In the Supreme Court of the State of California

In re

VICENTE BENAVIDES FIGUEROA,

On Habeas Corpus.

CAPITAL CASE

Case No. S111336

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

INFORMAL RESPONSE TO REDLINED COPY OF CORRECTED AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

PROCEDURAL HISTORY

On December 13, 1991, the Kern County District Attorney filed an information charging petitioner, Vicente Figueroa Benavides, with the following: in count I, murder (Pen. Code, § 187)[1]; in count II, rape (§ 261(2)); in count III, lewd and lascivious conduct on a child under 14 years (§ 288, subd. (a)); in count IV, sodomy on a person under the age of 14, who was more than 10 years younger than petitioner (§ 286, subd. (c)); in count V, intentionally causing permanent disability or disfigurement (§ 205), and, in count VI, child endangerment (§ 273a(1)). It was further alleged in count I that petitioner committed three special circumstances, to wit: murder while engaged in the commission of rape, sodomy and lewd and lascivious acts (§ 190.2, subd. (a)(17)(iii)-(v)). It was also alleged that petitioner inflicted great bodily injury with respect to counts II, III, and IV (§ 12022.8), causing these offenses to be serious felonies within the meaning of section 1192.7, subdivision (c)(8). Counts II, III, and V were also alleged to be serious felonies (§ 1192.7, subd. (c)(3)). (1CT 253-258.) On December 20, 1991, petitioner pled not guilty to all counts, denied all allegations, and requested a jury trial. (1CT 259-260.)

After several continuances (1CT 263-266, 298-302; 2CT 303-304, 310-311, 318-319, 333-334, 340-341), the trial began on March 15, 1993. Prior to the beginning of trial, the prosecution gave notice that they intended to seek the death penalty. (2CT 323-325.) On March 17, 1993,

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[1] Unless otherwise designated, all statutory references are to the Penal Code.

the court dismissed count VI, alleging felony child endangerment, at the request of the prosecution before jury selection began. (1RT 154; 2CT 466-468.)

The prosecution began its presentation of guilt phase evidence on April 1, 1993, and concluded on April 12, 1993. (2CT 490, 508.)[2] The court dismissed count V pursuant to petitioner's motion under section 1118.1. (2CT 524.)

Petitioner presented his defense in the guilt phase from April 12, 1993, to April 14, 1993. (2CT 508, 516.) No rebuttal was presented. (2CT 516.)

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

The death penalty phase began on April 22, 1993, and was concluded by a jury recommendation of death on the same day. (3CT 786-787.) Sentencing was scheduled for May 20, 1993 (3CT 789), but was continued to June 11, 1993, at petitioner's request (3CT 800-806).

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

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[2] 2CT 509-511 relate to events which occurred before April 12, 1993. They are out of order.

custody (3CT 875).

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

On November 12, 2002, petitioner filed a Petition for Writ of Habeas Corpus and 22 volumes of exhibits (numbered 1-158). On July 15, 2003, respondent filed an Informal Response. On February 20, 2004, petitioner filed an Informal Reply and volume 23 of exhibits (numbered 159-178).

On November 30, 2004, petitioner filed Supplemental Allegations and exhibits 179-181 in Support of the Petition.

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

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

> be organized in a manner that categorizes and identifies claims as follows: (1) Claims that were raised in the original petition filed on November 12, 2002, ("original petition") and that are reasserted in the amended petition without any modifications either to the allegations in the original claim or any supporting exhibits referenced in the original claim, excluding stylistic or editorial changes that do not change the asserted legal basis for relief; (2) Claims that were raised in the original petition and that are reasserted in the amended petition without legal change to the asserted legal basis for relief but with modifications to either the allegations in the original claim or any supporting exhibits referenced in the original claim as a result of HCRC's investigation of Ms. Culhane's allegedly fraudulent work product; and (3) Claims for which the asserted legal basis for relief was not raised in the original petition and that are asserted in the amended petition for the first time as a result of HCRC's investigation of Ms. Culhane's allegedly fraudulent work product.

On September 4, 2007, petitioner filed an amended habeas petition. On November 8, 2007, respondent filed a request for a more definite statement of the modifications made to the amended state habeas petition, which petitioner subsequently opposed. On January 23, 2008, this Court granted respondent's request for a more definite statement of modifications and ordered petitioner to file by April 22, 2008, a corrected amended petition that was identical to the original petition except for changes made necessary by the fraudulent investigation of Kathleen Culhane. This Court further directed petitioner to seek permission to file a supplemental petition if he wished to present additional material unrelated to the fraudulent investigation of Kathleen Culhane to supplement an existing claim.

On April 22, 2008, petitioner filed a Corrected Amended Petition for Writ of Habeas Corpus and a Red Lined Copy of the Corrected Amended Petition for Writ of Habeas Corpus (hereinafter referenced as "RCCAP").[3] On April 24, 2008, respondent received two boxes of exhibits (exhibits 1-139, totaling 6,427 pages) that were apparently filed in connection with the RCCAP and corrected amended habeas petition.

On April 22, 2008, petitioner also filed a motion to file a Supplemental Petition for Writ of Habeas Corpus. On June 6, 2008, respondent filed an opposition to petitioner's supplemental petition. On June 20, 2008, this Court ruled that petitioner's motion was denied "without prejudice to the filing of a reply to the Informal response to be filed by respondent in this matter." This Court further noted:

> the reply may include the allegations and exhibits contained in the February 20, 2004, reply to the informal response to the original petition for writ of habeas corpus.

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[3] All references will be to the RCCAP, from which respondent is working (instead of to the corrected amended petition).

Except as herein expressly admitted, respondent denies each and every allegation of the RCCAP and specifically denies that any of petitioner's statutory, regulatory, or constitutional rights are being or have been violated in any way.

Petitioner also requests this Court to take judicial notice of the appellate record in this case. (RCCAP at p. 17.) Respondent has no objection. (*In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35.)

STATEMENT OF FACTS

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

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

Shortly thereafter, Christina asked for permission to go play with her friend Maribel at the playground in the apartment complex. (11RT 2181.) Petitioner told her to come back in 30 minutes. (11RT 2182.) Christina left the apartment and closed the front door behind her. (11RT 2183.) When Christina left the apartment, Consuelo was coloring at the kitchen table (11RT 2182-2183) and petitioner was cutting onions to make himself some eggs for dinner (11RT 2187).

Christina reported that petitioner came outside about 15 minutes after she left and asked her to come home. (11RT 2182.)[4] Christina described petitioner as nervous and upset. (11RT 2186.) Christina followed petitioner back to the apartment into her mother's bedroom. (11RT 2183.) Consuelo had a bruise on her forehead and dry blood under her nose. (11RT 2184.) Petitioner held Consuelo and put rubbing alcohol on her forehead. (11RT 2184-2185.) Consuelo appeared to be wearing the same clothing she had on when Christina left the apartment. (11RT 2188.) Christina called her mother at work at 7:20 p.m. (11RT 2184; 13RT 2545.)

Estella drove home and found petitioner in their bedroom holding Consuelo. (13RT 2547-2548.) Estella testified that petitioner first told her Consuelo hit her forehead (which was bruised) on the door. (13RT 2548, 2589.) Later, he said he found Consuelo outside the door, lying on the sidewalk, vomiting, with blood on her nose. Estella remembered petitioner telling her he got Consuelo inside but could not recall if he said he sent her to her room or he put her in her room. (13RT 2548.)[5]

Estella drove Consuelo to DRMC, accompanied by petitioner and Christina. On the way to DRMC, petitioner told Estella to drive slowly. (11RT 2186.)

Consuelo was taken to DRMC, unconscious, with a report of a head injury. (12RT 2451-2452.) Later, that night she was transferred to Kern Medical Center (hereinafter KMC) for more intensive care because she had extremely low blood pressure, a very rapid heart rate, and her abdomen was distending rapidly, as if there were internal bleeding. (12RT 2452.)

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

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

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

Dr. Jack Bloch, Chief of Surgery at KMC, operated on Consuelo. He removed fresh blood from the abdomen and found a hematoma in the colon. (12RT 2453, 2456.) Part of Consuelo's duodenum (bowel) was broken in half over the spleen and her pancreas was broken in half over the spine. (12RT 2453-2454, 2456.) After the surgery, he contacted Estella and petitioner. Estella had a flat affect and "bizarre lack of concern," which was very unusual in his experience. (12RT 2464.) Petitioner refused to give his last name and exhibited little concern. (12RT 2464.)

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

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

backward. (10RT 2071.)

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

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

On November 25, 1991, Consuelo died at UCLA Medical Center as a result of abdominal injuries. (12RT 2356, 2369.) The next day, forensic pathologist Dr. James Dibdin conducted an autopsy of the 21-month-old

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

Estella Medina was very protective of petitioner. At trial, outside the presence of the jury, the court found her to be hostile toward the prosecution. (13RT 2571.) Estella testified that she and petitioner had sexual intercourse the night of November 16, 1991, and they used a towel to clean up afterwards. She claimed she had her period at the time. (13RT 2608-2609.) Estella allegedly did not recall her December 11, 1991, statement to District Attorney Investigator Gregg Bresson that she did not

have her period on November 16. (13RT 2643.)

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

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

Estella's loyalty to petitioner was also evidenced by her failure to immediately contact law enforcement about a conversation she had with Christina on May 22, 1992. Christina told Estella that once, when petitioner watched her and Consuelo, petitioner went into their bedroom at night, took Consuelo, and kept her in his bedroom with the door locked all night. (13RT 2561.) Estella did not report this until July 9, 1992, when she was interviewed by Ray Lopez, an Investigator with the Kern County District Attorney's Office. (13RT 2563.) Estella claimed that she telephoned the prosecutor to report it earlier, but he did not answer and she did not like to leave messages, so she allegedly hung up. (13RT 2564.)

Estella also claimed to have reported what Christina told her to a social worker but subsequently admitted she had not. (13RT 2564.)

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

A. Consuelo's Previous Injuries

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

On Halloween of 1991, Consuelo was physically ill when Diana Alejandro, her aunt, took care of her. Diana's children took Christina and Consuelo trick-or-treating at Diana's apartment complex. Consuelo was not feeling well and had a fever. Thirty minutes after the children left to go trick-or-treating, Consuelo returned to Diana's apartment crying. (14RT 2731.) Diana held Consuelo in her arms and tried to comfort her, but Consuelo repeatedly pushed her away. (14RT 2732.) Diana called Estella and asked what was wrong. Estella said that Consuelo had not been feeling well for the last couple of weeks. Consuelo had been throwing up. Estella planned to take her to Mexico for treatment when she got some time off. Diana suggested that Estella not delay and take Consuelo to a doctor's office right away, but Estella did not respond. (14RT 2733.)

Estella told Investigator Lopez that Consuelo had started behaving strangely in October of 1991. (13RT 2585.) Consuelo was not eating very well. She did not laugh or play. She acted sad and just laid in bed. (13RT

2584.) At trial, Estella claimed she thought Consuelo's behavior could be attributed to teething, so she did not take her to a doctor. (13RT 2586.)

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

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

B. Petitioner's Varying Excuses For Consuelo's Injuries

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

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

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

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

On the afternoon of November 18, 1991, after petitioner was arrested, he waived his *Miranda*[6] rights and gave a tape recorded statement to Detective Valdez in Spanish at the police department. (14RT 2752-2753.) During the interview, petitioner was quiet and failed to make eye contact. His head was bowed down, and he stared at the floor. (14RT 2757-2758.)

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[6] *Miranda v. Arizona* (1966) 384 U.S. 436

His statements were consistent with his previous statement, except he added the following: Consuelo had only been gone one minute between the time he heard the door close and the time he found Consuelo lying on her back outside the front door (15RT 3010), after he brought Consuelo into the house, he cleaned her up on his bed with toilet paper and a towel (15RT 3038). In addition, Detective Valdez asked when petitioner cleaned up the vomit outside the front door. Petitioner initially claimed he did not remember, but later said it was before he summoned Christina (15RT 3038).

C. Evidence From The Crime Scene

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

Petitioner's story that he found Consuelo bleeding from the nose and vomiting outside the front doorway and that he cleaned up the area, though he could not remember when, was also inconsistent with the physical evidence at the crime scene. (14RT 2748, 2751.) On November 20, 1991, criminalist Jeanne Spencer of the Kern County Regional Crime Lab did not find any blood or vomit outside the front doorway to apartment 155 or any evidence that the area had been cleaned up. (11RT 2286, 2288.)[7] She did

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[7] Detective Nacua went to apartment 155 several times before Spencer did on November 20, 1991. On November 18, 1991, at 2:50 a.m., the apartment manager let him into the apartment so he could do a welfare check to look for Christina. (12RT 2422-2423, 2436.) Later that day at 11:50 a.m., Estella let him into the apartment when petitioner was not there. (12RT 2438.) He found a towel with blood in the master bathroom, uncooked eggs in a bowl on the kitchen counter, a coloring book on the kitchen table, a tissue with vomit in the kitchen garbage can, and some

(continued...)

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

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

Spencer obtained blood samples from petitioner, Estella and Consuelo to compare to the blood stains on the towel.[8] Consuelo and petitioner had blood type O, and Estella had an A blood type. (11RT 2296.) Spencer identified Consuelo's blood on the towel. (11RT 2298-2299.) However, Spencer was unable to determine if the blood that was mixed with the semen sample was from Consuelo or Estella. (11RT 2299.)

On December 11, 1991, Estella told District Attorney Investigator Bresson that she did not have her period on November 16, 1991. (13RT 2643.) At trial, she testified she had sexual intercourse with petitioner on

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(...continued)
soiled Pampers (without any blood stains) in the garbage can. (12RT 2439.) He also found tissue with blood on it in the bathroom. (12RT 2441.)

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

November 16, 1991, had her period at the time, and used a towel to clean up. (13RT 2608-2609.)

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

D. Petitioner's Clothing And Consuelo's Clothing

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

Likewise, Spencer examined the clothing Consuelo was wearing when she was taken to DRMC. Estella testified that a doctor in the emergency room at DRMC directed her to undress Consuelo. As she was taking off Consuelo's disposable diaper, the doctor told her to leave the diaper on. (13RT 2558.) Estella threw Consuelo's clothing onto the hospital floor. (13RT 2627.) Estella's brother, Javier Alejandro, picked up Consuelo's clothing in a plastic bag from hospital personnel at DRMC. (12RT 2424, 2479.) Alejandro took the bag of clothing home. On November 18, 1991, at 9:05 a.m., Detective Jeff Nacua of the Delano Police Department picked up the bag of clothing from Alejandro. (12RT 2424, 2480.)

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

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

E. Evidence Rebutting A Defense That Consuelo Was Hit By A Car

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

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

clothing, her injuries and his review of the apartment area. (15RT 2930.)

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

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

Finally, Esmay described the location of the hypothetical car accident and its ramifications. The area around apartment 155 is paved, with the exception of some grass around the front of the apartment (15RT 2932), the area above the carports, and between the sidewalk and building (15RT 2934). So hypothetically, in order for Consuelo to have been struck out in the actual pathway of a car and land on a soft area, like grass, she would have to have been thrown up and over the carport or thrown under the carport onto the grass. Esmay explained that neither scenario could have occurred in this case. When one is hit and thrown by a car, his/her body will stop before the car does, even if the driver brakes. Had Consuelo been thrown in a car accident, Esmay would expect the car to have ended up in the same position as Consuelo's body. (15RT 2935.) Hence, Consuelo could not have been struck and thrown onto the grass by any stretch of the imagination. (15RT 2936.) Esmay noted that the parking area is supported

by a pole, which is next to the sidewalk. (15RT 2945.) He then considered another possible scenario: a backing-up type collision. He also rejected that scenario as unfeasible because the pole was not damaged, and it would have been bent had someone backed into a pole when a child was against it. (15RT 2946.) He would also have expected to see Consuelo underneath the vehicle when it stopped because she would stop more quickly than the car. (15RT 2949.) Assuming a car had backed into Consuelo and knocked her into a pole, he would expect Consuelo to have sustained minor to moderate injuries and her clothing would have been damaged, showing where the impact occurred. (15RT 2952, 2955.) Had a car pressed Consuelo against the pole, Esmay would also expect to see contusions and abrasions and other things in the area where the car touched the child. (15RT 2952.)

Estella's neighbors did not hear Consuelo scream or hear a car accident on November 17, 1991. Elena Carillo Alavarez and Javier Carillo Hernandez lived next door in apartment 154. (11RT 2225-2226, 2254.) They went to the grocery store between 6:00 p.m. and 7:00 p.m. (11RT 2256.) When they returned, they carried the groceries into the apartment. (11RT 2256.) By 7:00 p.m., they were at home watching television. (11RT 2255.) Elena testified that she would have heard a child screaming outside her apartment window, had that occurred. (11RT 2228.) They did not hear anything outside or from apartment 155. (11RT 2234, 2255.) Yvone Vasquez Figueroa lived next door in apartment 156. (11RT 2264.) She was home sick that day. (11RT 2265.) She did not hear a child scream or detect any other noise coming from apartment 155. (11RT 2268.)

F. Defense

Nat Baumer, Director of the Emergency Room department at Ventura County Medical Center, testified on petitioner's behalf. (14RT 2821.) He hypothesized that Consuelo's head, chest, and abdominal injuries could have been sustained in a car accident, assuming her stomach hit the

bumper. (14RT 2859.) However, he was unable to provide an explanation for her rib injuries under this scenario, and deferred giving an opinion on that to Dr. Lovell. (14RT 2836.) He admitted he did not have any expertise as to whether Consuelo would have fallen to the ground if hit by a car. (14RT 2860.) He also acknowledged that Consuelo would not have been able to get up and walk to her front door under this hypothetical, given the nature and extent of her injuries. (14RT 2864.) Baumer also conceded that Consuelo's injuries could not have been caused by her running into a door. (14RT 2865.)

Without saying that Consuelo was not sodomized, Baumer testified he was unable to reach a conclusion on that issue because the doctors did not conduct a chemical test to confirm the presence of semen. (14RT 2829.) When asked if profuse bleeding from the anus and vagina would impede such testing, he said he did not have expertise in that area and would have done the test anyway. (14RT 2855.) He also placed significance on Dr. Shaw's failure to detect lacerations during the anoscopy (14RT 2852) and on a report from a nurse at DRMC that indicated Consuelo had a "clean diaper" (14RT 2877), though he acknowledged poor training or the nature of the situation could have led the nurse to make a mistake in her notes (14RT 2880). Ultimately, Baumer concluded that the most likely scenario to explain Consuelo's injuries is that she was "abused by someone in a rage." (14RT 2865.)

Petitioner testified at trial. Though he rented apartment 155 with Estella, he claimed he only lived there on her days off. (15RT 2983-2984.) He was not present when Consuelo broke her arm. (15RT 2985.) He was not present when Consuelo hit her head either; he was in the bedroom. (15RT 3046.) He denied ever taking Consuelo into his bedroom and closing the door. (15RT 2986.) He did not know how Consuelo incurred broken ribs or vaginal and anal injuries prior to November 17, 1991.

Petitioner claimed he had not stayed with them since April or May of 1991. (15RT 3054.) Petitioner had watched Estella's daughters on prior occasions, but that was in April or May of 1991. (15RT 3044.) November 17, 1991, was the first date since then that he babysat them (15RT 2985), and that was the only time he was alone with Consuelo (15RT 3027). Estella was around the other times he had contact with Consuelo. (*Ibid.*) Petitioner did not harm or hit Consuelo on November 17, 1991, or any time before that. (15RT 3027, 3028.)

Petitioner's testimony about the events of November 17, 1991, varied from his previous statements in several respects. At trial, he said he "lost Consuelo" after Christina left the apartment. (15RT 3009.) He heard the door close when Christina left, but when he threw egg shells into the garbage, he allegedly noticed that the front door was open. (15RT 3048.) He professed not to have any knowledge about how much time elapsed between the time he left the kitchen and found Consuelo outside. (15RT 3010.) "After a while" he did not see her, and he found her outside. (15RT 3011.) When he found her, Consuelo was making sounds as if she was trying to say something. (15RT 3037.) Petitioner picked Consuelo up, with her face up. He could not explain how he got vomit on the lower half of his pant legs. (15RT 3034.) He took Consuelo inside and laid her on the sofa in the living room. (15RT 3014, 3034.) Then, he went outside to call Christina, but she was on her way back. (15RT 3034.) He returned to the house, picked Consuelo up off the sofa and took her to the bedroom and turned on the fan to give her some air. (15RT 3016.) Petitioner used toilet paper to clean the blood off of her. (15RT 3016-3017.) Petitioner claimed Christina used a towel to clean Consuelo, which was inconsistent with his previous statement that he used a towel to clean her. (15RT 3018.) Finally, he denied telling the detectives, Christina or Estella that Consuelo ran into a door, as he did not see her run into a door. (15RT 3019.) He maintained

that he initially told Detective Valdez he did not know what happened to her, whether she fell off a ladder or was hit by a car. (*Ibid.*) He claimed the audio tape did not record his suggestion that Consuelo was hit by a car because the detectives allegedly turned the tape off at some points during the interview. (15RT 3049.)

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

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

Four witnesses testified that petitioner is honest and non-violent. (16RT 3275, 3281-3282, 3292-3293; 17RT 3376.) Antonio Delatorre met petitioner in elementary school in Mexico. (16RT 3272-3273.) Delatorre moved to the United States 18 years ago. Since then, he had only seen petitioner occasionally when Duran went home to Mexico for vacation. (16RT 3273-3274.) The most recent contact he had with petitioner was five years ago. (16RT 3276.) Petitioner's second cousin, Guadalupe Benavides, had known petitioner over 40 years but had not been in contact with him in eight years. (16RT 3281.) When Guadalupe's daughter was

six or seven years old, petitioner had contact with her. She never knew petitioner to have behaved inappropriately with her. (16RT 3282-3283.) Petitioner's nephew, Hector Figueroa, visited petitioner every three to four months during the past four years. (16RT 3292.) Before petitioner was incarcerated, petitioner saw Figueroa's two sons (then two years old and an infant) at family reunions. Figueroa never saw petitioner do anything wrong with them. (16RT 3295.) Petitioner told Figueroa he found Consuelo on the street and that she had been thrown in a car accident. (16RT 3296.) Finally, petitioner's cousin, Armando Benavides, grew up with petitioner and had known him 20 years. (17RT 3375.)

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

Dr. Ann Tait, an emergency medicine specialist at DRMC, treated Consuelo the night of November 17, 1991. (17RT 3311-3313.) She did not remember if Consuelo had a diaper on or off, but stated that it would have been taken off by the nurses. (17RT 3315.) She did not know what happened to Consuelo's diaper because she initially treated Consuelo for a head injury and later suspected physical abuse, before Consuelo was transferred to KMC. (17RT 3319.) Given a choice between treating a patient and preserving potential evidence of child abuse, she emphasizes the patient's care. (17RT 3333.) She did not conduct a vaginal or anal exam of

Consuelo. (17RT 3327.) She did not recall whether Consuelo was bleeding abdominally or not because there is always blood in the emergency room. (17RT 3320.) She did not tell Estella to remove Consuelo's clothing or to leave her diaper on. (17RT 3328.)

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

G. Rebuttal

Dr. Anthony Shaw, Chief of Pediatric Surgery at UCLA Medical Center, performed surgery on Consuelo on November 20, 1991, and on November 23, 1991. (16RT 3157, 3159, 3183.) The first surgery was for exploratory purposes. He feared she would not survive unless he found something inside her abdomen that he could fix to reverse her condition. (16RT 3162.) He performed an anoscopy at the conclusion of the surgery. He did not see tearing of the anus. (*Ibid.*) However, it would not surprise him to not have lacerations present in a child who had been anally abused, depending on the size of the object used and the force applied. (16RT 3189.) Had the lacerations been superficial, they could have also been

effaced by the swelling in the area. (16RT 3163.) The second surgery was to evacuate the blood clotting and flow of blood in the abdominal area. (16RT 3183.) He did not find anything in Consuelo's medical records that was inconsistent with her having been sexually molested. (16RT 3163.)

H. Evidence At The Penalty Phase

Consuelo's aunt, Diana Alejandro, testified about the effect of Consuelo's death on her family. (19RT 3741.) She stated that her older sister (Dehlia Alejandro Salinas) had a nervous breakdown (*ibid.*)[9] and that her youngest daughter still has nightmares (19RT 3742).

Consuelo's cousin, Darlene Salinas, testified that Consuelo's death affected her four-year-old daughter and eight-year-old daughter. Her daughters spent a lot of time with Consuelo. (19RT 3743.) They affectionately referred to Consuelo by the nickname "Chiquita" because she was so small and petite. Consuelo was a joy to be around. Her family regrets not being able to see her ride a bicycle, or graduate from Head Start. Although she is gone, they will remember her every day. (19RT 3744.)

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

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

mother bear reading a bedtime story to a bear cub in bed reminded her of Consuelo because she used to read to her every night before they went to bed. (19RT 3746-3747.)

I. Defense

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

Delfino Trigo worked in the fields with petitioner as a seasonal farm worker between 1986 or 1987 and 1991. (19RT 3761-3762.) Petitioner was a good worker and never was absent from his job. (19RT 3762.) Petitioner was also a cooperative worker and Trigo never knew petitioner to be violent. (19RT 3763.) Having observed petitioner in both a work and social setting, Trigo believed petitioner was a good person. (19RT 3763.)

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

PRELIMINARY STATEMENT

A habeas corpus proceeding is a collateral attack upon a criminal judgment which, because of societal interest in the finality of judgments, is presumed to be valid. (*People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark, supra*, 5 Cal.4th at p. 764; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) Indeed, this Court has recognized the extraordinary nature of

habeas corpus relief from a judgment that is presumed valid and has recognized the importance of the finality of state court judgments and the state's interest in the prompt implementation of its laws. (*In re Harris* (1993) 5 Cal.4th 813, 831; *In re Clark*, *supra*, 5 Cal.4th at p. 764.)

It is the petitioner's burden in a habeas corpus proceeding to allege and prove all facts upon which he relies to overturn the judgment. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *In re Dixon* (1953) 41 Cal.2d 756, 760; accord *In re Bower* (1985) 38 Cal.3d 865, 872.)

> The petition should both (i) state fully and with particularity the facts on which relief is sought [citation] as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations.

(*People v. Duvall*, *supra*; *In re Harris*, *supra*, 5 Cal.4th at p. 827, fn. 5; *In re Clark*, *supra*, 5 Cal.4th at p. 781, fn. 16.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*People v. Karis* (1988) 46 Cal.3d 612, 656.) If the petition does not state a prima facie case for relief, it should be dismissed. (*Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347; *In re Swain* (1949) 34 Cal.2d 300, 303-304.)

> For purposes of collateral attacks, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.

(*People v. Duvall*, *supra*, 9 Cal.4th at p. 474, quoting *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1260, emphasis in original.)

The RCCAP should be dismissed. Petitioner asserted claims that either were or should have been raised on appeal. Moreover, as will be discussed in addressing each claim infra, petitioner has failed to state fully and with particularity sufficient facts which, if true, entitle him to relief and

to provide all reasonably available documentary evidence.

ARGUMENT

I. THE RCCAP IS PROCEDURALLY DEFECTIVE

To the extent that an individual claim in the RCCAP is procedurally defective, respondent will address that deficiency when responding to that claim. However, there are two habeas rules which apply to most, if not all, claims in the instant petition: (1) a habeas corpus petition must be filed in a timely manner (*In re Robbins* (1998) 18 Cal.4th 770, 778), and (2) habeas corpus generally may not serve as a substitute for an appeal. (*In re Harris*, *supra*, 5 Cal.4th at p. 829.) Because these two rules impact all, or most, of the claims in the petition, respondent will address each as they apply to the petition as a whole.

The original petition in this case was filed on November 12, 2002, within six months after petitioner filed his reply brief on direct appeal on May 16, 2002. Thus, it is presumptively timely pursuant to the Supreme Court Policies Regarding Cases Arising from Judgments of Death, Timeliness Standard 1-1.1. However, to the extent claims in the RCCAP allege matters that should have been raised on appeal, those claims are procedurally barred.

A. Claims That Were Raised on Appeal or Should Have Been Raised on Appeal Are Not Cognizable on Habeas Review

As a general rule, the grounds for obtaining habeas corpus relief are quite limited. Habeas corpus provides an avenue of relief when the ordinary remedy of direct appeal is inadequate. (*In re Sanders* (1999) 21 Cal.4th 697, 703-704.) Habeas corpus is not a substitute for an appeal. Issues that can be raised on appeal must initially be so presented, and not

on habeas corpus.[10] (*In re Harris*, *supra*, 5 Cal.4th at pp. 826-827; *In re Waltreus* (1965) 62 Cal.2d 218, 225.) Likewise, issues that have been raised on appeal are not subject to being revisited on habeas corpus. (*In re Terry* (1971) 4 Cal.3d 911, 927.) Moreover, if a petitioner attempts to avoid this bar

> by relying upon an exhibit (in the form of a declaration or other information) from outside the appellate record, [this Court will] nevertheless apply the bar if the exhibit contains nothing of substance not already in the appellate record.

(*In re Robbins*, *supra*, 18 Cal.4th at p. 814, fn. 34.)

> [I]n the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment....

(*In re Harris*, *supra*, at p. 829 [emphasis in original]; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

The following claims in the RCCAP either were, or could have been, raised on appeal and are, therefore, not cognizable on habeas corpus: claims 1-6, 9-12, 14-20, and 22-25.

Furthermore, petitioner has failed to even attempt to establish that any of the above claims fall within one of the exceptions to the *Waltreus/Dixon* bar set forth in *In re Harris*, *supra*, 5 Cal.4th at pages 829-841. Given that petitioner has failed to even advance any exceptions to the *Dixon* bar as to claims clearly based on the record, this Court should apply the bars as to all

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[10] Claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record, are an exception to this rule. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) Defense counsel presented evidence that hospital personnel tried to catheterize Consuelo multiple times, including with a Foley catheter, and that this caused Consuelo's vaginal redness and swelling. (14RT 2870.)

claims listed above.[11]

II. PETITIONER HAS FAILED TO DEMONSTRATE THAT HE IS ENTITLED TO RELIEF ON ANY CLAIMS IN THE PETITION

A. Claim 1: The Evidence Presented by the State That Petitioner Caused Consuelo Verdugo's Injuries Was Proper

Petitioner raises 15 issues and numerous sub-issues in his argument for claim 1. Petitioner essentially makes two arguments: (1) Consuelo's autopsy was unreliable in violation of his right to a fair trial (RCCAP at pp. 24-25, 47; claims A1-A2), and (2) the evidence presented by the prosecution against him was false (*id.* at pp. 24-45, 47; claims A3-A13, A15).

Both claims are procedurally barred because petitioner did not raise them on appeal. Petitioner has the burden in this proceeding of alleging and proving all facts upon which he relies to overturn the judgment and of giving a satisfactory reason for not resorting to his remedy on appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1253 [defendant waived claim on appeal that his conviction was based on false testimony by failing to raise issue at trial.) In *Musselwhite*, this Court explained

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[11] A state's procedural requirements will only be respected by federal courts where the federal court can subsequently determine that a state court relied on procedural bars in denying relief. (See *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 12 [simple one-line statement by state court invoking state procedural bar is sufficient].) Also, by applying this state's procedural bars whenever appropriate, the federal courts will know that this Court is regularly and consistently applying the standards set forth in *Clark* and *Harris*, which is a prerequisite to federal courts respecting state procedural bars. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 587 [federal courts will not respect state procedural bar which is not consistently enforced by state courts].)

> Given the conflicting nature of the expert medical testimony presented to the jury on the issue, the trial judge was especially well-equipped to resolve the question of perjured expert testimony.

(*Id.* at p. 1253.) The same is true here.

Even if this Court were to address the merits of petitioner's claims, petitioner should lose. The autopsy conducted in this case did not compromise the fairness of petitioner's trial or violate his rights to due process, and the prosecution neither presented false evidence nor withhold material, exculpatory evidence from petitioner.

1. Petitioner was not denied a fair trial

Petitioner raises numerous complaints regarding the autopsy and the pathologist who conducted it. He contends the autopsy was allegedly unreliable and unprofessional, Dr. Dibdin allegedly intentionally delayed preparing a written autopsy report until after the preliminary hearing in order to manufacture a cause of death that would help convict petitioner of rape and sodomy, and the absence of a written autopsy report prior to the preliminary hearing allegedly prevented defense counsel from being able to cross-examine the pathologist regarding Consuelo's cause of death. (RCCAP at pp. 21-24, claims A1-A2.) While petitioner appears to try to couch these arguments as violative of his right to a fair trial, respondent submits they all challenge the trial court's admission of the autopsy findings and are not properly before this Court.

The Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. (*Spencer v. Texas* (1967) 385 U.S. 554, 563-564.) However, habeas corpus is not an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

In any event, petitioner's contention that Consuelo's autopsy was unreliable in violation of his right to a fair trial is unsupported. Petitioner's bald contention that the Kern County Coroner falsified evidence (RCCAP at p. 22) has no bearing on Dr. Dibdin's job performance and does not advance his claim. Neither does petitioner's unsupported allegation that Dr. Dibdin miscalculated the cause of death in an unrelated autopsy conducted three and a half years later on a seven-year-old male, Ricky Romero (RCCAP at p. 23). In 1995, the Nevada County Coroner, while seeking to terminate Dibdin's contract, alleged that Dibdin rendered "questionable findings" in the Romero case. Dibdin cited "[a]cute focal infarction of the small bowel due to torsion due to adhesions" as the cause of death but failed to consider a toxicology report, and another pathologist opined that Dibdin's cause of death was unsupported by the autopsy findings or the clinical course of the patient. (Pet.'s RCCAP Exh. 47 at pp. 3-4/4844-4845 [Written Judgment in Sacramento County Superior Court Case No. 96-AS-01697, *James Dibdin v. County of Nevada, et al.*].) The California Medical Board investigated Dr. Dibdin's performance in the Romero case and determined there was no malpractice. (*Id.* at p. 4/4845.) Thus, Dr. Dibdin did not, as petitioner alleges, have a pattern of incompetence and professional misconduct. (Supp. Pet. at pp. 4-6.)[12]

Petitioner's contentions that Dr. Dibdin prepared the autopsy report after the preliminary hearing in order to manufacture a cause of death consistent with law enforcement's theory petitioner raped and sodomized Consuelo and that he fabricated the cause of death are likewise wholly unsubstantiated. (RCCAP at p. 24.) His assertion that the report was an

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[12] "Supp. Pet." refers to the Supplemental Petition for writ of habeas corpus filed in April of 2008. Also, petitioner's RCCAP Exhibits 47 and 133 each pertain to the Ricky Romero autopsy, not additional matters handled by Dibdin.

unreliable reconstruction of the autopsy based on Dr. Dibdin's memory rather than his direct observations (RCCAP at p. 23) is based on speculation and ignores the fact photographs were taken during the autopsy (1CT 211).

Finally, petitioner has waived the right to challenge the absence of an autopsy report at the preliminary hearing, having failed to do so prior to the preliminary hearing and having failed to cite that as a basis for his appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

However, even if this Court were to address his contention, it is without merit. The absence of a written autopsy report did not preclude defense counsel from conducting cross-examination regarding Consuelo's cause of death at the preliminary hearing. At the preliminary hearing, Detective Bresson testified to the pathologist's findings pursuant to Proposition 115. (§ 872, subd. (b); 1CT 206-208.) Defense counsel's election not to cross-examine him regarding Dr. Dibdin's cause of death (1CT 208-213) is evidenced by her withdrawal of a motion to continue the date of the preliminary hearing based on the absence of an autopsy report. Defense counsel explained, "It would neither establish the innocence of my client nor would it be used for impeachment." (1CT 119.)

In sum, petitioner has failed to demonstrate that the autopsy was unreliable because of the pathologist's credentials or the eight week delay between the autopsy and its preparation, that the pathologist fabricated the cause of death, or that the absence of an autopsy report at the preliminary hearing deprived him of a fair trial.

2. The prosecution did not present false evidence

Petitioner contends all the evidence produced against him was false in violation of his rights to a fair trial and section 1473. (RCCAP at pp. 25-47.) Petitioner forfeited this calim by failing to object below. (*People v. Harrison* (2005) 35 Cal.4th 208, 241-242.) His claim is baseless and

should be rejected, in any event.

"Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted." (*People v. Morrison* (2004) 34 Cal.4th 698, 716-717, citing *Napue v. Illinois* (1959) 360 U.S. 264 and other decisions.) "Put another way, the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading. (Citations omitted.)" (*Ibid.*) "When the prosecution fails to correct testimony of a prosecution witness which it knows or should know is false and misleading, reversal is required if there is *any reasonable likelihood* the false testimony could have affected the judgment of the jury. This standard is functionally equivalent to the '"harmless beyond a reasonable doubt"' standard of *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]. [Citation.])" (*People v. Dickey* (2005) 35 Cal.4th 884, 909.)

In addition, a writ of habeas corpus may be filed to show that false evidence that was substantially material or probative on the issue of guilt or punishment was introduced at trial. (§ 1473, subd. (b)(1).) False evidence is "substantially material" when there is a "'reasonable probability' that, had it not been introduced, the result would have been different." (*In re Malone* (1996) 12 Cal.4th 935, 965-966; *In re Roberts* (2003) 29 Cal.4th 726, 742, citing *In re Sassounian* (1995) 9 Cal.4th 535, 546.) Petitioner must make this showing by a preponderance of the evidence. (*In re Cox* (2003) 30 Cal.4th 974, 997-998.)

Under section 1473, a petitioner is not required to show that the testimony was perjured. (§ 1473, subd. (c); *People v. Marshall* (1996) 13 Cal.4th 799, 830.) However, he must show that the evidence adduced was false. (*In re Wright* (1978) 78 Cal.App.3d 788, 809, fn. 5; accord *In re Pratt* (1999) 69 Cal.App.4th 1294, 1313-1314; *In re Hall* (1981) 30 Cal.3d

408, 424; see also *In re Malone*, *supra*, 12 Cal.4th at pp. 961, 965-966 [petitioner bears the burden of proving that a prosecution witness lied].)

Notably, "a difference of opinion" or a witness's "mistaken" testimony will not support a false evidence claim. (*People v. Wilson* (2008) 44 Cal.4th 758, 801.) In the case *In re Robbins*, *supra*, 18 Cal.4th 770, this Court was confronted with a claim on habeas corpus that a prosecution witness (firefighter) gave false testimony about the timing of a dumpster fire that had been set to burn another murder victim's body. The witness testified that, based on a statement from a witness who saw smoke, the fire had to have started around 1:00 a.m., but could have been burning for several hours before that, i.e., as early as 11:00 p.m. (*Id.* at p. 800, fn. 24.) The witness subsequently submitted a declaration in which he stated that he knew he could not pinpoint how long the fire had burned when he testified at trial, that it was still "possible" that—as he testified the fire could have started up to three hours before the smoke was seen—but that was "not probable [n]or likely," and that he was not asked (when he testified) what the probable or likely timeframe was for the fire to have started. (*Ibid.*) This Court found no evidence that the witness's trial testimony was in any way false, that he committed perjury or that the prosecution knowingly permitted or promoted false testimony. This Court explained in pertinent part,

> [O]pinion testimony does not constitute perjury merely because the witness later changes his or her opinion, nor does it constitute perjury merely because the initial opinion later proves to be "incorrect." Testimony is perjured only if the witness does not honestly hold the opinion to which he or she testifies.

(*Id.*)

a. Evidence that Consuelo was raped and sodomized and that her internal injuries and death resulted from sodomy

Petitioner contends the People presented false evidence that Consuelo was raped (RCCAP at pp. 25-29; claims A3b, d, and g and A4); that her anal injuries were caused by sodomy (*id.* at pp. 26-33; claims A3d and g, A4, and A5b-e and h); and that her internal injuries and death resulted from sodomy (*id.* at pp. 33-35, claim A6). Respondent disagrees.

Petitioner contends Dr. Diamond gave false testimony that Consuelo was raped and sodomized. (RCCAP at pp. 25-26 (claim A3b, d) and pp. 30-32 (claim A5b-e).) At trial, Dr. Diamond testified in pertinent part that Consuelo was raped. His opinion was based, in part, on Dr. Dibdin's report to him of a tear of the anterior wall of the vagina. (10RT 2060, 2096.) However, Dr. Dibdin testified that there was a tear of the posterior (not anterior) wall of the vagina. (11RT 2122-2123.) Dr. Diamond has since changed his opinion that Consuelo was raped upon learning that Dr. Dibdin's testimony did not substantiate the existence of a tear of the anterior wall of the vagina. (Resp.'s RCCAP Exh. 1 at p. 10.) Dr. Diamond's testimony was not false within the meaning of section 1473 because he did not lie when he testified. Rather, his opinion that Consuelo had been raped was based on the mistaken understanding that Dr. Dibdin saw a tear of the anterior wall of the vagina. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 801.)

The prosecutor's reliance upon Dr. Diamond's testimony to support the rape conviction did not violate petitioner's right to due process either. There is nothing in the record that demonstrates that the prosecutor knew or should have known that the discrepancy between the tear of the anterior vaginal wall that Dr. Diamond thought existed and the tear of the posterior vaginal wall that was described by Dr. Dibdin at trial was critical to

Dr. Diamond's conclusion that Consuelo had been raped. (*People v. Morrison*, *supra*, 34 Cal.4th at pp. 716-717.) Though defense counsel cross-examined Dr. Diamond about the location of the tear of the vaginal wall, the significance of the tear being in the posterior wall as opposed to the anterior wall appears to have been lost upon both counsel. Neither recalled Dr. Diamond to the stand to confront him with Dr. Dibdin's testimony, and neither focused on the issue during closing argument.

In addition, petitioner makes numerous claims that Dr. Dibdin provided false testimony. He contends that Dr. Dibdin gave false testimony about Consuelo's acute genital injuries (RCCAP at p. 27, claim A3e) and anal injuries (*id.* at p. 29, claim A4, and at p. 32, claim A5g). However, this claim should be rejected because there is no evidence that Dr. Dibdin lied when he testified.

Petitioner further claims Dr. Dibdin falsely testified that Consuelo had been anally penetrated by "a fairly long hard object" that was wide enough to "dilate the anus to the point where the muscles [had been] torn." (11RT 2166-2167; RCCAP at pp. 29, claim A4.) As petitioner points out, Dr. Diamond presented conflicting testimony on this point. A conflict of opinion between experts does not show Dr. Dibdin's testimony to have been perjured or false. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 801.)

Petitioner further charges that Dr. Dibdin falsely attributed Consuelo's lax anal sphincter to traumatic injury of the anus as a result of sodomy because laxity of the anal sphincter after death is a well known post-mortem change. (RCCAP at p. 33, claim A5h; citing Pet.'s RCCAP Exh. 79 at p. 5471 [post-trial declaration from Dr. Shaw].) Dr. Dibdin testified there were multiple tears of the edge of the anus, particularly the left side, where one tear was a quarter inch long and another measured three-eighths of an inch. Dr. Dibdin testified that these tears went through the muscles of the anus, causing it to dilate. (11RT 2119.) Dr. Dibdin

never testified that Consuelo had a lax sphincter tone. Thus, petitioner's claim is based on a false premise and fails.

Petitioner next asserts that Dr. Dibdin falsely testified that he only observed swelling around Consuelo's genitalia and anus because Dr. Harrison detected full body edema on November 20. (RCCAP at pp. 27-28, claim A3g, citing Pet.'s RCCAP Exh. 3 at p. 1002 [UCLA Medical report] and 11RT 2155-2156.) Again, a conflict of medical opinion does not support a false evidence claim.

Petitioner further argues that Dr. Dibdin provided false testimony that Consuelo had prior anal and genital injuries. Specifically, petitioner contends Dr. Dibdin falsely testified that "Consuelo had *tears* in her anus, vagina and urinary bladder of up to fours weeks of age" and the prosecution knew there were no tears (Emphasis added; RCCAP at p. 28, claim A4, citing Pet.'s RCCAP Exh. 82 at p. 5489 [Dr. Dale Huff opines the tissue slides of the rectum, vagina and bladder depicted tissue degeneration, not lacerations or tears.].) Dr. Dibdin testified that he looked at "sections of the anus, vagina, and urinary bladder" and there were "*changes there*" that indicated previous injuries of up to four weeks of age. (11RT 2140.) Dr. Huff's difference of opinion does not show that Dr. Dibdin lied when he testified on this point. (See also Pet.'s RCCAP Exh. 8 at pp. 6-7 [autopsy report references "blunt force penetrating injury of the anus with evidence of previous anal injury].)

Petitioner alleges there is a "reasonable probability that the results of the proceeding would have been different" had the prosecutor and defense counsel not failed to present evidence that slides of the pelvic region did not depict lacerations or tears (2004 Inf. Reply at p. 36, citing *United States v. Bagley* (1985) 473 U.S. 667, 678-682 [which deals with prosecutorial nondisclosure of evidence in violation of the Fourteenth Amendment's due process clause].) This claim is not properly before this Court. It was not

contained in the original petition, and informal replies to informal responses cannot be relied upon to augment or supplement the petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 798.) In any event, *Bagley* does not apply because all the tissue slides in this case, as well as the tissue of Consuelo's pelvis (which the defense expert testified had a tear in the top of the vagina that was related to a hemorrhage between the rectum and vaginal wall) were made available to the defense prior to trial. (16RT 3104-3105, 3114.)

Finally, petitioner contends Dr. Dibdin's testimony about Consuelo's cause of death was false. Dr. Dibdin testified that Consuelo died from a blunt force penetrating injury of the anus that caused lacerations of the anus and abdomen and damaged her pancreas and duodenum. (11RT 2110, 2118, 2164.) Petitioner contends this was false. (RCCAP at pp. 33-34, claim A6.) Specifically, the declarants note that the wall of Consuelos' rectum was not ruptured and her lower intestinal organs, including the sigmoid colon and rectum, were intact. The lower intestinal organs would necessarily show evidence of trauma, they contend, had an object penetrated through Consuelo's rectum to the upper abdominal organs. (See, e.g., Pet.'s RCCAP Exh. 83 at p. 5511 [Declaration of Dr. Kennedy], Pet.'s RCCAP Exh. 77 at p. 5449 [Declaration of Dr. Bloch], Pet.'s RCCAP Exh. 79 at pp. 5466-5467 [Declaration of Dr. Harrison], Pet.'s RCCAP Exh. 144 at p. 5545 [Declaration of Dr. Alonso].)

The cause of the abdominal injuries which ultimately resulted in Consuelo's death was disputed at trial and was properly left to the jury. Dr. Diamond opined that the tears to Consuelo's pancreas and duodenum were caused by external trauma to the abdomen (10RT 2073), such as a punch or kick (10RT 2067). Dr. Bloch agreed. (12RT 2460-2461; see also 14RT 2895 [Dr. Baumer testified, "in summary, one can draw the conclusion that penile penetration occurred and a blow to the abdomen and[/]or back of the head with accompanying trauma to the posterior

aspects of the chest occurred and this was the actual cause of death.") Neither Dr. Diamond nor Dr. Bloch believed the abdominal injuries resulted from penile penetration of the anus because the anterior wall of Consuelo's rectum was not torn (10RT 2085, 12RT 2460). Again, a conflict of opinion will not support a false evidence claim.

Even if the cause of death cited by Dr. Dibdin was incorrect as petitioner alleges, it was not substantially material. There is not a reasonable probability that, had Dr. Dibdin's cause of death not been introduced, the result of petitioner's trial would have been different. (*In re Malone*, *supra*, 12 Cal.4th at pp. 965-966.) As discussed in argument M2c(7), Consuelo's anal trauma supports petitioner's convictions for sodomy and lewd and lascivious acts. Dr. Bloch, Dr. Diamond, and Dr. Baumer disagreed with Dr. Dibdin about how Consuelo incurred her abdominal injuries. (Compare 10RT 2067, 2073; 12RT 2460-2461; 14RT 2895; to 11RT 2110, 2118, 2164.) However, there was no question that Consuelo died from abdominal injuries. (12RT 2369.) Because Consuelo was in petitioner's exclusive care when she suffered the fatal injuries, the jury would not have acquitted petitioner of murder had they received evidence that there was no tear to Consuelo's rectum, making it physically impossible for penile penetration to have caused her abdominal injuries.[13]

Petitioner also asserts he was denied the effective assistance of counsel "because the prosecution introduced, and trial counsel unreasonably and prejudicially failed to exclude or refute, false testimony" about the nature and extent of Consuelo's injuries. (RCCAP at p. 21.) This assertion should also be rejected in that petitioner did not provide any

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[13] For the reasons set forth in argument M2d(1), respondent concedes that petitioner's rape conviction and special circumstance finding are no longer supported by substantial evidence. (Resp.'s RCCAP Exh. 1 at p. 10 [Decl. by Dr. Diamond].)

caselaw or analysis in support of his claim. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.) Rather, petitioner's ineffective assistance of counsel argument is first articulated in the Informal Reply. (2004 Inf. Reply at pp. 26, 34, 45, 48, 51, 60.) Because informal replies to informal responses cannot be relied upon to augment or supplement petitions, this claim is not properly before this Court. (*In re Clark*, *supra*, 5 Cal.4th at p. 798.)

To succeed on a claim of ineffective assistance of counsel, petitioner must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to petitioner. (*In re Neeley* (1993) 6 Cal.4th 901, 908-909; citing *Strickland v. Washington* (1984) 466 U.S. 668, 687.) The People did not present false evidence for the reasons set forth in argument B2. Therefore, defense counsel's failure to object was not unreasonable. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1024 ["A defense counsel is not required to make futile motions or to indulge in idle acts so as not to appear incompetent."].) For the same reasons defense counsel's performance was not unreasonable, it was not prejudicial.

In addition, defense counsel presented evidence that Consuelo's genital and anal trauma was not caused by sexual abuse as discussed in argument M1. Thus, he is not entitled to habeas relief due to ineffective assistance of counsel on that basis either.

In sum, petitioner has not shown that the People presented false evidence that Consuelo was raped and sodomized. Therefore, his contentions to the contrary must fail.

b. Evidence regarding the location, age and cause of Consuelo's rib fractures

Petitioner first contends that Dr. Dibdin provided false testimony regarding the location of Consuelo's rib fractures because all of the injuries he described were not visible on the radiographs reviewed by Dr. Seibly at

KMC. (RCCAP at p. 35, claim A7.) Petitioner's claim is baseless and should be rejected.

Dr. Dibdin testified that in the back of Consuelo's chest, she had acute, or fresh, fractures in ribs six through ten near the spinal column on the right and left sides. In the front of her chest, she had acute fractures in ribs six through ten on the right side. (11RT 2125, 2128.) In addition, she had older healing rib injuries in the back of the chest, in ribs eight and nine on the left side. (11RT 2125, 2127.) However, Dr. Seibly only noted breaks to posterior ribs eight through ten on the right side and a break in the front on the eighth rib on the left side (13RT 2536-2537) on November 18 when he reviewed radiographs that were taken of Consuelo at KMC (13RT 2526, 2528- 2529). Notably, Dr. Seibly reviewed radiographs of Consuelo's chest and abdomen. (13RT 2515-2516, 2530.) Consuelo's ribs were not specifically X-rayed or radiographed. (13RT 2530.) Furthermore, Dr. Seibly testified that the only way to know if there is a rib fracture is to look at the rib (13RT 2532), and he was not present at the autopsy (13RT 2530). In addition, injuries may be present but not detectible by radiograph because it takes between 10 and 14 days for callus to form at the site of a rib fracture, making the injury detectible by radiograph. (13RT 2515.) Therefore, Dr. Dibdin's testimony is not rendered false by the disparity between his findings and the less thorough findings of Dr. Seibly.

Petitioner further alleges that Dr. Dibdin falsely testified that the posterior rib injuries to ribs eight, nine and ten on the right side were acute because Dr. Seibly opined that these injuries were starting to demonstrate some callus formation. (13RT 2531; RCCAP at p. 35; claim A7a(1) and (2).) This variance of opinion does not show that Dr. Dibdin testified falsely.

Petitioner also alleges that Dr. Dibdin's testimony was false as he did not detect an acute displaced fracture of the eighth anterior rib (that

Dr. Seibly identified) or the (healing) wrist fracture Consuelo incurred on September 24, 1991. (RCCAP at pp. 35-36; claims A7a(3)). Dr. Dibdin was not questioned about these matters at trial. In any event, his alleged failure to denote these matters does not render his trial testimony untruthful. Hence, petitioner's false evidence claim fails.

Petitioner further alleges Dr. Dibdin fabricated the existence of acute and healing fractures in the left back ribs and lied about how he approximated the age of the posterior fractures in the eighth and ninth ribs on the left side. (2004 Inf. Reply at p. 41.) Dr. Dibdin opined that the posterior fractures to the eighth and ninth ribs on the left side were three to four weeks old based on a microscopic review of slides that contained small sections of the ribs where the breaks had occurred. (11RT 2126-2128.) Because 27 tissue slides were taken at the autopsy (16RT 3253-3254, 17RT 3370; Pet.'s RCCAP Exh. 8 at pp. 3557, 3560) and the "Manifest of Microscopic Slides" does not reference any slides of the left posterior ribs (Pet.'s RCCAP Exh. 8 at p. 3542; RCCAP at pp. 42-43), petitioner concludes that Dr. Dibdin did not prepare slides of the left *posterior* ribs. He further alleges that the prosecutor failed to disclose this allegedly material, and exculpatory information in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (2004 Inf. Reply at p. 43).

Petitioner did not raise either of these claims in the original petition, and informal replies to informal responses cannot be relied upon to augment or supplement petitions. (*In re Clark*, *supra*, 5 Cal.4th at p. 798.) In any event, his claims lack merit. The manifest of microscopic slides incorrectly states that slides C23-C27 relate to the left *anterior* sixth, seventh, eighth, ninth, and tenth ribs, respectively. (Pet.'s RCCAP Exh. 8 at p. 3542.) In fact, slides C23-27 pertain to the left *posterior* sixth, seventh, eighth, ninth, and tenth ribs. Dr. Dibdin did not have any reason to prepare slides of Consuelo's left *anterior* sixth, seventh, eighth, ninth and

tenth ribs because those ribs were not injured. Rather, her left anterior ribs six through ten were injured. (11RT 2125; see also Pet.'s RCCAP Exh. 8 at p. 2557 [Autopsy report found acute fractures "in ribs six through ten bilaterally posteriorly adjacent to the spinal column, and anteriorly in ribs six through ten on the right..." and healing fractures in the eighth and ninth ribs on the left posteriorly].) The reference on the slide manifest to slides of the left anterior ribs instead of the left posterior ribs is simply a mistake.

Petitioner next asserts that "[t]he prosecution and law enforcement deliberately fabricated Dr. Chabra's radiologic findings in an attempt to make them more consistent with Dr. Dibdin's findings." (RCCAP at p. 36, claim A7a(4)(a); citing Pet.'s RCCAP Exh. 1 at p. 20 [December 4, 1991 Addendum Radiology Report of Dr. J. Chabra].) Respondent preliminarily notes that Dr. Chabra did not testify at trial and his reports were not admitted into evidence. (1Supp.CT 71-150 [Trial Exhibit List].)
Dr. Chabra was a physician at KMC who reviewed a radiograph that was taken of Consuelo's chest on November 17, 1991. During his first review of the radiograph, he did not detect any rib fractures. (Pet.'s RCCAP Exh. 1 at p. 19.) In an addendum report that was prepared on December 4, 1991, Dr. Chabra noted healing fractures of the right front ribs eight through ten and a recent displaced fracture of the eighth rib on the right, either the front or the back. (Pet.'s RCCAP Exh. 1 at p. 20.) Petitioner's allegation that Dr. Chabra's addendum was fabricated is without merit and should be rejected.

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

Dr. Dibdin opined Consuelo had been tightly gripped around the chest and had her body pulled backward during the assault. (11RT 2128-2129.) Dr. Seibly agreed. (13RT 2523-2524; see also 13RT 2522, 2533, 2534.) Dr. Baumer and Dr. Lovell, experts for the defense, agreed it was possible that Consuelo had been squeezed tightly, thereby causing her rib injuries (14RT 2886 [Dr. Baumer]; 16RT 3107-3108, 3131, 3136-3137 [Dr. Lovell]), but concluded her injuries were caused by a sharp blow over the front of her body. (14RT 2895 [Dr. Baumer]; 16RT 3108, 3136 [Dr. Lovell].) Petitioner has not adduced any evidence that Dr. Dibdin lied about the nature or cause of Consuelo's back and rib injuries and a difference of opinion between medical experts will not support a false evidence claim. (RCCAP at pp. 37-38, claim A7b(2)). Therefore, petitioner's claim fails.

Literature that post-dated petitioner's trial does not support petitioner's false evidence claim against Dr. Dibdin either. Petitioner argues that Consuelo's injuries could have resulted from being slammed face-down on a surface or hurled face-forward into a solid object. (RCCAP at p. 38, claim A7b(3), 2004 Inf. Reply at p. 44, Supp. Pet. at pp. 8-9, citing Pet.'s RCCAP Exh. 131 at p. 6453 [Mechanical Factors Associated with Posterior Rib Fractures: Laboratory and Case Studies, Paul K. Kleinman and Alan E. Schlesinger, Pediatric Radiology, 1997] [Frmr. Pet.'s Exh. 169].) There was no evidence that Consuelo was a passenger in a car to support the deceleration scenario or that she was a pedestrian hit by a car. Both Dr. Dibdin and Dr. Baumer opined that Consuelo would have been unable to get up and walk to the front door with the injuries she sustained. (11RT 2144, 14RT 2864, respectively.) Most importantly, the article actually supports Dr. Dibdin's opinion testimony. It concludes:

> Posterior rib fractures can occur in accidental situations such as a high-speed accidents in which a child undergoes marked

> forward deceleration into a solid object, or is struck in the front by a motor vehicle. However, *when posterior rib fractures are encountered in an otherwise normal infant, with no history of a severe accidental event* resulting in massive anterior compression of the chest, *abuse should be presumed.*

(Pet.'s RCCAP Exh. 131 at p. 6454.) Indeed, Dr. Lovell testified that any rib fracture in a child makes him suspicious of abuse (16RT 3133) and bilateral posterior rib fractures are usually caused by abuse (16RT 3135.)[14]

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

c. Evidence about Consuelo's head injury

Petitioner next challenges as false, Dr. John Bentson's testimony that Consuelo could have been suffocated (RCCAP at pp. 39-41, claim A10). Dr. Bentson, the chief of neurology and radiology at UCLA, reviewed a cat scan taken on November 21, 1991. (12RT 2403-2404.) He detected bilateral watershed occipital parietal brain infarcts, which he said were caused by a drop in the amount of oxygenated blood that goes to the brain. The drop in oxygenated blood, he opined, *could have been* caused by suffocation. (12RT 2406, 2410.) Petitioner attributes the brain infarctions to Consuelo's abdominal bleeding, as Dr. Lovell did at trial (16RT 3113; RCCAP at p. 40) not suffocation (RCCAP at pp. 40-41; Pet.'s RCCAP Exh. 81 at p. 5487 [Dr. Vincent J.M. DiMaio opines by declaration that Consuelo would have stopped breathing within 90 seconds had she been

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[14] Accordingly, petitioner's cursory and untimely allegation that defense counsel unreasonably failed to present this information to the jury does not establish ineffective assistance of counsel. (Supp. Pet. at p. 10.)

suffocated] and Pet.'s RCCAP Exh. 78 at p. 5459 [Dr. Harrison opined by declaration that Consuelo's Glasgow score at DRMC would have been lower had Consuelo been suffocated]). Again, a difference of medical opinion does not render Dr. Bentson's testimony false.

Petitioner also alleges that Dr. Bentson falsely testified that Consuelo suffered multiple head traumas, but he fails to articulate how this testimony was false. (RCCAP at p. 41, claim A11.) Petitioner correctly notes that Dr. Bentson testified that Consuelo had swelling in the back of her head, on both sides, which "*seemed* to be from different traumas." (12RT 2417.) Petitioner then references a half-inch contusion in the front of Consuelo's scalp on the left side, citing to the autopsy report which was not admitted at trial. Petitioner concludes that the scalp contusion was not related to the cause of death and that it does not indicate major head injury because there was no bleeding in the subgaleal area and such bleeding typically accompanies a blow to the head that causes brain damage. (RCCAP at p. 41, citing Pet.'s RCCAP Exh. 84 at p. 5523 [declaration from Dr. Gleckman].) Dr. Bentson did not reference the scalp contusion or testify that Consuelo suffered from a "major head injury." (12RT 2402-2418.) Dr. Bentson, like the other prosecution witnesses, testified truthfully. Thus, this Court should reject petitioner's false evidence claim.

Petitioner further contends Dr. Dibdin falsely testified that Consuelo's head injuries were caused by Shaken Baby Syndrome (RCCAP at pp. 41-43, claim A12.) Dr. Dibdin found that Consuelo's subdural hemorrhage, generalized brain swelling, and infarcts to the brain (meaning areas where the brain died due to insufficient blood supply) were all indicative of Shaken Baby Syndrome. (11RT 2125, 2129.) Petitioner disagrees because Consuelo only had minor retinal injury, not bilateral retinal hemorrhages. (RCCAP at p. 42, citing Pet.'s RCCAP Exh. 78 at p. 5458 [Dr. Harrison's declaration]; Pet.'s RCCAP Exh. 84 at p. 5518 [Dr. Gleckman's

declaration].) Drs. Harrison and DiMaio opine the subdural hemorrhage was most likely caused by disseminated intravascular coagulation (DIC) and the infarcts and brain swelling were due to loss of oxygenated blood from the abdominal injuries and bleeding and low blood pressure. (Pet.'s RCCAP Exh. 84 at pp. 5516, 5517, 5521; Pet.'s RCCAP Exh. 81 at p. 5487.) Again, a difference of opinion among expert witnesses will not support a false evidence claim. Thus, petitioner's false evidence claim fails.

d. Evidence concerning Consuelo's health prior to November 17, 1991

Petitioner further argues the prosecution presented false evidence that Consuelo was in good health prior to November 17, 1991. (RCCAP at pp. 43-45, claim A13.) However, the only record citation cited in support of this claim pertains to the prosecutor's opening statement. (RCCAP at p. 43, referencing 10RT 2024.) Estella subsequently testified that Consuelo was in good health the morning of November 17. (13RT 2543.) Estella's testimony was truthful. Consuelo did not have a bloody nose, bruised lip or forehead, or any injuries to her head, ribs, or genital and anal areas when Estella left her in petitioner's care. (13RT 2544.) Thus, petitioner's false evidence claim is unsupported and should be rejected.

e. Evidence that Consuelo was not tested for the presence of semen

On cross-examination at trial, Dr. Diamond testified that he did not take a swab from Consuelo's vagina or rectum to test for the presence of semen. He explained that profuse bleeding in those areas would have washed away any semen deposits. (10RT 2083-2084.)

Petitioner now alleges the prosecution failed to turn over exculpatory evidence in its possession—a rape kit—in violation of his due process rights. In the alternative, he argues the prosecution presented false

testimony (by Dr. Diamond) to justify the absence of a rape kit, which allegedly was not obtained because the prosecution knew the kit would produce exculpatory evidence. (RCCAP at p. 46, claim A14.)
Dr. Diamond truthfully explained his failure to take a swab of Consuelo's vagina and anus to test for the presence of semen. Petitioner's claim to the contrary is wholly unsupported and should be rejected. Petitioner's due process claim is equally without merit.

Under the Due Process Clause, a prosecutor must disclose all substantial material evidence favorable to the accused without request, whether such evidence relates to the question of guilt, to matters of punishment, or to the credibility of witnesses. (*Giglio v. United States* (1972) 405 U.S. 150, 154; *Brady v. Maryland*, *supra*, 373 U.S. at p. 87.) There are three components to a *Brady* violation: the evidence must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and prejudice must have ensued. (*Strickler v. Greene* (1999) 527 U.S. 263, 364.) Favorable evidence is material, and constitutional error results from its suppression, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (*Kyles v. Whitley* (1995) 514 U.S. 419, 433-434; *United States v. Bagley*, *supra*, 473 U.S. at p. 676; see also *In re Sassounian*, *supra*, 9 Cal.4th at pp. 543-545.)

Petitioner has failed to produce any evidence to support his allegation that the prosecution actually obtained a rape kit, or that a kit, if obtained, would have resulted in a semen sample let alone been exculpatory. Even pathologist Frederick Lovell, the defense witness who criticized medical personnel for not conducting a rape kit in spite of the profuse bleeding, acknowledged that a rape kit would not have yielded a semen sample if the perpetrator had not ejaculated. (16RT 3143.) Therefore, petitioner's *Brady*

claim also fails.[15]

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

Finally, petitioner contends that Officer Esmay falsely opined that Consuelo was not hit by a car. (RCCAP at p. 47, claim A15.) At trial, Esmay testified that he had never seen a pedestrian who was hit by a car whose clothing did not show signs of the accident. (15RT 2940.) Petitioner contends this testimony was false because a report by criminalist Jeanne Spencer, which he alleges was not disclosed to the defense, denoted the presence of plant material on Consuelo's sweatshirt (RCCAP at p. 47, citing Pet.'s RCCAP Exh. 7 at p. 3506.) In his 2004 Informal Reply, petitioner alleges that the nondisclosure violated *Brady* [*v. Maryland*, *supra*, 373 U.S. at p. 87]. (2004 Inf. Reply at p. 57.) He is mistaken. Spencer's report was not favorable to petitioner because any plant material on Consuelo's sweat shirt was de minimus, so it does not support petitioner's car accident theory. (See Pet.'s RCCAP Exh. 7 at p. 3501 [no plant material is denoted on the diagram of the front and back of

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

Consuelo's Walt Disney sweatshirt]; Resp.'s RCCAP Exh. 2 [People's Trial Exh. 73 - plant material not visible on photograph of the back of her sweatshirt]; Resp.'s RCCAP Exh. 3 [People's Trial Exh. 74 - plant material not visible on photograph of the front of her sweatshirt].) Consequently, both Spencer and Estella Medina testified that Consuelo's clothing did not have dirt or gravel on it. (11RT 2318 & 13RT 2589, respectively.) The nondisclosure of the report was not prejudicial either. Esmay testified that if Consuelo had been hit by a car, she would have been projected forward and then quickly rotated underneath the car to the pavement, thereby damaging her clothing, upper torso, and head and resulting in roadrash. Consuelo did not exhibit roadrash, her clothing was not damaged, and she did not sustain the type of torso and head injuries described by Esmay. Moreover, the area around Consuelo's apartment was paved, except there was some grass around the front of the apartment, above the carports, and between the sidewalk and building. (15RT 2934.) In order for Consuelo to have been struck out in the pathway of where a car was going and land on the grass, she would have had to have been thrown up and over the carport or thrown under the carport onto the grass. (15RT 2935.) Here, there was no evidence that Consuelo's body had been struck or thrown. (15RT 2935-2936.) Thus, the results of the trial would not have been different had Spencer's report been disclosed.

In any event, Esmay's familiarity or lack thereof with the contents of Spencer's report does not bear on the veracity of his testimony at trial. Likewise, Esmay's testimony that he had never seen anal and vaginal tearing that was caused by a car accident is not rendered false by Consuelo's alleged failure to present to DRMC with genital and anal injuries. (15RT 2952-2953; RCCAP at p. 47; 2004 Inf. Reply at p. 58.) Because Esmay testified truthfully, petitioner's false evidence claim fails.

In sum, petitioner has not stated a valid claim for habeas corpus relief. His challenges to the autopsy findings are not reviewable on habeas corpus and lack merit in any event, and his allegations that the prosecution presented false evidence and withheld exculpatory evidence are wholly unsubstantiated.

B. Claim 2: The State Did Not Coerce the Testimony of Estella or Christina Medina, Withhold DHS and CPS Records from the Defense or Use Those Agencies to Violate Petitioner's Rights

Petitioner contends the state coerced the testimony of Estella and Christina Medina in violation of his rights to a fair and reliable determination of guilt and penalty, to a trial free of materially false and misleading evidence, to confront and cross-examine witnesses, to a trial by a fair and impartial jury, to a conviction beyond a reasonable doubt, to the disclosure of all materially favorable evidence including impeaching evidence, and to a determination of punishment that was not based on passion, prejudice, or materially false information. He contends this violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights and article I, sections 1, 7, 9, 12-17, 24, 27 and 28 of the California Constitution. (RCCAP at pp. 48-70.)[16]

Petitioner did not raise these claims on appeal. Therefore, he is procedurally barred from asserting them now. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) In any event, petitioner's contentions lack merit.

1. The state did not coerce Estella and Christina to testify

Petitioner contends law enforcement, the District Attorney's Office, and DHS coerced Estella Medina to testify falsely at trial that she feared

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[16] Petitioner's additional ineffective assistance of counsel claim is addressed in argument M7.

and mistrusted petitioner as he cared for her children. (RCCAP at pp. 49, 55-56, claim B1m-o; 13RT 2562.)

A judgment will not be reversed based on the erroneous admission of evidence unless there was a timely motion to exclude the evidence. (Evid. Code, § 353.) Accordingly, petitioner's claim is foreclosed by his failure to move to exclude Estella's testimony prior to trial. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 20-21.)

This claim is also procedurally barred. Habeas corpus is not an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence. (*In re Lindley*, *supra*, 29 Cal.2d at p. 723.)

Even if this Court were to address petitioner's claim on the merits, he is not entitled to relief. Estella's testimony was not coerced.

Pretrial statements by a witness obtained by law enforcement may be excluded if it appears that they resulted from unduly coercive interrogation methods. (*People v. Douglas* (1990) 50 Cal.3d 468, 497, disapproved in part on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) "The coerced testimony of a witness other than the accused is excluded in order to protect the defendant's own federal due process right to a fair trial, and in particular, to ensure the reliability of testimony offered against him." (*People v. Boyer* (2006) 38 Cal.4th 412, 444.) "When a defendant seeks to exclude the allegedly involuntary testimony of a witness or codefendant, the defendant bears the burden of proving that the admitted statements were involuntarily obtained." (*People v. Douglas*, *supra*, 50 Cal.3d at p. 500.) It is not enough for a defendant to allege that coercion was applied against the third party, producing an involuntary statement before trial. Instead, the defendant must demonstrate how such misconduct, if any, has directly impaired the free and voluntary nature of the anticipated testimony in the trial itself." (*People v. Boyer*, *supra*, 38

Cal.4th at p. 444.) In other words, a defendant must show that the evidence presented at trial was "made unreliable by ongoing coercion, rather than assuming that pressures that may have been brought to bear at an earlier point ordinarily will taint the witness's testimony." (*People v. Badgett* (1995) 10 Cal.4th 330, 347-348.)

A witness's statements are coerced if they are the product of police conduct which overcomes the individual's free will. (*People v. Lee* (2002) 95 Cal.App.4th 772, 782.) In determining whether a witness's statements are coerced or voluntary, a reviewing court looks at the totality of the circumstances, including the details of the interrogation and the characteristics of the witness. (*People v. Hill* (1992) 3 Cal.4th 959, 981, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Estella testified that she told Christina and Consuelo to close their bedroom door when petitioner was there and that she threatened to have petitioner "locked up" if he ever hurt her daughters. (13RT 2562.) Post-trial, Estella claims she fabricated this testimony in order to show the prosecution that she was not a bad mother. (Pet.'s RCCAP Exh. 63 at p. 5386.) However, Estella does not contend, and petitioner has not adduced any evidence to show, that Estella's testimony was coerced by law enforcement or the prosecution in violation of his right to a fair trial.

Petitioner next alleges that Christina's testimony was coerced. (RCCAP at pp. 56-64, claim B2.) This claim is not properly before this Court as petitioner did not move to exclude her testimony as coerced prior to trial. (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 20-21.) This claim is also procedurally barred because habeas corpus is not a remedy to review the rulings of the trial court with respect to the admission of evidence. (*In re Lindley*, *supra*, 29 Cal.2d at p. 723.) However, even if this Court were to address the issue, there was no coercion.

Petitioner alleges that law enforcement, the district attorney's office, and DHS coerced Christina to falsely testify that that petitioner took Consuelo into the bedroom with him one night and kept her there all night with the door locked. (RCCAP at pp. 56-64, claim B2; 11RT 2189-2190.) These agencies allegedly coerced Christina's testimony by removing her from her home, isolating her from her mother and repeatedly questioning her about sexual abuse. (*Ibid.*)

To the contrary, Christina's removal from her home and the ensuing dependency case in juvenile court were motivated by concern for her safety and were not handled by the District Attorney's Office in any event. (1CT 145.) In addition, Christina's report about the locked bedroom door incident was not coerced during interviews with law enforcement. Rather, she first disclosed the incident to her mother. Incidentally, Christina was also living with Estella at that time. (13RT 2561 [Estella testified that Christina told her about it on May 22, 1992, when they drove home from Magic Mountain]; Pet.'s RCCAP Exh. 66 at p. 5379 [Declaration by Estella states Christina was returned to her custody in April of 1992].) Christina's subsequent June 12, 1992 report of the incident to Investigator Lopez was not coerced either. (Pet.'s RCCAP Exh. 4 at pp. 1814-1848 [Transcript of Investigator Lopez's interview of Christina].)

Just as petitioner has not shown that Christina's report of the locked bedroom door incident to her mother and later to Investigator Lopez were coerced, he has similarly failed to show that Christina was subjected to ongoing coercion between the time she disclosed the incident and the time of trial. (*People v. Badgett*, *supra*, 10 Cal.4th at pp. 347-348.) The defense interviewed Christina on September 3, 1992, after she reported the locked bedroom door incident (Resp.'s RCCAP Exh. 4 at pp. 4, 6 [Oct. 23, 1992 Section 987.9 Request for Investigator Fees]), defense counsel cross-examined her at trial, and habeas counsel obtained a declaration from her

post-trial (Pet.'s RCCAP Exh. 67). Notably, Christina has never alleged that her testimony was fabricated, that she was coerced or felt pressured to testify in a certain manner, or that any benefits were offered or received in exchange for her testimony.

Petitioner next contends that Christina's belief that the locked bedroom door incident took place and her identification of the timeframe in which it occurred were the product of coercion and suggestive questioning by law enforcement. (RCCAP at pp. 62-63.) Psychologist James Wood, Ph.D., opines that Christina's November 18, 1991 interview at the police station "may have contaminated" her later report of the locked bedroom door incident. (Pet.'s RCCAP Exh. 89 at p. 5551.) He contends the detectives "suggested to Christina that she should doubt Mr. Benavides' statements" (that Consuelo hit her head on a door) and that "[t]his doubt *apparently* colored her memories and interpretations of past events involving Mr. Benavides." (*Id.* at p. 5548, emphasis added.) He alleges that "inaccurate or false memories" can be created when a child is asked to imagine events, but he does not go so far as to assert that Christina's report of the locked bedroom door incident was a false memory. (*Id.* at p. 5552.) He only alleges that extensive psychological coercion and contamination in prior interviews made the accuracy of this "new" memory "highly questionable." (*Id.* at p. 5551.) Wood's opinion is speculative and speculative claims are not a basis for habeas relief. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

Christina's testimony about when the locked bedroom door incident took place was not coerced either, contrary to petitioner's assertion.[17]

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[17] At trial, Christina did not recall when this incident occurred. (11RT 2194.) Christina was asked if she remembered Consuelo having a cast on her wrist on September 24, 1991, and she did. When asked if

(continued...)

(RCCAP at pp. 62-63, citing Pet.'s RCCAP Exh. 89 at p. 5553 [Wood alleges that her statements "appear to have changed in response to pressure from her interviewer"].) Christina told Investigator Lopez about the incident on June 12, 1992. At that time, Investigator Lopez asked Christina when the incident took place. Christina did not recall. (Pet.'s RCCAP Exh. 4 at pp. 1869-1870). He then gave her a point of reference and asked if it had occurred before Halloween? She was unable to remember. (*Id.* at p. 1870.) The following colloquy then ensued:

> Lopez: Was it a long time before she was taken to the hospital or a short time before she was taken to the hospital?
>
> Medina: Long time.
>
> Lopez: Was it before she broke her arm?
>
> Medina: Yeah.
>
> Lopez: A long time or a short time before she broke her arm?
>
> Medina: Short time.
>
> Lopez: A short time? Was it in September, October?
>
> Medina: I can't remember.

(*Id.* at pp. 1871-1872.) He subsequently asked Christina if the she recalled what time of year the locked bedroom door incident occurred. (*Id.* at p. 1881.) She was unable to give a definitive response. (*Ibid.*) Vicki Salinas asked if it had taken place during the school year. Lopez then asked if it had taken place after summer. Christina responded, "I don't

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(...continued)
petitioner had taken Consuelo into his room before Consuelo had gotten a cast on her arm or after she had the cast, Christina said it happened before then. (11RT 2203.) The People presented evidence that Consuelo got a cast on her arm on September 24, 1991. (*Ibid.*)

think it was after summer. Ummm, it was probably after summer." (*Id.* at p. 1882.) He then asked if it took place at the beginning of the school year, in September or October. She responded affirmatively. Lopez concluded by asking if it had taken place before November, and she said it had. (*Ibid.*) Based on the foregoing, Investigator Lopez did not force Christina to adopt any preconceived timeframe.

Because Estella's testimony and Christina's testimony were not coerced, defense counsel's failure to object to their testimony at trial was not unreasonable or prejudicial. (*People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1024.) Accordingly, petitioner's ineffective assistance of counsel claims also fails. (RCCAP at p. 48.)

Petitioner newly alleges that "law enforcement officers" failed to follow guideline numbers 58 [Interview and Interrogation Considerations], 59 [Minimizing the Number of Victim Interviews], 60 [Sensitivity], and 61 [Special Considerations] of the Guidelines for the Investigation of Child Physical Abuse and Neglect, Child Sexual Abuse and Exploitation prepared by the State of California's Commission on Peace Officer Standards and Training in 1986 when they interviewed Christina. (Supp. Pet. at pp. 10-12; Pet.'s RCCAP Exh. 130 at pp. 6447-6448.) This claim was not contained in the original petition, so it is not properly before this Court, as informal replies to informal responses cannot be relied upon to augment or supplement a petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 798.)

In any event, these guidelines were not violated by Delano police officers or District Attorney Investigator Lopez. Even if they had been, law enforcement officers did not coerce Christina's report of the locked bedroom door incident or testimony at trial for the reasons previously set forth.

2. The people did not prejudicially interfere with the defense's access to Estella or Christina

In a new claim, petitioner contends the state prejudicially interfered with his access to Estella. (RCCAP at p. 64, claim B3.) His claim is devoid of merit. (See 13RT 2560 [Estella testified that *CPS*, not the district attorney's office, told her to cease contact with petitioner if she wanted to regain custody of Christina.].) Moreover, Estella testified that she visited petitioner at jail on four occasions (13RT 2551-2552), including after she saw Consuelo's autopsy report (13RT 2565). She also talked to him on the telephone (at home) "at one time," she went to a friends' residence (Celia and Nicho Campos) to receive telephone calls from him, and she and petitioner swapped messages through his mother (13RT 2561). Estella also received letters from petitioner that were mailed to her care of the Campos.' (Pet.'s RCCAP Exh. 66 at p. 5378 [Estella's declaration].) In addition to having contact with petitioner, Estella met with petitioner's attorney (13RT 2587) and spoke to Ms. Huffman's defense investigator (Pet.'s RCCAP Exh. 66 at p. 5385).

Petitioner's claim that the state prejudicially interfered with his access to Christina should also be rejected. (RCCAP at p. 64, claim B3.) In 2002, defense investigator John Purcell alleged that Christina refused to talk to him because "the district attorney's office" told her not to. (Pet.'s RCCAP Exh. 106 at p. 5896.) However, Purcell conducted an hour and a half interview of Christina on September 3, 1992, and it took him four hours to summarize that interview and a separate interview of Dehlia Alejandro. (Resp.'s RCCAP Exh. 4 at pp. 4, 6 [Oct. 23, 1992 Section 987.9 Request for Investigator Fees].) Even if Christina had refused to talk to the defense, there is no evidence that the district attorney's office controlled who Christina talked to or what she did. In fact, Christina refused to speak to investigators from the prosecutor's office at times. (Pet.'s RCCAP Exh. 4

at p. 2075 [Christina was unwilling to be reinterviewed by Investigator Lopez until July 11, 1992.].) Thus, petitioner has not shown that the state interfered with his access to Christina or that he was prejudiced thereby.

3. The prosecutor did not have a constitutional duty to discover records that were not related to the investigation of petitioner's crime

Petitioner further alleges the prosecution withheld unspecified documents from DHS, CPS, and the juvenile court that were material to impeaching the testimony of Estella, Christina, and Christina's family members. (RCCAP at pp. 65-70, claims B4 and B5.) He fails to articulate what aspects of Estella's testimony or those of Christina's family members could have been impeached with CPS, DHS and juvenile court records. With respect to Christina's testimony, he challenges the prosecution's failure to disclose a one and one-half page March 1993 report from Christina's *counselor*, Terry McCauley, addressed to the Kern County Preservation Unit recommending that Christina continue treatment. The letter states Christina had "trouble recalling some important aspects" of the events of November 17, 1991. (RCCAP at p. 67.) Each page of the document is stamped "confidential patient information see California Welfare and Institutions Code section 5328." (Pet.'s RCCAP Exh. 9 at pp. 3628, 3629.) Petitioner contends this document was material to his defense and could have been used to impeach Christina's statements "regarding the details of that evening's events such as how much time she was allowed to play, whether petitioner had been nervous that night, whether petitioner stated that he found Consuelo outside or inside, and what petitioner told Christina he believed happened to Consuelo that evening." (RCCAP at p. 67.)

As previously discussed in argument A2e, the prosecution has a constitutional duty to disclose all exculpatory evidence to defendants in

criminal cases. (*Brady v. Maryland*, *supra*, 373 U.S. at pp. 83, 87.) The prosecution's disclosure obligation under *Brady* extends beyond the contents of its case file and encompasses a duty to ascertain as well as to divulge favorable evidence known to others acting on the government's behalf within the "'prosecution team,' which includes both investigative and prosecutorial personnel." (*In re Brown* (1998) 17 Cal.4th 873, 879.) As the court explained in *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305:

> A prosecutor has a duty to search for and disclose exculpatory evidence if the evidence is possessed by a person or agency that has been used by the prosecutor or the investigating agency to assist the prosecution in or the investigating agency in its work. The important determinant is whether the person or agency has been 'acting on the government's behalf' [citation] or 'assisting the government's case' [citation].
>
> Conversely, a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information. Thus, information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material.

(*Id.* at p. 1315.)

Applying those principles to the case at hand, the People did not have a Brady duty to discover a letter from a private third party—Terry McCauley—that was not within the actual or constructive possession of the prosecutor or the "prosecution team." The letter was not "generated or obtained by the People in the course of a criminal investigation." (*People v. Webb* (1993) 6 Cal.4th 494, 518.) There is no evidence the prosecutor was even aware of McCauley's letter. Defense counsel did not request it from the prosecutor or file a subpoena duces decum to obtain it from McCauley, Christina's counselor, prior to trial. Christina may have also

had a statutory (Evid. Code, § 1014) or constitutional privacy interest in the letter (Cal. Const., art. I, § 1; *People v. Hammon* (1997) 15 Cal.4th 1117, 1127.) Moreover, the letter was not material to petitioner's guilt or innocence. Christina was not a charged victim or a percipient witness in this case. She was not home when the crimes occurred. In addition, defense counsel had a full opportunity to explore her recall of the night of the crimes during cross-examination at trial.

Likewise, the prosecutor did not have a duty to discover unspecified CPS, DHS and juvenile court records. As the prosecutor advised defense counsel at the preliminary hearing on December 12, 1991, the District Attorney's Office does not handle dependency actions in juvenile court, including that involving Christina. (1CT 145.) Records or materials generated in connection with that proceeding were not collected by or in the possession of the "prosecution team."

4. The state did not manufacture evidence against petitioner

Petitioner further alleges that law enforcement and the prosecutor's office in Kern County have a history of manufacturing evidence, coercing testimony, and using DHS/CPS to violate the constitutional rights of criminal defendants. (RCCAP at p. 68, claim B6.) As support he cites lawsuits against Kern County and findings from the Report On The Kern County Child Abuse Investigation published by the Office of the Attorney General, Division of Law Enforcement, Bureau of Investigation, State of California dated September 1986. (RCCAP at pp. 69-70.) Those matters do not concern this particular case. The state did not coerce false testimony, manufacture evidence, or otherwise violate petitioner's constitutional rights. Thus, petitioner has not stated a basis for relief on habeas corpus.

C. Claim 3: The State Did Not Present False Testimony Regarding the Events of November 17, 1991

Petitioner generally contends his convictions and death sentence were rendered in violation of his rights to a fair, reliable, rational, nonarbitrary and accurate determination of guilt and penalty, to a fair trial free from false and misleading evidence, to an opportunity to confront and refute adverse evidence, and to the disclosure of all material exculpatory evidence in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights and article I, sections 1, 7, 9, 12-17, 24, 27 and 28 of the California Constitution and state law because the prosecution introduced false and misleading testimony about the timing of the events on November 17, 1991, alleged misstatements by petitioner, and petitioner's demeanor. (RCCAP at pp. 71-79.)[18]

He raises three claims: the state manufactured inconsistent statements by petitioner by cross-examining him about statements he made to his mother regarding the crime and about irrelevant information, thereby confusing him (RCCAP at pp. 71-74), the state manufactured false testimony regarding the length of time petitioner was alone with Consuelo on November 17, 1991, by leading Christina to testify at trial that petitioner told her she could play for 30 minutes in contrast to her earlier testimony at the preliminary hearing that she asked to play for fifteen minutes (RCCAP at pp. 74-76), and the state presented false testimony by medical personnel

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[18] Petitioner also asserts "trial counsel unreasonably and prejudicially failed to exclude or refute, false and misleading testimony about the timing of the events on November 17, 1991, alleged misstatements by petitioner, and petitioner's demeanor." (RCCAP at p. 71.) Petitioner's ineffective assistance of counsel claim should be rejected outright, as petitioner does not discuss let alone prove that defense counsel's actions were deficient or that he was prejudiced thereby. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

at DRMC and KMC that petitioner was uncaring (RCCAP at pp. 76-79).

These claims are procedurally barred by petitioner's failure to raise them on appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) Respondent also notes that claims challenging the admission of evidence are not cognizable in a habeas proceeding. (*In re Lindley*, *supra*, 29 Cal.2d at p. 723.) In any event, they lack merit.

1. The state did not manufacture inconsistent statements by petitioner

Petitioner contends the prosecutor improperly cross-examined him about two statements he made to his mother: whether he told her someone ran over Consuelo with a car and left her on his doorstep and whether he told her he went inside and got a towel before or after he came outside and picked Consuelo up off the ground. (RCCAP at pp. 71-72; 15RT 3058, 3061-3062.) He also alleges that he was cross-examined about "irrelevant" facts, such as discrepancies between his trial testimony and previous statements to law enforcement. (RCCAP at pp. 72-74, claim C1d, and at pp. 78-79, claim C3c, d, e, and f.) Defense counsel did not object to the prosecutor's questions. Indeed, there is nothing wrong about cross-examining a defendant about inconsistent statements. Moreover, petitioner himself admitted he had lied about "some things" when he spoke to the police (15RT 3056) and when he spoke to his mother about the case (15RT 3060).

Hence, petitioner's claim lacks merit. Accordingly, he has not stated a basis for habeas relief.

2. The state did not manufacture testimony regarding the length of time petitioner was alone with Consuelo on November 17, 1991

At trial, Christina testified that petitioner gave her permission to play with a friend for 30 minutes, but he called her home after about 15 minutes.

(11RT 2182.) On cross-examination, she was asked if she recalled testifying at the preliminary hearing that he told her she could be gone 15 minutes. She said she did not recall and that she was gone "about ten, fifteen minutes" before petitioner summoned her to come home. (11RT 2196.)

Petitioner contends Christina's trial testimony regarding 30 minutes was inconsistent with previous statements to investigators and at the preliminary hearing and that the prosecutor led her to give this answer. (RCCAP at p. 75.) Review of the trial transcript shows that the prosecutor did not lead her to give a particular response or otherwise manufacture her testimony. The following questions and answers were given at trial:

> Q. When you asked Vicente for permission to go, did he give you a certain time that you had to go and come back in?
>
> A. Yes.
>
> Q. And how long was that?
>
> A. Thirty minutes."

(11RT 2181-2182.) Thus, petitioner's claim to the contrary should be rejected.

3. The prosecution did not present false evidence regarding petitioner's demeanor after the crime

At trial, Dr. Bloch testified that when he spoke to petitioner at KMC, he was hunched forward looking to the floor, exhibiting a lack of concern. (12RT 2465-2466.) Anita Curran Wafford testified petitioner acted "nonchalant" and exhibited a lack of concern at KMC. (14RT 2772-2776.) Petitioner contends both witnesses testified falsely. (RCCAP at pp. 76-78, claim C3a and b.)

Declarations by Estella's family members claiming that petitioner cared about Consuelo or by DRMC nurse Fay Van Worth describing

petitioner as being very supportive of Estella do not show that Dr. Bloch or Anita Currant gave false testimony about petitioner's demeanor following Consuelo's hospitalization. Petitioner has also failed to show that the alleged false testimony was substantially material on the issue of guilt or punishment. (§ 1473, subd. (c); *In re Hall*, *supra*, 30 Cal.3d at p. 424.) Thus, he is not entitled to habeas relief on this basis either.

D. Claim 4: The State Did Not Present False or Misleading Evidence That Petitioner Caused Injuries Sustained by Consuelo Prior to November 17, 1991

Petitioner contends the prosecution introduced, and trial counsel unreasonably and prejudicially failed to exclude or refute, false testimony regarding the nature and cause of the victim's prior injuries and illnesses. He contends this violated his rights to a fair, reliable, rational, nonarbitrary and accurate determination of guilt and penalty, to a fair trial free from false and misleading evidence, to an opportunity to confront and refute adverse evidence, and to the disclosure of all material exculpatory evidence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal constitution; article I, sections 1, 7, 9, 12-17, 24, 27, and 28 of the state constitution, and state law. (RCCAP at pp. 80-101.)[19]

Petitioner is procedurally barred from challenging the admission of evidence of injuries suffered by Consuelo prior to November 17, 1991, as false, having failed to do so on appeal. (*In re Dixon*, *supra*, 41 Cal.2d at

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[19] Petitioner also asserts "trial counsel unreasonably and prejudicially failed to exclude or refute (false and misleading) testimony regarding the nature and cause of the victim's prior injuries and illnesses." (RCCAP at p. 80.) Petitioner does not discuss let alone prove that defense counsel's actions were deficient and that he was prejudiced thereby. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.) Accordingly, respondent addresses this claim in argument M7, where petitioner's claim is set forth in detail.

p. 759, and *In re Lindley*, *supra*, 29 Cal.2d at p. 723.) In any event, his claims lack merit and should be rejected.

At trial, the prosecution admitted evidence that prior to November 17, 1991, Consuelo suffered head, wrist, and rib injuries and had prior scarring of the pancreas. (See *ante*, pp. 12-13.) During closing statements, the prosecutor argued petitioner may have caused the prior rib, abdominal and head injuries. (18RT 3652.)[20]

Petitioner contends any evidence that he caused injuries suffered by Consuelo prior to November 17, 1991, or previously molested her was false (RCCAP at pp. 81-101.) His contention is based on speculation that these injuries could have been caused by Javier Alejandro, Dehlia Salinas, Antonio Alejandro, Diana Alejandro, family members who were allegedly violent, drug users and/or unstable (RCCAP at pp. 81-85, 89; claim D1) or by "sex abusers" Sacarias Alenjandro or Joe Avila (RCCAP at p. 100, claim D9). Speculation does not establish that any of the evidence presented by the prosecution was false, so petitioner's claim must fail.

Petitioner also challenges as false any evidence from which the jury could infer that he previously molested Consuelo. He relies on his

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[20] Petitioner also contends, without record citation, that the prosecutor falsely argued he caused Consuelo's wrist injury on September 24, 1991. (RCCAP at pp. 91-92, claim D4.) Review of the record belies this claim. In the same argument, he contends the prosecutor, Robert Carbone, withheld notes of a December 3, 1991 conversation in which Dr. Chandra opined that Consuelo's wrist injury was consistent with the history reported by Estella (a fall). (RCCAP at p. 92.) At trial, Estella testified to the explanation she gave Dr. Chandra (14RT 2725-2726). The prosecutor's failure to discover his notes is irrelevant as he never contended that the explanation Estella gave for Consuelo's wrist injury was unreasonable or inconsistent with the nature of the injury. Of interest was that Estella gave a different explanation for the wrist injury to Virginia Uclaray (13RT 2665), to Dr. Seminario (13RT 2656-2657) and at trial (13RT 2554, 2650).

explanation for why he took Consuelo into the bedroom and locked the door on a prior occasion to negate any implication that he molested her then (RCCAP at p. 94, claim D6). Petitioner's excuse for the conduct described by Christina at trial—his act of taking Consuelo into the bedroom and locking the door for the night—does not render Christina's testimony false.

Petitioner further alleges he was falsely implicated as having caused the prior injuries sustained by Consuelo "on or around Halloween." (RCCAP at p. 95, claim D7.) This "false evidence" claim should be rejected because petitioner's complaint relates to the inferences the prosecutor drew from Estella's description of Consuelo's condition a month before she died. Petitioner does not attack the veracity of the description provided by Estella, i.e., that Consuelo "was feeling kind of sad, she was feeling strange, she didn't want to eat good, she wouldn't laugh, she wouldn't play, she would just lay in bed." (13RT 2584.)

Petitioner next challenges as false, Estella's allegedly coerced testimony "that she worried about her children when they were alone with petitioner." (RCCAP at p. 95, claim D8.) Petitioner is barred from raising this issue on habeas, having failed to raise it at trial. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759, and *In re Lindley*, *supra*, 29 Cal.2d at p. 723.) In any event, his claims lack merit and should be rejected.

At trial, Estella denied that Christina told her about the incident when petitioner was babysitting her and Consuelo, came into their bedroom and took Consuelo into his bedroom and locked his bedroom door. (13RT 2561.) The following colloquy then ensued between the prosecutor and Estella:

> Q. Would you have confronted Vicente about it [the locked bedroom door incident]?
>
> A. Yes, I would because I had always told him if anything —if you would injure my kids in any way, I would have you locked up.

Q. In fact, you even told Christina when they went to bed to lock the doors if you weren't there, didn't you?

A. I would—I would always tell her to close the door.

Q. If you weren't there and Vicente was there to close the door to their bedroom. Is that right?

A. Yes.

(13RT 2562; emphasis added.) Petitioner alleges that Estella's italicized responses were coerced and false. (RCCAP at pp. 95-96.) As support, he relies on Estella's post-trial allegation that she "said some things [in court] that were not completely right" in an effort "to answer questions the way [she] thought the police and Jennifer [from CPS] wanted her to." (Pet.'s RCCAP Exh. 66 at p. 5385.) Estella explains,

> For example, Carbone asked me at trial why I had not told him that Christina said that one night Vicente took Consuelo into his room when she was whining. Carbone was trying to imply that I was covering up for Vicente. But I was not. I had already told [District Attorney Investigator] Lopez why this did not seem significant to me. I could tell that Carbone was trying to say I was a bad mother. *I wanted to show him that I was not.* To make my point I testified incorrectly that I had always told Vicente I would have him locked up if he did something to my children. But I actually never threatened Vicente about not touching my daughters—I never had a reason to threaten him since he was always so kind to them. I said that out of fear of what might happen if I said the wrong thing again; *I said it in the hope that Carbone and others would see that I took care of my children and leave me alone*—and maybe even reconsider giving Christina back to me.

(Pet.'s RCCAP Exh. 66 at pp. 5385-5386.) As to the coercion claim, Estella decided what to say at trial and whether to tell the truth or to lie. (*Id.* at p. 5385 [Estella did not know what questions were going to be asked in court or by whom].) With respect to petitioner's claim that Estella gave false evidence, the prosecutor did not know the nature of Estella's

testimony to be false. Estella purports to have crafted her testimony to con law enforcement and CPS. In any event, the testimony now contested by petitioner was not material and it's not reasonably probable that the outcome of petitioner's trial would have been any different but for this testimony. Notably, Estella also testified that she had trouble believing petitioner could have committed the charged offenses. (13RT 2642.) Thus, petitioner's false evidence claim should be rejected.

Finally, petitioner renews his argument that the prosecutor both presented false evidence that Consuelo was in good health prior to November 17, 1991 (RCCAP at p. 97, claim D9, first raised at pp. 43-45, claim A13) and failed to disclose information regarding other possible causes of her prior injuries (RCCAP at pp. 97-99, claim D9, first raised at pp. 43-45, claim A13). Both claims lack merit for the reasons previously discussed.

In sum, petitioner has not established that evidence he may have caused Consuelo's prior rib, abdominal or head injuries was false. Petitioner's contrary claim should be rejected.

E. Claim 5: The Prosecutor Did Not Accuse Petitioner of Molesting Christina or Suffering Prior Child Molest Convictions, Did Not Present False Evidence against Petitioner, and Did Not Withhold Exculpatory Evidence

Petitioner contends the prosecutor falsely asserted he molested Christina and was previously convicted of child molest. He further alleges the prosecutor presented false evidence. Finally, he argues the prosecutor withheld the following allegedly exculpatory evidence: a report that Christina did not show physical signs of having been sexually assaulted during an exam conducted by Dr. Diamond on December 10, 1991, interview notes of three individuals who opined petitioner was not a child molester, and information Consuelo had health problems prior to

November 17, 1991. (RCCAP at pp. 102-120.) These errors, he contends, violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal constitution; article I, sections 1, 7, 9, 12-17, 24, 27 and 28 of the state constitution and his state law rights to due process, a fair trial, present a defense, confrontation, compulsory process, a reliable and accurate assessment of guilt and penalty not based on false evidence and argument, a fair sentencing determination and freedom from cruel and unusual punishment. (RCCAP at p. 102.)

Since petitioner could have raised these claims below but failed to do so, he is procedurally barred from litigating them now. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) In any event, his contentions are baseless.

1. The prosecutor did not accuse petitioner of molesting Christina or suffering prior child molest convictions

Petitioner first argues the prosecutor falsely argued he molested Christina. (RCCAP at pp. 104-105, claim E3; at pp. 110-111, claim E6; and at p. 117, claim E9.) To support his claim, petitioner cites the following passage from the prosecutor's argument at the guilt phase:

> MR. CARBONE: ...[¶] Christina is lucky to get out alive. Not only from this guy behind me [petitioner], but from the next guy in line that she meets at the funeral. Joe Avila, another convicted sex offender. Her child has been—
>
> MRS. HUFFMAN: Objection, your Honor, another convicted child molester.
>
> THE COURT: Counsel.
>
> MR. CARBONE: I'm sorry, I misspoke.
>
> THE COURT: Absolutely. Ladies and gentlemen, and, again, counsel did misspeak himself. Mr. Benavides has no prior felonies, no record that I am aware of. If he did, you would have learned about it when he testified. Counsel, you agree with that?

> MR. CARBONE: Yes, your Honor. I apologize. I should have said another child molester, one that she knows to be a convicted registered sex offender for children."

(18RT 3592-3593.) Neither this passage nor any other part of the prosecutor's argument supports petitioner's position. Recognizing Consuelo's vulnerability based on her inability to say more than a few words or tell someone if something was wrong (11RT 2206), the prosecutor never accused petitioner of having molested Christina, who testified petitioner never hurt her or touched her in a bad way (11RT 2193).

Petitioner's additional assertion that the prosecutor falsely alleged he suffered a prior conviction and committed prior similar crimes is also unsupported and should be rejected. (RCCAP at pp. 105-106, claim E4.) The prosecutor allegedly made this false assertion when he questioned Estella. On direct examination, Estella testified that she started seeing petitioner seriously in February of 1991. On Christmas day (in 1990), petitioner left for Mexico intending to stay there for some period of time, but he returned early. He told her the reason he came back early was "he was in danger there." (13RT 2647.) There was no further discussion by Estella or any other witnesses, defense or prosecution, as to why petitioner was "in danger" in Mexico. A declaration by co-defense counsel Jeffrey Harbin alleges that the prosecutor told defense counsel and the court that petitioner had done the "same thing" (as he did to Consuelo) in Mexico. (Pet.'s RCCAP Exh. 65 at p. 5353.) However, the conversation is not contained in the record, so it did not take place in front of the jury. At both the guilt phase and the penalty phase, the prosecutor stipulated that petitioner did not have a prior record (18RT 3592-3593, 3767; 19RT 3767 [prosecutor stipulated "petitioner ha[d] no prior felony conviction and there [were] no instances of violence or threats of violent conduct prior to this case."]). Petitioner's unsupported claim of prosecutorial misconduct should

be rejected.

2. Evidence supporting petitioner's convictions of sexually assaulting and murdering Consuelo was not false

In an effort to relitigate the facts in his favor, petitioner appears to renew his false evidence claim on the grounds the prosecutor was allegedly aware of the following: (1) numerous individuals attested to his good character (RCCAP at pp. 106-110, claim E5), (2) prior to the date of the charged offenses Consuelo was "generally prone to injure herself" (*id.* at p. 111, claim E7), and (3) Consuelo was allegedly exposed to others who could have committed the charged offenses (*id.* at pp. 112-117, claim E8).

The standard for a false evidence claim was set forth in argument B2. Petitioner has not established that any of the evidence against him was either false or substantially material or probative on the issue of guilt or punishment. Both showings are required. (§ 1473, subd. (b)(1); *In re Hall*, *supra*, 30 Cal.3d 408, 424.) Therefore, his false evidence claim should be rejected.

3. The prosecutor did not withhold exculpatory evidence

As discussed previously, a prosecutor must disclose all substantial material evidence favorable to the accused relating to guilt, punishment or the credibility of witnesses. (*Brady v. Maryland*, *supra*, 373 U.S. at p. 87.) There are three components to a *Brady* violation: the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the state; and prejudice must have ensued. (*Strickler v. Greene*, *supra*, 527 U.S. at p. 364.)

Petitioner contends the prosecutor withheld exculpatory evidence, namely Joe Avila's RAP sheet, which allegedly indicated he was paroled

on November 20, 1990. (RCCAP at p. 112, claim E8.)[21] Avila's November 20, 1990 parole date was disclosed to the defense in the July 1, 1992, investigative report prepared by District Attorney Investigator Ray Lopez. (Pet.'s RCCAP Exh. 4 at p. 2071.) Investigator Lopez's July 13, 1992 interview of Avila was also discovered to the defense, and it referenced Avila's November 20 parole date as well. (*Id.* at p. 1726.)

Petitioner contends the People's failure to disclose Avila's RAP sheet precluded him from arguing that Avila was responsible for the charged offenses and inflicted her prior injuries. (RCCAP at pp. 113-114, claim E8; Supp. Pet at p. 13.) This contention is baseless. Petitioner had information that Avila was paroled on November 20, 1990, and there simply was no evidence that Avila ever had contact with Consuelo. (Pet.'s RCCAP Exh. 4 at pp. 1700-1729 [Transcript of Investigator Lopez's July 13, 1992 interview of Avila].) Estella testified she dated Avila *after* Consuelo's death. (13RT 2578-2579; Pet.'s RCCAP Exh. 4 at p. 2073 [Vicki told Investigator Lopez that Estella started dating Avila after petitioner was arrested].)[22]

Petitioner's second argument that the state withheld exculpatory evidence in the form of opinion testimony by Estela Mancilla Morales, Manuela Palomino Huerta and Manuel Benavides that petitioner was not a child molester should also be rejected. (RCCAP. at p. 118, claim E9.)

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[21] Respondent cannot deciper the parole date on Joe Avila's RAP sheet. (Pet.'s RCCAP Exh. 6 at p. 2946.) The date has been eclipsed by the binding.

[22] Vicki told Investigator Lopez that Estella had also "seen" or dated Avila before he was arrested. (Pet.'s RCCAP Exh. 4 at p. 2072.) However, Investigator Lopez determined that Avila was arrested for child molestation on May 10, 1986, and sent to prison on June 7, 1988. (*Id.* at p. 2073.) So that occurred before Consuelo was even conceived.

These individuals' opinions about petitioner's character were not material to petitioner's guilt or innocence.

Finally, petitioner objects to the state's failure to disclose that Christina was examined by Dr. Diamond on December 10, 1991, at which time she did not show any signs of having been sexually abused. (RCCAP at p. 119, claim E10.) The People did not have a *Brady* duty to disclose this report. The report was not material or exculpatory as petitioner was not charged with molesting Christina. Moreover, the prosecution's failure to disclose it was not prejudicial as Christina testified that petitioner never hurt her or touched her in a bad way. (11RT 2193.)

Petitioner further contends this Court erred on appeal by finding harmless, the trial court's erroneous admission of evidence that after Consuelo died, Estella associated with Joe Avila, a convicted child molester. (April 22, 2008 Supp. Pet. at pp. 12-14, citing *People v. Benavides* (2005) 35 Cal.4th 69.) Respondent agrees with this Court's ruling. In any event, petitioner has not identified any connection between this Court's ruling on appeal and the current claim "that the prosecution improperly and prejudicially presented false and misleading testimony that Petitioner was a child molester when it had overwhelming evidence in its possession disproving its own allegations, some of which it failed to disclose." (Supp. Pet. at pp. 12-13.)

F. Claim 6: Estella's Bias Toward Petitioner, Failure to Obtain Medical Treatment for Consuelo's Prior Injuries, and Inconsistent Explanations for How Consuelo Incurred Prior Injuries Was Relevant to Show Petitioner's Opportunity to Commit the Charged Offenses

Petitioner contends Estella's testimony regarding the following was irrelevant: (1) her visits to petitioner at jail after his arrest for Consuelo's sexual assault and murder (RCCAP at pp. 121-122, claim F1); (2) her

voluntary exposure of Christina to a convicted child molester following Consuelo's death (*id.* at p. 122, claim F2); (3) her failure to take Consuelo to the doctor for a head injury (*id.* at p. 123, claim F3); (4) questioning regarding her inconsistent explanations for how Consuelo received prior wrist and head injuries (*id.* at p. 124, claim F4, and at pp. 128-129, claim F9); and (5) her failure to seek medical attention for Consuelo when she failed to eat, play, acted sad, and just laid in bed about one month before the date of the charged offenses (*id.* at pp. 125-128, claims F5-7).

He contends this violated his rights to a fundamentally fair and reliable determination of guilt and penalty, to a trial free from materially false and misleading evidence, to the right to confront and cross-examine witnesses, and to the disclosure of all materially favorable evidence including impeachment evidence, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal constitution, and article I, sections 1, 7, 9, 12-17, 24, 27 and 28 of the state constitution. (RCCAP at p. 121.)

Since this claim restates an appellate claim, respondent incorporates the appellate response. (RB 59-66; *In re Harris*, *supra*, 5 Cal.4th at p. 825; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.) This claim is procedurally barred as it contains nothing of substance not already in the appellate record. (*In re Robbins*, *supra*, 18 Cal.4th at p. 814, fn. 34.) This claim should also be rejected because habeas corpus is not an available remedy to review the rulings of the trial court with respect to the admission of evidence. (*In re Lindley*, *supra*, 29 Cal.2d at p. 723.)

In any event, petitioner's claim fails on the merits, as well. As argued on appeal, the contested lines of questioning were relevant to show petitioner's opportunity to commit the charged offenses and to show Estella's loyalty to petitioner. (RB 59-66.) Thus, petitioner's claim for habeas relief should be rejected.

G. Claim 7: The State Did Not Withhold Material Exculpatory Evidence

Petitioner alleges the prosecutor failed to disclose material exculpatory evidence. He generally asserts that this violated his rights to due process, a fair trial, to present a defense, to confrontation, to compulsory process, to a reliable and accurate guilt and penalty assessment based on accurate evidence, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal constitution, and article I, sections 1, 7, 9, 12-17, 24, 27 and 28 of the state constitution. (RCCAP at pp. 131-162.)[23]

Specifically, he contends that the following evidence was exculpatory and material and improperly suppressed by the prosecution: (1) a September 4, 1991 report documenting the prosecution's unsuccessful attempt to interview Dr. Harrison, Joyleen Martinez, and Debra Ridling at UCLA that day (RCCAP at pp. 132-133, claims G1 and G2); (2) a December 4, 1991, police report narrating Detectives Nacua's and Valdez's contact with Dr. Chabra concerning rib injuries not noted by the doctor in his November 18, 1991 report (*id.* at pp. 133-134, claim G3); (3) the December 10, 1991 report of Christina's sexual assault exam (RCCAP at pp. 134-135, claims G4 and G5); (4) a police report alleging that Consuelo's uncle threatened defense counsel's secretary (*id.* at pp. 135-137, claim G6); (5) information about a county lawsuit against Estella for reimbursement of welfare benefits (*id.* at pp. 137-140, claim G7); (6) information about Joe Avila's parole date (*id.* at p. 140, claim G8); (7) criminalist Jeanne Spencer's handwritten notes (*id.* at pp. 142-143, claim

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[23] Petitioner's additional assertion he was denied the effective assistance of counsel should be rejected outright. His claim is cursory and does not address how counsel's representation was deficient or prejudicial. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; RCCAP at p. 131.)

G9); (8) a computerized tomography scan conducted at UCLA (*id.* at p. 143, claim G10); (9) evidence that would have impeached prosecution witnesses and evidence that the crime and prior abuse was perpetrated by Joe Avila or one of victim's relatives (*id.* at pp. 144-149, claim G11); (10) information about Consuelo's ill health prior to November 19, 1991, and petitioner's good character (*id.* at pp. 150-156; claim G12); (11) interviews of Dr. Tait, Dr. Harrison, and defense witness Warren Lovell (*id.* at pp. 156-157, claim G13); (12) interviews of petitioner's mother (*id.* at p. 158, claim G14); and (13) conversations between the prosecution and Estella and Christina (*id.* at pp. 159-160, claim G15.)[24]

Before trial began, the prosecutor stated on the record that he had fulfilled his discovery obligations, as follows:

> I have provided to Mrs. Huffman a copy of every document in my possession, everything, police reports, medical records from three different areas. I have made sure and gone back and re-subpoenaed and re-subpoenaed things over and over. I've obtained all the CAT scans, all of the x-rays, I have made them available to counsel in every way that I can, and I just want to make sure that the record is clear. I provided discovery, even copies of things that I knew she already had, just to make sure that she had the updated versions, that may have contained only a new page or two of material.

(1RT 19.)[25] To the extent any of the items contested by the defense were not provided, respondent submits that the item either did not fall within the

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[24] Petitioner's final allegation that "voluminous documents" revealed that the prosecution's coercive and suggestive interviewing practices either corroborated petitioner's version of the incident or illustrated the false medical testimony presented were also improperly withheld from the defense (RCCAP at p. 162, claim G16) is unsupported and too general to respond to. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

[25] The prosecutor also stated, "I've talked to a lot of doctors about what these injuries could mean, could not mean. Have I written down everything that they've said? No. I have talked to them about presentation

(continued...)

prosecutor's constitutional or statutory duty to provide it or that the failure to disclose it was not prejudicial.

Due process of law requires the prosecution to divulge all evidence to the defense which is both favorable to the accused and material either to guilt or punishment (*Brady v. Maryland*, *supra*, 373 U.S. 83), including all information that could impeach prosecution witnesses (*United States v. Bagley*, *supra*, 473 U.S. at pp. 675-676; *In re Sassounian*, *supra*, 9 Cal.4th at pp. 543-544, fn. 5). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Strickler v. Greene*, *supra*, 527 U.S. at p. 279.) The People's *Brady* duty pertains to evidence that is "'readily available' to the prosecution and not accessible to the defense. [Citation.]" (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1380.) While the prosecution may not suppress favorable and material evidence from the defense, it does not have the duty to conduct the defendant's investigation for him. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049.)

The following types of evidence have been found to be exculpatory: (1) evidence that is directly opposed to the guilt of the defendant (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1676); (2) evidence that points indirectly to third party culpability (*City of Alhambra v. Superior Court*

(...continued)
of these things in court, to the extent that it's not contained in the medical records, I have no other way to provide that to counsel." (1RT 19.) He further stated, "I have a three-ring binder that is full of doctor's reports only. I have, in addition, a whole set here, a complete set, fully numbered by me, of all the UCLA medical, uh, records. [¶] I went through these records. I read them extensively on at least a dozen occasions, and I went out and talked to all of the doctors." (1RT 17-18.)

(1988) 205 Cal.App.3d 1118, 1134); (3) evidence that undermines the credibility of a prosecution witness (*People v. Phillips* (1985) 41 Cal.3d 29, 46); (4) evidence that supports the testimony of a defense witness (*People v. Collie* (1981) 30 Cal.3d 43, 54); (5) evidence that mitigates the punishment of the defendant (*Brady v. Maryland, supra*, 373 U.S. 83, 87); and (6) evidence supporting a defense motion (*People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, 429). (1 Cal.Crim. Practice: Motions, Jury Instr. & Sent. § 13:33 (3d ed.) at p. 3.)

Separate from the constitutional mandate to disclose exculpatory evidence to a defendant in a criminal case, the prosecution must also comply with the state's discovery statutes. Section 1054.1 provides for mandatory disclosure by the prosecution to the defense of the following materials and information: (a) the names and addresses of prospective witnesses at trial, (b) statements of all defendants, (c) all relevant real evidence seized or obtained as a part of the investigation of the offenses charged, (d) the existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial, (e) any exculpatory evidence, and (f) relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including the records of physical or mental examinations, scientific tests, experiments or comparisons which the prosecutor intends to offer in evidence at trial.

Since the passage of Proposition 8 in 1982, which adopted article I, section 28(d) of the California Constitution, the "'Truth in Evidence Amendment,'" a witness may also be impeached with prior misdemeanor conduct involving moral turpitude. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296; *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1079; *People v. Lepolo* (1997) 55 Cal.App.4th 85, 89.) Moral turpitude is a willingness to lie (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522) or a

"'general readiness to do evil'" (*People v. Castro* (1985) 38 Cal.3d 301, 314). Therefore, the prosecutor also has a duty to disclose misdemeanor conduct involving moral turpitude.

1. Unsuccessful prosecution attempt to contact UCLA witnesses

Petitioner complains he was not provided with a copy of District Attorney Investigator Bresson's September 8, 1991, report documenting a tape-recorded meeting between him and the prosecutor with Debra Ridling, Joyleen Martinez and Dr. Harrison at UCLA on September 4, 1991. Assuming Petitioner's RCCAP Exhibit 6 is an authentic copy of Investigator Bresson's report, Ms. Ridling told them her contact with Consuelo was only "peripheral" and she recalled little about the case. When Ms. Ridling was questioned about her refusal to relay comments between staff regarding Consuelo "because of possible future consequences," Dr. Harrison accused Investigator Bresson and the prosecutor of harassment and terminated the interview before they questioned him or Joyleen Martinez. According to Investigator Bresson's report, UCLA's legal counsel advised Dr. Harrison and Ms. Ridling they did not have to talk to the prosecution but they ultimately elected to do so at a later date. (*Id.* at pp. 2954-2956.) Thus, the prosecutor did not have a duty to disclose Investigator Bresson's report because it was not exculpatory or relevant for impeachment purposes and would not have affected the outcome of the trial.

2. Law enforcement's December 4, 1991, contact with Dr. Chabra

Petitioner further contends the prosecutor withheld material exculpatory information in the form of a supplemental police report documenting Detective Nacua's and Detective Valdez's December 5, 1991, review of X-rays of Consuelo's chest taken November 17, 1991. The

detectives noticed that the X-rays showed additional broken ribs on Consuelo's left side and contacted Dr. Chabra regarding those observations. During this contact, Dr. Chabra advised them the breaks were very recent and explained they were possibly overlooked when the X-rays were taken. (Pet.'s RCCAP Exh. 5 at p. 2607.) In any event, the supplemental report documenting additional broken ribs is not exculpatory; it only contains Dr. Chabra's interpretation of the X-ray. Thus, petitioner's contention must fail.

3. Christina's sexual assault exam

Petitioner next argues the state suppressed Dr. Jess Diamond's December 10, 1991 sexual assault exam of Christina, in which no evidence of sexual abuse was found. (RCCAP at p. 134; claim G4; see also Pet.'s RCCAP Exh. 14 at p. 3947 [Dr. Diamond's Report].) Petitioner contends the report was material and exculpatory and could have been used to counter the prosecution's statement during closing argument that "Christina was lucky to get out alive" from "this guy behind me" (meaning petitioner). (*Id.* at p. 134, citing 18RT 3592.) Incidentally, the trial court sustained defense counsel's objection to the argument and instructed the jury that petitioner had not suffered any convictions. The results of Christina's sexual assault exam were not exculpatory and could not be used to impeach Christina because she testified that petitioner never hurt her or touched her in a bad way (11RT 2193). Therefore, the People did not have a *Brady* duty to disclose the report.

4. Police report by defense counsel's secretary

Petitioner alleges the prosecution withheld a police report of an assault with a deadly weapon (shot gun) against Marisol Alcantar, defense counsel Huffman's secretary, that allegedly took place on March 26, 1993, during petitioner's trial. Petitioner contends Consuelo's uncle, Javier

Alejandro, committed the alleged assault. He further accuses the prosecutor of making an illegal deal to cover up the crime in exchange for Alejandro's testimony in petitioner's case. (RCCAP. at pp. 135-137, claim G6.) This Court should reject both claims.

On the morning of March 26, 1993, Ms. Alcantar made a police report. She claimed that two Hispanic males broke into defense counsel's office, claimed to be related to Consuelo, asked for petitioner's case file, tied her up and threatened to kill her if defense counsel did not get off the case. (Pet.'s RCCAP Exh. 23 at pp. 4129-4130.) That afternoon, Alcantar was shown a photographic line-up. She selected one of the photographs, and said she was 70 percent sure he was one of the two individuals who assaulted her in the law office. The name of the individual in that photograph was redacted, but it appears to be Javier Alejandro. (*Id.* at p. 4135.) Alcantar claimed that the same individual had followed her during the previous six months. (*Ibid.*)

Petitioner seems to argue the prosecution had a duty to disclose the police report. Petitioner has not cited and respondent has not found any published caselaw to support his claim. The prosecution has a duty to disclose pending charges against a prosecution witness. (*People v. Coyer* (1983) 142 Cal.App.3d 839, 842-843; *People v. Martinez*, *supra*, 103 Cal.App.4th at pp. 1081-1082.) However, Alejandro had not been charged with a crime when he testified on April 6, 1993. Alejandro had spoken with the police on March 31, 1993, and denied Alcantar's allegations, but it appears the investigation was still underway when he took the witness stand. (Pet.'s RCCAP Exh. 23 at p. 4133.)[26] In any event, defense counsel

[26] On April 26, 1993, Javier Alejandro submitted to a polygraph. He denied having any knowledge about or personal involvement in Marisol Alcantar's assault with a shotgun, and was adjudged to be telling the truth. (continued...)

was aware of Alcantar's allegations against Alejandro. If the evidence that is subject to disclosure under *Brady* "is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence." (*People v. Salazar*, *supra*, 35 Cal.4th at pp. 1048-1049.) Defense counsel alerted the court and counsel to the alleged attack against her secretary the day it occurred. (7RT 1574-1575.) Before Alejandro testified on April 6, 1993, defense counsel stated she was aware of her secretary's allegations against him and stipulated that they were irrelevant, true or not. (12RT 2476.)

Likewise, there is no evidence the prosecutor made any promises or inducements to get Alejandro to testify. Petitioner's allegation that the prosecutor "covered up the [alleged] crime" in exchange for his testimony is wholly unsupported. Alejandro was not a material witness. Rather, he established the chain of custody to admit Consuelo's clothing into evidence. Alejandro testified that he was given Consuelo's clothing in a bag by staff at DRMC, and he took it home and then gave it to the police the next day. (12RT 2479-2480.)

5. County lawsuit against Estella for reimbursement of welfare benefits

Petitioner intimates that Darlene Salinas and Vicki Salinas were inappropriate caretakers for Christina, and the prosecution secured Christina's placement with them after the juvenile court removed her from her mother's care in exchange for their assistance, including their

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(Pet.'s RCCAP Exh. 23 at p. 4142.) Alcantar, by contrast, refused to submit to a polygraph. (*Id.* at p. 4143.) She also missed multiple appointments with the police and refused to answer their calls. (*Ibid.*)

testimony, with petitioner's prosecution. Petitioner further alleges that Darlene Salinas and Vicki Salinas received welfare benefits for caring for Christina and that these benefits provided a financial incentive for them to aid the prosecution in petitioner's criminal prosecution. Apparently, the Family Support Division of the District Attorney's Office sought reimbursement of the welfare benefits from Estella. He faults the prosecution for not disclosing that to the defense. (RCCAP at pp. 137-138; claim G7a, b & c.)

Under *Brady*, the prosecution is required to disclose favorable evidence to the defendant that is within the actual or constructive possession of the prosecution. (*Brady v. Maryland*, *supra*, 373 U.S. 83, 87.) As the prosecutor noted at the preliminary hearing, he and his office were not involved in Christina's juvenile dependency proceeding. (1CT 143, 145.) The prosecution did not select Christina's placement during the dependency proceedings or procure welfare benefits for Darlene Salinas or Vicki Salinas. Respondent submits that the records of the Family Support Division are separate from the criminal prosecution unit. (Cf. *People v. Jacinto* (2010) 49 Cal.4th 263, 270 [deputy sheriff's actions at the county jail were not properly imputed to the prosecutor; the sheriff's department was not a part of the prosecution team].) However, even if they were not, Darlene Salinas and Vicki Salinas could not have been impeached with evidence that the Family Support Division of the District Attorney's Office sued Estella to have the county reimbursed for the cost of Christina's care. Parents who have children who are removed from their custody by the juvenile court are routinely ordered to pay child support; Estella Medina was such a parent. Accordingly, petitioner's claim should be rejected.

Finally, petitioner asserts the prosecutor failed to disclose Vicki Salinas' agency relationship with law enforcement. (RCCAP at p. 140, claim G7d.) As previously discussed, there was no state agency

relationship to disclose.

6. Joe Avila's parole date

Petitioner erroneously asserts that the People "turned over false discovery and presented false evidence that convicted child molester Joe Avila had not been exposed to Consuelo Verdugo because he was incarcerated on the date of the charged offense and withheld evidence of Avila's proper parole date and evidence that Consuelo was exposed to him in the year preceding her death." (RCCAP at p. 140; claim G8.) As already discussed, there was no evidence that Avila ever had contact with Consuelo and reports by District Attorney Investigator Ray Lopez that were discovered to the defense stated that Avila was paroled on November 20, 1990. (Pet.'s RCCAP Exh. 4 at p. 2071 [July 1, 1992 report]; *id.* at p. 1726 [July 13, 1992 report].) Petitioner and Estella had dated since August of 1990 and shared an apartment together from March of 1991 until the date of the charged offenses. (13RT 2578-2579.) As discussed in Claim E8, there was no evidence that Avila was romantically involved with Estella prior to Consuelo's death or that he had any contact with Consuelo. Therefore, petitioner is not entitled to habeas relief based on *Brady* error.

7. Criminalist Jeanne Spencer's handwritten notes

Petitioner contends the prosecutor improperly withheld handwritten notes by criminalist Jeanne Spencer that noted the presence of "small dirt particles" in a napkin found in the kitchen waste basket (Pet.'s RCCAP Exh. 7 at p. 3426), the presence of dirt and debris in napkins in the bathroom waste basket (*id.* at p. 3412), and the presence of plant fibers on Consuelo's sweatshirt (*id.* at p. 3506; RCCAP at pp. 142-143, claim G9).[27]

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[27] Petitioner also alleges that Spencer's laboratory notes indicate that blood on Consuelo's shoe may have picked up dirt and gravel. (RCCAP at p. 142, citing Pet.'s RCCAP Exh. 7 at p. 3942.) However, page 3942 does (continued...)

He contends this evidence was consistent with his defense that he found Consuelo outside the front door and that the evidence was necessary to bolster his testimony to that effect. (RCCAP at pp. 142-143; Supp. Pet. at pp. 14-16.)

Even if petitioner could show that this evidence was exculpatory, which he has not, it was not material. The jury would not have acquitted petitioner or imposed a life sentence instead of the death penalty had the above information been presented to them. Petitioner's story that he found Consuelo outside the front doorway, bleeding from the nose and vomiting and that he cleaned up the area was still inconsistent with the absence of blood or vomit outside the doorway or other evidence showing the blood had been cleaned up (14RT 2748, 2751). Although the criminalist found some vomit wrapped in tissue in the kitchen garbage can, the vomit contained carpet fiber, not dirt, which was consistent with the interior carpeting (11RT 2291). Thus, the criminalist's handwritten notes were not improperly withheld.

Petitioner alleges that Spencer's undisclosed crime lab notes were material because they allegedly impeached her testimony and could have been used to refute the prosecution's cause of death. (Supp. Pet. at p. 15.) Not so. None of the tissues with dirt particles contained vomit. Even the defense expert conceded that Consuelo's injuries were not consistent with

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not contain the referenced information. Assuming arguendo, petitioner accurately characterizes Spencer's notes in this respect, this information was not material and the suppression of this evidence did not deprive petitioner of a fair trial. The soles of Consuelo's shoes were photographed and depicted in People's Exhibit 71, which was admitted into evidence. (2CT 521.) Thus, defense counsel could have argued that dirt on the bottom of Consuelo's shoes supported petitioner's comment that he found her outside, had she wanted to.

having run into a door or having been out of petitioner's sight for only a minute (14RT 2865), that she would have had gravel on her clothes had she been hit by a car and thrown (14RT 2859), and that she would not have been able to get up and walk to the front door had her abdominal injuries resulted from being struck by a car (14RT 2864).

8. CT scans conducted at UCLA

The prosecution presented evidence that Dr. Bentson, UCLA's chief neuroradiologist, reviewed a CT scan conducted on November 21, 1991 (12RT 2402-2404), that showed infarctions, meaning death of brain tissue, at the back of Consuelo's brain (12RT 2405-2406).[28] Dr. Bentson testified that the most common cause of infarctions is cutting off the blood supply or oxygen to the brain. (12RT 2406.) He opined that the infarcts resulted from Consuelo having been suffocated for six to eight minutes (12RT 2412)—*not* from a blow to the head (12RT 2408) or the two surgeries Consuelo underwent (at KMC and UCLA) before the CT scan (12RT 2413).

Petitioner contends the prosecution "failed to turn over two CT brain scans" of Consuelo's head that were taken at UCLA. (RCCAP at p. 143, claim G10). He then asserts that four CT scans were taken at UCLA,[29] but

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[28] Dr. Bentson prepared a slide with the pertinent portions of the CT scan, which was admitted into evidence as People's Exhibit 34. (12RT 2403.)

[29] Petitioner agrees that CT scans were conducted on November 21, 1991 (Pet.'s RCCAP Exh. 3 at p. 1059 [Report by Dr. Bentson]), November 23, 1991 (*id.* at p. 480 [Perinatal Intensive Care Unit Progress Note]), and November 24, 1991 (*id.* at p. 1215 [Physician Findings by Dr. Michael Phillippart]). (RCCAP at p. 143.) However, a CT scan was not conducted on November 22. (Compare Petitioner's RCCAP Exh. 3 at p. 462 [Perinatal Intensive Unit Progress Note] to p. 1073 of the same exhibit [Extended Care Critical Examination & Note by Dr. Harrison].) Dr. Harrison's report summarizes findings made based upon a review of the

(continued...)

only one was disclosed to the defense. (*Ibid.*, citing 14RT 2832.) He is wrong.

The prosecutor provided defense counsel with all the medical records in the case, including those from UCLA, and made all the CT scans available to the defense for review. (1RT 19.) Moreover, during in limine motions, the prosecutor stated that he planned to call a radiologist, Dr. Bentson from UCLA, to discuss the findings of the CAT scan he conducted of Consuelo's brain (1RT 13-24). He stated that Consuelo's brain injury was part of a pattern of injuries that was consistent with her having had a hand placed over her mouth, and that caused the loss of oxygen to the brain. (1RT 16-17.) Defense counsel did not recollect discovery to support that theory. (1RT 17.) The prosecutor cited Dr. Bentson's one-page UCLA Department of Radiological Sciences Diagnostic Report concerning a CAT scan conducted November 21, 1991, at 1339 hours in support. (1RT 19, 21-22; see also Pet.'s RCCAP Exh. 3 at p. 1059 [Report].) The prosecutor read Dr. Bentson's findings, including his overall impression of the results of the CAT scan: "There are extensive regions of cerebral and cerebellar hypodensity consistent with infarcts, mainly borderzone but also in the occipital and posterior temporal lobes." (1RT 22; accord Pet.'s RCCAP Exh. 3 at p. 1059.) Defense counsel Huffman claimed she had not previously received the report. (1RT 22.)

(...continued)
CT scan that was taken the previous day on November 21. (Pet.'s RCCAP Exh. 3 at p. 1073.) Notably, brain infarcts were depicted in all three CT scans. (Pet.'s RCCAP Exh. 3 at pp. 1059 [November 21, 1991 scan]), *id.* at pp. 480 [November 23, 1991 scan]; and *id.* at pp. 1154, 1215 [November 24, 1991 scan].) Finally, the 2004 Informal Reply incorrectly alleges that the last CT scan was conducted on November 25, 1991 (2004 Inf. Reply at p. 173, citing Pet.'s RCCAP Exh. 3 at p. 1215.) However, that document—Dr. Phillipart's report—expressly relates to the CT scan conducted on November 24.

The prosecutor then handed her his copy of the report and reiterated for the record that he took the report directly out of the medical records he had provided to defense counsel, noting it was on page 80 of the UCLA records. (1RT 22-23.) In response to defense counsel's statement that she did not have her medical records with her in court (1RT 22), the court offered to take the time necessary to "compare notes to see who's got what." (1RT 23.) Defense counsel then clarified that she was not suggesting the prosecutor had hidden anything from her; she simply did not recall the report. (*Ibid.*) Therefore, the record clearly refutes petitioner's claim that the prosecution suppressed evidence of the CAT scans taken at UCLA. Accordingly, petitioner's claim must fail.

9. Evidence that would have impeached prosecution witnesses and evidence that the crime and Consuelo's prior abuse was perpetrated by a relative of the victim or Joe Avila

Petitioner argues the prosecution withheld evidence that Joe Avila, Consuelo's aunts (Diana Alejandro and Dehlia Salinas), uncle (Javier Alejandro), and cousin Darlene perpetrated the charged offenses and/or previously injured her. (RCCAP at pp. 144-149, claim G11.) Petitioner's attacks on the character of the victim's family do not entitle him to habeas relief. There is no evidence that the prosecution possessed—let alone suppressed—evidence that any of above individuals physically or sexually abused Consuelo on November 17, 1991, or at any time prior to that.

Petitioner further argues the prosecution failed to disclose impeachment evidence concerning Darlene Salinas (RCCAP at pp. 145-146, claim G11b), Diana Alejandro (*id.* at pp. 146-147, claim G11d), and Javier Alejandro (*id.* at p. 147, claim G11e). This claim is also without merit.

Courts have found that the following types of evidence impact a witness's credibility, thereby making it "favorable" within the meaning of *Brady*: (1) inconsistent or conflicting statements (*Strickler v. Greene*, *supra*, 527 U.S. 263, 282); (2) false reports (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1245); (3) evidence contradicting a prosecution witness's statements (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1849, disapproved on other grounds by *People v. Martinez* (1995) 11 Cal.4th 434, 448); (4) promises or inducements (*Giglio v. United States*, *supra*, 405 U.S. at p. 154); (5) felony convictions involving moral turpitude (*People v. Martinez*, *supra*, 103 Cal.App.4th at p. 1079); and (6) pending charges against a prosecution witness (*People v. Coyer*, *supra*, 142 Cal.App.3d at pp. 842-843; *Martinez*, at pp. 1081-1082.) (1 Cal.Crim. Practice: Motions, Jury Instr. & Sent. § 13:33, *supra*, at p. 3.)

Petitioner alleges that Diane Alejandro "liked to fight" with her mother and with Estella and used drugs, citing a declaration submitted post-trial from his coworker, Cristobal Aguilar Galindo. (Pet.'s RCCAP Exh. 10 at pp. 5838, 5840). Galindo's unsubstantiated attack on Diane's character does not fall within any of the categories of permissible impeachment evidence. Accordingly, petitioner's claim fails.

Petitioner next contends that Darlene Salinas suffered two prior convictions which were not disclosed by the People. However, petitioner only adduced evidence of one prior conviction. The first alleged "conviction" was allegedly for using phencyclidine. However, the confidential juvenile report cited by petitioner for support merely alleges that Darlene was *arrested*, not convicted, of transporting/selling phencyclidine. (Pet.'s RCCAP Exh. 9 at p. 3766.) According to the same report, Darlene suffered a misdemeanor conviction of petty theft in 1981. Assuming the conviction could be substantiated, the defense could have impeached Darlene with the conduct underlying that misdemeanor

conviction. (*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 291-292) However, the defense's inability to cross-examine Darlene about whether she had stolen something 11 years before the trial was not prejudicial. Darlene only testified at the penalty phase about the effect of Consuelo's death on their family.

Finally, petitioner alleges Javier Alejandro was coerced into testifying in order to avoid prosecution for drug use or for allegedly threatening defense counsel's secretary on March 23, 1993. (RCCAP at p. 147, claim G11e.) As discussed in claim G4, defense counsel was well aware of her secretary's claim that Alejandro had threatened her and stipulated that the allegations, true or not, were irrelevant to Alejandro's testimony that he took Consuelo's clothing from DRMC and delivered it to the police the next day (12RT 2476, 2479-2480). The drug use allegation is unsupported, and thus does not provide a basis for habeas relief either.

10. Consuelo's ill health and petitioner's "good" character

Petitioner next contends the prosecution withheld evidence that Consuelo "was of ill health long before she met petitioner; that petitioner was a gentle, caring man who was not violent, whom Consuelo viewed as her father, and who was not believed to have caused Consuelo's injuries, even by Consuelo's family." (RCCAP at pp. 150-156, claim G12.)

As previously discussed, the prosecution disclosed all of Consuelo's medical records to the defense, including those detailing prior injuries and indicative of prior abuse. (1RT 19, 25.) In addition, the police interviews of petitioner's brother and fellow farmworkers that were cited by petitioner did not contain material exculpatory information that was subject to *Brady*. (RCCAP at pp. 154-156.) No one claimed to have been a percipient witness to the crime. Therefore, this Court should reject his claim.

11. Undisclosed interviews of Drs. Tait and Harrison and defense expert Warren Lovell

Petitioner further contends the state withheld exculpatory evidence from interviews of Dr. Tait, Dr. Harrison, and defense expert Warren Lovell. (RCCAP at pp. 156-157, claim G13.) Respondent disagrees.

Dr. Tait and Dr. Harrison did not testify at petitioner's preliminary hearing. Pursuant to Proposition 115, District Attorney Investigator Gregg Bresson described Consuelo's condition when she was seen by Dr. Tait at DRMC and by Dr. Harrison at UCLA and the treatment rendered by each. (§ 872, subd. (b); 1CT 160-166 [Dr. Tait's findings], and 202-206, 208-210 [Dr. Harrison's findings].) Investigator Bresson interviewed both witnesses before the preliminary hearing (1CT 164 [Dr. Tait], 208 [Dr. Harrison]). Investigator Bresson's interview of Dr. Tait was "rather limited" (1CT 155), and he had a ten-minute conversation with Dr. Harrison (1CT 210).

Petitioner has neither cited any documentary evidence that Investigator Bresson prepared a report of his interviews of Dr. Tait and Dr. Harrison, nor demonstrated that any reports contained material exculpatory information that was not already disclosed at the preliminary hearing. Without providing any citation to the Reporter's Transcript, petitioner alleges that Investigator Bresson referenced "the report" *at trial.* (RCCAP at p. 156.) Respondent reviewed volumes 11, 12, 13, and 15 of the Reporter's Transcripts, all of which contain testimony by Bresson. At one point, the court suggested Bresson "review one of his many reports" over the lunch break (after he was unable to give the date the victim was photographed at UCLA to lay the foundation for the photographs). (12RT 2401.) Respondent did not find any indication Bresson prepared a report concerning his Proposition 115 interviews of Dr. Tait or Dr. Bresson.

Even assuming petitioner could show that Bresson prepared reports which were withheld from the defense, petitioner has not shown that their

suppression was prejudicial. Petitioner claims to have been deprived of the opportunity to impeach Dr. Tait "with her statements that she had not seen evidence of sex abuse when she treated Consuelo" (RCCAP at p. 156). Not so. At the preliminary hearing, Bresson testified that Dr. Tait did not suspect Consuelo had been sexually abused. (1CT 166.) In addition, Dr. Tait's testimony that she did not see any vaginal secretions or blood on Consuelo's hospital gurney was elicited by the defense at trial. (17RT 3318.)

The prosecution's alleged nondisclosure of a Proposition 115 report regarding Dr. Harrison was not prejudicial either. Petitioner alleges that the defense would have elicited Dr. Harrison's opinion that Consuelo died from blunt force trauma to refute Dr. Dibdin's opinion that she died from penile penetration resulting in blunt force trauma to the abdomen, had a copy of Bresson's report been discovered. (RCCAP at p. 157, claim G13b.) There is no evidence that Dr. Harrison's statements to Investigator Bresson differed from his testimony at trial, where he was questioned by both parties about Consuelo's cause of death. On direct exam, Dr. Harrison stated that Consuelo "died of complications resulting from her initial injuries." (12RT 2356.) When asked about the cause of death on cross-exam, he gave the same answer, opining "that she died of complications from her injuries within her abdomen." (12RT 2369.) Upon further questioning by defense counsel, he opined that she suffered from blunt force trauma (as distinct from a puncture wound), but was unable to say what caused the trauma when she asked if it had resulted from penile penetration. (14RT 2369-2370.)

Petitioner's final contention that the prosecutor was required to alert him to the substance of his conversation with defense witness Warren Lovell also fails. (RCCAP at p. 157; claim G13c.) The prosecutor's impressions or conclusions from his conversation with Lovell would be

attorney work product, which is not discoverable pursuant to section 1054.6. (See also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 382.)[30] Dr. Lovell alerted defense counsel to the conversation in any event. (16RT 3080.) Accordingly, petitioner's claim fails.

12. Undisclosed interviews of petitioner's mother

Detective Valdez reinterviewed petitioner's mother, Maria Figueroa Benavides, in April of 1993 because the tape recording of the initial interview did not turn out due to a tape malfunction. (17RT 3308, see also Pet.'s RCCAP Exh. 4 at pp. 2133 - 2142 [Report of Reinterview].) Petitioner now alleges the state withheld the first interview of his mother. (RCCAP at p. 158; claim G14.) However, petitioner's mother affirmed that the second interview covered the material discussed during the previous one (*id.* at p. 2141), and petitioner has not shown otherwise. Such pleading is insufficient grounds for relief. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474.) Also, petitioner could have obtained a summary of his mother's statements to the police from his mother, who petitioner said regularly visited him at jail the year preceding the trial. (15RT 3058; *People v. Kasim*, *supra*, 56 Cal.App.4th at p. 1380.) Thus, petitioner is not entitled to relief.

13. Conversations between the prosecution and Estella and Christina

Petitioner further alleges that law enforcement did not report all of their contacts with Estella. (RCCAP at p. 159, claim G15.) Specifically, a tape recorded interview of Estella on Novemver 26, 1991, by District Attorney Investigator Greg Bresson and Detective Valdez that was

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[30] In addition, petitioner's summary of the prosecutor's cross-examination of Dr. Baumer regarding Dr. Lovell's employment is inaccurate. He mischaracterizes the record in an attempt to establish prejudice. (See 14RT 2888; RCCAP at p. 157.)

provided to the defense sought clarification regarding two matters that came up during prior unreported contacts with Estella. First, Investigator Bresson and the prosecutor talked to Estella and her son Ruben at UCLA Medical Center on an unspecified date. (Pet.'s RCCAP Exh. 4 at pp. 2199, 2202, 2211.) At that time, Ruben indicated that Christina had visited him at his residence for a couple of months during the summer. His girlfriend washed Christina's laundry and saw some blood spots in her underwear. (*Id.* at p. 2211.) During the November 26 interview, Investigator Bresson asked Estella if Christina was menstruating yet. Estella responded that over the past two to three months, Christina had complained about having cramps every month at about the same time every month. Estella purportedly informed Christina that she was bleeding, but Christina denied it and Estella did not notice blood when she washed Christina's panties. (*Id.* at pp. 2211-2212.) The second matter concerned a statement made by Estella to Detective Valdez at her home on the Friday before November 26 (after Estella had returned home from UCLA Medical Center). (*Id.* at pp. 2199, 2228.) On that Friday, Estella told Detective Valdez that on December 31, 1990, over a year before Consuelo died, petitioner traveled to Mexico and returned to the United States two weeks earlier than he originally planned. Detective Valdez asked how, if at all, petitioner explained his early return. Estella said he did not, but she was purportedly told by his friends that he had dated a married woman whose husband was incarcerated. (Pet.'s RCCAP Exh. 4 at pp. 2228-2230.) Petitioner alleges that exculpatory evidence, such as "petitioner's real reason for returning early to the United States" was not reported to the defense. (RCCAP at p. 160; but see Pet.'s RCCAP Exh. 66 [Estella does not contend she knew the reason petitioner returned from his trip to Mexico early or purport to have told law enforcement something other than what she said during the

recorded interview of November 26].) Thus, petitioner's claim lacks merit and fails.

Petitioner also claims the prosecution failed to report prior conversations with Christina. (RCCAP at p. 160.) Specifically, Investigator Bresson met Christina on December 20, 1991, to obtain forensic evidence (a blood sample), but did not notify the defense of this encounter. (*Ibid.*, citing Pet.'s RCCAP Exh. 7 at p. 3508.) The prosecution also allegedly failed to disclose that Investigator Lopez saw Christina at her cousin's house on numerous occasions. (RCCAP at p. 160, citing Pet.'s RCCAP Exh. 4 at pp. 1664-1676.) Petitioner has neither identified any statements by Christina that were withheld by the prosecution that were material and exculpatory or that could have been used for impeachment purposes, nor demonstrated how any suppressed statements were prejudicial. Therefore, his claim of *Brady* error fails.

H. Claim 8: The State Did Not Offer Witnesses Benefits in Exchange for Their Assistance with the Case

Petitioner contends the prosecutor failed to disclose material benefits that he allegedly offered witnesses. He alleges this violated the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 1, 7, 9, 12-17, 24, 27 and 28 of the California Constitution and his rights to due process, a fair trial, to present a defense, to confrontation, to compulsory process, to a reliable and accurate guilt and penalty assessments, to a fair sentencing determination, and to freedom from cruel and unusual punishment. (RCCAP at pp. 163-172.)[31]

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[31] Petitioner's additional assertion he was denied the effective assistance of counsel should be rejected outright based on his failure to articulate how defense counsel's representation was deficient and prejudicial. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; RCCAP at p. 163.)

Specifically, petitioner alleges that the prosecutor failed to disclose financial assistance provided to Darlene and Vicki Salinas. Not so.

As previously discussed, "the suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland*, *supra*, 373 U.S. 83 at 87.) A prosecutor also has a statutory duty to disclose to the defense any exculpatory evidence. (§ 1054.1, subd. (e).) The duty to disclose evidence favorable to the accused extends to evidence reflecting on the credibility of witnesses including any inducements made to secure the witnesses' testimony (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1272).

Petitioner asserts that Darlene and Vicki Salinas received cash in exchange for their testimony at the penalty phase because the Family Support Division of the District Attorney's Office sued Estella Medina for child support during the time Christina resided with the Salinas'. (RCCAP at pp. 163-165, 171; claims H1, H2, and H7.) Again, the Family Support Division is separate from the criminal prosecution unit of the District Attorney's Office. (Cf. *People v. Jacinto*, *supra*, 49 Cal.4th at pp. 270-271.) Petitioner has not shown that the prosecutor orchestrated the Salinas' receipt of child support or that it was provided as a payoff for their subsequent testimony regarding the effects of Consuelo's death on their family. Thus, there was nothing to disclose.

Petitioner's new assertion that the prosecution enabled Reynaldo Salinas to "overcom[e] obstacles to receiving welfare benefits [for taking in Christina], such as a criminal drug history" is also unsupported. (RCCAP at pp. 165-166.) Reynaldo did not testify at petitioner's trial or otherwise aid the prosecution. Thus, this claim also fails.

I. Claim 9: Petitioner Has Waived the Issue of the Admissibility of His Pre-Trial Admissions; the Trial Court's Admission of His Statements Did Not Violate His Constitutional Rights and Even If It Did, Any Error Was Harmless

Prior to trial, petitioner gave two statements to Detectives Valdez and Nacua of the Delano Police Department. The first statement was made on November 18, 1991, at 6:05 a.m., in the waiting room of the intensive care unit at KMC (1RT 101-102, 113). The second statement was made that afternoon at the police station after petitioner was arrested and waived his rights pursuant to *Miranda v. Arizona*, *supra*, 384 U.S. 436 (*Miranda*). (1RT 116-117.) The second statement was tape recorded. (1RT 104.) Detective Valdez conducted both interviews in Spanish. (1RT 105-106.)

The prosecutor moved to admit both statements at trial. Detective Valdez testified at an Evidence Code section 402 hearing on the issue. (1RT 99-125.) Before the hearing began, defense counsel stated that her interpreter, Mr. Hernandez, took the tapes and transcribed them himself. She said there were only "minor inconsistencies" between his transcription and that provided by Detective Valdez. (1RT 98.) She conferred with the prosecutor about the transcript of the interview (1RT 127, 141), and the prosecutor made the changes requested by the defense (1RT 146).

The trial court ruled that both of petitioner's statements were admissible. It ruled that the statement at KMC was not subject to *Miranda*, as petitioner was not in custody, the officers left the hospital without him, and did not place him under surveillance after they left the hospital. (1RT 126.) The court further found that the statement at the police station was preceded by a voluntary and intelligent waiver of his *Miranda* rights. (1RT 127.)

At trial, Detective Valdez testified that he and Detective Nacua interviewed petitioner at KMC around 4:30 a.m. on November 18, 1991.

(14RT 2741-2742.) Detective Valdez is fluent in Spanish and conducted the interview in Spanish. (14RT 2751.) During the interview, petitioner stated the following: Estella left the apartment at 6:35 p.m. Christina asked to go play with her friend for fifteen minutes. (14RT 2744.) Consuelo attempted to follow her out the door, but Christina brought her back and told her to stay. (14RT 2746.) Consuelo followed Christina again and petitioner told Christina to take Consuelo. Consuelo did not want to and hurried out the door. Consuelo attempted to follow. Consuelo shut the door hard and quickly. (14RT 2747.) Just prior to that, petitioner had gone into the kitchen to prepare eggs for dinner for everyone. (*Ibid.*) A minute later, petitioner did not hear any sound from Consuelo, so he went to the living room to check. The door was partially ajar. Petitioner opened the door and saw Consuelo lying outside the front door. Consuelo was on her back. Her eyes were looking up, contorted and rolling. She had blood on her nose and mouth and was vomiting. (14RT 2748.) Petitioner picked Consuelo up and took her to her room, where he cleaned her nose with toilet paper. (17RT 2750.) Christina came home. Petitioner cleaned up the vomit, but he could not remember when he did that. (14RT 2751.)

The prosecution also played the tape of petitioner's subsequent interview at the police station. Because the interview took place in Spanish, the jury was given a copy of the transcript of the interview that incorporated the changes requested by the defense. (1RT 104-105; see also 1Supp.CT 155-186 [Transcript of November 18, 1991 Police Station Interview].)

Petitioner challenges the trial court's admission of his statements to the police at KMC and the police station on a variety of grounds, none of which were raised at trial. A defendant must object at trial and should not be allowed to raise on habeas corpus an issue that could have been presented at trial. (*In re Seaton* (2004) 34 Cal.4th 193, 205.) Therefore,

the issues have been waived. Alternatively, it appears that all of petitioner's claims are record based and have been waived by his failure to raise them on appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 762.) In any event, the trial court's admission of petitioner's statements did not violate his constitutional rights. Even, if it did, any error was harmless.

1. Petitioner's statement at KMC was not subject to *Miranda*, and even if it were, any err in admitting the statement was harmless

At the Evidence Code section 402 hearing, the trial court ruled that petitioner's statement to Detectives Valdez and Nacua at KMC was noncustodial. (1RT 126.)

Petitioner contends that the trial court's admission into evidence at trial of his statement at KMC violated his Fifth Amendment rights. This claim is not cognizable on habeas corpus because it is based on the appellate record, and it could have been raised on appeal but was not. (*In re Sakarias* (2005) 35 Cal.4th 140, 169.) Even if this claim were properly before this Court, it lacks merit.

It is well known that *Miranda* and its progeny apply to exclude statements elicited from a defendant during "custodial interrogation." (*People v. Thornton* (2007) 41 Cal.4th 391, 432.) Interrogation without custody does not require the observance of *Miranda*. (*California v. Beheler* (1983) 463 U.S. 1121; *Oregon v. Mathiason* (1977) 429 U.S. 492; *People v. Ochoa* (1998) 19 Cal.4th 353, 401.)

"Custody" means a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler*, *supra*, 463 U.S. at pp. 1122-1125; *People v. Boyer* (1989) 48 Cal.3d 247, 271, disapproved in part on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) The test to determine custody is objective: "how a reasonable person in the suspect's position would have

understood the situation." (*Berkemer v. McCarthy* (1984) 468 U.S. 420, 442; accord, *Stansbury*, at p. 830; *Boyer*, at p. 272.) "Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given the circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." (*Thompson v. Keohane* (1995) 516 U.S. 99, 112.) The first inquiry is factual and reviewed under the deferential substantial evidence standard. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 402.) The second inquiry, whether a reasonable person would have felt at liberty to end the questioning, is decided independently by the reviewing court. (*Thompson*, *supra*, at pp. 113-116; *People v. Ochoa*, *supra*, at p. 402.) The following considerations have been identified as relevant to the issue of custody: the site of the interrogation; whether the subject is aware that he is the focus of an investigation; whether objective indicia of arrest are present; and the length and form of questioning. (*People v. Boyer*, *supra*, 48 Cal.3d at p. 272). A suspect is "in custody" for purposes of receiving of *Miranda* protection, "if there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler*, *supra*, 463 U.S. at p. 1125, citing *Oregon v. Mathiason*, *supra*, 429 U.S. at p. 495; *Stansbury v. California* (1994) 511 U.S. 318, 322.)

The record supports the trial court's finding that petitioner's statement to Detectives Valdez and Nacua on November 18, 1991 in KMC's Intensive Care Unit waiting room was non-custodial. (1RT 126.) The site of the questioning was a hospital waiting room, not an interrogation room at a police station. (1RT 101-102, 113.) Petitioner and Estella were in the waiting room when Detectives Valdez and Nacua approached them. (1RT 114.) The officers asked to speak with each of them privately. The officers asked petitioner to stay in the waiting room while they talked to Estella in

the hallway. (*Ibid.*) They did not leave a police officer with petitioner or confine him to the waiting room in any way. (1RT 115.) After speaking with Estella, the detectives talked to petitioner in the waiting room. (1RT 114.) Detective Valdez asked petitioner about what happened to Consuelo, and petitioner gave a statement. Petitioner was not arrested (1RT 126), handcuffed, or subjected to any form of physical restraint. (1RT 102.)

Petitioner argues that the interview at KMC was custodial because he was "objectively and subjectively a suspect." (RCCAP at p. 174.) Detective Valdez testified that before the officers spoke with petitioner, he was a suspect (1RT 112, 118), not the prime suspect (1RT 115-116). Petitioner contends that police reports that were contemporaneous to his questioning show he was the primary suspect. (RCCAP at p. 174; claim I2a(1).) "It is well-settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear on the question of whether the defendant is in custody for purposes of *Miranda*." (*Stansbury v. California*, *supra*, 511 U.S. at p. 324.) Thus, petitioner's claim must fail.

Petitioner also contends that his inability to speak English or drive prevented him from leaving KMC and thereby converted his interview with detectives into a custodial interrogation that required *Miranda* advisements. (2004 Inf. Reply at p. 197.)[32] He is incorrect. The test for custody does not depend on the subjective view of the interrogating officer or the person being questioned. A reasonable person in petitioner's shoes would not have

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[32] Contrary to petitioner's assertion, he is not entitled to a hearing "to prove" he was in custody when he was interviewed at KMC. (2004 Inf. Reply at p. 197.) Defense counsel expressly requested an Evidence Code section 402 hearing on the issue of whether petitioner was a suspect when he was interviewed at KMC (1RT 51) and to ask technical questions about the interview, including where it took place and who else was there (1RT 96).

believed that his freedom of movement was restrained under the circumstances. (*People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088-1089 [citations]; see also *People v. Ochoa*, *supra*, 19 Cal.4th at p. 401 [test for whether a defendant is in custody is objective]). Petitioner was not physically restrained before, during, or after the interview. (1RT 102.) The detectives did *not* leave an officer in the waiting room with petitioner, lock him in the waiting room or otherwise force him to stay there or anywhere else in the hospital when they talked to Estella out in the hallway before returning to talk to him. (1RT 115.)

Even if petitioner's statement at KMC was obtained in violation of Miranda, any error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [improper admission of a confession is subject to harmless error analysis]; *Chapman v. California* (1967) 386 U.S. 18, 24; accord, *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) Petitioner's subsequent interview at the police station covered the same topics that had been addressed at KMC, but in more detail. (14RT 2744-2751; 1Supp.CT 155-186.) Because the tape of petitioner's interview at the police station was properly admitted into evidence (as will be discussed in the next section of this argument), the court's admission of petitioner's statements at KMC, if erroneous, was harmless.

Petitioner further alleges that Detective Valdez's police report about the November 18 KMC interview should have been excluded as inherently unreliable. (2004 Inf. Reply at p. 197.) However, Detective Valdez's police report was not admitted into evidence. (2CT 518-521 [List of People's Trial Exhibits]; Pet.'s RCCAP Exh. 4 at pp. 1409-1410 [police report].) Petitioner also contends that the prosecutor's use of the report to cross-examine him constituted misconduct. (2004 Inf. Reply at pp. 197, 199.) Informal replies to informal responses cannot be relied upon to augment or supplement a petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 798.)

Therefore, that claim is not properly raised here.

In addition, petitioner has forfeited his claim. Prior to trial, he did not allege that Detective Valdez mischaracterized his statements at KMC. He did not move to suppress his statements at KMC on that basis or complain that the prosecutor should not be permitted to rely on Valdez's summary of his statements. (*People v. Prince* (2007) 40 Cal.4th 1179, 1275).

In any event, the prosecutor's cross-examination of petitioner about his prior statements to the police at KMC was not improper. This Court has summarized the standard by which a prosecutorial misconduct claim is reviewed as follows:

> A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.

(*People v. Morales* (2001) 25 Cal.4th 34, 44.)

The prosecutor was entitled to cross-examine petitioner about his prior statements to the police. As this Court explained in *People v. Dykes* (2009) 46 Cal.4th 731:

> The prosecutor is entitled to attempt to impeach the credibility of a defendant's testimony (see *People v. Chatman* [(2006)] 38 Cal.4th [344,] 382, 42 Cal.Rptr.3d 621, 133 P.3d 534) and point out inconsistencies between his or her testimony and prior inconsistent statements. When a defendant chooses to testify concerning the charged crimes, the prosecutor can probe the testimony in detail and the scope of cross-examination is very broad. (*Id.* at pp. 382-383, 42 Cal.Rptr.3d 621, 133 P.3d 534; *People v. Mayfield* (1997) 14 Cal.4th 668, 754, 60 Cal.Rptr.2d 1, 928 P.2d 485.)

(*Id.* at p. 764.)

Petitioner contends Detective Valdez falsely translated the phrase "a minute" in the police report. He contends that in Spanish, the phrase does not literally mean "a minute" but refers to a short period of time. (2004 Inf. Reply at p. 199.) The phrase appears twice in the report. Petitioner allegedly thought "Consuelo had followed [Christina] outside as he had lost sight of her as he was in the kitchen area" (preparing dinner), but "about a minute later [he] looked outside" and found her lying just outside the door. (Pet.'s RCCAP Exh. 4 at p. 1910; emphasis added.) At the conclusion of the interview, Detective Valdez inquired how Consuelo was so severely injured since petitioner had "just related that Consuelo was only gone out of his sight for a minute." Petitioner responded, "[S]he must of [*sic*] hit the door real hard." (*Ibid.*)

Haydee Claus provided a certified translation of petitioner's second interview which took place at the police station and was recorded. Petitioner was questioned about the length of time Consuelo was out of his sight in that interview, as well. (Pet.'s RCCAP Exh. 63 at pp. 5244, 5250, 5252, 5255, 5264 [certified translation of pp. 25, 28, 31, 40 of the Transcript of the November 18, 1991 police station interview].) Ms. Claus also reviewed "portions" of petitioner's testimony. (*Id.* at p. 11/5223.) Notably, Ms. Claus never alleged that petitioner's testimony or pretrial statement at the police station about Consuelo being out of his sight for "a minute" were incorrectly translated, nor did she assert that the phrase in Spanish means "a short period of time." (Pet.'s RCCAP Exh. 63 at pp. 5213-5223.)

The cases cited by petitioner do not support his claim either. (2004 Inf. Reply at pp. 197-199.) In *Hall v. Director of Corrections* (9th Cir. 2003) 343 F.3d 976, the defendant's murder conviction was reversed on the ground it was obtained through false evidence, namely jailhouse notes that were subsequently shown to have been altered from their original state. (*Id.*

at p. 985.) Petitioner was impeached with his prior statements at KMC, not statements that were falsely attributed to him. In *United States v. Short* (6th Cir. 1986) 790 F.2d 464 the defendant's conviction was reversed because the state erroneously admitted the defendant's confession without proof that it was knowing and intelligent. The defendant confessed during a police interview that was conducted in English, but the defendant was a German national who only spoke "broken English." (*Id.* at p. 465.) Here, by contrast, petitioner was interviewed in Spanish, his native tongue. Thus, petitioner's prosecutorial misconduct claim lacks merit.

2. Petitioner's statement at the police station was preceded by a knowing, intelligent and voluntary waiver of his *Miranda* rights

Petitioner alleges that the *Miranda* advisements given by Detective Valdez at the police station were inadequate and that his ensuing waiver was not intelligent. (RCCAP at pp. 175-176; claim I3.) Respondent disagrees.

When a suspect makes a statement during a custodial interrogation, the admissibility of that statement at his criminal trial turns on whether the police provided the suspect with four warnings. "These warnings (which have come to be known colloquially as '*Miranda* rights') are: a suspect 'has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" (*Dickerson v. United States* (2000) 530 U.S. 428, 435, citing *Miranda v. Arizona*, *supra*, 384 U.S. at p. 479.)

Moreover, in order to be valid, a suspect's waiver of *Miranda* rights must be "voluntary, knowing, and intelligent." (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 579; *People v. Combs* (2004) 34 Cal.4th 821, 845.) In order to be "voluntary," the decision to waive must be "the product of a free and

deliberate choice, rather than intimidation, coercion or deception. (*Moran v. Burbine* (1986) 475 U.S. 412, 421; *Combs*, *supra*, at p. 845.) A *Miranda* waiver must also be knowing and intelligent. Although "knowing" and "intelligent" are two different words, they express a single concept: the suspect understood the nature of the rights being given up and the consequences of waiving them. (*Burbine*, *supra*, at p. 421; *People v. Davis* (2009) 46 Cal.4th 539, 585-586.) Both aspects are tested against the totality of circumstances in each case, keeping in mind the particular background, experience and conduct of the accused. (*Davis*, at pp. 585-586, citing *North Carolina v. Butler* (1979) 441 U.S. 369, 374-375; *Burbine*, at p. 421.) "Any language difficulties" are a factor to consider in determining a defendant's ability to act knowingly and intelligently in waiving one's *Miranda* rights. (*United States v. Bernard S.* (9th Cir. 1986) 795 F.2d 749, 751-752.) Mental subnormality does not require automatic exclusion of a confession, "and the 'totality of circumstances' test still applies." (*People v. Lara* (1967) 67 Cal.2d 365, 385.)

A trial court's ruling on a motion to suppress a statement under Miranda is reviewed de novo. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1092.) "In doing so, however, the reviewing court accepts "the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.' [Citation.]" (*Id.* at pp. 1092-1093.)

The totality of the circumstances surrounding petitioner's police station interview supports the trial court's finding that petitioner had a knowing and intelligent understanding of the his *Miranda* rights and voluntarily waived them. (1RT 127.) On November 18, 1991, around 3:45 p.m., Detectives Valdez and Nacua arrested petitioner at Estella's apartment and drove him to the police department. (1RT 103, 116-117, 121.) Detective Valdez was 50 years old and grew up in a bilingual home.

He had spoken Spanish since he learned how to talk. (1RT 106.) He had spoken Spanish on a daily basis during the past twenty years as a police officer interviewing suspects and talking to individuals. (*Ibid.*) Detective Valdez asked petitioner if he read Spanish and then gave him the Delano Police Department Miranda Advisement Form that was written in Spanish. (1RT 103-104, 107; 1CT 34 [Form].)

The DPD Miranda Advisement Form is one-page long and divided into two parts. The top part is entitled "Aviso *Miranda*" (*Miranda* Advisements). (1CT 34.) The bottom half is entitled "Pasando Sus Dereches" (Passing Your Rights). (1CT 34; 1RT 109; Frmr Pet.'s Exh. 159 at p. 6299.) Detective Valdez asked petitioner to read the DPD *Miranda* Advisement form. (1RT 104.) Detective Valdez followed along as petitioner read the *Miranda* advisements out loud. (1RT 107.) Petitioner did not appear to have any difficulty reading in Spanish. (1RT 122, 123.)

Detective Valdez translated the DPD *Miranda* Advisement Form from Spanish into English. Mr. Hernandez, a defense interpreter, reviewed the DPD *Miranda* Advisement Form and found only "minor inconsistencies" between his interpretation and that provided by Detective Valdez. (1RT 98.) Detective Valdez translated the top half of the form as follows:

> You have the right to remain silent. Anything you say can and will be used in court against you. You have the right to speak with a lawyer before we ask you any questions and have him present with you during the interview. If you have no funds to pay for a lawyer, one will be appointed for you, free of charge, before the interrogation. If you decide to answer any questions now, without a lawyer present, you still have that right to stop, correction, to refuse to answer at any moment until you talk with a lawyer.

(1RT 109.) Based on the foregoing, there can be no dispute that the above advisements conveyed the four *Miranda* warnings. (*Dickerson v. United States*, *supra*, 530 U.S. at p. 435.) Detective Valdez translated the bottom

half of the DPD *Miranda* Advisement form as follows:

> Second portion of the *Miranda* is passing of your rights. Translated, it's waiver of your rights. I have read this declaration of my rights and I understand what they are. I am willing to make a declaration and answer questions. I don't want a lawyer at this time. I know and understand what I am doing. There has been no promises or threats, pressure or coercion against me. [Bottom part of form.]

(1RT 109.)

After petitioner finished reading the form, Detective Valdez asked two questions: whether he understood his rights and whether he was willing to answer questions. Petitioner responded affirmatively to both questions. (1RT 127; 1Supp.CT 156-157.) Both questions appeared on the bottom half of the DPD *Miranda* Advisement Form. With petitioner's consent, Detective Valdez marked "Yes" on the form beside the two questions. (1CT 34.) Before Detective Valdez began questioning petitioner, he informed petitioner that Consuelo had been physically and sexually assaulted, and petitioner was being detained in conjunction with his investigation about how Consuelo had been injured. (*Id.*) The fact the Miranda advisements were given in Spanish, petitioner's native tongue, further showed that petitioner's waiver was knowing and intelligent. (*United States v. Gonzales* (9th Cir. 1984) 749 F.2d 1329, 1336; compare *United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 538-539 [trial court's finding that *Miranda* rights were knowingly waived was reversed because the petitioner received the advisements in English but his first language was Spanish, a Spanish interpreter was not made available to him, he received a "borderline retarded score" on standardized intelligence testing, he was unable to understand oral instructions and was not given a written waiver to sign, he had no experience with the U.S. criminal justice system, and he produced independent evidence of his inability to understand English].)

Petitioner alleges, without citation to any documentary support, that while the prosecutor was investigating this case, the prosecutor questioned the validity of the DPD Spanish *Miranda* Advisement Form, as well as the detectives' request that petitioner read the form to himself. (RCCAP at p. 176.) However, prosecutors are supposed to identify potential legal issues in the cases they handle. In any event, petitioner's allegation is irrelevant to the trial court's ruling that petitioner waived his *Miranda* rights.

a. Alleged mental impairment

Petitioner now claims he did not understand the *Miranda* advisements because he is mentally retarded, and has poor reading skills and limited intellectual functioning. (RCCAP at p. 176, claim I3a and b.) Originally, petitioner did not reference any expert opinions for support. (Pet. at pp. 164-166.) However, he now cites a declaration from Antonio Puente, Ph.D., as support. (RCCAP at p. 176.)

Respondent objects to petitioner's reliance on Mr. Puente's declaration for support. It was not previously filed with the original petition or 2004 Informal Reply. Habeas counsel characterizes Mr. Puente's declaration as a "replacement" for a declaration from Ricardo Weinstein (Frmr. Pet.'s Exhibit 151), which was withdrawn. (Declaration of Michael Laurence in Compliance With This Court's Orders of Nov. 1, 2006 and Jan. 23, 2008 at p. 6.) Mr. Weinstein assessed petitioner's neuropsychological and cognitive functioning and provided information about petitioner's background, "including numerous now-withdrawn declarations." (*Id.* at p. 7.) Habeas counsel contends Mr. Puente was asked to independently examine petitioner to avoid any suggestion that the 'tainted' declarations influenced Dr. Weinstein's findings. (*Ibid.*) However, petitioner has not shown that Dr. Weinstein's review of fraudulent declarations obtained by Ms. Culhane necessitated an additional

neuropsychological exam by a new expert as opposed to having Dr. Weinstein simply review any replacement declarations and determine their effect, if any, on his opinion. (Compare Pet.'s RCCAP Exh. 89 at p. 5/5543, fn. 1 [Psychologist James Wood was asked to reconsider his prior opinion, which had been based in part on a fraudulent declaration obtained by Ms. Culhane].) If permitted to adduce a new expert opinion from Dr. Puente, petitioner would essentially get a windfall from Ms. Culhane's fraudulent work because Dr. Puente's opinion exceeds the scope of that reached by Dr. Weinstein and Dr. Puente's findings incorporate information that is favorable to petitioner from Dr. Weinstein's neuropsychological exam. For example, Dr. Weinstein found that petitioner had cognitive deficits and that "some" of his test scores reflected abilities in the mental retardation range (Frmr. Pet.'s RCCAP Exh. 151 at p. 32), but he did not opine that those matters "affected" petitioner's ability to understand the *Miranda* advisements (Frmr. Pet.'s RCCAP Exh. 151 at pp. 32-33) as now alleged by Dr. Puente (Pet.'s RCCAP Exh. 126 at p. 22). In addition, petitioner's full scale IQ scores on tests administered by Dr. Weinstein in 2002 were in the 80s on two tests and 72 on another test (Frmr. Pet.'s Exh. 151 at p. 9). On the other hand, in 2007, petitioner purportedly received a non-verbal IQ score of 48 on the Comprehension Test of Intelligence and an "IQ of 60-69: on a test that measures non-verbal intelligence, the Benton Visual Retention Test administered by Dr. Puente. (Pet.'s RCCAP Exh. 126 at p. 15, but see *id.* at pp. 5, 16 [In 2007, petitioner also obtained full scale IQ scores of 83 on the Beta-III and of 80 on the Wechsler Adult Intelligence Scale-III].)

Even if petitioner is permitted to supplant his claim with Dr. Puente's declaration, his claim is baseless. Dr. Puente opines that petitioner's ability to understand *Miranda* "was affected" by his "impaired intellectual functioning, tendency towards concrete thinking, problem-solving,

cognitive flexibility, memory, and limited learning capacity." (Pet.'s RCCAP Exh. 126 at p. 22.) Mr. Puente finds petitioner's intellectual functioning to be "within the mental retardation range." (*Id.* at p. 22.) To the contrary, petitioner's full scale IQ scores of 83 on the Beta and GAMA, of 82 on the WAIS, 80 on the WAIS III (Mexican Version), and 72 on the Woodcock Muñoz are not indicative of mental retardation (*id.* at p. 16).

Mr. Puente also opines that petitioner's "pre-adolescent intellectual functioning" was below the receptive language and reading level necessary to understand concepts in the *Miranda* waiver, but he fails to identify the reading level that is required to understand those concepts. (Pet.'s RCCAP Exh. 126 at p. 23.) Petitioner asserts that a seventh-grade reading level is required to understand one's *Miranda* rights. (2004 Inf. Reply at p. 202, citing Fulero and Everington, *Assessing Competency to Waive Miranda Rights in Defendant's With Mental Retardation* (1995) 19(5) Law and Human Behavior 533-545.) Petitioner's performance on the Woodcock Muñoz indicates that his reading and writing skills were equivalent to an individual who is 17 years and 2 months old, and his Spanish skills are equivalent to those of an individual who is 13 years and 8 months-old. (Pet.'s RCCAP Exh. 126 at p. 18.) In addition, petitioner received average grades in Spanish in the seventh grade. (Pet.'s RCCAP Exh. 52 at p. 5008 [Education Records for Petitioner]; Pet.'s RCCAP Exh. 116 at p. 5; Pet.'s RCCAP Exh. 126 at p. 18; Pet.'s RCCAP Exh. 127 at p. 40.) Thus, even if a seventh-grade reading level were required to understand the *Miranda* advisements, petitioner could read at, if not above, the level of a seventh-grader.

Petitioner further argues he acquiesced to Detective Valdez's question about whether he understood his rights because he is mentally retarded and behavioral studies show that mentally retarded individuals "are particularly vulnerable to acquiesce when posed questions with a yes or no answer

format." (2004 Inf. Reply at p. 203.) As already noted, petitioner's full scale IQ scores on the Beta, GAMA, WAIS and WAIS III (Mexican version) refute his mental retardation claim. Although the DPD *Miranda* Advisement Form contains yes/no answers to the question whether petitioner understood his rights and to the question whether he was willing to answer questions, petitioner was not merely handed the form to read and fill out. Rather, Detective Valdez listened to him read the advisements, watched him as he did so to check his understanding and then verbally asked him if he was willing to waive his rights under *Miranda*. Specifically, Detective Valdez asked petitioner if he understood his rights, and petitioner responded, "Yes." (1Supp.CT 156.) The following exchange then took place between Detective Valdez and petitioner:

> Valdez: Yes. Okay, I am going to put and [*sic*] "x" right here where it says yes. Okay. Here at number two you are willing to answer questions? Yes or no. How it's written there understand me?
>
> Benavides: Yes, yes I understand. Right now.
>
> Valdez: Excuse me?
>
> Benavides: Right now. Answer right now?
>
> Valdez: Yes. Do you want to talk to me.
>
> Benavidez: Yes.

(1Supp.CT 156.) Petitioner's responses show that he understood that he could decide whether to talk to detectives and he elected to do so.

The statements petitioner gave during the ensuing police station interview further discredit the notion that he unknowingly acquiesced to the detectives' request to question him; petitioner made a conscious choice to talk to the detectives. (2004 Inf. Reply at p. 203.) Petitioner understood

the questions posed, sought clarification when he did not,[33] and gave answers that were responsive to the question posed. More significantly, petitioner used the interview to deflect blame for Consuelo's injuries. Petitioner was adamant that he had never mistreated Consuelo or Christina (1Supp.CT 173 (line 5); 1Supp.CT 177 (line 10)), and did not hit or rape Consuelo (1Supp.CT 174 (line 24); 175 (lines 19-20); 176 (line 5); 177 (lines 5 and 65).) He called Consuelo mischievous as evidenced by a recent hand injury from which she had just recovered. (1Supp.CT 173). He also suggested that her current injuries could have resulted from a fall from a ladder. (1Supp.CT 178). When the police questioned some of petitioner's statements, such as his assertion that Consuelo was only out of his sight for a minute (1Supp.CT 175 (line 13)) or that she could have received injuries in her rectal area as a result of a fall (1Supp.CT 178 (lines 5 & 12)), petitioner did not retreat from his initial statement or admit any wrongdoing, but maintained that he did not know how Consuelo suffered her injuries. (See also 1Supp.CT 164 (line 20); 165 (line 13); 166 (line 26); 168 (lines 7 & 20); 169 (line 19); 170 (line 23) [at other points during the interview, petitioner professed a lack of memory when asked about incriminating facts].)

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[33] For example, after petitioner told detectives that he wanted to talk to them, he stated that he did not understand why he had been detained, and the officers clarified that he was being investigated for Consuelo's injuries. (1Supp.CT 157.) On another occasion, Detective Valdez informed petitioner that Consuelo's doctors reported that she was "very hurt from the inside" and asked petitioner how that could have happened. (1Supp.CT 174.) Petitioner responded that he did not understand. (*Ibid.*) Detective Valdez then clarified that a "rectal exam" indicated Consuelo had been "violated from behind." Petitioner adamantly retorted, "No! That I didn't know—that I didn't do." (1Supp.CT 174.)

b. Allegedly inadequate Spanish translation

Petitioner also contends that the *Miranda* advisements that he was given contained "numerous spelling and grammatical errors that affect the meaning of the text" that were confusing to him as a monolingual Spanish-speaker. (RCCAP at p. 176; claim I3c; 2004 Inf. Reply at p. 201; Supp. Pet. at pp. 16-17.) Not so. None of the alleged errors bore on the meaning of the four warnings required by *Miranda*. (*Dickerson v. United States*, *supra*, 530 U.S. at p. 435.)

Ms. Claus analyzed the quality of the Spanish to English translation of petitioner's taped interview at the police station. (Pet.'s RCCAP Exh. 63 at p. 1 and the 40-page attachment providing a transcription and translation of the interview.) Ms. Claus color-coded errors from the interview into four categories: yellow errors ("glaring errors that change meaning or create confusion; include Spanish language mistakes or translation errors in grammar or vocabulary"), orange errors ("errors in syntax or phrasing that render the translation awkward, somewhat ungrammatical or vague"), blue errors ("transcription errors; include punctuation errors, omission of words, 'improving' on original by not including hesitations, repetitions, false starts'") and red errors ("miscellaneous, more minor errors; include grammar, pronunciation, conjugation, gender, omissions, additions, register"). (*Id.* at p. 5224.) The Spanish language (yellow) and translation (orange) errors generally result in a miscommunication or a change in meaning. (*Id.* at p. 2.)

According to Haydee Claus' certified translation of the interview, petitioner received the following advisements (portions of which have been italicized to show the orange errors or underlined to show the yellow

errors)[34]:

DV: Before we speak with you, I want you to read this page here. Number one, number two, number three, number four. These are your rights, *what they call Miranda* Notification. Do you understand?

BVF: Yes.

DV: You have the right to remain silent. Second, anything you say, can and will be used against you with a, with a court of law. Third, you have the right to speak with an attorney before we ask you questions, and to have him present with you during the ques-questioning. Fourth, if you don't have enough funds to hir—hire an attorney, one will be appointed for you, free of charge, before or during the questioning. If you decide to answer questions right now without an attorney present, you still will have the right to stop answering at any time. Besides, you have the right to stop answering any time until you speak with an attorney. Passing your rights, [sic] I have read...I have read the statement about my rights and I understand *which ones they are*. I am willing to clear up and answer questions. I do not want an attorney at this time. I know and understand what I am doing. No promises or threats have been made to me, or, or pressure, or co—coercion against me. Have you understood your rights? Yes or no?

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[34] No blue/transcription errors were noted, but even if there had been some, they would be irrelevant to the issue of whether petitioner's waiver was knowing since the interview was not transcribed simultaneously. (Pet.'s RCCAP Exh. 63 at p. Attachment-2 (hereafter (A2).) Respondent does not denote the red/grammatical errors, because according to petitioner's own declarants, it is doubtful that petitioner noticed these alleged grammar mistakes let alone that they impacted the validity of his waiver or interview. (Pet.'s RCCAP Exh. 126 at p. 18 [though petitioner received "an average grade" in Spanish in seventh grade, he purportedly made frequent mistakes in the use of punctuation when he wrote and failed to read with the proper intonation]; Pet.'s RCCAP Exh. 127 at p. 41 [when petitioner wrote in the seventh grade, "he often made mistakes and rarely knew where periods or commas went;" "he was described as reading through sentences, 'like a train without making any stops for punctuation."].)

(Pet.'s RCCAP Exh. 63 at pp. 5226-5228.) None of the "errors" identified by Ms. Claus bore on the four warnings that are required under *Miranda*. (*Dickerson v. United States*, *supra*, 530 U.S. at p. 435.)

Petitioner further complains that the phrase "Pasando Sus Dereches" (on the bottom half of the DPD *Miranda* Advisement Form) has no meaning in Spanish and fails to connote the relinquishment of one's rights. (2004 Inf. Reply at pp. 200-201; Supp. Pet. at pp. 16-17, citing Pet.'s RCCAP Exh. 146 at p. 6657.) As the United States Supreme Court held in *Duckworth v. Eagan* (1989) 492 U.S. 195,

> "Reviewing courts...need not examine Miranda warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' ([*California v.*] *Prysock* [(1981)] 453 U.S. [355,] 361.)"

(*Id.* at p. 203.) That requirement was met in this case.

c. Lack of experience with U.S. criminal justice system

Petitioner further alleges that his *Miranda* waiver was not knowing and intelligent in light of his lack of familiarity with the U.S. criminal justice system. (2004 Inf. Reply at pp. 201, 203.) At trial, petitioner claimed he did not understand the *Miranda* advisements that he was given because he allegedly had "never been involved in these problems before." (15RT 3052.) Petitioner's failure to raise this issue on appeal forecloses him from asserting it now. (*In re Dixon*, *supra*, 41 Cal.2d at p. 762.) In any event, petitioner's lack of experience with the U.S. criminal justice system is only one factor in the totality of circumstances and does not outweigh the evidence that shows he understood his *Miranda* rights. (*People v. Lewis* (2001) 26 Cal.4th 334, 384 [rejecting claim that the defendant's low intelligence and young age (under 14) invalidated his waiver where the record revealed no confusion or failure to understand

during the police interview].) As already discussed, petitioner's responses show that he understood the advisements and knowingly waived them.

d. Submissiveness to law enforcement

In addition, petitioner alleges that his waiver cannot be viewed as knowing and intelligent because he was submissive to law enforcement. (2004 Inf. Reply at p. 203.) He contends this is evidenced by the following: he was previously beaten by Mexican border police (Frmr. Pet.'s Exh. 68), these beatings and prior beatings from his father resulted in PTSD (Frmr. Pet.'s Exh. 158), he allegedly dissociated when interacting with law enforcement (Frmr. Pet.'s Exh. 117), and he was traumatized by a beating his friends allegedly underwent from police officers one week before the date of the crime (Frmr. Pet.'s Exh. 100). (2004 Inf. Reply at p. 203.)

This issue is not properly before this Court as it was not cited as a basis for challenging the waiver in the original petition for writ of habeas corpus. Informal replies to informal responses cannot be relied upon to augment or supplement petitions. (*In re Clark*, *supra*, 5 Cal.4th at p. 798.) Even if this Court disagrees, there is no evidence to support petitioner's claim. The four exhibits originally cited as support in the Informal Reply have all been withdrawn. Therefore, this claim must fail.

3. Petitioner's statement at the police station was voluntary

> "The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citation.] The federal Constitution requires the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary. [Citation.] The same is now true under California law as a result of an amendment to the state Constitution enacted as part of Proposition 8, a 1982 voter initiative. (See Cal. Const., art. I, § 28, subd. (d);...) ... [¶] Under both state and federal law, courts apply a 'totality of

> circumstances' test to determine the voluntariness of a confession. [Citations.] Among the factors to be considered are '"the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' [Citation.]" (*People v. Massie* (1998) 19 Cal.4th 550, 576.)

(*People v. Boyette* (2002) 29 Cal.4th 381, 411.)

> A statement is involuntary if it is not the product of '"a rational intellect and free will."' (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534.) "'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined." [Citation.]' [Citation.] In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]" (*People v. Thompson* [(1990)] 50 Cal.3d [134,] 166.)
>
> A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. (*People v. Benson* (1990) 52 Cal.3d 754, 778, citing *Colorado v. Connelly* [(1986)] 479 U.S. [157,] 167.) A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*Benson*, *supra*, at p. 778.) Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) The statement and the inducement must be causally linked. (*Benson*, *supra*, at pp. 778-779.)

(*People v. Maury* (2003) 30 Cal.4th 342, 404-405; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 346-347.)

A reviewing court looks at the evidence independently to determine whether a defendant's confession was voluntary, but will uphold the trial court's findings of the circumstances surrounding the confession if supported by substantial evidence. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 383; *People v. Massie*, *supra*, 19 Cal.4th at p. 576; *People v. Wash* (1993) 6 Cal.4th 215, 235-236.)

Here, the trial court properly found that petitioner's statement at the police station was voluntary. (1RT 127.) There was nothing whatsoever coercive about the police activity in this case, so the essential prerequisite for petitioner's claim is absent. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 [107 S.Ct. 515, 93 L.Ed.2d 473].) As the transcript and audiotape of the interview show, the officers' conduct was not bold, aggressive or confrontational in any way. Petitioner was interviewed in Spanish, his native tongue. The detectives were polite and did not threaten appellant or make promises of leniency to induce a confession. There was no psychological coercion, and the interview was not overly long, having lasted only 45 minutes, between 4:05 p.m. and 4:50 p.m. (1Supp.CT 155, 185.)

a. Lack of consular advisements

Petitioner seems to contend that his "statements" to the police were not voluntary because he was not informed of his right to consular assistance pursuant to Article 36 of the Vienna Convention on Consular Relations (April 24, 1963) 596 U.N.T.S. 261, 21 U.S.T. 77. (RCCAP at p. 178; claim I5.) Petitioner's claim is procedurally defaulted as it was not raised at trial or on appeal. (*Medellin v. Texas* (2008) 552 U.S. 491, 522-523 [128 S.Ct. 1346, 170 L.Ed.2d 190]; *In re Martinez* (2009) 46 Cal.4th 945, 966.) In any event, petitioner was not entitled to consular assistance under the Vienna Convention when he gave a statement at KMC because he was not under arrest at that time. The failure of the police to notify

petitioner of his right to consular assistance before they interviewed him *at the police station* does not render that statement involuntary because he has not shown that he would not have talked, had he been told he could contact the Mexican consulate. (*United States v. Rodrigues* (E.D.N.Y. 1999) 68 F.Supp.2d 178, 184 ["Prejudice has never been-nor could reasonably be-found in a case where a foreign national was given, understood, and waived his or her *Miranda* rights."]) In addition, the suppression of evidence is not implicitly authorized for state police officers' failure to notify arrested foreign nationals of their right to consular notification and communication in violation of Article 36(1)(b) of the Vienna Convention. (*Sanchez-Llamas v. Oregon* (2005) 548 U.S. 331 [126 S.Ct. 2669, 165 L.Ed.2d 557].) As the transcript of petitioner's interview reflects, he was fully advised of his right to an attorney and his right to remain silent, and freely waived those rights. (1RT 127; 1Supp.CT 155-186 [transcript of interview].)

b. Alleged cognitive deficits

Petitioner also alleges that his "cognitive deficits" rendered his statement at the police station involuntary. (RCCAP at p. 178; claim I5; see also 2004 Inf. Reply at p. 202 [alleged deficits made him "more susceptible to coercion"].) He is wrong. As the United States Supreme Court explained in *Colorado v. Connelly*, *supra*, 479 U.S. at p. 167, "coercive police activity is a necessary predicate to the finding that a confession is involuntary under the Due Process Clause of the Fourteenth Amendment." In that case, like this one, there was no evidence that the police took advantage of any mental weakness of the defendant. As previously discussed, petitioner's statement at the police station was not extracted by coercion, promises or threats. (*People v. Richardson* (2008) 43 Cal.4th 959, 993 [rejecting claim that defendant's "low IQ—he later tested at 73—made him especially vulnerable in the interrogation setting" where, as here, the police had "no reason to know" that he had a low IQ].)

Notably, petitioner never asserted that his answers during the police station interview were confusing, unintelligible, or contradictory. (RCCAP at p. 178, claim I5; 2004 Inf. Reply at p. 202.)

c. Miscellaneous record-based claims not raised below

Petitioner further contends there was "a reasonable probability" that his statements were unreliable and involuntary as he was sleep-deprived and stressed from the interrogation and Consuelo's injuries. (2004 Inf. Reply at p. 205.)[35] The facts alleged in the Informal Reply were cumulative of facts that were in the record on appeal. Thus, the claims have been waived by petitioner's failure to raise them on appeal. (*In re Rinegold* (1970) 13 Cal.App.3d 723, 726-728; *In re Dixon*, *supra*, 41 Cal.2d at p. 762.) However, even if they were not waived, they lack merit.

At trial, petitioner claimed that he was not feeling well when he spoke to Detectives Valdez and Nacua at the police station but did so because they "were pressuring [him]." (15RT 3053.) Petitioner also testified that he had been up all night prior to his interview at the police station (15RT 3028), and was tired and concerned about Consuelo when he talked to the police at KMC (15RT 3064). The audiotape of the interview does not show any evidence of the detectives exerting pressure to talk to them or proceed without an attorney. (1Supp.CT 155-186.) Likewise, petitioner's speech is clear on the audiotape, and he appears to be lucid and coherent and able to assert himself when he did not understand a question or was questioned about having harmed Consuelo, despite claims at trial and now on habeas that he was tired.

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[35] Petitioner also alleged that he suffered symptoms of post traumatic stress disorder (PTSD). (2004 Inf. Reply at p. 205.) However, the only support for that claim, Petitioner's Former Exhibit 158 [declaration by Pablo Stewart], has since been withdrawn. Therefore, the claim fails.

4. Even if the court erred in admitting into evidence the statement petitioner gave at the police station, any error was harmless

Under the totality of the circumstances, petitioner's *Miranda* waiver was voluntary, knowing and intelligent and his statement was not coerced or involuntary. Even if this Court disagrees, the erroneous introduction of his statement into evidence was harmless beyond a reasonable doubt. (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 306-312; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Sims* (1993) 5 Cal.4th 405, 447-448.) As defense counsel pointed out at the outset of the Evidence Code section 402 hearing, petitioner never admitted any wrongdoing. (1RT 94.) Petitioner insisted he did not know what happened to Consuelo (1Supp.CT 179). He claimed he never harmed Consuelo (1Supp.CT at p. 177) or treated her or her sister badly (*id.* at p. 173). He vehemently denied raping Consuelo. (1Supp.CT 174, 176.) Moreover, petitioner's statement was in part exculpatory to the extent he placed blame for Consuelo's injuries elsewhere. He explained that Consuelo was mischievous, had recently broken her hand (1Supp.CT 173), and suggested that her current injuries resulted from a fall from a ladder (*id.* at p. 178). This was not a case where evidence of petitioner's guilt was provided solely by his statements. Moreover, the evidence of petitioner's guilt was overwhelming. Accordingly, the admission of petitioner's statement post-arrest at the police station was harmless beyond a reasonable doubt.

In the introductory paragraph of claim H, petitioner cursorily asserted that he was denied the effective assistance of counsel, without any analysis or discussion. (RCCAP at p. 173.) He subsequently alleged there was "a reasonable probability" that his *Miranda* waiver and statements to the police were unreliable given his alleged sleep deprivation, severe stress, neurocognitive deficits, unfamiliarity with the American criminal justice

system, and Detective Valdez's broken Spanish. (2004 Inf. Reply at p. 205.) He then contended that trial counsel's "ineffectiveness in not moving to exclude the statements based on their unreliability and/or presenting evidence of their unreliability prejudiced [him]." (2004 Inf. Reply at pp. 206-206.) Petitioner's claim is not properly before this Court, as informal replies to informal responses cannot be relied upon to augment or supplement petitions. (*In re Clark*, *supra*, 5 Cal.4th at p. 798.) In any event, his claim also fails on the merits.

Defense counsel did not have cause to question the reliability of the English translation of petitioner's pretrial statements to the police. The defense Spanish interpreter listened to the recording of petitioner's interview at the police station and found only "minor inconsistencies" between his translation and that rendered by Detective Valdez (1RT 98), and the transcript that was used at trial contained all the changes that had been requested by the defense (1RT 146). Defense counsel's failure to object to the admission of petitioner's pretrial statements' on the ground their translation into English was unreliable was also not prejudicial. None of the translation mistakes identified by Ms. Claus from the tape recorded interview were significant. (See argument M12.)

Defense counsel's failure to move to suppress petitioner's pretrial statements on the ground they were unreliable due to petitioner's alleged mental deficiencies was not unreasonable either. A declaration from Ms. Huffman states that she "never had any trouble with Mr. Benavides" and she was not aware, based on her interaction with him, that he had "serious cognitive difficulties and mental health disorders." (Pet.'s RCCAP Exh. 64 at pp. 5345-5344.) As discussed in argument I5b, petitioner's responses during the tape recorded interview do not reflect any mental deficiency either. (1Supp.CT 155-186.) For the same reason that defense counsel's performance was not deficient, it was not prejudicial either.

J. Claim 10: The Police's Investigation Did Not Violate Petitioner's Constitutional Rights and the State Did Not Withhold Material, Exculpatory Evidence or Present False Evidence against Petitioner

Petitioner contends that the following individuals should have been investigated as suspects for the charged offenses: Consuelo's uncles (Javier, Sacarias, Nicasio and Antonio Alejandro), Joe Avila, and two unnamed men in an unidentified pick up truck who allegedly attempted to stop Christina when she walked home from school on September 4, 1991.[36] Petitioner also alleges that Consuelo's maternal aunts (Dehlia Salinas and Diana Alejandro) and cousin Darlene Salinas should have been investigated for having inflicted her prior injuries. (RCCAP at pp. 183-190.) He further argues that the police's failure to investigate these individuals violated his rights to a fundamentally fair and reliable determination of guilt and penalty, to a trial free of materially false and misleading evidence, to confront and cross-examine witnesses, to a trial by a fair and impartial jury, to a conviction beyond a reasonable doubt, and to the disclosure of all materially favorable evidence including impeachment evidence, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and article I, sections 1, 7, 9, 12-17, 24, and 27-28 of the California Constitution. (RCCAP at. 180-191.)[37] He is wrong.

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[36] On September 4, 1991, at 4:07 p.m., Estella reported that two men (strangers) tried to stop Christina while she was walking home. Christina ran to a house and called her aunt. (Pet.'s RCCAP Exh. 5 at p. 2544; see also Pet.'s RCCAP Exh. 4 at 1838 [Christina mentioned the incident when she was interviewed by detectives in this case].)

[37] Petitioner also asserts he was denied the effective assistance of counsel. This claim should be rejected outright because he has not shown that defense counsel's representation was deficient and that he was prejudiced thereby. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; RCCAP at p. 180.)

"[P]olice officers are not required to take the initiative, or even to assist in procuring evidence on behalf of a defendant which is deemed necessary to his defense." (*In re Martin* (1962) 58 Cal.2d 509, 512; see also *In re Koehne* (1960) 54 Cal.2d 757, 759; *People v. Callen* (1987) 194 Cal.App.3d 558, 586.) The police cannot be expected to "gather up everything which might eventually prove useful to the defense." (*People v. Hogan* (1982) 31 Cal.3d 815, 851 [overruled on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836]; see also *People v. Bradley* (1984) 159 Cal.App.3d 399, 404-408 [no duty to seize blood stained articles at crime scene]; *People v. Watson* (1977) 75 Cal.App.3d 384, 400 [no duty to take suspect's blood sample to ascertain his sobriety following his arrest].) "Due process is offended only when the authorities, by their actions or regulations, impose any material obstacle in the part of the accused or frustrate his reasonable efforts designed to produce probative evidence." (*People v. Newsome* (1982) 136 Cal.App.3d 992, 1006; *People v. Flores* (1976) 62 Cal.App.3d Supp. 19, 23 [no duty to obtain names of witnesses].)

There is no evidence that any of the so-called suspects identified by petitioner had contact with—let alone injured—Consuelo on November 17, 1991. Apparently convicted child molester Joe Avila was paroled in November 1990 (Pet.'s RCCAP Exh. 4 at p. 2071, Pet.'s RCCAP Exh. 6 at p. 2946). However, there is no evidence to support petitioner's claim that he had access to and spent time with Consuelo the year before she died (RCCAP at p. 184) let alone prove that he ever abused her. To the contrary, Estella testified that she started dating *petitioner* in August of 1990. (13RT 2595.) Estella shared a residence with her mother and other family members at the time. (13RT 2597-2598.) Petitioner testified that he lived with Estella at her mother's house. (15RT 2985.) In March of 1991, Estella and petitioner rented an apartment together. (11RT 2277-2278; 15RT 2984 [petitioner's testimony].) Estella testified that petitioner stayed

there when he was not working and on her days off from work. (13RT 2601.) She further testified that she saw Avila *after* Consuelo died: at Consuelo's funeral, on New Year's Eve of 1991, a month after Mother's Day 1992, and on July 4, 1992 (13RT 2578-2579; accord Pet.'s RCCAP Exh. 4 at p. 2072 [Vicki Salinas told Investigator Lopez that Estella was dating Joe Avila in July of 1992]).

Petitioner has similarly failed to adduce any evidence that Estella's brother, Sacarias Alejandro, was responsible for Consuelo's current or prior injuries. (RCCAP at p. 189.) On November 14, 1991, three days before the charged offenses, an information was filed charging Sacarias with committing a lewd and lascivious act in May of 1991 against his girlfriend's 11-year-old daughter. (Pet.'s RCCAP Exh. 42 at pp. 4729-4731.) On January 16, 1992, the charge was dismissed, but the records adduced by petitioner do not indicate whether Sacarias was in custody while criminal action was pending against him. (Pet.'s RCCAP Exh. 42.) Even if Sacarias was not incarcerated on the date of the charged offenses, there is no evidence that he injured Consuelo that day or any other day.

Likewise, there is no evidence that Consuelo's prior rib and abdominal injuries were caused by her cousin Darlene or aunts, Dehlia and Diana. (RCCAP at pp. 186, 188-189.) In fact, Dehlia told Estella on occasion that Consuelo was not feeling well. (17RT 3348.) Diana noticed that Consuelo was not feeling well around Halloween of 1991 (14RT 2731), and she urged Estella to take her to a doctor for medical treatment (14RT 2733). Dehlia and Diana would not have reported Consuelo's ill health or urged Estella to seek medical treatment for Consuelo had they been abusing her.

Petitioner further asserts that the prosecution suppressed the mental health records of Dehlia Alejandro. (RCCAP at p. 187, claim J4a.) Petitioner has not articulated what he means by "mental health records." At

the guilt phase, Dehlia testified that she was hospitalized for a nervous breakdown in 1985 and again in 1992. (17RT 3345, 3350; see also 19RT 3471 [At the penalty phase, Diana Alejandro testified that Dehlia suffered a nervous breakdown following Consuelo's death].) Petitioner fails to show that the records were favorable and in the prosecution's possession. Finally, there is no evidence that the mental health records were material to his defense. (*Strickler v. Greene*, *supra*, 527 U.S. at pp. 280-281; *In re Brown*, *supra*, 17 Cal.4th at p. 879.) Petitioner contends he was deprived of arguing that Dehlia caused Consuelo's prior injuries because he did not have her records. (RCCAP at p. 187.) In fact, the defense called Dehlia as a witness, and she testified that Consuelo broke her wrist when she was babysitting her. (17RT 3338.) Thus, petitioner's claim fails.

Finally, the cases cited in petitioner's 2004 Informal Reply are inapposite to this case and do not prove that petitioner is entitled to habeas relief. (2004 Inf. Reply at pp. 208-209.) *Foster v. California* (1969) 394 U.S. 440, involved lineup identifications that were unnecessarily suggestive and conducive to irreparable mistaken identification, such that, when judged under the totality of the circumstances, it was deemed to be a denial of the defendant's due process rights. As already discussed, petitioner has not shown that the People suppressed material, exculpatory evidence in violation of *Brady v. Maryland*, *supra*, 373 U.S. 83. In *Cook v. State* (Tx. 1996) 940 S.W.2d 623, the prosecutor engaged in misconduct by withholding exculpatory evidence that someone other than the defendant had made repeated death threats to the victim. In *Ex Parte Brandley* (Tx. Crim.App. 1989) 781 S.W.2d 886, 892, the defendant's rights to due process and a fair trial were violated because an investigator physically threatened a witness and had him sign a written statement when he could not read or write and the defense was not advised that another person had confessed to the crime or that two other men were near the crime scene and

acting in a suspicious manner. In *Commonwealth of N. Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1109, 1117-1119, the prosecution ignored the content of a potentially exculpatory letter which appeared to be by an informant and indicated that the informant was responsible for the kidnapping and murder for which the defendant had been charged. *Arizona v. Youngblood* (1988) 488 U.S. 51 concerned the failure of police who were investigating the sexual assault of a 10-year-old boy to refrigerate the boy's clothing for the testing of semen samples, but held there was no due process violation absent proof that the police acted in bad faith, the United States Supreme Court held that the defendant's due process rights had not been violated. (*Id.* at pp. 55-56.) Lastly, *Pyle v. Kansas* (1942) 317 U.S. 213, and *Mooney v. Holohan* (1935) 294 U.S. 103, 112, both pertain to criminal convictions that were allegedly obtained through the prosecution's use of false or perjured testimony. Petitioner characterizes Estella's testimony that she saw Avila after Consuelo died as false and contends the prosecutor's admission of this testimony violated his rights to due process. (RCCAP at pp. 184-185; claim J2a, b & d.) Petitioner has not shown that false evidence that was substantially material on the issue of guilt or punishment was introduced against him at trial. (§ 1473, subd. (b)(1); *In re Roberts*, *supra*, 29 Cal.4th at p. 742.) Indeed, there was no evidence that Estella saw Avila or that Avila ever had contact with Consuelo, let alone injured her. Therefore, he is not entitled to habeas relief.[38]

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[38] Petitioner further alleges that the state manufactured evidence to mask weaknesses in its case and presented false testimony by Christina (11RT 2187-95) at the guilt phase and presented false testimony at the penalty phase by Diana Alejandro (19RT 3741-3742) and Darlene Salinas (19RT 3744). (2004 Inf. Reply at pp. 209-210.) These allegations were not contained in the original petition. Informal replies cannot be relied upon to augment or supplement the petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 798.) In any event, Christina's testimony was not false as discussed in (continued...)

K. Claim 11: The Prosecutor Did Not Commit Misconduct

Petitioner contends the prosecutor committed misconduct by: (1) equating the burden of proving guilt beyond a reasonable doubt with producing truthful testimony and evidence during voir dire and closing argument; (2) referring to facts not in evidence during direct and cross-examination and closing argument; (3) overstating the medical evidence presented at trial during closing argument about the amount of force necessary to break ribs and child abuse; (4) denigrating defense experts; (5) equating the defense's failure to examine evidence as evidence of petitioner's guilt; (6) improperly advising the jury during closing argument to find petitioner guilty based on his demeanor; (7) improperly instructing the jury during closing argument to ignore petitioner's good character evidence; and (8) improperly urging the jury during closing argument to convict based on emotion and fear. Petitioner contends this misconduct violated his due process right to a fair trial. (RCCAP at pp. 193-201.)

"Improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642.) However, conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial error under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Frye* (1998) 18 Cal.4th 894, 969, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The

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(...continued)
argument M7 and the declarations that supported his other claim (Pet.'s Exh. Nos. 148 and 163) have been withdrawn. Thus, both claims lack merit.

burden is on the defendant to show the existence of prosecutorial misconduct. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 427.)

Misconduct that infringes upon a defendant's constitutional rights, mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. (*Chapman v. California*, *supra*, 386 U.S. 18; *People v. Hall* (2000) 82 Cal.App.4th 813, 817, citing *People v. Harris* (1989) 47 Cal.3d 1047, 1083.) A state law violation is only grounds for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the disputed behavior. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Milner* (1988) 45 Cal.3d. 227, 245.) In either case, reversal is only required where the misconduct is prejudicial (*People v. Fields* (1983) 35 Cal.3d 329, 363).

Petitioner complained on appeal that the prosecutor improperly appealed to the prejudices and passions of the jury during closing argument. However, his other prosecutorial misconduct claims are not cognizable on habeas corpus because they were discernible from the trial record yet not raised on direct appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 762.)

Even if this Court were to address petitioner's claims of prosecutorial misconduct, they have been forfeited in that petitioner did not object to any of the alleged prosecutorial misconduct at trial and an objection from defense counsel and admonition from the court would have cured the harm. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 432.) Petitioner's prosecutorial misconduct claims also fail on the merits.

1. Admonishment of the jury to seek the truth

Petitioner contends, for the first time on habeas corpus review, that the prosecutor undermined the presumption of innocence by equating the People's burden to prove petitioner's guilt beyond a reasonable doubt with

a duty to produce truthful evidence. (RCCAP at p. 193, claim K2.)[39] He is wrong.

A prosecutor may not misstate the law generally or in an attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. (*People v. Hill* (1998) 17 Cal.4th 800, 829.) The prosecutor in this case did not misstate the law.

During voir dire, the prosecutor discussed his burden to prove petitioner's guilt beyond a reasonable doubt (4RT 850-851; 5RT 970-971; 7RT 1461; 9RT 1881-1883). He further pointed out that petitioner was presumed innocent (9RT 970; 9RT 1881), and queried prospective jurors about their duty to find petitioner not guilty if he did not meet his burden of proof (4RT 851; 5RT 971; 7RT 1463; 9RT 1882). His additional statements that the standard of proof could be summed up in one word, the truth (4RT 850), and a search for the truth (5RT 971; 7RT 1463; 9RT 1883) did not reduce his burden of proof.

During closing argument, the prosecutor outlined the elements of the charged offenses. (18RT 3558-3564.) He then asked the jury to determine whether the facts that were presented showed petitioner to be guilty beyond a reasonable doubt:

> We ask you to take a good hard look at the cold facts in this particular phase of the trial. We ask you to take a look and use your reason and logic to find out what happened, determine what the truth is, determine if I met my burden of proof beyond a reasonable doubt on these issues, and examine any doubts you

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[39] Although petitioner did not object to the prosecutor's statements during voir dire and closing argument, respondent concedes that this issue may not be forfeited to the extent arguments which reduce the prosecution's burden of proof potentially affect a defendant's substantial rights. (*People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172; *People v. Johnson* (2004) 119 Cal.App.4th 976, 985.)

> might have as to the elements of the offenses, and determine whether or not they are reasonable ones.

(18RT 3564.) He concluded the argument with the italicized remark to which petitioner now objects:

> At the end of this trial, ladies and gentleman, after Mrs. Huffman has had a chance to talk to you, I will be very brief in my rebuttal and I will ask you then as I ask you now, in accordance with the evidence presented, taking a cold reasonable hard look at this evidence to *return a true verdict based on truth and fact* and that is that the defendant is guilty of first degree murder and he is guilty of lewd acts with a child.

(18RT 3598; emphasis added.) The italicized language did not, as petitioner contends, dilute the People's burden to prove petitioner guilty beyond a reasonable doubt.

Moreover, any misconduct was not prejudicial. The court instructed the jury pursuant to CALJIC No. 1.00 to base their decision on the facts and the law, accept the law as given to them by the court, and to follow the court's instructions if anything said by the attorneys in their arguments or any other time during the trial conflicted with those instructions. (2CT 536, 18RT 3525.) The jury is presumed to have followed the court's instructions. (*People v. Ryan* (1981) 116 Cal.App.3d 168, 179.)

2. Alleged reference to facts not in evidence

Petitioner further contends the prosecutor referred to facts not in evidence. (RCCAP at pp. 193-194, claim K3.) Respondent disagrees.

Petitioner first argues the prosecutor "improperly and falsely" imputed a romantic relationship between Estella and Joe Avila, a convicted child molester, after Consuelo died. (RCCAP at p. 194, citing 13RT 2570, 2573.) At trial, defense counsel raised a relevance objection to the prosecutor's line of questioning regarding Estella's relationship with Avila, but she never asserted Estella was not romantically involved with Avila.

(13RT 2568.) "It constitutes misconduct to examine a witness solely for the purpose of implying the truth of facts stated in the question rather than in the answer to be given, and a prosecutor should not pursue a line of questioning that is damaging but irrelevant. [Citations.]" (*People v. Dykes*, *supra*, 46 Cal.4th at p. 766.) The prosecutor's questions were supported by evidence that Estella was romantically involved with Avila, and he argued, and the court agreed, that the relationship was relevant to show petitioner's opportunity to commit the charged offenses. (13RT 2569, 2575-2576.) At trial, defense counsel objected to this line of questioning on relevance grounds, but her objection was overruled. On direct appeal, this Court explained that the fact Estella Medina "kept company with a known child-molester Avila after Consuelo's death was of limited probative value to the determination of petitioner's guilt" because "[n]othing in the record established that before then [Consuelo's death], Medina either associated with Avila or had knowledge or reason to suspect defendant was abusing Consuelo." (*People v. Benavides*, *supra*, 35 Cal.4th at pp. 90-91.) To the extent the prosecutor's relevance assessment was incorrect, the prosecutor's line of questioning, even if improper, was not prejudicial given the strong evidence of petitioner's guilt. (*Id.* at p. 91 [trial court's erroneous admission of evidence of Estella's relationship with Avila was harmless error].)

Petitioner also complains about the prosecutor's examination of Estella at trial. The prosecutor elicited her testimony that petitioner left for Mexico on Christmas day in 1990 and came back early. (13RT 2647.) The prosecutor then asked, "And that was because, as he expressed to you, he was in danger there and he wanted to come back early. Isn't it a fact?"

(13RT 2647-2648.) Estella answered in the affirmative. (13RT 2648.)[40] Petitioner contends the question was improper and prejudicial. He alleges the jury necessarily construed Estella's response as evidence that he "had committed a crime in Mexico and was evading authorities" and convicted him based on facts not in evidence and an erroneous perception that he would commit another child molestation crime if acquitted. (RCCAP at p. 194.) Even if the prosecutor's question was improper, it was not prejudicial. The court informed the jury that petitioner did not have a prior criminal record or any felony convictions (18RT 3593) and instructed the jury to base its verdict on the facts presented at trial and not any other source (18RT 3525). Again, the jury is presumed to have followed the court's instructions. (*People v. Ryan*, *supra*, 116 Cal.App.3d at p. 179.)

In addition, petitioner argues the prosecutor committed misconduct during cross-examination of petitioner. (RCCAP at p. 194.) The prosecutor asked about Consuelo's prior head injury before addressing the head injury she incurred on November 17, 1991, as follows:

Q. When she hit her head were you there?

A. I believe I was there.

Q. Well, were you there or weren't you there? Yes or No?

A. Yes, I was there.

Q. And how did she hit her head?

A. I didn't see it. I was in the bedroom.

Q. *Estella told people at the hospital that the baby had been hit in the head with a door from following her sister*

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[40] Petitioner contends that defense counsel objected, which she did. However, she objected on the ground the question assumed facts not in evidence, not prosecutorial misconduct. Moreover, the court overruled her objection. (13RT 2648.)

Christina. Did you hear her say that?

A. *In the hospital I didn't hear her say anything like that.*

Q. Did you say anything to any of the hospital employees as to what happened to the child? Yes or No.

A. They didn't ask me or Stella anything.

Q. I want you to listen to the question, Mr. Benavides. Did you say anything, yes or no, to any hospital employees about what happened?

A. I didn't tell anyone anything.

Q. Now Estella told a social worker from UCLA that you said you picked up the baby and brought her in the bedroom and when you heard she wasn't crying you went back in to check on her. Did you tell Estella that?

A. I didn't tell her anything. I don't remember.

(15RT 3046-3047; emphasis added.) Petitioner argues the italicized question was improper because there was no evidence about what Estella told hospital workers about the prior injury. He is incorrect. Review of the foregoing passage shows that the prosecutor switched subjects—he went from questioning petitioner about Consuelo's prior head injury for which no medical treatment was sought to questioning him about the head injury Consuelo suffered on November 17, 1991. Moreover, the prosecutor's questions were proper. A prosecutor may ask a witness questions which are based on the evidence or reasonable interpretations which may be drawn from the evidence. (*People v. Stewart* (2004) 33 Cal.4th 425, 491-592.) The prosecutor was entitled to question petitioner about the statements Estella gave to hospital personnel regarding Consuelo's current head injury. Moreover, the jury would have deduced that the italicized question related to the November 17, 1991, head injury given the evidence of Estella's statements to hospital staff about the injury and that Estella did

not seek medical treatment for Consuelo's prior head injury. Thus, petitioner's prosecutorial misconduct claim fails.

Petitioner further contends the prosecutor committed misconduct during closing argument. He contends the prosecutor improperly implied that petitioner previously molested children on two occasions: once during the guilt phase and once during the penalty phase. (RCCAP at p. 195.)

A prosecutor is given wide latitude during closing argument. Prosecutorial argument may be vigorous, as long as it amounts to fair comment on the evidence, including reasonable inferences or deductions that may be drawn from that evidence. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) A prosecutor has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper." (*People v. Thomas* (1992) 2 Cal.4th 489, 526.) When a prosecutorial misconduct claim "focuses upon comments by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Turning first to the alleged misconduct that occurred during closing argument in the guilt phase, the prosecutor asserted:

> Christina is lucky to get out alive. Not only from this guy behind me [petitioner] but the next guy in line that she [Estella] meets at the funeral. Joe Avila, another convicted child molester, that she knows is a child molester. Her child has just been—

(RCCAP at pp. 194-195; 18RT 3592.) Defense counsel objected to the prosecutor's reference to "another child molester," and the prosecutor immediately apologized and said he misspoke. The court then instructed the jury that petitioner did not have a prior criminal record or any felony convictions, and the prosecutor agreed. (18RT 3593.) The prosecutor then remarked, "I apologize. I should have said another child molester, one that

she knows to be a convicted registered sex offender for children." (*Ibid.*) Though he did not object at trial, petitioner contends the latter statement "improperly and prejudicially falsely continued to imply that petitioner had previously been convicted of child molestation." (RCCAP at p. 195.) To the contrary, the prosecutor's characterization of Avila as "another" child molester to whom Christina had been exposed was a proper inference from the evidence presented at trial that showed petitioner had molested Consuelo. The comment did not imply that petitioner previously molested children (other than Consuelo).[41]

Petitioner further contends that during the penalty phase closing argument, the prosecutor improperly "reinforced the inference" petitioner suffered prior convictions. (RCCAP at p. 195.) After urging the jury to weigh the aggravating factors against the "tiny bits of circumstances in mitigation," the prosecutor remarked:

> And Mr. Harbin may say to you taking this man's life won't bring Consuelo back. So what? Life is precious. We don't take burglars and release them because they have already committed burglary. We give them the appropriate sentence if we can.

(19RT 3784-3785.) This remark cannot reasonably be read to imply that petitioner suffered prior convictions for child molestation and did not constitute misconduct.

Finally, petitioner claims the prosecutor made rude and obscene gestures at him in front of the jury. (RCCAP at p. 196; claim K3e.) A declaration submitted by interpreter Al Hernandez alleged the prosecutor "grimaced towards Vicente and made 'mad dog faces' at him." (Pet.'s RCCAP Exh. 107 at p. 2.) Petitioner failed to object to the prosecutor's

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[41] The prosecutor contended elsewhere during closing argument that the jury could sensibly conclude from the facts in the case that petitioner had previously physically and sexually abused Consuelo in the past and caused the prior scarring of her pancreas. (18RT 3652, 3660.)

actions trial. Thus, he has forfeited his prosecutorial misconduct claim. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

In any event, a prosecutor's rude behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*Donnelly v. DeChristoforo*, *supra*, 416 U.S. at pp. 642-643; *People v. Hill*, *supra*, 17 Cal.4th at p. 819.) Conduct that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. (*People v. Morales*, *supra*, 25 Cal.4th at p. 44.)

Misconduct that infringes upon a defendant's constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. (*Chapman v. California*, *supra*, 386 U.S. 18; *People v. Hall*, *supra*, 82 Cal.App.4th at p. 817, citing *People v. Harris*, *supra*, 47 Cal.3d at p. 1083.) A violation of state law is only cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the disputed behavior. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Milner*, *supra*, 45 Cal.3d. at p. 245.)

Mr. Hernandez does not identify the number of times the prosecutor allegedly "mad dogged" petitioner, and there is no evidence this took place in the jury's presence. (Pet.'s RCCAP Exh. 107.) Petitioner has not shown persistent or pervasive behavior by the prosecutor that rendered his trial fundamentally unfair. Moreover, petitioner has not shown behavior by the prosecutor that was targeted at the jury or a reasonable probability that the results of the proceeding would have differed had the prosecutor refrained from the alleged misconduct. Thus, petitioner's prosecutorial misconduct

claim should be rejected.

3. Alleged overstatement of the medical evidence

Petitioner next contends the prosecutor implied that additional inculpatory evidence not presented established petitioner's guilt. (RCCAP at p. 196; claim K4.) He refers to the prosecutor's comment:

> It occurred to me as I was preparing for today's argument that I could have presented more evidence in this case. For instance, we heard about the rib fractures. I guess someone could say well, we didn't hear about how much strength it takes to actually break the ribs. Bring a physicist in here and find out how many pounds per square inch. Bottom line is, we know it. We know it can happen. We know it does happen because it is documented from child abuse cases.

(18RT 3594-3595.)

A prosecutor commits misconduct by suggesting to the jury that he possesses any factual information or knowledge about the case beyond the evidence adduced at trial. The impropriety consists in leading the jury to judge the case not on the basis of the evidence actually presented, but instead on the basis of some other information to which the prosecutor alone is privy and about which the jury remains uninformed. (*People v. Earp* (1999) 20 Cal.4th 826, 864; *People v. Fauber* (1992) 2 Cal.4th 792, 822.)

The prosecutor's argument in this case was proper. He did not improperly suggest that the jury should find petitioner guilty based on evidence not presented at trial. He commented that perhaps more evidence could have been presented regarding the amount of force required to break Consuelo's ribs, but stated that the evidence already presented showed that Consuelo had been physically abused. This was a fair comment on the

evidence.[42] Dr. Diamond and Dr. Dibdin had both opined that Consuelo had been gripped around the chest and pulled backward, breaking her ribs. (10RT 2070-2071, 2087 [Diamond]; 11RT 2125, 2129 [Dibdin].) Even defense expert Dr. Lovell explained that a child's ribs are very flexible and are therefore very difficult to break and opined that Consuelo had received a sharp blow to the front of her body. (16RT 3107-3108.) As the prosecutor noted earlier in closing argument, Dr. Shaw had also been asked about rib fractures on rebuttal. Dr. Shaw testified "that the posterior rib fractures from the literature he has seen, from his own experience, they come from squeezing a child. This is common, unfortunately a common cause of these type of rib fractures in children." (18RT 3578-3579.) Based on the above, petitioner's misconduct claim fails.

4. Alleged denigration of defense expert

Petitioner further assigns as misconduct the prosecutor's attack on defense expert Dr. Nat Baumer's credibility. (RCCAP at p. 197, claim K5.) Petitioner contends the following question was improper: "Isn't it true that you would not come testify on the case unless you were allowed to consult with Dr. Lovell and he got paid too? Isn't that true, yes or no?" (14RT 2887.) Petitioner also characterizes as improper the prosecutor's assertion during closing argument that Dr. Baumer "misused his [Dr. Shaw's] report and the information in there one line to change his testimony five minutes before he took the stand for $2,000.00." (18RT 3571.) The prosecutor's actions were not improper.

The credibility of a witness may be attacked by any party. (Evid. Code, § 785.) Furthermore, the jury may consider the existence or

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[42] After the close of evidence, defense counsel Huffman stated for the record that she "did not bring in an expert on fulcrum and pressure because that would have possibly been detrimental to the defense and not helpful." (17RT 3512.)

nonexistence of a bias, interest or other motive in assessing a witness's credibility. (Evid. Code, § 780, subd. (f).) A prosecutor may permissibly comment on the facts showing the lack of credibility of a defense witness and ask the jury to disbelieve that witness. (*People v. Monterroso* (2004) 34 Cal.4th 743, 783-784.) It is common for parties to comment on an expert witness's fees and compensation.

Dr. Baumer testified that he reviewed various documents provided by the defense and initially concluded that Consuelo had been sexually abused. However, he changed his opinion based on a report by Dr. Shaw, which he reviewed just before coming to court, that stated Dr. Shaw saw no anal tears during an anoscopy conducted 72 hours after the assault. (14RT 2850-2851.) The prosecutor was entitled to question Dr. Baumer about the reason for his change of opinion as well as any compensation received in connection with his work on the case. Likewise, the prosecutor's comments about Dr. Baumer's lack of credibility were a fair comment on the evidence and inferences to be drawn therefrom.

5. Attacks on the defense

Petitioner next alleges the prosecutor equated defense counsel's failure to take specific actions with petitioner's guilt. (RCCAP at pp. 197-199, claim K6.) Respondent disagrees with petitioner's characterization of the record.

The prosecutor elicited Dr. Dibdin's testimony that microscopic slides of tissue were taken during the autopsy, including a slide which depicted a cross-section of Consuelo's anus, vagina and bladder. Dr. Dibdin discussed what the slides depicted and indicated that tissue samples and the microscopic slides had been retained at the coroner's office in case anyone questioned his findings. (11RT 2141, 2144.) Petitioner contends it was improper for the prosecutor to question Dr. Dibdin about the basis for his findings or present evidence that his findings were subject to review by the

defense. Not so. Petitioner further contends that the prosecutor asked Dr. Dibdin "whether trial counsel did in fact view the items [that were retained at the coroner's office]. Dr. Dibdin responded, 'no.'" (RCCAP at p. 198, citing 11RT 2141.) After asking Dr. Dibdin why he retained the entire area of Consuelo's anus and vagina at the coroner's office, the prosecutor asked if "anyone" had "ever contacted [him]—regarding his findings in this case?" Defense counsel objected, and the court sustained the objection. (11RT 2141.) Even if the question was improper, there was no prejudice to petitioner. Dr. Dibdin did not answer the question and the court's ruling informed the jury that the subject was not one they should consider. Moreover, the jury later heard the defense's interpretation of what the microscopic slides showed from defense expert, Dr. Warren Lovell, who interestingly disagreed with the pathologist concerning some of the rib injuries but affirmed the existence of an internal tear in the vagina about three inches above the anus. (16RT 3101-3104.)

Petitioner also alleges the prosecutor committed misconduct during closing argument. (RCCAP at p. 195, claim K6a(3) and at p. 199, claim K6b.) In urging the jury to reject petitioner's defense, the prosecutor argued that defense witnesses were not credible. (18RT 3567.) He stated:

> I want you to notice something else about the defense. Obviously at some point the defendant was telling people who were visiting him that this was a motor vehicle accident. And I asked Dr. Diamond and I believe Dr. Dibdin about that. Not because it's a credible piece of evidence, but because it was obvious that that [*sic*] was coming out at some point. But did the defense ask those questions? No. Those experts are put on the stand by me. Mrs. Huffman doesn't ask him about [a] motor vehicle accident. In the mean time, she has got a witness she knows she is going to present that's going to say oh, sure, it's possible this was a motor vehicle accident. [¶] Dr. Dibdin is put on the stand by me and we go over the microscopic analysis in some part, but not in detail. Of course their expert didn't pick up the microscopic slides and evidence until after he testified.

(18RT 3568-3569; see also 16RT 3101 [Dr. Lovell testified that he reviewed the slides the day before he testified].).)

Petitioner contends the first quoted paragraph somehow implied that the car accident defense "if put to the test by the government, would be revealed as false and fabricated evidence" and suggested that the defense was a sham and undermined petitioner's credibility. (RCCAP at p. 199, claim K6b.) Respondent disagrees with petitioner's characterization of the prosecutor's comments. A prosecutor may attack the defense case and argument. "Doing so is proper and is indeed, the essence of advocacy." (*People v Smith* (2003) 30 Cal.4th 581, 635.) That is all the prosecutor did here.

Petitioner alleges that the second paragraph that was quoted improperly equated defense counsel's failure to review the slides with evidence of petitioner's guilt. (RCCAP at p. 195.) Again, respondent disagrees. The prosecutor merely pointed out that Dr. Dibdin's findings were not refuted during cross-examination. Even if the comment was improper, it was not prejudicial because the jury heard evidence that a second set of microscopic slides were prepared from tissue samples that had been preserved at the coroner's office and examined by a defense expert, Dr. Lovell.

Petitioner also assigns as misconduct the prosecutor's comment during the penalty phase closing argument that Consuelo's body parts were still at the coroner's office for review. (RCCAP at p. 197; 19RT 3784.) Not so. The statement was made in an attempt to personalize the victim. The prosecutor explained

> We have seen her only in this case, until today, in the photograph as a person who was in the hospital, as a child who was in the morgue, *her body parts are still there at the coroner's office as we have heard.* But Consuelo Verdugo was a living, breathing, little girl with her whole life ahead of her on

> November 17. She will not ever go to school, she will not ever have her first date, she will never have children of her own, here sister will never have the opportunity to be with her again.

(19RT 3784; emphasis added.) When viewed in context, the statement was proper argument.

Petitioner further alleges the prosecutor committed misconduct during his closing argument at the guilt phase. (RCCAP at p. 199, claim K6c, citing 18RT 8568.) Specifically, the prosecutor stated:

> Ruben Garza was called on behalf of the defense, the Delano ambulance driver, in support of some misconception apparently that there was a seizure on the way to the hospital. There's absolutely no evidence in this case that this child had a seizure, had a seizure. No one said she had a seizure. They said I thought someone told me she had a seizure on the way to Kern Medical Center from Delano, one of the doctors did. But there's no one at the source of that who says she had a seizure. And, of course, seizure is important because it can account for loss of oxygen which can account for the brain damage. [¶] She asked him some questions about strapping the girl's legs down. I guess in some way that might cause edema or some—in some speculative way we could suppose that maybe that caused something. But, of course, he answered he didn't recall exactly what occurred. *And, of course, you notice that none of these witnesses were asked to bring their own records.* This guy is subpoenaed from Delano Ambulance Company and just put on the stand, no records, nothing to refer to, no specific information to give you.

(18RT 3568-3569; emphasis added.) Contrary to petitioner's assertion, the prosecutor did not urge the jury to impute petitioner's guilt from the failure of defense witnesses to bring reports to court.

6. Petitioner's demeanor on the stand cited as evidence of his guilt

Petitioner further argues the prosecutor improperly attacked his credibility during closing argument. (RCCAP at p. 199, claim K7.) The prosecutor argued,

> Did he look you guys [the jury] in the eyes when he said he didn't do it? Could he look us in the eyes and say he didn't do it? No. They [hospital personnel] called him nervous. They called him nonchalant...I want to use another word, he is guilty. He looks guilty. He is guilty.

(18RT 3594.) Petitioner alleges, without submitting a declaration or any documentary support, that he averted his eyes from the jury because the prosecutor allegedly made menacing gestures toward him at trial. (RCCAP at p. 200, citing Pet.'s RCCAP Exh. 107 at pp. 2-3 [Interpreter Hernandez alleged the prosecutor made "mad dog faces" at petitioner]; see also Pet.'s RCCAP Exh. 64 at pp. 3-4 [Defense counsel Huffman alleged that during trial when the judge was not looking the prosecutor allegedly once made a hand gesture pointing a gun at petitioner and another time made a hanging hand gesture at him, while acknowledging that she did not put this on the record].) However, Mr. Hernandez alleged that petitioner stopped making eye contact with the prosecutor, not the jury. (Pet.'s RCCAP Exh. 107 at pp. 2-3.) On this record, the prosecutor's remarks about petitioner's credibility were clearly within the scope of permissible argument.

7. Alleged admonition to ignore good character

Without providing a citation to the Reporter's Transcript, petitioner contends the prosecutor "falsely instructed the jury to ignore good character evidence because it had 'nothing to do with what he did at the scene.'" (RCCAP at p. 200, claim K8.) These comments, which were made during rebuttal argument, were proper.

During closing argument, defense counsel highlighted CALJIC No. 2.40's instruction that good character evidence may be sufficient by itself to raise a reasonable doubt as to the guilt of a defendant (2CT 556). (18RT 3605.) She then cited evidence of his good character on November 17 and 18, 1991. (18RT 3605-3607, 3609.) In response, the prosecutor stated on rebuttal:

> One of the things Mrs. Huffman talked about was character evidence. There were 37 types of character evidence presented. There was character evidence as to his honesty and believability. What's that introduced for? It's introduced for when he's on the stand testifying for us, that he's a truthful person. [¶] That's for those witnesses that said I believe he's an honest person, that's the purpose of his testimony. [¶] There was other character evidence involving his lack of character for violence. You think he's a nonviolent person? Yeah he's a nonviolent person. That's the second type of character evidence. [¶] The third problem is, did you see him around children? And yeah, he never molested my little girl that was six or seven at the time. He was coming by and I saw him eight years ago. [¶] I don't know if you recall that witness in particular. [¶] What does that have to do with what he did at the scene of the crime? Mrs. Huffman kind of minces it all together and says, oh, this is his good character, so this instruction applies. Not at all. *This instruction about character traits of defendant has nothing to do with what he did at the scene.*

(Emphasis added; 18RT 3655.) There was nothing improper in arguing the jury should focus on petitioner's actions the night of November 17, 1991, rather than evidence of his good character in determining his guilt of the charged offenses. Because there was no prosecutorial misconduct, petitioner's claim fails.

8. Alleged appeal to jury's prejudices and passions

Petitioner next argues that the prosecutor improperly appealed to the passions and prejudices of the jury during closing argument at the penalty phase. (RCCAP at p. 200; claim K9.) The prosecutor stated,

> I ask you one final thing, that is to give the defendant the mercy that he gave to Consuelo Verdugo. When he asked for your mercy here today through Mr. Harbin, you remember him on the stand denying anything happened. Mr. Harbin says that he could be rehabilitated, I ask you to remember how he denied every single thing for hours on there. I ask you to show him the same mercy that he showed Consuelo Verdugo and to do justice here today, that is to sentence him to death.

(19RT 3780.) Petitioner's prosecutorial misconduct claim has already been resolved against him by this Court on direct appeal. In so doing, this Court explained:

> In light of the aggravated nature of the offense, a reminder by the prosecution that Consuelo was helpless in the hands of the man to whom she had been entrusted and a suggestion that he deserved an equal measure of mercy did not constitute deceptive or reprehensible methods of persuasion, nor did such comments infect the trial with unfairness. [Citation.]

(*People v. Benavides*, *supra*, 35 Cal.4th at p. 109.) Thus, petitioner's claim is without merit.

Petitioner further contends that even if the cited instances of alleged prosecutorial misconduct were not prejudicial when considered individually, they had a cumulative effect on the trial that rendered their combined effect so prejudicial as to result in a miscarriage of justice. (RCCAP at p. 201, claim K10.) He is wrong. There was no misconduct for the reasons previously advanced. Should this Court disagree, any misconduct was not prejudicial, even if considered on a cumulative basis, because the factual evidence of petitioner's guilt was so strong.

To the extent defense counsel is found to have inadequately preserved the issue of prosecutorial misconduct for review, petitioner claims he was denied the effective assistance of counsel. In this context, petitioner must show that defense counsel's omission fell outside the range of an objective standard of reasonableness. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) When the claim of misconduct is based upon arguments or comments the prosecutor made before a jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 427.) If the challenged statement or argument was not misconduct then, of course, it would not be outside the range of

competence for counsel to fail to object. Even where the prosecutor may have engaged in objectionable conduct, mere failure to object does not establish incompetence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) Defendant must show that counsel's omission involved a critical issue, and that the failure to object could not be explained as a reasonable trial tactic. (*People v. Lanphear* (1980) 26 Cal.3d 814, 828-829, disapproved on another point in *People v. Balderas* (1985) 41 Cal.3d 144, 188; *People v. Jenkins* (1975) 13 Cal.3d 749, 753.) If counsel's performance does fall outside the range of reasonable competence, defendant then bears the burden of showing that counsel's omission resulted in prejudice. (*People v. Ledesma*, *supra*, at p. 217.)

Petitioner has not established deficient performance or any prejudice from his attorney's failure to object to the instances of alleged prosecutorial misconduct. Because there are many reasons why an attorney may choose not to impose a contemporaneous objection, incompetence of counsel is rarely established by a failure to object. (*People v. Avena* (1996) 13 Cal.4th 394, 421.) Petitioner has not shown the absence of a legitimate tactical reason for defense counsel's failure to object or request an admonition in those instances where there actually was a failure. He has also failed to show a reasonable probability that he would have obtained a more favorable outcome had defense counsel objected to the alleged misconduct. As previously discussed, the court instructed the jury to decide the case based on the evidence presented at trial, and the evidence of petitioner's guilt was overwhelming, regardless of whether defense counsel did or did not object to alleged prosecutorial misconduct.

L. Claim 12: Petitioner Has Waived His Inadequate Interpreter Services Claim

Petitioner had a Spanish interpreter, Al Hernandez, throughout his trial. Another interpreter, Victor Almaraz, translated for Spanish-speaking

defense witnesses called at the guilt and penalty phases of trial. Though he did not complain at trial or on appeal, petitioner now asserts that the interpretation at trial prevented him from understanding the proceedings and participating in his defense in violation of his Fourteenth Amendment due process right, his Sixth Amendment rights to confront and cross-examine witnesses called against him, his Fifth, Sixth, and Fourteenth Amendment rights to be present during proceedings and his Fourteenth Amendment rights to equal protection and due process of law. Petitioner also alleges that false, inaccurate and incomplete testimony was introduced to the jury due to the inadequate interpretation provided at trial. (RCCAP at pp. 202-220.)

Petitioner's attack on the competence of the Spanish interpreters at his trial is record-based and has been waived by his failure to raise it on appeal. (*In re Dixon*, *supra*, 41 Cal.2d 756, 762.) Assuming this Court wishes to address the merits of petitioner's claim, his claim is specious.

1. Good cause existed to appoint Mr. Hernandez and Mr. Almaraz to interpret at petitioner's trial

Petitioner complains that neither Mr. Hernandez nor Mr. Almaraz were certified interpreters. (RCCAP at p. 204, claim L4.) However, that does not entitle him to habeas relief.

When petitioner's trial took place in April of 1993, an uncertified Spanish interpreter could be utilized in court provided good cause existed for the interpreter's appointment. (Frmr. Gov. Code, § 68561, subd. (c), added by Stats. 1992, ch. 770 (S.B. 1304), § 5.) The state did not even have a program in place for certifying Spanish language interpreters. Three years earlier, the Chief Justice of California had appointed the Judicial Council Advisory Committee on Court Interpreters to "create a program to certify court interpreters, and to coordinate programs for interpreter recruiting, training, testing, certification, and continuing education and

evaluation." (Frmr. Gov. Code, § 68560, subd. (d), amended by Stats. 1992, ch. 770 (S.B. 1304), § 2.) The Legislature gave the Judicial Council until December 31, 1993, to approve one or more entities to certify Spanish language interpreters. (Frmr. Gov. Code, § 68562, subd. (b), added by Stats. 1992, ch. 770 (S.B. 1304), § 7.)

In this case, the trial court impliedly found good cause to appoint Al Hernandez on March 4, 1993, as the proceedings interpreter for petitioner's trial. (RT [3/4/93] 2, 4; 2CT 406.) Defense counsel Huffman had worked with Mr. Hernandez before and found him to be a good interpreter. (Resp.'s RCCAP Exh. 5 at pp. 6-7 [Aug. 17, 1992 Section 987.9 Request to Hire Two Investigators].) Mr. Hernandez had also interpreted at prior court appearances in this case without incident. (RT [3/4/93] p. 2; see, e.g., 2CT 320 [12/3/92 court appearance]; 2CT 325 [1/15/93 court appearance], and 2CT 340 [2/19/93 court appearance].)

There was also good cause for Victor Almaraz's appointment as the interpreter for Spanish-speaking witnesses at trial (16RT 3278, 2CT 514 [guilt phase]; 19RT 3751; 3CT 787 [penalty phase]).) Victor Almaraz had also interpreted at prior court appearances in this case without incident (See, e.g., RT [2/28/92] 3, 1CT 267; 1CT 303 [6/18/92 court appearance]; 2CT 333 [1/22/93 court appearance]; 2CT 340 [2/19/93 court appearance]). Mr. Almaraz was also part of a pool of interpreters approved by the court to interpret. (Pet.'s RCCAP Exh. 108 at p. 4.)

The fact Mr. Hernandez and Mr. Almaraz were not certified did not render their performance at petitioner's trial inadequate either. As the appellate court explained in *People v. Estrada* (1986) 176 Cal.App.3d 410, 415, "Certification is simply foundational to the interpreter's competence. He or she should not be found incompetent just because he or she is not on the certification list." Mr. Hernandez and Mr. Almaraz were both competent interpreters, as will be discussed below.

2. The interpreters in this case were both competent

Petitioner also contends that the interpreters were unqualified and incompetent. (RCCAP at p. 204, claim L4.) Respondent disagrees.

The California Constitution provides that "[a] person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." (Cal. Const., art I, § 14; see also *People v. Aguilar* (1984) 35 Cal.3d 785, 787.) "The right of a criminal defendant to an interpreter is based on the fundamental notion that no person should be subjected to a Kafkaesque trial which may result in the loss of freedom and liberty." (*Id.* at p. 787.) Thus, it is fundamental that a person should not be convicted of a crime unless he has a basic understanding of what is happening and an ability to communicate with his attorney. "The non-English speaking defendant who is denied the assistance of an interpreter, is made unable to communicate with the court or counsel and is unable to understand and participate in the proceedings which hold the key to freedom." (*Id.* at pp. 790-791.)

However, different considerations exist when a witness is unable to speak English. When a witness is incapable of expressing himself in the English language so as to be understood directly by counsel, and the court and jury, an interpreter shall be sworn to interpret for him. (Evid. Code, § 752.) Evidence Code section 750 makes an interpreter subject to all the rules of law relating to witnesses.

Although the roles of a witness interpreter and a defense interpreter are related, their functions are distinguishable. (See *People v. Aguilar*, *supra*, 35 Cal.3d at p. 790.) The witness interpreter makes questioning of a non-English speaking witness possible; the defense interpreter allows the defendant fundamental participation in his trial.

A criminal defendant has a right to a "competent interpreter." (*People v. Estrada*, *supra*, 176 Cal.App.3d at p. 415.) "The question of an

interpreter's competence is a factual one for the trial court." (*People v. Mendes* (1950) 35 Cal.2d 537, 543; *People v. Roberts* (1984) 162 Cal.App.3d 350, 355.) An appellate court will not disturb a trial court's ruling unless a manifest abuse of discretion is shown. (*Roberts*, at p. 355 [no abuse of discretion to admit prior testimony of witness who testified through noncertified interpreter.].)

a. Mr. Hernandez was competent

Petitioner contends that Mr. Hernandez did not properly interpret the meaning of his words but provided a literal translation, which at times distorted the meaning of the words. (RCCAP at p. 207, claim L4e, citing Pet.'s RCCAP Exh. 87 at p. 5536 [Supp. Decl. of Haydee Claus]; see also RCCAP at pp. 211-212, claim L5.) Respondent disagrees.

An interpreter must make a true translation of the questions posed and the answers given. (Evid. Code, § 751; *People v. Shaw* (1984) 35 Cal.3d 535, 542; *People v. Wong Ah Bank* (1884) 65 Cal. 305, 306.) "[I]t is the duty of an interpreter to interpret and report to the court every statement as made by the witness." (*People v. Shaw*, *supra*, 35 Cal.3d at p. 542.) A literal translation of courtroom dialogue without paraphrasing is required due to the imperceptible differences which may exist between the words spoken by the witness and the interpreter's understanding of their message. It is for this reason:

> "[c]ounsel and courts are equally cautioned to assure accurate interpretation through the use of direct questions to and answers from the witness requiring verbatim translation in order to avoid the pitfalls of paraphrasing leading to distortion or inaccuracies."

(*Id.* at p. 543.)

Petitioner alleges that Mr. Hernandez gave word for word interpretations, which he mischaracterizes as having been "nonsensical." (RCCAP at p. 211.) For example, petitioner complains about

Mr. Hernandez's interpretation of his responses to two questions on direct exam. The first response related to petitioner's arrival at Estella's apartment on November 16. Petitioner indicated that he arrived between 8:00 p.m. and 9:00 p.m. (15RT 2996-1997.) He was then asked how he got there. Petitioner responded, "Estella went for me at the apartment from my work." (15RT 2997.) The substance of petitioner's response was clarified by defense counsel's follow up question, "She picked you up at your work at the motel in McFarland," to which petitioner responded affirmatively. The second example cited by petitioner concerned the actions he took after he summoned Christina home. Defense counsel asked if petitioner stayed outside, waiting for Christina to come home. He responded, "I walked in and I went into the bedroom and I turned on the fan so it could—the air could hit the child." Again, Mr. Hernandez's words conveyed the substance of petitioner's response. (15RT 3015; see also 15RT 3037 [on cross-exam, petitioner stated that he took her the bedroom because he was giving her air with the fan.]) Any potential confusion was cleared up by subsequent questioning about why he turned on the fan. Petitioner said he did so, "to give her air." (15RT 3016.)

Petitioner next alleges that he had difficulty understanding the questions put to him at trial. (RCCAP at p. 211, citing 15RT 2974, 3031, 3050, and 3065.) Petitioner refers to instances when he purportedly did not understand a question. However, each time, petitioner received clarification and/or the question was rephrased until petitioner stated that he understood what was being asked. For example, before petitioner took the witness stand, outside the presence of the jury, the court explained that petitioner did not have to testify at his trial or say anything that might indicate he had committed the charged offenses. (15RT 2972-2974.) The court then asked petitioner if he had any questions about his right to remain silent. Petitioner stated he did not understand. (15RT 2974.) The court

then explained, stating,

> I have tried to make sure that you understand what it means to testify or not to testify in this case, and not only have I gone through this with you, but so has your attorney, but sometimes even though we've tried to discuss it with you thoroughly, sometimes people still have questions about what might or might now be involved, so that's why I ask you this question now. [¶] Do you have any questions or concerns about whether or not to testify?"

(15RT 2975.) Petitioner then responded, "No." (*Ibid.*) On another occasion petitioner was asked on cross-exam about the direction of Consuelo's head when petitioner allegedly found her outside. Petitioner stated that he picked her up. The prosecutor asked petitioner if he was having trouble understanding his questions. Petitioner said he was. The prosecutor then rephrased the question and asked if petitioner understood. Petitioner responded in the affirmative and answered the question. (15RT 3050; see also 15RT 3031 [when cross-examined about how "feeling bad" interfered with his ability to tell the police what happened, petitioner initially claimed he did not understand the question, so the prosecutor rephrased it and petitioner gave an answer]; 15RT 3065 [on redirect exam, defense counsel asked if petitioner was having difficulty understanding the questions from her and the prosecutor, and he responded, "Mr. Carbone some. No, it's not difficult."])

Petitioner alleges that his sometimes incongruous and unresponsive answers illustrate his inability to understand Mr. Hernandez's translation. (RCCAP at p. 211.) For example, petitioner was asked the question, "And what time do you normally leave when you go to work?" He responded, "Well, like that day—well, like another day Estella was going to take me." (15RT 3008.) The context in which the statement was made shows that this is not an example of deficient translation by Mr. Hernandez. Petitioner had previously testified that he did not drive and usually got a ride with Estella.

Accordingly, the time he departed for work depended on when Estella took him. (15RT 2997.) The other record citations provided by petitioner do not prove Mr. Hernandez's translation to have been inadequate either. Petitioner's testimony on direct exam (15RT 3010, 3011, 3018, 3023, 3024, 3027) and cross-exam (15RT 3030-3032, 3034, 3040, 3050, 3055, 3077) addressed the questions posed, though his initial response was not always direct and during cross-examination he tried to evaded the prosecutor's questions at times.

Petitioner further alleges that Mr. Hernandez mistranslated part of his testimony, specifically the phrase "me sentia mal," as "I was feeling bad." Petitioner contends the phrase should have been interpreted as "I was feeling sick." (15RT 3010, 3028-3029; RCCAP at pp. 211-212; 2004 Inf. Reply at p. 229.) Haydee Claus, a certified freelance Spanish court interpreter, acknowledges that the phrase has many meanings, including the one adopted by Mr. Hernandez, but it is most commonly translated as "I was feeling sick." (RCCAP at p. 212, citing Pet.'s RCCAP Exh. 63 at p. 11). Claus posits that Hernandez should have advanced the "I was feeling sick" interpretation because petitioner stated three times while using the phrase that he had not slept or eaten for some time. (*Ibid.*; accord Pet.'s RCCAP Exh. 107 at p. 2 [post-trial, Mr. Hernandez agrees given the context of the statement].) Respondent submits that the meaning adopted by Mr. Hernandez was appropriate. But even if this Court disagrees, any translation error was minor and rendered insignificant given the context in which petitioner's statements were made. On direct exam, petitioner said that the day he talked to the police he "wasn't well" and felt bad because of what happened to the child. (15RT 3003.) He stated that he was feeling real bad when he talked to the police and had told them he could not make a statement. (15RT 3010.) He also stated that he was upset and worried about Consuelo. (15RT 3021, 3022.). On cross-exam, he claimed to have

felt bad because he had been up all night (15RT 3028, 3032, 3033) and had not eaten all day (15RT 3032, 3033). He claimed he may not have known what he was saying because the police were "pressuring" him. (15RT 3029.) Petitioner denied feeling bad because he had just raped and molested Consuelo (15RT 3032). On redirect exam, petitioner reiterated that when he spoke to the police early Monday morning, he had not slept since he had gotten up Saturday (15RT 3063-3064) and had not eaten (15RT 3066). Therefore, Mr. Hernandez's translation of "me sentia mal" as "I was feeling bad" instead of "I was feeling sick" did not render his interpretation incompetent.

Petitioner alleges that Mr. Hernandez's translation was poor on other occasions as well. (2004 Inf. Reply at p. 229-230, referencing 15RT 3034 [Mr. Hernandez purportedly mistranslated the word "really" as "reality"; and 16RT 3271 [defense witness Mr. Delattore responded, "Correct that will be just fine," when asked whether he preferred to be called Mr. Duran or Mr. Delatorre.].) The foregoing does not establish Mr. Hernandez to have been incompetent at petitioner's trial.

Petitioner further alleges that Mr. Hernandez was not adequately trained to translate medical terms. (RCCAP at p. 208; Pet.'s RCCAP Exh. 107 at p. 1 [Mr. Hernandez purportedly learned medical terms from books he purchased and from watching Spanish television].) However, there is no evidence that any medical terms were mistranslated.

b. Mr. Almaraz was competent

Petitioner alleges that before his trial commenced, Mr. Almaraz was known to be an incompetent, unreliable and inaccurate translator. (RCCAP at p. 209.) Mr. Almaraz's performance at pretrial hearings in this case belies petitioner's claim. (RT [2/28/92] 3, 1CT 267; 1CT 303 [6/18/92 court appearance]; 2CT 333 [1/22/93 court appearance]; 2CT 340 [2/19/93 court appearance]).

Petitioner alleges that Mr. Almaraz's interpretation at trial was incompetent and confused defense witnesses, thereby violating petitioner's right to present a defense. (RCCAP at pp. 209, 215.) According to petitioner, nearly every Spanish-speaking witness who needs an interpreter stated they did not understand or were confused by Mr. Almaraz's interpretation. (RCCAP at p. 215, citing 16RT 3280, 3292-3293, 395, 398; 17RT 3376; 19RT 3752, 3754, 3756, 3760, 3763.) None of these record citations relate to anything of substance. Moreover, only one of the Spanish speaking witnesses from trial, Dionicio Campos [Govea], complained about Mr. Almaraz's interpretation. (Compare Pet.'s RCCAP Exh. 104 at p. 1 [Decl. of Dionicio Campos Govea] to declarations from other Spanish-speaking witnesses at trial Pet.'s RCCAP Exh. 122 [Decl. of Guadalupe Padillo Benavides], Pet.'s RCCAP Exh. 101 at p. 3 [Decl. of Guadalupe Pelayo Benavides], Pet.'s RCCAP Exh. 86 at pp. 5-6 [Decl. of Hector Figueroa Ramirez].) Specifically, Mr. Campos contended that Mr. Almaraz mistranslated the word "rancho" as ranch. (19RT 3753.) According to Mr. Campos, the word actually describes a group of a few humble houses and families who live on a rural area. (Pet.'s RCCAP Exh. 104 at p. 5858.) Campos contends Almaraz thereby led the jury to think petitioner's background was more affluent than it was. (*Ibid.*) To the contrary, this does not rise to the level of incompetence.

Post-trial, defense counsel's secretary, Marisol Alcantar, and Mr. Hernandez alleged that Mr. Almaraz made mistakes when he translated in court in other cases. However, neither specified whether that took place before or after petitioner's trial. (Pet.'s RCCAP Exh. Nos. 105 [Alcantar's declaration] and 107 [Hernandez's declaration].) Notably, neither cautioned defense counsel or the Court to not appoint Almaraz's in petitioner's case. (*Ibid.*) Neither criticized Almaraz's performance at petitioner's trial either. (*Id.*) As the proceedings interpreter, Hernandez

was in court when Almaraz was appointed as the witness interpreter (2CT 514, 3 CT 787) and heard Mr. Almaraz's translations in court first hand. He had ample opportunity to correct and/or alert the court to any mistakes made by Mr. Almaraz had there been any.

Post-trial petitioner's brother Evaristo Benavides and cousin Jose Isabel Figueroa Benavides stated that they found it difficult to talk to Mr. Almaraz over the telephone. (RCCAP at p. 210, claim L4f(3), citing Pet.'s RCCAP Exh. 119 at p. 6173 and Pet.'s RCCAP Exh. 102 at p. 5795, respectively.) Neither of these individuals is certified interpreters and their assessments do not bear on the adequacy of Almaraz's performance at trial in any way.

Petitioner further contends that Mr. Almaraz incorrectly provided literal translations for Spanish-speaking defense witnesses. (RCCAP at p. 215, claim L6b, citing Pet.'s RCCAP Exh. 108 [Decl. from Almaraz].) Respondent submits that this claim is not properly before this Court because it was not raised in the original petition, it is not related to Kathleen Culhane's fraudulent investigation, and it is not based on new information but is record based.

3. Alleged failure to provide an interpreter

Petitioner contends that Mr. Hernandez did not interpret all parts of the proceedings. (RCCAP at p. 208, claim Le3.) This claim was based on false allegations contained in a declaration submitted in Mr. Hernandez's name. (Frmr. Pet's Exh. 149 at p. 6058.) Mr. Hernandez did not submit that declaration (Pet.'s RCCAP Exh. 107 at p. 5), and the former declaration has since been withdrawn. The declaration that was actually submitted by Mr. Hernandez does not support petitioner's claim. (Pet.'s RCCAP Exh. 107 at pp. 1-5.)

Petitioner cites a vague and speculative declaration from his niece, Norma Patricia Yanez Benavides, in support of his claim. (RCCAP at

p. 208, citing Pet.'s RCCAP Exh. 111 at p. 5962.) Such pleading is insufficient for habeas relief. When petitioner was in jail, he purportedly told his niece that the interpreter (unnamed) did not interpret everything that was happening in court. (*Id.* at p. 5962.) Notably, petitioner's niece did not assert that this inhibited petitioner's understanding at trial, nor did she identify Mr. Hernandez as the interpreter at issue.

In his 2004 Informal Reply, petitioner also alleged that he lacked interpreter services "at times." (2004 Inf. Reply at p. 233.) However, he does not reference the date this allegedly occurred, identify the portion of the proceedings he allegedly missed or discuss any ensuing prejudice. Petitioner's assertion does not comport with respondent's review of the record. Petitioner had an interpreter at pretrial proceedings (1Supp.CT 80 [11/18/91]; 1CT 82 [11/21/91]; 1CT 53 [12/2/91]; 1CT 112 [12/12/91 [Preliminary hearing]; RT [12/20/91] 2; 1CT 267 [2/28/92]; 1CT 277 [5/8/92]; 1CT 297 [5/15/92]; 1CT 303 [6/18/92]; 1CT 310 [8/18/92]; 2CT 318 [10/30/92]), 2CT 320 [12/3/92]; 2CT 326 [1/15/93]; 2CT 333 [1/22/93]; 2CT 340 [2/19/93]). He had an interpreter during in limine motions, voir dire, and throughout the trial. (2CT 406 [3/4/93]; 2CT 439 [3/10/93], 2CT 457 [3/15/93]; 2CT 461 [3/16/93]; 2CT 466 [3/17/93]; 2CT 469 [3/18/93]; 2CT 471 [3/19/93]; 2CT 473, 475 [3/23/93]; 2CT 478 [3/24/93]; 2CT 480 [3/25/93]; 2CT 483 [3/26/93]; 2CT 485 [3/29/93]; 2CT 487 [3/30/93]; 2CT 489 [4/1/93]; 2CT 494 [4/5/93]; 2CT 500 [4/6/93]; 2CT 503 [4/7/93]; 2CT 509 [4/8/93]; 2CT 507 [4/12/93]; 2CT 512 [4/13/93]; 2CT 515 [4/14/93]; 2CT 524 [4/15/93]; 2CT 532-533 [4/19/93]; 3CT 739, 741 [4/20/93]; 3CT 750 [4/21/93]; 3CT 787, 789 [4/22/93].) Petitioner had an interpreter at the sentencing hearing, as well. (3CT 873.) Petitioner has the burden to produce evidence in support of his claim. He has not done so. Thus, he is not entitled to habeas relief.

4. The interpretation provided by Mr. Hernandez and Mr. Almaraz did not prevent petitioner from understanding the trial, participating in his defense or confronting witnesses called against him

Petitioner's next assertion that he did not understand the interpreters, that their interpretation effectively absented him from trial and prevented him from being able to confront and cross-examine witnesses called against him in violation of his rights under the Fifth, Sixth and Fourteenth Amendments is also unsupported. (RCCAP at pp. 214-217.) On numerous occasions petitioner stated that he understood his rights and what was taking place. (See, e.g., RT [12/20/91] 6 [petitioner understood his right to trial in 60 days and the ramifications of the trial and voluntarily waived time]; 15RT 2975 [petitioner understood he did not have to testify and waived that right]; and 15RT 3040 and 3044 [petitioner testified that he heard Christina and Estella testify at trial, respectively, and never said he did not understand their testimony due to Mr. Hernandez's translation or otherwise].) Petitioner sat through the entire proceedings and never told the court or counsel about his purported lack of understanding. Notably, the proceedings interpreter, Mr. Hernandez, did not allege that petitioner failed to understand what was said at trial. (Pet.'s RCCAP Exh. 107.)[43] Victor Almaraz purportedly visited petitioner at jail with defense counsel Harbin and explained the different phases of the trial and told petitioner what court proceedings were coming up. (*Id.* at p. 3.) Petitioner allegedly told Almaraz that he did not understand "how the court proceedings worked," and then Almaraz and Mr. Harbin explained what was happening. Notably,

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[43] Mr. Hernandez explained to petitioner what "octavo" and "sodomizar" meant. (Pet.'s RCCAP Exh. 107 at p. 2.) Clearly, petitioner understood Mr. Hernandez's response, as petitioner denied sodomizing the victim at trial. (15RT 3053-3054.)

Mr. Almaraz does not contend that petitioner remained confused after their discussions, nor does he allege that he and Mr. Harbin were unable to get through to petitioner. (*Ibid.*) In fact, Mr. Almaraz characterized petitioner as "easy to talk to." (*Id.* at p. 4.)

The fallacy of petitioner's claim is also evidenced by his failure to inform anyone that he was unable to understand the interpreters, follow the proceedings, communicate with counsel and participate in his defense. Nothing in the record, or the declarations of defense counsel and the interpreters indicates that he ever shared this information with them. Petitioner similarly failed to raise these concerns with the probation officer post-trial. Petitioner was interviewed by Probation Officer David Klug on May 12, 1993, with an interpreter. (Probation Report at p. 7.) At that time, petitioner claimed that defense counsel had not done anything and had not investigated the case well enough (a matter which defense counsel disputed at the sentencing hearing). Notably, he did not profess an inability to understand the interpreters, follow court proceedings, communicate with defense counsel or participate in his defense. (*Ibid.*) Petitioner did not raise any of those claims at the sentencing hearing either. Based on the foregoing, this Court should reject petitioner's claim.

5. The interpretation provided by Mr. Hernandez and Mr. Almaraz did not prevent petitioner from participating in his defense, including calling witnesses

Petitioner next alleges that the interpretation provided at trial prevented him from assisting counsel in his defense. (RCCAP at pp. 216-217.) As previously discussed, petitioner never alerted the court or counsel to his alleged misunderstanding and inability to participate in his defense. To the contrary, he testified on his behalf and expressly waived his Fifth Amendment rights before taking the witness stand. (15RT 2975.) Petitioner has not submitted a declaration stating that he did not understand

the proceedings and was unable to assist in his defense. In addition, defense counsel Huffman never indicated in court or in her eight-page declaration (Pet.'s RCCAP Exh. 64) that she had any difficulty communicating with petitioner, that he had difficulty communicating with her, or that he was unable to participate in his defense, or ever expressed an inability to understand the interpreters or what was being said in court. Likewise, defense counsel Harbin never told the court or alleged in his 11-page declaration that petitioner had difficulty communicating with him, was unable to participate in his defense at the penalty phase and did not understand what was happening in court. (Pet.'s RCCAP Exh. 65.) Indeed, petitioner has not adduced any documentary support for his claim. Thus, it also fails.

6. Hernandez's alleged poor translation of the police station interview

Mr. Hernandez listened to the audiotaped interview of petitioner at the police station and prepared a translation of it. He compared his translation to that which was prepared by Detective Valdez and found only minor inconsistencies between the two. (1RT 98.) Defense counsel and the prosecutor conferred about the transcript of the interview, and the prosecutor made the changes requested by the defense. (1RT 146.) Although he did not object at trial or when he filed the initial petition for writ of habeas corpus, petitioner now contends that Mr. Hernandez's translation of the police station interview "materially prejudiced" his representation. (RCCAP at pp. 215-216, claim L6.) This claim is not properly before this Court as it was not raised in the initial petition, and it does not relate to Kathleen Culhane's fraudulent investigation.

7. Trial court's alleged knowledge of interpreters' alleged incompetence

Finally, petitioner contends the trial court failed to appoint certified, qualified and competent interpreters despite its knowledge that Mr. Hernandez and Mr. Almaraz were uncertified, unqualified and incompetent in violation of his rights to a qualified interpreter, his Fourteenth Amendment rights to equal protection and due process of law. (RCCAP at p. 216.) Though uncertified, Mr. Hernandez and Mr. Almaraz were nevertheless competent. Petitioner has not adduced any evidence to the contrary, nor shown that the court had evidence to the contrary. Therefore, his habeas claim fails.

8. Ineffective assistance of counsel claims

Recognizing that his failure to object below to the interpreters' competence may preclude consideration of his claim on the merits, petitioner alternatively asserts that, if the court so rules, he was denied the effective assistance of counsel. He is wrong.

In order to demonstrate ineffective assistance of counsel, petitioner must establish first that counsel's "representation fell below an objective standard of reasonableness." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) In addition, he must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.)

Petitioner contends that trial counsel was incompetent for failing to have a "continuous, certified, and competent" interpreter appointed to assist him at trial. (RCCAP at p. 271, claim M10; and pp. 219-220, claim L10.) As previously discussed, petitioner had an interpreter throughout the trial. Though Mr. Hernandez was not a certified interpreter, he was nevertheless competent.

Petitioner further claims he appeared evasive and to be speaking grammatically incorrect Spanish due to Mr. Hernandez's translation of his testimony. (RCCAP at pp. 272-273.) Petitioner's contentions are not supported by the record.

Petitioner also contends that Mr. Hernandez's alleged mistranslation of his testimony "Me sentia mal" as "I felt bad" instead of "I was feeling sick," gave the impression that he professed to have a bad character. (RCCAP at p. 273, claim M10b.) As previously discussed, it is not altogether clear that Mr. Hernandez mistranslated the phrase in question, such that defense counsel should have objected to it at trial. Moreover, Mr. Hernandez's translation, even if found to be erroneous, was not prejudicial. Petitioner contends that the prosecutor's cross-examination about whether "feeling bad" prevented him from telling the truth was devastating for his credibility. (*Ibid.*) That may be, but petitioner's testimony on cross-exam was not negatively impacted by Mr. Hernandez's translation of the phrase "Me sentia mal" as "I felt bad" instead of "I was feeling sick." (15RT 2029-3032.) Specifically, the prosecutor asked the following questions to which petitioner gave the following answers:

Q. Does feeling bad make you lie, yes or no.

A. Yes.

Q. It makes you give intentionally false information?

A. Well, feeling the way at that moment, I think so.

Q. Isn't it true you were feeling bad because you'd just raped and molested that little girl?

A. No.

Q. Well, then what were you feeling bad about? You just testified that no one ever asked you about what had happened to the little girl?

A. Not that bad until—until the next day.

Q. Then what were you feeling bad about?

A. Because I'd been up all night and hadn't eaten....

(15RT 3032-3033.) Thus, petitioner was not prejudiced by Mr. Hernandez's translation of his testimony at trial.

Petitioner contends that Mr. Hernandez's poor interpretation "affect[ed]" his understanding of his right to remain silent and effectively prevented him from participating in his defense. (RCCAP at p. 273, claim M10c.) Not so.

Finally, petitioner alleges he was denied the effective assistance of counsel because an accurate translator was not provided for Spanish-speaking witnesses. (RCCAP at p. 219-220, claim L10; and at pp. 273-275, claim M11.) Petitioner asserts that his ability to offer evidence of his good character and mitigating evidence was prejudiced by Mr. Almaraz's allegedly poor translation. Mr. Almaraz's translation was not incompetent or prejudicial. Thus, petitioner's ineffective assistance of counsel claim must fail.

M. Claim 13: Ineffective Assistance of Counsel

Petitioner contends he was denied the effective assistance of counsel in that (1) the car accident defense was unreasonable and counsel failed to investigate whether Consuelo's injuries were caused by others and were not caused by sexual abuse (RCCAP at pp. 222-225), (2) counsel failed to investigate and present evidence to refute the rape, lewd and lascivious acts and sodomy charges and the special circumstance allegation that the murder was committed during the commission of those three sex offenses (*id.* at pp. 25-252), (3) counsel unreasonably failed to investigate, develop and present evidence that the pathologist's cause of death was anatomically impossible (*id.* at pp. 252-254), (4) counsel failed to show that compression

by squeezing was not the only theory accounting for all injuries (*id.* at p. 254), (5) counsel failed to investigate and present evidence to counter premeditated murder premised on the theory petitioner suffocated Consuelo (*id.* at pp. 254-258), (6) counsel failed to investigate and refute evidence that Consuelo's brain injuries resulted from petitioner shaking her (*id.* at pp. 258-259), (7) counsel failed to exclude evidence of Consuelo's prior injuries, including Christina's testimony that petitioner took Consuelo into a bedroom for a night (*id.* at pp. 260-267), (8) counsel failed to investigate and present evidence supporting petitioner's account he found Consuelo outside (*id.* at pp. 267-269), (9) counsel failed to obtain an accurate transcript and translation of petitioner's tape-recorded November 18, 1991 interview at the police station (*id.* at pp. 269-271), (10) counsel failed to provide petitioner with a competent, certified interpreter in violation of his rights to be present at trial and confront witnesses (*id.* at pp. 271-273), (11) counsel failed to provide accurate interpretation for monolingual Spanish speaking defense witnesses Javier Armando Navarrette Benavides, Dionicio Campos, Delfino Trigo, Guadalupe Benavides, and Hector Figueroa (*id.* at pp. 273-275), (12) counsel failed to ensure the accuracy of petitioner's testimony by preparing him to testify and reviewing his testimony (*id.* at pp. 275-276), (13) counsel failed to investigate, develop and present evidence of petitioner's good character and lack of sexual deviance at the guilt phase (*id.* at pp. 276-284), (14) counsel failed to present expert testimony at the guilt phase regarding petitioner's impaired mental state (*id.* at pp. 284-288), (15) counsel failed to present evidence petitioner did not present a future danger if given life without the possibility of parole (*id.* at p. 288), (16) counsel failed to investigate, and present mitigation evidence at the penalty phase (*id.* at pp. 288-304), (17) counsel failed to preserve petitioner's rights under the Vienna Convention to the Assistance of the Mexican Consulate (*id.* at pp. 304-305), (18) counsel

failed to object to irrelevant evidence (*id.* at pp. 305-309), (19) counsel failed to select a fair and impartial jury (*id.* at p. 309), and (20) counsel failed to seek a jury instruction to cure allegedly outrageous conduct by one of Estella's sisters (*id.* at pp. 309-310).

Petitioner has failed to show that defense counsel's performance was unreasonable and prejudicial with one exception. Defense counsel did not confront Dr. Diamond with information that the tear of the anterior wall of the vagina that was reported to him by Dr. Dibdin, and upon which Dr. Diamond relied in concluding Consuelo had been raped, was not substantiated by Dr. Dibdin's testimony. As discussed in argument M2d(1), this was prejudicial as to the rape conviction and special circumstance finding (Resp.'s RCCAP Exh. 1 at p. 10) but not as to the sodomy and lewd acts convictions and special circumstance findings, murder conviction, or the penalty determination.

To make a successful claim of ineffective assistance of trial counsel, petitioner must show that (1) his counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) that the deficiencies in counsel's performance were prejudicial in the sense that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.) Proof of constitutionally ineffective representation requires a factual basis and not mere speculation. (*People v. Williams* (1988) 44 Cal.3d 883, 933.) The burden is on petitioner to prove that counsel was constitutionally ineffective. (*People v. Babbit* (1988) 45 Cal.3d 660, 707.)

An appellate court's review of counsel's performance is a deferential one and petitioner must overcome a strong presumption that, under the circumstances, the challenged action falls within the wide range of reasonable professional assistance. (*In re Jones* (1996) 13 Cal.4th 552,

561; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.) The record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Ray* (1996) 13 Cal.4th 313, 349.) "[I]t is black letter law that 'if the record sheds no light on why counsel acted or failed to act in the challenged manner, we [the reviewing court] must reject '[an ineffective assistance of counsel]' claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance. [Citation.]" (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 434.) "[C]ourts should not second guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

(*Strickland*, *supra*, 466 U.S. at p. 697; see also *People v. Lewis*, *supra*, 26 Cal.4th at pp. 363-364.)

1. Counsel investigated alternative explanations for Consuelo's injuries and the defense offered was reasonable

Petitioner contends defense counsel unreasonably failed to investigate whether Consuelo's injuries were caused by others and/or did not result from sexual abuse.[44] He also contends the car accident defense presented was unreasonable. Finally, he alleges defense counsel did not investigate potential bias of the prosecutor's medical witnesses or review medical

[44] Respondent addresses petitioner's assertion that defense counsel unreasonably failed to investigate the cause of death cited by Dr. Dibdin in argument M3. (RCCAP at pp. 223, 252-254.)

records. (RCCAP at pp. 222-227, claim M1.) Petitioner's claim lacks merit because he has failed to show that defense counsel was constitutionally deficient and that counsel's alleged deficiency resulted in prejudice. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

A defendant's right to assistance of counsel includes an assurance that "before counsel undertakes to act at all, he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." (*In re Cordero* (1988) 46 Cal.3d 161, 180; *In re Fields* (1990) 51 Cal.3d 1063, 1069.) With respect to investigations, "'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffective assistance of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" (*In re Jones*, *supra*, 13 Cal.4th at p. 565, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 691.) The reviewing court also considers defense counsel's performance from his perspective, analyzing counsel's decisions on what he knew or should have known at the time. (*In re Thomas* (2006) 37 Cal.4th 1249, 1257, citing *People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1243-1248; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

As a general rule, "[i]n order to render reasonably competent assistance, a criminal defense attorney should...explore the factual bases for defenses that may be available to the defendant and otherwise pursue diligently those leads indicating the existence of evidence favorable to the defense." (*In re Neely*, *supra*, 6 Cal.4th at p. 919.)

Petitioner has not carried his burden of showing inadequate performance by trial counsel. Defense counsel made efforts to develop a theory of defense for petitioner. (RCCAP at p. 223, claim M1b.) Defense investigator Richard Villavolos photographed the crime scene and

interviewed neighbors at the Brandywine apartment complex. (Pet.'s RCCAP Exh. 70 [Declaration of Richard Villavolos, defense investigator].) Another investigator, John Purcell, looked for damage at the apartment complex and investigated traffic patterns there to find evidence that Consuelo had been in a car accident. (Pet.'s RCCAP Exh. 64 at p. 4 [Declaration by Donnalee Huffman].) Defense counsel also expended considerable effort securing expert witnesses for this defense. (3CT 896-897.) Defense counsel first retained Dr. Werner Spitz, a world renowned forensic pathologist and expert in the area of traffic deaths due to blunt abdominal trauma, after two pathologists in Los Angeles—Dr. Silverman and Dr. Ross Blant—each refused to take the case due to the nature of the charges. (Resp.'s RCCAP Exh. 6 at pp. 3-5 [Aug. 17, 1992 Hearing On Section 987.9 Requests].) A third doctor, Dr. Thomas Naguchi, had been willing to accept the case, but she believed his credentials were unsatisfactory based on his testimony in another case. (Resp.'s RCCAP Exh. 7 at p. 11 [Aug. 10, 1992 Section 987.9 Request To Appoint Expert].) After consulting with Dr. Spitz, she decided not to call him at trial and retained Dr. Nat Baumer as an expert. (Resp.'s RCCAP Exh. 8 at pp. 6-7 [Feb. 8, 1993 Section 987.9 Request To Appoint Expert].) Dr. Baumer testified that Consuelo's head and abdominal injuries could have been caused by being struck by a car (14RT 2833-2834), and that her rib injuries could have resulted from being thrust or landing in a car accident (14RT 2837).

Petitioner further attacks the reasonableness of the car accident defense. (RCCAP at p. 223.) However, this defense was consistent with petitioner's pretrial statement to the police. Petitioner claimed that Consuelo had gone outside without his knowledge, and he found her on the doorstep, injured, one minute later. (15RT 3010, 3014.) Petitioner also said that he did not know how Consuelo was injured—whether she fell off

a ladder or got hit by a car. (15RT 3049.) Post-trial, defense counsel contends a police officer also looked for evidence that Consuelo had been hit by a car. (Pet.'s RCCAP Exh. 64 at p. 2 [Declaration of Donnalee Huffman].)

Petitioner contends the car accident defense unreasonably failed to account for Consuelo's genital and anal trauma. However, defense counsel introduced evidence that Consuelo sustained the injuries from her hospitalization, not sexual abuse. (RCCAP at pp. 222-223, claim M1a.) For example, she elicited Estella's testimony that she changed Consuelo's diaper after she was summoned home from work and there was no blood or stool in it. (13RT 2628.) Dr. Nat Baumer, a physician with thirteen years' experience working in the emergency room, reviewed Consuelo's medical records from DRMC, KMC and UCLA and found conflicting reports as to whether Consuelo had genital injuries, including swelling and edema and whether or not there was any sexual assault. (14RT 2828.) He opined that Consuelo's swollen vagina resulted from multiple attempts to catheterize her with a Foley catheter, which causes redness and swelling of the tissue. (14RT 2870.) He opined Consuelo was not sexually abused because the staff at DRMC did not document the presence of vaginal or anal trauma or recollect a bloody diaper (14RT 2877), and an anoscopy conducted by Dr. Shaw at UCLA Medical Center on November 20, 1991, did not note any anal lacerations (14RT 2852). Dr. Baumer also explained that a head injury can cause the sphincter muscle to lose some muscle tone. (14RT 2842.) Both Dr. Baumer and defense expert Dr. Lovell testified they could not conclude Consuelo had been sexually abused because no vaginal or anal swabs were taken to detect the presence of semen. (14RT 2829, 16RT 3118, respectively.) Dr. Lovell further opined that the abrasion between Consuelo's vaginal and anal openings could have been caused by a catheter rubbing against the area or resulted from other manipulation during

Consuelo's hospitalization (16RT 3116.) Defense counsel also elicited Dr. Shaw's opinion, during cross-examination, that Consuelo's rectal bleeding could have been caused by the surgeries she had undergone. (16RT 3176.) In addition, the emergency room physician who treated Consuelo at DRMC, Dr. Tait, testified for the defense that after Consuelo was transferred to KMC, she did not recall seeing any blood on the stretcher where Consuelo's bottom had been. (17RT 3318, 3319.) Dr. Tait also testified that at the time of transfer, she suspected there had been physical abuse (17RT 3318), she had been trained in recognizing signs of physical abuse and trained to retain evidence that were used on or around the child until law enforcement could investigate possible abuse, but nothing had been retained in this case (17RT 3319).

Defense counsel also investigated whether Consuelo's current and prior injuries were caused by others and presented evidence that Estella's family members caused her prior injuries. (RCCAP at pp. 222-223, claim M1a; 13RT 2575-2576.) John Purcell, the defense investigator, interviewed Vicki Salinas (Consuelo's cousin) and attempted to locate and interview Estella's brother, Javier Alejandro on August 28, 31 and September 3, 1992. (Resp.'s RCCAP Exh. 4 at p. 3 [Oct. 23, 1993 Request For Payment of Investigator Fees].) Dehlia Alejandro (Consuelo's aunt) declined to be interviewed by Purcell (*id.* at p. 6), but ultimately testified for the defense that Consuelo hurt her arm in the fall of 1992 while she was babysitting her (17RT 3338). Defense counsel also tried to find evidence that a registered sex offender resided at the Brandywine apartment complex (14RT 2819) and had her investigator try to locate and interview Joe Avila, the registered sex offender acquainted with Estella, on November 12, 1992. (Resp.'s RCCAP Exh. 9 at p. 4 [Feb. 8, 1993 Section 987.9 Request for Payment of Investigator Fees].)

Petitioner newly alleges that defense counsel failed to adequately investigate his guilt because John Purcell, the investigator appointed to replace Richard Villalovos, did not speak Spanish. (RCCAP at p. 223, claim M1c.) However, Ms. Huffman officially hired two investigators: John Purcell and Al Hernandez, the latter of whom interpreted Spanish for her. (Pet.'s RCCAP Exh. 64 at p. 4 [Decl. of Huffman]; see also Resp.'s RCCAP Exh. 5 at pp. 5-6.) Because petitioner has not shown deficient performance or prejudice, this Court should also reject this ineffective assistance of counsel claim.

Petitioner further contends that defense counsel unreasonably failed to investigate the potential bias of the prosecutor's medical witnesses. (RCCAP at p. 223, claim M1d.) Diane Huddleston of UCLA Medical Center responded to the prosecutor's request for medical records. The cover letter that she sent with the records states "get this guy for all of us." (RCCAP at p. 224, citing Pet.'s RCCAP Exh. 3 at p. 412.) Huddleston did not testify and her personal note on the cover letter does not bear on the personal credibility of the employees from UCLA Medical Center who testified—Drs. Harrison, Bentson, and Shaw, and licensed social worker Eve Beerman. Petitioner has not adduced any evidence that these witnesses were biased against petitioner. (RCCAP at p. 224.) Petitioner has the burden to set forth facts supporting his allegations with particularity. Vague or conclusory allegations do not warrant habeas relief. (*People v. Duvall*, *supra*, 9 Cal.4th 464, 474; *People v. Karis*, *supra*, 46 Cal.3d 612, 656.)

Petitioner also contends defense counsel failed to review medical records and thoroughly investigate the medical evidence. (RCCAP at p. 224, claim M1e.) This claim should also be rejected. The day trial started, the prosecutor told the court he had provided defense counsel with copies of all the documents in his possession, including medical reports

from three different hospitals. (1RT 19.) Defense counsel stated that she had reviewed these reports. (1RT 20.) She also had an investigator check the background of some of the People's medical experts. (Resp.'s RCCAP Exh. 10 at p. 4 [Dec. 31, 1991 Section 987.9 Request to Appoint Investigator].) She further had the medical reports reviewed by a world renowned forensic pathologist, Dr. Werner Spitz, the author and editor of the authoritative textbook in his specialty, *Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Scene Investigation*, now in its fourth edition. After conferring with him, she decided not to call him as a witness and retained Dr. Nat Baumer, an emergency room physician. He reviewed all the medical reports, the autopsy report and photos, and reports by law enforcement. (14RT 2823; Resp.'s RCCAP Exh. 11 at p. 10 [March 14, 1993 Section 987.9 Request to Appoint Expert]; Resp.'s RCCAP Exh. 5 at p. 1 [Aug. 17, 1992 Section 987.9 Request to Hire Two Investigators]; and Resp.'s RCCAP Exh. 12 at p. 2 [Claim for Payment Submitted by Dr. Werner Spitz].) A second pathologist, Dr. Frederick Lovell, reviewed operative repots from KMC and UCLA Medical Center and the autopsy report. He also looked at 18-20 microscopic slides from the case and a specimen of Consuelo's pelvis that had been preserved at the coroner's office. (16RT 3094-3095; 3104-3105.)

As evidence that defense counsel failed to review records, petitioner cites the alleged "inept" cross-examination of Dr. Harrison about whether he observed superficial lacerations of Consuelo's anus. (RCCAP at p. 224, see also 12RT 2391 [Dr. Harrison said he may have made that finding, but he did not recall].) Petitioner contends defense counsel unreasonably tried to force Dr. Harrison to adopt this evidence, which he characterizes as "damaging and false." (RCCAP at p. 224.) To the contrary, defense counsel's question shows her familiarity with the medical records in this case. On November 19, 1991, Dr. TanaJan noted that Consuelo had

"superficial lacerations with active bleeding" in the rectal area. (Pet.'s RCCAP Exh. 3 at pp. 1255-1256 [Handwritten Physician's Note from UCLA Medical Center]; see also p. 1242 [UCLA Medical Center Death Summary prepared by Dr. Estela Franco also notes "superficial lacerations with active bleeding and some of the mucosa actually protruding from the rectum.") Just as defense counsel elicited testimony from Dr. Baumer that attempts by DRMC personnel to catheterize Consuelo could have caused her genital swelling (14RT 2870), defense counsel had a tactical reason to ask if Dr. Harrison had observed anal lacerations and found them to be superficial. Such evidence, if provided by Dr. Harrison, could be used to argue that the lacerations were insignificant and caused by medical personnel rather than by petitioner.

In his 2004 Informal Reply, petitioner alternately claims that defense counsel's review of the medical records was inadequate. (2004 Inf. Reply at p. 242.) He then faults defense counsel for asking Dr. Diamond, Dr. Harrison and Dr. Baumer if Consuelo underwent CPR or had a seizure during transport from DRMC to KMC because neither is noted in the ambulance records. (*Ibid.*, citing Pet.'s RCCAP Exh. 2 at p. 120.) However, the discharge summary from KMC prepared by Dr. Platnick states that paramedics witnessed Consuelo suffer a seizure en route from DRMC to KMC. (Pet.'s RCCAP Exh. 2 at p. 61) and defense counsel adduced evidence that the anal laxity could have been attributed to a loss of consciousness.

Petitioner further asserts that defense counsel unreasonably failed to interview medical witnesses prior to trial. (RCCAP at p. 224-225, claim M1e(2).) As previously noted, defense counsel stated that she had talked to people about the medical reports in this case, with the exception of witnesses from UCLA who were unwilling to talk to her. (1RT 20.) Petitioner criticizes defense counsel's cross-exam of Dr. Harrison on the

ground she used it as an "opportunity for discovery." (RCCAP at p. 225.) Petitioner has not shown that defense counsel's questioning of Dr. Harrison was unreasonable or prejudicial.

Petitioner's assertion that defense counsel "lacked a coherent theory to explain the medical condition of Consuelo during her hospitalization," should also be rejected. (RCCAP at p. 224-225, claim M1e(2).) As previously discussed, defense counsel adduced evidence to support the defense that Consuelo's genital injuries were caused by treatment she received while hospitalized. Petitioner's final assertion that defense counsel was "completely unprepared to present a defense" (RCCAP at p. 225). is too general to respond to. Moreover, petitioner does not cite any evidentiary support for this claim or provide any discussion of prejudice. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.) Therefore, his claim fails.

2. Failure to present more evidence to counter the rape and sodomy offenses and special circumstance allegations

a. Alleged failure to investigate whether Consuelo had genital and anal trauma when she was admitted to DRMC

Petitioner alleges that reasonably competent counsel should have recognized the need to investigate whether Consuelo had genital and anal trauma when she was admitted to DRMC. (RCCAP at pp. 225-226, claim M2a.) Defense counsel was concerned that medical personnel at DRMC did not document vaginal or anal injuries (Resp.'s RCCAP Exh. 11 at pp. 9-10 [March 24, 1993 Section 987.9 Request To Appoint Expert]) and she presented evidence to that effect at trial. (See, e.g., 13RT 2628; 14RT 2785, 2877; 17RT 3318.).

Moreover, defense counsel read and studied the extensive medical reports from DRMC, KMC, and UCLA Medical Center, and discussed

them with other people. (1RT 20, 22; see also Resp.'s RCCAP Exh. 9 at p. 4 [Feb. 8, 1993 Section 987.9 Request for Payment of Investigator Fees] [investigator reviewed emergency room records with a registered nurse].) She first retained a world renowned pathologist, Dr. Werner Spitz, who was recommended to her by a criminalist in Ventura. (Resp.'s RCCAP Exh. 6 at p. 5 [Aug. 17, 1992 Hearing on Section 987.9 Request].) Dr. Spitz wrote and edited the authoritative textbook in his specialty, *Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Scene Investigation*, now in its fourth edition. (Resp.'s RCCAP Exh. 7 at p. 16 [Aug. 10, 1992 Section 987.9 Request to Appoint Expert].) He also authored 87 scientific publications (*id.* at pp. 16, 19-26) and served on a committee investigating the death of President John F. Kennedy (*id.* at p. 17). Before making a determination in the case, Dr. Spitz reviewed the autopsy report and 60 autopsy phographs, the medical reports from DRMC, KMC, and UCLA Medical Center, Consuelo's death certificate, the complaint, police reports, newspaper articles, the preliminary hearing transcript, and the resumes of Dr. Diamond, Dr. Dibdin, Dr. Bloch and Dr. Harrison. (*Id.* at p. 10; Resp.'s RCCAP Exh. 12 at p. 2.) After conferring with Dr. Spitz, defense counsel opted not to call him as a witness and retained Dr. Baumer instead. (Resp.'s RCCAP Exh. 8 at p. 8 [Feb. 8, 1993 Section 987.9 Request to Appoint Expert].)

Dr. Baumer had worked in the emergency room for 13 years and presented courses on child molestation. (14RT 2837.) Dr. Baumer had testified as an expert at least 75 to 100 times, mostly for the prosecution but also for the defense. (Resp.'s RCCAP Exh. 8 at p. 8 [Feb. 8, 1993 Section 987.9 Request to Appoint Expert].) Dr. Baumer reviewed medical records from DRMC, KMC and UCLA Medical Center. (14RT 2823; Resp.'s RCCAP Exh. 11 at p. 10 [defense counsel believed that Dr. Baumer read all the medical reports].) Dr. Baumer also reviewed reports by law

enforcement (Resp.'s RCCAP Exh. 13 at p. 1), photographs of Consuelo that were taken at UCLA, photographs from the autopsy and the autopsy report (Resp.'s RCCAP Exh. 11 at p. 10.) Dr. Baumer also reviewed tissue slides that were taken by Dr. Dibdin at autopsy. (Resp.'s RCCAP Exh. 13 at pp. 3-4 [Transcript of Audiotaped Case Review by Dr. Baumer].) Dr. Baumer asked that Dr. Frederick Lovell be appointed to review the tissue slides that were taken at autopsy, as well. Dr. Lovell, a forensic pathologist in Ventura County, was subsequently appointed as an expert in the case for that purpose. (Resp.'s RCCAP Exh. 11 at p. 10 [March 24, 1993 Section 987.9 Request to Appoint Expert].) Dr. Lovell reviewed the autopsy report, operative reports from KMC, two operative reports from UCLA Medical Center, Dr. Shaw's operative report, microscopic slides and the specimen of Consuelo's pelvis and abdominal cavity that was preserved in the coroner's office. (16RT 3094-3095, 3104-3105.)

b. Alleged failure to locate or interview DRMC staff

Petitioner further asserts, without any analysis or reference to documentary support, that defense counsel unreasonably "failed to interview, locate or present testimony of persons who had relevant information about the condition of Consuelo's genitalia and anus" when she was admitted to DRMC. (RCCAP at p. 226, claim M2b.) Conclusory allegations are not a basis for habeas relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

Petitioner adduced declarations from multiple DRMC staff members who assert that defense counsel did not contact them prior to trial. The declaration submitted by defense counsel Huffman does not state what, if any measures, were taken to interview DRMC staff. (Pet.'s RCCAP Exh. 64.) However, District Attorney Investigator Ray Lopez conducted audiotaped interviews of DRMC staff members prior to trial, and the record

shows that defense counsel Huffman had her investigator review and summarize Investigator Lopez's reports and transcripts of his audiotaped interviews. (14RT 2815.) The defense investigator also reviewed emergency room records with a registered nurse. (Resp.'s RCCAP Exh. 9 at p. 4 [Feb. 8, 1993 Section 987.9 Request for Payment of Investigator Fees].) Petitioner has not acknowledged Investigator Lopez's interviews or shown defense counsel's reliance on them to have been unreasonable. Petitioner has also fails to articulate how he was prejudiced by defense counsel's alleged failure to interview DRMC staff. As previously discussed, defense counsel discovered that genital and anal trauma was not detected at DRMC and presented evidence of that at trial. (See, e.g., 13RT 2628; 14RT 2785, 2877; 17RT 3318.)

c. Failure to present evidence that genital and anal trauma was not detected at DRMC

Petitioner alleges that defense counsel's failure to present more evidence that DRMC staff members did not detect any genital or anal injuries deprived him of the effective assistance of counsel. (RCCAP at pp. 226-234, claim M2c.) Defense counsel's performance was not deficient or prejudicial for reasons that will follow. However, respondent recognizes that petitioner's rape conviction and the rape special circumstance allegation may be reversed due to ineffective assistance of counsel on another ground; i.e., defense counsel's failure to present evidence that the tear of the anterior wall of the vagina that was reported by Dr. Dibdin, and upon which Dr. Diamond relied in concluding that Consuelo had been raped, was not substantiated. (Resp.'s RCCAP Exh. 1 at p. 10 [Declaration of Dr. Jess Diamond]; see argument M2d.)

Consequently, respondent addresses counsel's failure to present more evidence that genital trauma went undetected separate from the claim that counsel failed to adduce more evidence of undetected anal trauma.

Argument M2c(1) and (2) concern defense counsel's failure to adduce more evidence that genital trauma was not detected, and defense counsel's failure to adduce more evidence that anal trauma was not detected is addressed in M2c(3)-(6).

(1) Failure to present more evidence that DRMC staff did not detect genital trauma

Petitioner contends defense counsel should have presented testimony from Linda Roberts (RCCAP at p. 227, claim M2c(1)), Fay Van Worth (*id.* at pp. 227-229, claim M2c(3), (4)), and Donald Jordan (*id.* at p. 229, claim M2c(5)). He also criticizes defense counsel's examination of Francis Zapien (*id.* at pp. 229-230, claim M2c(6)), Anita Caraan Wafford (*id.* at pp. 230-231, claim M2c(6)) and Dr. Tait (RCCAP at pp. 231-232, claim M2c(7), (8)).

A defense counsel's decision to call a particular witness is a matter of trial tactics unless the decision results from the unreasonable failure to investigate. (*People v. Bolin* (1998) 18 Cal.4th 297, 334.) Counsel cannot be faulted for deciding not to call a witness whose testimony might do more harm than good. (*People v. Miranda* (1987) 44 Cal.3d 57, 121-122, disapproved on other grounds in *People v. Marshall*, *supra*, 50 Cal.3d at p. 933, fn. 4.) In order to prevail on a claim of ineffective assistance of counsel for failure to call a witness, "there must be a showing from which it can be determined whether the testimony of the alleged additional defense witness was a material, necessary, or admissible, or that defense counsel did not exercise proper judgment in failing to call him. [Citation.]" (*People v. Hill* (1969) 70 Cal.2d 678, 690-691; *In re Noday* (1981) 125 Cal.App.3d 507, 522.)

Nurse Linda Roberts and her supervisor Fay Van Worth attempted, without success, to insert a catheter into Consuelo's urethra at DRMC

multiple times. In 2002, both nurses submitted declarations opining that they would have detected genital trauma, had there been any, during their attempts to catheterize Consuelo. (Pet.'s RCCAP Exh. 74 at pp. 5428-5430, 5433 [Roberts' Declaration] and Pet.'s RCCAP Exh. 75 at p. 5952 [Van Worth's Declaration].) In 1992, both told district attorney investigator Ray Lopez that they did not detect any visible trauma, including bruising, tearing or bleeding of the vagina or urethra. (Pet.'s RCCAP Exh. 4 at p. 1683 [Roberts' statement] and at pp. 1759-1760 [Van Worth's statement].) However, Roberts qualified her findings by noting that she neither suspected nor looked for evidence of sexual abuse. (Pet.'s RCCAP Exh. 4 at pp. 1681-1682.) Van Worth believed that Consuelo had been backhanded in the abdomen (Pet.'s RCCAP Exh. 4 at p. 1769), and said Dr. Tait reported the case to law enforcement that night due to suspected physical child abuse not sexual abuse. However, Roberts noted that she neither suspected nor looked for evidence of sexual abuse (*id.* at pp. 1681-1682). Van Worth also said she had not seen any vaginal swelling or discharge, blood on the sheet, or any indication of a vaginal-rectal tear (which was subsequently described at trial by Dr. Lovell). (Pet.'s RCCAP Exh. 4 at pp. 1759-1760, 1768.)

DRMC triage nurse/emergency room technician Francis Zapien was called as a prosecution witness. She witnessed Van Worth's attempts to catheterize Consuelo. (14RT 2779-2781; accord Pet.'s RCCAP Exh. 4 at p. 1791.) Petitioner complains that defense counsel failed to ask if Zapien had seen any indication of injury to Consuelo's genitalia. (RCCAP at p. 230.) However, Zapien indicated that Consuelo's vagina was slightly reddened on direct exam (14RT 2780) and stated that she did not notice any secretions or anything suspicious about Consuelo's vaginal area on cross exam. (14RT 2785.)

Petitioner further contends defense counsel unreasonably failed to elicit Dr. Tait's testimony that Consuelo did not have any genital injuries at DRMC. (RCCAP at p. 231.) Post-trial, Dr. Tait opines that though she was not examining the genitalia while she drew Consuelo's blood, she would have noticed "obvious signs of genital trauma—any bruising, swelling, bleeding, discharging of fluids." (Pet.'s RCCAP Exh. 76 at p. 5441.) Defense counsel presented Dr. Tait's testimony that she did not recollect vaginal discharge or blood. (17RT 3318.) Her failure to elicit the other evidence was not unreasonable. Defense counsel had expressly asked if Dr. Tait had drawn Consuelo's blood. Dr. Tait thought she had and then explained that the blood draw had been difficult because Consuelo's blood pressure was low and she was bleeding internally. (17RT 3332.) Dr. Tait neglected to mention that the blood draw was through the femoral artery, rather than Consuelo's arm, and the emergency treatment record prepared by Dr. Tait did not reference any blood draw. (Pet.'s RCCAP Exh. 1 at pp. 3-4.) Thus, defense counsel had no reason to suspect Dr. Tait would have detected genital trauma during the blood draw.

Moreover, defense counsel's failure to elicit Dr. Tait's testimony that she did not detect genital bruising or obvious signs of genital trauma during the blood draw was not prejudicial. Expertise and concentration are required to conduct a femoral blood draw. It requires palpation of the femoral artery to identify the adjacent femoral vein. (Resp.'s RCCAP Exh. 1 at p. 17 [Declaration of Dr. Jess Diamond].) The hematoma to the left side of the labia described by nurse Lackie (11RT 2249) and the bruise on Consuelo's perineum described by Dr. Diamond (10RT 2000) would not have been visible to Dr. Tait during a blood draw that she characterized as "difficult" due to Consuelo's hemorrhaging and low blood pressure. (17RT 3332.)

Petitioner has further adduced evidence that two other DRMC staff members did not see blood either. Nurse Anita Caraan Wafford did not see blood (Pet.'s RCCAP Exh. 4 at p. 1809) or evidence of sexual assault but noted DRMC staff was treating a head injury and not looking for evidence of sexual assault (*id.* at p. 1810), and she did not examine Consuelo at all (14RT 2772; Pet.'s RCCAP Exh. 4 at p. 1808). DRMC triage nurse, Donald Jordan, also did not see any blood. (Pet.'s RCCAP Exh. 4 at p. 1778.) He said he was looking for blood, but not in the context of a suspected sexual assault. He "didn't pay attention to" Consuelo's genital (or anal) area. (*Ibid.*) Defense counsel's failure to call Jordan as a witness or cross-examine Wafford about this was not unreasonable or prejudicial because the evidence was cumulative of Dr. Tait's testimony that she did not see any blood on Consuelo's stretcher. (17RT 3318.)

(2) Failure to present more evidence that genital trauma was not detected may have been prejudicial

Should this Court conclude defense counsel unreasonably failed to present more evidence that genital trauma was not detected at DRMC, her failure to do so may have been prejudicial as to the rape conviction and special circumstance finding. As will be discussed in argument M2d, Dr. Diamond no longer opines that Consuelo was raped, as the tear of the anterior wall of the vagina that had been reported to him by Dr. Dibdin was not substantiated. (Resp.'s RCCAP Exh. 1 at p. 10.)

(3) Failure to adduce more evidence that anal trauma was not detected at DRMC was not unreasonable; Consuelo was treated for a head injury and no one looked at her anus for suspected sexual abuse

Defense counsel's failure to introduce more evidence that anal trauma at DRMC went undetected was not unreasonable because a patient's

treatment is determined by the reported injury (14RT 2864), and Consuelo was admitted to DRMC for a head injury (12RT 2451-2452) by her mother, an employee at DRMC. (13RT 2545; see also 14RT 2771 [Anita Caraan Wafford knew Estella worked there], 17RT 3328 [Dr. Tait did, as well].) Consuelo was not able to inform staff that she had additional injuries. She was only 21 months old (10RT 2046), and was crying, moaning, and had incoherent speech (17RT 3327). According to nurse Linda Roberts, while DRMC staff were treating Consuelo for a head injury, they were operating under the mistaken premise that someone witnessed Consuelo's "accident." (Pet.'s RCCAP Exh. 4 at p. 1689 [Roberts' 1992 statement to district attorney investigator].) Dr. Tait testified that Christina told her that while she was going out the door, Consuelo hit her head on it from the other side. (17RT 3322.) Francis Zapien testified that petitioner told her Consuelo ran after the older child, behind her, and the door just hit her. (14RT 2782.) In addition, Consuelo exhibited injuries that were consistent with a head injury. She had a bruise on top of the bridge of her nose, abrasions to both lips, and a bruise on the forehead. (17RT 3317, 3328; see also Pet.'s RCCAP 73 at p. 5425 [Declaration by Francis Zapien notes that Dr. Tait was concerned about a soft spot on the lower part of Consuelo's head.]) Because Consuelo's symptoms corresponded to the medical history provided to staff, Consuelo was treated for a head injury.

Consuelo was critically ill and DRMC staff was busy trying to save her life, so they did not have time to conduct speculative exams of Consuelo's genital and anal areas. Consuelo was treated for a head injury during the first hour to hour and a half she was at DRMC. (Pet.'s RCCAP Exh. 4 at p. 1747.) Dr. Tait tried to have a technician come in to do a CAT scan of Consuelo's head. (17RT 3323.) She said that was time-consuming (Pet.'s RCCAP Exh. 76 at p. 5440). Even so, she ultimately was unable to get a technician to come in. (17RT 3323.) X-rays were also taken of

Consuelo's chest. (17RT 3323.) Nurses had difficulty drawing Consuelo's blood. (Pet.'s RCCAP Exh. 75 at p. 5435; Pet.'s RCCAP Exh. 76 at p. 5441.) About an hour after Consuelo arrived, her abdomen began to distend. (17RT 3316.) Even after Consuelo's abdomen began to distend, staff did not examine the cause for the abdominal changes but still suspected a head injury. (Pet.'s RCCAP Exh. 4 at p. 1687 [Roberts' statement to Investigator Lopez].) Consuelo became less responsive to painful stimuli and she was not breathing properly. (17RT 3317.) At 9:20 p.m., Consuelo "coded," meaning she underwent a cardiac respiratory emergency. (Pet's RCCAP Exh. 74 at p. 5429.) Staff had difficulty stabilizing her. (Pet.'s RCCAP Exh. 4 at p. 1688.) Consuelo scored between a three and four on the Glasgow Coma Scale (the lowest on the scale). She became bradycardiac, meaning she had an extremely slow heartbeat. Consuelo's heart beat 20 times per minute instead of between 90-120 times per minute. (Pet.'s RCCAP Exh. 74 at p. 5430; Pet.'s RCCAP Exh. 1 at p. 1065; Pet.'s RCCAP Exh. 75 at pp. 5435-5437.) At 9:33 p.m., the crisis subsided and nurses inserted tubes down her nose and throat to keep her breathing. (Pet.'s RCCAP Exh. 74 at p. 5430.)

Nurse Linda Roberts and Nurse Fay Van Worth subsequently attempted, unsuccessfully, to insert a catheter into Consuelo's urethra to monitor urine output. (Pet.'s RCCAP Exh. 74 at p. 5430.) Around that time, Dr. Tait received Consuelo's blood results, which indicated "massive" internal bleeding. (17RT 3318; Pet.'s RCCAP Exh. 4 at p. 1685; Pet.'s RCCAP Exh. 75 at p. 5436.) Dr. Tait testified she did not have any reason to do an anal or vaginal exam before she received Consuelo's blood results and observed changes in Consuelo's abdomen. (17RT 3317.) By that point, Consuelo was too sick to be examined and was being transferred to KMC for a CAT scan (*ibid.*).

Moreover, DRMC staff also failed to detect Consuelo's unreported yet irrefutable abdominal and rib injuries. Consuelo's abdomen distended before she was transferred from DRMC to KMC. (17RT 3317-3318; Pet.'s RCCAP Exh. 4 at p. 1686.) However, DRMC staff still suspected a head injury (Pet.'s RCCAP Exh. 1 at p. 4 [According to DRMC medical records Consuelo was listed as head injury patient at time of transfer]). No one examined Consuelo to determine the cause of her abdominal problems (Pet.'s RCCAP Exh. 4 at pp. 1686-1687; see also Pet.'s RCCAP Exh. 30 at p. 5430 [Roberts attributed the distended abdomen to there being air in Consuelo's stomach from having been intubated].) Dr. Tait did not feel anything had been overlooked during her treatment of Consuelo at DRMC. (Pet.'s RCCAP Exh. 76 at p. 5443.) The fact DRMC personnel did not detect all of Consuelo's unreported injuries while treating a reported head injury and the host of other problems that emerged during the course of her emergency hospitalization cannot be construed as proof that she did not have anal trauma when she arrived at DRMC. (Resp.'s RCCAP Exh. 1 at p. 24 [Declaration of Dr. Jess Diamond].) Based on the foregoing, defense counsel's failure to elicit more evidence that genital trauma was not detected at DRMC was not unreasonable. Even if this Court disagrees, defense counsel's failure to elicit more evidence was not prejudicial for the reasons set forth later in argument M2b(7).

(4) Failure to present more evidence that anal trauma was not detected was not unreasonable; catheterization attempts did not afford an opportunity to detect anal trauma

Petitioner has adduced declarations post-trial from DRMC nurse Linda Roberts and her supervisor Fay Van Worth opining that they would have detected anal trauma when each attempted to insert a catheter into Consuelo's urethra. (RCCAP at pp. 227, 229-230; Pet.'s RCCAP Exhs. 74

[Roberts' Declaration] and 75 [Van Worth's Declaration].) Neither Linda Roberts nor Faye Van Worth purported to look at Consuelo's anus at that time. (Pet.'s RCCAP Exh. 4 at pp. 1681-1682 [exam not conducted by Linda Roberts]; Pet.'s RCCAP Exh. 4 at pp. 1764, 1769 [Van Worth noted that DRMC staff did not conduct a rectal exam].) In 1992, Roberts told Investigator Lopez that in a child sexual abuse case, they would turn the child over and check to see if the rectum was dilated. (Pet.'s RCCAP Exh. 4 at p. 1692.) Roberts then stated that "we" (the staff) did not look at Consuelo's rectum and that she expressly did not "open the buttocks and examine the rectum" because they did not have reason to believe at the time that this was a sex abuse case. (*Id.* at p. 1693.) In 1992, when Investigator Lopez asked Van Worth if she saw anything in the anal area that made her suspect abuse, she responded, "I did not turn her over and look." (*Id.* at p. 1769.) In 1992, Van Worth also said she would not have suspected the "rectal-vaginal thing from her [Consuelo's] appearance." (*Id.* at p. 1765.) Accordingly, defense counsel's failure to elicit the evidence contained in Roberts' and Van Worth's declarations was not unreasonable.

Even if this Court were to disagree, petitioner's ineffective assistance of counsel claim fails because defense counsel's failure to elicit Roberts and Van Worth's post-trial contentions that they would have detected signs of anal trauma while trying to insert a catheter into Consuelo's urethra was not prejudicial. Catheterization occurs at the upper portion of the vaginal opening, not in the anal region, so their attention was directed elsewhere. Moreover, one typically has to spread the buttocks apart to detect an anal tear, particularly one located at six o'clock. (Resp.'s RCCAP Exh. 1 at p. 14 [Declaration of Dr. Jess Diamond].) Consuelo was lying on her back and her buttocks would have been closed, so the nurses would not have been able to see anal swelling or anal tears. (Accord Pet.'s RCCAP Exh. 4 at p. 1792 [Francis Zapien, the nurse who stayed with Consuelo while Van

Worth attempted to catheterize her was unable to even see Consuelo's anus].)

Petitioner further asserts that defense counsel unreasonably failed to cross-examine Francis Zapien about whether she detected anal trauma. (RCCAP at p. 230.) Francis Zapien did not check Consuelo's anal area or conduct a sexual assault exam. (14RT 2781; accord Pet.'s RCCAP Exh. 4 at p. 1792 [Zapien was unable to see Consuelo's anus].) Notably, Zapien does not allege in her post-trial declaration that she would have detected anal trauma, had any been present. (Pet.'s RCCAP Exh. 73 at p. 5425 [notes genital trauma not noted but does not say she did not see anal trauma].) Thus, petitioner's claim fails.

(5) Failure to present more evidence that anal trauma was not detected was not unreasonable; single rectal temperature reading did not afford an opportunity to detect anal trauma

Declarations submitted post-trial by DRMC personnel incorrectly opine that anal trauma would have been detected, had it existed, when "nurses" took Consuelo's rectal temperature. (Pet.'s RCCAP Exh. 73 at p. 5426 [Zapien]; Pet's RCCAP Exh. 75 at p 5437 [Van Worth]; see also Pet.'s RCCAP Exh. 72 at p. 5419-5420 [Wafford loosely used the term "we" when noting Consuelo's rectal temperature was taken]; Pet.'s RCCAP Exh. 76 at p. 5442 [Tait].) It is standard procedure for nurses to record a temperature reading in the patient's medical chart. (Resp.'s RCCAP Exh. 1 at pp. 17-18.) Medical records from DRMC show that Consuelo's rectal temperature was taken only once while she was there. (Pet.'s RCCAP Exh. 1 at pp. 2, 3.) Linda Roberts took Consuelo's rectal temperature when Estella, a coworker, rushed Consuelo into the trauma room. (Pet.'s RCCAP Exh. 74 at p. 5429, 13RT 2545) at 7:50 p.m. (Pet.'s RCCAP Exh. 74 at p. 5428; Pet.'s RCCAP Exh. 1 at p. 1).

Roberts did not see anal tearing, bleeding, bruising, swelling or dilation when she took Consuelo's rectal temperature and opines that she would have seen signs of trauma and taken Consuelo's temperature another way had Consuelo been sexually abused. (Pet.'s RCCAP Exh. 74 at pp. 5432-5433.) However, Dr. Alonso testified that a rectal temperature can be obtained when one's anus is traumatized as Consuelo's was. (13RT 2690.) Moreover, Roberts' declaration is inconsistent with her 1992 statement to Investigator Lopez that she did not look for signs of abuse (Pet.'s RCCAP Exh. 4 at pp. 1681-1682), and did not look at or even see Consuelo's anus or rectum (*id.* at pp. 1682, 1684, 1692, 1693). Thus, defense counsel's failure to present the evidence alleged in her declaration was not unreasonable.

Even if this Court disagrees, any error was not prejudicial. Roberts' declaration is inconsistent with her repeated statements in 1992 that she did not look at Consuelo's anus. Moreover, taking a temperature reading in a trauma room is a quick task. It is not time-consuming, particularly when the patient is as ill as Consuelo was (Resp.'s RCCAP Exh. 1 at p. 19 [Declaration by Dr. Jess Diamond], countering Pet.'s RCCAP Exh. 63 [Declaration by Dr. William Kennedy, II]). As Dr. Tait explained at trial, when a patient is critical, staff has to act fast. (17RT 3331-3332.)

(6) Failure to present more evidence that anal trauma was not detected was not unreasonable; femoral blood draw did not afford an opportunity to detect anal trauma

Post-trial, Dr. Tait opines that she would have noted "obvious signs of trauma—any bruising, swelling, bleeding, discharging of fluids or blood" while conducting a femoral blood draw of Consuelo. (Pet.'s RCCAP Exh. 76 at p. 5441.) Petitioner contends defense counsel unreasonably failed to elicit this testimony at trial. (2004 Inf. Reply at p. 241.) Not so.

First, Dr. Tait did not include anal tears as an "obvious sign" of trauma that she would have detected during the blood draw. (*Ibid.*) Second, defense counsel asked Dr. Tait if she had drawn Consuelo's blood. Dr. Tait testified that she drew Consuelo's blood, but she never deemed this to provide an opportunity to have detected obvious signs of anal (and genital) trauma. (17RT 3318.)

Even assuming that defense counsel unreasonably failed to present the evidence now asserted in Dr. Tait's declaration, any error was not prejudicial. Expertise and concentration are required to conduct a femoral blood draw. It requires palpation of the femoral artery to identify the adjacent femoral vein. (Resp.'s RCCAP Exh. 1 at p. 17 [Declaration of Dr. Jess Diamond].) Dr. Tait also testified that it was difficult to draw Consuelo's blood because she had low blood pressure and was hemorrhaging. (17RT 3332.) In addition, Dr. Tait's attention was not focused on Consuelo's anus during the blood draw, and she would not have seen anal tears or swelling because Consuelo was lying on her back with her buttocks closed. One typically has to spread the buttocks apart to see an anal tear, particularly a tear that is located at 6 o'clock. (Resp.'s RCCAP Exh. 1 at p. 14.) Anal tears are also better visualized when traction is exerted on the perianal skin. The detection of anal tears requires a concentrated look. (*Ibid.*) Dr. Tait was not looking; she was palpating the femoral artery.

(7) Failure to present more evidence that anal trauma was not detected at DRMC was not prejudicial

Assuming arguendo that defense counsel acted unreasonably by not presenting more evidence that anal trauma went undetected at DRMC, petitioner's ineffective assistance of counsel claim fails because defense counsel's error was not prejudicial. Petitioner asserts that no reasonable

jury would find that a child could be sodomized by an adult male and not show signs of anal injury an hour later. (RCCAP at p. 234, claim M2c(10).) DRMC staff's failure to detect anal trauma cannot be construed as evidence that Consuelo did not have anal trauma upon her admission at DRMC because no one suspected she had anal trauma and no one looked for it, as previously discussed. (Resp.'s RCCAP Exh. 1 at p. 14 [Declaration of Dr. Jess Diamond].) In any event, the evidence supporting petitioner's sodomy conviction was strong and there is not a reasonable probability that petitioner would have received a more favorable outcome but for defense counsel's failure to present more evidence that anal trauma went undetected at DRMC. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

Dr. Alonso detected anal trauma when he examined Consuelo in the emergency room at KMC. He saw redness and severe swelling around Consuelo's anal area. (13RT 2686, 2691.) Post-trial, Dr. Alonso purports to have changed his opinion that Consuelo was sodomized. (Pet.'s RCCAP Exh. 144 at p. 6643.) His change of opinion is based on a false premise as set forth more fully in argument M2c(8). In any event, there was substantial evidence to support petitioner's sodomy conviction even without his testimony.

At trial, Dr. Diamond opined that Consuelo had been sodomized. (10RT 2073.) He testified that the anal tears at 6 o'clock and 9 o'clock signified an object had been inserted there that had exceeded the ability of the anus to expand, and tore it at those two places. (10RT 2052, 2064.) He also testified there was marked swelling around the entire anal rim and that indicated that there had been trauma, bruising in that area. (10RT 2053.) Dr. Diamond also noted that Consuelo had a dilated anus and lax sphincter tone when he examined her. (10RT 2050.) As will be discussed in argument M2d, Dr. Diamond no longer attributes Consuelo's dilated anus

and lax sphincter tone to sodomy. (Resp.'s RCCAP Exh. 1 at p. 10.) However, he still believes she was sodomized based on her anal swelling and the anal tears he observed at six o'clock and nine o'clock. (Resp.'s RCCAP Exh. 1 at p. 11.)

The pathologist, Dr. Dibdin, also opined that Consuelo's anal injuries were consistent with anal penetration. (11RT 2167.) Consuelo's anus was one inch in diameter, which is seven to eight times larger than normal. (11RT 2119.) Dr. Dibdin also described multiple lacerations of the anal margins, particularly on the left, where there was a quarter-inch laceration at the upper margin and a three-eighths of an inch laceration at the lower margin. (11RT 2119.)

Petitioner babysat Consuelo and her sister Christina when their mother left for work at 6:40 p.m. on November 17. (13RT 2541-2542, 2545.) Christina left the apartment to go play with a friend. (11RT 2181, 2183.) Fifteen minutes later, petitioner left the apartment and summoned her to come home. (11RT 2182.) As previously discussed, Consuelo sustained fatal injuries while under petitioner's care that were consistent with physical and sexual abuse.

In addition, Consuelo's injuries were not consistent with the varying explanations set forth by petitioner. Initially, petitioner contended Consuelo was only out of his sight for about one minute. (15RT 3010.) He told Estella and detectives that Consuelo had hit her head on a door while chasing after Christina. (13RT 2548-2549, 2746.) He also told a detective "I didn't know what had happened to her, if she fell from a ladder or she got hit by a car." (15RT 3019.) He subsequently told his mother that Consuelo had been run over by a car. (15RT 3058; accord Pet.'s CAP Exh. 4 at p. 2055 [Petitioner's mother told Investigator Lopez that petitioner claimed he was innocent of the charges and surmised someone had run over Consuelo with a car and left her on the doorstep.].) At trial,

he testified that he did not know how much time had elapsed between the time he left the kitchen and the time he allegedly found Consuelo outside. He claimed he had not seen her "after a while," and then found her outside. (15RT 3010-3011.)

There was also evidence that Consuelo suffered from prior injuries that were similar to the fatal injuries suffered on November 17, 1991. She had two fractured ribs (11RT 2125) that were three to four weeks old (11RT 2128). She had adhesions and scarring of the abdomen that were one to two months old. (12RT 2546-2547.) She also had areas of old healing injury in the vagina and anus. (11RT 2142-2143.) Around the same time, petitioner exhibited abnormal secretive behavior with Consuelo and had the opportunity to inflict these injuries when he babysat Consuelo and Christina one night. Christina testified that he took Consuelo into his bedroom for the night and locked the bedroom door. (13RT 2561.) Within the same time frame, Consuelo exhibited physical symptoms (14RT 2731-2733) and emotional symptoms (13RT 2584-2585) that were consistent with the intentionally inflicted injuries the later medical examinations disclosed. Based on the foregoing, it is not reasonably probable that petitioner would have obtained a different outcome had Dr. Alonso's testimony that Consuelo was sexually abused not been introduced.

(8) Dr. Alonso's recantation is based on the false premise that DRMC staff looked for but did not detect anal trauma; defense counsel's alleged failure to investigate and/or present the evidence contained in his declaration was not unreasonable or prejudicial

As previously discussed, defense counsel's failure to present more evidence that anal trauma went undetected at DRMC was not prejudicial. (RCCAP at p. 234; Inf. Resp., Arg. M2c(7).) Post-trial, Dr. Alonso opines that Consuelo was not sodomized (Pet.'s RCCAP Exh. 144 at p. 6643)

contrary to his testimony at trial (13RT 2687). Dr. Alonso's declaration should not be taken at face value as it is based on false understanding of the treatment Consuelo received at DRMC before he examined her in the emergency room at KMC.

"[T]he offer of a witness, after trial, to retract his sworn testimony is to be viewed with suspicion." (*In re Roberts*, *supra*, 29 Cal.4th at pp. 742-743 citing *In re Weber* (1974) 11 Cal.3d 703, 722; *In re Cox*, *supra*, 30 Cal.4th at p. 998.)

Dr. Alonso testified that he examined Consuelo in the emergency room at KMC and saw redness around her entire anal area (13RT 2686) and perianal area (13RT 2691) and significant and severe swelling throughout the entire anal area (13RT 2686). Dr. Alonso inserted his finger half-way into Consuelo's rectum. (13RT 2690.) Consuelo did not have any sphincter tone. (13RT 2686, 2690.) When he removed his finger, it had stool on it that tested positive for blood (13RT 2685-2686, 2689-2690). Dr. Alonso opined without a doubt that Consuelo had been abused. He had never "seen a child that was involved in an accident with injuries, internal injuries, head injuries, etc. that had an anus like the one he examined that was not sexually abused." (13RT 2687)

In 2004, after respondent's Informal Response was filed, Dr. Alonso changed his opinion that Consuelo was sodomized. (Pet.'s RCCAP Exh. 144 at p. 6643.) His change of opinion is based on the failure of DRMC to detect anal trauma. (*Id.* at pp. 6642, 6643.) Dr. Alonso's recantation is based on a false understanding of the treatment Consuelo received at DRMC. For example, he wrongly states that "nurses" took her temperature rectally. (Pet.'s RCCAP Exh. 144 at pp. 6643-6645.) As previously discussed, only one rectal temperature reading was taken at DRMC. (Pet.'s RCCAP Exh. 1 at pp. 2-3.) Petitioner's counsel does not appear to have provided Dr. Alonso with testimony by DRMC staff

indicating that they never examined Consuelo's anus. (17RT 3327 [Dr. Tait]; 14RT 2772 (Anita Caraan Wafford); and 14RT 2781, 2785, 2786 [Francis Zapien].) Linda Roberts, the nurse who took Consuelo's temperature, and attempted to catheterize her did not turn Consuelo over and spread her buttocks apart to look at her anus (Pet.'s RCCAP Exh. 4 at pp. 1681-1682), nor did Van Worth, the supervisor who also tried to catheterize Consuelo (*id.* at pp. 1764, 1769.) Dr. Alonso was the first physician who actually examined Consuelo's anus. Because Dr. Alonso's recantation is based on the false premise that DRMC staff looked for and did not detect anal trauma, it is not trustworthy.

Dr. Alonso's recantation is also untrustworthy because it is inconsistent with his findings and testimony. He now opines that had Consuelo been penetrated with a penis or similar sized object, "she would have presented to DRMC with bruising, tearing, or bleeding that should have been readily visible to the treating nurses and doctor." (Pet.'s RCCAP Exh. 144 at pp. 6643-6644.) However, Dr. Alonso did not detect bruises, tears or blood around the anus when he examined Consuelo yet he opined she had been sexually abused based on other trauma. Dr. Alonso conducted a rectal exam and found blood on Consuelo's stool, but he did not purport to have seen blood on her gurney or elsewhere. Dr. Alonso described redness and swelling in the anal area, but he did not identify anal bruises or tears. At trial he intimated that his failure to detect anal tears did not negate the presence of such tears, as he "was not looking for that specifically because the child was hypotensive. [His] main concern was resuscitating the child." (13RT 2691.) By the same token, DRMC staff were not checking Consuelo's anus for suspected sexual abuse. They, too, were striving to save her life. While DRMC staff treated a reported head injury, Consuelo's condition deteriorated to the point she required CPR, a ventilator, and a cross-match blood transfusion. Her abdomen distended

due to internal bleeding and she lost consciousness.

Post-trial, Dr. Alonso opines that Consuelo's perianal redness and swelling, anal laxity, and the blood in her stool, were most likely caused by her medical condition when she arrived at KMC and prior medical procedures, rather than sexual abuse. (Pet.'s RCCAP Exh. 144 at pp. 6643-6644.) Petitioner alleges defense counsel unreasonably failed to adduce the evidence contained in the declaration submitted by Dr. Alonso after trial. (2004 Inf. Reply at p. 241.)

Defense counsel's failure to present the opinions advanced in Dr. Alonso's declaration was not unreasonable because none of the experts with whom she consulted shared the views he did. Petitioner has not shown that defense counsel should have identified the need to search for another expert who would assess the case differently than those with whom she consulted. Dr. Werner Spitz, a world renowned pathologist, reviewed the autopsy report and 60 autopsy photographs, medical reports from DRMC, KMC, UCLA Medical Center, Consuelo's death certificate, the complaint, a California investigative report, newspaper articles, the preliminary hearing transcript, and the resumes of Dr. Diamond, Dr. Dibdin, Dr. Bloch, and Dr. Harrison. (Resp.'s RCCAP Exh. 12 at p. 2 [Claim for Payment Submitted By Dr. Werner Spitz].) After he completed his case review, defense counsel elected not to have him testify. Defense counsel then retained emergency room physician Dr. Nat Baumer as an expert and had him review all the medical records from DRMC, KMC and UCLA Medical Center (14RT 2823; Resp.'s RCCAP Exh. 11 at p. 10), reports by law enforcement (Resp.'s RCCAP Exh. 13 at p. 1), photographs of Consuelo that were taken at UCLA, photographs from the autopsy and the autopsy report (14RT 2824; Resp.'s RCCAP Exh. 13 at p. 1), and tissue slides that were taken by Dr. Dibdin at autopsy (Resp.'s RCCAP Exh. 13 at pp. 3-4 [Transcript of Audiotaped Case Review by Dr. Baumer]). At Dr. Baumer's

request, defense counsel subsequently retained Dr. Frederick Lovell, a pathologist to review the tissue slides in this case and compare them to the Dr. Dibdin's autopsy report. Dr. Lovell reviewed the autopsy report, operative reports from KMC, two operative reports from UCLA Medical Center, Dr. Shaw's operative report, microscopic slides and the specimen of Consuelo's groin that was preserved in the coroner's office. (16RT 3094-3095, 3104-3105.)

Petitioner's ineffective assistance of counsel claim should also be rejected because defense counsel's failure to elicit the opinions advanced in Dr. Alonso's declaration was not prejudicial for the reasons that follow.

(a) Perianal redness and swelling

Post-trial, Dr. Alonso attributes the redness and swelling he detected in Consuelo's perianal area to her being in a state of "coagulapathy," meaning her ability to clot blood was impaired. (Pet.'s RCCAP Exh. 144 at p. 6644.) He noted that her coagulation factors were rising. She had a prothrombin time (PT) of 25.7 (normal is less than 13) and a partial thromboplastin time (PTT) of greater than 150 (25-40 is normal). Dr. Alonso opines she was in the beginning stages of what records of her subsequent treatment show to be disseminated intravascular coagulation (DIC). He further alleges that Consuelo's edema and erythema tended to be more pronounced in her perianal area due to gravity, which makes the blood pool downward. (*Ibid.*) Dr. Diamond disagrees. (Resp.'s RCCAP Exh. 1 at p. 12 [Declaration of Dr. Jess Diamond].)

Perianal swelling develops within 24 to 48 hours of the trauma. Dr. Alonso saw Consuelo at 10:30 p.m., less than two and a half hours after she had been admitted to DRMC at 7:50 p.m. A patient does not go into DIC that quickly. (Resp.'s RCCAP Exh. 1 at p. 12.) If the swelling in the perirectal area had been secondary to DIC, there should have been redness and swelling around the genital area, too, given the preceding attempts at

DRMC by Nurse Roberts and Nurse Van Worth to insert a catheter into Consuelo's urethra. (*Ibid.*) However, when Dr. Alonso examined Consuelo's genital area, he did not record any redness or edema. His written report from the exam states "vagina neg." The "neg." is short for negative, meaning he did not make any physical findings as to the genital area. (*Id.*; see also Pet.'s RCCAP Exh. 2 at p. 50 [Dr. Alonso's handwritten report].) Likewise, the notes recorded by KMC nurse Betsy Lackie did not cite genital edema either, though at trial Miss Lackie testified that this area was "slightly edematous." (11RT 2251.)

Dr. Alonso's conclusion that Consuelo's perirectal edema was caused by DIC is wrong for another reason, as well. The vagina is superior to, or above the anus, and the tissues in the vagina are looser. The absence of generalized swelling in the genital area contradicts Dr. Alonso's conclusion that the severe edema in the anal region resulted from blood pooling downward from above due to DIC. (Resp.'s RCCAP Exh. 1 at p. 12.)

(b) Anal laxity

Post-trial, Dr. Alonso attributes the anal laxity he detected (13RT 2686, 2690) to Pavulon, a paralytic agent/medication that she was given at KMC. (Pet.'s RCCAP Exh. 144 at p. 6644.) Laxity of the sphincter tone is a common side effect of the medication. (*Ibid.*; accord Pet.'s RCCAP Exh. 77 at p. 5450 [Declaration from Dr. Bloch].)

Dr. Alonso's new opinion is speculative. Consuelo was admitted to KMC at 10:30 p.m. but did not receive Pavulon until 10:40 p.m. (See Pet.'s RCCAP Exh. 2 at p. 59 [KMC medical records]; Pet.'s RCCAP Exh. 144 at p. 6644.) Dr. Alonso opined that Consuelo would have been under the effects of Pavulon for one hour, i.e., between 10:40 p.m. and 11:40 p.m. However, he does not claim to have detected the laxity within that one hour timeframe. (Pet.'s RCCAP Exh. 144 at p. 6644.)
Dr. Alonso's testimony, which was not provided to him by petitioner's

counsel (*id.* at p. 6643), indicated that he examined Consuelo "as soon as she arrived at the emergency room" (13RT 2688). Medical records also show that Dr. Alonso was with Consuelo before Pavulon was administered (Pet.'s RCCAP Exh. 2 at pp. 58-59). Thus, it is possible he detected the lax tone before 10:40 p.m.[45]

Dr. Alonso presumes the laxity was caused by Pavulon because had it been from sodomy, DRMC "*nurses*" could have seen this laxity "when *they* took her rectal temperature and attempted to catheterize her." (Pet.'s RCCAP Exh. 144 at p. 6645; emphasis added.) However, as previously discussed, Consuelo's temperature was only taken rectally once at DRMC (Pet.'s RCCAP Exh. 1 at pp. 2-3), and Roberts and Van Worth, the DRMC nurses who tried to insert a catheter into her urethra, did not turn Consuelo over and spread her buttocks apart to check her anus then or at any other point during her stay (Pet.'s RCCAP Exh. 4 at pp. 1681-1682, 1764, 1769). In 1992, Investigator Lopez specifically told Van Worth that Consuelo did not have a rectal tone. She responded, "[W]e didn't do a rectal on her [inaudible] *we would not have picked that up*. We were trying to get a

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[45] The fact Consuelo had a lax tone after the effects of the Pavulon wore off may also bolster Dr. Alonso's original conclusion that the anal laxity resulted from sexual abuse. (13RT 2687, 2690.) Consuelo had a lax sphincter tone on November 19, 1991 when she was discharged from KMC (Pet.'s RCCAP Exh. 2 at p. 63 [KMC Discharge Summary]; but see Pet.'s RCCAP Exh. 79 at p. 5470 [Dr. Shaw alleges that the loss of sphincter tone detected at KMC may not have been indicative of anal penetration because Consuelo had previously coded and that could have damaged her central nervous system, affecting her ability to control her anal sphincter].) Consuelo also had a lax tone when Dr. Harrison examined her at UCLA Medical Center on November 19, 1991. (12RT 2352, 2359; but see Pet.'s RCCAP Exh. 142 at p. 6620 [Dr. Baumer opines that Dr. Harrison's findings were not attributable to sexual abuse because Consuelo was paralyzed and unconscious at the time].)

Foley in to determine urine output, you know." (Emphasis added; Pet.'s RCCAP Exh. 4 at p. 1754.)

Even if the anal laxity that was detected in the emergency room at KMC was attributable to Pavulon or to Consuelo having coded, defense counsel's failure to present that information was not prejudicial. Dr. Alonso's opinion that Consuelo had been sodomized was "mainly based on the edema and erythema in the perianal area"; the anal laxity was "only a contributing factor." (Pet.'s RCCAP Exh. 144 at p. 6644 [Declaration of Dr. Alonso]; see also Resp.'s RCCAP Exh. 1 at p. 11 [Dr. Diamond maintains the anal tears and swelling alone support petitioner's sodomy conviction].)

(c) Blood in stool

Post-trial, Dr. Alonso opines that the blood in Consuelo's stool was "likely also due" to her coagulopathy and/or irritation from "nurses" taking her rectal temperature. (Pet.'s RCCAP Exh. 144 at pp. 6643-6644.) Consuelo was not in DIC when she was admitted to KMC at 10:30 p.m. (Resp.'s RCCAP Exh. 1 at p. 12 [Declaration of Dr. Jess Diamond]) and nurses in an emergency room know how to take a rectal temperature without inflicting injury (*id.* at p. 18). In any event, defense counsel's failure to present this evidence did not affect the outcome of petitioner's trial. Dr. Alonso's finding that Consuelo's stool tested positive for blood was not central to his opinion that she had been sodomized, which was primarily based on the edema and errythema in the perianal area (Pet.'s RCCAP Exh. 144 at p. 6644), and defense counsel elicited Dr. Alonso's testimony that one rectal temperature had been taken at KMC (13RT 2690).

Based on the foregoing, Dr. Alonso's recantation is not trustworthy. Moreover, defense counsel's failure to present the opinions advanced in his post-trial declaration was not unreasonable. It was not prejudicial either, as Dr. Alonso's assertions were refuted by Dr. Diamond. As previously

discussed, petitioner's sodomy conviction was supported by substantial evidence, even without Dr. Alonso' testimony.

d. Failure to refute Dr. Dibdin's testimony there was a one-half inch tear of the vaginal wall may have been prejudicial; failure to investigate whether Consuelo had a urethral abnormality was not unreasonable or prejudicial

(1) Tear reported by Dr. Dibdin

Dr. Diamond opined that Consuelo was raped, based in part, on information from Dr. Dibdin that Consuelo had a half-inch tear to the anterior wall of the vagina. (10RT 2060, 2096.) Dr. Diamond explained that a wall of the vagina is inside the hymen. (10RT 2060.) He further stated that the posterior wall of the vagina goes down toward the rectum, and the anterior wall goes up towards the head." (*Ibid.*) Dr. Diamond was asked "if a laceration or a cut of the interior part on the vaginal wall" could have been caused by external trauma, such as being struck on the outside on the skin? He responded, "No." (10RT 2061.) Dr. Diamond further opined that something had to have been placed inside the vagina, resulting in the tear reported to him by Dr. Dibdin. (*Ibid.*, accord 10RT 2073.) Petitioner asserts that defense counsel unreasonably failed to present evidence that there was no half-inch tear to the anterior wall of the vagina. (RCCAP at pp. 234-240; claim M2d(1)-(7).)

Defense counsel raised a hearsay objection to Dr. Diamond's reference to the tear of the anterior wall of the vagina reported to him by Dr. Dibdin. (10RT 2059.) The court permitted the testimony, subject to strike if not verified by Dr. Dibdin. (10RT 2060.) Dr. Dibdin subsequently testified there was a "half-inch tear of the *posterior wall* of the vaginal opening." (11RT 2122-2123.) Dr. Dibdin's autopsy report, which was not admitted into evidence at trial, notes a "half-inch laceration of the posterior

wall of the vaginal opening." (Pet.'s RCCAP Exh. 8 at p. 3557.) Dr. Dibdin's reference to the posterior wall suggests that the laceration was inside the vagina, along the back wall. (Pet.'s RCCAP Exh. 83 at p. 5510 [Declaration of Dr. William Kennedy, II].) However, a diagram that was attached to the autopsy report notes: "LAC'D POSTERIOR FOURCHETTE ½ INCH, NO VAGINAL PENETRATION?" (Pet.'s RCCAP Exh. 8 at p. 3545.)[46] The notation on the diagram suggests that there was not an internal vaginal tear, but rather a half-inch tear of the posterior fourchette, making it a tear that is external to the vagina. (Pet.'s RCCAP Exh. 83 at p. 5510.) Defense counsel did not cross-examine Dr. Dibdin about this at trial (RCCAP at p. 238, claim M2d(5)). On cross-exam, Dr. Dibdin stated that the "posterior portion of the vagina was lacerated, not the anterior portion" (11RT 2166); however, defense counsel failed to strike Dr. Diamond's testimony that there was a half-inch tear to the anterior wall of the vagina. (RCCAP at p. 238.)

Dr. Diamond's rape finding was based on a tear of the *anterior* wall of the vagina that was reported to him by Dr. Dibdin. (10RT 2060, 2069.) Post-trial, Dr. Diamond learned that the tear of the anterior wall of the vagina was not substantiated by Dr. Dibdin's testimony at trial. (11RT 2122-2123.) Dr. Diamond submitted a declaration opining that Consuelo was not vaginally penetrated with the caveat that he had not reviewed any of the microscopic slides that were prepared by the pathologist in this case. (Resp.'s RCCAP Exh. 1 at p. 10.)[47] On November 16, 2009, Department of

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[46] "Lac'd" is an abbreviation for lacerated. Both defense experts reviewed the autopsy report prior to trial. (Resp.'s RCCAP Exh. 13 at p. 1 [Dr. Baumer reviewed the report]; 16RT 3094-3095 [Dr. Lovell testified that he reviewed the autopsy report].)

[47] Petitioner accuses Dr. Diamond of misleading the jury to believe there was an injury in the internal vaginal wall. (RCCAP at p. 237.)

(continued...)

Justice Special Agent Don Newman and counsel for respondent conducted a tape recorded interview of Dr. Diamond. Dr. Diamond was asked whether he thought Dr. Dibdin's testimony about a half-inch tear of the posterior vaginal wall and his reference to a "half-inch tear of the posterior fourchette" on the diagram of the autopsy report related to one tear – a tear of the posterior fourchette. (Resp.'s RCCAP Exh. 14 at p. 8 [Transcript of Nov. 16, 2009 Interview of Dr. Jess Diamond].)[48] Dr. Diamond opined that the two statements referred to one tear – a tear of the posterior fourchette. (*Id.* at p. 9.) Dr. Diamond further stated that he did not believe that a half-inch tear of the posterior fourchette (or the vaginal tear at two o'clock) were indicative of rape. (*Id.* at pp. 7, 8.) Thus, defense counsel's failure to confront Dr. Diamond with Dr. Dibdin's testimony that there was no tear to the anterior vaginal wall and to pinpoint whether the half-inch tear of the posterior vaginal wall was the same as the half-inch tear to the posteriour fourchette may have been prejudicial as to the rape conviction and special circumstance finding.[49]

(...continued)
Dr. Diamond testified truthfully and represented the facts as he understood them to be.

[48] Dr. Diamond's address and wife's name have been redacted to protect their privacy. Respondent's counsel and Agent Newman also interviewed Dr. Diamond on June 29, 2009, and provided habeas counsel with that interview as well. It is not attached as an exhibit here, as the contents of the interview are summarized in the declaration submitted by Dr. Diamond. (Resp.'s RCCAP Exh. 1.)

[49] At the November 16, 2009 interview, Dr. Diamond was asked if the vaginal tear that was described by Dr. Lovell at trial (16RT 3104) affected his opinion about whether Consuelo had been raped. (Resp.'s RCCAP Exh. 14 at p. 8.) Dr. Diamond stated he lacked the expertise to express an opinion on the significance of Dr. Lovell's testimony as he was not a forensic pathologist; however, he maintained that a tear of the posteriour fourchette and the tear of the hymen at two o'clock were not indicative of vaginal penetration. (*Ibid.*)

Even if petitioner's rape conviction and the rape special circumstance finding were to be reversed due to insufficient evidence of a tear to the vaginal wall, any error would be harmless as to petitioner's first degree murder conviction. The jury found the special circumstance allegations that petitioner killed Consuelo during the commission of lewd and lascivious acts and sodomy to be true. (3CT 740-741.) Thus, his first degree murder conviction was supported by several other valid legal theories. (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1018 [court's erroneous instruction on sodomy felony-murder theory was harmless where the jury found that the murder was committed during a burglary and in the commission of rape and lewd acts]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 96 [court's instruction on sodomy felony-murder theory was harmless because the first degree murder conviction was also grounded on the robbery and burglary charges and related special circumstance allegations]; *People v. Hughes* (2002) 27 Cal.4th 287, 368 [court's erroneous instruction on sodomy felony-murder theory was harmless where the jury found true the special circumstance allegation that the defendant killed the victim during the commission of robbery]; and *People v. Johnson* (1993) 6 Cal.4th 1, 42, overruled on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 878-879 [insufficiency of the evidence of rape felony-murder was harmless where there was another valid basis for his defendant's murder conviction - burglary felony-murder].) Furthermore, it is not reasonably probable that the jury would have only sentenced petitioner to life in prison without the possibility of parole had they only been presented with evidence that he sodomized and committed lewd and lascivious acts with a 21-month-old girl instead of also being presented with evidence that he raped her, as well.

(2) Tear in top of vagina reported by Dr. Lovell

Petitioner further contends that during closing argument defense counsel unreasonably and prejudicially conceded the existence of a tear to the interior wall of the vagina, rather than refute it. (RCCAP at pp. 241-242, claim M2d(8).)

(a) Background

When Dr. Dibdin performed Consuelo's autopsy, he physically removed the area that composed the anus, the vagina, and the urinary bladder and preserved it in formaldehyde at the coroner's office. (11RT 2139, 2141.) Dr. Dibdin did not describe the specimen in detail at trial. It included the whole vagina and anus and extended up into the floor of the abdominal cavity. (16RT 3103-3104.)[50] Defense pathologist, Dr. Frederick Lovell, inspected the specimen of Consuelo's pelvis and abdominal cavity that was retained at the coroner's office. (16RT 3103.) Notably, Dr. Lovell saw a tear that was about an inch in size "in the top of the vagina," three inches up from the anus. (16RT 3104.)

Dr. Lovell also looked at about twenty microscopic slides that had been prepared from tissue samples that were taken at autopsy. (16RT 3101, 3130.)[51] Dr. Dibdin and Dr. Lovell viewed different sets of tissue slides; however, the tissue samples he received are within a fiftieth of a millimeter

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[50] The specimen of Consuelo's groin has since been destroyed. (Pet.'s RCCAP Exh. 71 at p. 5417 [Declaration of John Van Rensselaer].)

[51] According to John Van Rensselaer, the supervising coroner investigator at the Kern County Coroner's Office, there are 27 paraffin blocks containing samples of Consuelo's tissue and 27 slides that were cut from those blocks. (Pet.'s RCCAP Exh. 17 at p. 5417.) Dr. Dollinger reviewed the slides and listed the tissues preserved in these blocks and slides as follows: blocks 1-8 contain brain tissue; blocks 9-12 contain tissue from the perineum; block 3 contains spinal cord tissue; and blocks 13-27 contain rib bone. (Pet.'s RCCAP Exh. 71 at p. 5417.)

from those viewed by Dr. Dibdin, so the slides he viewed were representative of those viewed by Dibdin. (16RT 3130.) Dr. Lovell testified that one of the microscopic slides depicted tissue of a cross-section of the rectum and the vagina. (16RT 3103, 3104, 3114.) That slide showed a hemorrhage that was between the rectum and the vaginal wall. (16RT 3104, 3105.)

Defense counsel questioned Dr. Lovell about the vaginal tear as follows:

> Q. And when you were looking at the section [of Consuelo's groin] yesterday, uh, can you tell us, sir, if you noticed penial [*sic*] penetration of such intensity that it would cause trauma to the internal organs?
>
> A. Okay. I don't think I can say one way or the other for certain. There was hemorrhage, there was a tear, and hemorrhage in between the rectum and the vaginal wall. And, this is about two or three inches up from the anus, but the rectum itself, the wall was not perforated, and this tear seemed probably to come down from above. There was clotted blood in it, and which I had seen microscopically, and then I had seen today, but the wall itself wasn't perforated.
>
> Q. You are talking about a tear, how big was that?
>
> A. The tear I could see was in the top of the vagina, again I'm looking at something that has been handled, and it's hard to say, uh, it looked about an inch.
>
> Q. Now, are you saying the top of the vagina, what are you talking about, the anterior wall of the vagina?
>
> A. I felt it was right at the very top, there was, if you put a probe up in it, it was at the top, and it looked like kind of a sharp cut, and I think it was related to this hemorrhage running between the bladder and the rectum, but I can't say for certain.
>
> Q. What did—Uh, strike that. Could a cut like that happen when you're doing a section, or you're doing an autopsy?

A. Well, it's possible. It had bled though, down in, so that had come before, and I'm not sure whether that's related to that bleeding or not.

(16RT 3104-3105.)

(b) Counsel's argument was not unreasonable or prejudicial

During closing argument, defense counsel argued that the tear of the vaginal wall was not attributable to sexual abuse, but resulted from Dr. Diamond's attempts to catheterize Consuelo when he examined her at KMC. (18RT 3620-3621.) Petitioner faults counsel's argument on the ground it was not supported by expert testimony. (RCCAP at p. 241.) Nevertheless, counsel's argument was a fair comment on the evidence concerning the two catheters Dr. Diamond attempted to insert into Consuelo's urethra. (10RT 2059-2060.)

Petitioner next alleges that instead of conceding there was a tear to the vaginal wall, counsel should have shown that there was no evidence of internal tearing to the vagina in the medical records. (RCCAP at p. 242.) Petitioner's argument ignores Dr. Lovell's testimony that he saw a tear in the top of the vagina when he inspected the specimen of Consuelo's pelvis at the coroner's office (16RT 3104). Dr. Lovell also indicated that the tear appeared to be related to a hemorrhage that was between the rectum and the vaginal wall. (16RT 3104, 3105.) Based on the foregoing, counsel's attempt to cast the evidence that was presented at trial in a light that was favorable to the defense was not unreasonable or prejudicial.

(3) Failure to determine whether Consuelo had a urethral abnormality

Petitioner also contends defense counsel unreasonably failed to investigate "the possibility that she [Consuelo] suffered from a urethral anomaly." (RCCAP at pp. 238-239, claim M2d(7).) Respondent disagrees.

There is nothing in Consuelo's medical records to indicate that she had a urethral abnormality. (Pet.'s RCCAP Exh. 1 [DRMC medical records].) Even if petitioner could prove that Consuelo had previously suffered from a urethral abnormality, that has no bearing on whether she was vaginally penetrated by petitioner on the date of the charged offenses.

Petitioner also claims that the nurses' difficulty catheterizing Consuelo was relied upon by the prosecution to show that she was previously sexually abused (scar tissue). He contends that defense counsel's failure to present evidence of an alleged urethral abnormality and the alleged unavailability of appropriate sized catheters left the prosecution's explanation that rape caused the catheterization difficulties unrefuted. (RCCAP at pp. 238, 240, claim M2d(7).) Prior to trial, nurse Roberts opined that her inability to catheterize Consuelo may have been explained by prior sexual abuse that resulted in scar tissue in the urethra (Pet.'s RCCAP Exh. 4 at p. 1682.); nurse Van Worth opined she had been unable to catheterize Consuelo due to a urethral abnormality or obstruction (*id.* at p. 1746). The prosecutor did not introduce any evidence about why the two nurses at DRMC could not get a catheter in Consuelo's urethra. Contrary to petitioner's assertion, the prosecutor did not argue that the nurses' inability to catheterize Consuelo constituted evidence of prior sexual abuse. (See, e.g., 18RT 3557-3599; 3649-3661 [Argument by prosecutor].) As previously discussed, the reason nurses encountered difficulty catheterizing Consuelo was irrelevant. Therefore, this claim is also without merit.

e. Failure to present more evidence that genital injuries were not caused by sexual abuse

Petitioner contends that defense counsel unreasonably failed to present (more) evidence that DRMC staff injured Consuelo's genitalia when they tried to insert a catheter into her urethra. (RCCAP at pp. 242-

243, claim M2e.) Not so. Defense counsel elicited Francis Zapien's testimony on cross-exam that her supervisor tried to catheterize Consuelo at DRMC. (14RT 2786.) Zapien also testified that Consuelo's vaginal area was "slightly reddened" like diaper rash and that her supervisor was unable to insert the catheter. (14RT 2780-2781.) The jury also heard evidence that when Consuelo was examined in the emergency room at KMC, Dr. Alonso saw trauma to her "genital, urinary area" (13RT 2868) and that Betsy Lackie saw a tear that extended from her urethra to the vaginal opening (11RT 2249). Moreover, defense counsel presented expert testimony that a Foley catheter causes redness and swelling of genital tissue. (14RT 2870 [Dr. Baumer]) and that the abrasion on Consuelo's perineum could have been caused by a catheter rubbing against that area or by manipulation in the hospital. (16RT 3316-3317 [Dr. Lovell].)

Dr. Kennedy opines that DRMC staff caused the two o'clock tear of the hymen and the half-inch tear of the vagina/posteriour fourchette during their attempts to catheterize Consuelo. (Pet.'s RCCAP Exh. 83 at p. 5510; see also Pet.'s RCCAP Exh. 79 at p. 5469 [Dr. Shaw opines it was "entirely possible" that the hymenal tear was caused by catheterization attempts at DRMC].)

Defense counsel's failure to present Dr. Kennedy's opinion testimony did not constitute ineffective assistance of counsel. Defense counsel investigated and presented evidence in support of the defense that Consuelo's genital injuries were caused by the medical treatment she underwent. As previously discussed, Dr. Baumer reviewed all the medical reports in this case (14RT 2823; Resp.'s RCCAP Exh. 13 at p. 1 [Transcript of Audiotaped Case Review by Dr. Baumer].) He also reviewed reports by law enforcement, photographs of Consuelo that were taken at UCLA and at autopsy and the autopsy report. (Resp.'s RCCAP Exh. 11 at p. 10). Dr. Baumer simply did not share the view espoused by Dr. Kennedy.

Dr. Baumer did not believe that catheterization attempts caused the hole in the posterior vaginal wall or the tear of the hymen. (14RT 2871; see also Resp.'s RCCAP Exh. 13 at p. 1 [Prior to trial, Dr. Baumer informed defense counsel, "I find it difficult and that the child in the care of three different institutions would have that type of genital trauma with a Foley catheter"].) Petitioner has not shown that defense counsel had a reason to suspect, at that point, that a different expert would hold a different view. As the California Court explained in the case *In re Fields*, *supra*, 51 Cal.3d at p. 1075: "When three experts concur in a diagnosis, competent counsel might reasonably believe it pointless to search further in hope of finding an expert who would offer a different diagnosis, or facts that would support such a view."

Petitioner further alleges that defense counsel unreasonably failed to present expert testimony that Nurse Roberts and Nurse Van Worth used a Foley catheter that was too large for Consuelo's genitalia when they attempted to catheterize her at DRMC. (RCCAP at p. 243, claim M2e(3); see, e.g., Pet.'s RCCAP Exh. 83 at p. 5499 [Dr. Kennedy, a pediatric urologist, opines that a 16-inch Foley would be too wide for a child's urethra and that the standard of care for pediatrics was to use a narrower feeding tube, such as a five French or eight French for catheterization]; Pet.'s RCCAP Exh. 78 at p. 5458 [Dr. Harrison says that the appropriate size catheter for a patient Consuelo's size is a five-inch French feeding tube or an eight-inch Foley].)

DRMC medical records state "Foley attempted" but do no indicate what size catheter was used. (Pet.'s RCCAP Exh. 1 at p. 5.) In 1992, Van Worth said that she and Roberts had been unable to get a Foley in, but she did not identify what size catheter was used. (Pet.'s RCCAP Exh. 4 at pp. 1745, 1760, 1764, 1769, 1771.) Roberts and Van Worth each submitted declarations post-trial, but neither identifies the type or size tube or catheter

they used on Consuelo at DRMC. (Pet.'s RCCAP Exh. 74 at p. 5430 [Roberts only referenced use of a Foley] and Exh. 75 [Van Worth's Declaration].) The aforementioned references to use of a Foley catheter should not be construed as proof that Roberts and Van Worth used equipment that was too large for pediatric use. For example, KMC medical records state that a "Foley catheter was placed." (Pet.'s RCCAP Exh. 2 at p. 50.) However, Lackie testified that Dr. Platnick actually inserted a small feeding tube (11RT 2244) because the other catheters were not small enough for infants (11RT 2245).

Petitioner has not adduced any evidence as to the type or size tube or catheter that Roberts and Van Worth used when they tried to catheterize Consuelo. Anita Caraan Wafford, a licensed vocational nurse from DRMC, asserts post-trial that the smallest Foley catheters that were stocked at DRMC when Consuelo was treated there measured 14- or 16-inch French and were too large for someone Consuelo's size. (Pet.'s RCCAP Exh. 72 at p. 5420.) However, she does not have any direct knowledge about what type or size catheter or feeding tube Roberts and Van Worth used. (Pet.'s RCCAP Exh. 4 at p. 1807 [Wafford was not present when Roberts and Van Worth tried to catheterize Consuelo].) Dr. Shaw's assertion that the Foley catheters used at DRMC were "generally too large" unless they were purchased for pediatric use does not support petitioner's claim for the same reason. (Pet.'s RCCAP Exh. 79 at pp. 5469-5470.) He does not have any personal knowledge about whether Roberts and Van Worth used Foley catheters that were for pediatric use or whether they used a Foley catheter at all.

Based on the foregoing, petitioner's claim that Roberts and Van Worth used inappropriately sized catheters at DRMC is speculative and conclusory. Such pleading is insufficient grounds for relief. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at

p. 474; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1241, fn. 38; *People v. Karis*, *supra*, 46 Cal.3d at p. 656.) Thus, petitioner is not entitled to relief on his ineffective assistance of counsel claim.

f. Failure to present evidence that Consuelo's anal trauma was caused by something other than anal penile penetration

Petitioner alleges defense counsel unreasonably failed to investigate and present evidence that Consuelo's anal trauma was not caused by sexual abuse. (RCCAP at pp. 243-249, claim M2f.) Petitioner's ineffective assistance of counsel claim lacks merit and should be rejected.

(1) Failure to adduce evidence that anal tears were not detected at DRMC

At trial, Dr. Dibdin noted that Consuelo's anus was dilated. He opined the dilation was caused by anal tears that had gone through the muscles of the anus. (11RT 2119, 2143.) Petitioner alleges defense counsel unreasonably failed to investigate and present evidence that the anal tears Dr. Dibdin saw at autopsy were not present when Consuelo was admitted to DRMC. (RCCAP at p. 243, claim M2f(1).) Petitioner is wrong for the reasons previously discussed in argument M2c(3)-(6).

Petitioner also alleges defense counsel unreasonably failed to investigate and present evidence that the anal tears described by Dr. Dibdin were not present in the gross pelvis tissue that was preserved at the Coroner's office or in the microscopic slides of tissue. (RCCAP at p. 243, claim M2f(1).) To the contrary, Dr. Lovell testified that he looked at the anal sphincter (in the gross pelvis tissue in the coroner's office), and he did not see anal tears at six o'clock or nine o'clock. (16RT 3114.) Dr. Lovell also reviewed 18 or 20 microscopic slides of tissue. (16RT 3101, 3130.) There were no microscopic slides of tissue from the anal area. (16RT 3102-3103; accord Pet.'s RCCAP Exh. 82 at p. 5489 [Declaration by

Dr. Dale Huff, a pediatric pathologist in Pennsylvania who reviewed four slides at the request of petitioner's counsel].) According to the declaration filed by Dr. Huff, one slide contained a cross-section of tissue from the rectum and vagina (16RT 3102-3104) and part of the urinary tract. (Pet.'s RCCAP Exh. 82 at p. 5489).

Petitioner next contends counsel did not give Dr. Lovell the medical records that were necessary to assess whether anal tears were present in the specimen of Consuelo's groin or adequate time to review them. (RCCAP at p. 244, claim M2f(1)(c).) To the contrary, Dr. Lovell reviewed Dr. Alonso's report (16RT 3144), a 75-page transcript of Dr. Diamond's trial testimony (16RT 3111; 10RT 2028-2102), the operative reports from KMC and UCLA (16RT 3104-3015), and the autopsy report, which described the anal tears identified by Dr. Diamond (16RT 3095; Pet.'s RCCAP Exh. 8 at p. 3557; Resp.'s RCCAP Exh. 1 at p.14). Petitioner has not identified what additional records should have been provided or how additional time or preparation from counsel would have enhanced the credibility of Dr. Lovell's testimony that there were no anal tears in the pelvis specimen. (16RT 3101.) Thus, his ineffective assistance of counsel claim fails.

(2) Failure to adduce evidence that the anal tears were caused by manual manipulation by medical personnel and to refute expert testimony that the tears were not attributable to a bowel movement

Petitioner further contends defense counsel unreasonably failed to investigate and present evidence that the anal tears first identified by Dr. Diamond at KMC on November 18 at 9:00 a.m. were attributable to "manual manipulation for examination" by hospital personnel. (RCCAP at pp. 245-246, claim M2f(2); accord Pet's RCCAP Exh. 83 at pp. 5497, 5504

[Declaration by Dr. Kennedy].) Defense counsel investigated the cause of Consuelo's anal injuries. Petitioner has not shown that she had reason to believe there was a need to retain another expert in addition to those with whom she consulted who would view the case differently and who would attribute Consuelo's anal tears to the reasons advanced in Dr. Kennedy's declaration. Defense counsel's failure to present the opinions advanced in Dr. Kennedy's declaration was not prejudicial either, as Consuelo's anus was not "manipulated for exam" at DRMC. As previously discussed in argument M2c(3)-(6), no one at DRMC spread Consuelo's buttocks apart and examined Consuelo's anus or checked for anal tears.

(a) Single rectal temperature reading at DRMC and two at KMC

Petitioner contends that defense counsel was deficient for failing to show that instrumentation associated with temperature taking caused Consuelo's anal injuries. (RCCAP at p. 249, claim M2f(3)-(4), citing Pet.'s RCCAP Exh. 83 at p. 5497 [Declaration by Dr. Kennedy, who further deems the taking a rectal temperature to be an "invasive" procedure].) Consuelo's rectal temperature was taken at DRMC only once (Pet.'s RCCAP Exh. 1 at pp. 2-3) and KMC nurse Betsy Lackie took Consuelo's rectal temperature at 10:30 p.m. (13RT 1692; Pet.'s RCCAP Exh. 2 at pp. 50, 58) and at 11:30 p.m. (Pet.'s RCCAP Exh. 2 at p. 591).

Defense counsel's failure to present Dr. Kennedy's opinion testimony was not unreasonable or prejudicial. Petitioner has not shown that defense counsel had reason to believe there was a need to retain another expert who would view the evidence differently than those with whom she consulted. Her failure to do so was not prejudicial either. The word invade means to enter something. Any procedure that enters the body, such as feeding a child, is technically an invasive procedure. (Resp.'s RCCAP Exh. 1 at p. 17 [Declaration of Dr. Jess Diamond].) However, the word "invasive"

also suggests a violent or forceful entry. A rectal thermometer is a small instrument and its insertion into a child's anus is not a forceful or violent act. (*Ibid.*) Emergency room nurses know how to take rectal temperatures without inflicting injury and these nurses were particularly well trained and experienced. (*Id.* at p. 18.) Nurse Roberts was as a registered nurse (R.N.) and charge nurse on weekends. (Pet.'s RCCAP Exh. 4 at p. 1698.) She was trained in sexual abuse as part of her R.N. training. (Pet.'s RCCAP Exh. 74 at pp. 5432-5433.) She had also completed Sexual Assault Response Training and Trauma Nursing Care Curriculum and obtained her pediatric advanced cardiac life support certification. (*Ibid.*) Betsy Lackie had worked in the emergency room at KMC for eight years, was a certified emergency nurse, and had certifications in advanced cardiac life support, pediatric life support, and neonatal advanced life support. (11RT 2234.) Dr. Diamond has never seen a rectal temperature reading cause the anal trauma that Consuelo had. (Resp.'s RCCAP Exh. 1 at p. 18; see also 10RT 2064 [Based on the anal tears at six o'clock and nine o'clock, Dr. Diamond testified that the object inserted into Consuelo's anus had to have been larger than a finger].)

(b) Medications were not administered rectally

Petitioner further contends defense counsel unreasonably failed to show that Consuelo's anal tears were caused by the administration of medications. (RCCAP at p. 249, claim M2f(3)(f), citing Pet's RCCAP Exh. 83 at p. 5505 [Declaration by Dr. Kennedy].) Her failure to do so was not unreasonable or prejudicial. There was no evidence at trial or on habeas that any medicine was given to Consuelo anally at DRMC or KMC, before Dr. Diamond detected the tears during his 9:00 a.m. exam on November 18. (Resp.'s RCCAP Exh. 1 at p. 18.) To the contrary, Consuelo received medications at DRMC through an intravenous drip.

(Pet.'s RCCAP Exh. 72 at p. 5419 [Declaration by Anita Caraan Wafford]; see also Pet.'s RCCAP Exh. 2 [DRMC medical records].) Likewise, there is no evidence that medications were given rectally at KMC. (Pet.'s RCCAP Exh. 2 at p. 154 [surgical intensive care unit daily care and assessment record from November 18 indicates medications were given through a port and intravenously].) Even if petitioner could show rectal administration of medications at KMC, which he has not, that would not have caused anal tearing or other trauma because Consuelo's sphincter tone was noted to be lax at KMC by nurse Lackie (1CT 28) and Dr. Alonso (13RT 2686, 2690). Thus, petitioner is not entitled to habeas relief due to ineffective assistance of counsel on this basis either.

(c) Dr. Alonso's rectal exam did not cause anal trauma

Dr. Alonso conducted a rectal exam of Consuelo in the emergency room at KMC following her transfer there from DRMC. Dr. Alonso inserted his finger half-way into Consuelo's rectum for the exam. (13RT 2690.) Consuelo's anus gaped open at the time of the exam (Pet.'s RCCAP Exh. 2 at p. 128), so Dr. Alonso did not encounter any resistance to inserting his finger into Consuelo's anus. On cross-exam, defense counsel asked Dr. Diamond if a finger could have caused Consuelo's anal trauma. He said, "No" and explained that the object that was inserted had to have been larger than a finger because of the swelling that enveloped the entire anal rim. (10RT 2064.)

(d) No manual manipulation at KMC during abdominal surgery or after surgery prior to Dr. Diamond's exam

Consuelo subsequently underwent abdominal surgery between 12:10 a.m. until 4:30 a.m. on November 18 (Pet.'s RCCAP Exh. 2 at p. 87 [KMC Operating Room Nursing Record]). Her anus was not "manipulated"

during the abdominal surgery either. (Pet.'s RCCAP Exh. 2 at p. 86 [Operative Note by Dr. Bloch], at p. 87 [Operating Room Nursing Record] and at pp. 128-131 [Dr. Bloch's Transcribed Surgical Report].)

Finally, there is no evidence that Consuelo's anus was "manipulated for exam" between 4:30 a.m., when she came out of surgery, and 9:00 a.m., when Dr. Diamond examined her. (10RT 2046.) Petitioner alleges that Consuelo underwent numerous intrusive hospital procedures that required manual manipulation of the anus. (RCCAP at p. 245, citing Pet.'s RCCAP Exh. 2 at p. 154 [KMC Surgical Intensive Care, Daily Care and Assessment Record].) Respondent does not see a date on the KMC Surgical Intensive Care report. (*Ibid.*) However, it appears to be from November 18 since it references Dr. Diamond's exam of the patient after 9:00 a.m. (*Id.*) However, contrary to petitioner's assertion, the record does not describe any manipulation of Consuelo's anus prior to Dr. Diamond's exam. (10RT 2046.) The record appears to be divided into three nursing shifts. The first shift started at 7:00 a.m. and ended at 3:00 p.m. Under that heading, there is a notation that at 8:00 a.m., the patient was opening her eyes attempting to breathe. There are notes about Consuelo's pupils, and there seems to be a notation that she was moving her extremities at times. The record further notes that Consuelo received Norcuron at 9:00 a.m. (Pet.'s RCCAP Exh. 2 at p. 154.) After 2:30 p.m. (five and a half hours after Dr. Diamond first saws Consuelo), blood oozed from her mouth, nose, rectum, and vagina. (*Ibid.*) However, the record does not show any manipulation of her anus. It also states that "rectal temperatures" were approved by Dr. Diamond, and there is no indication that any rectal temperature were taken before he examined her. (*Ibid.*)

Based on the foregoing, defense counsel's failure to elicit evidence attributing Consuelo's anal trauma to the reasons set forth post-trial by Dr. Kennedy was not unreasonable or prejudicial. Thus, petitioner's

ineffective assistance of counsel claim fails.

(e) Failure to refute Dr. Diamond's opinion that the anal tears he saw were not caused by a bowel movement

Petitioner also alleges that defense counsel unreasonably failed to refute Dr. Diamond's testimony that the anal tears he saw were not caused by a bowel movement. (RCCAP at p. 246, claim M2f(2)(b).) On cross-examination, Dr. Diamond opined that the anal tears at six o'clock and nine o'clock were not consistent with a child having a bowel movement. He opined instead that a bowel movement would produce tears at six o'clock and twelve o'clock. (10RT 2091-2092.) Defense counsel argued that the anal tears were caused by a bowel movement based on Estella's testimony that she changed Consuelo's diaper before she went to work on November 17, and Consuelo had grape skins and pistachio nuts in her stool. (13RT 2624-2625; 18RT 3622.) Petitioner contends there is nothing in the literature to support Dr. Diamond's opinion (RCCAP at p. 246, citing Pet.'s RCCAP Exh. 83 at p. 5505 [Dr. Kennedy's Declaration]). According to Dr. Kennedy, one cannot determine the cause of anal tearing or rule out a potential cause based on the location of anal tears. (Pet.'s RCCAP Exh. 83 at p. 5505.) Dr. Kennedy asserts that tears from a bowel movement can appear at any location around the anus (*ibid.*), but his assertion does not contradict the logic of Dr. Diamond's conclusion that he would expect such tears to be at six o'clock and twelve o'clock, the narrowest part of the anal opening, not at nine o'clock (and three o'clock). Dr. Kennedy then alleges that the anal tears detected by Dr. Diamond "may have been" caused by a bowel movement. (*Id.*) Dr. Kennedy's opinion here seems to be based solely on his review of the literature. His specialty is pediatric urology. (*Id.* at pp. 1-2.) Unlike Dr. Diamond, he does not purport to have any experience, let alone expertise, in examining children in cases of suspected

sodomy. Defense counsel's failure to refute Dr. Diamond's opinion testimony and/or present testimony that a bowel movement "may have" caused the anal tears detected by Dr. Diamond was not unreasonable or prejudicial. The burden of proving ineffective assistance of counsel is upon the defendant and the proof "must be a demonstrable reality and not a speculative matter." (*People v. Karis*, *supra*, 46 Cal.3d at p. 656.) Moreover, the other trauma to Consuelo's anus cited by Dr. Alonso and Dr. Diamond, i.e., the perianal redness and swelling of the anal rim, is not explained by a bowel movement.

(3) Failure to show anal laxity was not attributable to sexual abuse

(a) Anal laxity is a side effect of Pavulon and Norcuron, two medications Consuelo received, however, the anal laxity may have preceded her receipt of the medication

Petitioner contends defense counsel unreasonably failed to present evidence that anal laxity detected by Dr. Alonso was attributable to Pavulon. (RCCAP at p. 246, claim M2f(3)(a).) Defense counsel's failure to present this evidence does not constitute ineffective assistance of counsel for the reasons previously discussed in argument M2c(8)(b).

Dr. Bloch opines post-trial that the administration of Pavulon provided a "reasonable explanation" for Consuelo's loose anal tone during the time she was under the effects of the medication. (Pet.'s RCCAP Exh. 77 at pp. 5450-5451.) On cross-exam, defense counsel asked Dr. Bloch, "Was there any injury to the child that would cause it to lose its rectal tone other than sexual abuse that you know?" (RCCAP at p. 247, claim M3f(3)(b), citing 12RT 2475.) Dr. Bloch responded, "Not that I discovered." (*Ibid.*) On further recross examination Dr. Bloch stated that

other things probably would not cause a child to lose anal tone, but he could not reach a conclusion as to that with any medical certainty. (12RT 2475.) Defense counsel did not ask if the lax tone were attributable to Pavulon. Her failure to do was not unreasonable because Dr. Baumer, the expert retained by defense counsel, failed to inform her that anal laxity is a side effect of Pavulon. (Pet.'s RCCAP Exh. 64 at p. 3/5339 [Huffman unaware medications could explain lax tone].)

Defense counsel's failure to ask Dr. Bloch if Consuelo's anal laxity were attributable to Pavulon was not prejudicial because there is no proof that the anal laxity was detected before Consuelo received Pavulon or after the effects of the medication had worn off, as previously discussed in argument M2c(8)(b). In addition, Consuelo's anal laxity was only a contributing factor to Dr. Alonso and Dr. Diamond's opinions that Consuelo had been sodomized. As previously discussed, Dr. Diamond maintains post-trial that Consuelo was sodomized based on the anal swelling and anal tears he detected alone. (Resp.'s RCCAP Exh. 1 at p. 11 [Declaration of Dr. Jess Diamond].)

Petitioner next contends defense counsel unreasonably failed to present evidence that the anal laxity detected by Dr. Diamond was attributable to Norcuron. (RCCAP at pp. 247-248; claim M2f(3)(c); accord Pet.'s RCCAP Exh. 83 at p. 5502 [Declaration by Dr. Kennedy]; Pet.'s RCCAP Exh. 79 at p. 5468 [Declaration by Dr. Shaw], and Pet.'s RCCAP Exh. 80 at p. 5479 [Declaration by Dr. Lovell].) Dr. Diamond examined Consuelo at 9:00 a.m. (10RT 2046.) When Dr. Diamond testified, he was unaware that Consuelo received Norcuron, a paralytic agent that causes muscles to become flaccid, allowing dilation of the anus and a lax sphincter tone, prior to his exam. (Resp.'s RCCAP Exh. 1 at p. 11.) Consuelo received Norcuron at 7:30 a.m. (Pet.'s RCCAP Exh. 2 at p. 126) and at 9:00 a.m. (Pet.'s RCCAP Exh. 2 at p. 154.) Based on that information,

Dr. Diamond cannot attribute the dilated anus and lax sphincter that he detected during his exam to trauma from sexual abuse. (Resp.'s RCCAP Exh. 1 at p. 11.) These two physical findings may have been secondary to the Norcuron. Consuelo may have had a dilated anus and lax sphincter tone when she arrived at DRMC, but that information is not available because staff at DRMC treated her for a head injury and no one there examined her anus for suspected sexual abuse. Based on the swelling of the anal margin and the anal tears at six o'clock and nine o'clock, Dr. Diamond maintains that Consuelo was sodomized. (*Ibid.*)

Defense counsel's failure to present evidence that Consuelo received Norcuron prior to Dr. Diamond's exam did not constitute ineffective assistance of counsel. As previously discussed, defense counsel had retained Dr. Nat Baumer as an expert and provided him with Consuelo's medical records from DRMC, among other things. (14RT 2823.) Dr. Baumer did not identify Norcuron as a cause of Consuelo's anal trauma. (Resp.'s RCCAP Exh. 13 [Transcript of Audiotaped Case Review by Dr. Baumer]; Pet.'s RCCAP Exh. 64 at p. 3/5339 [Declaration by Donnalee Huffman].) Moreover, defense counsel's failure to present this evidence was not prejudicial because Dr. Diamond maintains that the anal tears and anal swelling he detected alone establish that Consuelo was sodomized. (Resp.'s RCCAP Exh. 1 at p. 11.)

(b) Unsuccessful attempt to attribute laxity to a concussion

Petitioner also contends defense counsel unreasonably attempted to attribute Consuelo's anal laxity to a brain concussion during her cross-examination of Dr. Bloch. (RCCAP at p. 248, claim M2f(3)(e), citing 12RT 2471.) Prior to trial, Dr. Baumer informed defense counsel that Consuelo's anal laxity could be explained by the fact Consuelo was comatose. (Resp.'s RCCAP Exh. 13 at p. 3 [Transcript of Audiotaped Case

Review by Dr. Baumer]; see also Resp.'s RCCAP Exh. 7 at p. 11 [Aug. 10, 1992 Section 987.9 Request To Appoint Expert] [defense counsel believed that a physician at the preliminary hearing opined that a loose anus could be caused by a concussion].)

Petitioner contends there was no evidence of a serious brain injury that would support defense counsel's claim. (RCCAP at p. 248, citing Pet.'s RCCAP Exh. 84 at p. 5523 [Declaration of Aaron Gleckman, a forensic pathologist and neuropathologist, attributes the subdural hemorrhage and cerebral edema detected at autopsy to DIC, not severe blunt head trauma that resulted in brain injury because he did not find any evidence of subgaleal hemorrhage].) To the contrary, Dr. Bloch opined that Consuelo had suffered a concussion based on her lower score on the Glasgow Coma Scale (which reflected a decrease in her consciousness) and the absence of structural damage to the brain. (12RT 2472; see also 12RT 2349; Pet.'s RCCAP Exh. 74 at p. 5429 [Consuelo lost consciousness at DRMC and became completely unresponsive]; 16RT 3112 [Dr. Dibdin said Consuelo had fresh subdural hemorrhage that measured five millimeters and Dr. Lovell testified there was "no question there was brain damage"].)

Defense counsel's attempt to attribute Consuelo's anal laxity to a concussion was not prejudicial either. (RCCAP at p. 248, claim M2f(3)(e).) Although Dr. Bloch did not believe Consuelo's anal laxity was caused by her concussion (12RT 2470), Dr. Baumer testified that a head injury can cause the sphincter muscle to lose some tone. (14RT 2842.) In addition, Dr. Lovell testified that the anal laxity could be explained by the loss of oxygenated blood to her brain. (16RT 3146.) Therefore, petitioner's ineffective assistance of counsel claim fails.

(c) Failure to present evidence that anal dilation after death is not abnormal

Petitioner further contends defense counsel unreasonably failed to counter evidence that Consuelo's perianal swelling was evidence of sodomy. (RCCAP at p. 246, claim M2f(3).) He contends defense counsel was deficient for not countering Dr. Dibdin's testimony that following Consuelo's death on November 25, her anus was one-inch wide in diameter (which is seven to eight times larger than normal) with evidence that dilation of the anus is a normal post-mortem condition. (RCCAP at p. 248, claim M2f(3)(d), citing 11RT 2119, Pet.'s RCCAP Exh. 79 at pp. 5470-5471 [Declaration of Dr. Shaw].) Anal dilation may be a normal post-mortem condition. However, Dr. Dibdin's testimony was not an isolated finding; Consuelo was found to have a swollen anus the night of the charged offense, eight days before she died.

Defense counsel's failure to present evidence that anal dilation is a normal post-mortem condition was not prejudicial either. No one at DRMC examined Consuelo's anus, and those who did examine her anus at KMC did not describe it as normal. Consuelo was admitted to the emergency room at KMC at 10:30 p.m. (11RT 2238.) Dr. Alonso saw "significant and severe swelling throughout the entire perianal area (13RT 2691) and redness around her entire anal area (13RT 2686) and perianal area (13RT 2691). Consuelo's anal rim was also "markedly swollen" when Dr. Diamond examined her the following morning. (10RT 2050, 2080.) Consuelo's anus was also swollen when she arrived at UCLA on November 19 and was examined by Dr. Harrison. (14RT 2876.)

In fact, Consuelo's anal opening, as depicted in photographs taken at UCLA, was so abnormal that Dr. Kennedy opined it resembled a patient with anterior displacement of the anus. (Pet.'s RCCAP Exh. 83 at p. 5513.)

To the contrary, Consuelo did not have an anal malformation. (Resp.'s RCCAP Exh. 1 at p. 21. [Declaration of Dr. Jess Diamond].) DRMC medical records show that Consuelo was born at that hospital and treated there on occasion. Consuelo's birth records do not denote any anal malformation. (Pet.'s RCCAP Exh. 1 at pp. 28-42 [DRMC records]; Pet.'s RCCAP Exh. 66 [Estella's description of Consuelo's birth does not reference any anal malformations].) Moreover, patients with anterior displacement of the anus have difficulty controlling their bowels, according to Dr. Kennedy. (Pet.'s RCCAP Exh. 88 at p. 5512.) Consuelo did not have any history of problems with constipation, painful bowel movements, diarrhea or frequent soiling of her clothing.

(4) Failure to present evidence attributing perianal swelling to medical treatment provided at DRMC and to DIC

Petitioner next contends defense counsel unreasonably failed to present evidence that the perianal swelling detected by Dr. Alonso in the emergency room at KMC resulted from "these invasive procedures and her deteriorating medical condition over the course of her care." (RCCAP at p. 249, claim M2f(3)(f).) Petitioner does not identify the alleged "invasive procedures" to Consuelo's anus at DRMC. He simply quotes the concluding sentence of a paragraph in which Dr. Kennedy attributes Consuelo's anal injuries to "manipulation of the anus as part of examination of the rectum, instrumentation associated with temperature taking and administration of medications." (Pet.'s RCCAP Exh. 83 at p. 5497.) As previously discussed in arguments M3f(2)(a)-(d) and M3f(3)(d), no one at DRMC examined Consuelo's anus or rectum or gave her medications rectally, and neither the rectal temperature taken by nurse Roberts at 7:50 p.m. at DRMC nor that taken by nurse Lackie at 10:30 p.m.

at KMC caused perianal redness.[52] (Resp.'s RCCAP Exh. 1 at pp. 14-15, 17-18 [Declaration of Dr. Jess Diamond].)

Petitioner further attributes the perianal swelling detected by Dr. Alonso at KMC to her "medical condition over the course of her care." (RCCAP at p. 249, citing Pet.'s RCCAP Exh. 83 at p. 5497.) Again, petitioner provides no description of Consuelo's "medical condition" or analysis explaining why defense counsel should have known and presented evidence that her perianal swelling was attributable to her medical condition rather than sexual abuse. Conclusory allegations are not a basis for habeas relief.

Dr. Kennedy also opines that the perianal swelling that he attributes to "procedures" at DRMC was compounded by the fluid resuscitation measures initiated there. (Pet.'s RCCAP Exh. 83 at p. 5502.) Consuelo was given "whole blood and other fluids, which in many cases causes edema." Dr. Kennedy further states, "Because gravity causes fluids to settle downward, edema that affects the entire body will tend to appear more pronounced in certain areas, including the genitalia, buttocks and anal area." (*Ibid.*; accord Pet.'s RCCAP Exh. 142 at p. 6630 [Decl. by Dr. Baumer, which fails to explain his failure to assert this at trial even though he reviewed DRMC medical records before he testified (14RT 2827; Resp.'s RCCAP Exh. 11 at p. 10].) Even if the administration of

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[52] Petitioner's claim expressly pertains to the perianal swelling first noted by Dr. Alonso. While nurse Lackie took Consuelo's temperature a second time at 11:30 p.m. (Pet.'s RCCAP Exh. 2 at p. 591), that was presumably after Dr. Alonso examined Consuelo since she arrived at 10:30 p.m. and admitted to the operating room at 11:50 p.m. because her abdomen distended to the point she looked four months pregnant (11RT 2241, 2248). Even if Alonso had detected the perianal swelling after 11:30 p.m., the swelling was not caused by three rectal temperature readings, particularly since Consuelo's sphincter tone was lax at KMC. (13RT 2686.)

blood to a patient may cause full body edema, as alleged by Drs. Kennedy and Baumer, Consuelo's body was not swollen on the night of the crimes when Dr. Alonso detected peri-rectal swelling or the following morning when Dr. Diamond noted marked anal swelling. About an hour and a half after Consuelo arrived at DRMC, the staff received her blood results, which indicated she was bleeding internally. (Pet.'s RCCAP Exh. 74 at p. 5433.) Consuelo was given blood so she could be stabilized for transfer to KMC. (Pet.'s RCCAP Exh. 4 at p. 8/1809.) Dr. Tait's testimony, which apparently was not provided to Dr. Kennedy (Pet.'s RCCAP Exh. 83 at p. 5498), reveals that Consuelo was not retaining fluids in any part of her body when she left DRMC. (17RT 3318.) A short time later, when she was seen in KMC's emergency room by Dr. Alonso, he detected perianal swelling, but he did not note any other swelling. (13RT 2686; Pet.'s RCCAP Exh. 2 at p. 105 [KMC Physician Plan signed by Dr. Alonso noting peri-rectal edema].) Likewise, when Dr. Diamond examined Consuelo on November 18 at 9:00 a.m., her anal rim was bruised and markedly swollen (10RT 2050, 2053-2054), but other parts of her body were not swollen (10RT 2077). Other parts of Consuelo's body were not found to be swollen until later, on the night of November 18. For example, at 7:51 p.m., Dr. Bloch noted that she was becoming "increasingly edematous." (Pet.'s RCCAP Exh. 2 at p. 76 [KMC Progress Record].) At 11:00 p.m., Consuelo was noted to have swollen eyelids. (*Id.* at p. 154.) On November 19, 1991, Dr. Bloch found that Consuelo's tissues were "very edematous" at 9:00 a.m. (*id.* at p. 74), and she was "increasingly fluid overridden" by 6:00 p.m. (*id.* at p. 67). Thus, the fluid resuscitation measures that were undertaken at DRMC do not negate the findings of Drs. Alonso and Diamond that Consuelo had anal swelling.

(5) Failure to consult "expert in pediatric care and urological conditions"

Petitioner contends defense counsel unreasonably failed to consult "an expert familiar with pediatric care and urological conditions" to explain "the likely causes of Consuelo's trauma." (RCCAP at p. 249, claim M2f(4).) Defense counsel's performance was not deficient or prejudicial.

Defense counsel retained Dr. Nat Baumer, an emergency room physician who had instructed others on how to detect child sexual abuse to review all of Consuelo's medical records and render an opinion about what caused her injuries. (Resp.'s RCCAP Exh. 8.) She further retained Dr. Lovell, the pathologist Dr. Baumer requested, to review the autopsy report and examine the microscopic slides and the specimen of Consuelo's pelvis and abdominal cavity. (Resp.'s RCCAP Exh. 11.) Petitioner has not shown that defense counsel's failure to consult a pediatric urologist "'fell below an objective standard of reasonableness.'" (*In re Marquez* (1992) 1 Cal.4th 584, 603.)

Even if petitioner could show that defense counsel's performance was deficient, it was not prejudicial. Dr. Kennedy, a pediatric urologist at Stanford, opines that Consuelo was not anally penetrated. (Pet.'s RCCAP Exh. 83 at p. 5497.) However, his opinion is uninformed. Had habeas counsel provided Dr. Kennedy with Francis Zapien's testimony, he would not have *misconstrued* Zapien's out of court statements to mean that she conducted a sexual assault exam of Consuelo and did not detect anal trauma. (Pet.'s RCCAP Exh. 83 at pp. 5497-5498.) Dr. Kennedy incorrectly asserts,

> [o]ne of the DRMC personnel stated that Consuelo was examined there in what is called the frog-leg position, in which she was placed on her back with her legs spread to the sides. This position affords an excellent view of a child's genital and anal regions.

(*Id.* at p. 5498.) Post-trial, Francis Zapien said that Consuelo's legs were "spread and still, in a frog-like position" during attempts to catheterize her. (Pet.'s RCCAP Exh. 73 at p. 2/5424.) Zapien told Investigator Lopez that Consuelo was "laying on the gurney like a little frog. You know how the legs are?" (Pet.'s RCCAP Exh. 4 at p. 1791.) Neither of Zapien's statements should be equated with Consuelo having been examined for suspected sexual abuse because Zapien testified that she did not inspect Consuelo's anal area (14RT 2781, 2785-2786) or examine her for suspected sexual abuse (14RT 2781). (Resp.'s RCCAP Exh. 1 at p. 21 [Declaration by Dr. Diamond]; see also Pet.'s RCCAP Exh. 4 at p. 1792 [In 1992, Zapien also told Investigator Lopez that she did not see Consuelo's anus during Van Worth's attempts to catheterize her].) Because Dr. Kennedy's opinion was based on the false premise that Consuelo was examined for sexual abuse, when in fact she was not, there is not a reasonable probability that petitioner would have obtained a more favorable outcome had his opinion been presented to the jury.

Dr. Kennedy further opines that Consuelo's "anal injuries most likely resulted from manipulation of the anus as part of the examination of the rectum, instrumentation associated with temperature taking, and the administration of medications." (RCCAP at p. 249, citing Pet.'s RCCAP Exh. 83 at p. 5497.) It is not reasonably probable that the results of the proceeding would have been different had this opinion evidence been presented for the reasons set forth in arguments M2f(2)(a)-(d).

Several of Dr. Kennedy's assertions are disingenuous. For example, he alleges that the "lacerations of the anus described by Dr. Dibdin in his autopsy report" were "significant," making it unlikely that DRMC staff could have missed them. (Pet.'s RCCAP Exh. 83 at p. 5498.) One laceration measured a quarter-inch; the other three-eighths of an inch. (Pet.'s RCCAP Exh. 8 at p. 3557 [autopsy report].) On the other hand,

Dr. Kennedy characterized the half-inch tear at the opening of the vagina as a "relatively small tear," and assailed Dr. Dibdin for describing it in the autopsy report as "quite a large laceration." (Pet.'s RCCAP Exh. 83 at p. 5501.)

Dr. Kennedy further asserts that the likelihood for injury during catheterization is increased in children with labial adhesions, which can be caused by diaper rash. He then alleges that Consuelo "had a medical history of severe diaper rash." (Pet.'s RCCAP Exh. 83 at p. 5500.) This is misleading. Consuelo did not have any medical history of labial adhesions—which is the germane issue with respect to the potential for enhanced injury from catheterization, according to him. (Pet.'s RCCAP Exh. 1 [DRMC medical records].) Moreover, Estella's testimony, which he did not review (Pet.'s RCCAP Exh. 83 at p. 5499), revealed that Consuelo was only taken to the doctor for a diaper rash once when she was four or five months old, and she did not have a diaper rash on the date of the crimes. (13RT 2625.)

g. Failure to present expert testimony to rebut rape, sodomy and lewd acts charges and special circumstance allegations

Petitioner contends defense counsel unreasonably failed to properly select, guide, and solicit appropriate experts' opinions in a timely manner to disprove the state's assertions that petitioner committed any of the acts alleged in counts II, III, and IV, and the special circumstances. He also argues counsel unreasonably failed to adequately prepare Dr. Baumer and Dr. Lovell. (RCCAP at pp. 249-252, claim M2g.) Petitioner has not shown that he was denied the effective assistance of counsel.

(1) Failure to adequately prepare Dr. Baumer

Petitioner alleges that Dr. Baumer was not adequately prepared when he testified (on April 8, 1993) because he had not yet received the results of Dr. Lovell's review of the slides that were taken at autopsy. He alleges this denied him the effective assistance of counsel. (RCCAP at p. 250, claim M2g(3).) Petitioner's claim lacks merit. Petitioner has not show that Baumer testified without knowing the outcome of Lovell's review of the slides. Even if he had, there was no prejudice to petitioner.

(a) Background

Dr. Dibdin testified that he cut multiple microscopic sections from Consuelo's tissues during the autopsy in areas where there were injury. (11RT 2139.) Slides were prepared of the microscopic sections. The autopsy report described a microscopic examination of the "anus, vagina and urinary bladder" as follows:

> A complete cross section of the anus, vagina and urinary bladder is reviewed. The presence of acute tears and hemorrhage of approximately 4 to 7 days of age is confirmed with minimal inflammatory response and good preservation of red blood cells. There is severe edema of the connective tissues. There are areas of prominent neovascularization and fibrobalstic activity indicating previous injury of up to 4 weeks of age.

(Pet.'s RCCAP Exh. 8 at p. 3560.) However, the autopsy report was not admitted into evidence. Dr. Dibdin testified that he looked at slides of "sections of the anus, vagina, and urinary bladder" and "there were changes there" that indicated previous injuries of up to four weeks of age. (11RT 2140.) He did not testify that the slides showed tears. (*Ibid.*)

Prior to trial, Dr. Baumer reviewed slides of tissue from the anal and vaginal area. (Pet.'s RCCAP Exh. 142 at p. 5/6631 [Declaration by Dr. Baumer].) Dr. Baumer opined that "[t]he Foley catheter placed in the

urethral area could cause the erythema" (redness) that was depicted in the slides." (Resp.'s RCCAP Exh. 13 at p. 4 [Transcript of Audiotaped Case Review by Dr. Baumer].) However, "the anal slides" showed a "definite ecchymosis" (bruising) that he was unable to explain. (*Id.*; accord Pet.'s RCCAP Exh. 142 at p. 6/6632 [Declaration by Dr. Nat Baumer].) On March 12, 1993, Dr. Baumer recommended that defense counsel retain a pathologist, Dr. Frederick Lovell, to review the tissue slides. (Resp.'s RCCAP Exh. 13 at pp. 3-4 [Transcript of Audiotaped Case Review by Dr. Baumer].) Defense counsel subsequently retained Dr. Lovell as an expert witness "to look at the (tissue) samples taken by the autopsy surgeon in order to make a determination of the accuracy of the findings that were made in the autopsy." (Resp.'s RCCAP Exh. 11 at p. 1 [March 24, 1993 Section 987.9 Motion to Appoint Expert Witness (Dr. Lovell)]; accord Pet.'s RCCAP Exh. 80 at p. 3/5475 [Decl. by Dr. Lovell].)

(b) Petitioner fails to show that Baumer testifed without the benefit of Lovell's review of the autopsy slides, that such failure was attributable to counsel, and that he was prejudiced thereby

Dr. Baumer claims that when he testified (on April 8), he was not apprised of the results of Dr. Lovell's review of the microscopic slides. (Pet.'s RCCAP Exh. 142 at p. 8; 2004 Inf. Reply at p. 259.) Petitioner incorrectly alleges that Dr. Lovell did not review the slides until the day before his (April 13th) testimony. (RCCAP at p. 250, citing 16RT 3095.) Dr. Lovell testified that he inspected the specimen of Consuelo's pelvis that was preserved in formaldehyde at the coroner's office the day before he testified (16RT 3095, 3103) and that he had received slides to review (16RT 3095). However, Dr. Lovell was not asked when he received the slides. (16RT 3095.) On April 5, 1993, a defense investigator delivered a

set of tissue slides to Dr. Lovell. (Resp.'s RCCAP Exh. 14 at p. 4 [April 20, 1993 Section 987.9 Request for Payment of Investigator Fees].) On April 9, 1993, Dr. Lovell discussed the tissue slides with District Attorney Investigator Greg Bresson. Dr. Lovell acknowledged that he had received the slides from the defense investigator, examined them (Pet.'s RCCAP Exh. 4 at pp. 2/2147-3/2148), and talked to defense investigator Purcell about them (*id.* at p. 4/2149). Two days earlier, on April 7, the day before Dr. Baumer testified, a 90-minute conference call took place between Dr. Baumer, Dr. Lovell, and the defense investigator. (Resp.'s RCCAP Exh. 15 at p. 4.) The contemporary evidence is consistent with Drs. Baumer and Lovell discussing the results of Dr. Lovell's review of the slides since Dr. Lovell had possessed them for two days, and Dr. Baumer asked to have Dr. Lovell retained in the case for that purpose. If they did not discuss the slides, it seems hard to attribute that failure to defense counsel.

Even if Dr. Lovell had not reviewed the slides before Dr. Baumer testified, there was no prejudice to petitioner. When questioned about the slides at trial, Dr. Baumer stated that review of the tissue slides was outside his area of expertise and better left to a pathologist who "has the experience to see what tissue would look like in that area." (14RT 2872.)

Defense counsel then presented Dr. Lovell's expert testimony that he inspected Consuelo's groin at the coroner's office and did not see a hymen when he looked at the vaginal opening (16RT 3113) or anal tears at six o'clock or nine o'clock. (16RT 3114.) Defense counsel further asked Dr. Lovell if he saw acute tears and hemorrhaging about 4-7 days of age, as noted at page six of the autopsy report. (16RT 3114.) As discussed in argument M2d(2), Dr. Lovell testified that he saw a tear in the top of the vagina, about two or three inches up from the anus, that was related to a hemorrhage between the rectum and the vaginal wall. (16RT 3104-3105.)

Dr. Lovell looked at the tear microscopically (in a slide) and said it had blood in it. (16RT 3104.) Dr. Lovell testified that a microscopic slide of tissue from a cross section of the rectum and vagina showed hemorrhage there. (16RT 3114.) Dr. Lovell opined that the tear was four days old, but acknowledged it could have been four to seven days old or nine days old. (16RT 3115.) He noted that Dr. Shaw had found Consuelo's rectum to be normal when he conducted surgery on November 20, but maintained that "there was no question" the tear was present in the specimen of Consuelo's groin that Dr. Lovell reviewed at the coroner's office. (16RT 3115.) Dr. Lovell opined that Consuelo could have incurred the tear during surgery on November 23 (16RT 3115-3116) or at the autopsy (16RT 3105).

Dr. Baumer alleges post-trial that he would have testified that it was highly unlikely that Consuelo was sexually assaulted had he known that Drs. Lovell and Huff reviewed slides of tissue from the cross section of the "anus, vagina and urinary bladder" and disagreed with Dr. Dibdin's findings (in the autopsy report) that the slides showed "acute tears." (Pet.'s RCCAP Exh. 142 at p. 6/632; see also Pet.'s RCCAP Exh. 8 at p. 3560 [autopsy findings].) Dr. Baumer's assertion is based on a false premise – Dr. Lovell did in fact see a tear in the slides he reviewed. (16RT 3104 [Lovell's testimony]; see also Pet.'s RCCAP Exh. 4 at pp. 2148, 2151 [On April 9, 1993, Lovell told District Attorney Investigator Bresson that the tissue slide contained a tear between the rectum and vagina].) Post-trial, Dr. Lovell contends that a tissue slide of the rectum and vagina depicted "recent hemorrhaging between the vaginal and rectal wall." (Pet.'s RCCAP Exh. 80 at p. 5476; 16RT 3114.) Now Dr. Lovell also alleges that the slide of rectal mucosa and vaginal mucosa shows much edema but little inflamation, and no evidence of a tear. (Pet.'s RCCAP Exh. 80 at p. 5478, para. 13.) Lovell's declaration fails to explain or correct his prior testimony that he saw a tear (between the rectum and vagina) "microscopically" (in a

slide he reviewed) and it had blood in it (16RT 3104). Because Lovell's testimony was not among the items provided by habeas counsel to Dr. Baumer for review (Pet.'s RCCAP Exh. 142 at pp. 1/6628-2/6629), Baumer may have been unaware of the discrepancy between Lovell's post-trial assertion that the slide of the rectum and vagina did not depict a tear and his testimony that it did.

Because Dr. Baumer independently consulted Dr. Lovell about the case and specifically asked defense counsel to have him appointed to do the tissue comparison in this case, Dr. Baumer cannot reasonably contend that he would have testified differently had another pathologist, such as Dr. Huff, been retained instead. (*In re Cox*, *supra*, 30 Cal.4th at p. 998; Resp.'s RCCAP Exh. 11 at p. 8; Resp.'s RCCAP Exh. 13 at pp. 1-2.) Dr. Dale Huff, a pathologist at the Children's Hospital of Philadelphia, purported to have reviewed four slides that were taken from Consuelo's pelvic region. (Pet.'s RCCAP Exh. 82 at p. 7/5489.) He described the slides as follows:

> The slides are numbered 9, 10, 11 and 12. Slides 9 and 11 are a cross section of part of the large bowel, most likely the rectum. The other two slides, 10 and 12, are a cross section comprising tissue from three structures: the rectum, vagina, and part of the urinary tract – most likely the bladder. All anatomical structures represented in the slides are located inside the body. None of the slides includes tissue from the external genitalia, anus, or skin.

(*Ibid.*) Huff stated that the slides showed tissue degeneration, not lacerations or tears. (*Id.* at p. 5489.) Huff opined that the slides showed severe edema, scattered hemorrhage, and slight "neovascularity" (proliferation of blood vessels in the area of injury as part of the healing process) in the rectal tissue. (*Id.* at p. 5400.) The vaginal and urinary tract tissue allegedly showed signs of acute hemorrhage, edema and neovascularity. (*Ibid.*) Huff also found that the vaginal, rectal and bladder

tissue showed acute hemorrhage and edema. (*Id.*) Likewise, when Dr. Baumer reveiwed the slides pretrial, he said they showed definite ecchymosis (bruising) and edema, but he did not reference any tears. (Resp.'s RCCAP Exh. 13 at p. 4.) Thus, Baumer's request to have Lovell retained in the case and the similarity between Huff's findings and Baumer's findings undermine Baumer's post-trial assertion that Huff's findings would have altered his testimony.

In an attempt to establish prejudice, petitioner further contends that Dr. Baumer "relied on Dr. Dibdin's findings regarding anal tearing" when he allegedly testified that "the proper conclusion would be a foreign object penetrated the anal area," such as a finger, broom, or Coca Cola bottle. (RCCAP at p. 250, claim M2g(3), citing 14RT 2895.) This is a mischaracterization of Dr. Baumer's testimony. On cross examination, Dr. Baumer acknowledged that prior to trial, he concluded that a foreign object, such as a finger, Coca Cola bottle or broom stick, had penetrated Consuelo's anal canal and caused her anal injuries. (14RT 2894-2895; accord Resp.'s RCCAP Exh. 13 at p. 2 [Transcript of Audiotaped Case Review by Dr. Baumer].) However, Dr. Baumer testified that he had changed his initial opinion upon learning of Dr. Shaw's findings during the anoscopy. (14RT 2852-2853.) At trial, Dr. Baumer opined that Consuelo was not sodomized because no chemical tests were done to check for the presence of semen in the anal canal (14RT 2829), Dr. Shaw did not see any anal tears when he conducted an anoscopy at UCLA on November 20, 1991 (14RT 2852), and a nurse at DRMC did not see anal trauma and recollected a clean diaper (14RT 2877).

Petitioner claims that defense counsel unreasonably failed to provide Dr. Baumer with Dr. Shaw's report earlier before he testified. (RCCAP at

p. 251, claim M2g(4).)[53] However, a declaration dated March 24, 1993, by defense counsel Huffman states that Dr. Baumer "read all of the medical reports in this case." (Resp.'s RCCAP Exh. 11 at p. 8 [March 24, 1993 Section 987.9 Request to Appoint Expert (Dr. Lovell)].) In any event, Dr. Baumer received the report before he testified and it caused him to change his opinion to petitioner's benefit. Thus, defense counsel was not deficient in failing to provide Dr. Baumer with pertinent medical records in a timely fashion.

Petitioner also contends that Dr. Baumer was not given all the medical records with time to determine the cause of her anal and genital trauma. (RCCAP at p. 251, claim M2g(5).) As previously discussed, defense counsel gave Dr. Baumer all the medical records in this case. (14RT 2870-2871, Resp.'s RCCAP Exh. 11 at p. 8.) The operative report by Dr. Shaw that was discussed at trial is the only report that Dr. Baumer claimed he did not receive in a timely manner and petitioner was not prejudiced by Dr. Baumer's receipt of the report prior to trial for the reasons already discussed. Petitioner has not adduced any evidence to support his claim that Dr. Baumer lacked adequate time to assess the cause of Consuelo's trauma, as well, so it too fails. (Pet.'s RCCAP Exh. 142 [Declaration of Dr. Nat Baumer].)

Petitioner alleges that defense counsel's failure to adequately inform Dr. Baumer of Consuelo's "medical condition" led him to erroneously admit on cross-examination that he did not think attempts to catheterize Consuelo caused the "hole" in the posterior vaginal wall. (RCCAP at

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[53] Dr. Baumer claimed that he reviewed the report about Dr. Shaw's anoscopy (for the first time) just before he testified (14RT 2850-2851), but acknowledged he had been given a "host of records" from UCLA Medical Center and could not say which documents were familiar or not familiar without looking at each document (14RT 2843).

p. 253, citing 14RT 2870-2871; see also Resp.'s RCCAP Exh. 13 [Transcript of Audiotaped Case Review by Dr. Baumer shows that prior to trial, he did not attribute Consuelo's genital and anal injuries to the medical procedures she underwent].) Dr. Baumer's testimony was supported by the "half inch laceration of the posterior wall of the vaginal opening" identified by Dr. Dibdin at autopsy. (11RT 2122-2123; see also Pet.'s RCCAP Exh. 8 at p. 3 [autopsy report].) Moreover, defense counsel was not a physician and reasonably relied on his expert (Baumer), a physician who had spent thirteen years in the emergency room, to review the medical records, autopsy report and other records in the case and inform her if Consuelo's injuries were consistent with a sexual assault or attributable to some other cause.

(2) Failure to prepare Dr. Lovell

Petitioner next contends defense counsel failed to adequately prepare Lovell to testify at trial, thereby depriving him of the effective assistance of counsel. (RCCAP at p. 252.) For example, he contends defense counsel failed to provide Lovell with adequate medical records. (*Ibid.*) Post-trial, Dr. Lovell cursorily asserts that he asked Ms. Huffman for "all medical records and relevant reports." (Pet.'s RCCAP Exh. 80 at p. 5/5477.) Without specifying what part of his request Huffman failed to fulfill, Lovell alleges that the materials she provided were not satisfactory and left him unprepared to testify. (*Ibid.*) Defense counsel's declaration does not address Lovell's allegations. (Pet.'s RCCAP Exh. 64.) At trial, Dr. Lovell testified that he reviewed the following: the autopsy report, operative reports from KMC, two operative reports from UCLA Medical Center (including Dr. Shaw's operative report), microscopic slides of tissue that was taken during the autopsy and the specimen of Consuelo's pelvis that was preserved in formaldehyde at the coroner's office. (16RT 3094-3095, 3104-3105, 3115, 3139.) He also reviewed Dr. Alonso's emergency room

report from KMC (16RT 3139, 3144) and Dr. Diamond's trial testimony (16RT 3139) and inspected the specimen of Consuelo's brain that had been preserved at the coroner's office (16RT 3111).

Dr. Lovell was retained for the limited purpose of reviewing the tissue samples and "making a determination concerning the accuracy of the findings that were made in the autopsy report." (Resp.'s RCCAP Exh. 11 at p. 1 [March 23, 1993 Section 987.9 Request to Appoint Expert (Dr. Lovell); see also Pet.'s RCCAP Exh. 80 at p. 3/5475 [Decl. by Lovell].) Pathologist Dale Huff, like Dr. Lovell, was retained to confirm whether a microscopic slide that depicted tissue from a cross section of the "anus, vagina and urinary bladder" showed the presence of actue tears and hemorrhage as alleged in the autopsy report. (Pet.'s RCCAP Exh. 82 at pp. 5489, 5493 [Decl. by Huff].) A review of the materials habeas counsel provided to Huff shows that Ms. Huffman complied with Lovell's request for "all relevant reports." (Pet.'s RCCAP Exh. 82 at pp. 5489, 5493.) Habeas counsel provided the following materials for Huff's review: four tissue slides (numbered 9-12), the autopsy report, unspecified "autopsy materials from Kern County Coroner's Office," photographs from UCLA Medical Center and the autopsy, Dr. Bloch's November 17, 1991 operative report, and two operative reports by Dr. Shaw on November 20, 1993, and November 23, 1993. (*Id.* at p. 5489.) Since Huff was not given a full set of Consuelo's medical records, Ms. Huffman's failure to furnish those records to Lovell (if substantiated) was not unreasonable.

Even if petitioner shows that Ms. Huffman did not fulfill Lovell's request for all of Consuelo's medical records, Ms. Huffman's conduct was not prejudicial. Notably, defense counsel gave Dr. Baumer a full set of the medical records in the case (14RT 2870-2781; Resp.'s RCCAP Exh. 11 at p. 8 [March 24, 1993 Section 987.9 Request to Appoint Expert (Dr. Lovell)]), and Baumer and Lovell conferred about this case multiple

times. (See, e.g., Resp.'s RCCAP Exh. 13 at p. 1 [Transcript of Audiotaped Case Review by Dr. Baumer]; Resp.'s RCCAP Exh. 15 at p.4 [April 20, 1993 Section 987.9 Request for Payment of Investigator Fees] [They had a one and one-half hour conference call on April 7, 1993]; Resp.'s RCCAP Exh.16 at p. 4 [March 24, 1993 Section 987.9 Request for Payment of Investigator Fees].) The night before he testified, Lovell discussed the case with Ms. Huffman and her husband for three hours over dinner. Lovell asked a lot of questions about the medical records, to which she and her husband were allegedly unable to "fully respond." (Pet.'s RCCAP 80 at p. 5/5477.) However, Lovell does not identify medical questions that were unanswered or assert that this adversely affected his testimony. Because the record is silent as to how defense counsel prepared the witness and petitioner has not adduced a declaration from defense counsel on this matter, this Court cannot determine that Lovell's testimony was attributable to counsel's deficient performance. (*People v. Osband* (1996) 13 Cal.4th 622, 701.)

Petitioner's argument that defense counsel unreasonably failed to review pictures of Consuelo's genitalia with Dr. Lovell prior to court should also be rejected. (RCCAP at p. 252.) During Dr. Lovell's testimony, defense counsel asked him about photographs taken at UCLA Medical Center of Consuelo's vaginal and anal areas, marked as People's Exhibits 4, 5, and 7 (16RT 3097, 3099, 3100) and Defense Exhibits AA and C (16RT 3116-3117). Dr. Lovell had difficulty deciphering what several of the photographs depicted, particularly Defense Exhibit C, which showed the vaginal and anal openings and an abrasion on the perineum (the skin between these two openings). (16RT 3118). When first asked about this photograph, Dr. Lovell "had trouble orienting which is up and which is down." (16RT 3117.) Given Dr. Lovell's experience as Chief Medical Examiner in Ventura County beteen 1981 and 1993, defense counsel could

have reasonably surmised he would be able to identify photographs of the victim's genitalia without advance preparation. (16RT 3094.) Dr. Lovell had conducted over 1,000 autopsy reports for Ventura County and testified as an expert in the field of autopsies well over 100 times. (RCCAP Exh. 11 at p. 7.) In any event. this Court cannot determine that any of Dr. Lovell's testimony was the result of defense counsel's lack of preparation as the record is silent as to how defense counsel prepared the witness and petitioner has not submitted a declaration from counsel on point. (*People v. Osband*, *supra*, 13 Cal.4th at p. 701.)

Dr. Lovell also contends that he lacked adequate time to fully evaluate the tissue slides. (Pet.'s RCCAP Exh. 80 at p. 4/5476.) However, the picture he paints of his case review does not appear to be altogether accurate. Lovell acknowledged that when when he spoke to Ms. Huffman about the case in late March, he was aware of the time constraints. Nevertheless, he "reluctantly" agreed to assist her. (*Id.* at p. 3/5475.) Dr. Lovell notes that "following his conversation with Ms. Huffman about assisting her with the case late in March of 1993, the defense investigator contacted him and he "later reviewed *several* bone and tissue slides taken from Consuelo at autopsy and *a few pages* of medical records." (Pet.'s RCCAP Exh. 80 at p. 3/5475; emphasis added.) On April 12, the day before he testified, he purports to have reviewed 27 microscopic slides (which included tissue from the brain, rib, and perineum) and the specimen of Consuelo's pelvis that had been preserved in formaldehyde at the Coroner's Office over the course of "about an hour." (*Id.* at p. 3/5475-4/5476.) He contends his usual practice includes "an initial but thorough review of available slides and tissue, reflective consideration of [his] observations and formulation of an opinion following a review of supporting records and then further examination of the slides and tissue to ensure an accurate assessment of the condition of the tissue and [his]

conclusions." (*Id.* at pp. 4/5476-5/5477.) Lovell then alleges "the time frame in this case permitted no such evaluation." (*Id.* at p. 5/5477.) Lovell alleges he attempted to reach counsel by telephone without success and left "messages" informing her that he needed additional time to prepare, to which she did not respond. However, he does not state when or how many messages he left. (Pet.'s RCCAP Exh. 80 at p. 5/5477.) Because the record is silent on this matter and petitioner has not presented a declaration from deense counsel on point, this Court cannot attribute Lovell's testimony to deficient performance by defense counsel. (*People v. Osband*, *supra*, 13 Cal.4th at p. 701.)

Lovell's allegation that he was unable to follow his usual practice for evaluating slides is discredited by the fact John Purcell delivered a set of tissue slides to Lovell on April 5, 1993, over a week before he testified. (Resp.'s RCCAP Exh. 15 at p. 4 [April 20, 1993 Section 987.9 Request for Payment of Investigator Fees]; see also 16RT 3095 [Lovell testified that he had received the microscopic slides to review].) Dr. Lovell claimed he did not count the number of slides he reviewed or make a list about what each slide depicted. (16RT 3101, 3103.) However, Andrew Dollinger testified that 27 slides were prepared at autopsy, and Dollinger made a duplicate set of 27 tissue slides for the defense. (17RT 3370-3371.) Dr. Lovell also had time to reflect on what was depicted in the slides before he reexamined them at the Coroner's Office on April 12. On April 7, Lovell had a one and one-half hour conference call with Dr. Baumer and John Purcell (Resp.'s RCCAP Exh. 15 at p. 4). On April 9, Lovell discussed the slides with District Attorney Investigator Bresson. (Pet.'s RCCAP Exh. 4 at pp. 2147-2149, 2151.)

Dr. Lovell's assertion that he only "reviewed a few pages of medical records" also seems disingenuous in light of his testimony at trial. Lovell said he reviewed medical reports from Dr. Alonso (16RT 3139, 3145),

operative reports from KMC and UCLA Medical Center and the autopsy report (16RT 3094-3095, 3104-3105, 3115) as well as Dr. Diamond's trial testimony (16RT 3139), which alone was 75 pages long (10RT 2028-2103).

Lovell further asserts that had he possessed a better understanding of Consuelo's medical treatment in the case, he would have testified differently. As previously discussed, the offer of a witness to recant their testimony should be reviewed with suspicion. (*In re Cox*, *supra*, 30 Cal.4th at p. 998.) This principle applies here. Lovell alleges that he would have testified that "there was no indication in Consuelo's medical history to suspect vaginal or anal penetration." (Pet.'s RCCAP Exh. 80 at p. 5478.) In addition, Lovell contends he would not have opined that sexual abuse "might" explain the injuries to her genitalia and anus. (*Id.* at p. 7/5479.) Lovell's sweeping assertions are too general to respond to. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474 [Cursory assertions are not a basis for relief on habeas].) It should also be noted that most of Lovell's testimony refuted the prosecution's case. On cross-exam he acknowledged he was not saying that she had not been vaginally penetrated or sodomized. (16RT 3127.) However, he later qualified this statement and said he could not definitely say whether she had been sexually abused as the medical reports showed some things that could have been caused by abuse but other things were more negative (16RT 3142-3143), such as the fact he did not see "tears, looking at the specimen." (16RT 3143). In any event, it is not reasonably probable that petitioner would have obtained a more favorable outcome had Lovell testified in the manner now described because the evidence against petitioner was strong for the reasons set forth at pages 194-196.

Lovell also alleges that the lack of information provided to him about the course of Consuelo's hospitalization prevented him from fully disproving Dr. Alonso's finding that Consuelo was sodomized. (Pet.'s

RCCAP Exh. 80 at pp. 7/5479-9/5481.) He now opines that the lax tone detected by Dr. Alonso was attributable to the paralytic agent (Pavulon) that she was given. (*Id.* at p. 7/5479.) His new opinion is speculative for the reasons set forth in argument M2c(8)(b). Lovell also contends that the small amount of blood Dr. Alonso found in her stool during the guiac test was "most likely" due to internal bleeding and her being in the early stages of DIC. (*Id.* at p. 8/5480.) Dr. Alonso's finding that Consuelo's stool tested positive for blood was not central to his opinion that she was sodomized. He based his sodomy finding primarily on the errythema and edema in the perianal area. (Pet.'s RCCAP Exh. 144 at p. 6644 [Decl. by Dr. Alonso].) Lovell further opines that the perianal swelling and redness Dr. Alonso identified was caused by manual manipulation for insertion of a thermometer or prior attempts by DRMC staff to catheterize Consuelo. (Pet.'s RCCAP Exh. 80 at p. 9/5481.) There is no relationship between attempts that were made to catheterize Consuelo and the redness and severe swelling of her anal region. (Resp.'s RCCAP Exh. 1 at pp. 12-13 [Decl. by Dr. Jess Diamond].) Consuelo's perianal redness and swelling were not caused by "manual manipulation for insertion of a thermometer" either, as previously discussed in argument M2f(2)(a). In any event, petitioner would not have received a more favorable outcome had Lovell testified to the opinions advanced above. The evidence Consuelo was sexually abused was strong, as discussed at pages 194-196.

Lovell further opines that the lax sphincter tone noted by Dr. Diamond is explained by the paralytic agent (Norcuron) that was given to Consuelo before his exam. (Pet.'s RCCAP Exh. 80 at p. 7/5479.) Dr. Diamond no longer attributes Consuelo's dilated anus and lax sphincter tone to sodomy for the same reason (Resp.'s RCCAP Exh. 1 at p. 10), though he points out there is no way to know whether Consuelo's lax tone and dilated anus preceded the administration of Norcuron since no one at

DRMC actually checked her anus for suspected sexual abuse (*id.* at p. 14). Nevertheless, Dr. Diamond maintains Consuelo was sodomized based on her anal swelling and the anal tears he observed at six o'clock and nine o'clock. (*Id.* at p. 11.) Furthermore, petitioner would not have received a more favorable outcome had Lovell testified that the anal laxity detected by Diamond was caused by Norcuron. The evidence Consuelo was sexually abused was strong, as discussed at pages 194-196.

Lovell also contends that had he known that Consuelo was in a state of DIC for most of her hospitalization, and had counsel been better prepared and asked the "appropriate questions" he would have "better explained his findings regarding the hemorrhage in the wall between the vagina and the rectum." (Pet.'s RCCAP Exh. 80 at pp. 7/5479-8/5480.) Lovell fails to identify the "proper questions" that counsel should have asked. (*Ibid.*) In any event, petitioner would not have obtained a more favorable outcome had Lovell testified in the manner now proposed. Dr. Lovell testified that he saw a hemorrhage between the rectum and vagina "microscopically" (in the slides) that appeared to relate to a tear in the top of the vagina (that was visible in the specimen of Consuelo's pelvis). (16RT 3104-3105.) He opined that the hemorrhage was four days old, but he conceded it could have been 4 to 7 days old or 9 days old. (16RT 3115.) He did not describe—and no one appears to have questioned him about—the significance of the hemorrhage on the issue of whether Consuelo had been sexually abused. Moreover, counsel downplayed the significance of the hemorrhage and focused on the vaginal tear, which Lovell opined could have been caused by surgery. (16RT 3115-3116.) Finally, the evidence of petitioner's guilt was strong, as previously discussed at pp. 194-196.

In addition, Lovell alleges that had counsel provided him with Diamond's one-page report and had he "been fully informed," he would

have opined that Diamond's sodomy finding was "seriously undermined" by Diamond's failure to specify the size, shape and depth of anal tears in his report or take into account Consuelo's post-operative medical condition in his report. (Pet.'s RCCAP Exh. 80 at p. 5482.) Lovell's assertion lacks credibility since Dr. Diamond was questioned about these matters at trial (10RT 2028-2103), and counsel provided Lovell with the 75-page transcript of Diamond's testimony (16RT 3139).

Lovell further contends that his testimony about the cause of Consuelo's brain infarcts would have been strengthened had he reviewed all the medical reports in the case. (Pet.'s RCCAP Exh. 80 at p. 5483.) Lovell testified that Consuelo's brain infarcts were attributable to a loss of oxygenated blood supply to the brain. (16RT 3113.) He also testified that the pattern of her brain infarcts showed she had not been suffocated. (16RT 3151.) However, he was allegedly unaware that Consuelo "coded," meaning she had a cardiac and respiratory emergency, at DRMC. Because Lovell's testimony countered the evidence offered by the prosecution that Consuelo was suffocated and the source of Consuelo's brain infarcts was tangential to the sexual assault and murder charges, there is not a reasonable probability that petitioner would have obtained a more favorable outcome had Lovell also informed the jury of her heart and respiratory emergency at DRMC. As discussed at pages 194-196, the evidence supporting petitioner's sexual assault convictions was strong.

In conclusion, this Court cannot determine that any of Dr. Lovell's testimony was the result of defense counsel's deficient performance because the record is silent as to how defense counsel prepared the witness and petitioner has not presented a declaration from defense counsel on point. Moreover, it is not reasonably probable that petitioner would have obtained a more favorable outcome had Dr. Lovell reviewed a full set of Consuelo's medical records before he testified for the reasons previously

set forth. Thus, petitioner's ineffective assistance of counsel claim fails.

(3) Failure to present evidence that tissue slides of Consuelo's perineum contained no evidence of tears or scarring

As noted in argument M2g(1), Dr. Huff found that the four slides of Consuelo's pelvic region (numbered nine through twelve)[54] showed hemorrhage and edema, but no evidence of tears, new or old. (Pet.'s RCCAP Exh. 82 at pp. 5489-5490, 5493.) Petitioner contends defense counsel unreasonably failed to present this evidence to refute the autopsy report, which alleged that the slides "confirmed" the presence of tears that were visible in the specimen of Consuelo's pelvis that was preserved at the coroner's office. (RCCAP at p. 252, claim M2g(8); 2004 Inf. Reply at p. 255, citing Pet.'s RCCAP Exh. 8 at p. 3560 [autopsy report].)

Defense counsel's performance was not deficient or prejudicial. Dr. Huff's findings were contrary to those of Dr. Lovell, who testified that one of the slides contained a cross section of tissue from the rectum and vagina and showed evidence of hemorrhage and a tear. (16RT 3104.) Petitioner has not shown that defense counsel had cause to believe at that time that another expert would have construed the evidence more favorably to petitioner. (*In re Thomas*, *supra*, 37 Cal.4th at p. 1257.) Moreover, there is not a reasonable probability that the jury would have reached a different outcome had they received Dr. Huff's opinion testimony. Even if the slides did not depict any tears, as alleged by Dr. Huff, Dr. Dibdin's autopsy finding that there was a tear in the specimen of Consuelo's pelvis

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[54] According to Dr. Huff, slides nine and eleven are a cross-section of part of the large bowel, most likely the rectum. Slides ten and twelve are a cross-section comprising tissue from three structures: the rectum, vagina and part of the urinary tract. (Pet.'s RCCAP Exh. 82 at p. 5489.)

was confirmed by Dr. Lovell.[55] In addition, Dr. Lovell offered an explanation for the tear other than sexual abuse. He opined it could have resulted from surgery on November 23, 1993 (16RT 3115-3116), or the autopsy (16RT 3105).

In short, Dr. Baumer and Dr. Lovell both offered testimony that was favorable to petitioner. Dr. Baumer testified that Consuelo's head and abdominal injuries could have resulted from a pedestrian-automobile accident. (14RT 2834, 2836.) Dr. Lovell testified it was possible but not probable that Consuelo's rib injuries resulted from her having been squeezed tightly. (16RT 3107.) He opined she suffered a sharp blow over the front of her body. (16RT 3108.) He also opined that her abdominal trauma did not result from anal penetration. (16RT 3126.) The circumstance that Dr. Baumer and Dr. Lovell were impeached in some respects with other evidence does not suggest defense counsel was ineffective in offering their testimony or in preparing them to testify.

Moreover, defense counsel Huffman made extensive efforts to contact expert witnesses to testify on petitioner's behalf. As previously discussed in argument M1, defense counsel had difficulty finding experts who would testify on petitioner's behalf due to the nature of the charges. Drs. Silverman and Blant from Los Angeles refused to take the case. (Resp.'s RCCAP Exh. 6 at pp. 3-5.) Dr. Thomas Naguchi in Los Angeles had been willing to take the case, but defense counsel believed his credentials were unsatisfactory based on his testimony in another case. Dr. Werner Spitz from Michigan was the "only pathologist, with adequate credentials" that she was able to find who would take the case. (Resp.'s

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[55] Dr. Huff did not inspect the specimen of Consuelo's pelvis and abdominal cavity (Pet.'s RCCAP Exh. 82 at p. 5489), which the Coroner's Office had destroyed as of January of 2002 (Pet.'s RCCAP Exh. 71 at p. 5417).

RCCAP Exh. 7 at p. 11.) However, she elected not to call him after further consultation and instead retained Dr. Baumer, an emergency room expert with extensive court experience. (Resp.'s RCCAP Exh. 8 at pp. 1, 6-7.) Pursuant to Dr. Baumer's request, defense counsel also retained Dr. Lovell, a pathologist with extensive experience in autopsy work. (Resp.'s RCCAP Exh. 11 at pp. 1, 10.) Clearly, defense counsel was not deficient in her attempts to secure expert witnesses in this case, and petitioner's contention to the contrary should be rejected. Dr. Baumer and Dr. Lovell were the best qualified experts available to the defense. Petitioner has not shown that there was deficient performance, much less prejudice. Thus, his claims fail.

3. Failure to show that the pathologist's cause of death was anatomically impossible

Petitioner contends he was denied the effective assistance of counsel because counsel failed to investigate and present evidence that Dr. Dibdin's cause of death was anatomically impossible. Specifically, Consuelo could not have died from a blunt force penetrating injury to the abdomen caused by penile anal penetration given evidence that organs below the abdomen, including the distal sigmoid colon, cecum and rectum were intact. (RCCAP at pp. 252-254, claim M3.)

Contrary to petitioner's assertion, defense counsel did present evidence refuting Dr. Dibdin's cause of death. On cross examination, Dr. Diamond conceded that when he testified at the preliminary hearing, he believed that tears to Consuelo's pancreas and duodenum had been caused by sodomy. (10RT 2073, 2085.) However, he now believed they were caused by external trauma, like a punch or kick. (10RT 2067.) Having learned that there was no tear of the anterior wall of the rectum he did not believe they were injured as a result of sodomy because a foreign object could not go through the anterior wall into the peritoneal cavity to produce the damage. (10RT 2085.) Had the injuries been caused by sodomy, the

anterior wall of the rectum would have had to be ruptured or severed and then the lower abdominal organs would have been pushed aside. (10RT 2068, 2093.) In addition, Dr. Bloch testified on cross-examination that he did not believe the Consuelo's internal injuries were caused by anal penetration. In his experience such injuries result from external blunt force trauma, such as a punch or kick to the stomach. (12RT 2460.) Defense expert Dr. Baumer also testified that in his opinion Consuelo's abdominal trauma was not caused by anal penetration. (14RT 2860-2861.) Defense counsel questioned Dr. Lovell about the cause of death as well. After Dr. Lovell testified that he had looked at the specimen of Consuelo's groin that had been preserved at the Coroner's office, defense counsel asked if there had been penile penetration of such intensity that it would cause trauma to Consuelo's abdominal organs. Dr. Lovell said he was unable say for certain. He noted that there was a tear and a hemorrhage between the rectum and the vaginal wall, about two to three inches up from the anus, but said "the rectum itself, the wall, was not perforated." (16RT 3104.)

Petitioner also alleges that defense counsel unreasonably failed to cross-examine Dr. Dibdin about his cause of death given the absence of injuries to Consuelo's lower abdominal organs. (RCCAP at p. 254.) Determinations "[a]s to whether certain witnesses should have been more rigorously cross-examined...are normally left to counsel's discretion and rarely implicate inadequacy of representation." (*People v. Cox* (1991) 53 Cal.3d 618, 622.) The declaration submitted by defense counsel Huffman post-trial does not address her reason for not cross examining Dr. Dibdin about the cause of death. (Pet.'s RCCAP Exh. 64 at p. 5339.) When the record sheds no light on why counsel failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.)

In any event, defense counsel's failure to cross examine Dr. Dibdin about his opinion that penile penetration caused the abdominal injuries was not prejudicial because it would have been cumulative to other evidence already before the jury. Defense counsel presented Dr. Lovell's testimony that Consuelo's abdominal trauma "definitely" was not caused by anal penetration. (16RT 3126.) On cross-exam, she also elicited Dr. Diamond's opinion that penile penetration had not caused Consuelo's abdominal injuries including the tear of the pancreas or duodenum (10RT 20990), and Dr. Bloch's opinion that the abdominal injuries were not caused by anal penetration (12RT 2460).

4. Failure to show that non-squeezing compression was the only theory accounting for all injuries

Without any discussion, petitioner simply asserts: "Rib and abdominal injury—Trial counsel unreasonably failed to show that compression by squeezing was not the only theory accounting for all the injuries as Dr. Dibdin testified." (RCCAP at p. 254, claim M4.) Contrary to petitioner's assertion, defense counsel presented Dr. Lovell's opinion testimony that the rib fractures were caused by a sharp blow over the front of the body, not squeezing. (16RT 3108.) In addition, Dr. Baumer testified that Consuelo's rib injuries may have been caused by a car accident, by thrust or by landing (14RT 2837). Outside the presence of the jury, defense counsel also noted that she made a tactical decision not to "bring in an expert on fulcrum and pressure because that would have possibly been detrimental to the defense and not helpful." (17RT 3512.). Because defense counsel's performance was not deficient or prejudicial, this Court should reject petitioner's ineffective assistance counsel claim.

5. Failure to counter theory petitioner suffocated Consuelo

UCLA Medical Center's Chief of Neurology, Dr. Bentson, testified that a CT scan of Consuelo's brain on November 21, 1991, showed infarctions, meaning death of brain tissue. (12RT 2406.) He testified that brain infarcts are most commonly caused by the cutting off of the blood supply or oxygen to the brain and opined that suffocation could have caused the brain infarcts in this case. (*Ibid.*)

Petitioner complains defense counsel unreasonably failed to refute Dr. Bentson's testimony that suffocation could have caused Consuelo's brain infarcts. (RCCAP at pp. 254-258, claim M5, citing Pet's RCCAP Exh. 81 at p. 5487 [Dr. Vincent J.M. Di Maio, a forensic pathologist in Texas, who did not review Consuelo's medical records or CT scans, opines that suffocation and smothering does not cause watershed infarctions].)

A reviewing court that is addressing an ineffective assistance of counsel claim need not address the reasonableness of defense counsel's conduct if the record reveals that the defendant suffered no prejudice. (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 218, quoting *Strickland v. Washington*, *supra*, 466 U.S. 668, 697.) Review of the record in this case shows that defense counsel's failure to disprove suffocation as a potential cause of Consuelo's brain injuries was not prejudicial. Dr. Dibdin, Dr. Baumer, and Dr. Harrison all testified that Consuelo died as a result of her abdominal injuries. (11RT 2118, 2164; 12RT 2369; 14RT 2833.) While there was also evidence that Consuelo had brain injuries, including cerebral edema and brain infarctions, the cause of those injuries was tangential to the sexual assault and murder charges.

Moreover, defense counsel presented evidence that Consuelo's brain injuries could be attributed to a number of things other than suffocation. She elicited Dr. Bentson's testimony that Consuelo's brain infarcts could

have been caused by extremely low blood pressure (12RT 2413), consistent with the evidence that Consuelo had low blood pressure throughout her hospitalization at DRMC, KMC and UCLA Medical Center. Specifically, Dr. Tait testified that Consuelo had low blood pressure at DRMC. (17RT 3332.) Nurse Betsy Lackie testified that when Consuelo was admitted to KMC, the staff was unable at KMC to palpate her blood pressure. (11RT 2239.) Dr. Harrison testified that Consuelo's blood pressure remained low while she was at KMC (12RT 2363) and at UCLA Medical Center (12RT 2384, 2354, 2355). Defense counsel also presented Dr. Lovell's testimony that the brain infarcts could have been caused by brain swelling (16RT 3112), consistent with Dr. Bentson's testimony that Consuelo had swelling in the back of her brain on both sides (12RT 2417) and Dr. Dibdin's testimony that she had generalized brain swelling (11RT 2125).

Petitioner further alleges that defense counsel unreasonably failed to inform defense experts that Consuelo had a "cardiac and respiratory emergency" at DRMC, which he alternatively cites as the cause of her brain infarcts (due to decreased oxygen supply). (RCCAP at pp. 256-257, claim M5c.)

Contrary to petitioner's assertion, defense counsel provided Dr. Baumer with all of Consuelo's medical records, including those from DRMC. (Resp.'s RCCAP Exh. 11 at p. 10; 14RT 2823.) The DRMC medical reports included Linda Roberts' handwritten "Patient Progress Notes" which states, "pt. brady @ 20 CPR initiated—code called." (Pet.'s RCCAP Exh. 1 at p. 5.)

Although Dr. Lovell did not cite Consuelo's medical records from DRMC as one of the things he reviewed prior to trial (16RT 3094-3095, 3104-3105), defense counsel's declaration does not state what she told him about the medical treatment Consuelo received. (Pet.'s RCCAP Exh. 64.) In any event, petitioner's ineffective assistance of counsel claim fails as

petitioner has not shown that he was prejudiced by defense counsel's alleged failure to alert Dr. Lovell to Consuelo's cardiac and respiratory emergency at DRMC.

Petitioner further asserts that Consuelo's "cardiac and respiratory emergency" at DRMC was well documented and that defense counsel unreasonably failed to cross-examine Dr. Bentson about it as a potential cause of Consuelo's brain infarcts. (RCCAP at p. 257, claim M5d.) Defense counsel Huffman's declaration does not discuss whether she was aware of Consuelo's cardiac and respiratory emergency at DRMC or why she failed cross-examine Dr. Bentson about it as a potential cause of Consuelo's brain infarcts. (Pet.'s RCCAP Exh. 64.) Moreover, DRMC medical records did not disclose the "cardiac and respiratory emergency" in layman's terms. There were nearly fifty pages of medical records from DRMC (Pet.'s RCCAP Exh. 1 at pp. 1-49), and no report that Consuelo suffered a "cardiac and respiratory emergency." A "Patient Progress" note prepared by nurse Linda Roberts states "pt. brady @ 20 CPR initiated – code called." (Pet.'s RCCAP Exh. 1 at p. 5.) However, a lay person, such as defense counsel, who was reviewing the medical reports would not know that (1) "brady" was short for "bradycardiac," meaning a slowing of the heart beat; (2) the reference to 20 meant that Consuelo's heart only beat 20 times per minute instead of the regular 90 to 120 times a minute; or (3) "code called" meant that Consuelo was "coding" or undergoing a cardiac and respiratory emergency. (Pet.'s RCCAP Exh. 74 at p. 5429-5430. [Declaration by Linda Roberts submitted post-trial].) Consuelo's heart and breathing problems did not stand out in the minds of DRMC staff who were interviewed about Consuelo's physical condition and treatment at DRMC prior to trial by Investigator Lopez either. Francis Zapien (Pet.'s RCCAP Exh. 4 at pp. 1784-1802), Anita Caraan Wafford (*id.* at pp. 1803-1813), and Donald Jordan (*id.* at pp. 1774-1783) did not say anything about Consuelo

having heart or breathing problems. Nurse Linda Roberts and her supervisor Fay Van Worth were the only two individuals who even vaguely referenced heart or breathing problems to Investigator Lopez, and the reference was made in passing while discussing something else. Roberts recalled that petitioner

> was sitting outside the trauma room door when we were actually, you know, starting to code her and trying to get her—, we lost her, you know, her pulse rate for awhile and had you know, a difficult time stabilizing her and uh, I did notice that you know, the mother was crying a lot outside the door and we all thought it was kinda strange that he didn't comfort her.

(Pet.'s RCCAP Exh. 4 at p. 1688.) Van Worth told Investigator Lopez that she found Consuelo distended abdomen to have been significant as it was indicative of internal bleeding. Van Worth had not detected the distended abdomen "[u]ntil after they'd done CPR on for—, on her for a while and they had intubated her and bagged her for awhile." (*Id.* at p. 1758.)

Even if defense counsel were aware of Consuelo's cardiac and respiratory emergency at DRMC, her failure to cross-examine Dr. Bentson about it was not prejudicial. As previously discussed, the cause of Consuelo's brain injuries was tangential to the sexual assault and murder charges and defense counsel presented evidence that the brain infarcts could have been caused by her decreased blood pressure or brain swelling.

Petitioner next asserts that defense counsel unreasonably attempted to present evidence that Consuelo underwent CPR and suffered a seizure while being transported from DRMC to KMC. (RCCAP at p. 257, claim M5(c)(4), citing Pet.'s RCCAP Exh. 2 at p. 120 [Emergency Medical Services Transport does not reference a seizure or CPR].) A paramedic who transported Consuelo, Ruben Garza, was called as a defense witness and testified that Consuelo did not suffer a seizure or undergo CPR during transport. (16RT 3263.) However, Garza's testimony was contradicted by

Dr. Baumer, who testified that Consuelo underwent CPR during a transport from DRMC to KMC. (14RT 2827; see also 1Supp.CT 77 [A Critical Care Admission Note from UCLA Medical Center dated November 19, 1991, stated that Consuelo apparently suffered a seizure during transport to KMC].) Thus, defense counsel's performance was not unreasonable or prejudicial. Consequently, this ineffective assistance of counsel claim should also be rejected.

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

At trial, Dr. Dibdin opined that Consuelo's subdural hematoma, cerebral edema and rib injuries were consistent with Shaken Baby Syndrome. (11RT 2135.) Petitioner now contends that defense counsel unreasonably failed to investigate and refute prosecution evidence that Consuelo's brain injuries could have resulted from being shaken by petitioner. (RCCAP at pp. 258-259, claim M6.) Petitioner contends defense counsel unreasonably failed to present evidence that Consuelo did not have bilateral retinal hemorrhages, which are typical of Shaken Baby Syndrome. (*Id.*, citing Pet.'s RCCAP Exh. 84 at p. 5520 [Declaration or Aaron Gleckman]; accord Pet.'s RCCAP Exh. 78 at p. 5458 [Declaration of Dr. Harrison].) Petitioner contends defense counsel unreasonably failed to present evidence that Dr. Dibdin dated a 5-millimeter subdural hematoma that he saw at autopsy as having occurred, at the earliest, on November 19, 1991, two days after the charged crimes, as well. (*Ibid.*)

As discussed in argument Mg5, the record shows that defense counsel investigated and presented evidence that Consuelo's brain injuries were caused by something other than physical abuse. Thus, this part of petitioner's claim fails.

Defense counsel's failure to present evidence that Consuelo did not have bilateral retinal hemorrhages which are associated with Shaken Baby

Syndrome was not unreasonable. Defense counsel had a tactical reason not to raise the subject of retinal hemorrhages. Dr. Rick Miller examined Consuelo's eyes on November 21, 1991 and found a small retinal hemorrhage in her right eye. (Pet.'s RCCAP Exh. 3 at p. 1303, 1319.) He did not find bilateral retinal hemorrhages. Nevertheless, Dr. Miller found the hemorrhage in the right eye to be consistent with physical abuse (Pet.'s RCCAP Exh. 3 at p. 1303), and defense counsel could have reasonably decided it was not to petitioner's advantage to have additional evidence of physical abuse presented to the jury.

This Court need not decide whether defense counsel's failure to cross-examine Dr. Dibdin with his opinion that the subdural hematoma occurred at the earliest on November 19, 1991 was reasonable, as this omission was not prejudicial. Medical evidence established that Consuelo's death was related to her abdominal injuries, not her subdural hematoma. The cause of Consuelo's subdural hematoma was also tangential to the sexual assault charges. Thus, it is not reasonably probable that the jury would have reached a different verdict had defense counsel shown that the subdural hematoma occurred during Consuelo's hospitalization and was not caused by Shaken Baby Syndrome.

7. Failure to object to evidence of Consuelo's prior injuries, improper objection to CALJIC Nos. 2.50 and 2.50.1, failure to produce evidence petitioner did not cause Consuelo's prior injuries, and failure to challenge reliability of Christina's report about the locked bedroom door incident

Petitioner contends he was denied the effective assistance of counsel on four grounds: (1) defense counsel failed to object to evidence of Consuelo's prior injuries, (2) defense counsel improperly objected to the prosecutor's request to instruct the jury with CALJIC Nos. 2.50 and 2.50.1, (3) defense counsel failed to show that Christina's report about the locked

bedroom door incident was fabricated, and (4) defense counsel failed to present evidence that petitioner did not cause Consuelo's prior injuries. (RCCAP at pp. 260-267, claim M7.) The first two claims were raised and rejected by this Court on appeal. The third and fourth claims do not entitle petitioner to habeas relief either. The third claim is untimely, and failed to result in prejudice to petitioner in any event. The fourth claim is simply false.

a. Failure to object to evidence of Consuelo's prior injuries

Petitioner first contends, as he did on appeal, that defense counsel rendered ineffective assistance of counsel by failing to object to evidence of prior uncharged crimes. Specifically, Christina reported that when she and Consuelo were left alone with petitioner overnight sometime before September 24, 1991, petitioner took Consuelo into his bedroom, locked the door and kept her there all night (13RT 2561). In addition, Diane Alejandro, Consuelo's aunt, stated that Consuelo threw up and did not feel well around Halloween. (AOB 32-33; RCCAP at pp. 261-262.)

In response, this Court found that defense counsel was not deficient in seeking to exclude this evidence as it was admissible under Evidence Code section 1101, subdivision (b), to show that the fatal injuries were caused by sexual abuse and did not result from an accident. (*People v. Benavides*, *supra*, 35 Cal.4th 69.) As this Court explained, medical evidence showed that Consuelo had suffered prior internal injuries similar to the fatal injuries, the prior injuries were inflicted one to two months before the fatal injuries, and percipient evidence from Christina showed that petitioner "exhibited abnormal, secretive behavior with Consuelo and had the opportunity to inflict these injuries." (*Id.* at p. 93.) Diana's testimony showed that within the same timeframe, Consuelo "exhibited physical and emotional symptoms consistent with the intentionally inflicted injuries the

later medical examinations disclosed." (*Ibid.*) The jury could reasonably infer from this evidence that petitioner's intentional acts caused Consuelo's prior injuries. That inference was probative in establishing that the fatal injuries resulted from sexual abuse rather than an accident. (*Id.*)

In a supplemental petition, petitioner asserts that defense counsel unreasonably failed to elicit Estella's testimony that there was nothing abnormal about petitioner taking Consuelo into his room when she was crying because Estella customarily brought Consuelo into her bedroom when she cried at night and locked the bedroom door, having first initiated the habit of locking the door when she separated from Christina's father. (Supp. Pet. at p. 24; citing Pet.'s RCCAP Exh. 66 at p. 5382 [Declaration by Estella Medina].) Petitioner's claim is not properly before this Court as it was not alleged in the original petition and petitioner has not alleged facts "establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claims fall within an exception to the bar of untimeliness." (*In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781.)

However, even if the issue were properly before this Court, defense counsel's performance was not deficient. Discovery provided to defense counsel revealed that Estella told Investigator Lopez on July 9, 1992, that the locked bedroom door incident reported by Christina did not worry her or seem out of the ordinary because she and petitioner often took Consuelo into their room when she was scared, unable to sleep, crying or sick. (Pet.'s RCCAP Exh. 4 at pp. 2475-2476.) Defense counsel likely made a tactical decision not to elicit this testimony because there was no evidence that Consuelo was scared, crying, unable to sleep or sick when petitioner retrieved her from the girls' bedroom, took her into his bedroom and kept her there for the night behind a locked door. (11RT 2194 [Christina testified that Consuelo was whining, not crying, before petitioner took her into his room]; see also Pet.'s RCCAP Exh. 58 at p. 5114 [Christina

reported the incident to Ray Lopez during a June 12, 1992 interview, but she did not say Consuelo was crying or whining at the time].) Moreover, Estella's testimony would have just drawn additional attention to the locked bedroom door incident, which is something defense counsel wanted to minimize not emphasize.

b. Failure to request CALJIC Nos. 2.50, 2.50.1, 2.50.2

Petitioner further alleges, as he did on appeal, that he was denied the effective assistance of counsel based on defense counsel's failure to request that the court instruct the jury with CALJIC No. 2.50 [evidence of other crimes], CALJIC No. 2.50.1 [evidence of other crimes by the defendant proved by a preponderance of the evidence] and CALJIC No. 2.50.2 [definition of preponderance of the evidence]. (AOB 59; RCCAP at pp. 262-264.) When jury instructions were discussed, defense counsel expressly objected to the prosecutor's request that the trial court give CALJIC No. 2.50 regarding the evidence of Consuelo's prior abuse, including broken ribs, vaginal and anal tears, and head injury. (17RT 3412-3413.) Defense counsel argued,

> [T]here's no evidence that shows there are any prior crimes. There may be some inferences hat could be used to argue with regard to circumstances, but there certainly is no evidence of prior crimes regarding my client.

(17RT 3413.) On appeal, this Court concluded there was no ineffective assistance in the position taken by defense counsel. As this Court explained,

> Counsel could reasonably have concluded such an instruction would have emphasized in the jurors' minds a characterization of [petitioner] she was trying to avoid—that [petitioner's] actions toward Consuelo were, indeed, criminal.

(*People v. Benavides*, *supra*, 35 Cal.4th at p. 94.)

c. Failure to present evidence Christina fabricated the locked bedroom door incident

Petitioner raises two new claims concerning trial counsel's failure to present evidence that Christina fabricated the locked bedroom door incident. He alleges that trial counsel (1) failed to impeach Christina with her failure to report it to Investigator Lopez prior to June 1992 or (2) present expert testimony challenging the reliability of her report. (RCCAP at pp. 264-265, claim M7g, citing Pet.'s RCCAP Exh. 89 at pp. 5551-5554 [Declaration of James Wood, clinical psychologist].) These claims are not properly raised pursuant to this Court's Order of November 1, 2006, because neither relates to Ms. Culhane's fraudulent work product and petitioner has not "alleged with specificity, facts 'establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claims fall within an exception to the bar of untimeliness." (Nov. 1, 2006 Order of this Court, citing *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781; see also Policies, Policy 3, std 1-1.2, 1-2.)

(1) Failure to impeach Christina

Petitioner originally contended that Christina's testimony "was fabricated at the direction of the District Attorney Investigator with the assistance of" Virginia Salinas. (Pet. at p. 245, citing Frmr. Pet.'s Exh. 147 at pp. 6045 [Declaration by Virginia Salinas alleged that Christina told Lopez about the incident after Salinas had told her that "any time Consuelo [had been] alone with petitioner was a bad thing"].) Salinas' declaration has since been withdrawn.

Petitioner lacks good cause to complain that Christina was not impeached with her failure to report the locked bedroom door incident to law enforcement before June 1992. This new claim is based on information that was available before the original petition was filed on November 12, 2002. Prior to trial, the defense received discovery that Christina told her

mother about the locked bedroom door incident on May 22, 1992, when they were going home from a trip to Magic Mountain. Christina told District Attorney Investigator Lopez about it June 12, 1993. (Pet.'s RCCAP Exh. 4 at pp. 1849-1906 [Transcript of Investigator Lopez's June 12, 1992 Interview of Christina], and at pp. 2071-2082 [Kern County Case Report by Lopez Regarding June 12, 1992 Interview].)

In any event, defense counsel's failure to cross examine Christina about the timing of her report about the locked bedroom incident to law enforcement was not unreasonable or prejudicial. As already noted, determinations about whether a witness should have been more rigorously cross-examined are typically left to defense counsel's discretion. (*People v. Cox*, *supra*, 53 Cal.3d at p. 622.) Here, Christina was a sympathetic witness who was traumatized by her sister's death. Christina was only 11 years old when she testified at trial. (11RT 2177.) On direct exam, she testified that she first reported the locked bedroom door incident to her mother in May of 1992 when they were going home from a trip to Magic Mountain. (11RT 2189.) Thus, the jury was aware that the report was made six months after her 21-month-old sister died. Neither the prosecutor nor defense counsel presented evidence that the matter was officially reported on June 12 when she was interviewed by District Attorney Investigator Lopez. However, that detail was insignificant in view of the other information before the jury. Moreover defense counsel elicited other information that was helpful to the defense. She questioned Christina about the locked bedroom door incident and elicited her testimony that Consuelo did not appear to be hurt the morning after she had spent the night in the bedroom behind a locked door with petitioner. (11RT 2194-2195.) She also pointed out that Christina had been contacted by the police several times after Consuelo's death (11RT 2191) and got her to concede that petitioner had never hurt her (11RT 2193). Based on the foregoing,

counsel's performance was neither deficient nor prejudicial.

(2) Failure to present expert testimony questioning reliability of Christina's account

Petitioner's additional contention that defense counsel unreasonably failed to "present an expert opinion evaluating the reliability of Christina's account" is not properly before this Court either. (RCCAP at pp. 264-265, citing Pet.'s RCCAP Exh. 89 at pp. 5551-5554 [Declaration by James Wood].) Petitioner calls Mr. Wood's declaration a "replacement" for "information that was deleted because it was based on now withdrawn declarations by Ms. Culhane." (Declaration by Michael Laurence In Compliance With This Court's November 1, 2006 and January 23, 2008 Orders at pp. 22-23.) This characterization is misleading in that the new claim is based on information that was known when the original petition was filed. Accordingly, it should have been alleged then. Specifically, Mr. Wood submitted a declaration in 2002 in connection with argument B2o explaining that he had been retained by habeas counsel to evaluate the accuracy and reliability of Christina's testimony and describe how it was affected, if at all, by interviews conducted by the Delano Police Department and the Kern County District Attorney's Office. (Frmr. Pet.'s Exh. 142 at p. 5992.) Mr. Wood opined that Christina's testimony that she felt uncomfortable when petitioner took Consuelo into his bedroom and locked the door was unreliable, and her statements "may have been" the product of inappropriately suggestive and coercive interviews and interactions with law enforcement. (*Ibid.*) Mr. Wood's replacement declaration only varies slightly from his original declaration. Most of the paragraphs in the two declarations are the same, although some of the paragraphs have been moved around in the replacement declaration and there are some minor additions. The replacement declaration indicates that Wood's initial

opinion was based on a declaration from Dehlia Salinas that has since been withdrawn. (Pet.'s RCCAP Exh. 89 at p. 5543, fn. 1.) Mr. Wood did not purport to have reviewed any new materials between November 7, 2002 when he signed the first declaration (Pet.'s Exh. 142 at pp. 5992-5993 [¶ 14]) and August 7, 2007, when he signed the replacement declaration (Pet.'s RCCAP Exh. 89 at p. 5543 [¶ 14] and he reaches the same conclusions in the replacement declaration as in his previous declaration.

Assuming arguendo petitioner can show good cause for not raising this claim earlier, his ineffective assistance of counsel claim lacks merit. Defense counsel's conduct was neither deficient nor prejudicial.

Defense counsel investigated Christina's report of the locked bedroom door incident. (Resp.'s RCCAP Exh. 4 at pp. 4, 6 [Oct. 23, 1992 Section 987.9 Request for Investigator Fees shows that Purcell interviewed Christina on Sept. 3, 1992, and spent four hours summarizing the interview of her and of another witness on October 8].) Petitioner has not shown that defense counsel knew or should have known that additional investigation concerning the reliability of Christina's account was necessary, that there were psychologists in 1992 who specialized in the subject of child witness suggestibility and forensic interviewing techniques who could evaluate the reliability of Christina's statements, or that defense counsel should have been aware of the availability of this type of expert. (*People v. Williams*, *supra*, 44 Cal.3d at p. 937; Pet.'s RCCAP Exh. 89 at p. 5539 [Mr. Wood is a licensed clinical psychologist in another state (Texas) and though he obtained his Masters in 1988 and his Ph.D. in 1990 (both in clinical psychology), his research on the subject commenced in 1992].) Notably, petitioner has not cited and respondent has not found any published case in California addressing the admissibility of expert testimony regarding the suggestibility of child witnesses and forensic interviewing of children.

Petitioner has also failed to show that a different outcome would have resulted had defense counsel presented expert testimony that Christina's account of the locked bedroom door incident may have been contaminated by prior interviews with law enforcement. (*Strickland v. Washington*, *supra*, 466 U.S. 668, 693-694; *People v. Williams*, *supra*, 44 Cal.3d at pp. 944-945.) Notably, Christina first disclosed the matter to her mother when they were driving home from a trip to Magic Mountain. She later reported it to the police. As discussed in argument B1, Mr. Wood's opinion is speculative. He alleges that "inaccurate or false memories" can be created when a child is asked to imagine events, even when the event did not happen." (Pet.'s RCCAP Exh. 89 at p. 5552.) However, Christina was never directed to "imagine" a time when petitioner was alone with Consuelo. (Pet.'s RCCAP Exh. 4 at pp. 1815-1848 [Transcript of Nov. 18, 1991 Interview at Delano Police Department] and pp. 1849-1906 [Transcript of Ray Lopez's June 12, 1992 Interview].) Moreover, Wood does not assert that Christina created a false memory in this case. (*Id.* at p. 5552.) He only alleges that she had been subjected to extensive psychological coercion and contamination in prior interviews, making the accuracy of this "new" memory "highly questionable." (Pet.'s RCCAP Exh. 89 at p. 5551.) Moreover, Christina's credibility was not the key issue in this case in that she was not the alleged victim. Also, she never accused petitioner of sexually abusing Consuelo on the night of the locked bedroom door incident or otherwise. Petitioner concedes that she only testified that the locked bedroom door incident "made her uncomfortable." (RCCAP at pp. 264-265.) Because the evidence of petitioner's guilt in this case was strong, there is not a reasonable probability that petitioner would have obtained a more favorable result had defense counsel presented expert testimony that Christina's feelings about the locked bedroom door incident were not trustworthy.

d. Failure to investigate and present evidence that Consuelo's prior injuries were not caused by petitioner

Petitioner next asserts that defense counsel unreasonably failed to investigate and present evidence that Consuelo's prior injuries were not caused by him. (RCCAP at pp. 265-267.) As previously discussed in argument M1, defense counsel tried to find evidence that a registered sex offender resided at the Brandywine apartments. (14RT 2819.) In addition, she presented evidence that Estella's relatives caused Consuelo's prior injuries. (13RT 2575-2576.) Defense counsel called Estella's sister, Dehlia Alejandro, as a witness to testify that Consuelo hurt her wrist while she was taking care of her. (17RT 3338.)[56] Petitioner also testified that he was not present when Consuelo injured her wrist (15RT 2985) or head (16RT 3046), he had not stayed with or babysat Consuelo since April or May of 1991, and he never physically or sexually assaulted her (16RT 3054). Thus, defense counsel's performance was not unreasonable, and petitioner's ineffective assistance of counsel claim fails.

Petitioner also alleges that defense counsel unreasonably failed to present evidence that Consuelo's prior rib injuries resulted from a fall. (RCCAP at pp. 266-267.) None of the declarations cited by petitioner support his claim. Ana Maria Cordero Cardénas de Dávalos found

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[56] In a new claim, petitioner asserts that Consuelo's fall at Dehlia's house "could also account for her old rib injuries." (RCCAP at p. 267.) Speculative and conclusory pleading is insufficient grounds for habeas relief. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1241, fn 38; *People v. Karis*, *supra*, 46 Cal.3d at p. 656.) Moreover, Consuelo did not act sore around her ribs after she fell at Dehlia's house (13RT 2602) and DRMC medical personnel who treated her for a swollen arm and black hand did not identify any rib injuries at that time. (13RT 2554, 2650-2651; Pet's RCCAP Exh. 1 [DRMC medical records].)

Consuelo to be "mischievous" during the two months she allegedly provided childcare for her during the summer of 1991, but she did not report any falls. (Pet.'s RCCAP Exh. 94 at p. 5681.) Petitioner's good friend and cousin Dionicio Campos alleges that Consuelo fell a lot, but he does not have any direct evidence to support his claim, relying only on hearsay. (Pet.'s RCCAP Exh. 104 at p. 5865.) Finally, Campos' ex-wife Maria Celia Campos alleges that Consuelo fell a lot. (Pet.'s RCCAP Exh. 98 at p. 5681.) Defense counsel's failure to present her testimony, even if unreasonable, was not prejudicial as it would have been cumulative to Estella's and Dehlia's testimony that Consuelo fell a lot. (13RT 2588; 17RT 339-3340.) Ms. Campos' additional assertion that unspecified injuries suffered by Consuelo for which the police "blamed" petitioner "were certainly caused by" Consuelo's fall down two "rather high" cement steps in front of Campos' house about two months before Consuelo died "if not by the many other times she fell" (Pet.'s RCCAP Exh. 98 at p. 5681) is speculative and not a basis for habeas relief. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1241, fn 38; *People v. Karis*, *supra*, 46 Cal.3d at p. 656.)

Finally, petitioner alleges that defense counsel failed to present good character evidence that he was loving and caring and did not physically or sexually abuse other children. As support, he submitted declarations from his daughter Nelida Benavides Flores (who was raised by her mother, not petitioner), his daughter's sisters; and his two nieces, Norma Patricia Yáñez Benavides and Irma Leticia Yáñez Benavides. (RCCAP at p. 267, citing Pet.'s RCCAP Exhs. 95, 96, 111, 112.)

Even if defense counsel unreasonably failed to present the foregoing character evidence, her failure to do so was not prejudicial. There is no evidence that petitioner's daughter Nelida, Nelida's siblings, or petitioner's

nieces were ever left alone with him when they were minors, let alone 21-months of age and unable to talk, as Consuelo was on the date of the charged crimes. Even if Nelida, her siblings or petitioner's nieces had been left alone with petitioner as a minor, her/their testimony would have been cumulative to Christina's testimony that petitioner never harmed her. (11RT 2193.)

In sum, defense counsel's failure to object to evidence of Consuelo's prior injuries and to request CALJIC Nos. 2.50, 2.50.1 and 2.50.2 was not unreasonable. Her failure to show that Christina's report of the locked bedroom door incident was fabricated is untimely, and was not unreasonable or prejudicial in any event. Lastly, defense counsel did present evidence that petitioner did not cause Consuelo's prior injuries. Thus, this Court should reject his ineffective assistance of counsel claims.

8. Failure to support defense petitioner found Consuelo outside

Petitioner contends defense counsel unreasonably failed to investigate and present evidence supporting his account he found Consuelo outside the night she was injured. (RCCAP. at pp. 267-269, claim M8.) Not so. Ms. Huffman had defense investigators photograph the crime scene and interview neighbors at the Brandywine apartment complex (Pet.'s RCCAP Exh. 70 [Declaration of Richard Villavolos, defense investigator]), look for damage at the apartment complex and investigate traffic patterns there to find evidence that Consuelo had been in a car accident (Pet.'s RCCAP Exh. 64 at p. 4 [Declaration by Donnalee Huffman]). She presented expert testimony that Consuelo's head, abdominal, and rib injuries could have resulted from her being hit by a car (14RT 2833-2834, 2837), that Consuelo's anal and genital injuries were not detected at DRMC (14RT 2877), that the latter injuries were caused by the medical treatment Consuelo received (14RT 2870) not sexual abuse (14RT 2829, 2877; 2842;

16RT 3118; see also 14RT 2828 [alleging medical reports conflicted about whether she had genital trauma]). Thus, defense counsel's performance was not deficient or prejudicial.

Petitioner also argues defense counsel unreasonably failed to request "all available information from the crime lab." (RCCAP at pp. 267-268.) To the contrary, Ms. Huffman requested discovery on December 23, 1991. (1CT 259 [Minute Order].) Since respondent does not have a copy of defense counsel's trial file, she cannot confirm or deny petitioner's assertion that the criminalist's handwritten notes were not discovered to the defense and that those notes indicated the presence of plant material on Consuelo's sweatshirt, the presence of blood on Consuelo's shoe sole that may have picked up dirt and gravel, the presence of dirt-like debris and blood on a napkin found in the bathroom wastebasket, the presence of dirt particles on a napkin from the kitchen waste basket and a "small orange paint chip" on a paper towel from the kitchen waste basket (see argument G9, *infra*). Petitioner has not presented any evidence to show that counsel did not receive these notes. (Pet.'s RCCAP Exhs. 7 at pp. 3412, 3426-3427, 3506, 3942, 3506 [these matters were discovered to trial counsel]; and 64 [Decl. by defense counsel Huffman].)

To the extent these items were not provided, defense counsel's failure to investigate them was not unreasonable. To establish that investigative omissions were constitutionally ineffective assistance, petitioner must show at the outset that "counsel knew and should have known" further investigation might turn up materially favorable evidence." (*People v. Williams*, *supra*, 44 Cal.3d at p. 937.)

Defense counsel's failure to present the evidence contained in the criminalist's handwritten notes was not prejudicial either. The defense had pictures of Consuelo's sweatshirt and the bottom of Consuelo's shoe. There is not a reasonable probability that petitioner would have obtained a

more favorable result had the jury received evidence that the sweatshirt had plant material on it, but not enough to be visible in a photograph of the sweatshirt. (Resp.'s RCCAP Exhs. 2, 3.) Bill Esmay provided expert testimony that in order for Consuelo to have been struck in the actual pathway of a car and landed on a soft area, like grass, she would have had to have been thrown up and over the carport or been thrown under the carport onto the grass. Had she been thrown in a car accident, the car would have ended up in the same position as her body. (15RT 2935.) The drop of blood on Consuelo's shoe sole that petitioner alleges "may have picked up dirt," based on Spencer's handwritten notes does not support his defense that he found her outside either. Even Dr. Baumer conceded that Consuelo would not have been able to get up and walk to the front door with the injuries she had, had she been hit by a car (15RT 2864), and that Consuelo's injuries could not have been caused by running into a door (14RT 2865). Petitioner has not shown a reasonable probability that the outcome would have been different had the jury learned of the presence of dirt-like debris and blood on a napkin found in the bathroom wastebasket, of dirt particles on a napkin from the kitchen waste basket and of a "small orange paint chip" on a paper towel from the kitchen waste basket either.

Finally, petitioner argues defense counsel unreasonably failed to argue that (unidentifiable) plant material and some partial seeds that the criminalist observed in slides of tissue from Consuelo's nasal pharynx supported his account that he found Consuelo outside. (RCCAP at p. 269; 11RT 2324.) When the record sheds no light on why counsel failed to act in the manner challenged, the reviewing court should not speculate as to counsel's reasons. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) The declaration submitted by defense counsel does not address her failure to make the argument now advanced by petitioner. (Pet.'s RCCAP Exh. 64.) However, this would have been a weak argument at best, and would have

cost her credibility with the jury. Moreover, petitioner has not shown that defense counsel's failure to so argue was prejudicial. Thus, this ineffective assistance of counsel claim, like his others, is also baseless.

9. Incomplete and inaccurate translation of November 18, 1991 interview

Petitioner was interviewed in Spanish by Detectives Valdez and Nacua at the Delano Police Department on November 18, 1991. Law enforcement prepared a translation of the interview from Spanish into English. Prior to trial, an Evidence Code section 402 hearing was held regarding the admissibility of the interview. Before the hearing began, defense counsel stated that her interpreter, Al Hernandez, took the tapes and transcribed them himself. (1RT 97-98.) She said there were only "minor inconsistencies" between his transcription and that provided by Detective Valdez. (1RT 98.) Defense counsel and the prosecutor met and conferred about the transcript of the interview (1RT 127, 141), and the prosecutor made the changes requested by the defense (1RT 146). The prosecutor presented evidence of the interview at trial. A copy of the translation was then provided to the jury while the tape of the interview was played.

Petitioner contends the translation of the interview into English was inaccurate. He argues defense counsel unreasonably relied on Al Hernandez, an uncertified translator, to verify the accuracy of the transcript and unreasonably failed to present evidence that the interpretation was seriously flawed and confused petitioner. (RCCAP at pp. 269-271, claim M9.)

This Court need not decide whether defense counsel's failure to object to the alleged errors detected by Haydee Claus, M.A., was unreasonable, for any errors in the transcript were not prejudicial. (*People v. Mendoza* (2000) 24 Cal.4th 130, 170.) Ms. Claus, a state and federally certified freelance Spanish court interpreter, color coded errors that are allegedly

contained in the transcript of the November 18, 1991 police station interview. (Pet.'s RCCAP Exh. 63 at pp. 5213-5214 [Declaration of Ms. Claus]; see also pp. 5224-5264 [for key to color code and color coded transcript].) The most serious errors have been highlighted in yellow. Ms. Claus characterized those as "glaring errors that change meaning or create confusion; including Spanish language mistakes or translation errors in grammar or vocabulary." (*Id.* at p. 5224.)

According to Ms. Claus, "perhaps the most glaring translation error" related to Detective Valdez's assertion that a doctor said Consuelo had been sodomized. (Pet.'s RCCAP Exh. 63 at p. 5219.) Detective Valdez ("DV") stated:

> Bueno, yo te estoy diciendo el exámen de, de los médicos, del doctor, no nomás de uno, de varios, aquí el hospital de Delano, y el hospital allá de Bakersfield también, y ahora el médico también qu me avisó, que el exámen de él, de la chica, enseña que parece que fue rapada por atrás, por el rectal.

(Pet.'s RCCAP Exh. 63 at p. 5252.) The jury was given the following translation:

> Well, I'm telling you about the exam by the doctors, by the doctor. Not only of one but of various. Here in the hospital from Delano, and of the hospital over there in Bakersfield also. And now the doctor also advised me that his exam of the little girl shows that it seems she was raped from behind. From the rectal.

Whereas the certified translation states:

> Okay, I'm telling you, the exam from, from the physician, the doctor, not just one, from several, here at the Delano Hospital, and from over in the Bakersfield Hospital too, and now the doctor who notified me also, that his exam of her, of the little girl shows that it looks like she was shaved clean* from behind, from the rectal [*sic*].

(*Id.* at pp. 5252-5253.)

The translation that was provided to the jury, even if technically erroneous, was not prejudicial. Ms. Claus explained that the translation provided to the jury was erroneous.

> *[The word translated as "shaved clean" in Spanish is "rapada." From the context it appears to this translator that DV [Detective Valdez] may have been trying to say "raped" in Spanish and simply Anglicized the word to make it sound like Spanish. The resulting word is a form of the word "rapar" which is to shave clean.

(*Id.* at p. 5253.) Inspite of this alleged error, petitioner's response to the question shows he understood Detective Valdez's question.

> VB: No, I don't believe.
>
> DV: No, I am telling you that she is violated. (Raped).
>
> VB: But there is no way I could have done it.

(*Id.* at p. 5253.)

Ms. Claus also alleges that the translation of the interview that was provided to the jury "improved" on the original by making Detective Valdez "sound more fluent and grammatical than he did in Spanish." (Pet.'s RCCAP Exh. 63 at pp. 5217, 5218.) As support, she refers to the part of the interview where Detective Valdez stated that Consuelo had been violated from behind according to a doctor who examined her. (*Id.* at pp. 5119, 5251.) The following exchange took place between Detective Valdez (DV) and petitioner (VB) in Spanish:

> DV: Okey, déjame, explicarte otra cosa. El médico... hace rato también, un médico experto, que trata con examenes de niños, nos 'caba de decir también, que el exámen del, el rectal [sic] de la niña indica, que también fue...boliada...[*sic*]
>
> VB: ¿Como?
>
> DV: ...por atrás.
>
> DV: No, eso no, eso no creo. Eso nunca lo haría yo.

The transcript provided to the jury translated the above exchange as follows:

> DV: Let me explain another thing. The doctor a while ago also, an expert doctor that deals with examining children has just finished telling us also that the rectal exam of the little girl indicates that she was also violated (raped).
>
> [VB's question omitted]
>
> DV: ...from behind.
>
> DV: No! [T]hat I didn't know—that I didn't do.

Ms. Claus' certified translation states:

> DV: Okay, let me explain something else to you. The doctor...a while ago also, an expert doctor that deals with children's exams, just told us that the exam from the, the rectal [*sic*] of the girl indicates that she was also...bolated...[*sic*]
>
> VB: What?
>
> DV: ...from behind.
>
> VB: No, that I don't, that I don't think so. I would never do that."

(Pet.'s RCCAP Exh. 63 at p. 5251.)[57]

Again, any error in translation was not prejudicial. As Ms. Claus acknowledges, petitioner deduced what the intended meaning was and answered the question. (Pet.'s RCCAP Exh. 63 at p. 5218.)

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[57] Ms. Claus asserts that petitioner's response in Spanish, "No, no me dijo. Nomas me dijo, pues, que estaba en coma y ya nos vinimos..." as "No! that I didn't know—that I didn't do" instead of "No, that I don't, that I don't think so. I would never do that" (Pet.'s RCCAP Exh. 63 at p. 5253) was "seriously mistranslated" (*id.* at p. 5218). Respondent submits the difference in translation is not material.

In sum, counsel obtained a competent translation of petitioner's November 18, 1991 interview at the police station. Thus, petitioner was not denied the effective assistance of counsel.

10. Failure to provide a competent, certified interpreter

Petitioner contends defense counsel unreasonably failed to provide a competent and certified interpreter. (RCCAP at pp. 271-273, claim M10.) Petitioner's claim is baseless. Both of his interpreters were competent.

Article I, section 14 of the California Constitution provides that "[a] person...who is charged with a crime has a right to an interpreter"—meaning an interpreter's assistance—if he is "unable to understand English." (*People v. Alvarez* (1996) 14 Cal.4th 155, 209.) "[T]here is no right to a certified interpreter. There is only a right to a competent interpreter.... Certification is simply foundational to the interpreter's competence. He or she should not be found incompetent because he or she is not on the certification list." (*People v Estrada*, *supra*, 176 Cal.App.3d at p. 415; see also *People v. Superior Court (Almaraz)* (2001) 89 Cal.App.4th 1353, 1360.) One explanation for this may be the fact that 224 languages are spoken in California (excluding dialects), and more than four percent of the state's residents speak no English. (*People v. Correa* (2002) 27 Cal.4th 444, 462, fn. 3, citing Judicial Council of Cal. Admin. Off. Of Cts., Rep. To Legis. On the Use of Interpreters in the California Courts (2001) p. 16.)

Petitioner asserts that Mr. Hernandez inaccurately interpreted his trial testimony. (RCCAP at p. 273, claim M10b.) A declaration from Ms. Claus, a certified Spanish interpreter, criticizes Mr. Hernandez's interpretation of the phrase "Me sentia mal" as "I felt bad" instead of "I was feeling sick." (Pet.'s RCCAP Exh. 63 at p. 5223.) However, Ms. Claus's opinion is discredited by the fact she only reviewed isolated "portions of

petitioner's trial testimony." When viewed in the context of petitioner's entire testimony, Mr. Hernandez is shown to have properly translated these statements.

Petitioner's final assertion that poor interpretation [and impliedly defense counsel's failure to secure good interpretation] prevented him from understanding his right to remain silent is also without merit. (RCCAP at p. 273, claim M10c) Before petitioner took the stand, the court admonished him of his rights as follows:

> THE COURT: I'm sure that your attorney has already gone through this with you, but I need to do so also.
>
> You have an absolute right to remain silent. You will recall that we covered this during jury selection, right?
>
> THE DEFENDANT: Yes.
>
> THE COURT: That means that no one can force you to say anything that might indicate that you had committed any crime.
>
> Do you understand that, sir?
>
> THE DEFENDANT: Yes.
>
> THE COURT: It means that, if you wish to do so, you may remain seated there at counsel table and never take the stand.
>
> Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Even if your attorney tells you that she wants you to testify, you don't have to.
>
> Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Even if your attorney tells you that you have to testify, you don't have to.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: The choice, really, is yours and yours alone, because not only do you have a right to remain silent, you also have the right to testify on your own behalf, which means the right to take the oath from the clerk, as other witnesses have done, take the witness stand, as other witnesses have done, and to personally tell your side of the story to the jury.

Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Do you, in fact, wish to take the stand and testify in this matter, sir?

Do you wish to come up and testify in this case?

THE DEFENDANT: Yes.

THE COURT: Are you giving up, then, your right against self-incrimination?

THE DEFENDANT: Yes.

THE COURT: Are you doing this because of any threats being made against you, your family, or anyone close to you?

THE DEFENDANT: No.

THE COURT: Are you doing so because of any promise that have been made to you?

THE DEFENDANT: No.

THE COURT: Do you understand, sir, that after you answer your attorney's questions that you also will have to answer any questions that are asked of you by the Deputy District Attorney, Mr. Carbone?

THE DEFENDANT: Yes.

THE COURT: I probably won't have any questions for you, but if I do ask any questions of you, you will have to

answer those also.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You have been in court long enough now to know that, if a question is asked of you, and somebody objects, you are not to answer that question until I've had a chance to rule on the objection, right?

THE DEFENDANT: Yes.

THE COURT: And, you are not to volunteer any information, you are simply to answer the questions that are asked of you, right?

THE DEFENDANT: Yes.

THE COURT: *Sir, do you have any questions about your right to remain silent?* (Emphasis added.)

THE DEFENDANT: *I don't understand.* (Emphasis added.)

THE COURT: I have tried to make sure that you understand what it means to testify or not to testify in this case, and not only have I gone through this with you, but so has your attorney, but sometimes even though we've tried to discuss it with you thoroughly, sometimes people still have questions about what might or might not be involved, so that's why I ask you this question now.

Do you have any questions or concerns about whether or not to testify?

THE DEFENDANT: No.

THE COURT: Thank you.

I find that Mr. Benavides has made a voluntary and an intelligent waiver of that particular right.

(15RT 2972-2975.)

Petitioner asserts that the italicized language reflects a lack of understanding. (RCCAP at p. 273.) At most, it looks like petitioner did not "understand" the court's final question. The court then clarified its final question and petitioner understood (as he did all the court's prior questions).

Thus, petitioner has not shown that defense counsel failed to secure adequate interpreters for him or that he was prejudiced thereby. Accordingly, he is not entitled to habeas relief on the basis of ineffective assistance of counsel.[58]

11. Failure to provide interpreters for Spanish-speaking defense witnesses

Petitioner further alleges defense counsel unreasonably failed to object to Mr. Almaraz as an interpreter in this case and provide an accurate interpreter for five monolingual Spanish-speakers who testified as defense witnesses. (RCCAP at pp. 273-275, claim M11.) Victor Almaraz interpreted for Guadalupe Benavides (2CT 514), Hector Figueroa (2CT 514) and Armando Benavides[59] (2CT 516), all of whom testified at the guilt phase of the trial. He was also the interpreter for penalty phase witnesses Delfino Trigo and Dionicio Campos (3CT 787).

Defense counsel's failure to object to Mr. Almaraz as an interpreter was not unreasonable because Mr. Alamaraz was competent, as previously discussed in claim L2b. Petitioner criticizes Mr. Almaraz for mixing Spanish and English, citing declarations from defense counsel Huffman's secretary, Marisol Alcantar, and the other interpreter in this case,

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[58] Petitioner's cursory assertion that he did not understand his right not to testify (RCCAP at p. 273, citing Pet.'s RCCAP Exh. 126 at p. 6358) should be rejected for the reasons already set forth in response to petitioner's ninth claim. (Resp.'s Arg. I2a.)

[59] Petitioner refers to him as Javier Armando Navarette Benavides, but he testified as Armando Benavides. (RCCAP at p. 275.)

Mr. Hernandez. (RCCAP at p. 274.) However, neither Alcantar nor Hernandez criticized Mr. Almaraz's performance in this case. Indeed, Alcantar does not purport to have any knowledge about his performance in this case. (Pet.'s RCCAP Exh. 105.) Mr. Hernandez, on the other hand, was in court when Almaraz was appointed as the witness interpreter (2CT 514, 3CT 787) and heard Mr. Almaraz's translations in court first hand. He had ample opportunity to correct and/or alert the court to any mistakes by Almaraz, had there been any. Petitioner's brother, Evaristo Benavides, and cousin, Jose Isabel Figueroa, each allege post-trial that it was difficult to talk to Mr. Almaraz over the telephone. Petitioner has not adduced any information concerning their respective Spanish speaking capabilities. Moreover, they did not purport to have shared this information with defense counsel and their assessment of Mr. Almaraz's telephone skills does not bear on the adequacy of his performance at trial any way. (RCCAP at p. 274.)

Petitioner also fails to show he was prejudiced by defense counsel's failure to object to Mr. Almaraz's interpretation for five Spanish speaking defense witnesses. Each of these witnesses offered favorable testimony on petitioner's behalf, irrespective of the newly alleged interpretation difficulties. Guadalupe Benavides, Hector Figueroa, and Armando Benavides testified that petitioner was honest and non-violent (16RT 3281-3282, 3292-3293; 17RT 3376, respectively), Dionicio Campos testified he was noble and a hard-worker (19RT 3757-3758), and Delfino Trigo testified he was a good person (19RT 3763).

In short, petitioner has not shown that defense counsel unreasonably failed to object to Mr. Almaraz as an interpreter or that he was prejudiced thereby. Thus, his ineffective assistance of counsel claim fails.

12. Failure to prepare petitioner to testify

Petitioner next raises two claims: defense counsel unreasonably failed to explain his Fifth Amendment right not to testify and unreasonably failed to prepare him to testify. As a result, petitioner contends his testimony was stunted and defensive. (RCCAP at pp. 275-276, claim M12.) His contentions lack merit.

Petitioner's assertions are based on speculation and conclusory allegations. Such pleading is insufficient grounds for relief. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1241, fn. 38; *People v. Karis*, *supra*, 46 Cal.3d at p. 656.)

As to the first contention, defense counsel asked the Court to have petitioner admonished of his Fifth Amendment right to remain silent before he was called to the stand. (15RT 2972.) The court did so. (15RT 2972-2975.) On two occasions during the admonition, the court stated that defense counsel had gone over this right with him. (15RT 2972, 2975.) Defense counsel never disagreed, and defense counsel Huffman's declaration does not state otherwise. (Pet.'s RCCAP Exh. 164.) Before petitioner testified, the court found that he had made a voluntary and an intelligent waiver of that right. Defense counsel joined and concurred in the waiver. (15RT 2975.) Review of the court's admonishment and petitioner's responses, as set forth above under subheading 10 of this argument, refutes petitioner's contention he was not advised of his right to remain silent. Thus, that claim must fail.

Petitioner next contends that his testimony was stunted, defensive, and incredible, particularly on cross-examination, due to defense counsel's unreasonable failure to prepare him to testify and review his prior statements. (RCCAP at pp. 275-276.) Respondent disagrees.

Post-trial, Mr. Hernandez alleges that counsel did not prepare petitioner to testify. (Pet.'s RCCAP Exh. 107 at p. 5/5905.) This assertion is not trustworthy because Hernandez simultaneously claims that "his role was limited to doing interpretation in court" and interpreting for petitioner's family and friends once at Ms. Huffman's office. Hence, he has no personal knowledge about any trial preparation conducted by Huffman with petitioner. (*Id.* at p. 2/5902.) Defense counsel Huffman submitted a declaration stating she advised petitioner it would be preferable for him to testify in English as opposed to Spanish. (Pet.'s RCCAP Exh. 164 at p. 5342.) However, Ms. Huffman does not discuss the steps she took in preparing him to testify. She certainly did not state she failed to prepare him to testify. Moreover, petitioner conceded on cross-exam, that defense counsel had prepared him to testify. (15RT 3057.)

The record does not reflect the nature of defense counsel's preparation of petitioner, and therefore this Court cannot determine that any of his testimony was the result of him not being prepared. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1031, citing *People v. Osband*, *supra*, 13 Cal.4th at p. 701.) In addition, because even the most carefully prepared witness may give a surprise answer, the Court may not hold defense counsel responsible for the potentially damaging responses furnished by a defendant or another witness. (*Cunningham*, at p. 1031, citing *People v. Gates* (1987) 43 Cal.3d 1168, 1213-1214.)

Thus, petitioner has failed to show that defense counsel unreasonably failed to prepare him to testify or that he was prejudiced thereby. Hence, that claim should be rejected, as should his claim that she unreasonably failed to admonish him of his right to remain silent.

13. Failure to present evidence of good character and lack of sexual deviance

Petitioner contends defense counsel unreasonably failed to investigate, develop and present evidence at the guilt phase of his good character and lack of sexual deviance. (RCCAP at pp. 276-284, claim M13.) Petitioner has not met his burden of showing deficient and prejudicial performance by defense counsel.

a. Defense counsel presented evidence of petitioner's good character and lack of sexual deviance

Prior to trial, defense counsel Harbin filed an in limine motion to admit lay opinion testimony that petitioner was not sexually deviant pursuant to *People v. McAlpin* (1991) 53 Cal.3d 1289. (2CT 528-530.) Petitioner's cousin Guadalupe Benavides then testified that petitioner had contact with her daughter Pati when she was six or seven years old and petitioner never behaved inappropriately with her. (16RT 3282-3283.) Three other witnesses also testified at the guilt phase for the defense. Each provided evidence of petitioner's good character. Antonio Delatorre, Guadalupe Benavides, Hector Figueroa, and Armando Benavides each testified that petitioner is honest and non-violent. (16RT 3275, 3281-3282, 3292-3293; 17RT 3376.)

Petitioner alleges that trial counsel failed to interview the four defense witnesses who were called at the guilt phase. (RCCAP at p. 276.) All four witnesses spoke Spanish, and Mr. Harbin did not, so his Spanish interpreter, Victor Almaraz, contacted witnesses and relayed their information to Harbin. (Pet.'s RCCAP Exh. 65 at pp. 3, 8.) Prior to trial, Almaraz met with defense witness Hector Figueroa (and his brother) at Ms. Huffman's office. Almaraz ascertained their relationship to petitioner and how petitioner got along with Consuelo, and requested names of

petitioner's relatives. (Pet.'s RCCAP Exh. 102 at p. 15 [Decl. of Hector's brother, Jose Isabel Figueroa]; Pet.'s RCCAP Exh. 86 at p. 5 [Decl. of Hector Figueroa].) The other three defense witnesses - Antonio Delatorre Duran, Guadalupe Benavides, and Armando Benavides were also interviewed by the defense. (Pet.'s RCCAP Exh. 6 at pp. 2608-2610; see also Pet.'s RCCAP Exh. 101 at p. 1 [Guadalupe acknowledged telephone contact with a Spanish-speaking male and being questioned in the courthouse cafeteria]; Pet.'s RCCAP Exh. 100 at pp. 4 [Antonio alleges he was not "questioned" prior to trial but acknowledges that a Spanish-speaking thin male [Almaraz] met him at his hotel and talked to him in the courthouse basement].)

Moreover, petitioner has not shown that he was prejudiced by defense counsel's failure to better prepare the witnesses called at the guilt phase. (RCCAP at pp. 278-281.) For example, petitioner alleges that instead of calling Guadalupe Benavides as a witness, defense counsel should have called her daughter Laura Patricia ("Pati"), who allegedly knew petitioner much better than she did and was also at the courthouse. (RCCAP at p. 278; Pet.'s RCCAP Exh. 101 at p. 3 [Decl. from Guadalupe Benavides].) However, Laura Patricia's testimony arguably would have been less effective than that given by her mother because Guadalupe did not disclose her daughter's age at trial. Laura Patricia was 32. (Pet.'s RCCAP Exh. 101 at p. 1.) This would have been apparent had she testified, meaning that her prior contact with petitioner occurred 26 years prior to trial. Also, petitioner has not adduced any evidence that Laura Patricia had seen petitioner more recently than her mother had. (*Ibid.*) Petitioner complains that Javier Navaratte Benavides' testimony was short, but he fails to identify additional information that would have been helpful to the defense but was not elicited. (RCCAP at p. 280.) Mr. Delattore's conclusory post-trial assertion that he would have performed better had he chosen to testify

in Spanish rather than English does not establish prejudice either. (RCCAP at p. 279; Pet.'s RCCAP Exh. 100 at pp. 5-6.) Finally, petitioner notes Hector Figueroa was not permitted to opine about petitioner's relationship with Consuelo at trial (RCCAP at p. 279, citing 16RT 3293-3294); however, Mr. Figueroa's post-trial declaration supports the trial court's ruling that he lacked adequate personal knowledge of petitioner's relationship with Consuelo to render an opinion about it (Pet.'s RCCAP Exh. 86 at p. 4 [he only saw them together once during a barbeque at his home "in 1991"]).

b. Failure to present evidence he was loving toward Consuelo

Petitioner further alleges that defense counsel unreasonably failed to present evidence that he was loving and caring toward Consuelo. (RCCAP at p. 281.) Ana Maria Cordero Cardenas de Davalos and Cristobal Aguillar each opine post-trial that petitioner had a loving relationship with Consuelo. (Pet.'s RCCAP Exh. 94 at p. 8/5686; Pet.'s RCCAP Exh. 103 at p. 10, respectively.) However, their declarations do not establish they had adequate personal knowledge of petitioner's relationship with the victim to offer an opinion about it. Ana lived in Estella's apartment for two months during the summer of 1991 while her husband Jesus worked in the fields with petitioner. She babysat Consuelo while Estella worked. (Pet.'s RCCAP Exh. 94 at p. 2/5680.) However, Ana's declaration does not state when, where, and how frequently she saw petitioner with Consuelo. (*Id.* at p. 4/5682 [Petitioner was "rarely" at Estella's apartment], and p. 5/5683 [when "petitioner and Jesus had time" Ana, Estella and her daughters "spent time together"].) Petitioner's crew leader Cristobal Aguillar saw Consuelo at the hotel in MacFarland where the farmworkers stayed. (Pet.'s RCCAP Exh. 103 at p. 4/5832, 10/5838.) Aguillar alleges that Estella "often" brought her daughters to the hotel, but does not discuss when this

occurred or identify the number of times he saw petitioner interact with Consuelo at the hotel or elsewhere. (Pet.'s RCCAP Exh. 103 at p. 10/5838).

Petitioner also cites declarations from Jose Isabel Figueroa, Dionicio (Nicho) Campos, and Maria Celia Campos in support of this claim. (RCCAP at p. 281.) Jose Isabel Figeuroa, petitioner's co-worker and cousin, saw Consuelo at the hotel where petitioner and the other farmworkers stayed during the summer of 1991. (Pet.'s RCCAP Exh. 102 at pp. 1/5781, 11/5791). Figueroa also saw petitioner with Consuelo at his daughter's baptism in March of 1991 and at a baby shower in Los Angeles on an unspecified date. (Pet.'s RCCAP Exh. 102 at p. 13.) Figueroa opines that petitioner had a loving relationship with Consuelo. (Pet.'s RCCAP Exh. 102 at p. 11, Pet.'s RCCAP Exh. 103 at p. 10.)

The Campos family socialized with petitioner, Estella and Estella's daughters once a week at their home in Delano, and petitioner and Nicho would drink a few beers. (Pet.'s RCCAP Exh. 98 at p. 3/5731 [Decl. of Ana Maria Celia Campos]; see also Pet.'s RCCAP Exh. 104 at p. 9 [Decl. by Nicho Campos alleges he saw petitioner with Estella's children "many times"].) The Campos' opined that Consuelo adored petitioner, hugged and kissed him and was never afraid of him. (Pet.'s RCCAP Exh. 98 at p. /5731; Pet.'s RCCAP Exh. 104 at pp. 8, 9.)

Counsel's failure to present the above evidence was not unreasonable or prejudicial. Consuelo's "loving" relationship with petitioner is not inconsistent with petitioner having abused her. At only 21 months of age, Consuelo did not have either the intellectual or emotional maturity to conduct herself in a relevant/probative manner with a man who was also abusing her. In addition, their testimony would have been cumulative to Estella's testimony that Consuelo went to petitioner and "Papa" was one of three words in Consuelo's vocabulary. (13RT 2613, 2617.) Given the

strong evidence of the injuries suffered by Consuelo during the fifteen minute period she was alone with petitioner, there is not a reasonable probability that the jury would have reached a different outcome had defense counsel presented the evidence now raised by petitioner.

c. Failure to call petitioner's daughter and nieces

Petitioner next contends defense counsel unreasonably failed to call his daughter Nelida Benavides Flores. (RCCAP at p. 282.) However, petitioner does not appear to have been in contact with her (or her mother) at that time. Moreover, defense counsel had tactical reasons for not calling her as a witness.

Petitioner alleges his daughter Nelida grew up with him, but the declarations from her and her mother show him to have been an absentee father. Nelida was raised by her mother in extreme poverty. (Pet.'s RCCAP Exh. 95 at p. 1.) Nelida's mother, Juana Flores Rivera, had an "on again, off again" relationship with petitioner from approximately 1979 to 1988. (Pet.'s RCCAP Exh. 96 at p. 1 [their relationship lasted nine years]; and p. 2 [Nelida was born four years into the relationship]; Pet.'s RCCAP Exh. 95 at p. 1 [Nelida's birthdate].) Nelida was born on March 9, 1983, and was the youngest of eight children, most of whom had different fathers. (Pet.'s RCCAP Exh. 95 at p. 1, Pet.'s RCCAP Exh. 96 at p. 1.) Petitioner lived with Nelida for the first two years of her life. (Pet.'s RCCAP Exh. 96 at p. 2; Pet.'s RCCAP Exh. 99 at p. 1.) When Nelida was two, petitioner went to the U.S. for work. (Pet.'s RCCAP Exh. 96 at p. 2; Pet.'s RCCAP Exh. 99 at p. 4.) After petitioner moved out, Nelida only had intermittent contact with petitioner. (Pet.'s RCCAP Exhs. 95 at p. 3 [after picking seasons ended, petitioner visited Nelida when he returned from the U.S.].)

Post-trial, Nelida alleges petitioner was caring and protective of her and never mistreated her. (Pet.'s RCCAP Exh. 95 at p. 1.) However,

Nelida was only 10 at the time of trial and does not appear to have been aware of the nature of the charges against him. (Pet.'s RCCAP Exh. 95.) Significantly, Nelida moved to Ensenada with her mother and siblings when she was eight years old (1991-1992), and "lost contact" with petitioner. (*Id.* at p. 3.) A few years later (after petitioner was incarcerated), Ignacio Padilla contacted her mother Juana on petitioner's behalf. (Pet.'s RCCAP Exh. 96 at p. 4; Pet.'s RCCAP Exh. 99 at p. 5 [Since Ignacio was not contacted by the defense during petitioner's trial, this had to have occurred after trial.].) Calling Nelida as a witness would have been a risky proposition given the prosecutor's allegation to defense counsel that he had information petitioner raped his daughter in Mexico. (Resp.'s RCCAP Exh. 5 at p. 6 [Aug. 17, 1992 Section 987.9 Request To Hire Two Investigators].)

Petitioner also alleges that defense counsel unreasonably failed to present evidence that his nieces Norma Patricia (Pati) Yanez Benavides and Leticia (Leti) Yanez Benavides viewed him as a father figure and his sister Enedina Benavides entrusted him with her daughters. (RCCAP at pp. 282-283; Pet.'s RCCAP Exh. 112 at p. 3; Pet.'s RCCAP Exh. 111 at p. 4; Pet.'s RCCAP Exh. 121 at p. 15.) In 1971, when petitioner was 23, his sister Enedina moved back into their parent's home along with her three-year-old daughter Leti and one-year-old daughter Pati. (Pet.'s RCCAP Exh. 111 at p. 1.) Enedina and petitioner's nieces lived with petitioner's parents until 1982 or 1983. (*Id.* at p. 12.) At the time of trial, Leti was 25 (*id.* at p. 1) and Pati was 23 (Pet.'s RCCAP Exh. 112 at p. 1).

Petitioner has not shown that defense counsel's failure to present the foregoing evidence was attributable to defense counsel. A declaration filed by defense counsel Harbin alleges that he had planned to present testimony from "two women" (whose names he does not provide) who had grown up around petitioner and who would say he never hurt or molested them.

(Pet.'s RCCAP Exh. 65 at p. 9/5353.) This evidence was ultimately not presented. Harbin alleges that this omission was not attributable to a strategic decision, but fails to explain why the evidence was not presented. (*Ibid.*) Pati acknowledges that prior to trial, Victor (Almaraz) informed her that family members were needed to testify at petitioner's trial. (Pet.'s RCCAP Exh. 111, p. 15.) However, she did not travel to the U.S. in time to testify at petitioner's trial. (*Id.* at p. 16.) The declarations submitted by Almaraz, defense counsel Harbin and defense counsel Huffman do not confirm or deny Pati's assertion that she was not given the date on which she needed to appear in court. (Pet.'s RCCAP Exhs. 64, 65 and 108 at p. 2.) Leti contends she did not testify because she did not have a visa and was not asked to testify. (Pet.'s RCCAP Exh. 112 at p. 7.)

Even if petitioner could show that defense counsel unreasonably failed to present evidence that petitioner never mistreated his nieces, this omission was not prejudicial. Petitioner purportedly gave the girls bottles and played with them when they were younger (Pet.'s RCCAP Exhs. 111 at p. 4 and 112 at p. 3; Pet.'s RCCAP Exh. 121 at p. 15), but there is no evidence they were ever left alone with him as minors or that he watched them overnight. Moreover, these events took place twenty years before the charged offenses. (Pet.'s RCCAP Exh. 111 at pp. 1-2 [the nieces moved into petitioner's parents' home in 1971 and lived there until 1982 or 1983].)

d. Failure to present evidence petitioner was not inappropriate with friends' children

In addition, petitioner contends defense counsel unreasonably failed to present testimony from friends who allegedly entrusted their children to his care. (RCCAP at pp. 282-283.) For support, he cites declarations from his ex-girlfriend and daughter's mother Juana Flores Rivera, his ex-house mate Ignacio Padilla, and two cousins Jose Isabel Figueroa and Guadalupe Pelayo Benavides. (*Ibid.*) None of these declarants alleged that petitioner

babysat their children overnight or that they left their children alone with petitioner.

Ignacio Padilla Rivera alleges that during the two-year period he rented a house with petitioner and Juana (1983-1985), Juana visited her brother in another town several times for a "couple of days" and left the children with petitioner. (Pet.'s RCCAP Exh. 99 at pp. 1, 4; Pet.'s RCCAP Exh. 96 at p. 1.) However, he does not identify the names or ages of the children who stayed home or say that the children were left in petitioner's exclusive care. (Pet.'s RCCAP Exh. 99.) Juana's sister, Josefina, Josefina's two teenage daughters, and several of Juana's daughters also lived in the same house and may have been left in charge. (Pet.'s RCCAP Exh. 96 at p. 2; Pet.'s RCCAP Exh. 99 at pp. 1; see also Pet.'s RCCAP Exh. 99 at p. 2 [Ignacio said the women cared for the children].) Also, Juana never purports to have left the children in petitioner's care. (Pet.'s RCCAP Exh. 96.)

Petitioner's second cousin Guadalupe Pelayo Benavides alleges that another cousin Refugio Palomino "sometimes" left their seven-year-old daughter, five-year-old daughter and four-year-old son with petitioner. (Pet.'s RCCAP Exh. 122 at p. 6.) He does not state when, where, or how long his cousin's children were allegedly left with petitioner and his statement would have been inadmissible hearsay.

Jose Figueroa's four children were allegedly fond of petitioner during the "couple" of times petitioner, while staying with another family, visited the family in Los Angeles. Figeuroa does not provide the dates or years of the visits, the ages of his children, or describe the nature or location of petitioner's visits. (Pet.'s RCCAP Exh. 102 at p. 13.)

Though not referenced by petitioner (RCCAP at pp. 282-283), Celia Campos and Nicho Campos also submitted declarations post-trial alleging that their children were fond of petitioner. Nicho alleges they called him

"uncle" (Pet.'s RCCAP Exh. 104 at p. 10), and Celia alleges they all felt comfortable around petitioner, including her two daughters, whose ages she does not disclose. (Pet.'s RCCAP Exh. 98 at p. 3.) Both of these witnesses were contacted by the defense. (Resp.'s RCCAP Exh. 4 at p. 5 [Oct. 23, 1992 Section 987.9 Request For Investigator Fees shows that Jon Purcell interviewed Nicho on Nov. 13, 1992]; Pet.'s RCCAP Exh. 104 at p. 11 [Almaraz questioned Nicho a few times]; Pet.'s RCCAP Exh. 98 [Celia spoke with but allegedly was not questioned by Almaraz].) Both Nicho and Celia were present at the courthouse during the guilt phase (Pet.'s RCCAP Exh. 86 at p. 6; Pet.'s RCCAP Exh. 102 at p. 17) and defense counsel Harbin's declaration is remarkably silent as to his failure to present their testimony (Pet.'s RCCAP Exh. 65).

In any event, petitioner was not prejudiced by defense counsel's failure to present evidence of his good relationship with friends' children. Petitioner saw the children in a social setting. There is no evidence that he babysat any of them let alone spent the night with them. Moreover, their testimony would have been cumulative to Christina's testimony that petitioner never touched her in a bad way. (11RT 2193.) Given the strong physical evidence of the injuries suffered by Consuelo while petitioner was caring for her, it is not reasonably probable that petitioner would have obtained a more favorable outcome had defense counsel presented the foregoing evidence.

e. Failure to present expert testimony that petitioner was not sexually deviant

Petitioner's last assertion that defense counsel unreasonably failed to present evidence, including testimony by a mental health expert, that he was not sexually deviant pursuant to *People v. Stoll* (1989) 49 Cal.3d 1136 does not establish a prima facie case for habeas relief based on ineffective assistance of counsel either. (RCCAP at pp. 283-284.) Petitioner originally

supported this claim with a declaration by private psychologist Ricardo Weinstein. (Frmr. Pet.'s Exh. 151). He now seeks to support his claim with a new declaration from Francisco Gomez, Ph.D. (RCCAP at p. 284, citing Pet.'s RCCAP Exh. 127.)

Habeas counsel has not shown that the fraudulent work product of Kathleen Culhane necessitated the withdrawal of Dr. Weinstein's declaration and justified its replacement with the new opinion testimony of Dr. Gomez. (January 23, 2008 Ruling of This Court.) Mr. Laurence generally noted that Mr. Weinstein had reviewed background information on petitioner, including declarations that have been withdrawn, in preparing his neurological exam. (April 22, 2008 Declaration by Michael Laurence at pp. 6-7.) Respondent disagrees with counsel's assertion that an independent exam of petitioner by Mr. Puente was necessary "to avoid any suggestion that the 'tainted' declarations influenced Dr. Weinstein's findings." (*Id.* at p. 7.) Petitioner should not get to benefit from Ms. Culhane's fraudulent work product by obtaining yet another psychological exam. Rather Dr. Weinstein should have been asked to review the replacement declarations submitted by petitioner to determine what, if any, effect they have on his opinion. (Compare Pet.'s RCCAP Exh. 89 at p. 5543 [Replacement Decl. by James Wood], Frmr. Pet.'s Exh. 142 at p. 5992 [Frmr. Decl. by Mr. Wood].) Dr. Weinstein's evaluation to determine whether petitioner was sexually deviant was based on his interview of petitioner on July 1, 2, and 3, and October 16 and 17, 2002, and his review of declarations by petitioner's family, friends, former sexual partners, children, and "children who grew up with or were cared for by him" in determining whether petitioner met the risk criteria for being sexually deviant (Frmr. Pet's Exh. 151 at pp. 2/6074, 21/6093). The substance of those declarations was inadmissible hearsay and not admissible pursuant to *Stoll* anyway. (*People v. Stoll*, *supra*, 49 Cal.3d at

pp. 1152-1153 [trial court improperly excluded a psychologist's testimony that two of the defendants' *test and interview* results showed it was unlikely that they were involved in the charged sexual molests].) Thus, petitioner has not shown good cause to substitute Dr. Gomez's evaluation for that of Dr. Weinstein.

Regardless of whether petitioner's argument is supported by the declaration from Dr. Weinstein or Dr. Gomez, neither declaration renders defense counsel's performance deficient or prejudicial. Thus, his ineffective assistance of counsel claim fails.

Dr. Weinstein found that petitioner did not display character traits associated with a sexual deviant in 2002 at the age of 54 while incarcerated in San Quentin. However, this does not prove petitioner lacked the characteristics of a sexual deviant when he committed the crimes in 1991. Defense counsel's failure to present a Stoll expert was not prejudicial either. The rape, sodomy and lewd and lascivious acts charges were corroborated by physical evidence of anal and genital trauma,[60] and Consuelo was in petitioner's exclusive care when she incurred those injuries.

Moreover, defense counsel had a tactical reason to avoid the issue of petitioner's sexual deviancy. The prosecutor advised defense counsel and the court outside the jury's presence that petitioner had been accused of doing the same thing as he did to Consuelo to a girl in Mexico. (Pet.'s RCCAP Exh. 65 at p. 5353 [Declaration of Jeffrey Harbin]; see also

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[60] Respondent concedes that Dr. Diamond has recanted his opinion that Consuelo was raped absent evidence that substantiates the tear of the anterior wall of the vagina reported by Dr. Dibdin and upon which he relied in finding rape. (Resp.'s RCCAP Exh. 1 at pp. 7, 10.) However, Dr. Lovell described a tear in the top of the vagina in the specimen of Consuelo's pelvis and lower abdominal floor that was preserved in the coroner's office at the time of trial. (16RT 3104.)

Resp.'s RCCAP Exh. 5 at p. 6 [Aug. 17, 1992 Section 987.9 Request to Hire Two Investigators] [Petitioner allegedly raped his daughter in Mexico].) The prosecution did not present any evidence at the guilt or penalty phases that petitioner committed prior sexual offenses and stipulated that petitioner did not suffer prior convictions of any kind. (18RT 3592-3593; 19RT 3767.) Habeas counsel also failed to inform Dr. Weinstein and Dr. Gomez about the allegation petitioner had sexually abused a girl in Mexico. (Frmr. Pet's Exh. 151 at 21/6093 [Dr. Weinstein not informed]; see also Pet.'s RCCAP Exh. 127 at pp. 3/6362, 56/6415 [Dr. Gomez not informed].) Thus, they did not question petitioner about it or otherwise investigate the allegations as part of their evaluation. (Frmr. Pet.'s Exhs. 151, 152, and 158; Pet.'s RCCAP Exhs. 126 and 127.) Once a defendant places his character in issue, the prosecutor, may through cross-examination or rebuttal, present a more balanced picture of defendant's personality. (*People v. Daniels* (1991) 52 Cal.3d 815, 883.) At a minimum, the prosecutor would have been entitled to cross-examine any mental health professional who gave petitioner a psychiatric evaluation about this. Thus, had defense counsel presented an expert to testify petitioner was not sexually deviant, she would have opened the door to potentially damaging evidence and risked losing the prosecutor's stipulation. (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1334.)

Alternatively, Dr. Gomez's declaration, if found to be properly before this Court, does not entitle petitioner to habeas relief either. Dr. Gomez opines that petitioner (1) does not "have a developmental or social history associated with sexual deviance," (2) did not demonstrate an inappropriate need to interact with children or seek activities where he would interact with them, (3) always had sexual relationships with female partners that were age appropriate and demonstrated his preference for adult female sexual partners, (4) does not suffer from an impulse control disorder, and

(5) does not suffer from pedophilia. (Pet.'s RCCAP Exh. 127 at p. 64/6423.)

Dr. Gomez's first finding is not timely raised as a basis for ineffective assistance of counsel. Habeas counsel asserts that Dr. Gomez's declaration is a replacement for that submitted by Dr. Weinstein in 2002. (April 22, 2008 Declaration by Michael Laurence at pp. 6-7.) However, Dr. Gomez's evaluation exceeded the scope of that conducted by Dr. Weinstein to the extent Dr. Gomez found petitioner lacked "a developmental or social history associated with sexual deviance". (Frmr. Pet's Exh. 151 at p. 20/6092; compare Pet.'s RCCAP Exh. 127 at p. 64/6423.) Even if petitioner could show that this assertion was timely raised, he has not shown there were experts on the "developmental or social history associated with sexual deviance" in 1993, or that such evidence was admissible and satisfied the requirements of *Kelly/Frye*.[61]

Dr. Gomez's second and third findings are based on inadmissible hearsay. In addition, these findings do not fall within the type of evidence that was found to have been improperly excluded in *Stoll*. This evidence is not admissible character evidence under *People v. McAlpin*, *supra*, 53 Cal.3d at p. 1309, and petitioner has not cited any other authority upholding its admissibility.

Dr. Gomez's fourth and fifth findings seem to be admissible under *Stoll* to the extent they were based on his interview of petitioner at San Quentin on August 8, 9, 10, 2007 and petitioner's performance on the Psychopathy Check List- Revised. (Pet.'s RCCAP Exh. 127 at pp. 3/6362, 56/6415, 63/6422; *People v. Stoll*, *supra*, 49 Cal.3d at pp. 1152-1153.) His findings are objectionable to the extent they are based on inadmissible

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[61] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C.Cir. 1923) 293 F. 1013.

hearsay, including declarations from petitioner's friends and family members, unspecified documents relating to his personal and social history and psychological and physiological development, unspecified trial testimony, and vital records. (Pet.'s RCCAP Exh. 127 at p. 56/6415.)

Dr. Gomez's finding that petitioner did not display character traits of a sexual deviant or pedophile in 2007 as a 59-year-old incarcerated male does not prove that petitioner lacked the character traits of a sexual deviant when he committed the crimes in 1991. Defense counsel's failure to present the foregoing opinion testimony was not prejudicial for the same reasons his failure to present that of Dr. Weinstein was not. The same tactical considerations apply, as well.

Based on the foregoing, defense counsel's failure to call present more good character evidence or call a *Stoll* expert was not deficient or prejudicial. Hence, petitioner is not entitled to habeas relief on that basis.

14. Failure to present evidence of allegedly impaired mental state (cognitive defects, depression, post traumatic stress disorder, and alcohol dependency) at trial

Petitioner contends defense counsel was prejudicially deficient for not presenting evidence of his cognitive deficits, including mental retardation, and other impairments, such as posttraumatic stress disorder, major depressive disorder, and alcohol dependency at trial. (RCCAP at pp. 284-288 (claim M14) and pp. 288, 301 (claim M16).) Respondent disagrees.

a. Petitioner has failed to demonstrate that trial counsel was constitutionally deficient with respect to the investigation and presentation of petitioner's alleged cognitive deficits

Criminal trial counsel have no blanket obligation to investigate possible "mental" defenses, even in a capital case. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1244, citing *People v. Williams*, *supra*, 44 Cal.3d at

p. 943, and *People v. Frierson* (1979) 25 Cal.3d 142, 164.) To establish that trial counsel's alleged investigative omissions were constitutionally ineffective, petitioner must show at the outset that trial counsel knew or should have known that further investigation might turn up materially favorable evidence (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1252 [superseded on another ground as stated by *In re Steele* (2004) 32 Cal.4th 682, 691], citing *People v. Williams*, *supra*, 44 Cal.3d at p. 937).

Neither defense counsel Huffman and Harbin nor anyone else on the defense team detected petitioner's alleged cognitive impairments or alleged mental retardation. As previously noted, petitioner's recorded statement at the police station (1Supp. CT 155-186) and testimony at trial did not show him to be cognitively impaired. (Inf. Response, Arg. I3.) A declaration from defense counsel Huffman states she was unaware of petitioner's alleged cognitive difficulties. (Pet.'s RCCAP Exh. 64 at pp. 5343-5344.) Co-counsel Harbin claims to have visited petitioner "a lot more" than defense counsel Huffman and to have been closer to him than she was. (Pet.'s RCCAP Exh. 65 at p. 5350.) Significantly, Mr. Harbin's interactions with petitioner did not lead him to suspect and therefore investigate petitioner's alleged mental health problems either. (*Id.* at p. 5353 [suggesting that he and Huffman may have "misconstrued [their] client's abilities" if the representations of habeas counsel are accurate].) Neither of the interpreters referenced petitioner having any mental impairments either. Mr. Hernandez interpreted for petitioner throughout the trial and answered petitioner's questions when he did not understand something in court. (Pet.'s RCCAP Exh. 107 at pp. 1-2/5901-5902.) Victor Almaraz visited petitioner in jail and interpreted for Harbin. (Pet.'s RCCAP Exh. 108 at pp. 2-3/5907-5908.) Almaraz and Harbin explained the proceedings to petitioner and obtained names and contact information from him. (*Id.* at p. 3/5908.) Almaraz found petitioner to be cooperative

and easy to talk to. (*Id.* at p. 4/5909.) Defense investigator Jon Purcell sat through portions of the trial and visited petitioner a few times in jail. (Pet.'s RCCAP Exh. 106 at p. 3/5898.) Finally, defense counsel Huffman's secretary, Marisol Alcantar, grew up speaking Spanish at home. (Pet.'s RCCAP Exh. 105 at p. 1/5889.) She purportedly visited petitioner at the Lerdo jail one or two times and translated for Huffman. In addition, Alcantar answered weekly telephone calls from petitioner to Huffman's office. (*Id.* at pp. 3-4/5891-5892.) Although Alcantar characterized Estella's sister Dehlia as "off mentally," "slow to respond in conversation" and developmentally and cognitively challenged, she did not make similar judgments as to petitioner. (*Id.* at pp. 6-7/5894-5895.) Indeed, Antonio Puente, the neuropsychologist who examined petitioner in 2007, found that petitioner's "good appearance and congenial manner mask his underlying cognitive and neuropsychological deficits." (Pet.'s RCCAP Exh. 126 at p. 6.) So much so that, "even as a trained professional[,] [he] was unable to discern his cognitive impairments during [his] introductory conversation with him." (Pet.'s RCCAP Exh. 126 at pp. 4-6.)

Petitioner has not identified any reason defense counsel should have known that a meritorious mental defense was available. (See *People v. Beeler* (1995) 9 Cal.4th 953, 1007 [nothing in the record supports conclusion that evidence of memory loss and disassociation should have alerted counsel to a need for neurological testing for organic brain damage].) Petitioner provides no declaration from himself and therefore *no information at all* as to what he told his counsel regarding his supposed mental impairment. Petitioner may not have wanted mental health evidence to be investigated or presented. (Pet.'s RCCAP Exh. 126 at p. 23/6357 [petitioner spoke about himself as an intelligent person who did not have any problems understanding concepts when he talked to Antonio Puente]; Probation Report at p. 4 [petitioner did not cite mental retardation,

cognitive impairments or any psychological problems when the probation officer asked about his health and whether he suffered from any disabilities].) Without knowing what petitioner told counsel regarding his own mental health, it is impossible (without speculating) to determine the reasonableness of counsel's actions with respect to the investigation and presentation of petitioner's alleged mental health issues. In other words, petitioner asks this Court to find his trial counsel constitutionally ineffective based on incomplete information. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 691 ["the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions" and "what investigation decisions are reasonable depends critically on such information"]. This Court should decline to do so and should reject petitioner's claim for lack of evidentiary support. (*People v. Duvall*, *supra*, 9 Cal.4th at pp. 474-475 [habeas petitioner's prima face case should be supported by reasonably available documentary evidence].)

b. Petitioner has failed to establish that he suffered from cognitive deficits prior to his trial in the instant case

Petitioner's ineffective assistance of counsel claim based on counsel's failure to investigate his alleged cognitive deficits also fails as it is based on speculation and conclusory allegations. Such pleading is insufficient grounds for relief. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1241, fn. 38; *People v. Karis*, *supra*, 46 Cal.3d at p. 656.) For example, petitioner cursorily alleges, without any discussion or citations to documentary support, that he is mentally retarded. (RCCAP at p. 284.) However, his IQ scores suggest otherwise. When tested by neuropsychologist Ricardo Weinstein at the age of 50 in 2002, petitioner yielded an IQ score of 72 on the Woodcock Munoz Battery test, an IQ

score of 83 on the General Ability Measure for Adults test, and an IQ score of 82 on the Wechsler Adult Intelligence Scale - Spanish version. (Frmr. Pet.'s Exh. 151 at pp. 6074, 6081.) Five years later, petitioner obtained a full scale IQ score of 80 on the Wechsler Adult Intelligence Scale-Third Edition (Spanish version). (Pet.'s RCCAP Exh. 126 at p. 15; but see *id.* at pp. 15-16 [he had an IQ score of 60-69 on the Benton Visual Retention Test, which measures visual perception and visual memory, and "a nonverbal IQ score of 49" on the Comprehensive Test of Nonverbal Intelligence-Third Edition in 2007 when tested by neuropsychologist Antonio Puente at the geriatric age of 55.)

Petitioner further claims his alleged mental limitations are evidenced by his poor performance in secundaria (middle school). (RCCAP at p. 285.) Maria Dolores Castaneda de Palafox, petitioner's former geography and dance teacher from secundaria, alleges he had difficulty understanding concepts when he entered secundaria. (Pet.'s RCCAP Exh. 116 at p. 5.) Elvira Benavides Preciado, petitioner's cousin and classmate in secundaria, alleges petitioner had poor reading comprehension, often made grammatical mistakes in his writing, obtained low grades and eventually dropped out. (Pet.'s RCCAP Exh. 123 at p. 3.) Petitioner passed five out of nine courses during both years at the secundaria. During his first year, he passed Spanish, history and three other courses (whose titles are illegible), but did not pass math, biology, geography and English. (Pet.'s RCCAP Exh. 52 at p. 5008; Pet.'s RCCAP Exh. 116 at pp. 4-5 [a grade of 5 is non-passing].) During his second year, petitioner passed Spanish II, geography, history II, artistic education, and technology; he did not pass math, biology, foreign language, or physical education. (Pet.'s RCCAP Exh. 52 at p. 5010; Pet.'s RCCAP Exh. 116 at pp. 4-5.) Notably, neither petitioner's teacher nor cousin described him as mentally retarded or cognitively impaired, and contrary to petitioner's assertion, neither

contended he had "mental limitations" either. (RCCAP at p. 285; Pet.'s RCCAP Exh. 116 and Pet.'s RCCAP Exh. 123 at p. 3 [cousin alleged "everyone *began to notice* he was *struggling with the material* during his second year—not that he had "mental limitations"].) Rather, they, assert that petitioner and his older brother Manuel were forced to work in the fields during the school year in Los Camichines and in San Gabriel, leaving little time for school work. (Pet.'s RCCAP Exh. 116 at p. 6; Pet.'s RCCAP Exh. 123 at p. 3; accord Pet.'s RCCAP Exh. 91 at p. 20; Pet.'s RCCAP Exh. 121 at p. 11/6230; Frmr. Pet.'s Exh. 152 at p. 77/6183; Pet.'s RCCAP Exh. 121 at p. 11 [According to petitioner's sister, Enedina Benavides Figueroa, their father did not think girls should be educated and she only completed one year at primaria in Los Camichines and one year in San Gabriel; petitioner's younger brothers were not forced to work in the fields and were permitted to study, unlike petitioner]; Frmr. Pet.'s Exh. 152 at pp. 76-77 [Decl. by Amado Padilla alleges petitioner's father did not like his children to attend school].) Moreover, petitioner may not have been adequately prepared for secundaria because he allegedly only attended school in Los Camichenes for a few months, and the teacher for the ranchos children in Los Camichenes was allegedly temporary, undereducated herself, and forced to circulate among many different ranchos. (Frmr. Pet.'s Exh. 152 at pp .76-77 [Decl. by Amado Padilla].) In addition, petitioner did not like to read and did not show an interest in school. (Pet.'s RCCAP Exh. 123 at p. 3 [Decl. by Elvira Benavides Preciado]; Pet.'s RCCAP 114 at pp. 6028-6029 [Benito Preciado Benavides].) Thus, petitioner's performance can be explained by a variety of factors other than cognitive impairment.

Likewise, petitioner's failure to progress from farmwork to a higher paying job does not prove cognitive impairment or mental retardation either. (RCCAP at p. 285.) Petitioner enjoyed working in the field. (Pet.'s

RCCAP Exh. 114 at pp. 6028-6029.) Moreover, he was good at it. (Pet.'s RCCAP Exhs. 103 at p. 7/5835 [Decl. by Cristobal Aguilar Galinda says petitioner picked more boxes of grapes than anyone else]; Pet.'s RCCAP Exh. 125 at p. 3 [petitioner was a fast grape picker].)

In short, petitioner has failed to establish that he was, in fact, mentally impaired due to a cognitive defect or mental retardation at the time he killed Consuelo, let alone at any time during his life. Thus, he has failed to demonstrate that counsel was deficient for failing to investigate and present evidence of something that did not exist.

c. Assuming counsel was deficient, petitioner suffered no prejudice during the guilt or penalty phases

(1) Guilt Phase

Assuming, without conceding, that counsel was deficient for failing to adequately investigate and present evidence of petitioner's alleged cognitive deficits, such error by counsel was not prejudicial. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688, 692-694.) In assessing prejudice, petitioner must show that but for his counsel's deficiency, there is a reasonable probability that he would have received a more favorable outcome. (*Porter v. McCollum* (2009) __ U.S. __ [130 S.Ct. 447, 452-453] (per curiam).)

As argued above, petitioner has failed to establish that he ever had a cognitive defect or was mentally retarded when he killed Consuelo. Moreover, petitioner does not allege that his cognitive impairment prevented him from forming the intent to commit the charged offenses. (RCCAP at pp. 284-288.) Petitioner was charged with murder, and three felony murder special circumstances. (1CT 253-258.) Based on the verdicts of true on the special circumstance allegations of murder during the commission of rape, sodomy and lewd acts with a child under the age of 14,

the jury necessarily found that the killing of Consuelo was first degree felony murder. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 103.) Neither premeditation, deliberation nor intent to kill (malice)[62] are required to prove felony murder or a felony murder special circumstance. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140-1141 [felony murder does not require premeditation, deliberation or intent to kill]; *People v. Jennings* (1988) 46 Cal.3d 963, 979 ["A felony-murder special circumstance is established even absent intent to kill, premeditation, or deliberation, if there is proof beyond a reasonable doubt that the defendant personally killed the victim in the commission or attempted commission of, and in furtherance of, one of the felonies enumerated in subdivision (a)(17) of section 190.2."].) The only mental state required for felony murder is the specific intent to commit the underlying felony. Petitioner has not alleged or established that his mental impairments were so severe that he could not have intended to commit those particular crimes.

Rather, petitioner claims his "behavior upon finding Consuelo on the ground[,] his affect and demeanor, and his inability to respond appropriately to law enforcement questioning were all consistent with" his cognitive impairments, rendering counsel's failure to investigate and present evidence of it at the guilt phase prejudicial. (RCCAP at p. 284.) Petitioner claimed to have found Consuelo outside on the doorstep when he talked to Christina, Estella, and the police, as well as when he testified at trial. However, petitioner has not cited and respondent has not found, any evidence presented at trial about his "affect or demeanor" when he found her. Petitioner has not shown that his cognitive deficits somehow bore on such evidence either. Likewise, petitioner has not shown that his responses

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[62] Express malice is an unlawful intent to kill. (*People v. Garcia* (2008) 162 Cal.App.4th 18, 26.)

to police questioning were inappropriate or shown that his responses were attributable to impaired cognitive functioning. As previously set forth in response to petitioner's ninth claim (Argument I(the letter)2a), petitioner made a conscious choice to talk to detectives, understood the questions posed, sought clarification when he did not, and used the interview to deflect blame for Consuelo's injuries. Finally, petitioner argues that trial counsel prejudicially failed to present evidence of his cognitive deficits to somehow suppress his [*Mirandized*] statements to the police as unreliable, coerced and unknowing. (RCCAP at p. 284.) As previously discussed in response to petitioner's ninth claim, petitioner's waiver of the *Miranda* advisements was valid (Argument I2), and even if the trial court erroneously admitted his statements to the police, any error was harmless (Argument I4). Thus, for the foregoing reasons, trial counsel's alleged failure to investigate and present evidence of petitioner's supposed mental impairment at the guilt phase was not prejudicial.

(2) Penalty Phase

In assessing prejudice at the penalty phase, a reviewing court "consider[s] 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation'" to determine if there is a reasonable probability the defendant would have received a more favorable outcome but for his counsel's deficiency. (*Porter v. McCollum*, *supra*, 130 S.Ct. at pp. 453-454, quoting *Williams v. Taylor* (2000) 529 U.S. 362, 397-398.) "'When a defendant challenges a death sentence...the question is whether there is a reasonable probability that, absent the errors, the sentencer...would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" (*In re Fields*, *supra*, 51 Cal.3d at p. 1078.)

(a) Defense case

Defense counsel Harbin called two witnesses at the penalty phase: petitioner's longtime friend Nicho Campos, who grew up with petitioner on the same rancho in Mexico, and Delfino Trigo, petitioner's employer and friend. (19RT 3753, 3761, 3763.) The mitigating evidence presented at the penalty phase showed that petitioner was calm and non-violent throughout his life (19RT 3757, 3763), a hard worker and very decent person (19RT 3758, 3762), who did not have any prior incidents of violence, threats of violence, or convictions prior to this case (19RT 3767).

Defense counsel Harbin argued petitioner's crimes were mitigated by the following: (1) the circumstances of the charged crimes, (2) petitioner did not have prior criminal activity, (2) he did not have any prior felony convictions, (4) he was 42 when he committed the charged offenses, and (5) he is a man of good character. (19RT 3789-3792.) In connection with the first factor, defense counsel argued there were lingering doubts in this case which weighed in favor of a life sentence. (19RT 3793-3801.) Counsel further argued that petitioner would not be rewarded with a verdict of life imprisonment. (19RT 3816-3817.)

(b) No Prejudice

Even assuming defense counsel could have adduced evidence that petitioner was cognitively impaired and/or mentally retarded, and suffered from depression, posttraumatic stress disorder and alcohol dependency, and that his failure to do so at the penalty phase was unreasonable, counsel's omission was not prejudicial. Such evidence would have likely been treated by the jury as aggravating evidence rather than mitigating evidence. (See, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 321 [122 S.Ct. 2242, 153 L.Ed.2d 335] [evidence defendant was mentally retarded may have instead "enhance[d] the likelihood that [a jury would find] the aggravating factor of

future dangerousness].)

Moreover, neither petitioner's alleged cognitive impairment/mental retardation, depression, posttraumatic stress disorder and alcohol dependency, nor the mitigating factors that are set forth post, in Argument M16, justify a life sentence in light of the aggravating factors in this case. Petitioner committed the crimes in secrecy and Consuelo was particularly vulnerable. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 103.) Only twenty-one months of age, Consuelo was considerably smaller than petitioner. (10RT 2046.) She had not learned to talk and had a three-word vocabulary: "Mama, Papa, and agua." (13RT 2617.) She was unable to care for herself, let alone defend herself against an adult male. Petitioner was alone with Consuelo for approximately fifteen minutes after her mother went to work and Christina went to play at a friend's house. (11RT 2181-2182; 2273-2274.) When Christina returned home, Consuelo had visible head injuries: a bruise on her forehead and dry blood underneath her nose, a half-inch abrasion on the bridge of her nose, and abrasions to her lips. (11RT 2184, 12RT 2351; 15RT 3019, 16RT 3328). Consuelo's eyes rolled into the back of her head. (13RT 2692; 15RT 3042 [petitioner's testimony].) Emergency surgery performed that night at KMC, revealed that Consuelo had a hematoma in her colon (12RT 2453, 2456); her duodenum (part of the bowel) was broken in half over the spleen (*ibid.*), her pancreas was broken in half on top of the spine (12RT 2454, 2456), and she had adhesions and scarring in the abdomen from prior injuries (12RT 2454). Consuelo was also found to have bilateral posterior rib fractures (16RT 3131), which even defense expert Dr. Lovell conceded are usually from abuse (16RT 3135) and genital and anal trauma, as previously detailed at length in other claims. Before Consuelo died, her injuries had rendered her blind, brain dead and unable to walk. (13RT 2639.) Physicians who treated Consuelo opined that she had been severely beaten. (13RT 2686

[Dr. Alonso had never seen a child who had been so abused]; 12RT 2460 [Dr. Bloch opined she had been punched or kicked in the stomach]; 16RT 3173, 3194 [Dr. Shaw opined that an adult grasped Consuelo's chest and forcefully squeezed very hard, causing the rib injuries]; accord 11RT 2125, 2129 [pathologist's testimony]; see also 16RT 3318 [Dr. Tait suspected some type of physical abuse].) Defense expert Dr. Baumer reached the same conclusion. (14RT 2865.) Petitioner was found to have killed Consuelo during his commission of sodomy and lewd acts with a child under the age of 14.[63] (3CT 739-741; see *Fields v. Brown* (9th Cir. 2005) 431 F.3d 1186, 1204-1205 [when the aggravating evidence is powerful, the mitigating evidence that would have been produced at trial following a proper investigation must be sufficiently compelling to undermine confidence in the outcome]; *Foster v. Ward* (10th Cir. 1999) 182 F.3d 1177, 1188-1189 [counsel's failure to present evidence at the penalty phase, including defendant's mental retardation and brain damage, was not prejudicial in light of the evidence against the defendant, the number of aggravating factors found by the jury, and the nature of victim's murder]; *Cooks v. Ward* (10th Cir. 1998) 165 F.3d 1283, 1296 [no reasonable probability that mitigating evidence of defendant's troubled childhood, borderline I.Q., and history of alcohol and drug abuse would have led to a different sentence because of defendant's criminal history and the egregious nature of the crime]; *Francis v. Dugger* (11th Cir. 1990) 908 F.2d 696, 703-704 [concluding that the failure to present mitigating evidence of brain dysfunction and an impoverished and abused childhood did not prejudice

[63] The jury also found the rape special circumstance to be true. However, that finding may be in jeopardy unless there is evidence to substantiate Dr. Dibdin's report of a tear of the anterior wall of the vagina, upon which Dr. Diamond relied in finding that Consuelo had been raped. (Resp.'s RCCAP Exh. 1 at p. 11.)

capital defendant at penalty phase].) Thus, petitioner's ineffective assistance of counsel claim should be rejected for lack of prejudice.

d. Petitioner has failed to demonstrate that trial counsel was constitutionally deficient with respect to the investigation and presentation of evidence of his mental health

Petitioner further alleges that he suffers from depression, posttraumatic stress disorder, and alcohol dependency, and that defense counsel was prejudicially deficient for not investigating and presenting this mental health evidence. (Pet.'s RCCAP at p. 287.)[64] Respondent disagrees.

Petitioner contends defense counsel knew or should have known that he exhibited signs of depression. (RCCAP at p. 285.) His claim is deficient because it is not accompanied by the necessary documentary support. Ms. Huffman's secretary, Marisol Alcantar, and the Spanish interpreter used by Mr. Harbin, Victor Almaraz, claim post-trial that petitioner was emotional during their contacts with him, but neither purported to have shared their observations with defense counsel. (Pet.'s RCCAP Exhs. 105 [Decl. by Alcantar] and 108 [Decl. by Almaraz].) A declaration from defense counsel Huffman states that she was unaware petitioner suffered from any mental disorders, such as depression and posttraumatic stress disorder. (Pet.'s RCCAP Exh. 64 at pp. 5343-5344.) So was co-counsel Harbin, who alleges that he and Huffman "misconstrued" petitioner's abilities if habeas counsel's representation that petitioner suffers from mental disorders are accurate. (Pet.'s RCCAP 65 at p. 5353.) Petitioner has not identified anything within his interaction with

[64] Petitioner further contends, without any analysis or reference to documentary support, that he had a history of dissociation during stressful events. (RCCAP at p. 284.) Such pleading is insufficient grounds for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

counsel that should have alerted them to his supposed mental health issues. He did not submit a declaration claiming he suffers from clinical depression, posttraumatic stress disorder and alcohol dependency. He did not submit a declaration asserting that he informed counsel of these matters, and agreed to submit to a mental health evaluation[65] and to have evidence of his mental health presented at trial. He has not produced records from the Lerdo jail where he was housed pending trial or addressed any evidence that he took antidepressants or was otherwise treated for depression.

Petitioner does not even contend that defense counsel should have known about his alleged posttraumatic stress disorder or alcohol dependency. Nor has he identified anything within his interaction with counsel that should have alerted them to investigate these matters. Again, he has not submitted a declaration alleging that he suffers from PTSD or alcohol dependency, or disclosing what, if any, information he provided to counsel about his mental health. Petitioner may not have wanted mental health evidence to be investigated or presented. (Probation Report, p. 4 [petitioner told probation officer he drinks alcohol but denied being an alcoholic]; 15RT 3028, 3053 [petitioner testified that when he spoke to the police he was tired and concerned about Consuelo; he never claimed to have been depressed]; 3CT 865 [Petitioner's brother Evaristo Benavides Figueroa submitted a letter to the court seeking leniency at sentencing on the ground petitioner was hardworking and "emotionally stable"].) Without knowing what petitioner told counsel, it is impossible (without speculating) to determine the reasonableness of counsel's actions with respect to the investigation and presentation of his alleged depression, posttraumatic

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[65] Trial counsel cannot be blamed for not taking steps that require cooperation his client refuses to provide. (*People v. Haskett* (1982) 30 Cal.3d 841, 853.)

stress disorder and/or alcohol dependency. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 691 ["the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions" and "what investigation decisions are reasonable depends critically on such information."] Thus, this Court should reject the instant ineffective assistance of counsel claim for lack of supporting information.

e. Petitioner has failed to establish that he suffered from posttraumatic stress disorder, depression or alcohol dependency prior to his trial in the instant case

Petitioner has failed to establish in these proceedings that he suffered from posttraumatic stress disorder. Mental health experts retained by habeas counsel in 2002 opined petitioner "exhibited symptoms" of post traumatic stress disorder *in the past*, not when he committed the crimes.[66] (Frmr. Pet.'s Exh. 151 at pp. 13, 32 [Decl. of Ricardo Weinstein, Ph.D.]; Frmr. Pet.'s Exh. 152 at pp. 6215-6217, 6236 [Decl. of Amado Padilla, Ph.D.].) A third expert, Pablo Stewart reached the same conclusion, relying on the opinions previously reached by Dr. Weinstein and Dr. Padilla. (Frmr. Pet.'s Exh. 158 at pp. 15-16/6289-6290.) Declarations obtained by Kathleen Culhane falsely alleged that petitioner was beaten by U.S. Border Patrol in the 1980s (Frmr. Pet.'s Exh. 68 [Decl. of Jose Leonardo Aguillar Galindo]) and subjected to brutality by Delano police officers in 1991 (Frmr. Pet.'s Exh. 117 [Decl. of Jesus Mancilla]). Drs. Weinstein and Padilla opined that those police beatings caused petitioner to relive the physical abuse he endured from his father. (Frmr. Pet.'s Exh. 151 at p. 13; Frmr. Pet.'s Exh. 152 at pp. 6215-6217.) However, the factual support upon

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[66] The factual support for petitioner's claim that he suffered from PTSD in the past has been withdrawn.

Apparently, the declarations were fraudulently obtained by Kathleen Culhane.

which these individuals relied in reaching a PTSD diagnosis - Former Petitioner's Exhibits 68, 100, 117, and 158 - has since been withdrawn. (April 22, 2008 Decl. by Michael Laurence at pp. 6-7.) Neither Antonio Puente, Ph.D., nor Francisco Gomez, Ph.D., the mental health experts retained by habeas counsel in 2007, diagnosed petitioner with PTSD. (Pet.'s RCCAP Exhs. 126 and 127.) Hence, petitioner has not adduced any expert evidence that he suffered from PTSD *in the past*. In addition, petitioner has not adduced any evidence in these proceedings that he was beaten by anyone the night of the crimes, causing him to relive his father's prior beatings, or that he otherwise suffered from PTSD *at the time of the crimes*.

Petitioner has not shown that he suffers from depression either. Only one of the five experts retained by habeas counsel to evaluate petitioner's mental health in connection with these proceedings found that petitioner was depressed *as an adult*.[67] Two of the defense experts did not diagnose him with depression. Ricardo Weinstein, a neuropsychologist, opined petitioner had exhibited "symptoms of depression" and was susceptible to mental illness, particularly depression, due to his family history but did not diagnose him as having suffered from depression. Moreover, the declarations upon which he relied have since been withdrawn (Frmr. Pet.'s

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[67] As previously discussed in response to petitioner's ninth claim (argument I (the letter, not roman numeral one)), petitioner should not be permitted to rely on declarations by Dr. Puente and Dr. Gomez (Pet.'s RCCAP Exhs. 126 and 127) to support the claims in the RCCAP. Although the mental health experts who were previously retained by habeas counsel to evaluate petitioner's mental health appear to have based their opinions, in part, on fraudulent declarations that were prepared by Kathleen Culhane, the remedy should be reconsideration of their opinions without the fraudulent information. Petitioner should not be permitted to essentially benefit from his investigator's misconduct by obtaining new psychological examinations from new experts.

Exh. 151 at p. 32.) Antonio Puente, another neuropsychologist, opined that petitioner's mother and sister suffered from depression, but he did *not* find that petitioner did. (Pet.'s RCCAP Exh. 126 at p. 21.) Two defense experts opined petitioner suffered from depression *in the past*. (Frmr. Pet.'s Exh. 152 at p. 138/6244 [Decl. of Amado Padilla, psychologist and social historian]; Frmr. Pet.'s Exh. 158 at p. 22/6296 [Decl. by Pablo Stewart, M.D.]) The fifth defense expert, Francisco Gomez, a clinical psychologist and social historian, opines that the "cumulative effect of alcoholism, violence, poverty, emotional abuse, and family history of depression" resulted in "significant depression from early childhood on through his adulthood." (Pet.'s RCCAP Exh. 127 at pp. 53-55.) However, Mr. Gomez did not diagnose petitioner with clinical depression or a major depressive episode as an adult.

Contrary to petitioner's assertion, declarations from family and friends do not show him to have been clinically depressed as an adult prior to his arrest and subsequent prosecution. (RCCAP at p. 284; see, e.g., Pet.'s RCCAP Exh. 125 at p. 6316 [coworker alleged petitioner went to bed after drinking, was calm and appeared lost in his thoughts often when he was not drinking]; Pet.'s RCCAP Exh. 103 at p. 4/5832 [alleging petitioner loved to drink and round up the mariachi band]; Pet.'s RCCAP Exh. 103 at p. 5837 [alleging petitioner liked to drink but did not become aggressive from alcohol, often he went to bed after drinking; sometimes he became sad when he thought about their home town or Gloria].)[68] Petitioner may have

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[68] Dr. Gomez purportedly reviewed numerous declarations in preparing his evaluation of petitioner (Pet.'s RCCAP Exh. 127 at p. 3). In finding petitioner to have suffered from "signficant depression" he alleged that petitioner "became depressed by thoughts of the difficult life he lived with his father, his hometown, his mother, and his former girlfriend, Gloria. Mr. Benavides's fellow farmworkers often tried to cheer him up by

(continued...)

experienced situational depression at times, such as upon his break up with his first love, Gloria (Pet.'s RCCAP Exh. 123 at pp. 4-5), or upon the death of a newborn girl in 1982 and upon the death of a newborn son in 1985 (Pet.'s RCCAP Exh. 96 at pp. 1-4 [Decl. by Juana Flores Rivera]), but that is not the same as being clinically depressed. Notably, members of petitioner's family alleged that his sister Enedina Benavides Figueroa suffered from depression, but they did not claim petitioner ever did. (Pet.'s RCCAP Exh. 111 at p. 10 [Decl. by petitioner's niece Pati Yanez Benavides also alleged that petitioner's brother Cecilio had symptoms of depression, but never claimed petitioner did]; Pet.'s RCCAP Exh. 121 at pp. 17-18 [Decl. by petitioner's sister].)

Moreover, there is no evidence petitioner labored from clinical depression *at the time he killed Consuelo*. The key diagnostic criterion for major depressive disorder is the presence of a major depressive episode.

> There are nine symptoms that define a major depressive episode. Of the nine, at least five must have been present during a 2-week period. They must represent a change from previous functioning and they must cause significant impairment in daily functioning. At least one of the five symptoms must be either the first or the second symptom in the following list:
>
> 1. Depressed mood most of the day, nearly every day.

(...continued)
convincing him to drink more beer, but this usually served to push him deeper into depression. In times like these, Mr. Benavides usually went to bed early, but simply lay awake, lost and alone in his thoughts." (Pet.'s RCCAP Exh. 127 at pp. 53-54.) However, he does not identify the declarations or other evidence that support his conclusion petitioner suffered from significant depression. (*Id.* at pp. 53-54.) To the extent his opinion is based on the declarations just cited by petitioner, it supports respondent's argument about the paucity of evidence petitioner was diagnosed with clinical depression or suffered a major depressive episode.

2. Reduced interest or pleasure in all or almost all activities.

3. Significant weight loss or weight gain, or a significant decrease or increase in appetite.

4. Trouble sleeping or sleeping too much.

5. Psychomotor agitation or retardation.

6. Fatigue or loss of energy.

7. Feeling worthless or guilty in an excessive or inappropriate manner.

8. Problems in thinking, concentrating, or making decisions.

9. Recurrent thoughts of death, suicidal ideation, specific suicidal plan, or a suicide attempt.

(*People v. Sorden* (2005) 36 Cal.4th 65, 76, fn. 1, citing 1 Encyclopedia of Mental Health (Academic Press 1998) pp. 735-736 [dsn. Opn by J. Kennard].) Petitioner did not exhibit any of these symptoms on November 17, 1991, let alone the requisite five which are necessary for a diagnosis of a major depressive episode. To the contrary, the night before the crime, petitioner and Estella allegedly had sexual relations. (13RT 2542, 2608, 15RT 2997.) The next morning, petitioner worked. (13RT 2614.) Unable to pick grapes due to bad weather, petitioner spent about two and a half hours removing labels from boxes instead. (13RT 2543, 2614, 2616.) That afternoon, petitioner ran errands with Estella and Consuelo (13RT 2618), and he played pool with coworkers at the hotel in MacFarland in the early evening. (13RT 2621.) Petitioner cooked eggs for dinner that night. (11RT 2187.) Notably, Estella Medina, Cristobal Aguillar Galindo and Jose Jesus Davalos peeled labels off of boxes with petitioner that morning, and Davalos played pool with him that night. However, they do not contend that petitioner was depressed or suffering

from posttraumatic stress disorder then. (Pet.'s RCCAP Exh. 125 at p. 7 [Decl. by Mr. Jesus Davalos]; Pet.'s RCCAP Exh. 103 at p. 11 [Decl. by Mr. Aguilar Galindo]; Pet.'s RCCAP Exh. 66 at p. 2 [Decl. by Estella Medina].)

Just as there is no evidence petitioner was clinically depressed or suffered from PTSD at the time of the crimes, respondent has not found, and petitioner has not cited, any evidence from trial that his actions were impaired by alcohol consumption. (Frmr. Pet.'s Exh. 151 at p. 28/6100 [Decl. of Ricardo Weinstein].) Indeed, petitioner does not contend otherwise, nor has he adduced any evidence in these proceedings to that effect.

Moreover, even if there were evidence that petitioner suffered from depression, PTSD and alcohol dependency in November of 1991, defense counsel was tactically justified in not pursuing and presenting such evidence as this evidence may have hurt his case rather than helped it.

> A tactical decision not to pursue and present mitigating evidence on the grounds that it is double-edged in nature is objectively reasonable, and therefore does not amount to deficient performance.

(*In re Andrews*, *supra*, 28 Cal.4th at p. 1257, quoting *Rector v. Johnson* (5th Cir. 1997) 120 F.3d 551, 564.) Evidence that petitioner was emotionally unstable, dissociative and addicted to alcohol would conflict with his defense at the guilt phase that he had not committed the crimes and could cause the jury to believe that putting him to death was the only appropriate and safe punishment. Additionally, potential mitigation evidence such as brain damage and a troubled childhood "is double-edged in the sense that, while it does explain where the defendant has come from and how he got to be the way he is, it also has the potential to not only eliminate any lingering doubts jurors might have had as to the defendant's guilt, but also to strengthen their perception that sparing his life will

enhance the danger to society, a consideration that empirical data indicate will weigh heavily in the penalty jury's decision." (White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants* (2004) 102 Mich. L. Rev. 2001, 2035.) Finally, a defense shift during the penalty phase from "I didn't do it" to "here's why I did it" would have likely reduced the effectiveness of petitioner's lingering doubt argument. (19RT 3793-3802 [counsel Harbin's lingering doubt argument at penalty phase]; *State v. Harris* (Mo. 1994) 870 S.W.2d 798, 816 ["[t]he injection of evidence of a mental disease or defect during the penalty phase risks alienating a jury that has consistently heard a different theory of the case during the guilt phase"]; White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 357 ["it 'does not work' to put on a 'he didn't do it' defense at the guilt stage and then a 'he's sorry he did it' defense at the sentencing stage"].) Thus, for the foregoing reasons counsel was not deficient for failing to investigate and present evidence relating to petitioner's alleged depression, posttraumatic stress disorder and alcohol dependency.

f. Assuming counsel was deficient, petitioner suffered no prejudice from counsel's failure to present evidence of his alleged depression, posttraumatic stress disorder and alcohol dependency during the guilt or penalty phases

(1) Guilt Phase

Assuming, without conceding, that defense counsel was deficient for not adequately investigating and presenting evidence of petitioner's alleged PTSD, depression and alcohol dependency, such error was not prejudicial at the guilt phase. Notably, petitioner does not allege that PTSD, depression or alcohol dependency prevented him from forming the intent to commit the charged offenses. (RCCAP at p. 287.) Rather, he alleges these

impairments bore on "his behavior at the time of the incident," while in the hospital, and during the interrogation, and provided compelling mitigation evidence at the penalty trial. (*Ibid.*) Petitioner's argument presupposes that defense counsel could have found and presented evidence of a legitimate mental impairment. (RCCAP at p. 286, claim M14e.) However, as argued above, petitioner has failed to establish that he suffered from depression, PTSD or was intoxicated at the time of the crimes. Likewise, there is no evidence that he was clinically depressed, intoxicated or suffering from PTSD at the hospital or at the police station when he talked to the police. (See, e.g., Pet.'s RCCAP Exh. 104 at p. 9; Pet.'s RCCAP Exh. 98 at pp. 4-5 [Nicho and Celia Campos allegedly talked to petitioner the morning he was arrested; neither asserted that he was depressed in the declarations they submitted on his behalf].) Thus, petitioner has failed to demonstrate a reasonable probability that he would have obtained a more favorable outcome but for counsel's failure to investigate and present evidence of his supposed mental impairments at the guilt phase.

(2) Penalty Phase

Counsel's failure to investigate and present evidence of petitioner's alleged PTSD, depression and alcohol dependency at the penalty phase was not prejudicial either. As previously discussed, petitioner has not adduced any expert testimony that he suffers from PTSD. Only one of the five experts retained by habeas counsel to evaluate his mental health alleged that he suffered from depression as an adult (Pet.'s RCCAP Exh. 127 at pp. 53, 55), and only one suggested that petitioner's "cognitive deficits and mental disorders" were a mitigating factor pursuant to section 190.3, subdivisions (d) and (h). (Frmr. Pet.'s Exh. 158 at p. 6296 [Decl. by Pablo Stewart].) Mr. Padilla concluded petitioner remained non-violent and "maintained a kind heart and a willingness to give hope and trust to his family" despite a lifetime of suffering. (Frmr. Pet.'s 152 at p. 6245; see also Pet.'s RCCAP

Exh. 127 at p. 55 [Mr. Gomez opined that petitioner came through unending physical and emotional abuse as a peaceful and loving person, never resorting to violence, even in the midst of physical attacks against his mother].) Mr. Weinstein did not offer an opinion as to the potential mitigating effects of these problems (Frmr. Pet.'s Exh. 151 at pp. 6103-6105), nor did Mr. Puente (Pet.'s RCCAP Exh. 126 at p 22) nor did Mr. Gomez. (Pet.'s RCCAP Exh. 127 at p. 54.) Furthermore, evidence that petitioner suffered from PTSD, depression and alcohol dependency would have strengthened the People's case for the death penalty because it showed petitioner to be a danger to society, giving additional credence to defense expert Dr. Baumer's conclusion that the most likely scenario to explain Consuelo's injuries is that she was "abused by someone in a rage." (14RT 2865.) Finally, there is not a reasonable probability that petitioner would have received a life sentence but for defense counsel's failure to present evidence of petitioner's mental health (cognitive deficits and the other mitigating evidence to be discussed, *post* in Claim M16), given the strong aggravating evidence that was presented by the prosecution, as previously set forth in subheading C of this argument.

15. Failure to show petitioner was not a future danger at the penalty phase

Petitioner contends defense counsel was prejudicially deficient for failing to present evidence he did not present a future danger to society if given life without the possibility of parole because he has always been a model prisoner with no disciplinary offenses. (RCCAP at p. 288, claim M15.) Respondent disagrees.

Since respondent filed the 2002 Informal Response in this case, petitioner has submitted documentary evidence in support of his claim. A one-page document entitled "San Quentin Initial Classification Review" alleges petitioner was cooperative and did not pose a threat to staff or other

inmates while incarcerated in Kern County according to someone in the Sheriff's Department there. (Pet.'s RCCAP Exh. 136 at p. 6464.)[69] Co-counsel Harbin allegedly failed to present evidence that petitioner was a model prisoner at the Lerdo detention facility because counsel Huffman allegedly did not alert him to the benefits of this testimony. (Pet.'s RCCAP Exh. 65 at p. 5354.) The declaration from defense counsel Huffman neither confirms nor denies Harbin's assertion. (Pet.'s RCCAP Exh. 64.) Thus, petitioner has not adduced the documentary evidence necessary to support his claim. Moreover, counsel had a tactical reason not to present this evidence. Petitioner was single-celled and in protective custody the entire time he was housed at the Lerdo detention center. Thus, the probative value of his "good behavior" was limited. Moreover, evidence about his incarceration pending trial was potentially damaging to the extent child molesters are housed separately from the general jail population to protect their safety, highlighting the seriousness of petitioner's crimes.

Even assuming, but not conceding, that counsel unreasonably failed to present evidence of petitioner's good behavior during his solitary confinement at the Lerdo detention center, this omission was not prejudicial. There is not a reasonable probability that petitioner would have obtained a more favorable outcome but for counsel's failure to present that evidence.

16. Failure to present mitigating evidence at the penalty phase

Petitioner alleges defense counsel was deficiently prejudicial for not investigating and presenting compelling mitigation evidence regarding petitioner's background, social and cultural history and mental illnesses at

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[69] Petitioner has still not produced the actual records from the Lerdo detention facility for the period of time he was housed there.

the penalty phase. (RCCAP at pp. 288-303; claim M16.) Respondent disagrees.

Respondent addressed defense counsel's alleged failure to adequately investigate petitioner's cognitive deficits, including mental retardation, and supposed psychological conditions, including depression, posttraumatic stress disorder and alcohol dependency in argument M14. Rather than renewing prior arguments, respondent addresses the alleged mitigating evidence concerning petitioner's background and childhood.

"In a preparation for the penalty phase of a capital murder trial, counsel has an 'obligation to conduct a thorough investigator of the defendant's background.'" (*People v. Doolin*, *supra*, 45 Cal.4th 390, citing *Williams v. Taylor*, *supra*, 529 U.S. at p. 396, and *Wiggins v. Smith* (2003) 539 U.S. 510, 522.) The United States Supreme Court has stated,

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.

(*Wiggins v. Smith*, *supra*, 539 U.S. at pp. 521-522, quoting *Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691; *In re Thomas*, *supra*, 37 Cal.4th at p. 1258.)

In assessing counsel's investigation, this Court "must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms,' [citation], which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's

perspective at the time, [citation]." (*Wiggins v. Smith*, *supra*, 539 U.S. at p. 523.)

a. Background

The record in this case shows the defense investigated petitioner's childhood and background. Counsel Harbin spoke with petitioner at jail and asked for names of potential witnesses. (Pet.'s RCCAP Exh. 108 at p. 3/5908 [Decl. by Victor Almaraz].) Petitioner's niece and brother also gave the defense names of potential witnesses. (Pet.'s RCCAP Exh. 65 at p. 7/5351 [Decl. by Mr. Harbin].) Mr. Harbin directed Mr. Almaraz to obtain information about petitioner's character, background and to find out what petitioner was like growing up. (Pet.'s RCCAP Exh. 108 at p. 1/5906 [Decl. by Mr. Almaraz]; accord Pet.'s RCCAP Exh. 90 at p. 8 [Petitioner's cousin purportedly contacted for background information].)

Co-counsel Harbin had Mr. Almaraz track down witnesses in Mexico by telephone. (Pet.'s RCCAP Exh. 65 at p. 7/5351; Pet.'s RCCAP Exh. 108 at p. 2/5907.) Other than petitioner's niece, Pati, Mr. Almaraz does not name the individuals he contacted *in Mexico*. (Pet.'s RCCAP Exh. 108 at p. 3.) However, declarations submitted by petitioner acknowledge that family members in Mexico were contacted by the defense. (See, e.g., Pet.'s RCCAP Exh. 90 at p. 8 [Decl. by Elena Benavides Rodriguez alleged that the defense contacted her daughter, Maria Elena Acevedo Benavides (petitioner's cousin) for background information]; Pet.'s RCCAP Exh. 91 at p. 23 [Decl. by petitioner's aunt, Josefina Benavides, alleges the defense contacted her daughter Rosario].)

The defense also contacted family members and coworkers in California. Ms. Huffman had a meeting in her office with "petitioner's family and friends." (Pet.'s RCCAP Exh. 107 at p. 2/5902 [Decl. by Alfred Hernandez].) Mr. Almaraz contacted petitioner's boss, Delifino Trigo and petitioner's mother several times while she was in Delano. (Pet.'s RCCAP

Exh. 107 at p. 2/5902 [Decl. by Alfred Hernandez].) He also contacted Dionicio (Nicho) Campos and his wife Celia. (Pet.'s RCCAP Exh. 98 at p. 7 [Decl. by Celia Campos]; and Pet.'s RCCAP Exh. 104 at p. 11 [Decl. by Dionicio (Nicho) Campos].)

Prior to trial, co-counsel Harbin gave the prosecutor a three-page list of potential witnesses for the penalty phase, many of whom shared petitioner's last name. (1RT 84; 1Supp.CT 68-70 [list of proposed defense witnesses].) The letter listed 60 individuals[70]: Alberto Benavides, Maria Figueroa de Benavides, Manuel Benavides Figueroa, Cecilio Benavides Figueroa, Evaristo Benavides Figueroa, Jesus Benavides Figueroa, Juan Benavides Figueroa, Enedina Benavides Figueroa, Joel Benavides, Gloria Covarrubias, Nelida Benavides, Juana Flores, Josefina Benavides, Maria Benavides, Margarita Benavides, Maria Elena Benavides, Herminia Benavides, Tiburcio Benavides, Ignacio Benavides, Josefina Palomino Benavides, Refugio Palomino Benavides, Rosario Palomino Benavides, Maria Elena Benavides de Acebedo [*sic*], Juan Acevedo Benavides, Felipe Acevedo Benavides, Gloria Acevedo Benavides, Marta Acevedo Benavides, Maria de la Luz Acevedo Benavides, Alicia Acevedo Benavides, Esperanza Acevedo Benavides, Marisol Acevedo Benavides, Juan Benavides, Ignacio Benavides, Cecilio Benavides, Maria Benavides, Lucia Benavides, Mercedes Benavides, Cruz Benavides, Catarina Benavides, Maria Benavides, Juan Benavides, Crecenciano Benavides,

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[70] Mr. Harbin alleged there was a list of 77 witnesses. (1RT 84; accord Pet.'s RCCAP Exh. 65 at p. 5352 [Decl. by Mr. Harbin].) The prosecutor estimated that the letter contained forty or fifty names (1RT 38, 84). In addition to the three-page list of proposed witnesses for the penalty phase, Mr. Harbin proposed calling six additional witnesses at the guilt phase: Delfino Trigo, Carlos and Antonio Duran, Lupe and Patricia Benavides, and Armando Navarette Benavides. (Pet.'s RCCAP Exh. 6 at pp. 2608-2610 [April 9, 1993 letter from Mr. Harbin to prosecutor].)

Micaela Benavides, Blandina Benavides, Marta Benavides, Jose Benavides, Juana Benavides, Valente Aguilar Benavides, Leoncio Aguilar Benavides, Sergio Aguilar Benavides, Rosa Aguilar Benavides, Maria Luisa Aguilar Benavides, Refugio Reyes, Fausto Rodriguez, Luis Reyes, Deloros Reyes, Ignacio Murgia, Edelmira Murgia, Maria de la Pas Castaneda Villaluazo, Lorenzo Villaluazo Naranno. (1Supp.CT 68-70.)

Mr. Harbin informed the court and prosecutor he had made contact, directly or indirectly, with each of these individuals and that each had information for the penalty phase. (1RT 84, 86; see also Pet.'s RCCAP Exh. 6 at pp. 2608 [Mr. Harbin alleged he had contacted "seventy someodd people concerning Vicente" in letter to prosecutor listing proposed guilt phase witnesses].) The court cautioned Mr. Harbin that he

> might want to give a little further thought to [the] list of potential witnesses for the penalty phase. I'm not sure if competent counsel really intends or thinks that he or she might call this many people and I'm concerned about what kind of reaction subliminal or otherwise our potential jurors might have when they see a list that long. And I can kind of feel the same way about the People's motion [list of 100 proposed witnesses] although at least they are scattered among Delano Regional Medical Center, Kern Medical Center and UCLA.

(1RT 46.) Mr. Harbin ultimately decided not to voir dire the jury about the list of potential witnesses at the penalty phase given that they were mostly from out of state anyway. Mr. Harbin also further informed the court he was considering "two or three" strategies for how to proceed in the penalty phase based on petitioner's background and the nature of the evidence presented. (1RT 87.) Mr. Harbin stated he would not decide how to proceed at the penalty phase until the defense had gotten through the guilt phase. Then, he would pursue "one of three directions." (*Ibid.*)

As previously discussed, two witnesses ultimately testified at the penalty phase: petitioner's longtime friend Nicho Campos, who grew up

with petitioner on the same rancho in Mexico, and Delfino Trigo, petitioner's employer and friend. (19RT 3753, 3761, 3763.)[71] The mitigating evidence presented at the penalty phase showed that petitioner was calm and non-violent throughout his life (19RT 3757, 3763), a hard worker and very decent person (19RT 3758, 3762), who did not have any prior incidents of violence, threats of violence, or convictions prior to this case (19RT 3767). Defense counsel Harbin argued petitioner's crimes were mitigated by the following: (1) the circumstances of the charged crimes, (2) petitioner did not have prior criminal activity, (2) he did not have any prior felony convictions, (4) he was 42 when he committed the charged offenses, and (5) he is a man of good character. (19RT 3789-3792.) In connection with the first factor, defense counsel argued there were lingering doubts in this case which weighed in favor of a life sentence. (19RT 3793-3801.) Counsel further argued that petitioner would not be rewarded with a verdict of life imprisonment. (19RT 3816-3817.)

Based on the foregoing, petitioner has not shown that the investigation conducted and evidence presented by defense counsel was objectively unreasonable.

b. Petitioner's ineffective assistance of counsel claim should be rejected because it is not supported by the necessary documentary information

Petitioner's claim of ineffective assistance of counsel is deficient because it is not supported by the necessary documentary support. The instant petition and exhibits contain no declaration from petitioner and therefore *no information at all* about what he told his counsel regarding his

[71] Defense counsel Harbin purportedly paid to fly a witness from Texas out of his own pocket, but he does not provide the name of that witness or state whether the witness actually testified. (Pet.'s RCCAP Exh. 65 at p. 2.)

family, socioeconomic, medical history and alleged history of abuse. As discussed above, declarations from co-counsel Harbin, Mr. Almaraz, and some of petitioner's family and friends show that some investigation was conducted with regard to petitioner's background and childhood.

Mr. Harbin alleges that he and counsel Huffman did not interview "numerous" family members and other persons familiar with petitioner's social and mental health history. (Pet.'s RCCAP Exh. 65 at p. 7/5351.) He claims they did not investigate "the multi-generational history of mental illness and abuse, [petitioner's] exposure to neurotoxins and alcohol from an early age, the severe physical and psychological abuse inflicted on him and his family by his father, and as a young child, the effects of poverty and neglect, and his mental impairments and cognitive deficits." (*Ibid.*) He acknowledges he was responsible for the penalty phase but attributes his failure to investigate these matters to inexperience, a lack of direction from lead counsel Huffman, and to Ms. Huffman's alleged failure to obtain more investigative funds. (*Id.* at pp. 8-9/5352-5353.) Notably, Ms. Huffman's declaration neither addresses Mr. Harbin's assertions nor otherwise discloses the nature of her discussions with Mr. Harbin concerning investigation for the penalty phase. It is also remarkably silent as to what requests were made and obtained for investigative funds. (Pet.'s RCCAP Exh. 64.) Without knowing that or what petitioner told counsel regarding his background, petitioner essentially asks this Court to speculate that counsel was in fact deficient for failing to investigate and present evidence about petitioner's personal history. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 691 ["the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions" and "what investigation decisions are reasonable depends critically on such information"]. This Court should decline to do so and should reject

petitioner's claim for lack of evidentiary support. (*People v. Duvall*, *supra*, 9 Cal.4th at pp. 474-475.)

In any event, petitioner's claim is based on speculation and conclusory opinion. Such pleading is insufficient grounds for relief. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1241, fn. 38; *People v. Karis*, *supra*, 46 Cal.3d at p. 656.) For example, Mr. Harbin asserts that "many witnesses" were not available by telephone and that "a wealth of mitigation information would have been discovered" had an investigator traveled to Mexico. (Pet.'s RCCAP Exh. 65 at p. 5351.) However, Mr. Harbin does not identify any of these individuals by name, identify the significance of their proposed testimony, state why they were unavailable by telephone, or shown that the unavailable witnesses would have been accessible had an investigator gone to Mexico. Mr. Harbin also fails to establish that the type of evidence that allegedly would have been obtained by going to Mexico was not already available by other means. Petitioner has the burden of proving ineffective assistance of counsel as "'a demonstrable reality and not [as] a speculative matter.'" (*People v. Karis*, *supra*, 46 Cal.3d at p. 656.) Reasonable and informed decisions about how far to pursue particular lines of investigation are not incompetent simply because the investigation could have been more complete or exhaustive. (*People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1244, 1250, 1252-1253; see also *Burger v. Kemp* (1987) 483 U.S. 776, 788-794.)

Petitioner's contention that co-counsel Harbin unreasonably failed to contact 77 witnesses who could have testified at the penalty phase is likewise speculative. (RCCAP at p. 289, claim M16.) Petitioner fails to identify the 77 witnesses or specify what, if any mitigating evidence, each had to offer. (*Ibid.*) Presumably, one of the witnesses included his mother, as petitioner asserts that co-counsel Harbin unreasonably failed to call her

as a witness under the, in his mind, *false pretense* she was suffering from a nervous breakdown. (RCCAP at p. 290.) Respondent has not found and the RCCAP does not cite any evidence in the record as to the reason defense counsel elected not to call petitioner's mother as a witness. (*Ibid.*) A declaration which has been withdrawn apparently due to Kathleen Culhane's fraudulent work product alleged petitioner's mother was not called as a witness because she was having a nervous breakdown. (Frmr. Pet.'s Exh. 73 [Decl. by Mr. Almaraz].) However, the replacement declaration does not indicate why this witness was not called. (Pet.'s RCCAP Exh. 103 at p. 5908.) Petitioner's mother was excluded from the courtroom on the ground she was a potential witness. (1Supp.CT 68; 16RT 3298 [she was also listed as a proposed penalty phase witness].) Defense counsel Harbin's declaration does not explain his failure to call her at trial. (Pet.'s RCCAP Exh. 65.) However, defense counsel had a tactical reason for not calling her as a witness. When petitioner testified, he contended he did not recall telling his mother that Consuelo had been run over by a car. (15RT 3058, 3060.) Petitioner's mother, had she been called as a witness, would have refuted petitioner's testimony or been impeached with her prior statement that petitioner claimed Consuelo may have been run over by a car. (Pet.'s RCCAP Exh. 4 at p. 2136.) During the guilt phase, petitioner's cousin Hector Figueroa conceded on cross-exam that petitioner had told him "they" found Consuelo on the street thrown and he [petitioner] thought she had been hit by a car. (16RT 3296, 3298.) Surely defense counsel did not want this harmful information before the jury again.

Petitioner further alleges that counsel lacked a strategic reason for failing to call "the numerous witnesses available and willing to testify on his behalf." (RCCAP at p. 290.) Petitioner has not identified which witnesses allegedly should have been called by defense counsel, shown that the absent witnesses were among the names of individuals he and his

family asked counsel to contact (1Supp.CT 68-70 [list of 60 proposed penalty phase witnesses]), identified the relevant information that each allegedly would have provided, shown that the absent witness had not been previously asked to testify at trial (see, e.g., Pet.'s RCCAP Exhs. 122, 123), or shown that the absent witness's unavailability was attributable to inadequate investigation by the defense. For example, some of the declarants who claim they would have testified on petitioner's behalf were not aware of the nature of the charges against petitioner and may have been unwilling to testify had they been privy to that information (Pet.'s RCCAP Exh. 95 [Decl. by petitioner's daughter Nelida Benavides Flores does not relate nature of charges against petitioner]; Pet.'s RCCAP Exh. 94 at pp. 6, 8 [Ana Maria Cordero Cardenas de Davalos was in Mexico when she learned there had been an "accident," Consuelo had died and petitioner was being blamed; she did not believe petitioner hurt or abused Consuelo].) Others' ill health may have impeded travel to the U.S. (Pet.'s RCCAP Exh. 90 at pp. 1, 9 [Petitioner's aunt Elena Benavides Rodriguez suffered from Parkinson's disease and would have been 93 at the time of trial]; Pet.'s RCCAP Exh. 121 at p. 19 [Petitioner's sister Enedina claims she would have testified had she been asked], but see Pet.'s RCCAP Exh. 111 at p. 11 [contradicting the notion that Enedina would have been able to travel; Enedina's daughter, Norma Patricia [Pati] Yanez Benavides said her mother suffered from anxiety and depression and required both daughters' attention "a lot of the time"].) Others purportedly did not have a VISA for travel to the U.S. (Pet.'s RCCAP Exh. 112 at p. 8; Pet.'s RCCAP Exh. 121 at p. 19) and/or could not afford to travel to the U.S. to testify at their own expense (Pet.'s RCCAP Exh. 90 at p. 9; Pet.'s RCCAP Exh. 65 at p. 8 [Mr. Harbin alleges only a few witnesses could afford to travel from Mexico at their own expense].) Petitioner also fails to show that witnesses who were not called by defense counsel had information that was not too

remote in time. Specifically, between 1985 and 1993, petitioner worked in Kern County as a farm worker for six months at a time and then returned to Mexico in the off season. (Prob. Report [filed June 11, 1993] at pp. 3, 5; see also Pet.'s RCCAP Exhs. 92 at p. 9 [alleging petitioner began going to the U.S. to work in the 1980s]; Pet.'s RCCAP Exh. 102 at pp. 1, 3 [alleging petitioner started going to the U.S. in 1981 or 1982 (when declarant was 16 or 17 years old)]; Pet.'s RCCAP Exh. 96 at pp. 1-2 [alleging petitioner went to the U.S. to work in 1985]; and Pet.'s RCCAP Exh. 138 at p. 6473 [petitioner adjudicated temporary resident on Oct. 19, 1988].) Many of the declarations from petitioner's family and friends do not specify the years they had contact with petitioner or when their last contact with him was. Other declarants appear to have strengthened, if not forged, their relationship with petitioner since his incarceration (Pet.'s RCCAP Exh. 97 at pp. 1, 5 [Maria Elena Acevedo Benavides purportedly "got to know" and became friends with petitioner based on two contacts in 1990; they allegedly "remained in close contact" through letters and occasional telephone calls "since he's been imprisoned"]; Pet.'s RCCAP Exh. 98 at p. 3, Pet.'s RCCAP Exh. 96 at pp. 1-2, 4; and Pet.'s RCCAP Exh. 99 at p. 5 [Petitioner's daughter Nelida alleges petitioner has written to her since she was "a young girl" but they lost touch after she moved in 1991; they resumed contact through correspondence sometime after that but she does identify the year that occurred], but see Pet.'s RCCAP Exh. 96 at pp. 2-4 [Juana Flores Rivera indicates petitioner only saw their daughter Nelida sporadically between 1985-1991; Ignacio Padilla contacted Juana on petitioner's behalf a few years after she moved to Ensenada] and Pet.'s RCCAP Exh. 99 at pp. 5-6 [Ignacio Padilla was purportedly not contacted by the defense about petitioner's trial and was "shocked" when he heard of petitioner's convictions; thus, Padilla had to have contacted Juana post-trial].)

Petitioner further alleges the investigation conducted by Mr. Almaraz was inadequate. (RCCAP at pp. 290-291.) For support he alleges that the Mr. Almaraz was not a trained investigator and only billed the court for interpretative services not investigative services. (Pet.'s RCCAP Exh. 108 at pp. 1, 4.) However, petitioner fails to support his claim with records of the billing that was submitted for Mr. Almaraz's work in the case. Petitioner also alleges that Mr. Almaraz only obtained contact information for witnesses. This claim is invalid as demonstrated in subheading A of this argument. In addition, petitioner complains that Mr. Almaraz did not prepare written reports of witness interviews. However, Mr. Almaraz gave Mr. Harbin verbal reports following his interviews, and Mr. Harbin was present for some of the interviews and took his own notes. (Pet.'s RCCAP Exh. 108 at p. 1/5906; Pet.'s RCCAP Exh. 6 at p. 2608.) Moreover, this arrangement permitted Mr. Harbin to avoid discovering witness reports, as his notes would have been protected as attorney work product. (Pet.'s RCCAP Exh. 6 at p. 260 [Mr. Harbin provided addresses and phone numbers for proposed guilt phase witnesses and summarized their proposed testimony as follows: "known Vicente forever. no knowledge of him ever doing this before. likes him. friendly. hard worker. don't believe he did this. wants to testify on his behalf."].) This arrangement was also consistent with Mr. Harbin's tactical decision to delay providing discovery about proposed defense witnesses. Mr. Harbin filed a motion to prevent discovery of potential penalty phase witnesses until the close of the guilt phase (2CT 443-448) and successfully objected to the prosecutor's March 13, 1993 request for that discovery before then. (2CT 458.) (See also Pet.'s RCCAP Exh. 6 at pp. 2608-2609 [Mr. Harbin purportedly "hope[d]" [his letter disclosing potential guilt phase witnesses] would "in some small way satisfy [the prosecutor's] discovery jones" and opined that some of the

witnesses may already be "in transit" to Bakersfield for their court appearance].)

Petitioner further alleges that a minimally competent investigation would have revealed compelling facts in mitigation for the penalty phase, including: (1) petitioner's family history included mental illness, alcoholism, extreme poverty, malnutrition, physical and psychological abuse and petitioner's mental functioning was compromised by his parents' multigenerational history of impoverishment, mental impairments, alcoholism and violence; (2) petitioner's father was mentally unstable, abused alcohol and terrorized family members; (3) petitioner was extremely poor and did not have running water, electricity, or sufficient food as a child; (4) petitioner was forced to work long hour in the fields; (5) he was exposed to neurotoxins as a child; (6) he suffered from severe physical and emotional abuse from his father; (7) petitioner's father abused his mother; (8) petitioner tried to protect his mother from his father's beatings and was consequently abused by his father; (9) petitioner sustained head trauma; (10) petitioner suffered a lifelong affliction of alcoholism; (11) petitioner suffered from post traumatic stress disorder and significant depression from early childhood on throughout his adulthood; (12) petitioner has significant cognitive deficits, (13) petitioner worked hard and respected his father despite his father's abuse; (14) petitioner has a long history of being caring and loving toward his children, girlfriend's children, and children in his extended family, and acted as a father towards his nieces, Pati and Leti; and (15) Consuelo's death caused petitioner to relive the trauma he suffered (in the 1980s) from losing two newborns – a daughter died because she was born premature; a son died from bronchopneumonia. (RCCAP at pp. 292-303, claim M16.)

In many instances, petitioner fails to provide supporting documentation as proof that his background is what he claims it was. For

example, petitioner claims he suffered serious head trauma. (RCCAP at p. 300.) He alleges that as a toddler, he was knocked over by an animal, hitting his head on a rock. (*Ibid.* citing Pet.'s RCCAP Exh. 127 at p. 6383 [Decl. by Francisco Gomez].) However, Dr. Gomez does not identify the source of this information or describe any injuries allegedly incurred by the fall [other than saying petitioner's mother waived something in front of his nose to ease his alleged "dizziness"]. Petitioner further claims to have been thrown from wild horses and bulls as a "young boy," but has not adduced any evidence of a head injury that left him mentally impaired. (RCCAP at p. 300.) Petitioner allegedly rode bulls with his cousin when they were 12 or 13. (Pet.'s RCCAP, Exh. 122 at p. 5.) His cousin alleges that "they" often felt dizzy and confused following falls, when they were 15 or 16 and petitioner was in Secondaria, they began riding in a bull ring. (*Id.* at p. 3.) One time, petitioner allegedly fell off a bull onto the ground in the bull ring onto the hard packed dirt, landing on his side, at which time his legs, side, shoulder and finally the side of his head hit the ground hard. (*Id.* at p. 5.) However, he does not state when this occurred, identify any head injuries associated with the fall or lasting repercussions from it, let alone allege that if left him mentally impaired. (*Ibid.*) Petitioner's assertion that he "suffered a significant head injury in a serious car accident in the 1990s is similarly without support. (RCCAP at p. 300.) Petitioner's cousin Maria Elena Acevedo Benavides alleges that her mother cared for petitioner after he was involved in a car accident. However, she does not describe the nature or duration of the care provided, state when the accident took place, describe any injuries incurred by petitioner, or allege that petitioner suffered any let alone lasting mental impairments from it. (Pet.'s RCCAP Exh. 97 at p. 5715.) Moreover, the declaration by her mother does not even reference the incident. (Pet.'s RCCAP Exh. 90 at pp. 1-9 [Decl. by Elena Benavides Rodriguez].) In light of the lack of supporting documentation,

trial counsel was not deficient for failing to present evidence or information which petitioner has not substantiated himself in these proceedings.

In short, petitioner asks this Court to find his trial counsel constitutionally ineffective based on unsupported allegations. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 691 ["the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions" and "what investigation decisions are reasonable depends critically on such information"].) This Court should decline petitioner's invitation and deny his claim at the outset as being based on deficient information.

c. Assuming counsel was deficient, petitioner suffered no prejudice at the penalty phase

Assuming, without conceding, that counsel was deficient at the penalty phase for not adequately investigating and presenting petitioner's family and personal history, such error by counsel was not prejudicial. Petitioner alleges that the foregoing evidence could have explained petitioner's actions on the night of the incident and been used to prove a lingering doubt theory. (RCCAP at p. 303.)

As stated in argument M14, potential mitigation evidence such as brain damage and a troubled childhood is "double-edged" in the sense that, while it explains where the defendant has come from and how he got to be the way he is, it also has the potential to strengthen the jury's perception that sparing his life will enhance the danger to society. (White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, *supra*, 102 Mich. L. Rev. 2001, 2035.) A defense shift during the penalty phase from "I didn't do it" to "here's why I did it" would have likely reduced the effectiveness of petitioner's lingering doubt argument. (19RT 3793-3802 [counsel Harbin's lingering doubt argument at penalty phase]; *State v. Harris*, *supra*, 870 S.W.2d at p. 816 ["[t]he injection of

evidence of a mental disease or defect during the penalty phase risks alienating a jury that has consistently heard a different theory of the case during the guilt phase"]; White, *supra*, 1993 U. Ill. L. Rev. at p. 357 ["it 'does not work' to put on a 'he didn't do it' defense at the guilt stage and then a 'he's sorry he did it' defense at the sentencing stage"].) Due to the aggravated nature of the crime, there is not a reasonable probability that the jury would have imposed a life term, but for counsel's failure to present evidence concerning petitioner's background, including his poverty, physical abuse, and exposure to pesticides.

In sum, petitioner has not demonstrated that defense counsel unreasonably failed to present more mitigating evidence at the penalty phase or that he was prejudiced thereby. Therefore, he is not entitled to habeas relief on that basis.

17. Failure to preserve his rights under the Vienna Convention

Petitioner claims defense counsel deficiently and prejudicially failed to preserve his rights under the "Vienna Convention" to the assistance of the Mexican consulate. (RCCAP at pp. 304-305, claim M17.) Respondent disagrees for the reasons set forth in response to petitioner's twenty-fourth claim, Argument X (the letter).

18. Failure to object to various evidence and other things

Petitioner claims defense counsel unreasonably failed to object to various evidence which he baldly asserts was irrelevant, unreliable and prejudicial. (RCCAP at pp. 305-307, claims M18 a-e, and j.) He further faults defense counsel for not objecting to two unlawful searches of Estella's apartment, and to the prosecutor's improper questioning of petitioner, use of leading questions, and failure to give notice of proposed victim impact evidence. (*Id.* at pp. 307-308, claims M18f, g and h, k, and i,

respectively.) Finally, he contends defense counsel was ineffective for withdrawing a request to give CALJIC No. 2.09a.[72] (*Id.* at pp. 308-309, claim M18l.)

Petitioner has the burden to set forth facts supporting his allegations with particularity. Vague or conclusory allegations do not warrant habeas relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *People v. Karis*, *supra*, 46 Cal.3d 612, 656.)

Petitioner has not set forth claims M18 a-e, and j with particularity and they should all be rejected on that basis. Petitioner claims that his counsel should have objected to the following evidence: (a) Estella was obligated to report any suspicion of child abuse, (b) evidence petitioner had a "flat affect and bizarre lack of concern" at KMC, (c) evidence petitioner had the same demeanor at KMC, (d) evidence Estella knowingly exposed Christina to a convicted child molester who she dated after petitioner's arrest, (e) autopsy photos initially ruled admissible by the court over defense counsel's objection, and (j) unspecified hearsay espoused by expert and lay witnesses. (RCCAP at pp. 305-307, claims M18 a-e, j.) Petitioner fails to identify why the evidence cataloged in those claims was irrelevant, unreliable or prejudicial. With respect to claim M18j, he does not even articulate the alleged hearsay that was improperly espoused by expert and lay witnesses. He fails to prove that some of the contested evidence was even admitted at trial. For example, petitioner alleges defense counsel unreasonably failed to object to the admission of unspecified autopsy

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[72] Respondent presumes petitioner is referring to CALJIC No. 2.09, which states: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

photographs in claim M18e, but no autopsy photographs were admitted at trial to respondent's knowledge and he has not provided any citation to the record that indicates otherwise.[73] On other occasions, defense counsel did object to the contested evidence. For example, defense counsel's objections that evidence Estella dated Joe Avila was irrelevant (13RT 2568), and more prejudicial than probative (13RT 2572) were overruled by the trial court (13RT 2571, and 2757-2576, respectively; claim M18d). Thus, he is not entitled to habeas relief on these claims.

Petitioner's claims M18f, i, h, k, and l should also be rejected as speculative and conclusory. For example, petitioner contends defense counsel unreasonably failed to object to two illegal searches of the Brandywine apartment. (Claim M18f.) However, Estella testified she consented to police searches of her residence (13RT 2564, 2635), and petitioner has not identified the searches to which she allegedly did not consent. Petitioner similarly fails to specify what victim impact evidence he lacked notice of (claim M18i), what questions from the prosecutor to petitioner assumed facts not in evidence or went beyond the scope of cross-examination (claim M18h), identify which witnesses the prosecutor improperly asked leading questions of (claim M18k), or identify the evidence which warranted a request for CALJIC No. 2.09 (claim M18l). Finally, he never discusses how he was prejudiced, if at all, by the deficiencies of defense counsel raised in these five claims.

Petitioner's remaining claim M18g should be rejected on the merits. Respondent submits that tactical considerations could have supported defense counsel's decision not to object to the prosecutor's cross-

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[73] Petitioner's reference to 15RT 2971 refers to the admission of People's Exhibit 61, a photograph of Consuelo taken at KMC, not at autopsy.

examination of petitioner. For example, the passages from the record cited by petitioner as evidence of badgering all deal with areas where petitioner was questioned about prior inconsistent statements. The prosecutor's persistent questioning in these areas did not amount to badgering, and any objections would have merely drawn attention to petitioner's inability to explain these inconsistencies. Nevertheless, petitioner was not prejudiced by the prosecutor's questioning.

Therefore, petitioner is not entitled to habeas relief based on defense counsel's failure to object to various evidence and other matters or by co-counsel Harbin's decision to withdraw his request for CALJIC No. 2.09.

19. Failure to select a fair and impartial jury

Petitioner contends defense counsel unreasonably failed to select a fair and impartial jury. (RCCAP at pp. 309, claim M19.) His claim lacks merit.

Without providing a citation to the record, petitioner asserts defense counsel did not utilize four peremptory challenges. He seems to suggest this was unreasonable because the jury questionnaires of the sitting jurors allegedly show they were biased in favor of the prosecution and that some were emotionally predisposed to convict based on their own traumatic experiences with child abuse. (RCCAP at p. 309.) This claim should be denied as untimely since it could have been raised on appeal. (*In re Sanders*, *supra*, 21 Cal.4th at p. 703; *In re Robbins*, *supra*, 18 Cal.4th at p. 781; *In re Harris*, *supra*, 5 Cal.4th at p. 825; *In re Clark*, *supra*, 5 Cal.4th at p. 765, fn. 5; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.) It should also be rejected on the basis it is speculative. Such pleading is insufficient grounds for relief. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1241, fn. 38; *People v. Karis*, *supra*, 46 Cal.3d at p. 656.) Petitioner fails to

identify the portions of the questionnaires that allegedly show prosecutorial bias on the behalf of the jurors.

At any rate, there was no incompetence here. "Because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process." (*People v. Freeman* (1994) 8 Cal.4th 450, 485, citing *People v. Montiel* (1993) 5 Cal.4th 877, 911.)

Petitioner has not shown on this record that defense counsel was deficient for failing to exhaust her peremptory challenges. As proof defense counsel was incompetent, petitioner faults her failure to remove Peggy Rivard, Gordon Jones, Kenneth Morgan, Andrew Sanchez, and Richard Mortimer as potential jurors. (RCCAP at p. 309.)[74] Each of these individuals indicated on their questionnaire that the death penalty was an appropriate form of punishment. (3RT 639-646; 4RT 902, 759; 3RT 543, and 4RT 753, respectively.) However, defense counsel questioned each juror on this point. Each of these individuals responded that if the case reached the penalty phase, he or she would base his/her decision on the facts of the case and would be able to return a verdict of life without the possibility of parole if that was supported by the evidence. (3RT 641-642; 4RT 903-905, 763; 3RT 545, and 4RT 755-756, respectively.)

Petitioner has also failed to show prejudice. Nothing in the record suggests the actual jury was biased or that it is reasonably probable a different jury would have been more favorably disposed towards petitioner.

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[74] Petitioner does not name the latter three jurors. Instead, he argues that defense counsel failed to strike jurors who would automatically impose the death penalty, citing to places in the record where those three individuals were questioned. (RCCAP at p. 309.)

20. Failure to request curative instruction at penalty phase

Petitioner further contends counsel deficiently and prejudicially failed to request a curative instruction "based on the outrageous conduct of one of Estella's sister's on the stand where she stood up and starting yelling at the friends of petitioner who were in the audience." (RCCAP at pp. 309-310, citing Pet.'s RCCAP Exh. 102 at p. 5798 [Decl. by Jose Isabel Figueroa].) Petitioner has not shown counsel's conduct to have been unreasonable or prejudicial.

Jose Isabel Figueroa claims he was one of about 10 individuals who attended the trial to show support for petitioner, including Leon and Jose Manuel Aguilar, Hector Figueroa, Antonio Duran, Deflino Trigo and Nicho and Celia Campos. (Pet.'s RCCAP Exh. 102 at p. 5797.) Jose Figueroa alleges that while he was in court, a blown up picture of Consuelo was displayed and "a woman" (who he later learned was one of Estella's sisters) "stood up and *shouted something*" at petitioner's supporters in front of the jury. (*Id.* at p. 5798; emphasis added.) He did not understand what she said as he does not speak English; but he was offended by her tone and facial expression. (*Id.*)

Neither petitioner nor Jose Figueroa identify which of Estella's sisters allegedly yelled at petitioner's supporters in court. However, Diane Alejandro is the only sister that testified at the penalty phase. (3CT 787-788; 19RT 3740-3742.)[75] Neither the Reporter's Transcript nor the Clerk's Transcript contain any reference to any outburst by Estella's sister. (3CT 787; 19RT 3740-3742 [Diane Alejandro's testimony].) Indeed, there is no record of any outburst by a prosecution witness at the penalty phase. (See,

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[75] Diane Alejandro testified at the penalty phase on April 22, 1993. (3CT 787; 19RT 3740-3742.) The prosecutor showed her a photograph which she identified as depicting Consuelo. (19RT 3741.)

e.g., 19RT 3742-3744 [Testimony by Darlene Salinas] and 19RT 3745-3747 [Testimony by Virginia (Vicki) Salinas].) After the last prosecution witness testified at the penalty phase, defense counsel Harbin raised objections outside the presence of the jury concerning the testimony of Darlene and alleged hearsay from Vicki Salinas. (19RT 3747-3748, 3749-3750.) However, he did not object to an outburst by Diane Alejandro or anyone else.

Petitioner alleges defense counsel unreasonably failed to request a curative instruction to prevent the jury from being unduly inflamed by the witness' conduct. However, petitioner has not adduced any proof that Estella's sister made an inappropriate remark to petitioner's supporters. Petitioner has not articulated what the curative instruction should have said or shown that defense counsel did not make a tactical decision to overlook the alleged comment to avoid drawing further attention to it. The declaration from co-counsel Harbin does not reference an outburst by Diane Alejandro or any of Estella's sisters or discuss his reaction to it. Without knowing what was allegedly said, counsel's performance cannot be said to have fallen below an objective standard of reasonableness or to have been prejudicial. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 668, 688, 694.) Thus, this Court should reject petitioner's claim for lack of evidentiary support. (*People v. Duvall*, *supra*, 9 Cal.4th at pp. 474-475.)

Based on the foregoing, petitioner has not shown defense counsel to have rendered deficient and prejudicial performance, with one exception. As previously discussed in argument M2d(1)-(2), defense counsel's failure to elicit evidence that the tear of the anterior wall of the vagina did not exist may have been prejudicial as to the rape conviction and rape special circumstance allegation. (RCCAP at pp. 234-240, claim M2d(1)-(7).) However, petitioner's other ineffective assistance of counsel claims should fail.

N. Claim 14: Petitioner Was Not Denied Conflict Free Representation

Petitioner contends his rights under the Sixth and Fourteenth Amendments of the federal constitution and article I, section 15 of the state constitution were violated by his counsels' various alleged conflicts of interest. He contends defense counsel Harbin was unable to devote sufficient time to his case because he suffered from financial difficulties and was in trouble with the State Bar. He also alleges defense cocounsel Huffman's performance in his case was adversely affected by her husband's health problems, financial difficulties, and threats to her safety based on her representation of petitioner. (RCCAP at pp. 311-316, claim N, and Supp. Pet. at pp. 28-31.) Petitioner has attached various exhibits and declarations relating to Harbin's and Huffman's various personal difficulties, including matters totally unrelated to his case or their ability to conduct criminal representation. To the extent that these exhibits were attached to the supplemental petition filed in this case, they should be disregarded since he has failed to justify his substantial delay presenting those exhibits. (*In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781.) Without explanation or citation to authority, petitioner further asserts that defense counsels' alleged conflicts violated his rights to a fair trial, to present a defense, to confrontation and compulsory process, to an impartial jury and a reliable determination of guilt and to a rational determination of penalty as guaranteed by the Fifth and Eighth Amendments of the federal constitution, and article I, sections 1, 7, 9, 12-17, 24, 27 and 28 of the state constitution and state law. Petitioner's claims lack merit.

The right to the effective assistance of counsel under the Sixth Amendment to the federal constitution includes the right to representation free from conflicts of interest. An actual conflict occurs only when counsel "actively represented conflicting interests." (*Cuyler v. Sullivan* (1980) 446

U.S. 335, 348-350.) However, it is petitioner's burden to demonstrate that an "actual conflict of interest adversely affected his lawyer's performance." (*Cuyler v. Sullivan*, *supra*, 446 U.S. at p. 348; *Mickens v. Taylor* (2002) 535 U.S. 162; *People v Doolin*, *supra*, 45 Cal.4th at p. 421 (adopting federal standard of *Strickland v. Washington*, *supra*, for conflict of interest claims arising in contexts outside of multiple concurrent representation).) Since his allegations are based on alleged conflicts with his lawyers' self-interests, the *Strickland* rule for ineffective assistance of counsel applies. (*People v. Doolin*, *supra*, 45 Cal.4th at 429 citing *Mickens v. Taylor*, *supra*, and *Beets v. Scott* (5th Cir. 1995) 65 F.3d 1258, 1270-1271; *People v. Frye*, *supra*, 18 Cal.4th at pp. 994-999 (disbarment during trial for representation in separate criminal case); *Bonin v. Calderon* (1995) 59 F.3d 815, 828-829.)

Petitioner does not allege that defense counsel represented anyone associated with petitioner's case other than petitioner, so he has not shown an actual conflict based on mulitple representation. Thus, on that basis, he is not entitled to habeas corpus relief based on the alleged violation of his Sixth and Fourteenth Amendment rights.

Moreover, as respondent has already demonstrated in the argument pertaining to petitioner's claims of ineffective of assistance of counsel (Claim M), petitioner has failed to show that any of Harbin's and Huffman's separate personal problems adversely affected their representation of petitioner.[76] As this Court recently held in *People v. Doolin*, *supra*, 45 Cal.4th at 428, "conflicts of interest outside the context of multiple concurrent representation" are assessed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*,

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[76] The only exception relates to Claim M2d relating to Dr. Diamond's opinion that petitioner raped his victim. However, petitioner was not prejudiced.

supra. Accordingly, respondent has already dealt with this conflict of interest claim in refuting respondent's claims of ineffective assistance of counsel.

In sum, petitioner has failed to make any showing that trial counsels' performance was adversely affected by any alleged conflict, or potential conflict, of interest. Thus, petitioner is not entitled to habeas relief on that basis.

O. Claim 15: Jury Misconduct

Petitioner presents several specific instances in which he alleges jury misconduct occurred. (RCCAP at pp. 317-324.) Petitioner has failed to state a prima facie claim for relief for jury misconduct.

1. Juror Kucharski

Petitioner claims that Juror Kucharski "improperly and prejudicially interjected her personal feeling by telling other jurors" that defense witness Dr. Bloch was a liar. (RCCAP at p. 319.) Petitioner has not stated a claim for relief.

Initially, respondent notes that petitioner's allegations regarding Juror Kucharski's alleged communications to the jury are completely lacking in evidentiary support. Petitioner presents no evidence which supports his claims regarding this juror. Unless petitioner's allegations have been completely fabricated, then some evidence regarding his allegations exists. Petitioner should have included all reasonably available documentary evidence in support of his petition. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

In any event, the appellate record indicates that Juror Kucharski did properly bring her negative acquaintanceship with Dr. Bloch to the trial court's attention. The court conducted a hearing in chambers with all parties and she was excused from the jury without objection. There is no

evidence that she communicated her negative experience with Dr. Bloch to her fellow jurors and she was admonished not to speak to anyone about the matter. In fact, the record shows that Juror Kucharski did not and would not have communicated her interactions with Bloch since she advised the court that she would have left the jury room if there had been discussion about Dr. Bloch. (12 RT 2488-2492). Accordingly, there is no evidence that Kurcharski communicated her experiences with Dr. Bloch to the jury. In fact, the evidence is that she would have said nothing. Furthermore, to the extent that petitioner now questions the handling of this matter, his failure to raise the issue on appeal precludes raising it by state habeas. (*In re Harris*, *supra*, 5 Cal.4th at p. 842).

Moreover, to the extent that Kucharski merely told the jury that she believed Dr. Bloch to be a liar, petitioner has not established that Juror Kucharski committed misconduct at all. Petitioner alleges that Juror Kucharski expressed an opinion on the credibility of a witness. Thus, Juror Kucharski was doing nothing more than she was required to do as a juror. Jurors are tasked with evaluating the credibility of witnesses, and may express opinions based on the evidence presented in trial, even on technical matters. (*In re Malone*, *supra*, 12 Cal.4th at p. 963.) Nothing in petitioner's allegations indicate that Juror Kucharski's opinion of the credibility of a witness was not based on the evidence presented at trial and the demeanor of the witness. Accordingly, this claim should be denied.

2. Juror Karroll Wolfe[77]

Petitioner now raises two separate claims of misconduct regarding juror Wolfe. (RCCAP at pp. 320-323.) First, he alleges that Wolfe had improper conduct with witness Lori Garland. Second, he now alleges that Wolfe committed misconduct by disregarding the court's definition of life

[77] Karroll Wolfe's name now is Karroll Mulholland.

imprisonment without the possibility of parole. Initially, respondent notes that these allegations are at least partially based on a declaration of juror Karroll Mulholland (nee Wolfe) that was procured after the filing of the initial petition in this case. (Pet.'s RCCAP Exh. 109). Petitioner offers no explanation now about why he did not offer this evidence at the time he first sought collateral relief in this court and, accordingly, Mulholland's declaration should now be disregarded. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781.) In any event, he is not entitled to relief on this claim.

a. Contact with Witness Garland

Petitioner asserts Juror Karroll Wolfe committed prejudicial misconduct "by routinely making contact with witness Lori Garland while the trial was ongoing and failing to report this contact to the court." (RCCAP at p. 320.) As discussed above, in Argument I, this claim is based on the appellate record and should have been raised on appeal. In addition, it has been waived by Petitioner's acceptance of the juror after the trial court's inquiry. Finally, this claim is without merit.

Once the trial court became aware of contact between Juror Wolfe and a defense witness, the trial court held an immediate hearing into the matter. (16RT 3204-3235.) The court questioned the witness and the juror involved and admonished the jury not to talk to anyone who might be involved in the case. At the close of the hearing, Petitioner's counsel indicated:

> Well, your Honor, I don't think that there is any taint between these two in any way. I think Ms. Wolfe explained there was no discussion about the case or why she was a witness or anything. I don't see a problem.

(16RT 3230.) Thus, Petitioner's counsel waived any misconduct claims after the hearing by accepting the juror and not seeking her removal or a mistrial.

In addition, the record does not reveal any potential prejudice to petitioner. Even if Juror Wolfe's conduct could be construed as improper, the subsequent hearing before the trial court rebutted any presumption of prejudice that may have attached. As petitioner's counsel noted, no substantive information regarding the case was exchanged between Juror Wolfe and the witness. The contact between the two was a harmless incident that the trial court properly resolved. This claim should be denied.[78]

b. Court's definition of life imprisonment without the possibility of parole

Petitioner's final claim of jury misconduct alleges that Juror Wolfe did not believe that life without possibility of parole was a reality and that she therefore voted for death. (RCCAP at p. 323.) Wolfe's declaration asserts that she told the jurors that even if petitioner was sentenced to life imprisonment without the possibility of parole that he could still be released. She opined that the jury returned a death verdict when it realized petitoner could get out unless sentenced to death. (Pet.'s RCCAP Exh. 109.) Petitioner's claim must be denied.

On appeal, petitioner argued that the court did not sufficiently respond to the jury's inquiry about sentencing. This Court's opinion describes the events as follows:

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[78] Karroll Mulholland (nee Wolfe)'s 2007 declaration attached as to the revised petition adds nothing to this claim not contained in the appellate record. In any event, the declaration should not be disregarded. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781.)

> During penalty phase deliberations, the jury sent a note to the court asking, "Life without the possibility of parole-how permanent is it? Can it be overturned by legal changes? (other than appeal.) Is there a chance for him to walk out of prison? EVER!! EXPLANATION?" Without objection from counsel, the court answered the jury by rereading the instruction that advised, "A sentence of life without the possibility of parole means that Mr. Benavides will remain in state prison for the rest of his life and will not be paroled at any time. A sentence of death means that Mr. Benavides will be executed in state prison." The court then stated, "That instruction answers your question."

(*People v. Benavides*, *supra*, 35 Cal.4th at p. 114.)

This Court rejected a similar argument in *People v. Steele* (2002) 27 Cal.4th 1230, 1260-1261. In *Steele*, two jurors submitted affidavits after trial indicating that the only reason they voted for death was because they did not believe that life without possibility of parole would prevent the defendant from ever getting out of prison. This Court held that such statements were inadmissible under Evidence Code section 1050 because they fell "squarely within the prohibition against impeaching a verdict with evidence of the jurors' mental processes." (*Id.* at p. 1261.) Obviously, Wolfe's assertion that the jury voted unanimously for death when the jurors "realized" petitoner could be released is inadmissible and should be disregarded. (Evid. Code, § 1150.)

This Court's decision in *Steele* controls here. Juror Wolfe's declaration of what she thought life without possibility of parole meant and how that belief affected the verdict are nothing more than statements of her mental process that are inadmissible under Evidence Code section 1050. (See also *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1384, fn. 9). This claim should be denied.

In truth, this allegation is simply a variation on a theme familiar to this Court. As this Court noted when it affirmed petitioner's judgment on

direct review, this alleged misconduct relates to nothing beyond information generally relating to "'matters of common knowledge appreciated by every juror who must choose between a death sentence and a sentence of life without parole' such as changes in the law." (*People v. Benavides*, *supra*, 35 Cal.4th at p. 115, quoting *People v. Hovey* (1988) 44 Cal.3d. 543, 581).

Furthermore, this Court has "recognized that jurors **cannot always be effectively precluded** from discussing such topics of general awareness and concern as the possibility of parole (*People v. Mendoza* (2000) 24 Cal.4th 130, 195, 99 Cal.Rptr. 485, 6P.3d 150), escape (*People v. Pride* (1992) 3 Cal.4th 195, 268, 10 Cal.Rptr.2d 636, 833 P.2d 643), and the infrequent nature of executions (*People v. Majors* (1998) 18 Cal.4th 385, 421, 75 Cal.Rptr.2d 684, 956 P.2d 1137; *People v. Cox* (1991) 53 Cal.3d 618, 696, 280 Cal.Rptr. 692, 809 P.2d 351)." (*People v. Yeoman* (2003) 31 Cal.4th 93, 163 [emphasis added].)

Similarly, in another case this Court acknowledged:

> "To the extent the comments reflected speculation concerning punishment, in *People v. Steele*, *supra*, 27 Cal.4th 1230, 120 Cal.Rptr.2d 432, 47 P.3d 225, and other decisions, we have accepted similar discussions as an inevitable feature of the jury system. (See *id.* at pp. 1264-1265, 120 Cal.Rptr.2d 432, 47 P.3d 225; see also *People v. Schmeck* (2005) 37 Cal.4th 240, 307, 33 Cal.Rptr.3d 397, 118 P.3d 451 [no misconduct in jury's discussion of a television talk show program concerning a prisoner who was released although he had been sentenced to life in prison without the possibility of parole, or in jurors' speculation concerning the defendant's possible release]; *People v. Riel* [(2000)] 22 Cal.4th [1153,] 1219, 96 Cal.Rptr.2d 1, 998 P.2d 969 [no misconduct when a juror who had been employed at the county jail expressed the opinion that the court would reduce a death sentence to life imprisonment]; *People v. Pride*, *supra*, 3 Cal.4th at pp. 267-268, 10 Cal.Rptr.2d 636, 833 P.2d 643 [jurors discussed a recent escape from Vacaville prison, and a juror known to have served as an employee at that prison suggested that a life prisoner has a far greater opportunity to

> escape than a prisoner condemned to death]; *People v. Cox*, *supra*, 53 Cal.3d at p. 696, 280 Cal.Rptr. 692, 809 P.2d 351 [juror who referred to former Chief Justice Rose Bird, and asserted that the death penalty had not been carried out since the 1960's, did not commit misconduct].)"

(*People v. Dykes*, *supra*, 46 Cal.4th at p. 812.)

As this Court has pointed out:

> "The problem is not with the jury instructions. The phrase 'without possibility of parole' is clear and on its face absolutely bars parole. The problem is that some jurors may not accept the role of juries in the California death penalty scheme, and instead of making a decision based solely on weighing the aggravating and mitigating circumstances, may seek an assurance that there are no circumstances under which a sentence of life without possibility of parole could be altered to permit parole. **The trial court cannot provide such an assurance."**

(*People v. Perry* (2006) 38 Cal.4th 302, 321 [emphasis added].)

Ultimately, a juror's uncertainty about the meaning of life imprisonment without the possibility of parole does not establish misconduct. (*People v. Samuels* (2005) 36 Cal.4th 96, 135-136.) As this Courts' decisions indicate, it sets an impossibly high standard to expect jury instructions to completely eliminate such beliefs and opinions. (*People v. Schmeck* (2005) 37 Cal.4th 240, 307-309.) No jury misconduct is established in petitioner's case.[79]

P. Claim 16: The Claim Of Judicial Bias Is Meritless

Petitioner argues that the trial court had a pro-prosecution bias which infected the trial. (RCCAP at pp. 325-329.) This Court has determined that in evaluating such claims, the standard is "whether the judge 'officiously

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[79] Of course, respondent notes that the court was not required to instruct the jury that a sentence would be inexorably carried out. Such an instruction would have been inaccurate. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1091.)

and unnecessarily usurp[ed] the duties of the prosecutor...and in so doing create[d] the impression that he [was] allying himself with the prosecution ....'" (*People v. Clark* (1992) 3 Cal.4th 41, 143, quoting *People v. Campbell* (1958) 162 Cal.App.2d 776, 787.) Petitioner has failed to demonstrate any bias.

Initially, it is worth noting that this claim is barred, as explained in Argument IB, because it should have been raised on appeal. (*In re Harris*, *supra*, 5 Cal.4th at pp. 826-827; *In re Watreus*, *supra*, 62 Cal.2d at p, 225; *In re Dixon*, *supra*, 41 Cal.2d at p. 859.)

Petitioner identifies a number of isolated comments, but his portrayal of the record is incomplete. As to the first allegation (denominated 1.a), the fact is that the Court interrupted the prosecutor's examination which, if anything, may have shown disrespect for the prosecutor, not the defense. The record also reveals that during the prosecutor's cross examination of Dr. Baumer, the trial court interrupted the prosecutor to tell him how to properly frame a question (14RT 2862), sustained defense objections to the prosecutor's questions (14RT 2872), and cut off the prosecutor's questions (14RT 2890). In short, while each of these actions could be interpreted as condescending or hostile towards the prosecutor, the fact is that the trial court was simply exercising his discretion to move the proceedings along pursuant to Evidence Code section 765. Moreover, contrary to Petitioner's representation that the court was mischaracterizing Dr. Baumer's testimony (see RCCAP at p. 326), Dr. Baumer agreed with the question by the trial court, stating simply, "Correct." (14RT 2880.) This was not a situation where the trial court was overbearing or hostile to the witness.

Petitioner's second allegation (denominated 1.b) is that the trial court improperly chastised Dr. Baumer during his testimony. (RCCAP at pp. 325-326.) In response to a question by the prosecutor about whether Dr. Baumer had checked into the cause of the broken ribs, Dr. Baumer

testified that he "actually did something better." (14RT 2887.) He testified that he contacted Dr. Lovell because Lovell had enormous experience, and "because I think he's more valuable of a resource than reading about it in a text or journal because in my experience...50 percent of what I read may be wrong, and I don't know which 50 percent is right." (*Ibid.*) Moments later, the trial court overruled an objection relating to Dr. Baumer's knowledge of Dr. Lovell's skills as a coroner because "the witness indicated in essence that [Dr. Lovell] is more reliable than one hundred percent of the texts out there." (14RT 2888.) The trial court's paraphrasing of Dr. Baumer's testimony was both accurate and appropriate in that it explained the basis of his ruling on defense counsel's objection: since Dr. Baumer had put in issue Dr. Lovell's reliability, the prosecutor was entitled to explore it.

The court then explained that he was irritated, although not with the witness personally, but with the fact that he had arrived late and that, as a result, the jurors had been waiting for much of the afternoon. (14RT 2888-2889.) After the court stated that he had wanted Dr. Baumer on the stand at 1:30 (14RT 2888), Dr. Baumer explained that he was told to be present between 2:30 and 3:00 (14RT 2889), which appeared to satisfy the court. Petitioner argues that the court's comment that "my jurors have other things to do with their lives besides sit here" (see 14RT 2888) suggested that the defense was wasting time by going to trial. (RCCAP at p. 326.) Read in context, it is clear that the court was understandably frustrated that the jury was waiting for the witness to arrive. The jury had been excused before lunch and told to return at 2:00 p.m. (14RT 2791-2792.) After lunch, the court and counsel discussed exhibits at some length and then there was a recess of indeterminate length taken before the jury was brought back in to hear testimony. (14RT 2793-2820.) The trial court's comments cannot in any fashion be read as a criticism of the defendant's exercise of his right to a jury trial.

Petitioner next argues (in a subclaim denominated 1.d) that the trial court's comment to defense counsel that "there's a difference between redirect and rehash" somehow cemented the impression that the defense was wasting the jury's time. (RCCAP at p. 327.) However, conspicuously absent from petitioner's selective quotation from the record is the fact that the trial court made clear that the redirect/rehash statement was not directed at defense counsel. (14RT 2893.) Rather, the comment followed upon the heels of a conversation between the court and counsel about whether the redirect and recross could be competed before 5:00 p.m. or whether the witness should instead be directed to return the following week. (14RT 2892-2893.) Thus, the trial court was simply urging counsel to focus their examinations and not rehash points already covered.

Petitioner's next subclaim (denominated 1.e) is based on yet another misrepresentation of the record. He argues that the trial court's question of the witness was unfair because it occurred after both parties had "rested" and thus, the defense was unable to elicit additional testimony from Dr. Tait to undo the damage caused by the court's question. (RCCAP at p. 328.) The record, however, demonstrates quite clearly that immediately after asking the question now complained of, the trial court gave both parties an opportunity to ask additional questions, and both parties declined. (17RT 3333.) Perhaps aware of this fact, petitioner also folds into this subclaim a passing reference to counsel's ineffectiveness for failing to object to the question in the first instance.[80] This argument may be rejected out of hand as it is eminently reasonable to decline to object to a question from the court if, as in this case, it is of limited relevance and objecting might only

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[80] This claim should be rejected outright because petitioner has not discussed how, let alone demonstrated that, defense counsel's representation was deficient, or that he was prejudiced thereby. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

make counsel appear confrontational in the eyes of the jury, who may view the judge as the representative of "fairness" in the courtroom.

Petitioner also argues that the court's pro-prosecution bias was exacerbated by defense counsel's failing to object to the prosecutor's cross-examination of Dr. Baumer. The prosecutor posed the following questions, to which Dr. Baumer answered:

> Q. Well, doctor, isn't it true that based on histories you gave opinions about whether or not a child has suspected child abuse. Isn't that true?
>
> A. I render opinions, that's correct. I also know I'm wrong.
>
> Q. I know you're wrong too, doctor. Now, let me ask you some more questions.

(14RT 2884-2885; RCCAP at pp. 328-329, claim P1f.) The witness was simply acknowledging his own fallibility, and the prosecutor simply agreed with the doctor's assessment of that fallibility. It is difficult to conceive of a cognizable legal objection that could have been made by counsel. Petitioner articulates none. In the absence of some explanation of what objection would have been dictated under prevailing professional norms, and in the absence of some indication of what prejudice arose from the prosecutor's agreement with the witness as to his imperfection, the claim of ineffective assistance fails at the outset.

Finally, petitioner argues (in subclaim 2) that the trial court exhibited bias during jury selection, citing a passage in which the court arguably identified his "friends" as supporters of the death penalty, while designating those against the death penalty as "other people." (RCCAP at p. 329.) This argument need not be addressed in any detail because the comments were made during the individual voir dire of prospective juror Catherine Chapman. (3RT 591, 593-594.) Ms. Chapman did not sit on petitioner's

jury. (2CT 489-490.) As such, even if the trial court's comments could somehow be read as prejudicial in the abstract, the limited audience necessarily means that they did not cause actual prejudice in this case.

Individually, petitioner's subclaims fail to demonstrate error or impropriety. Cumulatively, they fall well short of the type of officious intermeddling that is required to demonstrate a judicial bias in favor of the prosecution. In *Clark*, the defendant cited four instances in which the trial court sua sponte interjected its own hearsay objections to the defendant's examination of witnesses, 22 instances of sua sponte relevancy objections, and several sua sponte objections based on vagueness or calling for a conclusion. (*People v. Clark*, *supra*, 3 Cal.4th at pp. 144-145.) The court in *Clark* found that the intervention into the defendant's examination of witnesses was justified and did not create an impression of impartiality. (*Id.* at p. 145.) As explained individually above, the court's actions in this case were each appropriate under the circumstances, and, in addition to being far fewer in number, are similarly unpersuasive on the issue of trial court bias. The alleged errors in this case pale in comparison to the situation in *Offutt v. United States* (1954) 348 U.S. 11, 16, fn. 2, where the trial court told counsel that he would place a gag in his mouth, yelled at him, and told him he was misbehaving. In *Offutt*, the court, in discharging the jury, told them,

> I also realize that you had a difficult and a disagreeable task in this case. You have been compelled to sit through a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst.

(*Id.* at fn. 3.) No such derogatory comments were made by the court in this case, and the claim of trial court bias must be rejected.

Q. Claim 17: The Prosecutor Did Not Admit Impermissible and False Victim Impact Evidence

Petitioner contends the prosecutor presented improper and false victim impact evidence, defense counsel unreasonably and prejudicially failed to object to this evidence, and the trial court erred by admitting this evidence and failing to sua sponte "limit the scope" of the jury's consideration of the evidence. He alleges this violated his right to a fair and reliable determination of penalty, his right to the effective assistance of counsel, and his privilege against self-incrimination as guaranteed by the First, Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution. (RCCAP at pp. 330-334.) Since this claim restates an appellate claim, respondent incorporates the appellate response. (RB 112-119; *In re Harris*, *supra*, 5 Cal.4th at p. 825; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Petitioner's claim should be rejected because claims challenging the admission of evidence are not cognizable in a habeas proceeding. (*In re Lindley*, *supra*, 29 Cal.2d at p. 723.) In addition, this claim is procedurally barred as it contains nothing of substance not already in the record. (*In re Robbins*, *supra*, 18 Cal.4th at p. 814, fn. 34.)

Thus, petitioner is not entitled to habeas relief on the ground he was convicted with impermissible and false victim impact evidence.

R. Claim 18: Petitioner Is Not Entitled to Relief on His Claim of Unconstitutional Shackling

Petitioner next claims the trial court committed constitutional error by shackling him at trial, "without manifest need or factual support." (RCCAP at pp. 335-337, claim R.) This claim has been waived by petitioner's failure to raise it on appeal and at trial and is without merit.

As noted above, in Argument I.B., the instant claim is waived because petitioner failed to raise it on appeal. (*In re Dixon*, *supra*, 41 Cal.2d at

p. 759.) Moreover, this claim is also procedurally defective because petitioner failed to object in the trial court. Failure to object to restraints and to make a record in the trial court waives the claim on appeal. (*People v. Majors* (1998) 18 Cal.4th 385, 406; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583; *People v. Stankewitz* (1990) 51 Cal.3d 72, 95.)

In addition, petitioner has not established a prima facie claim for relief.

"[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291; *People v. Mar* (2002) 28 Cal.4th 1201, 1214.) This Court has "consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury." (*People v. Tuilaepa*, *supra*, 4 Cal.4th at pp. 583-584.) Unless the record affirmatively shows that the jury saw restraints, a court's error in approving restraints is not constitutional error and it should therefore be tested under the [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836] test. (*People v. Jackson* (1993) 14 Cal.App.4th 1818, 1829.)

Petitioner has not submitted a declaration from himself or any of the jurors asserting that he wore handcuffs during the trial and that they were visible *to the jury*. Declarations submitted by defense counsel and petitioner's Spanish interpreter at trial are remarkably silent on the subject. (Pet.'s RCCAP Exhs. 64 [Decl. by Ms. Huffman], 65 [Decl. by Mr. Harbin], and 107 [Decl. by Al Hernandez].) Consuela's mother Estella Medina was subpoenaed to testify for the prosecution. (Pet.'s RCCAP Exh. 66 at p. 30/5385.) When she went into the courtroom to testify, she saw petitioner. However, she never asserted that he was handcuffed or otherwise restrained in court. (*Ibid.*) Petitioner's second cousin Hector Figueroa "remember[s]" seeing petitioner handcuffed inside the courtroom.

(Pet.'s RCCAP Exh. 86 at p. 7/5534.) He related two occasions on which he was in court. He testified at the guilt phase in April (*id.* at p. 6/5533 [paragraphs 16-19]; 16RT 3291), and he attended the sentencing hearing in June (*id.* at p. 7/5534 [paragraph 20].) Hector does not specify whether his recollection related to the guilt phase or sentencing phase of trial. The fact it is mentioned in paragraph 21, following the paragraph about his attendance at the sentencing hearing, suggests it took place post-trial, on the latter occasion. In any event, Hector does not assert that the jury saw petitioner in handcuffs in court.

Petitioner's second cousin Jose Isabel Figeuroa (Hector's brother) submitted a declaration referencing his attendance of the penalty phase of trial. (Pet.'s RCCAP Exh. 102 at p. 17/5797 [Decl. by Jose Isabel Figueroa].)[81] Jose alleges that petitioner "waved" when he and other supporters entered the courtroom. Jose Figueroa thought petitioner wore handcuffs, but he was not certain. (*Ibid.*) Jose's assertion that petitioner waved contradicts the notion that he was handcuffed at the time. (See also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1177-1180 [juror's view of the defendant in handcuffs on the jail floor of the courthouse after court had wrapped up for the day during the penalty phase of trial did not support a finding of a substantial likelihood that the juror was impermissibly influenced to the defendant's detriment].) In addition, Jose named six others who were purportedly in court with him. (Pet.'s RCCAP Exh. 102 at

[81] The declaration from Jose Figeuroa does not specify that he was in court at the penalty phase of trial, but he allegedly was present when a picture of Consuelo was displayed to the jury and during the testimony of one of Estella's sisters. (Pet.'s RCCAP Exh. 102 at p. 5798.) This took place during the penalty phase of trial. (19RT 3740-3742 [Testimony of Diane Alejandro, including her identification of People's Trial Exhibit 87 (photograph of Consuelo)].)

p. 17/5797).[82] Although three of those individuals filed declarations on petitioner's behalf, they did not assert that they or the jury saw petitioner in handcuffs in court (Pet.'s RCCAP Exhs. 94 [Decl. by Celia Campos], 100 [Decl. by Antonio Duran], 104 [Decl. by Nicho Campos]). Petitioner has not adduced any evidence from the other three who were mentioned by Jose - Leon Aguillar, Jose Aguillar and Delfino Trigo. (Pet.'s RCCAP Exh. 102 at p. 5797; see also 19RT 3759 [Delfino Trigo was a witness at the penalty phase].) Nor is there any evidence in the record or on habeas that the alleged use of handcuffs was painful, burdened petitioner's ability to communicate with his counsel or the court, or impacted his participation in the proceedings. (RCCAP at p. 337; Pet.'s RCCAP Exhs. 64, 65, 107.)[83]

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[82] Again, Jose does not specify that they all attended the penalty phase of trial, but that is the logical conclusion for the reasons set forth in the previous footnote. In addition, there was an order excluding potential witnesses from court and two of the six individuals cited by Jose testified at the penalty phase -Dionicio (Nicho) Campos and Delfino Trigo – supporting the notion that they were in court at the penalty phase (after their testimony). Also, Jose references his brother Hector Figeuroa having also been in court with him (Pet.'s RCCAP Exh. 102 at p. 17/5797), but Hector's declaration is silent as to whether he also attended the penalty phase, having only referenced the day he testified in April and the June sentencing hearing. (Pet.'s RCCAP Exh. 86 at pp. 65533-7/5534.)

[83] Petitioner newly alleges that "the shackles exacerbated [his] other limitations in his ability to participate in the proceedings, including his impaired neuropsychological and intellectual functioning." (RCCAP at p. 237, citing Pet.'s RCCAP Exh. 126 [Decl. by Antonio Puente].) Respondent has reviewed Mr. Puente's 25-page declaration but did not find it to support the proposition for which it was cited, nor has petitioner provided a point page for his reference. (Pet.'s RCCAP Exh. 126 at pp. 1/6335-25/6359.) Absent evidence that Mr. Puente opined that petitioner's participation at trial was impaired by the use of restraints, this new claim should be stricken as untimely. (April 22, 2008 Declaration by Decl. by Michael Laurence at p. 33 [alleging there is good cause to bring the new claim as it is based on new facts that were provided in new declarations.].) Even if Mr. Puente opined that the use of restraints

(continued...)

Absent a showing that the jury saw petitioner in handcuffs or that the handcuffs had an adverse effect, it is not reasonably probable that a more favorable result would have been reached but for the use of handcuffs on petitioner at trial. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

This claim is procedurally defective and factually bankrupt. Accordingly, it should be denied.

S. Claim 19: The Trial Court Properly Answered the Jury's Question Regarding the Possibility of Petitioner's Release from Prison

Petitioner renews a claim made in his direct appeal brief, and which was addressed fully in respondent's brief. (RCCAP at pp. 338-344; see Resp. Brf., Arg XIX, pp. 138-142.) In response to a question from the jury about the chance of petitioner being released from prison even with a sentence of life without parole, and with the consent of both counsel, the trial court reinstructed the jury with the standard instruction defining the punishment options. This Court already rejected this claim on appeal and petitioner does not otherwise elaborate on how the court erred beyond what was already considered on appeal. (*People v. Benavides*, *supra*, 35 Cal.4th at pp. 114-115). Accordingly, this claim should be disregarded. (*In re Harris*, *supra*, 5 Cal.4th at p. 842.)

As this Court recounted:

(...continued)
impacted petitioner's participation at trial, his declaration is speculative. Mr. Puente did not attend the trial and, as previously discussed, there is no evidence that petitioner was handcuffed during the trial when the jury was present. (See, e.g., Pet.'s RCCAP Exhs. 64, 65, and 104 [declarataions from defense counsel and petitioner's Spanish interpreter are silent on the subject].) Speculation and conclusory opinion are insufficient grounds for relief on habeas. (*In re Robbins*, *supra*, 18 Cal.4th at p. 781; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

> During penalty phase deliberations [in petitioner's case], the jury sent a note to the court asking, "Life without the possibility of parole-how permanent is it? Can it be overturned by legal changes? (other than appeal.) Is there a chance for him to walk out of prison? EVER!! EXPLANATION?" Without objection from counsel, the court answered the jury by rereading the instruction that advised, "A sentence of life without the possibility of parole means that Mr. Benavides will remain in state prison for the rest of his life and will not be paroled at any time. A sentence of death means that Mr. Benavides will be executed in state prison." The court then stated, "That instruction answers your question."

(*People v. Benavides*, *supra*, 35 Cal.4th at p. 114.)

This Court has consistently held that the phrase "life without possibility of parole" adequately informs the jury that a defendant sentenced to life imprisonment without possibility of parole is ineligible for parole. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1091.) Petitioner's claim adds nothing to the claim rejected on appeal. For that matter, petitioner does not suggest what the court was required to do that would not have resulted in providing the jury inaccurate information. (*Ibid.*)

Petitioner amplifies the claim by referring to empirical studies purporting to demonstrate the citizens may be confused about the true possibility of a person sentenced to life without parole ever being released from prison. (RCCAP at pp. 341-344.) He also relies on a declaration of juror Karroll Mulholland (nee Wolfe) (Pet.'s RCCAP Exh. 109). As previously argued, this declaration should be disregarded. In addition, he makes other claims, which are largely undeveloped, and which will be addressed briefly.

As to the studies, it is sufficient to note that none of them undermine the long line of California cases establishing the proper procedure for dealing with jury questions in such situations, all of which were cited and explicated in respondent's brief on appeal. (See Resp. Brf. at p. 140, citing

People v. Bonillas (1989) 48 Cal.3d 757, 797-798; *People v. Caro* (1988) 46 Cal.3d 1035, 1064-165; *People v. Ramos* (1984) 37 Cal.3d 136, 159, fn. 12; *People v. Perry*, *supra*, 38 Cal.4th at p. 321.) Assuming the statistical validity of the studies, and further assuming they suffered from no methodological flaws, the fact remains that we must assume the jurors put aside their prejudices and followed the instructions.

> We presume that jurors comprehend and accept the court's directions. [Citation.] We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.

(*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

This Court's decision in *People v. Ramos*, *supra*, 37 Cal.3d at p. 159, fn. 12 supports the trial court's decision. In *Ramos*, this Court observed that when the commutation issue is raised expressly by the jury, it may be appropriate to explain that the commutation power applies to both life and death sentences. However, this Court also noted that when the issue is not expressly raised, the trial court should exercise its discretion, and should defer to the defendant's assessment of the costs and benefits of such an instruction. In this case, the jury instruction did not expressly raise commutation, but merely asked about "future legal changes" and whether there was "a chance for him to walk out of prison." The trial court's response was to reread the instruction already requested by defense counsel. (3CT 767; 19RT 3715.) Therefore, the trial court did accede to defense counsel's request regarding this issue, as *Ramos* suggests is appropriate.

The trial court's action is also consistent with the reasoning of the United States Supreme Court in *Weeks v. Angelone* (2000) 528 U.S. 225, where the trial court responded to a jury question with a previously approved instruction. In *Weeks*, the high Court noted that not only was the instruction constitutionally correct, but "empirical factors" also militated in

favor of a presumption that the jury followed the instructions rather than speculated on inappropriate issues. (*Id.* at p. 234.) In particular, the court in *Weeks* noted that the jury was individually polled about their verdict in open court, the jury had reached their verdict of death relatively quickly, and the jury, which had demonstrated that it was not shy about asking questions, had not asked another question after the response given by the judge. (*Id.* at pp. 234-235.) Similarly, in this case, the jury was individually polled, the penalty phase was concluded in a single day, and this jury, which asked several questions, never revisited the topic of sentencing consequences after being instructed by the trial court. (3CT 788-789.)

Moreover, as explained by the court in *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1160-1162, it is risky to accurately summarize all of the various possibilities that may apply to a particular case after conviction. Advising a lay jury about issues like commutation, executive clemency, direct appellate review, state collateral review, and federal habeas corpus review, may be incomplete, may lead to speculation, and may well give the jury a distorted impression about the likelihood that the sentence will be carried out. (*Ibid.*) The truth is that the myriad procedural possibilities cannot be explained in a few paragraphs and still accurately convey to the jury the singular importance of their normative penalty decision.

Petitioner's remaining claims likewise lack merit. As to the subclaim regarding improper argument by the prosecution, it is sufficient to note that consideration of future dangerousness is proper in fixing the appropriate sentence, and it is settled that the prosecutor may present argument regarding the future dangerousness of a defendant in a capital case. (*People v. Clark*, *supra*, 3 Cal.4th at p. 161; *People v. Fierro* (1991) 1 Cal.4th 173, 249; *People v. Benson* (1990) 52 Cal.3d 754, 798; *People v. Davenport* (1985) 41 Cal.3d 247, 288.)

Petitioner's ineffective assistance of counsel claim for failing to object to the trial court's decision to simply reread the previously given instruction is likewise unavailing. (RCCAP at p. 344.) Given the nature of the law, it is doubtful that an objection would have moved the court to undertake any alternative course of action. Instructions explaining the governor's commutation power have been found to violate the state constitution. (See, e.g., *People v. Anderson* (1987) 43 Cal.3d 1104, 1151; *People v. Montiel* (1985) 39 Cal.3d 910, 928.) Thus, it is doubtful that the trial court would have been inclined to venture into that arena. Accordingly, petitioner cannot show that the failure to object resulted in any prejudice, because even had there been an objection there is no indication that the result, i.e, the re-instruction of the jury, would have been any different.[84]

T. Claim 20: Petitioner Has Not Made an Evidentiary Showing Sufficient for a Hearing on the Question of His Alleged Mental Retardation As There Is No Evidence That His Alleged Subaverage Intellectual Functioning and Adaptive Deficits Manifested Before the Age of 18

In Claim Twenty, petitioner contends he is ineligible for the death penalty because he is mentally retarded. (RCCAP at pp. 346-359.) Petitioner has not made a prima facie showing of mental retardation.

1. Mental Retardation Criteria

In *Atkins v. Virginia*, *supra*, 536 U.S. 304, the United States Supreme Court held that execution of the mentally retarded violated the Eighth Amendment. The *Atkins* Court, however, "le[f]t to the State[s], the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (*Id.* at p. 317 [the psychologist who

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[84] For the same reasons set forth in response to Claim O, Karroll Mulholland (nee Wolfe)'s belated declaration adds nothing to petitioner's challenge to the court's instructions.

examined Atkins pre-trial, found him to be "mildly mentally retarded" based on his full scale IQ of 59 on the Wechsler Adult Intelligence Scale test-III (WAIS-III), interviews with people who knew him, and a review of school and court records.].)

The California legislature responded by enacting section 1376, which was applicable in "any case in which the prosecution seeks the death penalty" and established procedures for the determination of mental retardation in preconviction capital cases. (§ 1376, subd. (b)(1).) The statute defines "mentally retarded" as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." (§ 1376, subd. (a).) Section 1376's definition of mental retardation is derived from the two clinical definitions that are cited in *Atkins*, that of the American Association on Mental Retardation (AAMR), which changed its name in 2006 to the American Association on Intellectual and Developmental Disabilities (AAIDD), and that of the American Psychiatric Association. (*In re Hawthorne* (2005) 35 Cal.4th 40, 47-48; *Atkins*, *supra*, 536 U.S. at p. 308, fn. 3; *Campbell v. Superior Court* (2008) 159 Cal.App.4th 635, 648-649.)

While section 1376 sets forth the procedures governing a defendant's pretrial claim of mental retardation, this Court has explained that postconviction claims of mental retardation should be raised by petition for writ of habeas corpus. (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 47.) Furthermore,

> To state a prima facie claim for relief, the petition must contain 'a declaration by a qualified expert stating his or her opinion that the [petitioner] is mentally retarded...' (§ 1376, subd. (b)(1).) Not only must the declarant be a qualified expert, i.e., an individual with appropriate education, training, and experience, the declaration must explain the basis for the assessment of mental retardation in light of the statutory standard.

(*Ibid.*)

> [T]he expert's declaration must set forth a factual basis for finding the petitioner has significantly subaverage intellectual function and deficiencies in adaptive behavior in the categories enumerated above [communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academics, work, leisure, health and safety]. *The evidence must also establish that the intellectual and behavioral deficits manifested prior to the age of 18.*

(Emphasis added; *id.* at p. 48.)

IQ test scores are an important objective component of the accepted definitions of mental retardation. Ordinarily, significantly subaverage intellectual functioning is demonstrated by an IQ of below 70, which is two standard deviations (or 30 points) below the mean of 100. (DSM-IV-TR (4th ed. 2000, Text-Revision), p. 41; AAMR, *Mental Retardation-Definition, Classification and Systems of Supports* (10th ed. 2002), p. 14; *Atkins*, *supra*, 536 U.S. at p. 308, fn. 3 [Atkins had a Full Scale IQ of 59 on the Wechsler Adult Intelligence Scale]; *Campbell v. Superior Court*, *supra*, 159 Cal.App.4th at p. 641.) Mild mental retardation is typically used to describe people with an IQ of 50-55 to approximately 70. (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 48; *State v. Thomas* (2002) 97 Ohio St.3d 309, 779 N.E.2d 1017, 1038 (footnote omitted); citing *Atkins*, *supra*, 536 U.S. at p. 308, fn. 3; DSM-IV-TR, *supra*, p. 42.) Borderline intellectual functioning describes an IQ range higher than that for mental retardation, generally between 71 and 84. (DSM-IV-TR, *supra*, p. 48.)

In determining the existence of significantly subaverage intellectual functioning, consideration should be given to the standard error of measurement and the instrument's strengths and weaknesses. (AAMR, *Mental Retardation: Definition, Classification and Systems of Supports*, *supra*, at p. 37; see also DSM-IV-TR, *supra*, at p. 41.) The standard error of measurement has been estimated to be three to five points for well-

standardized measures of general intellectual functioning, but may vary from instrument to instrument. (AAMR, *Mental Retardation: Definition, Classification and Systems of Supports*, *supra*, at p. 57; DSM-IV-TR, *supra,* at pp. 41-42.) For example, a full scale IQ score of 70 on the Wechsler scales represents a range of 65-75. (DSM-IV-TR, *supra*, p. 41.)

However, an IQ of 70 may not be adopted as the upper limit for making a prima facie showing of mental retardation. Section 1376's definition of mentally retarded does not include a numerical IQ score; a fixed cutoff is inconsistent with established clinical definitions, and IQ test scores are insufficiently precise to utilize a fixed cutoff in this context. (*In re Hawthorne*, *supra*, 35 Cal.4th at pp. 48-49 [prima facie showing of mental retardation established by the following: testimony from neuropsychologist and an expert specializing in psychiatry and neurology that petitioner was "one of the most profoundly impaired individuals he [had] seen;" by IQ scores of 70-75 (including a performance IQ of 71 on the Wechsler Adult Intelligence Scale), and a history of adaptive deficits in childhood (he was a slow learner, had trouble with basic reading, writing and arithmetic, and had problems communicating with others)]; *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999, 1011-1015 [verbal IQ score of 59 on the Wechsler Intelligence Scale for Children-Revised constituted evidence of significantly subaverage intellectual functioning; the full scale IQ of 81 was found to not be fully reliable because there was a wide disparity between the verbal IQ (59) and performance IQ (109)].)

Moreover, the definitions of mental retardation used by the American Psychiatric Association and AAIDD and set forth in section 1376, subdivision (a), provide that significantly subaverage intellectual functioning must also be accompanied by significant limitations in adaptive behavior. (AAMR, *Mental Retardation: Definition, Classification and Systems of Supports*, *supra*, at p. 19, DSM-IV-TR, *supra*, at pp. 39, 41.)

> Deficits in adaptive behavior are demonstrated by limitations in at least two of ten skill areas, or domains. Adaptive behaviors are those behaviors the individual uses in the community to get along—daily living skills. The ten skill areas (domains) are: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health, safety, functional academics, leisure, and work.

(*Campbell v. Superior Court*, *supra*, 159 Cal.App.4th at p. 641; *Atkins*, *supra*, 536 U.S. at p. 308, fn. 3; *In re Hawthorne*, *supra*, at p. 48.) Thus, a diagnosis of mental retardation may be made with IQ scores between 71 and 75 if the individual has significant deficits in adaptive behavior. (DSM-IV-TR, *supra*, p. 48.)

Upon the submission of an appropriate declaration "by a qualified expert" (§ 1376, subd. (b)(1)), this Court will generally issue an order to show cause returnable in the superior court in which the original trial was held "with directions to hold a hearing on the question of the petitioner's mental retardation." (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 49.) The petitioner may be subject to exam by an expert appointed by the court or designated by the prosecution, or both. (*Ibid.*, citing § 1376, subd. (b)(2); *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 39-41.) At the (ensuing) hearing in the superior court, petitioner shall have the burden of proving his mental retardation by a preponderance of the evidence. (*In re Hawthorne*, at p. 50.)

2. Petitioner fails to make a prima facie showing of mental retardation

Petitioner originally relied on a declaration submitted by neuropsychologist Ricardo Weinstein to support his claim of mental retardation. At the request of habeas counsel, Mr. Weinstein conducted a five day evaluation of petitioner on July 1, 2, and 3 and on October 16 and 17 of 2002. (Frmr. Pet.'s Exh. 151 at p. 2.) Mr. Weinstein conducted a clinical interview, reviewed dozens of declarations from petitioner's family

and friends, and administered various tests to petitioner, including the Woodcock Muñoz Battery test, the General Ability Measure for Adults (GAMA) test, and the Wechsler Adult Intelligence Scale-Spanish version (WAIS). (*Id.* at pp. 3, 9.) He found petitioner's cognitive functioning to be in the mental retardation to borderline mental retardation range. (*Id.* at pp. 4, 28.) He concluded, "some of Mr. Benavides' scores reflected abilities in the mentally retarded range, and his adaptive skills are indicative of substantially below average intellecual functioning." (*Id.* at p. 33.) His declaration was deficient because it did not identify any deficits in adaptive behavior, whereas *Atkins v. Virginia*, *supra*, 536 U.S. 304, required limitations in at least two out of ten skill areas or domains of adaptive behavior. (*Id.* at p. 309, fn. 3.)[85] Mr. Weinstein's declaration was subsequently withdrawn and replaced with a declaration by Antonio Puente another neuropsychologist on the guise Mr. Weinstein had reviewed "several declarations" that were withdrawn. (April 22, 2008 Decl. of Michael Lawerence at pp. 31-32.) This is another example of petitioner benefitting from his investigator's misconduct. He has used Culhane as a pretext to withdraw a deficient opinion by Mr. Weinstein and substitute a new one by Mr. Puente.

Antonio Puente, Ph.D., a clinical neuropsychologist in private practice, conducted eleven hours of interviews with petitioner in 2007 over the course of three days (July 24, 25 and August 20). (Pet.'s RCCAP Exh. 126 at pp. 2, 5.) He also administered a series of tests designed to detect neuropsychological and cognitive functioning and compared his findings to the evaluation and tests previously conducted by Mr. Weinstein.

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[85] The United States Supreme Court issued *Atkins v. Virginia*, *supra*, 536 U.S. 304, on June 20, 2002. Mr. Weinstein signed his declaration on November 2, 2002. (Frmr. Pet.'s Exh. 151 at p. 34.)

(*Id.* at pp. 6, 15; Frmr. Pet.'s Exh. 151 at pp. 1-2.) Mr. Puente also reviewed "social history documents," including photographs of the area where petitioner was born and raised in Jalisco, Mexico; school records; testimony and declarations of family members, friends neighbors, schoolmates, teachers and coworkers; research regarding the effects of pesticides to which he was allegedly exposed; petitioner's testimony from trial; declarations from two interpreters who worked on his capital case; the audiotape of petitioner's November 18, 1991 interview at the police station and translations of it (the copy admitted at trial and Ms. Claus' certified translation); and the *Miranda* advisements given to petitioner and Ms. Claus' declaration concerning those advisements. (*Id.* at p. 7.)

Petitioner now cites Mr. Puente's declaration in support of his claim that he is mentally retarded. (RCCAP at pp. 347-357; Pet.'s RCCAP Exh. 126.) Habeas counsel asserts that Mr. Puente's evaluation was necessitated by the withdrawal of Mr. Weinstein's declaration and that an independent exam by Mr. Puente was necessary "to avoid any suggestion that the 'tainted' declarations influenced Dr. Weinstein's findings." (April 22, 2008 Decl. by Michael Laurence at pp. 6-7, 31-32.)

Respondent objects to petitioner's reliance on Mr. Puente's declaration on the ground there has been no showing that Ms. Culhane's fraudulent work necessitated the withdrawal of Mr. Weinstein's declaration and justified its replacement with opinion testimony from a new expert. (Jan. 23, 2008 Ruling of this Court.) Petitioner should not get to benefit from his investigator's misconduct by obtaining yet another neuropsychological exam, which additionally incorporates the findings and test results obtained from Mr. Weinstein's 2002 exam. Rather, Mr. Weinstein should have been asked to review the replacement declarations to determine their effect, if any, on his opinion. (Compare Pet.'s RCCAP Exh. 89 at p. 5543 [Replacement Decl. by James Wood],

Frmr. Pet's Exh. 142 at p. 5992 [Frmr. Decl. by James Wood].) Moreover, petitioner should not take advantage of the Culhane situation to withdraw a legally deficient declaration and to substitute a new one in its place that rises to make up for deficiencies unrelated to the Culhane problem. In addition, respondent questions whether IQ scores from 2002 (obtained 35 years after petitioner turned 18) or from 2007 (40 years after he turned 18) can suffice to show that the condition of significantly subaverage intellectual functioning manifested before the age of 18. Even if they can be, the scores obtained by Mr. Weinstein in 2002, closest to the age of 18, arguably have more probative value than those obtained by Mr. Puente in 2007. Moreover, over time, performance on an IQ test may improve with practice. (AIDD, *Users Guide: Mental Retardation-Definition, Classification and Systems of Supports* (10th ed. 2006), p. 21). In this case, petitioner was administered the Wechsler Adult Intelligence Scale-Spanish Version in 2002 and the Wechsler Adult Intelligence Scale-III, an updated version of the same test, in 2007. (Frmr. Pet.'s Exh. 151 at p. 9; Pet.'s RCCAP Exh. 126 at pp. 5, 16.)

In any event, Mr. Puente's declaration does not state a prima facie case for relief under section 1376 for reasons that will be discussed below.

a. Petitioner has not proven that his intellectual functioning was below average before he turned 18

(1) IQ scores obtained 35 and 40 years after he turned 18 and when he had a motive to malinger are not reliable evidence of significantly subaverage intellectual functioning manifested before the age of 18

Mr. Puente opines that petitioner's "intellectual functioning is in the mental retardation range," but there is no evidence of petitioner's IQ during childhood or adolescence. (Pet.'s RCCAP Exh. 126 at pp. 16, 22.)

Petitioner purportedly attended *primaria* (elementary school) in Los Camichines, Mexico (Pet.'s RCCAP Exh. 110 at p. 3; Pet.'s RCCAP Exh. 119 at p. 7, and Pet.'s RCCAP Exh. 121 at p. 11), but he has not introduced any IQ scores from that time period. He attended *secundaria* (middle school) in San Gabriel, Mexico, and has not produced IQ scores from that time period either.

Petitioner's 2002 and 2007 IQ scores on tests administered when petitioner was 53 and 58 do not prove that his intellectual functioning was significantly below average before he turned 18 in 1967.[86] Section 1376 does not expressly require that a diagnosis of mental retardation be made by a standardized test score or before an individual turns 18. However, there must be evidence from which a conclusion can be reached that the defendant suffered from significantly subaverage general intellectual functioning together with deficits in adaptive behavior, before that age. (Blume, Johnson, & Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases* (2009) 18 Cornell J.L. & Pub. Policy 689, 697.)

Furthermore, none of petitioner's full scale IQ scores are 70 or below. In 2002, petitioner obtained full scale IQs of 82 on the Wechsler Adult Intelligence Scale-Spanish version (WAIS-Spanish version), of 83 on the General Ability Measure for Adults (GAMA) and 72 on the Woodcock Muñoz Battery test. (Frmr. Pet.'s Exh. 151 at p. 9.) In 2007, petitioner obtained full scale IQs of 83 on the Beta-III and of 80 on the Wechsler

[86] Petitioner was born on July 19, 1949. (Pet.'s RCCAP Exh. 48 at p. 4904 [Birth certificate]; Probation report [filed June 11, 1993], p. 3.)

Adult Intelligence Scale-III (WAIS-III).[87] (Pet.'s RCCAP Exh. 126 at pp. 5, 14, 16.)

Mr. Puente asserts that petitioner's overall functioning on the foregoing tests plus his nonverbal IQ of 48 on the Comprehensive Test of Nonverbal Intelligence 3 (CTONI 3) "showed significant cognitive deficits and significantly subaverage intellectual functioning." (Pet.'s RCCAP Exh. 126 at p. 15.) Mr. Puente further alleges there is "significant scatter" in petitioner's test scores but opines that, when viewed as a whole, the scores "fall within the range of mental retardation and indicate significant impairment in intellectual functioning." (*Id.* at pp. 16, 22.)

Mr. Puente's reference to "significant scatter" in scores seems to relate to petitioner's 2007 performance on the CTONI 3, Benton Visual Retention test and Peabody Picture Vocabulary Test. (Pet.'s RCCAP Exh. 126 at p. 15; RCCAP at pp. 351-351.) Notably, these three tests are not among the standardized tests recommended by the AAIDD and American Psychiatric Association, nor is the Woodcock Muñoz test that was given by Mr. Weinstein in 2002. (DSM-IV-TR, *supra*, at p. 41 [citing the Wechsler Intelligence Scales for Children (3rd ed.), Stanford-Binet (4th ed.), and Kaufman Assessment Battery for Children]; AAMR, *Mental Retardation Definition, Classification and Systems of Supports*, *supra*, at pp. 59-60 [characterizing the Wechsler scales and Stanford-Binet as the most commonly used instruments, and discussing the Cognitive Assessment Scale and the Kaufman Assessment Battery for Children, as well as various adaptations for people with limited verbal ability or profound cognitive impairments, i.e., the Slossman Intelligence Test, the

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[87] The United States Supreme Court observed that the WAIS-III is "the standard instrument in the United States for assessing intellectual functioning." (*Atkins*, *supra*, 536U.S. at p. 309, n. 5.)

Bayley Scales of Infant Development, the CTONI, the Leiter International Performance Scale-Revised, and the Universal Nonverbal Intelligence Test.].) Moreover, Mr. Puente fails to provide adequate information by which to assess petitioner's performance on these three tests. For example, Mr. Puente does not explain the nine-point spread in petitioner's score on the Benton Visual Retention test (Benton, 1963), which purportedly showed an "IQ of 60-69," state whether he "corrected the score" for the "Flynn Effect," and if so, what calculation was used to make that "correction." (Pet.'s RCCAP Exh. 126 at p. 15.)[88] Although Mr. Puente lists a variety of circumstances in which the CTONI 3 is given, he fails to explain why the test was appropriate in this case. (AAMR, *Mental Retardation-Definition, Classification, and Systems of Supports*, *supra*, p. 65 [Noting that the CTONI (Hamill, Peterson & Wiederholt, 1997), a previous version of the test Mr. Puente administered, "was specifically designed to be used to assess intellectual ability of individuals for whom most other intelligence tests are inappropriate or possibly biased."].) Finally, petitioner's score on the Peabody Picture Vocabulary Test was equivalent to the intellectual functioning of a 13- to 14-year-old child, but the test is not a reliable measure of his intelligence as it is recommended for an individual who is under the age of 18, not a 58 year old. (Pet.'s RCCAP Exh. 126 at p. 16.)

Petitioner further attempts to fit his IQ within the range necessary to establish mental retardation by arguing that the "Flynn Effect" means "that

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[88] The AAIDD recommends that "[i]n cases with multiple versions [of a test], the most recent version with the most current norms should be used at all times. In cases where a test with aging norms is used, a correction for the age of the norms is warranted." (AAIDD, *User's Guide: Mental Retardation – Definition, Classification and Systems of Supports* (10th ed. 2006), at p. 20.)

his IQ scores would be lower than, but statistically similar to that obtained on the Woodcock Muñoz." (RCCAP at pp. 351-352.) Political scientist James Flynn studied IQ tests across populations and discovered that IQ scores have been increasing from one generation to the next in all 14 nations for which IQ data existed. The "Flynn Effect" states that the results on any given IQ test will rise approximately 3.3 points for every 10 years the test is in existence. So, a test for which the original norm was 100 points will yield a mean score of 103.3 if given 10 years later. (*People v. Superior Court (Vidal)*, *supra*, 40 Cal.4th 999, 1007.) To compensate for this, IQ tests are renormed every 15 to 20 years to restore the mean score to 100. Consequently, fewer people fall into the range for mental retardation as time increases from each renorming of the IQ test. (Hagstrom, *Atkins v. Virginia: An Empty Holding Devoid of Justice for the Mentally Retarded* (2009) 27 Law & Inequ. 241, 262-263.) The main recommendation resulting from Flynn's work

> is that all intellectual assessments must use a reliable and appropriate individually administered intelligence test. In cases of tests with multiple versions, the most recent version with the most current norms should be used at all times. In cases where a test with aging norms is used, a correction for the age of the norms is warranted.

(AAIDD, *User's Guide: Mental Retardation – Definition, Classification and Systems of Supports*, *supra*, at pp. 20-21.)

Petitioner fails to provide the documentary support necessary to support his claim that the "Flynn Effect" impacts the reliability of any of his IQ scores. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; RCCAP at pp. 351-352.) Petitioner has not adduced any evidence about whether the IQ tests that were administered to him were used at the beginning or the end of a norm cycle in order to determine whether the "Flynn Effect" would even come into play. (Pet.'s RCCAP Exh. 126 [Decl. by Mr. Puente does

not even mention the "Flynn Effect."].)[89] Petitioner also fails to provide any evidence showing a consensus within the scientific community as to the applicability of the "Flynn Effect."

In addition to IQ test scores, a court should also consider any evidence that a defendant may have been feigning mental retardation or "may have been motivated to perform poorly" on tests. (*Thomas*, *supra*, 779 N.E.2d at pp. 1038-1039 [expert testified defendant "may have been motivated to perform poorly" on IQ test in order "to qualify for disability benefits," and that defendant "would feign sleeping" during some of the test administrations].) Mr. Puente opines that petitioner exerted his best efforts on the tests he administered and was not malingering, particularly since petitioner's scores were "generally consistent on multiple tests that [he] administered and that Dr. Weinstein administered four years prior." (Pet.'s RCCAP Exh. 126 at p. 6.) However, petitioner had a motive to malinger when he was tested in 2002, as well. Speculative claims are not a basis for relief on habeas. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; see also *Green v. Johnson* (4th Cir. 2008) 515 F.3d 290, 300, fn. 2 [Where one full scale IQ score was below the state threshold for mental retardation but three were above, the court noted that lower scores can be faked, but not higher scores.].) Based on the foregoing, there is some doubt that petitioner's IQ is even close to the threshold necessary to fall within the range of that considered to be mentally retarded.

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[89] In 2002, Mr. Weinstein baldly alleged that, due to the "Flynn Effect," petitioner's IQ scores on the WAIS are similar to his scores on the Woodcock Muñoz. (Frmr. Pet.'s Exh. 151 at pp. 9-10.) However, he neither calculated a "corrected" score for petitioner's performance on the WAIS test (based on the "Flynn Effect"), nor provided data about when the WAIS test was normed to substantiate his assertion.

In addition, Mr. Puente has not cited any evidence that petitioner's allegedly significant subaverage intellectual functioning manifested before the age of 18. Rather, Mr. Puente cursorily asserts "in light of the well-documented history of his cognitive deficits and adaptive behavior throughout his life, I believe that Mr. Benavides' mental retardation manifested itself before the age of 18." (Pet.'s RCCAP Exh. 126 at p. 15.)

Petitioner was not diagnosed as mentally retarded as a child and there is no evidence he was placed in special education classes during *primaria* or *secundaria*. (See, e.g., Pet.'s RCCAP Exh. 52 [Education records from *secundaria*].) Petitioner has adduced 35 declarations from family and friends who knew him as a child in Mexico and from coworkers, friends and acquaintances in California. (See, e.g., Pet.'s RCCAP Exhs. 66, 85, 86, 90-105, 110-125.) None of these individuals allege that petitioner's intellect was significantly subaverage or characterize him as mentally retarded, including his former teacher (Pet.'s RCCAP Exh. 116), former classmate (Pet.'s RCCAP Exh. 123), brother, who went on to become a teacher (Pet.'s RCCAP Exh. 119), and others who allegedly had experience with individuals who were mentally disabled (see, e.g., Pet.'s RCCAP Exhs. 66 [Decl. by Estella Medina], 105 [Decl. by Marisol Alcantar], and 92 [Decl. by Elena Preciado]).[90]

Although, petitioner's grades in seventh and eighth grade were not

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[90] Petitioner's younger cousin Benito Preciado Benavides alleges that he and petitioner did not like school and were both "dumb as donkeys" and incapable of completing school. (Pet.'s RCCAP Exh. 114 at pp. 6028-6029.) Benito's colloquial comment is not informative and does not establish that petitioner's problem in school was due to intelligence as opposed to a lack of interest. However, there is no evidence that he has adequate personal knowledge to judge petitioner's ability to complete his education. Benito did not attend *secundaria* with petitioner. (Pet.'s RCCAP Exh. 52 at pp. 5009, 5011.)

stellar, they do not reflect intellectual functioning that was significantly below average. According to petitioner's former Spanish and history teacher, Maria Dolores Castaneda de Palafox, students were graded on a scale of 1-10. A score of 10 was the highest grade, and 5 was a passing grade. (Pet.'s RCCAP Exh. 116 at p. 4.) Ms. Castaneda de Palafox alleges that petitioner "began to have problems understanding new concepts" when he entered *secundaria*. However, petitioner still attained average grades in Spanish and history (her classes) and geography in seventh and eighth grade. (*Id.* at p. 5; Pet.'s RCCAP Exh. 52 at pp. 5008, 5010.) She attributed his poor grades in other classes to his performance on tests, noting that other teachers did not take a student's effort and participation into account. (Pet.'s RCCAP Exh. 116 at p. 6.) In seventh grade, petitioner failed math, biology, and civics. However, 46% of the class failed math, 38% of the class failed biology and 34% of the class failed civics. (Pet.'s RCCAP Exh. 52 at p. 5009.) Moreover, petitioner's poor grades could just as easily be attributed to his having a girlfriend (Pet.'s RCCAP Exhs. 110 at p. 11; 119 at p. 8; 121 at p. 12), lack of nourishment (Pet.'s RCCAP Exhs. 114 at p. 7; 115 at pp. 8-9; 118 at p. 9; 124 at p. 5), poor parental support (Pet.'s RCCAP Exh. 116 at p. 6), lack of interest (Pet.'s RCCAP Exh. 114 at p. 2), his dislike for reading (Pet.'s RCCAP Exh. 123 at p. 3) exhaustion from working in the fields each morning before school (Pet.'s RCCAP Exh. 116 at p. 6, Pet.'s RCCAP Exh. 118 at p. 8, Pet.'s RCCAP Exh. 119 at p. 7, Pet.'s RCCAP Exh. 121 at p. 11) and the two-hour walk he made from Los Higuerillas to San Gabriel just to get to school (Pet.'s RCCAP Exhs. 114 at p. 7, 119 at p. 3), or inadequate preparation in the *primaria* in Los Camichines, where he attended a one-room school house with students of all ages (Pet.'s RCCAP Exh. 114 at pp. 2-3) and was instructed by one teacher, who was undereducated herself and absent on occasion (Pet.'s RCCAP Exh. 110 at p. 3).

Thus, petitioner's intellectual functioning may currently be significantly below average, but due to the lack of evidence of onset before the age of 18, that does not qualify for a diagnosis of mental retardation. (§ 1376, subd. (a); AAMR, *Mental Retardation-Definition, Classification, and Systems of Supports*, *supra*, p. 8.)[91]

(2) There is no evidence that petitioner's alleged brain damage with particular deficits in reasoning, problem-solving, and cognitive flexibility and in memory occurred before he turned 18

Mr. Puente further opines, based on his clinical assessment of petitioner and review of background materials, that petitioner suffers from mild to moderate organic brain damage. (Pet.'s RCCAP Exh. 126 at pp. 7, 12, 22.) He opined that petitioner has particular deficits in executive functioning and memory, both of which are consistent with brain damage in the temporal and frontal lobes of the brain. (*Id.* at pp. 8-14; see also RCCAP at pp. 348-350.)

According to Mr. Puente, executive functioning includes reasoning, problem-solving, and cognitive flexibility. (Pet.'s RCCAP Exh. 126 at p. 8.) Petitioner's scores on the Woodcock Muñoz – Fluid Reasoning subtest were comparable to a child who is six years and eleven months old. (*Id.* at p. 9.) The Bateria III purportedly showed the same deficiencies in concept formation. Petitioner's score on the Concept Formation subtest was equivalent to that of a child who is five years and five months old. (*Ibid.*) Petitioner had 85 errors, nearly 70% more errors than the cut-off for brain damaged individuals, on the Category Test, which measures one's ability to form concepts, organize, reason abstractly, solve problems, and

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[91] As will be discussed later in this argument, petitioner has not shown that his alleged cognitive deficits and adaptive deficits manifested before the age of 18 either.

integrate information. (*Id.*) On the Wisconsin Card Sorting Test (WCST), administered by Mr. Weinstein in 2002, petitioner had difficulty "shifting sets." His score in the "Failure to Maintain A Set" portion of that test apparently placed him below the first percentile. (*Id.*)

Mr. Puente also found petitioner to have significant memory impairment in immediate recall, delayed recall, and recall with or without interfering or prompting information. (Pet.'s RCCAP Exh. 126 at p. 12.) On the Woodcock Muñoz test, petitioner scored in the low average range in tests of short-term or working memory, performing at the level of seven years and four months of age. (*Id.* at p. 12.) Petitioner scored in the severely impaired range on the "Memory for Words test," a subset of the Woodcock Muñoz test. Petitioner's performance on the "Memory for Names" subtest of the Woodcock Muñoz Battery given by Dr. Weinstein in 2002 showed a similar level of impairment, reflecting the abilities of a four-year-old child, placing him in the low range of cognitive functioning for individuals of his same age. Petitioner's performance on the Continuous Visual Memory Test (CVMT) showed a combination of problem-solving and memory impairments. (*Id.* at p. 13.) On the Acquisition Task test, he performed in the severely impaired range. His total test score showed he was in the lower 1.7% of population. (*Ibid.*) His scores on the CVMT show that he can focus on the information, but his ability to store and retrieve it are significantly impaired. (*Id.* at pp. 13-14.) Petitioner's performance on the Woodcock Muñoz, Verbal Analogies subtest, purportedly showed similar impairments in memory. (*Id.* at p. 14.) Mr. Puente also concluded that petitioner has deficits in verbal fluency which are associated with frontal lobe damage. (*Ibid.*) For example, on the Woodcock Muñoz test, petitioner's measured processing speed was comparable to a nine year and nine month old. (*Id.* at p. 12.)

Like the IQ tests, the neuropsychological tests were all administered post-trial in connection with the instant habeas proceedings. Thus, petitioner had a motive to malinger on these tests as well, calling into question the reliability of the scores.

In any event, there is no evidence that petitioner suffered from brain damage and/or cognitive impairment before he turned 18. (§ 1376, subd. (a).) Mr. Puente contends petitioner's exposure to the following "risk factors" "could account" for his alleged neuropsychological and cognitive impairments: (1) stress suffered by petitioner's mother while she was pregnant with petitioner, (2) stress petitioner endured working in the fields as a child and from his father's physical abuse, (3) exposure to neurotoxins from pesticides where he lived and worked in the fields, (4) his consumption of *leche caliente* (fresh cow's milk combined with alcohol), (5) alcohol consumption during adolescence, (6) his reports of at least two car accidents where he "could have sustained brain injuries," and (7) "his pastime of riding bulls and wild horses, where his head jerked back and forth and where he was thrown off the animals." (Pet.'s RCCAP Exh. 126 at p. 21.) Mr. Puente's claim is speculative. Such pleading is insufficient for habeas relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

For example, respondent is not aware of, and petitioner has not cited, any evidence on habeas that petitioner's father abused his mother while she was pregnant with him.[92] There is no evidence petitioner was born premature, was mentally impaired at birth, or failed to meet developmental

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[92] Mr. Gomez asserts that petitioner's mother was beaten by petitioner's father when she was pregnant but does not cite the factual basis for his assertion or identify when this occurred. (Pet.'s RCCAP Exh. 127 at p. 19; but see Pet.'s RCCAP Exh. 124 at p. 4 [Petitioner' aunt, Ignacia Gonzales Campos, alleges that petitioner's mother had a stillborn once as a result of a beating from petitioner's father]; No death certificate was adduced in support of her claim (Pet.'s RCCAP Exh. 51 at pp. 4990-5007).

milestones as a child. (See, e.g., Pet.'s RCCAP Exhs. 85 [Decl. by petitioner's father],[93] 119 [Decl. by petitioner's sister], and 121 [Decl. by petitioner's brother].) Several declarants allege that petitioner drank *leche caliente* during his childhood and liked to drink alcohol (at unspecified ages), but none of the declarants who knew petitioner before he turned 18 contended that his consumption of either impaired his cognitive abilities.

Also lacking is evidence that petitioner was exposed to pesticides before he turned 18, and that the alleged exposure impaired his cognitive abilities. Petitioner's brother Evaristo alleges that "they" started using chemical fertilizers (Litrato and sulfur) when Evaristo was "about 13." (Pet.'s RCCAP Exh. 119 at p. 6.) Evaristo was five years younger the petitioner. (*Id.* at p. 1; Prob. Report [filed June 11, 1993], at p. 3.) Evaristo does not identify who "they" refers to, but even if he were referring to himself and his brothers, petitioner would have been 18 when Evaristo turned 13. Petitioner's aunt Ignacia Gonzales Campos alleges that "they" sprayed unspecified pesticides when petitioner was a "young man," but she does not identify his age. (Pet.'s RCCAP Exh. 124 at p. 6.) Petitioner's former neighbor Aurelio Baltazar Campos purportedly planted the fields with petitioner's father Alberto, petitioner's uncle Ignacio and petitioner. (Pet.'s RCCAP Exh. 120 at p. 1.) Mr. Campos alleges that petitioner began mixing and spraying unspecified chemicals as a "teenager" and that petitioner did most of the spraying when he and his brother Manuel worked with their father because Manuel was very affected by the chemicals. (*Id.* at p. 8.) Two other declarants alleged that pesticides were used in Mexico

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[93] Respondent questions the veracity of the declaration from petitioner's father. It is executed in English and no one else in petitioner's family speaks English. Moreover, it was purportedly signed on May 13, 2000 (Pet.'s RCCAP Exh. 85 at p. 21), and petitioner's father died sometime that year. (Pet.'s RCCAP Exh. 90 at pp. 1, 9.)

but did not contend that petitioner used pesticides. (Pet.'s RCCAP Exh. 125 at p. 6312 [Decl. by Jose Jesus Vasquez Davalos]; Pet.'s RCCAP Exh. 102 at p. 1 [Decl. by petitioner's cousin Jose Isabel Figeuroa].)

Likewise, there is no evidence that petitioner suffered mental impairments from riding bulls or horses prior to the age of 18. Many declarants allege that petitioner rode bulls or horses. (See, e.g., Pet.'s RCCAP Exh. 104 at p. 5; Pet.'s RCCAP Exh. 112 at p. 4.) Petitioner's second cousin Guadalupe Padilla Benavides, who was two years younger than petitioner, asserts that he and petitioner rode horses and bulls together and became dizzy/confused when thrown. On one occasion, petitioner was purportedly thrown from a bull in the bull ring and hit his head hard on the ground. Guadalupe contended petitioner began riding in the bull ring when he was in secundaria at the age of 15 or 16, but he does not give petitioner's age at the time of the fall in the bull ring, describe any head injuries or contend it left petitioner mentally impaired. (Pet.'s RCCAP Exh. 122 at pp. 5-6.)

Finally, respondent is not aware of, and petitioner has not cited, any evidence on habeas that supports Mr. Puente's speculative assertion that petitioner "could have" incurred serious brain injuries from "at least two" car accidents that petitioner reported to him. (Pet.'s RCCAP Exh. 126 at p. 21.) Petitioner has not presented a declaration contending he was in any car accidents. Petitioner's cousin Maria Elena Acevedo Benavides alleges that her mother (Elena Benavides Rodriguez) cared for petitioner after he was involved in *one* car accident, but there is no information about the date of the car accident and no evidence it occurred before petitioner turned 18. The declaration also lacks any description of any injuries sustained by petitioner, and any treatment provided to him, and contains no assertion that accident left petitioner with brain injuries. (Pet.'s RCCAP Exh. 97 at p. 5715.) Furthermore, her mother Elena Benavides Rodriguez does not

even mention the car accident in the declaration she submitted on petitioner's behalf. (Pet.'s RCCAP Exh. 90 at pp. 1-9.) Petitioner also fails to present independent documentation of the alleged car accidents (i.e., police reports and insurance claims).

In sum, Mr. Puente's finding that petitioner had cognitive deficits and/or significantly subaverage intellectual functioning in 2007 does not support a diagnosis of mental retardation pursuant to section 1376 due to the lack of evidence that those conditions manifested before petitioner turned 18. As one court has observed, if the defendant's mental deficiencies were due to an injury suffered when he was "in his mid 20s" it would "not meet the definition of 'mental retardation' of most states that prohibit execution of the mentally retarded." (*Thomas*, *supra*, 779 N.E.2d at p. 1038.)[94] Also, if a defendant's injury "had no lasting effect," it would not support a finding of mental retardation. (*Id.*)

b. Petitioner does not suffer from adaptive deficits that manifested before he turned 18

This Court has explained that the Legislature derived section 1376 from the two clinical definitions referenced by the United States Supreme Court in *Atkins*, *supra*, 536 U.S. at p. 309, fn. 3. (*In re Hawthorne*, *supra*, 35 Cal.4th 40 at p. 48.) Specifically,

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: 'Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas:

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[94] Petitioner's potential exposure to pesticides when he picked grapes in Delano, California, during his 30s and 40s does not support a diagnosis of mental retardation under the definition set forth in section 1376, subdivision (a). (Pet.'s RCCAP Exhs. 100 at p. 5759; 103 at pp. 5835-5836.)

> . communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.' [Citation.] [¶] The American Psychiatric Association's definition is similar: 'The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before the age of 18 years (Criterion C)....

(*Id.* at p. 48, citing *Atkins*, *supra*, at p. 309, fn. 3.) Moreover,

> as with preconviction applications, the expert's declaration [in a postconviction claim of mental retardation raised on habeas] must set forth a factual basis for finding the petitioner has significantly subaverage intellectual functioning and deficiencies in adaptive behavior *in the categories enumerated above*. The evidence must also establish that the intellectual and behavioral deficits manifested prior to the age of 18.

(*Ibid.*; emphasis added; see also *Campbell v. Superior Court*, *supra*, 159 Cal.App.4th at p. 641 [referencing the ten adaptive skills discussed by *Hawthorne*]).

(1) *Hawthorne* Criteria

Notwithstanding petitioner's asserted cognitive deficits and "borderline" intellectual functioning, petitioner has consistently demonstrated his ability to function in his environment. He fails to state a prima facie case under section 1376, as he does not have deficits in two of the ten adaptive skills discussed in *Atkins*, *supra*, 536 U.S. at p. 309, fn. 3, and *In re Hawthorne*, *supra*, 35 Cal.4th at p. 48.

(a) Communication

Petitioner appears to have always been able to express himself in Spanish. Although petitioner has not adduced educational records from the

primaria, his records from the *secundaria* indicate he received average grades in Spanish in the seventh and eighth grade. (Pet.'s RCCAP Exh. 52 at pp. 5008; 5010; Pet.'s RCCAP Exh. 116 at p. 5.) Petitioner's former teacher stated that she had her students work in groups and did not relate any problems with petitioner completing that task. (Pet.'s RCCAP Exh. 116 at p. 3.) To the contrary, she noted petitioner "interacted well with his peers." (*Id.* at p. 7.)

Petitioner's daughter Nelida was born on March 9, 1983 (when petitioner was about 33). (Pet.'s RCCAP Exh. 95 at p. 1; Probation report [filed June 11, 1993], p. 3 [petitioner's birthday is July 19, 1949].) Nelida contends she and petitioner have corresponded since she was a child. (Pet.'s RCCAP Exh. 95 at p. 3.)

On November 18, 1991, prior to trial, petitioner was interviewed at the police station. During the interview, he denied harming Consuelo in any way. (See, e.g., 1Supp.CT 174.) He also attempted to deflect blame for Consuelo's injuries with statements like "I didn't know what happened to her, if she fell from a ladder or she got hit by a car"). (*People v. Benavides*, *supra*, 35 Cal.4th at p. 100.) His responses throughout the entire, tape recorded, question and answer, interview were coherent and reasonably articulate. (1Supp.CT 155-186 [Transcript of Interview].) They do not suggest any mental retardation.

Since petitioner was incarcerated in this case, he has written numerous letters and made multiple telephone calls. Pending trial, petitioner telephoned Estella multiple times (13RT 2560-2561) and mailed letters to her. (Pet.'s RCCAP Exh. 66 at p. 23 [Decl. by Estella Medina].) Apparently, petitioner also mailed letters to his cousin Maria Elena Acevedo Benavides in Mexico. (Pet.'s RCCAP Exh. 97 at p. 3.) In October of 1992, petitioner sent a letter to the Mexican consulate informing them of his detention at the Lerdo jail and requesting assistance. (Pet.'s

RCCAP Exh. 145 at 649.) Petitioner has also written letters to family and friends (Pet.'s RCCAP Exhs. 91 at p. 22; 92 at p. 11; 93 at p. 11; 97 at p. 5; and 113 at p. 7) and telephoned them. (See, e.g., Pet.'s RCCAP Exhs. 92 at p. 11; 93 at p. 10; 97 at p. 5; and 111 at p. 14.) Petitioner's communications skills belie a diagnosis of mental retardation.

Petitioner's conduct at trial is also inconsistent with a person who is mentally retarded. He chose to testify on his own behalf at his capital trial. Before he took the stand, the trial court admonished him of his Fifth Amendment right to remain silent and found that he had made a free and voluntary waiver of that right. (15RT 2972-2975.) He was on the witness stand for one day. A review of his entire testimony at the trial again fails to suggest any mental retardation. (15RT 2983-3079.)

On May 12, 1993, petitioner again showed his capacity for effective communication during his interview with the probation officer in this case (with the aid of a Spanish interpreter). (Probation report [filed June 11, 1993], p. 1.) Petitioner "indicated he did not kill the victim nor did he know the victim was molested" and complained about the adequacy of defense counsel's performance. (*Id.* at p. 7.)

(b) Self-care

Petitioner appears to have always been able to care for himself. There is no evidence he had poor hygiene or bad table manners. His former teacher noted that petitioner's family were peasants and could not afford to buy him nice clothes. Nevertheless, his clothes were always clean. She also states that petitioner was considered "very handsome" by his female peers and "always had a group of female admirers." (Pet.'s RCCAP Exh. 116 at p. 3; accord Pet.'s RCCAP Exhs. 122 at p. 6.)

Indeed, petitioner's "good appearance" was noted by neuropsychologist Antonio Puente when he evaluated petitioner in 2007. (Pet.'s RCCAP Exh. 126 at p. 6.) Petitioner's ability to care for himself

undermines his claim he is mentally retarded.

(c) Home living

Petitioner has adduced declarations from numerous family members, including his father and two of his five siblings. (See, e.g., Pet.'s RCCAP Exhs. 85, 119, 121.) None of the declarants contend petitioner required any assistance in day to day living at home or elsewhere. (Compare, e.g., Pet.'s RCCAP Exh. 92 at p. 11 [Elena Preciado notes petitioner was particularly good to her disabled son Juan Preciado, who was oxygen-deprived at birth and consequently had slurred speech and was unable to walk or feed himself].)

(d) Social/interpersonal (relationships)

Petitioner was described by many people as friendly and sociable. (Pet.'s RCCAP Exh. 118 at p. 7; see also Pet.'s RCCAP Exh. 91 at p. 19 [His aunt Josefina described him as loving and affectionate].) His former teacher characterized him "as a good boy," respectful of others. He purportedly "interacted well with his peers" and had many friendships. (Pet.'s RCCAP Exh. 116 at pp. 3, 7; see also Pet.'s RCCAP Exh. 123 at p. 3 [Decl. by former classmate and second cousin].) Petitioner was also described as popular with women (Pet.'s RCCAP Exhs. 116 at pp. 3, 7; 122 at p. 6), and he hired mariachi bands to serenade his female companions (Pet.'s RCCAP Exh. 123 at p. 3).

Although petitioner has never been married, he formed several long-term relationships with various females. In 1964 or 1965, he fell in love with Gloria Covarrubias at the age of 15 (Pet.'s RCCAP Exh. 121 at p. 12 [Decl. by his sister Enedina Benavides Figueora]) while he was in *secundaria* (Pet.'s RCCAP Exh. 119 at p. 8 [Decl. by his brother Evaristo Benavides Figueroa]). They purportedly lived together for a short while. (Pet.'s RCCAP Exh. 123 at p. 4.) In 1972, they had a son, Joel. (Probation

report [filed June 11, 1993], p. 4.) In 1979, petitioner began a long-term relationship with Juana Flores. (Pet.'s RCCAP Exh. 96 at p. 1; Pet.'s RCCAP Exh. 95 at p. 1.) In 1982, Juana and petitioner had a daughter, Nelida. (Pet.'s RCCAP Exh. 95 at p. 1.) For two years, petitioner and Juana lived together with Nelida and Juana's other daughters and her two-year-old grandson. They rented a house with Juana's sister, her boyfriend and the sister's children. (Pet.'s RCCAP Exh. 96 at p. 2; Pet.'s RCCAP Exh. 99 at p. 1.) Petitioner stayed in Mexico and worked for his father during the two years he lived with Juana. (Pet.'s RCCAP Exh. 96 at p. 3.) In 1985, petitioner began working in the fields in Delano, California, for six months at a time. (Probation report [filed June 11, 1993], p. 3.) After the picking season ended, petitioner visited his daughter in Mexico. (Pet.'s RCCAP Exh. 96 at p. 3.) In 1988, petitioner's relationship with Juana ended. (Pet.'s RCCAP Exh. 96 at p. 1; Pet.'s RCCAP Exh. 95 at p. 1.) Finally, around August of 1990, petitioner began dating Estella Medina, the mother of the victim in this case. (13RT 2595.) In March of 1991, he and Estella rented an apartment together. (13RT 2598.) Notably, Estella, whose declaration explains that she is quite familiar with various mental disabilities suffered by her sister Dehlia and Dehlia's former boyfriend, never mentioned any mental impairment exhibited by petitioner. (See Pet.'s RCCAP Exh. 66 at pp. 7-9.) The fact petitioner was able to live with girlfriends is also inconsistent with his claim of mental retardation.

(e) Use of community resources

Petitioner has not adduced any evidence on habeas showing an inability to take advantage of community resources in Mexico while growing up.

(f) Self-direction

Petitioner has assumed responsibility for his life. Petitioner and his cousin grew up in extreme poverty and at a young age vowed to go to the United States to make a better life for themselves. Unlike his cousin, petitioner achieved his goal of going to the United States. (Pet.'s RCCAP Exh. 114 at p. 8.) Petitioner purportedly made his first trip to the United States when he was 17 or 18. (Pet.'s RCCAP Exh. 119 at pp. 1, 9 [Petitioner's brother Evaristo said he was 12 or 13 at the time, meaning it would have occurred in 1966 or 1967]; Probation report [filed June 11, 1993], p. 3; Pet.'s RCCAP Exh. 48 at p. 4904.) Petitioner subsequently attained temporary resident status in October 1988 and became a permanent resident in December 1990. (Pet.'s RCCAP Exh. 138 at pp. 6473, 6475.)

Petitioner's relationships with women also reveal he was capable of making decisions about his future. Specifically, petitioner's family did not approve of his choice of girlfriends, one of whom petitioner dated before he turned 18 (Gloria Covarrubias). (Pet.'s RCCAP Exhs. 110 at p. 11; 119 at p. 8; Pet.'s RCCAP Exh. 121 at p. 12.) Petitioner's family also disapproved of his subsequent girlfriend, Juana Flores (who petitioner dated when he was in his 30s). (Pet.'s RCCAP Exh. 96 at p. 3.) Petitioner had a long-term relationship with each of these women anyway.

(g) Functional academics

As previously discussed, petitioner was not diagnosed as mentally retarded as a child and there is no evidence he was placed in special education classes during *primaria* or *secundaria*. (Pet.'s RCCAP Exh. 52.) Ms. Castaneda de Palafox alleges that petitioner "began to have problems understanding new concepts" when he entered *secundaria*. However, petitioner still attained average grades in Spanish and history (her classes), and geography in seventh and eighth grade. (Pet.'s RCCAP Exh. 116 at

p. 5; Pet.'s RCCAP Exh. 52 at pp. 5008, 5010.) As previously discussed, petitioner's academic performance does not necessarily show difficulty understanding concepts. It could just as easily be attributed to having a girlfriend (Pet.'s RCCAP Exhs. 110 at p. 11; 119 at p. 8; and 121 at p. 12); lack of nourishment (Pet.'s RCCAP Exhs. 114 at p. 7; 115 at pp. 8-9; 118 at p. 9; 124 at p. 5), poor parental support (Pet.'s RCCAP Exh. 116 at p. 6), an inability to afford school books (*id.* at pp. 2; Pet.'s RCCAP Exh. 114 at p. 7), lack of interest and motivation (Pet.'s RCCAP 114 at p. 2), exhaustion from working in the fields on school days (Pet.'s RCCAP Exhs. 118, 119, 121) and walking two hours from Las Higuerillas to school in San Gabriel (Pet.'s RCCAP Exhs. 114 at p. 7, 119 at p. 3); or inadequate preparation in the *primaria*, where he attended a one-room school house with students of all ages (Pet.'s RCCAP Exh. 114 at pp. 2-3) and was instructed by a teacher who was undereducated herself (Pet.'s RCCAP Exh. 110 at p. 3).

Petitioner complains he had difficulty reading and made grammatical mistakes in his writing when he attended *secundaria* (RCCAP at p. 353, citing Pet.'s RCCAP Exh. 123 at p. 6277 [Decl. by second cousin/former classmate, Elvira Benavides Preciado]). However, these alleged difficulties should not be construed as evidence of adaptive deficits as they could just as easily be explained by the factors enumerated above. Moreover, petitioner's reading and writing skills did not prevent him from legalizing his immigration work status in the United States (Pet.'s RCCAP Exh. 138 at pp. 6473, 6475), or impede his ability to correspond with family and friends (Pet.'s RCCAP Exhs. 91 at p. 22; 92 at p. 11; 95 at p. 3; 96 at p. 4; 97 at p. 5; 111 at p. 14; and 113 at p. 7) or to read the Bible (Pet.'s RCCAP Exh. 92 at p. 11).

(h) Work

Petitioner has worked from an early age. His brother said he started working on the farm at the age of five, helping to support the family. (Pet.'s RCCAP Exhs. 119 at p. 5; 121 at p. 2.) Petitioner and his older brother Manuel were also forced to work with their father in the fields during the school year. Petitioner got up before sunrise, worked in the field in the mornings, and walked two hours to get from Las Higuerillas to San Gabriel. (Pet.'s RCCAP Exh. 119 at p. 9.) Then he attended *secundaria* from 2:00 p.m. – 8:00 p.m. (Pet.'s RCCAP Exh. 123 at p. 2.) Family and friends who knew him growing up in Mexico, described him as a hard worker (see, e.g., Pet.'s RCCAP Exhs. 85 at p. 2; 119 at p. 11; 120 at p. 7; 121 at p. 5).

Petitioner was 17 or 18 when he made his first trip to the United States to work in the fields. (Pet.'s RCCAP Exh. 1191 at p. 9; Probation report [filed June 11, 1993], p. 3.) If the declarations concerning his relationships with Gloria Covarrubias and Juana Flores are accurate, petitioner appears to have lived in Mexico for most of his 20s and 30s. Petitioner lived with Juana Flores during the first two years of his daughter's life (1983-1985). (Pet.'s RCCAP Exhs. 96 at p. 2; 99 at p. 4.) Petitioner did not work in the United States during those two years. (Pet.'s RCCAP Exh. 99 at p. 2.) Petitioner told the probation officer in this case that he arrived in Kern County in 1985 and worked there during the picking season for six months and returned to Mexico during the off-season. (Probation report [filed June 11, 1993], p. 3.) He appears to have been adjudicated a temporary resident of the United States on October 19, 1988 (Pet.'s RCCAP Exh. 138 at p. 6473) and gained permanent resident status on December 1, 1990 (*id.* at p. 6475). In July of 1998, he helped Jesus Davalos Preciado with his first illegal crossing. (Pet.'s RCCAP Exh. 93 at p. 4.) Mr. Preciado described petitioner as his "mentor." (*Id.* at p. 3.)

Petitioner's boss and coworkers in California repeatedly described him as an extremely reliable and hard worker, as well. (See, e.g., Pet.'s RCCAP Exhs. 102 at p. 7; 103 at p. 7; 125 at p. 7.)

Petitioner supported himself. In addition, he purportedly provided financial assistance to his sister and her daughters following her husband's death in 1972 (Pet.'s RCCAP Exh. 121 at p. 15; 111 at p. 14), gave Juana Flores money for their daughter Nelida (Pet.'s RCCAP Exh. 96 at p. 3; Pet.'s RCCAP Exh. 99 at p. 4), and sent money to his mother when he worked in the U.S. (Pet.'s RCCAP Exhs. 90 at p. 8; 93 at p. 10; and 124 at p. 9) Estella Medina reports that petitioner also gave her money to pay bills, treated Consuelo and Christina to rides when they went to the swap meet, and paid for food when they went out. (Pet.'s RCCAP Exh. 66 at p. 15/5370.)

(i) Leisure

Petitioner's engagement in leisure activities before the age of 18 does not support a diagnosis of mental retardation either. Declarations from petitioner's family and friends indicate he enjoyed bull fighting, mariachi bands, and attending the fiestas in Mexico. (See, e.g., Pet.'s RCCAP Exhs. 104 at p. 5; 112 at p. 4.)

(j) Health and safety

Declarations from petitioner's family, friend and coworkers do not express any concern about petitioner's ability to manage his health and safety at home, school or work. As already discussed, petitioner worked in the fields throughout his childhood and into adulthood. He walked two hours to get from Las Higuerillas to San Gabriel (Pet.'s RCCAP Exhs. 114 at p. 7, 119 at p. 3), at times carrying his younger brother on the walks (Pet.'s RCCAP Exh. 119 at p. 3.)

In sum, petitioner has failed to adduce evidence that he has significant limitations in two of the ten adaptive skills/domains enumerated by this Court in the case *In re Hawthorne*, *supra*, 35 Cal.4th at p. 48. Even if this Court were to disagree, petitioner has not shown that his behavioral limitations manifested before the age of 18.

(2) Mr. Puente's declaration fails to apply the *Hawthorne* criteria or assess adaptive functioning by a standardized measure

Section 1376, subdivision (a) defines "mentally retarded" as the "condition of significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." It does not define the term "deficits in adaptive functioning." However, consistent with the United States Supreme Court's opinion in *Atkins*, this Court has defined deficits in adaptive functioning based on the definition of mental retardation adopted by the American Psychiatric Association and by the 1992 definition that was adopted by the American Association on Mental Retardation (Luckasson et. al.), which required that a person have limitations in at least two of the ten following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 48, citing *Atkins*, *supra*, at p. 309, fn. 3.)

In 2002, the AAMR revised the definition of adaptive functioning according to three criteria rather than ten skill areas. Under the revised definition, adaptive behavior is "the collection of conceptual, social and practical skills that have been learned by people in order to function in their everyday lives." (AAMR, *Mental Retardation: Definition, Classification and Systems of Supports*, *supra*, at p. 73.) The AAMR further

recommended that such limitations be established through the use of standardized measures.

> On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is at least two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills.

(*Id.* at p. 14; see also AAIDD, *User's Guide: Mental Retardation – Definitions, Classifications and Systems of Supports*, *supra*, at p. 13.)

The American Psychiatric Association also promotes the use of standardized scales to assess adaptive functioning or behavior as follows:

> It is useful to gather evidence for deficits in adaptive functioning from one or more reliable independent sources (e.g., teacher evaluation and educational, developmental, and medical history). *Several scales have also been designed to measure adaptive functioning or behavior (e.g. the Vineland Adaptive Behavior Scales and the American Association on Mental Retardation Adaptie Behavior Scale). These scales generally provide a clinical cutoff score that is a composite of performance in a number of adaptive skill domains.* It should be noted that scores for certain individual domains are not included in some of these instruments and that individual domain scores may vary considerably in reliability. As in the assessment of intellectual functioning, consideration should be given to the suitability of the instrument to the person's sociocultural background, education, associated handicaps, motivation, and cooperation.

(Emphasis added; DSM-IV-TR, *supra*, p. 42.)

Although Mr. Puente's 2007 evaluation of petitioner post-dated the United States Supreme Court's June 20, 2002 opinion in *Atkins* as well as this Court's 2005 opinion in the case *In re Hawthorne*, *supra*, 35 Cal.4th 40, Mr. Puente does not identify adaptive deficits in two of the ten adaptive skills identified in those cases. Instead, he opines that petitioner has deficits in all three domains of adaptive skills, including conceptual, social

and practical skills. (Pet.'s RCCAP Exh. 126 at p. 16.) In so doing, he appears to have employed the AAMR's 2002 definition of adaptive behavior. Neither Mr. Puente nor petitioner acknowledge Mr. Puente's divergence from the definition used by the American Psychiatric Association (APA) that was approved by the United States Supreme Court and this Court. However, the two different standards appear to be similar. Examples of conceptual adaptive skills are language, reading and writing, money concepts, and self-direction. Examples of social adaptive skills are interpersonal relations, responsibility, self-esteem, gullibility, naiveté, following rules, obeying laws, and avoiding victimization. Finally, examples of practical adaptive skills are activities of daily living (eating, transfer/mobility, toileting, dressing), instrumental activities of daily living (preparing meals, housekeeping, transportation, taking medication, managing money, using a phone), occupational skills and maintaining a safe environment. (AAMR, *Mental Retardation: Definition, Classification and Systems of Supports*, *supra*, p. 42 [Table 3.1].)

Even if Mr. Puente's reliance on the AAMR's 2002 definition of adaptive behavior was appropriate in this case, Mr. Puente failed to assess petitioner's adaptive deficits according to a standardized instrument. (Pet.'s RCCAP Exh. 126 at p. 5-6, 16-17; *Campbell v. Superior Court*, *supra*, 159 Cal.App.4th at p. 643 [referencing use of the Adaptive Behavior Assessment System-Second Edition-Revised (ABAS-II) to assess adaptive deficits]; AAMR, *Mental Retardation-Definition, Classification, and Systems of Supports*, *supra*, at p. 77 [listing the following four instruments as valid measures of adaptive behavior while noting other measures may also be valid: AAMR, Adaptive Behavior Scale-School and Community (Lambert, Nihira, and Leland, 1993), Vineland Adaptive Behavior Scales (Sparrow, Balla and Cicchetti, 1984), Scales of Independent Behavior-Revised (Bruininks, Woodcock, Weatherman and Hill, 1991), and

Comprehensive Test of Adaptive Behavior-Revised (Adams, 1999)].)

(3) The adaptive deficits alleged by Mr. Puente did not manifest before the age of 18

Mr. Puente cites the following as adaptive deficits: (1) inability to avoid victimization from his brothers and father; (2) academic performance in *secundaria* and failure to learn English; (3) inability to care for himself; (4) failure to progress from farmwork to a higher paying job; and (5) failure to telephone Estella Medina at work on the night of the charged offenses. (Pet.'s RCCAP Exh. 126 at pp. 17-19.) Assuming, but not conceding that the above factors are appropriately characterized as adaptive deficits, they are not supported by the evidence and do not support a diagnosis of mental retardation because they did not manifest before the age of 18, as required by section 1376, subdivision (a). Moreover, petitioner's adaptive deficits must have existed "concurrently with" significantly subaverage intellectual functioning. (§ 1376, subd. (a).) Thus, if petitioner's academic performance in *secundaria* is relied upon to support a finding of significantly subaverage intellectual functioning that manifested before the age of 18, that factor should not also be relied upon as evidence of an adaptive deficit. In other words, it should not be counted as one of the two required deficits in the ten skill areas under the APA definition of adaptive behavior or serve as the sole factor cited under the AAMR's 2002 definition of adaptive behavior, which only requires one limitation from the three types of adaptive behavior (conceptual, social or practical skills) for a diagnosis of mental retardation.

(a) Allegations that petitioner was "picked on" by his brothers and physically abused by his father should not be construed as an inability to avoid victimization or a deficit in social skills

Mr. Puente alleges that petitioner was unable to avoid being victimized by his brothers as a child and cites this as an adaptive functioning deficit. (Pet.'s RCCAP Exh. 126 at p. 17; RCCAP at p. 352.) For support, he relies on declarations from petitioner's aunt and neighbor. (*Ibid.*) Petitioner's aunt, Josefina Benavides Rodriguez, recalled that petitioner's older brother Manuel and younger brother Evaristo "picked on" him. (Pet's RCCAP Exh. 91 at p. 19.) Petitioner's neighbor, Emilia Gonzalez Sanchez, allegedly "protected" petitioner when Manuel and others from the rancho picked on him, or hit him on the head. (Pet.'s RCCAP Exh. 115 at p. 17.) However, neither his aunt nor neighbor referred to petitioner as a "victim" or alleged that he was physically abused by his brothers or other peers, thereby rendering Mr. Puente's conclusion unreliable. Moreover, petitioner's aunt, Josefina Benavides Rodriguez, described petitioner as a loving, peaceful, and calm person (Pet.'s RCCAP Exh. 91 at pp. 16, 19); whereas Manuel was described as a "fighter" (Pet.'s RCCAP Exh. 121 at p. 6). That petitioner chose not to respond to being picked on by his brothers with violence should not be construed as an adaptive deficit.

This Court should also reject Mr. Puente's assertion that petitioner's inability, as a child, to escape physical abuse from his father constitutes evidence of an adaptive deficit. (Pet.'s RCCAP Exh. 126 at p. 17.) Mr. Puente alleges that petitioner cried during whippings from his father and failed to run away or otherwise stop his father's abuse. (*Ibid.*) Mr. Puente does not cite the factual basis for his description of the beating

or his presumption that petitioner could have somehow stopped the abuse or averted harm by "running away." For example, the rancho on Las Higuerillas where petitioner grew up was reportedly isolated (Pet.'s RCCAP Exh. 120 at p. 5), and Mr. Puente does not specify where petitioner should have run to hide (Pet.'s RCCAP Exh. 126 at p. 17). Petitioner was described by many as the primary defender of his mother against his father's abuse, so clearly petitioner could not have run to her to take cover from his father's wrath. (See, e.g., Pet.'s RCCAP Exhs. 91 at pp. 15-16, 110 at p. 7; 119 at p. 7; 121 at p. 7; 124 at p. 4). Mr. Puente's conclusion also overlooks and is inconsistent with accounts that petitioner's brothers, including his older brother Manuel who was described as a "fighter,"[95] were similarly unable to avoid their father's beatings (Pet.'s RCCAP Exhs. 110 at p. 6; 113 at p. 2; 114 at p. 4; 119 at p. 5; see also Pet.'s RCCAP Exh. 120 at pp. 1, 6 [Petitioner's adult male neighbor, Aurelio Baltazar Campos, refused to stand up to petitioner's father when he saw him drag petitioner's mother down the dirt street by the braid of her hair].)

Mr. Puente further asserts that petitioner's alleged inability to avoid victimization from his father continued into adulthood. He contends that "[u]nlike most of his siblings who abandoned his violent father as soon as they were able to fend for themselves, Mr. Benavides maintained his loyalty to his father and continued to work and be abused by him even as an adult." (Pet.'s RCCAP Exh. 126 at p. 17.) This is not altogether accurate. Petitioner and his older brother Manuel were forced to work in the fields with their father, whereas their younger brothers Evaristo and Cecilio were permitted to focus on their studies and not required to work in the fields. (Pet.'s RCCAP Exh. 119 at pp. 5, 9.) While petitioner worked for his father until he went to the U.S. for picking seasons and upon his return at

[95] Pet.'s RCCAP Exh. 121 at p. 6.

times, his brother Manuel continued to work for their father as well. (Pet.'s RCCAP Exh. 119 at p. 10 [Enedina states that their brother Manuel did not even go to school in San Gabriel and was the only sibling who always stayed on the rancho].) Mr. Puente incorrectly alleges that petitioner's niece Pati remembered "Alberto continued to regularly beat" petitioner "when he was a young man in his 20s." (Pet.'s RCCAP Exh. 126 at p. 17.) However, Pati only cited "two" occasions on which Alberto purportedly beat petitioner as a grown man in his 20s (Pet.'s RCCAP Exh. 111 at pp. 7-8). In any event, petitioner's continued loyalty to his father as an adult is not evidence of an adaptive deficit that manifested before the age of 18.

(b) Petitioner's performance in *secundaria* and failure to learn English are not evidence of deficits in conceptual skills

Mr. Puente further contends petitioner suffers from deficits in conceptual skills based on his poor grades in *secundaria* and failure to learn English. (Pet.'s RCCAP Exh. 126 at p. 18; see also RCCAP at p. 354.) As previously discussed, Ms. Castaneda de Palafox alleges that petitioner "began to have problems understanding new concepts" when he entered *secundaria*. Nevertheless, petitioner still attained average grades in Spanish and history (her classes), as well as in geography, in seventh and eighth grade. (Pet.'s RCCAP Exh. 116 at p. 5; Pet.'s RCCAP Exh. 52 at pp. 5008, 5010.) Though petitioner failed math, biology, and civics in the seventh grade, 46% of the class failed math, 38% of the class failed biology and 34% of the class failed civics. (Pet.'s RCCAP Exh. 52 at p. 5009.) Petitioner received a grade of 3 in English in the seventh grade and a grade of 1 in the eighth grade, but there is no evidence that he was motivated to learn English then. (Pet.'s RCCAP Exh. 52 at pp. 5008, 5010.) Moreover, his academic performance could just as easily be attributed to his having a girlfriend (Pet.'s RCCAP Exhs. 110 at p. 11; 119 at p. 8; 121 at p. 12), lack

of nourishment (Pet.'s RCCAP Exhs. 114 at p. 7; 115 at pp. 8-9; 118 at p. 9; 124 at p. 5), poor parental support (Pet.'s RCCAP Exh. 116 at p. 6), lack of interest (Pet.'s RCCAP Exh. 114 at p. 2) his dislike for reading (Pet.'s RCCAP Exh. 123 at p. 3) exhaustion from working in the fields each morning before school (Pet.'s RCCAP Exh. 116 at p. 6, Pet.'s RCCAP Exh. 118 at p. 8, Pet.'s RCCAP Exh. 119 at p. 7, Pet.'s RCCAP Exh. 121 at p. 11) and the two hour walk he made from Los Higuerillas to San Gabriel just to get to school (Pet.'s RCCAP Exhs. 114 at p. 7, 119 at p. 3) or inadequate preparation in the *primaria* in Los Camichines, where he attended a one-room school house with students of all ages (Pet.'s RCCAP Exh. 114 at pp. 2-3) and was instructed by one teacher, who was undereducated herself and absent on occasion (Pet.'s RCCAP Exh. 110 at p. 3).

Mr. Puente further contends that petitioner's academic functioning has not improved in the 40 years since he attended *secundaria*. (Pet.'s RCCAP Exh. 126 at p. 18.) For support, he cites petitioner's performance on the Woodcock Muñoz battery test, which purportedly ranged between a 10 year old and a 13 year old in writing, oral language and Spanish. (*Ibid.*) In reading and writing, petitioner performed at the level of a 17 year and two month old. (*Id.*) Mr. Puente's opinion is speculative since there are no baseline test scores from petitioner's childhood by which to compare his subsequent scores in 2002 and 2007. Speculative pleading is not a sufficient basis for relief on habeas. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

Mr. Puente further cites petitioner's "alleged inability to learn English notwithstanding having spent over twenty years in a mostly English speaking environment" as a significant indication of adaptive functioning deficits. (Pet.'s RCCAP Exh. 126 at p. 19 [noting that petitioner's scores on the WRAT-3 test administered in 2007 showed his abilities in reading

and writing English to be virtually non-existent]; RCCAP at p. 355.) This is inappropriate becaue petitioner was not immeresed in English during the time he spent in California and there is no evidence that petitioner ever tried to learn English. When petitioner was in California, he worked, lived and socialized with other Spanish-speaking farm laborers from Mexico. At the end of the picking season, petitioner returned to Mexico during the off-season. (Probation report [filed June 11, 1993], p. 5.) Estella Medina testified that she and petitioner communicated in Spanish. (13RT 2617.) Furthermore, many people have difficulty learning a foreign language, not just those whose intellectual functioning is significantly below average. Finally, Mr. Puente's judgment as to petitioner's English skills, or lack thereof, between 1987-2007, does not support a diagnosis of mental retardation as it is based on matters that took place after petitioner turned 18.

(c) Petitioner was able to care for himself and his relationships do not show a pattern of being taken care of by others or constitute evidence of a deficit in independent living skills

Mr. Puente further asserts that petitioner had a pattern of being taken care of *in his 30s* by girlfriends and friends, which allegedly evidences deficits in practical skills related to independent living. (Pet.'s RCCAP Exh. 126 at pp. 16, 19; RCCAP at p. 355.) Mr. Puente's assertion does not support a diagnosis of mental retardation under section 1376, subdivision (a), as the conduct upon which he relies took place *after* petitioner turned 18. As previously discussed in argument T2b(1), petitioner's relationship with Gloria Covarrubias, by contrast, began when he was 15 (Pet.'s RCCAP Exh. 121 at p. 12), and shows that he was capable of taking care of himself and directing his life. Their relationship

apparently spanned eight years until 1972, when their son Joel was born (Probation report [filed June 11, 1993], p. 4). Apparently, petitioner and Gloria lived together for a while during the course of their relationship. (Pet.'s RCCAP Exh. 123 at p. 4.)

Mr. Puente references a declaration submitted by Juana Flores Rivera to support his conclusion that petitioner was taken care of by girlfriends *during his 30s*. (Pet.'s RCCAP Exh. 126 at p. 19.) For example, he notes that Ms. Rivera described petitioner as "reliant" upon his mother during the time they dated. (*Ibid.*) Specifically, Ms. Rivera alleges that petitioner liked to spend time with his mother for reasons unknown to her, that his mother cooked for him and mended his clothes, and that petitioner did not spend daylight hours at her (Juana's) house. (Pet.'s RCCAP Exh. 96 at p. 4.) However, Ms. Flores also said that petitioner worked in the fields during the daytime. (Pet.'s RCCAP Exh. 96 at p. 3; accord Pet.'s RCCAP Exh. 99 at p. 2 [petitioner's former housemate, Ignacio Padilla Rivera, notes that he and petitioner worked in the fields, and the women (Juana and Josefina), cleaned the house, took care of laundry, cooked and cared for the children.].)

Moreover, Ms. Rivera's assumption of the household chores should not be construed as evidence that petitioner was unable to live independently. (Pet.'s RCCAP Exh. 126 at p. 19.) According to the DSM-IV-TR, in the assessment of adaptive deficits, consideration should be given to the person's sociocultural background. (DSM-IV-TR, *supra*, at p. 42; accord AAMR, *Mental Retardation-Definition, Classifications, and Systems of Supports*, *supra*, at p. 78 ["Clinicians must also pay close attention to the environments addressed by a measure of adaptive behavior. The examination of adaptive skills must be documented within the context of community environments typical of the individual's age, peers and culture."].) In petitioner's family and culture, men worked in the field and

women cooked, cleaned, prepared and delivered meals, took care of the home and cleaned the laundry. (See, e.g., Pet.'s RCCAP Exhs. 119 at pp. 4, 5; 121 at pp. 2, 3.)

Mr. Puente asserts that petitioner's pattern of being taken care of *in his 30s* continued when he began to do farmwork in the United States. (Pet.'s RCCAP Exh. 126 at p. 19.) He contends petitioner delegated the important decisions about when to go to the U.S. and which jobs to take, to a third party, in that petitioner's crewleaders allegedly contacted the guide and paid for petitioner's illegal border crossings (with an advancement in his pay). (*Ibid.*; see also Pet.'s RCCAP Exh. 103 [Decl. by crew leader Cristobal Aguillar].) However, petitioner's crewleader set up the illegal crossings for other illegal farmworkers, too, and pointed out that most undocumented immigrants used a guide to cross the border. (Pet.'s RCCAP Exh. 103 at p. 4.) Even after petitioner could legally cross into the U.S., another crewleader, Delfino Trigo, "sometimes" helped fund and arrange petitioner's travel. (*Id.* at p. 4) Apparently, petitioner's crewleaders also arranged for and paid for the *entire crew's* food and lodging (Pet.'s RCCAP Exh. 103 at p. 5), not just petitioner's food and lodging (Pet.'s RCCAP Exh. 126 at p. 19). Cristobal Aguillar said petitioner was like "family" and noted he frequently bunked with him and his brother. (Pet.'s RCCAP Exh. 103 at p. 5.) Other coworkers note that it was not unusual to sleep ten farmworkers to a room during the grape picking season and describe their lifestyle as "communal." (See, e.g., Pet.'s RCCAP Exh. 102 at p. 5; Pet.'s RCCAP Exh. 103 at p. 5.) Thus, when viewed in the appropriate context, petitioner's behavior was not atypical of a migrant farmworker. (DSM-IV-TR, *supra*, at p. 42 [Noting that consideration should be given to the person's sociocultural background when assessing adaptive deficits]; accord AAMR, *Mental Retardation-Definition, Classifications, and Systems of Supports*, *supra*, at p. 78

["Clinicians must also pay close attention to the environments addressed by a measure of adaptive behavior. The examination of adaptive skills must be documented within the context of community environments typical of the individual's age, peers and culture."].)

Mr. Puente also alleges, without reference to specific documentary support, that petitioner's crewleaders kept track of his expenses and helped manage his money. (Pet.'s RCCAP Exh. 126 at p. 19; RCCAP at p. 356.) However, petitioner's crewleader paid for everything for the entire crew (not just petitioner). (Pet.'s RCCAP Exh. 103 at pp. 5-6) and appears to have then deducted expenses from the crew's pay (*id.* at p. 12). Moreover, petitioner purportedly sent money to his mother (Pet.'s RCCAP Exh. 90 at p. 8), daughter (Pet.'s RCCAP Exh. 95 at p. 1), purchased a car with other farmworkers in California (Pet.'s RCCAP Exh. 102 at pp. 9-10) and gave Estella money for expenses and purchased gifts and food for her daughters (Pet.'s RCCAP Exh. 66 at p. 15). Notably, petitioner was not alleged to have had difficulty managing money before he turned 18, the relevant time period for purpose of section 1376. As an adolescent, petitioner purportedly attended festivals and hired mariachi bands to serenade his female companions. (Pet.'s RCCAP Exh. 123 at p. 3.)

Mr. Puente further alleges, without reference to documentary support, that petitioner was afraid to drive and cites transportation as another need crewleaders took care of for petitioner when he worked in the U.S. *in his 30s*. (Pet.'s RCCAP Exh. 126 at pp. 19-20.) Apparently the crewleaders had vans for driving the crew to and from the hotel to the fields. (Pet.'s RCCAP Exh. 103 at p. 5). Petitioner also purchased a car with coworkers to get to and from work (Pet.'s RCCAP Exh. 102 at pp. 9-10) and received rides from Estella to and from the apartment they shared. (13RT 2647.) Because petitioner's inability to drive did not impair his ability to hold a job or get where he needed to go, his failure to drive should not be

construed as an adaptive deficit. Even if this Court disagrees, petitioner's failure to drive before the age of 18 does not constitute evidence of an adaptive deficit that would support a diagnosis of mental retardation because there is no evidence that others in his community and of his socioeconomic status drove on a daily basis at that time. For example, none of petitioner's siblings reported having access to a vehicle and/or driving in Mexico before they turned 18 or cited, let alone placed significance on, petitioner's failure to do so.

(d) Petitioner's decision to remain in farmwork is not evidence of an adaptive deficit

Mr. Puente further cites petitioner's failure to progress from grape picking *at the age of 42* to construction, or another higher paying job, as an adaptive deficit. (Pet.'s RCCAP Exh. 126 at p. 20.) Again, Mr. Puente's observation is not relevant for purposes of section 1376, subdivision (a), to the extent it relates to conduct after the age of 18. The evidence adduced by petitioner on habeas indicates that throughout his childhood and adolescence, he was compelled to work in the fields to help support his family. Mr. Puente has not shown that petitioner had another better option prior to turning 18, such that his failure to change careers could be viewed as an adaptive deficit. Mr. Puente also alleges that petitioner lacked "the higher functioning necessary to master" another job, such as construction. (*Ibid.*) However, there is no evidence that petitioner ever wanted to pursue another line of work. Indeed, petitioner was a mentor to other farm workers (Pet.'s RCCAP Exh. 93 at p. 3), he liked working in the fields (Pet.'s RCCAP Exh. 114 at pp. 6028-6029) and was good at it (Pet.'s RCCAP Exhs. 93 at p. 7; 103 at p. 7). As previously discussed, speculative pleading is not a basis for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.)

(e) Petitioner was fully capable of using the telephone, so his failure to call the victim's mother on the night of the crimes is not evidence of an adaptive deficit

Finally, Mr. Puente contends that petitioner's behavior on the day of the charged offenses evidences deficiencies in adaptive skills because "by his account," upon finding Consuelo, he "summoned Christina, a nine-year-old girl" to call Estella at work (rather than calling her at work himself). Mr. Puente contends petitioner's "inability to call himself shows deficits in basic home living skills and problem solving, which were consistently deficient throughout his life." (Pet.'s RCCAP Exh. 126 at p. 20.) If anything this reflects a reasoned decision that petitioner's attention was best directed to Consuelo and that Christina could handle the task of calling Estella. It doesn't mean petitioner could not use a phone. In fact, Estella Medina testified that the night before the charged offenses, petitioner telephoned her from the hotel in MacFarland for a ride to their apartment. (13RT 2543, 2608.) She also testified that he telephoned her from jail while pending trial in this case. (13RT 2561.) Petitioner's ability to use a telephone was also well documented in many of the declarations that he submitted in this case (see, e.g., Pet.'s RCCAP Exhs. 92 at p. 11; 93 at p. 10; 97 at p. 5; and 111 at p. 14 [referencing petitioner's calls to them]).

In sum, petitioner has not made a prima facie showing under section 1376 for a post-conviction hearing on the issue of mental retardation. His borderline IQ scores from 2002 and 2007 do not prove that his general intellectual functioning was significantly subaverage prior to 1967 when he turned 18. In addition, an individual's ability to adaptively function in society is a vital element of a mental retardation diagnosis. Petitioner has demonstrated his ability to be highly adaptive. To the extent Mr. Puente contends otherwise, the adaptive deficits he cited did not manifest before

the age of 18. Therefore, they do not support a diagnosis of mental retardation under section 1376. A defendant may have "mental deficiencies" yet still be "capable of functioning in the community." (See *Thomas*, *supra*, 779 N.E.2d at p. 1039.)

3. Petitioner has not shown that his conviction should be set aside on the ground he was incompetent to stand trial

Petitioner's mental retardation claim also contains an oblique reference to the notion that petitioner was not competent during trial so as to be able to assist counsel and understand the proceedings. (RCCAP at p. 346.) Petitioner relies upon all of the same evidence as he does for the mental retardation claim, and, in similar fashion, offers no real analysis or even citation to authority to support his "claim."

In California, a defendant is mentally incompetent if, as a result of mental disorder or developmental disability, he is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (§ 1367, subd. (a); *People v. Lewis* (2008) 43 Cal.4th 415, 524.) Due process requires a trial court to conduct a section 1368 hearing to determine a defendant's competency whenever substantial evidence of incompetence has been introduced. (*People v. Blair* (2005) 36 Cal.4th 686, 711.)

This claim fails at the threshold because despite obtaining lengthy declarations from trial counsel Donnalee Huffman (Pet.'s RCCAP Exh. 64) and Jeffrey Harbin (Pet.'s RCCAP Exh. 65), neither expresses any doubt about petitioner's competence during the trial. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 848.) In fact, Ms. Huffman explains in her declaration that "I never had any trouble with Mr. Benavides." (Pet.'s RCCAP Exh. 64 at p. 7.) She also explains that he apparently knew what was going on at trial, because she declares: "When the death penalty verdict came in,

Mr. Benavides's reaction was disbelief. Mr. Benavides just kept shaking his head. I told him there would always be an automatic appeal. He thanked me for the work I did." (*Id.* at p. 8.) Mr. Harbin, in his declaration, explains:

> Current counsel for Mr. Benavides has informed me that Mr. Benavides has brain damage, suffers from depression and post-traumatic stress disorder, and has significant cognitive deficits. If these conditions are accurate, we misconstrued our client's abilities and understanding of the legal proceedings....

(Pet.'s RCCAP Exh. 65 at p. 9.) This passage indicates rather clearly that from trial counsel's perspective, there was no apparent problem with petitioner's competence to stand trial.

This Court has held that

> the standard for determining when a psychiatrist's opinion will constitute substantial evidence of incompetence to stand trial is as follows: "If a psychiatrist...who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial evidence test is satisfied.'" [Citation.]

(*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1110-1111.) In the declaration of Mr. Puente, which contains a lengthy recitation of all the alleged ailments suffered by petitioner, there is not one mention of petitioner's inability to understand the nature of the proceedings and assist counsel in his defense. (Pet.'s RCCAP Exh. 126 at pp. 1-25.) Mr. Puente questioned petitioner's ability to understand the *Miranda* advisements, but he never suggested that gave rise to a doubt concerning his competence to stand trial. Mr. Puente also opined that petitioner would need a substantial amount of preparation before being able to accurately and reliably testify in court. (*Id.* at p. 25.) This statement demonstrates that petitioner could in

fact assist in his defense, albeit with some preparation. In this respect, this case is little different from *People v. Frye*, *supra*, 18 Cal.4th at pages 948-952 [disapproved on other grounds by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421], where the sum total of the psychiatric testimony on incompetence was that the defendant might suffer stress and be unable to recapture memory if called to testify, and that therefore testifying might be difficult. That is insufficient, and falls far short of substantial evidence of incompetence.

U. Claim 21: Petitioner's Death Sentence Was Constitutionally Selected and Imposed

Petitioner's next claim appears to be an amalgam of several claims alleging that the Kern County District Attorney's Office used petitioner's race, gender, and economic status in exercising its discretion to seek the death penalty, and further that trial counsel was ineffective for failing to challenge the exercise of discretion as unconstitutional. (RCCAP at pp. 360-366.) Throughout the claim, petitioner repeatedly alleges that during the period from 1977 through 1993, the Kern County District Attorney's Office suffered from the aforementioned biases.

First, respondent notes that the crime was committed in 1991, petitioner was charged that same year, and his sentence of death was imposed in 1993. Thus, because the process of petitioner's case spanned the period from 1991 through 1993, the allegations that Kern County suffered from bias between 1977 and 1990 are irrelevant. Second, it cannot be overlooked that the petitioner has the burden to set forth the facts supporting the allegations with particularity. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.) However, all petitioner offers is an untimely and uninformative declaration from his investigator, Jon B. Purcell. (Pet.'s RCCAP Exh. 106). The declaration should be disregarded as untimely and because of petitioner's failure to present it with his initial petition. (*People*

v. Duvall, *supra*, 9 Cal.4th at p. 474; *In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781.)

Purcell expresses "concern" that the Kern County District Attorney's Office disproportionately sought the death penalty against Hispanic defendants such as petitioner. It "seemed" to him that there were a number of capital charges filed against Hispanic defendants even though those cases did not merit the death penalty. (Pet.'s RCCAP Exh. 106 at p. 2, para.6.) He provides no specifics about any other cases to support this comparison other than opining that Kern County charged petitioner "because he was the last person to be with the little girl." He opines that Kern County did not have DNA or other incriminating evidence.

Purcell's tentative and equiviocal "concerns" about what "seemed" to him to be a discriminatory charging pattern hardly raises a colorable claim.[96] Prior to 1992, it is unclear how much knowledge Purcell would even have about Kern County charging practices since he does not give specific details about his experiences in Kern County. He does not describe the other cases that raised his concerns about Kern County charging practices. His own concerns about petitoner's case do not suggest that the charges were disproportionate in petitioner's case—the murderous sexual assault of a girl less than two years old. He does not suggest how many other cases in Kern County at the time of petitioner's crimes even involved potential DNA evidence.

The other authority cited in this claim is a 1988 article in the Harvard Law Review purporting to demonstrate a disproportionate number of death sentences for minorities. However, the cited section discusses statistical analyses of death sentences imposed in Florida, Georgia, and South

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[96] What "seems," is hardly what "is." Hamlet, act I, sc. II, ll. 76-77 ("Nay, it is. I know no 'seems.'")

Carolina. Kern County is nowhere mentioned. (Compare *Belmontes v. Brown* (9th Cir. 2005) 414 F.3d 1094, 1127 [examining county specific statistics].)

All in all, petitioner's showing hardly amounts to a demonstration of discriminatory charging in Kern County. He has not presented "clear evidence" that the Kern County District Attorney did not file capital charges against similar situated non-Hispanic defendants and that the prosecution was motivated by a discriminatory purpose. (See *United States v. Armstrong* (1996) 517 U.S. 456, 465-466; *McCleskey v. Kemp* (1987) 481 U.S. 279, 296; *In re Seaton*, *supra*, 34 Cal.4th at pp. 202-203.)

Accordingly, petitioner's argument is entirely bereft of any meaningful support. Petitioner's claims of racial and gender bias, no matter how oft-repeated, cannot, without more, establish a prima facie case for relief.

V. Claim 22: California's Death Penalty Statute Is Constitutional

Petitioner next presents what has become a stock argument on direct appeal, arguing that California's death penalty scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution in that the statute fails to adequately narrow the class of offenders eligible for the death penalty. (RCCAP at pp. 367-391.) The claim is entirely generic in that it fails to address the specifics of Petitioner's case at all, despite purporting to raise an "as applied" challenge to the statute. The entire argument appears to have been cut and pasted from another canned argument, and is likely being raised only to preserve the issue for federal habeas review, notwithstanding the fact that it should have been raised on direct appeal. (See *supra*, at pp. 29-30.) In any event, the argument fails on the merits.

Petitioner's argument relies in large part upon a law review article (Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283), that purports to show that California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. (See RCCAP at p. 369.) Specifically, petitioner alleges that the number of special circumstances and the way they have been interpreted renders the statute unconstitutional. This Court has rejected the identical claim in numerous opinions. (See, e.g., *People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Mendoza*, *supra*, 24 Cal.4th at pp. 191-192; *People v. Frye*, *supra*, 18 Cal.4th at pp. 1028-1029 [rejecting defendant's statistical analysis]; *People v. Ray*, *supra*, 13 Cal.4th at p. 356; *People v. Champion* (1995) 9 Cal.4th 879, 951; *People v. Crittenden* (1994) 9 Cal.4th 83, 154-155.) Appellant offers no principled reason to depart from those decisions.

In *McCleskey v. Kemp*, *supra*, 481 U.S. 279, the Supreme Court summarized the constitutional prerequisites which a state must satisfy before a sentence of death can be lawfully imposed:

> In sum, our decisions since *Furman* [*v. Georgia* (1972) 408 U.S. 238] have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstances that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

(*Id.* at pp. 305-306.)

If these limits are satisfied, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 309 [110 S. Ct. 1078, 108 L.Ed.2d 255].) There is no exclusive "right way" for a state to implement its capital sentencing mechanism. (*Spaziano v. Florida* (1984) 468 U.S. 447, 464 [104 S. Ct. 3154, 82 L.Ed.2d 340].) The narrowing function described in *McClesky* may be performed at either the guilt or penalty phase of a capital case. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244-245 [108 S.Ct. 546, 98 L.Ed.2d 568].)

Under the Eighth Amendment,

> the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

(*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 246). Moreover, the Supreme Court explained the Eighth Amendment requirements in the context of California's statute in *Tuilaepa v. California* (1994) 512 U.S. 967, 971-922:

> Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. *Coker v. Georgia*, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977). To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244-246, 98 L.Ed.2d 568, 108 S.Ct. 546 (1988); *Zant v. Stephens*, 462 U.S. 862, 878, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983). The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). *Lowenfield*, 484 U.S. at 244-246. As we have explained,

> the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. *See Arave v. Creech*, 507 U.S. 463, 474, 123 L.Ed.2d 188, 113 S.Ct. 1534 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm"). Second, the aggravating circumstance may not be unconstitutionally vague. *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980); *see Arave*, *supra*, at 471 (court "'must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer'") (quoting *Walton v. Arizona*, 497 U.S. 639, 654, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990)).

California's statutory scheme fulfills the narrowing requirement in two ways. First, special circumstances define and delimit those murders which are death-eligible. (§ 190.2.) Before a defendant can become death-eligible, he must be convicted of first degree murder, and at least one special circumstance must be found true beyond a reasonable doubt. The latter requirement, the United States Supreme Court has held, adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53, 104 S.Ct. 871, 79 L.Ed.2d 29].) Second, the jury's discretion is narrowed and channeled by the list of aggravating circumstances in the selection phase. (§ 190.3.)

Petitioner's argument based on a statistical analysis is entirely unpersuasive. In *McCleskey v. Kemp*, *supra*, 481 U.S. at p. 289, the court found statistics "insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment analysis." The Court reasoned:

> The very exercise of discretion means that persons exercising discretion may reach different results from exact duplicates. Assuming each result is within the range of discretion, all are correct in the eyes of the law. It would not make sense for the system to require the exercise of discretion in order to be facially

> constitutional, and at the same time hold a system unconstitutional in application where that discretion achieved different results for what appear to be exact duplicates, absent the state showing the reasons for the difference....

(*Id.* at pp. 289-290.)

In any event, this Court has continually rejected arguments such as petitioner's that the California scheme for death eligibility fails adequately to narrow the class of murderers exposed to capital punishment. Repeatedly, it has held that the death penalty law, as a whole, adequately narrows the class of death eligible murderers. (*People v. Lindberg* (2008) 45 Cal.4th 1, 53; *People v. Gurule* (2002) 28 Cal.4th 557, 663-664; *People v. Koontz* (2002) 27 Cal.4th 1041, 1095; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050; *People v. Arias* (1996) 13 Cal.4th 92, 186-187.) The special circumstances are not over-inclusive in number, or the expansiveness of their terms, as construed (*Koontz*, *supra*, 27 Cal.4th at p. 1095; *Jenkins*, *supra*, 22 Cal.4th at p. 1050; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179; *People v. Arias*, *supra*, 13 Cal.4th at pp. 186-187), despite the asserted breadth of the felony-murder special circumstances (*Gurule*, *supra*, 28 Cal.4th at p. 663; *Koontz*, *supra*, 27 Cal.4th at p. 1095; *People v. Ochoa* (2001) 26 Cal.4th 398, 458; *People v. Lewis*, *supra*, 26 Cal.4th at pp. 393-394; *Jenkins*, *supra*, 22 Cal.4th at p. 1050; *People v. Frye*, *supra*, 18 Cal.4th at p. 1029) and the alleged overbreadth of the lying-in-wait special circumstance. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1148, and cases cited therein.)

W. Claim 23: The Jury Selection Procedures Employed in Petitioner's Case Were Proper and Constitutional

Petitioner claims that Hispanics were underrepresented in the jury pool in Kern County at the time of his trial in 1993. Accordingly, in conjunction with related claims, he alleges that the panel drawn in his case was not drawn from a fair cross-section of the community. (RCCAP Claim

W at pp. 392-397; Supp. Petn. at pp. 31-32.) This claim must be rejected as it is based on incompetent and unsupported assertions, and in any event fails to state a prima facie case for relief.

In order to establish a prima facie violation of the fair cross section requirement, petitioner must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. (*Duren v. Missouri* (1979) 439 U.S. 357, 364 [99 S.Ct. 664, 668, 58 L.Ed.2d 579].)

1. Petitioner's showing of underrepresentation is deficient[97]

Petitioner claims that of the 195 prospective jurors in his case, 24 (or 12.3 percent of the panel) had Spanish surnames. (RCCAP at p. 393.) Petitioner initially claimed, without support, that Hispanic adults represent 22 percent of the adults in Kern County. He claimed the latter figure was based on the 1990 census. However, he failed to cite a source for verifying his assertion. He failed to request judicial notice of the 1990 census data upon which he purported to rely, and he failed to include a copy of that information as part of his petition despite his obligation to include all reasonably available documentary evidence. Accordingly, his naked claim about the demographic data revealed by the 1990 census was entirely incompetent. His attempt to now add such exhibits as supplemental

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[97] Respondent does not contest that Hispanics are a cognizable group for purposes of cross-section analysis. However, to the extent that petitioner is basing his case on the jury panel drawn in his case, respondent does not accept arguments based on the percentages of Hispanic surnamed potential jurors in petitioner's case.

allegations comes too late. He does not explain why he failed to provide this available documentary information when he filed his petition and this court should not consider this evidence now. (*In re Clark*, *supra*, 5 Cal.4th at pp. 781-782 & fn. 16.)

In any event, based on the 1990 census data attached to the supplemental petition, petitioner claims that 27.97% of the total Kern County population was Hispanic. He then alleged that Hispanics over the age of 18 years of age comprised 24.08% of the total county population. Petitioner further alleges that since 12.3% of the jury panel chosen from the venire in his case had Spanish surnames. Based on the composition of the panel, rather than the larger venire, he computes an absolute disparity of underrepresentation of Hispanics of 11.78% and a comparative disparity of 48.75%. (RCCAP at p. 393; Supp.Petn. at pp. 31-32.)[98]

a. Petitioner's showing is deficient since it is based only on the jury panel drawn at his trial

Petitioner's reliance on the census data is completely unavailing. At the outset, as petitioner implicitly admits (RCCAP at p. 393), his showing is insufficient since it is based strictly on the composition of the panel called in his case, not multiple venires. However, "a defendant does not establish the underrepresentation requirement by showing a disparity on the particular jury panel assigned to the court in which his or her jury is to be selected. Underrepresentation on the defendant's particular panel is not relevant." (*People v. De Rosans* (1994) 27 Cal.App.4th 611, 618; *People v. Morales* (1989) 48 Cal.3d 527, 548; see also *Thomas v. Borg* (9th Cir.

[98] For purposes of this informal response only, respondent will accept petitioner's calculations.

1998) 159 F.3d 1147, 1150-1151.)[99]

Moreover, his claim regarding underrepresentation on his panel is expressly based solely on the surnames of jurors in his panel. His claim fails to account for the possibility that, by virtue of marriage, adoption, or numerous other reasons, some Hispanics may not have Hispanic surnames. While this Court has previously recognized that using surnames maybe a valid method of categorization when generating statistics based on large

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[99] Petitioner makes a number of excuses for his failure to make a sufficient showing of a prima facie case. However, none of his explanations justify his omissions. In a bootstrapping argument, petitioner blames his counsel for not challenging the Kern County juries. However, his claim fails under the two prong analysis for ineffective assistance of counsel under *Strickland v. Washington*, *supra*, 466 U.S. 668. To the extent that trial counsel in other Kern County cases were challenging representation on that county's juries, petitioner has not identified any such challenges that were successful. Petitioner's trial counsel could have reasonably concluded that a similar challenge would have been futile given the track record in other cases. Moreover, as to the second prong, he fails to show how, absent the waiver, the composition of his jury panel would have been any different, and thus he cannot establish prejudice. (Compare *People v. Cox*, *supra*, 53 Cal.3d at p. 657; *Thomas v. Borg*, *supra*, 159 F.3d at pp. 1152-1153.) Furthermore, he cannot show it is reasonably probable the outcome of his trial would have been different. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 861; *Thomas v. Borg*, *supra*.) Furthermore, to the extent that his showing now is deficient to support this claim, he does not "allege facts demonstrating that his trial counsel could have presented the required evidence." (*In re Seaton*, *supra*, 34 Cal.4th at pp. 207-208.) Although petitioner asserts that the Kern County Jury Commissioner refused to provide relevant data, he does not specifically explain the circumstances of this refusal or his efforts to develop this information. He does not now demonstrate that he would have been entitled to discovery or that he was prevented from securing information sufficient to support his claim. (See *People v. Jackson* (1996)13 Cal.4th 1164, 1194-1195; *Roddy v. Superior Court* (2007) 151 Cal.App.4th 1115, 1137-1143.) To the extent that he is unable to present more developed statistical information, his claim should be denied. (*Belmontes v. Brown*, *supra*, 414 F.3d at pp. 1123-1124, overruled on other grounds in *Ayers v. Belmontes* (2006) 549 U.S. 7.)

numbers (see *People v. Trevino* (1985) 39 Cal.3d 667, 684-686), it is also true that "[t]he statistical significance of erroneously identifying a person's ethnicity [by using surnames] also becomes much greater when the number of people involved is in the tens rather than thousands." (*United States v. Esparsen* (1991) 930 F.2d 1461; see also *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1123 (describing prospective jurors as Hispanic based on surnames sufficient only when record is inadequate to more precisely determine ethnicity).) Thus, the magnitude of the alleged disparity may well be quite smaller than petitioner's figures suggest. Indeed, courts across the country have indicated that classifying actual panel members into a racial classification based solely on their surname is of virtually no utility. "Given the examination process available in the selection of a petit jury, the spelling of a person's surname is insufficient—standing alone—to show that he or she belongs to a particular ethnic group." (*United States v. Campione* (7th Cir. 1991) 942 F.2d 429, 433; see also *Collado v. Miller* (E.D.N.Y 2001) 157 F.Supp.2d 227, 233.) Similarly, petitioner cannot rely simply on surnames to deduce the ethnic composition of his jury panel when there are questionnaires and voir dire available to make that determination.

b. Petitioner's showing of underrepresentation is deficient since it is based on the wrong pool of potential jurors

Petitioner's census data is overinclusive since it is based on a statistical analysis of the entire 1990 population of Kern County.[100] However, petitioner concedes that his jury was not drawn from the entirety

[100] Actually, petitioner has included both 1990 and 2000 census results for different categories. He cites 1990 figures for the ethnic/racial composition of Kern County. However, he cites irrelevant 2000 statistics for the geographic distribution within Kern County.

of Kern County. Rather, he concedes that his counsel agreed with the court not to include jurors from eastern Kern County.[101] (RT 58-59.) Petitioner himself estimates that this omitted region is over 25 percent Hispanic. Thus, his statistics do not accurately reflect the actual potential jurors in his case.

"The relevant 'community' for cross-section purposes is the community of qualified jurors in the judicial district in which the case is to be tried. [Citations.]" (*People v. Currie* (2001) 87 Cal.App.4th 225, 233, 104 Cal.Rptr.2d 430; see also *Roddy v. Superior Court*, *supra*, 151 Cal.App.4th at p. 1133.) In this case, the court and parties agreed to a community (essentially a district) that comprised only a portion of Kern County. Petitioner cites no authority that precluded this consensual arrangement between the court and the parties. Accordingly, petitioner's claim fails because it is county wide rather than confined to the actual smaller community from which his jury was drawn. (Compare *Williams v.*

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[101] Petitioner has waived any complaint that prospective jurors from eastern Kern County were completely excluded. Counsel below expressly waived the right to include such jurors, and thus no error can be asserted now. (RT 58-59.) Petitioner alleges that his counsel's agreement not to call jurors from the eastern part of the county constituted ineffective assistance of counsel under *Strickland v. Washington*, *supra*, 466 U.S. 668. Petitioner fails to demonstrate that counsel's decision not to summon jurors from eastern Kern County fell below an objective standard of reasonableness under *Strickland*'s first prong. Indeed, given the size of Kern County, it is not surprising that counsel would waive a procedure which would require jurors to travel great distances for a trial that in fact lasted more than a month. Such jurors likely would have greater hardships, and those that were able to serve might have been hostile to the process as a result of the inconvenience to their lives. Moreover, as to the second prong, he fails to show how, absent the waiver, the composition of his jury panel would have been any different, and thus he cannot establish prejudice. (Compare *People v. Cox*, *supra*, 53 Cal.3d at p. 657.) Furthermore, he cannot show it is reasonably probable the outcome of his trial would have been different. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 861.)

Superior Court (1989) 49 Cal.3d 736.) His statistics are meaningless.

c. Petitioner's showing of underrepresentation is deficient since it is based on an insufficient showing of disparity

As this Court has noted, "the United States Supreme Court has not yet spoken definitively on either the means by which disparity may be measured or the constitutional limit of permissible disparity." (*People v. Burgener* (2003) 29 Cal.4th 833, 859-860.) There is no "threshold of disparity substantial enough to be deemed constitutionally significant...." (*People v. Bell* (1989) 49 Cal.3d 502, 528, fn. 15.) At best, petitioner's showing of disparity is "razor thin." (*United States ex rel. Barksdale v. Blackburn* (5th Cir. 1981) 639 F.2d 1115, 1126-1127 (en banc), cited with approval in *People v. Ramos* (1997) 15 Cal.4th 1133, 1156 [example of "percentages...generally within the tolerance accepted by federal reviewing courts."].)

Among other things, a California juror must possess sufficient knowledge of the English language, be a citizen, and not be a convicted felon. (Code Civ. Proc. §§ 203, subds. (a)(1), (a)(6).) Petitioner's census data undoubtedly includes jurors who were not eligible to serve on his jury. In critiquing a defendant's reliance on general census data, the court in *People v. Alexander* (1985) 163 Cal.App.3d 1189 stated: "Common experience dictates that the percentage of minorities appearing in the general census figures who are statutorily ineligible for jury service must be large." (*Id.* at p. 1202.) Despite petitioner's attempt to refine his data to the adult population in Kern County in 1990, that same "common experience" still teaches that a percentage of the Hispanics included in his statistics were statutorily ineligible to serve on his jury.

As noted, petitioner bases his showing on the percentage of Hispanics in Kern County over the age of 18 in 1990. Yet, according to the

1990 census, 30% of the people five years or older who spoke Spanish at home in Kern County spoke English either "not well" or "not at all." (Resp.'s RCCAP Exh. 17, Table 138.) Of course, this group does include persons who were underage for jury duty. However, an age-based breakdown of adult Hispanic persons in Kern County who spoke a language other than English discloses that 36% of those adult persons could not speak English "very well." (Resp.'s RCCAP Exh.17, Tables 152, 163). The census figures for adult Hispanic occupants of linguistically isolated households (i.e., households in which the occupants over the age of 14 years of age are not proficient in English) indicated substantial percentages of Hispanics with limited command of the English language. (Resp.'s RCCAP Exh. 17, Tables 152, 163.)[102] Furthermore, the1990 census figures indicate 10% is a reasonable estimate of the total Hispanic population who were not citizens and, therefore, could not sit on a jury in petitioner's case based on the number of foreign born residents in Kern County from Spanish speaking countries and the number of non-citizens in Kern County. (Resp.'s RCCAP Exh. 17, Tables 6, 138, 139, 143).

Accordingly, petitioner's claimed statistical disparities can only decrease from what he has claimed in his petition as the Hispanic population is broken down for other disqualifying attributes such as fluency and citizenship. This Court has never adopted any one particular statistical methodology to evaluate claims of underrepresentation. (*People v. Ramos*, *supra*, 15 Cal.4th at p. 1155.) Given the relative lack of strength of petitioner's showing based only on percentages of the adult population, these additional percentages of other disqualifying attributes are

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[102] A study by the United States Department of Agriculture calculated that almost 25% of Kern County's 1990 population spoke a language other than English at home. The overwhelming majority of these residents (84.9%) spoke Spanish. (Resp.'s RCCAP Exh. 17.)

sufficiently precise and substantial enough to slice petitioner's showing of disparity thinner than a razor and to render them constitutionally insignificant in terms of any alleged underrepresentation. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 860 (citing tolerable comparative disparities exceeding 48.75%); see also *Hamilton v. Ayers* (E.D. Cal. 2006) 458 F.Supp.2d 1075, 1095, rev'd on other grounds *Hamilton v. Ayers* (9th Cir. 2009) 583 F.3d 1100 ("Although this percentage of under-representation is slightly greater than the amount held inadequate to alone show purposeful discrimination in *Swain* [*v. Alabama* (1965) 380 U.S. 202], *Hamilton* fails to address other issues which would narrow the gap between adult population and the jury pool, such as citizenship, prior felony conviction, or the ability to speak and understand English. See California Code of Civil Procedure section 230 and *United States v. Torres-Hernandez*, 447 F.3d 699, 701(9th Cir. 2006) (holding a determination of under-representation must rely on evidence that most accurately reflects the jury-eligible population"); *People v. Ramos*, *supra*, at p. 1156 (citing examples of range of disparites found significant and insignificant.) Based on "common experience" and the available statistical data, petitioner cannot demonstrate that there was an unfair and unreasonable representation of Hispanics available for his jury.

2. Petitioner's showing of systematic exclusion is insufficient

Nevertheless, even assuming the accuracy of petitioner's representation as to the relevant percentages of Hispanics in Kern County, his claim fails on the merits for reasons identical to those in *People v. Ayala* (2000) 23 Cal.4th 225, 256:

> Defendant cannot establish a prima facie case of systematic exclusion of Hispanics merely by presenting statistical evidence of underrepresentation in the jury pool, venire, or panel. He must show that any underrepresentation "is

> the result of an improper feature of the jury selection process." (*People v. Howard* (1992) 1 Cal.4th 1132, 1160 [5 Cal.Rptr.2d 268, 824 P.2d 1315].)

As to the actual methodology used by the Kern County Jury Commissioner in excluding jurors, petitioner offers this Court nothing other than his claimed inability to access the necessary information. (RCCAP at pp. 394-395.) That is insufficient. Habeas corpus requires a prima facie showing that there is a colorable basis for relief. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 475.) It is not merely a forum for fishing expeditions to explore all manner of potential errors. The claim is entirely lacking in evidentiary support, and must therefore be rejected.

Petitioner speculates as to the reasons for the alleged underrepresentation of Hispanics in his jury panel. As already noted, his counsel agreed to a jury pool that did not include residents of Eastern Kern County. It is not constitutionally inappropriate to base the jury list on voter registration and DMV records. (See, e.g., *People v. Sanders* (1990) 51 Cal.3d 471, 492-496 (Kern County).) Moreover, petitioner's "laundry list" of allegations of "possible laxity in enforcing race/class neutral excusal practices...fails to constitute a prima facie case of systematic exclusion of those minority groups affected by such practices." (*People v. Morales*, *supra*, 48 Cal.3d at 548; see also *Berghuis v. Smith* (2010) ___ U.S. ___, 130 S.Ct. 1382, 1388-1389, 1395 ["No 'clearly established' precedent of this Court supports [defendant's] claim that he can make out a prima facie case merely by pointing to a host of factors that, individually or in combination, might contribute to a group's underrepresentation."") On their face, petitioner's allegations do not demonstrate "systematic exclusion." (*People v. Anderson* (2001) 25 Cal.4th 543, 567-568, and cases cited therein.)

X. Claim 24: Petitioner Fails to State a Prima Facie Case That His Convictions Violate the Vienna Convention on Consular Relations, and Defense Counsel's Alleged Failure to Preserve His Consular Rights Does Not Constitute Ineffective Assistance of Counsel

Petitioner contends that his conviction and death sentence were obtained in violation of his constitutional rights. Specifically, he alleges that law enforcement failed to notify the Mexican consulate of his arrest or notify him of his right to consular assistance pursuant to the Vienna Convention on Consular Relations (hereafter Vienna Convention), Apr. 24, 1963, 21 U.S.T. 77, and the United States of American and Mexico Consular Convention, Aug. 12, 1942, 57 Stat. 800 (hereafter U.S. - Mexico Consular Convention). (RCCAP at pp. 398-409.)[103] Respondent disagrees.

Petitioner is procedurally barred from raising this claim, having failed to assert his consular rights at the time of his criminal trial or on appeal. Rather, petitioner raised the issue for the first time in the petition for writ of habeas corpus that he filed on November 12, 2002. (*In re Clark*, *supra*, 5 Cal.4th at pp. 767, 774.)

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[103] Petitioner cursorily asserts that the Mexican consulate was entitled to be informed of his arrest pursuant the United States of America and Mexico Consular Convention (U.S. - Mexico Consular Convention), Aug. 12, 1942, 57 Stat. 800. (RCCAP at p. 400; claim X6, citing Article I, subdivision 2, which provides in pertinent part: "Consular officers...shall ...enjoy...all the rights, privileges, exemptions and immunities which are enjoyed by consular officers of the same grade of the most favored nation .... Even if this Court agrees, the U.S-Mexico Consular Convention does not permit petitioner to enforce a violation of the *consulate's right.* The U.S.-Mexico Consular Convention does not grant petitioner a remedy in United States courts either, particularly, where as here, the consulate learned of petitioner's arrest six months before his criminal trial (Pet.'s RCCAP Exh. 145 at pp. 6648-6649), and assisted petitioner in a variety of ways, including its submission of a letter by the former Consul General in Fresno, Dr. Gabriel Garcia-Perez, to Judge Stuart asking him to be merciful to petitioner when he sentenced him. (3CT 833).

In any event, he is not entitled to relief on habeas corpus. Law enforcement's failure to comply with Article 36 of the Vienna Convention was not prejudicial.

1. The Vienna Convention and *Avena*

a. The Vienna Convention: Its purpose and preamble

Since 1969, the United States has been a party to the multi-lateral, 79-article Vienna Convention, which focuses chiefly upon consular relations, functions, and privileges. The preamble emphasized that the purpose of the Vienna Convention was to ensure consular functioning, *"[N]ot to benefit individuals."* (Vienna Convention, pmbl.; emphasis added.) Only articles 5 and 36 refer to individuals.

b. Article 36

Article 36, which instructs local authorities to inform arrested foreign nationals of their rights of consular notification, does not provide for a particular judicial remedy. Instead, it states that the rights of consular notification "shall be exercised in conformity with the laws and regulations of the receiving state," subject to a proviso that such laws must give "full effect" to the purposes of Article 36.

Article 36 provides in pertinent part:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> > (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers

of the sending State;[104]

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment.[105] Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

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[104] The U.S.-Mexico Consular Convention also grants consular officers the right to communicate with their nationals. (Art. VI, subd. 1(a)) and grants Mexican nationals the right to communicate with consular officers from their country (Art. VI, subd. 2(d)).

[105] Similarly, the U.S.-Mexico Consular Convention provides consular officers the right "to assist" their nationals. (Art. VI, subd. 2(d).) In addition, it grants consular officers a right to "address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of right accruing by treaty or otherwise...." Petitioner summarily asserts that law enforcement's failure to notify the consulate of his arrest prevented the consulate from exercising their right under the U.S.-Mexico Consular Convention to assist him in a meaningful way. (RCCAP at p. 398.) To the contrary, the consulate learned of petitioner's arrest and assisted him in various ways, as is discussed *post*.

> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

(Vienna Convention, Art. 36, emphasis added.)

c. *Avena*

In *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)* 2004 I.C.J. L2 (Judgment Mar. 31) (*Avena*), the International Court of Justice (hereafter "ICJ"), resolved a proceeding brought in 2003 by Mexico against the United States, alleging that the United States had breached its Article 36 obligations to 51 Mexican citizens, including petitioner. Those citizens had been convicted of capital crimes in state courts of ten states, and each had been sentenced to death. The ICJ concluded that the United States had breached its obligations under Article 36, paragraph 1(b) of the Convention. (*Id.* at pp. 53-54, ¶ 106.) However, the ICJ emphasized that the correctness of any conviction or sentence was not before it and that any consideration of "the prejudice and its causes," was for United States courts to decide. (*Id.* at p. 60, ¶ 122.) The ICJ directed the United States to "review and reconsider" the convictions and sentences of the affected Mexican citizens (*id.* at p. 65, ¶ 138) without regard to procedural default rules (*id.* at pp. 56-57, ¶¶ 111-113).

2. High court precedent following *Avena*

In *Sanchez-Llamas v. Oregon*, *supra*, 548 U.S. 331, a Mexican national who was not associated with the *Avena* case (Moises Sanchez-Llamas), challenged his conviction for attempted murder on the ground he was not advised of his right to consular assistance under Article 36 of the Vienna Convention. (*Id.* at pp. 339-340.) Defendant Sanchez-Llamas raised the issue at trial and on appeal. The Oregon Supreme Court affirmed

his conviction, finding that Article 36 did not create personally enforceable rights. (*Id.* at p. 340.) The United States Supreme Court granted certiorari and consolidated the case with that of a Honduran national, Mario Bustillo, who had an Article 36 claim, as well. Defendant Bustillo was convicted of murder in Virginia and asserted his Article 36 claim for the first time post-conviction in a state habeas petition. The state habeas court dismissed Bustillo's claim as procedurally barred as he did not raise the issue at trial or on appeal. (*Id.* at p. 342.) The United States Supreme Court ultimately held that (1) the suppression of evidence was not a proper remedy for a violation of Article 36 (*id.* at p. 350) and (2) contrary to *Avena*, state rules of procedural default may be applied to Article 36 claims of the Vienna Convention. (*Id.* at p. 360.)[106]

In *Medellin v. Texas*, *supra*, 552 U.S. 491, Jose Ernesto Medellin, one of the Mexican nationals named in the *Avena* decision, filed a second state habeas petition challenging his Texas murder conviction and death sentence on the ground he had not been informed of his Vienna Convention rights. (*Id.* at p. 503.)[107] For support, Medellin relied on the *Avena* decision and former President George W. Bush's February 28, 2005 Memorandum (stating that the United States would discharge its international obligations under *Avena* by having "State courts give effect to the decision"). (*Ibid.*) The Texas Court of Criminal Appeals dismissed Medellin's application for writ of habeas corpus as an abuse of the writ, concluding that neither *Avena*

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[106] Having concluded that Sanchez-Llamas and Bustillo were not entitled to relief on their claims, the Court did not determine whether the Vienna Convention grants individually enforceable rights, but assumed, without deciding, that it did. (*Id.* at p. 343.)

[107] Medellin raised the Vienna Convention claim in his first state habeas petition. The state trial court held that the claim was procedurally defaulted because he had not raised it at trial or on direct review. (*Id.* at pp. 501-502.)

nor the President's Memorandum was binding federal law that could displace Texas' limitations on filing successive habeas applications. (*Id.* at p. 504.) In *Medellin*, the High Court ultimately affirmed the judgment of the Texas court. It found that the ICJ's judgment in Avena created an international law obligation but was *not* a domestic law that pre-empts state restrictions on the filing of successive habeas petitions. (*Id.* at pp. 522-523; see also *In re Martinez*, *supra*, 46 Cal.4th at p. 958 ["The effect of *Medellin* is to restore the *status quo ante* that existed before *Avena* and the Presidential Memorandum, under which a state may reject a habeas corpus petition raising a Vienna Convention claim as procedurally barred."].)

3. Even if petitioner's claim were not procedurally barred, petitioner was not prejudiced by law enforcement's failure to advise him of his right to consular assistance

As previously discussed, petitioner's Article 36 claim is procedurally barred since he did not raise the issue at trial or on appeal. (*In re Martinez*, *supra*, 46 Cal.4th at p. 966.) However, even if it were not, petitioner has not made a prima facie case for relief on habeas corpus.

Assuming, without conceding, that Article 36 confers individual rights on foreign nationals (*Medellin v. Texas*, *supra*, 552 U.S. at p. 506, fn. 4; *Sanchez-Llamas v. Oregon*, *supra*, 548 U.S. at p. 343; *In re Martinez*, *supra*, 46 Cal.4th at p. 957, fn. 3),[108] petitioner is not entitled to relief on habeas because law enforcement's failure to advise him of his consular rights was not prejudicial. That is, petitioner has not shown that (1) "the alleged violation denied him of any benefit that he would have otherwise received had the consulate been properly notified" and (2) that he "did not obtain that assistance from other sources." (*People v. Mendoza* (2007) 42

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[108] Petitioner contends it does. (RCCAP at pp. 398-409, Nov. 30, 2004 Supp. Pet. at pp. 5-7, 9-11.)

Cal.4th 686, 711; see also *In re Martinez*, *supra*, at p. 965 [prejudice not shown where defendant was aware of his right of consular notification by the time of trial and there was no evidence of prejudice suffered from not having been advised of those rights at the time of arrest].)

Although not initially informed of his right to consular assistance, petitioner obtained assistance from the Mexican consulate. In *Avena*, the ICJ acknowledged that information drawn to the attention of a detained foreign national's State by means other than advisement by the detaining authority may still enable the State's consular officers to assist in arranging legal representation for its national pursuant to Article 36, paragraph (1)(c). (*Avena*, *supra*, at p. 53, at ¶ 104.) Significantly, the ICJ then found that *in petitioner's case*, "the Mexican consular authorities learned of their national's detention in time to provide such assistance, either through notification by United States authorities (albeit belatedly in terms of Article 36, subparagraph 1(b)) or through other channels." (*Ibid.*; see also *id.* at pp. 53-55, ¶¶ 105 and 106(3) [petitioner's case *not* among the three cases in which the United States was found to have violated its obligations under Article 36, paragraph (1)(C) and *not* among the cases in which the U.S. was deemed to have breached its obligation to enable Mexican consular officers to visit detained nationals by virtue of having violated Article 36, paragraph (1)(b)].) Apparently, petitioner sent a letter to the Mexican consulate in Fresno in October of 1992 requesting assistance with his defense. (Pet.'s RCCAP Exh. 145 at pp. 6648-6649.) According to Ambassador Tovar, on December 3, 1992, the consulate sent defense counsel a letter asking for information about petitioner's case. (*Ibid.*)[109] Dr. Gabriel Garcia-Perez,

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[109] Petitioner's assertion that the letter offered consular assistance (Pet.'s April 22, 2008 Supp. Pet. at p. 23) is not supported by this declaration (Pet.'s RCCAP Exh. 145 at p. 6649), and petitioner has not

(continued...)

who was the Consul General in Fresno at the time, subsequently submitted a letter dated May 4, 1993, seeking leniency at sentencing. (3CT 833.) According to Ambassador Tovar, the Mexican consulate also "maintained close contact" with petitioner's family "from the moment" they were notified of petitioner's case in 1992. (Pet.'s RCCAP Exh. 145 at p. 6652.)

Petitioner further alleges that law enforcement's non-compliance with Article 36 prevented the Mexican consulate from assisting him in various ways. For example, he alleges, without citing any support or explanation, that timely notification of his right to consular assistance would have "permitted him to obtain proper translation and understand his right to counsel during police questioning and subsequent phases of the legal proceedings." (RCCAP at pp. 407-408; claim X20b.) Ambassador Tovar opines the consulate "could have" (not "would have") helped petitioner understand the *Miranda* advisements. However, he does not assert that petitioner did not understand them based on his discussion in Spanish with detectives at the police station. (Pet.'s RCCAP Exh. 145 at pp. 6648, 6651.) Also, Article 36, paragraph (b)(1)'s requirement that a national be advised of his consular rights "without delay" is satisfied where the notice is provided within three working days of arrest. (*Avena*, *supra*, at p. 52, ¶ 97; *Medellin v. Texas*, *supra*, 552 U.S. at p. 502, fn. 1.) Moreover, Article

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(...continued)
produced the December 3, 1992 letter or any other evidence to support his claim. Ambassador Tovar alleges the letter was sent because telephone calls to defense counsel by the consulate were unanswered. (Pet.'s RCCAP Exh. 145 at p. 6649.) This is incorrect. Because Tovar was the former Consul General of Mexico in San Diego and Los Angeles (not Fresno), he may not have been aware that a defense investigator called the consulate on October 2, 1992 (Resp.'s RCCAP Exh. 4 at p. 5 [Oct. 23, 1992 Section 987.9 Request for Payment of Investigator Fees]), and later on December 18, 1992 (Resp.'s RCCAP Exh. 9 [Feb. 8, 1993 Section 987.9 Request for Payment of Investigator Fees]).

36 does not "demand that questioning await notice to, and a response from, consular officials." (*Sanchez-Llamas v. Oregon*, *supra*, 548 U.S. at p. 362 [conc. opn., J. Ginsberg].) Here, petitioner gave a statement at the police station on the day he was arrested, before there could be a violation of his Vienna Convention right to consular notification. Thus, this basis for prejudice is nonexistent.

Petitioner further asserts that law enforcement's compliance with Article 36 would have enabled the consulate to contact trial counsel at an earlier stage of petitioner's case and advocate for him with defense counsel. (RCCAP at p. 408.) However, the consulate already contacted defense counsel on petitioner's behalf and there is no evidence that the consulate would have provided any assistance beyond that which was given to defense counsel, had they been informed of petitioner's detention earlier on in the case, or that additional assistance would have been accepted by defense counsel or materially affected the outcome of petitioner's trial. Dr. Gabriel Garcia-Perez, the former Consul General in Fresno was aware of petitioner's detention at the Lerdo jail and his alleged difficulty communicating in English with counsel (Pet.'s RCCAP Exh. 145 at p. 6649). He was also authorized to interview and communicate with petitioner, inquire into any incidents involving him, and assist in proceedings before the State pursuant to the pursuant to the Mexico-Consular Convention, Art. VI (2), which Dr. Garcia-Perez submitted to the court prior to sentencing. Article VI provides as follows:

> 1.–*Consular officers of either High Contracting Party may within their respective consular district, address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of right accruing by treaty or otherwise.* Complaint may be made for the infraction of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through

the diplomatic channel, and in the absence of a diplomatic representative, a consul general or the consular officer stationed at the capital may apply directly to the Government of the country.

2.–Consular officers shall, within their respective consular districts, have the right:

(a) to interview and communicate with the nationals of the State which appointed them;

(b) to inquire into any incidents which have occurred affecting the interest of the nationals of the State which appointed them;

(c) upon notification to the appropriate authority, to visit any of the nationals of the State which appointed them who are imprisoned or detained by authorities of the State; and

(d) to assist the nationals of the State which appointed them in proceedings before or relations with authorities of the State.

(Addendum to Prob. Report filed June 11, 1993; italicized portion references portion highlighted in yellow by Dr. Garcia-Garza.)

Petitioner further asserts that timely compliance with Article 36 would have enabled the consulate to obtain documents and witnesses from Mexico, transport petitioner's family and friends to Bakersfield to testify at the guilt and penalty phases of his trial, and "provide competent, qualified interpreters for trial (as consular officers allegedly would have attended trial, detected and then remedied the allegedly inadequate Spanish translation). (RCCAP at pp. 408-409.) First, petitioner has not introduced a declaration or any other evidence to support the assumption that he would have promptly requested consular notification upon being informed of this right. Further, the claim that the consular officers would have involved themselves in petitioner's case more than they did is supported only by the general statements of Ambassador Tovar, the former Mexican Consul to

Los Angeles and San Diego at the time, not Dr. Gabriel Garcia-Perez, the former Mexican Consul in Fresno. Ambassador Tovar cannot speak to the services then provided and resources available to the Fresno consulate to assist their nationals. Moreover, Ambassador Tovar does not assert that petitioner failed to receive the assistance he allegedly could have offered from other sources. In addition, petitioner has not cited this Court to any case involving a Mexican national during this timeframe where compliance with Article 36 brought about the type of consular involvement that Ambassador Tovar now contends would have been provided. (Pet.'s RCCAP Exh. 145 at p. 6649.)

Petitioner attempts to supplement claim 24 with new allegations of prejudice. (Pet.'s April 22, 2008 Supp. Pet. at pp. 32-36.) He contends that had the consulate been formally notified of his arrest in a timely manner, the consulate would have visited him in jail, evaluated his mental health; explained his right to remain silent; provided legal assistance; located and interviewed monolingual Spanish-speaking witnesses; gathered background records; and provided funds to hire competent interpreters. (*Id.* at pp. 34-35.)

These claims are not timely raised. They do not counter respondent's Informal Response, which contended that the claim should fail on the grounds petitioner was not a Mexican national, nor do they relate to Kathleen Culhane's fraudulent work product. Therefore, respondent objects to petitioner being permitted to raise any of these claims now.

In any event, petitioner's claims do not show actual prejudice. The declaration from Ambassador Tovar does not comport with the consulate's relative inaction in the case, and does not claim that petitioner did not receive the assistance that the consulate allegedly could have provided from other sources.

In sum, petitioner has not shown prejudice based on law enforcement's non-compliance with his rights under Article 36 of the Vienna Convention. Thus, his claim must fail.

4. Petitioner's ineffective assistance of counsel claim based on failure to challenge law enforcement's non-compliance with Article 36 lacks merit

Petitioner claims he had a right under the Vienna Convention and under the Bilateral Consular Convention to the assistance of the Mexican consulate as a foreign national and he was denied the effective assistance of counsel based on trial counsels' failure to "preserve" those rights. (Claim M17; RCCAP at pp. 304-305.) Respondent disagrees.

Strickland v. Washington, *supra*, 466 U.S. 668 requires a showing both that trial counsel's representation fell below an objective standard of reasonableness and that he was prejudiced thereby. Here, trial counsel's inattention to Article 36 when petitioner was arrested on November 18, 1991 was not objectively unreasonable and did not, in any event, cause prejudice to petitioner. (*Strickland v. Washington*, *supra*, at pp. 687, 693-694.)

First, trial counsel's failure to assert Article 36 of the Vienna Convention in 1991 was not objectively unreasonable. The Vienna Convention was not recognized in the legal community then. (Sims & Carter, *Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool* (1998) 22-OCT Champion 28.) In addition, the 1989 American Bar Association (ABA) guidelines for defending death penalty cases that were in effect at the time of petitioner's trial in 1993 did not recognize a right to consular assistance. (*Id.* at pp. 916, 1012.)[110] The

[110] The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases are not controlling, but they are guides as to what reasonably diligent attorneys should do in capital cases.
(continued...)

right to consular assistance under Article 36 of the Vienna Convention was first referenced in the most recent edition of the ABA guidelines with the enactment of guideline 10.6. (ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003) 31 Hofstra L. Rev. 913, 1012-1014.) This is further evidenced by the fact that section 843c, subdivision (a)(1),[111] which codifies Article 36's requirement that every arrested foreign national be advised of his right to have the consulate notified of the arrest was not enacted until 1999, long after petitioner's arrest in 1991. (Added by Stats. 1999, ch. 268 (S.B. 287), § 1.)

Petitioner has not shown defense counsel's performance to have been deficient or prejudicial. He contends that defense counsel failed to assert his rights under Article 36 by waiting until his trial had ended to respond to telephone calls from the Fresno consulate in November and to a letter dated December 3, 1992. (RCCAP at p. 304; claim 13(17)(b).) However, a defense investigator called the Mexican consulate at least twice: once on October 2, 1992 (Resp.'s RCCAP Exh. 4 at p. 5 [Oct. 23, 1992 Section

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(...continued)
(*Bobby v. Van Hook* (2009) 558 U.S. ___ [130 S.Ct. 13, 17; 175 L.Ed.2d 255; *In re Lucas* (2004) 33 Cal.4th 682, 723.) However, the 2003 change in ABA guidelines shows that defense counsel cannot be faulted for failing to allege an Article 36 violation in 1993.

[111] Section 843c provides in relevant part:

> (a)(1) In accordance with federal law and the provisions of this section, every peace officer, upon arrest and booking or detention for more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country, except as provided in subdivision (d). If the foreign national chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified.

987.9 Request For Payment of Investigator Fees]) and once on December 18, 1992 (Resp.'s RCCAP Exh. 9 at p. 4 [Feb. 8, 1993 Section 987.9 Request For Payment of Investigator Fees]). Defense counsel also obtained and submitted a letter requesting leniency at sentencing from Dr. Gabriel Garcia-Perez, the former Consul General in Fresno. (3CT 833, 877.)

Operating from the premise that the Mexican consulate's calls and letter to defense counsel were not responded to until May of 1993, when defense counsel Harbin contacted them for a letter for the sentencing hearing,[112] petitioner next contends that counsel's untimely response was prejudicial. (RCCAP at pp. 304-305.) He argues that counsel's delayed response prevented the consulate from arguing that "international law required the suppression of his [*Mirandized*] statements to the police," "assisting with translation" and contacting character witnesses in Mexico. (RCCAP at p. 305.) This argument is based on a false premise. Counsel contacted the consulate before May, as previously discussed. Moreover, the Vienna Convention does not provide a right to intervention by the consulate. Likewise, it does not call for the suppression of evidence as a remedy for a violation of its provisions. (*Sanchez-Llamas v. Oregon*, *supra*, 548 U.S. at pp. 347-350; *United States v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3d 882, 885-888; *United States v. Alvarado-Torres* (S.D.Cal. 1999) 45 F.Supp.2d 986, 988-993; *People v. Corona* (2001) 89

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[112] Petitioner incorrectly contends the letter referenced the Vienna Convention. (RCCAP at p. 304; claim M17b.) It does not. Rather, it refers to Article VI, paragraph 1 of the U.S.-Mexico Consular Convention. (For a copy of the enclosure see the Addendum to Probation Report filed June 11, 1993.) Petitioner also contends that Judge Stuart "rejected the letter" and the other letters submitted by the defense. (RCCAP at p. 304; claim M17b; See also 3CT 832-867 [18 other letters were submitted on petitioner's behalf].) To the contrary, Judge Stuart stated that he had read and considered the letter from the consulate and the other letters submitted on petitioner's behalf. (3CT 877.)

Cal.App.4th 1426, 1428-1430.) Ambassador Tovar's assertion that the consulate would have assisted with translation services and contacted character witnesses in Mexico rings hollow in view of the consulate's relative inaction in the case. (Pet.'s RCCAP Exh. 145 at pp. 6649, 6652) Moreover, Mr. Tovar does not assert that petitioner did not obtain the assistance the consulate could have offered from other sources.

Petitioner further argues that, but for counsel's failure to assert his Article 36 rights, the consulate "could" have done the following: provided interpreter services for his communications with law enforcement; located and interpreted for Spanish-speaking witnesses; obtained unspecified documents from Mexican localities; located necessary experts, including specialists in capital defense, and facilitated communication with petitioner's friends and family. (Pet.'s April 22, 2008 Supp. Pet. at pp. 23-24, citing Pet.'s RCCAP Exh. 145 at pp. 6650-6654.) These new allegations are untimely and unrelated to Kathleen Culhane's fraudulent work product. Thus, they should not be permitted. In any event, counsel's performance was not objectively unreasonable and did not, in any event, cause prejudice to petitioner, as previously discussed. Thus, petitioner's ineffective assistance of counsel claim fails.

Y. Claim 25: The Jury Determination of Petitioner's Sentence of Death Was Constitutional

Petitioner's final claim is that the jury determination of death was improper because the jury was not instructed that: (1) all aggravating factors must be proven beyond a reasonable doubt; (2) aggravation must be found weightier than mitigation beyond a reasonable doubt; (3) death must be found to be the appropriate penalty beyond a reasonable doubt; and (4) they must unanimously agree on the circumstances in aggravation that supported their verdict. (RCCAP at p. 410.) He relies primarily on *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530

U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584. (RCCAP at pp. 412-422.)

This claim was rejected by this Court in *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; see also *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn. 14 [rejecting same claim based on *Apprendi*].)

This Court has repeatedly upheld the constitutionality of California's capital sentencing scheme despite the fact that it does not require jurors to find the presence of one or more specific aggravating factors beyond a reasonable doubt, that those specific factors outweigh the mitigating factors beyond a reasonable doubt, or that death is the appropriate verdict beyond a reasonable doubt. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 466; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79; *People v. Berryman* (1993) 6 Cal.4th 1048, 1101-1102, overruled on other grounds in *People v. Hill*, *supra*, 17 Cal.4th 800; *People v. Alcala* (1992) 4 Cal.4th 742, 809; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779; *People v. Pride* (1992) 3 Cal.4th 195, 268; *People v. Hardy* (1992) 2 Cal.4th 86, 214; *People v. Taylor* (1990) 52 Cal.3d 719, 748-749.)

This Court has also repeatedly held that California's capital sentencing scheme is constitutional despite the fact that it does not require jurors to agree unanimously on the presence of particular aggravating factors, or that particular factors outweigh mitigating factors. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 466; *People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1150-1151; *People v. Bolin*, *supra*, 18 Cal.4th at pp. 335-336; *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Pride*, *supra*, 3 Cal.4th at p. 268; *People v. Hardy*, *supra*, 2 Cal.4th at p. 214; *People v. Taylor*, *supra*, 52 Cal.3d at p. 749.)

The United States Supreme Court's decision in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, does not dictate a contrary result. In *Apprendi*, the high court held that, "[o]ther than the fact of a prior conviction, any fact

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) *Apprendi* specifically rejected the notion that its decision rendered invalid state capital sentencing schemes, such as the scheme in Arizona which required judges "after a jury verdict holding a defendant guilty of a *capital* crime, to find specific aggravating factors before imposing a sentence of death." (*Id.* at pp. 496-497, emphasis added.) *Apprendi* made clear, however, that a judge is not permitted to determine the existence of a factor which makes a crime a capital offense. (*Id.* at p. 497.)

In *People v. Ochoa*, *supra*, 26 Cal.4th at pages 453-457, this Court rejected the defendant's claim that, following the decision in *Apprendi*, trial courts were required to instruct jurors not to consider aggravating factors unless they found every aspect of those factors true beyond a reasonable doubt. This Court explained that once the jury has found the defendant guilty in California of first degree murder with at least one death-qualifying special circumstance, there is no requirement under *Apprendi* that the aggravating factors be found true by the jury beyond a reasonable doubt during the penalty phase. This is because a jury's finding of aggravating factors in the penalty-phase does not produce a sentence any greater than already authorized by the jury's guilt-phase verdict. In so ruling, this Court compared California's sentencing scheme with the sentencing scheme in Arizona *as it was characterized in Apprendi* and explained that a finding of first degree murder in Arizona was the functional equivalent of a finding of first degree murder with a section 190.2 special circumstance in California. (*Id.* at pp. 452-454.)

A little less than a year after *Ochoa* was decided, the United States Supreme Court issued its opinion in *Ring v. Arizona*, *supra*, 536 U.S. 584. In that case, the high court invalidated Arizona's capital sentencing scheme

because, as Justice O'Connor noted in her dissent in *Apprendi*[113] and as the Arizona Supreme Court conceded, Arizona's capital sentencing scheme required the judge, sitting without a jury, to determine the existence of a factor which made a crime qualify as a capital offense.[114] In other words, because Arizona's enumerated aggravating factors operated as the functional equivalent of an element of a greater offense, the Sixth Amendment required that they be found true by a jury, rather than by a judge. (*Id.* at pp. 589, 591-597, 609.)

Although this Court in *Ochoa* relied on *Apprendi*'s characterization of Arizona's capital sentencing scheme, which was later determined to be incorrect in *Ring*, the holding and reasoning in *Ochoa* is still sound. Under California's system, unlike the Arizona scheme, all the facts necessary for a crime to constitute a capital offense are determined by the jury using the beyond-a-reasonable-doubt standard during the guilt phase. The penalty-phase verdict represents a choice between two previously authorized sentences (death or life without the possibility of parole). (*People v. Prieto* (2003) 30 Cal.4th 226, 262-263; see also *Jones v. United States*, *supra*, 526 U.S. at p. 249.)

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[113] In Justice O'Connor's dissent in *Apprendi*, she described as "demonstrably untrue" the majority's assertion that in Arizona's sentencing scheme the jury made all the findings necessary to make a crime a capital offense. She explained that a defendant could not receive a death sentence in Arizona unless a judge first made the critical factual determination that statutory "aggravating factors" existed. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 538 [dis. opn. of O'Connor, J.].)

[114] Under Arizona law, the maximum punishment Ring could have received based upon the jury's verdict alone was life imprisonment. However, if the judge, sitting without the jury, found at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency, Ring could be sentenced to death. (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 591-597, 606.)

As explained by this Court in *People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14:

> [U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole. (§ 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*.

(See also *People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

Accordingly, there is absolutely no merit to petitioner's contention that, under the reasoning of *Apprendi* and *Ring*, California's capital sentencing scheme is unconstitutional because it does not require that jurors, in order to render a verdict of death, must unanimously agree on the presence of one or more specific aggravating factors beyond a reasonable doubt, that those specific factors outweigh the mitigating factors beyond a reasonable doubt, or that death is the appropriate verdict beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, respondent concedes that defense counsel's failure to confront Dr. Diamond with Dr. Dibdin's testimony that Consuelo had a tear to the posterior (rather than the anterior) wall of the vagina was prejudicial only as to petitioner's rape conviction and the rape special circumstance finding. Respondent's concession is based on Dr. Diamond's declaration that he cannot substantiate the report about the tearing of the vaginal wall based on the current record. Respondent respectfully requests that the petition for writ of habeas corpus be denied in all other respects.

Dated: August 4, 2010

Respectfully submitted,

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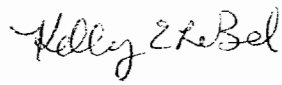

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DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On August 5, 2010, I served the attached **INFORMAL RESPONSE TO REDLINED COPY OF CORRECTED AMENDED PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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(Representing petitioner Benavides Figueroa)
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The Honorable Edward R. Jagels
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 5, 2010, at Sacramento, California.

_____
Declarant

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