motion. (10 CT 3415; see 10 CT 3408-3604.) The trial court granted the motion. (RT PPEC at pp. 86-87, 203-206.)[1] Over defense objection, however, the case was transferred to San Mateo County, only 90 miles away. (RT PPEC 256-264; 11 CT 3710.)

4. Jury voir dire began in San Mateo County on March 4, 2004. (11 RT 2025.) The parties agreed on a jury questionnaire; after nearly 1,000 jurors had completed their questionnaires, the results showed that 96% of potential jurors had been exposed to publicity about the case and, of this group, 45% were willing to admit they had prejudged Petitioner's guilt. (14 CT 4516,4520; 10 RT 1960-1970, 2007-2014.)

5. On May 3, 2004, defense counsel made a second motion to change venue based upon the pretrial publicity in light of the information contained in the questionnaires. (14 CT 4487-4716.) The state objected once again; this time, the trial court denied the motion to change venue. (36 RT 7094-7102.)

6. Opening statements in the guilt phase began on June 1, 2004. (18 CT 5626.) The state rested its case-in-chief on October 5, 2004. (19 CT 5934.) The defense rested its case on October 26, 2004. (19 CT 5960.) The jury began deliberations on November 3,

[1] Citations to "RT PPEC" refer to the separately paginated one-volume transcript entitled "Post-preliminary Examination Certified Record."

2004. (19 CT 5976.)

7. The jury deliberated all day on November 4, returning with a request to examine exhibits. (19 CT 5978-5979, 5983.) The jury deliberated all day on November 5, returning with a request to see additional exhibits. (19 CT 5981-5982.) The jury deliberated all day on November 8. (19 CT 5983-5986.) The jury continued deliberating until noon on November 9. (19 CT 5989-5990.) The court then dismissed juror 7. (19 CT 5990.)

8. Deliberations began anew that afternoon, November 9, 2004. (19 CT 5990.) This second jury deliberated that afternoon and the next day, until juror 5 was discharged late the next morning. (19 CT 5991.) On November l0, the reconstituted jury began deliberations yet again. (19 CT 5992.)

9. This third jury deliberated the remainder of November 10. (19 CT 5992-5993.) On the next day of deliberations – November 12, 2004 – the jury found Petitioner guilty as charged on count one (first degree murder) and guilty of the lesser included offense of second degree murder on count two. (20 CT 6133.) The jury found the multiple murder special circumstance true. (20 CT 6133.)

10. The penalty phase began on November 30, 2004. (20 CT 6138.) The state's penalty phase case ended the next day. (20 CT 6143.) The defense case in mitigation began that same day and ended on December 9, 2004. (20 CT 6170.) The jury began deliberating in the penalty phase that same afternoon. (20 CT 6172.) The jury deliberated all day on December 10. (20 CT 6174-6175.) Late the next morning the jury sentenced Petitioner to die.

(20 CT 6233.)

11. On March 16, 2005, the trial court denied Petitioner's motion for a new trial and imposed a sentence of death. (21 CT 6462, 6468.)

2. Direct Appeal

1. On July 8, 2009, attorney Cliff Gardner was appointed by the California Supreme Court to represent Petitioner in his direct appeal.

2. The record on appeal was certified for accuracy on January 30, 2012.

3. Petitioner's opening brief was filed on July 5, 2012. Respondent's Brief was filed on January 26, 2015. Petitioner's Reply Brief was filed on July 23, 2015. Petitioner raised the following issues:

I. The trial court improperly discharged thirteen prospective jurors over defense objection based solely on jury questionnaire answers showing that although they opposed the death penalty, they could nevertheless consider death as an option.

II. The trial court's improper discharge of thirteen prospective jurors based on their opposition to the death penalty also violated Petitioner's Eighth Amendment right to reliable guilt phase procedures and requires reversal of the convictions as well.

III. The trial court improperly excused an additional 17 prospective jurors based solely on jury questionnaire answers which did not show these jurors would be unable to set aside their opposition to the death penalty.

IV. Because the trial court erroneously excused five prospective jurors who were equivocal about whether their attitudes about the death penalty would affect their penalty phase deliberations, reversal of the death sentence is required.

V. The trial court committed prejudicial error and violated Petitioner's state and federal constitutional rights by forcing him to trial in a community where 96% of the jury venire had been exposed to massive pretrial publicity about the case and nearly half of all prospective jurors had already concluded he was guilty of capital murder.

VI. The trial court committed prejudicial error, and violated Petitioner's Fifth and Eighth Amendment rights, by admitting dog scent identification evidence that provided critical factual support for the state's theory of the case.

VII. The trial court created an unconstitutional presumption and lightened the state's burden

of proof beyond a reasonable doubt, by telling the jury it could infer Petitioner was guilty of murder based on (1) the dog tracking evidence and (2) any evidence which supports the accuracy of that evidence.

VIII. The error in instructing the jury with CALJIC number 2.16, permitting the jury to convict if it found that the dog tracking evidence was corroborated by other evidence, was compounded by the court's failure to inform the jury that it could rely on the dog tracking evidence to acquit, as well as to convict.

IX. The trial court violated both state and federal law by admitting expert "scientific" evidence based on where Conner's body was found, to infer that Conner was placed in the water where Petitioner had been fishing.

X. The trial court committed prejudicial error, and violated Petitioner's Fifth and Sixth Amendment rights, in (1) excluding critical defense evidence undercutting the state's theory of the case, (2) refusing to allow defendant to examine evidence absent the presence of state prosecutors and (3) refusing to grant a mistrial after the jury itself performed an experiment during deliberations.

XI. The prosecutor committed prejudicial

misconduct and violated due process by urging the jury to reject the defense theory and convict Petitioner of first degree murder because defense counsel did not present demonstrative evidence showing the instability of Petitioner's boat, when, in fact, the trial court had excluded this very evidence at the prosecutor's own request.

XII. The trial court erred in discharging Juror 5 for discussing the case in violation of the court's admonition but then refusing to dismiss other jurors and alternates who admitted they too had discussed the case in violation of the identical admonition.

XIII. The trial court's failure to conduct an adequate hearing in determining whether Juror 8 discussed the case with a nonjuror requires remand.

XIV. The trial court committed reversible error, and violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, when it refused to seat a new penalty phase jury after the jurors who convicted Petitioner of murder were applauded by wildly cheering crowds.

XV. The trial court erred in precluding Petitioner from presenting relevant mitigating evidence

which could have served as a basis for a sentence less than death.

XVI. Because the California capital sentencing scheme is unconstitutional in numerous respects, Petitioner's death sentence must be reversed.

4. The California Supreme Court held oral arguments in the case on June 2, 2020. On August 24, 2020, the California Supreme Court issued its opinion on the direct appeal, affirming the judgment as to guilt but reversing the judgment as to the sentence of death and remanding the matter to the Superior Court for a new penalty determination. (See People v. Peterson (2020) 10 Cal.5th 409.)

5. On February 22, 2021, the United States Supreme Court denied a petition for certiorari on the direct appeal.

6. On remand of the sentence to the San Mateo County Superior Court, the state declined to retry Petitioner's penalty phase. He was resentenced to life without the possibility of parole on December 8, 2021.

3. Initial Habeas Corpus Petition

1. On February 18, 2010, Lawrence A. Gibbs was appointed by the California Supreme Court to represent Petitioner in his habeas corpus and executive clemency proceedings related to his conviction and sentence of death. Petitioner raised the following issues:

I. Petitioner Was Deprived Of His Fifth, Sixth

And Eighth Amendment Rights to A Fair And Impartial Jury, And A Reliable Determination Of Penalty By A Seated Juror's Concealment Of Bias During Voir Dire

II. Presentation of False Evidence, In Violation Of Due Process And Penal Code section 1473, Regarding Conner's Fetal Age At The Time Of Death

III. Petitioner Was Deprived of His Fifth, Sixth, Eighth, and Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Failing To Consult With, And Present The Testimony Of, An Expert In The Field Of Fetal Biometry

IV. Presentation of False Evidence, In Violation Of Due Process And Penal Code section 1473, By The State's Introduction Of False Evidence That A Trailing Dog Detected Laci's Scent At The Boat Ramp In The Berkeley Marina

V. Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Failing To Present The Testimony Of An Expert In The Field Of Dog-Scent Identification

VI. Presentation of False Evidence, In Violation Of Due Process And Penal Code section 1473, By The State's Introduction Of False Evidence That The Bodies of Laci and Conner Could

Only Have Originated From The Area In Which Petitioner Said He Was Fishing

VII. Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Failing To Present The Testimony Of An Expert In The Field Of The Movement of Bodies In Bays and Estuaries, And By Counsel's Failure To Effectively Cross-Examine The Prosecution's Expert

VIII. Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Promising The Jury That It Would Hear Three Categories Of Exculpatory Evidence Which Would Prove Scott Was "Stone Cold Innocent," And Then By Not Fulfilling Those Promises

IX. Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Failing To Present Exculpatory Evidence

X. Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By Counsel's Failure To Present Exculpatory Evidence That Steven Todd Saw Laci in Modesto After Scott Left For The Berkeley Marina

XI. Cumulative Error

XII. The California Death Penalty Statute Unconstitutionally Fails To Narrow The Class Of Offenders Eligible For The Death Penalty

XIII. The Sentences of Death in California Are Unconstitutionally Dependent On The County In Which The Defendant Is Charged

XIV. Petitioner Was Denied His Right to Be Tried by a Fair and Impartial Jury

XV. The Death Penalty As Currently Administered In California Is Cruel and Unusual And Unconstitutional

XVI. Impediments and Deficiencies In The Post-Trial Process Render Petitioner's Convictions And Sentences Unreliable And Unconstitutional

XVII. California's Death Penalty System Is Wracked By Delay And Arbitrariness To the Point That It Fails To Serve Any Penological Purpose. It Therefore Violates State and Federal Constitutional Protections Against Cruel, Torturous, and Unusual Punishment and International Law

XVIII. Petitioner's Sentence of Death Is Illegal and Unconstitutional under the Eighth and Fourteenth Amendments as Well as the California Constitution, Because Execution by

Lethal Injection, the Method by Which the State of California Plans to Execute Him, Violates the Prohibition of Cruel and Unusual Punishment

XIX. The Violations of State and Federal Law Articulated In This Petition Likewise Constitute Violations Of International Law, And Require That Petitioner's Convictions and Penalty Be Set Aside

2. Petitioner's Initial Habeas Corpus Petition and supporting exhibits were filed on November 23, 2015.

3. On March 6, 2017, Mr. Gibbs moved to withdraw as Petitioner's habeas corpus/executive clemency attorney, and on July 12, 2017, the California Supreme Court granted that motion. On the same day, the Court appointed Cliff Gardner as lead habeas corpus/executive clemency counsel, and the Habeas Corpus Resource Center as associate habeas corpus/executive clemency counsel.

4. Respondent filed its Informal Response to the Initial Petition on August 10, 2017, and Petitioner filed his Reply to the Informal Response on August 7, 2018.

5. In claim one of the Initial Petition that Petitioner filed in the California Supreme Court, he contended that Juror Richelle Nice committed misconduct by providing demonstrably false answers in her jury questionnaire during the jury selection process – answers that were directly relevant to the prosecution's theory that Petitioner assaulted his wife while she was pregnant,

killing her and her unborn child Conner.

6. As alleged in the Initial Petition, Question 54a of the jury questionnaire asked if prospective jurors had ever been "involved in a lawsuit (other than divorce proceedings)." (Petition at p. 97.) Question 74 asked if prospective jurors or their family or close friends had ever been "the victim or witness to any crime." (Petition at p. 98.) Ms. Nice answered "no" to both questions. (Petition at p. 98.) The Petition alleged that these answers were false. According to the Petition, (1) in November of 2000, Ms. Nice – who was four and a half months pregnant at the time – filed a lawsuit against Marcella Kinsey alleging that Ms. Kinsey had committed crimes against her, her unborn child and her boyfriend Eddie Whiteside, (2) in that lawsuit, and under oath, Ms. Nice said she feared for the life of her unborn baby and (3) Ms. Nice testified under oath at an ensuing Superior Court hearing held in connection with her lawsuit and obtained a restraining order against Ms. Kinsey. (Petition, Exhibit 45.) Thus, as alleged in the Initial Petition, Ms. Nice gave false answers when she denied having been involved in a lawsuit or having been (or had friends) that were the victims of or witnesses to a crime. On October14, 2020 the Supreme Court unanimously issued an Order to Show Cause, providing as follows:

> The Secretary of the Department of Corrections and Rehabilitation is ordered to show cause in the Superior Court of California, County of San Mateo, when the matter is placed on calendar, why the relief prayed for should not be granted on the ground that Juror No. 7 committed prejudicial misconduct by not disclosing

> her prior involvement with other legal proceedings, including but not limited to being the victim of a crime, as alleged in Claim 1.

7. In the same order, the Court denied relief on Petitioner's other habeas corpus claims raised in the Initial Petition; the Court denied claims 2-11 on the merits and claims 12-19 as moot.

8. In accord with the Supreme Court's order to show cause, the case was remanded to the San Mateo County Superior Court, and, on December 11, 2020, respondent filed a Return to the Petition. In its Return, respondent provided documentation showing that in November 2001, Mr. Whiteside was charged with domestic violence against Ms. Nice and pled no contest to battery. Because the prosecution's case against Petitioner necessarily involved domestic violence, and Ms. Nice had not disclosed her own domestic violence incident in response to question 74 asking if she had ever been the victim of a crime – Petitioner made additional factual allegations in his Denial to the Return, which he filed on June 25, 2021.

9. On July 7, 2021, the Superior Court, recognizing that the respondent's Return included "new documentation related to additional incidents involving [Ms. Nice] with legal proceedings that were not part of the factual allegations presented in the original petition" –incidents which "related to [Petitioner's] juror misconduct claim" – ordered respondent to file a Supplemental Return responding to the additional factual allegations petitioner had made in his Denial. Respondent did so on August 5, 2021;

Petitioner filed a Denial to the Supplemental Return on August 20, 2021.

10. The Superior Court held an evidentiary hearing in connection with Petitioner's jury misconduct claim on February 25 and 28, 2022 and March 1, 24, and 25, 2022.

11. The parties completed post hearing briefing on June 9, 2022. On December 20, 2022, the Superior Court issued an order denying relief as to Claim 1 of Petitioner's Initial Petition.

B. Factual Overview

The facts shown at trial are fully set forth at pages 11-71 of Appellant's Opening Brief filed in Petitioner's direct appeal (AOB). For the Court's convenience, Petitioner summarizes the essential facts here and, where relevant, describes the newly discovered evidence revealed through post-conviction investigation.

1. The Events Leading up to Scott's Arrest for Murder.

a. Background facts and the events leading up to December 24, 2002.

1. Scott and Laci Peterson met while both were living in San Luis Obispo, California. (45 RT 8819.) Laci was attending college at Cal Poly. (45 RT 8819.) Scott lived and worked in San Luis Obispo and would later attend and graduate from Cal Poly

as well. (46 RT 8968-8969.)

2. Over the next three years, Laci and Scott steadily dated, became engaged, and married in August 1997. (46 RT 8968.) Laci graduated from college that same year and Scott graduated in 1998. (46 RT 8968-8969.) After graduation, they started and ran a popular college hangout in San Luis Obispo called The Shack. (46 RT 8970.) Scott did the cooking and Laci worked up front. (47 RT 9165-1966.)

3. In 2000, they sold The Shack and moved to Modesto, California, where Laci was raised. (46 RT 8969-8970.) Laci and Scott lived with Laci's mom Sharon Rocha and stepfather, Ron Grantski, for several weeks before renting and then buying a home in October 2000. (46 RT 8971.) Laci worked as a marketing representative for Southern Wine and Spirits and then as a substitute teacher. (46 RT 8972-8973.) Scott worked as a manager for Trade Corp., a fertilizer company. (59 RT 11624, 11626.)

4. During this time, they remodeled their home and put in a swimming pool and a built-in outdoor barbeque. (46 RT 8976-8978.) They liked to socialize with friends but according to Laci's mother, Sharon, they did not do drugs, engage in any high-risk behaviors, or have any psychological problems. (46 RT 8974-8975.) Sharon "thought the world of [Scott]." (46 RT 9063.) Laci's sister, Amy Rocha, described the couple as "get[ting] along very well," and said she had never seen them fight. (46 RT 8912-8913.) Nor had Amy ever heard Scott raise his voice. (46 RT 8934.) Amy described Scott as someone who tried to give Laci everything she

wanted. (46 RT 8936.) Laci's brother, Brent Rocha, described Scott and Laci's relationship as "very positive . . . [and] happy" and noted that they "appreciated [each other]." (47 RT 9229-9230.) One of Laci's childhood friends, Stacy Boyers, described Scott and Laci as "totally in love." (54 RT 10523.)

5. Laci became pregnant in the spring of 2002. (52 RT 10105-10106.) Laci went to prenatal yoga and Laci and Scott attended a weekly Lamaze class together. (46 RT 8926, 8929.) Laci's sister Amy recalled that Scott went to most of Laci's prenatal doctor appointments. (46 RT 8932-8933.) Amy testified that Laci and Scott both made lists of baby names and decided together to name their baby Conner. (46 RT 8936.) Laci's stepfather, Ron Grantski, recalled that during Laci's pregnancy, Scott scheduled regular Sunday dinners with Ron and Sharon so that the family could "spend more time together because of the baby." (47 RT 9130.)

6. On December 23, 2002, at around 5:45 p.m. Laci and Scott met Amy Rocha at Amy's hair salon so she could cut Scott's hair. (45 RT 8835-8837.) Amy showed Laci how to use a curling iron to style her new cut. (46 RT 8916-8917.) While they were at the salon, Laci called and ordered a pizza to pick up on the way home. (46 RT 8917.) Scott invited Amy to join them for dinner. (46 RT 8921.) Amy declined because she was meeting a friend who was visiting from out of state. (46 RT 8918.) Amy remembered that Laci and Scott "interacted with each other [like usual]" that night and nothing appeared "out of the ordinary." (45 RT 8858; 46 RT 8911.) At 8:30 that night, Laci spoke briefly with

her mother, Sharon, about plans for Christmas Eve dinner the following night. (46 RT 8996-8997 .)

b. The events of December 24, 2002.

1. On December 24, 2002, around 5: 15 p.m., Scott called Sharon to see whether Laci was already at Sharon's house. (46 RT 8998-8999.) Scott told her that Laci' s car was in the driveway and their dog, McKenzi, was in the backyard with its leash on. (46 RT 8999.) Sharon had not seen or spoken with Laci that day and suggested he call some of Laci's friends to see if she was with them. (46 RT 8999.)

2. Scott also called Amy. (45 RT 8876.) Amy described Scott as "panicked." (45 RT 8877.) Scott called some of Laci's friends and went door-to-door in the neighborhood. (54 RT 10513, 10515.) Neighbor Amie Krigbaum described Scott as "very, very upset" and "distraught." (48 RT 9510, 9523.) Laci's friends, Stacey Boyers and Lori Ellsworth, described Scott as "upset" and "panicked." (54 RT 10529, 10565.) No one had seen Laci. (46 RT 8999~9000; 54 RT 10513.) Sharon's husband, Ron, called 911 and the local hospitals. (46 RT 9001.)

3. Scott later told police that, before he left the house that morning, Laci said she was going to walk their dog McKenzi. (51RT10005.) When he returned, Scott found McKenzi outside with his leash on. (46 RT 8999.) Indeed, that morning, neighbor Karen Servas confirmed that at 10:18 a.m. McKenzi was out in the street with his leash on. (48 RT 9422.) The leash was moist and covered in leaves and grass clippings. (48 RT 9423.) Servas

put McKenzi in the Peterson's backyard and shut the gate. (48 RT 9425, 9428.) Servas testified that she heard raking sounds, as though someone was gardening. (48 RT 9428.)[2]

4. When Scott told Sharon Rocha about McKenzi, her "first thought" was that Laci must have been walking the dog and thought they should look for her in the park. (46 RT 8900.) Scott, Sharon, Amy, Ron, and other friends and family met at East La Loma Park near Laci and Scott's home to look for Laci. (46 RT 9005-9006.)[3]

c. The police search of the Peterson home and Scott Peterson's truck, warehouse and boat.

1. Police officer Jon Evers met Scott as he was searching in the park for Laci that evening. (50 RT 9906-9907.) Evers asked

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[2] In her trial testimony, Servas testified the raking sounds emanated from a neighbor's yard. (48 RT 9428.) In her statement to police, however, Servas was clear that when she heard the noise she believed it was Laci gardening. (IHP Exhibit 1 [Statement of Karen Servas] at HCP-00001.) On September 4, 2003, Servas reiterated that her prior statement was accurate. (*Id*. at HCP-000003.)

[3] Karen Servas initially told police that she found McKenzi at 10:30 a.m. (48 RT 9454.) But after looking at sales receipts and a cell phone call from that morning and backtracking she thought it was closer to 10:18 a.m. when she found McKenzi. (48 RT 9422.) According to Servas, after she found the dog, she then went to Austin's Patio Furniture, Starbucks, and then made a call to Tom Egan. Her 10:18 a.m. time estimate relied on (1) a receipt from Austin's Patio Furniture time stamped at 10:34 a.m. and (2) cell phone records showing a call to Egan at 10:37 a.m .. (48 RT 9422, 9435-9437.)

Scott for permission to search the Peterson home. (50 RT 9906-9907.) Scott told Evers it was fine to enter the home and search it. (50 RT 9906-9907.) Officers later described Scott as "very cooperative" and noted that he did not "hesitate" when asked whether they could search his home. (50 RT 9907; 51RT10078-10079.) Police took control of Laci and Scott's home. (46 RT 9008.) Scott was not permitted back in the house that night unless he was accompanied by a police officer. (46 RT 9008-9009.)

2. Over the course of the next few days, detectives Al Brocchini and Craig Grogan – with the help of numerous other police officers – searched Laci and Scott's home. (57 RT 11166.) As Detective Brocchini himself later admitted on cross-examination, because the detectives had already singled Scott out as the prime suspect in the case, they were specifically searching for any evidence that would link him to Laci' s disappearance and possible murder. (58 RT 11288.)

3. There was not much to find. Just outside the Peterson home, officers found a bucket with two mops inside. (50 RT 9787.) The mops and bucket did not smell of disinfectant or bleach. (50RT9851-9852; 51RT10070-0071.) Both were taken into evidence. (50 RT 9818.) When asked about the mops and bucket, Scott explained that Laci had mopped the floor that morning and he had taken the bucket and dumped the water outside when he returned that afternoon. (56 RT 11010-11011.) Scott had emptied the bucket because, in her pregnant condition, Laci could not lift anything heavy. (56 RT 11011-11012.)

4. Inside the house and on top of the clothes washer,

officers found some dirty wet rags. (50 RT 9789.) These were also taken into evidence. (50 RT 9842.) Ultimately, the rags were no more sinister than the mop; Scott explained his assumption that their house cleaner Margarita Nava used the rags the day before when she cleaned the house. (57 RT 11130.) In fact, Ms. Nava later confirmed that she did indeed use the rags to clean the outside windows and the fireplace screen. (57 RT 11108~1l109.)

5. Police found a curling iron out in the bathroom. (50 RT 9819.) Police also noticed that a rug was "scrunched" up. (50 RT 9789.) Police searched the home for any signs of blood using "an alternate light source." (57 RT 11164-11165.) No blood was found. (57 RT 11164-111165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) As one of the searching officers – Derrick Letsinger – forthrightly conceded, there were no signs at all of "foul play" in the house. (50 RT 9832.)

6. Moreover, as all officers made clear, Scott was extremely cooperative with police. As noted above, he permitted police to search and take control of his house. (50 RT 9907; 51RT10078-10079.) That same night, Scott allowed Detective Brocchini to look at his cell phone and review his call history. (55 RT 10732-10733.) Next Scott consented to a search of his truck parked outside. (51RT10078-10080.) Scott voluntarily told Detective Brocchini that he had a firearm in his glove box from a recent hunting trip. (55 RT 10748; 57 RT 11126-11127; 59 RT 11511.) Brocchini took the gun from the glove box and put it into his pocket without telling Scott. (51RT10083; 55 RT 10748-10749.) The gun was later examined; it had not been fired

recently. (59 RT 11603-11605.)

7. Inside the cab of the truck, Brocchini found a Big 5 Sporting bag with 2 new fishing lures still in the package and a receipt dated 12-20-02 for the lures, a two-day fishing license for December 23 and December 24 and a saltwater fishing pole. (55 RT 10746; 62 RT 12183-12184.) Scott gave Officer Evers a receipt from the Berkeley Marina, stamped 12:54 p.m. on December 24, 2002. (51RT10029.) Finally, Brocchini searched the large toolbox in the back of Scott's truck and the truck bed where he found two tarps and some patio umbrellas. (51RT10081-10083.)[4]

8. Scott also voluntarily consented to a search of his warehouse and boat. (51 RT 10038.) Inside the warehouse, police found Scott's 14 foot aluminum boat on a trailer with one circular concrete anchor inside. (51 RT 10044; 57 RT 11239-11240.) They also found (1) concrete dust (on Scott's trailer), (2) a fishing report about sturgeon fishing in the San Francisco Bay (on Scott's desk) and (3) a pair of needle nosed pliers with a single, dark hair fragment, 5-6 inches long, in the "clamping" part of the pliers. (57 RT 11239-11240; 67 RT 12962; 64 RT 12554-12558.) Detective Henry Hendee collected the pliers and the single hair and packaged them separately for examination. (64 RT 12555-12558.) The hair was consistent with hair found in Laci's hairbrush. (70 RT 13644.) As discussed more fully below, the pliers were so

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[4] Later the umbrellas and one tarp were found in a shed in the Peterson's backyard and the other tarp was found in a separate backyard shed with a gas leaf blower on top of it which was leaking gas. (55 RT 10741-10745.)

rusted that the state's own forensic expert admitted that they had not been used recently. (86 RT 16467.)[5]

9. After allowing police to search the warehouse, Scott accompanied Brocchini to the Modesto Police department for a sit down interview that began around midnight. (55 RT 10715.)

10. By the first week of January, Scott was under 24-hour surveillance. (58 RT 11295-11305.) Scott's phones had also been tapped and by the third week in January there was a GPS tracking system placed on his truck. (85 RT 16275-16277; 94 RT 17770.)

d. The media frenzy begins on December 26, 2002.

1. By December 26, 2002, the media had set up camp outside the Peterson home. (46 RT 9017-9019.) By December 27, the media had blocked off the whole street. (47 RT 9142-9143.) According to Laci's stepfather, Ron, it was "like nothing [he] had ever seen" before. (47 RT 9142-9143.) Brent Rocha described it as the media being "all . . . around" the Peterson's home. (47 RT 9248.) Neighbor Arnie Krigbaum called it a media "feeding frenzy." (48 RT 9526.) She noted that the entire block in front of the Peterson home was blocked off with media and satellite trucks which continued for five months. (48 RT 9525.) The

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[5] When Detective Hendee later opened the evidence envelope, there were two hairs, not one. (64 RT 12566.) Hendee tried to explain this change in the evidence by testifying that he did not know if the hair had broken or whether it had been two hairs that looked like one. (64 RT 12563-12567.)

reporters would sometimes stay past midnight and then come back at four or five in the morning. (49 RT 9638.)

2. Ms. Krigbaum recalled that when Scott came and went from the house, members of the media took pictures of him, videotaped him and shouted questions at him. (48 RT 9525.) At one point, a member of the media used a bullhorn and screamed "you murdered your wife, you murdered your child." (49 RT 9625.) Random people drove by the home shouting "murderer." (49 RT 9625.) Neighbors were scared for their own safety. (49 RT 9625.) Instead of the media attention dying down, Ms. Krigbaum testified that it "got worse as time progressed." (48 RT 9525.)

e. Scott's cooperation with the police.

1. In the days following Laci' s disappearance, Scott spoke extensively with police. He spoke with Detective Douglas Mansfield, Detective Craig Grogan, Detective Allen Brocchini, Detective John Buehler, Captain Christopher Boyer, Officer Jon Evers, and Officer Matthew Spurlock. (8 RT 1641; 50 RT 9867-9868; 51RT9999-10000; 55 RT 10715; 61 RT 11829-11830; 93 RT 17645-17646; 102 RT 19055.) He was repeatedly described as cooperative. (50 RT 9907 [Officer Spurlock describes Scott as "cooperative"]; 51RT10038 [Officer Evers describes Scott as "cooperative"]; 51 RT 10078 [Officer Evers describes Scott as "very cooperative"]; 5 5 RT 10715 [Detective Brocchini testified that Scott agreed to "sit down with [him] and . . . go over what [they] had talked about over the last few hours"]; 61 RT 11830 [Detective Mansfield described Scott as "very cooperative."].)

2. With respect to the morning of December 24, 2002,

Scott told detectives that – as was her usual routine – Laci got up around 7 a.m. to watch the Today Show. (61RT11838.) When Scott got up about an hour later, Laci was mopping the floor and was going to take the dog for a walk. (61RT11009, 11820, 11838.) They then watched part of the Martha Stewart show. (51 RT 10004.) Scott recalled that the episode included something on meringue. (100 RT 18769.)6

3. Scott said he left for a fishing trip to the Berkeley Marina at around 9:30 in the morning. (51 RT 10004.) He had purchased a rod and reel and a two day fishing license at Big 5. (61RT11820.) Laci planned to walk the dog and then go grocery shopping. (51RT10005; 61RT11821.) Scott explained that Laci's usual dog-walking route was to go to the East La Loma Park near their house, head towards the tennis courts, and then back to the house. (61 RT 11821.) The walk was "a mile loop" which took her about forty-five minutes. (61RT11821, 11839-11840.) Scott often

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6 Although the state disputed this aspect of Scott's recollection, the state was wrong. In fact, on December 24, 2002, at 9:46 a.m. Martha Stewart did indeed discuss meringue on her show. (55 RT 10805-10806;100 RT 18769.) Despite the fact that meringue was discussed on the show – and that he had reviewed the show specifically looking for any mention of meringue – Detective Brocchini wrote in his report that there was no mention of meringue on this date. (55 RT 10805-10806.) This false information was passed on to other detectives investigating the case. (55 RT 10806.) It was even used in an affidavit seeking a wiretap on Scott's telephones. (55 RT 10807.) Finally, the state specifically told the jury in opening statements that "[o]n the 24th Martha Stewart didn't have a segment with meringue." (43 RT 8454.)

walked this loop with Laci and McKenzi. (61 RT 11839.) When Scott left the house, Laci was wearing black maternity pants, a white t-shirt, and white tennis shoes, which she wore when walking the dog. (61 RT 11823; 84 RT 15925.)

4. Scott then drove to his warehouse to pick up the 14-foot aluminum boat that he had purchased two weeks before. (61 RT 11824, 11837.) At the warehouse, he checked his e-mail, cleaned up the office, put together a woodworking tool called a mortiser, and unloaded tools from the green toolbox in the back of his pickup truck. (61 RT11841-11842; 93 RT 17655.) He thought he was at the office for about an hour. (61 RT 11841-11842.)

5. Scott then drove to the Berkeley Marina. (61 RT 11824.) He spent about an hour in the water where he headed north towards an island that was later identified as Brooks Island. (61 RT 11844; 66 RT 12841.) He wanted to make sure that the boat was working properly. (61 RT 11844-11845.) Scott said that he did not have a map of area, but he had researched fishing in the bay on the internet. (56 RT 11040.) Scott put the boat back onto the trailer about 2:15 p.m. and headed back to Modesto. (61 RT 11845.) He planned to meet Laci at home around 4:00 p.m. (61 RT 11845.) Scott tried to call Laci on the way home but got no answer. (51 RT 10006.)

6. When Scott returned to Modesto, he dropped the boat off at the warehouse and arrived home around 4:30 p.m. (51 RT 10007.) Scott noticed that their dog McKenzi was outside with its leash on and the doors to the back patio were unlocked. (51 RT 10007.) Laci was not home but her car was in the driveway. (51

RT 10027.) Scott thought Laci must be at her mother's house. (96 RT 18087.) Scott ate a couple slices of pizza, drank some milk and because his clothes were wet he put them in the wash and took a shower. (51 RT10007-10008; 61 RT 11847.) Laci still was not home, so Scott called her mother, Sharon, to see if she was over at her house. (51 RT 10008.) Scott then called Laci's sister Amy and some of Laci's friends and went to several neighbor's homes looking for Laci. (61 RT 11850.)

7. The news that Scott had been at the Berkeley Marina on the day Laci disappeared was widely publicized within 24 hours of Laci going missing. (62 RT 12089, 12103-12104.) As Scott's defense counsel later pointed out: "Only the deaf and dumb didn't know where . . . Mr. Peterson was that day." (10 RT 1998; See also 69 RT 13406 [Modesto detective acknowledging that "everybody knew Scott had been fishing in the bay."]

8. Extensive forensic and circumstantial evidence supported Scott's statements to police. As noted, Scott told police he went to the Berkeley Marina and said he had researched fishing in the bay on the internet. Scott gave police a receipt from the Berkeley Marina stamped 12:54 p.m. on December 24, 2002. (51RT10029.) Police found a fishing report about sturgeon fishing in the bay. (67 RT 12962.) Scott said that after he left the house, he went to his warehouse where he logged on to the internet and then put together a mortiser. (56 RT 11021.) In fact, a search of Scott's work computer located at the warehouse showed internet usage between 10:30 a.m. and 10:56 a.m.; during that time period, someone researched how to assemble a mortiser. (83 RT

15753, 15759-15762.)

9. Sharon Rocha confirmed that on the evening of Laci' s disappearance, Scott told her that Laci planned to go to the store and take the dog for a walk (46 RT 9040.) Amy Rocha recalled that, around the time of Laci' s disappearance, Laci walked frequently as she was conscious of her weight and staying fit during pregnancy. (46 RT 8926-8927.) Amy Rocha explained to police that Laci did yoga on Mondays and walked daily or almost daily. (46 RT 8935.) Just a week before Laci's disappearance Laci and Scott spent a weekend in Carmel, California, with Scott's parents Lee and Jackie Peterson. (107 RT 19974.) Lee and Jackie both recalled that Laci walked for several hours around town shopping and then walked down to the beach and back up a hill which was 3/4 a mile to their hotel. (88 RT 16878-16880; 107 RT 19976, 19992-19993.) Laci's friend, Kristin Reed, confirmed that – while Laci had stopped walking for a while due to dizziness – by the first part of December she was back walking again because she was concerned over how much weight she had gained. (58 RT 11405-11407.)[7]

10. At this point in the investigation, Laci's family and friends fully supported Scott. (46 RT 8912-8913, 9063; 47 RT 9229; 54 RT 10523.) Laci's mom Sharon "thought the world of

[7] Although Sharon Rocha expressed a contrary view – believing Laci had stopped walking in the neighborhood in November 2002 – when Sharon heard that McKenzi was found with its leash on, Sharon's "first thought" was that Laci must have been walking the dog. (46 RT 8985, 9000.)

[Scott].” (46 RT 9063.) Sharon had never seen Scott violent with Laci or even raise his voice. (46 RT 9063.) Amy Rocha agreed that she had never seen them fight nor had she ever seen Scott do anything “that would even remotely be characterized as harming Laci.” (46 RT 8912-8913.) Laci’s stepfather, Ron, told detectives that Laci and Scott had never been separated during their marriage, spent “90 percent of their time together” and that Scott was “supportive” of Laci. (47 RT 9132.) Ron recalled that even when Scott “should have been mad at Laci he wasn’t.” (47 RT 9131.) Laci’ s brother Brent described Scott and Laci as follows: “Great relationship, very positive, happy, you know whatever Laci asked for Scott did, she appreciated him and . . . he appreciated her.” (47 RT 9229-9230.) Brent had never seen Scott “get even remotely violent” with Laci. (7 RT 9277.) When Detective Grogan asked Brent whether he thought Scott could have hurt Laci, Brent unequivocally answered “no.” (47 RT 9229.)

11. Laci and Scott’s friends agreed. Laci’s childhood friend Stacy Boyers “thought the world of Scott.” (54 RT 10523.) Scott and Laci’s friend Greg Reed considered Scott and Laci to have a “great relationship” and had never heard a negative comment from either of them about their relationship. (75 RT 14440.)

f. Amber Frey reports having an affair with Scott.

1. On December 30, 2002, Amber Frey called the Modesto Police and reported that she was having an affair with Scott. (59 RT 11481.)

2. Amber and Scott first talked via telephone sometime in

November 2002 and first met on November 20, 2002. (76 RT 14554, 14561.) They spent time together again on December 2, 2002. (76 RT 14587-14590.) Amber's young daughter Ayiana accompanied them. (76 RT 14592.) Scott stayed the night at Amber's house and they saw each other the following evening as well. (76 RT 14600-14601.) Scott told Amber that he had never been married and did not have any children. (7 6 RT 14610-14611.)

3. They next saw each other on December 9. (76 RT 14614.) Scott admitted he had been married but lied and told her he had lost his wife. (76 RT 14619-14620.) Scott had also told Shawn Sibley – a woman he had met through work and who introduced him to Amber – that he had "lost" his soul mate. (60 RT 11711.) Scott and Amber next saw each other on December 11, 2002 and attended a birthday party together. (76 RT 14627-14628.) They last saw each other on December 14, 2002. (76 RT 14639.) Amber told police this was the last time she had seen Scott. (59 RT 11477-11478.) She had spoken with him by telephone since, including on the night of a candlelight vigil in honor of Laci. (59 RT 11477-11478; 76 RT 14687.) During one of his earlier calls, Scott told her that he would be in Maine for Christmas and then in Europe for the New Year. (76 RT 14688.)

4. After Amber contacted police, she taped all subsequent calls between herself and Scott. (76 RT 14719.) Police told Laci' s family about the affair. (57 RT 11179.) At the same time, police falsely told Laci's family that Scott had recently taken out a life insurance policy on Laci for $250,000. (57RT11167-11169, 11173-

11176, 11179.) Despite its falsity, the life insurance policy was also widely reported in the media. (57 RT 11173-11176.) After news of the affair and the alleged recent life insurance policy came to light, Laci' s family and friends stopped · supporting Scott. (47 RT 9144-9145; 57 RT 11177.)

g. Scott is arrested and charged with murder.

1. Several months later on April 13, 2003, the body of Conner Peterson was discovered on the shore of San Francisco Bay, nearly one mile north of Brooks Island where Scott had been fishing on December 24, 2002. (61 RT 11871, 11880; 84 RT 15934.) The next day, the body of Laci Peterson was found on the shore nearly two miles northeast of Brooks Island, and east of where Conner's body washed ashore. (61 RT 11990, 11993; 84 RT 15934.)

2. Up until this point, Scott had never been convicted of a felony or a misdemeanor, nor had he ever even been arrested. (96 RT 18118, 18157.) He had no prior criminal record of any kind. (96 RT 18118, 18157.) There was no history of domestic violence. (96 RT 18157.) Nor was there any evidence at all that Scott had a violent nature. (96 RT 18157.) To the contrary, despite an extensive police investigation into his past, law enforcement could not find anyone who had ever even had a physical fight with Scott. (96 RT 18157.) As noted, Scott and Laci's friends and family had never even heard him raise his voice with Laci let alone do anything "that would even remotely be characterized as harming [her]." (46 RT 8912-8913 see also 46 RT 9063; 47 RT

9277.)

3. There was no cause of death. There was no murder weapon. There was no confession. Nevertheless, on April 18, 2003, Scott was arrested and charged with the capital murders of his wife and child. (87 RT 16581.)[8]

4. As noted above, the state's theory was that Scott killed

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[8] At the time of his arrest, Scott was staying in San Diego where his family lived. (95 RT 17976.) When he was arrested on April 18, 2003, Scott was carrying his brother's driver's license, a credit card belonging to his sister Ann Bird, $14,932 in cash and some camping equipment. (95 RT 17997; 102 RT 19095-19096, 19106-19107.) His hair and goatee had been "bleached." (99 RT 18620.) The state would later rely on this evidence to argue that Scott was about to flee the country. (109 RT 20313-20315.)

In fact, however, there was a far less nefarious explanation. Lee Peterson, Scott's father, testified that he and Scott were meeting to play golf that day. (107 RT 19997-19999.) Scott was carrying his brother's driver's license that day so that he could get a local's discount at the golf course. (107 RT 19997, 19999.) Police confirmed that, in fact, Lee Peterson had scheduled a tee time for four people that morning and there was a local's discount. (102 RT 19111, 19150.) And Scott's mother Jackie Peterson explained that she had accidentally withdrawn $10,000 from Scott's account (which she was a joint account holder on) and when the error was discovered she had given Scott the money to deposit back into the account. (107 RT 19969-19972.) The remaining money was from the recent sale of Scott's truck to his brother. (107 RT 19970-19971.)

As for fleeing the country, Scott had already taken a work-related trip to Mexico in February 2003 – when he was under suspicion for murder – and had returned to the United States. (94 RT 17811; 95 RT 17990.) When he was contacted by police at the parking lot, he did not insist on Miranda rights, he did not refuse to speak with police and he did not flee; instead, his first question was "have they found my wife and son?" (95 RT 18006.)

Laci in their home between the night of December 23 and the morning of December 24. (109 RT 20319.) Absent any evidence on the cause of death, the state theorized that Scott suffocated Laci. (109 RT 20200.) According to the state, Scott put the leash on McKenzi and let him loose in the neighborhood so that it would appear that Laci had been abducted while she walked the dog. (109 RT 20202.) Then Scott moved the body to his Modesto warehouse by putting it in the toolbox in the back of his truck. (109 RT 20202-20203.) At the warehouse, Scott then attached homemade cement anchors to the body and placed it in the back of his 14-foot boat which he then towed to the Berkeley Marina. (109 RT 20203-20204.) Finally, the state claimed, when he got to the marina he launched the boat and, once on the bay, he pushed the body (with the anchors) overboard. (109 RT 20203-20204.) As for motive, the state's theory was that Scott committed the crime either for financial reasons or to obtain freedom from Laci and Conner. (109 RT 20209.)[9] The defense theory, of course, was that Scott had no motive at all to kill Laci, and did not do so. (110 RT 20376.)

2. The State's Guilt/Innocence Phase Evidence And Theories As To The Crime, And The Facts Revealed By

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[9] Veteran district attorney investigator Steve Jacobson had a very different view from his colleagues. Mr. Jacobson was an investigator with the Stanislaus district attorney for 13 years. (80 RT 15360~15361.) Before that, he was a police officer with the Modesto, Oakdale and Waterford police departments. Based on the evidence, Jacobson believed this crime could not have been committed by one person. (81RT15483-15484.)

Post-conviction Investigation.

a. Evidence as to where and how the crime occurred.

1. As noted above, after hearing all the state's evidence, the trial court itself concluded that the state had failed to present any evidence showing "how this crime was committed" or "where this crime was committed." (108 RT 20163.) Despite the court's observation, the state nevertheless theorized Scott killed Laci at their home.

2. But there was no physical evidence to support this theory. According to detectives Skeltety and Hendee, despite thorough searches of the home lasting numerous days – and begun on the same day Laci went missing – police found *nothing* suggesting a crime occurred there. (57 RT 11164-11165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) No blood, urine, or tissue of any kind was found at the house. (57 RT 11164-11165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) Officer Letsinger noted there were no signs of "foul play" at the Peterson home. (50 RT 9832.) Nor did Karen Servas – the Peterson's next door neighbor – hear screams or other suspicious noises coming from the house on the night of the 23rd or the morning of the 24th. (48 RT 9444-9448.) Finally, there were no defensive marks or wounds on Scott at all. (64 RT 12452.)

3. Even the potential evidence police found had no connection at all to Laci's disappearance. As noted above, Officer Letsinger testified that when the Peterson home was first

searched he found two mops and a bucket sitting just outside the home which he thought were "suspicious." (50 RT 9787, 9817.) The state's theory was that Scott used the mops and bucket to clean up after the killing. (109 RT 20242.) But contrary to the state's position, the state's own criminalist Pin Kyo admitted that nothing of evidentiary value was found on the mops or bucket; neither blood, nor tissue, nor anything that supported the state's theory that Scott used it to clean up a crime scene. (89 RT 17015.)

4. Moreover, the state's theory as to how the crime occurred involved Scott smothering Laci. (109 RT 20200.) Despite advancing this theory, detective Grogan himself admitted that although the state had collected pillowcases at the scene, it had elected not to test even a single one. (100 RT 18786-18787.) And state criminalist Kyo added that the state did not test any of the pillows either. (90 RT 17139-17142.) Thus, Detective Grogan conceded that there was no "evidence . . . that shows smothering, strangulation, or asphyxiation." (100 RT 18787.)

5. The state next theorized that Scott used his truck to take the body to his warehouse. (109 RT 20202.) Once there, he transferred the body into his boat, hiding it under a tarp. (109 RT 20203.) To support this part of its theory, the state offered demonstrative evidence that Kim Fulbright – a pregnant woman who worked for the prosecutor's office – could fit into the toolbox in the back of Scott's truck as well as the boat. (62 RT 12173, 12186, 12192.) But according to Detective Hendee and state criminalist Kyo there was a more immediate problem with this part of the state's theory: Scott's truck contained no evidence that

it had been used to transport a body. (67 RT 12946-12952, 12959-12960, 12963-12965; 90 RT 17149-17156.) There was no blood, urine, or other tissue found in his truck or toolbox. (67 RT 12946-12452, 12959-12960, 12963-12965; 90 RT 17149-17156.) None of Laci's hair was in his truck or toolbox. (67 RT 12956-12958; 70 RT 13687.) The tarps found in the back of Scott's truck – which the state theorized Scott used to wrap the body in – a contained no relevant evidence whatsoever. (66 RT 12876.) There was no blood, urine or other tissue found on either tarp. (66 RT 12876.) Nor was there any evidence that a body had been at the warehouse. (66 RT 12881-12891.)

6. But the state did have evidence of concrete dust on Scott's trailer. (67 RT 13062-13063; *see* People's Exhibits 122B-G.) There was one homemade anchor found inside the boat. (67 RT 13060.) The previous owner had kept his anchor when he sold Scott the boat. (62 RT 12161.) The prosecution relied heavily on the notion that Scott's trailer had been used to pour additional circular concrete anchors, as evidenced by what the prosecutor perceived to be circular spaces on the trailer bed in the midst of concrete rubble. (109 RT 20214-20215.) According to the prosecutor, this was evidence that Scott made five concrete anchors, four of which were used to weigh down the body and submerge it in the bay. (109 RT 20214-20215, 20312.)

7. As discussed more fully below, the state searched the bay for weeks and weeks looking for the anchors but found nothing. (64 RT 12644-12645; 65 RT 12709-12710, 12779, 12786-12787; 66 RT 12813-12825, 12837.) Police used dive boats, sonar,

a special underwater search vehicle and specialized dive teams from the FBI, Contra Costa County, Marin County and San Francisco County. (64 RT 12644-12645; 65 RT 12786-12787; 66 RT 12819-12820.) Because they found nothing at all, the state was left with pictures of concrete dust to prove that five anchors had been made.

8. Rather than rely on prose descriptions of the photographs of the concrete dust, the actual exhibits given to the jury are the best indicator of the "strength" of this evidence. (See People's Exhibits 122-A – 122-1.) The supposed circular spaces the prosecution claimed to see on the trailer bed are not distinctive, and it is difficult to make out any circles at all in the photographs – they simply depict a collection of concrete detritus.

9. But even if the record supported the state's theory as to the concrete "anchors," that theory was puzzling for another reason as well. If the state's theory was right, then Scott meticulously cleaned his home, truck and boat of any evidence tying him to the crime but left the mess from making the concrete anchors in plain view for police to find. This is even odder in light of the fact that Scott plainly had time to clean the warehouse if he had wanted to; as detectives Mansfield, Wall, and Grogan themselves conceded, Scott was at the warehouse for an hour that morning assembling a mortiser and surfing the internet. (61 RT 11841-11842; 83 RT 15759-15760; 93 RT 17655.)

10. Finally, the boat itself provided no corroboration for the state's theory. Yet again, according to state criminalist Kyo, there was no blood, urine, or other tissue found in the boat itself. (90

RT 17161-17162, 17164.) The only notable evidence was a hair fragment consistent with Laci's hair on a pair of pliers in the boat. (67 RT 12973.) The prosecutor relied on this evidence to argue that "these pliers were used in this crime." (109 RT 20309.)

11. But the forensic evidence simply did not support this position either. State expert Sarah Yoshida examined the pliers and testified that, based on their rusted appearance, the pliers had *not* recently been used. (86 RT 16467-16468.) Ms. Yoshida also confirmed not only that the pliers had no visible signs of blood or tissue, but that as with the pillows and pillowcases, the state had elected not to do any further testing on the pliers. (86 RT 16476-16477.) Moreover, Peggy O'Donnell and Rosemary Ruiz – two women who worked in the same warehouse as Scott – had both seen Laci at Scott's warehouse around December 20, 2002. (97 RT 18198-18199; 98 RT 18415-18417.) This testimony became significant when the state's own hair expert, Roy Oswalt, explained the concept of secondary transfer through which the hair fragment may have fallen in the boat at that time or been transferred from Scott to the boat (as Laci, when she became pregnant sometimes wore Scott's clothing). (70 RT 13688-13689; 56 RT 11015.)[10]

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[10] The transfer explanation became even more significant given the state's attempt to suppress it. Scott told Detective Grogan that Laci had been to the warehouse. (98 RT 18418.) O'Donnell and Ruiz confirmed these statements; according to Detective Grogan, they told Officer Holmes that Laci had recently been to the warehouse and knew about the boat. (98 RT 18415-18419.) Detective Brocchini excised this important evidence from

12. The last part of the state's theory was that Scott pushed Laci's anchor-laden body off his small boat alone without capsizing. But as Detective Grogan admitted during cross-examination, during its investigation of this case the prosecution decided "not to try to attempt to push an – either a body or a weight out of the boat . . . . " (99 RT 18599.)

13. The defense did offer such evidence, seeking to introduce videotaped evidence of a demonstration it had performed. (104 RT 19371.) The defense obtained the same make and model as Scott's boat and performed a demonstration near Brooks Island where the state theorized Laci's body had been pushed overboard. (104 RT 193 71, 1940 l, 19404.) The demonstration involved a mannequin the exact weight of Laci – 153 pounds – which was weighted down with four anchors and a person weighted down so that he was the same weight as Scott. (62 RT 12186; 104 RT 19371, 19404-19405.) The demonstration was done at the same time of day as the state theorized Scott had disposed of the body – 12:30 to 1:00 p.m. – and it was filmed. (104 RT 19404-19405.) The boat capsized. (104 RT 19401.) The state objected to the evidence, and the trial court excluded it. (104 RT 19402-19403, 19406-19407.)[11]

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his report. (57 RT 11195.)

[11] The unfairness of this ruling is accentuated by the fact that the trial court admitted similar demonstrative evidence proffered by the state: evidence that Kim Fulbright – a pregnant woman who worked for the prosecutor's office – could fit into the toolbox in the back of Scott's truck as well as the boat. (62 RT 12173, 12186, 12192.)

b. Evidence as to when the crime occurred.

1) The date of the crime.

1. As noted, the state initially theorized that Scott killed Laci on the night of December 23 or the early morning hours of December 24. In closing argument, however, the prosecutor conceded that based the evidence, he could not prove when the crime occurred. (109 RT 20200.) Despite this "concession," the evidence plainly suggested that Laci was *not* killed on December 23.

2. Computer records from the Peterson's home computer show that someone was on the internet between 8:40 a.m. and 8:45 a.m. on the morning of December 24, looking at a garden weathervane, a GAP pro fleece scarf and a sunflower umbrella stand. (83 RT 15752-15756, 15816.) While it is certainly conceivable that Scott was looking for these items, it seems far more likely that Laci was searching for them – as several prosecution witnesses noted, Laci had a sunflower tattoo. (*See, e.g.*, 45 RT 8701, 8708; 46 RT 8988.)

Moreover, the importance of the lack of evidence on the stability of the boat was not lost on the jury. On the third day of jury deliberations, jurors asked if they could see the boat. (111 RT 20640-20642.) The court permitted this. (111 RT 20640-20642.) During the examination, several jurors asked if they could sit in the boat. (111RT20643.) Once in the boat, several jurors stood up and began to rock the boat back and forth testing its stability. (111 RT 20643-20644.) The boat was sitting on a trailer in a garage, (111 RT 20643), certainly a more stable location than when it was floating on the bay.

3. Police also found Laci's curling iron out on the bathroom counter. (50 RT 9819.) Margarita Nava – who cleaned the Peterson's home on the 23rd – confirmed that when she cleaned it then she put away everything on the bathroom counter. (44 RT 8660, 8681.) Though Laci conceivably could have used the curling iron to curl her hair just before going to sleep on December 23, the more rational explanation for the presence of the curling iron on the counter on the 24th is that Laci curled her hair with it that morning, undercutting any suggestion that Laci was killed on December 23.

4. Moreover, when Laci's body was found in April 2003, she was wearing tan pants. (69 RT 13498-13499.) But Amy Rocha recalled that on the night of December 23, Laci was wearing a black blouse with cream polka dots or little flowers and cream-colored pants. (45 RT 8846-8847.) Amy later saw these clothes at Laci' s house when she did a walk through with police. (46 RT 8918-8919.) Thus, if Laci was killed on the 23rd, it meant that someone had changed her clothes after her death.

5. Thus, though the prosecutor admitted that he could not prove when the crime occurred – after claiming throughout the trial that it happened on the evening of December 23 or the morning of December 24 – the prosecutor's "concession" obscured the reality that the evidence in fact suggests that Laci affirmatively was *not* killed on December 23, but instead the crime occurred on December 24 or later.

6. The date of December 24 is significant, and explains the prosecutor's attempt to include December 23 as a possible

date for the crime. Sometime after 10:30 on the morning of December 24, 2002, the Medina house across the street from Laci and Scott was burglarized. (49 RT 9590-9597, 9604.) Steven Todd was arrested for the Medina burglary. (52 RT 10177.) According to a declaration which the state itself prepared, several weeks after Laci's disappearance, Lieutenant Xavier Aponte – a guard at the California Rehabilitation Center in Norco, California – reported a call he had monitored between inmate Shawn Tenbrink and his brother Adam Tenbrink. During the call, Adam said his friend Steven Todd admitted Laci saw him burglarizing the Medina home on December 24, 2002. (20 CT 6433-6434.) Aponte said he taped this conversation, but then "lost" the tape. (20 CT 6434, 6435.)

7. Moreover, neighbor Diane Jackson reported to Sergeant Ed Steele that she had witnessed the Medina burglary on Covena Avenue on December 24. (99 RT 18562-18563.) She described seeing three men outside the home removing a safe. (52 RT 1-316-10317; 99 RT 18563.) A safe was in fact stolen from the Medina home, thus corroborating Jackson's report. Jackson also saw a van parked on the street in front of the house. (99 RT 18566.) Jackson described it as "an older model . . . tan or light brown." (99 RT 18567.) Sergeant Cloward also received a call from Tom Harshman reporting that on December 28, 2002, he saw a woman fitting Laci' s description urinating by the side of the road next to a van and then being pushed into the van. (99

RT 18670-18671.)[12]

8. It was also notable that around the time of Laci's disappearance she owned an expensive Croton watch inherited from her grandmother. (45 RT 8871; 53 RT 10409 10432; 94 RT 17809; 97 RT 18182.) Although the watch was never found in Laci's belongings after she disappeared, a Croton watch was pawned at a pawnshop in Modesto on December 31, 2002 -several days after she went missing. (53 RT 10467, 10469-10470.) The pawnshop slip included a thumb print of the person who pawned the item. (53 RT 10467, l 0469-i04 70.) The print did not belong to Scott. (53 RT 10467, 10469-10470.) The state, however, never sought the watch itself and the defense was unable to recover it because the pawnshop owner did not comply with the subpoena compelling its production and the person who bought the watch refused to sell it. (106 RT 19702.)

2) The time of the crime.

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[12] As noted, Jackson reported to police the burglary occurred on December 24. (99 RT 18562-18563.) This was consistent with the Medinas leaving for Southern California that morning. (49 RT 9590.) When Todd was interviewed by Officer Hicks, he lied and said the burglary was on December 27. (107 RT 20022.) After Hicks told Todd that the Medinas arrived home on December 26, Todd changed his statement and said the burglary was on December 26. (107 RT 20018-20019.) However, this was unlikely as well; by December 26, police and the media were already present at the Peterson home directly across from the Medina home, providing multiple witnesses – including police witnesses – to any attempt to burglarize the home across the street from the Peterson home. (46 RT 9017-9119; 57 RT 11166.)

1. As discussed above, the time of the crime ultimately became the critical disputed issue at trial. The state's theory was that Laci was killed before Scott left for Berkeley. The defense theory was that Laci was still alive when Scott left the house that morning. The state has never disputed that if, in fact, Laci was at home and alive after Scott left that morning, Scott is innocent.

2. In an effort to undercut the defense theory, the state offered evidence that if Scott was telling the truth – and Laci was alive when he left the house – there was only a ten-minute window for Laci to have been abducted by someone else. The state's theory was relatively simple and depended on two pieces of evidence.

3. First, the state sought to determine a time by which Scott left the house. Of course, Scott told police that he left home after seeing a meringue segment during the Martha Stewart Show. (100 RT 18769.) Martha Stewart discussed meringue at 9:48 a.m. (55 RT 10805-10806;100 RT 18769.) To try and prove Scott's departure time more precisely, the state presented testimony from Investigator Jacobson who reviewed Scott's cell phone records and corresponding cell site information. (81 RT 15383.)

4. These records showed that on December 24, 2002 at 10:08 a.m. Scott made a 1 minute and 21 second call which started at the 1250 Brighton cell tower and ended at the 10th and D cell tower. (91 RT 15383.) Several test calls by Jacobson showed that if Jacobson started a call in the Peterson driveway and drove towards Scott's warehouse the call would register on

the same cell towers as Scott's call had registered on the 24th. (81 RT 15387-15391.) So the state's theory was that at p. 10:08 – when this call was made – Scott began driving from his home to his warehouse. (109 RT 20226.)

5. The second piece of evidence on which the state relied was the testimony of Peterson neighbor Karen Servas. As noted above, Servas testified that she found McKenzi (the Peterson's dog) outside at p. 10:18 a.m. (48 RT 9422.)

6. In closing argument, the state relied on Servas' s testimony that she found McKenzi at p. 10:18 a.m. and argued that if Scott was telling the truth that Laci was alive when he left the house (at p. 10:08) – and Servas found McKenzi at p. 10: 18 – Laci would have to have been abducted in the ten-minute window between those two times. (109 RT 20226 [prosecutor argues that for Scott to be believed "[Laci] [gets] abducted . . . . the dog comes home and has to be found by Karen Servas, all in ten minutes, all in a ten minute window . . . . "].) This was even more unlikely, the prosecutor explained, because Scott said Laci was wearing black pants when he left home. (109 RT 20225.) Because Laci was ultimately found in tan pants, Laci would have had to change her pants in that l 0 minute window as well. (109 RT 20225-20226; 69 RT 13498-13499.) According to the prosecutor, there was simply not enough time for this to have happened; therefore, Scott Peterson was lying. (109 RT 20225-20226.)[13]

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[13] If the state was correct, of course, then Scott was lying about the color of Laci's pants. The state never offered any explanation as to why Scott would lie about the color of the pants

7. Evidence discovered during the habeas investigation, however, establishes that the state's timeline was simply wrong. Though he was unaware of its very existence, defense counsel has recently admitted that the prosecution provided him with a police report describing a December 27, 2002 interview with Russell Graybill. (Exhibit 4 [Declaration of Mark Geragos] at HCP-00032-34.) Graybill was the Petersons' postman, and he delivered mail to the Peterson home between 10:35 and 10:50 a.m. on December 24, 2002. (Exhibit 2 [Declaration of Russell Graybill] at HCP-000005-06; Exhibit 19 [Russell Graybill's Delivery Record].) Graybill knew the Petersons' dog, McKenzi, and explained to police (and has recently declared) that McKenzi would bark at him no matter where on the property the dog happened to be. (Exhibit 3 [Statement of Russell Graybill] at HCP-000008.) Whether the dog was in the front or back yards, or even inside the house, McKenzi would bark at Graybill. (Exh. 2 at HCP-000005.)

8. On December 27, 2002, Graybill told police that McKenzi did not bark at him on Christmas Eve. (Exh. 3.) Moreover, Graybill told police that the Petersons' gate was open when he showed up between 10:35 and 10:50 a.m. on Christmas Eve. (Exh. 3 at HCP-000008.) This was some 15 to 30 minutes *after* Servas had put the dog back into the yard and closed the gate, indicating Laci had gone on her walk after Servas put the dog away.

Laci was wearing.

9. This evidence is consistent with Servas's original statements to police. When first interviewed, Servas told police that when she put McKenzi into the backyard, she thought she heard Laci in the backyard gardening. (Exh. 1 at HCP-000001.) Coupled with Graybill's statements that the gate was open and McKenzi did not bark at him – as he always did – Servas' s statement tends to prove that Laci took the dog for a walk after Servas put him back into the backyard.

10. It was not unusual for McKenzi to escape. Indeed, Servas testified that she had found McKenzi out loose in the neighborhood on prior occasions. (48 RT 9481.) Other witnesses confirmed Servas' s testimony. Graybill himself recalled McKenzi being loose in the front of the house when he came to deliver mail on other days. (49 RT 9568.) Pool cleaner and prosecution witness Michael Imelia – who cleaned the Peterson's pool every week – testified that when he arrived each week, McKenzi was generally outside in the backyard. (53 RT I0447-10450.) Laci was usually in the house and would come out occasionally. (53 RT 10450-10451.) Police officers testified McKenzi was outside in the backyard on various dates when they came by the house. (48 RT 9362; 55 RT l0732.) Sharon Rocha testified that McKenzi spent significant time outside and only "occasionally" came inside the house. (46 RT 9049.)

11. In short, the evidence now conclusively shows (1) McKenzi spent significant time outside the house, both in the front and back yards while Laci was inside the house, (2) when Servas found McKenzi on at p. 10:18, the backyard gate was open

and it sounded to Servas as though Laci was gardening, and (3) when postman Russell Graybill delivered mail between 15 and 30 minutes after Servas had put the dog back and closed the gate, he observed that the gate was once again open and McKenzi did not bark, indicating the dog was gone. The state's suggestion that Servas's discovery of McKenzi outside the house at p. 10:18 meant that Laci had already been abducted or killed ascribes a significance to McKenzi's location that not only ignores Servas's testimony and statements to police, but the statements and testimony of Graybill as well.

12. Graybill's statements strongly suggested that Laci had taken McKenzi for a walk after Servas had put the dog back in the backyard. If this were true, the timeline was much, much longer than ten minutes as the prosecutor claimed. Instead, Laci could have been abducted anytime between 10: 18 a.m. (when Servas put the dog inside and drove away) and 5:15 p.m., when Scott returned home and found McKenzi with his leash on. While ten minutes may be a short window, much can – and did -happen in seven hours.

13. But the evidence that Laci disappeared after petitioner left to go fishing did not end with Graybill. Three witnesses who never testified could have also confirmed that Laci went for a walk with McKenzi after Servas found him on the street and returned him to the backyard.

14. First, there was Diane Campos. Campos worked as a custodian at Stanislaus County Hospital in Modesto, California. (Exhibit 12 [Declaration of Diana Campos] at HCP-000331.) On

December 24, 2002, she arrived to her 11:00 a.m. shift early at p. 9:50 a.m. (*Ibid*.) She immediately went to the outdoor table area at the back of the hospital to smoke a cigarette. (*Ibid*.) This area overlooks the Dry Creek trail. (*Ibid*.) Sometime around 10:45 a.m., a barking dog caught her attention. (*Id*. at p. 4.) Ms. Campos saw a "very pregnant woman" holding the dog's leash. (*Ibid*.) The dog looked like a golden retriever with a white marking down the front of his chest. (*Ibid*.) Ms. Campos noticed two men who looked homeless near her who told the woman to "shut the fucking dog up." (*Ibid*.)

15. Two days later on December 26, 2002, Ms. Campos saw a missing poster tor Laci Peterson at a Starbucks Coffee near the hospital. (*Id*. at HCP-000331.) She recognized Ms. Peterson as the woman who was walking her dog on December 24, 2002. (*Ibid*.) Ms. Campos was "sure it was the same woman." (*Id*. at HCP-000331, HCP-000332.) She called police the next day and was interviewed by Detective Owen of the Modesto Police Department. (See Exhibit 48 [Statement of Diane Campos].)

16. Then there was Frank Aguilar. Mr. Aguilar lived at p. 215 Covena Avenue in:Modesto, Caiifomia. (Exhibit 13 [Declaration of Frank Aguilar at HCP-000336.) On December 24, 2002l, Aguilar was driving with his wife, Martha, from their home up La Loma Avenue, away from Yosemite Blvd., and towards downtown Modesto. (*Ibid*.) As they were driving, they saw a pregnant woman walking towards them with a dog on a leash. (*Ibid*.) The woman was walking a mid-sized dog, like a long hair Labrador Retriever. (*Ibid*.) Mr. Aguilar is not sure of the

time, but it was between 9:30 and 11:00 a.m .. (*Ibid*.)

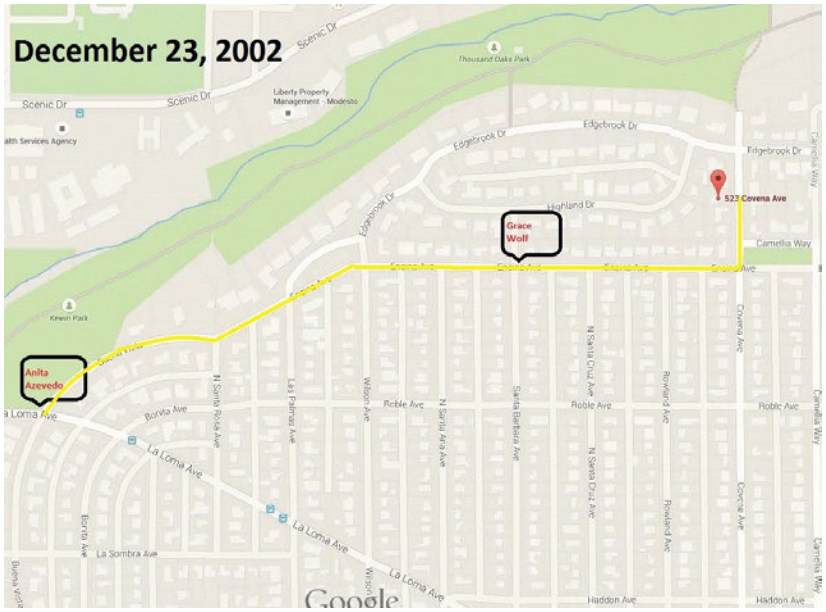
17. Sometime shortly after December 24, Mr. Aguilar learned from the news that Laci Peterson had gone missing and saw a photograph of her. (*Ibid*.) He realized that the photograph he had seen on the news was of the same woman he had seen walking the dog that morning. (*Id*. at HCP 000337.) Based on the photographs of Laci, Mr. Aguilar is sure that the woman he saw walking a dog on December 24, 2002, was Laci Peterson. (*Ibid*.)

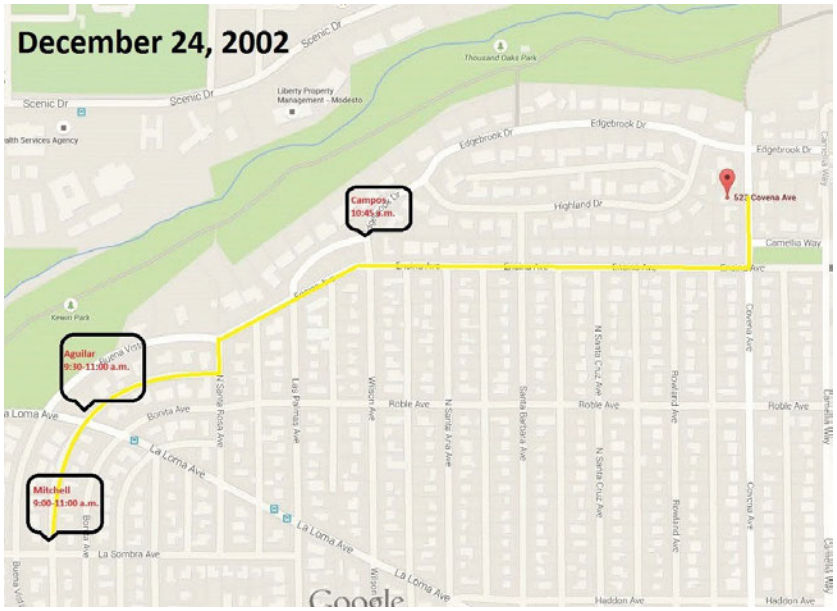
18. Finally, William Mitchell also saw Laci and Mckinzi on December 24, 2002. Mr. Mitchell was at home with his now-deceased wife, Vivian. Vivian was doing the dishes at the kitchen sink, which is at a window facing La Sornbra Ave. Vivian drew Mr. Mitchell's attention to a "beautiful lady . . . going by with a nice dog." (Exhibit 14 [Declaration of William Mitchell] at HCP-000340.) Mr. Mitchell looked out the living room window, but only caught a glimpse of the dog. The walker seemed to be headed toward La Lorna Avenue. The Mitchells had seen Laci walking her dog on several prior occasions. A neighbor across the street had also previously seen Laci walking the dog. The Mitchells told this neighbor about their sighting of Laci on Christmas Eve. (Id at HCP-000342.)

19. Additional evidence established that these three witnesses all saw Laci walking in an area near her house which was virtually identical to the route she had taken just the day before. Thus, Anita Azevedo saw Laci walking McKenzi on La Lorna and Encina Avenues on December 23, 2002. (Exhibit 15 [Declaration of Anita Azevedo] at HCP-000344.) Grace Wolf saw

Laci walking McKenzi the morning of December 23, 2002, also near her house. (Exhibit 16 [Declaration of Grace Wolf] at HCP-000346-47.)

20. The statements from these witnesses establish that Laci was seen on December 24, 2002 walking almost the identical route she had walked on December 23, 2002:





21. But even this is not all. As noted above, at the very hour Laci disappeared, Steven Todd was burglarizing the home of Rudy and Susan Medina. The Medina home was located at 516 Covena St., directly across the street from the Peterson's home. (49 RT 9590-9597, 9604.) Todd was later arrested and convicted of this burglary. (Exh. 30 [People v. Steven Wayne Todd, Reporter's Transcript of Change of Plea] at HCP-000424-25.) The evidence established that this burglary began sometime after the Medina's left their home that morning sometime before Diane Jackson drove past the home and observed the burglary. (See 49 RT 9590; 52 RT 1-316-10317; 99 RT 18563.)

22. Todd was interviewed by the defense team at the San Mateo County Jail on August 27, 2004, in the midst of trial. (Exh. 33 [Declaration of Carl Jensen] at HCP-000431.) When confronted with Diane Jackson's statements that she saw the safe on front lawn of the Medinas' home and a van parked in front of that home at p. 11:40 a.m. on December 24, 2002, Todd became "unglued." (*Ibid*.) Todd came out of his chair, put his hands on the table, and leaned over towards Jensen, yelling words to the effect of "You don't have a witness," and "You don't have a fucking thing!" (*Ibid*.) Indeed, a guard was so alarmed that she came and asked Jensen if he was okay. (*Ibid*.) Todd informed Jensen that he would invoke his Fifth Amendment rights if called to testify. Significantly, at this point Todd had already been convicted of the burglary.

23. On January 22, 2003, a corrections officer at CRC Norco, Lieutenant Xavier Aponte, recorded a phone call between

Steven Todd's friend, Adam Tenbrink, and Tenbrink's brother, Shawn. Lt Aponte immediately called the Modesto Police Department and informed it that Adam Tenbrink told his brother that Steven Todd admitted that Laci had seen him breaking into the Medina's home. (Exhibit 28 [Hotline Telephone Log].)

24. Of course, if Steven Todd saw Laci alive while he was burglarizing the Medina home on December 24, 2002, then there is reasonable doubt as to Scott's guilt. Scott left home to go fishing at p. 10:08 a.m. Todd's burglary would have been committed after the Medinas left their home at p. 10:35 a.m. Diana Jackson saw evidence of the burglary at p. 11:40 a.m. Thus, Todd would have seen Laci alive in Modesto more than an hour after Scott left the house.

c. Evidence as to why the crime occurred.

1. In criminal cases, the state need not prove motive in order to convict. But in this case; the state nevertheless sought to explain why a man with no prior criminal history nor history of domestic violence would suddenly kill his wife and unborn child.

2. As the prosecutor explained to the jury in closing arguments, the state's theory with respect to motive was three-fold: (I) Scott killed Laci for financial reasons, (2) Scott killed Laci because he did not want to be a father, and (3) Scott killed Laci because he wanted freedom to pursue other relationships. (109 RT 20206, 20208-20209, 20242, 20300-20302.) As noted, the defense theory was that Scott had no motive at all to kill Laci, and did not do so. (110 RT 20376.)

3. To support its financial-motive theory, the state presented evidence from Gary Nienhius. Nienhius was an internal auditor for the City of Modesto who was asked by the state to review the Peterson's financial records. (73 RT 13960, 13974.) Based on the financial statements provided by the state, Nienhius concluded that 70% of Scott's income went to fixed debt of credit card bills, mortgages and car loans. (73 RT 13977.) This did not include food, gas, or utilities. (73 RT 13977.) One of Scott's credit card balances was $12,000. (73 RT 13979.) Moreover, by November of 2002, Scott was only at p. 23% of his yearly goal for TradeCorp. (73 RT 13994.) Nienhius admitted, however, that Scott always paid his credit card bills and car loan on time and many credit cards carried a zero balance. (73 RT 14003-14004, 14007.) The state relied on Nienhius's testimony to argue that Scott was not doing well financially, which was a possible motive for him to kill his wife. (109 RT 20300-20301.)

4. But a closer look at their finances showed that Scott and Laci typically spent less than they earned. (103 RT 19355-19356.) Certified public accountant Marty Laffer testified that a review of Scott and Laci's monthly income and expenses showed that they spent less than they earned each month. (103 RT 19339, 19355-19356.) In fact, he noted that they paid extra on their mortgage each month. (104 RT 19422.) Prosecution witness and TradeCorp accountant Jeff Coleman testified that Scott was set to receive a monthly raise from $5,000 to $5,300-$5,350 in January 2003. (73 RT 14112.) And the fact of the matter is that there would be no financial windfall to Scott from Laci's death.

Although Laci was set to inherit about $160,000 from the sale of her grandparents' home, she could not access the money until she turned 30 – which was three years after her death. (46 RT 8936-8938; 47 RT 9183.) And if she died before the age of 30 and had no living children, then the $160,000 went to her brother Brent and sister Amy; it did not pass to Scott. (47 RT 9215-9216.)

5. There was also a separate Rocha family trust worth 2.4 million dollars from the estate of Laci's grandfather. (103 RT 19357.) Under the terms of this trust, upon the death of Laci's grandfather the trust would be distributed to his t11ree grandchildren: Laci, Brent and Amy. (103 RT 19357.) As was the case with the money from the sale of her grandparents' house, however, if Laci died with no living children before the trust was distributed, her share went to Brent and Amy; it did not pass to Scott. (103 RT 19357.)

6. In light of this evidence, Laci's brother, Brent, acknowledged that there was "no financial motive" for Scott to kill Laci. (47 RT 9216.) Laci knew the provisions of the trust, and the state presented no evidence that she kept this information from Scott. (46 RT 8936-3938.) Moreover, the notion that Scott killed Laci because they were in dire financial straits is totally inconsistent with the fact that Scott paid her health insurance premium on December 23, 2002 – the day before she went missing. (110 RT 20342.)

7. With respect to life insurance, Brian Ullrich – a friend of Laci and Scott – testified that in 2001 he obtained his financial investors license. (71 RT 13802.) In April of that year, Brian gave

Scott and Laci a call to see if they were interested in financial planning. (71RT13802-13803.) At this meeting, Brian recommended that they each purchase a life insurance policy. (71RT13804-13805.) In April 2001, each purchased a policy for $250,000. (71RT13804-13805.) After Laci's disappearance, Scott never called Brian or his office asking about the life insurance money. (71 RT 13817-13818.)

8. Detective Brocchini himself did not think that the life insurance policy was any motive for Scott to kill Laci. (97 RT 18295-18296.)[14]

9. The state's second theory as to motive was that Scott did not want to be a father. (109 RT 20206.) This theory was primarily based on the testimony of Brent Rocha's wife Rose who recalled Scott once saying that he was kind of hoping for infertility and Amber Frey's testimony that Scott mentioned getting a vasectomy. (47 RT 9285; 76 RT 14674; 109 RT 20206.) Rose admitted, however, that Scott might have been joking. (47 RT 9295.) And Scott had not gotten a vasectomy. (76 RT 14674.) In fact, evidence from Brent Rocha, Eric Olson and Gary Reed

[14] Scott also explored selling the house and Laci's Land Rover and decided to sell Laci's car but not the house. (81RT15414-15415; 94 RT 17799-17800.) The state relied on this as evidence that Scott knew that Laci was not coming home. (109 RT 20247, 20266.) But as noted, the media frenzy at Scott's home was overwhelming. (47 RT 9142-9143; 48 RT 9526.) Scott explained to his sister Ann Bird that the locks on Laci's car had been damaged and he needed a truck for his business as his truck was still in the possession of police. (97 RT 18254.)

showed that Scott was looking forward to the arrival of the baby. Brent testified that Scott was "excited" to have a baby and that one of Scott's "goals" was to have a family. (47 RT 9228-9229.) Olson testified that Scott was "happy" about the pregnancy. (59 RT 11660.) Gregory Reed confirmed this; he had spoken with Scott many times about his having a baby and Scott seemed "excited." (75 RT 14436.) Reed's wife Kristen was pregnant at the same time as Laci and all four had taken a birthing class together. (75 RT 14433, 14435.) Reed recalled that during Laci's pregnancy, he and Scott had once looked through a hunting and fishing catalog at the children's clothing section and joked about how excited they were to buy their kids that type of clothing someday. (75 RT 14436.)

10. Finally, the state theorized that Scott killed Laci because he wanted the "freedom" to pursue other relationships, like the one he had started with Amber Frey. (109 RT 20208-20209.) At trial the state played numerous calls between Amber and Scott that Amber had taped. (See 76 RT 14720, 14721, 14722, 14724-14725; 77 RT 14758, 14759, 14763, 14767, 14770.) Of course, to the extent that it was children Scott was trying to escape, dating Amber was a curious choice since she had a young daughter who lived at home with her. (76 RT 14592.) Perhaps recognizing this, during closing arguments the prosecutor candidly admitted: "I don't think [Scott] killed Laci Peterson to go marry Amber Frey . . . " (109 RT 20209.

d. The state's response to Scott's defense that he

was fishing.

1. As noted, Scott told detectives that on December 24, 2002, he went to the Berkeley Marina to fish for sturgeon and try out his new boat. A forensic search of the Peterson computers confirmed the lead-up to the fishing trip.

2. On December 7, 2002 someone looked at boat classifieds on the computer. (75 RT 14352.) Indeed, Scott purchased his boat in the next day or two. (62 RT 12161.) Then, on the morning of December 8, 2002, around 8 a.m., and then again in the evening, there were numerous visits to web sites focusing on boating in the Bay Area and sturgeon fishing. (75 RT 14367-14368, 14370-14371, 14374-14380, 14395-14396, 14399-14404.) There were searches for "'sturgeon', 'fishing', 'tackle', 'San Francisco' and "ten tips for better sturgeon fishing." (75 RT 14399-14404.) Someone had viewed the State of California Fish and Game website, the 2002 Ocean Sport Fishing Regulations webpage, an archived fishing report that included a report from 2000 that sturgeon fishing was good in December, and a Marine Sport Fish Identification webpage on green sturgeon. (75 RT 14395-14399, 15682-15694.)[15]

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[15] Angelo Cuanang – an expert sturgeon fisherman – noted that he would not fish sturgeon with lures like the ones Scott had purchased. (71RT13747.) Cuanang admitted the equipment Scott had with him -while not what an expert fisherman such as himself would use – could certainly be used to catch sturgeon in the bay. (71 RT 13789.) He also noted that San Francisco Bay is a good place to catch sturgeon between December and March. (71 RT 13740, 13742.) Finally, Detective Brochini himself conceded he found a fishing tackle box filled with lures and other fishing

3. All of these searches were conducted from the Peterson's home laptop. (75 RT 14359.) One search on the computer referenced a website for the Real Time Current Velocity website (which showed information on the currents in San Francisco Bay). (75 RT 14473-14474.) The state theorized that Scott was looking at currents to determine where to put Laci's body. (109 RT 20212.)

4. But this theory too was undercut by the state's own experts. According to the state's computer expert Lydell Wall, the Petersons had dial-up internet access; because dial-up access can take a long time to load a website, before it is loaded someone may have already moved on to another website. (75 RT 14473-74.) According to Mr. Wall, before the Real Time Current Velocity website was even loaded and visible on the computer screen, *the person doing the search had already clicked on the fish and game website.* (75 RT 14473-14474.)[16]

5. The state's theory was that Scott had not gone fishing

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equipment in the boat (55 RT 10755), and Cuanang specifically agreed that some of these items could indeed be used to catch fish in the bay. (71RT13763-13764.)

[16] Even putting this aside, the state's fishing expert Angelo Cuanang independently undercut the state's position. Mr. Cuanang testified that the movement of water or currents is important in sturgeon fishing. (71 RT 13753.) Thus, even if the Real Time Current Velocity website had loaded and been examined, it was entirely consistent with someone who wanted to go sturgeon fishing. And the fact of the matter is that there was no evidence that anyone had tried to delete any searches or other information from any of the Peterson computers. (83 RT 15807.)

on Christmas Eve day but had traveled to the Berkeley Marina to put Laci's body in the bay. (109 RT 20235.) According to the state, all of Scott's prior internet research was directed at this goal. (109 RT 20234-20235.) As part of this theory, the prosecutor belittled the idea that anyone would travel 90 miles – the distance to Berkeley from Modesto and pass numerous other bodies of water – to fish. (109 RT 20214.) And that anyone would fish on Christmas Eve Day. (109 RT 20229.)

6. Ironically, the best response to this argument came from two prosecution witnesses: Laci's own stepfather, Ron Grantski and Detective Bertalotto. Bertalotto conceded that the Berkeley Marina was, in fact, the closest saltwater spot to fish from Modesto. (88 RT 16796.) And Grantski admitted not only that he too had gone fishing on Christmas Eve day for several hours, but that he went fishing around 12:30 p.m. – just like Scott. (47 RT 9109-9110, 9127.) Sharon described how Ron would often go fishing spur-of-the-moment, had gone fishing on holidays, and might only fish for a short period of time. (46 RT 9069.) Moreover, state fishing expert Cuanang admitted that he too (like Scott) had also traveled 90 mile distances to fish. (71RT13783.) Both Laci's mother Sharon and sister Amy knew that Scott liked to fish and Sharon recalled him talking about fishing trips he had taken with his father Lee Peterson. (46 RT 8932, 8978.) Ron recalled that Scott had been fishing around Thanksgiving. (47 RT 9128.) Finally, when police searched Scott's truck and warehouse, they found several 2-day fishing licenses from 1994, 1999, and August, 2002. (57 RT 11084-11085, 11088-

11092.)

7. The state relied on several other facts to support its theory that Scott had not driven to the marina to fish on the 24th; the fishing lures he bought at Big 5 were unopened, his new fishing pole was unassembled, and there was to rope attached to the anchor found in his boat. (109 RT 20214, 20234-20235, 20311.) With respect to each area the prosecutor was clear:

> "I don't know anyone who's ever caught a fish with a lure that's still in the package." (109 RT 20214.)
>
> "See how [the fishing pole is] apart? That's the way it was on December 24th in the defendant's boat. This pole wasn't even put together . . . . You're not going to catch a sturgeon on a rod that's not put together. (109 RT 20234-20235.)
>
> "Let's take a look at this anchor real quick . . . . [T]here is no rope on that [anchor] . . . [P]itch it over your boat? Well, of course it's gone, right? There is nothing that's going to hold your boat. This is not an anchor." (109 RT 20311-20312.)

8. Once again, the response to these theories came from the state's own witnesses. Detective Brocchini admitted that there was a tackle box containing lures in Scott's boat on the 24th. (55 RT 10755-10756.) So Scott plainly had numerous other lures with which to fish. This is important for two reasons. First, and most obvious, it directly responds to the prosecutor's theory that Scott was not really fishing because his lures were "still in the package." In fact, as with most fishermen, there were many lures which were available in the tackle box: Second, the state's

theory was that Scott bought the new lures to make it look like he was going fishing when – in fact – he never intended to fish. The presence of lures in the tackle box completely undercuts this theory as well; simply put, it makes no sense that Scott would buy new lures to support a fake fishing alibi when he already had lures in his tackle box. Moreover, someone who went to the trouble of buying lures to make it *look* like he had gone fishing would certainly have taken the next, less onerous step of opening the package to strengthen the ruse.

9. The state's reliance on the unassembled fishing rod, and the absence of a rope on the anchor when the boat was searched, are equally suspect. In fact, Detective Hendee found two fishing rods in the boat; one was unassembled, and the second was assembled. (64 RT 12542-12543, 12545.) And Detective Brocchini admitted there *was* a 6-foot rope in the boat which could have been attached and then removed from the anchor. (55 RT 10766-10767.) Significantly, as internet research would have shown, the depth of the water near Brooks Island was only three to six feet. (101RT18902-18903.)[17]

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[17] The state also presented evidence that Scott told several people he had gone golfing that day rather than fishing. According to Harvey Kempell – whose wife Gwen was friends with Laci – on the night of December 24, Scott told him that he had been golfing that day. (48 RT 9362.) But that same night when Gwen asked Scott where he had been that day he told her and others that he had been fishing. (48 RT 9371; 50 RT 9796; 9867,) And although Harvey spoke with police that night, he did not mention that Scott said he had been golfing. (48 RT 9376.) Peterson neighbor Amie Krigbaum also said that when Scott –

e. Expert testimony introduced by the state to support its theory regarding the recovery of Laci's and Conner's bodies

Finally, the state relied on three additional different kinds of expert testimony to support its theory of the case: (1) expert testimony on dog scent evidence, (2) expert testimony about fetal development and (3) expert testimony about the movement of bodies in water.

1) Dog scent evidence.

1. Though Laci Peterson's body, and the body of her unborn child, were discovered in San Francisco Bay, the state had no direct evidence that she was killed in the Peterson's Modesto home or transported by truck to the marina. The state sought to fill this evidentiary void with dog scent evidence. Over defense objection, the state introduced dog scent evidence collected at the Berkeley Marina.

2. On December 28, 2002, Eloise Anderson brought her trailing dog Trimble to the Berkeley Marina. (84 RT 16075.) With respect to Trimble's track record for successfully following scent trails, Anderson admitted that Trimble "does make mistakes when you ask her to perform trailing exercises." (8 RT 1490-1491, 1495-1496, 1497-1500, 1500-1507, 1548.) For example, in 2001

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who was "very upset" and "distraught" – came looking for Laci in the neighborhood that night he said he had been golfing all day. (48 RT 9510, 9523.)

Trimble ran two *contact trails* (where the dog trails someone who has actually made physical contact with the ground, such as by running) where she had failed to trail correctly. (8 RT 1549-1550.) And as to *vehicle trails* (where the dog trails someone who has *not* made contact with the ground, such as a person in a car) her record was bleak. Trimble had attempted three vehicle trails and failed two of them. (8 RT 1541-1542; 85 RT 16145-16147.)

3. Nevertheless, the state introduced a vehicle trail performed by Trimble. Using sunglasses that had been removed from Laci's purse, Anderson provided Trimble with Laci's scent. Anderson chose to use the sunglasses even though she knew that the purse had also been handled by Scott. (8 RT 1552; 84 RT 16082.) After scenting Trimble with the sunglasses, Trimble gave no indication of scent at several locations at the marina until she explored the vegetation near an entrance to the boat ramp. (84 RT 16079.) According to Anderson, Trimble alerted at the end of the pier on the west side of the boat ramp. (84 RT 16075-16080, 16085.)

4. Anderson and Trimble were not the only team police called to search at the Berkeley Marina. Ron Seitz, whose dog was also certified by CARDA, was called to search the marina. (105 RT 19603.) Seitz used one of Laci's slippers to scent his dog. (105 RT 19608.) He specifically chose the slipper as opposed to the sunglasses to avoid "cross-contamination" of scent. (105 RT 19608.) Indeed, in sharp contrast to the sunglasses used by Anderson to scent Trimble, there was no evidence at all suggesting that Scott had handled the slipper. And in contrast to

Anderson's dog, Seitz's dog did *not* detect Laci's scent at the Berkeley Marina. (105 RT 19611-19614.)

5. During closing argument, the prosecutor told the jury that if it believed Trimble detected Laci's scent at the pier, it established Mr. Peterson's guilt of capital murder," as simple as that." (111 RT 20534.)

6. Evidenced developed in post-conviction investigation showed that Scott's defense counsel had consulted with – a but then inexplicably failed to introduce testimony from – expert canine search trainer Andrew Rebmann. (Exh. 4 [Declaration of Mark Geragos] at HCP-000025-30.) Rebmann informed counsel that (1) non-contact searches are impossible, but even assuming they are possible, Trimble lacked the necessary training, (2) the search was unreliable because it occurred four days later, (3) Anderson failed to employ adequate controls to ensure Trimble was not smelling Scott instead of Laci, and (4) Seitz's inability to replicate the results strongly indicated a false alert. (Exh. 5 [Declaration of Andrew Rebmann] at HCP 000037-40.)

7. Despite the availability of this powerful evidence, defense counsel inexcusably elected not to call Rebmann to testify at the Evidence Code section 402 hearing counsel requested on the dog scent evidence (Exh. 4 at HCP-000026-29), despite the fact that Rebmann was actually present in court (Exh. 5 at HCP-000042; Exh. 21 [Receipt for Rebmann's Hotel Stay, March 2, 2004] at HCP 000375.). Defense counsel has since declared that he miscalculated, mistakenly believing the trial court would exclude this evidence even without hearing from an expert. (Exh.

4 at HCP-000028.)

8. Defense counsel's miscalculations with respect to the dog scent evidence continued at trial. Thus, counsel elected to cross-examine the state's expert Eloise Anderson in lieu of calling Rebmann – or any other expert – to testify. (*Id*. at HCP-000029-30.) This was true even though Rebmann was prepared to testify as to various factors relating to the unreliability of the dog scent evidence in this case. (See Exh. 5 at HCP-000040-42.) And indeed, defense counsel himself recognized prior to trial that "Mr. Rebmann's testimony is necessary and critical to this case." (Exh. 22 [July 22, 2004 Pen. Code, § 987.9 Application] at HCP-000389.) Recognizing the import of Rebmann's proposed testimony, the trial court approved $7,500 for his expert fees prior to trial. (Exh. 23 [July 29, 2004 Order on Pen. Code,§ 987.9 Application] at HCP-000404.)

9. Still, defense counsel never called Rebmann to testify. The jury's verdicts reveal this was yet another error. The jury, having never heard from any expert witness that the dog scent evidence was unreliable, convicted petitioner and sentenced him to death.

10. But the critique of the state's testimony in this area is not limited to Rebmann. Dr. Lawrence Myers is an associate professor in the College of Veterinary Medicine at Auburn University in Alabama. (Exh. 6 [Declaration of Lawrence Myers] at HCP-000043.) Professor Myers is a world-renowned expert on canine scent detection, and has authored over 50 articles and book chapters on canine scent detection. (*Id*. at HCP-000043-44.)

11. Professor Myers reviewed Trimble's training records, Anderson's pretrial and trial testimony, photographs of the boat launch area at the Marina (Exh. 24), and the trial court's pretrial ruling on the admissibility of the evidence. (*Id*. at HCP-000044, HCP-000045.) Dr. Myers has concluded that Anderson's claim that Trimble detected Laci Peterson's scent at the Berkeley Marina on December 28, 2002, is completely unreliable, and would have appeared completely unreliable to any expert adequately trained in the field of canine scent detection. (*Id*. at HCP- 000045.) Indeed, Dr. Myers would have testified that the searching protocols employed by Anderson in this case were virtually guaranteed to produce an unreliable result. (*Id*. at HCP-000048.)

2) Fetal development evidence.

1. In an effort to support its theory that Laci was killed on December 23 – and thus Scott was the only possible killer – the state presented testimony from Greggory Devore, M.D., a doctor who specialized in high-risk obstetrics and maternal-fetal medicine. (95 RT 17855.) Dr. Devore was contacted by the Modesto Police and asked to review the Conner's fetal records to determine his age at death. (95 RT 17861.) Dr. Devore reviewed two ultrasound examinations and Conner's femur bone. (95 RT 17861, 17868.) Using "an equation by [Dr. Phillipe] Jeanty." an expert in fetal biometry, Dr. Devore estimated that Conner died on December 23, 2002. (95 RT 17881, 17883.) Dr. Devore admitted that this was an estimation and Conner may have died a day or two before or after this date. (95 RT 17887 .) But Conner

could not have died day or two before the 23rd (since Laci had been seen by her sister on December 23) and if he had died two days after the 23rd, Scott could not have been the killer.

2. The defense responded to this testimony with a remarkably unqualified expert of their own. Defense counsel consulted with and called Dr. Charles March – a fertility doctor – to testify about fetal biometry. (Exh. 4 at HCP-000019-21.) It did not go well. Dr. March admitted he was not an expert in this field. (106 RT 19843.) Nonetheless, Dr. March purported to similarly rely on formulas by the leading expert, Dr. Phillipe Jeanty, and testified that Conner's measurements in fact placed his time of death no earlier than December 27, 2002. (106 RT 19780.) During cross-examination, however, March admitted to relying on a statement Laci apparently made to a friend in order to determine her precise date of conception. (106 RT 19795-19811.)

3. The habeas corpus investigation revealed critical information in this regard. No one at trial sought to contact Dr. Jeanty, on whose formula Dr. Devore relied. Subsequently discovered evidence from Dr. Phillipe Jeanty establishes that both the state's and Petitioner's experts were wrong. Dr. Jeanty has declared that Dr. Devore applied the wrong formula in the wrong manner to the wrong bones and – not surprisingly – came up with the wrong results. (Exhibit 7 [Declaration of Phillipe Jeanty] at HCP-000050-61.)

4. The formula Dr. Devore used came from an article co-written by Dr. Jeanty, himself. Indeed, Dr. Devore cited Dr.

Jeanty in his report, which was provided to the defense on February 19, 2004. (See Exhibit 25 [Report of Greggory R. Devore] at HCP-000410.) Dr. Jeanty's formula was based on a *cross-sectional* study of babies and is used to estimate gestational age *when the last menstrual period is unknown*. (Exh. 7 at HCP-000059-60.)

5. According to Dr. Jeanty, however, the formula Dr. Devore used is not designed to be used in any situation in which the last menstrual period *is* known. In that situation, there is a more accurate approach to estimating age which uses a very different formula – also developed by Dr. Jeanty -based on a *longitudinal* study where the timing of the last menstrual period before pregnancy is actually known. (*Id*. at HCP-000060.) Dr. Jeanty was clear: no competent fetal biometrist would use the formula on which Dr. Devore relied, since the timing Laci's last menstrual period *was* known. (*Id*. at HCP-000061.)

6. Using the correct formula, and assuming Conner was growing at a constant rate, the femur would grow to the observed length in 238 days (not the 232 days that Dr. Devore estimated). (Exh. 7 at HCP-000056.) This means that Conner died on December 30, 2002. (*Ibid*.)[18]

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[18] If Conner was growing slower than normal, the femur would have grown to the observed length in 249 days, which would have meant that Conner died on January 10, 2003. If Conner was growing faster than normal, the femur would have grown to the observed length in 225 days, which would have meant that Conner died on December 17, 2002. (*Ibid*.)

7. In addition to using the wrong formula, Dr. Devore also improperly elected to apply the formula to only one bone. (Exh. 7 at HCP-000062-63.) This too was a mistake. In the very article on which Dr. Devore relied, Dr. Jeanty stated that "using more than one bone allows us to have more confidence in the GA [gestational age] obtained" and "use of the length of two or more bones is often necessary to find out which gestational age is more likely." (*Id*.; Exh. 25 at HCP-000410.) The article further states that "it is generally agreed in the field of fetal biometry that it is more accurate to use the mean or average measurements of more than one long bone to determine gestational age. Thus, where there are measurements for the femur, humerus and tibia, a more accurate gestational age can be derived by averaging the gestational ages based on the measurements of each bone." (Exh. 7 at HCP-000059.)

8. Dr. Jeanty applied the correct formula to measurements of the tibia. (Exh. 7 at HCP-000062.) Once again, assuming Conner was growing at a constant rate, the tibia would grow to the observed length in 244 days, which meant that Conner died on January 5, 2003. (*Id*. at HCP-000057-58.)

9. Dr. Jeanty applied the correct formula to measurements of the humerus. Once again, assuming Conner was growing at a constant rate, humerus would grow to the observed length in 244 days which also meant that Conner died on January 5, 2003. (Exh. 7 at HCP-000058.)

10. Averaging the three gestational ages he got from applying the correct formula to each of the three long bones, Dr.

Jeanty concluded that the gestational age was not 232 days as Devore estimated (using the wrong formula on a single bone) but 242 days (using the correct formula on all three bones). This meant that Conner died on January 3, 2003. (Exh. 7 at HCP-000059, HCP-000062.)

11. At the request of counsel for petitioner, Dr. Jeanty performed the following exercise: he applied the incorrect formula (the one Dr. Devore used) to both the tibia and humerus. Using this formula yields a calculation that both bones would have grown to the observed length in 242 days, which meant that Conner died on January 3, 2003. (*Id*. at p. 000062-63.)

12. In short, Dr. Devore inappropriately analyzed only one of the three long bones for which there were measurements. He then inappropriately applied the wrong formula to a single bone he selected, rather than three bones. Had he used the correct formula, and properly applied it to all the bones which should have been tested, his results would have squarely undercut the state's case. Had he used the incorrect formula, but properly applied it to all three long bones, Dr. Devore would also have reached a conclusion contrary to the state's theory. The jury never knew any of this.

13. Trial counsel recognized prior to trial the need to hire an expert to analyze and possibly impeach the results of Dr. Devore. Thus, counsel requested money for an expert to testify in this area. (Exh. 22 at HCP-000392.) According to counsel, expert testimony in this area would be "critical to the defense." (*Ibid*.) Recognizing the importance of this evidence, the trial court

approved more than $10,000 for this expert's fees. (Exh. 23 at HCP-000405.) But because defense counsel retained an unqualified fertility doctor – instead of the expert (Jeanty) relied on by the state's own expert (Devore) – the jury never learned that Devore's testimony was false.

14. Devore's false testimony was central to the jury's verdicts in this case. One juror described Devore's testimony as "indisputable." (Exh. 8 ["We the Jury"] at HCP-000219.) Another remarked that she "loved that guy (Devore). He did his research, all the way down to the bone." (*Ibid*.)

3) Evidence regarding the movement of bodies in water.

1. As noted, Scott told police that he went fishing on the day of Laci' s disappearance from the Berkeley Marina, driving his boat about two miles to the north, to a small island later identified as Brooks Island. (55 RT 10723-10726.) On April 13, 2003, the body of Conner Peterson was discovered in the shoreline area of Bayside Court in Richmond. (61 RT 11871, 11880.) The next day, Laci's body was discovered, washed ashore at Point Isabel in Richmond. (61 RT 11990, 11993.) Apart from the general proximity of Brooks Island and the points where the bodies washed ashore, there was no evidence connecting the bodies to the place where Scott was fishing.

2. To connect these two points, the prosecution relied on the testimony of hydrologist, Dr. Ralph Cheng. Dr. Cheng was a senior research hydrologist with the United States Geological Survey. (66 RT 12809-12813; 100 RT 18858.) Detective Hendee,

of the Modesto Police Department, asked Dr. Cheng if – based on where the bodies had been found and the tides and currents in the bay – Cheng could direct the police to a spot where there was a high probability that evidence related to the bodies could be found. (66 RT 12809.) Specifically, police were seeking to recover body parts of the victims or concrete weights they believed were used to anchor the bodies to the floor of the bay. (66 RT 12813.)

3. Dr. Cheng provided the police with a map which contained a "projected path" that Conner's body might have taken to the shore, and he pinpointed an area in the bay for the officers to search. (66 RT 12814, 12819-12820.) It was 500-1000 yards southwest of Brooks Island and in the approximate area where Scott said he was fishing on December 24. (55 RT 10725-10728; 66 RT 12814, 12819-12820.) Dr. Cheng could not produce a similar vector for Laci's body. (101 RT 18925.)

4. Beginning May 16, 2003, the police, with the help of teams of divers from the FBI, Contra Costa County, Marin County and San Francisco County, searched this "high probability area," with several boats equipped with sonar. (66 RT 12819-12820.) The boats covered the area with the sonar equipment and, if some object on the bottom was detected, the dive teams retrieved it. (66 RT 12823-12824.)

5. For the next seven days, numerous boats and three dive teams searched Dr. Cheng's high probability area. (66 RT 12822, 12823, 12826, 12828, 12829, 12829-12835, 12837.) They found nothing connected to the case. (66 RT 12824, 12827, 12828, 12829, 12835.)

6. The search of Dr. Cheng's high probability area continued in July. This time the police used a self-propelled search vehicle called a "REMUS," which stands for Remote Environmental Unit. (64 RT 12644.) Detective Hendee explained the REMUS's accuracy:

> So when you're done searching an area with REMUS, you can have a much higher degree of confidence that you found most of the items down there . . . .

(64 RT 12644-12645.)

7. Police searched with the REMUS from July 7 through July 13. (65 RT 12709.) They covered approximately 80% of an area that was much larger than Cheng's original high probability area (65 RT 12710), but still found nothing of relevance to Scott's case. (65 RT 12779.) Police searched the high probability area again in with dive boats equipped with sonar. And they searched again in April, 2004. Again – both times – they found nothing. (65 RT 12786-12787.)

8. The state called Dr. Cheng as an expert witness at trial to testify to his opinion that the bodies had been placed on the bay bottom near where Scott said he was fishing. In establishing his expertise, Dr. Cheng explained that as a Senior Research Hydrologist with the United States Geological Survey, his "particular assignment is [to] study of the movement of water in San Francisco Bay" as affected by currents and tides. (100 RT 18858:) On voir dire of his expertise by defense counsel, Dr. Cheng acknowledged that his work had never explored the movement of bodies in water or the bay. (100 RT 18865;

101RT18938.)

9. Dr. Cheng was then asked detailed questions about the movements of bodies in water, the precise subject he had admitted his studies did *not* involve. Dr. Cheng produced a "vector map," which charted the movement of Conner's body, hour by hour, in the days prior to April 13. (101 RT 18904, 18908-18911; Exh. 26 [Dr. Cheng's Vector Map].) Dr. Cheng's map shows the vector diagram and concludes that Conner's body migrated to Richmond (where it was found) from the high probability area near Brooks Island where Scott said he was fishing on December 24. (55 RT 10725-10728; 101RT18914.)[19] Dr. Cheng's vector map appears below:

10. Of course, this was the same "high probability" area that police had searched for more than two weeks with dive

[19] Dr. Cheng's vector map was admitted at trial as People's Exhibit 284.

teams, sonar equipment and the sophisticated REMUS machine without finding anything at all to connect Scott with the crime.

11. Significantly, however, Dr. Cheng could not reproduce the same trajectory for Laci's body. (101RT18925.) When asked for an explanation why he could not provide a vector diagram that showed how Laci's body ended up in Point Isabel, Dr. Cheng confessed that "[w]ell, I'm not – I'm not the expert in that area here. I don't know how the body is behaving in water." (*Ibid*.) Dr. Cheng admitted he had no experience at all with how bodies move in water:

> Q: You have never done any study in San Francisco Bay that has anything to do with bodies or things of that size, correct?
>
> A: That is correct.

(101 RT 18926.)

12. Despite Dr. Cheng's conceded lack of expertise in this area, the prosecutor relied heavily on his testimony, arguing to the jury in closing that if Dr. Cheng was believed, "then that man's a murderer. It's as simple as that." (109 RT 20279-20280.)

13. The jury deciding whether Scott was guilty of double murder, and whether he would live or die, did not hear the truth about the movement of bodies in water. Critical evidence regarding this subject – in which Dr. Cheng admittedly had no expertise – was developed during Petitioner's habeas investigation. As the attached declaration of Dr. Rusty A. Feagin, an expert in coastal ecology and the movement of bodies in bays and estuaries – and a new declaration from Dr. Cheng himself –

show, the jury was given inaccurate testimony about whether Conner's body could only have originated from the location where Petitioner had been fishing.[20]

14. Dr. Feagin is a tenured associate professor in the Department of Ecosystem Science and Management at Texas A&M University. His research has focused on the study of coastal ecosystems, hydrodynamics, geomorphology, erosion, and accretion dynamics on coasts (hurricanes, sea level rise, waves, tides); spatial analysis (GIS/GNSS/GPS/remote sensing); intertidal and nearshore environments (beaches, sand dunes, wetlands, estuaries); and coastal engineering. He has published approximately 40 peer reviewed articles on numerous topics related to bay and estuary ecology, including the movement of water, sediment and other substances in coastal areas. Dr. Feagin has previously testified as an expert in courts in Texas and Louisiana. (Exh. 9 [Declaration of Dr. Rusty A. Feagin] at HCP-000282-84.)

15. In stark contrast to Dr. Cheng, Dr. Feagin *is* an expert in the movement of bodies in water. (Compare Exh. 9 at HCP-000284 with 100 RT 18865, 18938; 101RT18925-18926.) For example, in a Louisiana murder case, Dr. Feagin testified

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[20] *In re Peterson*, California Supreme Court Case No. S230782, Claim Six, p. 154. Presentation of False Evidence, In Violation Of Due Process And Penal Code section 1473, By The State's Introduction Of False Evidence That The Bodies Of Laci And Conner Could Only Have Originated From The Area In Which Petitioner Said He Was Fishing.

regarding historical wind, tidal, flow dynamics to render an opinion on the movement of a body in the Pearl River Estuary. (Exh. 9 at HCP-000284.) Dr. Feagin examined all relevant environmental factors (including but not limited to winds, tides, circulation, topography and currents) and has concluded that the bodies of Laci and Conner could have originated from *three* distinct locations in San Francisco Bay: (1) from sites on the south and west of the recovery sites, (2) from sites near Point Portrero/Ford Channel north of Brooks Island, and (3) from sites that inflow to the bay from upstream in the tidal creek network. (Exh. 9 at HCP-000284-92.)

16. In addition to identifying three areas from which the bodies could have originated, Dr. Feagin also identified two very basic flaws in Dr. Cheng's analysis. First, although Dr. Cheng conceded he had no expertise in the movement of bodies in water, he testified to a "rule of thumb" that wind will move water at two to three percent of wind-speed. (100 RT 1882-1883; 101 RT 18926.) To the extent Dr. Cheng has assumed that bodies in water will move at the same speed as the water itself, he is wrong. (Exh. 9 at HCP-00029293.)

17. Second, Dr. Cheng described a wind of 40 knots occurring on April 12. (*Ibid*.) But data from the Richmond 9414863 gauge (NOAA 2013) shows sustained winds were below 25 knots maximum, with brief 'gusts' maxing out at 30 knots. (*Id*. at HCP-000294.)[21] Dr. Feagin's declaration thus makes clear that

[21] Dr. Feagin notes that the majority of the time winds were

two crucial factors in Cheng's analysis were simply wrong.

18. In short, the jury was presented with Dr. Cheng's theory that Conner's body migrated to Richmond (where it was found) from the high probability area near Brooks Island where Scott said he was fishing on December 24. In fact, however, this is only one of three entirely different scenarios which are all supported by the available evidence. With the data available, there is no scientifically reliable reason to prefer one scenario over the other. (Exh. 9 at HCP-000294-95.)

19. Indeed, Dr. Cheng himself has submitted a declaration agreeing that there were basic flaws in his testimony that were not explored at trial. (Exh. 10 at HCP-000327.) At trial, Dr. Cheng assumed that the bodies began moving on April 12 – the date of the storm – and used that assumption to reconstruct the vector path that Conner's body would have taken to get to the shore when it was discovered. (*Ibid*.) A chart showing this

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below 20 knots, with 25 knot gusts on the first half of April 12th. While the wind event on April 12 was significant, it was not the only significant wind event in the relevant time period. There was an equally strong wind event between March 26 and March 28, which actually lasted longer than the April 12 event. Dr. Feagin notes that Dr. Cheng relied heavily on the April 12 wind event to hypothesize that the bodies began floating toward shore as a result of that storm. But if the equally strong March wind event is also considered, as it must be, then it introduces other, earlier possibilities for when the bodies began moving. Such a possibility would be consistent with the second scenario, outlined above, in which the bodies originated from the area north of Brooks Island, near the Richmond harbor. (IHP Exh. 9 at HCP-000290-95.)

reconstruction was introduced at trial as People's Exhibit 284, and is attached to his-declaration as Attachment A. (*Ibid*.)

20. Dr. Cheng explains the significance of some of the assumptions he used in his testimony. According to Dr. Cheng, in his testimony he assumed that (1) the bodies began moving a particular time, during the storm on April 12-13, 2003, and (2) the bodies reached the shore on the dates they were discovered there. If the bodies began moving at a different time, or landed at an earlier time, the location in the bay where they began moving would have been different. (IHP Exh. 10 at HCP-000327.) In his declaration, Dr. Cheng admitted that in actuality, because it is impossible to know when the bodies started moving, or when they arrived at the shore and stopped moving, he cannot say how long the bodies traveled along the vector path he charted, either in terms of time or distance. For example, if the bodies began moving later than he assumed, or stopped moving earlier than he assumed, they would have been moving for a shorter time than he assumed, and they would have started at a different place along the vector path. (*Ibid*.) Thus, Dr. Cheng now admits that no one can pin-point with a high probability the starting location of the bodies' movements. (*See id*.)

21. Significantly, the vector path Dr. Cheng charted in his testimony extends from south of Brooks Island, all the way to the Richmond shore – a distance of approximately two miles. (Exh. 26.) In contrast to his trial testimony, it is Dr. Cheng's current opinion that the bodies could have been placed in the bay ***anywhere*** along that two-mile vector-path. (IHP Exh. 10 at

HCP-000327.)

22. Once again, defense counsel knew, or should have known, the importance of this evidence. Prior to trial, the prosecution disclosed an email from Dr. Cheng in which he explained his theory of how the bodies washed ashore. (IHP Exhibit 27 [E-mail from Ralph Cheng].) Importantly, Cheng also admitted to being unable to explain, under his theory, why or how Laci's body washed ashore where it did. (*Ibid*.) In the email, Cheng admitted his "estimates invoke large uncertainties." (*Ibid*.)

23. Defense counsel never consulted an expert to review Cheng's analysis or conclusions, and therefore the jury never heard of any evidence, which was readily available at the time of trial, undermining Cheng's testimony.

24. Additional facts supporting Petitioner's instant claims are included in the claims below.

V. SCOPE OF CLAIMS AND EVIDENTIARY BASES

The filing of this Petition does not constitute a waiver, express or implied, of any applicable privilege or protection including, but not limited to, the privilege against self-incrimination, the attorney-client communication privilege, and the work-product protection. *See* Cal. Evid. Code § 955; *Bittaker v. Woodford*, 331 F.3d 715 (2003); *People v. Ford*, 45 Cal.3d 431 (1988).

VI. CLAIMS FOR RELIEF

A. CLAIM ONE: Petitioner Was Deprived Of His Fifth, Sixth And Eighth Amendment Rights To A Fair And Impartial Jury By A Seated Juror's Misconduct And Bias

Petitioner's judgment of conviction and penalty have been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by a juror's misconduct and concealment of bias during voir dire.

This claim was raised in the initial habeas. (*See In re Peterson*, California Supreme Court Case No. S230782, Claim One, p. 96.). On October 14, 2020, the California Supreme Court issued an order to show cause why petitioner should not be granted relief related to this claim. After remanding to the superior court, an evidentiary hearing was held. The parties then submitted supplemental briefings. The court denied the habeas claim, finding that while juror misconduct had occurred, the state was able to rebut the presumption of bias. Petitioner disagrees with the superior court's finding and files this petition in part challenging that decision, relying on additional evidence and argument to the claim developed during the evidentiary hearing.

A juror who conceals relevant facts or gives false answers during the voir dire examination undermines the jury selection

process and commits misconduct, regardless of whether or not the juror intentionally provided false answers. Under state constitutional law, where, as here, a habeas petitioner has proved that a juror committed such misconduct, the petitioner is presumed to have suffered prejudice and must prevail unless the state is able to meet its heavy burden of rebutting the presumption by establishing that there is no substantial likelihood that the juror was actually biased against the defendant. In this case, the evidence developed at the evidentiary hearing on this claim makes clear that the state failed to meet that heavy burden and relief must be granted on this claim.

Moreover, under well-established United States Supreme Court precedent, where, as here, a petitioner establishes that a juror has failed to answer honestly a material question on voir dire and a correct response would have provided a valid basis for a challenge for cause, a defendant is denied his Sixth and Fourteenth Amendment rights to a fair and impartial jury and the effective assistance of counsel, and his Eighth Amendment right to reliable jury determinations.

To the extent that the state and federal constitutional standards differ, Petitioner has established his entitlement to relief on this claim under either standard. In support of this claim, petitioner alleges the following facts, among others to be presented after appointment of qualified counsel to represent Petitioner in these proceedings.

1. Applicable legal standards

1. As the California Supreme Court has recognized, "[t]he law concerning juror concealment is settled." (*In re Manriquez*, (2018) 5 Cal.5th 785 at p. 797.) In that vein, the Court has repeatedly noted "the general proposition that one accused of a crime has a constitutional right to a trial by impartial jurors." (*In re Hitchings* (1993) 6 Cal.4th 97, 110; accord *Manriquez*, supra, 5 Cal.5th at p. 797.) The Court has also recognized the direct relationship between a fair jury-selection process and the goal of obtaining an impartial jury. Thus, the jury selection process "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored," it enables "the trial judge . . . to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence," and it protects "the defendant's right to exercise peremptory challenges . . . . " (*Hitchings*, *supra*, 6 Cal.4th at p. 110, citing *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.)

2. But as both the United States and California Supreme Courts have observed, the ability of even the most well-intentioned jury-selection process to ensure an impartial jury depends "on prospective jurors answering truthfully when questioned." (*In re Boyette* (2013) 56 Cal.4th 866, 888; *Hitchings*, *supra*, 6 Cal.4th at p. 111; see *McDonough Power Equip. v. Greenwood* (1984) 464 U.S. 548, 554.) Both courts have agreed that a juror's false answers during jury selection directly undercut the ability of the parties to exercise both for-cause and peremptory challenges. (*Boyette*, *supra*, 56 Cal.4th at p. 889;

McDonough, *supra*, 464 U.S. at p. 554.)

3. And while the relationship between for-cause challenges – which remove jurors who cannot be impartial – and the mandate of ensuring an impartial jury is obvious, peremptory challenges are just as directly related to that essential mandate. "[T]he peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury." (*Boyette*, *supra*, 56 Cal.4th at p. 889.) As a result, "[t]he necessity of truthful answers by prospective jurors if [the jury selection process] is to serve its purpose is obvious." (*McDonough, supra*, 464 U.S. at p. 554.)

4. In accord with these authorities, "a juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*Hitchings*, *supra*, 6 Cal.4th at p. 111.)

5. Even unintentionally false answers given by prospective jurors during jury selection constitute misconduct. (*Manriquez*, *supra*, 5 Cal.5th at p. 797; *Boyette*, *supra*, 56 Cal.4th at p. 889.)

6. In the habeas context, it is the petitioner's burden to prove the existence of juror misconduct. A habeas petitioner must carry this burden by a preponderance of the evidence. (*In re Gay* (2020) 8 Cal.5th 1059, 1072.) The petitioner carries this burden by proving that a prospective juror has "conceal[ed] relevant facts or give[n] false answers during the voir dire examination . . . . " (*Manriquez*, *supra*, 5 Cal.5that p. 797.)

7. Once a court determines a juror has engaged in misconduct by providing false answers during the jury selection

process, be it intentionally or unintentionally, a defendant is presumed to have suffered prejudice and "[i]t is for the prosecutor to rebut the presumption by establishing there is 'no substantial likelihood that one or more jurors were actually biased against the defendant.'" (*Manriquez*, *supra*, 5 Cal.5th at p. 797, quoting *People v. Weatherton* (2014) 59 Cal.4th 589, 600.) The Court has described the prosecutor's burden in this context as a "heavy" burden. (*In re Stankewitz* (1985) 40 Cal.3d 391, 402.)

8. As the Court summarized in *Manriquez*, the ultimate question for this Court is whether there is a substantial likelihood that the juror was actually biased:

> [A] habeas corpus petitioner bears the initial burden of showing that a juror did not disclose requested material information. If such a nondisclosure is shown, a presumption of prejudice arises. An intentional concealment is strong proof of prejudice, while a showing that the nondisclosure was unintentional may rebut the presumption of prejudice. Whether any nondisclosure was intentional is not dispositive; an unintentional nondisclosure may mask actual bias, while an intentional nondisclosure may be for reasons unrelated to bias. The ultimate question remains whether petitioner was tried by a jury where a substantial likelihood exists that a juror was actually biased against petitioner.

(*Manriquez*, *supra*, 5 Cal.5th at p. 798.)

9. "Actual bias" is "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality,

and without prejudice to the substantial rights of any party." (*People v. Nesler* (1997) 16 Cal.4th 561, 581 quoting Code Civ. Proc., § 225, subd. (b)(1)(C).)

10. In sum, once a petitioner establishes that false answers were given, and juror misconduct has occurred, there are two inquiries. First, were the false answers intentional? Second, if not, did the false answers nevertheless mask actual bias?

11. There are a number of California decisions addressing the question of intentionality in connection with the same type of juror misconduct/concealment as is involved here – a juror's failure to disclose (1) prior involvement in other legal proceedings and (2) the fact that she has previously been both a victim of and witness to prior crimes. (See, e.g., *Manriquez*, *supra*, 5 Cal.5th 785 [addressing juror's failure to disclose that she was a victim of abuse as a child]; *In re Cowan* (2018) 5 Cal.5th 235 [juror fails to disclose prior involvement with the criminal justice system]; *People v. San Nicolas* (2004) 34 Cal.4th 614 [juror fails to disclose both that he was a victim of a stabbing and his prior involvement with criminal justice system]; *People v. Blackwell* (1987) 191 Cal.App.3d 925 [juror fails to disclose that she had been a victim of domestic violence]; *People v. Diaz* (1984) 152 Cal.App.3d 926 [juror did not reveal that she had been the victim of an assault with a knife].) These decisions articulate a number of specific, common-sense factors courts look at in determining whether the state has carried its burden of showing that the false answers were not intentional, and that the presumption of prejudice has therefore been rebutted.

12. Thus, although our Supreme Court has recognized that "an unintentional nondisclosure may mask actual bias," one factor courts look at is whether the juror's nondisclosure was intentional. (*Manriquez*, *supra*, 5 Cal.5th at p. 798.) "An intentional concealment is strong proof of prejudice, while a showing that the nondisclosure was unintentional may rebut the presumption of prejudice." (*Ibid.*)

13. In determining whether a juror intentionally concealed certain information, the juror's post-trial conduct is relevant. Where the juror voluntarily comes forward to reveal the previously undisclosed information and cooperates with the court and parties in addressing the issue, courts will generally find the non-disclosure unintentional. (See, e.g., *Manriquez*, *supra*, 5 Cal.5th at pp. 794, 801, 804; *San Nicolas*, *supra*, 34 Cal.4th at pp. 643, 646.)

14. Courts also examine whether information the juror knew during the jury selection process should reasonably have alerted the juror to the importance of the non-disclosed information. (*See Manriquez, supra*, 5 Cal.5th at p. 809; *Blackwell, supra*, 191 Cal.App.3d at p. 929.)

15. Finally, in *Boyette*, the Supreme Court counseled that in assessing whether the presumption of prejudice had been rebutted, a reviewing court should consider not just the specific nature of the misconduct itself (discussed above in the context of the *Manriquez* factors) but "the surrounding circumstances." (*Boyette, supra*, 56 Cal.4th at p. 890.)

16. In addition to these specific factors, courts assessing

whether a nondisclosure was intentional also look at the reasons given by the juror for failing to disclose the information. Courts may find a non-disclosure to have been inadvertent when a juror credibly provides a reason for the non-disclosure. (*Manriquez*, *supra*, 5 Cal.5th at p. 806; *Cowan, supra*, 5 Cal.5th at pp. 244-246.) In assessing the credibility of a juror's testimony (as with any witness) the starting point is Evidence Code section 780. That section provides that in determining the credibility of a witness a factfinder should consider any matter that has any tendency in reason to prove or disprove the truthfulness of her testimony, including but not limited to any of the following:

> (a) [Her] demeanor while testifying and the manner in which [s]he testifies.
>
> (b) The character of [her] testimony.
>
> (c) The extent of [her] capacity to perceive, to recollect, or to communicate any matter about which [she] testifies.
>
> (d) The extent of [her] opportunity to perceive any matter about which [she] testifies.
>
> (e) [Her] character for honesty or veracity or their opposites.
>
> (f) The existence or nonexistence of a bias, interest, or other motive.
>
> (g) A statement previously made by [her] that is consistent with [her] testimony at the hearing.
>
> (h) A statement made by [her] that is inconsistent with any part of [her] testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by [her].

(j) [Her] attitude toward the action in which [she] testifies or toward the giving of testimony.

(k) [Her] admission of untruthfulness.

17. In addition to section 780, the factors listed in jury instructions related to assessing the credibility of witnesses, CALCRIM No. 226 and CALJIC No. 2.20, are also relevant. For example, CALJIC No. 2.20 provides that in assessing the credibility of a witness the factfinder should consider "a statement [previously] made by the witness that is [consistent] [or] [inconsistent] with [his][her] testimony," "[a]n admission by the witness of untruthfulness" and "[t]he character of the witness for honesty or truthfulness or their opposites." (See generally *People v. Ayala* (2000) 23 Cal.4th 225, 271 [evidence that a witness has lied under oath on another occasion is directly relevant to the witness's credibility].)

18. In almost identical terms, CALCRIM No. 226 also requires consideration of the witness's "character for truthfulness," whether the witness has "[made] a statement in the past that is . . . inconsistent with his or her testimony," and whether she has "admit[ted] to being untruthful." CALCRIM No. 226 conveys the common-sense principle of considering "[h]ow reasonable is the testimony when you consider all the other evidence in the case," while CALJIC No. 2.20 suggests the same idea in considering "the character and quality of [the] testimony."

19. As noted above, the California Supreme Court has held

that a juror's unintentionally false answer on the juror questionnaire, that is an innocent mistake, can require relief if it masks a substantial likelihood of actual bias. (*Manriquez*, *supra*, 5 Cal.5th at p. 798 citing *In re Hamilton* (1999) 20 Cal.4th 273, 300.) This occurs when juror concealment, even if unintentional, "reflects a state of mind that 'would prevent a person from acting impartially.'" (*San Nicolas, supra*, 34 Cal.4th at p. 646 quoting *People v. Jackson* (1985) 168 Cal.App.3d 700.)

2. Factual allegations supporting this claim

The facts and allegations set forth in all other portions of this petition are incorporated by this reference as if fully set forth herein to avoid unnecessary duplication of facts.

a. Juror Richelle Nice's Answers About Her Financial Condition During Jury Selection And During Her Contemporaneous Child Support Applications.

1. Ms. Nice was called for jury duty in Petitioner's case. On March 9, 2004, under penalty of perjury, she filled out a jury questionnaire. (Evidentiary Hearing (EH) Exhibit 4 at p. 20.) She did not seek a hardship discharge. (*Id.* at p. 21.) She told the court and both parties she was living with her four children and her "significant other." (*Id.* at pp. 4-5.)

2. Roughly two weeks later, on March 26, 2004, and again under penalty of perjury, Ms. Nice filled out an Income and Expense Declaration for a child support action also in San Mateo Superior Court. (EH Exhibit 16 at pp. 1-3.) In that declaration, Ms. Nice told the court that the only people living with her were her four children. (*Id.* at p. 3.)

3. Roughly two weeks after that, on April 12, 2004, Ms. Nice appeared for voir dire. When the trial judge asked if her employer would pay her salary during the (estimated) five months of trial, she explained that although she would only be paid for two weeks, she was willing to sit for five months as a juror. (EH 23 RT 4598-4599.)[22] Under oath, Ms. Nice told the court and both parties that she had "talked about it" with her "family" – in particular her "significant other" who was living with her – and he had agreed to "carry the [financial] load." (EH 23 RT 4600, 4610, 4627.)

4. Five days later, and again under penalty of perjury, Ms. Nice filled out another Income and Expense Declaration for a different child support action in San Mateo Superior Court. (EH Exhibit 16 at pp. 9-11.) In that declaration, Ms. Nice once again told the court that the only people living with her with her four children. (*Id.* at p. 11.)

b. Ms. Nice Provided False Answers To Questions 54 And 74 on Her Jury Questionnaire.

2. Question 54a of the jury questionnaire asked prospective jurors "[h]ave you ever been involved in a lawsuit (other than divorce proceedings)?" (EH Exhibit 4 at p. 9.) Question 54b asked, if the answer to 54a was yes, whether the

[22] Citations to "RT EH" refer to the post trial Evidentiary Hearing on juror misconduct. The transcripts for that hearing are attached to this petition as Exhibit A, and the exhibits for that hearing are attached to this petition as Exhibit B." Petitioner will provide Evidentiary Hearing briefing at the court's request.

prospective juror was a plaintiff, the defendant or both. (*Id*. at p. 10.) Ms. Nice answered no to question 54a and left question 54b blank. (Id. at pp. 9-10.)

3. Question 74 asked "[h]ave you, or any member of your family, or close friends, ever been the VICTIM or WITNESS to any crime?" (*Id*. at p. 14.) Ms. Nice answered no to question 74. (*Ibid*.)

c. Lawsuits Involving Marcella Kinsey.

1. In November 2000, Ms. Nice filed a "Petition for Injunction Prohibiting Harassment" against Marcella Kinsey. (EH Exhibit 1 at p. 7.) At the time, Ms. Kinsey was the ex-girlfriend of Eddie Whiteside, a man Ms. Nice was dating. (*Ibid*.)[23] Ms. Nice filled out a complaint seeking an injunction prohibiting harassment against Ms. Kinsey and filed it in San Mateo Superior Court. (*Id*. at p. 7.) She filled out the form herself, without aid of counsel. (EH Exhibit 10 at ¶ 21.) In the form, Ms. Nice identifies herself as the plaintiff at least 16 times. (*See* EH Exhibit 1 at pp. 2, 5, 6, 8, 12, 13.)

2. Because Ms. Nice was "about five months pregnant" in November 2000, she sought protection for "Richelle J. Nice & unborn child." (*Id*. at pp. 7, 11.) In her written complaint, Ms.

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[23] There is a slight ambiguity in the record. In her November 2000 lawsuit, Ms. Nice claimed that Mr. Whiteside was her ex-boyfriend at the time of the Marcella Kinsey incident, though he was at her home when the incident occurred. (EH Exhibit 1 at p. 7.) During her 2022 evidentiary hearing testimony, Ms. Nice referenced Mr. Whiteside as her boyfriend at the time. (Reporter's Transcript Evidentiary Hearing (EH RT) 60.)

Nice made a number of factual allegations in support of her request for a restraining order. (*Id*. at pp. 7-11.) She "declare[d] under penalty of perjury under the laws of the State of California that the foregoing is true and correct." (*Id*. at p. 9.) In seeking a restraining order, Ms. Nice alleged:

- Ms. Kinsey "threatened to commit acts of violence against plaintiff[s]." (*Id*. at p. 7.)

- Ms. Kinsey "committed acts of violence against plaintiff[s]." (*Ibid*.)

- On September 23, 2000, Ms. Kinsey came to her (Ms. Nice's) home, screaming for Eddie Whiteside and Ms. Nice to come outside. (*Id*. at p. 11.)

- Mr. Whiteside's car was outside the home; Ms. Kinsey slashed the tires on the car. (*Id*. at p. 11.)

- Ms. Kinsey sprayed Mr. Whiteside with mace. (*Ibid*.)

- Moments later, Ms. Kinsey "kicked in the front door to Richelle's house." (*Ibid*.)

- Weeks later, after Ms. Nice moved to a different home, Ms. Kinsey "found out where Richelle lives," found out Ms. Nice's new telephone number, and followed Ms. Nice in her car to Ms. Nice's workplace. (*Ibid*.)

- In a subsequent telephone call, Ms. Kinsey said she "knew where she [Ms. Nice] lives and would not come there but she would handle it on the streets." (*Ibid*.)

3. Because of these incidents, Ms. Nice advised the court that she "feel's [sic] like [Ms. Kinsey] would try to hurt the baby, with all the hate and anger she has for Richelle." (*Ibid*.) Ms. Nice was "in fear for her unborn child." (*Ibid*.)

12. On December 13, 2000, Ms. Nice testified before San Mateo County Superior Court Judge Rosemary Pfeiffer in support of her request for a restraining order. (*Id*. at p. 4; RT EH 42.) Her testimony was "sworn." (*Ibid*.) Although there is no longer any transcript of that hearing, at the time of the hearing California Code of Civil Procedure section 527.6, subdivision (d) (now subsection (i)) provided that in order to grant a restraining order Judge Pfeiffer was required to find "by clear and convincing evidence that unlawful harassment exists."[24]

13. Judge Pfeiffer found clear and convincing evidence of unlawful harassment and issued a restraining order protecting "Richelle Nice & unborn child" for three years. (EH Exhibit 1 at p. 2.) She ordered Ms. Kinsey "to stay at least 100 yards away," from "Richelle Nice & unborn child" and "have no contact in person, by phone or mail." (*Id*. at pp. 2, 4.)

14. After the restraining order litigation, Ms. Nice filed a second lawsuit against Ms. Kinsey. In her 2022 evidentiary hearing testimony, Ms. Nice admitted that this lawsuit was filed in Santa Clara County. (RT EH 42.) Ms. Nice recalled filling out

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[24] California Code of Civil Procedure section 527.6, subdivision (b) (now subdivision (b)(3)) defined harassment as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner."

the paperwork, filing the complaint in the Superior Court and, later, going to court to dismiss the lawsuit. (RT EH 30, 42-43, 291.) Ms. Nice explained that this was a civil lawsuit for "lost wages and a number of other things." (RT EH 42-43.) Ms. Nice knew this was a lawsuit for money. (RT EH 291.)

d. The November 2001 Domestic Violence Incident

1. On the evening of November 2, 2001, East Palo Alto Police Officer Alan Corpuz arrested Eddie Whiteside for a violation of Penal Code section 273.5, subdivision (a) – corporal injury to a spouse or cohabitant. (EH Exhibit 8 at p. 3; RT EH 501-502.) Officer Corpuz prepared a police report that same night. (EH Exhibit 8 at p. 3.; RT EH 502.) According to Officer Corpuz, Richelle Nice was the victim, and her mother was a witness. (EH Exhibit 23; RT EH 505.)

2. Based on information Officer Corpuz obtained, Mr. Whiteside was criminally charged with several counts of domestic violence against Ms. Nice, including (1) corporal injury on a spouse/cohabitant in violation of Penal Code section 273.5, subdivision (a); (2) battery on a former girlfriend in violation of section 243, subdivision (e); and (3) simple battery in violation of section 242. (EH Exhibit 2 at p. 2.) Mr. Whiteside was also charged with (1) false imprisonment in violation of section 236 and (2) endangering the health of a child in violation of section 273A, subdivision (b). (*Ibid*.)

3. Ultimately, Mr. Whiteside pled no contest to the battery charge and the remaining charges were dismissed. (*Id*. at p. 11.) The court placed Mr. Whiteside on 18 months' probation,

ordered him to serve 10 days in county jail, and required completion of at least 104 hours of domestic violence counseling within a year. (*Id*. at pp. 9-10.) The court also precluded Mr. Whiteside from having any contact with, or coming within 100 yards of, "Richelle NIQ, Baby Doe." (*Id*. at pp. 7-8.)

e. The Initial Petition and Ms. Nice's Explanations for her Jury Questionnaire Answers

1. After Petitioner filed the Petition alleging juror misconduct in 2015, Ms. Nice formally offered explanations for her juror questionnaire answers on two separate occasions. First, in December 2020, with the aid of counsel, Ms. Nice prepared a sworn declaration, which Respondent used in support of its Return to the Petition. Second, Ms. Nice testified at the 2022 evidentiary hearing.

2. Within weeks of the Supreme Court's October 2020 Order to Show Cause, Ms. Nice hired attorney Negad Zaky. (RT EH 218, 573.) Mr. Zaky prepared a declaration for Ms. Nice and provided it to the District Attorney. (RT EH 588.) As to question 54, Ms. Nice explained she did not disclose her involvement in the November 2000 lawsuit against Ms. Kinsey as a result of misunderstanding the question; the lawsuit did not "cross her mind" because she believed "the word 'lawsuit' to mean and refer to a suit for money or property." (EH Exhibit 10 at ¶¶ 10, 18.) Ms. Nice added that she read questions 54a and 54b "together because they were labeled as being part of the same question," and in answering question 54a, she considered whether she ever been a plaintiff. (EH Exhibit 10 at ¶¶ 7-8.) Believing she "had

never been a plaintiff," she answered question 54a "no." (*Id*. at ¶ 8.)

3. As to question 74, Ms. Nice explained why she did not disclose having been a victim of any crime. As to the Marcella Kinsey incident in 2000, Ms. Nice explained (1) because she "did not participate in any criminal proceedings, [she] did not consider [herself] a victim of a crime," and (2) she "did not consider the circumstances leading to the [restraining order] as a crime;" instead, these were "[m]inor indignities . . . [which] do not . . . cause me to feel 'victimized' the way the law might define that term." (*Id*. at ¶¶ 22-24.) As for the November 2001 domestic violence incident with Mr. Whiteside, Ms. Nice said she "did not consider Mr. Whiteside's behavior a crime." (*Id*. at ¶ 27.) Ms. Nice's 2020 declaration did not address why she did not reveal having been a witness to "any crime," or that her significant other (Mr. Whiteside) had been the victim of a crime (the tire slashing). (*Id*. at ¶¶ 1-34.)

f. Ms. Nice's explanations in her 2022 evidentiary hearing testimony.

1. Ms. Nice was the main witness at the 2022 evidentiary hearing. By the time of the hearing Ms. Nice had hired a second lawyer, and she refused to testify based on her privilege against self-incrimination. (RT EH 20.) Ultimately, she did testify, but only after being given immunity in exchange for her testimony. (RT EH 21.) In her testimony at the evidentiary hearing, Ms. Nice addressed her answers to questions 54 and 74.

2. Ms. Nice testified that she did not reveal the November

2000 restraining order lawsuit because she believed that a lawsuit had to involve a suit for money. (RT EH 278, 290.) She did not reveal the separate civil lawsuit for money damages because she had dismissed it. (RT EH 30, 94.)

3. As relevant here, question 74 had two components, each with two parts, asking if (1) Ms. Nice herself had been the victim of or a witness to any crime and (2) Ms. Nice had a close friend that had been the victim of witness to any crime. Ms. Nice offered no explanation for why she did not reveal that Ms. Kinsey had slashed Mr. Whiteside's tires, who, according to her jury questionnaire, was Ms. Nice's significant other. Similarly, she offered no explanation for why she did not reveal that she was a witness to Ms. Kinsey's acts in kicking in her front door or stalking her. (See RT EH 65.)

4. As to the Marcella Kinsey incident, Ms. Nice offered three reasons why she did not reveal that she had ever been the victim of "any crime." First, she did not consider herself a victim of any crimes during this incident because she did not participate in a criminal proceeding against Ms. Kinsey. (RT EH 55, 281.) Second, any crimes that Ms. Kinsey committed were against the landlord and Mr. Whiteside, not her. (RT EH 56 [the tire slashing "wasn't a crime against me."]; 257-258 [the door that Kinsey kicked in was "the landlord's"], 258 [the tires that were slashed "weren't mine"].) Third, Ms. Nice simply did not consider herself a victim. (RT EH 59.) Contrary to what she said under oath in 2000 ("[I] feel[] like [Ms. Kinsey] would try to hurt the baby, with all the hate and anger she has for Richelle"), Ms. Nice

now swore that she never had any fear for her baby's life. (RT EH 52.) Instead, Ms. Kinsey's conduct fell under the category of "minor indignities," which she defined as situations involving "shoving matches, raising of voices, and other undignified means of communication." (RT EH 58-59.)

5. As to the Eddie Whiteside incident, Ms. Nice testified that she never was a victim of domestic violence. Ms. Nice testified that on the evening of November 2, 2001, she and Mr. Whiteside argued, "probably" about his cheating on her with other women. (RT EH 201.) She was holding her infant son at the time; she handed the baby to her mother, then went into the bedroom with Mr. Whiteside, closing the door. (RT EH 70, 72.) She punched him. (RT EH 71.) He did not hit her. (*Ibid.*) Mr. Whiteside called police. (RT EH 66.)

6. When police arrived, she refused to speak with them. (RT EH 73.) During her testimony, Ms. Nice recalled that in November of 2001 she was wearing braces and "I believe I had a small cut from my lip getting caught on my braces . . . . " (RT EH 71.) When police asked her what happened to her lip, she said she did not know. (RT EH 72.) Despite Ms. Nice's lack of cooperation, and perhaps because of her bloody lip, police then arrested Mr. Whiteside and charged him (as noted above) with various assaultive offenses against Ms. Nice. (EH Exhibit 2 at p. 2.) Police also charged him with endangering the health of a child and false imprisonment. (*Ibid.*)

7. Ms. Nice did not recall whether she told police officers that Mr. Whiteside was innocent. (RT EH 74.) She did not offer

to come to court and tell a judge or Mr. Whiteside's counsel that Mr. Whiteside was innocent. (RT EH 75-76, 203.) Mr. Whiteside never asked Ms. Nice to tell the truth about what really happened. (RT EH 76.)

8. At the hearing, Ms. Nice also admitted that at some point after her selection as a juror she gave Conner, the Petersons' unborn child, a nickname – calling him "Little Man" – but claimed she could not recall whether she began using the nickname during Petitioner's trial or afterwards. (RT EH 105-107.) Juror Greg Beratlis testified that during trial, when Ms. Nice was seated as a juror, her first words on entering the jury room were that jurors should make Petitioner "pay for killing the 'Little Man'." (RT EH 352.)

9. Within months of the end of trial, Ms. Nice began to write letters to Petitioner on death row. (RT EH 124.) The letters reveal a repeated focus on what happened to Conner. (EH Exhibit 6 at pp. 4-6, 17-18, 21, 22-24.)

10. Ms. Nice also testified that in her home she had pictures of her children up on the wall. (RT EH 205-206.) In 2017 – 13 years after the jury verdict – documentarian Shareen Anderson interviewed Ms. Nice in her home and saw a black and white photograph on the wall of a small child wearing clothing with the name "Little Man" written on it. (RT EH 485.)

g. Other Evidence Presented at the Evidentiary Hearing

1. The parties stipulated that if trial attorney Mark Geragos was called to testify at the hearing, he would testify that

(1) when Ms. Nice was seated as a juror he did not know about the Kinsey incident, the restraining order litigation, the civil lawsuit, or the Whiteside incident of November 2001 and (2) had he known this information he would have moved to strike Ms. Nice for cause or, failing that, he would have used a peremptory challenge to discharge her from jury service. (Joint Stipulation to Testimony of Mark Geragos, filed February 28, 2022.)

2. Petitioner also presented the testimony of Alfreda Bracksher, custodian of records for the East Palo Alto Police Department, to authenticate a police report showing that Mr. Whiteside was arrested on the evening of November 2, 2001 and charged with inflicting corporal injury on a spouse. (RT EH 500-502.) Ms. Nice was listed as the victim in the report. (RT EH 505.)

3. The parties presented a stipulation by Shareen Anderson, who interviewed Ms. Nice as part of a television documentary. The stipulation stated that, if called to testify, Ms. Anderson would testify that in 2017 she interviewed Ms. Nice at her home. After the interview, as Ms. Anderson was leaving, she saw a photograph on a wall of a small child. The child was wearing clothing that had the words "Little Man" visible.

h. The Superior Court's Decision

1. In its order dated December 20, 2022, the Superior Court determined that Petitioner was not entitled to relief in his claim of juror misconduct. The court found that Ms. Nice's answers on her juror questionnaire were "false in certain respects" but were not motivated by bias against Petitioner, but

by a combination of misunderstandings and sloppiness in answering the questionnaire. (Sup. Ct. Opinion at p. 30.)

2. First, the Court found that Ms. Nice had been involved in two lawsuits against Ms. Kinsey, identifying herself as plaintiff at least ten times in the temporary restraining order paperwork. In addition, she acknowledged in her testimony that she sued Ms. Kinsey for monetary damages in Santa Clara Superior Court. (*Id*. at p. 31). Thus, Ms. Nice answered questions 54a and 54b of the questionnaire falsely.

3. The Court also found that Ms. Nice answered question 74 falsely, since her boyfriend, Mr. Whiteside was a victim of Ms. Kinsey's crimes (slashing his tires and trying to spray him with mace), she was personally the victim of Ms. Kinsey's stalking behavior, and she witnessed herself assault Mr. Whiteside.

4. The Superior Court, however, found that Ms. Nice was not biased against Petitioner. It found that Ms. Nice testified credibly and explained why she sought a restraining order against Ms. Kinsey, the lifestyle she and Mr. Whiteside shared that led to the 2001 domestic violence incident, and why she dropped the civil suit against Ms. Kinsey. In addition, though Ms. Nice received immunity from the District Attorney after perjuring herself in her declaration, the Court found that nothing she testified to could have been used against her by the District Attorney. (*Id*. at p. 34.)

5. Specifically, the Court found that Ms. Nice was not impacted by the trauma of having her unborn child threatened and that her relationship with Mr. Whiteside and Ms. Kinsey was

akin to a "love triangle." (*Id.* at p. 35.) The Court, referencing the restraining order application Ms. Nice filed in 2000, relied on hearsay statements by Ms. Nice that she referred to Mr. Whiteside as her "ex-boyfriend" and that she reached out to Ms. Kinsey over the telephone to settle their differences before filing the application for a restraining order. Though it directly contradicted Ms. Nice's narrative in the restraining order litigation, the Court found credible Ms. Nice's claim that she sought the restraining order because she didn't want to fight Ms. Kinsey while she was pregnant because "rolling around like some dummies on the ground" could cause her to lose the baby. (*Id.*)

6. The Court found this testimony credible because of Ms. Nice's life experiences, noting that she grew up in East Palo Alto, having a high school education, four children with three different fathers, her brother had been in prison and her mother was a drug counselor. (*Id.* at p. 36.) The Court credited Ms. Nice's testimony at the evidentiary hearing, because she admitted to being untruthful when she stated under penalty of perjury that she was in fear for her unborn child in 2000 to obtain the restraining order against Ms. Kinsey (*Id.* at p. 37.) In addition, the Court found this was more credible because of Ms. Nice's history of being "spiteful" toward Ms. Kinsey, including calling the police on her nearly two years after the restraining order was issued, and that she contacted Ms. Kinsey twice while pregnant– once over the phone as mentioned above and once outside the courthouse after she dismissed the civil lawsuit against Ms. Kinsey. (*Id.* at pp. 37-39.) The Court further determined that Ms.

Nice was credible when she stated that she "[doesn't] hold on to things. [She] didn't remember [the restraining order litigation]. It didn't cross [her] mind." (*Id.* at p. 39.)

7. The Court also found that Ms. Nice was not a victim of domestic violence. It found credible Ms. Nice's testimony that it was she who hit Mr. Whiteside, despite the facts that the police arrested Mr. Whiteside, and the district attorney charged Mr. Whiteside with assault and child endangerment, based only on the fact that Ms. Nice had a cut on her lip from her braces. The Court speculated, based on her apparently extra-record knowledge of a history of racism in policing, that such racism was a possible reason why Mr. Whiteside, a black man who – according to Ms. Nice's testimony – had committed no crime, would be arrested and charged with multiple offenses, including child endangerment, in the incident. (*Id.* at pp. 40-42.)

8. The Court also did not consider Ms. Nice's refusal to discuss the juror misconduct allegation with Petitioner's investigators as indicative of bias, finding that Ms. Nice's cooperation with Petitioner's investigator prior to the filing of the juror misconduct claim indicated that she was not biased against him.[25] The Court also declined to draw an adverse inference from the fact that Ms. Nice asked for and accepted immunity from the District Attorney for prosecution for perjury in exchange for her

[25] The Court referenced Ms. Nice speaking with an "HCRC investigator" in 2015. However, HCRC was not appointed to the case until 2018. See Order, *People v. Peterson*, S132449 July 12, 2017.

testimony at the hearing. (*Id.* at p. 43.)

9. The Court found that Ms. Nice's declaration corroborated her hearing testimony and that any discrepancies were "minor" and resulted from the fact that she had not been able to meet with her attorney in person before signing the declaration. (*Id.* at pp. 45-46.) The Court also found that Ms. Nice's willingness to sit on the jury in a months-long trial, despite the fact that she would only be paid by her employer for two weeks of service, did not demonstrate that she was "eager to serve." (*Id.* at p. 48.)

10. Finally the Court found that Ms. Nice's statement that the jury should "get" Petitioner for what he did to "Little Man" was not an indication that Ms. Nice pre-judged the case because Ms. Nice made the statement after the evidence had been presented. (*Id.* at p. 51.) And the Court further concluded that the post-trial letters Ms. Nice sent to Petitioner did not evidence bias. (*Id.* at p. 52.)

3. Argument in Favor of Relief on this Claim.

a. Ms. Nice Provided False Answers on Her Questionnaire.

1. As summarized above, the California Supreme Court has repeatedly noted "the general proposition that one accused of a crime has a constitutional right to a trial by impartial jurors." (*In re Hitchings* (1993) 6 Cal.4th 97, 110.) Accord *In re Manriquez* (2018) 5 Cal.5th 785, 797.) The ability of even the most well-intentioned jury-selection process to ensure an impartial jury depends "on prospective jurors answering

truthfully when questioned." (*In re Boyette* (2013) 56 Cal.4th 866, 888; *Hitchings*, *supra*, 6 Cal.4th at p. 111. See *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554.)

2. In accord with these authorities, "a juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*Hitchings*, *supra*, 6 Cal.4th at p. 111.) Even unintentionally false answers during jury selection can constitute misconduct. (*Manriquez, supra,* 5 Cal.5th at p. 797; *Boyette*, *supra*, 56 Cal.4th at p. 889.)

3. In answering question 54a, Ms. Nice said she had never been "involved in a lawsuit (other than divorce proceedings)." Ms. Nice, however, had been involved in *two* lawsuits. First, she sued Ms. Kinsey in San Mateo Superior Court to obtain a TRO in November 2000, and testified against her in open court. Second, she later sued Ms. Kinsey for damages in a civil action filed in Santa Clara Superior Court.

4. In answering Question 74, Ms. Nice said neither she, nor any of her family or close friends, had ever been "the victim or witness to any crime." Ms. Nice admitted not only that Ms. Kinsey committed crimes against her and Mr. Whiteside during the September 23, 2000 incident and the following month leading up to the TRO application, but that the reason she called police was to report that crimes had been committed:

Q: You called police that night; is that right?

A: [by Ms. Nice] Yes.

Q: Is that because you thought a crime was being committed?

A: Yeah.

. . .

Q: And in fact your boyfriend's tires were slashed. You were aware of that; is that right?

A: Yeah

. . .

Q: She kicked in the front door of your house; is that right?

A: She did.

Q: Did you consider that to be a crime?

A: Yeah, sure.

Q: Did you consider slashing of the tires to be a crime?

A: It wasn't a crime against me.

Q: No, but do you consider it to be a crime?

A: Sure.

Q: Do you consider her stalking you to be a crime?

A: Sure.

(RT EH 56-57.)

5. Ms. Nice provided false answers in her questionnaire. As the Superior Court correctly found, that constituted juror misconduct.

b. Respondent Did Not Carry The Heavy Burden of Rebutting the Presumption of Prejudice Arising from Ms. Nice's Misconduct

Once a court determines a juror has engaged in misconduct by providing false answers during the jury selection process, be it intentionally or unintentionally, a defendant is presumed to have suffered prejudice and "[i]t is for the *prosecutor* to rebut the presumption by establishing there is 'no *substantial likelihood* that one or more jurors were actually biased against the defendant.'" (*Manriquez*, *supra*, 5 Cal.5th at p. 797, quoting *People v. Weatherton* (2014) 59 Cal.4th 589, 600 [emphasis in original.) The California Supreme Court has described the prosecutor's burden in this context as a "heavy" burden. (*In re Stankewitz* (1985) 40 Cal.3d 391, 402.) The Superior Court erred in finding that Respondent met this heavy burden.

1) Ms. Nice was Not Credible in Her 2022 Testimony that She Never Had a Genuine Fear for Her Unborn Child

6. As in other juror misconduct cases, Ms. Nice's credibility is central to the inquiry of whether Respondent rebutted the presumption of prejudice. (See, e.g., *Manriquez*, *supra*, 5 Cal.5th at p. 801 [noting referee's determination that juror was credible at the outset]; see also *Hitchings*, *supra*, 6 Cal.4th at p. 114 [whether juror misconduct occurred depends on credibility of two witnesses].)

7. It cannot be downplayed that the Superior Court deemed Ms. Nice to be a credible witness despite the fact that she *admitted that she had lied under penalty of perjury at least three times in the Superior Court*: (1) in her sworn declaration filed in 2020; (2) in legal papers she filed in 2000 requesting a TRO and

injunction; and (3) in her sworn testimony before Judge Rosemary Pfeiffer in 2000 in support of that restraining order. Moreover, *Ms. Nice refused to testify at the evidentiary hearing unless she was granted immunity for that acknowledged perjury*.

8. Despite these extraordinary circumstances, the Superior Court found credible Ms. Nice's claim that she sought a restraining order against Ms. Kinsey out of spite and not because she had a genuine fear for her unborn child, as she originally stated in the application for the temporary restraining order. (Sup. Ct. Opinion at pp. 35-36.) The Court postulated that Ms. Kinsey, Ms. Nice and Mr. Whiteside were involved in a "love-triangle." (*Id*. at p. 35.) The Court based this on Mr. Whiteside and Ms. Nice's relative ages, the fact that Mr. Whiteside and Ms. Kinsey previously dated and had recently broken up, and that Ms. Nice described her relationship with Mr. Whiteside as "complex." (*Id.*) None of these facts, however, support the conclusion that Ms. Nice never had a genuine fear of Ms. Kinsey. To the contrary, the existence of such a love triangle provides a significant basis for Ms. Nice to fear for her own and her unborn child's safety, particularly given Ms. Kinsey's violent actions at her own home when both she and Mr. Whiteside were present.

9. The Superior Court also found it significant that Ms. Nice contacted Ms. Kinsey over the telephone before filing the restraining order application, indicating that Ms. Nice did not have a genuine fear of Ms. Kinsey. (*Id.*) This fact, however, came from a document that was not admitted at the evidentiary

hearing.[26] In addition, the Court cherry picked this fact from Ms. Nice's narrative in her TRO application and found the remaining part of the application narrative, the portion where Ms. Nice describes Ms. Kinsey's actions and her fear for herself and her unborn child, incredible.

10. Among the claims Ms. Nice made under oath in her 2000 restraining order litigation was that a restraining order against Ms. Kinsey was required because she had "committed acts of violence against" Ms. Nice and her unborn child and she would "try to hurt the baby, with all the hate and anger she has for Richelle." (EH Exhibit 1 at pp. 7, 11.) Ms. Nice later testified under oath before San Mateo Superior Court Judge Rosemary Pfeiffer and obtained a restraining order protecting "Richelle Nice & unborn child." (EH Exhibit 1 at pp. 2, 4.) But in her 2022 testimony, Ms. Nice testified – again under oath – that her reason for obtaining the restraining order, was that if she and Ms. Kinsey fought, they "would roll[] around like some dummies on the ground" causing Ms. Nice to have a miscarriage. (RT EH 53.) It begets belief that Ms. Nice's 2022 account of her fear would be sufficient cause to issue a three-year restraining order

[26] In a pre-hearing holding, the Superior Court took judicial notice of the temporary restraining order application but specifically stated that it would not take judicial notice of hearsay statements contained in court records. (See 02/15/22 Order Re: Petitioner's Motion in Limine No. 1 to Take Judicial Notice of, and Admit Into Evidence, Relevant Court and Law Enforcement Records.)

under California Code of Civil Procedure section 527.6. More importantly, no court would grant such an order where the testimony of the moving party departs so dramatically from her written application, submitted under penalty of perjury. (See EH Exhibit 1 at p. 11.) The Superior Court unreasonably credited Ms. Nice's 2022 testimony over both Ms. Nice's contemporaneous account in 2000 and her testimony before a different Superior Court judge under oath in the very same courthouse twenty years earlier, at the time that the events that provided grounds for request for a restraining order were actively unfolding, or at least had recently occurred.

2) Ms. Nice Did Not Testify Credibly That She Simply Forgot to List the Kinsey Incident on Her Juror Questionnaire

1. The question of whether Respondent carried its burden of rebutting the presumption of prejudice turns largely on whether Ms. Nice's reasons for failing to disclose the Kinsey incident, her restraining order lawsuit, the civil lawsuit, and the November 2001 domestic violence incident, are credible. The Superior Court found that Ms. Nice's encounter with Ms. Kinsey and the multiple subsequent litigations did not "cross" Ms. Nice's mind just three years later when she was called to jury duty because she does not "hold on to things." (Super. Ct. Op. at p. 39 citing RT 84:24-25.)

2. This finding by the Superior Court is curious, given its finding that Ms. Nice involved the court systems of two separate counties and the East Palo Alto Police Department in a quest to

"spite" Ms. Kinsey. In order to find credible the suggestion that when Ms. Nice answered questions 54 and 74 she simply forgot Ms. Kinsey's criminal conduct, along with her own attempts to halt and be remedied for this conduct through legal action, the Superior Court had to find credible that Ms. Nice:

- Forgot Ms. Kinsey's violent conduct at Ms. Nice's home while Ms. Nice was present and pregnant, which included slashing Mr. Whiteside's tires, screaming for him and Ms. Nice to come out of the house, trying to spray him with mace, and ultimately kicking in the door to Ms. Nice's home.

- Forgot that she called the police during Ms. Kinsey's attack.

- Forgot that Ms. Kinsey's attack on the home where Ms. Nice and her family had lived for nine years led to their eviction from that home and forced them to move from Mountain View to East Palo Alto.

- Forgot that Ms. Kinsey continued to harass and stalk Ms. Nice after she and her family moved to a new home – which included Ms. Kinsey discovering Ms. Nice's new address and phone number, repeatedly showing up outside her home, calling and hanging up, following her to work, and threatening to settle her dispute with Ms. Nice "on the streets."

- Forgot that Ms. Kinsey's conduct caused sufficient stress to cause premature contractions and caused her to fear, at a minimum, that her unborn child would be born prematurely and/or harmed if she fought with Ms. Kinsey.

- Forgot that she sought a temporary restraining order and injunction against Ms. Kinsey, that the

restraining order was granted, that she testified in court in support of the injunction, and that the injunction was granted.

- Forgot filing a civil lawsuit against Ms. Kinsey for damages she sustained as a result of Ms. Kinsey's conduct.

- Forgot that she called the police in June of 2002 to report a violation of the restraining order against Ms. Kinsey.

These at times violent and life-altering interrelated events spanned (at minimum, as far as court and law enforcement records show) nearly two years of Ms. Nice's life, and it is not credible that she simply forgot these incidents when filling out the questionnaire.[27]

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[27] In crediting Ms. Nice's testimony that she simply forgot about the incidents when filling out the questionnaire, the Superior Court analogized what she termed Ms. Nice's mistakes in filling out the questionnaire to custodian of records Alfreda Bracksher's mistaken representations in response to a subpoena duces tecum and HCRC's miscommunications about its policy regarding interview notes; the Superior Court claimed that these examples demonstrate that even trained professionals can make mistakes under oath. (Sup. Ct. Op at p. 38 fn. 41.) However, the behavior of Ms. Bracksher stands in stark contrast to Ms. Nice's behavior. When learning of her error in her declaration, Ms. Bracksher did not retain an attorney, she did not request immunity from the District Attorney, and she did not attempt to justify her errors with contradictory explanations. Instead, she testified and explained her errors in a forthright manner, even conceding that she did not know why she made certain errors. (RT EH 538.) Similarly, when attorneys from HCRC learned of investigator notes in their files, they immediately admitted their mistake, apologized to the court, and provided the notes to the

3. It is even more doubtful that Ms. Nice forgot these incidents given the pre-trial publicity in Petitioner's case, which was massive and made explicit the prosecution's theory that Petitioner assaulted his pregnant wife, killing her and their unborn child. (See *Peterson*, *supra*, 10 Cal.5th at p. 439 [noting that Petitioner's case was the subject of massive worldwide media attention].) Because Ms. Nice (like virtually every other juror) acknowledged during voir dire that she had been exposed to pre-trial publicity, she was certainly on notice that her experience of being threatened and stalked while pregnant, fearing for the safety of her unborn child, and being involved in a domestic violence incident related to her partner's unfaithfulness would be central themes in the prosecution's case against Petitioner. (EH Exhibit 4 at pp. 17; EH Exhibit 5 at p. 4623; see *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929 [finding juror non-disclosure prejudicial where juror did not reveal that she had been the victim of domestic violence even though she knew the charged case involved domestic violence]; accord *Manriquez*, *supra*, 5 Cal.5th at p. 809 [finding it significant that nothing in the pre-trial questionnaire alerted juror to the importance of her sexual assault as a child].) It is not credible that these incidents would not have crossed Ms. Nice's mind once while she filled out the questionnaire or sat through voir dire in this very high-profile

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District Attorney. (*In re Scott Peterson*, SC055500A, Petitioner's Correction of In Court Offer of Proof filed Mar. 3, 2022.)

case.

3) Ms. Nice Did Not Testify Credibly that She Did Not Consider Ms. Kinsey's Behavior a Crime

1. In addition to claiming that the Kinsey incident did not cross her mind during jury selection, Ms. Nice also testified that she did not report the incident in response to question 74 because she did not consider Ms. Kinsey's behavior to be a crime. The Superior Court also credited this testimony. (Sup. Ct. Op. at pp. 45-46.)

2. Aside from the fact that Ms. Nice's explanation that she did not consider Ms. Kinsey's behavior criminal is in tension with her explanation that it never crossed her mind, it is also wholly incredible. Ms. Nice stated in her declaration, and testified at the evidentiary hearing, that the incidents with Ms. Kinsey were "minor indignities." (RT EH 58-59; EH Ex. 10 ¶¶ 22, 24.) In addition, she stated in her declaration that she did not consider Ms. Kinsey's actions leading up to the request for a restraining order to be criminal. (EH Ex. 10 ¶ 23.) But at the very same evidentiary hearing, Ms. Nice acknowledged that Ms. Kinsey's actions *were* criminal and that she *did* call the police. (RT EH 47 [admitting that she called the police]; RT EH 56-57 [stalking and slashing tires are crimes]; RT EH 48 [characterizing Ms. Kinsey's behavior as "stalkerish"].) In addition, Ms. Nice did seek and obtain a restraining order against Ms. Kinsey and provided a graphic account of the fear she felt because of Ms. Kinsey's threats; these are hardly the actions of someone responding to a minor indignity. The Superior Court does not attempt to resolve

these glaring contradictions, insisting only that Ms. Nice's testimony was credible because it was consistent with her 2020 declaration. (Super Ct. Op. at p. 46.) This Court is not bound by a credibility determination that is not supported by the record. (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 79-80.)

4) Ms. Nice's Testimony that She was Not a Victim of Domestic Violence is Not Credible

1. The Superior Court found Ms. Nice's evidentiary hearing testimony regarding the Whiteside domestic violence incident credible. As to that incident, Ms. Nice explained that she and Mr. Whiteside had an argument, she handed her baby to her mother, she and Mr. Whiteside entered their bedroom, she closed the door, and then she hit him. (RT EH 69-72.) After police arrived, she refused to speak with them. (RT EH 72-74.) Ms. Nice recalled that she was wearing braces and "I believe I had a small cut from my lip getting caught on my braces . . . . " (RT EH 71.) Contradicting her earlier statement that she refused to speak with police, Ms. Nice testified that when police asked her what happened to her lip, she said she did not know. (RT EH 72.) The police themselves seemed to find this response, coupled with Ms. Nice's bloody lip, not credible; they arrested Mr. Whiteside and charged him with various assaultive offenses against Ms. Nice, endangering the health of a child, and false imprisonment. (EH Exhibit 2 at p. 2.)

2. Looking at the record as a whole, there are many reasons to doubt Ms. Nice's 2022 version of events. According to Ms. Nice's 2022 testimony, although she knew Mr. Whiteside was

innocent, she did not tell that to police when they arrested him that night, and she never offered to come to court to tell the judge that he was innocent. (RT EH 74-76, 203.) And although Mr. Whiteside knew he was innocent, he never asked Ms. Nice to come to court to tell the truth about what happened. (RT EH 76.) Moreover, although Ms. Nice says she never provided any information to police, Mr. Whiteside was charged not only with battering Ms. Nice – which might be plausibly explained by Ms. Nice's 2022 recollection that she had a cut lip from braces she was wearing – but also, for unexplained reasons, with false imprisonment and endangering the health of a child, neither of which are supported by Ms. Nice's 2022 version of what happened. (EH Exhibit 2 at p. 2.) In short, the version of events Ms. Nice provided in her 2022 testimony as to the November 2001 Eddie Whiteside incident is inconsistent with the contemporaneous actions of all parties – Ms. Nice, Mr. Whiteside, and the police.

3. Even if Mr. Whiteside was arrested that night because of the racial bias in policing, as the Superior Court speculated, there is no reasonable explanation why the San Mateo County District Attorney would charge Mr. Whiteside with crimes such as child endangerment and false imprisonment. Nor does racism in the criminal justice system explain why Mr. Whiteside would plead guilty to a crime he did not commit (and be sentenced to probation and agree to attend 200 hours of domestic violence classes) or why Ms. Nice would not come forward and tell Mr. Whiteside's attorney that he was an innocent man.

c. The Circumstances Surrounding Ms. Nice's Jury Service and Post-Trial Actions are Indicative of Bias

1) Ms. Nice Pre-Judged the Case

1. The trial court specifically instructed Ms. Nice (along with the other jurors) not to reach a decision until "after discussing the evidence and instructions with the other jurors" and not to express, "at the beginning of deliberations . . . an emphatic opinion on the case, or to announce a determination to stand for a certain verdict." (111 RT 20564-20565.) Unfazed by these directives, Ms. Nice did exactly what the trial court instructed her *not* to do. When seated to replace juror 7 who had been discharged, Ms. Nice's first words were to urge her fellow jurors to make Petitioner "pay for killing the 'Little Man'." (RT EH 352.)

2. Ms. Nice's zealous determination to make Petitioner "pay" for what he allegedly did to an infant victim she had given her own nickname to – a mindset she brought to the jury before even starting to deliberate – does not bespeak of impartiality. To the contrary, a statement seeking to punish a defendant before his guilt is even decided "require[s] neither interpretation nor the drawing inferences;" it is unabashed proof of prejudice. (*People v. Weatherton* (2014) 59 Cal.4th 589, 599 [statement by juror before and during deliberations that defendant deserved the death penalty was evidence of pre-judgment of guilt].) As the Superior Court noted, disobeying the trial court's directive is not, standing alone, cause for a claim of juror misconduct. (Super Ct. Op. at p. 51.) However, it is certainly indicative of a juror who entered

deliberations with an impermissibly closed mind.

2) Ms. Nice Agreed to Serve on the Jury Despite a Financial Hardship

1. As the trial judge observed, Ms. Niece "practically volunteer[ed] to serve" on Petitioner's jury. (EH Exhibit 5 at p. 4631.) What the trial court did not know, and what the evidentiary hearing record shows, is that Ms. Nice provided false information to the trial court about her financial status to make it appear as if jury service would pose no financial burden.

2. On March 26, 2004, Ms. Nice signed an "Income and Expense Declaration" in a child support action against William Robinson, who was the father of one of her children. Mr. Nice declared under oath that (1) her monthly expenses were $3,820, (2) she received $400 in child support from a different partner,[28] (3) she had $160 in savings, and (4) she had a monthly salary of $1,885.20 after taxes. (EH Exhibit 16 at pp. 1-6.) In that sworn declaration, signed to get an order compelling the father of her child to pay child support, Ms. Nice answered a question asking what people lived with her, and she swore there were only four people living with her – her four children. (*Id.* at p. 3.)

3. Three weeks later, on April 17, 2004, Ms. Nice filled out a separate "Income and Expense Declaration" in conjunction with a child support action against James Smith, who was the father of another child. Mr. Nice declared her expenses, the $400 child

[28] Ms. Nice identified this partner as Eddie Whiteside. (EH RT 116-117.)

support and her salary, all of which were similar to her prior declaration. (*Id*. at pp. 9-12.) In this sworn declaration, signed to get an order for Mr. Smith to pay child support, Ms. Nice was again asked how many people lived with her and she again named only her four children. (*Id*. at p. 11.)

4. Notwithstanding her financial situation, and despite at least three invitations from the trial court to declare a financial hardship, Ms. Nice chose not to avail herself of that very simple option to end her jury service and continue to support her family. (EH Exhibit 17 at p. 2468 ["A lot of people aren't going to be paid to sit here for five or six months. Some of you will. So we're going to take some time today to entertain some hardship excuses if you're unable to serve on this jury because you don't get paid or whatever."]; 2469 ["we know that some of you won't get paid for five or six months . . . . If you're not going to get paid . . . you will be excused."]; 2473 ["There are a lot of reasons for hardship excuses. Number one, you're not going to get paid for six months. That's the obvious one."].) Instead, she elected to fill out the jury questionnaire and return for an additional day of *Hovey* voir dire.

5. Ms. Nice filled out her jury questionnaire on March 9, 2004 – only two weeks before her March 26 "Income and Expense Declaration" described above. But in answering the questionnaire Ms. Nice provided different information about who lived with her, this time declaring under oath that she was living not just with her four children, but with a "significant other" as well as her mother. (EH Exhibit 4 at pp. 4, 5.) When Ms. Nice appeared for her April 12 voir dire, she twice indicated – once to

the prosecution and once to defense counsel – that her significant other, whom she was living with, agreed to "carry the [financial] load." (EH Exhibit 5 at pp. 4610, 4627 [reaffirming that significant other will shoulder financial burden].) Ms. Nice made clear that Eddie Whiteside was this significant other. (RT EH 132-133.) As a consequence, Ms. Nice waived off financial hardship at the time she filled out the questionnaire and during voir dire and, in the words of the trial court, "practically volunteer[ed] to serve" on Petitioner's jury for five months without pay while supporting four young children. (EH Exhibit 5 at p. 4631.)

6. This discrepancy goes beyond a lack of skill at filling out legal forms, as the Superior Court characterized it. (Sup. Ct. Op. at p. 48.) At the same time she was allaying the trial judge's concerns about her financial condition by claiming to live with Mr. Whiteside who would "carry the load," she was telling the same court in two different child support cases that (1) the only people who lived with her were her four boys and (2) Mr. Whiteside was paying her just $400 per month in child support. In portraying her financial need when seeking child support payments Ms. Nice swore under oath she lived alone with her four boys. But in portraying her financial need when seeking a seat on the jury, Ms. Nice swore under oath she had financial support from her live-in significant other. It is, of course, difficult to determine which of these two versions is true.[29] However, if

[29] There is circumstantial evidence suggesting that Mr.

Mr. Whiteside was living with her and providing financial support, then Ms. Nice's Income and Expense Declarations, sworn under penalty of perjury in March and April of 2004, contained false statements. And if, on the other hand, the Income and Expense Declarations were correct, then Ms. Nice's jury questionnaire and her voir dire, also given under oath, contained false statements.

7. Regardless of what impact this series of events has on Ms. Nice's general credibility, the fact that she was willing to forego a hardship excusal with four children at home, $3,800 in monthly expenses, $400 in monthly child support, $160 in savings, and no salary to cover a five-month trial shows, at a minimum, demonstrates that she was eager to serve. As the Ninth Circuit has noted in granting relief to a California defendant precisely because of juror concealment, "there is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 982.) Here, in connection with her financial condition, Ms. Nice either lied under oath in her Income and Expense Declarations, or in her jury questionnaire and voir dire.

3) Ms. Nice's Post-Trial Conduct is

Whiteside was not, in fact, "carrying the load": Ms. Nice admitted that she had to get a part-time night job during Petitioner's trial. (RT EH 160-161.)

Indicative of Bias

1. Within months after Petitioner's trial ended, Ms. Nice began to write letters to him on death row. (RT EH 124.) Standing alone, this unusual conduct suggests a substantial emotional involvement in the case, the strength of which is only reinforced by the content of those letters, which reveals a repeated focus on what happened to Petitioner's unborn son, Conner. (EH Exhibit 6 at pp. 4-6, 17-18, 21, 22, 23-24.)

2. Ms. Nice's decision to write Petitioner numerous post-trial letters focusing, in part, on Conner does not, by itself, establish that Ms. Nice came into jury deliberations with a hidden bias because she had also been threatened while pregnant. Yet, her continued post-trial focus on Conner – and the extraordinary act of writing Petitioner repeatedly on the subject – is certainly consistent with a juror who has been impacted by the trauma of having her own unborn baby threatened. That Ms. Nice admittedly gave Conner a nickname – "Little Man" – further illuminates her emotional involvement in the case, and the strength of her personal connection to that particular nickname is only reinforced by the photograph in her home of a baby wearing a 'Little Man' shirt. (RT EH 485.)

3. In addition, Ms. Nice's post-trial behavior toward defense investigators is relevant to assessing prejudice. As the Superior Court noted, Ms. Nice spoke with a defense investigator,[30] but importantly, she did so *before* the claim

[30] The Superior Court erroneously stated that Ms. Nice spoke

alleging her misconduct had been brought. In contrast, after the claim was made that she had committed misconduct, Ms. Nice (1) refused to speak with the defense, (2) refused to speak with respondent, (3) hired a lawyer, and (4) refused to testify absent a grant of immunity. Petitioner recognizes that every juror has the rights to retain counsel, exercise their Fifth Amendment privilege against self-incrimination, and refuse to testify absent a grant of immunity. However, the jurors in previous cases before the California Supreme also had these rights, *but none of them asserted these rights*. (See, e.g., *Manriquez*, *supra*, 5 Cal.5th at p. 818 [noting that juror cooperated during habeas corpus investigation]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 646 [deferring to trial court's credibility determination which was based largely on juror's cooperation with defense investigators].) Although Ms. Nice was free to assert these rights, *Manriquez* permits an inference that in doing so, she demonstrated a desire to conceal her bias.

4. Moreover, though the Superior Court speculates that Ms. Nice may not have wanted to speak with defense investigators because of the publicity surrounding Petitioner's case (Super Ct. Op. at p. 43.) this ignores the fact that Ms. Nice

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with an HCRC investigator prior to the filing of the initial petition. (Super. Ct. Op. at pp. 42-43.) The court's assertion is factually impossible, as the California Supreme Court did not appoint HCRC to represent Petitioner in his habeas corpus proceedings until 2017, nearly two years after previous habeas corpus counsel filed the petition in this case. (See *People v. Peterson*, S132449, July 12, 2017 Order.)

spoke to multiple media outlets after the misconduct allegations came to light. (RT EH 173-174 [Dr. Oz interview], 204, 485 [A&E Interview]; Stapley, *'Stealth Juror' says claims made in Scott Peterson's appeal are flat-out wrong*, Modesto Bee (Sept. 20, 2017) <https://www.modbee.com/news/local/crime/scott-peterson-case/article174500171.html>, last accessed 2/7/2023 [Modesto Bee Interview].)

5. Finally, though the Superior Court refused to consider the fact that Ms. Nice was testifying under a grant of immunity from the District Attorney, this is a relevant factor that should be considered in determining Ms. Nice's overall credibility. (See CALJIC No. 2.20, CALCRIM No. 226.)

d. The Superior Court Misapplied Federal Law in Denying Petitioner's Jury Misconduct Claim

1. The California Supreme Court has suggested on several occasions that the federal test for assessing whether juror concealment requires relief varies from the California approach. (*Manriquez*, *supra*, 5 Cal.5th at p. 818, fn. 4. See also *id.* at p. 823, fn.1 [Franson, J., dissenting]; *Hitchings*, *supra*, 6 Cal.4th at p. 115, fn. 5.) Federal caselaw supports this suggestion.

2. The starting point for the federal analysis is the same as for the state analysis. As federal law makes clear, the Sixth Amendment guarantees criminal defendants the right to a fair trial by a panel of impartial, indifferent jurors. (*Irvin*, *supra*, 366 U.S. at p. 722.) "The bias . . . of even a single juror would violate [defendant's] right to a fair trial." (*Dyer*, *supra*, 151 F.3d at p. 973.)

3. In contrast to state law, however, claims of juror concealment under federal law are analyzed under three theories: "*McDonough*-style bias, . . . actual bias . . . and implied (or presumptive) bias . . . . " (*Fields v. Brown* (9th Cir. 2007) 503 F.3d 755, 766.) "*McDonough*-style bias" is a reference to the Supreme Court decision in *McDonough Power Equipment, Inc. v. Greenwood*, *supra*, and requires relief whenever a petitioner shows (1) the non-disclosure of requested information during jury selection was intentional and (2) had the information been disclosed it would have provided a valid basis for a challenge for cause. (*McDonough*, *supra*, 464 U.S. at p. 556.) Because this *McDonough* inquiry requires an intentional disclosure, it is very much like the state-law approach charted in *Manriquez* which also focuses on whether the non-disclosure was intentional (although the Court in *Manriquez* made clear that a lack of intentionality with respect to non-disclosure did not automatically preclude relief).

4. For all the reasons discussed above, the non-disclosures here fall squarely into the *McDonough* category. As for the additional element that a valid challenge would have ensued, trial counsel here made clear he would have challenged Ms. Nice had he known the truth. (Joint Stipulation To Testimony of Mark Geragos at ¶ 4; RT EH 314.) And a for-cause challenge would certainly have been granted. If the parties had been aware of the September 2000 Kinsey incident, the related TRO litigation and the November 2001 Whiteside incident, the voir dire would have covered these topics. Assuming Ms. Nice gave

the same explanations for those incidents that she gave at the 2022 evidentiary hearing, the parties would have known that Ms. Nice (1) claimed a substantially different sworn version of the Kinsey incident from her 2000 version when she swore under oath Kinsey would hurt the baby, (2) claimed to have used the court system in 2000 to seek a TRO not because she feared Kinsey, but "out of spite," (3) claimed to have reported Kinsey to police for violating the restraining order also "out of spite," and (4) claimed to have remained silent and allowed an innocent Mr. Whiteside to go to jail for a crime he did not commit. Regardless of which version of events is true, such a cavalier relationship with the truth would certainly have been grounds for a for-cause discharge. (See, e.g., 25 RT 4984 [trial court excuses juror for cause because juror omitted restraining order from her questionnaire and trial court noted that "it would seem to me that a juror with this intelligence would know that if she was – had a relationship with a violent husband, and considering the circumstances of this trial, would stick out like a red light."].)

5. Another theory available under federal law is a theory of implied bias, in which a court presumes the juror was biased based on circumstances suggesting the likelihood of a juror's substantial emotional involvement in the case that would adversely affect the juror's impartiality. (*Fields*, *supra*, 503 F.3d at p. 766; see also *Dyer*, *supra*, 151 F.3d at p. 981; *Manriquez*, *supra*, 5 Cal.5th at p. 818, fn. 4 [noting that federal law recognizes doctrine of implied bias].) A court may presume bias "where the relationship between a prospective juror and some

aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances . . . . " (*Fields*, *supra*, 503 F.3d at p. 770.) The question for assessing implied bias is whether "an average person in the position of the juror in controversy would be prejudiced." (*United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1112.) A court may properly presume bias where there the circumstances of the case, combined with some aspect of the juror's experience, create the "potential for substantial emotional involvement, adversely affecting impartiality . . . . " (*Ibid.*) "The standard is essentially an objective one, under which a juror may be presumed biased even though the juror himself believes or states that he can be impartial." (*Ibid.*; see also *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71 [defendant charged with bank robbery; held, two jurors who worked at a different branch of the bank should have been discharged because of the "potential for substantial emotional involvement, adversely affecting impartiality."].)

6. The en banc court in *Dyer* explained the necessity of an implied bias theory. (*Dyer*, *supra*, 151 F.3d at p. 985.) As the court explained, if actual bias were the only test, then if relatives of the victim or prosecutor "made their way onto the jury" there would be no impropriety "so long as they had all sworn they would be fair." (*Ibid.*) "[*N*]*o* reasonable jurist would take that position." (*Ibid.*)

7. The Superior Court dismissed Petitioner's reliance on *Dyer*, concluding that its facts were distinguishable. (Sup. Ct.

Op. at p. 33 fn. 36.) But the Superior Court erroneously ignored the similarities between the two cases, which support the applicability of *Dyer*'s implied bias analysis here. Like the juror in *Dyer*, at the time Ms. Nice filled out her questionnaire she was on notice of the state's theory that Petitioner assaulted his pregnant wife and killed her and their unborn child. Ms. Nice nevertheless concealed information about having been assaulted when pregnant, having feared for her unborn baby's life, and having been the victim of domestic violence. Moreover, and also like the juror in *Dyer*, it is apparent that Ms. Nice was trying to "preserve her status as a juror and to secure the right to pass on [Petitioner's] sentence." (*Dyer*, *supra*, 151 F.3d at p. 982.) Thus, as discussed in detail above, despite her precarious financial situation at home – four young children, income of $1,800 per month, expenses of $3,800 per month, and only $160 in savings – Ms. Nice declined the trial court's invitation to declare a financial hardship *three times*. (EH Exhibit 17 at pp. 2468, 2469, 2473.)

8. Again like the juror in *Dyer*, Ms. Nice, in order to preserve her chances of being selected, affirmatively failed to disclose other facts that would have jeopardized her chances of serving. Thus, in answering question 68 asking whether she, or any relatives or close friends had been arrested for any crime, she elected not to disclose Mr. Whiteside's arrest, thus avoiding any discussion of the Whiteside incident during voir dire. (EH Exhibit 4 at p. 13.) And as discussed above, Ms. Nice's sworn statements to the trial judge about her financial condition – and about the willingness of her live-in significant other to "carry the

load" – are starkly inconsistent with her sworn statements in connection with her child support actions from this identical time period. As in *Dyer*, and regardless of its source, Ms. Nice's "excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out." (*Dyer*, *supra*, 151 F.3d at p. 982.)

9. Moreover, it appears Ms. Nice was not entirely candid in answering another important part of the questionnaire. Because of the extensive publicity prior to trial, Ms. Nice was aware of the state's theory that Petitioner was cheating on Laci Peterson with other women. (RT EH 227-228.) Thus, she would have known that her opinion of men who cheat on their wives (as asked in question 26 of the questionnaire) might be relevant. In response, to question 26, she claimed to have "no" opinions about people involved in extramarital affairs. (EH Exhibit 4 at p. 5.) Yet at the hearing, Ms. Nice admitted that in her own life (1) Mr. Whiteside cheated on her with other women, (2) he made her life a "living hell," and (3) the fight with Mr. Whiteside on the night of November 2, 2001, was "probably" about his cheating. (RT EH 67, 124, 229.) Indeed, the subject of Mr. Whiteside's cheating so preoccupied her that, after convicting Petitioner and sending him to death row, she wrote Petitioner a letter explaining that Mr. Whiteside had the same cheating problem as Petitioner and asking him to explain "why men cheat." (RT EH 229; EH Exhibit 6A.)

10. In sum, given the state's theory in this case – involving a cheating husband, domestic violence in the form of an assault

on a pregnant Laci Peterson and the harming of her unborn child – Ms. Nice's history with very similar issues created a "relationship between a prospective juror and some aspect of the litigation . . . such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances" (*Fields*, *supra*, 503 F.3d at p. 770.) A finding of implied bias is proper because for an average juror with Ms. Nice's history there is the "potential for substantial emotional involvement, adversely affecting impartiality . . . . " (*Gonzalez*, *supra*, 214 F.3d at p. 1112.)

11. For all the foregoing reasons, the Superior Court erred in denying Petitioner relief on this claim, and this Court should grant this relief.

B. CLAIM TWO: Newly Discovered Evidence Exists That Fundamentally Undercuts The State's Case Against Petitioner And, If Presented At Trial Would Have More Likely Than Not Changed The Outcome.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Under California law, a Writ of Habeas Corpus may be prosecuted if "new evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the

outcome at trial." (Cal. Pen. Code 1473(b)(3)(A).) This evidence was discovered post-conviction and could not have been discovered prior to trial. This credible, timely evidence fundamentally undercuts the state's case against Petitioner, and relief is required.

Petitioner brings this claim of newly discovered evidence that Laci Peterson witnessed the burglary of a neighboring home, confronted the burglars who then killed her and, who after learning Scott, the primary suspect, had been fishing in the San Francisco Bay, dumped her body there. This evidence establishes actual innocence of Scott in the murder of Laci Peterson.[31] Petitioner is therefore actually innocent and entitled to relief.

Introduction

1. Petitioner incorporates by reference each of the facts alleged in all other claims of this petition. Petitioner also requests this court to take judicial notice of all pleadings and filings in both *People v Peterson*, San Mateo County Superior Court Case Number SC055500A, *People v. Peterson*, Case Number S132449, *In re Peterson* Case Number S230782.

2. At trial, the state's theory was that Petitioner, Scott Peterson, killed his wife, Laci Peterson, and their unborn son Conner on the evening of December 23, 2002, or the morning of December 24, 2002, left home for

[31] To avoid confusion, Petitioner refers to Scott Peterson as Scott and Laci Peterson as Laci. No disrespect is intended.

his office around 10 a.m. on December 24, 2002, then drove Laci's body from Modesto to the Berkeley Marina, launched his boat, and placed her body in the San Francisco Bay that afternoon.

3. The defense theory was that Laci was still alive when Scott left the house that morning to go fishing, and Scott is innocent.

Summary of Facts

4. At or before 10:08 a.m. on December 24, 2002, Scott left his home at 523 Covena Avenue in Modesto, California. (109 RT 20226.) Scott told police that, before he left the house that morning, Laci was preparing to walk their dog, McKenzi. (51 RT 10005.) Scott told police this was the last time he saw Laci.

5. Before 10:18 a.m., the Petersons' next-door neighbor, Karen Servas, found McKenzi in the street with his leash on. (48 RT 9422.) Servas walked McKenzi to the Petersons' yard. (48 RT 9425, 9428.) Servas left McKenzi in the yard and closed the gate. (48 RT 9429.) Servas then left to run errands and did not return home until around noon. (48 RT 9458.) Servas testified that "dogs get out" and she had seen McKenzi loose in front of the house on prior occasions. (48 RT 9481.) Indeed, on previous occasions, mailman Russell Graybill also saw McKenzi loose in front of the house. (49 RT 9568.)

6. After Servas put McKenzi back in the yard, multiple witnesses reported seeing Laci walking McKenzi in the neighborhood. Homer Maldonado, Tony Freitas, and at least 12 others reported seeing Laci walking in her immediate neighborhood the morning of December 24, 2002. (97 RT 18280-18281.) The neighborhood sightings are the red dots noted below.

(People's Exh. 267.)[32] Unfortunately, Det. Grogan conceded that while "the intention always was to try to contact any of those folks," they were not a priority. MPD did not conduct face to face interviews with any of the people that reported seeing Laci walking in the neighborhood the morning of December 24, 2002.[33]

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[32] Trial exhibits will be preceded with "People's," "Defense," or "Court.")

[33] MPD did conduct interviews with some of these witnesses after Scott was arrested, but they conducted no face to face interviews with these witnesses despite swearing under oath for

7. From 10:30 a.m. to 10:56 a.m., Scott is actively logged onto his computer at work researching how to assemble a wood working tool (83 RT 15753, 15759-15762.)

8. At around 10:33 a.m. the neighbors across the street at 516 Covena Avenue, Susan and Rudolph Medina, left for Los Angeles to spend Christmas with their children. (49 RT 9589-9590, 9617.)

9. Susan Medina testified they had "a lot of outgoing mails [sic] that day." (49 RT 9592.) The last thing the Medinas did before leaving for Los Angeles was check to see if their outgoing mail had been picked up—it had not. (49 RT 9614.) Based on their style of mailbox, the Medina's outgoing mail could be seen sticking out of the mailbox. (49 RT 9573.) When the Medinas returned home two days later on December 26, 2002, there was no mail "sticking out" of their mailbox and there were "two or three small letters" inside the mailbox. (49 RT 9614-9615.)

10. The Medina home was burglarized while the Medinas were gone. (IHP Exh. 29 at HCP-00418.)[34] Steven Todd and Donald Pearce were

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a search warrant that "no positive identifications of Laci have been established since Scott last saw her at home," and telling the public in press releases that, "unfortunately, we have to concrete leads from those tips at this point." (Defense Exhibit 7V.)

[34] Citations referring to exhibits from Petitioner's initial habeas petition *In re Peterson* Case Number S230782 will begin with

charged and plead guilty to burglarizing the Medina home. (*Ibid*.)

11. Steven Todd told police he was riding his bike down the street and targeted the Medina residence because one car was missing from the driveway, and he could see the mail in the mailbox from the street. (107 RT 20018-20023, 108 RT 20057.)

12. Graybill used his time scans from December 24, 2002, to estimate that he delivered mail to the 500 block of Covena Avenue between 10:35 a.m. and 10:50 a.m. on December 24, 2002. (49 RT 9562-9564.)

13. Based on Susan Medina's trial testimony and mailman Graybill's trial testimony, the only time the Medina's outgoing mail was visible from the street while they were gone was before 11 a.m. on the morning of December 24, 2002. By seeing the Medinas' outgoing mail and one car in the driveway, Steven Todd puts himself on Covena Avenue the morning of December 24, 2002 between 10:33 a.m. and 11:00 a.m.

14. Graybill testified at trial that he delivered mail to the Peterson home between 10:35 and 10:50 a.m. on December 24, 2002. However, defense counsel overlooked that Graybill had told police that the gate was open and McKenzi was not on the property. Graybill's initial statement to the police was the following:

"IHP.")

> "[Graybill] said he entered the area around 10:30 to 10:45 in the morning. He said he couldn't remember anything unusual from 516 Covena, but remembered the gate was open at 523 Covena. He said usually the dog barks at him from behind the gate. On 12-24-02 the gate was open and he did not see or hear the dog at 523 Covena."

(IHP Exh. 3 at HCP-000008.) Graybill made these contemporaneous statements to the police on December 27, 2002, just three days after Laci went missing. (*Ibid*.)

15. Graybill knew the Petersons' dog, McKenzi, and explained to the police (and has since declared) that McKenzi would bark at him no matter where on the property the dog happened to be. (IHP Exh. 3 at HCP-000008.) Graybill had even discussed McKenzi's behavior with Laci in mid-December. (IHP Exh. 2 at HCP-000006.) Whether the dog was in the front or back yards, or even inside the house, McKenzi would bark at Graybill. (*Ibid*. at HCP-000005.)

16. The open gate and absence of McKenzi at the Peterson home sometime between 10:35 a.m. and 10:50 a.m. agrees with the evidence that Laci walked McKenzi ***after*** Servas had returned McKenzi to the yard and closed the gate. When Graybill delivered the mail to the Peterson home, Laci was walking McKenzi.[35]

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[35] The jury did not hear testimony from Graybill that the gate was open, as a result of that missing evidence, the jury did not hear testimony from witnesses who reported seeing Laci walking McKenzi. Both of these items were the basis of an ineffective

17. After learning of the burglary, neighbor, Diane Jackson, reported to police that she saw a van outside the Medina home at 11:40 a.m. on December 24, 2002, and a "safe being removed from the house." (99 RT 18563.) Jackson initially told officers she believed the van was white, but upon thinking about it, she thought the van may be darker. (99 RT 18566.) Jackson reported seeing three dark-skinned, not African American, short in stature men by the van. (*Ibid*.)

18. At 11:40 a.m. on December 24, 2002, it is undisputed that Scott was making the ninety-mile drive to the Berkeley Marina towing a used 15' fishing boat he had recently purchased. Scott purchased a ticket at the Berkeley Marina launch ramp at 12:54 a.m. (51 RT 10029.)

19. Another tip about Medina burglary and sighting of Laci would be called in by a corrections officer at CRC Norco, Lieutenant Xavier Aponte. He telephoned the Modesto Police Department tip line that was established to receive tips related to the disappearance of Laci. The January 22, 2003, tip line log states the following:

> Lt. Aponte 909-2732901 CRC-Norco – received info from Shawn Tenbrink (inmate) he spoke to brother Adam who said Steve Todd said Laci witnessed him breaking in. Could not give dates and time. Aponte has further info.

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assistance of counsel claims in petitioner's prior petition, *In re Peterson* Case Number S230782.

(IHP Exh. 28 HCP-000416.)[36]

20. Scott returned home from fishing at about 4:30 p.m. to find Laci's car in the driveway, but she was not home. (51 RT 10007, 10027.) Scott assumed that Laci was at her mother, Sharon Rocha's home helping prepare for Christmas Eve dinner. (57 RT 11103, 96 RT 18087.) Scott called Sharon's home about 5:15 p.m. and discovered Laci was not there. (46 RT 8998-8999.) Scott then called friends and family and checked with neighbors to see if anyone had seen Laci. (46 RT 8999; 48 RT 9511-9512.) Scott and Sharon agreed to meet in the park, and Laci's stepfather, Ron Grantski, was to call hospitals and the police. (46 RT 9000.) Ron called 911 at about 5:48 p.m. on December 24, 2002, to report Laci as missing.

21. At 10:30 a.m. the following morning, the Modesto Police Department issued a news release that Laci had been reported missing and that Scott had been fishing in the Bay Area. (Exh. D-1 [Modesto Police Department December 25, 2002 Press Release].) As Scott's defense counsel would later point out; "Only the deaf and dumb didn't know where . . . Mr. Peterson was that day." (10 RT 1998; 69 RT 13406 [Modesto detective acknowledging that "everybody knew Scott had been fishing in the bay."])

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[36] Despite requests from defense and appellate counsel, the Modesto Police Department or the District Attorney's Office has never provided any follow-up on this tip to Scott.

A citizen even called the tip line to tell the police that by making Scott's alibi publicly known, whoever took Laci would have a perfect place to dispose of her body and "get away quietly." (Exh. E [Tip Line Call].)

22. By the afternoon of December 26, 2002, the Modesto Police Department held a press conference and television reporters were already asking specific questions about Scott's alibi. Chief Roy Wasden was asked, "Chief, was Scott fishing by himself, or was he with someone in Berkeley?" These news agencies not only knew that Scott went fishing in the "Bay Area" as noted in the December 25, 2002 press release, but they also knew more specifically that Scott went to the Berkeley Marina. (Exh. D-2 [Statement of Reporter].)

23. Shortly after this press conference, the Medinas returned to Modesto at around 4:30 p.m. on December 26, 2002. (49 RT 9597.) As they drove through the downtown area, there were "a lot of cameras" at police headquarters. (*Ibid*.) When they arrived at Covena Avenue, media trucks and police officers lined the street due to Laci's disappearance. (49 RT 9624.) Mr. Medina had to show his identification before being allowed through the police barricade that was blocking off the 500 block of Covena Avenue. (49 RT 9599.)

24. Upon arriving home, the Medinas discovered their home had been burglarized, and they immediately informed the police officers that

were already present on Covena Avenue. (49 RT 9604.) The speculation started immediately; family, friends, police, and the public at large wondered if this burglary directly across the street from the Peterson home had something to do with Laci's disappearance. (Exh. G [Modesto Police Department January 03, 2003 Press Release].)

25. This was no small burglary. Items stolen from the Medina home included:

A. Multiple large and small tools including a rolling toolbox full of tools, a reciprocating saw, drills, automotive tools, hand tools, and a 24" toolbox full of tools;

B. Large lawn equipment including a weed eater, lawn edger, and hedge trimmer;

C. A safe containing at least 75 items of jewelry and a gun; and

D. Additional items including another gun, watches, jewelry, cameras and camera equipment, and a Louis Vuitton bag.

(49 RT 9627-9633, Defense Exh. I.)

26. Upon learning of the burglary, police offered a $1,000 reward using the information provided by the Medinas and eyewitness Jackson. (Defense Exh. NN.) The reward flyer sought "information leading to the identification of the persons who burglarized" the Medina home. (*Ibid*.) The flyer noted three suspects, a van, and some of the Medina property. (*Ibid*.)

27. A confidential informant notified the Modesto Police and implicated Steven Todd, Donald Pearce, and at least one additional suspect named "Mark" in the Medina burglary. (108 RT 20056.)[37] Todd and Pearce were the only two suspects arrested for the Medina burglary. (IHP Exh. 29 at HCP-00418.)

28. Todd told police he was on his bike while casing the Medina home. (107 RT 20018.) Todd said he jumped the fence and first broke into the shed, where he put some tools into his backpack and rode home. (107 RT 20019-20020.) Todd said he rode his bike back to the Medina home and then broke into the house, where he found a safe. (107 RT 20020-20021.) Todd said he moved the safe to the front porch and then rode his bike back home to get help. (*Ibid*.) Todd said he made his third trip to the Medina's house with Pearce in a small white Honda to remove the safe from the porch. (107 RT 20022.) Todd denied knowledge or use of a van. (Exh. F [Statements of Steven Todd].)

29. Todd initially told Officer Hicks of the Modesto Police Department that he burglarized the Medina home on December 27, 2002. (107 RT 20022.) However, after Hicks told Todd that the Medinas arrived home on December 26, 2002, to a burglarized home, Todd changed his

[37] The identity of the confidential informant was never made known to the defense.

statement and said the burglary was on December 26, 2002. (107 RT 20018-200019.) Todd then said he woke up Pearce between 6:30 a.m. and 7:00 a.m. on December 26, 2002, and they went to steal the safe from the Medinas. (108 RT 20058.) However, by December 26, 2002, there was a significant police and media presence on the 500 block of Covena due to Laci's disappearance. (46 RT 9017-9119; 57 RT 11166.) It would have been impossible for Todd and Pearce to remove the large safe from the house unnoticed. (Exh. L [Statement of Ted Rowlands].)

30. While Todd and Pearce both said they were with family on December 24, 2002, the Modesto Police Department did not provide Scott with reports that showed police interviewed these alibi witnesses.

31. On January 6, 2003, Steven Todd and Donald Pearce were charged with the Medina burglary. (IHP Exh. 29 at HCP-000418.) The complaint read:

> "On or about and between December 24, 2002 and December 26, 2002, defendants did commit a felony, BURGLARY IN THE FIRST DEGREE, . . . in that the defendant[s] did willfully, unlawfully, and feloniously enter the inhabited dwelling, occupied by another, 516 Covena Street, Modesto, located in the County of Stanislaus, with the intent then and there and therein to commit theft."

(*Ibid*.)

32. The Modesto Police Department failed to follow up on the suspect named "Mark" or any other suspects named by confidential

informants.

33. The Modesto Police Department failed to identify the white or tan older model van Diane Jackson saw in front of the Medina home. (53 RT 10358-10359.)

34. The Modesto Police Department failed to recover many of the items stolen from the Medina home. (49 RT 9632.)

35. The Modesto Police Department failed to fingerprint the Medina safe before destroying it. (49 RT 9632.)

36. Despite these failings, on January 3, 2003, in the Modesto Police Department's daily press briefing associated with Laci's disappearance, the police told the public that Todd and Pearce had been arrested and charged with the Medina Burglary and that the burglary occurred on December 26, 2002. (Exh. G.) The issued statement contained the following:

> Modesto Police needed to rule out, or link, any connection to the burglary with the disappearance of Laci. Todd and Pearce have both cooperated fully in the burglary investigation and police do not have any reason to believe they are connected to the disappearance of Laci Peterson. "We have been able to verify the truthfulness of their statements," said Detective George Stough.
>
> Investigation revealed that the burglary occurred on December 26, two days after the disappearance of Laci Peterson.

(*Ibid*.)

37. On April 13, 2003, almost four months after Laci went missing,

the body of an infant male that was later identified as Conner Peterson was found on the Richmond shoreline of the San Francisco Bay. (61 RT 11880, 11871, 11926.)

38. The following day, the body of a female that was later identified as Laci Peterson was found on the Richmond shoreline of the San Francisco Bay. (61 RT 11990, 11993.)

39. Once Laci and Conner's bodies were identified, Modesto police believed they had the probable cause they needed to arrest Scott because he had placed himself at the San Francisco Bay the day Laci went missing. Scott was arrested and charged with capital murder of Laci and Conner Peterson on April 18, 2003. (87 RT 16581.)

40. During Scott's trial, the jury did not hear from eyewitnesses who reported seeing Laci walking McKenzi on December 24, 2002, because defense attorney, Mark Geragos, failed to read the police report in which Graybill told police that the Petersons' gate was open 15 to 30 minutes ***after*** neighbor Servas had put the dog in the backyard and closed the gate. (IHP Exh. 4 at HCP-000030-000032.) Geragos could not reconcile the morning timeline because most witnesses reported seeing Laci, ***after*** 10:18 a.m. when Servas put McKenzi back and closed the gate. (*Ibid*.) This miscalculation resulted in the jury not hearing from witnesses who saw Laci and McKenzi walking on the morning of December 24, 2002, after Scott had left for his

office. (*Ibid*.)

41. During Scott's trial, ***the jury did not hear about the hotline tip from Lt. Aponte***. Geragos later explained that the Aponte tip was contained among "10,000 tips," and he did not understand the significance of it until two weeks before the end of the trial when the prosecution turned over a letter from an inmate named "Mr. R." who was in custody at Stanislaus County Jail. (121 RT 21775-21777.)

42. On November 12, 2004, the jury found Scott guilty of murdering Laci and Conner Peterson. (112 RT 20823.)

43. On February 25, 2005, following the guilty verdicts, Geragos filed a Motion for New Trial. The motion was based in part on purportedly newly discovered evidence relating to the tip from Lt. Aponte. According to the motion, the defense did not contact Lt. Aponte until the prosecution provided the defense with a letter from "Mr. R." at Stanislaus County Jail. (20 CT 6254.) This inmate gave the defense investigator various names, which the defense then "ran through the discovery database." (20 CT 6254-6255.) As the Motion for New Trial describes:

> One of the names, hereafter referred to as AT [Adam Tenbrink], led to a small notation in the hundreds of pages of tip sheets provided by the Modesto Police. In the notation AT was talking with his brother, hereafter referred to as ST [Shawn Tenbrink], who was imprisoned at the California Rehabilitation Center facility commonly known as Norco. The notation stated that in a phone call four weeks after Laci's

> disappearance AT had told ST that Laci had walked up on Steve Todd while he was burglarizing the house next door and that he had verbally threatened her.

(20 CT 6255.)

44. The Motion for New Trial stated that "As a practical matter, we did not realize the significance of that name [Tenbrink] until probably two weeks before the end of the trial when [the prosecution] turned over the interview with the inmate . . . in Stanislaus County Jail." (121 RT 21775.) Defense counsel claimed in their motion that "you cannot connect the dots on any of this until we get [the statement from the inmate in Stanislaus County Jail]," and learn that Shawn and Adam Tenbrink "are connected to Todd, who was the burglar across the street [from the Peterson home]." (121 RT 21776-21777.)

45. The Honorable Judge Delucchi was not presented with the evidence that mailman Graybill saw the gate open, that McKenzi was not home between 10:35 and 10:50 a.m., and that witnesses saw Laci walking. The Motion for New Trial was denied. (121 RT 21787-21793.) In denying the motion, the trial court stated it was "not too impressed by [the Lt. Aponte] evidence." The court went on to say:

> I don't think it has much credibility or value to it. And the reason being is that there is evidence in this trial that the dog, McKenzi, was recovered at 10:14 or 10:18 . . . and the Medinas didn't leave until after 10:30 in the morning. So the burglary

> must have occurred after the Medinas left their residence, and by that time Laci Peterson, under one interpretation of the evidence, was already missing.

(121 RB 21788.)

46. While the Honorable Judge Delucchi acknowledged another interpretation of the evidence, he adopted the position that whatever happened to Laci, happened ***before*** 10:18 a.m. when Servas put McKenzi in the yard and closed the gate. The critical piece of evidence from the mailman was yet to be discovered by Scott's attorneys. The judge and jury knew Graybill had delivered the mail between 10:35 and 10:50 a.m., but they did not know that the gate was open and McKenzi was not home when Graybill delivered the mail. This missing evidence was a fatal blow to Scott's defense.

47. The gate being open when Graybill delivered the mail was a crucial piece of evidence that gave meaning to all the other evidence. What happened to Laci on December 24, 2002, happened ***after*** Scott left for the day. It happened ***after*** Servas put McKenzi back in the yard and closed the gate. It happened ***after*** the Medinas left for Los Angeles. It happened ***after*** Graybill delivered the mail. It happened ***after*** Laci walked McKenzi. Scott now brings new evidence that further supports this timeline—new evidence that proves Scott is innocent.

New Evidence

48. On August 22, 2022, Scott's sister-in-law Janey Peterson received a public tweet that said "[D.M.][38] in Modesto, CA can tell you everything about the murder." (Exh. H-1 [Declaration of Janey Peterson].) The reporting party identified herself as "Melissa" and went on to say that D.M. recently gave details about the Medina burglary, Laci's abduction, and Laci's murder to several individuals. (*Ibid*.) After messaging with the reporting party on Twitter, Janey forwarded the tweets and messages to defense attorney Pat Harris. (Exh. H-2 [Tweets]; Exh. H-3 [Twitter Messaging].) Pat Harris hired an independent private licensed investigator, Jason DeWitt, to follow up on the information. (Exh. H-1.)

49. Private investigator DeWitt and attorney Pat Harris went to Modesto in November of 2022 and interviewed T.S., one of the individuals Melissa had named. T.S. informed DeWitt that S.T., K.M., and K.W. heard D.M.'s statements. Dewitt was able to locate and interview witness S.T., on November 4, 2022. (Exh. I-1[Declaration of Jason DeWitt].)

50. S.T. told DeWitt and Harris that he met D.M. at a friend's house in the spring of 2022. (Exh. J [Declaration of S.T.].) He had never met

[38] Petitioner is requesting that the identity of D.M., Declarant S.T., and Declarant K.M. remain sealed, so the only place their identities are revealed is in Exhibits H1-H3, Exhibits I-1 and I-2, Exhibit J, and Exhibit K.

D.M. before. (*Ibid*.) While there, Laci's murder came up. (*Ibid*.) Referring to Scott, D.M. said, "The only thing that motherfucker is guilty of is being stupid." (*Ibid*.) D.M. said he and two others staked out the Medina home in a white van and knew the owners were away. (*Ibid*.) They were dragging a safe out of the house and Laci caught them and threatened to call the police. (*Ibid*.) D.M. said they had to shut her up. D.M. said the others he was with killed Laci, and then when they saw on the news that Scott went fishing they took Laci's body there and dumped it. (*Ibid*; Exh. I-1.)

51. DeWitt was unable to locate K.M. and K.W., so he returned to Modesto in December of 2022. DeWitt located and interviewed K.M. and K.W. on December 5 and 6, 2022. (*Ibid*.)

52. K.M. heard D.M. make statements about participating in the Medina burglary and statements about Laci's murder. (Exh. K [Declaration of K.M.].) D.M. said he was robbing a house and Laci caught them. (*Ibid*.) They could not afford to get caught and K.M. got the impression that the men with D.M. killed Laci. (*Ibid*.) They then saw Scott was fishing on the news and went there to dump Laci's body. (*Ibid*.)

53. K.W. acknowledged that she heard D.M. make statements about Laci's murder but she did not want to be involved. (*Ibid*.)

54. DeWitt returned to Modesto in March of 2023 and again met with S.T. and K.M. separately. (*Ibid*.) Both parties confirmed the accuracy

of their statements and willingly signed declarations without inducement on March 10, 2023. (*Ibid*.) DeWitt attempted to locate D.M. and was unable to do so.

55. This new evidence claim could not have been presented prior to receiving the tip, performing the defense investigation, and obtaining the signed declarations dated March 10, 2023. This new evidence was not available at the time of trial.

Timeline of New Evidence

56. Declarants S.T. and K.M. signed declarations as to what they heard D.M. say in the spring of 2022. (Exh. J [Declaration of S.T.]; Exh. K [Declaration of K.M.]; Exh. I-1.) The statements by D.M. were made during a friendly gathering. (*Ibid*.) Both declarants perceived that D.M. was being truthful. (*Ibid*.) Both declarants were upset by what they heard and made contemporaneous statements to others. (*Ibid*.) These contemporaneous statements led to others contacting Janey. (Exh. I-1.) Both declarants are concerned about their identities being revealed due to the grave nature of the information. (Exh. I-1.)

57. D.M. admitted to participating in a burglary with two others "across the street" from Laci's house. (Exh. K.) Indeed, it is undisputed that the Medina home, directly across the street from the Peterson home was burglarized between 10:33 a.m. on December 24, 2002, and 4:30 p.m. on

December 26, 2002.

58. D.M. said the house they were robbing was under construction. (Exh. J; Exh. K.; Exh. I-1.) Indeed, the Medina home was under construction. (49 RT 9583-9584.) Susan Medina testified that a building inspector had been at their home until 9:30 a.m. the morning of December 24, 2002. (*Ibid*.; 49 RT 9618.) Susan made no mention of construction or any type of framing, she simply testified he inspected their "patio." (49 RT 9584.) However, Steven Todd knew there was more than just a "patio" when he revealed to police that he gained access to the Medina residence under a "newly constructed porch." (Exh. F.) D.M. and Todd both use the word "construction" to describe the Medina home.

59. D.M. said they knew the dates the owners would be out of town. (Exh. J; Exh. K.)

60. D.M. said he and two others were dragging a safe out of the house toward a white van. (Exh. J; Exh. I-1.) Indeed, Jackson reported seeing three men loading a safe into a van outside the Medina home. (RT 18563-18567.) Jackson initially told officers she believed the van was white, but upon thinking about it, she thought the van may be darker. (99 RT 18566.)

61. D.M. said Laci "caught them and threatened to call the police." (Exh. J, *see also* Exh. K; Exh. I-1) Indeed, Lt. Aponte called the Laci Peterson hotline and told Modesto Police that inmate, Shawn Tenbrink,

spoke to his brother Adam on the phone who said "Steve Todd said Laci witnessed him breaking in." (IHP Exh. 28 [Hotline Telephone Log].) Furthermore, the police investigation into Laci's disappearance revealed that Laci had engaged people on the street in front of her home before. Neighbor M. Ikerd told police that just weeks before Laci went missing, Ikerd heard Laci loudly yelling at two women who were fighting on Covena Avenue. (99 RT 18578.) Laci told the women to "stop fighting and that kind of behavior would not be tolerated in the neighborhood." (*Ibid*.)

62. It certainly is not the first or second time Petitioner has heard that Laci encountered the burglary. First, there was the tip from Lt. Aponte that said Shawn and Adam were on the phone and Adam said "Laci witnessed [Todd] breaking in. (IHP Exh. 28 HCP-000416.) While Shawn initially denied this conversation happened to Lt. Aponte, six years later, he confirmed to defense investigator Jacqueline Tully that his brother "Adam said someone told him that Laci had seen Todd rob the house." (IHP Exh. 34 at HCP-000432.) The second instance was "Mr. R." He said "he was told by a gentleman in the garage that Laci had confronted the people" who were burglarizing the Medina home. (107 RT 19903.) Romano was unable to identify the man who told him this. This new evidence, however, is the first time Petitioner has obtained admissible direct evidence to support that Laci came upon the men burglarizing the Medina home on December 24, 2002.

63. D.M. said they could not afford to get caught. (Exh. K; Exh. I-1.) They had to shut her up. (Exh. J; Exh. I-1.) Indeed, at the time of the burglary, Steven Todd was a two-strike felon awaiting sentencing. On December 3, 2002, just prior to the Medina burglary, Steven Todd entered a guilty plea to two counts of first-degree burglary "with the understanding that if he came back for sentencing like he was supposed to and didn't pick up any law violations, he would be sentenced to six years." (IHP Exh. 30 at HCP-000420.) Another burglary conviction could send him to prison for 25 years to life under California's three strikes law. (*Id.*at HCP-000421.)[39] D.M. had three felony drug convictions in December 2002. (Exh. I-2 [D.M. Criminal Complaint].)

64. D.M. said the men he was with killed Laci. (Exh. J, *see also* Exh. K; Exh. I-1.)

65. D.M. said they saw on the news that Scott had been fishing. (Exh. J; Exh. K; Exh. I-1.) Indeed, the Modesto Police immediately publicized Scott's alibi. (Exh. D.) Scott's alibi was in the local Modesto news on Christmas Day, and it is certainly not a stretch to think that those who took Laci from the street in front of her home would monitor the news for

[39] Despite being arrested and pleading guilty to the Medina burglary—a third strike that could send Todd to prison for the rest of his life—Todd was only sentenced to 7 years, 4 months at his sentencing hearing. (Abstract of Judgement.)

any coverage of the story. They did not have to wait much more than 24 hours to find out that Laci's husband, Scott, had gone fishing for the day in the San Francisco Bay.

66. D.M. said they took Laci's body to where Scott was fishing, and they dumped it. (Exh. J; Exh. K; Exh. I-1.) Indeed, Dr. Rusty Feagin—an expert in coastal ecology and the movement of bodies in bays and estuaries—reviewed the evidence in this case post-conviction and concluded that the bodies of Laci and Conner could have originated from three areas:

a. From sites originating on the south and west of where Laci and Conner's bodies were found;

b. From sites near Point Portrero/Ford Channel north of Brooks Island; or

c. From sites that inflow to the bay from upstream in the tidal creek network.

(IHP Exh. 9 at HCP-000291.) A body could be dumped in the water from multiple locations along the shoreline as noted by Dr. Feagin. (Exh. M [Summary Map of Dr. Feagin's Conclusions].)

67. This is new, admissible evidence that Laci Peterson was alive the morning of December 24, 2002, during the commissioning of the Medina burglary.[40]

[40] Petitioner, in his prayer for relief as to this claim, requests this court grant an order to show cause and evidentiary hearing

68. If D.M. saw Laci Peterson during the Medina burglary, then Scott is innocent.[41]

69. This new evidence, D.M.'s knowledge of seeing Laci during the burglary and witnessing her murder, existed at the time of Petitioner's trial, but could not have been known by the defense at Petitioner's trial since D.M. only admitted to S.T. and K.D. in spring of 2022 and no one contacted anyone associated to Petitioner with this information until August 2022.

70. This new evidence is of such decisive force and value that it would have more likely than not changed the outcome at trial.

71. Post trial, Juror Six declared the following:

> The defense presented evidence that a burglary took place across the street form Laci and Scott's house . . . Any evidence that Laci was still alive when Scott was already at the marina would have been important to me as a juror. We heard evidence

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related to this claim. At an evidentiary hearing, Petitioner would subpoena and call D.M. to testify. If he invoked his Fifth Amendment privilege, Petitioner would call S.T. and K.D. to testify to his statements pursuant to Evidence Code section 1230 (Declaration Against Interest.) If he agreed to testify but testified differently to what he told S.T. and K.D., Petitioner would call S.T. and K.D to testify and offer his prior inconsistent statements regarding encountering Laci when he burglarized the Medina home and witnessing her murder.

[41] While the fact D.M. saw Laci during the burglary is enough to exonerate petitioner, the significance of the admission by D.M. that he witnessed the murder of Laci and knows who did it is of utmost significance for obvious reasons.

> that Laci was a pretty bold person . . . Evidence that she may have confronted burglars would have been significant.

(IHP Exh. 50 at HCP-000986-000987.) By the juror's standard, this evidence is significant.

72. Scott is timely and moved rapidly to bring this new evidence without substantial delay. Relief is required.

1. SUPPORTING DOCUMENTS.

Exhibit D-1	Modesto Police Department December 25, 2002 Press Release
Exhibit D-2	Statement of Reporter
Exhibit E	Tip Line Call
Exhibit F	Statements of Steven Todd
Exhibit G	Modesto Police Department January 03, 2003 Press Release
Exhibit H-1	Declaration of Janey Peterson
Exhibit H-2	Tweets from Janey Peterson
Exhibit H-3	Twitter messaging from Janey Peterson
Exhibit H-4	Anonymous Tip and Modesto Police Department follow-up
Exhibit I-1	Declaration of Jason DeWitt
Exhibit I-2	D.M. Criminal Complaint
Exhibit J	Declaration of S.T.
Exhibit K	Declaration of K.M.
Exhibit L	Statement of Ted Rowlands
Exhibit M	Summary Map of Dr. Feagin's Conclusions

2. SUPPORTING CASES, RULES, OR OTHER AUTHORITY.

1. Cal. Pen. Code sec. 1473(b)(3).
2. *In re Clark* (1993) 5 Cal.4th 750
3. *In re Hampton* (1993) 5 Cal.4th 750
4. *In re Branch* (1969) 70 Cal.2d 200
5. *In re Imbler* (1963) 60 Cal.2d 544
6. *Herrera v. Collins* (1993) 506 U.S. 390
7. *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463
8. *Spivey v. Rocha* (9th Cir. 1999) 194 F. 3d 971
9. *People v. Gilbert* (1944) 62 Cal.App.2d 933
10. *Fong Shee Shung* (1941 42 Cal.App.2d 721
11. *People v. Cardenas* (1982) 31 Cal.3d 897
12. *People v. Rucker* (1980) 26 Cal.3d 268
13. *People v. Woodard* (1979) 23 Cal.3d 329
14. *In re Lawley* (2008) Cal.4th 1231

3. ARGUMENT IN FAVOR OF RELIEF ON THIS CLAIM.[42]

1. Petitioner Moved Rapidly To Bring New Evidence Without Substantial Delay.

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[42] Pursuant to Rules of Court Rule 8.380, subdivision (b), because petitioner is unrepresented in this action, he is not submitting a Memorandum in support of his petition, but includes here some arguments in support of his claim to be supplemented by counsel, should counsel be appointed.

"New evidence means evidence that has been discovered after trial, that could not have been discovered prior to trial by exercise of due diligence, and is admissible and not merely cumulative, corroborative, or impeaching." (Cal. Pen. Code sec. 1473(b)(3)(B).)

New evidence is untimely if it is based on facts that were known at the time of trial. (*In re Clark* (1993) 5 Cal. 4th 750, 786.) "Where the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made . . . the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible." (*In re Hampton* (2020) 48 Cal.App.5th 463, 475.) Where the claim is untimely, an exception is made where there is a "fundamental miscarriage of justice," and it can be demonstrated that "the petitioner is actually innocent of the crimes of which petitioner was convicted." (*In re Clark* (1993) 5 Cal. 4th 750, 797-798.)

This new evidence could not have been known at the time of Petitioner's trial. Petitioner has long asserted that someone involved in the burglary of the Medina home may have abducted and killed Laci, and this theory was part of Petitioner's defense during trial. Investigators for the Petitioner spoke to Todd and Pearce, who were identified by the police investigation, (IHP Exh. 29.) but at no point was D.M. identified. Additionally, the state attempted to alter Petitioner's third-party culpability defense by introducing false evidence that the burglary occurred exclusively on December 26, 2002. (*See* CLAIM THREE of this petition.)

The facts included in this claim were only recently revealed

to Petitioner. Petitioner had no knowledge of the declarants until August 22, 2022, when a member of Petitioner's family received a message from "Melissa" via Twitter claiming she and others had heard D.M. confess and that "[D.M.] in Modesto, CA can tell you everything about the murder." (Exh. H-1.) Petitioner hired an independent private investigator, Jason DeWitt, to follow up on the information. (*Ibid*.)

DeWitt went to Modesto in November of 2022 and was able to locate and interview S.T. on November 4, 2022, however, attempts to locate other direct witnesses of the confession were unsuccessful. (Exh. I-1.) DeWitt returned to Modesto in December of 2022 and was able to locate two more direct witnesses and interviewed them on December 5-6, 2022. (*Ibid*.) After further investigation, DeWitt returned to Modesto in March of 2023. In the interest of justice, two of these witnesses signed declarations without inducement on March 9, 2023. (*Ibid*.) The third witness did not want to be involved. (*Ibid*.) Petitioner could not have presented a claim implicating D.M. prior to obtaining the signed declarations dated March 9, 2023.

Petitioner has continued to investigate and has gathered additional declarations in support this new evidence. (Exh. H-1; Exh. I-1.)

Petitioner prays the court take notice that this claim is promptly presented within eight months of first receiving information about declarants and within two months of obtaining signed declarations. If the court deems the claim untimely, Petitioner prays the court take notice that the Petitioner has

maintained his innocence and the nature of the claim proves that Petitioner is actually innocent.

The new evidence is of such decisive force and value that it would have more likely than not changed the outcome at trial.

A writ of habeas corpus may be prosecuted when new evidence is of "such decisive force" that it would have changed the outcome of Petitioner's trial. (Cal. Pen. Code sec. 1473(b)(3)(A).)

Under state law, a petition for writ of habeas corpus based on "new evidence" must be granted whenever the new evidence "undermines the prosecution's entire case." (*See*, e.g., *In re Branch* (1969) 70 Cal.2d 200, 213; *In re Imbler* (1963) 60 Cal.2d 554, 569.) Federal law too precludes the state from punishing a defendant who can establish his innocence of the crime for which he was convicted. (*See Herrera v. Collins* (1993) 506 U.S. 390, 417; *Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 476.) When a defendant alleges that new evidence shows he is innocent, relief is properly denied where "new evidence does not undermine the structure of the prosecution's case." (*Spivey v. Rocha* (9th Cir. 1999) 194 F.3d 971, 979.) But where the new evidence presented by Petitioner measured against "the proof of petitioner's guilt at trial" undermines the "structure of the prosecution's case," relief must be granted. (See *Herrera v. Collins*, supra, 506 U.S. at p. 418; *Spivey v. Rocha*, *supra*, 194 F.3d at p. 979.)

In sum, the question is simple. Does the new evidence fundamentally undercut the evidence presented by the state at trial? The answer here is, "Yes."

The prosecution conceded that this was a circumstantial

evidence case. (109 RT 20324.) The judge conceded that there were other interpretations of the evidence. (121 RT 221788.) Petitioner now brings direct evidence that undercuts the entire case presented at trial against Petitioner. This new evidence claim absolutely "undermines the prosecution's entire case" as required by state law. Additionally, under federal law, this new evidence undermines the "structure of the prosecution's case" presented at trial.

The new evidence is exactly the evidence that the jury in Petitioner's trial was looking for. Post trial, Juror Six declared the following:

> The defense presented evidence that a burglary took place across the street form Laci and Scott's house . . . Any evidence that Laci was still alive when Scott was already at the marina would have been important to me as a juror. We heard evidence that Laci was a pretty bold person . . . Evidence that she may have confronted burglars would have been significant.

(IHP Exh. 50 at HCP-000986-000987.) By the juror's standard, this evidence is significant.

Close Case

If additional analysis is considered, Petitioner takes the opportunity to note that the state's circumstantial case was a close case that merits relief. *Compare People v. Gilbert* (1944) 62 Cal.App.2d 933 [new evidence merits relief where case against defendant was close] *with Fong Shee Shung* (1941) 42 Cal.App.2d 721 [new evidence does not merit relief where case against defendant was overwhelming.] *See, e.g., People v. Cardenas*

(1982) 31 Cal.3d 897, 907 [twelve-hour deliberations was a "graphic demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 268, 391 [nine-hour jury deliberation shows close case"]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation].

Here, the state's circumstantial case brought no physical evidence. The prosecution admitted the shortcomings of their case, stating in closing arguments, "I can't tell you when he did it . . . I'm not going to try to convince you of something that I can't prove." (109 RT 20200.)

The prosecution suggested that Petitioner smothered or strangled Laci but conceded that that is "not going to leave a bunch of evidence." (109 RT 20200.) The prosecutor had to concede the lack of evidence because other than two stray hair fragments, there was no forensic evidence recovered in the Peterson house, their vehicles, or Petitioner's warehouse. (43 RT 8519; 44 RT 8596.)

Additionally, the judge acknowledged that shortcomings of the proceedings when he remarked, "if there is a conviction in this case, this will be an appellate lawyer's Petri dish. There is so many issues in this case, right?"

Lastly, it took three jury panels, with deliberations starting a new with each new juror, before a verdict was reached. The jury began deliberating just after lunch on Thursday, November 3, 2004. (111 RT 20572.) Petitioner's jury deliberated for over three days before one of them was replaced by an alternate on the afternoon of Tuesday, November 9, 2004. (112 RT 20775.) The

jury began deliberations anew and the following day another juror was excused telling the court:

> When I took the oath, I understood it to mean that I needed to be able to weigh both sides fairly, openly. And given what's transpired, my individual ability to do that I think has been compromised to a degree that I would never know personally whether or not I was giving the community's verdict, the popular verdict, the expected verdict, the verdict that might, I don't know, produce the best book.

(112 RT 20794.)

With another new juror, deliberations began again at 10:33 a.m. the morning of November 10, 2004. Two days later, on Friday, November 12 at 10:53 a.m., the jury requested verdict forms. Jury deliberation in Petitioner's case went on for seven days, with the final jury deliberating for over twelve hours. Clearly this was a close case.

Actual Innocence

The California Supreme Court has "long recognized the viability of an actual innocence habeas corpus claim, at least insofar as the claim is based on newly discovered evidence or on proof false evidence was introduced at trial." *(In re Lawley* (2008) 42 Cal.4th 1231, 1238 *(Lawley).)* Prior to 2017, the standard for new evidence claims was defined by *Lawley,* in which the CSC held that newly discovered evidence "must undermine the entire prosecution case and point unerringly to innocence or reduced

culpability." *(Id.* at p. 1239.) The CSC further held that "if 'a reasonable jury could have rejected' the evidence presented, a petitioner has not satisfied his burden." *(Ibid.,* quoting *Clark, supra,* 5 Cal.4th at p. 798, fn. 33.)

In 2017, the Legislature passed Senate Bill No. 1134, which addressed the unreasonably high *Lawley* standard by adding the "new evidence" section in section 1473, subdivision (b)(3). With this amendment, the Legislature intended to lower the new evidence standard from the near-unattainable *Lawley* standard to the current "more likely than not" standard in order to bring California's postconviction standard for innocence claims in line with other states and to provide innocent people in prison a new state right under which to plead their innocence. (See Sen. Com. on Public Safety, Analysis of Sen. Bill. No. 1134 (2015-2016 Reg. Sess.), April 5, 2016, pp. 4-6 [describing the *Lawley* standard as "so high that it is nearly impossible to meet absent DNA evidence, which exists only in a tiny portion of prosecutions and exonerations," and explaining that the proposed amendment "[sought] to bring California's innocence standard into line with the vast majority of other states' standards ... and to bring it closer in line with other postconviction standards for relief such

as ineffective assistance of counsel, or prosecutorial misconduct, and not so unreasonably high"]; see also Assem. Com. on Public Safety, Analysis of Sen. Bill. No. 1134 (2015-2016 Reg. Sess.), June 28, 2016, p. 3 ["Our laws must recognize that if evidence exists that a jury did not hear (regardless of whether it is the fault of a mistaken or lying witness, an ineffective attorney, or the misconduct of law enforcement), which creates a reasonable probability of a different outcome, the conviction should be

In conclusion, this credible, timely claim fundamentally undercuts the state's case against Petitioner, and relief is required.

C. The CLAIM THREE: The Prosecution Presented False Evidence And Argument Regarding The Date Of The Medina Burglary

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional and statutory rights as guaranteed by the state and federal constitutional law, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Napue v. Illinois, 360 U.S. 264 (1959); Cal. Pen. Code sec. 1473.)

Penal Code section 1473 provides in pertinent part:

> (b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons: (1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at a hearing or trial relating to the person's incarceration.

The state presented false evidence and argument at trial to support its theory that Laci could not have been abducted or murdered by the individuals who burglarized the Medina house because the burglary happened on December 26, 2002, after Laci was reported missing.

Despite arguing the burglary happened after Laci went missing to obtain a conviction in Petitioner's case, the District Attorney of Stanislaus County had already charged and accepted a guilty plea from Steven Todd that "on or about and between December 24th of 2002 and December 26th 2002," Todd burglarized the Medina home across the street from Petitioner's home. Petitioner's wife, Laci Peterson, went missing on December 24, 2002. In April of 2003, Petitioner was arrested and charged with murdering Laci and their unborn son, Conner. Petitioner's

defense counsel presented evidence that the Medina burglary occurred on December 24, 2002—the day Laci went missing. The prosecutor presented false evidence and gave false argument—contrary to their own complaint against Todd—that the burglary ***didn't happen on December 24th***. The presentation of this false evidence and argument directly undercut the third-party culpability claim of Petitioner at trial and requires relief.

1. SUPPORTING FACTS.

1. Petitioner incorporates by reference each of the facts alleged in all other claims of this petition. Petitioner also requests this court to take judicial notice of all pleadings and filings in both *People v Peterson*, San Mateo County Superior Court Case Number SC055500A, *People v. Peterson*, Case Number S132449, *In re Peterson* Case Number S230782.

2. At trial, the state's theory was that Petitioner, Scott Peterson, killed his wife, Laci Peterson, and their unborn son Conner on the evening of December 23, 2002, on the morning of December 24, 2002, left home for his office around 10 a.m. on December 24, 2002, then drove Laci's body from Modesto to the

Berkeley Marina, launched his boat, and placed her body in the San Francisco Bay that afternoon.

3. The defense theory was that Laci was still alive when Petitioner left the house that morning to go fishing, and Petitioner is innocent.

The Burglary

4. The Medinas lived across the street from the Petersons on Covena Avenue. At around 10:33 a.m. on December 24, 2002, the Medinas left for Los Angeles to spend Christmas with their children. (49 RT 9589-9590, 109 RT 20318.) The Medinas returned home around 4:30 p.m. on December 26, 2002, to find their home burglarized. (49 RT 9597, 9604.)

5. The Medina home was burglarized by at least two men: Steven Todd and Glenn Pearce. Both men were arrested in early 2003 for the burglary. (IHP Exh. 29 HCP-000419).

6. On December 27, 2002, upon learning of the Medina burglary, neighbor Diane Jackson notified the police. She told them that at 11:40 a.m. on December 24th, she saw a van outside the Medina home and a "safe being removed from the house." (99

RT 18562-18563, 18565.) Jackson described the men as "short of stature, dark-skinned, but not African American." (99 RT 18565.) Indeed, a safe was stolen from the Medina home. (49 RT 9606-9607.)

7. The police offered a reward using the information provided by the Medinas and eyewitness Jackson. (*People v Peterson*, San Mateo County Superior Court Case Number SC055500A Defense Exh. NN.) The flyer read in part that a residence in the 500 block of Covena had been burglarized "between 12-24 and 12-26-2002." (*Ibid*.)

8. On January 2, 2003, police received an anonymous tip. (Exh. N.) A confidential informant for the Modesto Police implicated Steven Todd, Donald Pearce, and at least one additional suspect named "Mark" in the Medina Burglary. (108 RT 20056)

9. When arrested later that same day, Todd initially told Officer Hicks of the Modesto Police Department that he burglarized the Medina home on December 27, 2002. (107 RT 20022.) However, after Hicks told Todd that the Medinas arrived home on December 26, 2002, to a burglarized home, Todd changed his statement and said the burglary was on December 26, 2002.

(107 RT 20018-200019.)

10. By 5:00 p.m. the following day, the Modesto Police Department issued a press release titled, "COVENA BURGLARS ARRESTED." (Exh. G.) The Modesto Police admitted in this press release that they "needed to rule out, or link, any connection to the burglary with the disappearance of Laci." (*Ibid*.) Police told the public that "Todd and Pearce have both fully cooperated in the burglary investigation and police do not have any reason to believe they are connected to the disappearance of Laci Peterson." (*Ibid*.)

11. It had been only one day since the anonymous informant contacted the Modesto Police, and yet the police stated in their press release that their "investigation revealed that the burglary occurred on December 26, two days after the disappearance of Laci Peterson." (*Ibid*.)

12. The only evidence the Modesto Police had that the burglary occurred on December 26, 2002, was that Todd and Pearce said so. By the time they were arrested on January 2, 2003, the police should have known that the last thing any suspect in the burglary is going to do is put themselves on Covena Avenue on Christmas Eve, the day Laci went missing. Yet, the Modesto Police

Department did nothing to follow up on the alibis Todd and Pearce gave for December 24, 2002. Petitioner has never received any reports indicating that the police followed up on December 24, 2002, alibis that Todd and Pearce provided to the police, despite Detective Allen Brocchini telling Fox News reporter, Laura Ingle, in an interview that aired March 30, 2023, that Modesto Police Department "confirmed their alibis." (Exh. O [Statement of Modesto Police Detective Allen Brocchini].)

13. The Modesto Police failed to follow up on any additional suspects named by the confidential informant. (108 RT 20018.)

14. The Modesto Police Department failed to identify the three men or the van that Jackson saw in front of the Medina home on December 24, 2002. (53 RT 10358-10359.) The Modesto Police Department showed one landscaping van to Jackson to inquire if that was the van she saw; it was not. (Bates 2444.) The report went onto say, "There was no further information and no further follow-up on the possible white van parked near the Medina's residence." (*Ibid*.) The police never showed Jackson a photo lineup containing Todd or Pearce.

15. The Modesto Police Department failed to fingerprint the Medina safe before destroying it. (99 RT 18613-18614.)

16. The Modesto Police Department failed to recover many of the items stolen from the Medina home. (49 RT 9632.)

17. Todd and Pearce were the only suspects arrested for the Medina burglary. (IHP Exh. 29 at HCP-000418.) On January 6, 2003, Steven Todd and Donald Pearce were charged with the Medina burglary. (*Ibid*.) The complaint charged that:

> "on or about and between December 24, 2002 and December 26, 2002, defendants did commit a felony, BURGLARY IN THE FIRST DEGREE, . . . in that the defendant[s] did willfully, unlawfully, and feloniously enter the inhabited dwelling, occupied by another, 516 Covena Street, Modesto, located in the County of Stanislaus, with the intent then and there and therein to commit theft."

(*Ibid*.)

18. On January 22, 2003—after Todd's arrest, but before Todd pled guilty—a corrections officer at CRC Norco, Lieutenant Xavier Aponte, telephoned the Modesto Police Department hotline, which had been established to receive tips related to the disappearance of Laci Peterson. The tip line log states the following:

> Lt. Aponte 909-2732901 CRC-Norco – received info

> from Shawn Tenbrink (inmate) he spoke to brother Adam who said Steve Todd said Laci witnessed him breaking in. Could not give dates and time. Aponte has further info.

(IHP Exh. 28 at HCP-000416.) At that point, there was more evidence that the Medina burglary occurred on December 24th—the day Laci went missing, and that Laci witnessed the burglary therefore she had to be alive when Scott left for his office on December 24, 2002. (109 RT 20226.)

19. On February 4, 2003, Steven Todd pleaded guilty to the charge of burglary of the Medina home "on or about and between December 24th of 2002 and December 26th of 2002." (IHP Exh. 30 at HCP-000424.)

20. Deputy District Attorney Rick Distaso appeared in court on behalf of the People for Todd's change of plea. (*Id*. at HCP-000419.) Distaso later appeared as the lead prosecutor on behalf of the People in the People of the State of California v. Scott Peterson. (1 RT 306.)

What the Jury Heard

21. The prosecution did not provide Petitioner's defense counsel with the criminal complaint, plea agreement, nor abstract

of judgment from the Medina burglary prior to or during Petitioner's trial.[43]

22. At trial, the defense maintained that the burglary occurred on December 24, 2002, the day Laci was abducted. The defense told the jury in their opening statement that Jackson saw three men and a van at the Medina's house at 11:40 a.m. on December 24, 2002, "And this burglary took place very - - you know, some people say the 26th. The people who were burglarized believe it was on the 24th, in the morning . . ." (44 RT 8645-8648.)

23. To support the defense theory, the jury heard that neighbor Jackson had notified the police about seeing three men and a van outside the Medina home at 11:40 a.m. on December 24, 2002. Jackson saw a "safe being removed from the house." (99 RT 18562-18563, 18565.) However, the jury did not hear the information directly from Jackson because the court ruled her testimony would be inadmissible because she was improperly hypnotized by the Modesto Police. (99 RT 18528-18529.) The court ruled that only her pre hypnosis statement was admissible, and it

[43] Petitioner's appellate counsel obtained and submitted these items as Exhibits 29-31 with Petitioner's initial habeas petition.

would be offered "for the truth" through the testimony of Detective Craig Grogan. (*Ibid*.) The only eyewitness the defense had to show the burglary occurred on December 24, 2002 was reduced to a stipulation "entered for the truth" because the Modesto Police failed to follow the statute on hypnosis with "particularity." (99 RT 18529.)

24. The court acknowledged the jury might not give the evidence the proper weight when they expressed concern that this evidence may confuse the jury because most other hearsay was being allowed to "show the reasonableness" of conduct, not for the truth of the matter. (99 RT 18549.) Prosecutor Dave Harris agreed that shifting gears from telling the jury that "this is for the truth but everything else isn't" will get the jury "very confused." (99 RT 18551.)

25. Ultimately, Detective Grogan went on to testify for the truth of the matter that Jackson saw a safe being removed from the Medina house at 11:40 a.m. on December 24, 2002. (99 RT 18563.) Detective Grogan confirmed that Jackson first thought the van was white, but upon thinking about it, she thought the van was darker. (99 RT 18566.) Jackson also said it was an older van. (*Ibid*.) The Modesto Police Department never identified the white

or tan older model van that Jackson saw in front of the Medina home. (53 RT 10358-10359.)

26. The defense offered additional evidence that the Medina burglary occurred on December 24, 2002. Burglar Todd admitted to seeing mail in the Medina mailbox. (107 RT 20118-20023, 108 RT 20057.) As discussed previously in Claim Twenty, based on Susan Medina's testimony and mailman Graybill's testimony, the only time the Medinas' outgoing mail was visible from the street while they were gone was before 11 a.m. on the morning of December 24, 2002. (49 RT 9573, 9579.) And the Medina's left their house at 10:33 a.m. on December 24, 2002. Therefore, by seeing the Medinas' outgoing mail, Steven Todd put himself on Covena Avenue on the morning of December 24, 2002.

27. Additionally, Sergeant Ronald Cloward of the Modesto Police Department, testified that based on the information he received that near or about the time that Laci Peterson was reported missing on December 24 was when the burglary occurred at the Medina residence. (52 RT 10260.)

28. As set forth in the initial habeas petition in Claim Nine and Claim Ten, Petitioner's defense counsel was ineffective

during trial for failing to present at least two pieces of evidence that could tie Laci's disappearance to the Medina burglary.

29. First, defense counsel failed to investigate and present evidence that Lieutenant Xavier Aponte, a CDCR officer, listened to a recorded call between an inmate and his brother that Steven Todd admitted that Laci had witnessed the burglary on December 24, 2002, after Petitioner had left Modesto for the Berkeley Marina.

30. On January 22, 2003, Lt. Aponte contacted the Modesto Police Department ("Aponte Tip") and provided the following information:

> Lt. Aponte 909-2732901 CRC-Norco – received info from Shawn Tenbrink (inmate) he spoke to brother Adam who said Steve Todd said Laci witnessed him breaking in. Could not give dates and time. Aponte has further info.

(IHP Exh. 28 at HCP-000416.) Scott's jury ***did not hear about the hotline tip from Lt. Aponte***. Geragos later explained that the Aponte tip was contained among "10,000 tips," and he did not understand the significance of it until two weeks before the end of the trial when the prosecution turned over a letter from an inmate named "Mr. R." who was in custody at Stanislaus County Jail. (121

RT 21775-21777.)

31. However, the Stanislaus County District Attorney had this evidence in their possession, because they gave it to defense counsel on May 13, 2003. (Exh. V [Declaration of Jan Gauthier with People's Opposition to Defense Motion for New Trial].) Yet despite this information coming from another law enforcement officer, the prosecutor at trial still falsely stated in his closing argument that the burglary did not occur on December 24, 2002. Based on the Aponte Tip, the only possible date for the burglary is December 24, 2002, as all parties agree that Laci was missing after that date. And prosecutor Distaso was aware of who Todd was and his significance to the Peterson case because Distaso had previously appeared in Todd's case when he pled guilty to the Medina burglary a little over a month after Laci disappeared.

32. Second, defense counsel was also ineffective for failing to discover, investigate, and present key evidence from mailman Russell Graybill that the Peterson *gate was open and McKenzi was not on the property* when he delivered the mail between 10:35 a.m. and 10:50 a.m. on the morning of December 24, 2002. (IHP at p. 186; Exh. 4 at HCP-000032.)

33. Graybill's observations about the gate and the dog are evidence that Laci was alive after Servas put McKenzi in the yard at 10:18 a.m. and that, consistent with reports from other neighbors, she was walking the dog in the neighborhood. This also corroborates the Aponte Tip that Laci was alive when the Medinas left on the morning of December 24, 2002, as stated by Todd to Shawn Tenbrink.

34. Both the defense and the prosecution questioned Modesto Police Officer Michael Hicks about the date of the burglary. Hicks confirmed that Todd initially told police they burglarized the home on December 27, 2002 (107 RT 20018-20019.), but then later changed his story and claimed the burglary occurred in the early morning hours of December 26, 2002. (*Ibid*.) Hicks testified Todd was "confused" about the date, but admitted he did not describe Todd as "confused" in his police report. (*Ibid*.) The Modesto Police Department helped Todd correct his clearly false claim that the burglary was on December 27, 2002. (*Ibid*.)

35. Furthering the presentation of false evidence, the prosecutor cross-examined Officer Hicks about Todd's accomplice Glenn Pearce, eliciting the answer of "Yes," when asked whether Todd woke up Pearce "in the early morning hours of December

26th" to go retrieve the Medina safe. (107 RT 20050.)

36. Despite all the evidence the prosecutor knew existed that the burglary occurred on December 24, 2002, he presented and argued that it occurred on December 26, 2002 to undermine the defense theory that Laci was alive when Scott left the house. Prior to trial, prosecutor Distaso had the criminal complaint against Todd, was present when Todd pleaded guilty for the Medina burglary that occurred "on or about December 24, 2002 and December 26, 2002," knew Jackson saw a safe being removed from the Medina home on December 24, 2002, and knew that Todd saw outgoing mail at the Medinas.

37. Prosecutor Distaso was also in possession of the tip from Lt. Aponte stating Todd had admitted that Laci witnessed Todd burglarizing the Medina home. (121 RT 21782.)

38. Despite the evidence, Distaso misled the jury with false evidence and argument. In his closing argument, Distaso referenced the testimony of Amie Krigbaum, who lived next door to the Medinas. Krigbaum testified during Petitioner's trial that she had a "brand new" Astro van that was white with "pretty big" neon green letters saying "Siemens" on all four sides. (48 RT 9338.)

Krigbaum's van was parked in front of her house all day on December 24, 2002. (48 RT 9338.) Despite the disparity in the description, Distaso said:

> You heard some testimony about Diane Jackson, remember that? And seeing a van. Remember what Amie Krigbaum said. She said that she had that white Siemens van at the time. I had her write on this picture. . . . Remember what she said? She said, yeah, it was parked in right in front of my house. . . .
>
> You heard Diane Jackson saw a van. I think the testimony was 11:40. You heard through that officer. There is a van. Of course, she saw a van. Van is right there on the street.

(109 RT 20317, *referring to* People's Exh. 31.) This false argument was contrary to testimony that the van Jackson saw was never identified. (53 RT 10358-10359.) The Modesto Police Department never identified the van that Jackson saw and Distaso knew that. (Exh. P [Statement of Diane Jackson].) And Jackson lived half a block away from the Medinas and Krigbaum. It's pretty safe to say that Krigbaum's new van that Jackson regularly drove by was not the unidentified older model van that Jackson saw.

39. Distaso went on to falsely argue, "Now that's a good point, that brings up a good point with the Medinas. Remember we heard all the testimony about the burglary at their house? There was a burglary at their house***. It didn't happen on December 24th***." (109 RT 20318.)

40. In Petitioner's closing argument, the defense stated, "first is the Medina burglary, which is across the street. Now, much has been made about the fact that that burglary didn't take place on the 24th, that it must have taken place on the 26th and the problem with that is, and one of the reasons that I asked - Officer Hicks came in, he testified that Todd told him that he saw the mail in the mailbox. (110 RT 20480.) Defense counsel goes onto explain that "[if] the Medinas put outgoing mail in that mailbox, the mailman had come around and taken the outgoing mail, there would have been no mail for Steven Todd to have seen on either the 25th, Christmas, or the 26th." (*Ibid*.) Defense counsel then tells the jury, "you have got Diane Jackson, which came in for the truth." she saw three men and a van on 12-24 at 11:40. (*Ibid*.) The defense pointed out the media presence on the street on December 26 and that it was unlikely a safe could be rolled down the front walk. (*Ibid*.) The burglary was a significant topic of discussion in

Petitioner's closing argument.

41. On November 12, 2004, the jury found Petitioner guilty of murdering Laci and Conner Peterson. (RT 112 20823.)

42. The false arguments made by the prosecution during trial were prejudicial.

43. In the book juror Greg Beratlis co-authored, "We the Jury," Beratlis expresses, "I was always looking for his [trial counsel's] smoking gun to take the case in another direction to show that Scott is not the only person who could have killed Laci, but his [defense attorney] remarks were never proven. There was supposed to be a van with dark-skinned individuals who kidnapped her [Laci], but that never panned out." (IHP Exh. 8 at HCP000221.)

44. In the same book, juror Richelle Nice states, "Okay, good, we will find out that someone else did it." (*Id*. at HCP-000220.) Nice continued, "he didn't put on a defense at all." (*Id*. at HCP-000225.) The prosecutor presenting false evidence stole the petitioner's defense that the jury was looking for to avoid conviction.

45. These jurors were looking for third-party culpability,

and the prosecution argued false evidence against the defense's third-party culpability theory. The true evidence is of an exculpatory nature. Statements by the jurors themselves show there is a reasonable probability they would have reached a different verdict. If the jury had not heard false evidence and argument that the burglary did not occur on December 24, 2002, Petitioner would have been acquitted.

46. Even Sergeant Ed Steele with the Modesto Police Department agrees that if the burglary that happened across the street from the Peterson home occurred on December 024, 2002, it would be extremely relevant to Laci's disappearance. (Exh. N [Statement of Modesto Police Sergeant Ed Steele].)

47. On February 25, 2005, following the guilty verdicts, Petitioner filed a Motion for New Trial. The motion centered around the Medina burglary and was based in part on purportedly newly discovered evidence relating to the tip from Lt. Aponte. (20 CT 6255.)

48. In their response to Petitioner's motion, the prosecution continued to argue false evidence about the date of the Medina burglary before the trial judge, the Honorable Alfred

Delucci. The prosecution discounted the Aponte Tip due to Servas' timeline and referred to the defense assertion that the burglary occurred on December 24, 2002 as "spin." They stated in their Points and Authorities in Opposition to Motion for New Trial that the defense "was able to place before the jury the entire circumstance of the Medina burglary with the Diane Jackson spin." (*People v. Peterson*, San Mateo County Superior Court Criminal Case No. SC055500A Opposition to Motion for New Trial at p. 9.)

49. The evidence admitted for the truth showed the Medina burglary occurred on December 24, 2002. The van Jackson described was never identified. The prosecution made prejudicial false arguments knowing the neighbor's van was not the van used in the burglary.

50. The Honorable Alfred Delucchi denied the Motion for New Trial, weighing all evidence against the testimony of neighbor Karen Servas. He explained, ". . . there is evidence in this trial that the dog, McKenzi, was recovered at 10:14 or 10:18 . . . and the Medinas didn't leave until ***after*** 10:30 in the morning. So, the Medina burglary must have occurred ***after*** the Medinas left the residence, and by that time Laci Peterson, under one

interpretation of the evidence, Laci was already missing." (121 RT 21788.) Judge Delucchi adopted the prosecution's interpretation of the evidence, and that interpretation was presented with false evidence and argument.

51. Prior habeas counsel was also ineffective for failing to address this claim.

52. Relief is required.

2. SUPPORTING DOCUMENTS.

Exhibit N	Statement of Modesto Police Sergeant Ed Steele
Exhibit O	Statement of Modesto Police Detective Allan Brocchini
Exhibit P	Statement of Diane Jackson

3. SUPPORTING CASES, RULES, OR OTHER AUTHORITY.

1. Cal. Pen. Code sec. 1473(b)(1)
2. Rules of Court Rule 8.380, sub. (b)
3. *U.S. v. Agurs* (1976) 427 U.S. 97
4. *Napue v. Illinios* (1959) 360 U.S. 264
5. *Giglio v. U.S.* (1972) 405 U.S. 150
6. *People v. Seaton* (2001) 26 Cal.4th 598
7. *Accor Maxwell v. Roe* (9th Cir. 2010) 628 F.3d 486
8. *Hall v. Dir. of Corrections* (9th Cir. 2003) 343 F.3d 976

9. *In re Hall* (1981) 30 Cal.3d 408

10. *In re Wright* (1978) 78 Cal.App.3d 788

11. *In re Merkle* (1960) 182 Cal.App.2d 525

12. *Miller v. Pate* (1967) 386 U.S. 1

13. *Alcorta v. Texas* (1957) 355 U.S. 28

14. *People v. Will* (2012) 53 Cal.4th 400

15. *People v. Rodriguez* (1986) 42 Cal.3d 1005

16. *People v. Taylor* (1982) 31 Cal.3d 488

17. *Hayes v. Brown* (2005) 399 F.3d. 972

18. *Strickland v. Washington* (1984) 466 U.S. 688

19. *Maples v. Thomas* (2012) 565 U.S. 266

4. ARGUMENT IN FAVOR OF RELIEF ON THIS CLAIM.[44]

The due process clause prevents the prosecution in a criminal case from introducing false evidence and imposes a duty on the prosecution to correct false testimony when it has been introduced. (U.S. v. Augers (1976) 427 U.S. 97, 103. See also *Napue v. Illinois* (1959) 360 U.S. 264, 269.) The prosecution's obligation to correct false testimony applies whether the prosecutor affirmatively elicits the false evidence on direct examination (as is the case here), or simply allows the false

[44] Pursuant to Rules of Court Rule 8.380, subdivision (b), because petitioner is unrepresented in this action, he is not submitting a Memorandum in support of his petition, but includes here some arguments in support of his claim to be supplemented by counsel, should counsel be appointed.

evidence to come in during defense counsel's cross-examination. (See Giglio v. U.S. (1972) 405 U.S. 150; *Napue v. Illinois, supra*, 360 U.S. 264.)

This obligation to correct false testimony exists even if the prosecutor did not intentionally elicit the false evidence. (People v. Seaton (2001) 26 Cal. 4th 598, 647.) As the Supreme Court has noted in this very context, in assessing whether due process has been violated, what matters is "the character of the evidence, not the character of the prosecutor." (U.S. V. Auger, supra, 427 U.S. at 110. Accor Maxwell v. Roe (9th Cir. 2010) 628 F.3d 486. 506.) [granting relief where efalse evidence was presented by prosecution, where the evidence was material, even though the prosecution presented the evidence in "good faith"]; Hall v. Dir. of Corrections (9th Cir. 2003) 343 F.3d 976, 978, 981, 985 [same].)

California law imposes a separate obligation to grant relief if "false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." (Cal. Pen. Code sec. 1473(b)(1).) It is immaterial whether the prosecution actually knew or should have known of the false nature of the evidence. (Cal. Pen. Code sec. 1473(c); In re Hall (1981) 30 Cal.3d 408, 424.)

With respect to the standard of prejudice, under California law relief is required when false evidence is presented whenever there is a reasonable probability the trier of fact could have arrived at a different decision in the absence of false evidence. (See e.g. In re Wright (1978) 78 Cal.App.3d 788. 807-808 and n.4. Accord In re Ferguson (1971) 5 Cal.3d 525; In re Merkle (1960)

182 Cal.App.2d 46.) Under federal law, a conviction obtained through the use of false or misleading testimony must be reversed "if there is any reasonable likelihood that the false testimony could have affected the judgement of the jury." (U.S. v. Agurs, supra, 427 U.S. at 103.)

The U.S. Supreme Court has applied this standard of prejudice many times, where the state presents false evidence which directly supports the state's theory as to the critical disputed issue in the case, relief is required under this standard. (Miller v. Pate (1967) 386 U.S. 1.) Similarly, where the state presents false evidence which directly undercuts the defense theory as to the critical issue in the case, relief is required. (Alcorta v. Texas (1957) 355 U.S. 28,32.)

Acorta is a very useful case in applying the standard of prejudice. There, the defendant was charged with murder in the killing of his wife. Defendant admitted to the killing; his defense was that he killed in a heat of passion. Defendant testified in support of his defense, telling the jury he killed his wife when he found her kissing her lover, Mr. Castilleja. (355 U.S. at 28-29.) At trial, Mr. Castilleja testified that he was a "casual friend" of the victim and had no romantic relationship with her at all. After defendant was convicted, he sought habeas relief, presenting testimony from Mr. Castilleja that his trial testimony was false and he and the victim had been lovers for some time. (Id. at 30-31.)

The Court granted relief precisely because the false testimony "tended squarely to refute" the only defense

presented—heat of passion. (Ibid.) In addition, the Court noted that truthful testimony would have corroborated petitioner's version of events and "might well have" resulted in "petitioner's defense [being] accepted by the jury . . ." (Id. at 31-32.) The Court reversed the defendant's murder conviction.

Here, it does not matter whether the federal or state test is applied. Just as in Alcorta, the false evidence here undercut the defense presented, that Laci Peterson was abducted by a third party, and the false evidence undercut Scott's alibi defense that he was on the way to the bay when Laci was seen by the burglars.

Without physical evidence, without any eyewitness testimony, with the prosecutor admitting in his closing argument, "I can't tell you when he did it, I can't tell you if he did it at night, I can't tell you if he did it in the morning. I'm not going to try to convince you of something that I can't prove," (109 RT 2022and having no cause of death, the case against Petitioner was one of exclusion. The timing of events was key. Based on Karen Servas' testimony that she returned the Peterson's dog to their yard about 10:18 a.m., the prosecutor argued that Laci had been murdered by then. That was a lot of weight to put on a closed gate. We now have Graybill's records and declaration proving that the dog was not in the yard and the gate was open sometime between 10:35 a.m. and 10:50 a.m. Thus, Laci was alive and walking in the neighborhood as reported by many witnesses. The defense offered by Petitioner was an alibi and third-party culpability. Evidence supporting this defense included the tip

from Aponte, the identified burglars (Todd and Pearce), the unidentified burglars (three dark skinned, not African American men) described by Jackson. The only way Petitioner could claim this defense is if the burglary occurred on December 24, 2002—a fact that is established in the charging documents of Todd and Pearce. The prosecutor knew this fact, yet withheld it, allowed false evidence in through witness, and made false arguments. The prosecution deprived Petitioner of his right to a valid defense. The fact is material and probative. If false testimony had not been introduced, the defense's theory would not be in question, and there is a reasonable probability that the jury would have acquitted or hung.

To be sure, Petitioner recognizes that there may be some cases in which the remainder of the evidence is so overwhelming that the presentation of false evidence may be considered harmless. This is not such a case. The remaining evidence in this case was marginal at best, and there is abundant evidence showing Petitioner's innocence. The California Supreme Court has also recognized that proper harmless error review requires the reviewing court to consider the entire record, not just bits and pieces which favor the state's position. (See People v. Will (2012) 53 cal.4th 400, 417-418; People v. Rodriguez (1986) 42 Cal.3d 1005, 1013; People v. Taylor (1982) 31 Cal.3d 488, 499-500.)

FBI forensic teams found no evidence of a crime inside the Peterson home. Neighbors report no screams or loud noises, no evidence of a crime was found in Peterson's truck or boat, both of which the that alleges Scott used to transport Laci's body. No

eyewitnesses report seeing anything untoward when they saw Scott on December 24, 2002 during times he was allegedly carrying out criminal activity. Computer usage at Petitioner's warehouse shows activity from 10:30 a.m to 10:56 a.m. where Petitioner is researching how to assemble a wood working tool and sending a Christmas email to his boss.

Computer usage at the Peterson home shows that it was likely Laci was using the computer at 8:45 a.m. The previously mentioned witnesses then saw Laci walking in the neighborhood during the time Petitioner was on the computer at his warehouse. And the evidence shows that Laci witnessed the Medina burglary sometime after that, when Petitioner was on his way to the Berkeley Marina. Evidence from Dr. Jeanty shows their unborn son Conner lived into January of 2003.

Furthering the discussion on the standard of review, *Hayes* found that *Napue* requires us to ask whether there is "any reasonable likelihood that the false testimony *could* have affected the judgment of the jury," whereas ordinary harmless error review requires us to determine whether the error *would* have done so." (*Hayes v. Brown* (2005) 399 F.3d. 972, 985 citing *Belemontes v. Woodford* (2003) 350 F3d at 881-82.) The power of the principal defenses being taken from consideration by the false evidence is so strong that it clears the hurdle of "could have affected the judgment of the jury."

Petitioner predicts an argument from Respondent of "overwhelming guilt" in an attempt to support an argument of harmless error. In *Zumot*, the reviewing federal court found "the

evidence and inferences permitted from that evidence involved too many genuine disputes for me to determine that there is no reasonable likelihood that the false evidence impacted the judgment of the jury." (*Zumot v. Borders* (N.D. Cal. 2020) 483 F.Supp. 3d 788, 814.) With only circumstantial evidence in this case, for which a reasonable interpretation points toward innocence, the analysis is much the same.

Next Petitioner argues that prosecution was in violation of *Brady* by not providing the charging papers. (*Brady v. Maryland* (1963) 373 U.S. 83.)

As previously noted, neither the charging documents nor the court records of the proceedings against Todd and Pearce, in which the prosecutors were participants, were provided to Petitioner. The evidence that the burglary occurred "on or about the 24th through the 26th" was not only exculpatory (supporting the defense of third-party culpability and an alibi), but it also removed Petitioner's right to confront an adverse witness. (See *Davis v. Alaska* (1974) 415 U.S. 308, 320.) Withholding impeachment evidence is even more egregious than failure to disclose exculpatory evidence because it deprived Petitioner of the "right to confront adverse witnesses." The defense's ability to properly cross examine multiple police officers who were called to the stand not only to testify about the burglary, but many other topics, was denied by the prosecution no providing the evidence. When impeachment evidence has been withheld, *Uramoto* finds the ". . . harmless error doctrine is inapplicable" when the case involves the "deprivation of the right to a full and robust cross-

examination of a paid Government informant on a matter that is likely to cast light on what is concededly the only issue in the case cannot be cured by the absence of any specific showing of prejudice." (*United States v. Uramoto* (9th Cir. 1980) 638 F.2d 84, 87.) There was not a government informant to be cross examined here, but instead the conclusions, testimony, and investigations of multiple police detectives would have been called into question given that their assertion of the date of the burglary was shown to be false by the evidence the prosecutor withheld.

Even if the court finds that presentation of false evidence did not violate Penal Code section 1743, or the Fifth and Fourteenth Amendments, relief would still be required here. Both the U.S. and California constitutions give defendants in criminal cases a right to the effective assistance of counsel. A "convicted defendant's claim that counsel's assistance was defective as to require reversal of a conviction or death sentence has two components." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The defendant must first show that counsel's representation fell below an objective standard of reasonableness. (*Id*. at 688.) A reviewing court will not find counsel's performance defective where challenged conduct was the result of an informed and reasonable tactical choice rather than of neglect. (*People v. Pope* (1979) 23 Cal.3d 412, 425-426.)

As previously noted, the prosecutor did not provide the charging documents (filed by their own office) against the two identified burglars. Defense attorneys were aware that Todd and Pearce had been charged with the burglary and should have

sought out these documents to support the third party culpability defense and to impeach witnesses. There was no tactical reason for the defense to fail to acquire and use these documents. The U.S. Supreme Court has recognized that where a criminal defense attorney pursued a certain theory of defense, the attorney's failure to present readily available evidence supporting that precise defense is unreasonable. (*See, e.g. Wiggins v. Smith* (2003) 539 U.S. 510, 526.) The California Supreme Court has long reached the same result. (*See, e.g. People v. Frierson* (1979) 25 Cal.3d 142, 164-165.) So too have lower federal courts. (See, e.g. *Dugas v. Coplan* (1st Cir. 2005) 428 F.3c 317, 328-389; *Clinksdale v. Carter* (6th Cir. 2004) 375 F.3d 430-435; *Sofar v. Dretke* (5th Cir. 2004) 368 F.3d 411, 473; *Eze v. Senkowski* (2d Cir. 2003) 321 F.3d 110, 126-130; *Hart v. Gomez* (9th Cir. 1999) 174 F.3d 1067,1071; Pavel v. Hollins (2nd Cir. 2001) 261 F.3d 210; *Chambers v. Armontrout* (8th Cir. 1990) 907 F.2d 825, 828-830; *Harris v. Reed* (7th Cir. 1990) 894 F.2d 871, 879.)

In order to prove ineffective assistance of counsel, a petitioner must also establish prejudice. The "reasonable probability" test in *Strickland* does not require defendant to prove counsel's deficient performance "more likely than not altered the outcome of the case." (466 U.S. at 693.) Rather, defendant need only show a "probability sufficient to undermine confidence in the outcome." (*Id*. at 694.) Where state law requires a unanimous verdict, and the defendant establishes that at least one juror could reasonably have reached a different result absent counsel's deficient performance, the Strickland test is satisfied,

and relief is required. (see, e.g. *Wiggins v. Smith* (2003) 539 U.S. 510, 537; *People v. Centeno* (2014) 60 Cal. 4th 659, 677; also *Zumot v. Borders* (N.D. Cal. 2020) 483 F.Supp. 3d 788.)

Assuming for the sake of argument that neither the due process nor California prohibitions on false evidence apply in this case, or that the state's evidence is somehow not deemed to be false, relief would nevertheless be required here under Strickland for the same reasons discussed in the false evidence claim. If the jury had not been exposed to the false evidence argued and elicited by the prosecutor—that the burglary did not occur on December 24—the defense theory of burglary, the third party culpability, and Petitioner's alibi would not be refuted. If the prosecutor had provided the charging documents or had defense counsel obtained them, the defense would have been able to present its theory in full and have the evidence to support it more fully. If the false evidence had not been presented, a vigorous cross-examination of several police officers would have taken place. Had the false evidence not been presented, "there is a reasonable probability that at least one juror would have voted to acquit." (Wiggins v. Smith (2003) 539 U.S. 510, 539.)

Jurors in the present case were looking for third party culpability to acquit and they said so in their book. On juror said "I was always looking for his [trial counsel's] smoking gun to take the case in another direction to show that Scott is not the only person who could have killed Laci . . . There was supposed to be a van with dark-skinned individuals who kidnapped her. [Laci], but that never panned out" (IHP Exh. 8 ["We the Jury"] at

HCP000221.) Another said, "Okay, good, we will find out that someone else did it." (Id. at HCP-000220.)

Thus, even if neither of the proscriptions of false evidence contained in the due process clause or California Penal Code section 1473 apply to this case, relief is still required.

Not presenting this claim in Petitioner's previous writ falls below "an objective standard or reasonableness . . . under prevailing professional norms." *In re Harris* (1993) 5 Cal.4th 813, 833 quoting *Strickland v. Washington* (1984) 466 U.S. 688, 687-688) It is not reasonable that habeas counsel would include the facts related above, yet use them only to reinforce the argument that trial counsel should have called burglar Todd to determine if he saw Laci walking in the neighborhood, clearing Petitioner from involvement in her death. Habeas counsel's point is important, but a false evidence claim more so. The state's misconduct greatly impacted Petitioner's trial; it denied Petitioner of his defense.

It is reasonable to assume that the reviewing court would have granted petitioner relief if it had been asked to consider this argument. If appellate counsel fails to raise an issue that may have resulted in a reversal, the failure is prejudicial. (*Gray v. Greer*. (7th Cir. 1985) 800 F.2d 644, 646.)

The Petitioner presents that the reviewing court would have reversed this constitutional deprivation. This claim is "cognizable in a postappeal habeas corpus petition to permit the petitioner to vindicate" a fundamental right to counsel. *In re Harris* (1993) 5 Cal.4th 813, 831 *quoting In re Mashching* (1953) 41 Cal.2d 530.

532.) In Harris, the court was dealing with a topic not in an appeal, but the same holds true for a topic which would have been raised within a writ of habeas corpus if not for ineffective counsel. (*Id*. at 824.) In the instant case, Petitioner was sentenced to death and had state appointed habeas counsel and therefore had a "right to assume that counsel is competent and is presenting all potentially meritorious claims." (*In re Clark* (1993) 5 Cal.4th 750) By not filing a false evidence claim counsel "failed to afford adequate representation" on Petitioners prior habeas petition, and Petitioner offers that failure as an "explanation and justification of the need to file another petition." (*Ibid*.) Petitioner relied on the effectiveness of state appointed counsel. Only now does Petitioner recognize the importance of this claim as it is a violation of his constitutional rights and guarantees. This claim is both "clear and fundamental, and strikes at the heart of the trial process." (*Harris*, 5 Cal.4th at 834.)

While Petitioner maintains that this is a valid claim, Petitioner also argues now that the prosecutor committed prejudicial misconduct in the presentation of false evidence related to the date of the Medina burglary.

Relief is required.

D. CLAIM FOUR: Suppression Of Exculpatory Evidence In Violation Of Petitioners Due Process Rights By Withholding Information Linking The Medina Burglary With The Abduction Of Laci Peterson And Supporting Petitioner's Defense Of Third Party Culpability

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Brady violation. The state withheld exculpatory information surrounding a tip received from Lieutenant Xavier Aponte depriving Petitioner of his right to a defense at trial. The following facts now known to Petitioner support this claim.

1. SUPPORTING FACTS.

1. Petitioner incorporates by reference each of the facts alleged in all other claims of this petition. Petitioner also requests this court to take judicial notice of all pleadings and filings in both *People v Peterson*, San Mateo County Superior Court Case Number SC055500A, *People v. Peterson*, Case Number S132449, *In re Peterson* Case Number S230782.

2. At trial, the state's theory was that Petitioner, Scott Peterson, killed his wife, Laci Peterson, and their unborn son,

Conner, on the evening of December 23, 2002, or on the morning of December 24, 2002, left home for his office around 10 a.m. on December 24, 2002, then drove Laci's body from Modesto to the Berkeley Marina, launched his boat, and placed her body in the San Francisco Bay that afternoon. No forensic evidence was found tying Peterson to her murder. The prosecutor in his closing argument conceded, "I can't tell you when he did it. I can't tell you if he did it at night. I can't tell you if he did it in the morning." (109 RT 20200.)

3. The defense theory was that Laci was still alive when Petitioner left the house that morning to go fishing, and Petitioner is innocent.

4. The Medina burglary has been discussed at length in the prior two claims.

5. There was voluminous discovery[45] in Petitioner's trial that included over 50,000 of discovery provided by the prosecution. (IHP Exh. 4 at HCP-000033.) Among those pages was a tip from Lieutenant Xavier Aponte with the CDCR that Laci had witnessed the burglary on December 24, 2002

6. The tip line received the tip from Lt. Aponte on

[45] Petitioner previously filed a claim that Petitioner was deprived of his rights by defense counsel's failure to present exculpatory evidence that Steven Todd saw Laci in Modesto after Petitioner left for the Berkeley Marina. (*In re Peterson*, California Supreme Court Case No. S230782 at p. 200.)

January 22, 2003, and it stated the following:

> Lt. Aponte 909-2732901 CRC-Norco – received info from Shawn Tenbrink (inmate) he spoke to brother Adam who said Steve Todd said Laci witnessed him breaking in. Could not give dates and time. Aponte has further info.

(IHP Exh. 28 at HCP-000416.)

7. During Scott's trial, ***the jury did not hear about the hotline tip from Lt. Aponte***. Geragos later explained that the Aponte tip was contained among "10,000 tips," and he did not understand the significance of it until two weeks before the end of the trial when the prosecution turned over a letter from an inmate named "Mr. R." who was in custody at Stanislaus County Jail. (121 RT 21775-21777.)

Lt. Aponte's Affidavits

8. Upon realizing the significance of the tip during Petitioner's trial, the defense interviewed Lt. Aponte in person on December 1, 2004. Lt. Aponte signed a declaration under penalty of perjury for Petitioner dated December 1, 2004. (Exh. T [Declaration of Lt.Xavier Aponte for the Defense].)[46]

[46] The declarations from Lt. Xavier Aponte, Jan Gauthier, and Detective Craig Grogan submitted as exhibits with this claim were previously submitted in conjunction with the Defense Motion for New Trial and the Opposition to Motion for New Trial. Petitioner does not have court records to properly cite, so copies of the declarations are attached for reference.

9. Shortly thereafter, the prosecution obtained a signed declaration under penalty of perjury dated March 03, 2005. (Exh. U [Declaration of Lt. Xavier Aponte for the People].)

10. In both declarations, Lt. Aponte states that he first heard that inmate Shawn Tenbrink was discussing Laci Peterson in January of 2003. Aponte told the defense it was "within a couple weeks of her missing," (Exh. T.), and similarly, Aponte told the prosecution it was "during January of 2003." (Exh. U.)

11. In both declarations, Lt. Aponte states he called the Modesto Police Department ("Modesto Police Department") hotline related to the disappearance of Laci Peterson. Aponte told the defense that he "immediately called the Modesto Police Department Hotline," (Exh. T.) and similarly, Aponte told the prosecution that he "contacted the Modesto police tip line." (Exh. U.)

12. In both declarations, Lt. Aponte states he did not hear back from Modesto Police Department, so he called the Modesto Police Department hotline a second time. Aponte told the defense that "he called a second time within the same week because he did not receive a call back from his first telephone call," (Exh. T.) and similarly, Aponte told the prosecution that, "after a period of days I received no return telephone call from the Modesto Police Department. I telephoned the tip line again

and left another message." (Exh. U.)

13. The prosecution did not provide Petitioner's defense counsel with the second tip. It is unclear whether the tip dated January 22, 2003, which was disclosed to Petitioner's counsel on May 14, 2003 (Exh. V [Declaration of Jan Gauthier].), is the first tip or second tip called in by Lt. Aponte.

14. The declarations explain that the conversation between inmate Shawn Tenbrink ("Shawn") and Adam Tenbrink ("Adam") occurred during a recorded telephone conversation between the brothers. (Exh. T; Exh. U.) The monitored call was about three to four minutes and was automatically recorded by the Inmate Monitoring and Recording System ("IMARS"). (Exh. T.) The dorm officer monitoring inmate calls contacted Lt. Aponte about the call. (Exh. T; Exh. U.)

15. Lt. Aponte listened to the recording. Aponte told the defense that "he listened to the recorded conversation between Shawn and his brother Adam," (Exh. T.) and similarly, Aponte told the prosecution that "I listened to this recording and heard Adam Tenbrink tell Shawn something about the Laci Peterson case." (Exh. U.)

16. Lt. Aponte made a tape recording of the recording. Aponte told the defense that he was "99% positive he made a separate recording onto a cassette tape of the conversation between Shawn and Adam. He did this thinking it would be important at some date," (Exh. T.) and similarly, Aponte told the

prosecution, "I made a recording of the conversation and contacted the Modesto police tip line." (Exh. U.)

17. Petitioner has never been provided with a recording of the call between Shawn and Adam. Lt. Aponte was unable to locate the recording he made, and the original recording was no longer available on IMARS. (Exh. T; Exh. U.) Subsequent searches by the CDC have been unsuccessful as well. (Exh. W.)

18. Both declarations go on to say there was further involvement with Modesto Police Department—Modesto Police Department called Lt. Aponte back. Lt. Aponte told the defense it "was at least a week before anyone got back to [him]," (Exh. T.) and similarly, Lt. Aponte told the prosecution, "I received a return telephone call from a Modesto Police detective a short time later." (Exh. U.)

19. Lt. Aponte said he spoke with a male detective from Modesto Police Department. Aponte told the defense "he spoke to the detective," and when Aponte was given a list of names, he said, "Grogan sounds familiar." (Exh. T.) Lt. Aponte later confirmed to the prosecution that he talked to a male detective, but admitted that he could not "recall the detective's name." (Exh. U.)

20. In both declarations, Lt. Aponte maintains that Modesto Police Department interviewed inmate Shawn Tenbrink. Lt. Aponte initially indicated to the defense that a detective from Modesto Police Department "came down" to interview Shawn in

person, (Exh. T.) However, he later attested for the prosecution that he "monitored a telephonic interview between the Modesto Police Department detective and Shawn Tenbrink". (Exh. U.) This interview occurred in Lt. Aponte's office. (Exh. T.)

21. To the best of Lt. Aponte's recollection, the Modesto Police Department detective listened to the recorded telephone conversation. (Exh. T.) However, Lt. Aponte does not recall whether he mailed a copy of the tape or whether the detective asked him to do so. (Exh. T; Exh. U.)

22. During the interview with the Modesto Police Department detective, Lt. Aponte said Shawn denied having a conversation with his brother Adam. (Exh. T.) Shawn also denied knowing Steve Todd. (*Ibid.*)

23. Shawn was returned to his unit at the prison after the interview. (Exh. U.)

24. The Modesto Police Department detective asked if there was any way in which Shawn's activities could be monitored. (Exh. T.)

25. Lt. Aponte said they monitored Shawn's calls more closely, and "immediately following the interview with the Modesto Police Department detective, Shawn went back to his housing unit and called his mother's place to get in touch with Adam. His brother wasn't home so Shawn talked to his mother." (Exh. T.) Lt. Aponte recalled that during the three to four minute call, "Shawn told his mother to tell Adam that the police had just

interviewed him, and he was to keep his mouth shut because he doesn't know who he is dealing with." (*Ibid*.)

26. This call was recorded by IMARS. (*Ibid*.) However, searches by the CDCR for this recording have been unsuccessful. (Exh. W.)

27. These affidavits by Lt. Aponte confirm the following:

A. Lt. Aponte called the Modesto Police Department tipline two times;

B. Lt. Aponte received a return call from Modesto Police Department;

C. Lt. Aponte arranged for a Modesto Police Department detective to interview Shawn;

D. Lt. Aponte made a separate recording of the call between Shawn and Adam;

E. Modesto Police Department telephonically interviewed Shawn Tenbrink;

F. Modesto Police Department asked Lt. Aponte to monitor Shawn's calls and mail;

G. a call between Shawn and his mother was also recorded.

28. The prosecution has never provided Petitioner with the second tip.

29. The prosecution has never provided Petitioner with any recordings or transcripts of the calls between Shawn and Adam or Shawn and hs mother.

30. The prosecution has never provided Petitioner with a report detailing contact between a Modesto Police Department

detective and Lt. Aponte. Including but not limited to, their initial call to Lt. Aponte, their request to set up an interview with Shawn, their interview with Shawn, their request that the prison monitor Shawn's activities, or whether they received any further information from the prison as a result of monitoring Shawn's mail and calls, including the call Shawn made to his mother.

31. The prosecution has never provided Petitioner with a Modesto Police Department report detailing any contact between a Modesto Police Department detective and Shawn. Including but not limited to, their conversation with Shawn or any background investigation into Shawn or Adam.

32. Additionally, the prosecution has never provided Petitioner with any information that details any follow up the Modesto Police Department may have done on the tip, including but not limited to, interviews or background checks.

33. The tip from Lt. Aponte dated January 22, 2003, remains the only item the prosecution has provided to Petitioner. (IHP Exh. 28 at HCP-000416.)

Petitioner's Interviews with Steven Todd, Shawn Tenbrink, and Adam Tenbrink

34. Petitioner has attempted to obtain information, despite the missing discovery.

35. Defense investigator Carl Jensen attempted to follow up on the tip from Lt. Aponte and was told that "Adam Tenbrink is a very close friend to Steve Todd." (106 RT 19703-19704.)

36. Tenbrink would have been a name that a Modesto Police Department officer would be familiar with. Shawn and Adam were arrested sixteen times in Modesto between 1997 and 2002. (Exh.Y [Arrest Records for Shawn Tenbrink and Adam Tenbrink].)

37. Todd was interviewed by the defense team at the San Mateo County Jail on August 27, 2004, in the midst of Petitioner's trial. (IP Exh. 33 at HCP-000431.) When confronted with Diane Jackson's statements that she saw the safe on the front lawn of the Medina's home and a van parked in front of that home at 11:40 a.m. on December 24, 2002, Todd became "unglued." (*Ibid.*) Todd came out of his chair, put his hands on the table, and leaned over towards Jensen, yelling words to the effect of "You don't have a witness," and "You don't have a fucking thing." (*Ibid.*) A guard was so alarmed that she came and asked Jensen if he was okay. (*Ibid.*) Todd informed Jensen that he would invoke his Fifth Amendment rights if called to testify. (*Ibid.*) By this time, of course, Todd had already been convicted of

the burglary. Todd continued to be uncooperative with Petitioner's investigators.

38. Post-conviction investigator, Jacqi Tully, attempted to interview both Adam Tenbrink and Steven Todd. (IHP Exh. 32 at HCP-000428-29.) At one point, Adam Tenbrink agreed to speak with Tully, but then refused to come to the door when she traveled to his home. (*Id.* at HCP-000429.) When Tully spoke with Steven Todd over the telephone, he was angry and exclaimed, "Fuck Scott Peterson." (*Ibid.*)

39. Tully interviewed Shawn, who confirmed he was an inmate at CDC Norco in January 2003. (IHP Exh. 34 at HCP-000432.) Shawn confirmed having a phone conversation with his brother Adam, in which the latter told him he knew who burglarized the house across the street from the Petersons. (*Ibid.*) Adam indicated that Laci Peterson had seen Todd commit the burglary. (*Ibid.*) Shawn could not recall whether Adam had informed him that Todd had burglarized the house with other people. (*Ibid.*)

40. Shawn's admission that the call with Adam had, in fact, occurred is contrary to what Shawn had previously told Lt.

Aponte and the Modesto Police Department detective when he denied having any conversation with his brother. (Exh. T.)

Petitioner's Requests for Information

41. On February 25, 2005, following the guilty verdicts, Petitioner's attorney, Mark Geragos, filed a Motion for New Trial. The motion was based in part on the fact that the defense had newly discovered evidence (at least to the defense) that pertained to the Aponte tip. (20 CT 6255.) Geragos submitted Lt. Aponte's affidavit to the court and asked the court to "admonish the prosecution to provide the defense all material related to the NORCO investigation and grant the defendant a new trial on the basis of recently discovered evidence." (20 CT 6256.) Lt. Aponte indicated there was considerable Modesto Police Department activity and the defense only had an initial tip.

42. In response to Geragos's request for a copy of all material, Det. Grogan provided an affidavit signed on March 9, 2003, that detailed his search. (Exh. Z [Declaration of Modesto Police Detective Craig Grogan].)

43. Det. Grogan's search spanned electronic files and handwritten files. (*Ibid*.) This case had voluminous discovery, containing over 50,000 pages. (IHP Exh. 4 at HCP-000033.)

44. Item two of Grogan's declaration stated:

> Per a request by the Stanislaus County District Attorney's Office, I searched the computerized files for the Peterson case ***looking for the tip listing Shawn Tenbrink referred to by the defense in their motion***. I found a tip dated 01/22/03 which included information from Lt. Aponte. The tip included the following information: Aponte's telephone number, the fact he is an employee at "CRC Norco," the inmate's name and the name of the inmate's brother. This tip was documented on a "tip sheet." The tip sheet which contained this tip is located at the bate stamp number 15311 and it was discovered to both the prosecution and defense.

(Exh. Z.) The ***only*** thing Det. Grogan searched for in the electronic files was the one tip that was not missing. Grogan does not attest to searching the electronic files for "all material" related to the tip, or any other material except the already provided tip.

45. Grogan's search continued; in item three of his declaration he stated:

> I also completed a hand search of handwritten reports, which are not searchable in the automated report format. I have found no other reports mentioning Aponte or Tenbrink.

(*Ibid*.) Here, Grogan did search for "reports" and items

mentioning "Aponte" or "Tenbrink," however, he is now only hand searching the handwritten reports. (*Ibid*.) He is unable to find anything in the handwritten reports. (*Ibid*.)

46. Item three continues with a physical search:

> I have not found any audiotapes in possession of the Modesto Police Department that contain a conversation recorded between Adam and Shawn Tenbrink.

(*Ibid*.) Grogan specifically notes searching for the audiotape of the call between Shawn and Adam, but makes no mention of searching for the other call between Shawn and his mother. There is also no indication he searched for CDs or digital recordings.

47. The final part of item three details a vague search:

> I sent an e-mail to detectives, officers and supervisors involved in the Peterson investigation requesting information about an interview between an officer or detective and Shawn Tenbrink. I have not received any information from any investigator as a result of that email.

(*Ibid*.) The date Grogan sent the email is not noted; who Grogan sent the email to is not noted; the content of the email is not noted; and how much time he allowed for a reply is not noted.

48. In item four Grogan attests:

> I did not go to California Rehabilitation Center in Norco at

> any point during this investigation, nor did any other officer or detective to my knowledge. I have inquired with supervisors in the Investigative Services Unit and they do not recall any officer being sent to that facility for an interview related to Laci Peterson.

(*Ibid.*) Grogan says he did not physically go to Norco, however, he does not answer as to whether he ***called*** Norco. He also makes no inquiries as to whether any other officer ***called*** Norco and spoke with Lt. Aponte or Shawn. It was, in fact, a telephonic interview with Shawn that took place.

49. Det. Grogan was the lead detective in Laci's disappearance and murder. (93 RT 17666.) And he did not search his electronic files—the largest portion of the case records—for any of the following:

A. Whether Modesto Police Department had another tip from Lt. Aponte;

B. Whether Modesto Police Department called Lt. Aponte back;

C. Whether Modesto Police Department arranged to interview Shawn;

D. Whether Modesto Police Department had a recording of the call between Shawn and Adam;

E. Whether a Modesto Police Department detective telephonically interviewed Shawn;

F. Whether Modesto Police Department had any reports on Shawn's monitored calls and mail;

G. Whether Modesto Police Department had a recording

of the call between Shawn and his mother; or

H. Whether Modesto Police Department conducted any follow-up on the tip they had.

50. Most notably, Det. Grogan does not confirm or deny whether he talked to Lt. Aponte himself. However, it is his name that Lt. Aponte thought sounded familiar. (Exh. T.)

51. As a result of the defense counsel's inquiry, Petitioner received no additional discovery from the prosecution.

52. Det. Grogan's affidavit indicates he looked everywhere, and it indicates he looked for everything, but he did not look everywhere for everything. His careful wording left defense counsel and the court believing that a thorough search was done.

53. The trial court denied Petitioner's Motion for New Trial based on the newly discovered evidence. (121 RT 21787-21793.) As previously explained in Claims Two and Three, the trial court was "not too impressed" by evidence connecting Laci's disappearance to the Medina burglary because the court failed to consider that Laci could have been alive after 10:18 a.m. on the morning of December 24, 2002.

54. Petitioner again, through habeas counsel, attempted to track down evidence related to the Lt. Aponte tip by requesting post-conviction discovery from the Attorney General of the State of California. (Exh. W [Response from Attorney General of California].) The CDC was unable to find any recordings of the call between Shawn and Adam or the call between Shawn and his mother. (*Ibid*.) The Attorney General did not make any requests of the Modesto Police Department, citing Grogan's declaration and stating, "it seems fairly clear that this information was canvassed thoroughly in the trial court. (*Ibid*.) The Attorney General goes on to inaccurately point out that the evidence has "little credibility or value given the fact that Laci had already disappeared" by the time the Medina burglary occurred." (*Ibid*.)

55. Petitioner might concede that the CDC has attempted a thorough search of their records, Det. Grogan with Modesto Police Department most certainly has not.

56. The court expressed repeated frustration with the prosecution's discovery violations. Two months into the trial on August 2, 2004, the court told the prosecution, "I've had it about up to here with these violations now." The court went on to say, "I'm just about ready to impose some sanctions. I'm getting sick

of this . . . I have had this conversation with the prosecution . . . at least ten times. It's getting to be vexatious it's starting to annoy me." (74 RT 14316.) The court went on to sanction the prosecution by striking the testimony of a prosecution witness. (74 RT 14321.)

Brady Elements

57. This evidence is exculpatory in nature. (*Brady v. Maryland* (1963) 373 U.S. 83.)

58. There is evidence being suppressed through either incompetence or maliciousness. (*Ibid*.)

59. Prejudice resulted from the failure to disclose the evidence. (*Ibid*.) Had trial counsel had this evidence, there is a reasonable probability that one or more jurors would have voted to acquit.

60. Post trial, Juror Six declared the following:

> The defense presented evidence that a burglary took place across the street form Laci and Scott's house . . . Any evidence that Laci was still alive when Scott was already at the marina would have been important to me as a juror. We heard evidence that Laci was a pretty bold person . . . Evidence that she may have confronted burglars would have been significant.

(IHP Exh. 50 at HCP-000986-000987.) By the juror's standard, this evidence is significant.

61. Prior trial and appellate counsel were ineffective for failing to address this claim in violation of Petitioner's Sixth Amendment right to competent trial and habeas counsel. (*Maples v. Thomas* (2012) 565 U.S. 266.)

62. Relief is required.

2. SUPPORTING DOCUMENTS.

Exhibit T	Declaration of Lt. Xavier Aponte for the Defense
Exhibit U	Declaration of Lt. Xavier Aponte for the People
Exhibit V	Declaration of Jan Gauthier
Exhibit W	Response from Attorney General of California
Exhibit Y	Arrest Records for Shawn Tenbrink and Adam Tenbrink
Exhibit Z	Declaration of Detective Craig Grogan

3. SUPPORTING CASES, RULES, OR OTHER AUTHORITY.

1. *Brady v. Maryland* (1963) 373 U.S. 83
2. *Amado v. Gonzalez* (9th Cir. 2014) 758 f.3d 1119
3. *Kyles v. Whitley* (1995) 514 U.S. 419
4. *U.S. v. Bagley* (1985) 473 U.S. 667
5. *Smith v. Cain* (2012) 565 U.S. 73
6. *Wearry v. Cain* (2016) 577 U.S. 385

7. *Strickland v. Washington* (1984) 466 U.S. 688
8. *Strickler v. Greene* (1999) 527 U.S. 263
9. *Berger v. United States* (1935) 295 U.S. 78
10. *Roberts v. Broomfield* (Oct. 28, 2022) _E.D. Cal._ Lexis 19712000
11. *In re Harris* (1993) 5 Cal.4th 813
12. *Gray v. Greer* (7th Cir. 1985) 800 F.2d 644
13. *In re Mashching* (1953) 41 Cal.2d 530
14. *Banks v. Dretke* (2004) 540 U.S. 688
15. *Giglio v. United States* (1972) 405 U.S. 150
16. *Napue v. Illinois* (1959) 360 U.S. 264
17. *Maples v. Thomas* (2012) 565 U.S. 266

4. ARGUMENT IN FAVOR OF RELIEF ON THIS CLAIM.[47]

Under the "landmark case of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) . . . Prosecutors are constitutionally obligated to disclose 'evidence favorable to an accused . . . [that] is material either to guilt or to punishment.' This prosecutorial duty is grounded in the Fourteenth Amendment, which instructs that states shall not 'deprive any person of life, liberty, or property,

[47] Pursuant to Rules of Court Rule 8.380, subdivision (b), because petitioner is unrepresented in this action, he is not submitting a Memorandum in support of his petition, but includes here some arguments in support of his claim to be supplemented by counsel, should counsel be appointed.

without due process of law.' U.S. Const. amend. XIV, sec. 1." (*Amado v. Gonzalez* (9th Cir. 2014) 758 F.3d 1119, 1133-1134.)

A constitutional duty to disclose is "triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that the disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for a crime that does not inculpate the defendant. (*Kyles v. Whitley* (1995) 514 U.S. 419, 434 *citing United States v. Bagley* (1985) 473 U.S. 667, 682.)

A prosecutor has "a duty to learn of any favorable evidence know to others acting on the government's behalf, including the police." (*Id*. at 437.)

Here, the prosecution's case was one of exclusion. They argued Petitioner was the only possible party who could have been involved in Laci Peterson's disappearance. Evidence of third-party culpability and evidence supporting Petitioner's alibi are clearly exculpatory. The prosecution had a constitutional duty to disclose evidence which supported both, and they did not do so.

There was no mystery before or during the trial that Petitioner's primary defense was third party culpability. Had the evidence of Lt. Aponte's other tip and police interactions with Lt. Aponte and Shawn Tenbrink been given to the defense, the judge and jury would have been made aware of many more exculpatory facts.

Following the rubric of analysis from *Kyles*, the question is not whether the state would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Here, there is no confidence that the verdict would have been the same.

In *Kyles v. Whitley*, the Court noted possible findings of fact. (514 U.S. at 453-454.) Petitioner respectfully follows the same logic below in listing possible findings of fact the jury may have found in the present case if full disclosure had been made to Petitioner's counsel:

a. The Medina burglary occurred on December 24, 2002;
b. The police department's assertion that the burglary occurred on December 26, 2002, was incorrect;
c. The police department too readily accepted the statements of Todd and Pearce as to the dates of the burglary;
d. The investigation into the burglary was clouded by a police bias that Petitioner was guilty;
e. Burglar Todd knew and lived near Adam Tenbrink;
f. Laci was alive after Petitioner left for the day, and Laci witnessed the Medina burglary; and
g. Petitioner is innocent.

As in *Kyles*, "all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, 'fairness' cannot be stretched to the point of calling this a fair trial." (*Ibid*.)

There is no confidence that the verdict would have been unaffected by the suppressed evidence if the jury could have come to the conclusion that Petitioner is innocent. Surely, Juror Six takes away any doubt that the suppressed evidence would have been "significant" when he declared the following:

> The defense presented evidence that a burglary took place across the street form Laci and Scott's house . . . Any evidence that Laci was still alive when Scott was already at the marina would have been important to me as a juror. We heard evidence that Laci was a pretty bold person . . . Evidence that she may have confronted burglars would have been significant.

(IHP Exh. 50 at HCP-000986-000987.)

To have a writ issued:

> a defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary bias to convict. One does not show a Brady violation by demonstrating that some of the exculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

(*Kyles*, 514 U.S. at 434-435.)

To prevail on a Brady claim, Petitioner:

> need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. (*Smith v. Cain* (2012) 565 U.S. 73, 75 (internal quotation marks and brackets omitted).) He must show only that the new evidence is sufficient to "undermine confidence" in the verdict. (*Ibid*.)

(*Wearry v. Cain* (2016) 577 U.S. 385, 392.)

In this case, as the comments from the jurors demonstrate, and as the trial record as a whole shows, evidence of third-party culpability and evidence that Laci was seen in the neighborhood after Petitioner is known to have been gone leaves justice in question.

It is no small thing to note that Shawn initially denied having a conversation with his brother about the Medina burglary—a conversation he later admitted to having. (IHP Exh. 34 HCP-000432.) The jury was denied this full knowledge by the prosecution.

Additionally, an:

> . . . incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of . . . defenses, or trial strategies that it otherwise would have pursued.

(*Bagley*, 473 U.S. at 682 *citing Strickland v. Washington* (1984) 466 U.S. 688, 695.)

In the present case, there are two options, (1) the MPD lost

one of the tips from Lt. Aponte and did nothing to follow up on the remaining one they had, per Det. Grogan's affidavit, or (2) the MPD has both tips, they did follow up with Lt. Aponte and Petitioner is being deprived of significant information. The evidence supports the latter. Lt. Aponte's declarations are clear that there was interaction with the Modesto Police Department and Det. Grogan's search was anything but thorough. The Modesto Police Department's 40,000 plus pages of electronic files for the Petitioner's case have not been searched for the information requested. Det. Grogan failed to comply with a specific discovery request. Whether this failure is due to maliciousness or incompetence is irrelevant. Whether it is in bad faith or in good faith is irrelevant, as either way, it violates *Brady*. Det. Grogan's declaration is a "misleading representation" that evidence does not exist. Given the significance of the evidence and that the judge had given the prosecution repeated warnings about discovery violations, the court undoubtedly would have granted Petitioner a new trial if Det. Grogan's search had "found" one piece of additional information pertaining to Lt. Aponte.

The purpose of *Brady* is to ensure that "criminal trials are fair, (*Brady*, 383 U.S. at 87) and that a "miscarriage of justice does not occur." (*Bagley*, 473 U.S. at 675.) Placing the burden on prosecutors to disclose information "illustrate[s] the special role played by the American prosecutor in search for truth in criminal trials." (*Strickler v. Greene* (1999) 527 U.S. 263, 281.) The prosecution is trusted to turn over evidence to the defense

because its interest "is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

Kyles is instructive with its review of the Court of Appeals decision stating, " . . . we note that, contrary to the assumption made by the Court of Appeals, 5 F.3d, at 818, once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." (*Kyles*, 514 U.S. at 435.) Petitioner would also note ". . . the material inquiry subsumes any harmless error analysis: if error is found, it cannot subsequently be found harmless under *Brecht*." (*Roberts v. Broomfield* (Oct. 28, 2022) __E.D. Cal.__ Lexis 19712000.) In the instant case, the prosecutor violated the due process clause of the constitution; no harmless error analysis is necessary.

It was ineffective assistance of appellate counsel for habeas counsel not to present this claim in Petitioner's previous writ, *In re Peterson*, California Supreme Court Case No. S230782. Counsel at that time had the information and included the one tip the state did provide within the exhibits. (IHP Exh. 28 HCP-000416.) In Claim Ten of that writ, counsel presented many of these facts arguing that trial counsel was ineffective in not presenting some of this information to the jury, depriving Petitioner of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (*In re Peterson*, California Supreme Court Case No. S230782, p. 205, no. 21.) While Petitioner maintains that is a valid claim, Petitioner also argues that habeas counsel failed to present the state's *Brady* violation and prosecutorial

misconduct and its impact on the defense. Following the analysis of *Kyles*, this error is highlighted given Shawn Tenbrink's recantation of his original statement made to Lt. Aponte and the MPD detective. The state has yet to admit that they have the tip or any follow up. Counsel did make another discovery request of the Attorney General, but the response focused on searching CDC records, not MPD records. (Exh. W.)

Similar to the argument presented in Claim Three of this petition, not presenting this claim in Petitioner's previous writ falls below "an objective standard or reasonableness . . . under prevailing professional norms." *In re Harris* (1993) 5 Cal.4th 813, 833 quoting *Strickland v. Washington* (1984) 466 U.S. 688, 687-688) It is not reasonable that habeas counsel would include the facts related above, yet use them only to reinforce the argument that trial counsel should have called burglar Todd to determine if he saw Laci walking in the neighborhood, clearing Petitioner from involvement in her death. Habeas counsel's point is important, but *Brady* more so. The state's *Brady* violation and prosecutorial misconduct greatly impacted Petitioner's trial; it denied Petitioner of his defense.

It is reasonable to assume that the reviewing court would have granted petitioner relief if it had been asked to consider this argument. If appellate counsel fails to raise an issue that may have resulted in a reversal, the failure is prejudicial. (*Gray v. Greer*. (7th Cir. 1985) 800 F.2d 644, 646.)

The Petitioner presents that the reviewing court would have reversed this constitutional deprivation. This claim is "cognizable

in a postappeal habeas corpus petition to permit the petitioner to vindicate" a fundamental right to counsel. *In re Harris* (1993) 5 Cal.4th 813, 831 *quoting In re Mashching* (1953) 41 Cal.2d 530. 532.) In Harris, the court was dealing with a topic not in an appeal, but the same holds true for a topic which would have been raised within a writ of habeas corpus if not for ineffective counsel. (*Id*. at 824.) In the instant case, Petitioner was sentenced to death and had state appointed habeas counsel and therefore had a "right to assume that counsel is competent and is presenting all potentially meritorious claims." (*In re Clark* (1993) 5 Cal.4th 750) By not filing a *Brady* claim counsel "failed to afford adequate representation" on Petitioners prior habeas petition, and Petitioner offers that failure as an "explanation and justification of the need to file another petition." (*Ibid*.) While Petitioner advised counsel as to the significance of the suppressed evidence and its importance, Petitioner relied on the effectiveness of state appointed counsel. Only now does Petitioner recognize the importance of this claim as it is a violation of his constitutional rights and guarantees. This claim is both "clear and fundamental, and strikes a the heart of the trial process." (Harris, 5 Cal.4th at 834.) Relief is required.

E. CLAIM FIVE: The State Presented False Evidence and Argument Regarding Conner's Fetal Age At The Time Of Death

Presentation of false evidence in violation of the Fifth, Sixth,

Eighth and Fourteenth Amendments and Penal Code section 1473(b)(4), by the state's introduction of false evidence regarding Conner's fetal age at the time of death.

1. SUPPORTING FACTS.

1. The facts and allegation set forth in all other portions of this petition are incorporated by this reference as if fully set forth herein.

2. At trial, the state's theory was that petitioner killed his wife Laci Peterson and her unborn son Conner on the evening of December 23, 2002, or the morning of December 24, 2002.

3. This timeframe was critical to the prosecution's case because a time of death after the morning of December 24, 2002, would exonerate Petitioner.

4. To support this theory, the state called Professor Allison Galloway to testify. Professor Galloway was asked if she could estimate Conner's age of at the time of death. To accomplish this, she took measurements of three of Conner's bones (the humerus, tibia and femur). She then consulted various academic studies that have developed formulae for estimating the

age based on bone measurements. Using a study by Sherwood, "Fetal Age: Methods of Estimation and effects of Pathology," American Journal of Physical Anthropology 113:305-315, Professor Galloway calculated that the femur indicated a gestational age of 35.1 weeks, the tibia indicated a gestational age of 36.3 weeks, and the humerus a gestational age of 35.6 weeks. As dictated by the protocols of forensic anthropology, Professor Galloway then provided for two weeks variation in the gestational age from the low and the high points, concluding that Conner was within a range of 33 to 38 weeks from the last menstrual period the time of death. (92 RT 17529-17532.)

5. According to Laci Peterson's medical records, the last menstrual period was May 6, 2002. (95 RT 17864.)

6. Under Professor Galloway's estimate, Conner stopped growing between 33 and 38 weeks later -- or between December 23, 2002, and January 27, 2003.

7. In closing arguments, the prosecutor told the jury that Dr. Galloway's testimony provided "just too big a range for us to really make any definitive determinations." (109 RT 20288.)

8. As a result, the state also called Dr. Greggory Devore to

testify. Dr. Devore was contacted by the Modesto Police and also asked to review Conner's fetal records to determine his age at death. (95 RT 17861.) Dr. Devore measured Conner's femur bone. (95 RT 17861, 17868.)

9. Dr. Devore made very clear that in reaching his conclusion as to Conner's age, he used "an equation by [Phillipe] Jeanty," an expert in fetal biometry, and estimated that the femur would grow to the observed length in 232 days, which meant that Conner died on December 23, 2002. (95 RT 17879-17883.)

10. In closing argument, the prosecutor told the jury that "Dr. Devore's measurements show us and his testimony shows us that Conner died right at the exact time the prosecution said he did." (109 RT 20289.)

11. It is not just the prosecutor's closing argument that demonstrates the importance of this evidence to the verdicts in this case. The jurors themselves have described their reliance on Dr. Devore's testimony, with one juror describing it as "indisputable," and another remarking that she "loved that guy (Devore). He did his research, all the way down to the bone." (IHP

Exh. 8 at HCP-000219.)

12. At the request of Petitioner's appellate counsel, Dr. Jeanty his expert opinion that provided a declaration Dr. Devore used the wrong formula and inappropriately applied that formula to only one of the three long bones for which there were measurements. . (HCP-000057.) Dr. Jeanty applied the correct formula to three bones and determined that conner died on January 3, 2003. (Id. at HCP-000059, HCP-000062.)

13. A date of death for Conner of January 3, 2003, clears Petitioner of any involvement in the deaths of Laci and Conner Peterson.

14. Petitioner previously submitted a false evidence claim regarding Conner's fetal age and a claim for ineffective assistance of counsel for failing to consult with an expert in fetal biometry. Those claims are not raised here.

15. Fetal development is a continually evolving science. Improvements in imaging and continuing study have changed the landscape of the science since Petitioner's conviction.

16. Petitioner has made a concerted effort to understand the evolving science in this area. Admittedly, Petitioner's ability

to study this field is severely hampered by being incarcerated. Requesting and reviewing the professional journals which publish the many peer reviewed papers on the topic has been extremely difficult. Finding and securing an expert who could offer an independent opinion pertaining to the changes and developments in the area impossible due to the constraints of prison mail, having no legal counsel with which to consult, and the short time period (120 days since the adverse ruling stemming from the Order to Show Cause in Petitioner's 2015 Writ.)

17. The Petitioner has no medical training.

18. What is clear from a review of the literature and from the facts presented above, is there was a dispute in the field during Petitioner's trial, and that dispute has grown since Petitioner's trial.

19. This importance of this evidence during trial shows that it is substantially material and probative to the issue of innocence. (Cal. Pen. Code sec. 1473(a)(1).)

20. Statements from jurors after the trial demonstrate the materiality of Devore's statements to the jury in this case. One

juror described Devore's testimony as "indisputable." (IHP Exh. 8 at HCP-000219.) 115 Another remarked that she "loved that guy (Devore). He did his research, all the way down to the bone." (Ibid.)

21. It follows then, that the evolution of the science in Petitioner's favor is relevant now.

22. Under recent changes by the legislature to California Penal Code section 1473(b)(4)(C), " . . . a significant dispute can be established . . . by peer reviewed literature . . ." Petitioner offers the following peer reviewed articles as a prima facie showing of the evolution of the science and thus the dispute in the scientific community against the false evidence presented at trial:

A. Butt K, Lim K., *Guideline No. 388 - Determination of Gestational Age by Ultrasound*. J Obstet Gynaecol Canada, (2019) Oct;41(10) at 1497.
B. Kasprian, G., Langs, G. & Cortes, M.S., *Fetal MRI-Based Artificial Intelligence in Gestational Age Prediction——a Practical Solution to an Unsolved Problem?*. Eur Radiol. (2021) Jun;31(6) at 3773.
C. O'Gorman N, Salomon LJ., *Fetal Biometry to Assess the Size and Growth of the Fetus*. Best Pract Res Clin

Obstet Gynaecol, (2018) May;49:3-15.

D. Irurita Olivares J, Alemán Aguilera I. *Proposal of New Regression Formulae for the Estimation of Age in Infant Skeletal Remains from the Metric Study of the Pars Basilaris*. (2017) Int J Legal Med. 2017 May;131(3):781-788.

E. Conway DL et al. *An Algorithm for the Estimation of Gestational Age at the Time of Fetal Death*. Paediatr Perinat Epidemiol. (2013) Mar;27(2):145-57.

F. Self A et al.*Second and Third Trimester Estimation of Gestational Age Using Ultrasound or Maternal Symphysis-Fundal Height Measurements: A Systematic Review*. Inter Jour Obstet Gynaecol, 2022 Aug;129(9) at 1447.

G. Buscrechio, Giorgia et al. *Analysis of Fetal Biometric Measurements in the Last 30 Years*. J Prenat Med. Jan-Mar:2(1) 11-13 2008.

H. Irurita, Olivares *New Models to Estimate Fetal and Young Infant Age with Pars Basilaries Biometry*. Forensic Science Int. 2023 Jan.

I. Hobbins, John *Fetal Insular Measurements in Pregnancy with Estimate Fetal Weight. Amer. Journal of Obtetrics & Gyn*. 2002 Vol 228 181-182.

J. O'Gorman, Neil and Solomon, Laurent *Fetal Biometry to Assess Size and Growth of Fetus*. Best Practices and Research Obstetrics and Gyn. 2018 Vol 49:3-15.

K. Butt, Kimberly and Lim, Kenneth. *Determination of*

Gestational Age by Ultrasound. Journal of Obstetrics & Gyn. Canada 2016 Vol. 38:5.

23. Petitioner believes that experts in the field of fetal biometry continue to evolve the science in Petitioner's favor.

24. Petitioner alleges that consultation with an expert, or experts, in the field would demonstrate the refinement of the field.

25. The date of death of Laci and Conner is key scientific evidence which would show Petitioner's innocence.

26. The Petitioner asks for court appointed counsel to pursue this valid claim, and funding to obtain expert opinion related to the changes in science. (Cal. Pen. Code sec. 1473(f).)

27. Petitioner prays the court provide relief from his wrongful conviction and imprisonment.

2. SUPPORTING DOCUMENTS.

Petitioner submits no supporting documents with this claim other than reference to the articles previously noted above.

3. SUPPORTING CASES, RULES, OR OTHER AUTHORITY.

1. Under recent changes by the legislature to California Penal Code section 1473(b)(4)(C), " . . . a significant dispute can be established . . . by peer reviewed literature . . ."
2. The Petitioner asks for court appointed counsel to pursue this valid claim, and funding to obtain expert opinion related to the changes in science. (Cal. Pen. Code sec. 1473(f).)

F. CLAIM SIX: Cumulative Error

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Even if none of the errors specified above alone requires a new trial, the combination of those errors with one another and/or the combination of those errors with the errors identified by petitioner on his direct appeal and previous writ (incorporated herein by reference) require relief.

The judge acknowledged the shortcomings of the proceedings when he remarked, "if there is a conviction in this case, this will be an appellate lawyer's Petri dish. There is so many issues in this case, right?" There are too many—relief is required.

1. SUPPORTING FACTS.

Petitioner incorporates by reference each of the facts

alleged in all other claims of this petition. Petitioner also requests this court to take judicial notice of all pleadings and filings in both *People v Peterson*, San Mateo County Superior Court Case Number SC055500A, *People v. Peterson*, Case Number S132449, *In re Peterson* Case Number S230782.

2. SUPPORTING DOCUMENTS.

3. SUPPORTING CASES, RULES, OR OTHER AUTHORITY.

1. *Taylor v. Kentucky* (1978) 436 U.S. 478
2. *People v. Holt* (1984) 37 Cal.3d 436
3. *People v. Ramos* (1982) 30 Cal.3d 553
4. *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432
5. *United States v. McLister* (9th Cir. 1979) 608 F.2d

4. ARGUMENT IN FAVOR OF RELIEF ON THIS CLAIM.[48]

Petitioner has set forth post-conviction claims regarding numerous errors, and he submits that each one of these errors independently compels reversal of the judgment or alternative

[48] Pursuant to Rules of Court Rule 8.380, subdivision (b), because petitioner is unrepresented in this action, he is not submitting a Memorandum in support of his petition but includes here some arguments in support of his claim to be supplemented by counsel, should counsel be appointed.

post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may be deprived of due process if the cumulative effect of all errors in the case denied him fundamental fairness. (*Taylor v. Kentucky*, *supra*, 436 U.S. At p. 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459; *see also People v. Ramos* (1982) 30 Cal.3d 553, 581, revd. on other grounds in *California v. Ramos* (1985) 463 U.S. 992; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 791.)

As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as they individually and collectively had a substantial and injurious effect or influence on the verdict, judgment and sentence and are moreover prejudicial under any standard of review.

As often said, Petitioner is not entitled to a perfect trial, just a fair one. Here, Petitioner received neither. For all the reasons discussed, Petitioner respectfully request that an order to show cause should issue, requiring the state to show cause why relief should not be granted for the issues herein.