IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE SCOTT PETERSON, Petitioner, On Habeas Corpus.	))))))))	No.: S230782 CAPITAL CASE Related to automatic appeal in S132449

San Mateo County Superior Court No. 55500A
Honorable Alfred Delucchi, Judge

REPLY TO INFORMAL RESPONSE TO

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 6

INTRODUCTION: A SINGLE QUESTION 8

STANDARD OF REVIEW 17

ARGUMENT 24

I. CLAIM ONE: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT JUROR RICHELLE NICE IMPROPERLY CONCEALED INFORMATION DURING VOIR DIRE 24

A. Introduction 24

B. The Allegations Of The Petition Show That Juror Nice Concealed Relevant Information; Assuming These Allegations To Be True Petitioner Has Established A Prima Facie Case Of Juror Concealment. . . 27

C. Because Prejudice Is Presumed Once Juror Concealment Has Been Established, Petitioner Has Established A Prima Facie Case Of Prejudice. 31

D. Conclusion 35

II. CLAIM TWO: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT THE STATE PRESENTED FALSE EVIDENCE AS TO WHEN CONNER STOPPED GROWING 37

A. Introduction 37

B. Because The False Evidence Claim Relies Entirely On Evidence Outside The Trial Record, The Claim Could Not Have Been Raised On Appeal 38

C. The New Evidence From Dr. Jeanty Does Not Merely Show A Disagreement Among Experts, But Instead Shows The State Presented Objectively False Evidence As To The Application Of The Jeanty Formula 39

D. A Prosecutor's Use Of False Evidence Is Not Immune From Review Simply Because The Prosecutor May Have Acted In Good Faith; What Matters Is the Character Of The Evidence Not The Character Of The Prosecutor 42

E. Because The State Bears The Burden Of Proving Any False Evidence Harmless, Petitioner Has Established A Prima Facie Case That The State Presented False Evidence. 43

F. Conclusion 46

III. CLAIM THREE: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO CALL AN EXPERT IN THE FIELD OF FETAL DEVELOPMENT 48

IV. CLAIM FOUR: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT THE STATE PRESENTED FALSE EVIDENCE AS TO THE DOG SCENT EVIDENCE 54

A. Introduction 54

B. Because The False Evidence Claim Relies Entirely On Evidence Outside The Trial Record, The Claim Could Not Have Been Raised On Appeal 56

C. The Allegations Of The Petition Show The State's Dog-Scent Evidence Was False; Assuming These Allegations Are True, Petitioner Has Established A Prima Case That The State Presented False Evidence. 58

D. Conclusion 65

V. CLAIM FIVE: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CALL A DOG-SCENT EXPERT 66

A. Introduction 66

B. The Allegations Of The Petition Show Defense Counsel Had No Legitimate Tactical Reason For Failing To Call A Dog-Scent Expert Prior To Trial; Assuming These Allegations Are True, Petitioner Has Established A Prima Facie Case Of Deficient Performance At The Pre-Trial Hearing. 68

C. The Allegations Of The Petition Show Defense Counsel Had No Legitimate Tactical Reason For Failing To Call A Dog-Scent Expert At Trial; Assuming These Allegations Are True, Petitioner Has Established A Prima Facie Case Of Deficient Performance At Trial. 73

D. Given The Importance Placed On The Dog Scent Evidence By The Trial Prosecutor, Petitioner Has Established A Prima Facie Case As To Prejudice. 75

VI. CLAIM SIX: PETITIONER'S CLAIM THAT THE STATE PRESENTED FALSE EVIDENCE OF WHERE THE BODIES WERE PUT IN THE WATER MAY BE SUMMARILY DISMISSED 78

VII. CLAIM SEVEN: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CALL AN EXPERT ON THE MOVEMENT OF BODIES IN WATER 81

VIII. CLAIM EIGHT: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN PROMISING BUT FAILING TO PRESENT, TESTIMONY THAT WOULD DISPROVE THE STATE'S THEORY AND ESTABLISH PETITIONER'S INNOCENCE. 89

A. Introduction 89

B. The Allegations Of The Petition Show Defense Counsel Promised To Present Evidence In Opening Statement He Had Not Properly Investigated And Then Failed To Present That Evidence; Assuming These Allegations Are True, Petitioner Has Established A Prima Facie Case Of Deficient Performance. 91

C. Given The Importance Of Defense Counsel's Credibility To The Defense, And The Prosecutor's Repeated Reliance On Counsel's Broken Promises, Petitioner Established A Prima Facie Case As To Prejudice. 97

IX. CLAIM NINE: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CALL WITNESSES WHO SAW LACI PETERSON WALKING HER DOG ON DECEMBER 24 AFTER SCOTT LEFT FOR THE MARINA 102

A. Introduction 102

B. The Allegations Of The Petition Show Defense Counsel Was Unaware Of Critical Evidence When He Made The Decision Not To Call The Laci-Sighting Witnesses; Assuming These Allegations Are True, Petitioner Has Established A Prima Facie Case Of Deficient Performance. 106

C. Given The Importance Of Showing Laci Was Alive When Scott Was On His Way To The Berkeley Marina, Petitioner Has Established A Prima Facie Case As To Prejudice. 108

X. CLAIM TEN: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO PRESENT EVIDENCE THAT BURGLAR STEVEN TODD SAW LACI LATE ON THE MORNING OF DECEMBER 24 AFTER SCOTT LEFT FOR THE MARINA 114

A. Introduction 114

B. The Allegations Of The Petition Show Defense Counsel Was Not Aware Of The Aponte Tip; Assuming These Allegations Are True, Petitioner Has Pled A Prima Facie Case Of Deficient Performance. . . . 118

C. Given The Importance Of Showing Laci Was Alive When Scott Was On His Way To The Berkeley Marina, Petitioner Has Established A Prima Facie Case Of Prejudice. 125

CONCLUSION 129

TABLE OF AUTHORITIES

FEDERAL CASES

Berger v. United States (1935) 295 U.S. 78 79

Dugas v. Coplan (1st Cir. 2005) 428 F.3d 317 . . . . . 97, 125

Griffin v. Warden (4th Cir. 1992) 970 F.2d 1355 97

Hall v. Director of Corrections (9th Cir. 2003) 343 F.3d 976 . . . . . 42, 65, 73, 97, 98

Hinton v. Alabama (2014) ___ U.S. ___, 134 S. Ct. 1081 51

Keith v. Mitchell (6th Cir. 2006) 466 F.3d 540 . . . . . 97, 124

Lafler v. Cooper (2012) 566 U.S. 156 69

Maxwell v. Roe (9th Cir. 2010) 628 F.3d 486 . . . . . 42, 65

McAleese v. Mazurkiewicz (3rd Cir.1993) 1 F.3d 159 99

Napue v. Illinois (1959) 360 U.S. 264 42

New Hampshire v. Maine (2001) 532 U.S. 742 86

Richards v. Quarterman (5th Cir. 2009) 566 F.3d 553 . . . . . 97, 124

Saese v. McDonald (9th Cir. 2013) 725 F.3d 1045 98

Smith v. Mullin (10th Cir. 2004) 379 F.3d 919 . . . . . 97, 125

Strickland v. Washington (1984) 466 U.S. 668 74

United States ex rel. Hampton v. Leibach (7th Cir. 2003) 347 F.3d 219 98

United States v. Agurs (1976) 427 U.S. 97 . . . . . 42, 43

United States v. Tucker (9th Cir. 1983) 716 F.2d 576 74

United States v. Young (9th Cir. 1994) 17 F.3d 1201 . . . . . 43, 65

Wiggins v. Smith (2003) 539 U.S. 510 . . . . . passim

Williams v. Taylor (2000) 529 U.S. 362 74

Williams v. Woodford (E.D.Cal. 2012) 859 F. Supp. 2d 1154 99

STATE CASES

In re Bacigalupo (2012) 55 Cal. 4th 312 . . . . . 17, 34, 109

Dardines v. Superior Court (1999) 76 Cal. App. 4th 247 18

People v. Duvall (1995) 9 Cal. 4th 464 . . . . . passim

People v. Centeno (2014) 60 Cal. 4th 659 . . . . . 22, 53

People v. Cruz (1964) 61 Cal. 2d 861 . . . . . 52, 53

People v. Guiuan (1998) 18 Cal. 4th 558 . . . . . 29, 92

In re Hall (1981) 30 Cal. 3d 408 . . . . . 43, 65

In re Hamilton (1999) 20 Cal. 4th 273 32

In re Jones (1996) 13 Cal. 4th 552 . . . . . 21, 23, 28

People v Hill (1998) 17 Cal. 4th 800 21

People v. Nesler (1997) 16 Cal. 4th 561 32

People v. Powell (1967) 67 Cal. 2d 32 . . . . . 52, 87

In re Price (2011) 51 Cal. 4th 547 34

People v. Romero (1994) 8 Cal. 4th 728 18

In re Sakarias (2005) 35 Cal. 4th 140 . . . . . 44, 61

In re Sanders (1999) 21 Cal. 4th 697 129

People v. Seaton (2001) 26 Cal. 4th 598 . . . . . 42, 65

INTRODUCTION: A SINGLE QUESTION

"[M]istakes in the criminal justice system are sometimes made." (*In re Sanders* (1999) 21 Cal.4th 697, 703.) And when they are, habeas corpus is available to ensure "the person being punished is actually guilty of the crimes of which he or she was convicted." (*Ibid.*)

Petitioner here was convicted and sentenced to death for the murder of his wife and unborn child. He has maintained his innocence from day one. In November of 2015 petitioner filed a Petition for Writ of Habeas Corpus with this Court. Aside from a juror misconduct claim, the Petition was based largely on new evidence from percipient and expert witnesses. Although petitioner raised a variety of legal claims -- including presentation of false evidence by the prosecution and ineffective assistance of trial counsel -- the essential factual predicate of petitioner's various claims is the same: the new evidence shows petitioner is innocent. As this Court envisioned in *Sanders*, petitioner is employing the Great Writ to ensure "the person being punished is actually guilty of the crimes of which he . . . was convicted." (*In re Sanders*, *supra*, 21 Cal.4th at p. 703.)

In pursuing this course Mr. Peterson recognizes reviewing courts may properly harbor skepticism when faced with a claim of innocence after a jury trial. From an

institutional perspective, that skepticism may well be necessary. After all, not only were substantial resources expended in providing petitioner a jury trial but the jury unanimously concluded he was guilty. Such verdicts cannot and should not lightly be set aside. But the fact of the matter is that it is in precisely this situation -- that is, where a jury has unanimously found a defendant guilty -- that this Court has recognized "mistakes . . . are sometimes made."

At the end of the day, petitioner's claims of error will require the Court to determine whether this is one such case and whether relief is required. But the ultimate question of whether relief is required is not before the Court at this early stage of the habeas corpus proceedings. Instead, the Court has the much simpler task of deciding whether petitioner has pled a prima facie case for relief.

In connection with this inquiry, the details of each of petitioner's claims will be discussed in the arguments below. For purposes of resolving the prima-facie case inquiry, however, it is important to note that although the parties presented two very different factual theories at trial, the jury had but one factual question to resolve in deciding if petitioner was guilty.

The state's theory was that Scott Peterson killed his wife Laci on the evening of December 23 or the morning of December 24, 2002, in their home at 523 Covena Avenue

in Modesto, California.[1] The state asserted that Scott put Laci in his truck. Cell phone records show that at 10:08 on the morning of December 24 Scott drove the truck to his warehouse at 1027 N. Emerald Avenue in Modesto. Under the state's theory, Scott attached cement anchors to Laci's body, loaded her body into his 14-foot boat and drove to his warehouse and then the Berkeley Marina, arriving at 12:54. He then put his boat into the water and -- when he was out on the bay -- pushed Laci's body overboard.

The defense agreed that Scott drove to his warehouse at 10:08 that morning. But the defense theory was quite different; under the defense theory, Laci was alive and at home at that time. Scott told police that Laci was mopping the floor when he left and planned to take their dog Mckenzi out for a walk. Scott drove to his warehouse, took his boat to the Berkeley Marina and went fishing. When he returned, Laci was gone. Under the defense theory, Scott had nothing to do with Laci's disappearance -- instead, she was alive when he left for the warehouse and marina and was abducted at some point either during or after having walked Mckenzi.

As these two thumbnail sketches show, the jury had one question to resolve: was Laci alive when Scott left for the warehouse and Berkeley Marina? If so, then Scott was innocent. If not, then he was guilty.

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[1] Because there are a number of witnesses with the last name of Peterson, and as he did on appeal, petitioner will on occasion use first names to avoid confusion. No disrespect is intended.

At trial, of course, the prosecutor skewered the defense theory that Laci took Mckenzi for a walk after Scott left for the marina. According to the prosecutor, this was just another lie Scott told to cover his tracks; the prosecutor told jurors in closing that after Scott killed Laci he put the leash on Mckenzi and let him outside the house before driving to the marina.

To his credit, the prosecutor was candid about the central evidence supporting the state's theory: the testimony of neighbor Karen Servas. As discussed in much greater detail below, at 10:18 that morning Servas found Mckenzi outside the Peterson home with his leash on. Servas was able to pinpoint the time so precisely based on cell phone records and store receipts containing time stamps. In order to keep Mckenzi safe, Servas did what any good neighbor would do -- she put Mckenzi in the Peterson's yard and closed the gate behind her so Mckenzi would not get out.

The prosecutor relied on this evidence to ridicule the defense theory that after Scott left, Laci took Mckenzi for a walk and was thereafter abducted. The prosecutor explained that for the defense theory to work, between 10:08 (when Scott left for the marina) and 10:18 (when Servas found and put Mckenzi back in the yard) Laci would have had to (1) finish mopping the floor, (2) get dressed and (3) take Mckenzi for a walk during which time she was abducted and (4) Mckenzi would have had to make her way home without Laci. The prosecutor was not subtle:

> And if that's the case, then this is what had to have happened in ten minutes, in a ten minute time. Laci would have had to get up, put on all her jewelry, because the defendant tells the police and some other folks, the dog tracking people and stuff, that [Laci was wearing jewelry]. . . . So she puts on all of her jewelry to then, I guess, go mop the floor. Because he says, when he says he leaves, she's mopping the floor, she's got on a white shirt and black pants, and she's barefoot. So she has to have put her jewelry on, finish mopping the floor, put on her shoes and socks, changed her clothes, because remember, when she's found, Laci Peterson is not bearing black pants.
>
> Laci Peterson is wearing a pair of pants just like these. No one confuses these pants with black. . . . So she changes out of these nice pair of capri pants, I mean she changes out of her black pants she was wearing when she was mopping, into these nice pair of capri pants so she can go walk the dog. She has to then get abducted . . . . This is all in ten minutes. . . . .
>
> The dog then has to be able to come home in the ten minutes time, because she's now done all these things, been abducted, the dog comes home and has to be found by Karen Servas, all in ten minutes, all in a ten minute window, because at 10:08 the defendant is just now driving away from his house.

(109 RT 20224-20225.) The jury agreed with the prosecutor, rejecting the defense theory and convicting petitioner of murder.

But this is precisely where the new evidence comes into play. The habeas record now shows that the prosecutor's theory of the crime was almost certainly false.

The starting point for this analysis is the December 27, 2002 statement of postman Russell Graybill discussed in Claim 9 of the Petition. Graybill gave this statement to police when his memory was fresh -- only three days after Laci went missing. Graybill

told police he delivered mail to the Peterson house between 10:35 and 10:50 that morning, well *after* Servas had put Mckenzi back in the yard and closed the gate. (Petition Exhibit 3.) Graybill knew the Peterson family, and he knew Mckenzi well -- according to Graybill, Mckenzi barked at him whenever he delivered mail to the Peterson house, no matter where Mckenzi was on the property.

But the jury never heard that when Graybill arrived at 10:35 to 10:50 the gate which Servas had closed at 10:18 was now *open* and Mckenzi was *not* barking. (Petition Exhibit 3.) This evidence directly supports the defense case that Laci took Mckenzi for a walk after Scott left for the marina. The state never suggests who else would possibly have opened the Peterson's gate and taken Mckenzi for a walk.

This is not the only evidence contradicting the state's case which the jury did not hear. As discussed in Claim 9 of the Petition, in accord with Graybill's recollection that Mckenzi was not at the house when he delivered mail, numerous witnesses saw Laci walking the dog in the neighborhood after Scott left for the marina. (Petition Exhibits 12, 13, 14, 15, 16.) This evidence also directly supports the defense theory that Laci left the house to walk Mckenzi *after* 10:08, the time that the state concedes Scott left the house on his way to the warehouse and then the Berkeley Marina.

But there is more. In 2002, the Medina family lived at 516 Covena -- across the

street from the Petersons. The prosecutor conceded at trial that the Medinas left for Los Angeles at 10:30 on the morning of December 24. On December 27, Diane Jackson reported to two different police officers that she saw the Medina home being burglarized and a safe stolen on the morning of December 24. Sure enough, when the Medinas returned home on December 26, their home had been burglarized, and a safe had been taken. The jury heard all this evidence about the burglary, along with testimony from police Officer Hicks that when he arrested Steven Todd for the burglary several days later, Todd admitted that he had committed the burglary but insisted the burglary occurred on December 26, not December 24 as Jackson had reported.

As discussed in Claim 10 of the Petition, however, in evaluating Todd's statement that the burglary occurred on December 26 -- and was therefore entirely unrelated to Laci's disappearance -- the jury never heard from Officer Xavier Aponte, a correctional officer at the California Rehabilitation Center in Norco, California. In January 2003 -- only weeks after Laci disappeared -- Officer Aponte monitored a telephone conversation between an inmate named Shawn Tenbrink and his brother Adam Tenbrink. Adam was a friend of burglar Steven Todd; during the conversation, Adam revealed that Todd confessed "Laci witnessed him breaking in." Since the Medinas left their home at 10:30 on December 24 -- after Scott had already left for the marina -- Todd's confession directly supports the defense theory that Laci was alive when Scott left for the marina.

The jury did not hear from Officer Aponte. The jury did not hear from burglar Steven Todd. The jury did not hear from Adam or Shawn Tenbrink.

Taken together, every piece of this new evidence supports a very different narrative than the one the prosecutor presented at trial. Servas found the dog and put him back in the Petersons' yard, closing that gate, at 10:18. Laci then left the house and took the dog out for a walk. That explains why the gate was open when Graybill delivered the mail at 10:35, why Mckenzi did not bark when Graybill delivered mail that morning, why numerous people in the neighborhood saw Laci walking the dog well after 10:18 that morning and why -- as Steven Todd later admitted -- Laci "witnessed him breaking in" later that morning.

At the end of the day, for the state to be right about what happened in this case, postman Russell Graybill, the witnesses who saw Laci walking the dog on the morning of December 24, Officer Aponte and Adam Tenbrink -- none of whom have any motive to lie for Scott Peterson -- all have to be wrong. Every one of them. Instead, the Court would have to accept convicted burglar Steven Todd's frantic insistence to investigators (rather than his candid admission to Adam Tenbrink) that he did not burglarize the Medinas home until December 26 and Laci could not therefore have "witness[ed] him breaking in" on December 24. And as discussed more fully below the Court would have to accept the state's December 26 thesis despite the testimony of four prosecution

witnesses -- including an investigating detective and Laci's own mother and brother -- about the intense police and media presence on Covena Street by December 26 which made it extraordinarily unlikely that any burglary was committed on Covena that day.

The Court does not yet have to decide if the criminal justice system has made a mistake in the trial of Scott Peterson. But for the reasons which follow, an Order to Show Cause should issue so the question can at least be fairly resolved.

STANDARD OF REVIEW

Petitioner has been convicted of capital murder and sentenced to death. His appeal and habeas petition are now pending before this Court. As noted above, aside from a juror misconduct claim the Petition is based largely on new evidence going directly to the question of innocence. This new evidence was never presented to the jury.

At this stage of the proceedings the Court is not charged with deciding if Mr. Peterson is entitled to relief. The Court's task is much simpler. The Court must "assum[e] the petitioner's factual allegations are true" and assess whether petitioner has established a prima facie case for relief on any of his claims. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) If so, an Order to Show Cause should issue requiring the state to formally admit or deny the factual allegations of the petition. (*Ibid*.) Credibility assessments are not made at this early, prima-facie-case stage of the proceedings, but instead are made later -- if necessary -- with the benefit of an evidentiary hearing. (*See In re Bacigalupo* (2012) 55 Cal.4th 312, 333.)

To assist the Court in assessing whether a prima facie case has been established, the Court ordered the state to file an Informal Response to the Petition. The Informal Response performs a "screening function," in which the state may urge the Court to dismiss a petitioner's claims summarily, without issuing an Order to Show Cause.

(*People v. Romero* (1994) 8 Cal.4th 728, 742.) Under *Romero* there are two distinct paths the state may take in urging summary dismissal. First, the state may by "submission of factual materials" demonstrate that summary dismissal is proper. (*Ibid*.) Alternatively, the state may elect *not* to offer any factual materials at all but instead "demonstrate by citation of legal authority . . . that the claims asserted in the habeas corpus petition . . . may [be] reject[ed] . . . summarily." (*Ibid*.)

The state has now filed its Informal Response. But for the most part, the state has not taken *either* of the approaches established in *Romero*. The state correctly recognizes that pursuant to *Romero*, it "need not provide documentary evidence to controvert the factual allegations of the petition." (Informal Response ("IR") 21.) Lower courts have noted sound reasons for the state to avoid presentation of factual materials; when the state *does* seek to "submit[] . . . factual materials" at the prima-facie-case stage of habeas proceedings, it bears a heavy burden to "provid[e] the court with irrefutable evidence that the petition's allegations are factually unfounded." (*Dardines v. Superior Court* (1999) 76 Cal.App.4th 247, 253.) The state wisely does not seek to carry such a burden here. Thus, the state does not submit a single declaration, affidavit or document to support its position that petitioner has not established a prima facie case. (IR 1-150.) Instead, the state argues it will take the second option outlined in *Romero* and limit its Informal Response to "legal arguments with respect to perceived flaws on the face of the petition." (IR 21-22.)

Despite this clear statement of intent, however, the state does nothing of the sort. Rather than focus the Informal Response on "legal arguments," as to each and every claim in the Petition the state instead "specifically . . . controvert[s] all of Peterson's factual . . . claims and allegations." (*See*, *e.g.*, IR 24, 40, 61-62, 70, 86, 92, 105-106, 111, 120-121, 128.) The state's approach -- "specifically contravert[ing] all of Peterson's factual allegations" -- is utterly irreconcilable with this Court's obligation to "assum[e] the petition's factual allegations are true." (*Duvall*, *supra*, 9 Cal.4th at p. 474.) Indeed, it is fair to say that controverting every factual allegation of the petition is as far from assuming the truth of those very same allegations as can be.

This was not mere boilerplate on the state's part. The Court need look no further than the very first claim in the Petition. That claim alleges juror Richelle Nice committed misconduct in giving materially false answers in response to questions asking if she had ever been involved in a lawsuit and, if so, whether as a plaintiff, defendant or witness. (Petition 96-108.) Fairly read, the state does not deny that Ms. Nice gave false answers; instead, it argues that Ms. Nice had no intent to deceive but simply misunderstood the questions. (IR 26-27.) *Significantly, however, the state does not attach a declaration from Ms. Nice herself to support its position.* Instead, the state urges the Court to simply assume Ms. Nice would credibly take this position at an evidentiary hearing.

Maybe she would. Maybe she wouldn't. Given the state's tactic in making this

representation without any factual support at all, it is entirely unknowable at this point. As discussed more fully below, in light of Ms. Nice's experience working in a law firm, it seems distinctly unlikely that any factfinder would accept as credible the state's current claim that she misunderstood basic terms like "lawsuit," "plaintiff" and "witness." But more important for current purposes is that this is precisely the type of credibility assessment which this Court does *not* make at this preliminary stage of the habeas proceedings.

This is one example. As discussed below, the state's approach in "specifically . . . controvert[ing] all of Peterson's factual . . . claims and allegations" infects its response to many of the claims in the Petition. As will be seen, throughout its Informal Response the state argues that petitioner's allegations are "not true" and "mistaken." In short, much of the state's argument is made not by following the rules which are applied in assessing a prima facie case, but by ignoring them almost entirely.

But there is more. In urging the Court to find that no prima facie case has been shown as to even a single claim, the state takes a clever divide-and-conquer strategy. In responding to each separate claim for relief the state argues that the Court should summarily deny relief because petitioner did not plead a prima facie case of prejudice for that specific claim. (IR 58, 69, 84, 91, 102, 110, 117, 127.) But the state's argument -- while clever -- misses the forest for the trees.

Contrary to the assumption at least implicit in the state's approach, this Court does not simply assess in isolation the prejudice stemming from individual instances of error. To the contrary, it assesses the cumulative effect of all instances of error together, recognizing that prejudice from different errors can be cumulative. (*See*, *e.g.*, *People v Hill* (1998) 17 Cal.4th 800, 847 [cumulating different instances of prosecutorial misconduct, error in shackling defendant, improper presence of a bailiff who was also a witness and improper instructions].) Similarly, prejudice from numerous instances of a lawyer's deficient performance may aggregate to constitute ineffective assistance of counsel even if no single instance rises to that level. (*See*, *e.g.*, *In re Jones* (1996) 13 Cal.4th 553, 583, 587.) The state ignores this case law entirely.

But this case presents the perfect illustration of these principles. The state's theory was that Scott killed Laci and drove her to the Berkeley Marina. The defense theory was that Laci was alive and at home when Scott left for the marina and she later took their dog Mckenzi for a walk. Given these starkly different theories, the jury had to decide whether Laci was alive when petitioner drove to the marina. If she was, the jury would certainly acquit. If she was not, conviction was certain.

As to this factual question, Scott has alleged that jurors never heard critical evidence. Specifically, he has alleged that counsel improperly failed to present testimony from (1) witnesses whose observations directly supported the defense theory that Laci

was walking the dog *after* Scott left for Berkeley, (2) witnesses who heard Steven Todd's confession that "Laci witnessed him breaking in" to the Medina home on December 24 *after* Scott left for Berkeley (3) a fetal development expert showing that Conner lived well beyond that date, as late as January 3, 2003, and so was alive when Scott left for the marina, (4) a dog-scent expert showing that the inculpatory dog-scent evidence the state introduced was entirely unreliable and (5) an expert on the movement of bodies in water showing that the state's expert provided only half the story to the jury. In its Informal Response, the state separately argues that summary dismissal of each claim is proper because none of them is *individually* prejudicial.

As discussed more fully below, the factual predicate for the state's argument is incorrect. In fact, each of these errors alone *does* meet the single-juror test for prejudice which governs both federal and state law. (*See Wiggins v. Smith* (2003) 539 U.S. 510 [where state law requires unanimous verdict, relief for ineffective assistance of counsel is required where absent counsel's error one juror could reasonably have reached a different verdict]; *People v. Centeno* (2014) 60 Cal.4th 659, 677 [same].)

But even assuming the state is correct, and these errors were individually harmless, the request for summary dismissal based on an asserted lack of prejudice is entirely premature. As noted, even if any one of these errors alone was not prejudicial, such errors cumulatively may rise to the level of prejudicial error when combined with

prejudice stemming from counsel's errors *as a whole*. (*See In re Jones*, *supra*, 13 Cal.4th at pp. 583, 587.) Thus, at this early pleading stage of the habeas process, a final assessment of prejudice as to any one claim -- and summary dismissal for an asserted lack of prejudice -- is both premature and inappropriate.

In assessing whether petitioner has pled a prima facie case for relief as to any of his claims, and contrary to the suggestion at least implicit in the state's decision to "controvert all of Peterson's factual . . . claims and allegations," the Court is *not* now tasked with deciding if relief is proper. As discussed in much greater detail below, assuming the truth of petitioner's factual allegations as *Duvall* requires, nothing in the state's Informal Response calls into question whether petitioner has established a prima facie case. An Order to Show Cause should issue.

ARGUMENT

I. CLAIM ONE: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT JUROR RICHELLE NICE IMPROPERLY CONCEALED INFORMATION DURING VOIR DIRE.

A. Introduction.

In Claim One of the Petition Mr. Peterson alleged that juror Richelle Nice concealed relevant information during voir dire. (Petition 96-108.)[2] Questions 54a and 54b of the jury questionnaire asked prospective jurors if they had ever been "involved in a lawsuit (other than divorce proceedings)" and, if so, whether they were the plaintiff or defendant. (Petition 97.) Question 72 asked if the prospective jurors had ever "participated in a trial as a party, witness or interested observer?" (Petition 98.) And question 74 asked if the prospective juror had ever been the victim of a crime. (Petition 98.) Seated juror Nice answered "no" to questions 54a, 72 and 74, and left 54b blank. (Petition 98.)

The documents filed in support of the Petition as Petition Exhibit 45 show that all

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[2] The Petition for Writ of Habeas Corpus will be referenced in this brief as "Petition." Exhibits which accompanied the Petition will be referenced as "Petition Exhibit" followed by the exhibit number and, if appropriate, the page number as well. The supporting memorandum petitioner filed with the Petition will be referenced as "Memorandum."

these answers were false. In November of 2000, Ms. Nice -- who was four and a half months pregnant at the time -- filed a lawsuit against Marcella Kinsey. (Petition 99.) Nice alleged that because of Kinsey's conduct she (Nice) "fears for her unborn child." (Petition 100.) Nice alleged that Kinsey "committed acts of violence against her" and "would try to hurt the baby." (Petition Exhibit 45 at pp. 905, 909.) And Nice later testified at a hearing in Superior Court and obtained a restraining order against Kinsey. (Petition 100.)

In short, the documents show: (1) Ms. Nice had been involved in a lawsuit; (2) she was the plaintiff; (3) she participated in the lawsuit as both a party and a witness; and (4) she alleged that she was the victim of a crime. Put another way, Nice's answers on the questionnaire were false. Based on these facts, Mr. Peterson alleged Ms. Nice had committed misconduct which raised a presumption of prejudice. (Petition 108.)

The state makes several important concessions. The state recognizes that "a conviction cannot stand if even one juror" was biased. (IR 24.) The state recognizes that "a juror who conceals relevant facts or gives false answers during voir dire commits misconduct." (IR 25.) Finally, the state recognizes that the reason for this strict rule is that false answers "eviscerate a party's statutory right to exercise" jury challenges. (IR 25.) The state's concessions are entirely appropriate.

The state's disagreement with Mr. Peterson in connection with this claim is not really on the law, it is on the facts. As noted, the state "specifically . . . controvert[s] all of Peterson's factual . . . claims and allegations in Claim One . . . ." (IR 24.) The state argues that Mr. Peterson did not plead a prima facie case as to either juror concealment of information or prejudice. (IR 26-30 [concealment]; 30-40 [prejudice].) As discussed below, the state is wrong on both counts and an Order to Show Cause should issue.[3]

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[3] In his Petition, Mr. Peterson explained that he used Ms. Nice's name, rather than juror number, because she published a book in her own name and identified herself as Juror 7. (Memorandum 2, n.1.) The state responds in a footnote indicating it would refer to Ms. Nice by juror number, presumably to protect her anonymity. (IR 23, n.2.) The state's concern is commendable, but dramatically misplaced here.

Since 2004, Juror Nice has taken every opportunity to disclose to the American public her identity as a juror in the Peterson case. Immediately after the verdict, on December 14, 2004, Ms. Nice introduced herself to the American public in an appearance under her own name on CNN's Larry King Live. (http://transcripts.cnn.com/TRANSCRIPTS/0412/14/lkl.01.html, last visited on 5/21/18.) The next day she again appeared under her own name on national television on the Fox News show "On The Record With Greta Van Susteren." (www.foxnews.com/transcript/2004/12/15/ inside-peterson-jury.html, last visited on 5/21/18.) She appeared on "Good Morning America," as described in the December 13, 2004 issue of USA Today. (http://usatoday30.usatoday.com/news/ nation/2004-12-13-peterson_x.htm, last visited 5/21/18.) On March 16, 2005, she appeared on CNN Live. (http://www.pwc-sii.com/Mediadiscuss.htm, last visited 5/25/18.) As noted, in 2006 she published a book about serving on the Peterson jury, identifying herself as "Richelle Nice, Juror No. 7." And in June 2006 she sold her story to People Magazine; the June 5, 2006 issue features a story about Ms. Nice's correspondence with Scott entitled, "Letters from Scott" and informs readers that "[s]ince last August, Richelle Nice, one of 12 jurors in the capital murder trial of Scott Peterson, has become a pen pal to the man she convicted." (http://people.com/archive/letters-from-scott-vol-65-no-22/, last visited on 5/21/18.)

Ms. Nice has voluntarily and enthusiastically disclosed her identity and experiences in the Peterson case to millions of Americans. Accordingly, for the sake of clarity and consistency, Mr. Peterson will follow the nomenclature used by prior counsel in the Petition and refer to her by name.

B. The Allegations Of The Petition Show That Juror Nice Concealed Relevant Information; Assuming These Allegations To Be True Petitioner Has Established A Prima Facie Case Of Juror Concealment.

The state concedes -- somewhat grudgingly to be sure -- that Ms. Nice *had* been involved in a lawsuit prior to her jury service. (IR 27.) Thus, in an artfully phrased concession the state recognizes it is "technically correct" to conclude Ms. Nice's lawsuit against Ms. Kinsey was indeed a lawsuit. (IR 27.) With even greater care, the state then concedes Ms. Nice provided false information on her questionnaire, admitting that because Ms. Nice's lawsuit was "technically" a lawsuit, her answer to question 54a did "not comport with technically correct legal jargon." (IR 27.) Or, to translate the state's legalistic concessions into plain English, the answers Ms. Nice gave on her questionnaire were false.

The state argues, however, that Ms. Nice simply made an honest mistake. In the state's view, although Ms. Nice's legal action against Kinsey was a lawsuit, Ms. Nice may not have realized that when she testified against Kinsey in Superior Court in 2000, she was a witness in a lawsuit -- she may have thought it was something else. (IR 26-27.) *The state attaches no declaration from Ms. Nice herself to this effect.*[4]

[4] The state's failure to offer any extra-record support at all for its factual allegation that Ms. Nice simply misunderstood the questions is all the more surprising in light of the state's candid recognition that "[f]acts must be alleged in a manner that makes the declarant liable for perjury if the allegation is false." (IR 32.)

Mr. Peterson will be blunt. There is *nothing* in the record to support the state's explanation as to why Ms. Nice gave false answers. Nothing.

Certainly the paperwork Ms. Nice herself prepared does not support the state's interpretation. On the lawsuit itself, Ms. Nice listed herself as "plaintiff." (Petition Exhibit 45 at p. 903.) She listed Ms. Kinsey as "defendant." (*Ibid.*) The paperwork showed that "a court hearing has been set" for hearing in Department 14 of the Superior Court on December 13, 2000. (*Ibid.*) Ms. Nice even added a request for "attorneys fees and costs." (*Id.* at p. 906.) She then filled out a "Civil Case Cover Sheet" for filing in the San Mateo Superior Court, stating that the case was "not a class action suit." (*Id.* at p. 911.) This was the very same Superior Court in which Ms. Nice was called to jury service in this case. And when the December 13th date arrived for Ms. Nice's trial, the documents show Ms. Nice was "sworn and testified." (*Id.* at p. 914.) The paperwork Ms. Nice filled out strongly suggests was aware she was involved in a lawsuit involving plaintiffs and defendants.

Despite this evidence the state maintains that Ms. Nice simply did not know she was involved in a lawsuit, she was a party to that lawsuit or had testified as a witness. (IR 26-27.) The state's position is difficult to square with the plain import of the documents Ms. Nice herself filled out, as discussed above. It is also difficult to square with Ms. Nice's background.

The state accurately notes that Ms. Nice's "background did not include any professional training in the law." (IR 27-28.) The state adds that jurors are not "experts in English usage" and may be "uncertain as to the meaning of terms." (IR 27.)

This is all certainly true. But as Justice Brown noted some years ago, neither are "juror[s] some kind of dithering nincompoop[s], brought in from never-never land . . . ." (*People v. Guiuan* (1998) 18 Cal.4th 558, 579 [Brown, J., concurring and dissenting].) Ms. Nice was asked if she had ever been "a witness." She was asked if she had ever been involved in "a lawsuit." She was asked if she was the plaintiff or defendant. Contrary to the state's suggestion, these are not complex terms which require "professional training in the law" to understand. (IR 27-28.) Ms. Nice was not being asked to apply the Rule Against Perpetuities.

The state's position is especially odd here. With some understatement, the state concedes that Ms. Nice had "an interest in the law." (IR 32.) In fact, Ms. Nice stated in her questionnaire that she had wanted to be a lawyer when she was younger, she had been to college and had even worked in a law office prior to the trial. (Petition Exhibit 44 at pp. 886, 888; 23 RT 4611.) It seems very unlikely she would not understand terms like

"witness," "plaintiff" and "lawsuit."[5]

To be sure, despite the explicit nature of the documents Ms. Nice herself prepared and signed, and Ms. Nice's background working in a law office, the state is certainly free to take the position that Ms. Nice would say she just did not understand that she had appeared as a witness and was party to a lawsuit. And the credibility of such an inherently incredible position is one a factfinder would have to assess. But this hypothetical question of fact and credibility has nothing at all to do with whether -- assuming Mr. Peterson's factual allegations are true -- a prima facie case of juror

[5] It is worth noting that the confusion the state now alleges Ms. Nice had with respect to terms like "lawsuit," "plaintiff" and "witness" was not shared by other members of the jury pool. To the contrary, other prospective jurors understood the plain meaning of these terms in a wide range of contexts. (*See*, *e.g.*, 2 Hovey CT 93 [small claims court proceedings]; 4 Hovey CT 783 [patent infringement action]; 5 Hovey CT 990 [landlord tenant dispute]; 15 Hovey CT 4071 [worker's compensation claim]; 40 Hardship CT 11362 [paternity action].) Other jurors had no trouble applying these terms to similar domestic violence disputes. (*See*, *e.g.*, 22 Hardship CT 6173; 31 Hardship CT 8596; 40 Hardship 11454; 65 Hardship CT 18932.) The state never explains why other jurors would understand these terms, but Ms. Nice would not.

concealment has been pled. It plainly has.[6]

C. Because Prejudice Is Presumed Once Juror Concealment Has Been Established, Petitioner Has Established A Prima Facie Case Of Prejudice.

In urging the Court to find that no prima facie case has been established the state makes a second argument. The state argues that petitioner did not establish a prima facie case of juror misconduct even if the Court "credit[s] Peterson's claim that juror [Nice] committed misconduct and improperly concealed material information during voir dire." (IR 30.) According to the state, this is because Ms. Nice was not biased. (IR 30.)

It is important to put the state's argument in context. The state properly concedes that "a juror who conceals relevant facts or gives false answers during voir dire commits

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[6] In passing only, the state notes that the lawsuit between Nice and Kinsey, and Ms. Nice's testimony at that lawsuit, occurred in December 2000, whereas Ms. Nice filled out her questionnaire in March of 2004. (IR 29.) In other words, a little over three years had passed. The state suggests the incident in which Kinsey "threatened [Ms. Nice's] unborn child," and in which Nice testified in open court had become "long buried" in Ms. Nice's memory and she just plain forgot about it.

The alternative factual theory the state now offers up suffers from the same flaws as its prior offering: it is entirely unsupported by a declaration from Ms. Nice and it depends entirely on a factfinder accepting as credible a version of events which is distinctly unlikely. It too has nothing at all to do with whether -- assuming Mr. Peterson's factual allegations are true -- he has pled a prima facie case of juror concealment. In any event, the attached declaration of jury foreman Steve Cardosi establishes the falsity of the state's passing suggestion that Ms. Nice had forgotten the Kinsey incident. To the contrary, Ms. Nice spoke about the Kinsey incident with other jurors. (*See* Exhibit 50 [Cardosi Declaration] at HCP-000987.)

misconduct." (IR 25.) When a juror commits misconduct, prejudice is presumed and the state has the burden of proving the misconduct harmless. (*In re Hamilton* (1999) 20 Cal.4th 273, 295; *People v. Nesler* (1997) 16 Cal.4th 561, 578.)

Here, as discussed above, a prima facie case of juror concealment has indeed been established. At this early stage of the habeas process, then, the question is whether -- as a matter of law -- the state has carried its burden of proving the misconduct harmless. If the state has not carried this burden, an Order to Show Cause must issue.

The state suggests it can rebut the presumption of bias as a matter of law because Ms. Kinsey's threats to juror Nice did not "endanger[] juror [Nice] and the life of her unborn child." (IR 31.) It is hard to square this suggestion with the actual record.

Ms. Nice explicitly alleged that Kinsey "committed acts of violence against [her.]." (Petition Exhibit 45 at p. 905.) She alleged Kinsey "would try and hurt the baby." (*Id*. at p. 909.) She alleged that she "fears for her unborn baby." (*Id*. at p. 908.) And after hearing both Ms. Nice and Ms. Kinsey testify, the Superior Court judge found there was sufficient evidence of danger to impose a three-year restraining order prohibiting Ms. Kinsey from coming within 100 yards of "Richelle Nice & unborn child." (*Id*. at p. 912.)

Contrary to the state's position, this documentary evidence does not *rebut*

prejudice, it *establishes* it. The state was charging Scott Peterson with killing Laci and his own unborn child. Ms. Nice concealed the fact that she had been directly involved in a lawsuit to protect her own unborn baby from violence. This was directly relevant to her ability to sit in judgment on this case.

And as petitioner explained in some detail in both his Petition and Supporting Memorandum, the extraordinary letters Ms. Nice wrote to Mr. Peterson after the death verdict not only suggest why Ms. Nice lied to get on the jury, but confirm why the state will be unable to prove her misconduct harmless. As summarized in the Petition and the Supporting Memorandum, these letters disclose Ms. Nice's near obsessive interest in the harm to Conner. (Petition 103-106; Memorandum 7-10. *See also* Exhibit 51 [Beratlis Declaration] at HCP-000992 [noting that when Nice was seated to replace a juror, she "came in [the jury room] talking a big game about how we should 'get Scott for what he did to Laci and Little Man.' Little Man was the nickname Richelle used to refer to Laci and Scott's unborn son, Conner."].)

The state urges the Court to blind itself to the letters because in the Petition Mr. Peterson focused only on "those passages that relate to Conner and parenting." (IR 36.) The suggestion, of course, is that other portions of the letters might undercut the idea that the unusual decision Ms. Nice made to write a series of letters to the person she had just sentenced to death reflected an obsessive interest in the unborn child.

But the fact of the matter is that Mr. Peterson attached as an exhibit to his Petition the entirety of each letter on which he relied. (Petition Exhibit 47.) If anything was taken out of context -- or if there was even a shred of evidence to place Ms. Nice's comments in a different context -- the state would presumably have pointed that out. It did not. (IR 36.)[7]

The state takes a similar approach to the statements Ms. Nice made in her own book. In her book, Ms. Nice discloses various statements she made during deliberations which reveal her focus on violence to the unborn child. (Petition 103.) The state urges the Court to blind itself to these facts as well, arguing that the book contains "multiple levels of hearsay." (IR 32.)

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[7] Perhaps because Ms. Nice decided to sell Mr. Peterson's letters to People Magazine, the state does not dispute that she in fact corresponded with Mr. Peterson. Nevertheless, the state makes a technical objection that the letters filed as exhibits in support of the Petition have not been authenticated. The short answer is that they have now been authenticated. (Exhibit 52 [Peterson Declaration] at HCP-000995.) The slightly longer answer is that the state's observation completely ignores the procedural posture of this case.

At the prima-facie-case stage, the petitioner's burden is simply to plead sufficient facts for relief. (*In re Bacigalupo*, *supra*, 55 Cal.4th at p. 332.) If the pleading is sufficient, the petitioner later proves those facts which the state disputes at an evidentiary hearing. (*See In re Price* (2011) 51 Cal.4th 547, 559.) In other words, aside from being meritless -- since there is no genuine dispute that Ms. Nice wrote the letters -- the state's "authentication" objection is entirely premature at the pleading stage of a habeas proceeding. Mr. Peterson has attached the letters simply as documentary evidence showing what can be shown at an evidentiary hearing. (*See Duvall*, *supra*, 9 Cal.4th at p. 474 [habeas petitioner should set forth facts on which relief is sought and include copies of reasonably available documentary evidence supporting the claim].)

It is not entirely clear what this means. Ms. Nice was one of the authors of the book. (Petition Exhibit 8 at p. 140.) In it she reports her own statements in the jury room. (Petition Exhibit 8 at p. 238.) Moreover, as just discussed, the state's evidentiary objection has no place in the prima facie case calculus; as with Ms. Nice's letters, the book has been attached as documentary evidence showing what an evidentiary hearing will show. There is no reason in law, logic or common sense for the Court to simply ignore statements Ms. Nice made in a book she co-authored.[8]

D. Conclusion.

Deciding whether petitioner pled a prima facie case as to this claim should be simple. Assuming the factual allegations of the Petition are true, there is no doubt juror Nice (1) was involved in a lawsuit involving a threat of harm to her unborn child, (2) testified as a witness in that lawsuit, and (3) alleged that she and her unborn baby received threats of violence. Similarly, there is no doubt that in her jury questionnaire, juror Nice (1) denied ever participating in a lawsuit, (2) denied ever testifying as a witness and (3) denied ever being the victim of a crime. All of these answers were

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[8] The state accurately notes some of Ms. Nice's other questionnaire responses did not in and of themselves indicate bias. (IR 33.) The legal relevance of the state's point is hard to discern. A juror misconduct claim does not require habeas petitioners to show that every answer a particular juror gave during voir dire or in her questionnaire constituted misconduct. And the state cites no authority for the startling proposition that it may defend a juror's improper concealment of material information during voir dire by noting that there were other questions which the juror may have answered truthfully.

unequivocally false. Given that the state charged Scott Peterson with murdering his unborn child, these false answers did not relate to some unimportant, tangential point. And given Ms. Nice's statements after trial -- in her own book and her own letters -- the state cannot establish as a matter of law that the misconduct was harmless. Petitioner has pled a prima facie case of misconduct and an Order to Show Cause should issue on this claim.

II. CLAIM TWO: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT THE STATE PRESENTED FALSE EVIDENCE AS TO WHEN CONNER STOPPED GROWING.

A. Introduction.

The state's theory of the case was that Scott killed Laci on the evening of December 23 or the morning of December 24, 2002. At trial, the state called Dr. Greggory Devore who testified that he measured Conner's femur bone, applied a formula developed by Dr. Phillipe Jeanty, and concluded that Dr. Jeanty's formula showed Conner died on December 23. (95 RT 17861, 17868, 17879-17883.)

It turns out Dr. Devore got it wrong. As explained in Dr. Jeanty's 13-page declaration submitted with the Petition, along with an additional 34 pages of graphs and data, Dr. Devore relied on the wrong formula, he erroneously applied that formula to only one bone (rather than three) and -- not surprisingly -- his result in applying the formula was wrong. (Petition Exhibit 7.) A correct application of Dr. Jeanty's formula shows that Conner died *not* on December 23 (as Devore testified) but January 3. (Petition Exhibit 7 at p. 62.) Even applying the incorrect formula that Dr. Devore used -- but applying it correctly by measuring three bones -- the formula indicates a date of death of January 3. (*Id.* at pp. 62-63.) Based on these facts Mr. Peterson alleged the state had presented false evidence about the exact date Conner died based on Dr. Jeanty's formula. (Petition 109-

116.)

The state argues that for four reasons, petitioner did not plead a prima facie case of false evidence. As discussed below, none of these arguments supports the state's position that summary dismissal of this claim is proper. Assuming the factual allegations of the Petition are true, petitioner has established a prima facie case of false evidence and an Order to Show Cause should issue.

B. Because The False Evidence Claim Relies Entirely On Evidence Outside The Trial Record, The Claim Could Not Have Been Raised On Appeal.

The state first makes a short argument that the false evidence claim is procedurally defaulted because it should have been raised on appeal. (IR 41-42.) The argument is without merit.

The state recognizes that "it is certainly true that Dr. Jeanty's declaration . . . in support of Peterson's claim was not part of the trial record . . . ." (IR 41.) No matter, the state now says, because at trial defense counsel cross-examined Dr. Devore and brought out "the purported concerns raised by Jeanty's declaration." (IR 41.) Thus, the false evidence claim should have been raised on appeal. (IR 41.)

The argument need not long detain the Court. Contrary to the state's suggestion,

"the purported concerns raised by Jeanty's declaration" were never explored at trial. No expert -- much less Jeanty himself -- testified that Devore used the wrong formula. No expert -- much less Jeanty himself -- testified that it was improper to apply the Jeanty formula (even the incorrect one) to only one bone. No expert -- much less Jeanty himself -- testified that a correct application of the Jeanty formula leads to a result squarely inconsistent with the state's case. These are the precise facts on which the false evidence claim is based, and these are the facts which the state concedes were "not part of the trial record." (IR 41.) There is no default in this case.

C. The New Evidence From Dr. Jeanty Does Not Merely Show A Disagreement Among Experts, But Instead Shows The State Presented Objectively False Evidence As To The Application Of The Jeanty Formula.

Turning to the merits, the state argues petitioner did not establish a prima facie case for relief because "Dr. Devore's testimony was not objectively false." (IR 51.) The state correctly notes that a "reasonable disagreement among credible experts" will not suffice to establish a false evidence claim. (IR 51.) The state seeks to fit the facts of this case into the box of a "reasonable disagreement among credible experts."

Contrary to the state's suggestion, however, this is not a case where two experts simply disagreed about the date Conner stopped growing. The state's expert said that according to Dr. Jeanty's formula, Conner died precisely on December 23. But according

to Dr. Jeanty, Dr. Devore did everything wrong -- he used the wrong formula, he measured the wrong bones and he got a result which is unsupported by the formula. Dr. Jeanty's declaration makes clear that the correct application of his formula shows that Conner likely died on January 3.

An analogy may help to expose the basic fallacy in the state's position. According to the Pythagorean theorem, the square of the hypotenuse of a right angle triangle is equal to the sum of the squares of the other two sides. The theorem is often expressed as the formula $a^2 + b^2 = c^2$ where c is the length of the hypotenuse and a and b are the lengths of the triangle's other two sides. If a triangle has a side "a" which is three inches long, and side "b" is four inches long, a correct application of the Pythagorean theorem reveals that side "c" -- the hypotenuse -- is five inches long: $3^2 + 4^2 = 5^2$ or $9 + 16 = 25$.

With that as background, assume an expert for the state came into court and testified that he applied Pythagoras's theorem to a right angle triangle of which the two shorter sides were three inches and four inches long respectively, and he concluded that under Pythagoras's theorem, the hypotenuse was six inches long. In other words, the expert took a specific theorem and told jurors the equally specific result from applying that theorem.

But that testimony was wrong. An accurate application of Pythagoras's theorem

shows the hypotenuse was five inches long, not six. A declaration from Pythagoras as to the correct application of his own theorem does not simply create a "reasonable disagreement among credible experts." (IR 51.) The state's expert may have other reasons for believing the hypotenuse is six inches long -- he may even disagree with Pythagoras's theorem -- but his testimony as to the result he reached by applying Pythagoras's specific formula is unequivocally and objectively false.

That is precisely what we have here. Dr. Devore did not offer a general view as to when Conner stopped growing, any more than the expert in the hypothetical above offered a general view on how long the hypotenuse was. Instead, just like the expert in the above hypothetical, Dr. Devore testified as to the mathematical result obtained when he applied a specific formula -- in this case, the Jeanty formula. And just as in the Pythagorean example above, the originator of the formula is able to state with certainty that Dr. Devore conveyed false evidence to the jury about the result he reached through incorrect application of his specific formula. The state's suggestion that this was a "reasonable disagreement among credible experts" ignores that Dr. Devore was not providing a general and subjective conclusion as to fetal development, he was providing a specific and objectively verifiable conclusion derived from quantifiable data as to the date bone growth stopped according to Dr. Jeanty's formula. And as Dr. Jeanty has concluded, the state's expert got it *objectively* wrong. Assuming petitioner's factual allegations are true, petitioner has established a prima facie that false evidence was

presented at trial.

D. A Prosecutor's Use Of False Evidence Is Not Immune From Review Simply Because The Prosecutor May Have Acted In Good Faith; What Matters Is the Character Of The Evidence Not The Character Of The Prosecutor.

The state adds a separate legal reason in urging this Court to find there is no prima facie case. The state argues there is no evidence the prosecutor knew that Devore had misapplied Jeanty's theory. (IR 56.) The state's legal thesis is that a prosecutor's reliance on false evidence is fine so long as the prosecutor is acting in good faith.

The state is wrong as a matter of both federal and state law. The Due Process Clause prevents the prosecution in a criminal case from introducing false evidence. (*United States v. Agurs* (1976) 427 U.S. 97, 103. *See also Napue v. Illinois* (1959) 360 U.S. 264, 269.) For sound policy reasons, the bar on presentation of false evidence applies even where the prosecutor does 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." (*United States v. Agurs*, *supra*, 427 U. S. at p. 110. *Accord Maxwell v. Roe* (9th Cir. 2010) 628 F.3d 486, 506 [granting relief where false evidence was presented by prosecution, where the evidence was material, even though the prosecution presented the evidence in "good faith"]; *Hall v.*

Director of Corrections (9th Cir. 2003) 343 F.3d 976, 978. 981, 985 [same].) The state violates Due Process when it presents false evidence even where the prosecutor is unaware the evidence presented was false. (*United States v. Young* (9th Cir. 1994) 17 F.3d 1201, 1203-1204.)

Not surprisingly, California law is similar. In addition to the Due Process obligation to grant relief where the state has introduced false evidence, 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." (Pen. Code § 1473, subd. (b)(1).) As under federal law, it is immaterial whether the prosecution actually knew or should have known of the false nature of the evidence. (Pen. Code §1473, subd. (c); *In re Hall* (1981) 30 Cal.3d 408, 424.) Even assuming the prosecutor's good faith here, it is irrelevant to the prima facie case inquiry.[9]

E. Because The State Bears The Burden Of Proving Any False Evidence Harmless, Petitioner Has Established A Prima Facie Case That The State Presented False Evidence.

The state's final argument in support of its request for summary dismissal of this

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[9] In a related argument, the state notes that nothing suggests Dr. Devore lied in his testimony. (IR 55.) This is true but, yet again, its legal relevance is hard to fathom. To paraphrase the Supreme Court, what matters is the character of the evidence, not the character of the expert. (*See Agurs*, *supra*, 427 U.S. at p. 110.)

claim is that there is no prejudice. (IR 59.) It is once again important to place this prejudice argument in context.

This Court has properly concluded that when the state relies on false evidence, it is the state's burden to prove the error harmless beyond a reasonable doubt. (*In re Sakarias* (2005) 35 Cal.4th 140, 165.) As discussed above, petitioner has established a prima facie case of false evidence. As such, at this early stage of the habeas process the question is whether *as a matter of law* the state has carried its burden of proving the error harmless. If not, then an Order to Show Cause must issue.

The state makes two points to suggest it has carried its burden as a matter of law. First the state argues that Dr. Jeanty's criticisms of Dr. Devore came into evidence through the testimony of Dr. March. (IR 59.) The claim is unsupportable.

Citing page 106 RT 19771 and 19784-19785 the state maintains that "arguably" jurors were exposed to Dr. Jeanty's concerns about using only the femur to reach a conclusion as opposed to three bones. (IR 59.) The qualifier "arguably" is important. The pages the state cites do not support the state's contention at all; there is no discussion on any of these pages about the need to rely on and average three different long bones as opposed to a single bone.

The state next notes that jurors heard Dr. March give a different date than Dr. Devore for when Conner died. (IR 59.) This is true, but it too has nothing at all to do with Dr. Devore (1) using the wrong formula and (2) applying it to only one bone. These are the specific criticisms Dr. Jeanty has raised.

Finally, the state argues that Dr. March's examination contained a "pointed criticism" of the formula on which Dr. Devore relied. (IR 59 citing 106 RT 19813-19814.) This is true, but it points in a very different direction than the state wants. At the cited pages Dr. March said *nothing at all* about Dr. Devore applying the wrong formula. He said *nothing at all* about Dr. Devore's failure to apply the formula to three bones. Instead, Dr. March explained that in the article which included the Jeanty formula, Jeanty incorporated an error rate to take account of different possible growth rates. (106 RT 19813.) This too has nothing at all to do with Jeanty's specific criticisms of Devore's application of the Jeanty formula in this case or the conclusions supported by correct application of that formula.

The state adds that in light of testimony from Professor Galloway -- the state's anthropologist who gave a five week range for when Conner stopped growing -- "it was no doubt clear to the jury that trying to pinpoint the specific date of Conner's death with reliable accuracy was impossible." (IR 59.) The irony of the position taken by the state's current lawyers should not escape the Court.

The state's prior lawyers expressed a very different view. Thus, at trial the prosecutor told jurors that Professor Galloway's had provided "just too big a range for us to really make any definitive determination." (109 RT 20288.) But contrary to the newly minted position now taken by the state's current lawyers, the prosecutor did not just throw up his hands and admit that "trying to pinpoint the specific date of Conner's death with reliable accuracy was impossible." (IR 59.) Instead, the trial prosecutor did the exact opposite, relying on Devore and telling jurors his application of Jeanty's formula "shows us that Conner died right at the exact time the prosecution said he did." (109 RT 20289.) In the state's evolving position on the accuracy of fetal-development evidence it says not a word about the position it took below. (IR 59.) And we know to a certainty that jurors took the prosecutor at his word -- in their book *We the Jury* jurors made very clear they relied on Devore's testimony as to the date revealed by misapplication of Jeanty's formula. (Petition Exhibit 8 at p. 219.)

F. Conclusion.

Assuming the factual allegations of the Petition as true, Dr. Devore told jurors he (1) was applying a formula developed by Dr. Jeanty and (2) using that formula, Conner died on December 23. Similarly, these factual allegations show that, according to Dr. Jeanty, Dr. Devore (1) used the wrong formula, (2) applied it to the wrong bones and (3) gave jurors a date which correct application of the formula simply does not support. As

in the example with the Pythagorean theorem, this is the very definition of objectively false evidence. And in light of the reliance on Dr. Devore by both the prosecutor and the jury, at this early stage of the habeas proceedings, the state cannot prove as a matter of law that this error was harmless. Moreover, the fact of the matter is that summary dismissal is not warranted at this early stage because prejudice from separate errors can cumulate. Petitioner has established a prima facie case for relief on this claim and an Order to Show Cause should issue.

III. CLAIM THREE: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO CALL AN EXPERT IN THE FIELD OF FETAL DEVELOPMENT.

In a report provided to the defense several months prior to trial, and in his testimony at trial, Dr. Devore concluded that Conner died on December 23. (95 RT 17879-17883.) As discussed in detail above, Dr. Devore reached this result by applying a fetal development formula devised by Dr. Jeanty. (95 RT 17861, 17868, 17879-17883.) To respond to this evidence the defense retained Dr. Charles March.

It is hard to see why. Dr. March was an expert in infertility. (106 RT 19843.) Dr. March admitted at trial he had no background in anthropology or forensic pathology. (*Ibid*.) Although Dr. March offered a different conclusion than Dr. Devore, he was unaware that Devore (1) used the wrong formula developed by Dr. Jeanty and (2) failed to apply that formula to three bones (as opposed to only one) as specified by Dr. Jeanty to ensure an accurate result. Dr. March made no attempt to use Dr. Jeanty's correct formula, apply it to the three long bones -- the femur, the tibia and the humerus -- or provide the date predicted by correct application of the Jeanty formula.

Trial counsel has admitted he failed to consult with an expert in fetal biometry and he has explained his decision to use Dr. March. (Petition Exhibit 4 at pp. 17-20.) Counsel has explained that he did not have sufficient time to hire a proper expert because

the state did not provide notice of its expert until February 2004. (Petition Exhibit 4 at pp. 17-19.) Counsel has conceded that Dr. March's expertise was "not specifically in assessing the age of a fetus from fetal bones." (*Id*. at p. 19.)

This is an important concession on defense counsel's part. After all, this was the exact purpose for which defense counsel retained Dr. March -- to assess the reliability of Dr. Devore's testimony as to "the age of a fetus from fetal bones."

Trial counsel has also conceded that in cross-examining Dr. March, the prosecutor elicited Dr. March's admission that he had no background in forensic anthropology or pathology and was only an expert in infertility. (*Id*. at p. 20.) And counsel has concluded he had no tactical reason for failing to call someone who actually *was* familiar with Dr. Jeanty's formula and who could have explained that Dr. Devore used the wrong formula and applied it to an insufficient number of bones. (*Id*. at pp. 20-21.) Counsel admits he knew Dr. March was not really the best expert to call. (*Ibid*.)

Because Dr. Devore did not testify until seven months after the prosecution named him as an expert, Mr. Peterson alleged in Claim Three of his Petition that counsel *did* have sufficient time to hire a proper expert. Given the reliance placed on Dr. Devore's testimony about the Jeanty formula by both the prosecutor and the jury, Mr. Peterson alleged that counsel's failure to call a properly qualified expert constituted ineffective

assistance of counsel. Specifically, Mr. Peterson alleged that (1) counsel's performance in failing to call a qualified expert fell below an objective standard of reasonableness and (2) counsel's failure prejudiced petitioner. (Petition 117-123.)

Although this stage of the habeas proceedings involves only an assessment of whether a prima facie showing has been made (assuming the truth of the facts alleged in the Petition) -- and credibility determinations form no part of that calculus -- the state "specifically . . . controvert[s] all of Peterson's factual . . . claims and allegations in Claim Three . . . ." (IR 62.) Thus, rather than assume the truth of petitioner's factual allegations based on defense counsel's sworn declaration, the state declares these allegations "unfathomable." (IR 67.) As discussed in some detail above, the state's unwillingness to assume the truth of petitioner's factual allegations for purposes of assessing whether a prima facie case has been established is inappropriate. Defense counsel has stated under oath -- accurately -- that because Dr. March's expertise was "not specifically in assessing the age of a fetus from fetal bones" he was not the best expert. (Petition Exhibit 4 at p. 19.) But as noted above, "assessing the age of a fetus from fetal bones" was exactly what Dr. Devore testified to, and exactly what the defense should have rebutted.

In arguing that petitioner did not plead a prima facie case of deficient performance, the state alleges that defense counsel is not credible when he admits that Dr. March was not qualified. The state notes that in seeking funds for Dr. March, counsel told the

funding court he was qualified. (IR 66.)

This latter assertion is true. But even putting aside that credibility determinations are not generally made at the prima-facie-case stage, there is a much larger problem with the state's position that defense counsel thought March was qualified. The state's position does not *solve* the performance problem, it actually creates a bigger one.

If defense counsel in this case genuinely concluded March was qualified to testify about the application of Jeanty's formula and to "assess[] the age of a fetus from fetal bones" that conclusion itself was objectively unreasonable. March practiced obstetrics and gynecology and his field of specialty is infertility. (106 RT 19843.) While the state now lauds his expertise in "gynecology, reproductive endocrinology and infertility," (IR 48) the fact of the matter -- as the trial prosecutor exposed below -- is that Dr. March did not know what he was doing in connection with fetal biometry and was predictably exposed as utterly unqualified to testify in that area. (106 RT 19794-19843, 19848-19858; 109 RT 20290-20292. *See Hinton v. Alabama* (2014) ___ U.S. ___, 134 S.Ct. 1081, 1088 [trial counsel ineffective for failing to replace inadequate expert].) Assuming

petitioner's factual allegations are true, petitioner has pled a prima facie case of deficient performance.[10]

The state alternatively contends that petitioner has not presented a prima facie case as to prejudice. (IR 69-70.) The state's appellate lawyers repeat their argument that "it was evident that trying to pinpoint the specific date of Conner's death with reliable accuracy was impossible." (IR 69. *See also* IR 59.)

As noted above, however, the "impossibility" of "trying to pinpoint the specific date of Conner's death with reliable accuracy" based on Dr. Devore's testimony was apparently lost on the state's trial lawyers. In stark contrast to the newly minted position now taken by the state's appellate lawyers, the state's trial lawyers told jurors that pinpointing the date of Conner's was not only possible, but had been done and "shows us that Conner died right at the exact time the prosecution said he did." (109 RT 20289.) The prosecutor's substantial reliance on Dr. Devore's testimony shows just how important it was to the state's theory. (*See People v. Powell* (1967) 67 Cal.2d 32, 55-57 [prosecutor's reliance on evidence in final argument reveals how important the prosecutor "and so presumably the jury" considered the evidence]; *People v. Cruz* (1964) 61 Cal.2d

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[10] The state adds a second reason for its argument that there is no prima facie case as to performance. The state notes that apart from March, defense counsel retained Henry Lee, a criminalist, and Cyril Wecht, a pathologist. (IR 65.) The legal relevance of this observation is difficult to see given the state's forthright concession that neither of these experts testified as to fetal biometry or -- indeed -- had any expertise in that area at all. (IR 66.)

861, 868 [same].) And here, there is no need to guess whether jurors thought "trying to pinpoint the specific date of Conner's death with reliable accuracy was impossible," as the state's new set of post-conviction lawyers now suggest. The jurors themselves have publically stated in unmistakable terms that they found Dr. Devore's testimony persuasive evidence of guilt. (Petition Exhibit 8 at p. 219.) In equally plain terms, they have noted that calling Dr. March was one of defense counsel's biggest blunders and was a turning point in the trial. (*Id*. at p. 126, 132, 164.)

In short, at this early stage of the proceedings, the state has not shown as a matter of law that trial counsel's failure to consult with an expert (like Dr. Jeanty) who would have exposed the obvious flaws in Dr. Devore's application of the Jeanty formula was harmless. This is especially true not only because this case is at the prima facie case stage, but because California requires a unanimous verdict to convict of a criminal offense. In such states, when a defense lawyer unreasonably fails to call a particular defense witness, all the defendant need show to establish prejudice is that a single juror could reasonably have found a doubt in light of the new testimony. (*See Wiggins v. Smith*, *supra*, 539 U.S. at p. 537; *People v. Centeno*, *supra*, 60 Cal.4th at p. 677.) Moreover, as discussed above, summary dismissal is also inappropriate at this stage of the proceedings because aggregated prejudice from separate errors may itself require relief. The state ignores both points entirely in its discussion. Petitioner has established a prima facie case for relief and an Order to Show Cause should issue on this claim.

IV. CLAIM FOUR: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT THE STATE PRESENTED FALSE EVIDENCE AS TO THE DOG SCENT EVIDENCE.

A. Introduction.

The state's theory at trial was that after killing Laci on the evening of December 23 or the morning of December 24, Scott brought her to the Berkeley Marina in his boat, which he launched into the bay. According to this theory, while out on the bay Scott pushed Laci's body overboard.

To support this theory, the state presented testimony from dog handler Eloise Anderson that on December 28 (four days after Laci went missing), Anderson gave Trimble (her dog) Laci's scent using a pair of sunglasses which had been given to her by another dog handler, Cindy Valentin. According to Anderson, Trimble alerted to Laci's scent during a search on a boat ramp at the Berkeley Marina. (7 RT 1381; 84 RT 16085; 8 RT 1520-1521, 1590-1591.) In his Petition, Mr. Peterson alleged facts relating to four different subject areas: the process by which Trimble was given Laci's scent, Trimble's training, the method used to conduct the actual search here and the environmental conditions under which the search was conducted:

(1) **Flaws in the process by which Trimble was given Laci's scent.** First Mr.

Peterson alleged five facts relating to the way in which Trimble was given Laci's scent: (1) Ms. Valentin was wearing gloves when she picked up Laci's sunglasses, (2) before handling Laci's sunglasses, Valentin first picked up a pair of slippers belonging to Scott Peterson, (3) Valentin did not change gloves after handling the slippers, (4) the sunglasses Anderson used to scent Trimble were therefore contaminated with Scott's scent and (5) Anderson failed to perform the "missing member" test to ensure Trimble would not search for Scott's scent. (Petition 126-127.)

(2) **Trimble's training history.** Second, and relying on expert declarations from Professor Lawrence Myers and dog handler Andrew Rebman, Mr. Peterson alleged three facts relating to Trimble's training: (1) proper training of scent detection dogs requires training exercises which are both double-blind and randomized, (2) Trimble's training records show that her training exercises were neither and (3) Trimble's history showed she could not successfully perform a closed-container non-contact trail as was performed here, and in fact had failed at her one attempt. (Petition 134-136, 141.)[11]

(3) **The circumstances of the December 28 search**. Third, and again relying on these expert declarations, Mr. Peterson alleged three facts relating to how the search was conducted: (1) it was not double-blind (because Anderson was specifically told where police hoped to find a scent), (2) it was not randomized (because Anderson was not told to search anywhere but the target area where police hoped to find a scent) and (3) because Anderson failed to perform the "missing member" test it was impossible to say whether Trimble was alerting to Laci's scent from her sunglasses or Scott's scent from his slippers. (Petition 137-139, 141.)

(4) **The environmental conditions of the December 28 search.** Finally, and again relying on the expert declarations, Mr. Peterson alleged two facts relating to the conditions under which the search was conducted: (1) it was conducted four days after Laci was theorized to have been at the marina, (2) the search was conducted at a marina, a location exposed to wind, salt water and human traffic, all of which significantly reduced the chance that any scent would remain when the search was conducted four days later.

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[11] A "closed container subject search" is a search where the dog is trying to track a subject who has not been exposed to the environment, as where the subject has been transported in a closed car or boat. In contrast, an "open air subject search" occurs where a dog tries to track a subject who has been exposed to the environment, as where the subject is riding a bicycle.

(Petition 138, 141.)

Taking all these factual allegations together, Mr. Peterson alleged in Claim Four of his Petition that the state's dog-scent evidence -- evidence that Trimble reliably alerted to Laci's scent at the marina -- was false. (Petition 123-143.) He sought an Order to Show Cause on this issue.

The state argues that for four reasons, petitioner did not plead a prima facie case of false evidence. As discussed below, none of these arguments supports the state's position that summary dismissal of this claim is proper. Assuming the factual allegations of the Petition are true, petitioner has established a prima facie case of false evidence and an Order to Show Cause should issue.

B. Because The False Evidence Claim Relies Entirely On Evidence Outside The Trial Record, The Claim Could Not Have Been Raised On Appeal.

The state first argues that the false dog-scent evidence claim is procedurally defaulted because it should have been raised on appeal. (IR 70-72.) The argument is without merit.

The state recognizes that Mr. Peterson's claim is based on declarations from experts explaining why Ms. Anderson's testimony is false. (IR 71.) The state says this

does not matter because defense counsel's cross-examination exposed the falsity of the dog-scent evidence. (IR 71.) Thus, the state reasons that the false evidence claim should have been raised on appeal. (IR 70-71.)

Contrary to the state's suggestion, the falsity of Anderson's testimony was not exposed at trial. Indeed, if it had been it is unlikely the prosecutor would have relied on this evidence in closing argument to tell jurors that the dog-scent evidence showed Mr. Peterson was guilty of capital murder "as simple as that." (111 RT 20534.)

The record on this point is clear. At trial, no expert explained that under the facts of this case the absence of a missing member test meant it was impossible to determine whose scent Trimble alerted to (if anyone's). And there was no expert testimony showing that it was impossible to determine if an alert by Trimble at the marina was reliable because of (1) the absence of double-blind testing and randomization in Trimble's training history, and his prior inability to conduct a closed-container subject search, (2) the absence of either a double-blind or randomized search at the marina or (3) the timing and environmental conditions under which the search was conducted. These are the precise facts on which the false evidence claim is based, and these are the facts which the state concedes were not part of the trial record. There is no default in this case.

C. The Allegations Of The Petition Show The State's Dog-Scent Evidence Was False; Assuming These Allegations Are True, Petitioner Has Established A Prima Case That The State Presented False Evidence.

The state argues that petitioner did not plead a prima facie case that false evidence was presented in connection with the dog-scent evidence for two main reasons -- its disagreement with the facts underlying the claim and prejudice. As to the facts, the state first "specifically . . . controvert[s] all of Peterson's factual . . . claims and allegations in Claim Four . . . ." (IR 70.) The state does just that in urging the Court to find no prima facie case.

For example, Professor Lawrence Myers reviewed all of Trimble's training records. (Petition Exhibit 6 at p. 45.) Professor Myers concluded that these training exercises were neither randomized nor double-blind as required for proper training. (Petition Exhibit 6 at p. 47.) Based on this expert conclusion, petitioner alleged that Trimble's training exercises were not randomized or double-blind as required. (Petition 136.) Rather than assume this factual allegation as true however, the state quotes from Anderson's trial testimony and concludes that Professor Myers "is mistaken" about the absence of double-blind testing. (IR 77.) Later, the state says Professor Myers is mistaken about the absence of randomized testing as well. (IR 77.)

This pattern continues throughout the state's argument. Mr. Peterson alleged that

Anderson was told where to search on December 28. (Petition 125-126.) The state disputes this fact saying "[t]hat is not true." (IR 78.) Based on declarations by both Myers and Rebman, Mr. Peterson alleged that absent a missing member test the scent-trailing testimony in this case was worthless. (Petition 127-128, 138-139, 141.) The state says this factual allegation too is "without merit." (IR 81.) Based on Rebman's first hand observations, Mr. Peterson alleged that in 2002 Trimble failed a closed-container subject search set up for her by Rebman himself. (Petition 146-147.) The state disputes this, offering only Anderson's contrary view that the test was not a closed-container subject search. (IR 80-81.)

In light of this record, the state's decision to dispute these facts is puzzling. As to the lack of double-blind testing, Anderson herself admitted that in connection with Trimble's successful searches "most of the time we know where the trail is." (85 RT 16108.) As to the absence of randomization, Officer Boyer admitted that he did not ask Anderson to search the marina generally; instead, he specifically directed her to search the "boat ramp" to look for "an entry or exit trail." (84 RT 15997.) And as for the state's suggestion that Trimble did not fail a closed-container subject search, the video of that failure is in the appellate record. (Defense Trial Exhibit D-5-Y; 85 RT 16147; *see* 85 RT 16116-16119, 16146.)

But the many errors in the state's analysis of the facts are the least of the state's

problems. Without repeating in detail what petitioner has explained above, in assessing whether a petitioner has pled a prima facie case, the Court does not assume the factual allegations are "mistaken" or "not true." If petitioner's allegations are credibly supported by appropriate documentation -- as every one of Mr. Peterson's allegations is -- the Court must assess whether he has pled a prima facie case by assuming these allegations are true. (*Duvall*, *supra*, 9 Cal.4th at pp. 474-475.) The state's approach is once again entirely contrary to *Duvall*.

Beyond these purely factual disputes -- which should have no place in the prima facie case calculus -- the state expresses a legitimate concern, noting that a disagreement among reasonable experts does not mean false evidence has been presented. (IR 72.) This is true. If at the end of the day the Court concludes that is all that is presented here, there can be no claim for the presentation of false evidence.

But we are not there yet. Assuming petitioner's allegations are true, this is not a case of reasonable experts disagreeing. Assuming the truth of the allegations about the missing member test, the circumstances of this search, Trimble's history, training and prior failures and the impact of the marine environment, there is no disagreement among reasonable experts. Assuming the truth of these allegations, no expert would disagree that testimony suggesting Trimble reliably detected Laci's scent was false. The state does not really dispute this; what the state disputes are the factual allegations regarding the

missing member test, the circumstances of this search, Trimble's history and the impact of the environment.

The state is, of course, free to dispute the facts. What the state may not do, however, is dispute facts *in the context of the prima facie stage of proceedings*. If petitioner's allegations are assumed to be true -- allegations which are supported by documentary evidence -- the trial testimony that Trimble reliably detected Laci's scent is false; as such, petitioner has pled a prima facie case of false evidence.

The state's second argument in support of its request for summary dismissal of this claim is that there is no prejudice. As noted above, however, when the state relies on false evidence, it is the state's burden to prove the error harmless beyond a reasonable doubt. (*In re Sakarias*, *supra*, 35 Cal.4th at p. 165.) Thus, because petitioner has established a prima facie case that the state presented false dog-scent evidence, at this early stage of the habeas process the question is whether *as a matter of law* the state has carried its burden of proving the false evidence harmless. If not, then an Order to Show Cause should issue.

The state makes three points in support of its argument that it has carried its burden as a matter of law. First the state argues that "the infirmities in the reliability of Trimble's search" were exposed at trial and "there is nothing new here." (IR 85.) The

record will not support this assertion. At trial, no expert explained to jurors that it was impossible to determine if Trimble's alert meant anything at all because (1) Anderson failed to perform a missing member test, (2) Trimble's prior training lacked either double-blind testing or randomization, (3) the December 28 search was neither double-blind nor randomized or (4) the timing and environmental conditions under which the search was conducted reduced the possibility of a reliable result. Indeed, had the infirmities in the reliability of Trimble's search really been exposed at trial, the prosecutor would not have relied on the dog-scent evidence in closing argument to tell jurors that Mr. Peterson was guilty of capital murder "as simple as that." (111 RT 20534.)

Second, the state notes that the defense called dog handler Ron Seitz to testify at trial in "an attempt to neutralize any residual value the prosecution may have derived from Anderson's . . . testimony . . . ." (IR 85.) As the Court is no doubt aware, this reflects something of a change in the state's view as to the value of Mr. Seitz's testimony. At one point in Respondent's Brief filed on appeal the state informed this Court that far from being helpful to the defense, Seitz's testimony actually "corroborated" Trimble's reliability and "provides further support for Trimble's detection of Laci's scent . . . ." (*People v. Peterson*, S132449, Respondent's Brief at p. 299.)

But even putting aside the state's sea change of positions, Seitz's testimony does not help the state. The fact that defense counsel felt the need to present Seitz's testimony

itself reflects a recognition that what the state now calls the "infirmities" in Trimble's reliability had not been adequately revealed. (IR 85.) If they had, of course, there would have been no need to call Mr. Seitz in the first place.

Finally, the state finds support in an instruction which the court gave to the jury about the dog-scent evidence. (IR 85.) The state characterizes the instruction as informing the jury "that the dog trailing evidence was not sufficient by itself to prove Peterson's guilt" and that the dog-scent evidence "had to be corroborated before it could be considered reliable and used to infer Peterson's guilt." (IR 85.)

This instruction is the subject of several claims of error on appeal. (*People v. Peterson*, S132449, Appellant's Opening Brief at pp. 239-254, 255-265.) As the discussion there shows, the state's characterization of this instruction is not entirely accurate. The instruction actually read as follows:

> Evidence of dog tracking of the victim has been received for your consideration. The evidence is not by itself sufficient to permit an inference that the defendant is guilty of the crime of murder. Before guilt may be inferred, there must be other evidence that supports the accuracy of the dog tracking evidence.
>
> The evidence can be direct or circumstantial and must support the accuracy of the dog tracking evidence.

(19 CT 6071.)

The court went on to give examples of evidence that would "support the accuracy of the dog tracking evidence," including (1) whether the handler was qualified, (2) whether the dog was adequately trained, (3) whether the dog had been found reliable, (4) whether the dog had been at a place where "circumstances have shown the victim to have been," (5) whether the scent had become stale and (6) "any other factor that could affect the accuracy of the dog-tracking evidence." (19 CT 6071-672; 111 RT 20549-20550.)

In other words, jurors were told they *could* rely on the dog-scent evidence to infer guilt of capital murder as long as there was *some* circumstantial evidence which supported that evidence. And that "corroborating evidence" could be "any . . . factor" which jurors thought supported the accuracy of the dog tracking evidence. On appeal, Mr. Peterson has contended in part that this instruction undercut the state's burden of proof by improperly permitting jurors to convict based on a "dog tracking plus" theory. (AOB 239-254.) Regardless of whether this is correct, however, and contrary to the position now taken by the state, this instruction certainly did nothing to *minimize* the importance of the dog-scent evidence in the jury's decision-making. To the contrary, telling jurors they could infer guilt of murder by relying on the dog-scent evidence so long as it was corroborated by some piece of circumstantial evidence makes the dog evidence *more* important, not less. The state has not shown that the presentation of false evidence about Laci's scent being at the marina was harmless as a matter of law.

D. Conclusion.

Assuming the factual allegations of the Petition are true, Anderson's testimony that Trimble alerted on Laci's scent at the marina was false. This was not merely a disagreement among reasonable experts; assuming the truth of petitioner's factual allegations, all reasonable experts would agree that any alert by Trimble was meaningless. And while the state spills a great deal of ink disagreeing with those factual allegations -- "he is mistaken," "this is not true," the factual allegation is "without merit" -- these factual disputes have no place here. The state's use of an Informal Response to "specifically . . . controvert[s] all of Peterson's factual . . . claims and allegations in Claim Four" is simply misplaced. In light of the prosecutor's reliance on Anderson's testimony, at this early stage of the habeas proceedings the state cannot prove the error harmless as a matter of law. Moreover, as noted above, summary dismissal based on a lack of prejudice as to any one claim is not warranted at this stage because prejudice from separate errors must be assessed cumulatively. Petitioner has established a prima facie case for relief and an Order to Show Cause should issue on this claim.[12]

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[12] The state repeats an argument it made in connection with the false evidence claim regarding application of Dr. Jeanty's formula, arguing that absent a showing that the prosecutor here knew Anderson's testimony was false, no prima facie case of false evidence can be pled. (IR 84.) As discussed above, however, the state is wrong as a matter of both federal and state law: the bar on presentation of false evidence applies even where the prosecutor does not intentionally elicit the false evidence. (Pen. Code § 1473, subd. (c); *People v. Seaton* (2001) 26 Cal.4th 598, 647; *In re Hall* (1981) 30 Cal.3d 408, 424. *Accord Maxwell v. Roe*, *supra*, 628 F.3d at p. 506; *Hall v. Director of Corrections*, *supra*, 343 F.3d at pp. 976, 978, 981, 985; *United States v. Young*, *supra*, 17 F.3d at pp. 1203-1204.)

V. CLAIM FIVE: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CALL A DOG-SCENT EXPERT.

A. Introduction.

Prior to trial the court overruled defense counsel's objection to testimony from Ms. Anderson that Trimble alerted to Laci's scent at the Berkeley Marina on December 28. (10 RT 2002-2003.) At trial, the state introduced Anderson's testimony. (84 RT 16075-16080, 16085.) During closing arguments the prosecutor told jurors that if they found that Trimble's alert was accurate, petitioner was guilty of murder "as simple as that." (111 RT 20534.)

It turns out there were numerous problems with Anderson's testimony. Regardless of whether the Court finds that Anderson's testimony was false (discussed in Argument IV above), neither the judge charged with deciding if Anderson's testimony was admissible at the pre-trial hearing, nor the jury charged with deciding whether Anderson's trial testimony was reliable, had the full story about her testimony or anything close to it. As explained in detail above, trial counsel could and should have presented expert witnesses both at the pre-trial hearing and at trial showing that (1) the absence of a missing member test meant it was impossible to determine whose scent Trimble alerted to (if anyone's), (2) the absence of double-blind testing and randomization in Trimble's

training history, as well as his history of failing closed-container subject searches, meant it was impossible to determine if an alert by Trimble meant anything at all, (3) the absence of either a double-blind or randomized search at the marina meant it was impossible to determine if an alert by Trimble meant anything at all, (4) the timing and environmental conditions under which the search was conducted meant it was impossible to determine if an alert by Trimble meant anything at all. Accordingly, in Claim Five of his petition, Mr. Peterson alleged trial counsel was ineffective for failing to present an expert at both the pre-trial hearing and the trial. Specifically, Mr. Peterson alleged that in light of the flaws in Anderson's testimony which should have been explored by a defense expert (1) counsel's performance in failing to call a qualified expert at the pre-trial hearing and at trial fell below an objective standard of reasonableness and (2) counsel's failures prejudiced petitioner. (Petition 144-153.)

The state argues that petitioner failed to plead a prima facie case, either as to performance or prejudice. (IR 88-89 [performance at the pre-trial hearing], 89-91 [performance at trial], 91 [prejudice].) As discussed below, the state's arguments are meritless and an Order to Show Cause should issue on this claim.

B. The Allegations Of The Petition Show Defense Counsel Had No Legitimate Tactical Reason For Failing To Call A Dog-Scent Expert Prior To Trial; Assuming These Allegations Are True, Petitioner Has Established A Prima Facie Case Of Deficient Performance At The Pre-Trial Hearing.

There is no dispute that trial counsel failed to call a defense expert at the pre-trial hearing. In his habeas petition, petitioner alleged that defense counsel had hired expert Andrew Rebman to testify and Mr. Rebman was present at the pre-trial hearing. (Petition 145-150.) Petitioner alleged that Mr. Rebman had explained to counsel in some detail the flaws in Anderson's testimony. (Petition 148-149.) Defense counsel has explained that he did not call Rebman at the pre-trial hearing because he thought that based on the law, he would win his motion to exclude Anderson's testimony in light of the record before the trial court. (Petition Exhibit 4 at p. 26-28.) Defense counsel explained the law as he understood it at the time. (Petition Exhibit 4 at pp. 27-28.) His understanding was that the law precluded admission of dog-scent evidence without the contemporaneous location of the target at the end of the search. (Petition Exhibit 4 at p. 28.)

In his Petition, Mr. Peterson alleged that counsel's understanding of the law was wrong because the law had changed prior to trial. (Petition 150; Memorandum 75.) At the time of trial, the location of the target at the end of the search was no longer "a requirement for admissibility." (Memorandum 75.) Making a tactical decision based on a misunderstanding of the law is the very definition of an unreasonable decision.

In its Informal Response the state simply ignores the reasons defense counsel actually gave for his decision. (IR 88-89.) Instead, the state argues that petitioner failed to plead a prima facie case of deficient performance because defense counsel consulted with an expert prior to the pre-trial hearing and successfully kept some dog tracking evidence out. (IR 88-89.)

The state's argument is puzzling. The performance question at issue here is whether defense counsel made a reasonable tactical decision not to call Mr. Rebman at the pre-trial hearing. The fact that counsel was able to exclude some of the dog-scent evidence is not a tactical reason for anything at all, much less an explanation for failing to call Rebman to get the remainder of the dog-scent testimony excluded. Counsel may have made many reasonable decisions in this case; the question this Court must resolve, however, is whether he made a reasonable tactical decision not to call Rebman at the pre-trial hearing.

As to this question, the state says nothing at all. Assuming petitioner's factual allegations are true, petitioner has pled a paradigmatic example of deficient performance -- counsel made a decision based on an understanding of the law that was incorrect. (*See Lafler v. Cooper* (2012) 566 U.S. 156, 162.) The state's observation that defense counsel successfully objected to other evidence -- while true -- simply does not provide a tactical reason for failing to call Mr. Rebman at the pre-trial hearing.

In connection with the state's offering, however, it is worth noting that the many commendations the state bestows on defense counsel may not be entirely justified. (IR 88.) The state lauds defense counsel's performance in getting other dog-scent evidence excluded and cites it as reassuring evidence that counsel's performance prior to trial was entirely fine. (IR 87-89.) The state characterizes the evidence which counsel excluded as "far more damaging to Peterson's defense than the testimony concerning Trimble's trailing efforts at the marina." (IR 88.) The record will not support this characterization; in fact, the excluded evidence may actually have been helpful to the defense.

The state's theory, of course, was that Scott killed Laci at their home at 523 Covena Avenue in Modesto, put her in his truck and drove to his warehouse in Modesto. To test this theory, the state brought Cyndi Valentin and her bloodhound Merlin to the house at 523 Covena. If Merlin could track Laci from the house to the warehouse, that would go a long way toward helping the state prove its case.

But Merlin could do no such thing. Merlin found Laci's scent outside the Covena house, tracked her through several streets in the neighborhood and then to a nearby Gallo Winery nowhere near the warehouse. (7 RT 1360-1361.) Because this was not advancing the state's theory, of course, police simply stopped the search and went to plan B. (7 RT 1359-1360, 1418-1420.)

Plan B involved police turning their attention to the warehouse, and trying to see if dogs could pick up Laci's scent there. This too might support the state's case. In order to ensure she would not subconsciously tip off Merlin as to where police hoped the scent would take them, Ms. Valentin quite properly told Detective Brocchini not to tell her where the warehouse was but to take her near it to see if Merlin picked up the scent. (7 RT 1420-1421.)

From the state's perspective, however, this turned out to be a mistake. Brocchini took her one block away from the warehouse and gave Merlin Laci's scent. (7 RT 1420.) According to Valentin, Merlin did indeed pick up Laci's scent and then went "directly opposite" from the warehouse. (7 RT 1421.)

Police turned to plan C. Since dogs were unable to track Laci's scent in any helpful way from the house, or from outside the warehouse, police put a cadaver dog named Twist *inside* the warehouse. After all, the state's theory was that Laci was dead when Scott took her to the warehouse. Twist's handler was Eloise Anderson, who also handled Trimble; according to Ms. Anderson's report, there were "no alerts." (8 RT 1599.) During pre-trial hearings, Anderson completely changed her testimony and said her dog did alert. (8 RT 1533.)

Finally, police had Merlin -- the same dog who had unsuccessfully trailed Laci

from the Covena house and near the warehouse -- try to pick up Laci's scent from the warehouse. Merlin alerted yet again and went down various streets towards Highway 132. (7 RT 1352-1353.) Then, after numerous rainstorms in the area, on January 4, 2003 -- a full 11 days after Laci disappeared -- police took Trimble (another dog of Anderson's) to Highway 132 where remarkably enough she alerted just where Merlin had. (8 RT 1524.) Then, after additional rainstorms, police took Trimble to Highway 132 on January 30 -- 37 days after Laci's disappearance -- and Trimble alerted at a series of intersections towards Highway 580. (8 RT 1524.) Of course, none of these dog-scent searches was either double-blind or randomized.

This was the evidence which the trial court excluded at defense counsel's request. (10 RT 2000-2005.) As the record shows, most of this evidence not only does not support the state's case, it affirmatively shows how unreliable the state's dog-scent evidence really was. Merlin's complete inability to track Laci from the house directly conflicted with the state's case. So did Merlin's inability to track Laci to the warehouse. And Twist's inability to alert in the warehouse did the same. Moreover the state's notion that a jury would credit the Highway 132 and 580 alerts performed weeks and months after Laci disappeared -- and after substantial rain storms in the area -- not only seems highly unlikely, but ignores the trial court's own finding that this evidence was "conjectural or speculative" and "lack[ing] a certain degree of certitude." Notwithstanding defense counsel's success in excluding this evidence, none of this even remotely constitutes a

tactical explanation for counsel's failure to call an expert at the pre-trial hearing to explain the substantial flaws in Anderson's remaining testimony about Trimble. Counsel's failure to call Rebman at the hearing was based on his mistake about the law. Petitioner has pled a prima facie case of deficient performance as to the pre-trial hearing.

C. The Allegations Of The Petition Show Defense Counsel Had No Legitimate Tactical Reason For Failing To Call A Dog-Scent Expert At Trial; Assuming These Allegations Are True, Petitioner Has Established A Prima Facie Case Of Deficient Performance At Trial.

Defense counsel gave a different reason for his decision not to call Rebman at trial than he gave for not calling him at the pre-trial hearing. Counsel explained that he thought his cross-examination of Anderson was sufficient to undermine the state's evidence and calling an expert was "unnecessary." (Petition Exhibit 4 at pp. 29-30.) Petitioner has alleged that in light of the flaws in Anderson's testimony, this decision fell below an objective standard of reasonableness. (Petition 151-152.)

Petitioner concedes that this presents a much closer question. After all, assessing the need to present an expert at trial after cross-examining a state expert is a tactical decision typically well within the province of trial counsel. But that does not mean that there is a per se rule that any decision counsel makes in this area is immune from review.

To the contrary, even strategic and tactical decisions must be reasonable. (*See,*

e.g., *Silva v. Woodford* (2002) 279 F.3d 825, 846 ["[A]n attorney's performance is not immunized from Sixth Amendment challenges simply by attaching to it the label of 'trial strategy.' Rather, '[c]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective'" quoting *United States v. Tucker* (9th Cir. 1983) 716 F.2d 576, 586].) Reasonableness is determined by "prevailing professional norms" such as those "reflected in American Bar Association Standards and the like." (*Strickland v. Washington* (1984) 466 U.S. 668, 688-689. *See also Wiggins v. Smith* (2003) 539 U.S. 510, 524 [describing the ABA Guidelines as "well-defined norms" to which the Court has long referred as guides in determining reasonableness]; *Williams v. Taylor* (2000) 529 U.S. 362, 396 [citing ABA Standards for Criminal Justice in assessing reasonableness].) Here the prosecution put on quasi-scientific evidence of dubious validity that purported to place Laci at the Berkeley Marina – a claim central to the prosecution's case. Trial counsel had an expert able and prepared to testify to numerous specific reasons this evidence was not credible. Counsel's failure to call that witness left the prosecution's evidence without affirmative rebuttal.

Given the flaws in the dog-scent evidence which the defense never addressed with a defense expert (and which were largely minimized by Anderson herself) -- and the importance of rebutting any suggestion that Laci's scent was reliably detected at the

marina -- counsel's decision not to call Rebman was unreasonable.[13]

D. Given The Importance Placed On The Dog Scent Evidence By The Trial Prosecutor, Petitioner Has Established A Prima Facie Case As To Prejudice.

The state alternatively contends that petitioner has not presented a prima facie case as to prejudice. (IR 91.) The state repeats its argument that the numerous flaws in Anderson's testimony were presented to the jury through cross-examination. (IR 91.) As noted above, however, the record does not support this assertion. No expert explained to jurors that it was impossible to determine if Trimble's alert meant anything because (1) Anderson failed to perform the missing member test essential to ensure Trimble was not detecting Scott's scent rather than Laci's, (2) Trimble's prior training lacked either double-blind testing or randomization, (3) Trimble had failed her prior closed-container subject searches demonstrating Trimble's failure to perform the exact same task with

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[13] The state adds that petitioner failed to plead a prima facie case as to counsel's trial performance, noting that had counsel called Rebman to testify "the prosecution would have, no doubt, undermined such testimony by highlighting Trimble's certification by CARDA and OES's authorization permitting Anderson and Trimble to participate in search and seizure endeavors." (IR 90.) Mr. Peterson will certainly concede that keeping this kind of information from being presented to the jury could reasonably justify a decision not to call an expert.

The problem with the state's position here, however, is that this information *was* presented to the jury during Anderson's testimony. (84 RT 16050, 16055 [Trimble was certified by CARDA]; 16055 [Trimble was authorized to work with OES].) The decision not to call Rebman could not reasonably have been motivated by a desire on counsel's part to keep this information from the jury, since the jury already had that very information.

which, the prosecution claimed, she supposedly detected Laci's scent, (4) the December 28 search was neither double-blind nor randomized -- both essential to ensure that Trimble's actions were responsive to detected scents rather than cues from her handler, or (5) the late timing and intervening environmental conditions under which the December 28 search was conducted precluded an accurate alert to scents which were posited to have been left four days earlier. Indeed, had defense counsel's cross-examination been as powerful as the state now suggests, it is unlikely the prosecutor would have relied on this evidence in closing argument to tell jurors that Mr. Peterson was guilty "as simple as that." (111 RT 20534.)

The state briefly argues that the dog-scent evidence was not really all that important. (IR 91.) But as just noted, that is hardly what the prosecutor told the jury. (111 RT 20534.) Just as important, that is not what the trial judge told the jury either, instructing jurors they could rely on the dog-scent evidence to infer guilt of capital murder as long as there was some circumstantial evidence to corroborate it. (19 CT 6071.)

In short, at this early stage of the proceedings, the state has not shown as a matter of law that trial counsel's failure to call Rebman prior to or at trial was harmless. In light of the prosecutor's reliance on Anderson's testimony, and the fact that Rebman's testimony had only to persuade a single juror for prejudice to be established, summary

dismissal based on a lack of prejudice is unwarranted here. Moreover even if this error was not in and of itself prejudicial, summary dismissal based on a lack of prejudice is nevertheless improper at this early stage because the prejudice from several errors is to be assessed cumulatively. Petitioner has pled a prima facie case for relief and Order to Show Cause should issue on this claim.

VI. CLAIM SIX: PETITIONER'S CLAIM THAT THE STATE PRESENTED FALSE EVIDENCE OF WHERE THE BODIES WERE PUT IN THE WATER MAY BE SUMMARILY DISMISSED.

At trial the state presented testimony from Dr. Ralph Cheng to support its theory that petitioner put Laci and Conner in the water when he was in San Francisco Bay on December 24. Dr. Cheng testified that in light of where Conner was later found the "highest probability" area for his placement in the water was the area where Scott said he had been fishing. (101 RT 18914.)

Because Dr. Cheng admitted he had no experience at all in connection with the movement of bodies in water, during post-conviction proceedings Mr. Peterson retained Dr. Rusty Feagin, an expert with extensive expertise with the movement of bodies in water. (Petition Exhibit 9 at pp. 282-286.) Dr. Feagin reviewed the relevant materials from this case and concluded there were three equally possible places Conner could have been placed in the water. (*Id*. at pp. 285-295.) One of those three areas was the area Dr. Cheng identified. (Petition 169-170.) Based on Dr. Feagin's conclusions petitioner alleged that the state had presented false evidence. (Petition 154-173.)

The state contends that petitioner has not pled a prima facie case for relief. (IR 92-104.) The state notes that "subjective disagreement among credible experts" does not in and of itself constitute the presentation of false evidence. (IR 97.) The state is correct.

Had Dr. Cheng testified that the area he identified was the *only* area the bodies could have originated, such testimony could be considered false. But as the state correctly points out, Dr. Cheng did *not* offer any such testimony. Instead, he qualified his testimony by saying it was the "highest probability" area and was not a "deterministic prediction." (IR 96 citing 101 RT 18914.) He hedged his bets, noting that his conclusions involved some uncertainty. (101 RT 18901.) And the state correctly finds refuge in the nature of an adversary system by noting that although Dr. Feagin has identified alternative scenarios which are just as likely "[t]here was no obligation on the part of Cheng to suggest an 'alternative scenario' . . . ." (IR 101.) The state reassuringly adds there is no showing that "Cheng's expert testimony was so profoundly lacking in reliability that the prosecution should have known that it was false." (IR 102.)

This is all true. Dr. Cheng was a prosecution witness. Under an adversarial system, it was not Dr. Cheng's job to offer alternative scenarios which did not advance the prosecution's case, and it was not the prosecutor's job to educate jurors about scenarios inconsistent with the state's theory. (*But see Berger v. United States* (1935) 295 U.S. 78, 88 [noting that the Government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done."].) Neither Dr. Cheng nor the prosecution had any obligation to show the jury there was "disagreement among credible experts." (IR 97.)

Of course, if neither Dr. Cheng nor the prosecutors had an obligation to present the jury with these alternative scenarios, who did? It is to that separate issue Mr. Peterson now turns.

VII. CLAIM SEVEN: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CALL AN EXPERT ON THE MOVEMENT OF BODIES IN WATER.

As noted above, to support its theory that petitioner put his pregnant wife in the water when he was on San Francisco Bay on December 24, the state called Dr. Ralph Cheng to testify. Dr. Cheng testified that given where Conner was later found, the "highest probability" area for his placement in the water was the area where Scott said he had been fishing. (101 RT 18914.) The defense called no expert witness to explain that Dr. Cheng's testimony was incomplete and that there were other areas where the bodies could have been placed -- facts of crucial importance since Scott's presence on San Francisco Bay on the day Laci disappeared was widely publicized.

This was important. As the state recognized at trial, because of the publicity which attended the case "the rest of humanity knew appellant was at the marina on Christmas Eve." (RB 335. *See also* 69 RT 13406 [prosecution witness Detective Mike Hermosa admits that by January 2003 "everybody knew" Mr. Peterson said he had been at the Berkeley Marina on Christmas eve].) Absent evidence that there were areas where the bodies could have been put in the water *other* than where Scott was fishing -- and still been found where they were -- jurors could well believe that they could only have been put in where Scott was fishing. And that is exactly what the prosecutor argued, telling

jurors that if they found Dr. Cheng credible "then that man's a murderer. It's as simple as that." (109 RT 20280-20281.)

If defense counsel had retained an expert qualified to testify about the movement of bodies in water, the jury would have learned there were three areas in which the bodies could have been placed into the bay, not just one. (Petition 166-170, 176.) As the state recognizes, because he was a prosecution expert, Dr. Cheng certainly had no obligation to expand his testimony to talk about these other areas. (IR 101.) Nor was it the prosecutor's job to introduce this evidence. But the bottom line is that the jury deciding whether Dr. Cheng's testimony was reliable never knew any of this. Accordingly, in Claim Seven of his petition, Mr. Peterson alleged that it was defense counsel's obligation to present this evidence and that counsel was ineffective for failing to do so. (Petition 174-178.) Specifically, Mr. Peterson alleged that (1) counsel's performance in failing to call a qualified expert at trial fell below an objective standard of reasonableness and (2) counsel's failure prejudiced petitioner. (Petition 174-178.)

In support of his claim Mr. Peterson provided a declaration from trial counsel explaining his failure to offer an expert on the movement of bodies in water. (Petition Exhibit 4 at pp. 21-25.) Counsel admitted that prior to trial he retained an expert named Dr. Kitting with whom he pursued the possibility of performing an experiment to track a weighted drift buoy in the bay. (*Id*. at p. 22.) Dr. Kitting indicated no such experiment

could be performed; counsel's contact with Dr. Kitting ended in the summer of 2004. (*Ibid*.) Counsel then forthrightly explained his reason for failing to call an expert at trial:

> I had no tactical reason for not hiring an expert such as Dr. Feagin, apart from my very strong belief that Dr. Cheng, who himself admitted that he was not an expert in the area of the movement of objects in water, would not be permitted as an expert by the trial court.
>
> Had I believed that the trial court would find Cheng qualified in the very field he admitted he was not qualified, I would have retained an expert such as Dr. Feagin to review Dr. Cheng's opinion and testify . . . . I did not make a tactical decision not to investigate or present an expert in this area.

(Petition Exhibit 4 at pp. 24-25.)

The state argues that petitioner has failed to plead a prima facie case, either as to performance or prejudice. (IR 108-110 [performance], 110-111 [prejudice].) As to trial counsel's performance, however, the state once again refuses to assume the truth of petitioner's factual allegations based on defense counsel's own explanation for his conduct. Instead, the state disputes these factual allegations entirely. Thus, at the outset the state announces that it "specifically . . . controvert[s] all of Peterson's factual . . . claims and allegations in Claim Seven . . . . " (IR 105.) The state is true to its word.

The state disputes counsel's statement that his contact with Dr. Kitting ended in the summer of 2004, arguing without evidence that counsel consulted him through Dr.

Cheng's cross-examination in 2004. (IR 109-110.) The state goes further, disputing defense counsel's recollection for why he did not retain an expert and offering a different tactical reason to justify counsel's failure to present an expert. (IR 109.) According to the state, counsel did not call an expert to "testify to the perceived infirmities with trying to plot the course of either Laci's or Conner's bodies' migration to shore" because Dr. Cheng himself had acknowledged the imprecision of his estimated origin point. (IR 108.)

As petitioner has previously explained, the state's factual disputes with defense counsel are inappropriate here. The assessment of whether a prima facie case has been shown should be made by assuming the truth of petitioner's factual allegations, not by assuming the truth of the state's contrary theories. (*Duvall*, *supra*, 9 Cal.4th at pp. 474-475.) Here, assuming the truth of defense counsel's statements about his limited contact with Dr. Kitting, and his actual reasons for not calling an expert, petitioner has certainly pled a prima facie case that counsel's decision not to call an expert fell below an objective standard of reasonableness. Indeed, the state does not even dispute this; the state simply disagrees with petitioner's underlying factual allegations.[14]

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[14] But even setting aside the state's inappropriate (at this stage) *factual* disagreements with defense counsel's declaration, and assuming the state is right that the defense was in contact with Dr. Kitting during Dr. Cheng's examination, this does not change anything. The fact of the matter -- which the state does not dispute -- is that (1) counsel could have called an expert to testify that there was not just one but three areas in which the bodies could have been placed, but (2) did not do so. If Kitting *was* qualified to offer such testimony, and -- as the state suggests -- defense counsel was actually in contact with him during trial, this makes counsel's failure to call him worse, not better. And if Kitting was *not* qualified to offer such testimony, then any continued contact with him is beside the point.

And the state's alternative explanation for defense counsel's failure to call an expert makes little sense on the facts of this case. As noted, the state argues that counsel did not call an expert to "testify to the perceived infirmities with trying to plot the course of either Laci's or Conner's bodies' migration to shore" because Dr. Cheng had acknowledged the imprecision of his estimated origin point. (IR 108.) The argument misapprehends the thrust of the expert testimony.

Counsel's error here was *not* in failing to call an expert to expose "infirmities" in the exercise of "trying to plot the course of either Laci's or Conner's bodies' migration to shore." Counsel's error was in failing to call an expert to *embrace* that very exercise and plot *alternative* courses which supported the defense theory of the case. As the state does not dispute, the defense could have called an expert to testify that *in addition* to Dr. Cheng's area, there were two other areas in which placement of the bodies was equally probable. And some of these areas were easily accessible from Bay Area freeways. (Petition Exhibit 9 at p. 292.) The state's proffered tactical reason simply misses the central thrust of Dr. Feagin's testimony.

Indeed, the factual predicate for state's argument -- that Dr. Cheng admitted the imprecise nature of his own conclusion -- actually makes defense counsel's failure to present expert testimony for the defense even more inexplicable. As a practical matter, in light of Dr. Cheng's acknowledged imprecision, it was extremely unlikely the state would

have maintained that Dr. Cheng's area represented the only area in which the bodies could have been placed. Thus, the state would have been hard-pressed to dispute Dr. Feagin's conclusions.

In short, neither defense counsel nor the state has provided a defensible tactical reason for counsel's failure to present an expert like Dr. Feagin. Assuming the truth of petitioner's allegations, petitioner has pled a prima facie case of deficient performance.

The state alternatively argues that petitioner has not pled a prima facie case as to prejudice. The state argues that petitioner "overstat[es] the importance of Cheng's testimony . . . ." (IR 106.) The state adds that testimony from an expert like Dr. Feagin would actually "be viewed as inculpatory" since Dr. Cheng's area was included as a possibility. (IR 110.)

Petitioner can perhaps be forgiven for "overstating" the importance of Dr. Cheng's testimony given the prosecutor's argument at trial. The prosecutor told jurors in no uncertain terms that if they found Dr. Cheng credible "then that man's a murderer. It's as simple as that." (109 RT 20280-20281.) In light of the clarity of the position taken by the state's trial lawyers below, if anything, the state's appellate lawyers are improperly understating Cheng's importance. (*See New Hampshire v. Maine* (2001) 532 U.S. 742, 749 ["where a party assumes a certain position in a legal proceeding, and succeeds in

maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . ."].) As juror Greg Beratlis relates, "the most compelling evidence overall was the location of the bodies where Laci and Conner's bodies were discovered." (Exhibit 51 [Beratlis Declaration] at HCP-000992.) The state's contrary argument here not only completely ignores the trial prosecutor's characterization of Dr. Cheng's testimony, but this Court's very practical admonition that in assessing prejudice "we have seen how important these statements were to the People's case, and 'There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor -- and so presumably the jury -- treated it." (*People v. Powell*, *supra*, 67 Cal.2d at pp. 55-57.)

The state makes one final argument as to prejudice, suggesting that the jury would have viewed Dr. Feagin's testimony as "inculpatory." (IR 110.) The state explains that Dr. Feagin would have confirmed that Dr. Cheng's area was one of three possible areas in which the bodies could have been placed. (IR 110.)

The argument has little force. *Without* Dr. Feagin's testimony, the jury knew of only *one* area that the bodies could have been placed in -- an area consistent solely with the state's theory. There was no expert testimony to offer a counter narrative. *With* Dr. Feagin's testimony, the jury would have known that the bodies could have entered the water at *three* different areas including two that were not only entirely consistent with the

defense case, but completely inconsistent with the state's theory. Moreover, the defense's candor in calling an expert who presented a full picture -- including information that no point of entry could be definitively ascertained -- would have contrasted sharply with the experts called by the state at trial.

In the final analysis, at this early stage of the habeas proceedings, the state has not shown *as a matter of law* that trial counsel's failure to call Dr. Feagin at trial was harmless. As noted on several occasions above, this is especially true here since the Court considers prejudice from several errors cumulatively. Here, petitioner has pled a prima facie case for relief as to a number of instances of ineffective assistance including counsel's failure to present a fetal development expert, a dog-scent expert, an expert on the movement of bodies in water, witnesses who saw Laci walking the dog after Scott left for the marina and witnesses who heard burglar Steven Todd confess that Laci saw him burglarizing the Medina household after Scott left for the marina. Because prejudice from these claims can cumulate, summary dismissal of any of these claims on the basis of a lack of prejudice is inappropriate at this stage of the proceedings. Petitioner has pled a prima facie case and an Order to Show Cause should issue on this claim.

VIII. CLAIM EIGHT: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN PROMISING BUT FAILING TO PRESENT, TESTIMONY THAT WOULD DISPROVE THE STATE'S THEORY AND ESTABLISH PETITIONER'S INNOCENCE.

A. Introduction.

As discussed above, the defense theory in this case was simple: Laci was alive when Scott left for the warehouse, and later the marina, and Scott was therefore innocent. In his opening statement defense counsel not only apprised jurors of this theory in general but outlined some of the specific evidence he would be presenting to support the theory. Counsel told jurors they would hear from witnesses who saw Laci walking in the neighborhood after Scott left for the marina. (44 RT 8643, 8644, 8645, 8656.) Counsel left little doubt that he would present this evidence, even telling jurors that as to one of these promised witnesses the defense was "able to find her through a lot of effort and finally convince her to come forward." (44 RT 8645.) Counsel told jurors they would hear from a witness who saw Laci being pulled into a van in the neighborhood several days after December 24. (44 RT 8647.) Counsel told jurors they would hear from several witnesses who saw Scott putting the boat into the water, and there was no body in the boat. (44 RT 8605.)

Counsel presented *none* of these witnesses, explaining that he made the promise to present the Laci-sighting witnesses at opening statement *before even interviewing the witnesses*. (Petition Exhibit 4 at p. 30.) When he subsequently interviewed these witnesses, he learned that they saw Laci after 10:18 on the morning of December 24. (*Id.* at pp. 30-31.) He decided not to call them because -- as a direct consequence of his failure to review the handwritten report of postman Graybill's December 27 police interview -- counsel's understanding at the time was that Laci was abducted between 10:00 and 10:18 that morning. (*Id*. at pp. 30-31.)[15]

Based on these facts, petitioner alleged that defense counsel rendered ineffective assistance by promising the jury he would present witnesses he had not interviewed. (Petition 179-185.) Petitioner's allegations were simple: it was unreasonable for counsel to make that promise before interviewing the witnesses. Mr. Peterson alleged that (1) counsel's performance in making promises in opening statement which he had not properly investigated fell below an objective standard of care and (2) counsel's failure prejudiced petitioner. (Petition 179-185.)

The state argues that petitioner has failed to plead a prima facie case, either as to performance or prejudice. (IR 112-117 [performance]; 117-120 [prejudice].) Petitioner

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[15] Defense counsel subsequently conceded that in light of the handwritten report of the police interview with mailman Russell Graybill, counsel's understanding of the timeline was wrong. (Petition Exhibit 4 at p. 32.)

will address each of these contentions. As discussed below, the state's arguments are meritless and an Order to Show Cause should issue on this claim.

B. The Allegations Of The Petition Show Defense Counsel Promised To Present Evidence In Opening Statement He Had Not Properly Investigated And Then Failed To Present That Evidence; Assuming These Allegations Are True, Petitioner Has Established A Prima Facie Case Of Deficient Performance.

The state argues petitioner has failed to plead a prima facie case as to inadequate performance for three reasons. First, the state's appellate lawyers once again take precisely the opposite position from the one the state's trial lawyers took. In contrast to the state's trial lawyers -- who quite predictably skewered the defense for failing to follow through on the promise to produce these witnesses (109 RT 20321, 20322, 20323) -- the state's current lawyers argue counsel made no promises at all in his opening statement. (IR 112 [counsel "made no promise that the defense would present testimony involving the purported eyewitness sightings of Laci and her dog."]; 115 [with respect to the witness who saw Laci being forced into a van "there was no promise of defense testimony in this regard."]; 116 [no promise from defense that it would present a witness from the marina].) Since no promises were made, the state argues that petitioner has not pled a prima facie case for relief.

The state's trial lawyers were correct. Every person in court to hear defense counsel's opening statement knew he was promising evidence. That, after all, is the purpose of opening statement. And it seems unlikely that defense counsel was suggesting the *state* would be presenting witnesses who would undercut its own theory of the case.

Fortunately, there is no reason to guess at what the participants thought. The trial prosecutor's closing argument certainly make clear the state thought defense counsel's opening statement contained promises from the defense. (109 RT 20321, 20322, 20323.) The jurors themselves viewed defense counsel's argument as a promise to produce this exculpatory evidence. (Petition Exhibit 8 at p. 184 ["he was going to show that Laci was alive on December 24, 2002."]; 220 [defense counsel "promised the jury he would present eyewitnesses who would say they saw Laci alive on the day she was supposed to have been murdered."] *See also* Exhibit 50 [Cardosi Declaration] at HCP-000986.) Justice Brown's observation about jurors bears repeating here; jurors are not "some kind of dithering nincompoop[s], brought in from never-never land" (*People v. Guiuan*, *supra*, 18 Cal.4th at p. 579 [Brown, J., concurring and dissenting].) Both the jurors and the state's trial lawyers knew that counsel had made promises which he did not keep.

Alternatively, the state argues there is no prima facie case as to inadequate performance because sometimes things change during trial. (IR 113-114.) As a consequence, the state reasons it may be a perfectly "reasonable tactical decision" for

defense counsel to change strategy from the one promised in opening statement. (IR 113-114.) Mr. Peterson quite agrees with the state on this, at least in theory.

But what this indisputable theoretical proposition has to do with the specifics of *this* case is difficult to see. Significantly, the state does not identify anything that changed to justify counsel's decision not to call the witnesses he had promised he would call. Certainly the state's theory at all times remained the same as it was prior to trial -- that Scott killed Laci before leaving for the warehouse and then the marina. And Scott's theory did not change -- Laci was alive when he left for the warehouse.

The reason the state does not identify anything that changed in this case is because nothing did. The record shows this is *not* a case where something happened in the state's case to make counsel reconsider his tactical choices.

Here, trial counsel has conceded he made these promises in his opening statement before even interviewing the witnesses. (Petition Exhibit 4 at pp. 30-31.) He has conceded that in interviews with these witnesses *after* his opening statement they gave a time frame which was not consistent with counsel's understanding of the case. *The only changed circumstance is that counsel finally interviewed the witnesses he had already promised.* But this was fully within counsel's control. The state's apparent position is that it is a "reasonable tactical decision" for defense counsel in a capital case to promise

the jury specific evidence in opening statement before actually knowing what that evidence is and whether it will be introduced. Nothing in law, logic or common sense supports setting the bar for effective assistance so low. Indeed, as discussed below, the law declares otherwise.

The state's final argument as to counsel's performance is that "defense counsel managed to bring out much of the information about purported sightings of Laci through cross-examination of Detective Craig Grogan." (IR 114.) Similarly, the state notes that during Grogan's cross-examination, "counsel elicited Tom Harshman's account of seeing a woman resembling Laci who was forced into a van . . . ." (IR 115.) According to the state, defense counsel was therefore able to introduce evidence from these eyewitnesses who "were not subject to cross-examination by the prosecution." (IR 114.) The state concludes that counsel therefore had a tactical reason to "proceed in the manner described." (IR 114.)

If indeed defense counsel had been able to introduce evidence from the Laci-sighting and van witnesses through Detective Grogan without having them exposed to cross-examination, that might well be a legitimate tactical reason for not calling the witnesses themselves. Contrary to the state's position, however, that is not what happened.

During his cross-examination of Detective Grogan, defense counsel tried to show the police investigation of the case was inadequate. As the state accurately notes, counsel cross-examined Grogan about police interviews of people such as Grace Wolf, Tony Frietas, Homer Maldonado, Helen Maldonado and Tom Harshman who -- according to information they provided police on the tip line -- saw Laci after Scott left for the marina. (98 RT 18476-18511.) But the state fails to note that in the middle of defense counsel's cross-examination, the court explicitly provided the following instruction about the information counsel was eliciting:

> Ladies and gentlemen of the jury, I have to sort of -- in order to put all this evidence we've been receiving the last couple days into context. A lot of this information that the -- Detective Grogan got on the tip line is not being offered for the truth, okay? It's being offered to explain the reasonableness of Detective Grogan's conduct; what he did as a result of this information that he received, okay?

(99 RT 18561.) In closing argument, the state's trial lawyers hammered this point home as to the Laci-sighting witnesses:

> The most important thing, I think, of that, that I really want to make clear to you is, you did not hear a single witness who said they saw Laci Peterson walking in the neighborhood . . . . You did not hear from this stand a single witness who said that. *You heard officers testify that people reported to that. You can't consider that for the truth, not a single bit of it.*

(109 RT 20321, emphasis added.)

The prosecutor then hammered home the same point as to the testimony of Tom Harshman on which the state's current lawyers rely:

> Remember that whole thing with . . . the van, and all that crazy story? How come Tom Harshman didn't getup here on the stand? Let's hear what he has to say if that's true. None of those people came in and testified. You know why? You can assume because that what they were going to say was not credible.

(109 RT 20322-20323.)

Now, however, the state's appellate lawyers say the exact opposite. Without even a nod to the trial court's instruction, or the trial prosecutor's arguments, the state now argues petitioner did not plead a prima facie case of inadequate performance because -- in fact -- "defense counsel managed to bring out much of the information about purported sightings of Laci through cross-examination of Detective Craig Grogan." (IR 114.) But as the trial court's instruction and the trial prosecutor's argument both show, the jury "did not hear a single witness who said they saw Laci Peterson walking in the neighborhood . .

. . . You did not hear from this stand a single witness who said that." (109 RT 20321.)[16]

C. Given The Importance Of Defense Counsel's Credibility To The Defense, And The Prosecutor's Repeated Reliance On Counsel's Broken Promises, Petitioner Established A Prima Facie Case As To Prejudice.

The state alternatively contends petitioner has not pled a prima facie case as to prejudice. (IR 117-120.) Unfortunately, however, the state's argument misreads the

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[16] Although the state does not actually say this, it may be suggesting defense counsel could reasonably decide not to call any of these witnesses in the hopes that jurors would ignore their instructions. But there are two problems with any such suggestion.

First, defense counsel has explained the reason he promised these witnesses, but ultimately did not call them, admitting that he simply had not interviewed them until after his opening statement. (Petition Exhibit 4 at pp. 30-31.) Thus, the state is urging this Court to summarily dismiss petitioner's claim not by assuming the truth of petitioner's factual allegations, but by disputing them. *Duvall* does not permit this. (9 Cal.4th at pp. 474-475.) Worse, the state does this without any supporting declarations or other materials and despite its concession that "[f]acts must be alleged in a manner that makes the declarant liable for perjury if the allegation is false." (IR 32.)

Second, by proposing counsel made a tactical decision which is at odds with the tactical judgment defense counsel has articulated, the state is urging this Court to assume a tactical judgment defense counsel did not actually make. This is improper. Every court in the country that has addressed this issue -- including the United States Supreme Court -- has held that in deciding if a trial lawyer rendered ineffective assistance of counsel, courts may not invent tactical reasons for an action which counsel did not have. (*See Wiggins v. Smith* (2003) 539 U.S. 510, 526 [cautioning that courts and the state alike must avoid substituting a "post hoc rationalization of counsel's conduct."] *Accord Richards v. Quarterman* (5th Cir. 2009) 566 F.3d 533, 564; *Keith v. Mitchell* (6th Cir. 2006) 466 F.3d 540, 543-544; *Dugas v. Coplan* (1st Cir. 2005) 428 F.3d 317, 333-334; *Smith v. Mullin* (10th Cir. 2004) 379 F.3d 919, 929; *Brown v. Sternes* (7th Cir. 2002) 304 F.3d 677, 691; *Griffin v. Warden* (4th Cir. 1992) 970 F.2d 1355, 1358.)

case law in connection with establishing prejudice in the "broken promise" context.

The case law is clear. Mr. Peterson discussed it at some length in the memorandum supporting his petition. (Memorandum 84-87.) There are two consequences when a defense lawyer makes key promises to the jury in opening statement but fails to deliver. First, the jury may conclude that the reason defense counsel did not introduce the evidence is because the evidence is actually adverse to the defense. (*See*, *e.g.*, *United States ex rel. Hampton v. Leibach* (7th Cir. 2003) 347 F.3d 219, 259 ["Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility. In no sense does it serve the defendant's interests."]. *Accord United States v. Gonzalez-Maldonado* (1st Cir.1997) 115 F.3d 9, 15 [same]; *Saesee v. McDonald* (9th Cir. 2013) 725 F.3d 1045, 1049 [same].)

Second, when defense counsel makes promises which are broken the jury may come to doubt the "credibility of [defense] counsel." (*Saese v. McDonald*, *supra*, 725 F.3d at pp. 1049-1050.) When a defense lawyer failed to present testimony he has promised to a jury "counsel has broken 'a pact between counsel and jury,' in which the juror promises to keep an open mind in return for the counsel's submission of proof. [Citation.] When counsel breaks that pact, he breaks also the jury's trust in the client. Thus, in some cases -- particularly cases where the promised witness was key to the

defense theory of the case and where the witness's absence goes unexplained -- a counsel's broken promise to produce the witness may result in prejudice to the defendant. (*Ibid*. *Accord United States ex rel. Hampton v. Leibach, supra*, 347 F.3d at p. 259.)

Taken together, these two consequences can be devastating to a defense. That is precisely why "[t]he failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel." (*McAleese v. Mazurkiewicz* (3rd Cir.1993) 1 F.3d 159, 166; *Williams v. Woodford* (E.D.Cal. 2012) 859 F.Supp.2d 1154, 1171.)

Here, counsel promised (1) five witnesses who saw Laci alive after Scott left home, (2) one witness who saw Laci forced into a van, and (3) multiple witnesses who saw Scott launch a boat that contained nothing that could have been a body. Counsel then produced none of these witnesses. And the prosecutor in closing explicitly asked jurors to draw the precise inference which the case law recognizes as so prejudicial, telling jurors that petitioner had a "very experienced defense team" with "very good lawyers" and that the reason these witnesses were not called was because they would not support the defense case. (109 RT 20322-20323.)

In light of the case law, the specific prejudice question here is whether jurors would actually have drawn an adverse inference from defense counsel's broken promises.

In light of the prosecutor's specific request that they do exactly that, it seems likely the jurors did draw such an inference. But this is an unusual case; in fact, there is no need to guess. As petitioner explained in his Memorandum, several jurors have described in writing the inferences they actually drew and it turns out that jurors drew the precise adverse inference the prosecutor had asked them to draw. (Petition Exhibit 8 at pp. 183, 220-221.) Accordingly, petitioner has pled a prima facie case as to prejudice.

The state ignores this case law entirely in making a contrary argument. The state ignores the prosecutor's argument. The state ignores the statements of the jurors. Instead of focusing on what the case law has identified as the potential prejudice from broken promises in opening statement, the state argues that had defense counsel presented the evidence described, the state could have countered it. (IR 117-119.) Regardless of the merits of this claim, it has nothing to do with counsel's error. The state has missed the critical distinction between two distinct types of claims (1) a claim that counsel provided ineffective assistance in breaking promises made in an opening statement and (2) a very different claim that counsel provided ineffective assistance in failing to introduce exculpatory evidence.

As the case law discussed above shows, the prejudice calculus in the first type of claim requires a focus on the actual effect of the broken promise. This in turn requires an assessment of whether jurors would draw an adverse inference from defense counsel's

broken promise, either as to what the evidence would have shown or to defense counsel's credibility, or both, and the impact of such an adverse inference on the case as a whole.

The prejudice calculus from the second type of claim-- defense counsel's failure to present exculpatory evidence -- is very different. This requires an assessment of how the evidence would have impacted the trial, and includes consideration of how the state would have responded to the evidence counsel failed to present.

In its Informal Response, the state has conflated the prejudice analysis of these two distinct claims. Perhaps because it ignores the case law entirely, the state performs no analysis whatever of the precise prejudice flowing from a defense lawyer's broken promises. (IR 117-120.) For the reasons discussed above, petitioner has indeed pled a prima facie case as to prejudice in connection with this claim. And for reasons also discussed above, even if this were not the case, summary dismissal of this claim would be unwarranted because the prejudice arising from different errors is assessed cumulatively. Petitioner has pled a prima facie case for relief and an Order to Show Cause should issue as to this claim.[17]

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[17] In its prejudice discussion the state very briefly reprises an argument it made in connection with the performance prong of this issue, arguing there was no prejudice because -- in fact -- defense counsel did introduce the evidence he promised during his cross-examination of Detective Grogan. (IR 117.) As discussed above, however, the state ignores both (1) the trial court's very clear instruction to the jury that this evidence was *not* introduced for the truth of the matter asserted and (2) the prosecutor's explicit argument to the jury that no such evidence was actually introduced. (99 RT 18561; 109 RT 20321-20323.)

IX. CLAIM NINE: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO CALL WITNESSES WHO SAW LACI PETERSON WALKING HER DOG ON DECEMBER 24 AFTER SCOTT LEFT FOR THE MARINA.

A. Introduction.

According to the prosecution, when Scott left home for his warehouse on December 24, he had already killed Laci and put her body in his truck to go to the Berkeley Marina. Thus, accepting the state's theory of the case, if the defense could prove Laci was alive when Scott left home that morning, Scott was necessarily innocent. This is precisely why defense counsel promised jurors in his opening statement that they would hear from witnesses who saw Laci walking her dog in the neighborhood after Scott left for the marina. (44 RT 8643, 8644, 8645, 8656.)

In his Petition, Scott alleged that defense counsel rendered ineffective assistance in failing to present testimony from Diane Campos, Frank Aguilar, William and Vivian Mitchell, Anita Azevedo and Grace Wolf. (Petition 186-194.) More specifically, Scott alleged (1) eyewitness Diane Campos saw Laci walking her dog at 10:45 on the morning of December 24, (2) eyewitness Frank Aguilar saw Laci walking her dog between 9:30 and 11:00 that same morning, (3) eyewitnesses William and Vivian Mitchell had seen Laci walking the dog before, and saw her walking the dog that morning, (4) eyewitness

Anita Azevedo saw Laci walking the dog on the morning of December 23 and (5) eyewitness Grace Wolf also saw Laci walking the dog on December 23. (Petition 186-194.) Scott supported his allegations with declarations from each of these eyewitnesses, sworn under penalty of perjury. (Petition Exhibits 12, 13, 14, 15, 16.)[18]

Defense counsel has explained why he did not call these witnesses. That explanation was directly tied to the testimony of prosecution witness Karen Servas. Servas was a neighbor of the Petersons who testified that she put the Petersons' dog Mckenzi in the back yard at 10:18 a.m. on the morning of December 24. (48 RT 9422.) She was able to place the time by looking at the time stamps on receipts she kept from that morning's shopping trip. (48 RT 9422.) She saw Mckenzi loose outside the home; Servas took the dog and put him back in the yard. (48 RT 9428.) To ensure Mckenzi did not escape, Ms. Servas specifically recalled closing the gate behind her. (48 RT 9428.)

Defense counsel has explained that he did not call witnesses who saw Laci walking Mckenzi in the neighborhood because he believed their statements conflicted with Karen Servas's testimony about the timeline. (Petition Exhibit 4 at p. 31.) The defense theory, of course, was that Laci was abducted while walking Mckenzi after Scott left the house at 10:08. Defense counsel believed that when Servas found Mckenzi outside the Petersons' house (and put him back in the yard), this meant Laci had *already*

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[18] The December 23 witnesses are relevant to rebut the state's suggestion at trial that Laci was no longer able to walk the dog by late December.

been walking the dog and been abducted. (*Ibid*.) In light of the inference counsel drew from Servas's testimony -- that at 10:18 Laci had already gone for walk with the dog and been abducted -- counsel believed that any Laci sightings after 10:18 "were either mistaken or not credible." (*Ibid*.) Thus, as counsel himself explains, "[w]hen these witnesses insisted that they saw Laci later than 10:18 a.m., they were not contacted by the defense again." (*Ibid.*)

But as Scott alleged in his petition, the entire factual predicate for counsel's decision was flawed. And it was not flawed because of some new piece of evidence that counsel did not know about. As counsel himself has candidly conceded, it was flawed because counsel was unaware of a handwritten police report memorializing an interview police conducted with postman Russell Graybill only three days after Laci disappeared. (Petition Exhibit 4 at pp. 31-33; Petition 194-197.) In that relatively contemporaneous interview, Graybill -- who was the Petersons' mailman and who knew Mckenzi well -- told police (1) Mckenzi always barked at him when he delivered mail, (2) he delivered mail to the Peterson house that day between 10:35 and 10:50, (3) when he arrived the gate was open and (4) Mckenzi did not bark that day. (Petition Exhibit 3.) In other words, after Servas put Mckenzi back in the yard and *closed* the gate at 10:18, someone *opened* the gate and took Mckenzi out. This was why the gate was open when Graybill delivered mail, and why Mckenzi was not barking at him that morning.

In Claim Nine of his Petition, Scott alleged that counsel should have been aware of Graybill's statement of December 27 since it was provided to the defense during the discovery process. (Petition 195.) In light of Graybill's statement, defense counsel's reason for failing to call witnesses who saw Laci after 10:18 fell below an objective standard of reasonableness. (Petition 195-198; Memorandum 102-104.)

There should be little dispute about this. To his credit, defense counsel has admitted that he made the decision not to call these witnesses without ever seeing the handwritten Graybill statement of December 27. (Petition Exhibit 4 at pp. 31-33.) Counsel has gone further and explained that if he *had* seen the statement, he would have known that *after* Servas had put Mckenzi in the yard at 10:18 and closed the gate, postman Graybill saw the gate was open at 10:35 to 10:50 and Mckenzi was not at the house. (Petition Exhibit 4 at p. 34.) Had counsel known this prior to trial, he would have made a very different decision about the Laci-sighting witnesses:

> Had I been aware of the handwritten police notes describing Graybill's observations -- which supported the theory that Laci left the house after 10:18 a.m. -- I would have made a different evaluation of the credibility of the witnesses who claimed to have seen Laci walking later than 10:18. I therefore would have called these witnesses to testify as promised in my opening statement.

(Petition Exhibit 4 at pp. 33-34; Petition 198; Memorandum 104.) Scott also alleged counsel's failure was prejudicial; if even a single juror had found even a single Laci-

sighting witness credible, that juror would have had to vote not guilty, since it would have meant Laci was alive when Scott left for the marina. (Petition 199; Memorandum 105-107.)

The state argues that petitioner has failed to plead a prima facie case, either as to performance or prejudice. (IR 121-127 [performance]; 127-128 [prejudice].) As discussed below, both contentions are meritless and an Order to Show Cause should issue on this claim.

B. The Allegations Of The Petition Show Defense Counsel Was Unaware Of Critical Evidence When He Made The Decision Not To Call The Laci-Sighting Witnesses; Assuming These Allegations Are True, Petitioner Has Established A Prima Facie Case Of Deficient Performance.

The state argues petitioner has failed to plead a prima facie case as to inadequate performance. The state concedes defense counsel decided not to call the Laci-sighting witnesses because -- based on Karen Servas's testimony that she put Mckenzi back in the yard at 10:18 and closed the gate -- he believed that whatever had happened to Laci necessarily happened before 10:18. (IR 121.) The state says counsel's decision to accept the Servas timeline was "not unreasonable" because her receipts enabled her to be accurate about when she got back and found Mckenzi. (IR 121-122.)

The state is correct that Servas's 10:18 time was supported by substantial documentation. But the state's conclusion is entirely backwards. Servas's precision about her timeline actually shows why defense counsel's decision was completely unreasonable. Here is why.

As the state notes, Servas's testimony about placing Mckenzi back in the yard at 10:18 was informed by "store receipts and cell phone records." (IR 122.) In other words, the jury would certainly perceive it as an accurate timeline. But if Servas is correct that she put Mckenzi in the yard at 10:18 and closed the gate, jurors would have been required to answer a question the state *to this day* has not answered:

> Who opened the gate and took Mckenzi for a walk *after* 10:18, so that when Graybill arrived between 10:35 and 10:50, the "gate was open" and Mckenzi was not on the premises barking?

There is a reason the state has never answered this question. The obvious answer is one that is fatal to the state's case: it was Laci who took Mckenzi for a walk and she did so *after* Karen Servas put Mckenzi in the yard and closed the gate at 10:18. That is why the gate was open when Graybill came by at 10:35, and that is why Mckenzi was not barking at Graybill when he delivered the mail that morning.

In short, and by his own admission, counsel decided not to call the critical Laci sighting witnesses solely because he had not reviewed a critical piece of the discovery that the prosecution had provided to him months and months earlier. Because that is by definition not a reasonable tactical decision, petitioner has established a prima facie case as to the deficient performance of his trial lawyer.[19]

C. Given The Importance Of Showing Laci Was Alive When Scott Was On His Way To The Berkeley Marina, Petitioner Has Established A Prima Facie Case As To Prejudice.

The state argues that petitioner has not pled a prima facie case as to prejudice. (IR 123-127.) But the state's argument runs afoul of *Duvall* yet again; the state "specifically . . . controvert[s] all of Peterson's factual . . . claims and allegations in Claim Nine" and then advances a prejudice thesis that depends on credibility. (IR 120.) Thus, the state argues that Graybill's December 27 statements to police, and the statements of the

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[19] The state suggests that this Court cannot consider Graybill's statement -- or what reasonable counsel would have done with the statement -- because that would be an improper reliance on "hindsight." (IR 122.) The observation has utterly no application here.

Police took the Graybill statement three days after Laci disappeared and disclosed it to the defense well before trial. Thus, it is entirely proper for this Court to consider the Graybill statement in deciding whether counsel's decision not to call the Laci-sighting witnesses was reasonable. Moreover, contrary to the state's suggestion, while defense counsel's declaration about what he would have done had he known about Graybill's statement is not binding on the Court, it is certainly relevant.

Laci-sighting witnesses, are not credible. (IR 123-125 [Graybill]; 125-127 [Laci-sighting witnesses].)

As discussed in detail above, in assessing whether a prima facie case has been pled, the Court must assume the truth of petitioner's allegations. (*Duvall*, *supra*, 9 Cal.4th at pp. 474-475.) Contrary to the state's suggestion here, that assessment is certainly not made by assuming a petitioner's sworn declarants are *not* credible. As this Court has concluded, credibility assessments are not generally made at the prima facie case stage of the proceedings, but instead are made later -- if necessary -- with the benefit of an evidentiary hearing. (*See People v. Bacigalupo*, 55 Cal.4th at p. 333.)

This is especially true here, in light of the reasons the state gives for why this Court should find that these declarants are not credible. The reasons the state gives are remarkable.

First, the state attacks postman Graybill's credibility. The state argues that his statement to police is not credible because it "contain[s] apparent contradictions or inaccuracies" when compared to his trial testimony. (IR 123.)

Graybill's statement to police was given on December 27, 2002 -- *only three days after Laci disappeared*. (Petition Exhibit 3.) Graybill's testimony itself occurred on June

10, 2004 -- *18 months after Laci disappeared*. (49 RT 9555.) If there are contradictions, it seems likely that Graybill more accurately recalled events three days after Laci disappeared, rather than 18 months later. The state ignores this entirely.

But there is more. The state goes on to argue that two "discrepancies" with respect to Graybill's testimony are so significant that the probative value [of his information] was negligible." (IR 125.) In light of the importance of Graybill's December 27 statement to petitioner's defense, this Court should examine the two discrepancies on which the state so heavily relies.

First, the state notes that in his December 27, 2002, statement Graybill said the gate was open when he delivered mail. (Petition Exhibit 3.) This is true. The state then notes that in Graybill's June 2004 testimony -- 18 months after he actually delivered the mail that day -- he was asked generally whether anything was "out of the ordinary" when he delivered the mail and he said no. (IR 124.) According to the state, this major discrepancy suggests Graybill's contemporaneous statement of December 27 should not be believed.

As the state concedes, however, during Graybill's trial testimony, neither the prosecution nor the defense ever asked him if the gate was open when he delivered the mail. (IR 123.) He was never shown a copy of his December 27 statement during his

trial testimony 18 months later. The inference of a disqualifying "discrepancy" the state is urging the Court to draw from Graybill's agreement there was nothing "out of the ordinary" that day defies common sense. It assumes, without any supporting evidence at all (or any supporting logic) that an open gate at the Peterson home would have been "out of the ordinary" or at least considered to be so by Graybill. Put another way, the state is making a mountain out of a molehill.

The state's second argument for why this Court should discount Graybill's December 27 statement has even less substance. The state notes "trial counsel states in his declaration that Graybill reported to police that he delivered a package to the Peterson home" on December 24. (IR 124.) The state argues there is a discrepancy because in the December 27 police report "Graybill did not tell authorities that he delivered a package to the Peterson home . . . ." (IR 125.)

If there is a discrepancy, it has nothing to do with Graybill, it has to do with defense counsel. It is, after all, his declaration the state is referencing. Equally important -- as even a quick examination of the December 27 statement will show -- is that contrary to the state's suggestion, Mr. Graybill did not discuss what he delivered that day -- whether it was a package, or mail, or both. *The subject was not even covered in the*

December 27 police statement.[20]

At the end of the day, the state's attacks on the credibility of these declarants

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[20] The state's asserted "discrepancies" as to the Laci-sighting witnesses are no more convincing. The state suggests Frank Aguilar is not credible because he recalled seeing Laci sometime between 9:30 and 11:00. (IR 125.) Of course, Aguilar's recollection is entirely consistent with the defense theory that Laci took Mckenzi for a walk after Servas placed her in the yard at 10:18. Given that no party has ever suggested Laci was out walking the dog at 9:30 that morning before Scott drove to the warehouse at 10:08, it seems unlikely that Aguilar saw Laci between 9:30 and 10:08. Thus, if he did see her as he states, it was after that time -- when Scott was on his way to warehouse and then the marina.

The state has nothing of substance to say about William Mitchell, a graduate of Stanford law school, a former Modesto city council member, a former vice mayor of Modesto and a former assistant county counsel. (Petition Exhibit 14; IR 125-126.)

The state correctly notes that both Grace Wolf and Anita Azevedo saw Laci on December 23. (IR 126.) But the purpose of these witnesses was to show that Laci was still walking the dog at this point in her pregnancy.

Finally, as to Diane Campos, the state argues that her identification of Laci was "contradicted by trial testimony." (IR 126.) The state argues that Laci was in no physical condition to walk in the park where Diane Campos says she saw her, and the trail was steep and uneven. (IR 126.) The state extracts its assertion that Laci's "compromised physical condition" is incompatible with witnesses who saw her walking Mckenzi from a collection of statements about pregnancy-related discomforts dating from October 2002, mostly reporting tiredness, occasional dizziness, and nausea. (IR 126 citing RB 112-114.) The state's source for the allegedly prohibitive roughness of the park derives from the testimony one resident familiar with the area who described a portion of the park as "very, very rough" and steep (48 RT 9357), and another who testified that she personally did not walk in that area of the park during her own pregnancy because it was "unsteady . . . mottled . . . steep and sandy and dusty and uneven." (87 RT 16751-16752.) While this testimony may have suggested that Laci had at times experienced pregnancy-related discomfort and that at least one portion of the park near Covena Avenue was challenging, it does not "contradict" Diane Campos's that she saw a woman and a dog matching the description of Laci and Mckenzi in a different and easily accessible area of the park -- the portion near the hospital -- on December 24th, 2002.

should have no place in the prima-facie case calculus as to prejudice. None of these witnesses/declarants had any reason to lie for Scott Peterson. And if even a single juror believed Graybill's testimony that the gate was open when he delivered mail between 10:35 and 10:50 on December 24, 2002 -- and Mckenzi was not barking -- the inference from the Karen Servas timeline that Laci must have been abducted prior to 10:18 drops out of the case. Graybill's testimony is strong evidence that someone took Mckenzi for a walk after Servas put McKenzi back in the yard at 10:18. The state has never suggested who that someone might be other than Laci. And if it was Laci who took Mckenzi for a walk after 10:18 and left the gate open, no juror could vote to convict since at that point Scott was well on his way to the warehouse and the marina. (*See* Exhibit 50 [Cardosi Declaration] at HCP-000986-987 ["Any evidence that Laci was still alive when Scott was already at the Marina would have been important to me as a juror."].)

Similarly, if even a single juror believed even a single one of the confirming December 24 Laci-sighting witnesses, the same result is required. If Laci is alive and walking Mckenzi after Scott leaves for the warehouse, he is innocent. Finally, for reasons discussed several times earlier in this response, even if petitioner had not pled a prima facie case of prejudice specifically as to this claim, summary dismissal would still be unwarranted because of the Court's obligation to consider prejudice from different errors cumulatively. Petitioner has established a prima facie case and an Order to Show Cause should issue as to this claim.

X. CLAIM TEN: ASSUMING THE TRUTH OF PETITIONER'S FACTUAL ALLEGATIONS, PETITIONER HAS PLED A PRIMA FACIE CASE THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO PRESENT EVIDENCE THAT BURGLAR STEVEN TODD SAW LACI LATE ON THE MORNING OF DECEMBER 24 AFTER SCOTT LEFT FOR THE MARINA.

A. Introduction.

Claim 10 in the Petition involves defense counsel's failure to investigate a critical tip which came to the Modesto police from Lt. Xavier Aponte, a California correctional officer. (Petition Exhibit 28.) The state takes the position that petitioner did not establish a prima facie case for relief as to this claim. (IR 128-133.) In order to assess the state's position, some background is helpful to understand the extraordinary importance of the information Lt. Aponte provided but the jury never heard.

Scott and Laci lived at 523 Covena Avenue in Modesto. After Laci went missing on December 24, police set up a tip line. On the afternoon of December 27 -- only three days later -- neighborhood resident Diane Jackson called to report that she had seen a burglary at 11:40 in the morning of December 24, 2002 at 516 Covena Avenue. (99 RT 18562-18563.) She told police she saw a safe being removed from the house. (99 RT 18563.)

The same day police received the telephone tip from Ms. Jackson, police officer Stough went to her home and spoke with her. (99 RT 18564.) Ms. Jackson confirmed the precise information she had given earlier in the day -- she saw a burglary at 516 Covena Avenue three days earlier -- on December 24. (99 RT 18564-18565.)

The house at 516 Covena Avenue is directly across the street from the Peterson's home. (99 RT 18565.) The Medina family lived there at the time. (99 RT 18565.) As the prosecutor recognized, the evidence showed the Medinas had left home at 10:32 on the morning of December 24 to drive to Los Angeles for the Christmas holiday. (109 RT 20318.) When the Medinas returned on December 26, they found that they had been burglarized; as Ms. Jackson had accurately told police, their safe was missing. (49 RT 9607.)

Police investigated the burglary. After receiving an anonymous tip, on January 2, 2003, police Officer Hicks arrested both Glenn Pearce and Steven Todd for the burglary. (107 RT 20014; 108 RT 20055.) Officer Hicks interviewed both men. (107 RT 20015; 108 RT 20049-20050.) Both men were unusually cooperative.

For starters, both Todd and Pearce immediately gave Hicks almost the same response when asked about the burglary. According to Hicks, the first statement Todd made upon his arrest was that "I'll tell you about the burglary." (107 RT 20016.)

Remarkably enough, when Officer Hicks interviewed Pearce, Pearce said almost the same thing, telling Hicks that "he would tell [me] anything that [I] want to know about [the burglary.]" (108 RT 20050.)

Without prompting, Todd immediately added "but [I] had nothing to do with the woman." (107 RT 20016.) When Officer Hicks asked Todd "what woman he was talking about" Todd replied "the missing woman with the baby." (107 RT 20016.)

Todd went on to explain that the burglary occurred on December 26. (107 RT 20019.) Pearce too told Hicks the burglary was on December 26. (108 RT 20050.) Ultimately, both Todd and Pearce pled guilty to a burglary occurring "between December 24, 2002 and December 26, 2002." (108 RT 20055; Petition Exhibit 29 at p. 418; Petition Exhibit 30 at p. 424.)

The jury heard all this information. Obviously, if the burglary occurred on December 26 -- two days after Laci disappeared -- it had nothing to do with Laci's disappearance. That was precisely the state's theory; the prosecutor told jurors "[i]t didn't happen on December 24th." (109 RT 20318.)

This is exactly where defense counsel's error as to Lt. Aponte comes into play. Here is the evidence the jury did *not* hear.

On January 22, 2003 -- only weeks after Laci went missing -- Lt. Aponte was working as a correctional officer at the California State Prison in Norco, California. (121 RT 21776.) Lt. Aponte was monitoring a telephone call between Shawn Tenbrink, an inmate at the prison, and his brother Adam. (Petition Exhibit 28.) According to Officer Aponte, Adam told his brother "that Steve Todd said Laci witnessed him breaking in." (Petition Exhibit 28.) According to a declaration prepared by the state in connection with Scott's new trial motion, Lt. Aponte tape recorded the Tenbrinks' conversation. (20 CT 6434-6435.) The state admits that it is "unable to locate" the tape recording. (*Ibid*.)

The significance of Steven Todd's statement is difficult to overstate. If indeed "Laci witnessed him breaking in" then -- regardless of whether Todd is involved in Laci's actual disappearance and murder -- Scott is innocent. After all, the state itself conceded the Medinas left home on December 24, 2002 at 10:32 in the morning. (109 RT 20318.) The burglary necessarily occurred after that. If as Officer Aponte recorded "Steve Todd said Laci witnessed him breaking in" to the Medina house after that time, then Laci was alive when Scott was on his way to the Berkeley Marina, and Scott is innocent.

The state disclosed the Aponte tip to the defense in May 2003 as part of discovery. (20 CT 6380.) Defense counsel did not have his investigator interview Aponte until weeks after the jury returned a guilty verdict. (20 CT 6133, 6261-6263.) Neither Adam nor Shawn Tenbrink were ever interviewed by the defense prior to trial, nor did the state

ever discover or disclose to the defense the tape recording of their conversation which Officer Aponte had made.

In light of all these facts, Scott alleged in Claim 10 of his Petition that trial counsel provided ineffective assistance in failing to follow up on the Aponte tip *prior* to trial, rather than after the guilty verdicts. (Petition 200-214.) Specifically, Scott alleged that (1) counsel's performance in failing to investigate the Aponte tip fell below an objective standard of reasonableness and (2) counsel's failure prejudiced petitioner. (Petition 200-214.)

Despite the obvious significance of evidence that Laci saw Todd breaking into the Medina home after Scott was on his way to the marina, the state argues that petitioner has failed to plead a prima facie case, either as to performance or prejudice. (IR 132-133 [performance]; 133-136 [prejudice].) As discussed below, the state's contentions are meritless and an Order to Show Cause should issue on this claim.

B. The Allegations Of The Petition Show Defense Counsel Was Not Aware Of The Aponte Tip; Assuming These Allegations Are True, Petitioner Has Pled A Prima Facie Case Of Deficient Performance.

The state argues that petitioner has not pled a prima facie case of deficient performance in failing to investigate the Aponte tip prior to trial. The state argues that

"Peterson's defense team pursued this avenue and presumably found it wanting." (IR 132.)

In light of the plain allegations of the Petition, and counsel's own admissions at the hearing on the new trial motion where he raised this issue, the state's argument is not entirely clear. But there are only two possibilities: either defense counsel *did* investigate the Aponte tip or he did *not*. Thus, the state could first be making a factual argument that defense counsel did indeed investigate the tip by interviewing Aponte and the Tenbrink brothers and he then decided not to pursue it. This may well be the state's position given that it "specifically . . . controvert[s] all of Peterson's factual . . . claims and allegations in Claim Ten." (IR 128.) The Petition specifically alleges defense counsel was *not* aware of, and failed to pursue, the Aponte tip prior to trial. It alleges he did *not* interview Aponte until after trial, did *not* obtain the tape recording, and did *not* interview the Tenbrink brothers prior to trial. (Petition 211.) If the state is genuinely "controvert[ing]" all of petitioner's factual allegations -- and arguing that the "defense team pursued this avenue" -- then the state may well be taking the position that notwithstanding the plain allegations of the Petition, defense counsel did indeed take these investigative steps.

If this is the state's position, it bears noting that there is no factual support for it at all. To the contrary, this position ignores defense counsel's written new trial motion which sought a new trial based on the Aponte tip because counsel had "recently

discovered new exculpatory evidence." (20 CT 6254.) It ignores defense counsel's on-the-record comments at the new trial motion making clear the Aponte tip was new to him. (121 RT 21775-21777.) It ignores counsel's admission at the new trial motion that although the Aponte tip had indeed been disclosed to the defense during discovery, counsel did not pursue it because he simply "did not realize the significance of that name until probably two weeks before the end of trial . . . ." (121 RT 21775.)[21]

But even putting aside the absence of any support in the record for this position, if this indeed is what the state is arguing, then summary dismissal is patently improper. As noted numerous times above, in assessing whether a prima facie case has been pled this Court must assume the truth of petitioner's allegations, not simply disregard them. And here the Petition specifically alleges defense counsel was *not* aware of, and failed to pursue, the Aponte tip prior to trial. It alleges he did *not* interview Aponte until after trial, he did *not* obtain the tape recording, and he did *not* interview the Tenbrink brothers prior to trial. (Petition 211.)

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[21] The state criticizes petitioner for submitting a declaration from defense counsel with the habeas petition which addresses counsel's other failures, but does not address the Aponte issue. (IR 133.) The criticism is distinctly out of place; as the state itself recognizes, the Aponte issue was initially litigated in a new trial motion. (IR 129-132.) As already noted, during the course of that open-court session defense counsel made clear he was unaware of the Aponte tip. (121 RT 21775-21777.) The state does not explain why counsel should have to reiterate in a declaration what he already said in open court.

Of course, if the state is not taking the position that counsel *did* investigate the Aponte tip, the only other possibility is that the state is arguing counsel did *not* do this investigation because he made a reasonable decision not to do so. This may be what the state means when it says defense counsel could reasonably have decided not to call Todd as a witness because he believed the burglary occurred on December 26. (IR 133.)

Petitioner will start with a point of agreement. In theory at least if defense counsel reasonably believed the burglary occurred on December 26, he could decide not to investigate the Aponte tip. But the problem with the state's position is not theoretical -- it is real. On the record of this case no reasonable lawyer could believe the burglary occurred on December 26. In fact, not only does the record itself strongly suggest the burglary occurred on December 24, but the record affirmatively shows this is precisely what defense counsel believed.

The record itself is clear. Aside from the self-serving statements given by Todd and Pearce themselves, there is no evidence at all on which to base a reasonable belief that the burglary occurred on December 26. And those statements themselves are suspect; if Laci did see Todd and Pearce break into the Medina house, they had every reason in the world to lie to police and say they were nowhere near the Medina home on December 24.

Moreover, aside from the obvious motive Todd and Pearce had to lie, the circumstances surrounding the statements they made were distinctly curious. As discussed above, upon their arrest, Todd and Pearce both immediately agreed to tell police anything they wanted to know about the burglary. (107 RT 20016; 108 RT 20055.) And then, without even being asked a question, Todd added the had "nothing to do with . . . the missing woman with the baby." (107 RT 20014, 20016.)

Balanced against the word of two burglars with every reason to lie, and who both "independently" evidenced an extremely unusual willingness to cooperate with police in talking about the burglary, is the evidence showing the burglary occurred on December 24. Eyewitness Diane Jackson -- who had no motive to lie -- specifically told police on December 27 that she saw burglars taking a safe from the Medina residence on December 24. (99 RT 18562-18563.) She confirmed this hours later in a second interview with police. (99 RT 18564-18565.) And the Medinas -- who also had no motive to lie -- later confirmed that Jackson was entirely correct -- their safe had been stolen. (49 RT 9607.)

Necessarily, then, the state's theory is that although Jackson correctly identified what the burglars stole, she incorrectly identified the date. This too is odd; after all, Jackson gave this information to police (twice) on December 27. It seems very unlikely that if the burglary she saw really did occur only the day before -- on December 26 -- , Jackson would get the date wrong by so many days. It seems equally unlikely that had the

burglary really occurred on December 26 (as the state theorizes), Jackson would neither have noticed the extraordinary media presence on Covena that day nor commented on it in her report to police.

But that is exactly what the state is now suggesting was reasonable. According to the state, rather than suspecting burglars with every reason to lie, defense counsel could reasonably have believed that Jackson -- who had no reason to lie -- was wrong when she told police on December 27 that the burglary occurred three days earlier rather than the day before.

This is not all. Although the prosecutor was apparently willing to subscribe to such a theory, the state's own witnesses entirely undercut it. Laci went missing on December 24; the story blew up in the media the next day. Susan Medina testified that when she returned from her trip to Los Angeles on December 26, there was so much media presence on the street that it was blocked off. (49 RT 9597-9598, 9607.) Sharon Rocha -- Laci's mother -- testified that when she arrived at 523 Covena on December 26, she saw media in the front yard. (46 RT 9018.) Detective Grogan admitted that at 8:00 on the morning of December 26 Scott called him on his cell phone to tell him there were already news crews in the front of his house demanding a statement. (96 RT 18160.) And prosecution witness Brent Rocha -- Laci's brother -- confirmed that by December 26 "the media was camped all the way around the [front of] the Covena house." (47 RT 9248.)

Thus, if the burglary occurred on December 26, it would have had to happen in full view of the media.

Finally, to the extent there was even the slightest doubt as to the date on which the burglary occurred, the Aponte tip itself resolves it. If indeed "Laci witnessed [Todd] breaking in" to the Medina home, the burglary had to occur on December 24, *before* her disappearance, not two days *after* it. In short, in light of the record as a whole, no reasonable defense lawyer would (1) assume the burglary occurred on December 26 and (2) therefore decide not to pursue the Aponte tip.

Fortunately, however, these is no need to guess whether defense counsel decided not to investigate the Aponte tip because he believed the burglary occurred on December 26. At trial defense counsel spent several pages of his closing argument explaining to jurors his view that the burglary occurred on December 24. (110 RT 20480-20482.) In other words, to the extent the state now argues that counsel reasonably decided not even to investigate the Aponte tip because he believed the burglary was on December 26, the state is once again improperly seeking to defend a tactical judgment that defense counsel never made. (*See Wiggins v. Smith*, *supra*, 539 U.S. at p. 526 [courts and the state alike must avoid substituting a "post hoc rationalization of counsel's conduct."] *Accord Richards v. Quarterman*, *supra*, 566 F.3d at p. 564; *Keith v. Mitchell*, *supra*, 466 F.3d at

pp. 543-544; *Dugas v. Coplan*, *supra*, 428 F.3d at pp. 333-334; *Smith v. Mullin*, *supra*, 379 F.3d at p. 929.)

There is no reasonable explanation for counsel to have been unaware of the Aponte tip and to have failed to even investigate it. Petitioner has established a prima facie case of deficient performance.[22]

C. Given The Importance Of Showing Laci Was Alive When Scott Was On His Way To The Berkeley Marina, Petitioner Has Established A Prima Facie Case Of Prejudice.

The state argues that petitioner has not pled a prima facie case as to prejudice for two reasons. (IR 133-136.) First, the state argues in a single sentence that "the credible evidence adduced at trial established that the burglary occurred on the morning of December 26." (IR 133.) The state cites 107 RT 20017-20018 to support its reference to "the credible evidence" which establishes this point.

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[22] In its discussion of the performance prong the state adds that counsel could reasonably have decided not to investigate the Aponte tip because he reasonably believed "Todd did not encounter Laci Peterson regardless of when he burglarized the Medina's residence." (IR 133.) But the state never identifies what evidence would permit anyone -- much less reasonable counsel -- to reach such a conclusion.

The state's conclusion is certainly not supported by the Aponte tip itself. According to Lt. Aponte's recollection, "Steve Todd said Laci witnessed him breaking in." (Petition Exhibit 28.) In light of the clarity of this information, the state's squarely contrary suggestion that "Todd did not encounter Laci Peterson regardless of when he burglarized the Medina's residence" is made not by relying on the record, but by ignoring it altogether.

The pages the state relies on to support its reference to "the credible evidence" consist entirely of Officer Hicks recounting that Steven Todd said the burglary occurred on December 26. (107 RT 20017-20018.) That is it -- the word of an admitted burglar who has every reason to lie. In the state's reference to "the credible evidence" there is no discussion at all about the testimony of Diane Jackson, or the curious statements made by Steve Todd to police, or the curious statement made by Glenn Pearce to police, or the testimony of Sharon Rocha, Brent Rocha, Detective Grogan and Susan Medina that the media had already descended on Covena Avenue by December 26. The fact that Todd assured police he had "nothing to do with the missing woman with the baby" does not as a matter of law render harmless defense counsel's failure to investigate the Aponte tip.

The state next observes that Todd said he saw mail in the Medina's mail box. (IR 133.) According to the state, this means that even if the burglary occurred on December 24, it did not occur until after postman Graybill delivered the mail between 10:35 and 10:50. (IR 133.) Noting Diane Jackson's confirming testimony that the burglary occurred at 11:40 that morning, the state correctly reasons that taken together, all this evidence means the burglary occurred after Karen Servas arrived home that morning from shopping and put Mckenzi in yard and closed the gate at 10:18. (IR 133-134.)

This is all true. Every word of it. But contrary to the state's mystifying conclusion, this does not show why counsel's failure to investigate the Aponte tip was *harmless*, it shows why it was *prejudicial*.

The state concludes from these facts that any failure to investigate the Aponte tip was harmless because -- in light of Karen Servas's testimony that she put Mckenzi back in the yard at 10:18 -- Laci had already disappeared and could not therefore have seen Steve Todd burglarize the Medina home. (IR 134.) This conclusion depends entirely on an inference that Laci had to have already walked Mckenzi -- and disappeared -- by 10:18.

The state's conclusion is off by a full 180 degrees. The only way the state can adopt the inference that Laci disappeared by 10:18 is by entirely ignoring the December 27 statement of Russell Graybill.

As discussed in great detail in the argument relating to Claim 9 above, Graybill's December 27 statement to police shows he delivered mail to the Petersons between 10:35 and 10:50 on the morning of December 24. (Petition Exhibit 3.) This was well after Servas had put Mckenzi in the yard and closed the gate at 10:18. Significantly, at the time Graybill delivered the mail, the gate to the Peterson's yard was open and Mckenzi was not at the house. (Petition Exhibit 3.) This means that someone opened the gate, and

took Mckenzi for a walk, *after* Karen Servas put Mckenzi back in the yard and closed the gate at 10:18. In short, the fact that the burglary occurred -- and Laci saw burglar Steve Todd -- *after* Karen Servas put the dog back shows that Steve Todd saw Laci alive after Scott left for the marina that morning. If that is true, of course, Scott is indeed "stone cold innocent" as defense counsel told jurors in opening statements. Petitioner has pled a prima facie case and an Order to Show Cause should issue as to this claim. (*See* Exhibit 50 [Cardosi Declaration] at HCP-000986-087 ["We did not hear evidence of a monitored telephone call to a Modesto prisoner saying that the man arrested for the burglary had told someone that Laci Peterson had seen him burglarizing the house. Any evidence that Laci was still alive when Scott was already at the marina would have been important to me as a juror."].)[23]

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[23] The state notes that a declaration from Adam Tenbrink "contains inadmissible hearsay and is, therefore, not a basis for granting relief." (IR 134.) The state again misapprehends the procedural posture of this case.

The Court is not now deciding whether to grant relief. It is deciding whether petitioner has pled a prima facie case. According to Officer Aponte, "Steve Todd said Laci witnessed him breaking in." (Petition Exhibit 28.) Given that Scott left for his warehouse, and then the marina, at 10:08 -- and the state's concession that if the burglary occurred on December 24 it occurred after 10:18 -- there should no longer be any doubt that a prima facie case of prejudice has been established. It is worth noting that in its entire 150 page Informal Response, the state never disputes that if Laci saw Todd breaking into the Medina home after 10:18, Scott is innocent.

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CONCLUSION

"[M]istakes in the criminal justice system are sometimes made." (*In re Sanders*, *supra*, 21 Cal.4th at p. 703.) For all the reasons set forth above and in the Petition and Supporting Memorandum, petitioner has pled a prima facie case for relief. To ensure that Mr. Peterson is not executed for a crime he did not commit an Order to Show Cause should issue.[24]

Dated: August 7. 2018

Respectfully submitted,

CLIFF GARDNER
LAZULI WHITT

HABEAS CORPUS RESOURCE CENTER
FRED RENFROE
ANDRAS FARKAS

/s/ Cliff Gardner
By: Cliff Gardner
Attorneys for Petitioner

[24] In his Petition, Mr. Peterson also raised a number of claims contending California's death penalty scheme is unconstitutional. (Petition 219-276.) The state argues that no prima facie case has been pled as to these claims. (IR 137-148.) Mr. Peterson considers the prima facie case inquiry as to these issues fully joined by the current pleadings on file with the Court. Accordingly no further discussion of those issues is required.

WORD COUNT CERTIFICATE

I certify that the accompanying Reply is double spaced, that a 13 point proportional font was used, and that there are 29,987 words in the Reply.

Dated: August 7, 2018 /s/ Cliff Gardner

Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 303 Second Street, San Francisco, CA 94107. I am not a party to this action.

On August 7, 2018, I served the within

REPLY TO INFORMAL RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

upon the parties named below by depositing a true copy in a United States mailbox in San Francisco, California, in a sealed envelope, postage prepaid, and addressed as follows:

Mr. Scott Peterson, V-72100
San Quentin State Prison
San Quentin, California 94974

Superior Court of Stanislaus County
800 11th Street
P.O. Box 3488
Modesto, California 95354

Office of the District Attorney
832 12th Street, Suite 300
Modesto, California 95354

and upon the parties named below by submitting an electronic copy through TrueFiling:

Donna Provenzano, Deputy Attorney General
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I declare under penalty of perjury that the foregoing is true. Executed on August 7, 2018, at San Francisco, California.

/s/
Nicholas Rapach