SUPREME COURT COPY

## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

VICENTE BENAVIDES FIGUEROA,

On Habeas Corpus.

Case No. S111336

**CAPITAL CASE**

Related to Automatic Appeal Case No. S033440
Kern Superior Court Case No. 48266A

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

# INFORMAL REPLY TO THE INFORMAL RESPONSE TO THE CORRECTED AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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DEATH PENALTY

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

| | |
|---|---|
| In re<br><br>VICENTE BENAVIDES FIGUEROA,<br><br>On Habeas Corpus. | Case No. S111336<br><br>**CAPITAL CASE**<br><br>Related to Automatic Appeal Case No. S033440<br>Kern Superior Court Case No. 48266A |

**INFORMAL REPLY TO THE INFORMAL RESPONSE TO THE CORRECTED AMENDED PETITION FOR WRIT OF HABEAS CORPUS**

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Petitioner, Vicente Benavides Figueroa, by this verified Informal Reply to Respondent's Informal Response, hereby incorporates the allegations of his Corrected Amended Petition for Writ of Habeas Corpus, and the facts contained in the exhibits filed in support of the Corrected Amended Petition, as if fully set forth herein, and offers the following additional legal authority and factual submissions in support of the issuance of an Order to Show Cause, order for an evidentiary hearing, and the grant of habeas corpus relief so that he may have the fair trial to which he was entitled.

## I. Introduction

Mr. Benavides is innocent. He has spent 21 years wrongfully incarcerated for a crime he did not commit. He was 42 years old when he was arrested. He is now 63 years old.

Prior to his arrest, Mr. Benavides had no criminal or violent history. He had many close friends and family, all of whom knew him to be kind, loving, and caring. No one had ever known him to hurt a child or commit any deviant sexual act. He was a poor, humble farm worker from a small, rural town in Mexico. When he was arrested, he had spent over a decade traveling in the spring to the Central Valley of California to pick fruit, and returning to Mexico in the late fall or winter. Despite spending so much time living in the United States, he never learned English. This is likely because he is intellectually disabled.

Mr. Benavides was convicted in 1993 of raping, sodomizing, being lewd and lascivious, and murdering his girlfriend's 21-month old daughter, Consuelo Verdugo. The prosecution's theory that Consuelo was sexually abused depended on the testimony of the county pathologist and doctors who attended to or examined Consuelo in the eight days she was hospitalized before she died. Every doctor who testified at trial that Consuelo was sexually abused, except for one, however, has since retracted their testimony. In post-conviction, these doctors have learned that their opinion that Consuelo was sexually abused was false as a result of the prosecution's failure to provide them with Consuelo's full medical hospitalization record. At the time of their testimony, none of these doctors were aware that the nurses and doctor who first attended to Consuelo at Delano Regional Medical Center (DRMC) saw absolutely no signs of trauma to her genitalia or anus, despite ample opportunity to do so. Having learned this information and reviewed Consuelo's full medical history, the

doctors have realized that they misinterpreted signs of Consuelo's deteriorating medical condition as a sign of sex abuse.

The key prosecution witness was Dr. Jess Diamond, a pediatrician and child sex abuse specialist. He testified that Consuelo had been raped and sodomized. Like other doctors, Dr. Diamond was not provided with Consuelo's full medical history prior to testifying. In post-conviction, after reviewing Consuelo's full medical history, Dr. Diamond has also retracted his testimony. In a declaration submitted by Respondent, Dr. Diamond states that he no longer believes Consuelo was raped. (Response Ex. 1.)[1] Still troubled by the case, Dr. Diamond subsequently consulted with a world-renowned expert in child sex abuse, Dr. Astrid Heger. After reviewing with Dr. Heger the medical records and photographs of Consuelo's anus and genitalia taken at the hospitals, Dr. Diamond has also retracted his testimony that Consuelo was sodomized. (Ex. 149.) Hence, Dr. Diamond no longer believes that Consuelo was raped or sodomized.

The only prosecution witness who has yet to retract his testimony is Dr. James D. Dibdin, the state's pathologist. Dr. Dibdin has a long, ignominious history of misconduct and falsifying findings. Based on his negligent practice and lies, he has been suspended from practicing medicine in the United Kingdom and he is on the verge of losing his medical license in the United States. Every doctor who has examined Dr. Dibdin's findings of Consuelo's autopsy has found them to be unsupported and false. Most critically, all experts agree that Dr. Dibdin's opinion about what caused Consuelo's death is completely false. Indeed, it is anatomically impossible. Dr. Dibdin opined that Consuelo died as a result of penile penetration of the

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[1] In this Informal Reply, the Informal Response to Redlined Copy of the Corrected Amended Petition for Writ of Habeas Corpus is referred to as "Response," and the accompanying exhibits as "Response Ex."

anus that severed her internal upper abdominal organs. The mechanism of injury Dr. Dibdin describes cannot have occurred without there also being a massive tear to the rectum and substantial injury to the lower abdominal organs. Consuelo's medical records establish, however, that her rectum or lower abdominal organs were not injured.

Unfortunately, this was not the only falsehood that Dr. Dibdin told the jury. He also testified that Consuelo had an internal vaginal injury that indicated she had been raped. Upon recently examining Dr. Dibdin's autopsy findings, Dr. Diamond has found that the internal vaginal injury is unsubstantiated and required him to recant his testimony that Consuelo was raped.

Despite this overwhelming and compelling showing that the rape, sodomy, and lewd and lascivious felony charges and special circumstances were based on false and misinformed evidence, Respondent maintains that Mr. Benavides had a fair trial. Respondent does not even concede that Mr. Benavides has stated a prima facie case for relief in the Corrected Amended Petition for Writ of Habeas Corpus.[2] Respondent's position is indefensible.

This travesty of justice occurred both because of trial counsel's ineffectiveness and the prosecution's misconduct. The medical evidence demonstrating that Consuelo was not sexually abused was available to counsel, but she utterly failed to review and understand it and timely and adequately consult with experts. In complete derogation of the most basic duty of defense counsel, she failed to interview *any* of the prosecution's medical witnesses before they testified. The prosecutor, however, also shares fault for the false presentation of evidence. He had reason to know

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[2] In this Informal Reply the Corrected Amended Petition for Writ of Habeas Corpus is abbreviated as CAP. The Redline Copy of the Corrected Amended Petition for Writ of Habeas Corpus is abbreviated as RCCAP.

that the theory he was pedaling was not supported by the medical evidence; in particular, he was aware that no one at DRMC observed any evidence of trauma to the anus or genitalia. Knowing this information conflicted with his theory, the prosecutor did not provide it to the prosecution medical experts he called to testify. As shown in post-conviction, this evidence was critical. Had the prosecutor shown the DRMC records to these witnesses, they would not have testified that Consuelo was sexually abused. Having no meaningful evidence to refute the prosecution's false theory about the cause of Consuelo's injuries, the jury convicted Mr. Benavides.

Counsel's representation of Mr. Benavides at the penalty phase was similarly abysmal. Counsel failed to conduct an investigation into Mr. Benavides's character and background, ignored numerous friends and family who offered to help and testify on Mr. Benavides's behalf, and completely failed to consult with any mental health experts. Out of a list of over 70 witnesses that counsel had obtained of witnesses that could testify on Mr. Benavides's behalf, counsel called only two to testify. Their testimony occupies only 14 pages of the Reporter's Transcript. The entire penalty phase occurred in less than a full court day. Counsel failed to present a plethora of compelling, mitigating evidence about the impoverished and abusive conditions in which Mr. Benavides grew up; his neuropsychological and cognitive impairments; his consistent history of lack of sexual deviance; and substantial evidence from his daughter, siblings, aunts, parents, uncles, nieces, friends, and so many others, who knew him well, who could have testified that he was always a kind, caring, and non-violent man, who could not have committed the extremely violent crime of which he was accused. The jury heard none of this compelling evidence. As a result, they sentenced him to death.

Mr. Benavides is the victim of California's dysfunctional capital system. He has lingered in prison for two decades on false charges. It is imperative that this Court not allow this miscarriage of justice to continue.

## II. The Claims in the Corrected Amended Petition Are Properly Raised.

Confronted with compelling evidence of Mr. Benavides's innocence and a host of legal deficiencies that marred Mr. Benavides's trial, the grossly inaccurate factual portrait developed at trial, and the wealth of unused information, Respondent retreats into a factual recitation based solely on the record at trial, wholly ignoring the substantial new evidence presented in post-conviction.[3] (Response at 5-27.) After presenting this inaccurate picture of the facts, Respondent attempts to blunt the force of Mr. Benavides's claims by a perfunctory reliance on purported procedural bars. Respondent argues that most of the claims in the Corrected Amended Petition are procedurally barred because they were or could have been raised on appeal. (Response at 29-30, citing *In re Harris*, 5 Cal. 4th 813, 826-41 (1993), *In re Dixon*, 41 Cal. 2d 756, 759 (1953), and *In re Waltreus*, 62 Cal. 2d 218, 255 (1965).) Respondent makes the sweeping assertion that the following claims are procedurally barred: Claims 1-6, 9-12, 14-20, and 22-25. (Response at 30.) As explained below, Respondent's assertion that procedural rules bar merits review of all these claims is flawed for several reasons.

Respondent wantonly ignores that all of the claims Respondent argues are procedurally barred are supported by substantial facts outside the

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[3] In its "Statement of Facts" Respondent even fails to acknowledge that its star witness, Dr. Jess Diamond, by Respondent's own concession has retracted his testimony that Consuelo Verdugo was raped. (Response at 170.)

appellate record, and thus are properly presented in habeas and could not have been raised on appeal. It is "well established . . . that when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right resort to habeas corpus is not only appropriate, but required." *In re Bower*, 38 Cal. 3d 865, 872 (1985) (citing *People v. Pope*, 23 Cal. 3d 412, 426 (1979); *In re Lewallen*, 23 Cal. 3d 274, 278 (1979)). A claim is cognizable on habeas when it is supported by exhibits, such as declarations or other information not in the appellate record that provides substantial support for a claim. *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (holding that *Dixon* and *Waltreus* bars inapplicable when extra-record material has information "of substance not already in appellate record").

As explained more specifically within each claim, significant extra-record facts support each claim and thus they are not subject to procedural bars. *See Robbins*, 18 Cal. 4th at 814 n.34. A review of Claim Twenty, however, provides a good illustration of the degree to which Respondent's procedural arguments lack merit. In Claim Twenty, Mr. Benavides has alleged that pursuant to the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002), he is ineligible for the death penalty because he is mentally retarded. (RCCAP at 346-59.) In support of the claim, Mr. Benavides has submitted a declaration of a qualified neuropsychologist opining that Mr. Benavides is mentally retarded (Ex. 126), and a number of declarations from his friends and family describing his adaptive functioning deficits (*see, e.g.*, Exs. 94, 96, 99, 102-03, 111, 116, 119, 123). Claim Twenty obviously was not and could not have been raised on appeal because it substantially depends on extra-record facts. *See Bowers*, 38 Cal. 3d at 872; *In re Robbins*, 18 Cal. 4th at 814 n.34. Moreover, Respondent's argument that Claim Twenty should have been raised on appeal directly

contradicts this Court's express holding that "[p]ostconviction claims of mental retardation should be raised by petition for writ of habeas corpus." *In re Hawthorne*, 35 Cal. 4th 40, 47 (2005). Respondent fails to acknowledge any of this clear law in mechanically asserting that Claim Twenty is procedurally barred. Respondent's procedural arguments with regard to other claims are equally meritless and similarly fail to acknowledge the host of exhibits submitted in support of the claims, which render them cognizable on habeas review.

Respondent has also failed to acknowledge that many of the claims involve clear and fundamental constitutional errors that strike at the heart of the trial process, which are exempt from the procedural bars. *See Harris*, 5 Cal. 4th at 834. The *Waltreus* bar, involving claims actually raised and rejected on appeal, and the corollary *Dixon* bar, involving claims that could have been, but were not, raised on appeal, have four well-recognized exceptions that allow for merits review of the claims. The exceptions to these procedural bars are claims regarding (1) fundamental constitutional error, (2) lack of the court's fundamental jurisdiction, (3) the court acting in excess of its jurisdiction, or (4) changes in the law. *Id.* at 829-40. Several of the claims that Respondent contends are procedurally barred are subject to the exception for fundamental constitutional errors, including Claim Sixteen, alleging the denial of an impartial judge; Claim Twenty-Three, alleging the jury selection process was unconstitutional; and Claim Twenty-Five, alleging denial of right to a jury determination of the facts necessary for a death sentence. *Id.* at 829-36 (discussing exception for fundamental constitutional errors). In addition, Claim Twenty-Two, alleging the Mr. Benavides's death sentence was imposed pursuant to an unconstitutional statute, constitutes a fundamental miscarriage of justice that this Court has recognized is not subject to procedural bars. *See In re Clark*, 5 Cal. 4th

750, 759 (1993) (holding that claims involving an invalid statute are not barred by delayed presentation).

Finally, in asserting the claims listed above are procedurally barred, Respondent has also ignored that most of them contain an allegation that Mr. Benavides's right to the effective assistance of counsel was denied to the extent trial counsel could have and failed to preserve his constitutional rights. For such claims, habeas is the appropriate venue for relief. *See People v. Geddes*, 1 Cal. App. 4th 448, 454 (1991) (defendant claiming counsel was ineffective in failing to obtain favorable evidence must use habeas corpus to show the evidence that would have been found and its effect on trial); *People v. Cotton*, 230 Cal. App. 3d 1072, 1083 (1991) (habeas corpus petition is the proper vehicle for ineffective assistance of counsel claim relying on matters outside the appellate record).

In sum, Respondent's indiscriminate assertion that most of the claims in the Corrected Amended Petition are procedurally barred because they could or should have been raised on appeal lacks merit. The claims are cognizable on habeas because they are supported by substantial extra-record facts, fall within one of the exceptions regarding fundamental constitutional errors that cannot be barred from review, and/or allege counsel's ineffectiveness in failing to preserve the errors for review. Accordingly, Mr. Benavides's claims are not barred under the procedural rules governing the pleading and proof of habeas petitions.

## III. There Are Numerous Impediments to the Full and Reliable Presentation and Litigation of Each Claim for Relief Raised Herein and on Direct Appeal.

In the Corrected Amended Petition, Mr. Benavides has alleged multiple, significant prejudicial constitutional violations that require the

institution of formal proceedings and ultimately the grant of relief. Mr. Benavides has been hampered in his efforts to perfect his allegations and documentary support thereof by multiple defects and impediments that prevent meaningful appellate or habeas corpus review and violate Mr. Benavides's constitutional rights to due process and equal protection and against cruel and unusual punishment, and his state statutory rights. California's death penalty review process does not provide a constitutionally adequate opportunity to be heard on direct appeal or in habeas corpus, and renders Mr. Benavides and his counsel unable to develop, obtain, and present potential facts and arguments in support of meritorious claims for relief. As a result of the many flaws in the process and impediments confronting Mr. Benavides and his counsel, the full scope of the factual allegations and evidence in support of the claims in the Corrected Amended Petition and this Informal Reply is not presently reasonably obtainable.

A reasonable opportunity for full factual investigation and development through, among other things, timely appointment of counsel, adequate funding, access to subpoena power and other court process, comprehensive discovery, other means of compulsory process, an evidentiary hearing, and to interview material witnesses and obtain relevant information without interference from government actors have not been provided to Mr. Benavides or his counsel. Despite these state-imposed impediments, the evidentiary bases that are reasonably obtainable under the present circumstances and set forth in the Corrected Amended Petition adequately support each claim and justify the issuance of an order to show cause and the grant of relief.

Mr. Benavides has been deprived of his right to counsel and the benefits thereof because the appointment of counsel for direct appeal and

habeas corpus in this case was not timely. The lack of timeliness in Mr. Benavides's case is consistent with the lapse of time in California capital cases generally. Indigent death-sentenced defendants in California have the right to court-appointed counsel to challenge their convictions, death-eligibility, and sentence on automatic appeal and in habeas corpus proceedings. Cal. Penal Code §§ 1239-41 (affording counsel for automatic appeal); Cal. Gov't Code § 15421 (authorizing appointment of the State Public Defender); Cal. Gov't Code § 68662 (affording counsel for state habeas corpus).

Mr. Benavides did not receive the benefit of the timely appointment of counsel for either the automatic appeal or habeas corpus proceedings, and the delay in appointment in this case prevented him and his counsel from obtaining facts supporting his claims for relief. Mr. Benavides was sentenced to death on June 11, 1993. (1 CT 873-74.) The Habeas Corpus Resource Center (HCRC) was not appointed as habeas counsel for Mr. Benavides until nearly six years later, on March 18, 1999. Delay in the appointment of counsel has impeded counsel's effort to gather and allege facts in support of the claims for relief in myriad ways. *See In re Zamudio Jimenez*, 50 Cal. 4th 951, 955 (2010) (noting that extended delay in appointing habeas counsel in capital cases affects ability to collect "critical documents [that] may have been destroyed and [interview] witnesses [that] may no longer be available, or their memories may have faded"). In Mr. Benavides's case, key witnesses died before the HCRC had an opportunity to interview them. These witnesses included members of Mr. Benavides's family who likely could have provided valuable exculpatory and mitigation evidence. Moreover, due to the passage of time, several witnesses lack the specific recollection of the case that is necessary to reconstruct the events at

the time of the trial and records have been lost or destroyed that were available at the time of trial.

Mr. Benavides's ability to present all meritorious claims for relief has been further circumscribed by unduly limited, statutorily circumscribed discovery while preparing the petition, and otherwise lack of authority to issue subpoenas or access to other legal process to compel witness testimony or the disclosure of records and other tangible material related to potentially meritorious grounds for relief. Following shortly after its appointment to represent Mr. Benavides, the HCRC sought informal discovery from the Kern County District Attorney's Office. Though counsel has had access to some of the prosecution's files, review of the records in our possession and our investigation have revealed that we have not obtained full discovery from the prosecution and law enforcement agencies to which Mr. Benavides would have been entitled at trial.

This Court's adjudication of capital direct appeals and habeas corpus petitions does not provide meaningful, full, and fair appellate or habeas corpus review before an impartial tribunal. From 1979 through 1986, this Court reversed 59 of 64 judgments of death on appeal; an affirmance rate of 8 percent. *Cal. Comm'n on the Fair Admin. of Justice, Report and Recommendation on the Administration of the Death Penalty in California*, 120 n.21 (Gerald Uelmen ed., 2008) (hereafter *Commission Report*), available at http://www.ccfaj.org/documents/CCFAJFinalReport.pdf. As reported by the California Commission on the Fair Administration of Justice in 2008, "Since the removal of three Justices in the election of 1986 and their subsequent replacement, the affirmance rate of the California Supreme Court for death judgments has exceeded 90%." *Id.* (citing Gerald F. Uelmen, *Review of Death Penalty Judgments By the Supreme Courts of California: A Tale of Two Courts*, 23 Loy. L.A. L. Rev. 237 (1989)). This

Court's exceedingly high affirmance rate in automatic appeals has steadily increased in recent years. From April 1, 2008, through June 30, 2009, this Court affirmed 33 death penalty cases while reversing three (91 percent affirmance rate). Gerald F. Uelmen, *Too Much Togetherness?*, 29 California Lawyer 26, 29 (Sept. 2009). From July 1, 2009, to June 30, 2010, this Court affirmed 21 of 22 death judgments (95 percent affirmance rate). Gerald F. Uelmen, *The End of an Era*, 30 California Lawyer 32 (Sept. 2010). From July 1, 2010, to June 30, 2011, this Court affirmed all 26 death penalty cases it decided (100 percent affirmance rate). Gerald F. Uelmen, *All On Board*, 31 California Lawyer 18, 21 (Sept. 2011).

This Court's denial rate in capital habeas corpus cases is even greater than its affirmance rate on automatic appeal. The issuance of an order to show cause and subsequent reference or evidentiary hearing is exceedingly rare in capital habeas corpus cases. Ninth Circuit Court of Appeals Senior Judge Arthur L. Alarcón published his findings in May 2007, which show that out of 689 state habeas corpus petitions filed in capital cases in this Court since 1978, an order to show cause was issued in only 57 cases (a rate of 8.3 percent) and an evidentiary hearing was held only 31 times (a rate of 4.5 percent). Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 741 (2007); *see also Commission Report* at 134. Similar to the change in affirmance rates for automatic appeals, this Court's rate of issuance of orders to show cause in capital cases per year (*i.e.*, the number of orders to show cause issued compared to the number of habeas corpus denials without issuance of an order to show case) declined dramatically after 1988—prior to which orders to show cause issued in approximately 78 percent of the capital habeas corpus cases decided. This Court summarily denies the overwhelming majority of capital habeas corpus petitions without any explication of its reasoning after

reviewing only the petition and, usually, the requested informal briefing. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. at 741; *see also Commission Report* at 134. This Court rejected a request from the Ninth Circuit Court of Appeals that this Court's orders denying state habeas corpus petitions include its reasons for the denial, citing the unduly time-consuming nature of such an endeavor and the detriment it would cause to this Court's performance of its responsibilities in noncapital cases. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. at 741. (Ex. 173.) In a letter to Chief Judge Mary M. Schroeder dated October 29, 2003, then-Chief Justice Ronald M. George described how, based on a two-year internal experiment to determine the feasibility of issuing expanded orders in capital habeas cases, the usual staff-produced internal memoranda used when reviewing capital habeas petitions were much less time consuming to produce and less than half the length of memoranda necessary to prepare an expanded order for a capital habeas petition. (Ex 173.) In a letter to United States Senator Dianne Feinstein dated November 29, 2005, then-Chief Justice Ronald M. George explained that when this Court reviews a capital habeas petition "it is not uncommon now for the justices to conclude that a claim is without merit—while not necessarily agreeing upon all bases for that conclusion."[4] (Ex. 174.) Under this Court's decisions and the process devised for ruling on a habeas corpus petition, full and fair fact development of the claims for relief alleged in Mr.

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[4] To the extent any justice of this Court intends to decide a claim adversely based on an argument not raised or briefed by Respondent, Mr. Benavides specifically requests to be given an opportunity to brief the issue in order to provide this Court with full information and arguments necessary to reach a reasoned decision. The effect of this Court's unforeseeable denial of a claim on grounds not raised by either party would be to deprive Mr. Benavides of the due process of law.

Benavides's Corrected Amended Petition will not occur until after the issuance of an order to show cause or a writ of habeas corpus.

This Court's conduct when sitting in review of capital habeas corpus petitions amounts to an unconstitutional suspension of habeas corpus in California. *See* Cal. Const. art. I, § 11. In stark contrast to this Court's rates of affirmance and denial in death penalty cases, federal courts have granted relief in federal habeas corpus proceedings arising from California death judgments in more than a majority of the cases reviewed. As reported by the Commission on the Fair Administration of Justice in 2008, "federal courts have rendered final judgment in 54 habeas corpus challenges to California death penalty judgments" and "[r]elief in the form of a new guilt trial or a new penalty hearing was granted in 38 of the cases, or 70%." *Commission Report* at 115. Between the publication of the *Commission's Report* in 2008 and an article on California's death penalty system authored by Judge Alarcón (and Paula M. Mitchell) in 2011, "federal habeas corpus relief has been granted in five additional cases, and denied in four additional cases, all of which are final judgments, making the rate at which relief has been granted 68.25%." Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 Loy. L.A. L. Rev. S41, S56 n.26 (2011).

As alleged throughout the Corrected Amended Petition and this Informal Reply and specifically in Claims One through Eleven, Seventeen, and Twenty-One, pervasive misconduct on the part of the prosecution and state actors beginning with the law enforcement investigation and resultant prosecution of Mr. Benavides, and continuing through the post-conviction process, has impeded and prevented Mr. Benavides and his counsel from gathering facts supporting his claims for relief and obtaining meaningful

review of his conviction and sentence on appeal and in habeas corpus proceedings. As alleged throughout the Corrected Amended Petition and this Informal Reply and specifically in Claims Thirteen and Fourteen, Mr. Benavides systematically has been denied his right to the effective assistance of counsel at trial and on automatic appeal, which has impeded and prevented Mr. Benavides and his counsel from gathering facts supporting his claims for relief and obtaining meaningful review of his conviction and sentence on appeal and in habeas corpus proceedings.

As shown throughout the Corrected Amended Petition and Informal Reply, there is compelling and overwhelming evidence that Mr. Benavides is innocent. Notwithstanding this evidence, Mr. Benavides has remained wrongfully incarcerated for over two decades as a direct result of California's broken and dysfunctional capital trial and post-conviction process.

## IV. Mr. Benavides Is Entitled to an Order to Show Cause Regarding Each of His Claims for Relief.

### A. Claim One: Mr. Benavides Was Denied a Fair Trial by the State's Presentation of False Testimony That Mr. Benavides Caused Consuelo Verdugo's Injuries.

The state presented false evidence to show that Mr. Benavides caused Consuelo Verdugo's injuries and prove that Mr. Benavides was guilty of the charged crimes of murder, rape, sodomy, and lewd and lascivious conduct. It is reasonably likely that the false evidence both individually and cumulatively affected the judgment of the jury. The state's presentation of false evidence, in combination with trial counsel's unreasonable and prejudicial failure to object to the evidence and present evidence in rebuttal, denied Mr. Benavides the right to due process, the effective assistance of

counsel in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, and their California Constitutional analogues.

"One of the bedrock principles of our democracy, 'implicit in any concept of ordered liberty,' is that the State may not use false evidence to obtain a criminal conviction." *See Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959).) The "rudimentary demands of justice" require a court to invalidate a conviction pursuant to the Due Process Clause of the Fourteenth Amendment if it is obtained by the state's knowing presentation of false evidence. *See Mooney v. Holohan*, 294 U.S. 103, 104 (1935). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *See Napue*, 360 U.S. at 269. "[W]hether the nondisclosure [of the correct testimony] was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." *Giglio v. United States*, 405 U.S. 150, 153 (1972).

The prosecutor has a duty to correct false testimony regardless of whether the defense counsel knows that the testimony is false. *See Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1117 (9th Cir. 2001); *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000) ("[T] the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false.")

> All perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial. The jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism. A prosecutor has a special duty

> commensurate with a prosecutor's unique power, to assure that defendants receive fair trials.

*LaPage*, 231 F.3d at 492.

A conviction based on the prosecutor's knowing use of false evidence must be reversed if there is any reasonable likelihood that it could have affected the judgment of the jury. *See Napue*, 360 U.S. at 271; *United States v. Agurs*, 427 U.S. 97, 103 (1976); *In re Roberts*, 29 Cal. 4th 726, 740 (2003). Even if the prosecution did not have knowledge of the false evidence, a conviction cannot stand under the Due Process Clause when there is a reasonable probability that had the evidence been disclosed the result of the proceedings would have been different. *United States v. Bagley*, 473 U.S. 667, 678 (1985); *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989) (quoting *United States v. Bagley*, 473 U.S. at 682.) Similarly, California Penal Code section 1473, subdivision (b)(1)(A), entitles habeas petitioners to seek relief when "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced" against a petitioner at a hearing or trial relating to his incarceration. Neither section 1473, nor the federal due process standard require that a petitioner show that the prosecution knew or should have known that the testimony was false, nor that the testimony was perjurious. *See* Penal Code § 1473, subd. (c); *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002) (holding that whether or not prosecutor knew of false, perjured testimony, reversible constitutional error occurred); *People v. Marshall*, 13 Cal. 4th 799, 830 (1996) (same); *United States v. Young*, 17 F.3d 1201, 1203-1204 (9th Cir. 1994) ("A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness."). False evidence under section 1473 is "substantially material or probative" if there is a "reasonable probability"

that it could have affected the outcome. *In re Sassounian*, 9 Cal. 4th 535, 546 (1995). The requisite "reasonable probability" standard under both section 1473 and the Due Process Clause is whether, under the totality of the circumstances, the evidence undermines confidence in the outcome. *See id.; see also Bagley*, 473 U.S. at 682.

Moreover, the need for heightened reliability in capital proceedings that is protected by the Due Process Clause requirement of fundamental fairness and the Eighth Amendment guarantee against cruel and unusual punishment, mandates reversal of a conviction and death sentence obtained on the basis of false and unreliable evidence. *See Simmons v. South Carolina*, 512 U.S. 154 (1994) (Due Process Clause requires that defendant be permitted to inform jury of parole ineligibility to correct misimpression created by state argument that he will present a danger to community if not sentenced to death); *Johnson v. Mississippi*, 486 U.S. 578 (1988) (holding that Eighth Amendment requires reversal of death sentence based in part upon felony conviction subsequently set aside); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (Eighth Amendment violated where jury given inaccurate information regarding the availability of appellate review of its decision to sentence defendant to death); *Gardner v. Florida*, 430 U.S. 349 (1977) (Due Process Clause violated where death sentence is based in part upon false information contained in probation report that defendant had no opportunity to rebut); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (non-capital sentence imposed on the basis of materially untrue assumptions regarding defendant's previous criminal record violates Due Process Clause and must be vacated); *Townsend v. Burke*, 334 U.S. 736, 740 (1948) (same); *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir. 1993) (defendant has due process right not to be sentenced on basis of materially incorrect information).

Respondent's general response is to characterize Mr. Benavides's overwhelming showing of false evidence as merely a conflict of medical opinion. (Response at 36-49.) Respondent ignores that when a medical opinion is unsupportable by medical evidence it is not a contrary opinion, but rather a false statement. Mr. Benavides has made such a showing; the prosecution knowingly presented witnesses who testified to medically unsupportable conclusions about their observations and their ultimate opinions. Where such conflicting information was not disclosed to the jury and there is a reasonable probability that the result of the proceedings would have been different had the information been disclosed, relief is warranted. *See Bagley*, 473 U.S. at 682.

More fundamentally, however, Mr. Benavides unquestionably has demonstrated more than a mere conflict of opinion. Mr. Benavides has presented declarations from virtually every attending physician who testified at trial stating that their testimony was inaccurate because they were not provided with all the relevant information to provide an informed opinion. Most critically, after reviewing the full medical record, Dr. Diamond has recently recanted entirely his testimony that Consuelo was raped or sodomized. Mr. Benavides's showing that witnesses who previously testified offered false or inaccurate testimony based on the prosecution's failure to provide them with full information is sufficient to establish a prima facie case that the conviction was based on false evidence in violation of Mr. Benavides's constitutional rights. *See, e.g.*, *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009) (finding that petitioner made a prima facie showing of a violation of constitutional rights based on false testimony by submitting an affidavit of a testifying expert that the State provided her with incorrect data which led to her incorrect conclusion about the victim's time of death); *In re Roberts*, 29 Cal. 4th at 736-37 (issuing

order to show cause on false testimony claim where some witnesses recanted part of their trial testimony). In addition, Mr. Benavides has proved that the crucial issue of the cause of death offered by the state's pathologist, Dr. Dibdin, is false because it is "anatomically impossible." (*See, e.g.*, Ex. 79 at ¶ 26.) This is not a mere difference of opinion between experts, but rather, a showing that Dr. Dibdin lied and that the trial was infected with crucial, material false evidence.

Mr. Benavides is entitled to relief under this Court's recent decision *In re Richards*, No. S189275, 2012 WL 5990939, at *11 (Cal. Dec. 3, 2012), because he has shown by a preponderance of the evidence that the critical expert testimony presented at trial was "objectively untrue." Unlike *Richards*, where the experts changed their subjective opinion about the case, the testifying doctors who have recanted their testimony in this case, have done so because their initial opinion was uninformed and they therefore now believe it was objectively untrue. *Id.* Furthermore, the new evidence that the experts who testified at trial have recanted their opinion (*see, e.g.*, Exs. 80, 142, 144), in particular Dr. Diamond (Ex. 149), viewed in light of the weak evidence supporting Mr. Benavides's guilt, "'points unerringly to innocence or reduced culpability'" and thus warrants habeas relief. *Id.* at *13 (citing *In re Clark*, 5 Cal. 4th 750, 766 (1993)).

Notably, Respondent also fails to address a number of the allegations in this claim. (RCCAP 21-47.) This is noteworthy because, by contrast, in its 2003 Response Respondent addressed many of the allegations with arguments that Mr. Benavides demonstrated in the 2004 Informal Reply to be meritless. It appears, therefore, that Respondent has been convinced that its previous arguments lack merit. In any case, this Court must take Mr. Benavides's factually supported, un-rebutted allegations as true and issue an order to show cause as they raise a prima facie case that Mr. Benavides

was deprived of a fair trial by virtue of the presentation of overwhelming false evidence.[5]

Overlooking voluminous extra-record evidence in support of this claim, Respondent mechanically argues, as she does with respect to virtually every claim in the Corrected Amended Petition, that this claim is barred because it should have been raised on appeal. (Response at 31, 34.) Respondent's invocation of the requirement to raise claims apparent from the record is frivolous. This claim is appropriately raised in habeas because proof that the evidence was false is supported by extra-record facts. *See, e.g.*, *In re Bower*, 38 Cal. 3d 865, 872 (1985); *In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (holding bar inapplicable when extra-record material has information "of substance not already in appellate record"). Furthermore, Penal Code section 1473, subdivision (b)(1)(A), explicitly directs petitioners to seek habeas relief, as opposed to appellate review, for claims that a conviction was obtained based upon false evidence.

### 1. The State Manufactured and Presented False Testimony About Dr. James Dibdin and His Autopsy Findings.

Respondent claims that Mr. Benavides's allegations that the autopsy report was fabricated and contained numerous inaccuracies and falsehoods essentially amounts to an objection to the admission of evidence, which is not cognizable on habeas. (Response at 32.) Respondent misconstrues Mr. Benavides's claim. Dr. Dibdin's autopsy report contains several significant internal inconsistencies, unsupported findings, and falsehoods. Mr. Benavides has shown the falsity and inconsistencies in the autopsy report

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[5] An Order to Show Cause is necessary to permit Mr. Benavides to compel the testimony of Dr. Dibdin and law enforcement and prosecutorial personnel to further prove their knowing presentation of the false testimony.

through extra-record evidence including additional contradictory medical records and the opinions of experts who have reviewed the full medical record of Consuelo Verdugo. Had this information been presented at trial by either the prosecutor or trial counsel, Dr. Dibdin would have been thoroughly impeached and discredited. Given that Dr. Dibdin's findings were the cornerstone of the prosecution's case, there can be no doubt that his false testimony thoroughly infected the outcome of the trial.

**a. The Kern County Coroner's Office and Dr. James Dibdin Have a Pattern of Manufacturing False Evidence.**

Respondent dismisses Mr. Benavides's showing of a pattern of Kern County Coroner's office, and specifically Dr. Dibdin, in falsifying evidence in criminal cases in order to assist prosecutors in proving their cases. (Response at 33.) This pattern of fabrication is circumstantial evidence that Kern County Coroner's office in general and Dr. Dibdin specifically falsified evidence in this case. Mr. Benavides has provided numerous examples that Dr. Dibdin has a long, ignominious history of incompetence, unprofessionalism, and falsifying findings. (RCCAP at 22-23.) Dr. Dibdin appears to have continuously moved around every few months or years from one country to another (England, Australia, and United States), from state to state in the United States (Oklahoma, Wisconsin, Nevada), and from one California County to another (Kern, San Bernardino, Riverside), often being dismissed or terminating his employment due to problems with his employers over the quality of his work. Dr. Frank Sheridon, the Coroner of San Bernardino County has described Dr. Dibdin's capabilities as a pathologist as follows:

> Bad autopsies; cavalier attitude; flies into rages; generally no foundation for his cause of death; generally will guess at the

> cause of death and state it at the beginning of an autopsy. He does autopsies as fast as possible for monetary purposes. He jumps to preconceived notions in connection with autopsies. He's dangerous to have him work on an autopsy with you.

(Ex. 47 at 4772.) The pathologist of Riverside County, Dr. Detraglia, described Dr. Dibdin as a "disaster waiting to happen. He does fast autopsies and shoots from the hip."[6]

Both counsel and the prosecutor had reason to know at the time of trial that there were serious problems with Dr. Dibdin's findings. In a very similar case in 1992, just one year prior to Mr. Benavides's trial, a Superior Court Kern County judge took the extremely unusual step of dismissing murder charges against Teddy Charles Wilson, whom Dr. Dibdin had testified had killed his 8-month old son by violently shaking him, squeezing him so hard that he broke his ribs and lacerated his liver and pancreas, and possibly throwing him to the ground. After hearing all the evidence in a two-week trial, the court found there was insufficient evidence to submit the case to the jury and the court acquitted and released Mr. Wilson. (Ex. 154 at 6850-52.)[7]

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[6] The quotations from Dr. Sheridon and Dr. Detraglia come from Dr. Dibdin himself, who filed a lawsuit for slander against them and several of his former employers including the Nevada County Coroner, Sacramento County Coroner, and the Coroner for Brown County, Wisconsin. Notably, Dr. Dibdin's accusations of slander against his former employers were dismissed as unfounded and he was ordered to pay attorney's fees and sanctions for bringing the action in bad faith. (Ex. 47 at 4863; Ex. 134.)

[7] As shown in Ex. 154, the newspaper article reporting about Dr. Dibdin's testimony at the preliminary hearing in the Wilson case was on the back of the page in the *Bakersfield Californian* that had a story about Mr. Benavides's arraignment. (Ex. 154 at 6849.) Had counsel followed Wilson's case, counsel would have learned a year before trial that Dr. Dibdin's testimony was so unpersuasive that the court found it insufficient to even send a case to the jury. (Ex. 154 at 6852.) This should have alerted counsel of the importance of investigating Dr. Dibdin's findings.

Kern county officials in particular have been aware of Dr. Dibdin's incompetence. Dr. Dibdin's contract was not renewed in Kern County because of "questionable practices as a pathologist" and his "refusal to correct causes of death with the coroner, Helen Bruce Frankel." (Ex. 47 at 4771.) Dr. Dibdin had "heated disagreements" with several members of the Kern County Coroner's Office, including Ms. Frankel, Ron Smith and/or John Van Rensslaer, and Mr. Dollinger. (Ex. 47 at 4771.)

Dr. Dibdin had a notorious history of making erroneous findings. In one case, eerily similar to the case at bar, the Nevada County Coroner stated that Dr. Dibdin "provided an autopsy report with questionable findings, not even considering the toxicology report." (Ex. 47 at 4853-54.) When the Coroner asked Dr. Dibdin to reconsider his findings in light of the toxicology report, he refused to do so. The Northern California Forensic Pathology (NCFP) group reviewed the case and determined that Dr. Dibdin's cause of death is "simply not supported by either the autopsy findings or the clinical course of the patient." (Ex. 47 at 4845, n.1.) Based on this significant flaw in Dr. Dibdin's assessment, the Coroner rejected his opinion and adopted that offered by NCFP. (Ex. 47 at 4844-45.)

In another Nevada County case, Dr. Dibdin also offered an anatomically impossible cause of death, which was rejected by doctors reviewing his work. After performing an autopsy, Dr. Dibdin concluded that 7-year-old Ricky Romero had died of natural causes after small bowel surgery. James Meeker, the chief toxicologist of the Institute of Forensic Sciences in Oakland, and Dr. Robert Anthony, a pathologist from Sacramento, completely disagreed with Dr. Dibdin's conclusion, opining instead that an overdose of fentanyl caused the child's death. Dr. Anthony stated that there was "no anatomic or physiological basis for Dr. Dibdin's conclusions." (Ex. 133 at 6460.) Nevada County Sheriff-Coroner Troy

Arbaugh rejected Dr. Dibdin's findings and instead endorsed the findings of James Meeker and Dr. Anthony, listing them on Romero's official death certificate. (Ex. 133 at 6459-60.) In rejecting Dr. Dibdin's findings Sheriff-Coroner Arbaugh noted that "there have been two similar cases in Sutter County which we are aware of" where similar disagreements arose. (Ex. 132 at 6456.)

Respondent's only response to the numerous examples of Dr. Dibdin's misconduct is to argue that there is no pattern of incompetence and unprofessionalism because in the Romero case the California Medical Board found Dr. Dibdin's conduct did not rise to the level of malpractice. (Response at 33.) Obviously, the fact that his misconduct in Romero did not qualify under the high standards for a malpractice finding does not negate that his findings in the case were highly questionable, nor overcome the vast evidence in the many other cases that shows Dr. Dibdin routinely arrives at false and unsupported findings in his autopsies.

As shown in the additional exhibits submitted with this reply, Dr. Dibdin has continued this pattern of incompetence and falsification of findings. Perhaps in an effort to escape his problems in the United States, Dr. Dibdin moved to England at some point in the early 2000's. Dr. Dibdin obtained employment as a consultant pathologist at the South Tyneside District Hospital in England. His work involved analyzing tissue specimens from patients with abnormalities to diagnose a range of illnesses. Around 2004, his colleagues raised questions about his work, indicating that he had made a "catalogue of testing and diagnosis errors." They reported that between April 2004 and September 2004 Dr. Dibdin had "significantly high error rates in reporting on specimens and made a number of specific errors which, it is alleged, no reasonable competent and careful histopathologist of his grade and experience should have made."

(Ex. 152 at 6838.) Based on these allegations, a review of his work was undertaken by the hospital, which showed a "number of concerns about his procedures" that were then reported to the General Medical Council (GMC) in 2005. In 2007, the GMC heard testimony alleging that he had "made at least 111 mistakes," leadings to serious repercussions for patients. (Ex. 152 at 6840.) In at least two cases, his errors led to a delay in a patient being diagnosed with cancer. In one case he opined that a patient had heartburn, when in fact the patient had cancer, while in another case he concluded a patient's breast cancer was benign, though it was not. In another case he misdiagnosed a patient as suffering from cancer, where there was "no evidence of the disease." The GMC panel was "told that Dr. Dibdin's 'error rate' was 'significantly in excess that expected of a reasonably competent and careful consultant histopathologist'" of his experience. (Ex. 152 at 6840.)

In early 2007, Dr. Dibdin appeared before a Fitness to Practice Panel of the GMC. Dr. Dibdin defended himself by testifying that he had not produced the pathology reports that had the erroneous findings and, in an apparent attempt to attribute his errors other doctors, argued that other doctors could access his reports online due to the poor computer security system of the hospital. (Ex. 155 at 6854.) The Panel found Dr. Dibdin lacked credibility:

> [T]he impression you have given to this Panel is that you were not an open and straightforward witness. It has based this judgement on both the oral evidence given during this case, and the Panel's reading of the transcripts from the hearing in 2007. Whilst you gave direct answers to non-controversial questions, many of your answers in response to matters of your potential culpability were rambling and overly elaborate. Your elaboration in answering gave the impression to this Panel that you were constructing a deliberately false picture in order to detract from your culpability. Whilst your demeanour

> could have been understandable in someone who was unfamiliar with formal proceedings such as this, the Panel found it surprising given that your work involves giving expert evidence in court. You must have been well aware of the seriousness of giving evidence under oath or following a solemn affirmation, which states that you must speak the truth, the whole truth and nothing but the truth. In short, the Panel found aspects of your evidence to be evasive to the point of obfuscation.

(Ex. 155 at 6862.) Ultimately, the Panel found that Dr. Dibdin's statements were "untrue . . . misleading . . . . [and] dishonest." (Ex. 155 at 6863.) The Panel found Dr. Dibdin's "misconduct as serious and, as a result, [the Panel found that it had] no doubt that [Dr. Dibdin's] fitness to practise is impaired." (Ex. 155 at 6865.) Based on these findings, the Panel imposed a period of suspension of Dr. Dibdin's medical license "to mark its disapproval of [Dr. Dibdin's] behaviour." (Ex. 155 at 6867.) His license to practice was ultimately completely suspended in England in 2009. (Ex. 147 at 6662.)

Thereafter, Dr. Dibdin appears to have moved to California and currently is subject to proceedings that may revoke his license to practice medicine in the United States. On January 11, 2012, the Executive Director of the Medical Board of California, Linda K. Whitney, filed a complaint against Dr. Dibdin requesting that his medical license be revoked or suspended. The complaint alleges that Dr. Dibdin aided and abetted the unlicensed practice of medicine, committed dishonest and corrupt acts, and unprofessional conduct by providing bogus prescriptions for medical marijuana.[8] (Ex. 153.)

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[8] Since 1983 Dr. Dibdin has also set up a number of corporations, at least three of which have a suspended license. A business entity's powers, rights, and privileges are suspended or forfeited in California "1) by the Franchise Tax Board for failure to file a return and/or failure to pay taxes,

Given Dr. Dibdin's extensive history of misconduct, it is not surprising that Respondent has not obtained a declaration from him explaining why he twice provided Dr. Diamond with false findings about a laceration in the vagina and a laceration in the rectum, and why he testified falsely about an anatomically impossible cause of death.[9] Similar to the two Nevada cases described above, Dr. Dibdin's autopsy report in this case is also not supported by his own autopsy findings and the clinical course of Consuelo's medical condition. Every doctor who treated Consuelo and the several prominent experts in the field who have reviewed his findings and the full medical record reject his conclusions regarding sex abuse and shaken baby syndrome as unsupported and implausible. Moreover, had Dr. Dibdin's pattern of incompetence, which has led to significant problems with his past employers, been revealed to the jury, in conjunction with evidence of Dr. Dibdin's incompetence in this case, his testimony would have been thoroughly impeached and rejected by the jury. Unquestionably, such evidence fully supports Mr. Benavides's claim that Dr. Dibdin's conclusions in this case were made without evidence and were false, as opposed to mere differences in medical opinion as Respondent claims.

#### b. The Prosecution Manufactured False Evidence in the Autopsy Report.

Strong circumstantial and direct evidence indicates that Dr. Dibdin followed his pattern of manufacturing false evidence in this case by delaying the preparation of the autopsy report nearly two months to assist

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penalties, or interest; and/or 2) by the Secretary of State for failure to file the required Statement of Information and, if applicable, the required Statement by Common Interest Development Association." (Ex. 157.)

[9] From HCRC's correspondence with Ms. LeBel, counsel for Respondent, it appears that she did not interview Dr. Dibdin in post-conviction. (Ex. 148 at 6731.)

the prosecution in proving the special circumstances that rendered Mr. Benavides eligible for a death sentence. There is also strong persuasive evidence that the prosecutor knew or should have known that Dr. Dibdin's testimony about the anal and vaginal injuries was false. Moreover, in post-conviction it appears that Respondent is partly following this pattern of obscuring the truth by failing to provide Dr. Diamond with all the available medical records, photographs, and medical personnel's declarations to inform his opinion and misleading this Court in arguments made in the Response. As a result of these unethical and unlawful actions, Mr. Benavides has remained wrongfully incarcerated for over twenty years.

According to Dr. Diamond's trial testimony, prior to the preliminary hearing he "was told" that there was a laceration in the rectum. (10 RT 2085.) This information was false. (10 RT 2085.) Based on this false information, Dr. Diamond testified at the preliminary hearing on December 12, 1991, that the rupture of Consuelo's pancreas and duodenum were caused by a foreign object inserted into the rectum. (1 CT 195-96.) On January 21, 1992, two months after the autopsy, Dr. Dibdin produced an autopsy report providing the same cause of death that Dr. Diamond had testified about at the preliminary hearing. The fact that he produced the autopsy report two months after the autopsy indicates that it was based mostly on his memory rather than what he actually saw. (Ex. 77 at ¶ 17.) Respondent's allegation that the autopsy report was not based on Dr. Dibdin's memory because he may have consulted the autopsy photographs is speculative and unpersuasive since the photographs did not and could not capture all the detail described in the autopsy report. (Response at 34.) Moreover, to the extent that Respondent could support this assertion with evidence, Respondent's assertion has created a factual dispute that requires an evidentiary hearing to resolve. *See*, *e.g.*, *People v. Duvall*, 9 Cal. 4th

464, 474-75 (1995) (holding that prior to issuing an Order to Show Cause, Court assumes factual allegations as true in determining whether petitioner established a prima facie case).

In the autopsy report, Dr. Dibdin indicated the "child died as a result of an acute blunt force penetrating injury of the anus which caused lacerations of the anus together with injury to multiple internal organs including the bowel and pancreas." (Ex. 8 at 3561.) In support of the sodomy charge, Dr. Dibdin wrote in his autopsy report that the "appearance of injuries to the anus is consistent with penile penetration of the anus creating acute lacerations and *direct* injury to the abdominal contents." (italics added.) Though according to Detective Bresson's testimony at the preliminary hearing, Dr. Dibdin had told him that the cause of death was "blunt force penetrating injury to the anus" with a penis (1 CT 207-08), Bresson did not testify that Dr. Dibdin had told him the penile anal penetration had also caused injury to the abdominal organs. Dr. Dibdin seems to have adopted that gloss on the cause of death from Dr. Diamond's preliminary hearing testimony.

As explained by the doctors who have reviewed Consuelo's full medical history, Dr. Diamond's preliminary hearing opinion and Dr. Dibdin's opinion in his autopsy report is "anatomically impossible" in light of the lack of injury to the rectum and lower abdominal organs, and the lack of injury seen at Delano Regional Medical Center (DRMC). (*See, e.g.*, Ex. 78 at ¶ 11; Ex. 79 at ¶ 12.) Dr. Diamond and Dr. Dibdin knew or should have known that the cause of death they gave was false. If Consuelo had been penetrated by an adult male penis that had reached into her upper abdominal cavity and caused a transection, which is a full rupture, of the pancreas, duodenum, and mesocolon, she would have necessarily shown massive injuries to her lower abdominal organs, including her distal and

sigmoid colon, and her rectum. (Ex. 83 at ¶ 43.) The surgical reports and Dr. Dibdin's own autopsy report show there was no injury to the colon or other lower abdominal organs and that the rectum was intact. (Ex. 2 at 128-131; Ex. 3 at 683-84; Ex. 8 at 3555-61.) As explained by Dr. Bloch, the Kern Medical Center (KMC) surgeon who performed the first abdominal surgery on Consuelo, just hours before Dr. Diamond examined her:

> The pancreas, duodenum, and transverse mesocolon are located in the upper cavity of the abdomen and cannot be reached through the rectum without creating unmistakable damage. In addition, the upper rectum would have a large hole that would have been visible and bleeding. I cannot understand how the medical examiner concluded sodomy had caused her upper abdominal internal injuries in light of the fact that she did not sustain injury to her lower peritoneal organs.

(Ex. 77 at ¶ 11.) As explained by Dr. Kennedy, anal "penetration deep enough to injure the abdominal organs at all would have caused massive tearing to the rectum, particularly where the penis ruptured the rectal wall and entered the abdominal cavity." (Ex. 83 at ¶ 43.) Since unquestionably Dr. Diamond did not see massive tearing of the rectum[10] when he examined Consuelo, nor did Dr. Dibdin, they both should have known that the cause of death they provided was patently false. As explained by Dr. Heger, a preeminent expert in child abuse, Dr. Dibdin's cause of death is "absurd" and never before reported in the annals of child sex abuse literature. (Ex. 170 at ¶ 23.)

By the time of trial, Dr. Diamond had changed his opinion about the cause of death, but Dr. Dibdin had not. Dr. Diamond testified at trial, that

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[10] Dr. Diamond saw anal tears, but did not detect any injury to the rectum. (Ex. 2 at 51-52.) The anus and rectum are distinct structures. The rectum is the internal, terminal portion of the large intestine, while the anus is the external portion, at the end of the rectum. (Ex. 82 at ¶ 5.)

"[a]t this time I understand there was no tear to her rectum, which I was told at the [preliminary hearing] there was." (10 RT 1085.) He explained that because there was no tear to the rectum, a foreign object "could not go through the anterior wall into the peritoneal cavity."[11] (10 RT 1085.) Dr. Diamond never explained who had given him the false information about the tear in the rectum, nor who had corrected that information. The most likely scenario is that Dr. Dibdin and/or the prosecutor provided him with the information. The prosecutor did not provide counsel with any notice prior to trial that Dr. Diamond had changed his opinion and had previously received false information. Whether or not there was a tear in the rectum was critical information directly pertinent to the sodomy charges.[12]

Four days after Dr. Diamond's testimony explaining why a foreign object "could not go through" the rectum wall, reading from his autopsy report, Dr. Dibdin testified that Consuelo had died "as a result of acute blunt force penetrating injury of the anus which caused lacerations of the anus together with injuries to the multiple internal organs, including the bowel and the pancreas." For emphasis, Dr. Dibdin spelled out the letters of the readily discernible word "penile" when he testified that the anal injuries were "consistent with penile, p-e-n-i-l-e, penetration of the anus" causing "direct injury to the abdominal contents." (11 RT 2143.) When asked by the prosecutor if he had an opinion as to what instrument was

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[11] Neither Dr. Diamond, nor any other doctor was ever directly asked at trial whether Dr. Dibdin's cause of death was plausible. Only now, over twenty-years later, after he has reviewed all the medical records and photographs, has Dr. Diamond explained that this cause of death is "impossible" in light of the medical evidence. (Ex. 149 at ¶ 6.)

[12] That counsel failed to seek discovery or elicit testimony about this explosive evidence demonstrates what little understanding counsel had of the medical records and her woefully inadequate representation of Mr. Benavides. (*See* Claim Thirteen.)

used to penetrate the anus, Dr. Dibdin responded "[i]t's probably a penis." (11 RT 2144.) In response to the prosecutor's question regarding why he thought it was a "probably a penis," Dr. Dibdin provided the following graphic, misleading and unsupported picture of how Mr. Benavides allegedly sodomized Consuelo:

> Well, it looks to me like the child has been held with both hands in the manner I have described with his back—with the child's back toward the assailant and that the child is due to be placed in the assailant's lap and held in that manner.

(11 RT 2144.) Notably, Dr. Dibdin's response did not actually explain why he believed it was "probably a penis" that caused injury to the rectum and "direct injury" to the upper abdominal organs. This is because there is no logical explanation for his opinion. As noted by KMC surgeon Dr. Bloch, though Dr. Dibdin refers to the medical reports in his autopsy report, it is clear that he either did not actually review them, inadequately reviewed them, or ignored the evidence in the surgical reports contradicting his theory:

> Dr. Dibdin appears to base his assessment of the cause of death upon injuries to the bowel seen during surgery noted in the medical reports. Though he references the medical reports he does not specify which of the observed injuries supports his conclusion and does not describe his examination of the bowel. Furthermore, his reference to the injuries seen at surgery is inaccurate. For example, he states the pancreas was totally resected, which means removed, during the course of surgery. As my surgical records indicate, only a part of the pancreas was removed, and Dr. Shaw does not note in his reports the removal of any additional portion of the pancreas.

(Ex. 77 at ¶ 17.)

Dr. Didbin's testimony was unmistakably false. The surgical reports and his own autopsy report demonstrate there was no injury to the rectum

and lower abdominal organs, which, as explained above, necessarily rendered his opinion false. When other doctors tried to explain that they had different opinion about the cause of death, such as the UCLA pediatric intensivist Dr. Harrison, who testified that he believed Consuelo had died as a result of complications from her internal injuries, the prosecutor elicited testimony, through leading questions that the pathologist, whose "specialty is to actually give us a cause of death from the injuries" had superior expertise in such matters. (12 RT 2356.) As a result of the prosecutor's misleading questions and counsel's incompetent representation, the jury did not learn that Dr. Dibdin's findings were absurd and false. The jury likely thought the expert's differing testimony about what caused Consuelo's death were simply based on alternative, sound medical opinions, both of which were plausible, though Dr. Dibdin's was more likely to be accurate.

Respondent's contention that Mr. Benavides has waived any challenge to an absence of an autopsy report at the preliminary hearing for failure to object at trial (Response at 34), once again mischaracterizes Mr. Benavides's claim. The absence of an autopsy report at the preliminary hearing, and subsequent preparation of the autopsy report two months later adopting Dr. Diamond's preliminary hearing anatomically impossible cause of death, which he changed at trial, provides strong circumstantial evidence that the report was manufactured and inaccurate. Further, as shown above, trial counsel provided ineffective assistance in violation of the Sixth Amendment by withdrawing her motion to continue the preliminary hearing based on the absence of the autopsy report. Respondent's assertion that she elected to do so based on the notion that the autopsy report would not help prove Mr. Benavides's innocence or provide impeachment evidence is based on unsupported speculation and is far from an informed

strategic choice.[13] (1 CT 119.) Trial counsel could not have known the evidentiary value of the autopsy report without having seen it. In fact, if she had delayed the preliminary hearing until she obtained the autopsy report and fully informed herself about the information in the medical records, counsel could have dismissed the charges before proceeding to trial based on the considerable inaccuracies in the report such as the medically impossible cause of death. As stated by Ms. Huffman in her declaration:

> I continue to be very troubled about the sex offense charges in this case. I am particularly troubled by the cause of death given by the pathologist at trial. I believe that I was not aware of all the relevant information that I needed in order to properly defend Mr. Benavides. Had I had this information, I believe I could have conducted a much better defense and he would not have been convicted of the charges, much less received the death penalty. In fact, if I had this information I do not think the case would have even gone to trial. I would have gotten the charges dismissed and Mr. Benavides would be a free man.

(Ex. 64 at ¶ 21.)

In sum, there is clear evidence, certainly sufficient for a prima facie case for relief, that Mr. Benavides's conviction was based on materially false evidence that Dr. Dibdin manufactured and that Dr. Diamond and the prosecutor knew or should have known about. The false information provided to Dr. Diamond prior to the preliminary hearing of an injury to the rectum, persisted through trial and infected the proceedings. It is both reasonably probable and reasonably likely that it could and did affect the outcome of the trial and thus merits relief. *See Napue*, 360 U.S. at 271;

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[13] Moreover, this Court may not rely on such factual arguments without issuing an Order to Show Cause to permit the taking of evidence and resolving factual disputes. *See, e.g.*, *Duvall*, 9 Cal. 4th at 474-75.

*Bagley*, 473 U.S. at 682. Given this false evidence, this Court cannot have confidence in the outcome of the trial.

### 2. The State Presented False Testimony, Inference, and Argument That Consuelo Verdugo's Genital and Anal Injuries Were Caused by Rape and Sodomy.

Despite Respondent's concession that there is insufficient evidence to support the rape charges and Dr. Diamond's retraction in 2009 of half the reasons he believed Consuelo was "repetitive[ly]" sodomized (Response at 41, n.13, Resp. Ex. 1 at ¶ 19), Respondent maintains that Mr. Benavides's rape and sodomy convictions were not based on false evidence. Respondent essentially argues that the difference between (1) the opinions of all the medical personnel in their post-conviction declarations retracting their testimony that Consuelo was sexually abused based on their review of her full medical record, which they had not reviewed at trial, and (2) Dr. Dibdin's opinion and Dr. Diamond's opinion in his 2009 declaration amounts simply to a difference of medical opinion. (Response 37-42.) It is clear from the declarations presented in support of the Corrected Amended Petition that the testimony that Consuelo was sexually abused was false. Even if such declarations were insufficient to establish the evidence was false, Dr. Diamond's recent retraction of his testimony that Consuelo was raped and sodomized (Ex. 149 at ¶ 5) unquestionably establishes that Mr. Benavides was convicted based on false evidence of sexual abuse. The only doctor who has yet to retract his testimony is Dr. Dibdin, whom as shown above has an extensive history of incompetence and manufacturing evidence and who Respondent concedes provided Dr. Diamond with false evidence of internal injuries to the vagina.

Respondent egregiously misleads this Court by arguing that the question of whether false evidence was presented in support of the rape

charge was a matter of whether there was a tear in the posterior, rather than anterior, "wall of the vagina." (Response at 37.) Respondent alleges that in 2009 Dr. Diamond changed his trial testimony that Consuelo was raped based "upon learning that Dr. Dibdin's testimony did not substantiate the existence of a tear of the anterior wall of the vagina." (Response at 37, citing Resp. Ex. 1 at 10.) Respondent is well aware that the reason Dr. Diamond changed his opinion was that there was no medical evidence for Dr. Dibdin's testimony that there was an *internal* tear of the vaginal wall, in the anterior or posterior wall. In a taped conversation between Dr. Diamond and Ms. LeBel on November 16, 2009, two and a half months after he signed his declaration, Dr. Diamond agreed with Ms. LeBel, counsel for Respondent, that the reason Dr. Dibdin's findings were unsubstantiated was that the half inch tear of the "posterior wall of the vaginal opening" described in the autopsy report (Ex. 8 at 3557) and which he testified about (11 RT 2123), in fact referred to an external tear in the posterior fourchette. (Resp. Ex. 14 at 9.) Dr. Diamond and Ms. LeBel specifically discussed that Dr. Dibdin had noted the half inch tear in his autopsy diagram in the posterior fourchette, which is in the external genitalia, and wrote a notation next to it that said "NO VAGINAL PENETRATION?" (Resp. Ex. 14 at 9; *see* Ex. 8 at 3545 (autopsy diagram).) It is clear from Dr. Diamond's and Ms. LeBel's discussion that Dr. Diamond agreed with Dr. Kennedy that there is no evidence of an internal tear of the vagina. (*Compare* Ex. 83 at ¶ 41 *with* Resp. Ex. 14 at 9.) In his declaration, Dr. Kennedy clearly explains that the posterior fourchette is part of the "external female genitalia" and that Dr. Dibdin's notations in his autopsy diagram read in conjunction with his autopsy report most likely refer to a "laceration external to the vagina." (Ex. 83 at ¶ 41.) Tellingly, Respondent has not provided a declaration from Dr. Dibdin

rebutting Dr. Diamond's and Dr. Kennedy's conclusions. Accordingly, it is clear from the evidence before this Court that the testimony about an internal tear of the vaginal wall was false.

It is also noteworthy that during this telephone call on November 16, 2009, Ms. LeBel misled Dr. Diamond, and failed to provide him all relevant information, just as the prosecution did at trial. The purpose of her call to Dr. Diamond was to urge him to reconsider his conclusion that Consuelo had not been raped. She attempted to do so by describing Dr. Lovell's muddled testimony at trial in which he seems to confirm Dr. Dibdin's microscopic findings of a tear in the internal vaginal wall. (Resp. Ex. 14 at 8.) Ms. LeBel did not inform Dr. Diamond that Dr. Lovell has retracted his trial testimony and, after reviewing the slides carefully and Consuelo's medical history during these proceedings, stated unequivocally that there is "[n]o evidence of a tear" in the microscopic slides. (Ex. 80 at ¶ 13.) Ms. LeBel also did not inform Dr. Diamond, that Dr. Huff, a Senior Pathologist at the Children's Hospital in Philadelphia, specializing in anatomic and pediatric pathology, confirmed Dr. Lovell's findings that no tears are depicted on the slides. (Ex. 82 at ¶ 15.) Ultimately, Dr. Diamond declined to opine about Dr. Lovell's testimony and suggested that a forensic pathologist review the slides. (Resp. Ex. 14 at 8.) As mentioned, Ms. LeBel did not respond by informing Dr. Diamond that Dr. Huff had done so. Dr. Diamond did reaffirm, however, that his findings of a tear in the hymen and of the posterior fourchette "are not indicative, emphatically, are not indicative of rape." (Resp. Ex. 14 at 9.)

Respondent argues that Dr. Diamond's testimony that Consuelo was raped based on the false information that there was a tear in the internal vaginal wall was "not false within the meaning of [Penal Code] section 1473 because he did not lie when he testified," but rather was simply

"mistaken" in his understanding that Dr. Dibdin saw a tear of the anterior wall of the vagina. (Response at 37, citing *People v. Wilson*, 44 Cal. 4th 758, 801 (2008).) Respondent is wrong. Dr. Diamond's "mistaken" understanding and resulting false testimony that Consuelo was raped is false within the meaning of section 1473 and the Federal constitution. *See People v. Marshall*, 13 Cal. 4th at 830 ("Under the current rule, a showing that the false testimony was perjurious . . . is no longer necessary.");[14] *Killian*, 282 F.3d at 1208 (holding that whether or not prosecutor knew of false, perjured testimony, reversible constitutional error occurred). Respondent's citation to *People v. Wilson* is inapposite since in *Wilson*, unlike here, the jury heard conflicting evidence and the defendant did not present any evidence in post-conviction that the account given by a witness was demonstrably false. *Wilson*, 44 Cal. 4th at 800-01.

Moreover, there is strong evidence that Dr. Diamond knew or should have known at the time of trial that there was no tear in the vaginal wall. As explained by Dr. Kennedy, had there been a tear in the interior vaginal wall, Dr. Diamond (and all other medical personnel) would have seen it during his examination and the profuse bleeding that would have resulted from such a tear. (Ex. 169 at ¶ 5.) Dr. Diamond's explanation in his 2009 declaration that he could not see the internal vaginal wall when he examined Consuelo because it was obscured by the hymen (Resp. Ex. 1 at ¶ 18) is further proof that there was no such tear. Had there been an internal tear of the vagina wall, the "hymen would have been completely torn" and the internal vaginal wall would be "readily visible." As explained by Dr. Kennedy, "Dr. Diamond should have known and testified that the fact that

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[14] Respondent is clearly aware that section 1473 does not require a showing of perjury. *See* Response at 35 (citing *Marshall* as indicative that section 1473 does not require a showing that the testimony is perjured).

the internal vaginal walls were obscured by the hymen when Dr. Diamond examined Consuelo indicates that she was not vaginally penetrated by a penis or similarly sized object." (Ex. 169 at ¶ 5; Ex. 170 at ¶ 12.) Further, had there been such a tear, Dr. Diamond would have been able to see it when he attended the autopsy (10 RT 2054) and he should have noted the absence of documentation of such a tear when he reviewed the autopsy report (10 RT 2059). (Ex. 169 at ¶ 6.) Dr. Diamond's failure to question the accuracy of the information he was given that Dr. Dibdin had found an internal tear of the vagina, in light of this readily available contradictory evidence reveals a failure to meet the basic standard of care and his likely bias in favor of the prosecution that colored his ability to objectively interpret the medical evidence.

Respondent's further argument that the presentation of the false testimony that Consuelo was raped does not violate due process because there is no evidence the prosecutor knew or should have known about the absence of a tear in the internal vaginal wall and its significance for the rape charge also fails. (Response at 37.) Respondent's concession that defense counsel provided ineffective assistance of counsel because she should have known there was no tear in the interior vaginal wall and thus no evidence of rape (Response at 206), strongly indicates that the prosecutor similarly knew or should have known there was no such internal vaginal tear or reliable evidence of rape. *See People v. Morrison*, 34 Cal. 4th 698, 717 (2004) ("[T]he prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading.") Furthermore, as is clear from the declarations of all the medical personnel called to testify by the prosecution, the prosecutor misled and misinformed them by withholding medical reports of Consuelo's treatment, including the DRMC records, and the prosecution's

interviews with the DRMC personnel where they all unequivocally stated that they did not see any injury to the genitalia or anus. (*See, e.g.*, Ex. 78 at ¶ 14; Ex. 79 at ¶ 22.) These reports included observations of trained medical personnel that contradicted the prosecution's theory of the case and which demonstrated Mr. Benavides's innocence of capital murder. The prosecutor also failed to provide these prosecution medical witnesses with Dr. Dibdin's autopsy report, which would have led many of these witnesses to have grave questions about the reliability of Dr. Dibdin's findings. (*See, e.g.*, Ex. 77 at ¶¶ 11, 17; Ex. 78 at ¶¶ 14, 16; Ex. 79 at ¶¶ 12-13.)

There can be no doubt the prosecutor's withholding of all the medical records to the prosecution medical witnesses produced the false testimony. The most salient example of this is Dr. Diamond's recantation of his testimony that Consuelo was raped and sodomized, which he explains was based on a failure to review the full medical record. (Ex. 149.) In his 2009 declaration Dr. Diamond explained that had he known that Dr. Bloch had drained all urine from the bladder during the surgery that preceded Dr. Diamond's examination, he would have not concluded that the lack of urine output from the catheters he inserted confirmed the information he received about a tear in the vaginal wall. (Resp. Ex. 1 at ¶ 17.) After reviewing the medical records and Dr. Dibdin's autopsy report, Dr. Diamond realized that there actually was no evidence of an internal tear in the vaginal wall and retracted his testimony that he believed Consuelo had been raped. (Resp. Ex. 1 at ¶ 18.) When he further reviewed the records and close-up photographs of Consuelo's genitalia in consultation with Dr. Heger in 2012, he recanted his testimony that Consuelo was sodomized. (Ex. 149 at ¶ 5.)

Respondent's argument that Mr. Benavides's claim of unlawful false testimony by Dr. Dibdin regarding the acute genital and anal injuries "should be rejected because there is no evidence that Dr. Dibdin lied when

he testified" (Response at 38) is wrong as a matter of law and fact. As recognized by Respondent, Penal Code section 1473 does not require a showing that the evidence was perjurious to grant relief for a false testimony claim. (*See* Response at 35, citing *See People v. Marshall*, 13 Cal. 4th at 830.) Relief under the Federal constitution also does not require a showing of perjury. *See Young*, 17 F.3d at 1203-1204 ("A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness."). Furthermore, as shown above and in the RCCAP, there is extensive evidence that Dr. Dibdin knew or should have known that his testimony about the injuries to the genitalia and anus having been caused by a penis was false.

Respondent characterizes as a mere difference of medical opinion the testimony by Dr. Dibdin that there were anal tears that had "gone through the muscle" and that there was a path of injury that reached from the anus to the abdomen (11 RT 2119, 2166-67) and contrary testimony by Dr. Diamond that he was informed at trial that "there was no tear to her rectum" (10 RT 2085.) (Response at 38.) In responding to counsel's question of why he believed the injuries to the anus were caused by penile penetration, Dr. Dibdin gave the following outrageously false and misleading testimony:

> Well, I believe that this child has got some fairly long hard object pressed in to push through its anus which is wide enough to dilate the anus to the point where the muscles have torn. It's a tube shaped object because it's gone fairly deeply in the abdomen. It's gone deep enough to cause injuries to the back of the liver. And that sounds like the shape of a penis.

(11 RT 2166-67.) Obviously, the scenario presented by Dr. Dibdin is not an alternative plausible interpretation of the medical evidence given that personnel at DRMC did not observe any such injury and the undisputed

lack of injury to the lower abdominal organs and rectum. Instead, Dr. Dibdin's testimony is absurd and anatomically impossible, as described by so many doctors who have reviewed his findings. (*See, e.g.*, Ex. 78 at ¶ 11; Ex. 79 at ¶ 12; Ex. 149 at ¶ 6.) Further, had there been anal tears that "went through the muscle" and caused the sphincter to dilate, there would have been massive bleeding that would have been readily apparent to all who examined Consuelo. (Ex. 169 at ¶ 19.) Dr. Dibdin's testimony was false and due to the prosecution's misconduct and counsel's ineffectiveness[15] the jury did not learn from Dr. Diamond or any other doctor that it was false as opposed to a differing, sound medical opinion, offered by a doctor specialized in determining the cause of death, as the prosecutor argued.

### 3. The State Pathologist Presented False Testimony by Offering an Anatomically Impossible Cause of Death.

Respondent's argument that the opinion of at least four doctors that the cause of death offered by Dr. Dibdin was false because it is "anatomically impossible" amounts to a mere difference of opinion between Dr. Dibdin and the doctors is obviously untrue. (Response at 40.) Dr. Dibdin's opinion is not simply a different interpretation of the medical evidence. It is readily false. As explained by Dr. Bloch, Dr. Shaw, Dr. Harrison, and Dr. Kennedy, Consuelo's abdominal injuries could not have been caused by penile penetration of the anus, without also injuring the rectum and lower abdominal organs, and causing severe bleeding of the

[15] Respondent's argument that Mr. Benavides has not offered any support for the argument that counsel was ineffective in this regard is absurd. (Response at 41-42.) As has been extensively shown in Claim Thirteen, subclaims 2 and 3, counsel's unreasonable failure to understand the medical records and conduct a reasonable investigation into the medical injuries supporting the sex charges precluded her from presenting this critical evidence.

anus that could not have been missed by the DRMC personnel. (Ex. 83 at ¶ 43; Ex. 77 at ¶¶ 11-13; Ex. 78 at ¶ 11; Ex. 79 at ¶¶ 12, 26.) The doctor's explanations establish that Dr. Dibdin's opinion was false as opposed to an alternative plausible mechanism of injury for the abdominal organs. *See Maiden v. Rozwood*, 397 N.W.2d 817, 828 (Mich. 1999) (explaining that affidavits from experts emphatically indicating that there was "no medical basis for [the pathologist's] findings and conclusions" constitute "more than a mere difference in medical opinion" and instead show incompetence and that her conclusion were fallacious and erroneous.)

Contrary to Respondent's contention, evidence that Dr. Dibdin's testimony was false was not presented to the jury during Dr. Diamond and Dr. Bloch's testimony. (Response at 40-41.) Dr. Diamond did not testify that Dr. Dibdin's cause of death was anatomically impossible. Instead, guided by the prosecutor's leading questioning, he affirmatively misled the jury to believing that it was possible to tear the pancreas and duodenum via penile penetration while not injuring other organs because the intervening organs could be pushed aside while the pancreas and duodenum, which are fixed structures, would be severed by the "penetrating force." (10 RT 2068.) This explanation should never have been offered to the jury since the theory depended upon the existences of an injury to the rectum wall, which was not documented in any medical report, including the autopsy report. (RCCAP at 33-34.) Hence, it was a misleading hypothetical offered by the prosecutor to attempt to legitimize Dr. Dibdin's cause of death.

Further, the prosecutor falsely implied that there was an injury to the rectum wall that Dr. Diamond had not observed because he was not present for the full autopsy. (10 RT 2092-93.) This false impression was bolstered by Dr. Diamond's testimony that the forensic pathologist was the best person to testify about the internal injuries. (10 RT 2069.) Dr. Diamond's

earlier testimony that, prior to the preliminary hearing, he was first "told" that there was a tear to the rectum wall, and then later understood that there was no such tear (10 RT 2085) was never linked to negate Dr. Dibdin's cause of death. Instead Dr. Diamond's explanation was offered as merely his "opinion," rather than direct refutation of the cause of death offered by Dr. Dibdin. (10 RT 2093.) Given this testimony, the jury, like Respondent, understood the differences between Dr. Diamond and Dr. Dibdin regarding the cause of death as alternative, yet equally valid, medical opinions. The jury never knew that Dr. Dibdin's cause of death was completely false. This fact is further supported by the fact that the court, in sentencing Mr. Benavides, explicitly found that he believed Dr. Dibdin's cause of death theory was "credible and clearly established that the cause of the child's death was acute blunt force penetration of the anus consistent with penile penetration." (10 RT 3857.) If the court could not perceive the flaws in Dr. Dibdin's theory, it is most certain that neither could the jury.

Dr. Bloch's opinion that he believed the abdominal injuries were caused by blunt force to the abdomen instead of anal penetration was even less likely to have alerted the jury that Dr. Dibdin testified falsely. (12 RT 2460.) He was never asked why he did not agree with Dr. Dibdin's opinion and hence was not given an opportunity to explain to the jury that the abdominal injuries could not have occurred through anal penile penetration because there were no injuries to the lower abdominal organs and rectum. (Ex. 77 at ¶ 11.) As shown in Dr. Diamond's 2012 declaration, had he been given the full medical record and asked to explain why he disagreed with Dr. Dibdin, he could have provided powerful testimony showing Dr. Dibdin's cause of death is "impossible." (Ex. 149 at ¶ 6.)

Respondent's argument that even if Dr. Dibdin's testimony about the cause of death was false, there is no reasonable probability that had it not

been introduced the result of the proceedings would be different is disingenuous. (Response at 41.) Dr. Dibdin's testimony about the cause of death was extremely prejudicial as it provided the only support for the prosecution's felony-murder theory and Dr. Dibdin's graphic, false description of how Mr. Benavides allegedly brutally sodomized Consuelo directly causing severe damage to her abdominal organs was an incendiary image that undoubtedly stirred deep passions in the jury. Moreover, as shown above, had Dr. Dibdin been shown to be lying about that which he allegedly was a specialist in—causes of death—the jury would have had serious doubts about his other findings (and for good reason) and at least one juror would have had doubts about Mr. Benavides's guilt. Finally, as shown by Dr. Diamond's 2012 declaration, among others, had the doctors who testified on behalf of the prosecution been aware that Dr. Dibdin had lied about the cause of death, they would have had reason to reassess their opinion that Consuelo was sexually abused and with a full understanding of her medical history, would have come to the conclusion that she was not sexually abused. (Ex. 149.)

Respondent's similar argument that Dr. Huff's declaration refuting Dr. Dibdin's testimony that there were microscopic tissue slides of the anus and vagina that had evidence of prior abuse, up to four weeks in age (11 RT 2140) simply represents a difference of medical opinion (Response at 39) is also meritless. As Dr. Huff explains, Dr. Dibdin's testimony was false for two reasons: (1) the microscopic tissue samples did not contain tissue from the anus, only from the rectum; and, (2) there was no evidence of prior injury in the slides. (Ex. 82 at ¶¶ 5, 14.) Accordingly, Dr. Dibdin could not have found evidence of prior injuries to the anus as he testified and wrote in his autopsy report (Ex. 8 at 3560), because the slide did not contain tissue of the anus. Further, the tissue of the rectum and genitalia that was

microscopically examined by Dr. Dibdin did not contain evidence of old injuries.

Responding to a citation to *Bagley* in the 2004 Informal Reply, where Mr. Benavides argued that it was reasonably probable the result of the proceeding would have been different if the jury had not heard Dr. Dibdin's false testimony that microscopic slides confirmed the presence of old injuries to the anus and vagina, Respondent makes the confused argument that reference to *Bagley* constitutes a new claim raised for the first time in the reply. (Response at 39-40, citing 2004 Informal Reply at 36.) Respondent appears to be unfamiliar with the law governing the materiality standard for claims of false evidence. As explained above (and in the 2004 Informal Reply), the knowing presentation of false evidence by the prosecution warrants a new trial if there is a "reasonable likelihood that the testimony could have affected the jury verdict." *Endicott*, 869 U.S. at 455 (citing *Bagley*, 473 U.S. at 678-80). On the other hand, if the prosecution presented the perjured testimony unknowingly, a new trial is warranted only if there is a "'reasonable probability'" that if the evidence had been disclosed to the defense "'the results of the proceedings would have been different'." *Id.* (citing *Bagley*, 473 U.S. at 682.) Hence, by citing *Bagley* Mr. Benavides is not claiming, as Respondent misapprehends, that the prosecution unlawfully suppressed the microscopic slides (Response at 40), but rather that Dr. Dibdin's false testimony that there was "scientific" evidence of prior abuse in the microscopic slides (11 RT 2140) meets the reasonably probable standard and warrants a new trial. This Court cannot have confidence in the outcome of the trial in light of Dr. Dibdin's false testimony about the prior sexual injuries and as shown above, so many other of his false findings. *See Bagley*, 473 U.S. at 682 ("A 'reasonable

probability' is a probability sufficient to undermine confidence in the outcome.")

Respondent also argues that Dr. Dibdin's testimony that the dilated anus he observed at autopsy was evidence of injury and had been caused by multiple anal tears that had gone through the muscle and caused it to dilate (11 RT 2119) is not false. In support of the claim that Dr. Dibdin falsely attributed the anal laxity or anal dilation that he observed during the autopsy to trauma, Mr. Benavides presented the declaration of Dr. Shaw who explained as follows:

> The loss of anal tone at autopsy also does not support a finding of sodomy. Dr. Dibdin notes at autopsy that the anus is expanded and dilated. This is a normal postmortem condition. When a person dies, he or she lose their muscle elasticity, thus the anus becomes lax, and dilated.

(Ex. 79 at ¶ 21; *see* RCCAP at 33.) Respondent's argument that the claim fails because Dr. Dibdin testified that Consuelo's anus was dilated, rather than lax is patently meritless. (Response at 38-39; 11 RT 2119.) As explained by Dr. Shaw, any suggestion by Dr. Dibdin that anal laxity or anal dialation, which is virtually synonymous in this context, was attributable to trauma was false. This is a normal, well-known post-mortem condition that any pathologist should have known about. (*See* Ex. 170 at ¶ 25.)

Respondent argues that Dr. Dibdin's testimony that he observed profuse edema (swelling) only in the anal and vaginal area and that it was caused by trauma (11 RT 2118, 2155-56) was not false. Respondent argues that UCLA hospital records indicating that prior to Consuelo's death she had edema throughout her body simply represent a difference of medical opinion. (Response at 39.) Respondent's argument is baseless. Medical records establish that Consuelo's entire body was swollen or edematous

during the later course of her hospitalization. (Ex. 3 at 1002 (UCLA critical care records by Dr. Harrison noting: "Total body edema is clinically unchanged."). These records directly contradict Dr. Dibdin's testimony that he observed swelling only in the genitalia and anus given his other testimony that the condition of her swelling would not have changed post-mortem. (11 RT 2155-56.) Moreover, as shown in People's Exhibit 3, marked for identification on March 15, 1993, Consuelo's entire body is swollen at autopsy, as would be expected from a child in Consuelo's severe medical condition. (Ex. 83 at ¶ 38.) Hence, Dr. Dibdin's testimony that Consuelo was swollen only in the anal and vaginal area was demonstrably false. Further, to the extent there is more pronounced swelling in her buttocks, genitalia, and anus it is partly due to gravity settling fluids in these areas. (Ex. 83 at ¶ 21; Ex. 82 at ¶ 16; Ex. 144 at ¶ 9.)

Notably, Respondent does not respond to the subclaim that Dr. Diamond also falsely testified that when he examined Consuelo only her genitalia and anus were swollen and that the swelling was evidence of trauma. (RCCAP at 26.) In the 2003 Response, Respondent argued that evidence that the swelling Dr. Diamond observed was caused by disseminated intravascular coagulation (DIC), manual manipulations pursuant to medical interventions, and fluid overload from fluid resuscitation efforts instead of trauma simply represented a difference in medical opinion. (2003 Response at 38-39, 41.) Respondent has wisely abandoned these baseless arguments. First, as Dr. Diamond now recognizes after reviewing her full medical records and the photographs of Consuelo fully swollen body taken shortly before he examined her (People's Exhibit 61), Consuelo's genital and anal swelling is not indicative of trauma and most likely is attributable to renal failure. (Ex. 149 at ¶ 5.) Second, as explained by Dr. Kennedy, Dr. Diamond should have known

that the swelling he observed, which he described as "marked swelling . . . around the whole rectum" (10 RT 2053) could not be evidence of trauma since it had not been seen at DRMC though they had ample opportunity to have detected such marked swelling had it been present. (Ex. 169 at ¶ 13.) It is clear, therefore, that Dr. Diamond's testimony that the anal swelling was attributable to trauma was false in violation of the federal Constitution and Penal Code section 1473. *See Marshall*, 13 Cal. 4th at 830. The fact that the prosecutor did not provide Dr. Diamond, or any of the other prosecution medical witnesses, with the clearly contradictory information in the interviews by law enforcement of the DRMC personnel indicating they saw no swelling (*see, e.g.*, Ex. 4 at 1760)[16] raises a strong inference that the prosecutor knowingly presented false evidence in violation of Mr. Benavides's right to due process. *See Napue*, 360 U.S. at 271.

In sum, there is strong evidence that the prosecutor knowingly presented false evidence to prove the sex abuse charges. Such evidence includes Dr. Diamond's change of opinion from the preliminary hearing to the trial, based on information that he was "told" about the presence or absence of injuries to the rectum and the prosecutor's failure to disclose to the prosecution witnesses the medical evidence conflicting with their opinion, in particular the lack of injury seen by DRMC personnel. Even if the prosecutor did not know the medical witnesses he called to testify had given false testimony, it is irrefutable that they did testify falsely, as they have all now admitted, except for Dr. Dibdin, whose findings have been shown to be egregiously false. Given the extent of the false evidence

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[16] Supervising DRMC nurse Faye Van Worth informed the district attorney's investigator Ray Lopez that "there was no swelling, there was no vaginal discharge, there was no blood. I didn't notice anything gross in the vaginal-rectal area when I was trying to get the Foley in that would make me suspicious." (Ex. 4 at 1760.)

presented there can be no doubt that the presentation of such evidence at Mr. Benavides's trial, whether knowingly or unknowingly presented, meets either materiality standard. It is both reasonably likely and probable that the evidence could and did affect the jury's determination. *See Endicott*, 869 F.2d at 455.

**4. The State Presented False Testimony Regarding the Location, Age, and Cause of Consuelo's Rib Fractures.**

Respondent contends that Mr. Benavides has not shown that Dr. Dibdin testified falsely about the location, age, and mechanism of injury of the rib fractures. (Response at 42-47.) As with Dr. Dibdin's other findings, Mr. Benavides has demonstrated by documentary evidence and the opinions of other experts that Dr. Dibdin's findings regarding the rib fractures are false. The evidence demonstrating that Dr. Dibdin testified falsely was not presented to the jury and unlawfully suppressed by the prosecution. The evidence thoroughly undermined Dr. Dibdin's credibility. Mr. Benavides's conviction must be reversed because there is a reasonable likelihood that Dr. Dibdin's false testimony could have affected the judgment, *Napue*, 360 U.S. at 271, and there is a reasonable probability that had the evidence been disclosed the result of the proceedings would have been different, *Bagley*, 473 U.S. at 682.

Dr. Dibdin did not observe fractures that any competent medical expert would have seen—such as fractures that were visible in the radiographs—and, mistakenly reported fractures that were not confirmed by his own findings or other experts. For example, Dr. Dibdin failed to report an acute displaced fracture of the eighth anterior rib and a wrist fracture, which were documented in the medical reports and visible in the radiographs. (Ex. 1 at 20, 24.) Dr. Dibdin's failure to report these fractures in his autopsy report is consistent with a pattern of careless and

unprofessional work that resulted in false findings in other areas that significantly prejudiced Mr. Benavides.

Dr. Dibdin testified that he saw bilateral posterior rib fractures in ribs 6-10 near the spine. He also reported seeing healing fractures in the left posterior ribs 8 and 9. He testified that he looked at microscopic tissue of the ribs and confirmed that these fractures were three to four weeks old. (11 RT 2125-28.) A review of Dr. Dibdin's autopsy report shows that he fabricated his testimony regarding the presence of acute and healing fractures in the left posterior ribs and his dating of those fractures under the microscope. The microscopic manifest of tissue slides taken at autopsy shows that 27 slides were taken and they did not include slides of the left posterior ribs.[17] (Ex. 8 at 3542.) Hence, Dr. Dibdin's testimony that he observed acute and healing fractures in the left posterior ribs and "confirmed" their presence and dated them by microscopic observation, as stated in his report (Ex. 8 at 3560, 3557) is readily false. Respondent's assertion that Dr. Dibdin just made a "mistake" in labeling slides 6-10 in his microscopic manifest as anterior, rather than posterior, is rant speculation, notably unsupported by a declaration from Dr. Dibdin. (Response at 45.) Further, even if that is true, Respondent's five mistaken identifications of slides C23-27 is part of an extensive pattern of critical inaccuracies in Dr. Dibdin's findings that raises strong doubts about his competence. (*See* 11 RT 2114-15 (Dibdin admitted that his autopsy report contained inaccurate information about Consuelo's age, length, and weight); Resp. Ex. 1 at ¶ 18

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[17] There is no question that *only* 27 slides were taken. Autopsy assistant Andrew Dollinger testified that when the case was first examined by the pathologist he took 27 cassettes to KMC where they made 27 paraffin blocks and corresponding slides. (17 RT 3370.) His testimony was corroborated by James Malouf, the chief investigator at Kern County Coroner's office. (16 RT 3253-54.)

(Dr. Diamond's 2009 declaration indicating Dr. Dibdin provided him unsubstantiated information about a tear to the anterior wall of the vagina); Ex. 149 at ¶ 6 (Dr. Diamond indicates in his 2012 declaration that Dr. Dibdin's cause of death is "impossible.").)

If there had been healing fractures, which were three to four weeks old as Dr. Dibdin asserted, they should have been visible in the x-rays. Dr. Seibly, a radiologist at KMC, testified that he did not see any rib fractures, healing or acute, in the left posterior ribs. (13 RT 2514-15.) Dr. Seibly explained the discrepancy with Dr. Dibdin by stating that the fractures may not be visible in the x-rays because they had yet to form callous, which usually occurs within 10-14 days. (13 RT 2515.) However, based on the fabricated microscopic examination, Dr. Dibdin dated the left, posterior healing fractures to be three to four weeks old—hence, they should have been visible in the x-rays had they existed. Respondent's contention that the discrepancy between Dr. Seibly's radiographic findings and Dr. Dibdin's autopsy findings merely represents a difference in medical opinion is therefore incorrect. (Response at 43.) Rather, Dr. Seibly's testimony substantiates the claim that Dr. Dibdin testified falsely regarding the presence of healing fractures in the ribs.

The jury was not informed that the absence of healing fractures in the x-rays or microscopic slides of the left posterior ribs proved that Dr. Dibdin testified falsely regarding these fractures. The prosecutor knew or should have known that Dr. Dibdin's testimony regarding the left rib fractures was false. The prosecutor failed to disclose the microscopic manifest, which documents that lack of left posterior rib slides. The lack of such slides in the manifest constitutes material, exculpatory, impeachment evidence that completely undermined the credibility of Dr. Dibdin. Hence, the prosecutor's failure to disclose this information constitutes a violation of

his obligations and warrants a reversal of the conviction. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Bagley*, 473 U.S at 682. Further, had the jury known that Dr. Dibdin outright lied about his findings regarding the posterior left fractures, the result would have been devastating for the prosecution.

Evidence presented in the Corrected Amended Petition that law enforcement prompted DRMC radiologist Dr. Chabra to issue three different reports interpreting the x-rays constitutes additional evidence that the prosecution was actively fabricating medical evidence in order to substantiate Dr. Dibdin's false findings. (RCCAP 35-36.) In light of his multiple revisionist reports, Dr. Chabra was obviously not called to testify. Respondent's argument (Response at 45) that this evidence should be disregarded because it was not admitted at trial misunderstands the relevance of the evidence, which is to corroborate a pattern of fabrication by the prosecution.[18]

Building on his false testimony regarding the presence of bilateral posterior rib fractures, Dr. Dibdin testified that this pattern of fractures was indicative that the child had been gripped and squeezed from behind. (11 RT 2128-29.) Dr. Dibdin testified falsely that there was no other explanation for the pattern of rib fractures he observed. (11 RT 2164.) Medical literature explaining the mechanisms of injury of such fractures clearly offers another equally viable explanation for this type of fractures. The pattern of rib fractures seen from squeezing is the result of dorsal migration of the posterior rib margin with respect to the vertebral column.

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[18] Respondent's related argument that Mr. Benavides did not previously argue that Dr. Dibdin testified falsely about the acute and healing rib fractures or present evidence that the prosecution manufactured this testimony (Response at 42) lacks merit. (*See* RCCAP at 35-37.)

Dr. Paul Kleinman, a preeminent expert on pediatric bone fractures, explains:

> A second mechanism generating similar forces [to abuse] would occur if the infant were slammed face-down on a surface, or hurled face-forward into a solid object. In this scenario, the posterior rib arc would migrate posteriorly, resulting in leverage over the transverse processes.

(Ex. 131 at 6453.) Dr. Kleinman explains that this second mechanism was present in a clinical case, where a child was struck and possibly run over by a car.[19] (Ex. 131 at 6453.) This second mechanism supported the defense theory that a car accident accounted for her rib and abdominal injuries. Respondent's contention that this evidence should be discounted because there is no evidence of a car accident misses the point. (Response at 46.) The defense theory at trial was that Consuelo's injuries were caused by being struck by a car that left the scene. However, counsel's inability to explain the anal and genital injuries as resulting from a car accident doomed her theory. (Ex. 64 at ¶ 8 (Huffman admitting that she could not explain the anal and genital injuries by her car accident theory); 15 RT 2939 (testimony by California Highway Patrol officer indicating he had never seen an automobile accident causing the anal injuries present in this case). *But see* Ex. 151 (explaining that anogenital injuries in child pedestrians run over by low-speed motor vehicles can mimic child sexual

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[19] It is significant that the child pedestrian victim he describes showed a similar pattern of rib fractures to the fractures reported in Consuelo. The child had medially displaced anterolateral fractures at the impact site, and linear nondisplaced fractures in the posterior ribs. (Ex 131 at 6451.) Similarly, Consuelo's x-rays show an acute displaced anterolateral fracture, and evidence from the autopsy reported the presence of linear posterior rib fractures.

abuse).) Trial counsel's unreasonable failure to present evidence to the jury explaining that the posterior rib fractures could be caused by a car accident and the prosecutor's affirmative misleading the jury by presenting Dr. Dibdin's false testimony that only squeezing could account for the rib fractures prejudiced Mr. Benavides.

Further, though posterior rib fractures may be caused by a car accident or abuse, the extent of the abdominal and rib injuries that Consuelo had makes it highly unlikely, in fact nearly impossible, that they were caused by a person squeezing Consuelo's torso as Dr. Dibdin testified and demonstrated for the jury. (11 RT 2128-29.) As explained by Dr. Heger, a renowned expert in child abuse:

> It is impossible that an average adult would be able to exert enough pressure on the chest of a 21-month old child with their hands to cause bilateral acute rib fractures of ten ribs on one side of the chest or back and five on the other. It is also impossible, that a person, by simply gripping and squeezing the child would rupture the pancreas, duodenum, and mesocolon, and cause the massive internal damage observed during the laparotomy. The most logical explanation for these massive abdominal and rib injuries was compression of the chest by a large, heavy object such as the tire of a car.

(Ex. 170 at ¶ 26; *see also* Ex. 144 at ¶ 13 (Dr. Alonso, an emergency room doctor, indicates that he has never seen a victim of child abuse have such severe abdominal injuries and that such injuries are much more likely to have occurred from being struck by a car, impact with a steering wheel or bicycle handlebars, or falling from a height).)

Respondent asserts that Dr. Baumer and Dr. Lovell's testimony that it was "possible" that the posterior rib fractures were caused by abuse negates a claim that Dr. Dibdin testified falsely by stating that there was no other viable explanation for the fractures other than squeezing. (11 RT 2164; Response at 46.) Respondent's assertion is clearly flawed. Dr. Baumer and

Dr. Lovell's testimony support, rather than negate this claim as Respondent argues. Dr. Baumer testified that he thought abuse was possible, but believed Dr. Lovell was the most qualified to opine on the rib fractures. (14 RT 2886-87.) Dr. Lovell indicated that while it was "possible" the fractures were due to abuse, it was far more likely that they were caused by compression of the chest given the presence of acute *and* posterior fractures. (16 RT 3136-37.) Like much of Dr. Dibdin's testimony he affirmatively misled the jury by testifying that abuse was the most likely explanation.

#### 5. The State Presented False Testimony That Consuelo Was Suffocated, and Suffered From Multiple Head Traumas and Shaken Baby Syndrome.

Respondent offers no more than her standard response of a conflict of medical opinion to address Mr. Benavides's overwhelming evidence refuting the State theory that Mr. Benavides suffocated Consuelo, caused her head injuries, and shook and squeezed her causing brain damage. (Response at 48-49.) Once again, Respondent ignores that the expert opinions presented by Mr. Benavides do not merely offer an alternative interpretation of the evidence, but rather, show that the testimony offered at trial was incorrect because it was based on incomplete information about Consuelo's deteriorating medical condition throughout her hospitalization.

##### a. Suffocation

Dr. Bentson testified that CAT scans of Consuelo's brain taken on November 21, 1991, showed watershed bilateral infarcts, which he attributed to suffocation caused by cutting off oxygen to the child for at least six to eight minutes. (12 RT 2402-18.) As with other state experts, Dr. Bentson was not given Consuelo's medical records to review prior to

testifying. (12 RT 2414-15.) Thus, he was not aware that Consuelo presented to DRMC with a relatively normal Glasgow Coma Scale between 11-14. Had her brain infracts been caused by suffocation by Mr. Benavides prior to arrival, she would not show this level of consciousness. (*See* RCCAP at 39-41.) As a result of Dr. Bentson's ignorance of the medical history, Dr. Bentson was also not aware that, for the four days prior to the CAT scan, Consuelo suffered from very low blood pressure that reduced the supply of oxygen to the brain, likely causing her brain to infarct. (Ex. 84 at ¶ 9.) Given Consuelo's state of consciousness upon arrival at the hospital and the likely explanation that the low blood pressure subsequently caused her brain infarcts, Dr. Bentson's testimony regarding suffocation is not a viable alternative medical explanation for the brain infarcts. The state manufactured Dr. Bentson's testimony by failing to provide him with the full medical history necessary for him to provide an informed and reliable medical opinion.

In addition, based on the time frame in which Mr. Benavides was alone with Consuelo, approximately 15 minutes, and her arrival at DRMC in a semi-conscious state, it is physically impossible for Mr. Benavides to have suffocated her. As explained by forensic pathologist Dr. Vincent J.M. Di Maio, a child who is smothered will have a slow heartbeat in approximately 30 seconds and will cease to breathe within 90 seconds. (Ex. 81 at ¶ 8.) Therefore, if Mr. Benavides had smothered Consuelo, as the prosecutor argued (18 RT 3585-87), she would have been dead prior to her arrival at DRMC. Moreover, smothering will typically not cause the localized brain injuries, such as watershed infarcts, observed by Dr. Bentson. (Ex. 81 at ¶ 10.) Hence, Dr. Bentson's testimony that the infarcts were caused by suffocation was false, not merely a different medical opinion as Respondent argues. (Response at 47-48.)

The prosecutor knew or should have known that the testimony he presented regarding suffocation was false. Moreover, trial counsel unreasonably failed to introduce expert testimony to refute Dr. Bentson's testimony. Trial counsel failed to cross-examine Dr. Bentson with the relevant medical history to show that loss of blood supply was the most likely cause of her brain infarcts.[20] Both the prosecutor and the trial counsel's failings prejudiced Mr. Benavides. The jury was not provided with any information to question the state's evidence that Mr. Benavides suffocated Consuelo. The prosecutor's theory that Mr. Benavides suffocated Consuelo in order to prevent her from screaming while he sodomized and raped her, and the further speculation that this accounted for the neighbors not hearing anything that day (11 RT 3586-87) was extremely damaging. This theory was an intricate part of the prosecutor's attempt to show that Mr. Benavides premeditated the murder of Consuelo. Had the testimony of suffocation been excluded as impossible given the facts of the case, or at least refuted through cross-examination, there is a reasonable probability that Mr. Benavides would not have been found guilty of murder or sentenced to death. *See Bagley*, 473 U.S. at 678-82.

**b. Head Traumas**

Dr. Bentson testified that the scalp edema he observed in the CAT scans on both sides of the head were attributable to multiple head traumas. (12 RT 2417.) Had Dr. Bentson been made aware of Consuelo's full medical history, he would have concluded that the edema he observed in the CAT scans, taken four days into Consuelo's hospitalization, was

[20] The trial court compounded counsel's error by intervening during her cross-examination of Dr. Bentson and asking a number of leading questions with the effect of bolstering Dr. Bentson's false opinion regarding suffocation. (12 RT 2416; *see* Claim Sixteen.)

attributable to her prolonged state of DIC, rather than multiple head traumas. (Ex. 84 at ¶¶ 14-15.) Again, Mr. Benavides has not merely presented a different medical opinion, but rather a refutation of the evidence presented based on its failure to take account of the full medical record.

Respondent's assertion that Dr. Bentson did not testify that the scalp swelling on both sides of the back of the head was due to a head injury is clearly erroneous. (Response at 48.) Relying on the italicized phrase below, Respondent argues that Dr. Bentson did not attribute the scalp swelling to a head injury:

> Q [Prosecutor]: I just have one question for you, doctor. The scalp edema that you saw on the film and that the defense counsel asked you about, it went all the way around. Would that have been caused by more than one blow?
>
> A [Bentson]: Well, the scalp swelling was mostly in the back of the head, but it was on both sides of the back of the head. And it *seemed to be from different traumas*, let's say. Generally speaking when we see this sort of thing we assume it came from more than one event.

(12 RT 2417.) As is clear from the quoted passage, Dr. Bentson affirmed the prosecutor's assertion that the scalp edema showed "more than one blow."

**c. Shaken Baby Syndrome**

Dr. Dibdin testified that the brain and rib injuries he observed at autopsy indicated that Consuelo had been squeezed and shaken. (11 RT 2135-36.) Dr. Dibdin testified that Consuelo had a subdural hematoma, or bleeding under the skull, which was typical of blood vessels tearing in the skull when a child is shaken back and forth. (11 RT 2135-36.) Dr. Dibdin testified falsely that Consuelo's injuries were indicative of Shaken Baby

Syndrome. Like many of Dr. Dibdin's opinions, it is unsupported by the full record of Consuelo's hospitalization. The expert declarations provided in support of this claim show not merely a difference in medical opinion, as Respondent asserts (Response at 48-49), but rather that Dr. Dibdin's testimony was false.

As explained by Dr. Aaron Gleckman, a forensic neuropathologist and expert in Shaken Baby Syndrome, a child who has brain damage due to shaking will typically have extensive bilateral retinal hemorrhages, subdural hematomas, and cerebral edema. The retinal hemorrhages should be visible immediately or shortly after the child is shaken. Consuelo did not have any eye damage when Dr. Tait performed an eye exam, a funduscopy, at DRMC within hours of the alleged shaking. (Ex. 1 at 3.) The first indication of hemorrhaging in the eyes in the medical records is reported on the fourth day of her hospitalization, November 21, 1991, when Dr. Miller an ophthalmologist from UCLA, examined Consuelo and found a small dot-like intraretinal hemorrhage in the right eye with no damage to the left eye. (Ex. 3 at 991.) This minor damage to the right eye is most likely the result of Consuelo's prolonged state of DIC and low blood pressure. This minor damage to one eye is inconsistent with the extensive bilateral retinal damage usually present in Shaken Baby Syndrome. (Ex. 84 at ¶ 11.) In addition, shaken babies typically display flame-shaped retinal hemorrhages, as opposed to the dot-like intraretinal hemorrhage present in Consuelo. (Ex. 84 at ¶ 11.) Contrary to standard practice in a case where Shaken Baby Syndrome is expected, Dr. Dibdin did not examine the eyes at autopsy. (Ex. 84 at ¶ 19.) In fact, in his testimony at trial, he did not make any reference to the eyes, and hence, did not explain how a child could be shaken and not display any damage to the eyes until four days into her hospitalization.

Likewise, Dr. Dibdin's testimony that the subdural hemorrhage present in Consuelo at autopsy indicates that she was shaken is false. Dr. Dibdin reported finding a 5 milliliter subdural hemorrhage at autopsy. (Ex. 8 at 3558.) He reported that the hemorrhage was three to six days old, which would mean it appeared at the latest on November 21, 1991, five days after the alleged shaking. (Ex. 8 at 3560.) If the hemorrhage were the result of Mr. Benavides shaking her, it should have been present on November 17, 1991. Moreover, upon examining the brain tissue slides Dr. Gleckman estimates that the hemorrhage is only 36-48 hours old because there is no indication of fibroblast proliferation, which is usually present in the latter stages of wound healing. (Ex. 84 at ¶ 13.) Hence, by Dr. Gleckman's estimate the subdural hemorrhage did not appear until November 24, 1991, at the earliest. Dr. Gleckman's estimate is supported by the CT scans taken on November 21, 1991, which do not show the subdural hemorrhage. The appearance of the subdural hemorrhage in the final days of Consuelo's hospitalization is most likely the result of prolonged DIC. (Ex. 84 at ¶ 14.) The absence of a subdural hemorrhage in the first five days of Consuelo's hospitalization by Dr. Dibdin's own estimate, renders false his testimony that it indicated the baby was shaken.

Although the CT scans of November 21, 1991, did show brain swelling, it is nonspecific and consistent with the major loss of blood and oxygen resulting from her abdominal bleeding and DIC. (Ex. 84 at ¶¶ 14-16.) Though brain swelling is a characteristic of shaken babies, the absence of concomitant subdural hemorrhaging and retinal damage, makes a diagnosis of shaken baby syndrome highly unlikely. (Ex. 84 at ¶ 15.)

After reviewing the medical records from DRMC, KMC, and UCLA, the autopsy report, brain tissue slides, skull x-rays and CT scans, Dr. Dibdin and Dr. Bentson's testimony, Dr. Gleckman opines to a high degree of

medical certainty that Consuelo did not suffer from Shaken Baby Syndrome. He opines that all the brain damage she suffered was secondary to loss of oxygenated blood supply as a result of damage to her abdominal organs. (Ex. 84 at ¶ 7.) Dr. Gleckman's expert opinion is not merely an alternative diagnosis. Dr. Gleckman explains in his declaration why Dr. Dibdin's conclusions are erroneous, including the essential fact that Consuelo did not display typical injuries of shaken babies until many days into her hospitalization. The prosecutor knew or should have known that Dr. Dibdin's testimony was false. Based solely on Dr. Dibdin's dating of the subdural hemorrhage, the prosecutor should have known that it could not be a result of shaking on November 17, 1991. Likewise, trial counsel's failure to cross-examine Dr. Dibdin with his own report and to present expert testimony to defeat the shaken baby syndrome diagnosis was unreasonable and fell below an acceptable standard of competence.

Both the prosecutor and trial counsel's failings in this regard prejudiced Mr. Benavides. Had the jury known that Dr. Dibdin falsely testified and concluded in his autopsy report that Consuelo was shaken, he would have been seriously discredited. This false testimony alone, and in conjunction with other false findings rendered by Dr. Dibdin, would have led the jury to seriously doubt the foundation of the state's theory. The prosecutor argued in closing that Mr. Benavides violently shook Consuelo. (18 RT 3589.) Had the Shaken Baby Syndrome evidence been excluded or rebutted, there is a reasonable probability that the results of the proceedings would have been different. *See Bagley*, 473 U.S. at 678-82; *Endicott*, 869 F.2d at 455.

### 6. The State Presented False Evidence, Argument, and Inference That Consuelo Was Completely Healthy Until Mr. Benavides Began to Take Care of Her.

Based on law enforcement interviews of several people who knew Consuelo, the state knew or should have known that she had serious health problems, which started prior to Mr. Benavides taking care of her. The prosecution also knew that Consuelo had injured herself several times in the past, none of which were connected to Mr. Benavides. Nonetheless, the prosecutor argued falsely that Consuelo was healthy until Mr. Benavides began to take care of her. (13 RT 2587-88.) The prosecutor falsely argued that Consuelo was a "completely normal" child, devoid of medical problems, prior to November 17, 1991, when Mr. Benavides took care of her. (10 RT 2024.) Respondent dismisses this claim stating it is unsupported because Mr. Benavides has not shown that prior to November 17, 1991, Consuelo had the face, head, rib, genital and anal injuries that she suffered on that date. (Response at 49.) The prejudice from the prosecution's evidence falsely connecting Mr. Benavides to Consuelo's prior injuries and health problems was that it increased the likelihood that the jury would find him guilty of the charged crimes alleged to have occurred on November 17, 1991. That the November 17th injuries did not occur prior to that date does not affect the prejudice wrought by this false testimony.

To prove that Mr. Benavides was connected to Consuelo's prior injuries the prosecutor falsely portrayed Consuelo's mother, Estella Medina, as a mother who allowed Mr. Benavides to injure her child and lied to protect him. The prosecutor fabricated evidence to advance this argument. For example, in questioning Estella, the prosecutor falsely implied that she had told Detective Valdez that Mr. Benavides was in the

room when Consuelo fell off a couch and hit her head while she was in another room. The prosecutor's questioning of Ms. Medina follows:

> Q. I'm going to ask you about your taped conversation with Detective Valdez. Did you tell him, quote, she was on top of the couch and trying to get some knick-knacks from the wall of the shelf?
>
> A. I probably said that.
>
> Q. Do you recall telling Detective Valdez a moment or two later in response to follow-up questions, I didn't see her when she fell down. Did you tell him that?
>
> A. I don't recall telling him that.
>
> Q. Do you recall telling him that Vicente was in the room at the time that she injured her head and you did not see her injure her head because you were in the next room?
>
> A. I don't know.
>
> Q. Mrs. Medina, is it because you've said so many different things about what has happened that you—
>
> A. I mean, this happened a year and a half ago. I don't recall what I said then or what I'm saying—I mean, I know what I'm saying now, but I was very upset. I was under a lot of distress and everything. I mean, I don't recall exact words to what—the exact words what I said.

(13 RT 2644-45.) The prosecutor had no legitimate basis to imply that Estella had told Detective Valdez that Mr. Benavides was in the room when Consuelo hurt her head and that she was not there. In fact, her taped statements record the opposite: Estella was in the living room and she does not remember whether Mr. Benavides was there or in another room. (Ex. 4

at 2200-01). By misquoting the transcript of the taped conversation, the prosecutor implied that Estella was lying, even though the transcript corroborated her testimony. By fabricating these facts the prosecutor falsely implied that Mr. Benavides was responsible for Consuelo's prior injuries and that Estella was allowing him to hurt her and covering up for him. Similarly, the prosecutor falsely implied that Mr. Benavides was responsible for Consuelo's prior arm and rib injuries, and her illness during Halloween, although he had no good faith basis to make such an implication. (*See* Petition Claim Four.)

The prosecutor not only falsely linked Mr. Benavides to Consuelo's prior injuries and illnesses, but he also falsely argued that Estella was protecting him. Without any basis to do so, the prosecutor asked Estella:

> Q. Mrs. Medina, isn't it true that you knew what was happening with this man but you weren't reporting it?
>
> A. No, I didn't.
>
> Q. It wasn't until he came around that the child started having broken bones and bruises, was it?
>
> A. No.

(13 RT 2587-88.) The prosecutor lacked any good faith basis for arguing that Estella was purposefully concealing Mr. Benavides's abuse of Consuelo.

The prosecutor's only purpose for presenting this evidence was to imply that Mr. Benavides had caused Consuelo's prior injuries and illnesses, which lessened the prosecution's burden of establishing Mr. Benavides's guilt for the instant offenses. The evidence was introduced as Mr. Benavides's prior bad acts and to show a pattern of Mr. Benavides

abusing Consuelo. The prosecutor knew or should have known that Consuelo's prior illnesses and injuries were not connected to Mr. Benavides.[21] The basis for introducing this evidence hence was false.

This Court's decision on appeal that the prior injuries were admissible to show that the November 17, 1991 injuries did not occur by accident because the prior injuries likewise were non-accidental, depends on a false premise that the prior injuries[22] had any connection to Mr. Benavides. *People v. Benavides*, 35 Cal. 4th 69, 93 (2005). Because there was no evidence connecting the prior injuries to Mr. Benavides, they were not probative of Mr. Benavides's guilt of the November 17, 1991. Moreover, because counsel failed to object to the evidence of prior injuries as being more prejudicial than probative, this Court did not consider whether the evidence should have been excluded on that basis. *Id.* Given the lack of connection of the prior injuries to Mr. Benavides the evidence was clearly arbitrary and fundamentally unfair and violated Mr. Benavides's federal constitutional rights to due process and reliable jury verdicts. *See Colley v. Sumner*, 784 F.2d 984, 990 (1986) (holding that

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[21] Respondent's argument that evidence in the law enforcement reports that Consuelo fell a lot, bruised herself, and always had a diaper rash, has no bearing on the charged crimes misses the point. (Response at 51, n. 15.) Respondent fails to understand that these reports indicate that the prosecutor's argument that Consuelo was healthy until Mr. Benavides showed up was false and hence violated Mr. Benavides's right to due process. *See Napue*, 360 U.S. at 270 (explaining that a prosecutor has the "responsibility and duty to correct what he knows to be false and elicit the truth.") (internal citations omitted).

[22] As shown above and in Claims Four and Thirteen, there are also serious questions whether some of the old injuries even existed or were attributable to trauma. As shown above, Dr. Dibdin's testimony about old rib injuries and old injuries to the anus and genitalia is not supported by the medical evidence. The old pancreatic adhesions could have been congenital or due to inflammation as opposed to trauma.

relief is warranted where the admission of prior bad act evidence was "arbitrary and fundamentally unfair.")

The prosecutor's false implications that Mr. Benavides was responsible for Consuelo's past injuries were very damaging. By arguing that Mr. Benavides had a trend of abusing Consuelo the prosecutor falsely connected him to the old injuries though no evidence supported such a theory. In fact, all evidence uncovered by law enforcement of all who knew Mr. Benavides's past dealings with Consuelo showed that he had always been a kind, gentle and caring caretaker. (*See* Claim Thirteen, subclaims 7 and 13.) Had the jury known this evidence, they would have considered it highly unlikely that Mr. Benavides had suddenly decided, without any motive whatsoever, to sodomize, rape, punch, suffocate, and strike Consuelo in the head in a brief fifteen-minute period in which he was left with her.

By connecting Mr. Benavides to Consuelo's past injuries, the prosecutor managed to explain Mr. Benavides's alleged November 17, 1991, actions within the context of a pattern of abuse by Mr. Benavides in conjunction with a negligent mother who allowed this to happen. Had the jury learned that these prior injuries were not attributable to Mr. Benavides (and that some did not exist or were not attributable to trauma) and that Mr. Benavides had always been a kind and caring caretaker, they would have had a reasonable doubt that Mr. Benavides could have been responsible for sodomizing, raping, and beating Consuelo on November 17, 1991. Mr. Benavides is entitled to relief because the prosecutor knew or should have known that this evidence was false and, as shown, there is a reasonable likelihood that the false testimony could have affected the judgment of the jury. *See Napue*, 360 U.S. at 271; *Agurs*, 427 U.S. at 103; *In re Roberts*, 29 Cal. 4th at 740. Even if the prosecutor unknowingly presented this false

evidence, which is unlikely, Mr. Benavides is still entitled to relief because there is a reasonable probability that the result of the proceedings would have been different had this false evidence not been presented. *See Bagley*, 473 U.S. at 678-82; *Killian*, 282 F.3d at 1209-10.

### 7. The State Presented False Evidence That Consuelo Was Not Tested for the Presence of Semen.

Respondent argues that Mr. Benavides has not shown that Dr. Diamond falsely testified that he did not perform a rape kit because the presence of blood would have washed away the semen. (Response at 49-51.) Dr. Diamond's testimony is incredible in light of the prevailing practice of obtaining a rape kit under all circumstances where there is a suspicion of abuse.

The standard of care in a sex abuse examination requires that the examiner test for the presence of semen. (Ex. 83 at ¶ 34.) Dr. Diamond's explanation that the presence of blood contraindicated using a rape kit is contrary to standard practice. (Ex. 83 at ¶ 34.) As Dr. Baumer explains, the presence of blood will frequently not interfere with the determination of whether there is semen. (Ex. 142 at ¶ 12; *see also* 16 RT 3143 (Dr. Lovell testifying that swabs should have been taken even with the presence of blood). It is "highly unlikely" that all trace of semen would have been washed away by the blood. (Ex. 83 at ¶ 34.) Even if Dr. Diamond were correct that the blood washed away the semen making a negative result inconclusive, a positive result would have confirmed the sex abuse. (Ex. 83 at ¶ 34.) Considering that his report indicates the child was sexually abused, it is highly improbable that he did not perform a test to detect the presence of semen.

### 8. The State Presented False Evidence That Consuelo Could Not Have Been the Victim of an Auto Accident.

Officer Esmay testified that he was "certain" Consuelo's injuries were not caused by a car accident. (15 RT 2960.) A central reason for Esmay discounting the car accident theory was that he had never known such accidents to cause injuries to the genitalia and anus. (Ex. 4 at 2131.) As with other state witnesses, the prosecutor did not provide Officer Esmay with the DRMC records that showed she had no such injuries upon admission to the hospital. (15 RT 2928.) As shown above, the state's theory that these injuries were present upon admission to DRMC was false.[23]

Another reason given by Esmay for discounting the car accident as a cause of Consuelo's injuries was that Consuelo's clothing did not show evidence of contact with the ground, such as grass stains. (15 RT 2932.) Esmay's testimony was false. Evidence suppressed by the state showed that Kern County Criminalist Jeanne Spencer found plant material on Consuelo's sweatshirt. (Ex. 7 at 3506.) Respondent's argument that such evidence is immaterial because Spencer did not note it in her diagram of the sweatshirt, though she did so in her lab notes, and it is not readily visible in the photographs of the sweatshirt is meritless. (Response at 51-52.) The presence of plant material on the sweatshirt, as documented by Spencer, supports the theory that Consuelo could have been run over by a car, and that Mr. Benavides found her outside as he has always stated. That it is a small amount of plant material does not refute this point.

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[23] Moreover, as shown in Exhibit 151, Esmay was incorrect in testifying that child pedestrian victims of car accidents do not have anogenital injuries. As study of four cases of children pedestrians hit by slow-moving vehicles showed injuries to the anogenital area that mimicked injuries in the same area usually attributed to child sexual abuse. (Ex. 151.)

Because there is evidence that the prosecutor knew or should have known that the testimony was false, Mr. Benavides need only show that there is a reasonable likelihood that the false testimony could have affected the verdict. *See Napue*, 360 U.S. at 271; *Agurs*, 427 U.S. at 103; *In re Roberts*, 29 Cal. 4th at 740. Mr. Benavides has done so. Officer Esmay's testimony was the centerpiece of the prosecution's attack on the defense's theory of a car accident as an explanation for Consuelo's injuries. Had the state not presented false evidence regarding the lack of grass stains and the lack of injury to her genitalia and anus upon admission to DRMC, Officer Esmay would not have testified that he was "certain" that a car accident had not caused her injuries. (15 RT 2960.) Mr. Benavides is also entitled to relief under the higher prejudice standard for unlawful suppression of evidence. There is a reasonable probability that had the prosecutor disclosed to the defense evidence of the grass stains corroborating Mr. Benavides's account, the jury would have had a reasonable doubt as to his guilt and the result of the proceedings would have been different. *See Bagley*, 473 U.S. at 678-82; *Killian*, 282 F.3d at 1209-10.

**9. Conclusion**

Mr. Benavides has made a prima facie case that the prosecution presented false evidence that pervaded Mr. Benavides's trial, thoroughly affecting the outcome. The prosecutor knew that the lack of injury to the genitalia and anus at DRMC completely defeated the sex crimes and special circumstances, which were used to elevate this case to a capital crime. Knowing the exculpatory nature of this evidence, the prosecutor purposefully excluded the highly relevant DRMC records and law enforcement interviews with DRMC personnel from the materials that he provided to the state's witnesses. Mr. Benavides has shown conclusive and

direct evidence from many of these witnesses that had they known Consuelo's full medical history they would not have testified as they did at trial. They would have all testified that the sex charges were not supported by medical evidence.

Having fabricated the state witnesses' testimony by providing them with an incomplete record of Consuelo's hospitalization records, the prosecutor then had the audacity to argue in closing the following:

> There is not a doctor who treated her, not a surgeon who operated on her, and not the forensic pathologist who finally finished the gruesome task of cataloging these injuries who said anything other than that she was sexually abused. And physically abused. No one. I challenge the defense to come forward and tell you about one witness who saw this child that didn't catalog these things.

(18 RT 3582.) The prosecutor knew that all the DRMC medical personnel had clearly and unequivocally stated that they had not seen any sign that she was sexually abused even though they had ample opportunity and training to do so. Defense counsel's failure to meet the prosecutor's "challenge" by presenting this crucial exculpatory evidence prejudiced Mr. Benavides and seriously affected the outcome of the trial. Absent the trial counsel's failures and the prosecutor's presentation of false evidence, alone or in combination, the result of the proceedings would have been different. These serious errors undermine confidence in the outcome of Mr. Benavides's case and warrant a new trial. *See Bagley*, 473 U.S. at 678-82; *Giglio*, 405 U.S. at 154; *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

## B. Claim Two: The State Unlawfully and Prejudicially Coerced the Testimony of Estella Medina and Cristina Medina.

The Corrected Amended Petition sets forth allegations that make a prima facie showing that Mr. Benavides is entitled to have his convictions and sentence set aside as a result of the prosecution's coercive and suggestive tactics surrounding the testimony of Estella Medina and her daughter Cristina. The record before this Court demonstrates that the prosecution, on numerous occasions, threatened to permanently deprive Estella Medina of custody of her daughter Cristina if she did not testify against Mr. Benavides, utilized coercive and suggestive interviewing tactics that manipulated and manufactured the trial testimony of Cristina Medina, and knowingly presented unreliable, false, misleading, and prejudicial statements of these two witnesses elicited as a direct result of the prosecution's coercion. In addition, the state failed to disclose social services documents that demonstrated the depth of the prosecution's participation in coordinating Cristina's juvenile placements and other aspects of her social services case, as well as revealed that Cristina had a poor memory of the events she testified about at trial. Respondent contests Mr. Benavides's claims and argues that the testimony of Estella and Cristina Medina was not coerced. Respondent's arguments lack merit.

The prosecution may not present evidence that is unreliable as the result of threats or coercion applied by the state to the witness. *See Pyle v. Kansas*, 317 U.S. 213 (1942); *Clanton v. Cooper*, 129 F.3d 1147 (10th Cir. 1997); *United States v. Chiavola*, 744 F.2d 1271 (7th Cir. 1984). "It is unthinkable that a statement obtained by . . . conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case. . . . [M]ethods offensive when used against an accused do not magically become any less so when exerted against a witness."

*Clanton*, 129 F.3d at 1158 (citation omitted). Mr. Benavides is entitled to relief because the coerced testimony rendered his trial unfair. *Pyle*, 317 U.S. at 215; *People v. Badgett*, 10 Cal. 4th 330 (1995).

**1. Law Enforcement Agents Unconstitutionally Coerced Prosecution Witnesses Estella Medina and Cristina Medina, Resulting in False and Unreliable Testimony.**

As demonstrated in the Corrected Amended Petition and accompanying exhibits, law enforcement officials coerced Estella's testimony by temporarily removing Cristina from her home and threatening to remove Cristina permanently from her custody unless she agreed to tell police that Mr. Benavides was a danger to her daughters and testify against Mr. Benavides. (RCCAP at 48-56.)

Respondent's recitation of legal authority regarding whether a *pretrial* statement by a witness may be excluded as a result of coercive interrogation methods (Response at 54-55) demonstrates Respondent's misunderstanding of Mr. Benavides's claim. Mr. Benavides does not contend that there was any pretrial statement which trial counsel could have attempted to exclude. The false coerced statements came into existence at the time of trial when Estella testified. Testimony of third parties that is offered at trial must be excluded when a defendant demonstrates that improper coercion has impaired the reliability of the testimony. *People v. Badgett*, 10 Cal. 4th at 348. In order to state a claim of violation of his due process rights, a defendant must also allege that the pretrial coercion was such that it would actually affect the reliability of the evidence to be presented at trial. *Id.; see also Pyle*, 317 U.S. at 215 (deprivation of constitutional rights found where state knowingly used perjured testimony to obtain conviction and deliberately suppressed favorable evidence).

Respondent's contention that Mr. Benavides has not shown that Estella's testimony was coerced by law enforcement or the prosecution in violation of Mr. Benavides's right to a fair trial (Response at 55) is incorrect. Mr. Benavides has made a prima facie showing that the prosecution and law enforcement unconscionably engaged in an intentional, protracted, and unlawful practice of threatening Estella with losing custody of Cristina if she did not inculpate Mr. Benavides. Indeed, the prosecution and law enforcement carried out their threats by removing Cristina from Estella's custody on two occasions prior to trial because she remained steadfast in her belief that Mr. Benavides did not injure Consuelo. The prosecution and law enforcement subsequently and continually informed Estella that in order to regain custody of Cristina, she must inculpate Mr. Benavides. As a direct result of the state's impermissible coercion, Estella falsely testified that she "always" told Mr. Benavides that if he ever injured her kids in any way, "I would have you locked up." (13 RT 2562.) Estella also testified that she told her girls to close the door to their bedroom when Mr. Benavides was at the house. *Id.* Her testimony that she had in the past—repeatedly—felt the need to threaten Mr. Benavides or give instructions to her daughters to protect them from Mr. Benavides was false and unreliable.

Estella made these false statements because she was desperate to keep her child, feared what law enforcement officers would do to her and Cristina, and was told that expressing the belief that Mr. Benavides was a threat to her children was the only way she would be allowed to maintain custody of Cristina. (Ex. 66 at ¶¶ 70-99.) At the time of her trial testimony, Estella remained under the continual coercive duress of the prosecutor and law enforcement because (1) they had demonstrated to Estella that they had absolute control over whether Estella had custody of Cristina and or even

whether Estella could speak to or see her daughter, and, (2) at the time of her testimony, the state wielded this power by withholding custody of Cristina from Estella. In fact, Estella did not believe that Mr. Benavides would, or had, ever hurt her daughters, and she told the girls to lock their bedroom door as a general safety rule because there was no man living in the house after Celestino Medina left. (Ex. 66 at ¶ 91.) Mr. Benavides unquestionably has demonstrated that Estella was under the coercive duress applied by the state at the time she gave her testimony, rendering her testimony unreliable in violation of Mr. Benavides's right to a fair trial.

The evidence is clear that the district attorney's office removed Cristina from her mother's custody in order to influence Cristina's testimony at trial. In addition, law enforcement sought to and did unlawfully influence Cristina's testimony. In violation of the Guidelines for the Investigation of Child Physical Abuse and Neglect, Child Sexual Abuse and Exploitation promulgated by the Commission on Peace Officer Standards and Training ("Guidelines"), the officers invoked outside authority and contaminated Cristina's account when they told her that Consuelo's doctor, a medical expert, agreed with them that the version Cristina told about her sister's injuries was not the full story, and caused Cristina to change her view; detectives and child protective services counselors also interviewed Cristina numerous times, causing her to become very frustrated and confused from the many times she was asked questions repeatedly about the incident and taking an enormous toll on her; and the state strongly influenced and negatively reinforced Cristina's responses when she did not incriminate Mr. Benavides. (Ex. 130 at 6447-6449 ("Guideline #58 ...while conducting interviews and interrogations, the investigating officer should consider the following procedures: ... protect confidentiality of all parties involved in the offense ... avoid

disclosure of case information to all parties involved in the alleged offense to prevent contamination"; "Guideline #59 . . . Every effort should be made to minimize the number of interviews with the child victim"; "Guideline #60 . . . Care should be taken to be sensitive to the needs of the child"; "Guideline #61 . . . When conducting child victim interviews, the investigator should consider the following: . . . allow the child to describe the incident in his/her own words . . . avoid influencing the child's account of the alleged offense . . . avoid being judgmental when discussing the alleged suspect.").)

Respondent argues that reference to the Guidelines constitutes a new untimely claim. (Response at 59.) Respondent misconstrues Mr. Benavides's claim. Mr. Benavides did not and does not contend that the Guidelines provide legal grounds for relief or that he is entitled to the granting of the writ because of law enforcement officials' failure to comply with them. Instead, the Guidelines provide support for the claims that the prosecution violated the Constitution by manufacturing false evidence. The fact that the law enforcement officials' violated numerous Guidelines, which are in part designed to ensure they protect the children and obtain accurate information about what transpired, provides strong, additional circumstantial evidence that their suggestive and coercive interview techniques produced false evidence. These allegations of law enforcement officers' failure to follow the Guidelines, therefore, do not constitute a new claim, as Respondent asserts, but rather simply provide this Court with additional information to evaluate the prosecution's unconstitutional misconduct.

Moreover, the evidence that the district attorney's office intended to shape and coerce Estella's and Cristina's testimony to support their case against Mr. Benavides is overwhelming. First, they told Estella that

Cristina was taken from her because she did not believe Mr. Benavides was guilty. (Ex. 66 at ¶¶ 70-99.) Second, the timing of both removals of Cristina from Estella's custody demonstrates that they were based on Estella's statements regarding her belief in Mr. Benavides's innocence and not on whether her home was safe for Cristina at the time she was questioned. Detective Valdez and Investigator Bresson told Estella that they had decided to remove Cristina from her home because there were "too many questions unanswered," only a few minutes after she stated that she did not believe Mr. Benavides had been the cause of Consuelo's previous injuries, he had not committed the crimes, she was not covering up anything or trying to protect him but could not believe he committed the crimes even after Bresson and Valdez told her they had "confirmed" it, and she was "not gonna say in court either that he did it." (Ex. 4 at 2199-2215.) Bresson then asked Estella if, "knowing that [Cristina was going to be taken from her] is there anything that you can add to our investigation?", affording her another opportunity to keep her child by providing the investigators with the information they wanted. (Ex. 4 at 2226.)

Although Cristina had been returned to her home temporarily on April 16, 1992 (Ex. 9 at 3699), the district attorney investigator again removed Cristina when Estella failed to provide the "correct" answers during an interview on July 9, 1992. District attorney investigator Ray Lopez conducted that interview, questioning Estella about whether she had seen any discharge, tearing, or bleeding when changing Consuelo's diaper on November 17, 1991, or seen any injuries to Consuelo's genitalia or anus that night, and whether she still believed Mr. Benavides did not cause the injuries Consuelo sustained that night, or prior to that night. After Estella denied seeing any injuries or believing that Mr. Benavides injured Consuelo, Detective Lopez once again had Cristina removed from her care

and placed her with her niece, Virginia (Vicki) Salinas. (Ex. 4 at 2469-2503, 2303.) When making this decision, Lopez contacted social services worker Jane Canning of the Department of Human Services and District Attorney Robert Carbone. (Ex. 4 at 2303.)

Respondent disputes Mr. Benavides's claim that law enforcement coerced Cristina to provide false and unreliable testimony by removing her from her home, isolating her from her family, and repeatedly questioning her about sex abuse with suggestive and coercive methods. (Response at 56.) Respondent also provides its own baseless speculation as to the motivations behind Cristina's removal from her home and ensuing dependency case—that they were motivated by concern for her safety—and incorrectly asserts they "were not handled by the District Attorney's Office in any event." (Response at 56.) Respondent cannot credibly argue that Cristina's removal was motivated by concerns for the child's safety. (Response at 56.) Notably, District Attorney Investigator Greg Bresson and Delano Police Detective Al Valdez never pretended that Cristina was being taken from Estella because her home was not safe. This was only logical, since the alleged source of the danger, Mr. Benavides, had already been arrested. Nearly a year after her first removal, District Attorney Investigator Lopez admitted law enforcement's role in the removal when he told UCLA social worker Nancy Hayes that "Well you know, we, we uh uh uh, the Delano Police Detectives had her removed from Estella's custody when this first happened . . . last year. . . ." (Ex. 61 at 5209.) Furthermore, Respondent ignores the information contained in the exhibits provided by Mr. Benavides in support of the Corrected Amended Petition which demonstrate that the prosecutor's office was, in fact, very much involved in removing Cristina from her home and the ensuing dependency case. District Attorney Investigator Ray Lopez played an integral role in

procuring the evidence submitted to the juvenile court to paint Estella as an unfit mother. (Ex. 9 at 3607, 3642, 3687, 3690.)

Suggestive and coercive questioning of a child, including using leading questions and conditioning future benefits upon her providing "correct" answers, produces unreliable statements and testimony. *See Idaho v. Wright*, 497 U.S. 805, 813-18 (1990) (doctor engaged in suggestive questioning of child witness when he failed to record interview on videotape, asked leading questions, and questioned the child with a preconceived idea of what she should be disclosing); *Brown v. Lyford*, 243 F.3d 185, 188 (5th Cir. 2001) (mishandling of child witnesses who allegedly complained of abuse, by using "holding technique" in which children were restrained while they answered questions, made their testimony unreliable); Debra A. Poole and Michael E. Lamb, *Investigative Interviews of Children* (1998); Stephen J. Ceci and Maggie Bruck, *Jeopardy in the Courtroom, A Scientific Analysis of Children's Testimony* (1995).

In this case, law enforcement personnel and individuals acting on their behalf undermined the accuracy and reliability of Cristina's statements about Mr. Benavides's relationship with her sister and the events surrounding her sister's death by using closed-ended interview questions that suggested information and theories; repeating questions and information to indoctrinate Cristina to accept these statements as her own; and providing positive reinforcement when Cristina gave answers the interviewers wanted to hear and negative reinforcement when she did not. (Ex. 89 at ¶¶ 13-47.) In response to the tactics used by interviewers, Cristina provided false and unreliable testimony, including her statements at trial that the first night Mr. Benavides cared for her and her sister, Mr. Benavides "wouldn't let" Cristina sleep with her sister in her bedroom, took

Consuelo into his room for the night and locked the door until the morning (11 RT 2189-90); she feared Mr. Benavides and did not know he was in jail when he telephoned the house one day (11 RT 2191); Mr. Benavides took care of her and Consuelo only twice: the night of the locked door incident and the night Consuelo was hurt (11 RT 2194); the night her sister was hurt Mr. Benavides told her she could go play for only 30 minutes (rather than 15 minutes as she previously told investigators) (11 RT 2181-82); and Mr. Benavides was nervous when he asked her to come home that night (11 RT 2186). Cristina's statements to police, and then to the court, regarding Mr. Benavides's relationship with her sister and the events surrounding her sister's death were thus unreliable. Specifically, Cristina's statement that Mr. Benavides had taken her sister into the bedroom and locked the door falsely implied that Mr. Benavides had taken Consuelo into the bedroom to harm her, and that Cristina had tried to go into the room because she was worried about her sister's safety while she was alone with Mr. Benavides. (11 RT 2190.) Before exposure to coercive questioning, Cristina believed neither of these things.

Respondent argues that Cristina's statement to her mother about the locked door incident on the way back from Magic Mountain in May 1992 was not the product of coercion because this particular statement was not made during a conversation with police officers or investigators. (Response at 56.) The fact that Cristina discussed this incident with her mother at a time when she was not being questioned in no way refutes the sustained pattern of coercion by law enforcement and others acting on behalf of law enforcement. As Professor James Wood describes in his declaration, repeated suggestive questioning that introduces new information to a child may have a profound effect on a child's statement and memory, causing the child not only to change what she says about a

particular event, but also to change what she believes and remembers about it. (Ex. 89 at ¶¶ 13-47.) This is because, as Professor Wood explains, children who are nine or ten years old have more difficulty than adults with source-monitoring, or determining the source of their memories, such as whether something actually happened or whether they just imagined or thought about it happening. (Ex. 89 at ¶¶ 9, 39.) This is particularly problematic for children who are interviewed more than once. (Ex. 89 at ¶¶ 9-47.) Cristina also likely knew that the reason she was removed from her home was that her mother refused to believe and affirm that Mr. Benavides had harmed Consuelo. (*See, e.g.*, Ex. 4 at 1873, 1899-1900.) Given this conditioning, contrary to the state's position at trial, Cristina did not "spontaneously" discuss the case and a particular incident involving Mr. Benavides and his actions toward Consuelo with her mother that day.

Respondent contends that Mr. Benavides has not established that Cristina was subjected to ongoing coercion between the time she disclosed the incident and the time of trial. (Response at 56.) Respondent ignores the information contained in the Corrected Amended Petition describing the repetition and nature of the various methods of coercion applied to Cristina during the time frame to which Respondent refers, including evidence that she continued to be interviewed by law enforcement as well as her aunt Virginia Salinas, as well as evidence that she was removed for a second time from Estella's custody though Cristina's desire was to live with her mother and her experiences living away from her mother were traumatic for her. (Ex. 4 at 2303; Ex. 9 at 3698-3700; Ex. 67 at ¶¶ 19-20, 22, 25-45.) In fact, Cristina was living with her father, Celestino Medina, at the time of trial—a placement that was particularly difficult for her. (Ex. 67 at ¶¶ 40-43.) Consequently Respondent's contention is inaccurate. (RCCAP at 56-64.) Contrary to Respondent's assertion, that counsel for Mr. Benavides

cross-examined Cristina at trial has no bearing on whether her statements were coerced. (Response at 56-57.)

Respondent dismisses as "speculative" Professor Wood's expert opinion that Cristina's statements and testimony were unreliable as a likely result of the state's coercive conduct toward Cristina. Respondent asserts that Professor Wood's statements regarding likely, apparent, or possible causes and effects of the state's conduct on Cristina's statement render his opinion speculative. (Response at 57.) Respondent's assertion lacks merit. That Professor Wood cannot state with absolute certainty that Cristina's statements are false because he was not present when the events that Cristina describes occurred does not render his opinion speculative. Professor Wood's opinion that Cristina's statements were coerced and resulted in unreliable statements that were not based on her memory is based on his extensive experience, training, and research regarding the proper methodology for reliable interviews of children in cases of suspected sexual abuse. (Ex. 89 at ¶¶ 1-6.) Moreover, Professor Wood's expert opinion is based on a detailed analysis of Cristina's statements and the manner in which the suggestive questioning, reinforcement, conformity pressure, and authority influence led to wide variability in the facts she described. (Ex. 89 at ¶¶ 17-47.) Professor Wood's conclusion, after reviewing all the statements, was unequivocal: "The resulting variability of the facts that Cristina described, as well as the circumstances and context in which her statements were given, indicated that the source of Cristina's statements was often not her own memory." (Ex. 89 at ¶ 47.) Accordingly, Mr. Benavides's claim states an adequate basis for habeas relief.

Respondent argues that there is no evidence demonstrating that detectives coerced Cristina into adopting a timeframe for when Mr. Benavides had taken Consuelo into the master bedroom. (Response at 57-

59.) The interview with Cristina conducted on June 12, 1992, by Investigator Lopez, however, demonstrates that the investigator used negative reinforcement to modify Cristina's response. When she said repeatedly, four separate times, that she did not remember when this incident occurred, Lopez expressed his disapproval of her answers by repeating the question. He asked Cristina four times whether the incident happened in September or October, or near Halloween, finally falsely stating that "we boiled it down as sometime between September and October," when Cristina had never offered this specific information. (Ex. 4 at 1872-74, 1882.) As Professor Wood documents, this type of suggestive questioning, which reinforces certain answers and ignores other answers that do not agree with the theory held by the interviewer, produces very unreliable results. (Ex. 89 at ¶¶ 31-42; *see also Idaho v. Wright*, 497 U.S. at 812-13, 826-27.)

Respondent disputes Mr. Benavides's claim that trial counsel rendered prejudicially ineffective assistance when they failed to object to Cristina's and Estella's unreliable and false testimony because, in Respondent's view, the testimony was not coerced. (Response at 59.) Mr. Benavides has established in this Reply and the Corrected Amended Petition that said testimony was, in fact, coerced. Trial counsel's failure to object to the testimony was therefore unreasonable because it allowed the trial to become infected with prejudicial, material, and false evidence. Cristina's statements that Mr. Benavides had taken her sister into a bedroom for the night and locked the door were substantially material to the case and prejudicial to Mr. Benavides. There was no direct evidence demonstrating that Mr. Benavides had caused Consuelo's injuries on November 17, 1991, and therefore her death. The district attorney thus relied on a theory in which Mr. Benavides had been molesting and abusing Consuelo for months

prior to her death, and had caused her to suffer various injuries that went unreported by Estella Medina, leading up to the incidents that killed Consuelo which were the culmination of the pattern of abuse engaged in by Mr. Benavides. (18 RT 3660 ("I will submit to you, ladies and gentlemen, that [Mr. Benavides inflicted previous injury on Consuelo] is a very sensible conclusion to draw from the facts in this case . . . the child was previously abused, both physically and sexually, but [the evidence] shows that it happened over a period of time. And it shows with Estella Medina why those things went unreported. Unreported. This child has fractured ribs, scar tissue in the abdomen, blunt trauma tears in the vagina and anus. Gee, I wonder who did it on November 17th, 1991, given the state of this evidence.").) In support of this theory, the prosecution attempted to present various explanations of prior injuries sustained by Consuelo. These included injuries to her wrist, ribs, pancreas and head. However, no other incident, aside from the one described by Cristina in which Mr. Benavides took Consuelo into the bedroom, suggested that Mr. Benavides had engaged in any prior molestation or sexual abuse. Thus, in order to complete the prosecution's desired picture of Mr. Benavides as a molester who had been harming Consuelo for months, a prior incident of sex abuse was required, and detectives hounded Cristina until she provided it. The prosecution then improperly and falsely argued at trial that, unlike the testimony of defense witnesses, "[a]nytime we corroborate anything that Christine[24] [siç] tells us, it comes out true." (18 RT 3656.)

The coerced testimony provided by Estella was similarly prejudicial. Estella, as the adult witness who had spent the most amount of time with

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[24] The transcripts of law enforcement interviews and the trial spell Cristina's name with an "h" even though she spells it without one. (Ex. 67.)

both Mr. Benavides and her daughters, provided a crucial piece of evidence that the prosecution needed to seal its case against Mr. Benavides: that the woman who knew his behavior best around her daughters had become suspicious of Mr. Benavides's intentions with her daughters.

Had evidence of the closed-door incident not been presented, the jury would have had no evidence in support of the prosecution's theory that Mr. Benavides caused "old damage to the vaginal and anal area" (18 RT 3587), and was "another child molester" (18 RT 3593), who stayed with Estella because she did not protect her daughters, but instead left him alone with them—to babysit them—and allowed him to molest Consuelo (18 RT 3596). The jury would have had no reason to believe that Mr. Benavides possessed any of the "perversion[s]" that the district attorney attributed to him that would lead a grown man to suddenly rape, sodomize, shake, and beat a twenty-one month old girl. (18 RT 3596.) Finally, the court relied on Cristina's description "as to the earlier time or occasion when [Mr. Benavides] took Consuelo into his bedroom, closed the door and kept her there for the rest of the evening," to explain Consuelo's prior injuries, and deny Mr. Benavides's motion for a new trial. (19 RT 3856.) Without this evidence, the jury would not have convicted Mr. Benavides of the rape and sodomy of Consuelo because there would have been no reason to believe Mr. Benavides was sexually abusive, the court would not have relied on this testimony, which it termed a "significant part of the evidence," and Mr. Benavides would not have been sentenced to death.

### 2. The State Prejudicially Interfered With the Defense's Access to Key Prosecution Witnesses.

Respondent disputes Mr. Benavides's claim that the state prejudicially interfered with the defense's access to Estella Medina by threatening her with losing custody of her daughter Cristina, contending

that because the threat came from Child Protective Services (CPS), the state was not responsible for the order. (Response at 60.) Respondent is incorrect. Mr. Benavides has demonstrated that the prosecution worked very closely and in concert with CPS in twice orchestrating the removal of Cristina, repeatedly interviewing Cristina with the aim of producing harmful evidence against Mr. Benavides, and placing Cristina in the home of family members who agreed to assist in the state's efforts to coerce Cristina to provide false evidence against Mr. Benavides.

Respondent similarly contests Mr. Benavides's claim that the state prejudicially interfered with the defense's access to Cristina by telling Cristina not to speak to the defense, arguing that "there is no evidence that the district attorney's office controlled who Christina (sic) talked to." (Response at 60-61.) Respondent's argument is baseless, as Mr. Benavides has demonstrated the great lengths to which the district attorney's office and law enforcement went to control not only who Cristina spoke with, but also who she did not speak to and what she said to those she did speak to. Cristina was not allowed to speak to her own mother, except on limited occasions which were very carefully monitored by the individuals working with the prosecution to build a case against Mr. Benavides. Even Cristina's cousin, Virginia Salinas, acted as an agent of law enforcement and assisted District Attorney Investigator Ray Lopez in suggesting information to Cristina in order to change her statements regarding Mr. Benavides. A tape-recorded interview demonstrates that Lopez told Virginia that "unless we're gonna take it any further . . . the family's the only one that can get anything out of [Cristina] . . . . Maybe you can get her to talk." (Ex. 4 at 1674-75.) He then described for Salinas the questions she should ask Cristina about her statement that she had a friend who had been raped, such as "that friend that was raped and that friend that was afraid to go into taxis. Is that you?"

and "Hey, who's this friend? Why do you have to keep it a secret? Is that friend you?" (Ex. 4 at 1674-75.) Detective Lopez also arranged to have Cristina placed at Virginia Salinas's house. (Ex. 4 at 1674-75, 2290, 2303.) Salinas was indeed an agent of law enforcement, because the district attorney investigator knew of and sanctioned her information gathering—even going so far as to *request* that she interview a witness in a criminal case—and because she did so to assist law enforcement, not to further her own ends. *See United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994).

Furthermore, Respondent's assertion that defense investigator John Purcell conducted an hour and half interview of Cristina is patently false. (Response at 60.) As described in full detail in Claim Thirteen, subclaim 7(c) of this Reply, Respondent misconstrues and inaccurately relies on defense investigator Jon Purcell's billing records (Resp. Ex. 4 at 4, 6), and ignores Mr. Purcell's explanation in his declaration that when he tried to interview Cristina and her extended family, "they told [him] that the district attorney investigators had told them in no uncertain terms that they were not to talk to the defense" (Ex. 106 at ¶ 4).

**3. The State Had a Duty to Disclose Exculpatory or Impeaching Evidence Located Within Department of Human Services, Child Protective Services, and Social Services Records That Were Within Its Constructive Possession or Control, and That Were Created by Agencies Acting on the Government's Behalf.**

Respondent argues that the prosecution had no duty to disclose the CPS and Department of Human Services (DHS) records regarding Cristina Medina that contained exculpatory or impeaching information because they were not related to Mr. Benavides's alleged crime. (Response at 61.) Respondent specifically disputes its duty to disclose a letter containing information that Cristina's memory for events that occurred the day of

November 17, 1991, was poor, pointing out that the document is stamped "confidential patient information *see* California Welfare and Institutions Code section 5328." (Response at 61; Ex. 9 at 3628-29.) However, CPS documents in general pertaining to Cristina Medina, and this document in particular, most definitely was related to the investigation of Consuelo's death as Cristina was a key prosecution witness and the reliability of her pretrial statements and in-court testimony was extremely relevant. (*See* RCCAP at 65-68.) Further, these documents were under the constructive control of law enforcement, and law enforcement had knowledge of these documents. (*See* RCCAP at 65-68.)

The government's duty to disclose favorable or exculpatory evidence to the defense, *see Brady v. Maryland*, 373 U.S. 83 (1963), exists whether the defendant makes a specific request, a general request, or no request at all. *See United States v. Agurs*, 427 U.S. 97, 107 (1976). The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge any favorable evidence known to the others acting on the government's behalf, such as the police and members of other government agencies. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *In re Brown*, 17 Cal. 4th 873 (1998); *see also Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). "The fundamental due process principle . . . is that the prosecution may not deprive an accused of the opportunity to present material evidence which might prove his innocence. Even if the prosecution's motives are 'praiseworthy,' they cannot prevail when they 'inevitably result, intentionally or unintentionally, in depriving the defendant of a fair trial.'" *Bellizzi v. Superior Court*, 12 Cal. 3d 33, 36-37 (1974) (quoting *People v. Kiihoa*, 53 Cal. 2d 748, 754 (1960)).

The prosecutor may not delegate the job of determining what evidence is exculpatory to the police or any agency, but must affirmatively seek out favorable, material information from police, *see Kyles*, 514 U.S. at 438; *see also Walters v. Superior Court*, 80 Cal. App. 4th 1074 (2000), as well as other agencies. *See Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc) (Department of Corrections); *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986) (Department of Alcohol, Tobacco, and Firearms); *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461-63 (9th Cir. 1993) (Drug Enforcement Administration); *United States v. Steel*, 759 F.2d 706, 714 (9th Cir. 1985) (Federal Bureau of Investigations); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991) (personnel files of federal agent witness); *In re Brown*, 17 Cal. 4th at 873 (crime lab); *see also Ritchie*, 480 U.S. at 57-58 (state statute that does not prohibit disclosure of Children and Youth Services agency files in all circumstances indicates that state policy does not prevent disclosure of material files to defendant).

Unquestionably, the Delano Police and the Kern County District Attorney's investigators, and the District Attorney's Office, had direct knowledge of the existence and contents of the CPS and other social services records that were created at the behest of the detectives and investigators themselves. The letter written by counselor Terry McCauley was mailed directly to a county agency, the Kern County Family Preservation Unit, to be maintained in their files, with the specific understanding that "this document may become part of the record of the Court." (Ex. 4 at 3629.) In fact, the writer attested to the contents of the letter under penalty of perjury. (Ex. 4 at 3629.) This letter was maintained by DHS as part of the case file in the juvenile case concerning Cristina Medina, and as part of that case was available to law enforcement officers as they coordinated her placement and interviews regarding Mr. Benavides

and her sister's death. Neither the letter nor its contents were disclosed to Mr. Benavides before trial.

Further, Cristina Medina was removed from her mother's custody for the first time on November 26, 1991, by Police Detective Valdez and District Attorney Investigator Bresson, who placed her in the care of CPS. The second time she was removed from her mother's custody, on July 9, 1992, the decision maker was again a district attorney investigator, Investigator Lopez, who made the decision either on his own and then communicated it to DHS, or decided in coordination with DHS caseworker Jane Canning. The District Attorney's Office also shared information with DHS and CPS during the investigation and prosecution of Mr. Benavides (Ex. 4 at 1675; Ex. 5 at 2561[25]), and made recommendations for, or made decisions in, Cristina's case, such as where she would be placed. Lopez even testified at CPS hearings in the juvenile case regarding Cristina (Ex. 9 at 3607, 3687, 3689-90), and social services caseworker Jane Canning attended hearings regarding Mr. Benavides's case and made sure she was informed of the proceedings in the criminal matter, citing extensively from police reports in her reports to the juvenile court. (Ex. 9 at 3611, 3613, 3589-3600, 3605-07, 3619-20, 3633-36, 3640-42, 3650-3653.) Cristina was thus removed from her home at the direction of the prosecution, and the prosecution and Department of Social Services together coordinated the subsequent actions taken with respect to Cristina, her placements, and interviews of her regarding her sister's death. Furthermore, because the

[25] This document shows that DHS worker Alice Thompson obtained the police reports relating to Mr. Benavides's case. This material information was not disclosed to the defense prior to trial, and was only discovered by Mr. Benavides post-conviction. Had the prosecution disclosed this document, the defense would have received additional evidence that the prosecution's involvement in Cristina's placement was designed to affect her testimony and Estella's testimony.

prosecution knew Cristina was interviewed repeatedly by social services personnel regarding the events surrounding her sister's death, the prosecution knew that these interviews might be a source of information regarding the events surrounding Consuelo's death, including exculpatory or impeaching information, and therefore had the duty to review them to determine whether their disclosure was required.

Respondent states that the prosecution would not have had to disclose the letter because it was confidential under Welfare and Institutions Code section 5328 and that Cristina may have had a privacy interest in the letter. (Response at 61-63.) Respondent notably does not submit any evidence that the prosecution was unaware of the letter. Moreover, in addition to the fact that the author of the letter apparently deemed its confidentiality limited when she acknowledged that it might be disclosed to the juvenile court, section 5328 provides for 22 individuals to whom (or situations in which) such documents may be disclosed, including persons designated by the minor's parent, courts and court personnel, and law enforcement officers or persons designated by law enforcement agencies. In light of these exceptions to the confidentiality of such documents, there was no barrier to the District Attorney's Office obtaining this document in addition to the rest of the DHS and CPS files concerning Cristina's interviews with social services personnel regarding the events surrounding her sister's death, and her relationship with law enforcement and the involvement of law enforcement in her CPS case.

These documents, as well as the remaining documents in the DHS juvenile case file concerning Cristina, contained a wealth of exculpatory or impeaching information demonstrating the coordination between DHS and the prosecution investigators investigating Mr. Benavides's criminal case. In light of the prosecutor's false representation to the court that Cristina's

removal and juvenile case "had absolutely nothing to do with my office" (1 CT 143-45), this information was clearly impeachment material that should have been disclosed. In addition, since the many Jurisdictional and Dispositional Reports of the DHS caseworkers discussed statements by witnesses in Mr. Benavides's criminal case, including statements by Estella and Cristina, that clearly demonstrated the connection between the witness's statements (and changes in witness statements) and the actions of prosecution investigators, the Kern County District Attorney's Office had a duty to disclose these reports under *Brady*, 373 U.S. at 83, and *Kyles*, 514 U.S. at 419.

Respondent contests the information submitted by Mr. Benavides establishing that Kern County law enforcement and district attorney's office have a history of using DHS/CPS to violate the constitutional rights of criminal defendants, manufacture false evidence, and coerce testimony, arguing that the information cited does not "concern this particular case." (Response at 63.) Respondent is mistaken, and this Court certainly must consider the gravity of egregious misconduct in which this county's agencies have participated over a span of many years, including the time period during which Mr. Benavides was arrested and tried. *See Miller-El v. Dretke*, 545 U.S. 231, 239-240 (2005) (holding that trial court will sometimes have to look at information beyond facts of defendant's case in deciding whether neutral explanation offered by prosecutor for a challenged peremptory strike is pretextual; although some false reasons are shown up within four corners of given case, sometimes court may not be sure unless it looks beyond case at hand). The Kern County law enforcement agencies' improper investigation of child abuse cases was so serious that it led to investigation by a Grand Jury and the California Attorney General in the 1980s. (Ex. 150.) The coercive tactics employed by law enforcement and

the prosecution in Mr. Benavides's case are the same customary techniques used for years in suspected molestation cases in Kern County, techniques that have been repeatedly exposed and discredited. As such, contrary to Respondent's assertion, the information unquestionably concerns this particular case.

Respondent argues this claim is procedurally barred because it should have been raised on appeal. (Response at 53, citing *In re Dixon*, 41 Cal. 2d. 756 (1953).) Mr. Benavides's claim is not barred by *Dixon*, as the claim of state coercion of witnesses and failure to disclose evidence is supported by, and depends upon, numerous extra-record facts that are not part of the record on appeal. *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998).

Respondent asserts that Mr. Benavides's claim is foreclosed pursuant to *People v. Demetrulias*, 39 Cal. 4th 1, 20-21 (2006), because Mr. Benavides "fail[ed] to move to exclude Estella's testimony prior to trial." (Response at 54.) Respondent's assertion is incorrect. Mr. Benavides could not have moved to exclude Estella's testimony because the statements Estella made at trial were made for the first time during her testimony. The state's coercion culminated in the false testimony Estella provided at trial. To the extent that trial counsel failed to object to and move to exclude the testimony at the time it was elicited, trial counsel was ineffective for failing to do so.

Respondent also asserts that *In re Lindley*, 29 Cal. 2d 709, 723 (1947), procedurally bars review of this claim in habeas corpus proceedings. *Lindley* precludes review of a court's ruling on admissibility of evidence in habeas proceedings. *Id.* Mr. Benavides's claims of prosecutorial coercion are not barred by *Lindley*, because the trial court did not make a pretrial ruling as to whether to exclude the testimony of Cristina and Estella with the knowledge that their testimony was coerced. These

claims challenge the prosecution's reliance on false evidence that was in fact not disclosed to the defense prior to trial—they do not challenge evidence that was considered for admission and then admitted by the trial court. Thus, these claims are properly before this Court on habeas.

Finally, in a footnote, Respondent argues that Mr. Benavides's claim that counsel was ineffective in failing to discover this evidence and exclude this false testimony has no merit. This argument is addressed fully in Claim Thirteen. Counsel was indeed deficient in failing to investigate the prosecution's misconduct, which she had suspicions about early in the case. (1 CT 142-45.) Her failure to investigate this information, prevent its introduction, or at least counter it at trial, seriously prejudiced Mr. Benavides in that it allowed the prosecution to present extensive false evidence regarding prior sexual abuse and prior abuse injuries when in fact no evidence existed showing that Mr. Benavides ever committed any past acts of abuse, sexual or physical.

Mr. Benavides has made a prima facie showing that he is entitled to reversal of his convictions and death sentence on the grounds that his trial was rendered fundamentally unfair by coerced and manufactured testimony.

### C. Claim Three: The State Presented False Testimony Regarding the Events That Occurred on November 17, 1991.

Mr. Benavides has established a prima facie case that the prosecution presented false evidence, inference, and argument at trial regarding, among other things, the timing of the events on November 17, 1991, alleged statements by Mr. Benavides, and Mr. Benavides's demeanor. The use of this false testimony rendered Mr. Benavides's conviction and sentence of death in violation of Mr. Benavides's rights to a fair, reliable, rational, non-arbitrary and accurate determination of guilt and penalty, a trial free from

false and misleading evidence, an opportunity to confront and refute adverse evidence, the disclosure of all material exculpatory evidence, and the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, international law, and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution, Section 1473 of the California Penal Code and other state laws.

The presentation of false testimony is "inconsistent with the rudimentary demands of justice" and violates due process, requiring a reversal of the conviction. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935). A prosecutor commits misconduct by knowingly using perjured or false testimony to seek a conviction, or by failing to correct false testimony—either by suppressing evidence that would correct the testimony, failing to investigate whether the testimony might be false, or otherwise. *See United States v. Agurs*, 427 U.S. 97, 112-13 (1976); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This right extends to situations in which the prosecution allows a witness to give a false impression of the evidence, *see, e.g.*, *Alcorta v. Texas*, 355 U.S. 28, 31 (1957), as well as those in which testimony presented is false outright, *see, e.g.*, *United States v. Blueford*, 312 F.3d 962 (9th Cir. 2002). It applies to instances where the false testimony is unsolicited by the State, *see Giglio v. United States*, 405 U.S. 150, 154 (1972), as well as those in which the presentation is knowingly made, *see Napue*, 360 U.S. at 264. In California, the presentation of false testimony warrants reversal even though the prosecution had no way of becoming aware at the time that the testimony was false. Cal. Penal Code, § 1473(b)(1) (West 2011); *In re Sassounian*, 9 Cal. 4th 535, 543 (1995) (A prisoner is entitled to relief by writ of habeas corpus when "[f]alse evidence that is substantially material or probative on

the issue of guilt or punishment was introduced against a person at . . . trial . . . .").

Whether defense counsel is aware of the falsity of trial testimony or statements makes no difference. The prosecutor's duty to correct false testimony arises, not only out of its "unique power[] to assure that defendants receive fair trials," *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000), but also out of "the free standing constitutional duty of the State and its representatives to protect the system against false testimony." *Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1118 (9th Cir. 2001). Therefore, regardless of whether defense counsel should have known that a state witness testified falsely, "[a] prosecutor's 'responsibility and duty to correct what he knows to be false and elicit the truth,' *Napue*, 360 U.S. at 269-70, requires [him] to act when put on notice of the real possibility of false testimony." *Id.* at 1117-18.

A habeas petitioner is entitled to relief when 1) false evidence or false testimony was presented at his trial; 2) the state knew or should have known the evidence or testimony was false (to prove a violation of federal constitutional law only); and 3) the false or perjured testimony may "in any reasonable likelihood" have affected the judgment of the jury. *Napue*, 360 U.S. at 269, 272; *see also Sassounian*, 9 Cal. 4th at 543 (citing *United States v. Bagley*, 473 U.S. 667, 678 (1985)). Once this standard is satisfied on habeas, no additional showing of prejudice need be made under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), *see, e.g.*, *Benn v. Lambert*, 283 F.3d 1040, 1052 (9th Cir. 2002), or under the harmless error analysis of *Chapman v. California*, 386 U.S. 18, 24 (1967). *Bagley*, 473 U.S. at 682; *Sassounian*, 9 Cal. 4th at 545 n.7. Rather, it is then the prosecution's burden to demonstrate that the outcome of the trial was not affected by the false evidence. *Agurs*, 427 U.S. at 103-07.

During trial, the prosecutor was able to bolster his weak circumstantial case by using Mr. Benavides's testimony as evidence of his guilt. For many reasons, Mr. Benavides's trial testimony was chaotic and confusing. Mr. Benavides did not understand many of the questions and sometimes offered bizarre responses that were obviously due to Mr. Benavides's lack of understanding of the proceedings because of his limited cognitive abilities, *see infra* Claim Twenty; the poor interpretation provided at trial, *see infra* Claim Twelve; the poor interpretation provided during his interviews with police, *see infra* Claims Nine and Twelve; trial counsel's failure to prepare Mr. Benavides for the trial proceedings, *see infra* Claim Thirteen; and the fact that much of the prosecution's cross-examination relied upon hearsay statements that were not recorded verbatim, but rather summarized by the prosecution's investigators.

The prosecution's cross-examination of Mr. Benavides, using unreliable and false accounts of Mr. Benavides's previous statements to law enforcement and false information allegedly derived from prior interviews with Cristina Medina and Maria Benavides, violated Mr. Benavides's constitutional rights.

### 1. The Prosecutor's Cross-Examination of Mr. Benavides on Minute Details of His Alleged Statements Improperly Exploited His Impaired Mental Functioning and the Lack of Proper Interpretation and Exposed the Jury to Unreliable Hearsay Statements.

Respondent claims the prosecutor did not improperly cross-examine Mr. Benavides with irrelevant and unreliable hearsay statements and ask questions for which the prosecutor did not have a good faith basis. (Response at 65.) Respondent's argument lacks merit.

Law enforcement authorities interviewed Mr. Benavides twice, at 6:00 a.m. and again at 4:05 p.m. on November 18, 1991. Detective Nacua

stated that during the first interview "through questioning it was concluded that Consuelo was left alone with [Mr. Benavides] in a healthy state for approximately fifteen minutes," and that after further questioning Mr. Benavides "had conflicting statements, which resulted in his arrest [for] attempted murder, sodomy, child molest, and assault with a deadly weapon." (Ex. 4 at 2331.) The interview at 6:00 a.m. was not tape-recorded, nor were handwritten notes provided to defense counsel. The only memorialization of this interview is a summary printed in a police report by Detective Al Valdez of the Delano Police Department.[26] (*See* Ex. 4 at 1909-10.)

During the 4:05 pm interview, portions of which were recorded, Mr. Benavides said that he found Consuelo outside the front door, bleeding and vomiting (Ex. 4 at 1982-84 ("I look out when the girl was on the ground")), and that he did not know what had happened to her (Ex. 4 at 1982-83 ("I don't know if [she hit herself] on the door because I didn't see. Like I told you in the morning I didn't see. When I came out she was already on the floor.").) He later repeated that he did not know what happened because he "didn't see." (Ex. 4 at 2008.)

At trial, the statements Mr. Benavides gave to the police during his first untranscribed interview were presented to the jury and the trial court by Detective Valdez, with the assistance of leading questions by the district attorney. (14 RT 2744-51.) Mr. Benavides then testified that he did not know what happened to Consuelo, he did not know if she ran into a door because he did not see her hurt herself, and he did not tell police she had run into a door. (15 RT 3020-23.)

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[26] Mr. Benavides was not read his Miranda rights before the 6 a.m. interview. *See* Claim Nine, *infra*.

During cross-examination, the prosecutor portrayed Mr. Benavides as a liar because Mr. Benavides was unable to follow and explain alleged inconsistencies between his previous statements and his current testimony. As a result, the prosecutor urged the jury to interpret Mr. Benavides's inability to understand questions as evasiveness and his confusion as lies.

First, the prosecutor hounded Mr. Benavides because he told the police that he had put Consuelo on the bed when he brought her in the house, but then clarified in his testimony that he first had put her on the sofa, cleaned her up, and then moved her to the bed. The prosecutor repeatedly raised this issue. The prosecutor first asked Mr. Benavides, "Did you tell Detective Valdez that you took her into her room and laid her on the bed?" (15 RT 3034.) He raised this issue again later, cross-examining Mr. Benavides using the hearsay statements of a witness who was not present when Consuelo was hurt: "Estella [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?" (15 RT 3047.) And finally, the prosecutor asked again about whether Mr. Benavides had mentioned the sofa to the police:

> Q: Did you ever tell the police when you talked to them on November 18 anything about putting Consuelo on the sofa?
>
> A: Yes
>
> Q: Was that during your taped statement?

(15 RT 3052.)

The prosecutor thus implied that Mr. Benavides had changed his version of events by inserting a new fact into his testimony—that he had placed Consuelo on the sofa first—which was not recorded in police interviews. The prosecution's reliance on Mr. Benavides's first interview

with police and subsequent argument that Mr. Benavides was lying during his testimony violated Mr. Benavides's constitutional rights. The first statement was not tape-recorded or otherwise memorialized verbatim and provided no basis for the prosecution to cross-examine Mr. Benavides on whether he had made a particular statement to police. The fact was not even inconsistent with his prior statements, or statements to others, but was presented as such by the prosecution, along with many other supposed inconsistent facts.

Another example involves the prosecution's fabrication of false evidence that Mr. Benavides said he had lost sight of Consuelo for "one minute." Ignoring the fact that Mr. Benavides interpreted "one minute" as a short period of time, and not literally sixty seconds, the prosecution confused and bullied Mr. Benavides until he stated that he had told police the "opposite of the truth" and "not the truth"—referring to the period of time during which he had lost sight of Consuelo. (15 RT 3056-57.) The jury undoubtedly interpreted this as an admission that Mr. Benavides lied to the police in general about what happened, when in fact Mr. Benavides, with his limited cognitive abilities, was admitting that he was incorrect about how long Consuelo was not in his sight. Even this admission was false. Mr. Benavides's statement was actually still the same: he had lost sight of her for a short period of time.

This contorted admission led to further harassment and false insinuation by the prosecution on the subject of truth. When Mr. Benavides could not remember what he had told his mother about the events a year before, the prosecutor improperly insinuated that he was lying: "Does the truth change for you depending on who you are talking to, sir? . . . Does your story change depending on who you are talking to? . . . Has your

statement changed depending upon whom you have talked to? . . ." (15 RT 3059.)

The prosecution falsely implied that Mr. Benavides fabricated a story that Consuelo had been hit by a car, when Mr. Benavides had stated repeatedly that he did not know what happened to Consuelo, and only possibly told his mother the child *might* have been hit by a car.

> Q: By the way, did you ever tell the police anything about Consuelo being hit by a car?
>
> A: I told them that I didn't know what had happened to her, if she fell from a ladder or she got hit by a car.
>
> Q: Do you see car in that transcript, sir, or hear that on tape?"

(15 RT 3049.)

Actually, there was mention of a car accident during the interview, but not by Mr. Benavides. Instead, it was raised by Detective Valdez. In the taped portion of the police interview with Mr. Benavides, Valdez explained to Mr. Benavides, because Mr. Benavides did not know what injuries Consuelo had sustained, that one of her injuries was a "cut" pancreas. "And that only happens if someone hit her on purpose or if she crashed in a car," said Valdez. (Ex. 4 at 1999.) The prosecution therefore misrepresented the evidence to the jury by stating that Mr. Benavides had suggested the possibility that Consuelo was in a car accident when in fact the detective had done so. The fact that Mr. Benavides might have mentioned this *as a possibility* to family members after his interview with detective provides no evidence of guilt. (Ex. 4 at 2136 ("The report also says here that [Mr. Benavides said] maybe a car ran over her and then maybe someone picked her up and put her there in front of the door. Maria:

Yes, in front of the door, (unintelligible)").)[27] Instead, it is the product of his low level of cognitive functioning, which led him to repeat an idea suggested by the police in his interview. (*See, e.g.*, Ex. 126 at ¶¶ 58-63.) Because the prosecution had no good faith basis for cross-examining Mr. Benavides regarding whether he fabricated a story about Consuelo getting hit by a car, the prosecutor's questioning was improper, invited unsupported speculation, and violated Mr. Benavides's constitutional rights. *See, e.g.*, *United States v. Blueford*, 312 F.3d at 968 ("it is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt . . ."); *People v. Lomax*, 49 Cal. 4th 530, 580 (2010) (holding cross-examination lacking a good faith basis improper).

The prosecution repeatedly called Mr. Benavides a liar when evidence, instead, demonstrated that his statements were true. An example of Mr. Benavides's statements regarding the investigator's tactics is illustrative. Mr. Benavides mentioned that the police apparently turned the tape-recorder on and off during his interview. "Every once in awhile they did stop the tape. They would stop it." (15 RT 3049.) The prosecutor used this as further evidence that Mr. Benavides was lying, not only about this, but again when he allegedly made up a story about Consuelo being hit by a car. "Did they stop it when you said [the word] automobile and restart it afterward? Is that what you're saying, Mr. Benavides?" (15 RT 3049.) The prosecutor again accused Mr. Benavides of lying about the recording during closing argument. "Absolutely no evidence of [the recording being

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[27] As noted above, it is unclear from Maria's statement whether Mr. Benavides told her that Consuelo might have been hit by a car. Throughout the entire interview with her, the district attorney investigator asks only yes or no questions, and Maria's answers do not always indicate her complete understanding of them.

stopped]. You listened to the tape recording. . . . [D]on't you think we would have heard further evidence on that?" (18 RT 3565-66.)

With absolutely no good faith basis for its cross-examination, the prosecution also questioned Mr. Benavides with false charges that he had been physically abusing and sexually molesting Consuelo for quite some time. Further distorting and misrepresenting the evidence, the prosecutor implied that it was Cristina who had made these charges against Mr. Benavides, not the prosecution:

> Q: Isn't it true, Mr. Benavides, you have been molesting that little girl for a while? . . .
>
> A: I never molested her.
>
> Q: Can you explain for us how she got her broken ribs that she had previously?
>
> A: I don't know.
>
> Q: Can you explain for us how she had tearing in the vaginal and anal area previously?
>
> A: Sir, I'm telling you that I didn't stay with them since it was April or May. I don't know.
>
> Q: Any reason you can think of that Christina [sic] would have made up all these things that you say are not true?

(15 RT 3054.) These false statements and implications not only conveyed to the jury information that was quite the opposite of existing evidence, but also served conveniently to mask the prosecution's misconduct in shaping the evidence presented. "[The prosecutor's] implications tended to make the prosecutor his own witness—offering unsworn testimony not subject to

cross-examination." *People v. Bolton*, 23 Cal. 3d 208, 213 (1979); *see also United States v. Hall*, 989 F.2d 711, 716 (4th Cir. 1993) (prosecutor may not, "under the guise of 'artful cross-examination,' [] tell the jury the substance of inadmissible evidence"). The prosecutor's statements acted as "'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." *Bolton*, 23 Cal. 3d at 213. (quoting Vess, *Walking a Tightrope: A Survey of Limitations On The Prosecutor's Closing Argument* 64 J. Crim. L. & Criminology 22, 28 (1973)) (internal quotations marks omitted). Had these statements not been presented, there is a reasonable likelihood that the outcome of Mr. Benavides's trial would have been different.

**2. The Prosecution Manufactured Inconsistent Statements Allegedly Made by Mr. Benavides by Using Unreliable and Coercive Interview Tactics and Then Cross-Examining Mr. Benavides With False and Misleading Evidence of Prior Interviews With Cristina Medina and Maria Benavides.**

Respondent contends that the cross-examination of Mr. Benavides with his mother's statements was not improper because "there is nothing wrong about cross-examining a defendant about inconsistent statements" and notes that trial counsel did not object to the prosecutor's questions. (Response at 65.) Respondent is correct that there is nothing wrong with cross-examining a defendant about inconsistent statements—the issue here, however, is that *there were no inconsistent statements upon which to cross-examine Mr. Benavides*. The prosecutor asked questions about whether Mr. Benavides had made particular statements and implied that Mr. Benavides had actually made the statements the prosecutor asked about when the prosecutor had no good faith basis upon which to make such implications. The questions the prosecutor asked were based on interviews that were not

recorded, transcribed, or otherwise reliably memorialized. Only one of the three interviews of Maria Benavides was recorded and disclosed to Mr. Benavides's defense counsel. This third interview consisted almost entirely of a district attorney investigator asking Maria, a woman with no formal education, leading questions that were sometimes a paragraph long, regarding very specific statements she allegedly had made in the past. Almost no open-ended questions were asked, and nearly all of the "statement" is given by the investigator, not Maria herself, who simply affirms certain statements. (Ex. 4 at 2133-42.) In fact, one of the statements used to cross-examine Mr. Benavides—regarding whether he obtained a towel before or after picking up Consuelo—is a statement Maria admits was relayed to her by Nicho (Dionicio) Campos, not Mr. Benavides. (Ex. 4 at 2138 (". . . Vicente went inside to get a towel and returned outside to pick up the little girl . . . . Is that correct? . . . Maria: . . . I am embarrassed to say he did not tell me, he told it to this man, here, to Nicho.").) The prosecutor's use of this statement, and Maria's unrecorded other statements, to cross-examine Mr. Benavides implied that Mr. Benavides did, in fact, make the statements represented by the prosecutor, or that his mother at least believed he made them. Neither of these possibilities was accurate. The prosecutor's cross-examination based on this information, whether it was fabricated or simply unreliable and misleading, was therefore improper. *See, e.g.*, *United States v. Sanchez*, 176 F.3d 1214, 1221 (9th Cir. 1999) (misconduct where the prosecutor elicited inadmissible evidence during cross-examination); *Goldsmith v. Witkowski*, 981 F.2d 697, 704 (4th Cir. 1992) (prosecutor prohibited from presenting evidence through the "back door"); *United States v. Check*, 582 F.2d 668, 683 (2d Cir. 1978) (prosecutor may not introduce inadmissible hearsay through "artful" cross-examination). Trial counsel had no

reasonable or strategic basis for failing to object to the prosecutor's improper questioning and it had the injurious effect of causing the jury to believe that Mr. Benavides was lying and that he was guilty.

Respondent alleges the state did not manufacture Cristina's testimony regarding the amount of time Mr. Benavides allowed her to go play with Marivel that night. (Response at 65-66.) As set forth in detail in the Corrected Amended Petition (RCCAP at 74-76; *see also* Claim Four, *infra*), Cristina's testimony regarding this fact changed markedly from her initial statements to police and her statement at the preliminary hearing, in which she testified the amount of time was 15 minutes, compared to her trial testimony where she testified the time was twice as long or 30 minutes. (*See* Ex. 4 at 1814, 1839 (Cristina tells detectives on November 18, 1991, that Mr. Benavides told her she could play for 15 minutes and she was gone for only 15 minutes); Ex. 4 at 1855, 1857, 1876 (Cristina first tells detectives in June 12, 1992 interview that Mr. Benavides told her she could play for 30 minutes and then says 15 minutes is more accurate).) This change was the direct result of the manipulative and coercive tactics of the prosecution team. (Ex. 89 at ¶ 39; *see* Claim Two, *supra*.)

### 3. The Prosecutor Relied on False and Misleading Testimony That He Presented in a False Light During Closing Argument.

Respondent argues that the prosecutor did not present false evidence regarding Mr. Benavides's demeanor after Consuelo was injured. (Response at 66-67.) Respondent is mistaken.

The prosecutor argued that the way witnesses described Mr. Benavides as nervous, nonchalant, and disinterested, actually meant he was "guilty." "He looks guilty. He is guilty. He acts guilty." (18 RT 3594.) During closing, the prosecutor referred to Cristina's testimony that Mr.

Benavides seemed "nervous" that night, (11 RT 2186), to Anita Caraan's statements that he seemed "nonchalant" and that "he wasn't interested" in what was happening to Consuelo (14 RT 2773), and to Dr. Bloch's testimony that he "exhibit[ed] little concern," (12 RT 2464). The prosecutor knew that Cristina's testimony that Mr. Benavides was "nervous" after Consuelo was hurt was false. This statement did not agree with her earlier descriptions of the events or of Mr. Benavides's demeanor. (Ex. 4 at 1863 (In June 12, 1992 interview of Investigator Ray Lopez with Cristina, she states that Mr. Benavides did not yell or seem nervous when he came to get her.).) Furthermore, this statement was the result of the repeated questioning and cajoling she endured at the hands of the prosecution team. (Ex. 89 at ¶¶ 23-47.)

Anita Caraan's statement that Mr. Benavides "wasn't interested" in Consuelo's medical care was inadmissible speculation. Caraan thought only that Mr. Benavides "looked strange" and "not present." (Ex. 72 at ¶ 6.) In addition, Caraan's opinion was undoubtedly affected by the information provided to her by the prosecution as it solicited her statements. Caraan believed that the evidence showed that Consuelo was sexually molested. (Ex. 72 at ¶ 8.) Caraan's outrage at what she thought Mr. Benavides did to Consuelo colored her description of him when she spoke to the prosecution. (Ex. 72 at ¶ 7.) What Caraan did not know was that Mr. Benavides was charged with rectal penetration, which completely conflicted with what she and other DRMC personnel saw when they examined Consuelo on November 17, 1991. Thus, the prosecution's misinformation given to medical personnel biased them and allowed the prosecution to shape their testimony regarding Mr. Benavides's demeanor.

Respondent argues that these claims are procedurally barred by *In re Dixon*, 41 Cal. 2d 756, 759 (1953), because they were not raised on direct

appeal. (Response at 65.) These claims could not have been raised on direct appeal because they rely on extra-record facts, including facts that could not have been and were not discovered until after trial. Respondent also argues that these claims are barred by *In re Lindley*, 29 Cal. 2d 709, 723 (1947), because they "challeng[e] the admission of evidence" in a habeas proceeding. These claims challenge the prosecution's reliance on false evidence that was in fact not admitted nor disclosed to the defense prior to trial—they do not challenge evidence that was considered for admission and then admitted by the trial court. Thus, these claims are properly before this Court on habeas.

Had the false and misleading statements, arguments, and inferences regarding the events that occurred on November 17, 1991 not been introduced by the prosecution at trial, there is a reasonable likelihood that the outcome of Mr. Benavides's trial would have been different.

### D. Claim Four: The Prosecutor Presented False and Misleading Testimony That Mr. Benavides Caused the Injuries Consuelo Verdugo Sustained Prior to November 17, 1991.

The Corrected Amended Petition makes a prima facie showing that Mr. Benavides is entitled to have his convictions and death sentence set aside as a result of the erroneous admission of false, misleading, and highly prejudicial evidence of alleged other crimes and bad acts that was irrelevant to any legitimate issue in the case and served only to raise the impermissible inference of Mr. Benavides's alleged criminal propensity, in violation of his rights to a fair, reliable, rational, nonarbitrary, and accurate determination of guilt and penalty, a trial free from false and misleading evidence, an opportunity to confront and refute adverse evidence, the disclosure of all material exculpatory evidence, and the effective assistance

of counsel as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, international law, and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law including Penal Code section 1473.

As stated above, a prosecutor commits misconduct by knowingly using perjured or false testimony to seek a conviction, or by failing to correct false testimony—either by suppressing evidence that would correct the testimony, failing to investigate whether the testimony might be false, or otherwise ensure that that evidence presented at trial is accurate and reliable. *See United States v. Agurs*, 427 U.S. 97, 112-13 (1976); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In California, the presentation of false testimony warrants reversal even though the prosecution was not aware at the time that the testimony was false. Cal. Penal Code § 1473(b)(1); *In re Sassounian*, 9 Cal. 4th 535, 546 (1995) (A prisoner is entitled to relief by writ of habeas corpus when "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against [a person] at . . . trial . . . .").

Whether defense counsel is aware of falsity in trial testimony or statements makes no difference. *See Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1117 (9th Cir. 2001); *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). Therefore, regardless of whether defense counsel should have known that a witness testified falsely, "[a] prosecutor's 'responsibility and duty to correct what he knows to be false and elicit the truth,' *Napue*, 360 U.S. at 269-70, requires [him] to act when put on notice of the real possibility of false testimony." *Bowie*, 243 F.3d at 1117-18.

"Admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial

effect' on the trier of fact." *In re Jones*, 13 Cal. 4th 552, 581 (1996) (quoting *People v. Thompson*, 27 Cal. 3d 303, 314 (1980)). Such evidence is so prejudicial because it "produces an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.' It breeds a 'tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offences.'" *Thompson*, 27 Cal. 3d at 317 (quoting 1 Wigmore, Evidence, § 194, p. 650). The admission of evidence of other crimes or bad character solely for the purpose of showing criminal propensity, and action in conformity therewith, may render the trial fundamentally unfair in violation of the Due Process Clause. *See McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993) (admission of evidence of defendant's prior possession of knives, fascination with knives and carving of words into door with knife violated Due Process Clause requiring reversal of conviction); *Panzavecchia v. Wainwright*, 658 F.2d 337, 341 (5th Cir. 1981) (trial fundamentally unfair in violation of Due Process Clause where jury permitted to consider prior crimes in connection with murder charge to which they were irrelevant except to show bad character and propensity).

The prosecution presented false testimony, inference, and argument at trial that Mr. Benavides committed prior bad acts before Consuelo Verdugo was injured on November 17, 1991, and caused several prior injuries and illnesses described or implied in the testimony of the prosecution's trial witnesses. These prior injuries included injuries testified about by the medical personnel (prior rib, pancreas, and anal/vaginal injuries) as well as illnesses, such as a stomach ache at Halloween, and injuries, such as Consuelo's broken wrist, which were described (or sometimes implied) by lay witnesses.

### 1. The Prosecution's Case at Trial Relied Substantially on a Theory That Mr. Benavides Caused Consuelo's Prior Injuries.

At trial, the prosecutor presented evidence that Consuelo broke her wrist in September 1991, had been injured around Halloween 1991, and had other injuries prior to the events that led to her death in November 1991. Nurse Virginia Uclaray testified that Estella brought Consuelo to the hospital with a possible fracture of the left wrist on September 24, 1991, and that Estella stated she did not know how her daughter was injured. (13 RT 2663-65.) Dr. P.R. Chandrasekaran, who treated Consuelo's wrist that day, testified that Estella told him the injury occurred when Consuelo was playing in the yard. (14 RT 2725-26.) Consuelo's sister Cristina Medina remembered being at Diana Alejandro's house around Halloween when Consuelo was sick, throwing up, rubbing her stomach, and seeming to be hurt. (11 RT 2211.) Diana Alejandro testified she also thought Consuelo seemed sick around Halloween, was hurting, kept crying, and had a fever. (14 RT 2731-32.) Estella told Diana that Consuelo had not been well for several weeks and kept throwing up. (14 RT 2733.) Radiologist James Seibly testified that he examined an x-ray taken on November 18, 1991, showing that Consuelo had linear rib fractures at least ten to fourteen days old, which were consistent with a tight gripping force. (13 RT 2511-19, 2528, 2531-34.) Pathologist James Dibdin testified that he observed the same rib fractures, and estimated they were three to four weeks old, and were consistent with Consuelo having been grabbed from behind by an assailant. (11 RT 2125-29.) Dibdin also testified that Consuelo had old healing injuries to her anus and vagina. (11 RT 2143.) Dr. Jess Diamond testified that Consuelo had scar tissue in her abdomen that was caused by external trauma, and that this scarring was unusual to find in a child who had not had surgery. (10 RT 2047-48.) Estella testified that Consuelo

suffered several head injuries—including one when she fell and hit a coffee table while learning to walk and one when she fell off a recliner while reaching for knick-knacks. (13 RT 2555, 2558-59, 2644; 14 RT 2730; 17 RT 3347.) Cristina Medina testified that the first night her mother left her and her sister alone with Mr. Benavides, he came into the room she shared with her sister, took Consuelo into his room, and locked the door. (11 RT 2189-90.) He kept Consuelo there all night. (11 RT 2190.) In the morning, Consuelo seemed "okay" to Cristina. (11 RT 2194-95.) This occurred before Consuelo broke her wrist (11 RT 2202-23), which was around September 23, 1991. (14 RT 2726.)

The prosecution used this incident, combined with other evidence that Consuelo had suffered physical injuries and illnesses, to convince the jury that Mr. Benavides had been forcibly molesting Consuelo for months prior to her death, and that his pattern of molestation had resulted in Mr. Benavides killing Consuelo. (*See, e.g.*, 13 RT 2587-88; 15 RT 3054; 18 RT 3660.) He told the jury:

> He's a molester. Maybe he tried to get what he wanted the easy way. We have old broken bones and old scarring of the pancreas. We have old reports of incidents of head injury. Maybe that is what he did. I don't know.
>
> Mrs. Huffman is—I don't know if he took her in there and banged her up against the wall to stun her and then sodomized her. I don't know if he punched her as hard as he could in the stomach *like he did before* and then attempted to sodomize her—[objection lodged and overruled] . . . *consistent with the old blunt force trauma* that causes that scarring in the pancreatic area.

(18 RT 3652) (emphasis added). Again, in his final guilt phase closing argument, he made the connection clear:

> Mrs. Huffman says by innuendo I have attempted to show the defendant inflicted previous injury on this child. And I will submit to you, ladies and gentlemen, that is a very sensible conclusion to draw from the facts in this case, but what it points out, not only does it show us that the child was previously abused, both physically and sexually, but it shows that it happened over a period of time. . . . This child has fractured ribs, scar tissue in the abdomen, blunt trauma tears in the vagina and anus. Gee, I wonder who did it on November 17th, 1991, given the state of this evidence.

(18 RT 3660.)

Based on this evidence, the prosecutor argued that these injuries were caused by Mr. Benavides (18 RT 3660), Consuelo did not begin to suffer injuries until Mr. Benavides came into her life (13 RT 2587-88; 14 RT 2731; 15 RT 3054), and these injuries demonstrated Mr. Benavides's propensity for violence and sex abuse, because he had physically and sexually abused Consuelo in the months before her death (15 RT 3054 ("Isn't it true, Mr. Benavides, you have been molesting that little girl for a while?"); 13 RT 2587-88 ("Mrs. Medina, isn't it true that you knew what was happening with this man but you weren't reporting it? . . . It wasn't until he came around that the child started having broken bones and bruises, was it?"); 18 RT 3596-97 ("If the evidence of the prior injuries before and the lack of reporting don't convince us . . . .")).

**2. The Prosecution's Case Was Based Entirely on False Evidence That Mr. Benavides Caused Consuelo's Prior Injuries.**

The Corrected Amended Petition demonstrates that the prosecution used false testimony, inference, and argument to ask the jury to hold Mr. Benavides responsible for Consuelo's prior injuries, and find him guilty of rape, sodomy and murder. Respondent asserts that Mr. Benavides's claim that the prosecution falsely asserted and led the jury to believe that Mr.

Benavides caused Consuelo's prior injuries is "speculation." (Response at 68.) Respondent's contention lacks merit because Mr. Benavides has presented facts and allegations, far from mere speculation, establishing that the following evidence and inferences presented by the prosecution were false: that Consuelo only began to have illnesses and injuries once Mr. Benavides began living with Estella and her daughters; that Estella was protecting Mr. Benavides by lying to cover up that Mr. Benavides caused Consuelo's head injury and arm injury; that Mr. Benavides was responsible for Consuelo's mood change because she became depressed as a result of being molested by Mr. Benavides; that Mr. Benavides caused Consuelo's prior rib injuries; and that Mr. Benavides caused Consuelo's prior abdominal injuries. (RCCAP at 81-101.) Mr. Benavides has set forth information establishing that he was not present during any of the periods in which Consuelo sustained her prior injuries and illnesses and that Consuelo had been exposed to various caretakers, conditions, and situations which likely caused her prior injuries and illnesses which were completely unrelated to Mr. Benavides. (RCCAP at 82-100.)

Despite the prosecution's emphatic reliance on the theory, no evidence supported it or demonstrated that Mr. Benavides had harmed Consuelo in the past. Indeed, the state possessed—but withheld from the defense—material evidence to the contrary. (*See, e.g.*, Ex. 5 at 2568 (indicating that Dr. Chandra told the prosecution that Consuelo's wrist injury was consistent with the explanation of the injury provided to the doctor (that Consuelo fell).) The state manufactured evidence and falsely implied circumstances in interviews with witnesses to influence the witnesses' false statements at trial. The state manufactured Cristina Medina's statements implying that Mr. Benavides had previously molested Consuelo by interviewing Cristina on multiple occasions resulting in

statements made by Cristina that finally agreed with the theory developed by the prosecution that Mr. Benavides had previously molested Consuelo. (*See* Claim Two, *supra*; Ex. 89.) The state also coerced inculpatory statements from Estella Medina by punishing her with taking Cristina away from her and accusing her of being a bad mother who did not protect her children when she expressed her beliefs that Mr. Benavides did not harm Consuelo in any way. (*See* Claim Two, *supra*.)

As discussed in further detail in Claim Thirteen, *infra*, the false evidence and inferences described in this claim and presented to the jury by the prosecution were unreliable, inadmissible, and unduly prejudicial. The false evidence and inference were improperly presented to the jury as a result of the state's misconduct, trial counsel's unreasonable failure to exclude or refute them, and the trial court's error in not excluding related testimony.

On appeal, this Court evaluated the trial court's and trial counsel's actions with respect to the admission of some of the prior injuries, but was limited by the record on appeal and did not consider the allegations and information presented above demonstrating the state's misconduct as it relates to this false evidence and inference. This Court found that Cristina's testimony about Mr. Benavides taking Consuelo into his room when she was whining and Consuelo being sick at Halloween was admissible and that counsel was not ineffective for failing to object to the evidence. *People v. Benavides*, 35 Cal. 4th 69, 93 (2005). Because this Court's finding was based on the limited record on appeal, however, this Court did not consider the unreliability of this evidence, its irrelevance in being connected to Mr. Benavides, and the undue prejudice from its admission as demonstrated by the allegations and facts presented in post-conviction.

As a result, the string of inferences drawn by this Court to hold that the evidence was relevant and admissible is unsupported given the evidence presented in the Corrected Amended Petition. This Court ruled that the jury "could reasonably infer that defendant's intentional acts caused Consuelo's prior injuries," because Mr. Benavides allegedly showed "secretive" behavior in late September, and Consuelo showed "physical and emotional symptoms" in this "same time frame," presumably late October, around Halloween, and forensic evidence established the prior injuries had been inflicted one or two months prior to November 17, 1991. *Benavides*, 35 Cal. 4th at 93. This Court further inferred that this inference was probative in establishing "sexual abuse rather than accident." *Id.* As shown above and described more fully in Claim Thirteen, *infra*, Mr. Benavides's behavior was not secretive or unusual, Consuelo's Halloween stomach illness was not connected to Mr. Benavides, and Dr. Dibdin's description of prior injuries to the genitalia and anus was false. Therefore, the prosecutor's presentation of this unreliable, irrelevant, inadmissible propensity evidence and inference regarding Cristina's testimony surrounding that night was unduly prejudicial and violated Mr. Benavides's right to due process because it created the unwarranted impression that he had previously abused and injured Consuelo and thus was likely to have caused her fatal injuries.

Respondent insists Mr. Benavides has not shown that Cristina's testimony, and the inferences drawn from it, were false. (Response at 68-69.) Cristina testified that Mr. Benavides would not let her sleep with Consuelo (11 RT 2189-90), and he instead took Consuelo into the bedroom alone and locked the door. (11 RT 2190.) Based on her testimony, the prosecutor argued that Mr. Benavides molested Consuelo that evening causing her prior pancreas and abdominal injuries. (18 RT 3652 ("[w]e

have old broken bones and old scarring of the pancreas. . . . Maybe that is what he did").) In fact, Mr. Benavides has set forth a wealth of information demonstrating the coaching tactics used by the prosecution to ensure that Cristina's testimony supported the prosecution's theory rather than ensure that she was telling the truth.

Two law enforcement interviews with Cristina were disclosed to the defense. (Ex. 4 at 1814-48; Ex. 4 at 1849-906; *see also* Ex. 58 at 5098-143.) During these interviews, Cristina discussed whether Mr. Benavides had ever hurt her or her sister—she said he had not—and whether she felt safe at her mother's house—she said she did. She also said she was not afraid of Mr. Benavides. During these interviews, however, law enforcement officials used a variety techniques to modify her beliefs and statements, and therefore her future testimony. Police officers lied to Cristina, blamed her, threatened her, and refused to listen to her when she made statements that disagreed with their theory of the case. Dr. Wood stated that the first documented interview of Cristina that was disclosed was one of the "worst interviews of a child" he had ever encountered. (Ex. 89 at ¶ 17.) Cristina told her interviewers repeatedly in these interviews that Mr. Benavides had never hurt or molested her and that he had never molested or hurt her sister. (Ex. 67 at ¶ 28.) Rather than accept her account, or even ask her for additional information, the officers used a series of suggestive and leading questions to persuade Cristina that her version of events was wrong and their version was right. (Ex. 89 at ¶ 28.) For example, they suggested to Cristina that the first thing she said to Mr. Benavides when she arrived at the apartment that night was "What did you do to her?" (Ex. 4 at 1816.) When Cristina misunderstood their question, and appeared to agree with it (Ex. 4 at 1816), ("uh, yeah and I ask…"), the police created a false fact in their report that became part of the mythology

of both Mr. Benavides's criminal case and Cristina's juvenile case, affecting not only what others thought Cristina believed, but eventually affecting what she actually believed as well. (Ex. 4 at 1912; Ex. 9 at 3748.) At the end of this interview, the officers asked Cristina if she believed "something else" about how her sister died "now that we talked to you?" and she said she did not know. (Ex. 4 at 1846.) Valdez told Cristina to "think about" her answers and whether she knew "the truth," because someone would return to ask her what happened "for sure," insinuating clearly that she had not provided "sure" answers in that first interview. (Ex. 4 at 1846.)

At that point, Cristina desperately wanted to return to live with her mother. (Ex. 67 at ¶¶ 30, 45.) Thus, in the second disclosed interview of Cristina, after previous suggestive, coercive, and manipulative law enforcement contacts, Cristina agreed with Investigator Lopez's version of events. For example, Cristina agreed with Lopez when he stated that Mr. Benavides had told her that she could play with Marivel for 30 minutes, not the 15 minutes she previously stated. (Ex. 4 at 1857.) She further agreed with Lopez and said that she believed Mr. Benavides raped her sister. (Ex. 4 at 1869.)[28] The suggested and coerced nature of her conclusions is

[28] Regarding her belief in Mr. Benavides, Lopez prompted her again in this interview into stating that she did not believe Mr. Benavides when he asked her five times in a row, without interruption, what makes her believe Mr. Benavides is lying. (Ex. 4 at 1866 ("Lopez: Do you think he's lying? Why do you think he's lying? [] If you think he was lying, it's okay to tell us. [] Chata, why do you think he was lying? (long pause - Christina (sic) continue to cry) You can tell us. It's okay. Did Vincente [sic] give you a reason to think he was lying? Is there anything about Vincente [sic] that makes you think that he lied? (long pause)").) By contrast, during the first interview, Cristina told law enforcement that she believed Mr. Benavides. (Ex. 4 at 1829.) The shift in her belief during the second interview is significant, because it helps account for the major change in Cristina's perceptions and representations of events that had formerly not concerned her in any way.

apparent from her statements in this interview that she believed Mr. Benavides raped Consuelo immediately after she stated three times that Mr. Benavides had never hurt Consuelo before, and that he took good care of Cristina and Consuelo. (Ex. 4 at 1868.) During this interview, Cristina again reported the incident in which Mr. Benavides took Consuelo to his room. In this interview, however, she portrayed it as a sinister event in which Mr. Benavides would not listen to her when she asked him to leave Consuelo to sleep with her. (Ex. 4 at 1869-70.)

By the time of trial, Cristina's perspective on Mr. Benavides's role in her sister's death had been modified to such a degree that the story of Mr. Benavides taking her sister to sleep in his room is completely unreliable, and any kernel of truth that existed—such as the possibility that Mr. Benavides took Consuelo in order to calm her when she was whining or sick—has been buried under false innuendo and repetition of prosecution team suggestions made during Cristina's interviews. For example, at trial Cristina claimed that Mr. Benavides *would not let* her sleep with her sister, implying that Cristina resisted but that Mr. Benavides took her sister anyway, and stated that she knocked on the door in an attempt to get to her sister, (11 RT 2189-90), implying that she feared for her sister, though she had not expressed any fear associated with Mr. Benavides until she had been interviewed by the prosecution. The prosecution said that Cristina had "never told anyone before" about this incident, (11 RT 2189), until she allegedly spontaneously told her mother while driving back from Magic Mountain.

The prosecution falsely presented this story in support of its theory that Mr. Benavides caused Consuelo's prior pancreas and rib injuries on this date, because he molested her. "We have old broken bones and old scarring of the pancreas. . . . Maybe that is what he did." (18 RT 3652).

Hearing only Cristina's trial testimony and without any understanding of the evolution over time of Cristina's accounts regarding this incident, the only way the jury could interpret the Cristina's description of the event was to conclude that Mr. Benavides had molested Consuelo, as the prosecution suggested.

The prosecution knew these statements were false. Cristina told the prosecution's investigators, repeatedly, that Mr. Benavides had not molested her or her sister. (Ex. 67 at ¶28.) She also told them that when Mr. Benavides took Consuelo into the room Consuelo was not hurt. (Ex. 4 at 1871.) Yet, despite this knowledge, the prosecution led Cristina to tell the falsified story at trial, and then used her story, and the harmful implications it entailed, to help prove that Mr. Benavides had sodomized and raped Consuelo on November 17, 1991.

These false statements and inferences prejudiced Mr. Benavides. Without them, the prosecution lacked any evidence that Mr. Benavides engaged in molestation of anyone in the past. The only other evidence of prior injuries connected to the sex abuse charges was Dr. Dibdin's false findings about prior injuries to the genitalia and anus. (*See* Claims One and Thirteen.) Without Cristina's statement, the prosecution could not connect Mr. Benavides to the prior pancreas and rib injuries. In presenting this story, the prosecution relied on a series of false inferences and false propensity evidence: because Mr. Benavides had been alone with Consuelo around the time she obtained her pancreas and rib injuries, he must have caused those injuries and he, therefore, must have caused her present pancreas and rib injuries—even though there is no direct evidence showing he did so. The prosecution improperly relied on this false propensity evidence to prove Mr. Benavides's guilt. *See McKinney,* 993 F.2d at 1380 (due process is violated by admission of improper propensity evidence);

*Panzavecchia*, 658 F.2d at 341 (trial fundamentally unfair where jury permitted to consider prior crimes in connection with murder charge to which they were irrelevant except to show bad character and propensity).

Moreover, Mr. Benavides was deprived of his constitutional right to effective representation because his court-appointed counsel unreasonably failed to object to the introduction of false evidence, introduce evidence that the testimony was false, or argue for appropriate instructions to guide the jury. *See People v. Younger*, 84 Cal. App. 4th 1360 (2000); *Panzavecchia*, 658 F.2d at 341. As described in this Court's decision on appeal, counsel objected only to Diana Alejandro and Cristina Medina giving their opinion about whether Consuelo had been injured, an objection the trial court upheld, *see People v. Benavides*, 35 Cal. 4th at 92—but counsel unreasonably failed to object to any other testimony about the prior injuries or illnesses as irrelevant and unduly prejudicial propensity evidence and unreasonably rejected the prosecutor's request to instruct the jurors on the limited used of the prior injury testimony. (*See* Claim Thirteen, subclaim 7.) Without the context of Cristina's statements, or the information regarding the numerous other far more likely causes for her injuries—including that she was in the care of at least one convicted child molester and other violent, psychotic, drug-dealing and drugged out caretakers[29]—the jury could only believe, and did believe, that Mr.

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[29] (*See, e.g.*, Ex. 4 at 2071-73; Ex. 4 at 2250, 2260 (Diana did not want to talk to Estella about Consuelo because Diana knew she would end up becoming physically violent with Estella; Diana threatens to hit others); Ex. 4 at 2380 (Estella moved out of her mother's house after one of her brothers tried to shoot another brother at home in front of her children); Ex. 9 at 3766 (detailing the drug and other criminal charges brought against Darlene and Reynaldo Salinas); Ex. 38 at 4692-97 (Sacarias, Consuelo's uncle, committed domestic violence); Ex. 39 at 4698-99 (Sacarias possessed cocaine for sale); Ex. 40 at 4700-09 (Sacarias possessed heroin and cocaine for sale); Ex. 41 at 4710-47 (Sacarias committed domestic violence); Ex. 42

Benavides had a pattern of hurting Consuelo Verdugo, and had done so again on November 17, 1991. Thus, there is a reasonable likelihood that Cristina's false statements, and the false implications drawn from them, affected the outcome of Mr. Benavides's trial.

Respondent contests Mr. Benavides's claim that the prosecutor presented the false and coerced testimony of Estella Medina that she worried about her children when they were alone with Mr. Benavides. (Response at 69-71.) Respondent asks this Court to disregard the information set forth by Mr. Benavides establishing that Estella had been coerced prior to trial (RCCAP at 95-97) and conclude without any basis other than Respondent's bald assertion that Estella "decided what to say at trial" (Response at 70). Respondent's assertion cannot be true as Respondent quotes the very evidence establishing that Estella's testimony was coerced. Estella explains that, after having her daughter Cristina removed from her custody twice before as a result of Estella's refusal to falsely accuse Mr. Benavides, Estella testified "out of fear of what might happen if I said the wrong thing again," and "in the hope that [the prosecutor] and others would . . . reconsider giving Cristina back to me." (Ex. 66 at ¶ 102; *see also* Response at 70.) Respondent also asserts that Estella's false and coerced testimony "was not material" or prejudicial. (Response at 71.) Respondent is incorrect. As a result of Estella's false and coerced statements, the jury believed that Estella mistrusted Mr. Benavides with her daughters and that she had reason to mistrust Mr. Benavides because he had harmed or threatened to harm them in the past. Estella's false and coerced statements added crucial support to the prosecutor's false

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at 4728-38 (Sacarias committed lewd acts with a child under the age of fourteen); Ex. 43 at 4743-47 (Debra Alejandro obtained a restraining order against Sacarias because he was physically abusive to her during their relationship).)

theory that Mr. Benavides had caused Consuelo's prior injuries and, consequently, led the jury to believe that he had indeed caused them.

In response to Mr. Benavides's claim that the prosecutor presented false evidence that Consuelo was healthy prior to meeting Mr. Benavides, Respondent relies on Respondent's arguments concerning Claim One of the Corrected Amended Petition. (Response at 71-72.) Respondent's reliance on her argument with respect to Claim One ignores the facts and allegations set forth in Claim Four, subclaim 9, of the Corrected Amended Petition establishing in more detail the falsity of the evidence presented regarding Consuelo's health prior to the commencement of Estella's relationship with Mr. Benavides. (Response at 49; *see* RCCAP at 97-100.) Mr. Benavides has established that the prosecutor specifically accused Estella Medina of knowing that her daughter began to suffer injury only after Estella began dating Mr. Benavides. (13 RT 2587-88.) The prosecutor also elicited testimony that this was true when questioning Diana. (14 RT 2730-31 ("other than things that happened to her that we are going to talk about in a minute, was she a normal and healthy child? A: Yes, she was").) The prosecution specifically presented the testimony of Diana Alejandro and Delia Alejandro that Consuelo could walk, that she began walking at an early age, and that she was active and alert (13 RT 2729-30, 17 RT 3347), thereby giving the jury the false impression that Consuelo had no trouble walking, walked like a normal child, and had no out of the ordinary health problems—aside from those that were caused by Mr. Benavides.

This false testimony affected the outcome of Mr. Benavides's trial. Lacking any evidence that Mr. Benavides had in fact harmed Consuelo on November 17, 1991, the prosecution relied heavily on circumstantial evidence of what it implied was a pattern, of prior acts of violence and molestation committed by Mr. Benavides against Estella's children. The

prosecution used the false evidence and implication detailed above to support its theory and demonstrate that Mr. Benavides, consistent with his pattern, had flown into a rage on November 17, and punched, kicked, raped, and sodomized Consuelo. (18 RT 3566.) The false testimony and evidence introduced by the prosecution regarding Consuelo's health prior to meeting Mr. Benavides provided the jury with a false baseline from which they judged Consuelo to deviate when Mr. Benavides was around. The result was that the jury held Mr. Benavides accountable for Consuelo's general health problems, since they had no other explanation for her many injuries and illnesses other than the one presented by the prosecution: Mr. Benavides's presence. There is a reasonable likelihood that this false testimony affected the outcome of Mr. Benavides's trial, and led the jury to convict him and sentence him to death.

The prejudicial effect of this false testimony was compounded by the fact that defense counsel failed to present any evidence of other possible causes or explanations of the injuries, or to object while this evidence was presented.

> One of the principal tasks of a defense attorney is to attempt to protect his or her client from the admission of evidence that is more prejudicial than probative, and that obligation clearly applies to efforts made by the prosecution to introduce evidence of prior crimes or acts of violence alleged to have been committed by a defendant, when such crimes are unrelated to the charged offense. "In order to render reasonably competent assistance, a criminal defense attorney should investigate carefully the possible grounds for seeking the suppression of incriminating evidence . . . ."

*In re Jones*, 13 Cal. 4th at 581-82 (quoting *In re Neely*, 6 Cal. 4th 901, 919 (1993)). To avoid unnecessary duplication, Mr. Benavides respectfully refers this Court to the full discussion on the issue of trial counsel's failures with respect to this false evidence and inference in Claim Thirteen of this

Reply, *infra*. Had Mr. Benavides's counsel performed as the reasonably competent advocates required by the Constitution, counsel would have moved to exclude the alleged bad acts and bad character evidence presented by the prosecution and asked for a jury instruction that advised the jury how to consider this evidence. The trial court would have been required to exclude the evidence under California law, *see* Cal. Evid. Code § 1101, and under the Federal Constitution, *see McKinney*, 993 F.2d at 1385. Had defense counsel challenged this evidence and excluded it as highly prejudicial and false, there is a reasonable probability that the outcome of Mr. Benavides's trial would have been different. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Though Respondent claims to have addressed in its response to Claim One of Mr. Benavides's claim that the state's failure to disclose other possible causes of Consuelo's injuries violated Mr. Benavides's constitutional rights, Respondent did not do so. (Response at 71; *see also* Response at 49.) Mr. Benavides has established that it was precisely this failure that prevented defense counsel from countering the false testimony presented by the prosecution, thus rendering Mr. Benavides's trial, infected as it was with false testimony, misinformation, and false impressions, entirely unfair and devoid of due process. *See* discussion, *supra*, in Claim One, and *infra*, in Claims Five, Seven, and Thirteen. Had the prosecution disclosed this extensive evidence, there is a reasonable probability that the outcome of Mr. Benavides's trial would have been different.

**3. The Prosecutor's Presentation of False Evidence Warrants Reversal of Mr. Benavides's Conviction.**

Mr. Benavides has established that the prosecutor in Mr. Benavides case committed misconduct by knowingly using perjured or false testimony to seek a conviction, and by failing to correct false testimony. *See United*

*States v. Agurs*, 427 U.S. at 112-13; *Napue*, 360 U.S. at 269. Indeed, the prosecutor compounded the misconduct affirmatively making inferences based on the false evidence and creating additional false evidence in the form of said inferences. The prosecutor's use of "evidence that involve[d] [alleged] crimes other than those for which [Mr. Benavides was] being tried [was] a 'highly inflammatory and prejudicial effect' on the trier of fact." *Jones*, 13 Cal. 4th at 581 (quoting *People v. Thompson*, 27 Cal. 3d 303, 314 (1980)). This evidence was so prejudicial because it "produce[d] an 'over-strong tendency to believe [Mr. Benavides was] guilty of the charge[s] [] because [the false evidence suggested to the jury that] he is a likely person to do such acts.'" *Thompson*, 27 Cal. 3d at 317 (quoting 1 Wigmore, Evidence, § 194, p. 650). "It [bred] a 'tendency to condemn, not because he [was] believed guilty of the present charge, but because he [had] escaped unpunished from other [alleged] offences.'" *Id.* The prosecutor's presentation of the false testimony and inference warrants reversal of Mr. Benavides's conviction. Cal. Penal Code § 1473(b)(1); *Sassounian*, 9 Cal. 4th at 546 (A prisoner is entitled to relief by writ of habeas corpus when "[f]alse evidence that is 'substantially material or probative' on the issue of guilt or punishment was introduced against a [person] at . . . trial . . . .").

### E. Claim Five: The Prosecutor Presented False and Misleading Testimony That Mr. Benavides Was a Child Molester When He Possessed Overwhelming Evidence Disproving the Allegations and Which He Failed to Disclose.

Mr. Benavides has presented a prima facie case that his conviction, confinement, and death sentence were illegally obtained in violation of his protections under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, international law, and Article I, Sections 1,

7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law rights, including those provided by California Penal Code Section 1473, to due process; a fair trial; present a defense; confrontation; compulsory process; a reliable and accurate assessment of guilt and penalty based on accurate, not false testimony, evidence, and argument; a fair, non-arbitrary sentencing determination; and to be free of the imposition of cruel and unusual punishment by the prosecution's false assertions and inferences regarding Mr. Benavides's character and alleged propensity to molest children and its failure to disclose contrary evidence. The prosecution falsely asserted and argued that Mr. Benavides was a child molester who previously had molested Consuelo and her sister Cristina. The prosecutor compounded this misconduct by failing to disclose, thereby preventing the jury from hearing, evidence that Consuelo's sister Cristina had not been sexually abused; people who knew Mr. Benavides stated that he was not violent and was not a child molester; Consuelo's activity, lack of adequate supervision, and exposure to her caretakers and family members resulted in many of the injuries the prosecutor attributed to Mr. Benavides; several other individuals had the opportunity to cause injury to Consuelo; and others, including Joe Avila, who was a convicted pedophile, had access to Consuelo in the past.

The Due Process Clause of the Fourteenth Amendment requires the prosecution to disclose to the defense all favorable evidence material to guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). Non-disclosure of exculpatory or impeaching evidence violates due process by "depriving a defendant of liberty through a deliberate deception of court and jury . . . [which is] as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Brady*, 373 U.S. at 86 (citation omitted). This

obligation exists regardless of whether the information is requested by the defendant. *See Kyles*, 514 U.S. at 433 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Neither defense counsel's knowledge of the evidence nor the ability of the defense to obtain it relieves the prosecutor of his duty to disclose the evidence. *See, e.g.*, *Benn v. Lambert*, 283 F.3d 1040, 1061 (9th Cir. 2002) (holding that defense knowledge of prosecution expert and defense's ability to obtain impeachment evidence does not dispose of prosecutor's *Brady* obligations to disclose such evidence) (citing *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959)).

Due process also prohibits the prosecution from knowingly using perjured or false testimony—or failing to correct false testimony—by suppressing evidence that would correct the testimony, failing to investigate whether the testimony might be false, or otherwise ensuring that the proceedings were not influenced by false testimony. *See Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109 (9th Cir. 2001); *United States v. Agurs*, 427 U.S. 97, 112-13 (1976); *Napue*, 360 U.S. at 269. The prosecutor's duty to correct false testimony arises, not simply out of a duty of fairness to the defendant, but out of "the free standing constitutional duty of the State and its representatives to protect the system against false testimony." *Bowie*, 243 F.3d at 1118.

"Admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." *In re Jones*, 13 Cal. 4th 552, 581 (1996) (quoting *People v. Thompson*, 27 Cal. 3d 303, 314 (1980)). Such evidence is so prejudicial because it "produces an 'over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts.' It breeds a 'tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from

other offences.'" *Thompson*, 27 Cal. 3d at 317 (quoting 1 Wigmore, Evidence, § 194, p. 650). The admission of such evidence of other crimes or bad character solely for the purpose of showing criminal propensity and action in conformity therewith may render the trial fundamentally unfair in violation of the Due Process Clause. *See McKinney v. Rees*, 993 F.2d 1378, 1385 (9th Cir. 1993) (admission of evidence of defendant's prior possession of knives, fascination with knives and carving of words into a door with a knife violated Due Process Clause requiring reversal of conviction); *Panzavecchia v. Wainwright*, 658 F.2d 337, 341 (5th Cir. 1981) (finding a trial fundamentally unfair in violation of Due Process Clause where jury permitted to consider prior crimes in connection with murder charge to which they were irrelevant except to show bad character and propensity).

Respondent inexplicably argues that the prosecution never accused Mr. Benavides of having molested Cristina, even while citing a passage in which the prosecutor stated that Cristina was "lucky to get out alive" from Mr. Benavides because he was a "molester." (Response at 72-73 (citing 18 RT 3592-93).) The prosecution clearly stated that Mr. Benavides was a child molester at trial. "[Mr. Benavides]'s a molester. Maybe he tried to get what he wanted the easy way." (18 RT 3652.) In so doing, the prosecutor ignored Cristina's statements that Mr. Benavides did not molest her, that she felt protected by Mr. Benavides, and that he took good care of her. (*See* Ex. 4 at 1887-88 (Cristina states that Mr. Benavides was good to her and her sister, never hit her or her sister, never got angry with her mother because of her and her sister, and never did anything to her that she did not like or felt uncomfortable about).) Although there was no evidence to support the prosecutor's argument, he alleged that Mr. Benavides was a "molester" and Cristina was "lucky to get out alive," implying that she had already sustained some injury short of death. (18 RT 3592.)

Respondent further argues that the state's failure to disclose a report that Dr. Diamond examined Cristina on December 10, 1991, and found no evidence that she had been sexually abused was not prejudicial because the report was not material or exculpatory. (Response at 76.) Respondent is simply incorrect. Because the report was withheld from the defense, the prosecution was able to imply that Cristina had been molested even while it possessed concrete, unassailable evidence to the contrary. Dr. Diamond's report was material and exculpatory specifically because of the prosecution's numerous statements asserting that Cristina had been in some sort of danger when she was living with Mr. Benavides. Had the prosecution provided the report to the defense, trial counsel would have been able to move to prevent the prosecution from making unfounded arguments suggesting Cristina was abused or present evidence countering the prosecution's allegations and laying to rest the prejudicial speculation about Mr. Benavides. But for the prosecution's failure to disclose this report, there is a reasonable probability that the outcome of Mr. Benavides's trial would have been different.

Respondent also claims the prosecution never asserted that Mr. Benavides committed prior crimes similar to those he was charged with in this case. (Response at 73-74.) Respondent's argument is baseless. In stating that Mr. Benavides was "a molester," the prosecutor explicitly urged the jury to conclude that Mr. Benavides's actions caused Consuelo's prior vaginal, abdominal, and rib injuries. (18 RT 3587-88.) The prosecutor claimed that Estella provided the perfect "fulcrum" for Mr. Benavides's alleged ongoing "perversion" (18 RT 3595-96), because she did not protect Consuelo from getting her arm broken, did not take her child to the doctor when she sustained a head injury, did not take care of her prior broken ribs or scarred pancreas. (18 RT 3596-97.) The prosecutor concluded that

Estella provided Mr. Benavides the perfect situation because, all this time, she did not report the prior abuse of Consuelo when she suffered these injuries, impliedly at the hands of Mr. Benavides. (18 RT 3596-97.) And "if the evidence of the prior injuries before and lack of reporting [child abuse didn't] convince" the jury of Mr. Benavides's guilt, the prosecutor argued that Estella's predilection for sex abusers should. (18 RT 3597.)

In addition to making this argument to the jury, the prosecutor implied that Mexican authorities suspected Mr. Benavides of criminal activity when the prosecutor questioned Estella about Mr. Benavides's need to return from Mexico early in 1991, even though he had absolutely no basis to ask such a question. The jury heard that he returned early because "he was in danger there." (13 RT 2647-48.) The jury received no instruction regarding how to interpret Estella's statements. (13 RT 2647-48.) The only inference the jury could draw from that testimony was that Mr. Benavides was in danger because he committed a crime or was being pursued for harming someone in Mexico. The prosecutor's unfounded suggestion, in conjunction with the other unfounded statements and insinuations of the prosecution—such as statements that Consuelo had not suffered injuries until Mr. Benavides entered her life (13 RT 2587-88)—led the jury to believe that evidence existed to demonstrate that Mr. Benavides molested children before he allegedly molested Consuelo on November 17, 1991. The jury relied on this improper propensity evidence when determining Mr. Benavides's guilt. *See People v. Younger*, 84 Cal. App. 4th 1360, 1383-84 (2000); *McKinney*, 993 F.2d at 1380 (due process is violated by admission of improper propensity evidence).

In addition to insinuating that Mr. Benavides engaged in prior molestation or similar crimes in front of the jury, the prosecution falsely stated that "fact" to the other decision-maker on the case, the trial judge. In

front of Judge Stuart, the prosecutor stated that Mr. Benavides had done the "same thing" down in Mexico. (Exhibit 65 at ¶ 26.) Though this statement was not made part of the record on appeal, Mr. Harbin's reference to it was. (15 RT 2901 (Mr. Harbin relays the prosecutor's claim to the judge that "something evidently bad" had happened in Mexico to force Mr. Benavides to return).) Information about this apparent "bad" incident in Mexico tainted the trial court's decision-making in Mr. Benavides's case, including the decision not to instruct the jury on how to consider the evidence of other crimes (CALJIC No. 2.50; 17 RT 3412-13), and the decision to admit evidence that Estella Medina dated Joe Avila, a child molester, after Consuelo's death (evidence that was falsely timed to prevent the jury from realizing that Joe Avila had access to Consuelo for the entire year prior to her death, which made him an alternate suspect if in fact she had been molested) (13 RT 2573-76.)

Thus, despite having possession of numerous pieces of evidence demonstrating Mr. Benavides was not a child molester and actual knowledge to the contrary, the prosecution falsely stated several times that he was. These false statements and implications not only had a reasonable likelihood of affecting the outcome of the case since they affected the jury's determination of Mr. Benavides's guilt and punishment, but also had a reasonable likelihood of affecting the trial court's evidentiary determinations and sentencing decisions. *See* discussion, *infra*, in Claim Sixteen.

Although the defense stated it would address the incident in which "something bad" evidently happened in Mexico (15 RT 2901), the defense never raised the issue again at trial. Had the defense presented available evidence demonstrating that Mr. Benavides had not committed similar crimes or similar acts in Mexico, this evidence would have countered the

prosecution's theory that Mr. Benavides's guilt of the current crimes of sex abuse and molestation was proven by the fact that he committed prior similar crimes and had a propensity to commit these sort of crimes, because he was a "molester." Had the defense introduced this evidence, there is a reasonable probability that the outcome of Mr. Benavides's trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see also Bagley*, 473 U.S. at 682.

Respondent claims that Mr. Benavides has failed to show that the evidence presented by the prosecution was false, *i.e.* that Mr. Benavides did not cause the prior injuries and was not a child molester. (Response at 74.) On the contrary, Mr. Benavides has presented evidence that conclusively undermines the prosecution's trial theory of the cause of Consuelo's death and negates the origins of the prior injuries as they were presented at trial. *See* discussion in Claim One, *supra*, and Claim Four, *supra*; Claim Thirteen, *infra*. In addition to this, Respondent asks Mr. Benavides to prove a negative, *i.e.*, that he is not a child molester. While the obligation to "prove a negative . . . [is] a burden virtually impossible to discharge," *Miller v. California*, 413 U.S. 15, 20 (1973), Mr. Benavides has presented *overwhelming* evidence that he has never hurt a child in any way, either intentionally or unintentionally, physically or sexually.[30] In light of the fact

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[30] (*See, e.g.*, Ex. 86 at ¶¶ 9-10; Ex. 91 at ¶ 77; Ex. 92 at ¶¶ 33, 34, 39 (Mr. Benavides treated Estella's daughters as if they were his own and they loved him very much; Mr. Benavides treated the girls well and never mistreated the girls); Ex. 93 at ¶ 5; Ex. 94 at ¶ 23; Ex. 95 at ¶¶ 3, 6, 11; Ex. 96 at ¶¶ 1, 4, 7, 8, 17; Ex. 98 at ¶¶ 1, 12, 19, 23, 26 (Mr. Benavides interacted with declarant's and Estella's children in a loving, respectful, and appropriate manner); Ex. 99 at ¶¶ 3, 10-12, 19; Ex. 100 at ¶ 19; Ex. 102 at ¶ 39 ("[Mr. Benavides] was affectionate and appropriate with my young children and with Estella's girls."), 64; Ex. 103 at ¶¶ 32, 38; Ex. 104 at ¶¶ 37-38 (Mr. Benavides's friend describes Mr. Benavides as a wonderful human, observed him with Estella's daughters and saw that they were

that Respondent has offered no evidence, aside from the fact that Consuelo suffered injuries prior to November 17, 1991, in support of its contention that Mr. Benavides was a child molester and molested Consuelo Verdugo prior to that date, Mr. Benavides has made a prima facie case that the prosecutor's unwarranted inferences and arguments were false and prejudicially affected the verdict.

Respondent apparently disputes the materiality of Joe Avila's criminal history (or "RAP" sheet) that was withheld from the defense, claiming that Estella testified only that she dated Joe Avila after Consuelo's death. (Response at 75.) Even though Estella testified that she saw Joe Avila at Consuelo's funeral, on New Years Eve of 1991, and on July 4, 1992, and several other times in which he helped her move, borrowed grape shears, or was at his sister's house when Estella was there, she did not testify that she began dating Joe Avila after Consuelo's death. (13 RT 2578-81.) In fact, she did not testify at all regarding when she began dating Joe Avila. The prosecution, however, had information that Estella and Joe Avila had been "seeing" one another for a long time, since prior to Joe Avila's arrest. (*See, e.g.*, Ex. 4 at 2071-73.) The prosecution also possessed evidence that Estella dated Joe Avila after he was paroled on November 20, 1990, a year before Consuelo was injured. (Ex. 4 at 2071-73.)

Respondent argues that the fact that Avila was paroled prior to Consuelo's death is insufficient to show that he had the opportunity to harm Consuelo or cause her prior injuries. Respondent can make this argument only by ignoring other evidence in the possession of the prosecution including the fact that Joe Avila was released not after Consuelo died, but

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affectionate with him and showed no fear or disdain toward him, expresses that no one believed Mr. Benavides could have hurt the girls); Ex. 111 at ¶ 11-12, 41, 62, 65.)

an entire year before, information that Avila was a convicted and registered child molester, and information that Estella Medina had been spending time with Avila since he had been released from prison. Contrary to Respondent's suggestion, evidence of Joe Avila's release prior to Consuelo's prior injuries was material because Avila had access to her and, unlike Mr. Benavides, had a history of violent and sexual behavior with children. Evidence of his early release date thus contradicted the prosecution's representations that if Consuelo obtained her injuries not in the manner described by her mother, she must have obtained them as a result of being molested by Mr. Benavides. (*See, e.g.*, 18 RT 3596 (The prosecutor argued that Estella "can't even tell two doctors the same story about how she broke her arm. Maybe she did break it at the grandmother's, maybe she didn't.").)

Joe Avila's RAP sheet proving he was released from prison a year prior to Consuelo's death was therefore material and exculpatory, and had it been disclosed there is a reasonable probability that the jury would not have found Mr. Benavides guilty of the crimes and would not have sentenced him to death. *See Bagley*, 473 U.S. at 682. Additionally, had defense counsel obtained this available evidence and presented it at trial by introducing the RAP sheet or criminal records themselves, there is a reasonable probability that the outcome of Mr. Benavides's trial would have been different. *Strickland*, 466 U.S. at 694. To the extent that trial counsel had other evidence demonstrating Avila's early release date, trial counsel was ineffective in failing to use the evidence to dispute the prosecutor's false assertion.

Respondent contends that the state was not required to disclose the character evidence statements made to the prosecution by Mr. Benavides's brother Manuel because his opinion about Mr. Benavides was not material

to his guilt or innocence. (Response at 75-76.)[31] Respondent is incorrect. Manuel Benavides provided material, exculpatory information to the prosecution that he had known his brother, Mr. Benavides, his whole life and that Manuel's several daughters had grown up around Mr. Benavides without incident. This evidence was exculpatory because it countered the prosecution's evidence that Mr. Benavides had caused any of Consuelo prior injuries indicative of sex abuse because he was "a molester." (18 RT 3652.) Had the evidence of Avila's RAP sheet and exculpatory statements about Mr. Benavides's history of good conduct around children been disclosed to the defense for use before and during trial, there is thus a reasonable probability that the outcome of Mr. Benavides's trial would have been different. *See Bagley*, 473 U.S. at 678-82.

In addition, had defense counsel investigated this information and introduced available evidence of Joe Avila's relationship with Estella prior to Consuelo's death and his parole release date, there is a reasonable probability that the outcome of Mr. Benavides's guilt phase and sentencing would have been different. *Strickland*, 466 U.S. at 694.

Respondent argues that Mr. Benavides could have raised these claims on direct appeal, and is therefore barred from litigating them now, under *In re Dixon*, 41 Cal. 2d 756, 759 (1953). However, Mr. Benavides has raised constitutional errors that by definition cannot be raised on appeal because they generally are not discovered or discoverable at the time they occur, and, in Mr. Benavides's case they were not reasonably discoverable until after trial. These issues involve the elicitation of false testimony and the prosecution's failure to disclose material exculpatory evidence. In addition,

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[31] Respondent also improperly refers to the declarations of Estella Mancilla Morales and Manuela Palomino Huerta, which have been withdrawn. (*See* RCCAP at 118.)

these claims could not be stated on direct appeal because they relied, in order to demonstrate a prima facie case, on extra-record documents including statements by witnesses not provided to the defense at the time of trial, and court documents in the possession of the prosecution, Department of Corrections, and Department of Health Services.

This Court's decision in Mr. Benavides's direct appeal issued on February 17, 2005, has bearing on this claim. In the Corrected Amended Petition, Mr. Benavides alleged that the prosecution knew that Consuelo was exposed to violent persons and sex abusers whom, unlike Mr. Benavides, were far more likely to have caused any of her prior injuries. (*See* Claim Five, subclaim 8.) On appeal, this Court held that the trial court abused its discretion in admitting evidence, over defense objection, of Estella Medina's association with Joe Avila. *People v. Benavides*, 35 Cal. 4th 69, 90 (2005). This Court found that this evidence was irrelevant because nothing in the record established that Estella associated with Avila prior to November 17, 1991, "or had knowledge or reason to suspect defendant was abusing Consuelo." *Id.* at 90-91. Though the suppressed RAP sheet and law enforcement interviews show that Estella was associating with Avila a year before Consuelo was injured, the evidence about Avila and the evidence of prior injuries and illnesses were nonetheless inadmissible because neither had any relevance to the question of Mr. Benavides's guilt of the charged crimes. This Court found on appeal that the trial court's abuse of discretion in admitting the evidence was harmless in light of other evidence against Mr. Benavides. *Id.* at 91. The error, however, was not harmless when considered in conjunction with the extra-record evidence presented in the Corrected Amended Petition and this Reply.

Respondent addresses allegations in the Supplemental Petition that was lodged, but which this Court declined to file without prejudice to including the allegations in this Informal Reply. Respondent indicates this Court's ruling on appeal was correct and that Mr. Benavides has not identified any connection between this Court's ruling on appeal and this claim. (Response at 76.) Respondent's assertions are baseless.

The prosecutor introduced evidence of Avila's association with Estella to show her propensity to associate with inappropriate adult companions. *Benavides*, 35 Cal. 4th at 90. By suppressing Avila's RAP sheet showing his actual release date and making false statements that Estella met Avila only after Consuelo's funeral, the prosecutor was able to argue that Avila had nothing to do with Consuelo's injuries on November 17, 1991, or prior to that date. (*See* RCCAP Claim 5(8).) At the same time, the prosecutor used the evidence to argue that Estella's association with Avila somehow implicated Mr. Benavides in the crime. (*See, e.g.*, 13 RT 2567-68, 2578-81; 18 RT 3592-93.)

Had the prosecution not suppressed Avila's RAP sheet documenting his release a year prior to Consuelo's death and had the defense adequately investigated Avila's background, the defense could have argued that Avila, a convicted child molester, unlike Mr. Benavides, who had no previous criminal history or history of abusing children, was more likely to have caused Consuelo's prior injuries.[32]

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[32] As argued in the Corrected Amended Petition, counsel should have moved to exclude the prior injuries and illnesses as unduly prejudicial predisposition evidence that had no connection to Mr. Benavides whatsoever. (*See* Claim Thirteen, subclaim Seven.) To the extent the evidence was admissible, however, counsel was hampered in her ability to counter it by the prosecution's suppression of Avila's RAP sheet.

Moreover, as argued in Corrected Amended Petition Claims Six and Thirteen, the irrelevant evidence regarding Avila was part of a slew of irrelevant character evidence introduced, without objection by the defense, to tarnish Estella Medina's character and incriminate Mr. Benavides by proxy. Estella's alleged neglect of her children and choice of male partners was irrelevant to Mr. Benavides's guilt and far more prejudicial than probative of his guilt. Hence, the error in introducing evidence about Avila was not an isolated error, but rather part of the central flawed theme of the prosecution—that Mr. Benavides was guilty because his girlfriend was the type of person to allow her children to be neglected and abused.

Further, contrary to this Court's assertion that there is "strong evidence" against defendant, *Benavides*, 35 Cal. 4th at 91, which renders the error harmless, ample evidence presented in the Corrected Amended Petition and this Reply proves that Consuelo was not sexually abused and that Mr. Benavides lacked the character or motive to suddenly inflict physical harm on her. (*See, e.g.*, RCCAP Claims 1, 4, 5-7, 13.)

Thus, the trial court's error in allowing admission of irrelevant evidence regarding Avila, considered in conjunction with the prosecutor's misconduct in suppressing his parole date, defense counsel's unreasonable failure to investigate Avila's background, and defense counsel's ineffectiveness in failing to object to a host of irrelevant and prejudicial bad character evidence regarding Estella Medina, was not harmless. This irrelevant evidence was the centerpiece of the prosecution's theory, designed to obscure the lack of any bad character evidence regarding Mr. Benavides. Absent the accumulation of these errors, there is a reasonable probability that the result of the trial would have been different.

### F. Claim Six: The State Improperly Presented Irrelevant Evidence Concerning Estella Medina in an Attempt to Prejudice the Jury Against Mr. Benavides.

Mr. Benavides has made a prima facie showing that his conviction and sentence of death were rendered in violation of his rights because the prosecutor improperly introduced irrelevant and prejudicial evidence regarding Estella Medina's alleged child neglect to demonstrate Mr. Benavides's "opportunity" to harm Consuelo in the past, and thus the prosecutor asked the jury to punish Mr. Benavides for Estella Medina's child neglect. In addition to ignoring evidence that other persons had greater opportunity to cause injury to Consuelo, the prosecutor misused the evidence regarding Estella Medina as if it were character evidence pertaining to Mr. Benavides, relying on it to show that Mr. Benavides had the propensity to commit crimes against Consuelo on November 17, 1991.

Respondent contends only that the evidence was "relevant to show Mr. Benavides's opportunity to commit the charged offenses and to show Estella's loyalty to Mr. Benavides." (Response at 77.) The evidence was not relevant to Mr. Benavides's culpability, and, even accepting Respondent's view, what little relevance it had was substantially outweighed by the prejudice wrought by its introduction at trial. Moreover, the evidence improperly undermined Estella's exculpatory statements that she did not believe that Mr. Benavides caused the injuries that resulted in Consuelo's death.

As set forth in the Corrected Amended Petition, the prosecutor transformed Mr. Benavides's trial into a trial of Consuelo's mother, Estella Medina. (RCCAP at 121-30.) The prosecutor's evidence and argument targeted Estella's neglectful mothering, allowing him to argue that Estella's neglect permitted Mr. Benavides to cause Consuelo's injuries and illnesses. The prosecutor's twisted logic produced his argument that, because Estella

could not account for how Consuelo was injured, Mr. Benavides must have been responsible for these injuries. For example, because Estella did not know how Consuelo had previously broken her arm, the prosecutor argued that somehow Mr. Benavides must have been the cause. (18 RT 3596-97 ("She did not protect Consuelo Verdugo. I mean, she can't even tell two doctors the same story about how she broke her arm. Maybe she did break it at the grandmother's, maybe she didn't. So what. . . . If the evidence of the prior injuries before and the lack of reporting don't convince us, certainly her actions after this child is killed has [sic] got to convince us, she would have never turned him in.").) In fact, the prosecutor knew that his insinuations were untrue; prosecutorial notes indicated that Dr. Chandra believed what Estella said about how Consuelo was hurt: that she fell down. (Ex. 5 at 2568.)

Despite Respondent's argument that the evidence was introduced to show only that Mr. Benavides had the "opportunity" to abuse Consuelo, (Response at 77)[33], and not as character evidence, this evidence said nothing about Mr. Benavides's opportunities to cause harm but rather was a

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[33] The prosecution did not discuss Mr. Benavides's opportunity to commit these acts during the in limine proceedings concerning their admissibility. He merely described the facts surrounding Cristina's statements regarding the locked door incident as well as facts alleged by Diana Alejandro, who stated in an interview that in October Consuelo had been "grabbing her vaginal area, groping, groaning, and vomiting and having problems." (1 RT 65.) He then described other injuries suffered by Consuelo, including prior rib, pancreas, and vaginal injuries. (1 RT 64.) He did not attempt to link these injuries to Mr. Benavides. The court asked the prosecution when Mr. Benavides and Estella had begun living together, and he stated in February of 1991. The defense countered that while the two had met at that time, they never lived together; Mr. Benavides only visited the apartment. (1 RT 65.) Defense counsel's motion to exclude statements other than what was observed by these two witnesses was then granted by the trial court. (1 RT 68.) No evidence linked Mr. Benavides to Consuelo's other injuries.

strong indicator of character—Estella's character as a mother. Rather than presenting evidence that actually demonstrated whether Mr. Benavides had access to Consuelo at the times she suffered her prior injuries (which the prosecutor could not do because none existed), the focus of the prosecution's evidence was on the fact that Estella, as a bad mother, allowed Consuelo to suffer injuries and illnesses repeatedly. This irrelevant evidence prejudiced Mr. Benavides by distracting the jury from whether there was evidence to prove Mr. Benavides committed the charges and aroused the jury's passions and anger towards Estella, and, by association, towards Mr. Benavides. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Davis v. Zant*, 36 F.3d 1538, 1546-51 (11th Cir. 1994). To mask the dearth of evidence demonstrating that Mr. Benavides had the character to spontaneously commit the crimes alleged by the prosecution, the prosecution focused its case instead on Estella's bad character and prejudicially urged the jury to convict Mr. Benavides by his association with her.

The prosecutor similarly was permitted to present evidence that Estella dated a convicted child molester named Joe Avila *after* Consuelo's death to show that Mr. Benavides had the opportunity to harm Consuelo. As this Court held on appeal, the trial court abused its discretion in admitting evidence about Estella's association with Avila because "[n]othing in the record established that before then, [Estella] Medina either associated with Avila or had knowledge or reason to suspect defendant was abusing Consuelo." *People v. Benavides*, 35 Cal. 4th 69, 90-91 (2005).[34]

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[34] As explained in the reply to the response to Claim Five, though there is off-record evidence presented with this Corrected Amended Petition that Estella did associate with Avila prior to November 17, 1991, evidence about Avila should still have been excluded as it was more prejudicial than probative. Further, as explained in Claim Thirteen, given that evidence

This Court rejected the tenuous string of inferences that the prosecutor offered to introduce this evidence. Apparently, the prosecutor's logic was that because Estella would not protect her daughter Cristina after Consuelo's death—presumably because she voluntarily spent time with someone whom she knew might molest her daughter—she did not protect Consuelo from Mr. Benavides even though she knew he had harmed her in the past. The fact that Mr. Benavides, unlike Avila, had never before threatened or harmed Consuelo, Cristina, or any other child, in any way—making a comparison between him and Avila outrageous and wholly unfair—did not factor into the relevancy determination. (13 RT 2568-71.)

The prosecutor grossly misled the jury—and the trial court—when he asked to introduce evidence about Avila and then presented it to the jury over defense counsel's objection. While representing to the jury (and the trial court during the determination of the admissibility of the evidence) that the evidence tended to show that Mr. Benavides was guilty of harming Consuelo in the past because her mother allowed a convicted child molester to spend time with Cristina after Consuelo died, the prosecutor failed to make any mention of the fact that Joe Avila himself had access to Consuelo and Cristina during the year prior to Consuelo's death and had opportunities to cause the prior injuries suffered by Consuelo. (*See* Ex. 6 at 2943-51; Ex. 4 at 2072-73.) Avila's opportunities to harm Consuelo were not considered important by the prosecution and were therefore not presented; only the infrequent instances when Mr. Benavides might have been caring for Cristina and Consuelo were admitted. No evidence regarding the opportunities of Avila, or other possible abusers such as Javier Alejandro,

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about Avila was admitted as well as evidence of prior injuries, counsel provided ineffective assistance in failing to introduce evidence that Avila was the much more likely cause of such prior injuries than Mr. Benavides.

Antonio Alejandro, Nicasio Alejandro, Delia Alejandro, or Diana Alejandro was introduced by the defense or the prosecution, despite the fact that both knew or should have known that such evidence existed.[35]

When evaluating whether the prosecutor's actions and statements violated due process, the Court must consider several factors to determine whether the evidence and argument, in context, rendered the entire trial unfair. *See Donnelly*, 416 U.S. at 643; *Davis,* 36 F.3d at 1546-51; *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985). A defendant's trial is rendered unfair, in violation of the Due Process Clause, if consideration of the following factors indicates that, had the misconduct not been committed, there is a reasonable probability that the outcome of the proceedings would have changed: (1) the degree to which the challenged evidence has a tendency to mislead the jury and to prejudice the defendant; (2) whether the evidence is isolated or extensive; (3) whether the evidence was deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish defendant's guilt. *See Davis*, 36 F.3d at 1545 (misconduct must be "so egregious as to create a reasonable probability that the outcome was changed") (quoting *Donnelly v. DeChristoforo*, 416 U.S. at 645); *Kincade v. Sparkman*, 175 F.3d 444, 446 (6th Cir. 1999).

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[35] (*See, e.g.*, Ex. 4 at 2071-73; Ex. 9 at 3766-67 (detailing drug and other criminal charges brought against Darlene and Reynaldo Salinas); Ex. 4 at 2250, 2260, 2380, 2411 (Diana did not want to talk to Estella about Consuelo because Diana knew she would end up becoming physically violent with Estella; Diana telling lady, "Please don't because I don't want to hit you" during verbal altercation); Estella moved out of her mother's house after one of her brothers tried to shoot another brother at home in front of her children); Ex. 62 at 5211-12; Ex. 23 at 4127-45; Ex. 45; *see also* RCCAP at 114-19.)

Consideration of these factors inexorably demonstrates the due process violations present in this case. First, the evidence presented at trial, including the evidence detailed above, was egregiously misleading and prejudicial. The prosecution used this evidence to argue that Estella was the "fulcrum" around which Mr. Benavides's "perversion" fit perfectly—arguing that Estella knew Mr. Benavides had a pattern of harming her child and that she specifically protected Mr. Benavides from arrest because she was so in love with him. (18 RT 3595-96, 3660.) As this Court recognized on appeal, "[n]othing in the record established that . . . Medina . . . had knowledge or reason to suspect defendant was abusing Consuelo" or any other children.

Contrary to the prosecutor's exhortations, Estella's lack of parenting skills had nothing to do with Mr. Benavides's alleged guilt or his opportunity to harm Consuelo. While other itinerant caretakers had opportunities to harm Consuelo, the prosecutor failed to prove Estella's behavior created opportunities for *Mr. Benavides* to harm Consuelo. That Consuelo's arm injury was caused by a fall at Delia Salinas' house, when Mr. Benavides was not present, was undisputed. That Consuelo was sick on Halloween was in no way shown to be evidence that Mr. Benavides caused her illness. There was no evidence that Mr. Benavides could have or did cause Consuelo's abdominal or pancreatic prior injuries. The only so-called suggestion that Estella felt Mr. Benavides was a threat to her children appears in the prosecutor's cross-examination questions, which he asked without any support or showing that he had a good faith basis for asking them. (13 RT 2587-88 ("It wasn't until he came around that the child started having broken bones and bruises, was it?") (cross-examination of Estella Medina); 15 RT 3054 ("Isn't it true, Mr. Benavides, you have been molesting that little girl for a while?") (cross-examination of Vicente

Benavides).) Thus, there was no indication that any of the evidence had specifically to do with whether *Mr. Benavides*—and not Consuelo's family members and mother's associates who were violent, used drugs, had psychotic episodes, and/or had been convicted of child molestation—had the opportunity and demonstrated propensity to harm Consuelo. The jury therefore focused their attention on Mr. Benavides rather than consider the array of possible causes for Consuelo's injuries. The jury was misled into assuming that whenever Consuelo was injured or ill, Mr. Benavides was responsible and, in turn, that the prior injuries proved that Mr. Benavides was responsible for Consuelo's fatal injuries.

Second, the improperly admitted evidence was extensive and its effects far-reaching. Without the misleading evidence of Estella's alleged bad parenting, her relationship with a child molester, and the injuries and illnesses Consuelo suffered, the prosecution had absolutely no evidence tending to show that Mr. Benavides might be capable of committing the extreme, violent crimes with which he was charged. The suggestion that Estella was protecting Mr. Benavides and had allowed him repeatedly to harm Consuelo was a major theme in the prosecution's case, and was mentioned six times in the prosecution's closing argument. This was the topic with which the prosecutor decided to end his closing argument and offer as his final rebuttal. (18 RT 3595 ("She provides the opportunity for him."); 18 RT 3595-96 ("Estella Medina provides the opportunity, the perfect fulcrum for the defendant."); 18 RT 3596 ("... the defendant could not have found a better situation for his perversion. She did not protect Consuelo Verdugo. . . . [S]he can't even tell two doctors the same story about how she broke her arm."); 18 RT 3696 ("She has a head injury and they put aloe vera on it. And she is a certified nurse's assistant."); 18 RT 3596-97 ("She is the reason these things go unreported. She is the reason

why a child has broken fractured ribs and is never taken care of. She is the reason why she has scarring of the pancreas and never [was] taken to a doctor."); 18 RT 3660 ("the child was previously abused, both physically and sexually ... it happened over a period of time. And it shows with Estella Medina why those things went unreported. Unreported. This child has fractured ribs, scar tissue in the abdomen, blunt trauma tears in the vagina and anus. Gee, I wonder who did it on November 17th, 1991, given the state of this evidence.").)

Third, the presentation of this evidence was intentional and deliberate. The prosecution knew there was no connection between Estella's neglect and Mr. Benavides's supposed guilt, but presented the evidence anyway, to fill deficiencies in the prosecution's case. The prosecution had evidence in its possession that indicated other individuals had opportunity to cause Consuelo's injuries but chose to ignore it.

Finally, the remaining prosecution evidence was weak. The prosecution's evidence that Consuelo was sexually and physically abused was based on incomplete information and was demonstrably false. The prosecution had no evidence linking Mr. Benavides to Consuelo's prior injuries or indicating that Mr. Benavides had committed any violence or acts of sexual molestation in the past. Moreover, the prosecution recognized the weakness of its evidence that the cause of Consuelo's death was even a sex crime or a crime at all. Facing this lack of evidence, the prosecution misled its medical witnesses by failing to show them records that the first medical team to treat Consuelo saw absolutely no sign of rape, sodomy, or molestation-related injury. (*See* discussion, *supra*, in Claim One.)

In light of this extensive false, irrelevant, inflammatory, and misleading evidence regarding Estella's parenting, the jury falsely

concluded that because Consuelo was harmed in the past and Estella did not report it, Mr. Benavides had a pattern of abusing and molesting the child that continued until November 17, 1991. This gross misconduct requires the granting of relief. The prosecution here ignored that its duty and function "under the Federal Constitution is not to tack as many skins of victims as possible to the wall. [Its] function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *Donnelly*, 416 U.S. at 648-49. Had the prosecutor not introduced this extremely prejudicial evidence and argument, there is a reasonable probability that the result of the proceedings would have been different. *Donnelly*, 416 U.S. at 645.

On many occasions during which the prosecution conveyed this inaccurate, irrelevant, and highly prejudicial information to the jurors, Mr. Benavides's counsel sat silent and failed to voice any objection. Counsel's failure in this regard amounted to constitutionally ineffective assistance. *See, e.g., Crotts v. Smith*, 73 F.3d 861 (9th Cir. 1996), *superseded by statute on other grounds, as stated in Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000); *Sager v. Maass*, 84 F.3d 1212 (9th Cir. 1996). Indeed, it is impossible to imagine any reason why an attorney in a capital case would consent to the prosecution's substantial reliance on completely irrelevant and inflammatory evidence. Had the evidence been challenged by the defense, the court would have weighed the admissibility of this evidence under Evidence Code section 352, and would have found that, if the evidence had any probative value at all, it was far outweighed by the prejudice that it engendered. The admission of this evidence thus rendered Mr. Benavides's trial fundamentally unfair in violation of his constitutional rights on this ground as well. *See Spencer v. Texas*, 385 U.S. 554, 561-62 (1967); *United States v. LeMay*, 260 F.3d 1018, 1026-27 (9th Cir. 2001).

Mr. Benavides's conviction and death sentence must therefore be vacated. Counsel's failure to protect the integrity of Mr. Benavides's jury in this way was purely the result of negligence and fell below a constitutionally acceptable standard of performance. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). This Court cannot find that the prosecution's severe misconduct had no effect upon the jury's verdict, and thus, counsel's unconstitutionally deficient performance prejudiced Mr. Benavides.

Respondent's only other argument, aside from restating its belief in the relevance of the evidence, is that the claim is procedurally barred from consideration. Respondent first argues that this claim restates an appellate claim, and therefore may not be presented on habeas under *In re Dixon*, 41 Cal. 2d 756, 759 (1953). (Response at 77.) In fact, Mr. Benavides's claim differs from the appellate claim in that it relies extensively on extra-record facts, including relevant facts that were not discovered until after trial because they were withheld from the defense, such as Joe Avila's actual parole date, the extent of the prosecution's knowledge of the opportunities of other family members and associates to harm Consuelo, and knowledge of Mr. Benavides's lack of prior bad acts of molestation or any harm to children. Mr. Benavides has simply utilized a habeas petition for one of its intended purposes: to present a constitutional violation occurring at trial in conjunction with evidence that does not appear in the appellate record. Such factual development is required in habeas proceedings when necessary, as it is here, to establish that the defendant was denied a constitutional right at trial. *See, e.g., In re Bower*, 38 Cal. 3d 865, 872 (1985); *Thigpen v. Roberts*, 468 U.S. 27, 32 n.6 (1984).

Second, Respondent again raises an objection under *In re Lindley*, 29 Cal. 2d 709, 723 (1947). To the extent that Mr. Benavides's claim

challenges the admissibility of evidence, this challenge is permitted on habeas when it relies on evidence withheld from the defense at the time of trial, in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), or when that evidence is misleading or false. *See Donnelly*, 416 U.S. at 645; *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Indeed, if Mr. Benavides were not permitted to challenge false evidence admitted at trial, or evidence admitted under false pretenses, the Due Process Clause would be eviscerated.

Mr. Benavides has thus demonstrated prima facie that the extensive evidence regarding Estella Medina's character presented at trial was irrelevant and inflammatory, and entitles Mr. Benavides to a new trial free of this inflammatory evidence.

### G. Claim Seven: The State Withheld Material Exculpatory Evidence That Was Relevant to the Impeachment of Prosecution Witnesses and That Indicated the Prosecution Had Manufactured False Testimony.

The Corrected Amended Petition sets forth allegations which demonstrate prima facie that Mr. Benavides is entitled to have his convictions and death sentence set aside as a result of the prosecution's failure to disclose material, exculpatory evidence relevant to the impeachment of prosecution witnesses and demonstrating that the prosecution presented false testimony. Respondent contends Mr. Benavides's claim fails because the prosecutor did not have a duty to disclose the evidence and also argues that the prosecutor's failure to disclose the evidence was not prejudicial. Respondent is incorrect.

The Due Process Clause requires that a prosecutor disclose to a criminal defendant any material, exculpatory evidence in the State's possession. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 433 (1995). This

obligation exists regardless of whether the defendant requested the information. *Id.* Furthermore, when the suppression of the evidence has the effect of allowing false testimony to go uncorrected, the prosecutor's duty is not dependent on his or her knowledge that the information existed. The fact that "the district attorney's silence [is] not the result of guile or a desire to prejudice matters little, for its impact [is] the same, preventing . . . a trial that could in any real sense be termed fair." *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959).

The prosecutor in this case disobeyed this constitutional mandate by failing to disclose numerous critically important categories of exculpatory evidence that prejudiced Mr. Benavides, including but not limited to: (1) evidence that the prosecution pressured and mislead its medical witnesses so that they provided false or misleading testimony at trial; (2) evidence that law enforcement manufactured false medical evidence regarding prior injuries sustained by Consuelo Verdugo; (3) evidence that the prosecution knew that Cristina Medina had not been sexually abused; (4) evidence establishing that defense counsel's secretary was threatened by members of the Alejandro family; (5) evidence that the prosecution provided benefits to members of the Alejandro family in order to influence their trial testimony rendering the information they provided at trial unreliable; (6) evidence that criminalist Jeanne Spencer's evaluations of the crime scene contained exculpatory information; (7) evidence that supported the defense theories regarding Consuelo's head injuries; (8) evidence that Mr. Benavides did not inflict Consuelo's prior injuries; (9) exculpatory statements made by medical witnesses to the prosecution prior to trial; and (10) exculpatory statements regarding Mr. Benavides's history and prior conduct made to the police prior to trial. In determining the significance of the prosecution's suppression of this evidence, this Court must evaluate the cumulative effect

of the unlawful withholding of evidence. *See, e.g.*, *Kyles*, 514 U.S. at 436-42; *People v. Kasim*, 56 Cal. App. 4th 1360, 1384 (1997).

Respondent quotes statements made by the prosecutor at trial that the prosecutor had fulfilled his discovery obligations and submits that any items that were not provided by the prosecution were either not constitutionally or statutorily required to be produced or that the failure to disclose them was not prejudicial. (Response at 79-80.) The prosecutor's self-serving statements are demonstrably false as Mr. Benavides has set forth in the Corrected Amended Petition (*see* RCCAP at 131-62) and, consequently, Respondent's reliance on the prosecutor's statements does not support Respondent's assertion.

**1. The State Unlawfully Failed to Disclose Documents Relating to Cristina Medina's Placement With Virginia Salinas and Darlene Salinas.**

Respondent claims the state had no duty to disclose documents related to Cristina's custody placement because they were not in the State's possession. (Response at 86.) These include documents created by the Kern County District Attorney's Office - Family Support Division, and the Kern County Department of Human Services/Child Protective Services (DHS/CPS). Respondent relies on *People v. Jacinto*, 49 Cal. 4th 263, 270-71 (2010), to support Respondent's assertion that the records of the Family Support Division are separate from the criminal prosecution unit. (Response at 86.) *Jacinto*, however, actually furthers Mr. Benavides's claim. *Jacinto* deals with the question of whether actions by a government actor (in that case, a sheriff) can be attributed to the prosecution and constitute prosecutorial misconduct. In *Jacinto*, this Court found that in order to impugn the prosecutor with misconduct, the "defendant must show the [government actor was] part of the prosecution team (*or otherwise*

*acted at the prosecution's behest*)." *Jacinto*, 49 Cal. 4th at 271 (emphasis added); *see also Kyles*, 514 U.S. at 432-33. Mr. Benavides has demonstrated that the DHS/CPS in fact "acted at the prosecution's behest" as District Attorney Investigator Ray Lopez regularly conferred with DHS/CPS and played an integral role in determining Cristina's placement and in orchestrating interviews of Cristina aimed at modifying her testimony—he regularly attended Cristina's dependency hearings, communicated with DHS/CPS social service workers regarding whom she spoke to and with whom she had contact. (*See* RCCAP at Claim Two.) The prosecution itself initiated the juvenile case and participated in it throughout the criminal investigation.[36] The prosecution team itself, specifically Police Detective Valdez and District Attorney Investigator Bresson, decided to remove Cristina and initiate the DHS/CPS case. (Ex. 4 at 2215.) Later, Investigator Lopez, also of the district attorney's office, initiated the second removal of Cristina from her mother's home. (Ex. 4 at 2290-303.) Furthermore, the removal did not occur in response to a caseworkers' visit to the home or the completion of a DHS/CPS evaluation of Estella Medina's progress toward fulfilling DHS/CPS requirements, but rather in response to the District Attorney Investigator's questioning during an interview with Estella about Mr. Benavides's case. (Ex. 4 at 2290-303.) Later, Investigator Lopez told Virginia (Vicki) Salinas that he needed her help to talk to Cristina. (Ex. 4 at 1674-75.) Due to these actions, taken by the investigators and prosecutors working on Mr. Benavides's case, Cristina's placements were initiated and the DHS/CPS investigation begun. The DHS/CPS investigation, therefore, was clearly undertaken at the behest of the prosecution and formed an integral part of the prosecution

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[36] The pertinent discussion in Claim Two is hereby incorporated by reference as if set forth fully herein.

investigation and strategy of trying to convince Consuelo's family to testify against Mr. Benavides. Furthermore, the Family Support Division was *actually a part of* the Kern County District Attorney's Office and operated under the direction of then Kern County District Attorney, Edward R. Jagels. (Ex. 13 at 3932.)

The scope of the government's disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge any favorable evidence known to others acting on the government's behalf, such as the police and members of other government agencies. *See Kyles*, 514 U.S. at 437; *In re Brown*, 17 Cal. 4th 873 (1998). Courts have "consistently declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel." *Brown*, 17 Cal. 4th at 879 (internal quotation marks, brackets, and citation omitted). The prosecutor's office is the spokesperson for the government. *Id.* As a concomitant of this duty, any favorable evidence known to others acting on the government's behalf is imputed to the prosecution. *Id.*[37]

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[37] *See also Smith v. Secretary Dept. of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) ("the prosecution" extends to law enforcement personnel and other arms of the state involved in investigative aspects); *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991) ("The prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge."); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("[A] prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."); *Martinez v. Wainwright*, 621 F.2d 184, 186 (5th Cir. 1980) ("The duty to produce requested evidence falls on the state; there is no suggestion in *Brady* that different 'arms' of the government are severable entities. [Citation.]").

Pursuant to this duty, the prosecutor must affirmatively obtain and disclose favorable, material information from law enforcement entities that conducted investigation in the case, *Kyles*, 514 U.S. at 538; *see also Walters v. Superior Court*, 80 Cal. App. 4th 1074 (2000), as well as other agencies with relevant information, *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc) (Department of Corrections); *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986) (Department of Alcohol, Tobacco, and Firearms); *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461-63 (9th Cir. 1993) (Drug Enforcement Administration); *United States v. Steel*, 759 F.2d 706, 714 (9th Cir. 1985) (Federal Bureau of Investigation); *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991) (personnel files of federal agent witness); *In re Brown*, 17 Cal. 4th at 873 (crime lab); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987) (state statute that does not prohibit disclosure of Children and Youth Services (CYS) agency files in all circumstances indicates that state policy does not prevent disclosure of material CYS files to defendant).

Respondent argues that the prosecutor could not have disclosed certain district attorney and DHS records because they were not in his possession. Respondent represents that the prosecutor did not possess records from the District Attorney's Family Support Division seeking child support from Estella Medina for Cristina's care during her placements with Virginia Salinas and Darlene Salinas. As noted above, knowledge possessed by members of the investigation team is imputed to the prosecution; the actual prosecutor need not have knowledge of the material for a *Brady* violation to occur. *Brown*, 17 Cal. 4th at 880-81; *Kyles*, 514 U.S. at 432-33. This imputation occurs when the prosecutor should have known of the documents because the prosecutor has the duty to seek out and disclose favorable information known to members of other government

agencies working with the prosecution on aspects of the investigation. *Brown*, 17 Cal. 4th at 880-81.

In addition to having imputed knowledge, the prosecutor also had actual knowledge of the exculpatory evidence in this case. Both district attorney Carbone and Investigator Lopez knew that Cristina was placed with Darlene Salinas and then Vicki Salinas and that Estella Medina would be required by the state to pay child support to fund the increased payments to Vicki and Darlene. Respondent concedes that "[p]arents who have children who are removed from their custody by the juvenile court are routinely ordered to pay child support." (Response at 75.) Not only did Darlene Salinas receive compensation while Cristina was placed in her home, but she was also well provided for long after Cristina left her home—when she received continued increased payments despite her removal in April 1992. (Ex. 12 at 3922.) These extended increased payments were also paid for by Estella. (Ex. 12 at 3922.)

Thus, the members of the prosecution team themselves had knowledge of the welfare payments that provided the basis for the child support complaints, because they made these payments possible. Moreover, the District Attorney did not have to look very hard to find the documents and information pertaining to the custody and welfare matters, because the Kern County District Attorney's Office itself filed the cases against Estella, one of the most important witnesses in Mr. Benavides's case, in March and September 1992. (Ex. 12 at 3910; Ex. 13 at 3932.) Because the prosecutor could easily have accessed documentation regarding these benefits, it was not the prosecutor's lack of knowledge, but his lack of interest in doing so, that caused him not to disclose information related to the child support lawsuits.

This material evidence was very favorable to the defense, as it demonstrated the methods employed by the prosecution in developing evidence for trial: the prosecution provided benefits to witnesses who cooperated in the investigation of Mr. Benavides's case and testified at trial. *See, e.g., United States v. Shaffer*, 789 F.2d 682 (9th Cir. 1986). Thus, the favorable evidence contained in the welfare cases, would have led competent defense counsel to investigate the cooperation and testimony of these witnesses. Such evidence would have provided compelling impeachment material challenging the credibility of the prosecution's witnesses. Moreover, the defense would have uncovered evidence of the prosecution's ongoing coercion of the main witnesses against Mr. Benavides: Estella and Cristina. Nondisclosure of this information deprived Mr. Benavides of his constitutional right to a fair trial.

The prosecution also knew, and failed to disclose, that DHS interviews with Cristina's family members concerned facts related to Mr. Benavides's case. As a result of its role coordinating and developing the DHS/CPS case, the prosecution ensured that an important part of the DHS investigation (as well as the prosecution's investigation) focused on discovering what Cristina and Estella believed had happened to Consuelo. (*See* Ex. 9 at 3742-71.) Due to its involvement in the DHS/CPS investigation, the prosecution knew that DHS/CPS agents would interview Cristina's and Estella's family members about what they had said about Mr. Benavides and his case, just as the prosecution had. In fact, the prosecution continued to coordinate with DHS/CPS as both investigations progressed so that information was shared between them. (Ex. 4 at 1675; Ex. 9 at 3611, 3613, 3589-600, 3605-07, 3619-20, 3633-36, 3640-42, 3650-53, 3687, 3689-90.) As with the other exculpatory and favorable information in the DHS/CPS reports, the prosecution knew that the social service

worker's interviews with family members of Consuelo Verdugo, conducted in the months following Consuelo's death and prior to Mr. Benavides's trial, were likely to contain information that was material to Mr. Benavides's trial. In coordinating with DHS/CPS and reviewing the information obtained by them, the prosecution had a duty to determine which documents and what information obtained by these agencies was favorable to the defense and to disclose that information. *See Kyles*, 514 U.S. at 419.

### 2. The State Unlawfully Failed to Disclose Exculpatory Medical Evidence.

Respondent argues that undisclosed prosecution reports and notes that contained inconsistent statements of medical witnesses and evidence that these witnesses had been pressured or misled into testifying in a particular way were not exculpatory or material. (Response at 82, 94-96.) These reports included prior interviews with witnesses who testified for the prosecution at trial, including Dr. Dibdin, Dr. Diamond, Dr. Alonso, Dr. Shaw, Dr. Bentson, Dr. Harrison, Dr. Malouf, Dr. Seibly, Dr. Bloch, Dr. Seminario, Dr. Tait, Virginia Uclaray, Eve Beerman, as well as witnesses that did not testify, including Joylene Martinez.

The prosecutor failed to disclose a case report of a September 4, 1992 visit to UCLA in which the prosecutor harassed medical witnesses, including Dr. Richard Harrison who testified at trial, and pressured them to give statements favorable to the prosecution regarding the case. Both the case report and Dr. Harrison's declaration demonstrate that prosecutor Carbone was hostile and verbally abusive towards the witnesses because they would not provide the conclusions that he desired. (Ex. 5 at 2734-37; Ex. 78 at ¶ 13.) Carbone and Investigator Lopez spoke to the patient relations liaison at the hospital, who placed a phone call to the hospital's

legal counsel. After speaking with Carbone, legal counsel suggested to Dr. Harrison and the other medical witnesses that they cooperate with the investigation. (Ex. 5 at 2734-37.)

In addition to this direct pressure applied to Dr. Harrison to induce his cooperation, the prosecution also indirectly influenced Dr. Harrison's opinions about the case and his testimony. After trial, Dr. Harrison realized that he had not been provided with all of the medical information pertinent to the questions he was asked on the stand. For example, Dr. Harrison had not been provided with the records from Delano Regional Medical Center (DRMC) or the autopsy report. (Ex. 78 at ¶ 14.) These materials were not only withheld from Dr. Harrison, but were withheld from other medical witnesses as well, in order to induce these witnesses to present misleading and false testimony. (*See*, *e.g.*, Ex. 79 at ¶ 23; Ex. 149.) *See supra* Claim One and *infra* Claim Thirteen.

The September 4, 1992 UCLA case report, if disclosed, would have demonstrated the prosecutor's improper and misleading tactics used to obtain cooperation and testimony favorable to the prosecution,[38] and would have provided additional support for the unreliability of the state's evidence. In particular, disclosure of this case report would have caused reasonably competent defense counsel to impeach Dr. Harrison's testimony at trial. Further, its early disclosure would have led reasonably competent counsel to interview Dr. Harrison and determine that he had not been made aware of, or asked to review, documents relevant to his opinion about Consuelo's medical condition. This would have prevented Dr. Harrison's misleading trial testimony, including the glaring absence of his expert

[38] Another example of the prosecution's improper tactics was when they coerced Dr. Seminario to breach patient-physician confidentiality and disclose Estella's medical records to the prosecution without a release, and without even notifying Estella. (Ex. 4 at 2308-21.)

opinion that the cause of Consuelo's death stated in her autopsy report was anatomically impossible, and his opinion that Consuelo's head injuries were not due to shaking. (Ex. 78 at ¶¶ 14-18; 12 RT 2338-97.) Had the prosecution disclosed this evidence, and defense counsel been allowed to determine that Dr. Harrison's testimony was misleading and misleadingly obtained, there is a reasonable probability that the outcome of Mr. Benavides's trial would have been different.

The prosecution also withheld interviews conducted at UCLA with medical witnesses, including counselor Eve Beerman, on November 21, 1991. This interview with Beerman was the source of the prosecution's claim at trial that Mr. Benavides had told Consuelo to walk back to the bedroom after he picked her up off the ground. Apparently Beerman told the prosecution that Estella had given her that information. (13RT 2559.) The prosecution then used the information to cross-examine both Estella and Mr. Benavides at trial. (13 RT 2559; 15 RT 3046-47.) The materiality of the Beerman interview lies in the fact that, as with statements allegedly made to Maria Benavides (15 RT 3061), Mr. Benavides was cross-examined with her very specific statements even though they were not disclosed to trial counsel (15 RT 3047). Furthermore, the statements used to cross-examine Mr. Benavides were not even Beerman's statements, but were the double hearsay statements allegedly of Mr. Benavides, as told to Estella, and then again as told to Beerman. Had the actual statement of Eve Beerman been disclosed, the defense would have been well-prepared to counter the cross-examination of Mr. Benavides and Estella based on these statements, and would have used information from the interview to impeach Beerman on the stand as well. Thus, there is a reasonable probability that the outcome of the trial would have been different.

Respondent asserts that a withheld document showing that police officers asked Dr. Chabra to change his report, in light of the fact that the officers saw additional newly broken ribs in the x-rays that the radiologist did not see, was not material. (Response at 83.) However, even a cursory review of the document raises questions as to the government's tactics used to obtain the evidence of rib injuries, and the veracity of that evidence. During the first documented interview police conducted with Dr. Chabra, memorialized in a December 3, 1991 report, Dr. Chabra indicated that Consuelo's ribs showed only old healing injuries two weeks to one month old. (Ex. 4 at 1916.) The withheld report shows that the officers returned to Dr. Chabra two days later, after the officers had reviewed Consuelo's medical records and "brought to Dr. Chabra's attention" additional broken ribs on Consuelo's left side. (Ex. 5 at 2607.) According to the police report, Dr. Chabra then stated to the police officers that the additional fracture or fractures were very recent. (Ex. 5 at 2607.) Dr. Chabra thus changed his opinion to agree with the observations of the police officers. The reason for this change, as stated in the police report, was that he "possibly . . . overlooked" the recent fracture of the left rib in his initial review. (Ex. 5 at 2607.) In fact, when the prosecution's other rib expert, Dr. Seibly, reviewed the same radiographs from November 18, 1991, he noted no acute (recent) or healing fractures to the left posterior ribs at all. (13 RT 2514-15.) Thus, Dr. Chabra's final report, incorporating the medical evaluations of police officers, was incorrect. Had this information been disclosed, reasonably effective defense counsel would have used this information to impeach the representations at trial regarding the existence and cause of recently obtained rib injuries. This information would have undermined the prosecution's theory that Consuelo had recent rib injuries caused by squeezing. (*See* 11 RT 2128-29, 2164.) Disclosure of the

December 2, 1991 report would have provided ample material to call into question the prosecution's methods of obtaining medical evidence in Mr. Benavides's case. The withheld information also would have led reasonably effective defense counsel to investigate the prosecution's medical evidence for further signs of misleading and coerced testimony.

The materiality of the undisclosed evidence obtained during interviews with medical witnesses was heightened by additional undisclosed evidence demonstrating a pattern by the prosecution of misleading its witnesses in order to induce false or misleading testimony, or to persuade these witnesses to change their testimony in the prosecution's favor. The undisclosed favorable evidence includes, but is not limited to, interviews with prosecution medical witnesses Dr. Dibdin, Dr. Diamond, Dr. Alonso, Dr. Shaw, and Dr. Bloch. Although these were critical prosecution witnesses, the state did not disclose a single case report or interview summary, or provide any interview notes or even the dates of these interviews. This evidence shows that medical witnesses did in fact discuss the case and their testimony with the prosecution prior to trial. (*See, e.g.*, 13 RT 2565; Ex. 5 at 2734-37; Ex. 78 at ¶ 13.) Because the content of these interviews and the fact that most of them even occurred were not disclosed, the defense was unaware that these witnesses, and other medical witnesses, were not given all relevant medical information and records pertaining to the case. This critical information included records showing that medical personnel at DRMC did not observe any sign of sexual abuse or that the autopsy report included an anatomically impossible cause of death. Had this information been disclosed, the defense would have known that the medical testimony in the case was based on incomplete and misleading information.

Dr. Dibdin's testimony provides a further example of the prosecution's pattern of manufacturing favorable testimony at trial. In violation of his obligation to disclose *Brady* material, the prosecutor failed to disclose the microscopic manifest listing the 27 tissue slides taken by Dr. Dibdin. (Ex. 8 at 3542.) A review of the undisclosed manifest reveals that Dr. Dibdin did not take slides of the left posterior ribs. (Ex. 8 at 3542.) Nonetheless, Dr. Dibdin testified that the left posterior ribs contained healing and acute fractures that he dated based on a microscopic review of the left posterior rib tissues. (11 RT 2126-27.) Had counsel been provided with this information, counsel could have impeached Dr. Dibdin by showing that his testimony was false. *See* discussion in Claim Thirteen.

Similarly, Dr. Diamond's testimony was rendered inaccurate by the incomplete information he received from the prosecution. At the preliminary hearing, Dr. Diamond testified that the cause of Consuelo's death was sodomy. (1 CT 194-196.) He stated that the injuries were due to a foreign body being inserted into the rectum going through the anterior wall of the rectum. (1 CT 195.) At trial, Dr. Diamond changed his mind. When asked at trial what would have had to occur for Consuelo's death to be the result of sodomy, he stated that there would have to have been a tear to the rectum wall. (10 RT 2068.) Dr. Diamond apparently changed his opinion because of information provided to him by the prosecution. "At this time I understand there was no tear to her rectum, which *I was told* at the time [of the preliminary hearing] there was." (10 RT 2085 (emphasis added).) Having been informed by the prosecution that his testimony at the preliminary hearing was inaccurate, Dr. Diamond changed his medical opinion. The prosecution failed to provide the defense with any discovery indicating who told Dr. Diamond the erroneous critical information about an alleged hole in the rectum prior to the preliminary hearing, who retracted

that information, and when Dr. Diamond changed his opinion. Defense counsel first learned of this critical change in Dr. Diamond's opinion during his trial testimony. Although the absence of a tear in the rectum wall made impossible the state pathologist Dr. Dibdin's cause of death, the prosecution managed to obscure this fact by not asking Dr. Diamond to opine whether he agreed with Dr. Dibdin that the cause of death was penile penetration causing direct injury to the abdominal organs. (10 RT 2028-73.)

It is clear from the evidence, that what changed his opinion about the cause of Consuelo's injuries and death was consultation with the prosecution team. Dr. Diamond discussed the case with the prosecution before testifying. (Ex. 4 at 1913.) Since these contacts were not reported, defense counsel was deprived of information regarding the cause of Dr. Diamond's change of opinion, and information regarding the manner in which Dr. Diamond went from supporting Dr. Dibdin's theory of Consuelo's cause of death to believing that it was incorrect. Had materials documenting the prosecution's interviews of these witnesses been disclosed, defense counsel would have used this information to impeach not only Dr. Diamond and Dr. Dibdin, but other medical witnesses, especially with respect to the incomplete information provided to them by the prosecution. Had counsel received documents regarding prosecution interviews with medical witnesses, as well as the testimony and prior statements of the experts, counsel would have been able to expose the prosecution's pattern of shaping and modifying its witnesses' testimony so as to fit the prosecution's theories. Reasonably effective counsel would also have interviewed medical witnesses with this information in mind, showing them the DRMC records and autopsy report, and providing additional evidence the prosecution withheld from these witnesses. Disclosure of evidence that medical experts were pressured and misled by

the prosecution, or that their opinions were manufactured at the behest of the prosecution, would have been used by the defense as impeachment evidence and as a basis for further investigation by the defense. As has been amply shown in Claim Thirteen, this evidence would have altered the jury's perspective as to the reliability of most, if not all, of the medical evidence bearing on the ultimate question—Consuelo's cause of death. As a result, had this evidence been disclosed, there is a reasonable probability that Mr. Benavides would not have been found guilty and sentenced to death.

**3. The State Unlawfully Failed to Disclose Evidence Regarding Vicki Salinas's Status as a Police Agent.**

Respondent disputes Mr. Benavides's claim that the prosecution prejudicially failed to disclose evidence that Vicki Salinas acted as an agent of the prosecution by stating that there was no agency relationship between Vicki and the prosecution and referring to Respondent's argument in response to Claim Two. Respondent ignores the substantial factual support for this claim. A person acts as a state "agent" when law enforcement personnel know of, and sanction, the individual's search for evidence, and the individual obtains evidence to assist law enforcement. *See United States v. Reed,* 15 F.3d 928, 931 (9th Cir. 1994) (citing *United States v. Miller*, 688 F.2d 652 (9th Cir. 1982)).

Vicki Salinas's agency relationship with law enforcement is discussed in the Reply to the response to Claim Two. In order to avoid unnecessary repetition, that discussion is hereby incorporated by reference as if set forth fully herein. In addition to Vicki Salinas's questioning of Cristina on behalf of Investigator Lopez, Vicki also questioned Estella on Investigator Lopez's behalf. On July 6, 1992, Investigator Lopez requested that Vicki telephone Estella and ask her about her relationship with Joe Avila, and whether she

knew that Joe was a registered sex offender. Vicki agreed and did so. (Ex. 4 at 2091-96.) The information she obtained, that Estella was spending time with Joe Avila, was used at trial by the prosecution to cross-examine Estella. (13 RT 2569-73.) As he used Vicki to obtain information from Cristina, Investigator Lopez used Vicki to obtain evidence from Estella because he could not obtain it himself. He made a request that Vicki obtain specific evidence in a specific way—by allowing her phone conversation with Estella to be recorded—and Vicki obtained this evidence for Investigator Lopez and the prosecution's use at trial, not for her own use.

Had the defense known that the prosecution was suing Estella to provide child support benefits that were given to Vicki in exchange for acting as an agent for the prosecution, the defense could have used the information to impeach Vicki's credibility. As a result, there is a reasonable probability that Mr. Benavides would not have been convicted or sentenced to death absent this due process violation.

#### 4. The State Unlawfully Failed to Disclose Physical Evidence Supporting Mr. Benavides's Statements.

Respondent contends that handwritten notes by criminalist Jeanne Spencer regarding the existence of dirt on napkins containing vomit and the presence of plant fibers on Consuelo's sweatshirt were not exculpatory or material as supportive of Mr. Benavides's statement that he found Consuelo outside, because no vomit was found on the ground outside and because the vomit found on a napkin in the wastebasket contained carpet fiber. (Response at 87-89.) Respondent's arguments do not undermine the fact that the undisclosed evidence was material and exculpatory. That there may have been some evidence supporting the prosecution's position does not refute that the prosecution had a duty to disclose evidence supportive of the defense theory.

The suppressed crime lab evidence was exculpatory and material because Spencer's reports indicated that she found "small dirt particles" in a napkin that had a vomit odor in the kitchen wastebasket that was consistent with a tape lift from outside. (Ex. 7 at 3426-27.) Spencer found that this napkin also contained dried plant matter. (Ex. 7 at 3426.) She found dirt and debris in the napkins in the bathroom wastebasket. (Ex. 7 at 3412.) Her reports also showed that Consuelo's sweatshirt contained plant fibers (Ex. 7 at 3506) and that blood on Consuelo's shoe sole may have picked up dirt and gravel when she stepped on it after she bled. (Ex. 7 at 3492.) Exhibit 135 is a close-up photograph of Consuelo's shoe sole, first disclosed by Kern County Regional Criminalistics Laboratory in 2002, that depicts the blood on the sole. Respondent's argument that the evidence about the blood on Consuelo's shoe sole mixed in with dirt and gravel was not material or suppressed because a photograph of Consuelo's shoe soles was introduced as People's Exhibit 71, lacks merit. (Response at 87-88, n.27.) That exhibit is a distant picture of the shoe sole, which unlike the close-up picture in Exhibit 135 disclosed in post-conviction, and unlike Spencer's critical lab notes, does not show the soles had blood and dirt mixed in together.

Mr. Benavides testified at trial that he had found Consuelo, who was vomiting, outside the front door, close to the carport. (15 RT 3012-13; *see* People's Exhibit 63.) The prosecution assailed this testimony at trial with the testimony of Jeanne Spencer, who stated that there was no blood or vomit found on the ground in front of the door and that the vomit contained carpet fiber consistent with the carpet in the house. (14 RT 2748-2751; 11 RT 2291.) Had her notes been disclosed to trial counsel, counsel would have used them to impeach Spencer's statements and to show that the vomit could have come from outside, because it contained dirt and debris. The

fact that it also contained a carpet fiber does not detract from the materiality of this evidence in support of Mr. Benavides's testimony. In fact, that there was carpet fibers mixed in with the vomit is completely consistent and supportive of Mr. Benavides's account that he cleaned up Consuelo, who was vomiting both when he found her outside and when he brought her inside the house. (Ex. 63 at 5238.) Had counsel been provided Spencer's notes, counsel could have impeached Spencer and presented testimony corroborating Mr. Benavides's account. The suppression of this evidence allowed the prosecutor to make the false argument in closing that "we have fibers from a carpet in the vomit inconsistent with having been cleaned up from outside as testified to and stated in previous statements by the defendant." (18 RT 3650.) Since the entire case against Mr. Benavides was based on circumstantial evidence, a large part of which were his alleged inconsistent statements, suppression of this corroboratory evidence substantially prejudiced Mr. Benavides. Thus, there is a reasonable probability that Mr. Benavides would not have been found guilty or sentenced to death had this evidence been disclosed.

**5. The State Unlawfully Failed to Disclose Ct Scans of Consuelo's Head.**

Respondent contends that the district attorney disclosed all CT scans taken of Consuelo's head at UCLA. Respondent does not contest that the scans were material evidence. (Response at 89-91.) Respondent has failed to rebut the prima facie showing that the prosecution failed to disclose all the CT scans from UCLA.

In support of its argument that all UCLA CT scans were disclosed Respondent refers to a pretrial assertion by the prosecutor on the record that he disclosed all medical records and CAT scans to defense counsel. (Response at 90, citing 1 RT 19.) The prosecutor, however, did not specify

how many CT scans he disclosed to counsel. Moreover, the prosecutor's assertion is contradicted by the fact that the trial file contains only one set of CT scans, those taken on November 21, 1991, despite the existence of three other sets of CT scans taken on November 22, November 23, and November 24, 1991. (Ex. 3 at 462, 480, 1215.) That only one set of CT scans was disclosed is also supported by the trial testimony. Defense counsel's expert, Dr. Baumer, reviewed only one set of CT scans prior to trial. (14 RT 2829-33.) Only the November 21, 1991 CT scans were discussed at trial by both the prosecution and the defense. (12 RT 2402-08.) Accordingly, the weight of the evidence shows that the prosecutor unlawfully suppressed the additional CT scans.

In support of its contention that all CT scans were disclosed, Respondent also refers to a pretrial on-the-record discussion between the prosecutor and Huffman indicating that Huffman was unaware of Dr. Bentson's UCLA report interpreting the CT scans as showing brain infarcts. (Response at 90-91.) Though that discussion supports the fact that Huffman lacked sufficient familiarity with the medical records and unreasonably failed to present evidence to counter the prosecution's theory that Consuelo was suffocated, despite having been told about it before trial, the discussion in no way refutes that the CT scans were suppressed.

The suppressed CT scans had material information that could have been used by effective counsel to refute the prosecution's theory that Consuelo was suffocated. Had the additional CT scans conducted at UCLA been disclosed, they would have confirmed that Consuelo's brain injuries were secondary to her loss of oxygenated blood supply that resulted from her abdominal injuries; and thus shown that the injuries were not the result of suffocation. (*See* Ex. 84 at ¶¶ 15-16.) The evidence of suffocation was extremely prejudicial as it was used by the prosecutor to argue that Mr.

Benavides suffocated Consuelo while he was sodomizing her to prevent her from screaming and being heard by the neighbors. (18 RT 3586-87.) The prosecutor could not have presented this egregiously inflammatory and false argument had this material evidence been disclosed that Consuelo was not suffocated. Without this evidence it is reasonably probable that the result of the proceedings would have been different.

### 6. The State Unlawfully Failed to Disclose Evidence Concerning Consuelo's Prior Injuries.

Respondent contends that the prosecution did not possess evidence that Consuelo's family members and caretakers were violent, used and/or sold drugs, and were psychotic, and thus prevented defense counsel from impeaching these witnesses or presenting evidence that these individuals likely caused Consuelo's prior injuries.[39] (Response at 91.) As stated above, it is the prosecution's duty to not turn a blind eye to the possibility of impeachment material that exists in government files, and to seek out information known to the prosecution team. *Kyles*, 514 U.S. at 537. Information concerning the dangerousness of Estella's family and other witnesses who were exposed to Consuelo in the months prior to her death was provided directly to members of the prosecution team, police officers

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[39] Respondent asserts that Mr. Benavides's claim and presentation of supporting information are "attacks on the character of the victim's family [and] do not entitle [Mr. Benavides] to habeas relief." (Response at 91.) Respondent's assertion is neither accurate, nor relevant. Mr. Benavides has presented this information to demonstrate that Consuelo's family members and caretakers possibly caused Consuelo's prior injuries; the information was not intended as an attack on the character of those witnesses as Respondent alleges. Furthermore, Mr. Benavides has not claimed, as Respondent suggests, that such alleged "attacks on the character" of these witnesses are a basis for relief. Mr. Benavides bases his claim for relief on the fact that the prosecution did not disclose information regarding these other possible and likely causes of Consuelo's prior injuries.

or district attorney investigators during witness interviews with Delia Salinas (Ex. 4. at 2051-53, 2310; Ex. 66 at ¶¶ 26-30, 47); Diana Alejandro (Ex. 4 at 2236, 2243); and Javier Alejandro (Ex. 23 at 4129-30), and as part of the interviews conducted by DHS/CPS, (Ex. 9 at 3766 (witness Darlene Salinas was arrested for transport/sale of phencyclidine, convicted of petty theft; witness Reynaldo Salinas was convicted of receiving stolen property, theft, and being under the influence of a controlled substance, and was arrested for possession of marijuana/hashish). The prosecution also learned during witness interviews that Cristina and Consuelo had been present when one of their uncles tried to shoot another uncle, and that their mother regularly fought with their aunt Diana, even using baseball bats and knives. (Ex. 4 at 2411.) Finally, the prosecution was told that other members of Consuelo's family had been sexually abused and assaulted. (Ex. 6 at 2934.) The prosecution thus failed to disclose a great deal of information that Consuelo was regularly exposed to violent, psychotic, and drug addicted and/or drug dealing caretakers who were much more likely to be neglectful or violent in a way that would cause Consuelo's prior injuries than Mr. Benavides, who rarely babysat the children, and had no criminal or violent history.

Respondent additionally argues that Mr. Benavides's claims are "without merit" because this information was not impeachment information. (Response at 91.) On the contrary, this information could have been used to impeach the Darlene Salinas by presenting to the jury evidence that Darlene had an incentive to cooperate with the prosecution and testify against Mr. Benavides in order to obtain financial assistance in the form of welfare benefits. (*See* Claim Eight.) This information was also material and exculpatory because it would have refuted the prosecution's claims that Consuelo's prior injuries—including the broken wrist suffered

at Delia's house, the stomach illness she experienced at Diana's house, the head injury she suffered at Estella's, and old pancreas injuries noted by doctors that she suffered within two months prior to her death—were much more likely to have been caused by violence or neglect at the hands of her family members or other individuals she was exposed to than by Mr. Benavides, whom had been described as nonviolent and highly unlikely to be the perpetrator of Consuelo's injuries.

Respondent asserts that the information of Darlene's drug use and theft conviction was not material. (Response at 93.) The fact that her drug conviction was a misdemeanor does not mean that disclosure is not required. *See Wood v. Bartholomew*, 516 U.S. 1, 7-8 (1995) (evidence "reasonably likely" to lead to a different outcome at trial must be disclosed); *People v. Santos*, 30 Cal. App. 4th 169, 178-79 (1994). Disclosure was required to assist the defense in developing evidence of the underlying conduct relevant to trial. *Santos*, 30 Cal. App. 4th at 176-78.; *see also Kyles*, 512 U.S. at 445. Here, that included the fact that Darlene was a drug user, a fact that defense counsel would have used as impeachment information by asking Darlene about the circumstances surrounding her obtaining temporary custody of Cristina even though she had a drug conviction and as the basis for fully investigating the cause of the prior injuries, Cristina's placement, and Darlene's motivation for testifying. This information would have led defense counsel to uncover the prosecution's coercion of testimony by Cristina and Estella.

Contrary to Respondent's assertion, the prosecution's withholding of this information was in fact prejudicial. Defense counsel would have been able to use this information to investigate the witnesses' opportunities to injure Consuelo, and refute the prosecution's circumstantial evidence that Mr. Benavides must have caused these injuries. If the prosecution could

permissibly argue that Mr. Benavides caused the prior injuries, despite his infrequent babysitting of Consuelo and Cristina, absence when these injuries occurred, and lack of any history of violence or criminal convictions, then the defense could have also argued that Estella's siblings who cared for Consuelo, regularly spent time with her, and had committed prior crimes, were the more likely perpetrators of her prior injuries. *See People v. Hall*, 41 Cal. 3d 826 at 833 (1986); *DiBenedetto v. Hall*, 272 F.3d 1, 8 (1st Cir. 2001). Thus, had the evidence of the violence, psychotic behavior, and drug use of these caretakers been disclosed prior to trial for competent counsel to use in preparation for trial and during trial, there is a reasonable probability that the outcome of the proceedings would have been different.

### 7. The State Unlawfully Failed to Disclose Exculpatory Statements by Dr. Tait, Dr. Harrison, and Defense Expert Warren Lovell.

Respondent argues that the prosecution was not obligated to disclose information about District Attorney Investigator Gregg Bresson's interview with Dr. Tait and Dr. Harrison prior to the preliminary hearing, and the prosecutor's discussion with Dr. Lovell prior to trial. Respondent argues that information from these interviews was either not discoverable and/or not material. Respondent is incorrect.

Respondent argues that because Investigator Bresson may have not produced a report of his interview with Dr. Tait, the information he received from her was not discoverable. (Response at 94.) Respondent is incorrect on several accounts. First, there is evidence that Investigator Bresson took notes or produced a report of his interview with Dr. Tait. In cross-examination at the preliminary hearing counsel asked Investigator Bresson whether his testimony on direct examination about Dr. Tait's professional

background that he "read" was her curriculum vitae. Investigator Bresson responded that it was not. (1 CT 163.) Counsel's question indicates that Investigator Bresson's direct testimony was based on information that he read, presumably his notes or a report of the interview. It is highly likely that he did take notes of the conversation since it would be unlikely that he could remember, without notes, all the medical detail he testified that Dr. Tait had given him about Consuelo's medical condition. (*See* 1 CT 161-63.) Moreover, even if he did not reduce Dr. Tait's statements to writing, the prosecution was obligated to disclose the information she provided under Penal Code section 1054.1, subdivision (f), requiring disclosure of "reports of the statements of witnesses" whom the prosecutor intends to call at trial. *See Roland v. Superior Court*, 124 Cal. 4th 154, 165-66 (2004) (holding that Penal Code sections 1054.1 and 1054.3, require disclosure of the oral statements of intended witnesses by the prosecution and defense even if the statements are not reduced to writing); *see also Phillips v. Ornoski*, 673 F.3d 1168, 1186-87 (9th Cir. 2012) (prosecution's duty to disclose favorable evidence extends to calls made by the sheriff's department on behalf of prosecution witness).

Contrary to Respondent's assertion, Mr. Benavides has made a prima facie showing that Dr. Tait's statements to Investigator Bresson were material exculpatory evidence that could have been presented at trial as strong evidence of Mr. Benavides's innocence. It is highly likely that Investigator Bresson asked Dr. Tait if she saw any evidence of sexual abuse. Though according to Investigator Bresson's response to the prosecutor's leading question in the preliminary hearing Dr. Tait did not suspect Consuelo had been physically or sexually abused given Estella's account that she had run into a door, it is likely Dr. Tait also informed him that she had not seen any signs of trauma to the anus or genitalia, which she

had ample opportunity to see. (Ex. 76 at ¶¶ 7, 10.) As has been amply shown in Claims One and Thirteen, this was critical evidence that would have changed the testimony of most of the doctors who testified that Consuelo was abused. (*See, e.g.*, Ex. 144.)

Similarly, the prosecution failed to disclose Investigator Bresson's notes of his interview with Dr. Harrison. Investigator Bresson specifically testified that he was looking at his notes as he testified at the preliminary hearing about what Dr. Harrison allegedly told him. (1 CT 204-05.) Respondent argues that there was no prejudice from the prosecution's failure to disclose this evidence. Though Mr. Benavides cannot be sure of what is in the notes since the prosecution has continued to refuse to disclose the information, despite repeated requests for disclosure in post-conviction discovery, it is likely that evidence from the interview was material and exculpatory or impeachment evidence. The interview may have allowed counsel to realize that Dr. Harrison was not provided with all the relevant medical records before testifying at trial. (Ex. 78 at ¶ 14.) Had Dr. Harrison known, for example, that Dr. Dibdin had opined the cause of death was penile penetration of the anus causing direct injury to the abdominal organs, Dr. Harrison could have testified that Dr. Dibdin's opinion was anatomically impossible given his own observations and those of other medical personnel who did not see the injuries that would be present if Dr. Dibdin's opinion were true. (Ex. 78 at ¶ 11, 14.) Contrary to Respondent's suggestion, Dr. Harrison's testimony that he believed Consuelo died from complications due to her internal injuries was not the equivalent of showing that Dr. Dibdin's cause of death was false. (Response at 95.) Consequently, Mr. Benavides was likely prejudiced by the prosecution's suppression of Investigator Bresson's notes of his interview with Dr. Harrison.

Next, Respondent argues that the prosecutor was not required to disclose the substance of his conversation with Dr. Lovell because the information he obtained was covered by the attorney work product. (Response at 95-96.) Respondent is incorrect because the information that the prosecutor failed to disclose about his interview with Dr. Lovell was not privileged information about the prosecutor's impressions, conclusions, or opinions about Dr. Lovell. *See Izazaga v. Superior Court*, 54 Cal. 3d 356, 382 n.19 (1991). The information that the prosecutor failed to disclose was information that would have precluded the prosecutor from falsely implying that Dr. Lovell had been fired from his position at the Ventura County Coroner's Office.

Prosecutor Carbone contacted Dr. Lovell prior to trial, and discussed Dr. Lovell's prior employment, but failed to disclose the substance of that interview to defense counsel. In post-conviction, Mr. Benavides has learned that the prosecution investigated the circumstances of Dr. Lovell's departure from the Ventura County's Coroner's office, and learned that Dr. Lovell had retired and there was nothing negative about his experience working there. (Ex. 80 at ¶ 28.) During the undisclosed interview with Dr. Lovell, Dr. Lovell told Carbone that he had retired from a position as Chief Medical Examiner/Coroner of Ventura County. Despite knowing this information, the prosecution represented at trial that something had "happened" while Dr. Lovell was working in Ventura County and implied that Dr. Lovell had been fired from his job. (14 RT 2888.)[40] Again in closing, the prosecutor falsely stated that Dr. Lovell's testimony should be discounted when he told the jury that Dr. Lovell was not a Board Certified

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[40] Though in a footnote Respondent argues this characterization of the prosecutor's statements is "inaccurate," Respondent does not explain what is inaccurate about the characterization. (Response at 96, n. 30.)

physician, whereas Dr. Dibdin was. (18 RT 3587.) When he made this statement, the prosecutor knew that Dr. Lovell was certified by the American Board of Pathology in 1959 (Ex. 80 at ¶ 2) because this was written in Dr. Lovell's curriculum vitae, a copy of which had been provided to the prosecutor (16 RT 3091). The prosecutor's false statements about Dr. Lovell's credentials led the jury and the court to discount Dr. Lovell's medical testimony at trial. (19 RT 3858.) Had evidence demonstrating that the prosecution had obtained evidence directly contradicting this statement been disclosed prior to trial, competent defense counsel would have moved to strike the prosecutor's statements implying otherwise. Thus, the jury and the court would not have discounted Dr. Lovell's testimony, and there is a reasonable probability that with this evidence the outcome of Mr. Benavides's trial would have been different.

#### 8. The State Unlawfully Failed to Disclose Interviews of Mr. Benavides's Mother and With Other Witnesses Who Provided Substantial Character Evidence About Mr. Benavides.

Respondent asserts that Mr. Benavides's claim that the prosecution unlawfully withheld information regarding law enforcement's first interview with Maria Benavides is insufficient grounds for relief because Maria Benavides affirmed that the second interview, which was disclosed, covered the material discussed in the previous one. (Response at 96.) Respondent's assertion is incorrect. Maria Benavides's statements regarding what her son had told her about the events of November 17 were certainly material, because Mr. Benavides's account of the events of November 17 had to do with nothing other than the critical question of Mr. Benavides's guilt of the alleged charges. The fact that law enforcement felt it necessary to re-interview Maria and reaffirm statements from the first

interview indicates that the information was material. Unfortunately, law enforcement affirmed only the portions of Maria's first interview that furthered the prosecution's case against Mr. Benavides, ignoring other material information contained in the first interview. Maria Benavides's statements from the first interview were also exculpatory, and disclosure of these statements would have helped defense counsel respond to the prosecution's cross-examination of Mr. Benavides. (*See, e.g.*, 15 RT 3058-62.) Rather than disclosing these statements prior to trial, Investigator Lopez inaccurately summarized them into one paragraph. The prosecutor then used this false and unreliable summary of hearsay to cross-examine Mr. Benavides at trial, relying on it as if it contained a verbatim characterization of Maria Benavides's statement rather than the district attorney investigator's poor translation and rough summary of the statements Maria made in Spanish. (15 RT 3058-62.) This misuse of a prosecution summary in place of an actual transcript was part of a pattern of improper conduct by the prosecution. (*See, e.g.*, discussion in Claim Nine (discussing use at cross-examination of summary of Mr. Benavides's statement to police in lieu of using transcript).) Had defense counsel possessed the information from prior interviews that obviously provided the basis for a significant portion of the prosecution's cross-examination of Mr. Benavides, counsel would have been able to refute the prosecution's argument that Mr. Benavides told other people "another couple [of conflicting] versions of what he says occurs," (18 RT 3566-67), and "[o[bviously . . . was telling people . . . that this was a motor vehicle accident." (18 RT 3568.) In Claim Three, subclaims 1 and 2, Mr. Benavides discusses in detail (1) the materiality of the contents of the first interview with Maria, (2) the prejudicial effect of the prosecution's failure to disclose the transcript or recording of the first interview with Maria, and

(3) the prosecution's misconduct in manufacturing "evidence" in the form the above-mentioned summary of the first interview with Maria and using it to impeach Mr. Benavides.[41] To avoid unnecessary repetition, Mr. Benavides respectfully refers this Court to Claim Three, subclaims 1 and 2.

Respondent contends that the prosecution did not have a *Brady* duty to disclose the favorable information provided to the prosecution by friends of Mr. Benavides who knew him to be a good man because it was not material or exculpatory as "no one claimed to be a percipient witness to the crime." (Response at 93.) That the witnesses did not see Consuelo when she sustained her injuries on November 17, 1991, does not render the information these witnesses had to give immaterial. The prosecution spoke with individuals including, but not limited to, Manuel Benavides, Cristobal Aguilar Galindo, Delfino Trigo, and Jose Jesus Vasquez Dávalos. These witnesses provided information including statements that Mr. Benavides was a good person, was not a child molester, was not violent, and had no criminal record, and statements concerning what occurred and what Mr. Benavides's actions were on November 17, 1991. Additionally, the three letters of recommendation from prominent members of Mr. Benavides's Mexican community, given by Maria Benavides to the prosecution during her second interview, also contradicted the prosecution's evidence. (Ex. 5 at 2783-91.) The statements regarding Mr. Benavides's good character, lack of criminal record, and his reputation for honesty and non-violence in the community were all material and exculpatory because they contradicted

[41] Unfortunately, Maria Benavides died in 2003 before Mr. Benavides discovered Kathleen Culhane's fraudulent work product. As a result, Mr. Benavides is unable to provide a declaration in support of this claim. Maria fought for Mr. Benavides until the end and she died exhausted and broken by her son's plight and begging her granddaughter Pati to continue fighting for her son. (Ex. 111 at ¶ 65.)

the prosecution's portrayal of Mr. Benavides as a violent man who caused Consuelo injury for months before her death, and the prosecutor's false representation to the defense, and during cross examination of Estella, that Mr. Benavides was wanted in Mexico for a crime relevant to the instant case, impliedly a similar crime. (13 RT 2647; 15 RT 2901.) Had the favorable information obtained by the prosecution during many prior undisclosed interviews with these witnesses been disclosed, there is a reasonable probability that the outcome of Mr. Benavides's trial would have been different.

### 9. The State Unlawfully Failed to Disclose Cristina Medina's Statements.

Respondent asserts that Mr. Benavides's claim that the prosecution unlawfully failed to report prior conversations with Cristina Medina fails because Mr. Benavides has not identified any statements by Cristina that were withheld by the prosecution that were material or exculpatory or that could have been used as impeachment material and because Mr. Benavides has not demonstrated how any suppressed statements were prejudicial. (Response at 98.) Contrary to Respondent's assertion, however, Mr. Benavides has described information establishing that various law enforcement contacts with Cristina took place—neither the contacts nor the contents of the interviews were disclosed to Mr. Benavides. (RCCAP at 160-61.) Any evidence of law enforcement's prior contacts with Cristina and the contents of these contacts constitute valuable impeachment material because it is relevant to the reliability of Cristina's statements made at trial. Cristina's testimony was a critical piece of the prosecution's case against Mr. Benavides, and without it, the prosecutor would have been unable to convince the jury that Mr. Benavides committed the acts charged by the prosecution. The prosecution used Cristina's testimony to falsely argue to

the jury that Mr. Benavides testified falsely at trial and that Mr. Benavides had been inflicting injury on Consuelo for months prior to her death. Had the prosecution disclosed the evidence of law enforcement's prior contacts with Cristina, competent trial counsel would have investigated and presented evidence demonstrating law enforcement's unlawful and coercive investigation tactics and the unreliability of Cristina's testimony.

### 10. The State Unlawfully Failed to Disclose Evidence From Cristina's Sexual Assault Examination.

Respondent contends that the prosecution did not have a duty to disclose evidence of a sexual assault examination of Cristina Medina that indicated that no evidence of sexual abuse was found because the results of Cristina's examination were not exculpatory and could not have been used to impeach Cristina based on her testimony. (Response at 83.) Respondent's contentions are flawed. First, Mr. Benavides has not asserted that the evidence of the examination could be used to impeach Cristina. Second, Mr. Benavides has established that the evidence of the examination was exculpatory as the prosecution explicitly argued to the jury that Cristina was "lucky to get out alive" as Mr. Benavides, he implied, was also molesting Cristina and would have committed the same acts against Cristina that he was charged with committing against Consuelo. (18 RT 2592; *see also* RCCAP at 134-35.) Hence, there was a direct allegation, though false and improper, against Mr. Benavides that he also molested Cristina Medina. This examination would have been used to counter the false allegation that the prosecution used to convince the jury that Mr. Benavides was guilty of the charged offenses. Had the prosecution disclosed this examination, the jury would have received concrete evidence that Mr. Benavides did not sexually abuse Cristina and would have

discredited the prosecution's false argument, and the outcome of Mr. Benavides's case would have been different.

### 11. The State Unlawfully Failed to Disclose Joe Avila's Rap Sheet Indicating Avila's Actual Parole Date.

Respondent contends that the prosecution did not have a duty to disclose evidence of convicted child molester Joe Avila's actual parole date and evidence regarding Avila's exposure to Consuelo prior to her death. Respondent argues that the prosecution complied with its discovery duties by disclosing reports that "stated" Avila's actual parole date of November 20, 1990, and the evidence, in any case was not material, because there was no evidence that Avila was romantically involved with Estella prior to Consuelo's death. (Response at 87.) Respondent is mistaken. Mr. Benavides addresses these arguments in detail in Claim Five of this Informal Reply and Claims Five and Seven of the Corrected Amended Petition; to avoid unnecessary duplication, Mr. Benavides respectfully refers this Court to the discussion in those claims. Mr. Benavides has established that Avila was exposed to Consuelo prior to her death and that the prosecution discovered conflicting and inaccurate information about Avila's actual parole date, falsely indicating that Avila was paroled either several days or one year *after* Consuelo was injured. (*See* RCCAP at 140-42.) The prosecution did not disclose Avila's RAP sheet, which indicated his actual parole date of November 20, 1990—one year prior to Consuelo's death. Mr. Benavides suffered prejudice as a result of the prosecution's failure to disclose this evidence.

The prosecution's failure to disclose extensive valuable material, exculpatory evidence at trial that supported Mr. Benavides's statements regarding the facts of the incident, illustrated the false medical testimony manufactured and introduced by the prosecution, and demonstrated Mr.

Benavides's good and nonviolent character was prejudicial to Mr. Benavides. Had the prosecution disclosed all of this information, the outcome of the trial would have been different.

### H. Claim Eight: The State Prejudicially Failed to Disclose Benefits Offered to Witnesses in Exchange for Their Assistance With the Case.

Mr. Benavides has made a prima facie showing that he is entitled to relief because the prosecution failed to disclose material benefits provided to witnesses in exchange for their assistance in investigating and presenting the case against Mr. Benavides. Respondent disputes Mr. Benavides's claim, contending that it did not have a duty to provide the material evidence in its possession and denying that the prosecution played any part in the Salinas's receipt of benefits. (Response at 98-99.) Respondent is mistaken.

As Respondent concedes, the suppression of evidence favorable to the defense violates due process where the evidence is material either to guilt or to punishment. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 433, (1995) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Under *Brady*, there is no distinction between exculpatory and impeachment evidence. *See United States v. Bagley*, 473 U.S. 667, 682 (1985). Information relating to immunity or lenient treatment provided to a witness, *Giglio v. United States*, 405 U.S. 150 (1972), and monetary rewards given in exchange for cooperation with the prosecution, must be disclosed, *Singh v. Prunty*, 142 F.3d 1157 (9th Cir. 1988). The failure to disclose such information invalidates a criminal judgment if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Bagley*, 473 U.S. at 682.

Respondent asserts that the family support division is separate from the criminal prosecution unit of the District Attorney's Office and that Mr. Benavides has not shown that the prosecutor orchestrated the witnesses' receipt of child support. (Response at 99.) Respondent relies on *People v. Jacinto*, 49 Cal. 4th 263, 270-71 (2010), to support Respondent's apparent assertion that the prosecutor himself must be the actual perpetrator of the misconduct. *Jacinto*, however, actually furthers Mr. Benavides's claim because it establishes that "to satisfy [the] element [that the misconduct was committed by the prosecutor] defendant must show the [Department of Human Services/Child Protective Services (DHS/CPS)] were part of the prosecution team (*or otherwise acted at the prosecution's behest*)." *Id.* at 271 (emphasis added); *see also Kyles*, 514 U.S. at 432-33. The factual allegations submitted in support of the claim make a prima facie showing that the DHS/CPS in fact "acted at the prosecution's behest" as District Attorney Investigator Ray Lopez played an integral role in controlling Cristina Medina's placement and in orchestrating various interviews of Cristina aimed at modifying her testimony—he regularly attended Cristina's dependency hearings and communicated with DHS/CPS workers regarding who she spoke to and had contact with. (*See* RCCAP at 51-67; *see also* Claim Two, subclaims 1, 3, and Claim Seven, subclaims 1, 3.) Respondent does not address these factual allegations other than to simply make a general denial that they show the family support division of the Kern County District Attorney's Office acted at the prosecution's behest. Respondent's general denial does not overcome Mr. Benavides's prima facie showing. *See People v. Duvall*, 9 Cal. 4th 464, 474-75 (1995) (holding that Court assumes petitioner's factual allegations are true in evaluating whether a claims establishes a prima facie case for relief).

Mr. Benavides has also made a prima facie showing that the district attorney's office arranged to place Cristina at the home of Darlene and Reynaldo Salinas and provide them with monetary benefits for her care. Indeed, even when Cristina was removed from their home in mid-April, Darlene and Reynaldo continued to receive monetary benefits for months. (Ex. 12 at 3922; Ex. 61 at 5209.) The prosecution had Cristina placed with Darlene and Reynaldo in spite of the fact that they were drug users with criminal convictions. (Ex. 9 at 3766-67.) The benefits printout used in the child support case brought against Estella Medina demonstrates that when Darlene and Reynaldo accepted custody of Cristina in January 1992, they received $315 for her care. (Ex. 9 at 3731; Ex. 12 at 3922.) In February, March, and April 1992, they received $326 per month for her care, even though Cristina was returned to her mother's care on April 16, 1992. (Ex. 12 at 3922; Ex. 9 at 3699.) In exchange for Darlene's testimony at trial, the prosecution continued providing Darlene with monetary benefits purportedly for Cristina's care—up until at least October 1992—though Cristina was not in the Salinas's care after mid-April. (Ex. 12 at 3922; Ex. 9 at 3698, 3686.)

Respondent erroneously contends that Mr. Benavides must show that the prosecutor's provision of child support benefits to these witnesses was orchestrated as a payoff for their subsequent testimony at trial. (Response at 99.) Whether a state actor explicitly communicates the expectation that the provision of benefits to a witness is done in exchange for their cooperation or testimony is not dispositive, so long as the witness subjectively understands the benefits were provided in exchange for their cooperation. "[I]t is the witness' subjective expectations, not the objective bounds of prosecutorial influence, that are determinative . . . the actual power of the authorities to aid or harm him is not conclusive." *People v.*

*Coyer*, 142 Cal. App. 3d 839, 843 (1983); *see also United States v. Kone*, 307 F.3d 430, 438-41 (6th Cir. 2002). The timing of the increase in welfare benefits makes a prima facie showing that the prosecution orchestrated the increase in benefits in exchange for Darlene's cooperation and favorable testimony for the prosecution.

Had the increased benefits been disclosed to the defense, they could have been used to show Darlene had a vested interest in testifying for the prosecution and they would have cast doubt on the credibility of and motivation behind her testimony that Consuelo Verdugo's family wanted "justice" to be done and hoped that "nothing like this ever happens again to our children." (19 RT 3744.) The information would have also led defense counsel to further investigate the tactics used by the prosecution to obtain the cooperation of its witnesses. Thus, the state's improper provision of benefits to witnesses was critical because it tended to show the misconduct that permeated the investigation and the apparent fraud with which witness cooperation was obtained. *See, e.g.*, *Kyles*, 512 U.S. at 445, 446 n.15, 450. Disclosure of these benefits would have triggered competent defense counsel's investigation of these methods and her discovery of the use of unconstitutional and improper tactics by the prosecution. *See, e.g.*, *United States v. Moreno-Rodrigez*, 744 F. Supp. 1040, 1041 (D. Kan. 1990) ("[T]he government is under an obligation to disclose any *Brady* material, including the credibility of witnesses, that would create a reasonable doubt as to defendant's predisposition as well as overreaching tactics on the part of the government.").

The prosecution withheld evidence regarding benefits it afforded to witnesses as incentives to assist in the investigation and presentation of its case against Mr. Benavides. The prosecution's failure to disclose this evidence violated Mr. Benavides's constitutional rights. But for the

prosecution's failure to disclose this evidence, the outcome of Mr. Benavides's trial would have been different.

### I. Claim Nine: The State's Reliance on Mr. Benavides's Illegally Obtained, Unreliable, and Involuntary Statements, and Its Prejudicial Misconduct in Interrogating Him Violated Mr. Benavides's Constitutional Rights.

The State violated Mr. Benavides's rights by illegally obtaining involuntary statements and subsequently using minor inconsistencies in these statements to impeach him at trial. Mr. Benavides's statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and Mr. Benavides's right to consular assistance under the Vienna Convention on Consular Relations (VCCR). In addition, Mr. Benavides's statements should have been excluded because his neurocognitive deficiencies and unfamiliarity with the American justice system rendered him unable to properly understand and respond to questions by law enforcement, and validly waive his *Miranda* rights.

#### 1. This Claim Is Not Procedurally Barred.

Respondent argues that Mr. Benavides's claims are record-based and thus are waived for his failure to raise them at trial or on appeal and are not cognizable on habeas. (Response at 101-02.) Respondent is mistaken in asserting that the claim is record-based. The facts that show that Mr. Benavides's statements were given in violation of his *Miranda* rights and consular rights, and were involuntary and unreliable are not on the record. Due to trial counsel's unreasonable failure to investigate Mr. Benavides's social history and mental deficits, the trial record is devoid of evidence of Mr. Benavides's serious neurocognitive deficiencies that impaired his ability to comprehend questions posed during interrogations and

intelligently and voluntarily waive his rights. Furthermore, the predicate facts for this claim required Mr. Benavides to provide extra-record evidence from a certified court interpreter documenting the deficiencies in the Delano Police Department *Miranda* waiver and Detective Valdez's in-court translation of the waiver. Because Mr. Benavides's claims rely on this extra-record evidence, the claim is appropriately brought on habeas.[42] *See, e.g.*, *In re Bower*, 38 Cal. 3d 865, 872 (1985) ("when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right resort to habeas corpus is not only appropriate, but required"). Further, as Mr. Benavides has alleged in Claim Thirteen, to the extent some of these claims could have been raised at trial by competent counsel, counsel was ineffective for failing to do so. (*See infra* Claim Thirteen, subclaims 9, 14, 17.)

### 2. Mr. Benavides's Statements in the Early Morning of November 18, 1991, to Detective Valdez at Kmc Were Illegally Obtained.

Respondent argues that Mr. Benavides's statements to Detective Valdez at KMC (hereafter "KMC statement") at 6:05 a.m. on November 18, 1991, did not violate *Miranda* because he was not in custody. In the alternative, Respondent claims that if there was error, it was harmless. (Response at 102-08.) Respondent's arguments lack merit. Respondent takes a myopic view of the claim, failing to recognize the import of the combination of Mr. Benavides's mental health problems, the violation of his consular rights, Detective Valdez's poor Spanish language skills, and the

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[42] To the extent this Court decides that these claims should have been raised on appeal, Mr. Benavides was unconstitutionally deprived of his federal and state constitutional rights to effective representation because appellate counsel unreasonably and prejudicially failed to raise these claims on appeal.

flaws in the Spanish-language waiver on the reliability and validity of Mr. Benavides's waiver and statements.

Respondent argues that because Mr. Benavides was not handcuffed and was free to leave following the interrogation at KMC, he was not in custody for the purposes of *Miranda*. Respondent is incorrect. A person is in "custody" not only following a formal arrest, but whenever there has been a restraint on freedom of movement of the degree associated with formal arrest. *See California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Miranda*, 384 U.S. at 444. The United States Supreme Court has established a two-part standard for determining whether a suspect is in custody for *Miranda* purposes: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). This test can be applied only after the facts surrounding the interrogation are established. *Id.* at 112. The evidence before this Court establishes that Mr. Benavides was in custody at the time of the KMC interrogation. Law enforcement officers, believing that Mr. Benavides was responsible for the injuries, questioned him in an accusatorial manner. Mr. Benavides was not permitted to leave until he had provided a full accounting to their satisfaction. Detectives Valdez and Nacua took Mr. Benavides aside and told him that they "needed to get a statement from him in private." (Ex. 4 at 1909.) The detectives did not "conclude[]" the interview until Mr. Benavides had given them a full detailed account of his day. (Ex. 4 at 1909-10.) The detectives separated Mr. Benavides and Estella when they were interviewed and they were spoken to in private in the waiting room. (Ex. 4 at 1907.) Since Mr. Benavides cannot drive or speak English he had no means of leaving the hospital other than with

Estella. Given the circumstances Mr. Benavides did not feel at liberty to terminate the interrogation or leave.

In addition, reference to Detective Valdez's police report regarding Mr. Benavides's KMC statements should have been excluded as inherently unreliable. (Ex. 4 at 1909-10); *see generally Hall v. Director of Corrections*, 343 F.3d 976, 981-985 (9th Cir. 2003) (admission of unreliable, false and material evidence required new trial).[43] Detective Valdez's poor Spanish language skills resulted in confusion for Mr. Benavides who had a great deal of difficulty understanding his questions. Haydee Claus, M.A., a certified interpreter reviewing the tape and transcript of his interview with Mr. Benavides later that day found Detective Valdez's Spanish "limited and broken." (Ex. 63 at ¶ 4.) Ms. Claus concluded that Detective Valdez's poor grammar, poor verb conjugation, and gross mispronunciation of words in Spanish together with his tendency to mix English and Spanish, would cause a monolingual Spanish speaker, such as Mr. Benavides, to have great difficulty clearly and precisely understanding the questions and information given by Detective Valdez. (Ex. 63 at ¶¶ 4-5.)

The summary police report written by Detective Valdez does not disclose the communication difficulties that Mr. Benavides experienced during the interrogation or contain a verbatim account of the answers he provided. Given the inherent unreliability of the report, it should not have

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[43] Respondent attempts to distinguish *Hall* arguing that unlike *Hall*, Mr. Benavides was not impeached with "statements that were falsely attributed to him." (Response at 108.) Respondent is incorrect. That is precisely the argument made in this claim. Detective Valdez's poor Spanish language skills and the fact that he produced a summary report a day after he conducted the interview are strong indicators that the report he produced did not reliably reproduce the contents of his interviews with Mr. Benavides.

been used as the prosecutor did to cross-examine Mr. Benavides with minor alleged inconsistencies and portray him as a liar who was changing his story.[44] The report is a summary written on November 19, 1991, of Detective Valdez's recollection of his interview with Mr. Benavides the previous day. As such, it is not a reliable indicator of Mr. Benavides's exact words to Valdez, especially given Valdez's Spanish language communication problems. *See United States v. Short*, 790 F.2d 464, 469 (6th Cir. 1986) (excluding statement which violated *Miranda* partly because it constituted a law enforcement agents' inaccurate interpretation of petitioner's halting English.)

The error was not harmless as Respondent contends. (Response at 105.) The contents of Detective Valdez's unreliable report were admitted via his testimony and were used to impeach Mr. Benavides. The prosecutor repeatedly questioned Mr. Benavides about Detective Valdez's report stating that Mr. Benavides said he had only lost sight of Consuelo for "a minute" when he found her laying outside. (15 RT 3054, 3057, 3063.) In Spanish, as in English, the phrase "a minute," does not literally mean a minute, but rather a short period of time. Detective Valdez's poor Spanish language skills most likely account for this misunderstanding. Detective Valdez's mistake should not have been used to impeach Mr. Benavides.

Respondent argues that it is notable that Ms. Claus, in her transcription and translation of Detective Valdez's interview (Ex. 63) does not state that Mr. Benavides's "pretrial statement at the police station about

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[44] Respondent incorrectly claims that the allegation in the 2004 Reply that the prosecutor committed misconduct by cross-examining Mr. Benavides with this unreliable, summary report is a new claim raised for the first time in the reply. (Response at 105.) The allegation in the 2004 Reply clearly referenced Petition Claim Three, which was incorporated by reference in this claim (RCCAP at 174), and where the details of the prosecutor's misconduct are contained in subclaim 1(d).

Consuelo being out of his sight for 'a minute'" was incorrectly translated. (Response at 107.) The reason Ms. Claus did not do so is because Mr. Benavides never actually said during his statement at the police station that she was out of sight for a minute. As is clear from the transcript, Detective Valdez was the one repeatedly insisting that Mr. Benavides had previously indicated that she was out of his sight for only a minute and trying to extract from Mr. Benavides the exact time he did not see her. Mr. Benavides never actually states on tape that it was only a minute, but instead tries to explain to Detective Valdez that it was a short time frame, for which he could not give an exact number of minutes because he was not looking at a watch. (*See, e.g.*, Ex. 63 at 5244-45, 5284.)

The prosecutor's use of this misleading and incomplete report to impeach Mr. Benavides is part of an overall pattern of misconduct. As part of this pattern the prosecutor portrayed Mr. Benavides as lying to his mother regarding the crime based on an alleged report from a detective's contact with Mr. Benavides's mother. The report with the allegedly impeaching details, as his mother stated them, however, has yet to be disclosed to the defense. (*See supra* Claim Seven, subclaim (10).) In addition to the pattern of misleading summary reports, law enforcement in this case has engaged in a pattern of excluding material exculpatory information from police reports. (*See supra* Claim Seven generally.) Given this pattern of unreliable and incomplete summaries of witness statements in conjunction with Detective Valdez's poor Spanish language skills, the summary report of Mr. Benavides's KMC statement should have been excluded as unreliable and more prejudicial than probative.

### 3. Mr. Benavides's Statements in the Afternoon of November 18, 1991, to Detective Valdez at the Police Station Were Illegally Obtained.

Similarly, Mr. Benavides's recorded statements of November 18, 1991, at 4:05 p.m., at the Delano Police Department (DPD) should have been excluded as inherently unreliable and more prejudicial than probative. *See Estelle v. McGuire*, 502 U.S. 62 (1991); *Hall v. Director of Corrections*, 343 F.3d at 981-85. The statement should have been excluded because it was based on an infirm Spanish language *Miranda* waiver, *see United States v. Perez-Lopez*, 348 F.3d 839, 847-849 (9th Cir. 2003), Mr. Benavides's waiver was not voluntary, knowing and intelligent, *see United States v .Garibay*, 143 F.3d 534 (9th Cir. 1998) (defendant's waiver was not knowing and intelligent due to his low mental capacity and poor language skills), and the statement was obtained in violation of Mr. Benavides's consular rights, *see Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2005) (indicating a defendant can raise a violation of the VCCR as part of a broader challenge to the voluntariness of a statement). Even if the statement were admissible, the inaccurate transcription and translation of the interview should not have been supplied to the jury. *See United States v. Robinson*, 707 F.2d 872, 879 (6th Cir. 1983) (conviction reversed because tape transcripts were unreliable); *Hall v. Director of Corrections*, 343 F.3d at 981-85. The transcription was riddled with inaccuracies, which had the effect of falsely portraying Mr. Benavides as an evasive liar, while it omitted Detective Valdez's obvious fluency problems, which accounted for Mr. Benavides's confusion. (*See infra* Claim Thirteen, subclaim (9).)

The Spanish language *Miranda* waiver given to Mr. Benavides (1 CT 34) is infirm in that it failed to give Mr. Benavides adequate notice that he was relinquishing his legal rights. *See Perez-Lopez*, 348 F.3d at 847-49. The bottom portion of the waiver is entitled "PASANDO SUS

DERECHOS," which translates to "PASSING YOUR RIGHTS." The phrase is as meaningless in Spanish as it is English and fails to connote that the reader is waiving his rights. (Ex. 146 at ¶ 8.) At the hearing to determine the validity of the Spanish language *Miranda* warning, Detective Valdez affirmatively misled the trial court into believing that the Spanish language version said "waiver of your rights." Specifically, Detective Valdez testified: "Second portion of the Miranda is passing of your rights. Translated, it's waiver of your rights." (1 RT 109.) Trial counsel prejudicially failed to rebut Detective Valdez's testimony with a competent interpreter's testimony. Had trial counsel done so, the court would have excluded the statement as the fruit of an illegal waiver.

Respondent's argument that Detective Valdez's translation errors did not affect the meaning of the warning lacks merit. Respondent mistakenly relies on Ex. 63, Ms. Claus's analysis of the accuracy of the translation of the taped interview versus what was actually said on the tape, instead of Ex. 146, which consists of Ms. Claus's analysis of the accuracy of Detective Valdez's testimony in court translating his Spanish-language *Miranda* waiver versus the actual certified English translation of the actual *Miranda* waiver given to Mr. Benavides. The latter, Ex. 146, shows that the *Miranda* waiver contains errors, which in combination made the waiver confusing and did not aptly inform Mr. Benavides of his rights.

In addition, Mr. Benavides's waiver was not voluntary and intelligent in light of the confusing Spanish in the waiver, which was particularly difficult for Mr. Benavides to understand given his mental deficits and unfamiliarity with the American criminal justice system. The waiver contains numerous spelling and grammatical errors that affect the meaning of the text and would be confusing to a monolingual Spanish speaker such as Mr. Benavides. (Ex. 146 at ¶¶ 4-11.) The grammatical mistakes in the

waiver are particularly confusing for Mr. Benavides given his neuropsychological and intellectual impairments. Respondent's argument that the multiple grammatical errors in the waiver are unimportant because "it is doubtful that petitioner noticed these" (Response at 118, n.34) in light of the fact that he had difficulty with grammar in middle school is a meritless argument. That Mr. Benavides had poor grammar skills, does not mean that he would not be confused by the multiple errors in Detective Valdez's translation of the waiver. On the contrary, Mr. Benavides's poor academic skills make it more likely that he would have difficulty understanding Detective Valdez's subpar Spanish translation of the waiver.

Courts have underscored that "thoroughness and clarity are especially important when communicating with uneducated defendants." *United States v. Perez-Lopez*, 348 F.3d at 848. The *Miranda* warning must be "clear and not susceptible to equivocation." *United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002). "*Miranda* requires 'meaningful advice to the unlettered and unlearned in language which [they] can comprehend and on which [they] can knowingly act.'" *United States v. Connell*, 869 F.2d 1349, 1351 (9th Cir. 1989) (quoting *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir. 1967)). The *Miranda* waiver supplied to Mr. Benavides, with its numerous grammatical mistakes was far from clear and greatly susceptible to equivocation.

"Intellectual and linguistic limitations of persons with mental retardation make comprehension of the vocabulary and syntax of *Miranda* warnings difficult." Solomon M. Fulero & Caroline Everington, *Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation,* 19:5 Law and Human Behavior 533, 535 (1995) ("*Competency to Waive Miranda Rights*"). As Dr. Puente explains, Mr. Benavides's "pre-adolescent intellectual functioning is below the receptive

language and reading level necessary to understand the concepts in the *Miranda* waiver." (Ex. 126 at ¶ 60.)

Respondent argues that the totality of the circumstances supports the trial court's finding that Mr. Benavides knowingly and intelligently waived his *Miranda* rights. (Response at 109.) The trial court, however, was unaware that Mr. Benavides had significant intellectual and neuropsychological impairments and that Detective Valdez's Spanish translation of the English-language *Miranda* warnings was faulty, because counsel unreasonably failed to investigate and present this evidence. Respondent also argues that counsel's statements in court that Al Hernandez reviewed the translation *of the transcript of the interview* and only found "minor inconsistencies" (1 RT 98) is indicative that the Valdez's translation of the *Miranda* warnings was adequate. (Response at 110.) Respondent is confused. Hernandez's opinion about Valdez's interpretation of the interview has no bearing on the validity of his translation of the *Miranda* warnings that he gave Mr. Benavides to sign. Moreover, Respondent's argument ignores the factual allegations in the Corrected Amended Petition that Hernandez's Spanish language skills were also deficient. (*See infra* Claim Twelve.) He failed the Spanish-language state certification examination three or four times, by his own account, and, like Valdez, had no formal training in Spanish-language interpretation and translation. (Ex. 107 at ¶ 3.)

Detective Valdez's interrogation was manipulative and coercive, and confusing for Mr. Benavides as a monolingual Spanish speaker with severe neuropsychological and cognitive deficits. Mr. Benavides's deficits made him more susceptible to coercion and the detective's suggestive questioning. Mr. Benavides testified that the detectives were "pressuring" him and he was not feeling well. (15 RT 3052.) In order to mask his

deficits Mr. Benavides stated that he did comprehend the waiver even though he lacked the mental capacity to do so. *See Competency to Waive Miranda Rights* at 534-35; Ex. 126 at ¶ 60. Mr. Benavides was not afforded the patient, detailed, and simplified explanation of his rights that he would have needed in order to fully comprehend his rights. (Ex. 126 at ¶ 63.) Furthermore, behavioral studies show that mentally retarded individuals such as Mr. Benavides are particularly vulnerable to acquiesce when posed questions with a yes or no answer format. *Competency to Waive Miranda Rights* at 534-35. As Dr. Puente explains, Mr. Benavides showed this strong acquiescence bias or inclination to agree with authority figures even during Dr. Puente's examination. He very likely did so to avoid disclosing his difficulties understanding. (Ex. 126 at ¶ 59.) Given this context, Mr. Benavides's acquiescence to Detective Valdez's yes or no question as to whether he understood his rights did not constitute a valid waiver. (Ex. 146 at ¶ 8; Ex. 126 at ¶ 60.) Respondent's recitation of the portion of the transcript where Mr. Benavides acquiesces that he has understood and waives his rights (Response at 115) does not refute that he likely did so because of his reluctance to disclose to the detectives that he had not understood them and understandable tendency to mask his impairments. Respondent's further assertion that Mr. Benavides's responses during the interview where he was responsive to the detective's questions and explained that he had not hurt Consuelo show that he did not unknowingly acquiesce to the interview (Response at 116) is a fallacious argument. The issue is not whether he was reluctant to speak, but rather whether he understood that he was entitled to remain silent, that what he said could and would be used against him, that he could refuse to speak, and that he was entitled to the assistance of a free attorney, before he agreed to speak. The totality of the evidence shows he did not have a full

understanding of his rights before he agreed to be interviewed by the detectives.

Mr. Benavides's tendency toward submissiveness to law enforcement authority figures was aggravated by his inexperience in the American criminal justice system. As stipulated by the prosecution, Mr. Benavides had no prior record of felony convictions in the United States or in Mexico. (19 RT 3767.) The Mexican legal system does not afford defendants rights equivalent to those guaranteed by *Miranda v. Arizona*. (Ex. 145 at ¶ 10.) In fact, based on his Mexican cultural context, Mr. Benavides felt obligated to cooperate with authorities and did not understand that remaining silent was his legal right. Mr. Benavides grew up in a very poor, rural area of Mexico, and his experience in the United States was limited to seasonal jobs picking fruit. Given his origins and limited experience with the American criminal justice system, he had difficulty understanding his right to a lawyer free of charge and his right against self-incrimination. (Ex. 145 at ¶ 10.) Had authorities complied with petitioner's right to contact the Mexican consulate upon his arrest, the consulate officials could have helped bridge this gap between the Mexican and American legal systems. (Ex. 145 at ¶ 10.) The consulate could have also provided a competent interpreter to ensure that he fully understood the waiver and the detective's broken Spanish. (Ex. 145 at ¶ 16.) The violation of petitioner's VCCR rights warrant suppression of his statement. *See United States v. Guay*, 108 F.3d 545, 549 (4th Cir. 1997) (validity of waiver should be considered in light of petitioner's background, experience, and conduct.)

Respondent's contention that Mr. Benavides's claim regarding the violation of his rights under the VCCR is procedurally defaulted for failing to raise it at trial or on appeal lacks merit. (Response at 122.) As explained in reply to this argument in Claim Twenty-Four, the claim depends on

extra-record evidence, such as the declaration of Ambassador Loaeza, and hence could not have been raised on appeal. Further, Mr. Benavides has asserted both in the instant claim and in Claim Thirteen, that counsel was prejudicially ineffective for failing to preserve his VCCR rights. Claims of counsel's ineffectiveness are appropriately raised on habeas. *See In re Seaton*, 34 Cal. 4th 193, 200 (2004).

Citing *United States v. Rodrigues*, 68 F. Supp. 2d 178, 184 (E.D.N.Y. 1999), Respondent further contends that the failure of the police to inform him of his consular rights at the police station does not render his statement involuntary because he "has not shown that he would not have talked" had he been told of his right to contact the Mexican consulate. (Response at 122-23.) Respondent's argument lacks merit. Several circumstances strongly suggest that he would have declined to be interviewed if he knew that a fellow Mexican from the consulate could be present to assist him. First, about a year after he was arrested he reached out to the consulate, sending them a letter asking them for assistance because his attorney was not helping him, and he could not communicate with her in English. (Ex. 145 at ¶ 5.) This demonstrates that Mr. Benavides trusted and saw the Mexican consulate as an ally who could help him navigate the American judicial system. Had he known he could have that ally present shortly after he was arrested it is likely that he would have waited to talk until a consulate official arrived. Second, Mr. Benavides has declared under penalty of perjury in the declaration submitted in support of this reply that he would have invoked his right to consular assistance if he had been advised of such. (Ex. 165.) Third, as stated by Ambassador Loaeza, had a consular official been present, they would have advised Mr. Benavides to avail himself of his right to remain silent until he could obtain an attorney. (Ex. 145 at ¶ 10.) The sum of all these circumstances strongly suggests that

Mr. Benavides would have chosen to refuse to answer questions if he had known that he had right to consular assistance shortly after his arrest. Moreover, *Rodrigues* is distinguishable, because one of the basis for the court denying the petitioner's claim was that there was no evidence the foreign national's local consulate "regularly provides any assistance at all to its citizens who are arrested, let alone evidence that the local official makes it a regular practice to tell arrestees not to talk to the authorities until they have consulted an attorney." *Rodrigues*, 68 F. Supp. 2d at 184. In the instant case, there is ample evidence that the Mexican consulate offers substantial assistance to its arrested citizens, especially possible capital defendants, and they would have in fact advised Mr. Benavides to avail himself of the right to remain silent. (Ex. 145 at ¶¶ 10-17.)

Respondent's suggestion that *Sanchez-Llamas v. Oregon*, 548 U.S. at 331, precludes this Court from suppressing a statement based on failure to advise foreign nationals of their consular rights is incorrect. While violation of his VCCR rights alone may not require suppression, a "defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police." *Sanchez-Llamas*, 548 U.S. at 350.

Respondent's argument that Mr. Benavides has waived any argument that his inexperience with the criminal justice system contributed to his lack of understanding of Valdez's subpar translation of the *Miranda* waiver also lacks merit. (Response at 119.) Respondent cites to Mr. Benavides's testimony where on cross-examination he tried to explain to the prosecutor that even though he read his *Miranda* rights in the taped interview, he "didn't know what it was" because he "had never been involved in these problems." (15 RT 3052.) Respondent appears to be arguing that this testimony somehow preserved Mr. Benavides's right to appeal the court's

finding that his *Miranda* waiver was intelligent, voluntary, and informed. Respondent is incorrect, since counsel unreasonably failed to preserve this as a reason to challenge the *Miranda* waiver in the pre-trial hearing regarding this subject. Mr. Benavides's testimony, instead, further illustrates counsel's unreasonable failure to investigate and present all meritorious grounds to exclude Mr. Benavides's statements at the police station. However, to the extent that this Court agrees with Respondent that Mr. Benavides's testimony duly preserved this as a ground for relief, appellate counsel rendered prejudicial ineffective assistance by failing to raise it on appeal.

Respondent raises several objections to Mr. Benavides's claims that his neuropsychological deficits and cognitive impairments strongly affected his ability to comprehend and intelligently and voluntarily waive his rights. Respondent argues that (1) Mr. Benavides should not be allowed to rely on Dr. Puente's declaration as support for the claim because it is not an appropriate replacement for Dr. Weinstein's withdrawn declaration (Response at 112-13); and, (2) even if Dr. Puente's declaration is properly before this Court, it does not provide support for Mr. Benavides's mental impairments because he is not mentally retarded (Response at 113-16). Both of Respondent's arguments fail.

Respondent's argument that Dr. Puente's declaration is not properly before this Court lacks merit. (Response at 112-13.) Respondent argues that post-conviction counsel should have asked Dr. Weinstein to review the new social history declarations and erase from his memory the many declarations he previously read, which were fraudulently prepared by Ms. Culhane and which have been withdrawn from consideration by this Court. As explained more thoroughly in the reply to this argument in Claim Thirteen and Twenty, it would be very difficult for Dr. Weinstein to attempt

to forget all he had previously read about Mr. Benavides's social history and replace it with the new information, especially given that some of the information was similar. Respondent is incorrect in arguing that post-conviction counsel is attempting to get a "windfall" from Ms. Culhane's fraud, which has already prejudiced Mr. Benavides greatly by adding many years to his unjust incarceration. Instead, post-conviction counsel's decision to retain a new expert was made to protect Mr. Benavides from further prejudice from Ms. Culhane's fraud. As explained by the HCRC's Executive Director Michael Laurence, Dr. Puente was retained to conduct an independent neuropsychological examination of Mr. Benavides and to provide an expert opinion to replace Dr. Weinstein's declaration with Dr. Puente's to avoid any suggestion that the declarations tainted by Ms. Culhane's fraud influenced Dr. Weinstein's findings. *See* Declaration of Michael Laurence in compliance with orders for November 1, 2006, and January 23, 2008, filed April 22, 2008 at 6. Respondent's analogy to Dr. Wood's replacement declaration is inapposite because Dr. Wood, unlike Dr. Weinstein, reviewed only one tainted declaration and based almost his entire assessment on the transcripts of the detective interviews with Cristina Medina, which were obviously not tainted by Ms. Culhane's fraud. (*See* Ex. 89 at ¶ 14, n.1.) Dr. Weinstein, by contrast, relied heavily on the social history declarations that Ms. Culhane had submitted for a large number of his findings. (Former Ex. 151 at ¶¶ 30-62, 67-101, 106.)

Respondent's complaint that Dr. Puente should not have been able to incorporate in his assessment Dr. Weinstein's prior neuropsychological and cognitive test results has no merit. (Response at 113.) Dr. Puente would not be conforming to the standard of care, which requires assessment of all available data, had he ignored Dr. Weinstein's test results. Respondent's argument that the scope of Dr. Puente's assessment is broader than the

scope of Dr. Puente's also lacks merit. A key rebuttal to this argument is the fact that the allegations of Mr. Benavides's neuropsychological impairment in this claim are virtually unchanged.[45] (RCCAP at 175-76, 178.) In other words, Mr. Benavides has relied on the same evidence of neurocognitive impairments presented in the 2002 Petition—including significant deficits in intellectual functioning, susceptibility to suggestive questioning, and acquiescence bias towards authority figures—as support for this claim in the Corrected Amended Petition. That Dr. Weinstein and Dr. Puente both found that Mr. Benavides suffered from serious organic brain damage that had the effects just described shows their results are corroborated and reliable.

Respondent also contests Dr. Puente's opinion that Mr. Benavides is mentally retarded. (Response 114-15.) A complete response to her arguments is in the reply to Claim Twenty. For purposes of this claim, however, it is inapposite whether Mr. Benavides IQ scores are slightly above the scores to be evaluated as mentally retarded as Respondent argues. (Response at 113-14.) There can be no reasonable argument that Mr. Benavides's low IQ scores, adaptive functioning deficits, and broad neuropsychological impairments in "reasoning, problem-solving, cognitive flexibility, memory, and limited learning capacity affected his ability to understand his *Miranda* rights." (Ex. 126 at ¶ 58.)

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[45] Respondent also complains that Dr. Weinstein's declaration was not directly cited in this claim in the 2002 Petition. However, Respondent ignores that the claim specifically incorporated by reference the facts and allegations in the claims pertaining to Mr. Benavides's "mental retardation, mental illness and neuropsychological dysfunction," which includes, for example, Claim Thirteen (IAC), subclaim 14, where Dr. Weinstein's findings were most extensively described and his declaration was repeatedly cited. (RCCAP at 174.)

Respondent's lay opinion that Dr. Puente is incorrect in his expert assessment that Mr. Benavides's neuropsychological impairments affected his ability to understand his *Miranda* rights is a factual dispute that does not negate the prima facie case, supported by Dr. Puente's expert opinion, that Mr. Benavides lacked the capacity to do so. *See In re Hawthorne*, 35 Cal. 4th 40, 52 (2005) (holding that factual disputes with expert opinion that petitioner is mentally retarded highlight the need to issue an order a show cause and order an evidentiary hearing to resolve such disputes). Respondent's misguided arguments shows why it is best to resolve these disputes in a hearing, with the assistance of expert testimony. Respondent, for example, argues that Mr. Benavides had the necessary reading skills to understand the *Miranda* warnings because he obtained a score on the Reading and Writing subtest of the Woodcock Muñoz battery that placed his performance at the equivalent of a boy 17 years and 2 months old. (Response at 114, citing Ex. 126 at ¶ 46.) Respondent, however, ignores that Dr. Puente opined this score likely does not reflect his abilities at the time of his arrest as he has had ample opportunity to hone these skills in over twenty years of his incarceration at San Quentin State Prison, where he spends the majority of his days locked in his cell. (Ex. 126 at ¶ 46.) More importantly, as stated above, Dr. Puente's opinion that Mr. Benavides lacked the capacity to fully understand the *Miranda* warnings is based on not only Mr. Benavides's reading skills, but a whole host of other mental functions such as reasoning, problem-solving, and cognitive flexibility that are necessary to have adequate understanding of one's rights. (Ex. 126 at ¶ 58.)

It is clear from the totality of the circumstances that Mr. Benavides's waiver was not voluntary, knowing, and intelligent. Mr. Benavides had a very traumatic experience on the night of November 17, 1991, when he

found Consuelo, whom he treated as his own daughter, with life-threatening injuries. His stress escalated when police officers accusatorily interrogated him at KMC and subsequently when he was arrested and interrogated in the afternoon after he had spent a night in vigil at the hospital. Given his sleep deprivation, extremely stressful circumstances of possibly losing a child he loved and treated as a daughter and then being wrongfully accused of sexually and physically assaulting her, his severe neurocognitive deficits, and lack of familiarity with the American criminal justice system, coupled with Detective Valdez's broken Spanish and the inadequacy of the *Miranda* waiver, there is a reasonable probability that Mr. Benavides's waiver and statements were inherently unreliable, involuntary and not made with a full and intelligent understanding of his rights. *See, e.g., People v. Farnam*, 28 Cal. 4th 107, 181 (2002) (voluntariness of statement must be determined in light of totality of the circumstances); *Smith v. Zant*, 887 F.2d 1407, 1426 (11th Cir. 1989) (holding that mentally retarded petitioner did not intelligently and voluntarily waive his *Miranda* rights were he was under severe stress and authorities failed to explain the warnings slowly and carefully.) The prosecutor's introduction of Mr. Benavides's KMC and police station statements rendered the trial fundamentally unfair in violation of his right to due process. *See, e.g., Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Trial counsel's ineffectiveness in not moving to exclude the statements based on their unreliability and/or presenting evidence of their unreliability prejudiced Mr. Benavides. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). There is a reasonable probability that had Mr. Benavides's statements been excluded or at least rebutted with the above evidence of their unreliability, the result of the proceedings would have been different.

### J. Claim Ten: The State Violated Mr. Benavides's Right to Due Process by Unfairly Targeting Him as the Sole Suspect and Ignoring Evidence That Implicated Other Suspects.

Mr. Benavides has presented a prima facie case that law enforcement and the prosecution targeted him early on in their investigation and ignored evidence that exculpated him and that implicated other suspects, in violation of his rights to a fundamentally fair and reliable determination of guilt and penalty, a trial free of materially false and misleading evidence, the right to confront and cross-examine witnesses, a trial by a fair and impartial jury, a conviction beyond a reasonable doubt, effective assistance of counsel, the disclosure of all materially favorable evidence including impeachment evidence, and authorities refraining from destroying potentially exculpatory evidence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, international law, and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law.

Respondent's attempt to set forth the applicable law demonstrates Respondent's misunderstanding of Mr. Benavides's claim. Mr. Benavides has established that law enforcement and the prosecution conducted a less than thorough, indeed an intentionally misleading investigation of Mr. Benavides, neglecting the weaknesses in the case, and instead manufacturing evidence to mask them, and refusing to investigate evidence it did not deem supportive of their theory of the case. Respondent's contention that the police do not have a duty to assist Mr. Benavides in procuring evidence deemed necessary to his defense (Response at 128) is inapposite as Mr. Benavides has not advanced a claim suggesting that the police have such a duty.

The state has a duty to investigate and prosecute criminal charges with fairness, and to avoid "tunnel vision" or "confirmatory bias" that might lead its agent to investigate only some avenues and not others.[46] The rationales underlying this legal obligation are basic to our notions of justice. The prosecutor is "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). He or she therefore must act to preserve the criminal trial, as distinct from the prosecution's own deliberations, as the chosen forum for ascertaining the truth about criminal accusations. *See Rose v. Clark*, 478 U.S. 570, 577-78 (1986); *Estes v. Texas*, 381 U.S. 532, 540 (1965); *United States v. Leon*, 468 U.S. 897, 900-01 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth'") (quoting *Alderman v. United States*, 394 U.S. 165, 175 (1969)).

The principle of due process is broad. It requires fundamental fairness by the state in all of its dealings with an individual accused of crimes. The state, for example, has a duty to seek the truth in its criminal investigations; where its investigative procedures are so improper that they

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[46] The Illinois Commission on Capital Punishment, in its study of the problems with the imposition of capital punishment in Illinois, recognized that established research has identified "tunnel vision" as an impediment to law enforcement investigation reliability. Report of the Commission of Capital Punishment, Governor's Commission on Capital Punishment (April 15, 2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html. Tunnel vision or "confirmatory bias" occurs "where the belief that a particular suspect has committed a crime often obviates an objective evaluation of whether there might be others who are actually guilty." *Id.* at 20. Officers become so convinced that they have arrested the correct person that they often ignore information pointing in another direction. *Id.* at 20-21.

undermine confidence in the verdict, the defendant's right to due process has been violated. *See Foster v. California*, 394 U.S. 440, 442 (1969); *see also Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Arizona v. Youngblood*, 488 U.S. 51, 55-56 (1988); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (Due process is not satisfied where the state contrives a conviction "through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty."). Additionally, reversal is required where the prosecution's conduct in any way impermissibly infringes upon a right specifically guaranteed by the Bill of Rights. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

To determine whether the facts show that the investigation led to a denial of Mr. Benavides's right to due process and fundamental fairness, the court looks to the "totality of the circumstances" to determine whether the prosecutor's investigative procedures undermine confidence in the outcome of the trial. *Foster*, 394 U.S. at 442; *see also Cook v. State*, 940 S.W.2d 623, 633 (Tex. Crim. App. 1996) (Baird, J., concurring and dissenting) (death penalty defendant's trial violated due process where prosecution withheld evidence that another individual had made death threats to the victim, had access to the victim around the time of the murder and was called a "pathological liar" by police; withheld inconsistent statements of the state's witnesses; introduced misleading testimony; misrepresented a deal made with a testifying witness; and attempted to interview the defendant without his counsel's knowledge[47]); *Ex Parte Brandley*, 781

[47] Kerry Max Cook was eventually found to be factually innocent of the charges and released from prison. *See* James S. Liebman, *The New Death Penalty Debate: What's DNA Got To Do With It*, 33 Colum. Hum. Rts. L. Rev 527, 554 n.47 (2002) (post-conviction investigation led to discovery of egregious prosecutorial misconduct and eventually exonerative DNA analysis, freeing Kerry Max Cook from death row after 20 years); James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2156

S.W.2d 886, 892 (Tex. Crim. App. 1990) (en banc). The court must examine the facts with particular care where the conviction is based only on circumstantial evidence. State misconduct is more likely to affect the outcome of the trial based upon circumstantial evidence than one in which there is direct evidence, untainted by state misconduct, linking a defendant to the crime. *Brandley*, 781 S.W.2d at 892; *see also United States v. Agurs*, 427 U.S. 97, 113 n.21 (1976).

As described above, and in the Corrected Amended Petition (RCCAP at 181-91), law enforcement and the prosecution team developed their theory both of the cause of Consuelo's death and the identity of the perpetrator within 24 hours after she was injured, and refused to be swayed from their course. When they were informed repeatedly by witnesses, even by Consuelo's family members, that they had never witnessed Mr. Benavides harm Consuelo, or any child, that he was a gentle and non-violent person, and that they did not believe he had committed the crimes against Consuelo, law enforcement officials chose to ignore this information. When the investigation revealed that other individuals who had regular access to Consuelo were violent, psychotic, using drugs, or convicted for molesting children, law enforcement officials also ignored this information in order to prevent the investigators from having to broaden the investigation. As a result, several of the prosecution's lay witnesses provided false testimony at trial. This misconduct was intentional, and once it began it infected every step of the investigation.

This conduct not only pervaded the investigation of the identity of the perpetrator, but also guided the investigation of the cause of death. Knowing that the statements and records from DRMC doctors and nurses

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n.145 (2000) ("Shoddy police work based on premature conjecture is tragically illustrated by Kerry Max Cook's case.").

who examined Consuelo and saw no evidence of sex abuse undermined their theory of the cause of death, prosecutorial investigators simply withheld those documents from the medical witnesses they interviewed, and ultimately obtained false and manufactured testimony from these medical witnesses. (*See, e.g.*, Ex. 149 at ¶¶ 3, 5-7; Ex. 78 at ¶ 14; Ex. 79 at ¶¶ 23-24, 26.)

In order to preserve the effects of its tightly controlled investigation, the prosecution withheld evidence of its misdeeds. It failed to disclose evidence that Joe Avila, a twice-convicted child molester, had access to Consuelo for the year prior to her death, *see* discussion *supra* in Claims Four, Five and Seven, and failed to disclose evidence of material benefits to witnesses, *see* discussion *supra* in Claims Two, Eight, and *infra* in Claim Seventeen.

In suppressing evidence unfavorable to its theory of the case, the state undermined Mr. Benavides's ability to develop a defense and undermined its own ability to gain a verdict worthy of confidence. Had law enforcement and the prosecution fulfilled their due process-mandated duty, *see Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1117 (9th Cir. 2001), and investigated the information repeatedly provided by witnesses that contradicted their theory, or at least provided this information to the defense, the prosecution would not have presented the false and misleading evidence that Joe Avila did not have access to Consuelo. Contrary to Respondent's contention that Mr. Benavides has not shown that the evidence of Joe Avila's actual release date and access to Consuelo during her lifetime was neither material nor exculpatory (Response at 131), Mr. Benavides has set forth sufficient information to support the allegations that Joe Avila had contact with Consuelo and that such evidence was exculpatory. (RCCAP at 183-85.) Had the prosecution

disclosed the evidence that pointed to other possible suspects, and impeached its own witnesses, the defense would have been equipped to challenge the prosecution's theory, as well as offer its own alternate theories to the jury.

Respondent attempts to dispute Mr. Benavides's allegations that the police failed to investigate various other individuals with a history of violence, drug abuse, psychotic mental illness, and/or sexual abuse who had access to Consuelo and a much greater propensity to cause her prior illnesses and prior injuries by ignoring the well-supported allegations Mr. Benavides has set forth and stating that there is no evidence that any of the other individuals had contact with or injured Consuelo on November 17, 1991 or that they were responsible for Consuelo's prior injuries. (Response at 128-29.) Respondent, however, fails to address or acknowledge that the meager evidence suggesting Mr. Benavides was responsible for Consuelo's prior injuries pales in comparison to the evidence that Consuelo's family members or Joe Avila were much more likely to cause Consuelo's injuries—they had a demonstrable history of violence, sexual abuse, drug abuse, and psychosis. Mr. Benavides has no such history. In fact, as Mr. Benavides has established, his character for non-violence and peacefulness is extremely well-supported. Respondent, thus, makes Mr. Benavides's point: based on the paltry circumstantial evidence against Mr. Benavides, he could not have possibly caused Consuelo's injuries.

Respondent's contention that the fact that Delia and Diana Alejandro told Estella that Consuelo was suffering from illnesses on prior occasions is evidence that they were not abusing Consuelo because Delia and Diana "would not have reported Consuelo's ill health or urged Estella to seek medical treatment for Consuelo had they been abusing her" (Response at

129) is entirely nonsensical.[48] That Delia and Diana Alejandro told Estella of their observations does nothing to prove that they did not cause Consuelo's illnesses. Given that Consuelo's ill health was obviously apparent to all who came in contact with her, it is completely plausible that Delia and Diana immediately notified Estella of their observations in such a way as to deflect an impression of neglectful or abusive caretaking before Estella could draw her own conclusions after observing Consuelo's ill health.

Respondent purports to address the legal authority Mr. Benavides set forth in the 2004 Informal Reply and in this Reply by reciting the basic facts of select cases and cursorily stating that the cases are inapposite to this case. (Response at 130-31.) Respondent's argument is entirely unpersuasive as the legal authority Mr. Benavides has set forth is applicable to Mr. Benavides's case because it establishes for this Court the legal standards for a fair trial and due process as they relate to police investigations.

The information regarding the prosecution team's tactics, and the evidence it discovered and then suppressed, was not disclosed. These tactics and this nondisclosure were willful; the prosecution intended to win the trial and convict Mr. Benavides, at whatever cost. Mr. Benavides was severely prejudiced by these actions, which negated his right to a fair trial and completely undermined confidence in his conviction and sentence. Mr. Benavides's conviction cannot stand in light of this misconduct. *See United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981) (a pattern of due

[48] By Respondent's logic, then, that Mr. Benavides immediately saw to it that Estella was notified of Consuelo's injuries on November 17, 1991, and urged Estella to come home to seek treatment for Consuelo is strong evidence that he did not inflict Consuelo's injuries on that day.

process violations by investigative officers might warrant the imposition of an "extreme remedy in order to deter further lawlessness").

### K. Claim Eleven: The Prosecutor Engaged in Prejudicial Misconduct During Trial.

Mr. Benavides has set forth facts and allegations demonstrating a prima facie case that the prosecutor engaged in a purposeful, intentionally improper, and consistent pattern of misconduct that was designed to and did in fact prejudicially deprive Mr. Benavides of his constitutional rights, and undermined the fundamental fairness of the trial. Respondent urges this Court to deny Mr. Benavides's claim on procedural grounds as well as on the merits. For the reasons that follow, Respondent's contentions and arguments must be rejected, and this Court should grant Mr. Benavides relief on this claim.

#### 1. Mr. Benavides's Claim Is Not Procedurally Barred.

Respondent urges this Court to reject the bulk of Mr. Benavides's claim, with the exception of the claim that the prosecutor improperly appealed to the prejudices and passions of the jury during closing argument, as procedurally barred pursuant to *In re Dixon*, 41 Cal. 2d 756, 759 (1953), because the balance of the claim could have been, but was not, raised on appeal. (Response at 133.) Respondent is mistaken; the claim is not barred by *Dixon*.

Respondent offers no analysis to guide this Court as to why and how a *Dixon* default applies to these allegations, particularly the allegations of ineffective assistance of counsel, and in fact, it does not. Mr. Benavides could not have presented these allegations on appeal because they are based at least in part upon information developed by habeas counsel that is not within the appellate record. Claims and allegations that require

consideration of matters outside the record in order to establish a prejudicial violation must be raised in habeas proceedings. *See, e.g.*, *In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (holding bar inapplicable when extra-record material has information "of substance not already in appellate record"); *In re Bower*, 38 Cal. 3d 865, 872 (1985). Mr. Benavides's claim is supported by extra-record information that establishes a prima facie case for relief. (*See, e.g.*, RCCAP at 196, 200; Ex. 107.) The exhibits offered in support of the Corrected Amended Petition include information that was not available to Mr. Benavides at the time of his trial either because it was suppressed or withheld by the prosecution and law enforcement or because trial counsel unreasonably and prejudicially failed to obtain it.

To the extent that this Court concludes that any or all of the allegations and legal issues that comprise Mr. Benavides's claim should have been raised by trial counsel, the failure to do so was prejudicial and there was no reasonable tactical purpose for these unprofessional errors. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984); *Cargle v. Mullin*, 317 F.3d 1196, 1220-21, 1224 (10th Cir. 2003) (noting that trial counsel's ineffectiveness can exacerbate instances of prosecutorial misconduct); *People v. Babbitt*, 45 Cal. 3d 660, 697 (1988) ("Because defendant's ineffective assistance claim requires that we examine the merits of his prosecutorial misconduct claim, we shall do so notwithstanding his failure to object."); *People v. Fosselman*, 33 Cal. 3d 572, 581 (1983) (same). Mr. Benavides has alleged that his counsel was prejudicially ineffective for failing to object to each instance of the prosecutor's misconduct set forth in this claim in the Corrected Amended Petition (RCCAP at 201; *see also* RCCAP at Claim Thirteen), a point that Respondent concedes. (Response at 150.) This Court may consider these issues because the claim involves an issue of counsel's effectiveness in failing to object to the prosecutor's

misconduct. *In re Robbins*, 18 Cal. 4th at 814 ("We do not apply [*Dixon*] bar[] to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record."). Habeas corpus, rather than appeal, is the appropriate remedy when the facts demonstrating prejudice (as well as error) lie outside the record. *See People v. Geddes*, 1 Cal. App. 4th 448, 454 (1991) (defendant claiming counsel was ineffective in failing to obtain favorable evidence must use habeas corpus to show the evidence that would have been found and its effect on trial).

However, if this Court concludes that parts or the entirety of this claim should have been presented on appeal, the failure of Mr. Benavides's appellate counsel to raise the claims on appeal deprived him of his constitutional right to effective assistance of appellate counsel. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (holding that due process requires the effective assistance of counsel on appeal).

Respondent also contends that Mr. Benavides's claim of prosecutorial misconduct is forfeited because trial counsel did not object to the misconduct and that an objection from trial counsel and an admonition from the court would have cured the harm. (Response at 133.) Respondent is mistaken; the claim is not forfeited as a result of trial counsel's failure to object to the misconduct. Mr. Benavides did not intend to forfeit, relinquish, or abandon these fundamental constitutional rights or privileges. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Not only did Mr. Benavides not waive these protections, Mr. Benavides has alleged that if defense counsel failed to safeguard Mr. Benavides's multiple trial rights and the right to a reliable and comprehensive review of that trial, then counsel's representation violated the Sixth and Fourteenth Amendments, rendering the *Dixon* bar inapplicable. Furthermore, an admonition from the court would not have cured the harm. *See, e.g.*, *People v. Benson*, 52 Cal.

3d 754, 794 (1990) (bar does not apply when the harm could not have been cured). Mr. Benavides addresses those specific instances below. Respondent concedes, however, that Mr. Benavides's claim that the prosecutor committed misconduct by making statements that reduced his burden of proof is not forfeited by trial counsel's failure to object. (Response at 134 n.39.)

In any event, this Court may consider the issues of the prosecutor's misconduct in misstating the law; referring to facts not in evidence; presenting material false evidence; denigrating Mr. Benavides and defense experts; improperly arguing that guilt should be implied from trial counsel's failure to test some of the evidence; improper reference to Mr. Benavides's demeanor as suggesting guilt; the improper instruction to the jury to ignore Mr. Benavides's good character evidence; the improper appeal to the jury's prejudices and passions; all of which are vital to the fairness and appearance of fairness of a capital trial, even if a party did not preserve these issues for review. *See, e.g.*, *People v. Williams*, 17 Cal. 4th 148, 161 n.6 (1998) ("An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party.") (citing *Canaan v. Abdelnour*, 40 Cal. 3d 703, 722 n.17 (1985), and *People v. Berryman*, 6 Cal. 4th 1048, 1072-76 (1993)).

For all of these reasons, Mr. Benavides's claim of pervasive prosecutorial misconduct is not barred from merits review.

### 2. Mr. Benavides Has Established a Prima Facie Case of Prosecutorial Misconduct Requiring This Court to Grant Relief.

Where prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), relief is required. Under some

circumstances, prejudice from prosecutorial misconduct is presumed without having to make a showing that the entire trial was unfair. For example, "[t]he United States Supreme Court has presumed that a due process violation has occurred when prosecutorial misconduct implicates specific rights guaranteed by the Bill of Rights." *Marshall v. Hendricks*, 307 F.3d 36, 70 (3d Cir. 2002) (citing *Griffin v. California*, 380 U.S. 609 (1965); *Doyle v. Ohio*, 426 U.S. 610 (1976)); *see also Duckett v. Mullin*, 306 F.3d 982, 988 (10th Cir. 2002) ("'when the impropriety complained of effectively deprived the defendant of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair'") (quoting *Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990)). Mr. Benavides has established in the Corrected Amended Petition a prima facie case that the prosecution violated his constitutional rights by its pervasive and consistent misconduct at both phases of the trial, some of which was purposeful and intentional, and some of which entitles Mr. Benavides to relief even if it was unintentional or simply negligent. Respondent fails to rebut Mr. Benavides's prima facie showing, and, as a result, Mr. Benavides is entitled to relief on this claim.

**a. The Prosecutor Improperly Reduced the State's Burden of Proof.**

A prosecutor's misstatement of the law in closing argument may deny the defendant a fair trial. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *United States v. Hammond*, 642 F.2d 248, 249–50 (8th Cir. 1981) (finding that misstating the law of criminal intent denies due process); *People v. Bell*, 49 Cal. 3d 502, 538 (1989); *Spivey v. Head*, 207 F.3d 1263, 1275 (11th Cir. 2000) ("Improper prosecutorial arguments, especially misstatements of law, must be considered carefully because 'while wrapped

in the cloak of state authority [they] have a heightened impact on the jury.'") (internal citation omitted)). Where the prosecutor's argument erroneously absolves the prosecution of its obligation to prove all elements of the offense beyond a reasonable doubt, prejudice is established. *See, e.g.*, *United States v. Sandoval-Gonzalez*, 642 F.3d 717, 724–26 (9th Cir. 2011) (holding that prosecutor's misstatements of law regarding a burden-shifting presumption constituted reversible error where district court failed to sustain defendant's objections during closing argument and to issue a curative instruction).

This is precisely what the prosecutor did in Mr. Benavides's case. The prosecutor erroneously and intentionally misstated the law by equating the burden of proof with the burden of providing truthful testimony and evidence. (4 RT 850 ("I like to sum up beyond a reasonable doubt as one word: the truth. We're here to search for the truth."); RCCAP at 193.) In doing so, the prosecutor improperly implied that the jury should rely on their beliefs regarding what the abstract "truth" was, rather than fulfill their duty to believe the defendant innocent until proven otherwise, by the prosecution's evidence presented at trial, beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 363-64 (1970) ("[R]easonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'") (citation omitted); *People v. Reyes Martinez*, 14 Cal. App. 4th 1412, 1415-16, 1418 (1993) (prejudice where improper reduction of burden of proof of essential element of offense when jury improperly instructed regarding mandatory presumption). Respondent disputes Mr. Benavides's claim, arguing that the prosecutor did not misstate the law because he also mentioned that the burden of proof was beyond a reasonable doubt. (Response at 134-35.) However, as is clear from the passages quoted by Respondent, the

prosecution equated a finding of guilt beyond a reasonable doubt with the truth. The prosecutor's statements undermined the presumption of innocence and negated an essential element of the state's burden of proof. By summing up his burden of proof as a search for the truth, the prosecutor implied to the jury that it need only determine the verdict based on what it subjectively decided was *true* instead of on the facts that had been proven beyond a reasonable doubt.

Contrary to Respondent's assertion (Response at 135), the prosecutor's misconduct in reducing his burden of proof was prejudicial. Respondent argues that the jurors could not have been misled by the prosecutor's misstatement about the law because the jurors were instructed that if there was a conflict between the law as explained by the court and the attorneys, they should follow the explanation given by the court. Respondent's argument lacks merit because that instruction was not sufficient to cure the prosecutor's error. The term "reasonable doubt" was not defined for the jury other than by the description given by the prosecutor. As such, the jury did not have reason to realize that the prosecutor's definition was in conflict with the legal definition. The jurors, therefore, likely understood their duty was to find the truth, which due to the prosecutor's erroneous argument they equated with determining whether there was a reasonable doubt.

**b. The Prosecutor Improperly Introduced and Urged the Jury to Consider False Evidence and Draw False Inferences From the Evidence Presented.**

Mr. Benavides has established a prima facie claim that the prosecutor committed misconduct when he referenced facts not in evidence as well as irrelevant and false evidence. (RCCAP at 193-96.) As discussed in detail below, Respondent's contentions that the prosecutor's arguments were

proper, did not refer to facts not in evidence, and were not prejudicial lack merit. (Response at 135-42.) The facts and allegations set forth in Claims One through Eight of the Corrected Amended Petition (incorporated by reference into Claim Eleven, *see* RCCAP at 192) and this Informal Reply have bearing on this claim as they detail the claims of false and unreliable evidence presented by the prosecution. To avoid unnecessary repetition, Mr. Benavides respectfully refers this Court to the discussion in those claims.

The presentation to the jury of false evidence, including false testimony, which is material to the issue of either guilt or punishment, is a violation of the defendant's constitutional rights. *See, e.g., Napue v. Illinois*, 360 U.S. 264 (1959); *Hayes v. Brown*, 399 F.3d 972, 978 (9th Cir. 2005). Section 1473 of the California Penal Code, subdivision (b)(1), provides that a writ of habeas corpus may issue if "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." Cal. Penal Code § 1473 (2012); s*ee also In re Roberts*, 29 Cal. 4th 726, 741-42 (2003).

To obtain relief, Mr. Benavides is not required to show that the prosecution knew or should have known that the testimony was false. *Killian v. Poole*, 282 F.3d 1204, 1209-10 (9th Cir. 2002) (holding that prosecution's knowledge of the witness's falsehoods are irrelevant); *United States v. Young*, 17 F.3d 1201, 1203-04 (9th Cir. 1994) (holding defendant convicted on false evidence entitled to new trial even if prosecutor unwittingly presents false evidence); *Sanders v. Sullivan*, 900 F.2d 601, 606-07 (2d Cir. 1990) (granting habeas relief on one conviction although perjurious nature of testimony was not known to parties until after trial); *People v. Marshall*, 13 Cal. 4th 799, 830 (1996) ("Under the current rule, a

showing that the false testimony was perjurious, or that the prosecution knew of its falsity, is no longer necessary.") (citing *In re Hall*, 30 Cal. 3d 408, 424 (1981)). However, when and if the false or misleading nature of the testimony comes to light, the prosecution has the duty to correct it. *In re Jackson*, 3 Cal. 4th 578, 595 (1992), *disapproved of on other grounds by In re Sassounian*, 9 Cal. 4th 535, 545 n.6 (1995) (holding that the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading). This obligation applies even if the false or misleading testimony goes only to witness credibility. *People v. Morrison*, 34 Cal. 4th 698, 716-17 (2004) (citing *Napue v. Illinois*, 360 U.S. at 264).

Relief is also compelled where prosecuting attorneys were or should have been aware that the testimony was false. *See, e.g.*, *Napue v. Illinois*, 360 U.S. at 269; *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935) (holding that deliberate use by the prosecutor of perjured testimony to obtain a conviction is a denial of due process); *People v. Kasim*, 56 Cal. App. 4th 1360, 1386 (1997) (reaching same result when prosecution *should have known* that the testimony was perjured) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Where the government knowingly permits the introduction of false testimony, "reversal is 'virtually automatic,'" *Hayes*, 399 F.3d at 978 (quoting *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991)), and the conviction must be set aside "'if there is any reasonable likelihood that the false testimony could have affected the jury verdict.'" *United States v. Cooper*, 173 F.3d 1192, 1203 (9th Cir. 1999) (quoting *Ortiz v. Stewart*, 149 F.3d 923, 936 (9th Cir. 1998)).

Furthermore, a prosecutor runs afoul of the Confrontation Clause when suggesting during closing argument that evidence not admitted bolsters the case against the defendant. *See, e.g.*, *United States v. Carroll*,

678 F.2d 1208, 1210 (5th Cir. 1982) (district attorney violated defendant's Confrontation Clause rights by suggesting in closing argument that the defendant had to have been at the scene of the crime because he knew more about pictures than his lawyer did). In this case, the prosecutor's argument routinely strayed well beyond the bounds of vigorous argument and constituted gross misconduct, thus violating Mr. Benavides's state and federal constitutional rights to confront witnesses, a fair trial, due process of law, the effective assistance of counsel, and reliable guilt and penalty phase verdicts. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 831 (1991) (prejudicial and excessive victim impact argument improper); *Berger v. United States*, 295 U.S. 78, 84 (1935) (improper to misstate evidence); *United States v. Molina*, 934 F.2d 1440, 1446 (9th Cir. 1991) (improper to argue facts not in evidence); *People v. Hill*, 17 Cal. 4th 800, 823 (1998). Mr. Benavides has established that various portions of the prosecutor's argument in closing were not supported by the evidence presented at trial. In closing argument, the prosecutor not only grossly mischaracterized the evidence, but also he argued facts that were not in evidence. (*See* RCCAP at 82-120, 194-99.) The prosecution's introduction and argument of facts not in evidence severely undermines confidence in the verdict and penalty determination and therefore requires reversal. *See, e.g.*, *Hill*, 17 Cal. 4th at 827-28.

This Court's decision on direct appeal has bearing on Mr. Benavides's claim that the prosecutor falsely referenced evidence pertaining to Estella Medina's relationship with convicted child molester Joe Avila as though it began after Consuelo's death to falsely and improperly imply that Mr. Benavides was a child molester simply because another of Estella's male companions was. (RCCAP at 193-96; *see, e.g.*, Ex. 4 at 2071-73.) Mr. Benavides discusses in detail this Court's opinion

regarding this issue as well as Respondent's response to Mr. Benavides's claims regarding the presentation of false evidence regarding Estella's association with Joe Avila in Claims Five and Six of this Informal Reply. To avoid unnecessary repetition, Mr. Benavides respectfully refers this Court to Mr. Benavides's discussion on this issue in those claims.

Respondent incorrectly contends that Mr. Benavides's claim that the prosecutor improperly implied during his cross examination of Estella Medina that Mr. Benavides was wanted in Mexico for a similar offense (RCCAP at 194), when absolutely no evidence of this existed other than unsubstantiated rumors (Ex. 69 at ¶ 10), was not prejudicial. (Response at 136-37.) The prosecutor's statements, which implied evidence existed that was not introduced at trial and misstated known facts, were improper as the prosecutor did not have a good faith basis for making such inquiries.[49] *See United States v. Davenport*, 753 F.2d 1460, 1463 (9th Cir.1985) (prosecutor's question must be supported by "a good faith belief in the misconduct of the defendant which was the subject of the question."); *People v. Chojnacky*, 8 Cal. 3d 759, 766 (1973) ("It is improper to ask questions which clearly suggest the existence of facts which would have been harmful to defendant in the absence of a good faith belief that the questions would be answered in the affirmative, or with a belief that the facts could be proved, and a purpose to prove them, if their existence should be denied."); *see also United States v. Bagley*, 473 U.S. 667, 678-82 (1985); *Kincade v. Sparkman*, 175 F.3d 444, 446 (6th Cir. 1999); *Gomez v. Ahitow*, 29 F.3d 1128, 1136 (7th Cir. 1994). Furthermore, the prosecutor's improper questioning was in fact prejudicial. The prosecutor's misconduct caused the jury to infer that Mr. Benavides had committed a crime in

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[49] Respondent does not contest, and therefore concedes, that the prosecutor's implication was improper. (Response at 137.)

Mexico and was escaping authorities. The prosecutor's repeated improper and false argument that Mr. Benavides had a history of child molestation exacerbated the effect of the prosecutor's improper questioning because it led the jury to convict Mr. Benavides on the false perception, based on facts not in evidence, that the jury must convict Mr. Benavides in order to prevent him from continuing to evade authorities and continuing to molest children.

The prejudicial impact of the prosecutor's misconduct was compounded by his repeated, false, and unsupported inquiries during cross examination of Estella and Mr. Benavides. The prosecutor asked Estella:

> Q. Mrs. Medina, isn't it true that you knew what was happening with this man but you weren't reporting it?
>
> A. No, I didn't.
>
> Q. It wasn't until he came around that the child started having broken bones and bruises, was it?
>
> A. No.

(13 RT 2587-88.) He also asked Mr. Benavides the same thing: "Isn't it true, Mr. Benavides, you have been molesting that little girl for a while?" (15 RT 3054.) The prosecutor had no good faith basis for these questions, and in fact, as discussed in Claims Four, Five, and Six, *supra*, had in his possession evidence indicating that the information insinuated by his questions was completely false, including evidence that Mr. Benavides was nonviolent and had no history of criminal behavior and evidence that, prior to the commencement of Estella's relationship with Mr. Benavides, Consuelo Verdugo was clumsy, fell a lot, and, as a result, was accident-prone. Despite this evidence, he asked questions based on his own

opinions of the case and implied to the jury the existence of additional evidence that would not be produced at trial. *See, e.g.*, *United States v. Molina*, 934 F.2d at 1440, 1444-45 (misconduct where prosecutor suggested to the jury that evidence not presented supported witness's testimony).

Mr. Benavides has also shown that the prosecutor falsely insinuated in his cross-examination of Mr. Benavides that Estella told hospital workers that Consuelo had previously hit her head from following Cristina out the door. (RCCAP at 194.) Respondent argues that the prosecutor's questions regarding what Estella told hospital workers referenced Consuelo's November 17, 1991 injuries, rather than her prior injuries. In support of this contention, Respondent misleadingly quotes only a portion of the Reporter's Transcript. (Response at 137-39.) Respondent fails to include the question and answer (in italics below) that appear on the transcript immediately *before* the portion of the transcript quoted by Respondent. A full picture of the relevant cross examination of Mr. Benavides is below:

> Q. You talked about the baby having a broken arm. But I want to ask you about the injury to her head that happened before November 17, 1991. Were you there when that happened?
>
> A. When she broke her arm or she hurt her head?
>
> 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 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.

(15 RT 3046-47, emphasis added.) Respondent argues that from the above passage the jury would have deduced that the prosecutor was first asking about the prior head injury and later about the November 17, 1991 head injury. No juror would have interpreted the questioning in this manner. The prosecutor did not signal in any way that he "switched subjects" as Respondent contends. (Response at 138.) Respondent argues that the prosecutor's reference to Estella's discussions with "people at the hospital" signaled to the jury that the prosecutor had "switched subjects" to referring to the November 17, 1991 injuries because the jury was allegedly aware

that Estella had not sought medical treatment for the prior head injury. Respondent's argument lacks merit. The jury would not have been able to determine the prosecutor had suddenly switched from referring to the prior head injury to the November 17, 1991 head injury by reference to such a phrase. Moreover, because Estella worked at a hospital it is quite possible that the jurors understood the phrase to refer to her discussions about the prior head injury with her coworkers. In sum, the prosecutor's questioning was likely understood by the jury to refer to the prior head injury and was improper as it was not based on any evidence or reasonable interpretations drawn from the evidence. The prosecutor's improper questioning prejudiced Mr. Benavides because it undermined Mr. Benavides's and Estella's credibility by suggesting that both attempted to cover up source of the injuries Consuelo suffered prior to and during the time of the crime. But for the prosecutor's misconduct, the outcome of Mr. Benavides's trial would have been different.

Respondent next contests Mr. Benavides's claim that the prosecutor committed misconduct during closing argument at trial. Respondent asserts that the prosecutor's statements were properly inferred from the evidence presented at trial that showed that Mr. Benavides had molested Consuelo and that the statement did not imply that Mr. Benavides previously molested children. (Response at 140.) Respondent is incorrect.

A prosecutor runs afoul of the Confrontation Clause when suggesting during closing argument that evidence not admitted bolsters the case against the defendant. *See, e.g.*, *United States v. Carroll*, 678 F.2d at 1208, 1210 (district attorney violated defendant's Confrontation Clause rights by suggesting in closing argument that the defendant had to have been at the scene of the crime because he knew more about pictures than his lawyer did). The prosecutor's argument strayed well beyond the bounds of

vigorous argument and proper inference and constituted gross misconduct, thus violating Mr. Benavides's state and federal constitutional rights to confront witnesses, a fair trial, due process of law, the effective assistance of counsel, and reliable guilt and penalty phase verdicts. *See People v. Hill*, 17 Cal. 4th at 823; *Berger v. United States*, 295 U.S. at 84 (improper to misstate evidence); *Payne v. Tennessee*, 501 U.S. at 831 (prejudicial and excessive victim impact argument improper); *United States v. Molina*, 934 F.2d at 1440, 1446 (improper to argue facts not in evidence).

Respondent ignores Mr. Benavides's claim that the prosecutor improperly characterized Joe Avila as "another convicted child molester"—thereby falsely declaring Mr. Benavides a convicted child molester—and argues that the prosecutor's argument in closing, after trial counsel's objection and the trial court's admonition that Mr. Benavides had no prior conviction, was supported by the evidence presented at trial and was a proper inference from the evidence. (Response at 140.) Trial counsel's objection, the prosecutor's correction, and the court's instruction to the jury on the issue, however, could not un-ring the bell that the prosecutor had rung. The jury heard the prosecutor's statement which was designed to and did in fact invite the jury to assume that the prosecutor had additional information about Mr. Benavides's past that the jury did not have access to and, thus, erroneously and prejudicially conclude that Mr. Benavides had committed the crimes with which he had been charged because he had done it before in the past. There was no evidence at all that Mr. Benavides had sustained any convictions at all, let alone a conviction for child molestation. To the contrary, the prosecutor's statement was in direct contradiction to the evidence presented at trial that Mr. Benavides had no prior criminal record and that Mr. Benavides had a character for nonviolence. The prosecution's introduction and argument of facts not in evidence severely undermines

confidence in the guilt and penalty verdicts, because it relates to the central question of whether Mr. Benavides was guilty of the offenses charged, and therefore requires reversal. *See, e.g.*, *Hill*, 17 Cal. 4th at 827-28.

Respondent also disputes Mr. Benavides's claim that the prosecutor improperly denigrated Mr. Benavides by making rude and obscene gestures toward him in full view of the jury arguing that Mr. Benavides has not shown that the behavior was persistent or pervasive, rendering Mr. Benavides's trial fundamentally unfair. (Response at 140-41.) Respondent is incorrect. Mr. Benavides has made a prima facie showing that the prosecutor engaged in misconduct that was so egregious that it infected the trial with such unfairness as to deny him due process. *See Donnelly*, 416 U.S. at 642-43. Physical gestures, such as making faces, contribute to cumulative prejudicial error. *See, e.g.*, *Hill*, 17 Cal. 4th at 828. Respondent's contention that Defense interpreter Al Hernandez does not identify the number of times the prosecutor made rude and obscene gestures towards Mr. Benavides and does not specify that it took place in the jury's presence is inapposite. (Response at 140.) The facts presented in support of this allegation clearly establish a prima facie case of the prosecutor's pervasive misconduct that improperly influenced the jury and intimidated Mr. Benavides. Mr. Hernandez recounts that the prosecutor's grimaces and "mad dog" faces aimed at Mr. Benavides were persistent enough to cause Mr. Hernandez to notice them and to feel the need to tell Mr. Benavides to ignore him. (Ex. 107 at ¶ 7.) Mr. Hernandez's observations are corroborated by trial counsel Donnalee Huffman who also observed the prosecutor "at trial" making improper hand gestures toward Mr. Benavides when the judge was not looking: once pointing a gun at Mr. Benavides, and another time making hanging gestures toward Mr. Benavides. (Ex. 64 at ¶ 10.) "Eventually," Mr. Hernandez says, "[Mr.

Benavides] just stopped making eye contact with him to avoid having to see these gestures." (Ex. 107 at ¶ 7.) Given the severity, persistence, and pervasiveness of the offensive gestures described by Hernandez and Huffman, it is likely that the jury observed them and drew improper inferences from them. In addition to causing the jury to feel contempt toward Mr. Benavides by virtue of the prosecutor's denigrating gestures toward Mr. Benavides, the prosecutor's repeated and gross conduct ultimately intimidated Mr. Benavides and forced him to avert his eyes from the prosecutor to avoid seeing the offensive gestures. The jurors were prejudiced by these gestures as they paid close attention to Mr. Benavides's facial expressions throughout the trial. (Ex. 109 at ¶ 3.) Furthermore, in closing argument, the prosecutor specifically pointed Mr. Benavides's demeanor out to the jurors, asking them whether he looked [the jury and the prosecutor] in the eye, and stating that he looked nervous and, "to use another word, he is guilty. He looks guilty. He is guilty." (18 RT 3594.) The prosecutor committed misconduct by intimidating Mr. Benavides to the point that he failed to make eye contact and then arguing that his failure to do so showed a consciousness of guilt. Such misconduct by the prosecutor injected a layer of evidence which was not properly before the jury and rendered Mr. Benavides's trial fundamentally unfair in violation of his constitutional rights.

**c. The Prosecutor Improperly Referred to Facts Not in Evidence.**

The prosecutor argued in closing that he could have presented an expert to show that a person abusing a child could exert sufficient pressure to break the ribs reported to have been broken in Consuelo's rib cage. (18 RT 3594-95.) The prosecutor's argument was improper because he improperly argued that facts not in evidence supported his argument. *See*

*United States v. Molina*, 934 F.2d at 1440, 1446 (improper to argue facts not in evidence). Respondent argues that the prosecutor's argument was proper because expert testimony was introduced to show that the rib fractures could be caused by child abuse, specifically a person gripping and squeezing the child's ribs. (Response at 143.) The expert's testimony, however, did not address the amount of force necessary to cause such fractures, as the prosecutor pointed out in his argument. In fact, had such evidence been introduced, the jury would have learned that it was highly improbable, to the point of being almost impossible that a person could exert enough force with their hands to break all ten ribs Dr. Dibdin reported had been broken and also cause the internal abdominal injuries. (Ex. 170 at ¶ 26 .)

#### d. The Prosecutor Improperly Denigrated a Defense Expert.

The prosecutor improperly denigrated Dr. Baumer. On cross-examination, the prosecutor asked Dr. Baumer: "[I]sn'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?" (14 RT 2887.) The fact that the prosecutor immediately withdrew the question before the court could rule on the defense objection is persuasive evidence that the prosecutor had no good faith for asking the question. Later, in closing argument, the prosecutor argued that Dr. Baumer had changed his testimony at the last minute because he had been paid to do so. (18 RT 3571.) Again, the prosecutor had no basis to make such an argument. Dr. Baumer explicitly testified that he would not testify falsely simply because he was paid by the defense. (14 RT 2893.) Respondent's arguments that the prosecutor's question of Dr. Baumer and argument in closing were proper lacks merit. Though a prosecutor may argue that a witness lacks

credibility, the prosecutor must have some basis to make such an inference. As shown above, there was no basis for the prosecutor's question and argument. *See, e.g.*, *Davenport*, 753 F.2d at 1463 (prosecutor's question must be supported by "a good faith belief . . ."); *Chojnacky*, 8 Cal. 3d at 766 ("It is improper to ask questions which clearly suggest the existence of facts which would have been harmful to defendant in the absence of a good faith belief that the questions would be answered in the affirmative, or with a belief that the facts could be proved, and a purpose to prove them, if their existence should be denied.").

**e. The Prosecutor Improperly and Prejudicially Equated Defense Counsel's Failure to Take Specific Actions With Petitioner's Guilt.**

Respondent asserts, without explanation, that the prosecutor's repeated references to the defense's failure to examine the evidence collected by Dr. Dibdin were not improper. (Response at 144-45.) Respondent's unsupported assertion lacks merit. The court sustained the defense objection to the prosecutor's improper question whether trial counsel had sent anyone to view the body tissue collected by Dr. Dibdin. (11 RT 2141.) Notwithstanding, the court's ruling, the prosecutor revisited the topic in concluding direct examination by eliciting testimony that Dr. Dibdin still had the samples he collected in his lab, thereby clearly referencing the earlier improper question regarding counsel's failure to test the evidence. (11 RT 2144.) The prosecutor then revisited the topic in guilt phase closing arguments (18 RT 3569) and penalty phase closing arguments (19 RT 3784). The prosecutor's improper reference to the fact that counsel had not tested the evidence improperly shifted the burden of proof to Mr. Benavides and implicated his right to remain silent. *See, e.g.*, *United States v. Roberts*, 119 F.3d 1006, 1011 (1st Cir. 1997) (error for prosecutor to tell

jurors that defendant is responsible for presenting compelling case; statement misstated law about what state must show and shifted burden of proof). By making such arguments, the prosecutor improperly suggested that Mr. Benavides had an obligation to test the evidence and that failure to do so was evidence of his guilt. The prosecutor's repeated references to these improper arguments violated Mr. Benavides's constitutional rights.

#### f. The Prosecutor Improperly Asked the Jury to Ignore Evidence of Mr. Benavides's Good Character.

Mr. Benavides has established a prima facie claim that the prosecutor improperly exhorted the jury to ignore good character evidence. The prosecutor told the jury this evidence had to do with whether Mr. Benavides told the truth on the stand and had "nothing to do with what he did at the scene." (18 RT 3655; RCCAP at 200.) Respondent contends the prosecutor's argument was proper because the prosecutor was arguing the jury should focus on Mr. Benavides's alleged actions the night of November 17, 1991, rather than evidence of his good character in determining his guilt of the alleged charges. (Response at 149.) Respondent is incorrect. The prosecutor specifically told the jury that California jury instruction 2.40, which instructed the jury that good character evidence may be sufficient by itself to raise a reasonable doubt as to the guilt of a defendant (2 CT 556), did not apply in Mr. Benavides's case. The prosecutor asserted, "This instruction about character traits of character of [sic] the defendant has nothing to do with what he did at the scene." (18 RT 3655.) Such an argument violated Mr. Benavides's right to due process because the prosecutor asked the jury to discount the good character evidence presented at trial even though it was properly placed before the jury. *See Gall v. Parker*, 231 F.3d 265, 315-16 (6th Cir. 2000); Cal. Evid. Code §1102(a). Furthermore, the prosecutor's argument in effect

misstated the law by instructing the jury not to consider evidence and that particular jury instructions properly provided to the jury did not apply. The prosecutor's misconduct violated Mr. Benavides's constitutional rights and rendered his trial fundamentally unfair.

#### g. The Prosecutor Improperly Appealed to the Passions and Prejudices of the Jury.

Mr. Benavides presented a prima facie claim that the prosecutor violated Mr. Benavides's constitutional rights when he improperly appealed to the passions and prejudices of the jury, in an inflammatory argument, by telling the jury they should show Mr. Benavides the same mercy he showed Consuelo Verdugo. (RCCAP at 200-01.) Respondent cites to this Court's opinion on direct appeal and asserts that Mr. Benavides's claim is without merit. (Response at 149-50; *see also People v. Benavides*, 35 Cal. 4th 69, 109 (2005).) Mr. Benavides urges this Court to reconsider this claim in conjunction with the factual allegations of prejudicial prosecutorial misconduct presented in the Corrected Amended Petition demonstrating that the evidence used to convict Mr. Benavides was incomplete, false, and improperly presented. The prosecutor's argument was improper because it was aimed to and did in fact invite the jury to convict Mr. Benavides based on emotions and fear and ignore the reasoned and individualized consideration of mitigating evidence as dictated by the constitution. *See Cunningham v. Zant*, 928 F.2d 1006, 1019-121 (11th Cir. 1991) ("A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law.") (citation omitted); *Hill*, 17 Cal. 4th at 828. The prosecutor's misconduct had the injurious effect of causing the jury to act out of emotion and fear and determine that the appropriate penalty was death.

### 3. Mr. Benavides Was Deprived of a Fair Trial and Is Entitled to Relief Based on the Individual and Cumulative Effect of the Prosecutor's Misconduct.

Respondent contests Mr. Benavides's claim that the cumulative effect of the prosecution's misconduct prejudiced Mr. Benavides and had a substantial and injurious influence or effect on the jury's guilt and penalty phase determinations, because, Respondent asserts, there was no misconduct and any misconduct this Court finds was cumulatively not prejudicial because the factual evidence of Mr. Benavides's guilt was so strong. (Response at 150.) Mr. Benavides has established a prima facie claim that the prosecutor's misconduct was pervasive, repeated, and severe. (*See* RCCAP and Reply Claims One through Eight, and Eleven.) Furthermore, Mr. Benavides has set forth information and allegations demonstrating that Mr. Benavides did not commit the offenses with which he was charged and, thus, Respondent's basis for asserting that there was no prejudice is flawed. (*See* RCCAP and Reply Claims One and Thirteen.)

Individually and cumulatively, the prosecutor's improper conduct had a materially adverse effect on Mr. Benavides's defense. *See, e.g.*, *Bates v. Bell*, 402 F.3d 635, 648-49 (6th Cir. 2005) (holding that cumulative effect of the prosecutor's improper arguments that inflamed the passions and prejudices of the jury, offered personal opinions about the veracity of the defense presentation, and denigrated defense counsel warranted reversal); *United States v. Sanchez*, 176 F.3d 1214, 1219-25 (9th Cir. 1999) (holding that cumulative misconduct required reversal where prosecutor elicited a law enforcement officer's opinion whether a defendant gave truthful answers during an interrogation, introduced inadmissible hearsay statements of a third person through cross-examination, vouched in closing argument for witnesses, denigrated defense as a sham); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (finding that cumulative impact of prosecutor's

racially inflammatory statements and personal opinion of the evidence required reversal); *People v. Hill*, 17 Cal. 4th at 800 (reversing conviction required where cumulative effect of prosecutorial misconduct prejudiced petitioner's trial even though acts considered singly may not have warranted reversal).

The prosecutor's acts of misconduct were not isolated, but rather permeated the entire trial. Because the prosecutor's misconduct so infected Mr. Benavides's trial with unfairness, Mr. Benavides's convictions were a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765-66 (1987). On all of the grounds set forth above, Mr. Benavides's guilt verdict and penalty phase determination must be set aside.

### L. Claim Twelve: Mr. Benavides Was Unconstitutionally Deprived of Adequate and Competent Interpreter Services During His Capital Trial.

Mr. Benavides has set forth facts that establish his prima facie entitlement to reversal of his conviction and death sentence because he received inadequate and incompetent interpretation at trial, which prevented him from comprehending the proceedings, assisting his counsel, and communicating reliably with the jury during his testimony. The interpretation also rendered unreliable the testimony of other Spanish-speaking witnesses. This inadequate interpretation violated Mr. Benavides's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to be tried while competent; comprehend the nature and content of all capital proceedings against him; assist counsel in his defense; be present; present a defense; confront and cross-examine the witnesses against him; the effective assistance of counsel; a fair and impartial jury; a reliable, fair, non-arbitrary and non-capricious determination of guilt, death eligibility, and penalty verdicts based on accurate information, rather than false

testimony or misinformation; due process of law; and in violation of his state and federal constitutional rights to a competent interpreter and to equal protection under the laws.

Interpreters play three different but essential roles in criminal proceedings:

> (1) They make the questioning of a non-English-speaking witness possible; (2) they facilitate the non-English-speaking defendant's understanding of the colloquy between the attorneys, the witness, and the judge; and (3) they enable the non-English speaking defendant and his English-speaking attorney to communicate . . . an interpreter performing the first service will be called a 'witness interpreter,' one performing the second service, a 'proceedings interpreter,' and one performing the third service a 'defense interpreter.'

*People v. Aguilar*, 35 Cal. 3d 785, 790 (1984) (internal citations omitted). Mr. Benavides has made a prima facie showing that he was denied a witness interpreter, proceedings interpreter, and defense interpreter and he has not waived his right to any of the three.

### 1. Mr. Benavides's Claim Is Not Procedurally Barred

Respondent mechanically argues, as it does for most of the claims, and is it did in its 2003 Response, that this claim is record-based and consequently has been waived due to the failure to raise it on appeal. (Response at 152; 2003 Response at 94.) As is patently evident from the factual allegations in the Corrected Amended Petition, the claim is not record-based, but instead based on extra-record evidence, including among others, the declarations of the two interpreters at trial, and a certified interpreter's declaration. (Exs. 87, 107, 108.) Moreover, by their nature, claims challenging the adequacy of interpretation at trial must depend upon extra-record facts because the Spanish interpretation for each question or statement is not provided on the record. *See Aguilar*, 35 Cal. 3d at 793 n.10

(noting that because "no transcript of the oral proceedings in the translated language exists . . . . the denial of a defense interpreter represents a singularly unchecked aspect of our criminal justice system."). Because the factual support for the claim is based on extra-record evidence this claim is properly raised on habeas. *See People v. Rodriguez*, 42 Cal. 3d 1005, 1016 (1986) (holding that "[o]f course, habeas corpus may be utilized to offer any relevant evidence not appearing on the face of the record" in support of a claim of inadequate interpretation).

Respondent's claim that Mr. Benavides has waived this claim is also meritless. There is no evidence that Mr. Benavides waived his right to an interpreter to help him communicate with counsel and understand the proceedings and to an interpreter for the defense Spanish-speaking witnesses. Mr. Benavides's claim that he was entitled under the state and federal constitutions to a proceedings and defense interpreter cannot be waived without a voluntary and intelligent waiver. *Aguilar*, 35 Cal. 3d at 790, 794. Waiver is the "'intentional relinquishment or abandonment of a known right.'" *Aguilar*, 35 Cal. 3d at 794 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The right of a defendant under the California constitution to an interpreter "may not validly be waived without an 'affirmative showing,' on the record, of waiver which was 'intelligent and voluntary' on the part of the affected defendant." *Aguilar*, 35 Cal. 3d at 794 (citing *People v. Chavez*, 124 Cal. App. 3d 215, 227 (1981).) There is absolutely no indication of an affirmative waiver by Mr. Benavides on the record of his right to a competent proceedings and defense interpreter. Mr. Benavides's "'passive acquiescence in the grinding of the judicial machinery'" does not constitute a voluntary and intelligent waiver to his right under the California and federal constitution to a competent interpreter. *Aguilar*, 35 Cal. 3d at 794 (citing *United States ex rel. Negron*

*v. New York*, 434 F.2d 386, 390 (2d Cir. 1970)). The rationale for not assuming a waiver of this fundamental right is best explained by the court in *Negron* describing a defendant of similar background to Mr. Benavides:

> Nor are we inclined to require that an indigent, poorly educated Puerto Rican thrown into a criminal trial as his initiation to our trial system, come to that trial with a comprehension that the nature of our adversarial processes is such that he is in peril of forfeiting even the rudiments of a fair proceeding unless he insists upon them. . . . For all that appears, Negron, who was clearly unaccustomed to asserting "personal rights" against the authority of the judicial arm of the state, may well not have had the slightest notion that he had any "rights" or any "privilege" to assert them.

*Negron*, 434 F.2d at 390.

Mr. Benavides's right to a "witness interpreter," for non-English speaking witnesses, on the other hand, can be waived if an objection is not raised at trial. *People v. Romero*, 44 Cal. 4th 386, 411 (2008). However, as explained in the Corrected Amended Petition in this claim and Claim Thirteen, subclaim 11, counsel's failure to object does not preclude relief because counsel's failure was unreasonable and prejudicial. *See In re Seaton*, 34 Cal. 4th 193, 200 (2004) (holding that counsel's failure to object when a defendant's rights are violated does not waive a right when counsel provided constitutionally deficient assistance). This is particularly true in this case.

The witness interpreter was Victor Almaraz, an uncertified interpreter with a history of providing poor interpretation, who has brain damage, and a criminal history for spousal abuse and selling drugs. (Exs. 24-32, 108.) Almaraz also worked as an interpreter for defense counsel Jeffrey Harbin. Almaraz contacted Spanish-speaking witnesses for Harbin and arranged for the witnesses to appear at trial. As described in detail in Claim Thirteen, subclaims 13 and 16, counsel's use of Almaraz to conduct the minimal and

subpar investigation into Mr. Benavides's character and social history fell far below the standard of care required for a capital case. In light of counsel's failure to realize that Almaraz could not communicate properly with Spanish-speaking witnesses or conduct an adequate investigation, it is not surprising that they also failed to realize that he was incompetent to interpret in court. In other words, counsel's dismal performance in presenting good character evidence at the guilt phase and a wealth of social history information at the penalty phase is inextricably linked with their failure to ensure the Spanish-speaking witnesses had a competent interpreter to interpret their testimony to the jury and counsel's questions to them. Counsel's deficient performance undoubtedly prejudiced Mr. Benavides, and he cannot be held to have waived his rights because of counsel's failures.

Accordingly, Mr. Benavides has not waived his right to a competent proceedings interpreter, defense interpreter, and a witness interpreter.

**2. Mr. Benavides Was Denied His State and Federal Constitutional Right to the Appointment of a Competent Interpreter.**

**a. State and Federal Constitutional Right to an Interpreter**

The California Constitution, article 1, subsection 14, provides: "A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." As stated by this Court, the constitutional provision is a mandate to provide defendants with a clear understanding of what is happening to them:

> The people of this state, through the clear and express terms of their Constitution, require that all persons tried in a California

> court understand what is happening about them, for them, and against them. Who would have it otherwise?

*Aguilar*, 35 Cal. 3d at 795. The right to understand the proceedings and to a defense interpreter is also grounded in the federal constitution. The right to interpreters safeguards the constitutional rights of non-English-speaking defendants "to due process, to confrontation, to effective assistance of counsel, and to be present at trial." *Rodriguez*, 42 Cal. 3d at 1011; *see Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000) ("[C]ompetent translation is fundamental to a full and fair hearing."); *see also People v. Menchaca*, 146 Cal. App. 3d 1019, 1023 (1983) (holding that due process is violated by depriving an individual of his or her right to interpretation under Article I, section 14 of the California Constitution). The denial of an interpreter also implicates fundamental fairness in the proceedings. As explained by one court:

> Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial, [citation omitted], . . . [a]nd it is equally imperative that every criminal defendant—if the right to be present is to have meaning—possess sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.

*Aguilar*, 35 Cal. 3d at 793 (citing with approval *Negron*, 434 F.2d at 389) (internal citations omitted).

A defendant, whether English-speaking or not, is also entitled to a competent witness interpreter. *People v. Aranda*, 186 Cal. App. 3d 230, 237 (1986); *People v. Estrada*, 176 Cal. App. 3d 410 (1986). The deprivation of a competent witness interpreter implicates a fundamental constitutional right, and "may impair a defendant's right to confront adverse witnesses." *People v. Roberts*, 162 Cal. App. 3d 350, 356 n.6

(1984); *see also People v. Johnson*, 46 Cal. App. 3d 701 (1975). Where "a better translation would have made a difference in the outcome of the [proceeding]," relief is required. *Acewicz v. INS*, 984 F.2d 1056, 1063 (9th Cir. 1993); *Perez-Lastor*, 208 F.3d at 780.

Because numerous federal constitutional rights are implicated in the denial of the right to a competent interpreter an error "may be deemed harmless only if the appellate court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *Rodriguez*, 42 Cal. 3d at 1012 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). In applying this standard, this Court must "examine the entire record" and reverse the judgment if "it appears reasonably possible that the error might have materially influenced the jury in arriving at its verdict." *Rodriguez*, 42 Cal. 3d at 1012 (citing *People v. Coffey*, 67 Cal. 2d 204, 219-20 (1967)) (internal quotations omitted); *cf. People v. Carreon*, 151 Cal. App. 3d 559, 575 (1984) (holding that in order to show prejudice from the lack of an interpreter a defendant need only show "an informed speculation that the defendant's right to effective representation was denied").[50] This Court "must weigh the impact of the error not only on the decision of the jury, but also on the course of the trial." *Rodriguez*, 42 Cal. 3d at 1012 (citing *People v. Stritzinger*, 34 Cal. 3d 505, 520 (1983)) (internal quotations and citation omitted).

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[50] This Court derived the "informed speculation" standard from *Lollar v. United States*, 376 F.2d 243, 247 (D.C. Cir. 1967). *See People v. Doolin*, 45 Cal. 4th 390, 419 (2009). In *Lollar*, the court described the informed speculation standard as equivalent to the *Chapman* standard. *Id.* at 419 n.21 (citing *Lollar*, 376 F.2d at 247).

### b. California Statutory Scheme for the Appointment of Interpreters

The lack of competent court interpreters has been an ongoing concern of the Legislature and the Judicial Council for the past 40 years. In 1973, the Legislature directed the Judicial Council to "conduct an extensive investigation of the need for and problems with use of interpreters in the courts." *People v. Superior Court (Almaraz)*, 89 Cal. App. 4th 1353, 1357 (2001) (citing Cal. Gov't Code § 68560). As a result of the Judicial Council's report, in 1978 the Legislature enacted Government Code section 68560, which, as originally enacted, provided for the employment of court interpreters "based on recommendations of competency from the State Personnel Board." *Almaraz*, 89 Cal. App. 4th at 1357 (citing Former Cal. Gov't Code § 68562, added by Stats.1978, ch. 158, § 1). Pursuant to section 68560, in 1990 "the Chief Justice of California appointed the Judicial Council Advisory Committee on Court Interpreters to propose actions to the Judicial Council to (1) improve the quality of interpreter services provided to courts, (2) increase the number of available, qualified court interpreters, and (3) provide non-English-speaking persons with increased access to the court system." Cal. Gov't Code § 68560(d). Section 68560, subdivision (e) also expressly notes that the "Legislature recognizes that the number of non-English-speaking persons in California is increasing, and recognizes the need to provide equal justice under the law to all California citizens and residents and to provide for their special needs in their relations with the judicial and administrative law system."

As noted by one commentator, there are several conclusions and inferences that can be drawn from the legislative enactment of section 68560:

> First, its enactment evidences a legislative awareness of the decades-old problem regarding the increasing number of non-English speaking persons accessing the court system. Second, implicit in its finding that programs should be established to train, certify, and evaluate interpreters is the recognition that only professionally-trained and certified interpreters can provide these non-English speaking citizens "equal justice under the law" and "increased access to the court system." Moreover, the plain language of the statute makes clear that these legislative steps were not taken solely for the benefit of non-English speaking criminal defendants. The statute more broadly encompasses "all California citizens and residents," not just those who appear in criminal proceedings. In this way, a reading of section 68560 leads to the conclusion that the Legislature has requested, if not required, that all court interpreters be certified so as to ensure equal court access for all Californians.

Nicholas P. Tsukamaki, *Legislative Inconsistency: California's Good CauseSstatutory Exceptions as a Step back in the Effort to Improve Court Access for Non-English speaking Civil Litigants*, 41 U.S.F. L. Rev. 69, 83 (2006) (footnotes omitted).

The Judicial Council Advisory Committee on Court Interpreters appointed by the Chief Justice issued a report in 1992 recommending improvements in the quality of court interpreters, an increase in the number of available and qualified interpreters, and provisions to provide non-English-speaking persons with increased access to the court system. *Almaraz*, 89 Cal. App. 4th at 1358. The report resulted in the enactment of Government Code sections 68561 and 68562. *Id.* Under section 68561, the Legislature provisionally certified the interpreters on the list of recommended interpreters established by the State Personnel Board until January 1, 1996, but required that thereafter interpreters comply with a more stringent certification process in order to be deemed certified. Cal. Gov't Code § 68561(b). The statute allows for appointment of an

uncertified interpreter so long as the court in appointing the uncertified interpreter "follow[s] the good cause and qualification procedures and guidelines adopted by the Judicial Council." Cal. Gov't Code § 68561(c). The Judicial Council did not adopt detailed procedures until 1996, when it enacted California Rule of Court Rule 984.2, which was renumbered Rule 2.893. *Almaraz*, 89 Cal. App. 4th at 1358. Though the procedures enacted by the Judicial Council in 1996 were not in place in 1993, at the time of Mr. Benavides's trial, they are instructive as to what criteria a court should have used in assessing good cause for appointment of a non-certified interpreter. Rule 2.893 provides that certified interpreters provisionally qualified before 1996 must fill out Form INT-110 explaining their qualifications to interpret in court.[51] Form INT-110 asks the applicant to disclose whether they have taken the state, federal, or other certification exam and the results of the examination; whether their interpretation skills in written, oral consecutive, simultaneous, and sight translation have been evaluated and the results of that evaluation; their education, language training, interpretation and translation training, and teaching experience; whether they have been disqualified from interpreting in a court hearing; whether they have had training in the code of professional conduct; training in legal terminology, criminal and civil procedure; and, whether they have been convicted of a criminal offense. In determining whether to appoint an uncertified interpreter the court must consider the information on Form INT-110 and the availability of certified interpreters in order to determine whether good cause exists to appoint the uncertified interpreter. The court must state its

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[51] *See* Judicial Council of California, Procedures and Guidelines to Appoint a Noncertified Interpreter in Criminal and Juvenile Delinquency Proceedings, Form No. IN-100 (1996), available at http:// www.courtinfo.ca.gov/forms/documents/in100.pdf (hereafter Form INT-00).

finding on the record. Cal. R. Ct. 2.893(b)(1). Non-certified interpreters cannot be appointed to interpret under this scheme for more than any four six-month periods, with exceptions pertaining to larger counties. Cal. R. Ct. 2.893(c). Non-certified interpreters who were not provisionally qualified prior to 1996, cannot interpret in court except for brief matters and in specific instances where the defendant has waived his right to a certified interpreter. Cal. R. Ct. 2.893(b)(2).

#### c. The Court Violated Mr. Benavides's Constitutional and Statutory Rights to a Competent Proceedings Interpreter, Defense Interpreter, and Witness Interpreter.

Mr. Benavides has made a prima facie showing in the Corrected Amended Petition that he was not provided with a competent proceedings interpreter, defense interpreter, and witness interpreter. Mr. Benavides was entitled to a competent interpreter. *Estrada*, 176 Cal. App. 3d at 415.

Al Hernandez was appointed to interpret for Mr. Benavides as a proceedings and defense interpreter. (Ex. 107 at ¶¶ 1, 5.) He also verified the translation of the detective's interview with Mr. Benavides that was given to the jury and interpreted for one brief meeting between Huffman and some friends of Mr. Benavides. (1 RT 98; Ex. 107 at ¶ 5.) Hernandez had a long career in law enforcement. According to Hernandez, he was favored by the judges to interpret because of his background in law enforcement. He had no formal training to interpret. Instead, he taught himself the legal and medical terminology by buying books and watching Spanish-language television. He took and failed the state certification examination three or four times. (Ex. 107 at ¶ 3.)

Despite his lack of certification, the court failed to follow the statutory requirement of making a finding that good cause warranted his

appointment. Respondent argues that the court "impliedly found good cause" on March 4, 1993, when the court administered the interpreter's oath for the first time to Hernandez and asked him to appear at a subsequent proceeding. (Response at 153, citing RT (3/4/93) at 2, 4, and 2 CT 406.) Respondent's argument is specious. The court made no inquiry and the record does not show that the court had any information about Hernandez's qualifications to interpret despite his lack of certification. The fact that Hernandez had interpreted in previous court proceedings, prior to the court administering the oath, as Respondent points out, supports rather than undermines this claim. In other words, the fact that the court allowed Hernandez to interpret, without even administering the oath, is further proof that the court was not following the statutory requirements. Respondent also cites a funding request in August of 1992 by defense counsel Huffman for the proposition that she had "worked with Mr. Hernandez before and found him to be a good interpreter." (Response at 153, citing Resp. Ex. 5 at 6-7.) That assertion, however, is not in the cited funding request. In fact, Huffman could not vouch for the quality of Hernandez's Spanish since she did not speak Spanish herself. (Ex. 105 at ¶ 2.) Had the court conducted the necessary inquiry into Hernandez's qualifications, the court would have discovered that he was not competent to interpret. The court would have learned that Hernandez had no training to interpret and if he had taken and failed a certification exam by that time, Hernandez would have had to disclose that information to the court. Had the court had that information, the court would not have found good cause to appoint Hernandez.

The court also failed to make a finding that Victor Almaraz, the interpreter for the Spanish-speaking witnesses, was competent to interpret. Unlike with Hernandez, Respondent does not argue that the court

"impliedly" made a finding of good cause, but rather simply that there was good cause for Almaraz's appointment. Respondent argues that his previous experience interpreting in the case "without incident" and the fact that he was on a list of interpreters approved by the court means there was good cause for his appointment and that he provided competent interpretation. (Response at 153.) Respondent's argument lacks merit.

Had the court conducted an inquiry about Almaraz's qualifications with questions such as those on Form INT-110, as described above, the court would have learned a variety of reasons to disqualify him. First, Almaraz was not certified. (Ex. 108 at ¶ 14.) There is no evidence that he ever had any training in interpreting or that his skills were ever formally evaluated. If he had been asked about his previous experiences interpreting, and he had answered honestly, he would have had to disclose that he had several problems interpreting in court due to the poor quality of his interpretation. Hernandez worked with him on more than one case and found his interpretation to be incompetent:

> I knew Victor from a number of previous cases where we had both interpreted. I consider Victor to be an incompetent translator. He was not well-educated or trained and, although he could handle some simple matters, he could not handle anything complex. He does not speak Spanish well. Judges allow him to translate on cases because they take pity on him. I witnessed many times when he misinterpreted a word by a witness which led to a lot of confusion in the courtroom. In one case where we worked together he did not know how to interpret "taller," which, in the context the witness used it, meant car repair shop. I saw him mumble a nonsensical word to cover up for the fact that he did not know the word. I had to tell him how to translate the word.
>
> I also was with Victor in another case, which took place before Vicente's trial, where the attorneys, Victor, and I were called into the judge's chambers to clarify some confusion that had

> been created as a result of his mistranslation. Initially I was interpreting for the defendant, while Victor was doing so for the witnesses. The prosecutor had asked a young man, who was a Spanish-speaking witness, when he had used the bathroom. Victor used "servicio" for "bathroom," which confused the witness who thought he was asking whether he had served in the armed services. The witness said he had not been in the "servicio." We then went in chambers where it became clear that Victor had failed to adequately convey the question to the witness, which had led to the confusion.

(Ex. 107 at ¶¶ 13-14.) Hernandez's experience with Almaraz is corroborated by Marisol Alcantar, Huffman's secretary, who is a fluent Spanish and English speaker and who also witnessed Almaraz interpret in court:

> [Almaraz's] Spanish is sometimes unintelligible—he uses slang and combines English and Spanish words. I have heard Victor interpret in court on previous occasions, and he has often used the wrong word to translate between English and Spanish and vice versa. I saw him once translate the word "vésicula," which means gallbladder, as a "woman's private area." This created a lot of confusion in court. As a fluent English and Spanish speaker, I would not use him in a courtroom.

(Ex. 105 at ¶ 15.)

Under the criteria for qualification to interpret for non-certified interpreters in Form INT-110, Almaraz would also have had to disclose potentially disqualifying information about his lack of ethics and criminal convictions. It seems highly unlikely that Almaraz had training in the code of professional conduct or if he did, that he assimilated the information. Indeed, Almaraz's highly unethical behavior permeated his involvement in Mr. Benavides's case. On one occasion, he took one hundred and thirty dollars from friends of Mr. Benavides under the false pretense that the money was necessary to pay for making copies in the case. (Ex. 86 at ¶

14.) He also was notorious for flirting with female witnesses and badgering them to go out with him. (Ex. 97 at ¶ 11; Ex. 111 at ¶ 51.) Further, he had an extensive criminal history. (Ex. 24-32 (criminal cases against Victor Almaraz).) He has a criminal history of possession of controlled substances, including dealing heroin and cocaine. (Ex. 25-29.) At one time he sold four-five bags of heroin a day. (Ex. 28 at 4413.) He also has a history of violence. Almaraz choked and assaulted his common law wife with a firearm and shot another woman. (Ex. 29 at 4474.) If Almaraz had been forthcoming with the court, he probably also would have had to disclose that he had suffered a major head injury in 1986, which caused substantial neurological damage. According to a 1987 evaluation by a UCLA neurologist, Almaraz reported suffering from problems with memory, depth perception, spoken language, and psychomotor depression, in addition to regular seizure activity. (Ex. 30 at 4530.) Had the court known that Almaraz was not certified, had no training in interpretation, substantial problems interpreting in other courts, conducted himself unethically, had an extensive criminal history, and substantial neurological damage, the court would not have found good cause to appoint him as a witness interpreter in Mr. Benavides's case.

**d. Hernandez Was an Incompetent Interpreter**

Respondent disagrees with the expert opinion of Haydee Claus, M.A., a highly experienced state and federally certified Spanish court interpreter, who trains interpreters, that Al Hernandez fundamentally misunderstood his function as an interpreter when he provided overly literal interpretations of Mr. Benavides's testimony. Respondent appears to argue that Hernandez was required to use overly literal interpretation even if it

distorted the meaning of what Mr. Benavides said in Spanish. (Response at 155.) As explained by Ms. Claus, Respondent is incorrect:

> A common mistake of uncertified interpreters is to literally interpret word for word, without taking into account the context of the words. The test for certifying interpreters examines precisely a person's ability to interpret the meaning of words in context, as opposed to simply offering a word-for-word interpretation. Often a literal interpretation will be incorrect. A classic mistake of an untrained person is to give such literal interpretations, without taking into account the context.

(Ex. 87 at ¶ 5.) The "primary responsibility of an interpreter is to convey meaning accurately from one language to another. . . . The conveyance of the message is generally not a literal word-for-word translation, but rather a molded version of the original message in which the underlying meaning is expressed."[52]

One critical example of Hernandez's overly literal interpretation of Mr. Benavides's testimony was his misinterpretation of the Spanish phrase "me sentía mal" as "I was feeling bad," rather than "I was feeling sick." As explained by Ms. Claus, the Spanish phrase "me sentía mal" can mean feeling worried, distraught, upset, sad, sick, or bad. The essential job of an interpreter is to choose the appropriate interpretation that accurately conveys the meaning of what the speaker said by looking at the context in which it was said. (Ex. 87 at ¶ 4.) Hernandez in his declaration admits that he interpreted the Spanish phrase literally as "I felt bad" though the meaning intended by Mr. Benavides was that he was not feeling well physically. (Ex. 107 at ¶ 6.) Respondent's lay opinion that Hernandez's

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[52] Alta Language Services, Inc., *Study of California's Court Interpreter Certification and Registration Testing* 17 (2007) (report commissioned by the Administrative Office of the Courts) available at http://www.courts.ca.gov/2686.htm.

overly literal interpretation, which failed to convey the meaning of what Mr. Benavides actually said, was "appropriate" does not counter Ms. Claus's expert opinion that it was incorrect, nor rebut the prima facie case of Hernandez's incompetence. (Response at 158.)

Respondent's argument that the error was "minor" and non-prejudicial is belied by the record. The prosecutor latched on to Hernandez's misinterpretation of the phrase and used it as a central theme of his cross-examination of Mr. Benavides. The prosecutor began his cross-examination with the following line of questions:

> Q. Mr. Benavides, you have indicated to us that you were feeling bad when you talked to the police officers. Is that correct?
>
> A. Yes
>
> Q. Do you feel bad today?
>
> A. No.
>
> Q. Does feeling bad make you tell things that are not true?
>
> A. Well, that is, I do feel bad. Do you want me to explain?
>
> Q. I'm asking you if your feeling bad on November 18th led you in any way to make any statements that were untruthful to the police officers when you talked to them?
>
> A. I felt bad because I had been up all night.

(15 RT 3028; *see also* 15 RT 3031-33, 3074.) If Hernandez had correctly interpreted Mr. Benavides's testimony as "I was feeling ill" Mr. Benavides would not have had to explain it, as he did above, and repeatedly in his

cross-examination, that he meant to convey that he was feeling ill. Moreover, the prosecutor would have been deprived of this ambiguous phrase to suggest that the real reason Mr. Benavides was "feeling bad" was because he had just raped and molested Consuelo. (15 RT 3032.) That Mr. Benavides repeatedly tried to clarify that he felt bad because he had been up all night supports the fact that Hernandez's interpretation was incompetent and that it prejudiced Mr. Benavides. Respondent's argument that Mr. Benavides's clarification shows Hernandez was not incompetent makes no sense. (Response at 158-59.) As shown above, the misinterpretation shows his incompetence and was very damaging to Mr. Benavides's credibility.

Respondent also dismisses the examples on the record that Hernandez improperly interpreted Mr. Benavides's testimony when he provided word-for-word nonsensical interpretations. Respondent argues that any confusion from Hernandez's misinterpretation was cleared up by subsequent questioning. (Response at 155-56.) That the confusion may have eventually been cleared up does not refute the fact that the interpretation was incompetent. *See Perez-Lastor*, 208 F.3d at 778 (explaining that "an incorrect or incomplete translation is the functional equivalent of no translation"). Further, Respondent fails to acknowledge the overall prejudicial impact of Hernandez's incompetent interpretation. Hernandez failed to convey what Mr. Benavides actually said in the manner that he said it to the jury. The bungled sentences Mr. Hernandez interpreted did not reflect what Mr. Benavides had said in Spanish. Moreover, Hernandez's misinterpretations made Mr. Benavides sound confusing and evasive, which necessarily diminished his credibility.

Respondent similarly argues that the many instances on the record in which Mr. Benavides is clearly confused by Hernandez's interpretation and

Mr. Benavides's responses are incongruous or non-responsive do not demonstrate Hernandez's incompetence because, allegedly, "each time, petitioner received clarification and/or the question was rephrased" until he understood. (Response at 156-57.) Respondent is incorrect. "[U]nresponsive answers by the witness provide circumstantial evidence of translation problems." *Perez-Lastor*, 208 F.3d at 778. Also, Respondent again fails to acknowledge that Mr. Benavides's repeated requests for clarification likely reflect Hernandez's poor interpretation skills, which were particularly difficult for Mr. Benavides given his limited cognitive skills. It is highly likely that the jury viewed Mr. Benavides's many requests for clarification and non-responsiveness to be a sign of evasiveness that undermined his credibility. This is especially true because in closing argument, the prosecutor specifically argued that the "quality of [Mr. Benavides's] answers" and his "avoiding answering the questions" showed he was "unbelievable." (18 RT 3565.) The jury also likely discounted his testimony as generally confusing and stilted. That counsel or the prosecutor may have eventually clarified, through repeated questions, the questions they were asking or the testimony Mr. Benavides was attempting to provide did not cure this prejudice as Respondent argues. The jury's assessment of Mr. Benavides's credibility on the stand was critical to the defense case. Hernandez's failure to accurately convey Mr. Benavides's testimony to the jury and counsel and the prosecutor's questions to Mr. Benavides undoubtedly prejudiced him.

There is also evidence that Hernandez did not interpret everything that was said in court. When Mr. Benavides's niece Norma Patricia (Pati) Yañez Benavides visited him, Mr. Benavides told her that his translator did not interpret everything in court. (Ex. 111 at ¶ 56.) Respondent's dismissal of this factual allegation as speculative is incorrect. (Response at 162.)

Pati's sworn declaration presents a prima facie case that Mr. Benavides did not receive continuous interpretation throughout the proceedings.[53] *See Aguilar*, 35 Cal. 3d at 787 (holding that the right to interpreter assistance extends "throughout the entire proceeding").

Respondent argues in a separate section of the Response that Mr. Benavides's claim that Hernandez was an incompetent interpreter fails because he allegedly did not complain to anyone about the interpretation during the trial. (Response 163-64.) Notably, Respondent fails to mention in this section of the Response that Mr. Benavides did complain about the interpretation to his niece Pati. Respondent also ignores that in October of 1992, when counsel had represented him for nearly a year, Mr. Benavides wrote to the Mexican Consulate asking for their assistance because he was having difficulty with his case and attorney because he could not communicate with them in English. (Ex. 145 at ¶ 5.) Moreover, as stated above, given Mr. Benavides's inexperience with the American criminal justice system and humble background, it is unlikely that he even knew that he had a right to a better interpreter. *See Negron*, 434 F.2d at 390 (explaining that a first time Puerto Rican defendant "unaccustomed to asserting 'personal rights' against the authority of the judicial arm of the state, may well not have" known of his rights to an interpreter). It is also likely that he was reluctant to disclose his incomprehension, which was partly due to his cognitive deficits, in order to avoid stigma. (Ex. 126 at ¶ 59.)

Respondent's claim that Mr. Benavides must produce a declaration indicating that he had difficulty communicating with counsel is not

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[53] Mr. Benavides will not respond to Respondent's improper arguments in this regard that refer to declarations that were withdrawn from this court's consideration. (Response at 161-62.)

supported by any authority. (Response at 164-65.) Mr. Benavides's Corrected Amended Petition, a verified document, expressly sets forth his difficulty understanding and communicating with counsel. Moreover, Mr. Benavides's communications to others during the trial such as his niece and the Mexican Consulate that he was having difficulties with the interpretation are far more credible than any declaration that Mr. Benavides could present at this point, which Respondent would like dismiss as self-serving. Respondent also argues that the fact that Harbin and Huffman do not mention interpretation problems in their declaration is significant. (Response at 164-65.) However, that Mr. Benavides's monolingual English-speaking counsel did not notice any problems with the Spanish that Almaraz and Hernandez spoke is not surprising as they had no means of assessing the quality of their Spanish. Further, another reason Huffman did not notice problems is because she hardly ever met with Mr. Benavides and avoided his calls. (Ex. 105 at ¶¶ 8, 10; Ex. 65 at ¶ 18.) Counsel's failure to ensure Mr. Benavides had adequate interpretation was part of counsel's general ineffective assistance.[54]

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[54] Respondent incorrectly claims that reference to Hernandez's poor verification of the state's translation of the November 18, 1991, interview by the detectives with Mr. Benavides is a new claim that is not properly before this Court. (Response at 165.) Mr. Benavides submitted a detailed analysis by Ms. Claus of the inadequacies of the translation with the 2002 Petition. (*See* Ex. 63.) Counsel's failure to ensure the translation was accurate and the prejudice from the fact that this inaccurate transcript was given to the jury and used to cross-examine Mr. Benavides about alleged inconsistencies was thoroughly pled in the 2002 Petition in Claim Thirteen, subclaim 9 (RCCAP at 269-71), which was incorporated by reference to this claim (RCCAP at 203, 215). Respondent's other arguments attempting to explain counsel's ineffectiveness (Response at 166-68), are also addressed in Claim Thirteen, subclaims 9-13.

#### e. Almaraz Was an Incompetent Interpreter.

Respondent argues that the record of pretrial hearings "belies" Mr. Benavides's claim that Almaraz was an incompetent interpreter. Respondent relies on a half-page of the reporter's transcript regarding scheduling, which indicates Almaraz interpreted for Mr. Benavides (RT (2/28/2) at 3), and four minute orders indicating Almaraz interpreted on those days for Mr. Benavides (1 CT 267, 303; 2 CT 333, 340). (Response at 159.) Respondent's argument is frivolous. Obviously, the mention in the record that he was the interpreter in no way undermines the claim that those who saw him interpret in court proceedings knew him to be incompetent.

By contrast, Respondent dismisses clear and extensive evidence on the record that every witness for whom Almaraz interpreted indicated they did not understand a question or expressed confusion regarding the questions, because their testimony, allegedly, did not relate to "anything of substance." (Response at 160.) Respondent's argument is belied by the record. Almaraz interpreted for the three character witnesses at the guilt phase—Guadalupe Benavides[55], Hector Figueroa, and Armando Navarrette—and the two penalty phase witnesses—Dionicio Campos and Delfino Trigo. Because counsel conducted such an inadequate investigation into Mr. Benavides's character and social history, the testimony of these five witnesses is contained in only 31 pages of transcript.[56] (*See infra* Claim Thirteen, subclaims 13, 16.) Remarkably,

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[55] Respondent confuses Guadalupe Padilla Benavides, who did not testify, and whose declaration is Exhibit 122, with María Guadalupe Pelayo Benavides, who did testify, and whose declaration is Exhibit 101. (Response at 160.)

[56] *See* 16 RT 3279-84 (Guadalupe Benavides); 16 RT 3291-98 (Hector Figueroa); 17 RT 3374-78 (Armando Navarrette); 19 RT 3751-58 (Dionicio Campos); 19 RT 3759-64 (Delfino Trigo).

over one third of those pages contain evidence that the witnesses were confused. (RCCAP at 215 (listing 11 pages where witnesses expressed such confusion).) This is noteworthy both because of the prevalence of the evidence and because all witnesses expressed confusion, which strongly indicates that it was due to Almaraz's poor interpretation, rather than the witness's shortcomings. *See Perez-Lastor*, 208 F.3d at 777 (explaining that an "indicator of an incompetent translation is the witness's expression of difficulty understanding what is said to him"). Respondent's argument that nothing of substance was stated in these passages ignores that those 31 pages contains the entire defense evidence of mitigation and good character evidence. That the evidence was insubstantial was a function of counsel's inadequate and prejudicial performance as described in Claim Thirteen, subclaims 13 and 16. The prejudice from the inadequacy of their presentation was exacerbated by the fact that what little they did present was distorted and confusingly presented to the jury due to Almaraz's notorious poor interpretation skills.

Respondent similarly dismisses the example in Dionicio Campos's testimony that Almaraz, like Hernandez, was using overly literal interpretation that failed to convey the meaning of what the witness testified to the jury, when he interpreted the Spanish word "*rancho*," which means a humble hamlet of houses, as "ranch." Respondent argues that such mistakes do not show Alamaraz's incompetence. (Response at 160.) Respondent is incorrect. *See Perez-Lastor*, 208 F.3d at 778 ("[D]irect evidence of incorrectly translated words is persuasive evidence of an incompetent translation.") Further, as shown above, Almaraz's overly literal interpretation is but one of many examples on the record of Alamaraz's incompetence, which is corroborated by extra-record evidence

indicating the witnesses who spoke to him found his Spanish inadequate and from others who knew his court interpretation to be subpar.

Next, Respondent dismisses the examples of Almaraz's incompetent interpretation that Marisol Calderon Alcantar and Al Hernandez witnessed, arguing that they did not caution defense counsel about his incompetence. (Response at 160-61.) Hernandez in fact did do so. When Hernandez learned that Almaraz was going to interpret in the case, he vigorously objected, going so far as to tell the attorneys that he "was withdrawing if [Almaraz] was going to interpret in the case." (Ex. 107 at ¶ 13.) Hernandez's objections were based on his experiences observing Almaraz conduct extremely poor interpretation in court that created confusion in the courtroom and distorted the witnesses' testimony. (Ex. 107 at ¶¶ 13-14.) Notwithstanding Hernandez's objections, counsel did not replace Almaraz. Alcantar's experience with Almaraz's interpretation corroborates Hernandez's. She found his Spanish sometimes "unintelligible" and knew him to use slang and combine English and Spanish words. She saw him misinterpret words from English to Spanish and also cause a lot of confusion in court. (Ex. 105 at ¶ 15.)

Respondent argues that accounts by Mr. Benavides's Spanish-speaking brother Evaristo Benavides and his cousin, Jose Isabel Figueroa, indicating that they had great difficulty understanding Almaraz's Spanish because he mixed words in English and Spanish, had a poor vocabulary, and had poor pronunciation, are not probative of Almaraz's incompetence because they are not "certified interpreters." (Response at 161, citing Ex. 119 at 6173 and Ex. 102 at 5795.) Respondent's argument is specious. Their descriptions of Almaraz's poor Spanish language skills completely corroborate Hernandez's and Alcantar's descriptions. Moreover, their declarations show that counsel was ineffective in using Almaraz as the only

person to communicate with Mr. Benavides's friends and family, most of whom were monolingual Spanish-speakers. Almaraz's poor Spanish language skills clearly prevented him from adequately communicating with the witnesses and obtaining the information necessary to present in Mr. Benavides's defense.

Respondent's contention that the fact that Almaraz provided literal interpretation is a new claim not properly before this Court (Response at 161) is also baseless. It is unclear to what Respondent objects. Respondent cites the new declaration of Victor Almaraz, Exhibit 108, which was submitted with the Corrected Amended Petition as a replacement for his declaration prepared by Ms. Culhane, which was withdrawn. (*See* Former Ex. 73.) The replacement of his declaration is clearly related to Ms. Culhane's fraud and is therefore appropriate. Respondent also cites to claim L6b on page 215 of the Corrected Amended Petition, which cites to the new Declaration of Dionicio Campos, Exhibit 104, which was also submitted as a replacement for his withdrawn declaration prepared by Ms. Culhane. (*See* Former Ex. 90.) Accordingly, the allegations in this claim are properly based on new information in the replacement declarations.

### 3. Mr. Benavides Was Prejudiced by the Denial of a Competent Proceedings, Defense, and Witness Interpreter.

Mr. Benavides has made a prima facie showing that it is reasonably possible that the numerous errors of the interpreters in these proceedings may have materially influenced the jury and affected the course of the trial. The numerous interpreter errors in conveying the defense witnesses' good character and penalty phase defense testimony, Mr. Benavides's critical testimony, and what he and the detective said during his interview the day after Consuelo was injured examined in light of the entire record were not

harmless beyond a reasonable doubt. Almaraz's and Hernandez's poor interpretation skills also likely affected Mr. Benavides's ability to communicate with his attorneys. Accordingly, Mr. Benavides is entitled to relief. *Rodriguez*, 42 Cal. 3d at 1012. It is also clear that Mr. Benavides is entitled to relief because a better interpretation would have made a difference in the outcome. *See Acewicz*, 984 F.2d at 1063.

### M. Claim Thirteen: Trial Counsel's Representation of Mr. Benavides Was Woefully Deficient and Resulted in His Unjust Conviction and Death Sentence.

Trial counsel rendered constitutionally deficient representation at all critical stages of the criminal proceedings. Counsel's deficient performance deprived Mr. Benavides of the right to the effective assistance of counsel, present a defense, a trial free of materially false and misleading evidence, and due process of law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, international law, and Article I, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27 and 28 of the California Constitution and state law. As a result, Mr. Benavides's convictions and sentence of death were rendered in violation of Mr. Benavides's rights to a fair and impartial jury and a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty.

Introduction

Mr. Benavides's trial counsel Donnalee Huffman and Jeffrey Harbin have a long track record of providing woefully deficient and prejudicial representation to clients. Counsel's pattern of ineffective representation displayed in Mr. Benavides's case eventually led to disciplinary proceedings by the California State Bar against both counsel, neither of whom is currently a member of the Bar.

Donnalee Huffman resigned from the State Bar on February 2, 2007, while disciplinary charges were pending against her. (Ex. 140 at 6479.) In 2005 and 2004, the State Bar disciplined Huffman for her incompetent representation of three clients. In two different cases the State Bar found that Huffman "intentionally, recklessly, or repeatedly failed to perform legal services with competence" (Ex. 140 at 6489, 6503), while in the third case the bar found that she was "gross[ly] negligen[t]" in disbursing attorney fees awarded by the court. (Ex. 140 at 6503.) Huffman agreed with all of these State Bar findings. (Ex. 140 at 6491, 6505.) In one case where Huffman failed to file a writ petition in the appropriate court and then abandoned her client, the State Bar found that she "improperly withdrew from employment without taking reasonable steps to avoid reasonably foreseeable prejudice" to the client. (Ex. 140 at 6489.)

Jeffrey Harbin was disbarred on August 17, 2002, after years of disciplinary proceedings against him stemming from his negligent representation of clients. "Harbin's history of discipline began in 1989, a few months after his admission to the bar, with a private reproval for failure to perform legal services competently, communicate with a client or properly withdraw as counsel." (Ex. 168 at 8181.) As a result of Harbin's failure to file the required pleadings and appear in court in his client's cases, the court entered a $65,000 judgment against the client. (Ex. 168 at 8181.) In 1990 his former client filed a malpractice action against Harbin, in which the court granted judgment for the former client in the amount of $240,000. (Ex. 141 at 6567.) On April 14, 1993—in the middle of Mr. Benavides's trial—the San Diego Superior Court issued an order in which it assigned all accounts receivable from Harbin's law practice to his former client who had obtained the malpractice judgment against him. (Ex. 141 at 6567; Ex. 18.)

In 1990 Harbin's former client also filed a complaint with the State Bar. Following the issuance of a Notice to Show Cause filed in May 1992, Harbin stipulated to the facts and discipline disposition in exchange for a private reproval that became effective in November 1992, as he was supposed to be preparing for Mr. Benavides's trial. (Ex. 141 at 6508.) Although he registered in January 1993 for Ethics School, Harbin failed to attend it, and thus violated a condition of his private reproval. (Ex. 41 at 6531.) Just five months after Mr. Benavides's trial, in November of 1993, Harbin was permitted to stipulate to a public reproval and additional conditions designed to ensure fulfillment of his obligations to his clients. (Ex. 141 at 6524-48.) However, due to his failure to comply with the conditions he was disciplined and suspended in 1994 and 1995.

In addition to the case described above, Harbin's disciplinary actions stem from his negligence in representing three additional clients. In one case, where he was representing a client in a personal injury matter, Harbin failed to file a lawsuit or negotiate with the client's insurance company. The client fired him and when she went to his office, she found it empty and learned that he had moved without providing a forwarding address. In another case, the client paid Harbin $18,000 in advance legal fees, but Harbin failed to appear at several hearings and was sanctioned $500 by the court, which he never paid. In a third case, Harbin represented a plaintiff in a civil action in which he failed to appear at a status conference and several hearings. He did not return at least 20 telephone calls from the client and at one point told the court he thought he had substituted out of the case. The court determined that Harbin had abandoned the client. (Ex. 168 at 8181.)

Eventually the "State Bar Court found that Harbin committed misconduct in three separate client matters, including failing to competently perform legal services, properly withdraw from employment, communicate

with clients, comply with court orders, release a client file and cooperate with the bar's investigation. Coupled with four previous disciplines, the court recommended Harbin's disbarment." Harbin was disbarred in 2002. (Ex. 168.)

Huffman's and Harbin's multiple failings in Mr. Benavides's case fall far below the standard of competence required of counsel representing a capital petitioner and mirror their negligent representation of clients documented in State Bar records that eventually led to their disbarment. Huffman, who was in charge of the guilt phase, failed to develop and present compelling exculpatory evidence. Huffman's superficial, rushed, and incomplete investigation of the medical evidence and the cause of Consuelo's injuries fell below any objective standard of reasonableness. Huffman's failure to interview any of the prosecution's medical witnesses, timely and reasonably consult with defense medical experts, verify the reliability and accuracy of anticipated medical testimony, and investigate available forensic evidence deprived Huffman of the ability to make informed and rational decisions regarding potentially meritorious defenses and tactics. Further, Huffman failed to conduct a reasonable and timely investigation into Consuelo's prior injuries and illness, which prevented Huffman from obtaining the information to successfully exclude the evidence and develop a sound defense strategy. In addition, Huffman's failure to provide Mr. Benavides and defense witnesses with continuous, competent, and unbiased interpretation not only violated Mr. Benavides's right to the effective assistance of counsel, but also the right to be present at the trial, present a defense, confront witnesses and to have a sentencer not influenced by false and misleading information.

Although Harbin had no prior experience representing capital defendants, Huffman entrusted him with investigating and presenting the

good character and penalty phase evidence. Harbin presented only two defense witnesses at the penalty phase that only offered a brief and unspecific picture of their knowledge of Mr. Benavides. Their testimony together occupies only 14 pages of transcript. The entire penalty phase, including opening and closing oral arguments, presentation of witnesses, and jury deliberations, lasted less than a day. (3 CT 787.) Huffman and Harbin unreasonably ignored the repeated pleas from numerous friends and family members of Mr. Benavides, and the Mexican Consulate to provide them with assistance and mitigating information. They completely ignored Mr. Benavides's mother's multiple requests to assist in her son's case. Further, Harbin unreasonably failed to investigate and present widely available character evidence regarding Mr. Benavides's peaceful and caring nature, and lack of criminal behavior. Harbin's wholesale failure to conduct a timely and adequate investigation into Mr. Benavides's social history, mental health impairments, and cognitive deficits, completely deprived Mr. Benavides of the right to effective assistance of counsel. Huffman and Harbin both admit that their failure to conduct a reasonable investigation was not based on any strategic or tactical consideration.

There is more than a reasonable probability that, but for these failures, the result of the proceedings would have been different. Mr. Benavides has presented a plethora of evidence from testifying medical witnesses indicating that their testimony was based on a fundamental misunderstanding and lack of information regarding the course of Consuelo's hospitalization. Had counsel timely provided them with accurate information, they would have testified that Consuelo was not sexually abused. Respondent concedes this is true with regard to the rape conviction and special circumstance. Further, counsel's failure to investigate and present evidence regarding Mr. Benavides's character,

social and cultural history, mental health, and cognitive deficits rendered the penalty phase completely unreliable. The defense case at penalty was wholly inadequate, failed to humanize Mr. Benavides and inform jurors about a wealth of mitigating information. This lacuna of information made it easier for the jurors to sentence him to death.

As Respondent has admitted, counsel's assistance was prejudicially ineffective and resulted in Mr. Benavides's unjust conviction for rape and the erroneous finding that the rape special circumstance was true. (Response at 170.) Though Mr. Benavides's wrongful conviction for rape was the result of counsel's critical failure to adequately consult with experts and grasp the significance of the information in Consuelo's medical records, Respondent maintains that counsel's failures had no repercussions for the sodomy and lewd and lascivious convictions and special circumstances. Respondent relies on Dr. Diamond to maintain that these convictions are still valid. However, since Respondent filed the Response, Dr. Diamond has recanted his testimony that Consuelo was sodomized. After consulting with one of the premier experts in child sexual abuse, Dr. Astrid Heger, Dr. Diamond has recognized that he made a mistake in attributing genital and anal injuries he saw to trauma rather than to Consuelo's critical medical condition. Dr. Diamond now believes that Consuelo was neither raped nor sodomized. (Ex. 149 at ¶ 5.) All medical experts who testified at Consuelo's trial have now recanted their testimony that Consuelo was sexually abused except for the pathologist, Dr. James D. Dibdin. His opinion, however, has been completely discredited by all the testifying doctors, including Dr. Diamond.

Notably, Respondent has not provided a declaration from Dr. Dibdin, despite strong evidence in the Corrected Amended Petition that his false and erroneous findings are at the root of Mr. Benavides's wrongful

conviction. Respondent does not refute the fact that the cause of death given by Dr. Dibdin is anatomically impossible. Respondent also does not explain why Dr. Dibdin provided Dr. Diamond with false information about injuries to the vagina, which led to the wrongful conviction for rape. The false information that Dr. Dibdin gave Dr. Diamond about the critical injuries to the victim's genitalia cannot fairly be characterized as a mere difference of medical opinion or benign oversight. Dr. Dibdin's testimony that there was a tear both in the vagina and the anal cavity large enough to be caused by penile penetration, despite there being no evidence to show such tears, can only be characterized as a falsehood. Dr. Dibdin's false testimony not only shows his pro-prosecution bias, but also constitutes fraud on the court.

Legal Standard

The Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *In re Fields*, 51 Cal. 3d 1063, 1069 (1990). The right to effective assistance is "not to some bare assistance but rather to *effective* assistance." *People v. Ledesma*, 43 Cal. 3d 171, 215 (1987) (emphasis in original). A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate. *See, e.g., Id.*; *In re Cordero*, 46 Cal. 3d 161, 180 (1988).

In order to show trial counsel provided constitutionally ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from the deficiencies. *Strickland*, 466 U.S. at 687. Deficient performance is demonstrated by a showing that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice showing is a "reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 693-94; *In re Marquez*, 1 Cal. 4th 584, 602-03 (1992). However, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. In determining whether a defendant was prejudiced by counsel's deficient performance, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695-96. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "This includes a duty to . . . investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict." *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001), *amended by* 253 F.3d 1150 (9th Cir. 2001) (citing *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir.1999)). The "adversarial process will not function normally unless the defense team has done a proper investigation." *Siripongs v. Calderon* (*Siripongs II*), 133 F.3d 732, 734 (9th Cir. 1998) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986)). Counsel must, "at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994); *In re Marquez*, 1 Cal. 4th at 602 -603 ("This means that before counsel undertakes to act, or not to act,

counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation."); *see also Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 453 (2009) (counsel's failure to "even take the first step of interviewing witnesses or requesting records" and ignoring "pertinent avenues for investigation of which he should have been aware" constituted deficient performance).[57]

**1. Failure to Conduct a Reasonable Investigation Into the Cause of Consuelo's Injuries.**

Respondent claims that trial counsel conducted an adequate investigation into the cause of Consuelo's injuries because she hired expert witnesses and claimed on the record to have read the medical records. (Response at 176-79.) Respondent further asserts, in willful ignorance of voluminous evidence, that Mr. Benavides has failed to show prejudice for counsel's failure to interview witnesses and lack of preparation for trial. (Response at 172.) Respondent's assertions readily ignore declarations from almost all of the medical personnel who attended to Consuelo, many of whom testified, which state that had they been informed of Consuelo's full medical history they would have testified that she was not the victim of sexual abuse.

In responding to these allegations, Respondent wantonly ignores the repercussions of its concession that counsel provided prejudicially deficient assistance in failing to disprove the allegations of rape. Counsel

[57] The prevailing standard of care in California capital cases at the time of Mr. Benavides's trial was well established. (*See* Ex. 171; Ex. 172.) As courts have recognized, resolving this standard and applying it to Mr. Benavides's case is a factual inquiry that requires the holding of an evidentiary hearing. *See, e.g., Plummer v. Jackson*, No. 09-2258, 2012 WL 3216779, *9 (6th Cir. Aug. 8, 2012) (state court unreasonably denied petitioner's ineffectiveness claim without an evidentiary hearing despite the parties' factual disputes concerning counsel's performance).

unreasonably and prejudicially failed to cross-examine Dr. Dibdin, the pathologist, and Dr. Diamond, the sex abuse expert, with the fact that there was no evidence of a tear in the vagina, which was the underpinning of Dr. Diamond's and Dr. Dibdin's opinions that Consuelo had been raped. Though it is clear from Respondent's admission that counsel had only a superficial understanding of the most critical information in the autopsy report and Consuelo's medical records about injuries to her genitalia, Respondent still inexplicably maintains that counsel had sufficient command of the critical medical records. (Response 176-77.)

Respondent also ignores the prejudicial effect of Dr. Dibdin's repeated lies about the injuries to the genitalia. Dr. Dibdin not only falsely informed Dr. Diamond that Consuelo had a hole in her vaginal wall, but he also falsely informed him that Consuelo had a hole in her rectum. Prior to the preliminary hearing, which took place before an autopsy report was disclosed to the defense, Dr. Dibdin falsely informed Dr. Diamond that there was a tear in the anterior wall of Consuelo's rectum. (10 RT 2085.) Based on that information, Dr. Diamond testified at the preliminary hearing that he believed Consuelo's abdominal injuries were caused by some foreign object inserted through the anterior wall of her rectum. (1 CT 195-196.) Though Dr. Diamond testified at the time of trial that he had subsequently learned there was no such tear in the rectum (10 RT 2085), counsel inexplicably failed to cross-examine Dr. Dibdin as to why he would provide Dr. Diamond with this critical false information. Most egregiously, counsel failed to cross-examine Dr. Dibdin regarding how he could maintain that Consuelo's abdominal injuries were directly caused by penile penetration (10 RT 2143, 2164), when there was no tear in the rectum and no damage to the lower abdominal organs. Had Dr. Diamond been asked about this, he would have explained that Dr. Dibdin's cause of death is

impossible in view of the lack of injury to the rectum and lower abdominal organs. (Ex. 149 at ¶ 6.) Many other doctors who testified could have also explained that the cause of death given by Dr. Dibdin was anatomically impossible and false had they been fully informed about Consuelo's medical history and asked to testify about it. (*See, e.g.*, Ex. 79 at ¶ 12; Ex. 77 at ¶ 17; Ex. 78 at ¶ 11.) Counsel's failure to elicit this testimony completely refuting Dr. Dibdin's medical opinion and eviscerating his credibility was ineffective and prejudicial.

That Dr. Dibdin twice provided false information about the injuries to the vagina and rectum to Dr. Diamond is an established fact admitted by Respondent. This was false information transmitted from Dr. Dibdin to Dr. Diamond, not merely a difference of opinion among medical professionals. As a result of counsel's failure to cross-examine Dr. Diamond and Dr. Dibdin with this readily available information to show that the prosecution's case relied on false information, the jury attributed the differing testimony of the doctors to reasonable differences between medical professionals, as opposed to fraudulent representations made by the state's pathologist about the critical findings regarding injuries to the genitalia. The prejudice from counsel's failures cannot be overstated.

Although trial counsel had nearly a year and a half to prepare for trial, lead counsel Donnalee Huffman unreasonably failed to use this time to conduct a thorough and reasonable investigation into the case. Early on, she adopted a car accident theory even though she did not have any witnesses to support this theory and it did not explain the injuries to Consuelo's genitalia and anus. (Ex. 64 at ¶ 8; 1 RT 134.) The medical evidence was solely Huffman's purview. (Ex. 64 at ¶ 11.) She did not allow her co-counsel to conduct any investigation into the medical evidence. (Ex. 65 at ¶ 4.)

Huffman's investigation of the medical evidence was wholly inadequate and done at the last minute. Prior to trial, Huffman did not interview any of the DRMC nurses who had first attended to Consuelo on the night of the alleged sex charges and for whom she had police reports stating unequivocally that they had not seen any trauma to the genitalia or anus. (Ex. 74 at ¶ 11; Ex. 75 at ¶¶ 10-11; Ex. 72 at ¶ 5; Ex. 73 at ¶ 8.) Although she called Dr. Tait, who worked at DRMC, to testify, she failed to interview her prior to trial except possibly in the courthouse shortly prior to testifying. (Ex. 76 at ¶ 17; Ex. 65 at ¶ 15.) Huffman inappropriately fixated on Consuelo's diaper even though Dr. Tait informed her that she had not removed it and she assumed it had been thrown away. (Ex. 76 at ¶ 17.) Although Dr. Tait could have testified that neither she nor anyone on the staff had seen any trauma to Consuelo's genitalia or anus, Huffman inexplicably failed to elicit this testimony. (Ex. 76 at ¶ 10.) Further, Huffman failed to elicit testimony rebutting the prosecution's theory that the rushed nature of the treatment at DRMC accounted for their failure to see trauma. Dr. Tait could have testified that they had every opportunity to see trauma, had it been present, during their repeated attempts to catheterize Consuelo and while she drew femoral blood from the child's groin area. (Ex. 76 at ¶ 10.)

Likewise, Huffman failed to interview any of the prosecution's medical witnesses who were involved in caring for Consuelo during her eight days of hospitalization at KMC and UCLA. Huffman failed to apprise them of Consuelo's full medical history, which shows that Consuelo's alleged sexual injuries were the result of her deteriorating medical condition and hospital procedures. Because Huffman did not interview these witnesses, she was not aware that they were unfamiliar with the full medical history. (*See*, *e.g.*, Ex. 144 at ¶ 10.) Mr. Benavides has

provided declarations from all the main physicians who attended to Consuelo and testified at trial stating that had they known the full medical history they would have testified to a high degree of medical certainty that Consuelo was not sexually molested on the night of November 17, 1991. They also would have uniformly testified that the cause of death given by Dr. Dibdin is anatomically impossible. Counsel's failure to elicit this evidence of Mr. Benavides's innocence led to his unjust conviction.

Repeating the errors of their 2003 response, Respondent continues to maintain that counsel adequately reviewed the medical records because Huffman said she reviewed them on the record. (*Cf.* 2003 Response[58] at 99, 178 (citing 1 RT 19-20) *with* Response at 176-77 (citing 1 RT 19-20), 179-180 (citing 1 RT 20, 22).) Respondent relies on a statement made by Huffman during a pretrial hearing where she indicates that though she has reviewed all the medical records, she has not seen any to support the prosecutor's theory that the child was suffocated. (1 RT 16-22.) In response the prosecutor referred her to Dr. Bentson's report in the UCLA records, which Huffman indicated she did not recall seeing. (1 RT 22-23.) Though the hearing occurred on March 15, 1993, two weeks prior to trial and nearly a year and a half into the case, Huffman had yet to fully familiarize herself with the medical records. Her ignorance of the critical information in the medical records persisted through trial. For example, though she knew in March 1993 that the prosecutor would attempt to show the child was suffocated based on Dr. Bentson's report, she failed to consult with the appropriate experts to learn that the brain injuries reported by Dr. Bentson were not indicative of suffocation and likely resulted from DIC. (*See* RCCAP Claim 13 (5).)

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[58] "2003 Response" refers to the Informal Response to the Petition for Writ of Habeas Corpus filed by Respondent on July 15, 2003.

Though Huffman stated in court that she had reviewed the medical records (1 RT 19), it is clear that her review was cursory and inadequate. Respondent's current concession that there is no evidence of rape in the medical records is the most salient proof that counsel's knowledge of the medical records was woefully inadequate and that her ignorance prejudiced Mr. Benavides. Her failure to fully understand the records is further evident from her numerous misstatements of the medical evidence in examining witnesses and failure to formulate appropriate referral questions for her experts. For example, she repeatedly, and to no avail, attempted to establish that Consuelo had been administered cardiopulmonary resuscitation (CPR) in the ambulance from DRMC to KMC, (10 RT 2074 (asking Dr. Diamond); 14 RT 2827 (asking Dr. Baumer)), even though the ambulance records did not support this assertion (Ex. 2 at 120.) After cross-examining various witnesses with this mistaken information, she then revealed her ignorance by calling the Delano paramedic to testify that these procedures had happened in transport. The paramedic, Ruben Garza, who clearly had not met with Huffman prior to testifying or brought his records with him, testified that Consuelo had not undergone CPR or a seizure while in transport. (16 RT 3264, 3268.) As a result, Huffman completely undermined her credibility and nullified the effects of her previous examination of the witnesses. Her failure to fully understand the medical records led to her ineffective examination of the witnesses and thoroughly prejudiced Mr. Benavides.

Had Huffman carefully reviewed the records, she would have realized that Consuelo suffered a cardiac respiratory emergency at DRMC, not while in the ambulance, which led the DRMC nurses to perform CPR. (Ex. 74 at ¶ 7; Ex. 76 at ¶ 8.) Huffman could have elicited this evidence via the testimony of the DRMC personnel had she had a basic grasp of the

medical records. Further, had she adequately and timely consulted with the experts and provided them with the full medical records, she could have elicited evidence that Consuelo's respiratory emergency at DRMC may have been the cause of the lax sphincter tone observed by medical personnel at KMC. (Ex. 79 at ¶ 20.)

Respondent provides no response to the claim that Huffman's questions about CPR showed her ignorance about the medical records. Respondent, however, argues that Huffman's questions to the doctors and the paramedic about seizures during transport are reasonable because the doctor who prepared a discharge summary from KMC, Dr. K. B. Platnick, made a notation two days after she was transported in the ambulance that the "patient *allegedly* suffered a seizure" which was witnessed by the paramedics. (Ex. 2 at 61; (italics added); Response at 178.) There are several problems with Respondent's defense of counsel's performance. First, if Huffman relied on Dr. Platnick for her assertion, Huffman should have interviewed the doctor prior to trial to determine the source and reliability of the doctor's notation. Prior to asking the questions of the witnesses at trial, Huffman should have also determined whether the information was reliable given that no other record contains that information and the ambulance records contradict the information. Furthermore, if Huffman found that the information was reliable, then she should have called Dr. Platnick to testify about it. Huffman did none of the above. Huffman instead elicited testimony from three doctors, including the defense expert, and the paramedic establishing that the child had not had CPR or suffered a seizure during transport. Huffman's lack of preparation for trial regarding the critical elements of her defense theory fell woefully below the standard of care required for an attorney representing a capital defendant.

Respondent's manufacture of an alleged strategic reason for counsel's persistent attempts to have Dr. Harrison admit that he had seen superficial lacerations of the anus even though he repeatedly denied having seen them is patently absurd. (RCCAP at 224.) Citing medical reports produced by medical personnel other than Dr. Harrison indicating the presence of superficial anal lacerations, Respondent claims that counsel's questions were reasonable because they were designed to show that the superficial lacerations were caused by medical personnel. (Response at 177-78.) If counsel did have such a theory, she should have called the authors of those medical records to provide that testimony, not Dr. Harrison who had not observed such lacerations. Furthermore, as amply shown in the Corrected Amended Petition, counsel unreasonably failed to present evidence to show that the superficial anal lacerations were in fact the result of Consuelo's medical condition. Counsel in no way fulfilled her duty to present this theory by questioning Dr. Harrison about information he did not know.

Counsel's unreasonable failure to read and understand the medical records, timely consult with medical experts, and interview the medical personnel who treated Consuelo and provide them with a information regarding the course of Consuelo's hospitalization, unduly prejudiced Mr. Benavides. Respondent's concession that their sex abuse expert Dr. Diamond testified without knowledge of the medical records and that had counsel confronted him with the readily available information in the records, his conclusion about the rape would have changed compels the conclusion that counsel understanding of the medical evidence was woefully deficient. Mr. Benavides has provided ample evidence showing that had counsel conducted a reasonable investigation into the medical evidence the outcome of the trial would have been different. *See, e.g.*, *Strickland*, 466 U.S. at 694.

Respondent's claim that Mr. Benavides has failed to present any evidence that the prosecution witnesses were biased against him lacks merit. (Response at 176.) The grave miscarriage of justice that has kept Mr. Benavides incarcerated for over two decades was the result of the testimony of a series of doctors who provided erroneous opinions that Consuelo had been sexually abused based an incomplete medical history. As shown in Dr. Kennedy's 2012 declaration, the errors that Dr. Diamond committed that led him to believe Consuelo was sexually abused were a derogation of the basic standard of care required for doctors. (Ex. 169.) The fact that so many testified incorrectly without questioning the lack of medical evidence to support their testimony can only be explained by a bias in favor of the prosecution. As Dr. Heger explains, it is likely that the medical personnel misinterpreted signs of Consuelo's deteriorating medical condition as trauma based on the preconceived false belief that Consuelo had been abused. (Ex. 170 at ¶ 16.)

### 2. Failure to Investigate and Present Evidence to Rebut the Sex Crime Charges and Special Circumstances.

#### a. Failure to Present Evidence That Consuelo Did Not Have Any Trauma to the Genitalia and Anus During the Initial Two Hours of Her Hospitalization at Drmc.

Respondent argues that trial counsel's investigation and presentation of evidence regarding the sex crimes was reasonable notwithstanding counsel's failure to call critical DRMC witnesses who all unequivocally saw no trauma to the genitalia or anus. Respondent claims it was reasonable for counsel to rely on the reports of the prosecution's investigator interviews with DRMC witnesses and summaries of the records created by her investigator instead of interviewing the DRMC

witnesses. (Response at 179-182.) Respondent further claims trial counsel adequately presented evidence of the lack of trauma at DRMC through the testimony of Dr. Baumer, Dr. Tait, Francis Zapiain, and Estella Medina. (Response at 174-75, 179.) Respondent also continues to maintain that DRMC personnel did not have the opportunity to detect genital and anal trauma, because they did not specifically look for evidence of sex abuse. (Response at 183-86.) Finally, Respondent claims Mr. Benavides has not shown prejudice from counsel's deficient performance. (Response at 182.) Respondent either misunderstands or ignores the critical exculpatory value of the evidence of lack of trauma at DRMC; regardless, her response lacks merit.

Pointing to a statement made by Huffman in a fund request hearing, Respondent argues that Huffman was "concerned" that the DRMC personnel did not document injuries to the anus or vagina. (Response at 179.) Although Huffman stated in the hearing that "[t]here is some problem with what the emergency people should have noted when they did the examination" (Response Ex. 11 at 9-10), she clearly did not fully investigate or understand the nature of the "problem" or its full exculpatory value. Because Huffman did not interview DRMC personnel or timely consult with the appropriate experts, she was unaware that Consuelo presented with no injuries to her genitalia or anus at DRMC. (Ex. 64 at ¶ 9.) Huffman was also unaware that the injuries seen at KMC were likely due to DRMC personnel repeatedly and unsuccessfully attempting to catheterize her, with an inappropriately large Foley catheter, and manual manipulation for hospital procedures. (Ex. 64 at ¶ 9.) She also did not know that DRMC policies require retention of diapers with any unusual discharge or blood. (Ex. 64 at ¶ 9.) Huffman's failure to present this information was a result of her lack of familiarity with the records and

resulting ignorance of the exculpatory information, not a result of a reasoned trial decision. Had Huffman known this information, she would have introduced it at trial. (Ex. 64 at ¶ 9.)

Though Mr. Benavides has submitted declarations from all the DRMC staff who attended to Consuelo and specifically alleged the critical exculpatory information they could have provided (*see* RCCAP at 226-34), Respondent has the mendacity to dismiss the claim as "conclusory." (Response at 181.) Respondent's argument is ridiculous.

While acknowledging that multiple DRMC personnel stated in their declarations that they were not contacted by counsel, Respondent argues Mr. Benavides has failed to make a prima facie case of deficient performance because Huffman did not state in her declaration what, if any, measures were taken to interview them. (Response at 181.) Respondent's claim is spurious. In the sentence following her complaints about Huffman's declaration Respondent cites to 14 RT 2815, where Huffman told the court that the defense "never interviewed any [medical] witnesses." (Response at 181-82.) The record is clear that Huffman made no effort to interview the DRMC personnel. As stated in the declarations of all the personnel who treated Consuelo at DRMC, they were not contacted by the defense prior to trial, but had they been contacted, they would have provided all the critical exculpatory information in their declarations. (Ex. 76 at ¶ 17; Ex. 74 at ¶ 16; Ex. 75 at ¶ 17; Ex. 72 at ¶ 9; Exh. 73 at ¶ 14.)

Respondent's claims that counsel reasonably relied on her investigator's summaries of reports from the prosecution's interviews of DRMC witnesses (Response at 181-82) contradicts well-established law regarding defense counsel's duties to investigate and subject the prosecution's case to meaningful independent review. *See Strickland*, 466 U.S. at 688 (counsel has duty to use skills to render the trial a "reliable

adversarial testing process"); *Nix v. Williams*, 467 U.S. 431, 453 (1984) (Stevens, J., concurring in the judgment) ("The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process, rather than the ex parte investigation and determination by the prosecutor."); *Elmore v. Osmint*, 661 F.3d 783 (4th Cir. 2011) (reversing capital defendant's conviction where counsel failed to investigate the State's forensic evidence based on their faith on the integrity of the police); *Anderson v. Johnson*, 338 F. 3d. 382, 392 (5th Cir. 2003) (reversing conviction where counsel unreasonably relied on State's investigative work); *see also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.4.1 ("Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial."). Counsel not only unreasonably failed to interview the DRMC witnesses, but most egregiously failed to call them to testify to the helpful information in the prosecution's interviews, which were provided in discovery. As meticulously detailed in the Corrected Amended Petition, all the DRMC personnel who treated Consuelo affirmatively and emphatically told the prosecution's investigator that they had not detected any injury to the genitalia or anus during repeated medical procedures, including attempts to catheterize the child and take her rectal temperature. (RCCAP at 226-34.)

Respondent's repeated claim that Mr. Benavides was not prejudiced by counsel's failure to interview and call to testify DRMC witnesses because counsel presented some testimony about Consuelo's treatment at DRMC lacks any merit. In support of this assertion, Respondent repeatedly cites to four pages of the transcript referring to testimony from Estella Medina (13 RT 2628), and one page of the testimony of defense expert Dr. Bauer (14 RT 2877), DRMC emergency room technician Frances Zapiain

(14 RT 2785), and DRMC Dr. Tait (17 RT 3318). (Response at 174-75, 179, 182.) The minimal evidence counsel elicited from these witnesses was ineffectively presented and failed to convey to the jury the critical fact that none of the personnel at DRMC saw any trauma to the genitalia and anus despite ample opportunity to do so and the training to recognize it.

Respondent refers to Estella Medina's testimony at 13 RT 2628, where she testifies that when she took Consuelo's diaper off in the emergency room she did not see any blood in the diaper.[59] Ms. Medina's limited testimony that she did not see blood could not supplant the testimony of the DRMC personnel who observed Consuelo's genitalia for an extended period while attempting to catheterize her and her anus when taking a rectal temperature and yet saw no trauma of any kind. Ms. Medina did not provide crucial testimony that DRMC personnel could have provided indicating that hospital policy mandates the retention of a diaper with unusual discharge and that the fact they did not retain the diaper indicated there was no such discharge. (*See, e.g.*, Ex. 74 at ¶ 15.) Further, Ms. Medina, did not have the credibility that DRMC doctor and nurses had. The prosecution made her the focus of the prosecution's case and argued she provided the "fulcrum" for Mr. Benavides's alleged sex abuse of the child. (18 RT 3595.) In fact, the prosecution elicited testimony from Dr. Tait to impeach Ms. Medina's testimony that Dr. Tait had told her to remove the diaper and leave it under the child's bottom. (13 RT 2627.) Dr. Tait testified that Ms. Medina's testimony in that regard was untrue. (17 RT

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[59] Respondent incorrectly indicates that Ms. Medina testified that she changed the child's diaper "*after* she was summoned home from work." (Response 174 (italics added).) Ms. Medina testified she changed Consuelo's diaper before she left for work and then removed it in the emergency room at DRMC. (13 RT 2624-26.)

3328.) This testimony allowed the prosecution to raise the specter of Ms. Medina lying to cover up for Mr. Benavides.

Similarly, Dr. Baumer's testimony that he remembered a nurse stating she did not see any trauma and that Consuelo had a clean diaper (14 RT 2877), was not an adequate substitute for testimony from DRMC percipient witnesses. His testimony was hearsay that could not be used for the truth of the matter and lacked the credibility of the DRMC percipient witnesses who could have testified that they saw no trauma despite ample opportunity to see it. Moreover, unlike the DRMC personnel themselves, Dr. Baumer could not rebut the prosecution's theory that DRMC personnel did not see trauma because they lacked the training or opportunity to see it.

Respondent's argument that evidence of the lack of trauma to the genitalia at DRMC was effectively presented through the testimony of Dr. Tait and emergency room technician Frances Zapiain is also meritless. Respondent mischaracterizes the record indicating that Dr. Tait testified that she did not "recall seeing any blood on the stretcher" when Consuelo was transferred to KMC. (Response at 175; *see also* Response at 185.) Dr. Tait's testimony was more equivocal. In response to counsel's question regarding whether she recalled blood on the stretcher, Dr. Tait responded as follows:

> Oh, goodness, there's always a mess in a case like this. After a major case, you don't even remember, you don't notice, there's always blood. I don't remember seeing, yes, there's blood on the stretcher where her bottom was, but there's always a mess in the room.

(17 RT 3318.) In cross-examination she clarified that she was not saying there was no blood, but rather that she did not recall whether or not there was blood. (17 RT 3319-20.)

More importantly, counsel failed to ask Dr. Tait the critical questions regarding whether Dr. Tait had had the opportunity to observe Consuelo's genitalia and anus and whether she had observed any injuries. Had counsel done so, Dr. Tait would have testified that notwithstanding the emergency nature of the situation, she would have seen if there were any bleeding, bruising, swelling, or discharge of fluids from the genitalia and anus when she drew blood from Consuelo's femoral vein in her groin.[60] (Ex. 76 at ¶ 7.) Counsel's failure to ask Dr. Tait this critical question, allowed the prosecutor and the court to discount Dr. Tait's failure to see injury as the result of the expedient nature of the treatment at DRMC. (14 RT 2879 (prosecutor); 14 RT 2881 (Court).)

Defending counsel's method of discovering what information a witness can offer by asking questions on the stand, rather than interviewing them before testifying, Respondent argues that counsel had no reason to know that Dr. Tait drew blood from the femoral artery in the groin because she did not explicitly say she did so when describing the blood draw during her testimony. (Response at 185.) Respondent's argument is spurious, at best. Had Huffman interviewed Dr. Tait prior to testifying, she would have learned that, when the nurses were unable to draw blood from Consuelo's arm, Dr. Tait was called in to draw blood from the femoral vein in the groin. This is a complicated procedure that must be performed by a doctor. (Ex. 76 at 5441.) Respondent makes the further specious argument that counsel had no reason to know that Dr. Tait had drawn blood from the

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[60] Respondent's further claim that counsel was not ineffective for failing to call DRMC nurses Anita Caraan and Donald Jordan to testify that they had not seen any signs of trauma to the genitalia or anus because it would have been cumulative of Dr. Tait's testimony (Response at 186), fails because as explained above counsel failed to elicit such testimony from Dr. Tait.

femoral vein because her records do not so state. (Response at 185.) Respondent is mistaken. Dr. Tait specifically states in her treatment record that after multiple attempts were made to draw blood with considerable difficulty "femoral blood" was drawn. (Ex. 1 at 3.)

Respondent's further claim that Mr. Benavides was not prejudiced by counsel's failure to elicit testimony from Dr. Tait regarding the lack of trauma to the genitalia because she would not have had the opportunity to detect the trauma when she drew blood from her femoral vein in her groin is unsupported and meritless. (Response at 185.) Without citation to any source for support, Respondent claims that when Dr. Tait performed the femoral blood draw she did not have an opportunity to see the hematoma in the labia observed by Nurse Betsy Lackie for the first time at KMC later that night and the 1/8 inch by ¼ inch bruise to the perineum noted by Dr. Diamond at KMC the next day. (Response at 185.) Respondent cites to Dr. Diamond's 2009 declaration for the proposition that a femoral blood draw requires expertise and concentration. (Response at 185.) It is precisely because Dr. Tait was carefully concentrating on the child's groin that Dr. Tait maintains she would have seen any bruising, swelling, bleeding, or discharge of fluids or blood, in the genitalia or anus when she attempted the femoral blood draw. She did not see any signs of trauma. (Ex. 76 at ¶ 7.) Notably, though in his 2009 declaration Dr. Diamond disagrees with Dr. Tait about her ability to detect anal tears when performing the femoral draw, he does not declare that she would have been unable to detect the injury to the genitalia. (Response Ex. 1 at 16-17.)

Respondent's unsupported claim that DRMC personnel would not have had the opportunity to see the hematoma—a formation of blood under the skin—on the labia, first noted by nurse Lackie at KMC also lacks merit. Ms. Lackie described the hematoma as "massive" (11 RT 2239) and being

larger than a nickel, but smaller than a quarter. (11 RT 2249.) She detected the hematoma when first attempting to catheterize Consuelo. (11 RT 2239; Ex. 2 at 59.) There is no reason that DRMC nurses Linda Roberts and Faye Van Worth would not have noticed the hematoma during the two hours in which they treated Consuelo, and directly observed the genitalia when repeatedly attempting to catheterize her, had it been present. (Ex. 74 at ¶ 13; Ex. 75 at ¶ 11.) Respondent's obstinate insistence that they lacked opportunity to observe the trauma to the genitalia because they were not looking for sexual abuse strains reality. (Response at 183-84.) Respondent has not presented any evidence to rebut the prima facie case of counsel's prejudicial ineffectiveness amply supported by the declarations of all the treating DRMC personnel.

Respondent also defends counsel's cross-examination of DRMC emergency room technician Frances Zapiain. (Response at 184.) Respondent relies on Ms. Zapiain's one word response "right" to counsel cross-examination question of whether she had told detective Lopez that she had not observed "any secretions or anything suspicious" in the vaginal area (14 RT 2785), as evidence that counsel effectively presented the evidence of lack of trauma at DRMC. (Response at 179, 182, 184.) In further testimony, however, Ms. Zapiain qualified her answer, indicating that Consuelo was lying in an unnatural frog-like, flaccid position and had unexplained redness around her vagina. (14 RT 2780-81.)

Counsel's failure to effectively impeach Ms. Zapiain with her previous inconsistent statements and to present testimony from the nurses who attended to Consuelo indicating that Consuelo's flaccid legs were not unnatural in light of her medical condition, and that they did not see any signs of trauma to her genitalia, was prejudicial. The prosecution called Ms. Zapiain to testify, though she had only limited exposure to Consuelo.

She was an emergency room technician who assisted the nurses for part of the catheterization procedures and was mostly outside of the emergency room trying to control people on the outside. (Ex. 4 at 1787, 1794.) She testified on direct that Consuelo was lying in an unnatural frog-like position. (14 RT 2780.) Counsel unreasonably failed to impeach her with her previous statement to detective Lopez where she did not characterize the frog-like position as unusual or cause for concern (Ex. 4 at 1791), and present evidence from more experienced personnel at DRMC to show there was nothing unnatural or unusual about her position. If called to testify, the supervising nurse Faye Van Worth could have explained that Consuelo's limp and unresponsive state was the result of her body going into shock due to internal blood loss. (Ex. 75 at ¶ 14.) Ms. Van Worth, like all other personnel at DRMC could have testified unequivocally that she did not see any signs of trauma to the genitalia or any reason to suspect sex abuse. (Ex. 75 at ¶ 14.)

Counsel was also ineffective in failing to counter Ms. Zapiain's damaging testimony about the unusual redness around the vagina and difficulties catheterizing her. Ms. Zapiain testified that Consuelo's vagina was "slightly reddened" and presumably referring to the catheter indicated that there was "like resistance, we couldn't get in." (14 RT 2780-81.) Counsel unsuccessfully tried to have Ms. Zapiain attribute the redness to Consuelo having a diaper rash. Though Ms. Zapiain had told detective Lopez that there was a "little redness" akin to a diaper rash (Ex. 4 at 1792), she denied having made that statement to detective Lopez. (14 RT 2785.) Counsel unreasonably failed to call detective Lopez to impeach her. On further cross-examination, Ms. Zapiain attempted to explain that the redness was not where she expected to see it for a diaper rash by giving a confusing answer—at once saying the slight redness was in the inside and

outside "lybia (sic)" of the vagina. (14 RT 2788.) Ms. Zapiain did not document this slight redness in any records, nor did she tell anyone on staff about the redness at the time of the hospitalization.

Counsel unreasonably failed to call numerous witnesses from DRMC, with more experience and exposure to Consuelo than Ms. Zapiain who could have testified that they did not observe any unusual redness in her genitalia and that the difficulty catheterizing Consuelo was likely due to a urethral malformation. Linda Roberts, the DRMC trauma nurse, could have testified that she did not observe "injury of any sort to her genitalia" during the two hours in which she tended to Consuelo and repeatedly attempted to catheterize her. (Ex. 74 at ¶ 13.) Ms. Van Worth, the supervisory nurse, could have testified that Consuelo appeared to have a malformed urethra that led to problems with her catheterization. (Ex. 75 at ¶ 8.) The multiple attempts to catheterize her could lead to irritation in the area. (Ex. 75 at ¶ 8.) Ms. Van Worth could have also testified that they had ample opportunity to observe signs of trauma to the genitalia had there been any and that no one on the staff saw any trauma to Consuelo's genitalia during her treatment at DRMC. (Ex. 75 at ¶¶ 10-11.)

In sum, counsel's isolated and ineffective attempts to elicit evidence of lack of trauma at DRMC from Estella Medina, Dr. Baumer, Dr. Tait, and Ms. Zapiain, do not excuse her failure to present evidence from the personnel who directly examined Consuelo and observed her genitalia and anus who could have unequivocally and emphatically rebutted the prosecution's theory that Mr. Benavides sexually abused Consuelo. Respondent's attempts to characterize counsel's representation as effective are feckless, especially in light of Respondent's concession that Consuelo was not raped and Dr. Diamond's recent retraction of his testimony.

### b. Failure to Refute Evidence of Sodomy.

#### 1) Introduction

Respondent's claim that Consuelo was sodomized relies solely on Dr. Diamond's 2009 declaration, which Dr. Diamond has now retracted. (Ex. 149.) Apart from Dr. Dibdin, all doctors who testified that Consuelo was sodomized have now retracted their testimony. Notably, Respondent does not provide a declaration from Dr. Dibdin defending his position. This is very likely because Dr. Dibdin's medical opinion is indefensible and has been shown in many instances to be based on false findings. There can be no doubt that the declarations provided in support of the Corrected Amended Petition and this Informal Reply establish that counsel provided constitutionally deficient and prejudicial assistance and more importantly, that Mr. Benavides is factually innocent.

Respondent's argument that Mr. Benavides has failed to establish a prima facie case of counsel's ineffectiveness in failing to rebut the sodomy charges is patently meritless. Respondent's position that Mr. Benavides did not establish a prima facie case is almost entirely based on factual disputes between the medical personnel who provided declarations to Mr. Benavides filed in support of the Corrected Amended Petition and Dr. Diamond's beliefs in 2009, before he admitted that he had made a mistake in opining that Consuelo was sodomized. Respondent has continuously failed to recognize that factual disputes do not rebut a prima facie case for relief and instead highlight the need for this Court to issue an order to show cause and order an evidentiary hearing to resolve any such disputes. *See In re Hawthorne*, 35 Cal. 4th 40, 52 (2001) (Respondent's argument that expert and lay declarations do not establish mental retardation, "[r]ather than negate petitioner's prima facie showing . . . . simply highlights the factual

nature of the dispute between the parties—a circumstance particularly appropriate to a full evidentiary hearing on the ultimate question.").

Since 1991, Dr. Diamond has changed his opinion several times about how and whether Consuelo was sexually abused. It is clear that up until 2012, he always based his opinion on insufficient and incorrect information about Consuelo's medical history and that his assumptions about her history were unduly skewed to concluding that she was abused. At the preliminary hearing Dr. Diamond testified Consuelo had been sodomized based on the false belief that there was a hole in the rectum. Dr. Diamond testified at the preliminary hearing that a foreign object had penetrated through the rectum and caused the upper abdominal organs to rupture. (1 CT 195-96). He indicated he believed that the upper abdominal organs had been ruptured via the rectum rather than through blunt force trauma to the abdomen because there was no damage to the liver, which he believed "excluded someone hitting her and producing the trauma from the outside." (1 CT 195.) When asked whether he had seen a perforation of the rectum when he attended the autopsy and when he examined Consuelo, he responded that he was not present at "that part" of the autopsy and that he could not tell whether there was a perforation when he examined the child, though the "surgeon would have known." (1 CT 196.) There are several serious problems with Dr. Diamond's opinion that demonstrate his failure to follow the standard of care and his pro-prosecution bias. First, the standard of care demanded that he inform himself by consulting the medical records and talking to the surgeon before reaching such a conclusion. Had he done so, Dr. Diamond would have learned that there was no such perforation to the rectum. (Ex. 79 at ¶ 9.) Second, as Dr. Diamond and all other doctors now recognize, the theory that Consuelo's pancreas and duodenum were ruptured by penile penetration through the

rectum—a theory later adopted as the cause of death by Dr. Dibdin—is patently absurd and Dr. Diamond should have known that was the case at the time he offered his opinion. (*See, e.g.*, Ex. 149 at ¶ 6.) Even if he did not know whether the rectum was perforated, he should have known that such an injury would caused massive tearing and bleeding and would have been readily apparent to him and all other medical personnel who examined Consuelo. (Ex. 149 at ¶ 6; Ex. 43 at ¶ 83.) Further, as explained by Dr. Heger, as a child sex abuse specialist, Dr. Diamond should have known that his theory of the cause of death was so rare as to be absurd. The mechanism of injury he described has never been reported in child abuse literature. (Ex. 170 at ¶ 23.)

By the trial in 1993, Dr. Diamond recognized some of his mistakes, yet he still adopted an unreasonable position, unsupported by the medical evidence and tainted by his pro-prosecution bias. Dr. Diamond testified that he had changed his opinion from the preliminary hearing because he had reviewed the literature and "reviewed the anatomy of the internal organs, which [he didn't] keep up with very much" and realized that the tearing of the pancreas and duodenum could be caused by blunt force trauma to the abdomen without injuring the liver. (10 RT 2089.) He also testified that he now understood that "there was no tear to her rectum, which I was told at the time there was."[61] (10 RT 2085.) Dr. Diamond testified that although he did not believe that sodomy had caused the injury to the abdominal organs, he still believed that Consuelo had been

[61] Dr. Diamond's preliminary hearing testimony and trial testimony about where he obtained the information that there was a tear in rectum appear to be in conflict and it is not clear which is true. Whereas at the preliminary hearing he said he did not know whether there was a tear but assumed there was in formulating his cause of death, at trial he indicated he was "told," presumably by Dr. Dibdin, who also misinformed him about a tear in the vagina.

sodomized based on the lax sphincter tone, anal tears at 6:00 and 9:00, perianal swelling, and anal dilation he observed. (10 RT 2053, 2069, 2093; *see also* Response Ex. 1 at ¶ 19.)

In 2009, over fifteen years later, Dr. Diamond again changed his rationale for believing that Consuelo was sodomized after reviewing the medical records provided to him by the Deputy Attorney General and reading some of the declarations submitted with the original petition. Unexplainably Dr. Diamond failed to review the medical chart for the medication that was administered to Consuelo at the time of his examination, 9:00 a.m. on November 18, 1991. Dr. Diamond admitted in his 2009 declaration that had he reviewed the medical record at the time of his examination or prior to his testimony, he would have realized that the lax sphincter tone and anal dilation he observed were possibly attributable to the paralytic agents that were administered to Consuelo before and at the time of his exam and as such he could no longer attribute the lax tone and dilation to trauma. (Response Ex. 1 at ¶ 19.) Dr. Diamond further admitted that he erroneously testified that the lax tone could be due to "repetitive sodomy." (Response Ex. 1 at ¶19.) In his 2009 declaration Dr. Diamond maintained, however, that he still believed Consuelo was sodomized based on the anal tears and "generalized anal swelling" he observed. (Response Ex. 1 at ¶ 36.)

Troubled by the false information he received from Dr. Dibdin that led him to mistakenly believe Consuelo was raped and the fact that he had continuously based his opinion on insufficient information about Consuelo's medical history, Dr. Diamond asked Dr. Astrid Heger, a preeminent expert on child abuse to consult on the case. Dr. Heger reviewed the case with Dr. Diamond and showed him the close-up photographs of Consuelo's anus and genitalia taken at UCLA and explained

to him that the superficial anal tears and anal swelling he had observed were not diagnostic of sexual abuse and most likely attributable to Consuelo's medical condition and a rare skin disease called lichen sclerosus, which made her skin very susceptible to injury from minor pressure. (Ex. 149 at ¶ 5; Ex. 170 at ¶ 13.) Based on his consultation and review of the photographs, which he had not seen prior to signing his 2009 declaration, Dr. Diamond now no longer believes that there is sound medical evidence showing that Consuelo was sodomized. (Ex. 149 at ¶ 5.)

It is now patently clear that Mr. Benavides has been wrongfully incarcerated for over twenty years based on false information given by a pathologist, whose malpractice currently has him on the verge of losing his medical license (Ex. 153), and several medical personnel whose objectivity was compromised by their pro-prosecution bias and who mistook signs of Consuelo's deteriorating medical condition to be indicative of sexual abuse. The medical evidence demonstrating that Consuelo was not raped or sodomized was readily available in the medical records and but for counsel's wholly inadequate knowledge of the records and failure to adequately consult with experts, would have been presented to the jury and would have prevented Mr. Benavides from being convicted.

**2) Counsel Unreasonably Failed to Present Compelling Evidence That Consuelo's Anal Condition Was Not Due to Trauma.**

Respondent attempts to frame the issue as being a matter of counsel's failure to adduce "more evidence" of lack of anal trauma at DRMC. (Response at 186.) It is unclear what evidence of lack of anal trauma at DRMC Respondent believes counsel adequately presented. To the extent Respondent is again relying on Dr. Tait, Dr. Baumer, Frances Zapiain, and Estella Medina's isolated and ineffectual testimony, which did not

specifically refer to the anus, as shown *supra* counsel's presentation of this evidence was ineffectual. As detailed in the Corrected Amended Petition, counsel could have presented extensive evidence from all the treating personnel at DRMC indicating they did not see any anal trauma, much less trauma that would have resulted from insertion of an adult male penis into a child's anus, despite ample opportunity and training to recognize such trauma. (RCCAP at 226-34.)

Respondent's main response to this evidence is to reiterate the prosecution's position at trial that DRMC personnel did not see the anal trauma because they were treating Consuelo for a head injury, were not looking for sexual trauma, and thus did not have the opportunity to observe the trauma. (Response at 186-92.) Respondent's claim fails because all the medical personnel who treated Consuelo at DRMC have stated otherwise. The fact that Dr. Diamond disagreed with them in his 2009 declaration does not negate the prima facie case of counsel's prejudicial ineffectiveness in failing to present their testimony. Had the jury heard the unequivocal testimony from these eyewitnesses indicating that they did not see the trauma, there is a reasonable probability that at least one juror would have had a reasonable doubt that Mr. Benavides sodomized Consuelo. *See, e.g.*, *Strickland*, 466 U.S. at 693-94.

Respondent claims that counsel's performance was not deficient in failing to call the main DRMC treating nurses, Ms. Roberts and Ms. Van Worth, to testify that they did not see any trauma to the anal area. (Response at 190.) In making this claim, Respondent relies heavily on selected, out-of-context, and misleading quotations from the nurses' interviews with the prosecution investigator Lopez that they did not specifically look at her rectum. For example, referring to Ms. Van Worth's

statement, Respondent quotes only the clause in italics below as if it were a complete sentence:

> Lopez: How about the anal area?
>
> Van Worth: *I did not turn her over and look*, but you know, in a child that small, there was nothing obvious and gross....
>
> Lopez: Right.
>
> Van Worth: . . . or I would've seen it when I tried to put the catheter in.
>
> Lopez: Okay.
>
> Van Worth: Uh, because you have the legs apart.
>
> Lopez: Sure.
>
> Van Worth: And you know, in a child that small, the (inaudible) is right there by the vaginal area and I-, I saw nothing that made me suspicious at that time, of sexual assault.

(Ex. 4 at 1746.)[62] In their declarations both Ms. Van Worth and Ms. Roberts reiterated that they would have noticed if there had been trauma resulting from an adult male penis penetrating the child's rectum despite the fact that they were not looking for it. (Ex. 74 at ¶ 11; Ex. 75 at ¶ 12.)

Restating the arguments raised to argue that counsel was not deficient in failing to present evidence of genital trauma, Respondent further claims Mr. Benavides was not prejudiced by counsel's failure to call the DRMC nurses to testify because their multiple attempts to catheterize Consuelo and

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[62] Respondent mistakenly cites this passage as Ex. 4 at 1769. (*See* Response at 190.)

take her temperature rectally did not afford them an opportunity to detect the anal trauma. (Response at 190-92.) As explained above, DRMC personnel disagree and counsel had an obligation to present their compelling evidence, even if Dr. Diamond, a non-percipient witness to what happened at DRMC, disagreed in his 2009 declaration.

More importantly, Respondent's argument has an essential flaw: If the anal tears and swelling were so minimal that they were undetectable during the two hours in which the DRMC nurses repeatedly focused on Consuelo's genitalia and anus while attempting to catheterize her and take her rectal temperature, and Dr. Tait concentrated on her groin while attempting to obtain a femoral blood draw, then it is highly unlikely that they were caused by an adult male penis. (Ex. 169 at ¶ 12.) Sodomy requires penetration by a penis. (2 CT 584.) Dr. Dibdin's scenario that an adult male penis penetrated the rectum, reaching the abdominal contents is impossible to maintain in light of the lack of injury at DRMC and the fact that the rectum was intact. Dr. Diamond's scenario in his 2009 declaration that an adult male penis penetrated the child's anus causing "generalized swelling" and the anal tears, (Response Ex. 1 at 24), yet remained undetected despite the DRMC personnel's careful attention is also highly unlikely. Fortunately, Dr. Diamond has now recognized that the swelling and anal tears that he saw were attributable to Consuelo's medical condition, rather than to trauma, and he no longer maintains that Consuelo was sodomized. (Ex. 149 at ¶ 5.)

There are several problems with Dr. Diamond's assertion in his 2009 declaration, which he now recognizes is medically unsound. Notably, though Dr. Diamond argues in his 2009 declaration that the tears would not have been detected by the DRMC personnel because they did not spread her buttocks (Response Ex. 1 at 14), Dr. Diamond does not state that they

would not have been able to see the generalized swelling he observed. This is likely because he cannot reasonably assert that the DRMC personnel would have missed what he described during his testimony as "marked swelling . . . around the whole rectum." (10 RT 2053; *see also* Response Ex. 1 at 24 (Declaration of Jess Diamond, M.D describing "generalized anal swelling").) Dr. Diamond signed his declaration in 2009, when he did not have independent memory about the case and without seeing the photographs of Consuelo taken during her hospitalization. In 2012, when he saw the photograph taken at KMC an hour before his examination, he recognized that the anal swelling he observed was present throughout the body and due to her medical condition rather than trauma. (Ex. 149 at ¶ 5.)

Respondent's insistence that the DRMC nurses did not have an opportunity to see the anal tears when they took Consuelo's rectal temperature is also flawed. (Response at 191-92.) Respondent claims that Dr. Tait, Supervising Nurse Van Worth, Trauma Nurse Roberts, Nurse Wafford, and Nurse's Aide Zapiain all "incorrectly opine" in their declarations that they would have detected the anal trauma, if there were any, when they took her rectal temperature. (Response at 191.) Respondent offers little to counter their allegations other than again to reiterate that they would not have seen the trauma because they were not looking for it. Dr. Diamond's assertion in his 2009 declaration that the anal tears would not have been visible to the DRMC medical staff when they repeatedly attempted to catheterize her and took her rectal temperature is countered not only by the five DRMC medical staff listed above, whom unlike Dr. Diamond were percipient witnesses, but also by Dr. Kennedy. As Dr. Kennedy explains, the frog-leg position in which Consuelo was examined affords and excellent view of the child's genital and anal regions. (Ex. 83 at ¶ 12; *see also* Ex. 4 at 1680 (Nurse Roberts told Detective Lopez

that Consuelo was in a "frog like position").) If the tears had resulted from anal penetration with an adult male penis in the hours prior to admission to DRMC, Consuelo would have been noticeably bleeding when she arrived at the hospital. (Ex. 83 at ¶ 12.) If the tears were so minute that they were undetectable, then it is highly unlikely that they were caused by an adult male penis. (*Id.*) Furthermore, notwithstanding Dr. Diamond's disagreement in his 2009 declaration, the DRMC declarations submitted in support of the petition indicating there was no trauma at DRMC must be taken as true and indisputably establish a prima facie case for relief. *See People v. Duvall*, 9 Cal.4th 464, 474-75 (1995). They present compelling evidence of innocence that should have been presented to the jury and there is a reasonable probability that they would have swayed at least one juror to have a reasonable doubt about Mr. Benavides's guilt.

Respondent's claim that Ms. Robert's assertions in her declaration are inconsistent with her statements to Detective Lopez is completely untrue. (Response at 192.) Ms. Robert's has consistently stated that, though she did not examine the rectum or anus, she would have seen signs of trauma had Consuelo been penetrated with an adult male penis. Ms. Roberts explained to Detective Lopez that though she did not examine the rectum or anus, there was no blood coming from the rectum and no noticeable trauma. (Ex. 4 at 1692-93.) She repeatedly and emphatically told Detective Lopez that she did not see any trauma to the genitalia or anus:

> I did not see anything unusual about it [her vaginal and anal area] and that's why we were real surprised when we heard that…

(Ex. 4 at 1683.)

> I didn't see any tearing, I didn't see any bruising, I didn't see any bleeding, I didn't see anything out of normal. We always look for that, you know, we're trained to look for that . . .
>
> . . . and I'm sure that if something would have been, you know, really wrong there it would've just caught my eye immediately, but uh, I did not see that

(*Id.*)

> It was nothing fresh, there was…nothing, no. No. Absolutely not. There was no bruising of any sort, I didn't see any bruising.

(*Id.* at 1684.) Consistent with her statements to Detective Lopez, Ms. Roberts explained in her declaration that she did not see any "tearing, bleeding, bruising, swelling or unusual dilation of her anus." (Ex. 74 at ¶ 13.) She explained that taking a rectal temperature is an invasive procedure. If she had seen signs of trauma in the anal area, she would have noticed it and taken her temperature by other means. (Ex. 74 at ¶ 13.) There can be no question that Ms. Roberts would have seen the "generalized anal swelling" around the whole rectum described by Dr. Diamond when she repeatedly attempted to catheterize her and took her rectal temperature.

Respondent's claim that Dr. Tait did not have an opportunity to see the anal trauma when she concentrated on Consuelo's groin to draw femoral blood (Response at 192-93), fails for the same reasons stated above. Respondent makes the ludicrous argument that counsel's performance was not deficient because when Dr. Tait testified that she drew Consuelo's blood, Dr. Tait "never deemed this to provide an opportunity" to detect obvious signs of anal or genital trauma. (*Id.* at 193.) Had counsel adequately familiarized herself with the medical records and fully interviewed Dr. Tait prior to testifying, she would have learned that the

femoral blood draw afforded her the opportunity to see trauma had there been any. Dr. Tait would have explained and testified:

> Although I was not examining Consuelo's genitalia or anus when I drew blood from her groin, had there been any obvious signs of trauma—any bruising, swelling, bleeding, or discharging of fluids or blood—I would have seen it and I would have noted such in the patient's chart. I did not see any such signs during my treatment of Consuelo.

(Ex. 76 at ¶ 7.) If the tears were so minute that they would not have been detectable by Dr. Tait when she focused her attention on her groin to draw femoral blood, then the tears Dr. Diamond observed were likely not caused by an adult male penis. (Ex. 169 at ¶ 12.) Respondent cites no support for the assertion that Dr. Tait would have also missed the generalized swelling around the whole rectum when looking at her groin. The assertion is implausible.

**3) The Evidence Supporting the Sodomy Conviction Was Weak and Has Been Fully Refuted.**

Respondent's general claim that even if counsel was deficient for failing to present evidence regarding the lack of anal trauma at DRMC, Mr. Benavides was not prejudiced because there was other alleged "strong" evidence in support of the sodomy charge relies on a recitation of trial evidence that has been amply refuted in the Corrected Amended Petition. (Response at 193-96.) The only evidence Respondent recites specifically referring to anal trauma is the testimony of Dr. Alonso, Dr. Diamond, and Dr. Dibdin. (*Id.* at 194-95.) Dr. Alonso, like Dr. Diamond, had not reviewed the full medical history prior to testifying. Now that he has done so, he believes that Consuelo was not sexually traumatized. (Ex. 144 at ¶ 14.) Dr. Diamond's disagreement in his 2009 declaration with Dr. Alonso's medical opinion does not negate the prima facie case of counsel's

prejudicial ineffectiveness in failing to present this evidence. *See Duvall*, 9 Cal.4th at 474-75. Furthermore, as will be shown more fully below, Respondent's attack on Dr. Alonso's declaration lacks merit. As has been shown above, Dr. Diamond's 2009 opinion that the anal tears and generalized swelling he observed the day after Consuelo was admitted to DRMC were evidence of penile penetration, despite DRMC not seeing such trauma was untenable and Dr. Diamond has retracted his position. Likewise, Dr. Dibdin's position that Consuelo died as a result of penile penetration through the rectum causing the upper abdominal organs to rupture, despite no injury to the rectum or lower abdominal organs, is anatomically impossible. (*See infra* Claim Thirteen, subclaim 3.) Respondent further cites Dr. Dibdin's testimony that during the autopsy he observed anal tears and the anus dilated to one inch, seven to eight times the normal size, as support for the sodomy conviction. (Response at 195.) Dr. Dibdin's testimony is not evidence that Mr. Benavides sodomized Consuelo for several reasons. First, Dr. Dibdin's credibility is highly questionable in light of his demonstrably false findings that there was a hole in the vagina and a hole in the rectum and his anatomically impossible cause of death. Second, dilation of the anus is a normal post-mortem condition (Ex. 79 at ¶ 21; Ex. 170 at ¶ 25.), which Dr. Dibdin should have informed the jury about, rather than misleading them to believe it was a sign of sexual trauma. Third, if sodomy had caused the anal dilation and tears, the DRMC medical personnel surely would have noticed the unusually enlarged anus and tears when they took her rectal temperature and while catheterizing her. In sum, there is no credible evidence that Consuelo was sodomized prior to admittance to DRMC by Mr. Benavides or anyone else in light of the lack of any trauma observed at DRMC that

would have been attendant to penile penetration by an adult male penis of a twenty-one month old child. (Ex. 170 at ¶ 12.)

The additional evidence referred to by Respondent as allegedly supporting the sodomy conviction is weak, fully refuted, and in no way indicative that Consuelo was sodomized. (Response at 195-96.) That Consuelo was injured while in Mr. Benavides's care when he lost sight of her for a short time, the number of minutes which he could not exactly specify, in no way supports the sodomy conviction. Mr. Benavides's consistent explanation that he did not know what happened to Consuelo, but supposition that she might have been hit by a car or hit the door while chasing her sister, is also not supportive of the sodomy conviction, and fully consistent with his innocence. The prior rib fractures and healing pancreas adhesion, which were in no way connected to Mr. Benavides also do not support the sodomy conviction. Dr. Dibdin's false testimony that Consuelo had old injuries to the genitalia and anus has been fully refuted in the petition. (Ex. 82.) Cristina's testimony that one night, several months prior to Consuelo getting hurt, Mr. Benavides took Consuelo into his room and the next day she emerged unhurt, is also in no way indicative of his having hurt Consuelo, much less sodomized her. Further, as shown in the Corrected Amended Petition, Cristina's account was the result of intense coercive and suggestive questioning by Delano Police Department officers and detectives from the Kern County District Attorney's office. (Ex. 89 at ¶ 47.) In sum, Respondent's argument that even if counsel was deficient in failing to present the lack of trauma at DRMC, Mr. Benavides was not prejudiced because strong evidence supports the sodomy conviction is frivolous. The sodomy conviction was based on demonstrably false and misleading testimony virtually all of which the witnesses have retracted.

**4) Counsel Unreasonably and Prejudicially Failed to Present Evidence That the Injuries Dr. Alonso Observed at Kmc Were Not Evidence of Sexual Trauma.**

Dr. Leonardo L. Alonso was the emergency room physician in charge of Consuelo's care at KMC. He testified that he observed "significant and severe swelling throughout the entire anal area. It was red and there was no rectal tone, absolutely none, and there was blood in the stools." (13 RT 2686.) He explained that the anus was "so swollen that [the inside mucosa] was visibly evident." (*Id.* at 2687.) Based on these observations he testified that he believed "without a doubt" that Consuelo was abused. (*Id.*) He added that he had never seen a child as sexually abused as Consuelo. (*Id.*)

As was the case for all testifying physicians, including Dr. Diamond, Dr. Alonso was not aware of, or provided with, Consuelo's full medical history. (Ex. 144 at ¶ 7.) In particular, he was not aware that Consuelo did not present at DRMC with the conditions he later interpreted to be signs of sexual abuse. (*Id.*) After reviewing the full medical records, law enforcement interviews with DRMC personnel, and their declarations, Dr. Alonso now believes to a "high degree of medical certainty that Consuelo was not anally or vaginally penetrated with a penis or similarly sized object on the evening of November 17, 1991." (Ex. 144 at ¶ 14.)

Respondent argues that counsel's performance was not prejudicially deficient in failing to interview Dr. Alonso, provide him with Consuelo's full medical history, and elicit his testimony that Consuelo was not sexually abused. Respondent argues that Dr. Alonso has a mistaken understanding of what DRMC personnel observed and is mistakenly attributing the conditions he observed to Consuelo's deteriorating medical condition and medications she was given. (Response at 196-204.) Respondent's

arguments not only lack merit, but also fail to negate the prima facie case of counsel's prejudicial ineffectiveness. Dr. Alonso's post-conviction opinion, based on a review of the full medical history must be taken as true at this stage of the proceedings, *Duvall*, 9 Cal.4th at 474-75, and it undoubtedly establishes a prima facie case of prejudicial deficient performance based on counsel's failure to present the evidence. Dr. Diamond's dispute in his 2009 declaration with Dr. Alonso's findings establishes a factual conflict, which if necessary can be resolved with the issuance of an order to show cause and an evidentiary hearing. *In re Serrano*, 10 Cal.4th 447, 456 (1995.) However, given that Dr. Diamond no longer believes that Consuelo was sodomized, any such dispute is inapposite and instead this Court should issue an order to show cause asking Respondent to explain why immediate relief should not be granted to Mr. Benavides in the form of his release.

Respondent argument that Dr. Alonso's recantation is based on an alleged mistaken understanding of what DRMC personnel observed is patently untrue. (Response at 196-98.) Respondent, for example, argues that Dr. Alonso believed that more than one rectal temperature was taken at DRMC. In support of the argument, Respondent misleadingly quotes Dr. Alonso as stating that "nurses" took Consuelo's rectal temperature. (Response at 197, 202.) As is clear from Dr. Alonso's declaration, his references to "nurses" does not indicate that he believed more than one rectal temperature was taken at DRMC. He declared that: "In their repeated attempts to catheterize Consuelo and take her rectal temperature, the nurses would have observed any trauma to the anus or genitalia if it had been present." (Ex. 144 at ¶ 8.) The sentence clearly refers to the more than one nurse that were involved in her care (Linda Roberts and Faye Van Worth), specifically in attempting to catheterize her. More importantly, his opinion

does not depend on how many times the nurses took her rectal temperature, but on the unassailable notion that DRMC personnel had ample opportunity to see the "significant and severe swelling throughout the entire anal area" that revealed even the inner mucosa, which he observed at KMC (13 RT 2686-87), had it been present at DRMC.

Respondent further argues that Dr. Alonso's opinion is untrustworthy because he did not review the testimony of the DRMC witnesses who indicated they did not examine the anus. (Response at 197-98.) However, Dr. Alonso reviewed the law enforcement interviews of the DRMC personnel and their declarations, where they also indicated that they had not examined the anus, but opined that they would have seen signs of sexual abuse had a penis or similarly sized object been inserted into Consuelo's anus prior to arrival at DRMC. (*See, e.g.* (Ex. 4 at 1682-84; 1692-93; Ex. 4 at 1745-46; Ex. 73 at ¶ 8; Ex. 74 at ¶¶ 13-14.)

Respondent's further claims that Dr. Alonso's opinion that DRMC nurses would have seen bruising, bleeding, or tearing had she been penetrated by a penis or similarly sized object in the evening she was admitted to DRMC is inconsistent with his testimony because he did not observe such signs of trauma at KMC and yet he testified that she was sexually abused. (Response at 198.) Respondent's argument is bogus. Dr. Alonso observed bruising and bleeding and partially relied on these findings to opine at trial that Consuelo was sexually abused. Dr. Alonso observed severe swelling and redness around the entire rectal area. (13 RT 2691.) He explained that a hematoma is blood under the skin that will show as redness and swelling. (13 RT 2688.) In other words, he interpreted the redness and swelling as signs of bruising.[63] Further, he

[63] Dr. Heger believes that it is likely that Dr. Alonso and other KMC personnel misinterpreted signs of Consuelo's deteriorating medical

testified that he found blood in the stool. (13 RT 2686.) The swelling, redness, and anal laxity were the reasons for his opinion at trial that Consuelo had been sexually abused. (Ex. 144 at ¶ 11.) The fact that the DRMC personnel did not see these signs of trauma, which were pronounced enough for him to readily observe them, led Dr. Alonso to conclude that the trauma was not present at DRMC.

Respondent's argument that counsel's performance was not deficient because the experts she consulted with did not offer the opinion that Dr. Alonso gave in post-conviction, once he was fully informed of Consuelo's medical history, lacks merit. (Response at 199.) As more fully explained below, counsel's consultation with the defense experts fell far below the standard of care. Counsel failed to provide them with a full set of medical records, appropriate referral questions, adequate guidance regarding the critical information at trial, any defense investigation, nor adequate time to prepare to testify. Had counsel provided them with all the information and time they needed to conduct their evaluation, both testifying experts, Dr. Baumer and Dr. Lovell, would have testified that Consuelo was not sexually abused. (Ex. 80 at ¶ 23; Ex. 142 at ¶ 16.) The fact that even the prosecution's main witness, Dr. Diamond, has recanted all his testimony that Consuelo was raped and sodomized after reviewing the medical records is strong proof that counsel's consultation with defense experts was prejudicially ineffective. (Response Ex. 1; Ex. 149].)

Relying on Dr. Diamond's opinion in his 2009 declaration, Respondent further argues that Dr. Alonso is mistaken in attributing the redness, swelling, anal laxity, and blood in the stool he observed at KMC to

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condition, such as redness and swelling, as signs of trauma because of the biased mistaken belief that Consuelo had been sexually abused. (Ex. 170 at ¶ 16.)

Consuelo's deteriorating medical condition and medications. (Response at 200-04.) Dr. Diamond is incorrect as shown in detail below and as he has now recognized. However, regardless of Dr. Diamond's opinion in 2009, counsel should have presented to the jury Dr. Alonso's fully informed post-conviction opinion, which is shared by many other treating physicians, that Consuelo was not sexually abused. Respondent cannot credibly dispute that Mr. Benavides has stated a prima facie case of counsel's prejudicial ineffectiveness in failing to present this strong evidence undermining the prosecution's case notwithstanding Respondent's factual disagreement with all the medical experts. *See Duvall*, 9 Cal. 4th at 475.

Respondent's argument that Dr. Alonso is mistaken in attributing the swelling and redness he saw at KMC to coagulopathy, rather than trauma is confused, internally inconsistent, and based on a false understanding of the findings at KMC. (Response at 200-01.) Dr. Alonso explained in his declaration that Consuelo was in coagulopathy, meaning her ability to clot blood was impaired. The initial KMC laboratory reports show that her coagulation factors were rising, including a PT of 25.7 (normal is less than 13) and a PTT of greater than 150 (25-40 is normal). These results indicate that she was in the beginning stages of what her later records show as disseminated intravascular coagulation (DIC). Dr. Alonso opines that the edema (swelling) and erythema (redness) he observed were most likely attributable to coagulopathy. (Ex. 144 at ¶ 9.)

Respondent argues that the redness and swelling was not secondary to DIC. Referring to Dr. Diamond's 2009 declaration, Respondent indicates that perianal swelling develops "within" 24 to 48 hours of the trauma. (Response at 200, citing Response Ex. 1 at 12.) Respondent then argues that when Dr. Alonso saw Consuelo, less than two and a half hours after she was admitted to DRMC, she could not have already been in DIC.

Dr. Diamond believed a patient does not go into DIC that quickly. (Response Ex. 1 at 12.) Yet, as Respondent should know from its own recitation of Dr. Alonso's declaration, he did not state that Consuelo was in DIC when he examined her, but rather in a state of coagulopathy, the preceding stage to DIC. (Ex. 144 at ¶ 4.) In his 2009 declaration, Dr. Diamond recites the blood results that Dr. Alonso relied on to determine she was in a stage of coagulopathy, but does not appear to contest that she was in a state of coagulopathy. (Response Ex. 1 at 11-12.) There is no indication in his 2009 declaration that Dr. Diamond contests that coagulopathy can lead to perianal swelling and redness. It appears from Dr. Diamond's 2009 declaration that he would concede that redness and swelling would result from DIC, but he provides no opinion regarding whether the precursor stage could also cause perianal swelling and redness.

Respondent further argues that if the redness and swelling were attributable to DIC, the genitalia would also show redness and swelling. (Response at 200-01.) This argument is erroneous for several reasons. First, as stated above, Dr. Alonso did not attribute these conditions to DIC, but rather coagulopathy. Second, as explained by Dr. Alonso, "[d]ue to gravity, which makes the blood pool downward, her edema and erythema tended to be more pronounced in her perianal area." (Ex. 144 at ¶ 9.) Dr. Diamond's opinion in his 2009 declaration that the redness and swelling would also appear in the genitalia, at the same time as the perianal area, because the genitalia is above the anus and has looser tissues (Response Ex. 1 at 12), does not adequately respond to Dr. Alonso's explanation that gravity would lead to the blood pooling downward in the perianal area first.[64] Third, there was some evidence at trial that Dr. Alonso, and KMC

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[64] Due to her deteriorating medical condition, Consuelo's genitalia eventually did swell and become reddened as is evident in People's Exhibit

emergency room nurse Betsie Lackie observed some redness and swelling in the genitalia.[65] (13 RT 2688 (referring to the vaginal area, Dr. Alonso testified that there was "a lot of redness which hematomas will show and swelling."); 11 RT 2251 (Ms. Lackie testified testimony that the vaginal region was slightly edematous).)

Next, Respondent contests Dr. Alonso's conclusion that the anal laxity he observed was attributable to the administration of Pavulon, a paralytic agent Consuelo was given at 10:40 p.m., ten minutes after she arrived at KMC. Respondent speculates that Dr. Alonso may have observed the lax sphincter tone within the first ten minutes she was admitted at KMC or after the effects of the Pavulon wore off, about an hour after it was administered. (Response 201-02, 222.) Respondent has presented no evidence in support of this speculation and readily ignores Dr. Alonso's declaration where he asserts otherwise. As Dr. Alonso explained in his declaration, when Consuelo arrived at KMC his main concern was to resuscitate and stabilize her. In order to do so, he established a clear airway and an intravenous line. He did not turn his attention to the perianal area until a nurse or physician pointed out the trauma in the area. (Ex. 144 at ¶ 4.) It is likely that nurse Lackie was the person who called his attention to the area. She testified that when she was trying to catheterize Consuelo she

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63, a picture of Consuelo taken at KMC on November 18, 1991, at 8:00 a.m., an hour before Dr. Diamond examined her. (15 RT 2966-68; *see also* Ex. 149 at ¶ 5 (2012 declaration of Dr. Diamond where he admits that the photograph shows overall swelling, especially of the genitalia).)

[65] Respondent and Dr. Diamond interpret a notation in Dr. Alonso's records as saying "vagina neg" and thus indicating he did not observe redness or swelling in the area. (Response at 201; Response Ex. 1 at 12.) The notation regarding the vagina in Dr. Alonso's handwritten report is not clearly legible and it is far from clear that it says "neg" as Respondent urges. (Ex. 2 at 50.) Dr. Alonso is unable to interpret his notation.

observed trauma to the genitalia, which she told the doctors about. (11 RT 2239.) According to Ms. Lackie's medical notations she attempted the catheterization and observed the trauma at 11:15 p.m., 35 minutes after Consuelo received the paralytic agent. (Ex. 2 at 59.) As Respondent recognizes in footnote 45, the fact that medical personnel later also observed a lax sphincter tone can readily be explained by Consuelo's deteriorating medical condition. (Response at 202.)

Respondent's stubborn insistence that DRMC personnel did not have the opportunity to observe the lax sphincter tone observed by Dr. Alonso (Response at 202) defies logic. Dr. Alonso testified that there was "no sphincter tone at all" and that the anus was so swollen that the inside mucosa was "visibly evident." (13 RT 2687, 2690.) Though DRMC personnel did not conduct a rectal exam, they would have noticed these gross signs of trauma when they repeatedly attempted to catheterize her, took her rectal temperature, and set a femoral blood line.

Respondent's further argument that counsel's failure to present the evidence that the anal laxity Dr. Alonso observed was due to a paralytic agent was not prejudicial because he indicated in his post-conviction declaration, but not at trial, that the anal laxity was only a "contributing" factor for his conclusion that she was sodomized is illogical on its face. (Response 203.) Due to counsel's failure to elicit this testimony from Dr. Alonso, the jury did not learn that the anal laxity was only a contributing factor. Further, Dr. Diamond's testimony about the anal laxity being due to possibly repeated sodomy, which he has now recanted, (Response Ex. 1 at ¶ 19) reinforced the jury's mistaken belief that the anal laxity was a sign of sodomy.

Respondent's similar argument that counsel was not prejudicially deficient in failing to present evidence that the blood in the stool found by

Dr. Alonso was not a sign of sodomy also fails. (Response at 203.) As Dr. Alonso explained in his declaration, the microscopic amount of blood he observed in the stool was likely due to coagulopathy and/or irritation from the nurses taking her rectal temperature. (Ex. 144 at ¶ 9.) Due to counsel's failure, the jury did not learn that this was not a basis for his opinion that she was sodomized.

In sum, Respondent cannot refute the extraordinarily strong factual support for the claims in the Corrected Amended Petition and this Informal Reply, which counsel failed to present to the jury, that Consuelo was not sodomized on November 17, 1991, prior to her admission to DRMC.

#### c. Conceded Prejudicial Failure to Refute Rape Evidence.

Respondent concedes that counsel "may have" provided prejudicially ineffective representation in failing to show Consuelo was not raped. Respondent also concedes that there is insufficient evidence to sustain Mr. Benavides's conviction for rape and the rape special circumstance. Respondent, nonetheless, attempts to cabin the unavoidable far-ranging effects of its concession by arguing that counsel's errors have no repercussion for the sodomy and lewd and lascivious convictions and special circumstance findings. (Response at 206-07.) Respondent cannot rationally maintain that counsel's fundamental lack of understanding of the key medical evidence, which led to her failure to counter the rape conviction, did not also affect her representation of Mr. Benavides on the sodomy and lewd and lascivious charges. Further, Respondent cannot avoid the substantial blow to the state experts' credibility given their concession that Dr. Dibdin provided false information to Dr. Diamond and that Dr. Diamond reached a diagnosis and testified without knowing basic, critical information in the medical records. Had counsel met the most basic

standard of care, which requires knowledge of the extent and causes of injuries to the genitalia and anus, counsel would have been able to show that the sodomy, and lewd and lascivious charges were based on false and misleading evidence presented by the state experts akin to that which the State has admitted led to a wrongful conviction for rape. There can be no doubt that had counsel shown the false basis for the state expert's conclusion that Consuelo was raped and presented the plethora of medical evidence in the Corrected Amended Petition and this Informal Reply that she was also not sodomized or sexually abused, at least one juror, and likely all jurors, would have had a reasonable doubt about Mr. Benavides's guilt of the sex abuse charges. Respondent's argument that Mr. Benavides has not even made a prima facie case of counsel's prejudicial ineffectiveness is absurd.

In the original petition filed in 2002, Mr. Benavides explained in detail counsel's unreasonable failure to show the lack of evidence of vaginal penetration. (*See* RCCAP at 235-43; *see also* 2002 Petition[66] at 214-22.) Mr. Benavides explained that Dr. Dibdin falsely testified that there was an injury in the internal vaginal cavity, though he had not made such a finding in his autopsy report. Mr. Benavides explained that Dr. Diamond had testified that his conclusion that Consuelo was raped was based on Dr. Dibdin's report to him of a laceration in the anterior wall of the vagina. (10 RT 2060.) Dr. Diamond explained to the jury that the tear in the anterior wall of the vagina explained what had happened with the catheter he had tried to insert in Consuelo's urethra at the time of his examination. He explained that as he "went for the urinary meatus, [the catheter] went into that vaginal opening and through the anterior wall [sic]

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[66] "2002 Petition" is used to refer to the Petition for Writ of Habeas Corpus filed on November 12, 2002.

of the vagina into the peritoneal cavity." (10 RT at 2060-61.) He told the jury that external trauma could not account for the tear and that the tear indicated she had been vaginally penetrated. (*Id.* at 2061.) As Mr. Benavides explained in the 2002 Petition, Dr. Diamond's testimony that there was a tear in the anterior wall of the vagina was not substantiated by Dr. Dibdin. Relying on Dr. Kennedy's expert opinion Mr. Benavides explained that Dr. Dibdin's testimony used misleading terminology to suggest there was a tear inside the vagina, even though an examination of his autopsy report and the accompanying diagram indicated that the half inch tear he observed at the autopsy was in the posterior fourchette, an external area of the vagina. Mr. Benavides argued that counsel's failure to cross-examine Dr. Diamond and Dr. Dibdin regarding these matters and to move to strike Dr. Diamond's testimony as unsupported by the evidence was prejudicial. (*See* RCCAP at 235-43; 2002 Petition at 214-22.)

Notwithstanding the detailed explanation of the claim and supporting evidence, Respondent claimed in its original 2003 response that the claim was based on "speculation and conclusory assertions." (2003 Response at 103.) Respondent further criticized Dr. Kennedy's interpretation of the autopsy diagram to indicate that the half inch laceration found by Dr. Dibdin was in the external genitalia as "unreasonable." (2003 Response at 104.) Notably, Respondent has never provided a declaration from Dr. Dibdin to explain why his testimony contradicted his autopsy findings and why he repeatedly provided false information to Dr. Diamond.

In 2008, Mr. Benavides filed a Corrected Amended Petition. There was absolutely no change to this subclaim nor the exhibits supporting the claim in the Corrected Amended Petition. (*See* RCCAP at 235-43.) Nonetheless, Respondent's 2007 response to this claim was substantially different. Based on the information in the 2002 Petition, Respondent

belatedly concedes that Mr. Benavides was wrongfully convicted of rape and the related special circumstance finding. Respondent concedes that Dr. Dibdin falsely informed Dr. Diamond that there was a tear in the anterior wall of the vagina. (Response Ex. 1 at 10.) Respondent further concedes that Dr. Diamond testified without knowing critical information in the medical records. (*Id.* at 9 (conceding he was unaware of KMC surgeon Dr. Bloch's report before testifying); *id.* at 10 (conceding he was unaware that neither Dr. Dibdin's testimony nor autopsy report showed an interior vaginal tear); *id.* at 11 (conceding he was unaware of paralytic medication administered to Consuelo just before and at the time of his examination).) Respondent further now agrees with Dr. Kennedy that the most reasonable interpretation of the autopsy diagram is that there was no internal vaginal tear. (Response at 205.)

Based on his review of the medical records, Dr. Diamond now believes that Dr. Dibdin's report of a tear to the anterior vaginal wall is not "substantiated." (Response Ex. 1 at 10.) In other words, Dr. Dibdin provided false information to Dr. Diamond about a tear in the internal vaginal wall and falsely testified to that effect. This was not the first time Dr. Dibdin provided false information to Dr. Diamond. As shown above, Dr. Dibdin falsely informed Dr. Diamond prior to the preliminary hearing that there was a tear in the rectum (10 RT 2085) and provided an anatomically impossible cause of death. As shown in the Corrected Amended Petition, Dr. Dibdin's false reporting of his findings is part of a pattern of egregious misconduct in this and other cases which has led to a series of wrongful criminal prosecutions. (*See supra* Claim One, subclaim one.) The prejudicial effect of his false and misleading testimony had an undeniable pervasive effect in Mr. Benavides's case.

The prosecution's claim that Mr. Benavides is guilty of lewd and lascivious conduct relies on the same evidence that was presented at trial in support of the rape and sodomy convictions.[67] Accordingly, the jury would not have convicted Mr. Benavides of lewd and lascivious conduct had they had a reasonable doubt about the sodomy and rape charges.

**1) Counsel Unreasonably and Prejudicially Conceded Consuelo Had a Tear in the Internal Vaginal Wall.**

While conceding that counsel was prejudicially ineffective in failing to present evidence of the lack of tear in the internal vaginal wall and the insufficiency of the evidence in support of the rape charge, Respondent disingenuously maintains that counsel's argument conceding there was a tear in the internal vaginal wall was neither unreasonable nor prejudicial. (Response at 210.) Counsel argued in closing that Dr. Diamond must have torn the vaginal wall when he attempted to catheterize her. (18 RT 3620-21.) Counsel failed to present any medical experts in support of her argument. In rebuttal argument, the prosecutor pointed out that defense experts had refuted her theory having testified that they did not believe internal vaginal tears would be caused by catheterization. (19 RT 3596.) Counsel's argument, unsupported by any medical evidence, conceding a

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[67] This Court mistakenly asserted on appeal that the record contains additional evidence in support of the lewd and lascivious conviction. *People v. Benavides*, 35 Cal.4th 69, 98 (2005). Contrary to this Court's assertion, there is no evidence that Mr. Benavides picked up, disrobed, removed Consuelo's diaper, and held and placed Consuelo in a position to facilitate the rape and sodomy. *Id.* Consuelo was fully dressed and had her diaper on when she was taken to the hospital and there was no evidence the diaper had been removed. (13 RT 2626-27.) To the extent this Court relied on Dr. Dibdin's testimony that the assailant placed the child on his lap to sodomize her (11 RT 2144), as shown above, Dr. Dibdin's testimony has been fully discredited.

tear in the internal vaginal wall that did not exist, was extremely prejudicial to the defense. (RCCAP 242-43.)

Respondent argues that counsel's argument was a "fair comment" on the evidence presented at trial, while willfully ignoring the evidence in the Corrected Amended Petition. (Response at 210.) Counsel argued that Dr. Diamond must have torn the vaginal wall because in order for the catheter he inserted to reach the peritoneum, as he had testified, the catheter would have had to penetrate not only through the urethra wall, but also the anterior and posterior vaginal walls. (18 RT 3620-21.) Respondent does not explain how counsel's unsupported supposition, refuted by her own defense experts, can be characterized as a "fair comment" on the evidence.

Respondent also contends that counsel's argument was fair in light of Dr. Lovell's testimony, while completely ignoring his declaration where he explains that his testimony was uninformed by the full medical record and hampered by the rushed and limited time he had to review the preserved tissue. (Response at 208-10.) As Dr. Lovell explains:

> A review of the full set of medical records has given me an understanding about the course of events during her hospitalization and her deteriorating medical condition that I did not have at the time I testified. Had I had this understanding in 1993, I would have testified that there was no indication in her medical records which would lead me to suspect that Consuelo had been vaginally or anally penetrated with a penis or similar sized object on the night of November 17, 1991. Had I had this information I would not have testified that sex abuse might explain the injuries to her genitalia and anus.

(Ex. 80 at ¶ 15.)

Dr. Lovell, like many of the other doctors who testified was not informed that medical staff at DRMC had not seen signs of trauma to her genitalia or anus, had repeatedly tried to catheterize her, and that the first

signs of trauma were seen at KMC. (Ex. 80 at ¶ 16.) Because he was not provided with a full set of medical records, he was also not informed that for most of her hospitalization Consuelo had been in disseminated intravascular coagulation (DIC). (Ex. 80 at ¶ 18.) Because he did not have full knowledge of the course of Consuelo's hospitalization nor time to competently and carefully review the preserved tissue at the Coroner's office, he was unable to explain that the hemorrhaging he observed between the rectum and vaginal wall was most likely the result of DIC. (Ex. 80 at ¶ 18.)

In post-conviction, unlike at trial, in accordance with the standard of care, Dr. Lovell was given the opportunity to review the slides carefully and in conjunction with a full set of Consuelo's medical records. As Dr. Lovell explains, the standard of care for reviewing tissue slides requires time and careful consideration to arrive at an accurate and reliable result:

> [At trial] I only had about an hour to review [the microscopic slides at the Coroner's Office], which I believed was insufficient time to evaluate fully the state of the tissue. In the course of my years as a pathologist, I have developed a practice that I believe best ensures the integrity and reliability of my observations and opinions. My professional practice includes an initial, but thorough review of available slides and tissue, reflective consideration of my 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 my conclusions. The time frame in this case permitted no such review or evaluation. I attempted to speak with Ms. Huffman by telephone to inform her that I needed additional time to review the materials, but she was never available to speak with me. My telephone messages to that effect were never returned.

(Ex. 80 at ¶ 9.) Based on his careful review of the slides in post-conviction Dr. Lovell determined that there is no evidence of a tear in the slides of the

perianal space. The slides show much edema (swelling), but little inflammation. One section with rectal and vaginal mucosa has a wall of space with clotted blood. (Ex. 80 at ¶ 13.) Because at trial Dr. Lovell did not have the benefit of all the medical records and sufficient time to carefully examine the slides, Dr. Lovell was equivocal about the origin of this clotted blood. He testified that he could not "say one way or the other for certain" whether the clotted blood was the result of penetration. (16 RT 3104.) As Dr. Lovell explains, he was unable to accurately explain the origin of the blood clot because he did not have a full set of medical records:

> I did not know that for most of her hospitalization Consuelo was in disseminated intravascular coagulation (DIC). Had I known this information at trial, I would have better explained my findings regarding the hemorrhage in the wall between the vagina and the rectum that I saw in my review of the slides. Without this information, it was difficult for me to counter the prosecution's allegations that the injuries to the genitalia and anus seen by medical personnel indicated she had been sexually molested. In addition, because Ms. Huffman was not well prepared she too did not ask me the appropriate questions while I was testifying.

(Ex. 80 at ¶ 18.) Dr. Lovell's post-conviction interpretation of the slides is consistent with that of Dale S. Huff, M.D., a Senior Pathologist at the Children's Hospital of Philadelphia, certified in Anatomic and Pediatric Pathology. As Dr. Huff explains:

> It is my professional opinion to a high degree of medical certainty that the slides do not depict any lacerations or tears. The slides depict tissue degeneration consistent with the decline in Consuelo's medical condition during the eight days she was hospitalized prior to her death.

(Ex. 82 at ¶ 6.)

It is abundantly clear from the evidence in the Corrected Amended Petition, which has led to Respondent's concession that there is insufficient evidence of rape, that counsel's concession of a tear in the vaginal wall and feeble attempt to offer a baseless theory to explain it fell far below the standard of care required in a capital trial and prejudicially affected Mr. Benavides.

Respondent's attempt to defend counsel's concession of a tear in the vaginal wall based on Dr. Lovell's trial testimony, while willfully ignoring Dr. Lovell and Dr. Huff's declarations boarders on unethical. In November of 2009, five months after Dr. Diamond signed his declaration indicating his belief that Consuelo was not raped, Deputy Attorney General LeBel called Dr. Diamond to determine whether his findings in conjunction with Dr. Lovell's trial testimony that there was a tear between the rectum and vaginal wall changed his opinion that Consuelo was not raped. (Response Ex. 14 at 8 (Transcript of 11/16/09 Telephonic Interview of Dr. Diamond by Ms. LeBel and Special Agent Don Newman).) Ms. LeBel provided Dr. Diamond with Dr. Lovell's trial testimony, but notably did not provide him with Dr. Lovell's post-conviction declaration where he explained the flaws in his testimony, nor Dr. Huff's declaration. (Response Ex. 14 at 7 (Ms. LeBel noting she sent him Dr. Lovell's testimony); *see also* Ex. 148 at 6723, 6727.) Ms. LeBel's failure to provide Dr. Lovell and Dr. Huff's declarations to Dr. Diamond, which squarely refutes Dr. Lovell's trial testimony, raises grave questions regarding whether she attempted to mislead Dr. Diamond. Further, Respondent's repeated reference in the Response to the fact that Dr. Diamond rendered his opinion without opining on the validity of Dr. Lovell's forensic findings in an attempt to suggest that the forensic findings might support the rape conviction, (*see, e.g.,* Response at 206, n. 49), misleads the court. *See* Rule 5–200 of the Rules of

Professional Conduct (providing that "[i]n presenting a matter to a tribunal, a member: [¶] (A) Shall employ . . . such means only as are consistent with truth; [and] [¶] (B) Shall not seek to mislead the judge . . . by an artifice or false statement of fact or law. . . .").

In response to Ms. LeBel's question whether Dr. Lovell's testimony changed his opinion that Consuelo had not been raped, Dr. Diamond indicated that Dr. Lovell's findings were beyond his expertise and required review by a forensic pathologist. (Response Ex. 14 at 8.) Ms. LeBel did not inform Dr. Diamond that the slides had been reviewed by an expert pediatric pathologist, Dr. Huff. Dr. Diamond further stated that the tear of the posterior fourchette described by Dr. Dibdin and the two inch tear of the hymen he observed "are absolutely not indicative of vaginal penetration." (Response Ex. 14 at 8.) He explained that the hymenal tear he observed as a result of the numerous attempts at catherization. (Response Ex. 14 at 10.) When Ms. LeBel further prodded, Dr. Diamond stated that those physical findings are "not indicative, emphatically, not indicative of rape." (Response Ex. 14 at 9.) Given Dr. Diamond's unequivocal rejection of the physical findings as indicative of rape and the uniform expert evidence that the slides contain no indication substantiating the rape, there can be no doubt that Mr. Benavides was wrongfully convicted of rape and that there was error in the finding that the rape special circumstance was true.

**2) Counsel Unreasonably and Prejudicially Failed to Investigate and Present Evidence Explaining the Causes of the Difficulty Catheterizing Consuelo.**

Respondent contends that counsel was not prejudicially ineffective in failing to investigate the causes of the difficulties catheterizing Consuelo and to present evidence explaining the difficulties were likely attributable

to a urethral malformation, as opposed to injuries due to rape. Respondent argues that Consuelo's medical records do not document a urethral malformation, and that in any case the evidence is irrelevant because the prosecutor did not argue the difficulties catheterizing Consuelo were attributable to rape. (Response at 210-11.) Respondent's arguments lack merit. Due to counsel's unreasonable failure to present expert evidence to explain the catheterization difficulties as likely attributable to a malformed urethra, the jurors likely reasonably inferred that the difficulties were caused by sexual abuse.

The jurors heard prosecution witnesses testify that DRMC and KMC personnel had difficulty catheterizing Consuelo. DRMC emergency room technician Frances Zapiain testified that Consuelo was lying in an unusual frog-like position. (14 RT 2780.) In response to the prosecutor's question whether there was something "abnormal about the vagina," Ms. Zapiain testified, "[s]lightly reddened and like resistance, we couldn't get [the catheter] in." (14 RT 2780-81.) The testimony was clearly intended to suggest to the jury that trauma from the rape affected the nurses' ability to catheterize Consuelo in the urethra. Likewise, KMC nurse Betsie Lackie testified that when she started to attempt to catheterize Consuelo she observed a massive hematoma to the external genitalia and what appeared to be some internal tearing from the urethra to the vagina. (11 RT 2239.) She stated that the nursing staff was unable to pass a feeding tube to get a urine specimen and the physicians had to perform the procedure. (11 RT 2239-40.) She specifically attributed the tear she observed between the urethra and vagina as the cause of her inability to catheterize Consuelo: "All I can tell you, there was a tear present and that's why we were unable to insert a catheter and had to have the physicians do it." (11 RT 2250.)

Because counsel failed to offer an explanation for the difficulties catheterizing Consuelo to counter the explanation offered by the prosecution the jury very likely understood the catheterization difficulties as corroboration that Consuelo had been raped. Counsel's failure to present such evidence is particularly egregious as it was readily available in the discovery provided by the prosecution. Supervisory nurse Faye Van Worth, who had far more expertise, training, experience, and exposure to Consuelo than Ms. Zapiain, told the District Attorney investigators that she attributed the difficulties catheterizing Consuelo to "an anomaly of the urethra." (Ex. 4 at 1745-46.) Had counsel interviewed and called Ms. Van Worth to testify, she could have explained why the urethral anomaly could lead to catheterization problems as follows:

> These catheterization problems likely were exacerbated because the baby appeared to have a malformed urethral area. Generally, a female person is born with two orifices in her genital area: a vaginal orifice connecting to the uterus, and a urethral meatus that connects to the bladder. There are some developmental anomalies in which the urethral meatus opens into the vagina rather than as a separate orifice above the vagina. This condition makes it extremely difficult to catheterize a patient, especially a child. Even when it is possible to catheterize, nurses often are required to make multiple attempts at the catheterization. The multiple attempts may cause the patient's skin to become irritated.

(Ex. 75 at ¶ 8.) Ms. Van Worth and Ms. Roberts could have also provided convincing evidence that the tear from the urethra to the vagina that Ms. Lackie readily observed when first cleaning the labia to insert the catheter was not present at DRMC. (Ex. 75; Ex. 74.) Had counsel consulted with an expert in pediatric urology, counsel would have learned that the photographs of Consuelo's genitalia substantiate Ms. Van Worth's observations that Consuelo may have had a subtle malformation of the

urethra.[68] (Ex. 83 at ¶ 45.) There is no possible reasonable basis for counsel's failure to call Ms. Van Worth and Ms. Roberts to testify, consult with the appropriate experts, and present evidence negating the prosecution witnesses' testimony providing an alternative to rape as a reason for the catheterization difficulties. Counsel's failure to present this evidence alone, or in conjunction with her failure to counter the rape and sodomy charges with the vast and compelling exculpatory evidence detailed in the Corrected Amended Petition prejudiced Mr. Benavides.

**3) Counsel Unreasonably and Prejudicially Failed to Present Evidence Explaining the Injuries to the Outer Vaginal Labia, Which First Appeared at Kmc, as Unrelated to Sexual Abuse.**

Respondent misleadingly attempts to frame the issue as whether counsel failed to present "more evidence" that the genital trauma was not caused by sexual abuse. (Response 211-15.) Counsel wholly failed to present evidence that the genital trauma first observed at KMC was attributable to the repeated multiple failed attempts at catheterization at DRMC and hospital procedures. Respondent's position that counsel's performance conformed to constitutional standards is particularly indefensible given that their own expert, Dr. Diamond, now maintains that the hymenal tear he observed was caused by the numerous attempts to catheterize Consuelo.

Surprisingly, Respondent refers to the damaging testimony of DRMC technician Zapiain, and KMC Dr. Alonso and nurse Lackie as evidence that counsel presented evidence that catheterization accounted for the genital

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[68] It is noteworthy that though in his 2009 declaration Dr. Diamond contests Dr. Kennedy's opinion that Consuelo may have also had an associated anal malformation, Dr. Diamond does not appear to contest that Consuelo's urethra was malformed. (Response Ex. 1 at 21.)

trauma. (Response at 212.) Ms. Zapiain did not attribute the slight redness she observed to catheterization. Rather Ms. Zapiain indicated that the redness and inability to catheterize Consuelo were indications that the vagina was abnormal. (14 RT 2780.) As explained above, counsel unreasonably failed to counter Ms. Zapiain's uninformed suggestion that Consuelo's vagina looked abnormal with the testimony of the more qualified and experienced DRMC nurses Faye Van Worth and Linda Roberts, who attempted the catheterizations and could have unequivocally testified that they saw nothing abnormal about Consuelo's vagina during their multiple attempts to catheterize her. Likewise, counsel offered no evidence to explain the trauma to the genital, urinary area which Dr. Alonso testified about (13 RT 2686)[69] or Ms. Lackie's testimony regarding the hematoma and tear in the genitalia, which she first observed when she began to clean the labia in order to catheterize Consuelo. (11 RT 2239, 2249.) As Dr. Alonso states in his declaration, which Respondent wholly ignores, had he been fully informed that this trauma was not observed at DRMC, he would not have testified that it was attributable to sexual trauma but rather that it was due to her medical condition and prior medical procedures at DRMC. (Ex. 144 at ¶¶ 8-9.) As Dr. Alonso explains, "[i]n their repeated attempts to catheterize Consuelo and take her rectal temperature, the [DRMC] nurses would have observed any trauma to the anus or genitalia if it had been present." (Ex. 144 at ¶ 9.) This is substantiated by the fact that Ms. Lackie observed the trauma not by conducting a sex abuse exam, but when she first began to clean the labia in order to catheterize Consuelo. (11 RT 2239.) Respondent cannot credibly argue that the nurses at DRMC who repeatedly tried to catheterize

[69] Respondent provides an incorrect citation for this testimony as occurring at 13 RT 2868. (Response at 212.)

Consuelo would not have also observed what Ms. Lackie described as a "massive hematoma" in the labia if it had been present prior to Consuelo's arrival at DRMC. Due to counsel's failure, the jury never learned that the genital trauma was first observed at KMC and not present at DRMC.

Respondent also argues that counsel presented expert evidence that catheterization could account for the genital trauma first observed at KMC via the testimony of Dr. Baumer and Dr. Lovell. (Response at 212.) Respondent is incorrect. Dr. Baumer and Dr. Lovell both testified that redness they observed in a photograph of the genitalia taken at UCLA, four days into Consuelo's hospitalization, which also showed a catheter inserted into the urethra, could be attributable to rubbing from the catheter. (*See* 14 RT 2869-70 (Dr. Baumer's testimony regarding People's Exhibit 35, a photograph taken at UCLA on November 21, 1991, indicating that "you have a foley catheter in that causes redness"); 16 RT 3116-18[70] (Dr. Lovell's testimony that Defense Exhibit AA is a photograph which shows reddening "adjacent to the catheter"); 16 RT 3302 (Prosecution's stipulation that Defense Exhibit AA is a photograph taken at UCLA on November 21, 1991).) Their testimony in no way explained the trauma Dr. Alonso and Ms. Lackie first observed at KMC, after she arrived from DRMC where nurses had made repeated attempts to catheterize her. Moreover, any helpful effect from Dr. Lovell's testimony was blunted by his testimony that Consuelo may have been vaginally penetrated. (16 RT 3127.) As Dr. Lovell explains in his declaration, which Respondent also ignores, had he been provided with Consuelo's full medical history and been adequately prepared to testify, he would not have testified that sex abuse explained the genital and anal injuries and would have testified that the most likely

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[70] Respondent provides an incorrect citation for this testimony as occurring at 16 RT 3316-17. (Response at 212.)

explanation for the trauma observed at KMC were the multiple catheterization attempts at DRMC. (Ex. 80 at ¶¶ 15-16.)

Respondent further contends that counsel was not ineffective for failing to present evidence that the tear to the hymen recorded by Dr. Diamond and the half-inch tear to the posterior fourchette reported by Dr. Dibdin were most likely attributable to the multiple catheterization attempts. (*See* Ex. 83 at ¶ 14-18 (explaining that the hematoma and bruising observed at KMC were most likely attributable to DRMC catheterization attempts); Ex. 79 at ¶ 19 (explaining that the most likely explanation for the bruising to the vulva observed at KMC, which was not present at KMC, were the multiple unsuccessful attempts at catheterization at DRMC.) Respondent claims that counsel adequately consulted with Dr. Baumer, but that Dr. Baumer did not agree with Dr. Kennedy that catheterization could account for the genital trauma. (Response at 212-13.) Respondent affirmatively misleads the Court by ignoring Dr. Baumer's declaration where he explains that his testimony would have been very different had he been timely provided with a full set of medical records, an informed second opinion regarding Dr. Dibdin's findings regarding the anal and vaginal tissue slides, and the post-conviction declarations of DRMC personnel and other treating medical personnel. Had Dr. Baumer been provided with this information he would have testified that "Consuelo was not sexually assaulted." (Ex. 142 at ¶ 16.)

That Respondent defends counsel's failure to present evidence that the catheterization caused the genital trauma is surprising given that Dr. Diamond has now conceded that the hymenal tear he observed was caused by the catheterization attempts. (Response Ex. 14 at 10 (Ms. LeBel's interview with Dr. Diamond, 11/16/09) ("That's where they testified numerous attempts to catheterize and *I believe* that's what caused the tear at

the hymen at 2:00 o'clock.") (italics added)).) Respondent's citation to Dr. Baumer's response to the leading, compound question by the prosecutor denying he was attributing the "lacerations of the anus, a laceration in her vaginal wall and a tear in her hymen," to catheterization, (14 RT 2871), is also surprising given that Respondent has conceded that there is no tear in the vaginal wall. (*See* Response at 206, citing Response Ex. 1 at p.10.) If Respondent was able to change Dr. Diamond's opinion that the genital trauma observed at KMC was indicative of sex abuse by providing him with Consuelo's full medical record and the informed medical opinion of treating and consulting experts, surely counsel could have done the same with her own experts prior to trial. Respondent's arguments to the contrary cannot be countenanced by this Court.

Had counsel conducted the required investigation and interviewed the nurses at DRMC, counsel would have learned that the Foley catheters stocked in the DRMC emergency room at the time were too large to be used on a child as small as Consuelo. (Ex. 72 at ¶ 4.) Consuelo's medical records indicate that the DRMC nurses used a Foley to attempt to catheterize Consuelo. (Ex. 1 at 5 ("Foley attempted.").) Had the jury heard this evidence it could have provided an explanation for why the repeated catheterization attempts at DRMC could have caused the trauma first seen at KMC. Respondent argues that Ms. Caraan's declaration indicating that the DRMC emergency room did not stock smaller Foley's and the medical records indicating a Foley was used to catheterize Consuelo does not prove an inappropriately sized Foley was used to catheterize Consuelo. (Response at 213-14.) Respondent again misperceives Mr. Benavides's burden, which is only to establish a prima facie case for relief. *See Duvall*, 9 Cal. 4th at 475. Ms. Carran's declaration provides strong circumstantial evidence that an inappropriately sized catheter was used at DRMC and may

have caused the injuries. Respondent's speculation that the nurses did not use a Foley though medical records refer to a Foley and only Foley's were available at DRMC is baseless. Further, Respondent's speculation in no way refutes the prima facie case that counsel was prejudicially ineffective for failing to present evidence of the use of inadequately sized catheters as a possible cause of the injuries to the genitalia first seen at KMC. Most importantly, regardless of what size Foley may have been used at DRMC, there is no dispute that the nurses there did not see any trauma despite ample opportunity and training to see it. That irrefutable fact that was not presented to the jury warrants relief.

#### d. Failure to Present Evidence That Anal Trauma Seen by Hospital Personnel Was Not Caused by Penile Penetration.

Trial counsel unreasonably and prejudicially failed to present evidence that the anal trauma, which was first observed at KMC, was not caused by penile penetration. (*See* RCCAP at 244-53.) Respondent disputes the extensive evidence presented in the Corrected Amended Petition by the physicians and nurses who treated Consuelo during her hospitalization indicating that the anal trauma they observed was not attributable to penile penetration. Respondent relies solely on the 2009 declaration of Dr. Diamond where he takes issue with the assertions of all the treating nurses and physicians who personally observed the trauma and who now, with the benefit of knowing Consuelo's full medical history, do not attribute it to penile penetration.

Respondent's argument fails for several reasons. First, Dr. Diamond no longer believes that Consuelo was sodomized. (Ex. 149 at ¶ 5.) Second, as shown in detail below, Respondent's arguments, which rely on Dr. Diamond's 2009 declaration are meritless. Third, even if there still were a

genuine factual dispute between Dr. Diamond and all the treating physicians and nurses, it is a dispute that counsel unreasonably and prejudicially failed to present to the jury and which unquestionably establishes a prima facie case of counsel's prejudicially deficient performance. Had the jury learned that Dr. Diamond's trial opinion was formulated without knowledge of the full medical record and contradicted by all the treating physicians and nurses and highly qualified and specialized experts such as Dr. Kennedy and Dr. Heger, it is reasonably probable that at least one juror would have had a reasonable doubt that Mr. Benavides sexually abused Consuelo.

**1) Counsel Unreasonably and Prejudicially Failed to Show That the Anal Tears Dr. Dibdin Testified About Were Not Present at Drmc.**

First, Respondent summarily dismisses the claim that counsel unreasonably failed to present evidence showing that the anal tears Dr. Dibdin testified about were not present at DRMC. (RCCAP at 243-44.) Dr. Dibdin testified that he observed anal tears that "had gone through the muscles of the anus and that's why the anus was dilated to this large diameter." (11 RT 2119.) Respondent claims its response to Claim M2c(3)-(6) explains why counsel was not ineffective in countering Dr. Dibdin's testimony. (Response at 215.) In response to that claim, Respondent argues that DRMC personnel did not observe the trauma to the genitalia or anus because they were not looking for it and did not have an opportunity to visualize it. (Response at 183-86.) It is obvious that though DRMC personnel were not looking for signs of sex abuse, they would have seen the deep tears Dr. Dibdin described and the bleeding which would necessarily result from tears through the muscle that lead to a dilated anus had such tears been present at DRMC. (Ex. 83 at ¶ 12; Ex. 169 at ¶ 19.)

Respondent has not presented any evidence to counter the declarations of all the DRMC personnel indicating they had ample opportunity and training to see such trauma had any been present. (Exs. 72-76.) In his 2009 declaration Dr. Diamond claims that detection of the anal tears required a "concentrated look" because the small size of the two tears reported in the autopsy report (one a ¼ inch and the other 3/8 inch) would not have been seen without carefully looking for them. (Response Ex. 1 at 14.) Dr. Diamond, however, does not comment on Dr. Dibdin's testimony that the tears were so deep that they went "through the muscle" and caused the anus to dilate to a large diameter, information which Dr. Dibdin did not record in his autopsy report.[71] Respondent's unsupported assertion that such deep tears and the attendant profuse bleeding could have been missed by DRMC personnel is illogical. Counsel's failure to provide evidence from DRMC personnel and expert testimony to counter Dr. Dibdin's attribution of this trauma to penile penetration was extraordinarily prejudicial.

Next, Respondent defends counsel's presentation of expert evidence to counter Dr. Dibdin's report that the anal tears were present in the preserved tissue. (Response at 215.) Respondent argues that Dr. Lovell did testify that he did not see anal tears in the preserved tissue maintained at the Coroner's office and that testimony about the tissue slides would be irrelevant because they did not contain tissue from the anus. (Response at 215.) Ignoring Dr. Lovell's declaration, Respondent further claims that Mr. Benavides has failed to show how counsel's failure to provide Dr. Lovell with sufficient time and a full medical history prevented him from providing helpful testimony for Mr. Benavides. (Response at 216.)

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[71] In disputing Dr. Kennedy's opinion, Dr. Diamond misquotes Dr. Kennedy's declaration, omitting his reference to Dr. Dibdin's testimony where he describes the tears as going through the muscle. (Ex. 169 at ¶ 19.)

Respondent's arguments lack merit. Dr. Lovell's muddled and prejudicial testimony, which resulted from counsel's failure to give him complete records and adequate time to review the slides, and where he partially confirmed Dr. Dibdin's findings, wholly failed to adequately counter the prosecution's case.

Respondent mischaracterizes Dr. Lovell as having testified that he did not see the anal tears Dr. Dibdin described. Though Dr. Lovell testified that he did not see a tear in the anal sphincter at six o'clock and nine o'clock, he immediately followed that assertion with testimony explaining that he saw the acute tear in the microscopic slides that Dr. Dibdin had described. (16 RT 3114-15.) Because counsel failed to provide him with time and materials, and to adequately prepare him to testify, Dr. Lovell's testimony was very unclear as to the location of the tear he was confirming. Counsel referred him to the section of the autopsy report entitled "anus, vagina and urinary bladder," and Dr. Lovell gave a convoluted explanation stating that there were microscopic cross-sections "several inches up" where he "saw what [Dibdin's] talking about there, yes." (16 RT 3114.) When asked whether the tear was four to seven days old as Dr. Dibdin had concluded, Dr. Lovell responded, "Wait, no, oh, no, I was talking about the part down below, the upper part I wouldn't try to age it." (*Id.*) Given the lack of clarity of Dr. Lovell's testimony and the inherent complicated nature of the medical information it is most likely that all the jury gathered from Dr. Lovell's testimony was that he had confirmed Dr. Dibdin's findings of an anal tear in the microscopic slides.

Counsel's last minute consultation with Dr. Lovell had a direct prejudicial impact on his ability to provide helpful testimony. Though examination of the tissue at the Coroner's office was critical to mounting a defense, counsel unreasonably waited until the day before Dr. Lovell

testified to have him examine the tissue. Counsel ignored Dr. Lovell's repeated calls and warnings that the one hour he was provided to examine the slides was insufficient to arrive at a reliable and scientifically sound conclusion. (Ex. 80 at ¶¶ 6, 9.) Had Dr. Lovell been given sufficient time to review the slides and a full set of medical records, Dr. Lovell would have testified that there is no tear in the microscopic tissue slides. (Ex. 80 at ¶ 13.) Instead of describing the hemorrhage in the wall between the vagina and rectum that he saw as a tear, the medical records would have enabled Dr. Lovell to explain the hemorrhage as resulting from the disseminated intravascular coagulation (DIC) documented in her records for most of her hospitalization. (Ex. 80 at ¶ 18.) Most importantly he would "not have testified that sex abuse might explain the injuries to her genitalia and anus." (*Compare* Ex. 80 at ¶ 15 (finding no evidence of sexual abuse after reviewing the slides and medical records in post-conviction), *with* 16 RT 3127 (Dr. Lovell testifying that he agrees with prosecutor that he is not saying there was not vaginal and anal penetration).)

Respondent misses the point when she argues that counsel's failure to present evidence that microscopic evaluation of the tissue slides did not confirm the anal tears reported by Dr. Dibdin was irrelevant because the slides did not contain tissue from the anus. (Response at 215-16.) Due to counsel's failure to adequately consult with her experts prior to trial and elicit information during their testimony, the jury did not learn that Dr. Dibdin falsely reported in his autopsy report that the microscopic slides "confirmed" the presence of acute tears and hemorrhage in the anus. (Ex. 8 at 3560.) Counsel failed to present testimony specifically explaining that Dr. Dibdin's findings were false because the slides do not contain tissue from the anus. (Ex. 82 at ¶ 5.) This was critical information that would have not only impeached Dr. Dibdin's testimony about the acute tears, but

also his testimony regarding the alleged presence of older injuries he reported observing in the microscopic slides of the anal tissue. (11 RT 2139-40.) Had the jury learned about this false finding alone or in conjunction with all the other false information that Dr. Dibdin provided—including a false report of a hole in the vagina (10 RT 2085), a false report about a hole in the rectum (Response Ex. 1 at 10), and an anatomically impossible cause of death (*see, e.g.*, Ex. 79 at ¶ 26)—the jury would not have credited Dr. Dibdin's testimony and would have realized that the prosecution's case was built on quicksand.

**2) Counsel Unreasonably and Prejudicially Failed to Present Evidence That Hospital Procedures and Consuelo's Fragile Medical Condition Likely Accounted for the Anal Tears First Seen by Dr. Diamond at Kmc.**

Respondent takes issue with Dr. Kennedy's explanation for the anal tears first observed by Dr. Diamond, 13 hours into Consuelo's hospitalization and after an abdominal surgery, as attributable to digital manipulation for hospital procedures and her deteriorating medical condition. (Response at 217-18.) Respondent's argument wholly fails because it relies on Dr. Diamond's 2009 declaration, which he has retracted after consulting with Dr. Heger and realizing that the superficial anal tears he observed are not indicative of sexual abuse and most likely attributable to her medical condition. (Ex. 149 at ¶ 5.) Respondent's argument also fails because at best it establishes only a factual dispute that warrants the issuance of an Order to Show Cause and because it lacks merit.

By the time Dr. Diamond examined Consuelo nurses had taken several rectal temperatures[72] and both Dr. Alonso and Dr. Diamond had inserted fingers[73] into her anus to examine her. (Ex. 83 at ¶ 29.) As Dr. Kennedy explains:

> The digital manipulation and rectal temperature readings most likely account for the tears observed by Dr. Diamond. The likelihood of injury from these procedures increased as Consuelo's edema worsened and she developed DIC. The edema and the DIC combined to make the tissue of her anus more susceptible to tearing and bleeding.

(Ex. 83 at ¶ 29.) Respondent cites Dr. Diamond's 2009 declaration in which he states that he had never seen a thermometer cause the "anal trauma that Consuelo had." (Response Ex. 1 at 18.) It is not clear from Dr. Diamond's sentence what specific anal trauma he believes could not have been caused by a rectal thermometer. To the extent he is referring to the anal tears, Dr. Diamond's position in his 2009 declarations was that the tears were so small that they would not have been detected without carefully looking for them at DRMC. (Response Ex. 1 at 14.) In his 2009 declaration Dr. Diamond does not directly address Dr. Kennedy's explanation that these small, superficial tears were caused by Consuelo's deteriorating medical condition leading to increased edema and DIC, which

[72] Respondent asserts that only three rectal temperatures had been taken at the time, one at DRMC and two at KMC. (Response at 217.) However, medical records indicate that it was likely taken several more times prior to Dr. Diamond's examination. (Ex. 169 at ¶ 14, n.2.)

[73] Respondent claims that Dr. Diamond inserted only one finger into her anus, but Dr. Diamond's testimony is inconsistent as to how many fingers he inserted. Though he did indicate at one point that he inserted one finger, in different parts of his testimony he indicated that he inserted "two fingers" (1 CT 196) and withdrew his "hand, my fingers" (10 RT 2050). Even if he only inserted one finger it could have caused the small, superficial tear. (Ex. 169 at ¶ 14, n.3.)

made her susceptible to bruising and tearing. In his 2012 declaration Dr. Diamond now recognizes that such superficial anal tears are indeed accounted for by Consuelo's medical condition. (Ex. 149 at ¶ 5.) Even Dr. Diamond still maintained his 2009 opinion, Respondent cannot reasonably dispute that counsel's failure to present expert testimony to counter Dr. Diamond's explanation for the anal tears was clearly prejudicial. If counsel had interviewed Dr. Diamond prior to trial and shown him a full set of medical records and photographs of Consuelo's genitalia and consulted with experts in the field such as Dr. Kennedy and Dr. Heger, it is reasonably likely that Dr. Diamond would have conceded that his opinion that Consuelo was sexually abused was based on incomplete and erroneous information and would have changed his opinion, as he has done today with full knowledge of the medical history, to opine that Consuelo was not sexually abused. (Ex. 149.) Even if Dr. Diamond had not been convinced at the time of trial to change his opinion, counsel could have presented the opinion of qualified and informed experts and shown that Dr. Diamond's opinion was based on insufficient and erroneous information. Had the jury known Dr. Diamond's history of reaching erroneous conclusions without adequately reviewing the medical records (*e.g.*, rape) it is reasonably likely that a jury would have credited Dr. Kennedy's explanation over Dr. Diamond's.

Respondent's attempt to defend counsel's performance by arguing that counsel had no reason to know another expert would provide Dr. Kennedy's opinion lacks merit. (Response at 217.) As already amply explained above, counsel's failure to provide her experts with a full set of medical records, adequate time to review the evidence and to ask them the pertinent referral questions prevented her from presenting strong exculpatory evidence to the jury. Both Dr. Baumer and Dr. Lovell have

explained that had they had adequate preparation they would have both testified that the medical evidence did not support a finding that Consuelo was sexually abused. (Ex. 80 at ¶ 23; Ex. 142 at ¶ 5.) Dr. Diamond has also now conceded that his opinion was based on inadequate knowledge of the medical records and erroneous understanding of the medical evidence. (Ex. 149.)

Furthermore, counsel was also ineffective for failing to consult with a pediatric urologist, such as Dr. Kennedy, who had the specific expertise necessary to assess the prosecution's evidence regarding injuries to the genitalia and anus, or a child abuse expert such as Dr. Heger, who could counter Dr. Diamond's mistaken beliefs. Dr. Baumer's expertise in emergency medicine and Dr. Lovell's in pathology did not provide them with the specific necessary knowledge to evaluate all the possible causes of the genital and anal injuries, including the possibility of a urethral or anal malformation as explained by Dr. Kennedy or the fact that Consuelo had the rare skin disease lichen sclerosus that made her skin susceptible to injury, as explained by Dr. Heger. (Ex. 83 at ¶¶ 45-46; Ex. 170 at ¶ 13.) Neither Dr. Lovell nor Dr. Baumer could offer a credible counter to Dr. Diamond, whose expertise as a pediatrician provided him with specific knowledge of children. *See Caro v. Calderon*, 165 F. 3d 1223, 1227 (9th Cir. 1999) (finding counsel was ineffective for failing to consult an appropriate expert in neurology or toxicology to assess exposure to toxic chemicals, though counsel had consulted with a medical doctor, psychologist, and psychiatrist).

Next, Respondent attacks a straw man by claiming that Dr. Kennedy attributed the anal tears to administration of medications via Consuelo's anus. (Response at 218-19.) As is clear from his declaration Dr. Kennedy never made such an assertion. Respondent wantonly misreads an

introductory sentence in Dr. Kennedy's declaration where he summarizes his conclusions, which he later explained in detail in his declaration. Dr. Kennedy states that the "*anal injuries* most likely resulted from manipulation of the anus as part of examination of the rectum, instrumentation associated with temperature taking and administration of medications." (Ex. 83 at ¶ 10 (emphasis added).) Dr. Kennedy was referring to all the anal injuries observed, including the anal tears, redness, and swelling and the loose sphincter tone. As Dr. Kennedy explained later in his declaration, and Dr. Diamond has conceded, the administration of medications—namely paralytic agents shortly before Dr. Alonso and Dr. Diamond examined Consuelo accounted for the lax sphincter tone they observed. (Ex. 83 at ¶ 22, 25; Ex. 169 at ¶ 17.) Respondent's distortion of Dr. Kennedy's language is a red herring.

Respondent contests Dr. Kennedy's opinion that Dr. Diamond and Dr. Alonso insertions of fingers in the anus for their examinations could have caused the small, superficial anal tears that Dr. Diamond reported. (Response at 219; *see* Ex. 83 at ¶ 29.) Though Respondent does not cite Dr. Diamond's 2009 declaration, Respondent appears to be relying on his rationale in that declaration for disagreeing with Dr. Kennedy. (*Cf.* Response at 219 with Response Ex. 1 at ¶ 28.) As stated above, counsel was ineffective for failing to present expert testimony such as Dr. Kennedy's to explain the causes of the anal tears other than sodomy even if the prosecution's expert disagreed. Without such evidence the jury had no other explanation for the injuries other than sodomy. Further, as Dr. Kennedy explains, Dr. Diamond's argument in his 2009 declaration overlooks the fact that when Dr. Alonso examined Consuelo and even more so the next day when Dr. Diamond examined her, Consuelo was experiencing severe problems with blood clotting and body edema that

made her very susceptible to inadvertent injury by routine medical procedures. (Ex. 169 at ¶ 14.) As Dr. Diamond has now conceded, Consuelo's medical condition best accounts for the superficial anal tears he observed. (Ex. 149 at ¶ 5.)

Respondent's reliance on Dr. Diamond's testimony that a finger could not have caused the tears because he observed "swelling completely around the anal opening," (10 RT 2064-65) is problematic. (Response at 219.)[74] As explained by Dr. Kennedy, if the swelling Dr. Diamond observed was caused by a large object such as a penis, then it would have been readily apparent to DRMC personnel. (Ex. 169 at ¶ 13.) As Dr. Diamond has now recognized, the more likely explanation for the swelling Dr. Diamond observed was her renal failure. (Ex. 149 at ¶ 5.) As Dr. Kennedy and Dr. Heger explain, the swelling observed by medical personnel at KMC is attributable to a combination of blood clotting problems, fluid overload, and problems producing urine which made her severely edematous. (Ex. 83 at ¶ 25; Ex. 170 at ¶ 15.) Dr. Diamond's testimony is also problematic because he has retracted part of the reason he opined that a finger could not have caused the trauma he saw. In the sentences preceding the testimony that Respondent cites, Dr. Diamond testified that the anal tears were caused by an object larger than a finger because the "[s]ize of the object is greater than the capability of the anus to dilate." (10 RT 2064.) After reviewing the medical records in 2009, Dr. Diamond realized and admitted that the anal dilation and lax anal tone he observed was not a result of trauma, but rather due to the paralytic medications Consuelo was given. (Response Ex. 1 at 10-11.) Dr. Diamond's testimony, therefore, about the size of the object that caused the anal tears cannot be credited as it was based on a lack

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[74] Respondent incorrectly refers to this testimony as occurring during cross-examination rather than direct examination.

of understanding of Consuelo's medical condition. Further, as Dr. Diamond has recently admitted, the superficial tears he observed are not indicative of sexual abuse. (Ex. 149 at ¶ 5.)

Relying on Dr. Diamond's 2009 declaration, Respondent argues that there was no anal manipulation during Consuelo's surgery or thereafter, before Dr. Diamond's examination, which could account for the anal tears he saw. (Response at 219-20.) Respondent's argument fails because Dr. Diamond had recently retracted his 2009 declaration and now understands and admits that the superficial anal tears he observed were indeed accounted for by the very delicate state of Consuelo's skin due to, among other things, lichen sclerosus. (Ex. 149 at ¶ 5.) Further, Respondent's argument misses the point. As explained in the portion of the Corrected Amended Petition to which Respondent is responding, and in Dr. Kennedy's declaration which is cited in the Corrected Amended Petition (RCCAP at 245), the small and superficial anal tears that Dr. Diamond first observed are most likely attributable to normal manual manipulation that attended the taking of rectal temperatures at DRMC and KMC and insertion of fingers for examination by Dr. Alonso and Dr. Diamond, which inadvertently caused the small tears due to the delicate condition of Consuelo's skin, which was caused by her critical medical condition. (Ex. 169 at ¶ 14.)

Respondent offers a disingenuous response to the claim that counsel was ineffective in failing to present expert evidence countering Dr. Diamond's testimony that the location of the anal tear he observed at 9:00 could not have been caused by a bowel movement. (Response at 220-21; RCCAP at 246.) On direct examination the prosecutor asked Dr. Diamond to explain the significance of the location of the anal tears he observed. Dr. Diamond responded as follows:

> If it's due, for example, to a large bowel movement, the narrowest part of the anus is from twelve to six, and so you may get a tear at six, or a tear at twelve, to an excessively large bowel movement, however, the tear at nine o'clock doesn't, that means something went in that caused it to tear.

(10 RT 2052.) On cross-examination, Dr. Diamond reiterated his rationale that the location of the tears led him to believe a bowel movement did not cause the tears. (10 RT 2091-92.) As Dr. Kennedy explains, there is no medically sound evidence for Dr. Diamond's reliance on the location of the tears to discount a bowel movement as a cause. (Ex. 83 at ¶ 31.) Respondent misportrays Dr. Diamond's testimony by arguing that he simply stated that he would "expect" to see tears at 6:00 and 12:00, but not at 9:00. As is clear from the quoted passage above, Dr. Diamond testified that the 9:00 tear cannot be caused by a bowel movement and that it "means something went in." (10 RT 2052.) Respondent's further contention that Dr. Kennedy, the Chief of Pediatric Urology at Lucille Packard Children's Hospital at Stanford University Medical Center, lacks the expertise and credentials to provide his opinion and that his reference to the lack of support in the medical literature for Dr. Diamond's opinion somehow shows he is speculating and has limited experience is simply bogus. (Response at 220-21.) Respondent falsely claims that Dr. Kennedy does not have "experience, let alone expertise" examining children in cases of suspected sex abuse. As explained by Dr. Kennedy in his declaration, he spent six years as a resident and fellow at The Presbyterian Hospital in New York examining children with genitourinary injuries resulting from physical and sexual abuse. (Ex. 83 at ¶ 5.) The fact that Dr. Diamond did not cite in his 2009 declaration any literature supporting his theory, or even referenced his theory as supportive of sodomy in the 2009 declaration even though he responded to most of the contentions in Dr. Kennedy's declaration

suggested that he no longer could stand behind his testimony. As became clear in 2012, Dr. Diamond's realization in 2009 that his opinion was based on false information about the vaginal injuries provided to him by Dr. Dibdin and lack of full information about the medical records, led him to consult with Dr. Heger to ensure that he had not made a mistake in maintaining that Consuelo was sexually abused. He has now recognized that the superficial anal tears he observed are not diagnostic of sexual abuse. (Ex. 149 at ¶ 5.) Counsel had an obligation to provide expert opinion to counter the medically unsound testimony given by Dr. Diamond that erroneously led the jury to believe the anal tears could only have been caused by an object entering the anal cavity. Counsel's failure prejudiced Mr. Benavides.

**3) Counsel Unreasonably and Prejudicially Failed to Present Evidence Explaining That the Anal Laxity and Dilated Anus First Seen at Kmc Was a Side Effect of the Medications Consuelo Was Given and Her Medical Condition.**

Though Respondent has provided a 2009 declaration from Dr. Diamond admitting that the anal laxity he and Dr. Alonso observed may have been a side effect of the paralytic medications Consuelo had been given rather than evidence of sodomy, (Response Ex. 1 at 11, 13), Respondent surprisingly maintains that counsel was not ineffective in failing to present this evidence and Mr. Benavides was not prejudiced by the fact that the jury did not hear this critical exculpatory evidence. Respondent claims that counsel was not ineffective for failing to present this evidence because her defense expert did not inform her about it and in any case, the evidence was not prejudicial because it was only a "contributing" factor for Dr. Diamond's conclusion that Consuelo was sodomized. (Response at 222-24.) Respondent's arguments are

indefensible. (RCCAP 246-49.) As explained above, Respondent's speculative argument that Dr. Alonso may have incorrectly attributed in his declaration the anal laxity he saw to paralytic agents that had been given at the time he examined her is meritless and contradicted by the available medical evidence. (Response at 223.)

Respondent argues that counsel was not ineffective in failing to interview Dr. Bloch prior to trial and provide him with a full set of Consuelo's medical records which would have allowed him to testify that the anal laxity observed at KMC was most likely attributable to paralytic medications, rather than sexual abuse. (Ex. 77 at ¶ 14.) Respondent argues that counsel had no reason to ask Dr. Bloch whether paralytic medications could cause a lax tone because Dr. Baumer did not provide her with that information. (Response at 223-24.) Respondent ignores Dr. Baumer's declaration explaining that counsel's failure to provide him with sufficient time, a full set of records, and the opinion of a forensic pathologist to verify Dr. Dibdin's findings as he requested, accounted for his inability to provide a fully informed opinion. As is patently clear from the opinion of many of the treating physicians, including Dr. Diamond, had they been provided with a full set of records and fully informed of Consuelo's medical history, they would not have attributed the anal laxity observed at KMC to sodomy. (*See, e.g.*, Response Ex. 1 at ¶ 9; Ex. 144 at ¶ 11.)

Respondent argues that counsel's failure to present evidence that the anal laxity was caused by paralytic agents rather than trauma was not prejudicial because it was "only a contributing factor" to Dr. Alonso and Dr. Diamond's opinion that Consuelo was sodomized. (Response at 274.) Respondent cannot minimize the damaging effect of Dr. Alonso and Dr. Diamond's erroneous testimony regarding the anal laxity in contributing to Mr. Benavides's wrongful conviction for sodomy. Dr. Diamond provided

the following extremely prejudicial, false testimony to explain the causes of the anal dilation and lack of anal tone he observed:

> The anal opening can be enlarged by acute——for example, an acute rape where there's a large object is inserted forcibly, damages the external sphincter and, therefore, the sphincter relaxes and you get a wide open patulous opening. It can also be caused at injury at birth which damages the nerve supply so that these children have no nerve supply to that external sphincter and it's always patently open. It can occur in children who have been repetitively sodomized over long period of time and, therefore, you lose the tone of the sphincter and it will be——when you touch it it (sic) will open widely.

(10 RT 2062-63.) Dr. Diamond has specifically retracted this testimony. (Response Ex. 1 at ¶19.) It is absurd for Respondent to argue that such testimony did not unduly prejudice Mr. Benavides. As has been shown, had counsel familiarized herself with the medical records, adequately consulted with the correct experts, interviewed the testifying medical personnel, including Dr. Diamond, and made them aware of Consuelo's full medical history, she would have been able to change their opinion that Consuelo was sexually abused and, even if she had not been able to do so at the time, she would have been able to show that their opinions were based on an inadequate knowledge of Consuelo's medical condition and were thus unsound. The prosecution's entire theory of the case would have been discredited had counsel provided the minimally effective representation that required her to have full knowledge and understanding of the evidence the prosecution intended to present against Mr. Benavides.

Likewise, Dr. Alonso's testimony, which he has retracted, was extremely damaging. He indicated that the results of his rectal exam were "very abnormal." (13 RT 2686.) He said there was "severe swelling throughout the entire anal area" and "no rectal tone, absolutely none." (13 RT 2686.) He stated that the lack of muscle tone and swelling was so

severe that the inside mucosa of the anus was "visibly evident." (13 RT 2687.) He concluded his observations by saying that he believed "without a doubt" that Consuelo had been abused. (13 RT 2687.) Like all the other testifying physicians, Dr. Alonso testified without knowing that the symptoms he observed, which were "visibly evident," were not observed by the personnel at DRMC even though they had ample opportunity to see them. Now that Dr. Alonso has had an opportunity to review her medical records, Dr. Alonso does not believe Consuelo was sexually abused. (Ex. 144 at ¶14.) Respondent's argument that Mr. Benavides was not prejudiced by this extremely damaging false testimony, which both Dr. Diamond and Dr. Alonso have retracted, is spurious and borders on unethical.[75]

Respondent's defense of counsel's inept attempts to show that the anal laxity was caused by a concussion is grounded in Respondent's lay misunderstanding of the medical evidence of brain injuries. First, Respondent argues that counsel reasonably attempted to show that the anal laxity was due to a concussion because Dr. Baumer in his preliminary impression of the case indicated it could be explained by her being comatose. (Response at 224.) Having a concussion is not the same as being comatose. More importantly, counsel failed to present evidence to

[75] Respondent also makes the following nonsensical argument regarding lack of prejudice: "Defense counsel's failure to ask Dr. Bloch if Consuelo's anal laxity were (sic) 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)." (Response at 223.) Petitioner agrees that there is no evidence Consuelo's anus was lax when she was not on the paralytic agents and that is precisely why the medications most likely account for the anal laxity. (Ex. 77 at ¶ 14.) To the extent Respondent meant to argue the opposite of what Respondent wrote—that Consuelo's anus could have been lax even when she was not on medication—as stated above, the argument is speculative and contrary to the medical evidence indicating that DRMC personnel would have noticed if her anus was lax.

show that Consuelo's anal laxity during the time she was comatose could have been due to that condition notwithstanding Dr. Baumer's advice. Respondent cites to a funding request where counsel mistakenly stated that medical personnel testified in the preliminary hearing that a concussion could cause a loose anus as indicative of her effectiveness. (Response at 225, citing Response Ex. 7 at 11.) There was no such testimony at the preliminary hearing and counsel's continued adherence at trial to this mistaken belief exemplifies her ineffectiveness. Respondent's further contention that counsel reasonably attempted to show that a concussion accounted for the anal laxity because Dr. Bloch testified that Consuelo may have had a concussion (Response at 225), ignores the fact that Dr. Bloch also testified that a concussion cannot cause anal laxity (12 RT 2470). Respondent's argument that counsel's attempt to present the unsupported theory that a concussion accounted for the anal laxity was not prejudicial because Dr. Baumer testified that a head injury could account for the anal laxity and Dr. Lovell testified it could be accounted for by loss of oxygen to the brain lacks merit. (Response at 225.) As explained above, due to counsel's failures the defense experts were not aware of Consuelo's full medical history and were not properly prepared to testify. Had counsel adequately prepared them, they could have provided testimony specifically explaining that the anal laxity was most likely attributable to the administration of paralytic agents as supported by the medical records. Counsel's failure undoubtedly prejudiced Mr. Benavides.

#### 4) Counsel Unreasonably and Prejudicially Failed to Present Evidence That Anal Dilation Seen by Dr. Dibdin at the Autopsy Was Not Attributable to Sodomy.

Respondent claims counsel was not ineffective and any failures were not prejudicial in her failing to present evidence to counter Dr. Dibdin's testimony that the anal dilation he observed postmortem was a sign of sexual trauma. (Response at 226.) Respondent's arguments are patently meritless.

Dr. Dibdin testified that Consuelo's anus was dilated seven to eight times larger than a normal size for a child her age when he examined her postmortem. (11 RT 2119.) Dr. Dibdin explained the anal dilation as being a consequence of her anal muscles not functioning because there were anal tears that "had gone through the muscles of the anus." (11 RT 2119.) Counsel unreasonably failed to present evidence that anal dilation is a normal postmortem condition to counter Dr. Dibdin's testimony attributing the dilation to trauma. (Ex. 79 at ¶ 21; Ex. 170 at ¶ 25.) As explained *supra*, counsel also failed to present evidence to show that if there were such tears through the muscle of the anal rim, they could not have been present when Consuelo was admitted at DRMC. Respondent admits that anal dilation "may be" a normal postmortem condition, but claims counsel was not ineffective in failing to present such evidence and there was no prejudice because KMC and UCLA personnel observed redness and swelling of the anal rim before Consuelo died. (Response at 226.) As explained above, the redness and swelling observed at KMC were a result of Consuelo's medical condition, which was evidence counsel also unreasonably failed to present. Further, the presence of such conditions does not excuse counsel's failure to present evidence to rebut Dr. Dibdin's

assertion that the anal dilation he observed was an abnormal postmortem condition indicative of trauma.

Respondent's argument that DRMC personnel failed to see that Consuelo's anus was dilated seven to eight times larger than normal because they did not examine her anus is illogical on its face given uncontroverted evidence that they had ample opportunity to observe such trauma had it been present. Respondent's similar argument that Dr. Dibdin's findings are reliable because personnel at KMC also saw signs of anal trauma, including the "significant and severe swelling throughout the entire anal area" that revealed even the inner mucosa (13 RT 2686-87) and redness around the "entire rectal area" (*id.* at 2691) that Dr. Alonso observed and the "markedly swollen" (10 RT 2050) anal rim Dr. Diamond observed, fails for the same reason. (Response at 226.) Respondent cannot logically argue that such significant trauma could have been missed by DRMC personnel had it been present despite their not specifically examining the anus for sexual trauma. Respondent's reference to Dr. Diamond's disagreement in his 2009 declarations with Dr. Kennedy's opinion that Consuelo may have had an anal malformation does not advance Respondent's argument. (Response at 226-27.) Whether or not Consuelo had an anal malformation, it was unreasonable for counsel not to present evidence to impeach Dr. Dibdin's testimony that the anal dilation was evidence of trauma as opposed to a normal postmortem condition. It is reasonably probable that Dr. Dibdin's graphic, false, and misleading testimony regarding tears through the muscle that caused the anus to dilate exponentially beyond normal had a substantial prejudicial effect.

#### 5) Counsel Unreasonably and Prejudicially Failed to Present Evidence That the Perianal Swelling First Observed at Kmc Was Not a Sign of Trauma.

Respondent argues that counsel was not ineffective in failing to present expert evidence to explain that perianal swelling first observed at KMC was attributable to Consuelo's medical condition rather than trauma. (Response at 227-29.) Respondent's arguments fail to rebut the prima facie case of counsel's ineffectiveness in failing to present this evidence.

Respondent again argues that the perianal swelling observed at KMC was missed by DRMC personnel because they did not examine Consuelo for sexual abuse. (Response at 227.) Respondent never explains, though, how they could have missed what Dr. Alonso described in his testimony as "significant and severe swelling throughout the entire anal area" (13 RT 2686) if it had been present. Respondent also completely ignores Dr. Alonso's declaration, where he explains that his testimony attributing the genital and anal injuries he observed to trauma, including the anal swelling, was mistaken and based on lack of information about Consuelo's medical history, in particular the absence of trauma at DRMC. (Ex. 144 at ¶ 9.) As Dr. Alonso explains in his declaration, in view of Consuelo's full medical history, the most likely explanation for the perirectal swelling he observed is coagulopathy and its prominence in the perirectal area is a function of gravity. (Ex. 144 at ¶ 9.) There should be no doubt that counsel rendered prejudicially ineffective assistance by failing to educate Dr. Alonso about Consuelo's full medical history and provide his testimony that the swelling he saw was not attributable to trauma. As a result of counsel's failure to present this evidence, the jurors interpreted the redness and swelling as having been caused by the sodomy and rape. (Ex. 109 at ¶ 7.)

Using a lay analysis of the medical records, Respondent then tries to counter Dr. Kennedy's expert opinion that the fluids given to Consuelo at DRMC, including whole blood and other fluids, caused her to become edematous (swollen). (Ex. 83 at ¶ 21.) Respondent argues that Dr. Kennedy must be wrong because Consuelo's whole body was not swollen when Dr. Alonso observed her on the night of November 17, 1991, and the next day when Dr. Diamond observed her. (Response at 229.) Respondent ignores Dr. Kennedy's explanation that gravity caused the edema to first become more pronounced in the genitalia, buttocks and anal area. (Ex. 83 at ¶ 21; *see also* People's Exhibit 61 (photograph of Consuelo taken at KMC an hour prior to Dr. Diamond's examination showing swelling in these areas).) Respondent's arguments that the medical evidence shows Consuelo became increasingly edematous over the course of her hospitalization only provides further evidence that the edema was a result of her deteriorating medical condition, rather than trauma. Respondent's argument that Mr. Benavides has not presented even a prima facie case of counsel's constitutionally defective performance is meritless.

**6) Counsel Unreasonably and Prejudicially Failed to Consult and Call to Testify an Expert in Pediatrics and Urology Who Could Have Explained the Likely Causes of the Anal Injuries.**

Respondent argues that counsel was not ineffective and did not prejudice Mr. Benavides by her failure to consult with an expert with the appropriate expertise to assess the anal injuries observed during Consuelo's hospitalization and misattributed by prosecution witnesses to trauma. (Response at 230.) Respondent claims that counsel was not ineffective in consulting only with Dr. Baumer, an emergency room physician, and Dr. Lovell, a pathologist. First, as explained above, counsel's consultation with

Dr. Baumer and Dr. Lovell was deficient due to her failure to provide them with sufficient time and a full medical history, and ask them the appropriate referral questions. Had counsel done so, both would have provided strong evidence to rebut the prosecution's evidence supporting the sex charges. (*See* Exs. 80, 142.) Second, Dr. Baumer and Dr. Lovell had insufficient expertise to specifically address the medical questions involved in this case regarding pediatric and urological conditions that could explain the injuries seen during her hospitalization. As is clear from Dr. Kennedy's declaration, an expert with his experience was needed to examine the photographs of Consuelo's genitalia and anus during her hospitalization and her medical records to fully understand and explain her condition. As is clear by Dr. Heger's declaration and Dr. Diamond's full retractions of his testimony after consulting with Dr. Heger, it was critical for counsel to consult with a sex abuse specialist to understand the flaws in the doctor's opinion that Consuelo had been sexually abused.

Respondent contends that counsel's failure to consult with an appropriate expert was not prejudicial because Dr. Kennedy is allegedly "uninformed." (Response at 230.) Respondent's argument is based on absurd interpretations of Dr. Kennedy's declaration. First, Respondent argues that Dr. Kennedy's opinion is based on the "false premise that Consuelo's anus was examined for sexual abuse" at DRMC when she was lying in a frog-like position. (Response at 231.) Dr. Kennedy did not state that Consuelo was examined for sexual abuse at DRMC. As is clear from the passage of Dr. Kennedy's declaration quoted by Respondent, Dr. Kennedy simply stated that the frog-leg position in which Consuelo was laying at DRMC, "affords an excellent view of the child's genital and anal regions." (Ex. 83 at ¶ 12; *see also* Ex. 169 at ¶ 12.) Respondent does not contest that Consuelo was lying in a frog-leg position (Response at 231,

citing Francis Zapiain's testimony and declaration[76]), but asserts without support that such a position did not afford DRMC personnel an opportunity to detect the signs of sexual abuse. Dr. Kennedy's professional opinion that Consuelo's position provided DRMC personnel with an opportunity to observe signs of sexual abuse, had there been any, is shared by all DRMC personnel, including Ms. Zapiain. (Ex. 73 at ¶ 8; Ex. 72; Ex. 74; Ex.75; Ex. 76.)

Respondent also argues that Dr. Kennedy's assertions are "disingenuous" because he characterized as "significant" the anal tears that Dr. Dibdin testified had gone through the muscle of the anus and "relatively small" the vaginal tear that Dr. Dibdin described. (Response at 231-32.) This critique is in Dr. Diamond's declaration and appears to be based on a misreading of Dr. Kennedy's declaration. Dr. Diamond faults Dr. Kennedy for referring to the anal tears Dr. Dibdin described as "significant" but in quoting his declaration, Dr. Diamond omits Dr. Kennedy's reference to Dr. Dibdin's testimony. (Ex. 169 at ¶ 19.) Dr. Kennedy reasonably characterized the deep tears Dr. Dibdin described in his testimony, which he explained caused the anal sphincter to lose its tone (11 RT 2119), as "significant." The half inch tear to the vaginal wall, whose location Dr. Dibdin ambiguously described, was "relatively small" and, as Dr. Kennedy explained, quite likely to be caused by the narrow tip of a catheter. (Ex. 83 at ¶ 42; Ex. 169 at ¶ 20.) Dr. Kennedy's description of the tears is reasonable and based on the medical evidence. Respondent's critique of his

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[76] Ms. Zapiain's description of Consuelo's frog-leg position is corroborated by Linda Roberts, R.N., the trauma nurse in charge of Consuelo's care. (Ex. 4 at 1680 (In Ms. Robert's pre-trial interview with Detective Lopez, she explains that Consuelo was in "what we call kind of a in a frog like position.").)

characterization based on a misreading of Dr. Kennedy's declaration is disingenuous.

Similarly, Respondent faults Dr. Kennedy for indicating that Consuelo may have had labial adhesions that increased her likelihood of injury from the multiple catheterization attempts. (Response at 232, citing Ex. 83 at ¶ 16.) Respondent takes issue with Dr. Kennedy's reference to Consuelo having a history of diaper rashes as one of several possible causes of the labial adhesions. As Dr. Kennedy explains, his understanding that Consuelo had a history of diaper rashes was based on declarations that were withdrawn from the original petition; however, the absence of such history in no way affects his conclusions. There are many other reasons Consuelo could have had labial adhesions, including irritation from detergents, soap, or ill-fitting clothes. More importantly, Dr. Kennedy's conclusion that the genital injuries first observed at KMC were most likely caused by hospital procedures, rather than trauma, is not dependent on whether she had labial adhesions or what caused them. (Ex. 169 at ¶ 21.) Routine hospital procedures likely caused the injury to her genitalia even if it was perfectly normal. Respondent's argument is a red herring.

Finally, as discussed above, Respondent's argument that Mr. Benavides was not prejudiced by counsel's failure to present the opinion of an expert such as Dr. Kennedy or Dr. Heger to show Consuelo was not sodomized is meritless. It is reasonably probable that the results of the proceedings would have been different had these experts' testimony been presented to show that Consuelo was not sodomized or otherwise sexually abused.

**e. Failure to Present Expert Evidence to Rebut the Sex Charges.**

Throughout the Response, Respondent repeatedly argues that counsel met the standard of care for an effective investigation into the sex abuse charges by her brief consultation with Dr. Werner Spitz, and her inadequate and rushed consultation with Dr. Baumer and Dr. Lovell, and that any deficiencies in counsel's consultation with the defense experts were not prejudicial. (*See, e.g.,* Response at 172-73, 176-77, 180-81, 199.) The most detailed discussion of Respondent's argument is at pages 232-48 and will be addressed below. In order to avoid unnecessary repetition, this section of the reply is referenced above and below in addressing Respondent's similar arguments raised in other sections of the Response.

Respondent's attempt to defend counsel's performance is disingenuous in light of Respondent's concession that its own main expert, Dr. Diamond, would have testified substantially different had he been fully informed about Consuelo's medical history. Dr. Lovell and Dr. Baumer, like Dr. Diamond and all the other testifying physicians, were not fully informed about Consuelo's medical history when they testified. Like all the other testifying physicians, including Dr. Diamond, their post-trial review of the full set of medical records has substantially changed their opinion. Most importantly, Dr. Baumer, Dr. Lovell, and now Dr. Diamond all believe unequivocally that Consuelo was not raped or sodomized. (Ex. 142 at ¶ 16; Ex. 80 at ¶ 15; Ex. 149 at ¶ 5.)

Respondent makes a number of meritless arguments that generally amount to arguing that any problems with the consultation were not counsel's fault and that in any case there was no prejudice because their testimony was sufficiently favorable. A review of Respondent's arguments shows they are based on faulty understandings of the facts and speculation.

However, even if there was a genuine factual dispute, this Court must take the facts alleged in the Corrected Amended Petition as true and issue an order to show cause to resolve any disputes. *Duvall*, 9 Cal.4th at 475.

**1) Background**

Respondent repeatedly begins her discussion of counsel's alleged adequate investigation by referring to counsel's consultation with the "world renowned" forensic pathologist Dr. Werner Spitz. (*See, e.g.,* Response at 173, 177.) Respondent, however, never informs this Court that Dr. Spitz's brief consultation was for only 8.6 hours, i.e. one work day. (Response Ex. 12 at 2.) Though Dr. Spitz billed for reviewing several medical records, the preliminary hearing transcript, and law enforcement records, and two telephone conversations with counsel lasting less than half an hour, there is no evidence in his bill or otherwise of what he told counsel. Dr. Spitz has no memory or records about this consultation. All that is known from the record is that counsel subsequently decided to use another expert. Given the evidence of counsel's inadequate knowledge of the medical records as shown by her examination of the experts and failure to formulate appropriate referral questions for the experts she subsequently consulted and provide them with a full set of legible records, counsel's consultation with Dr. Spitz likely was similarly inadequate.

In February of 1993, nearly a year and a half after being appointed and less than two months prior to trial, Huffman requested the appointment of Dr. Nat Baumer. Huffman gave Dr. Baumer a stack of medical documents, some of which were illegible and poorly copied. (14 RT 2844.) The records Dr. Baumer reviewed were incomplete. (Ex. 142 at ¶ 9.) For example, he was missing at least one of three surgical reports that were central to understanding the course of Consuelo's hospitalization.

Referring to the missing report during his testimony at trial, Dr. Baumer stated: "the information I read today was of a significant nature that had I read it, it would have been earmarked." (14 RT 2844.) In the missing report, UCLA Surgeon Dr. Anthony Shaw states that he found "no evidence of any laceration" upon his examination of Consuelo's external genitalia and her rectum. (Ex. 3 at 962.) Dr. Shaw's report is crucial as it shows there were no lacerations 72 hours after the alleged attack and hence provided important information that conflicted with other reports of injury and would have led to closer examination of other reports had it been timely provided. Dr. Shaw's report was important because, unlike other doctors, he had an opportunity to do a thorough exam of the child's rectum with an anoscope and of her genitalia as she was under anesthesia at the time. (14 RT 2882; Ex. 142 at ¶ 5.)

Huffman not only failed to provide Dr. Baumer with a full set of reports, but she also failed to follow-up on Dr. Baumer's preliminary assessment of the case. In March 1993, Dr. Baumer prepared a tape for Huffman with a host of thoughts and "questions that needed to be addressed" regarding the materials he had reviewed. (14 RT 2831.) Dr. Baumer recommended that Huffman obtain a second opinion from Dr. Lovell regarding Dr. Dibdin's findings of the anal and vaginal slides. (Ex. 142 at ¶ 11.) Dr. Baumer noted that the review was important because although he could account for the erythema (redness) noted in the slides, he could not account for the ecchymosis (bruises). (Ex. 142 at ¶ 11; Ex. 5 at 2869.)

Although a review of Dr. Dibdin's findings by a pathologist was essential to understanding the case, Huffman did not obtain the services of Dr. Lovell until after trial had begun. Dr. Lovell reluctantly agreed to participate in the case, though he explained to Huffman that he would not

have sufficient time to prepare a competent opinion on the case. (Ex. 80 at ¶ 5.) He repeatedly attempted to obtain information regarding the defense and prosecution theory of the case and the important injuries in the case to no avail. (Ex. 80 at ¶¶ 6-11.) The defense investigator Mr. Purcell did not give him information he needed to understand the case. (Ex. 80 at ¶ 6.) Further, due to the hurried and short time frame, Dr. Lovell was able to review the slides and preserved tissue at the Coroner's office only for an hour, the day before he testified. (Ex. 80 at ¶¶ 8-9.) Since Dr. Baumer testified four days before Dr. Lovell went to the Coroner's office, Dr. Baumer's testimony was not informed by Dr. Lovell's examination of the tissue slides and pelvic tissue at the Coroner's office.

The night before his testimony, Dr. Lovell went out to dinner with Huffman and her husband and asked them many questions, to which they were not able to fully respond. (Ex. 80 at ¶ 10.) According to Dr. Lovell, they "clearly did not have a full understanding or grasp of the relevant information." (Ex. 80 at ¶ 10.) The more questions Dr. Lovell asked, the more he realized that he did not have all the information he needed to give an accurate and competent medical opinion. As a consequence, Dr. Lovell's testimony was muddled and unconvincing. (Ex. 65 at ¶ 14.) Dr. Lovell's performance was so unimpressive that the Court stated at sentencing that he did not "give much weight if indeed any" to the testimony of Dr. Lovell. (19 RT 3858.) Huffman's failure to provide him with sufficient time, materials or information thwarted his ability to give competent, informed and credible testimony. (Ex. 80 at ¶ 29.)

**2) Counsel's Consultation With Dr. Baumer Was Ineffective and Prejudicial**

Respondent claims counsel's consultation with Dr. Baumer conformed to the standard of care and any deficiencies in her consultation

were not prejudicial. (Response at 234-40.) Respondent cannot salvage counsel's admitted ineffectiveness, nor reasonably ignore the overwhelming prejudice Mr. Benavides has suffered as a consequence.

First, Respondent argues that Dr. Baumer did have the benefit of Dr. Lovell's findings prior to testifying. (Response at 234-35.) Respondent indicates that Dr. Lovell received the tissue slides from the defense investigator Jon Purcell on April 5, 1993, and spoke to the District Attorney Investigator about them on April 9, 1993. Respondent then speculates that Dr. Lovell must have reviewed the slides and spoken to Dr. Baumer about them in an April 7, 1993 telephone call with him and Mr. Purcell. Respondent presumably relies on Mr. Purcell's billing, which refers to a call between Dr. Baumer, Dr. Lovell, and Mr. Purcell on that date, but which does not provide any indication of what was said during the telephone call.[77] Respondent's speculation is unsupported as there is no record of what was discussed during that telephone call and at this point the participants cannot reliably recall its content. More importantly, though, even if the slides were discussed during the telephone call, Dr. Lovell could only provide his preliminary observations and, due to counsel's ineffectiveness, Dr. Baumer still did not receive the information he had requested of counsel—namely that a pathologist review *all* of Dr. Dibdin's findings. Counsel did not arrange for Dr. Lovell to examine the gross pelvic tissue and microscopic slides at the Coroner's office until April 12, 1993, the day before he testified, and four days *after* Dr. Baumer testified.

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[77] As evidence of the call, Respondent cites to Response Ex. 15 at 4, which is a superior court order approving funding for Mr. Purcell, but which does not reference the telephone call. Presumably, Respondent intended to cite to trial counsel's Request For Payment of Investigator Fees Pursuant to Penal Code section 987.9, filed April 23, 1993, at 4, which is Mr. Purcell's billing for the April 7, 1993 call, but which does not contain any indication of what they discussed.

Dr. Baumer, hence, did not learn that Dr. Lovell and another pathologist present at the time, Andrew Dollinger, had both not seen the evidence of tearing that Dr. Dibdin claimed was evident in the pelvic tissue when they examined it in the Coroner's office. (Ex. 80 at ¶ 7.) Further, as described above, due to counsel's failure to provide Dr. Lovell with sufficient time to review the slides and a full set of medical records to interpret them, Dr. Lovell was not able to provide a reasoned and well informed opinion regarding his findings in the slides. Had Dr. Lovell been properly prepared, he would have opined that the slides, like the pelvic tissue, do not contain any evidence of tearing. (Ex. 80 at ¶ 13.) Had Dr. Baumer learned this information, which he had specifically requested, he would have testified that it was highly unlikely that Consuelo was sexually assaulted. (Ex. 142 at ¶ 11.) Counsel was clearly ineffective and prejudiced Mr. Benavides by her failure to provide Dr. Baumer with the information he requested prior to testifying. *See Bloom v. Calderon*, 132 F.3d 1267, 1277-78 (9th Cir. 1997) (counsel provided ineffective assistance by failing to provide requested information and documents to expert prior to trial, with devastating consequences for defense).

Respondent raises a number of baseless arguments to attempt to show that even if counsel's performance was deficient, it was not prejudicial. Respondent argues, for example, that Dr. Baumer's post-trial opinion is based on the "false premise" that Dr. Lovell did not see a tear in the tissue slides. (Response at 236-37.) Though Respondent recognizes that Dr. Lovell has stated in his declaration that "[n]o evidence of a tear is seen" in the tissue slides (Ex. 80 at ¶ 13), Respondent argues that Dr. Lovell fails to explain why he has retracted his trial testimony that he saw a tear in the slides between the rectum and vaginal wall (16 RT 3104). Respondent makes this argument only by ignoring the detailed explanation in Dr.

Lovell's declaration that due to counsel's failure to give him appropriate guidance, a full set of medical records, and sufficient time to examine the slides and pelvic tissue, he was unable to provide a reliable opinion regarding the evidence seen in the slides. (Ex. 80 at ¶¶ 9-11.) Dr. Lovell specifically explained that because he did not have a full set of medical records, he was not aware that Consuelo was in disseminated intravascular coagulation (DIC) for most of her hospitalization, which would have given him the basis to explain the hemorrhage in the wall between the vagina and rectum and counter the prosecution's allegations that his findings confirmed the trauma Dr. Dibdin reported. (Ex. 80 at ¶ 18.)

Respondent's speculation that Dr. Baumer "may have been unaware" of the discrepancy between Dr. Lovell's testimony and his declaration and that had he known of it, he would not have changed his opinion is unfounded for several reasons. (Response at 237.) First, Dr. Lovell clearly explains in his declaration that he has changed his testimony. (Ex. 80 at ¶18.) Second, Respondent's argument that Dr. Baumer was unaware of Dr. Lovell's testimony regarding the tear is inconsistent with Respondent's earlier argument that Dr. Lovell informed Dr. Baumer about his findings prior to Dr. Baumer's testimony. (Response at 235.) In any case, Dr. Lovell's findings that the tissue slides of the pelvic area do not depict tears are confirmed by Dr. Dale Huff, a Senior Pathologist at the Children's Hospital of Philadelphia, who is board certified in Anatomic and Pediatric Pathology. (Ex. 82 at ¶ 6.) Dr. Baumer's reliance on Dr. Lovell and Dr. Huff's findings to base his opinion that Consuelo was not sodomized or raped is completely reasonable. Respondent's attempts to undermine his opinion fail.

Respondent also makes a convoluted and nonsensical argument that Dr. Baumer cannot reasonably contend he would have testified differently

if he had had Dr. Huff's findings. Respondent appears to argue that because Dr. Baumer, like Dr. Huff, did not see tears in the slides when he looked at them, that it is unlikely Dr. Baumer would testify differently if a pathologist such as Dr. Huff had provided him with his findings. (Response at 237-38.) Respondent's argument is flawed in several ways. First, as explained above, there can be no doubt that Dr. Baumer's opinion would be different had he possessed an informed and reliable opinion from a pathologist regarding the evidence in the tissue slides and pelvic tissue, which he specifically requested. Second, contrary to Respondent's lay interpretation of the medical evidence, Dr. Baumer's and Dr. Huff's opinions about the slides are not the same. From his preliminary review of the slides, Dr. Baumer indicated that though he could explain the erythema (redness) in the slides, he could not explain the ecchymosis (bruising). Dr. Baumer indicated he needed a pathologist, who had the needed expertise, to review the slides to explain what he saw. (Response Ex. 13 at 4; *see also* Response Ex. 11 at 10 (counsel's funding request for Dr. Lovell where she indicates Dr. Baumer informed her that he needed Dr. Lovell to conduct tests of the tissue samples collected by the pathologist to reach a "complete conclusion" regarding the case).) As Respondent admits, Dr. Baumer testified that a pathologist would be the best person to examine the microscopic slides and preserved tissue. (14 RT 2871-72.) Had Dr. Baumer had the opinion of a specialist like Dr. Huff, or the informed opinion of Dr. Lovell, he would have realized that the hemorrhaging he observed in the slides, which he referred to as ecchymosis, was not the result of a localized injury, but rather a consequence of DIC. (Ex. 82 at ¶ 9.) This information would have led Dr. Baumer to testify, contrary to what he did, that it is highly unlikely Consuelo was sexually assaulted. (Ex. 142 at ¶ 11.)

Respondent also argues that counsel was not ineffective in failing to provide Dr. Baumer with a full set of medical records. Respondent speculates that Dr. Baumer must have received a full set of medical records based on counsel's assertion in a funding request that Dr. Baumer read all the records. (Response at 239, citing Response Ex. 11 at 8.) Counsel's assertions cannot be credited, however, because as Dr. Baumer made clear in his testimony, at the very least he had not received the surgical report of Dr. Shaw until just minutes before he testified. The information in Dr. Shaw's report was critical, as he reported not finding any laceration in the genitalia and rectum when he examined Consuelo with an anoscope just 72 hours after the alleged attack. Had Dr. Baumer received Dr. Shaw's report prior to testifying, he would have "earmarked" it. (14 RT 2844.) Respondent's further argument that counsel's providing Dr. Shaw's report to Dr. Baumer minutes before he took the stand conformed to a reasonable standard of care lacks merit. (Response at 239.) The report provided important information that conflicted with other reports of abuse. Had Dr. Baumer been timely provided with Dr. Shaw's report and a full set of medical records, informed by a reasonable investigation that should have included medical witness interviews, and asked the appropriate referral questions, he could have offered a credible, convincing, informed professional opinion to rebut the abuse charges. (Ex. 142 at ¶¶ 4-16.) Counsel's last minute provision of Dr. Shaw's report to Dr. Baumer allowed the prosecutor to disparage Dr. Baumer's opinion that Dr. Shaw's report raised questions for him by arguing that he changed his opinion "five minutes before he took the stand for $2,000." (18 RT 3571.)

Respondent claims that even if counsel's consultation with Dr. Baumer was deficient, it was not prejudicial because Dr. Baumer allegedly provided sufficiently favorable testimony. (Response at 237-38.)

Respondent's claim cannot be reconciled with the record. At the end of Dr. Baumer's testimony, in re-cross examination, the prosecutor read extremely damaging portions of Dr. Baumer's report and obtained Dr. Baumer's assent that all the portions were "correct." Dr. Baumer's final testimony follows:

> Q. [Prosecutor] Doctor, in fact, in your report, you wrote, "child sustained injuries to the vaginal and rectal area . . . as noted by the autopsy report and by three separate physicians, one of which was the coroner, a Dr. Diamond and the gentleman in charge of the intensive care unit at UCLA." Is that correct?
>
> A. [Dr. Baumer] That's correct.
>
> Q. Did you also indicate in your report the proper conclusion would be a foreign object penetrated the anal canal and this foreign object could be a finger, a coca-cola bottle or broom stick?
>
> A. I did.
>
> Q. "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."
>
> "Could this have all occurred within a 15 minute period? Yes." Is that correct?
>
> A. That's correct.
>
> Q. Now, in terms of coming in here and testifying falsely for money that Mrs. Huffman had paid, doctor, I ask you again, upon your review of 1000 pages almost of documentation, all of the photographs in the case and you wrote this opinion down and as you're coming through the

door of the courthouse, you're shown one line in one report and that changed your opinion. Is that correct? Yes or no.

A. The——your Honor, I have a difficult time answering yes or no.

THE COURT: I think it's already been asked and it has been answered.

MR. CARBONE: I'll withdraw my question.

THE COURT: Thank you. Mrs. Huffman?

MRS. HUFFMAN: Nothing further.

(14 RT 2894-96.)

As is clear from the above quoted passage, Dr. Baumer did not testify that Dr. Shaw's report "changed" his opinion as Respondent claims. (Response at 238.) The effect of Dr. Shaw's report on his opinion was more complicated and due to counsel's failure to redirect, Dr. Baumer did not have an opportunity to provide further explanation.

Respondent completely misrepresents the record in stating that Dr. Baumer allegedly testified that "Consuelo was not sodomized" because no chemical tests were done to check for semen in the anal canal, Dr. Shaw did not see anal tears when he conducted an anoscopy, and a nurse at DRMC indicated she did not see any trauma and recollected seeing a clean diaper. (Response at 238) Contrary to Respondent's characterization of the record, Dr. Baumer testified only that he would have liked to see chemical testing before coming to a conclusion (14 RT 2828-29), the results of Dr. Shaw's anoscopy was a "significant piece of information" (14 RT 2852), and all he said about the observations by the Delano nurse was that he "couldn't explain that" (14 RT 2877). Dr. Baumer did not testify that Consuelo was

not sodomized. As is clear from the final part of his testimony quoted above, Dr. Baumer endorsed his preliminary uninformed view that the anal canal had been penetrated by "a finger, a coca-cola bottle or broom stick" (14 RT 2895) and testified that he could not say whether or not Dr. Shaw's findings changed his opinion. Respondent cannot sincerely argue that Dr. Baumer's testimony was favorable.

Respondent further argues that Dr. Baumer's testimony that he did not believe that catheterization accounted for the "hole" in the vaginal wall was supported in light of Dr. Dibdin's autopsy report indicating he found a "half inch laceration of the posterior wall of the vaginal opening." (Response at 240, citing 11 RT 2122-23 and Ex. 8 at 3 (autopsy report).) Respondent argues that counsel is not at fault for any mistake in Dr. Baumer's testimony. (Response at 240.) Respondent's argument wholly lacks merit. As Respondent admits through its submission of Dr. Diamond's 2009 declaration, there is no medical evidence to support a hole in the internal vaginal wall. (Response Ex. 14 at 9.) Dr. Diamond changed his opinion about this information based on his review of the medical records and very likely after reading the reasoning in Dr. Kennedy's declaration, which he adopted, that the autopsy diagram depiction of the lacerations very likely indicates the vaginal laceration was external. (*Compare* Response Ex. 14 at 9, *with* Ex. 83 at ¶ 41.) If Respondent was able to change Dr. Diamond's opinion by providing him with a full set of medical records and the opinion of an expert in pediatric urology, obviously counsel could have done the same with a defense expert at trial. Moreover, if counsel had adequately responded to Dr. Baumer's request to have a pathologist review Dr. Dibdin's results and provide him with information to inform his opinion, Dr. Baumer would have learned that there was no medical evidence in the preserved tissue showing a "hole" in the vagina or

even lacerations. (Ex. 82 at ¶ 6; Ex. 80 at ¶¶ 7, 13.) Had counsel provided him with that information, Dr. Baumer would have testified, opposite to what he did, that the superficial genital lacerations observed by hospital personnel at KMC most likely were attributable to catheterization. Most importantly, he would have testified that Consuelo was not anally or vaginally penetrated. (Ex. 142 at ¶ 5.) Respondent's argument that Mr. Benavides was not prejudiced by Dr. Baumer's testimony to the contrary is absurd.

**3) Counsel's Consultation With Dr. Lovell Was Ineffective and Prejudicial.**

Respondent also defends counsel's performance regarding her consultation with Dr. Lovell and argues that any deficiencies in her performance did not prejudice Mr. Benavides. (Response at 240-48.) Respondent's arguments are all meritless and are based on a basic misapprehension of Mr. Benavides's burden at this stage of the proceedings. For example, most of Respondent's arguments consist of factual disputes with Dr. Lovell's sworn statements in his declaration. Respondent fails to acknowledge that if there is a genuine factual dispute, this Court must issue an Order to Show Cause and order an evidentiary hearing to resolve that dispute. *See In re Serrano*, 10 Cal.4th at 456.

Respondent's mistaken understanding of Mr. Benavides's burden is evidenced by its continued citation to *People v. Osband*, 13 Cal.4th 622, 701 (1996), throughout its argument. (Response at 242-44.) Respondent cites *Osband* for the proposition that if the record is silent as to how counsel prepared a witness, the claim of counsel's ineffectiveness must be denied. Respondent's reliance on *Osband* has several problems. First, as shown in more detail below, the record is not silent regarding how counsel prepared Dr. Lovell. Dr. Lovell explains counsel's subpar performance in

detail in his declaration. Second, as stated in *Osband*, a claim of counsel's ineffectiveness should not be rejected where, as here, "there simply could be no satisfactory explanation" for counsel's failures. *Osband*, 13 Cal.4th at 701. Third, *Osband* refers to the role of an appellate court deciding a claim of counsel's ineffectiveness on direct appeal as distinguished from the role of the court in deciding a habeas claim. The language relied on by Respondent in *Osband* is a citation from *People v. Cudjo*, 6 Cal. 4th 585, 623 (1993), which in turn cites *People v. Pope*, 23 Cal.3d 412, 426 (1979), *overruled on other grounds in People v. Berryman*, 6 Cal.4th 1048, 1081, n.10 (1993). *Osband*, 13 Cal.4th at 701. This Court explained in *Pope* that where the record on appeal sheds no light on why counsel acted or failed to act, a claim of ineffectiveness must be denied unless there is no possible reasonable explanation for counsel's actions. *Pope*, 23 Cal.3d at 426. This Court further explained in *Pope* that if the record on appeal

> does not illuminate the basis for the challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a petition for habeas corpus. In habeas proceedings, there is an opportunity for an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in a manner complained of.

*Pope*, 23 Cal.3d at 426. The evidence presented in the Corrected Amended Petition and this Informal Reply at the very least establishes a prima facie case of counsel's ineffectiveness that warrants relief or an evidentiary hearing. Hence, Respondent's reliance on *Osband* to argue the claim should be denied lacks merit.

Respondent argues that the limited records that counsel provided Dr. Lovell were sufficient for his consultation and that Mr. Benavides was not prejudiced by counsel's failure to provide him with a full set of records. (Response at 240.) Respondent ignores the host of favorable information

that Dr. Lovell could have testified to if he had been given a full set of records and adequately prepared to testify. (*See* Ex. 80.) Prior to trial, Dr. Lovell was not provided with any records from DRMC, a full set of KMC or UCLA records, or UCLA photographs.[78] (16 RT 3094-95.) As a consequence, he was not aware that the first signs of injury to the genitalia were seen at KMC; that Consuelo was on paralytic agents when doctors observed a lax tone; that she suffered from DIC for most of her hospitalization; that the brain infarcts were first documented at UCLA, four days after she was hospitalized; and, that Consuelo went into cardiac and respiratory arrest at DRMC. (Ex. 80 at ¶¶ 16-26.) Had he known this information prior to testifying, he could have explained Dr. Alonso's findings as a result of hospital procedures and explained the hemorrhage he saw in the slides as a result of DIC. (Ex. 80 at ¶¶ 16-18.) He also could have adequately countered Dr. Diamond's findings of sodomy and reconciled his findings with Dr. Shaw's findings of no lacerations to the genitalia or anus. (Ex. 80 at ¶¶ 23-25.) Had Dr. Lovell had a full set of medical records, in particular the CT scans, he could have explained that Consuelo's brain infarcts were most likely due to her low blood pressure, seizure activity and her loss of oxygen from coding at DRMC, as opposed to the prosecution's theory that suffocation caused them. (Ex. 80 at ¶¶ 25-26.) In addition, had he been provided with the UCLA photographs prior to testifying, Dr. Lovell would have been sufficiently familiar with them not to mistake their orientation as he did at trial, with the effect of seriously

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[78] Respondent's contention that Dr. Lovell is "disingenuous" in claiming that he was only provided with a "few pages" of medical records is incorrect. (Response at 244.) The medical reports Dr. Lovell was provided are only about 22 pages of the over 1600 pages of medical records that cover Consuelo's eight days of hospitalization. (*Cf.* Ex. 1-3 *with* Ex. 2 at 50, 86, 128-131, Ex. 3 at 956-62, Ex. 5 at 2545-51.)

damaging his credibility. (16 RT 3117.) Respondent's contention that providing him with photographs to review for the first time on the stand comports with a reasonable standard of competence lacks merit. (Response at 242-43.)

Respondent's further contention that even if counsel's performance was deficient for failing to provide Dr. Lovell with a full set of medical records, it was not prejudicial because Dr. Lovell consulted with Dr. Baumer and Dr. Baumer allegedly had a full set of records is based on several false premises. (Response at 241-42.) As explained above, Dr. Baumer was not given a full set of medical records and Dr. Lovell did not speak to him after he examined the tissue preserved at the Coroner's office. Further, even if Dr. Baumer did have a full set of records, which constitute over 1600 pages (Ex. 1-3), it is highly unlikely that he could have passed on to Dr. Lovell all the information in the records. Thus, counsel's failure to provide Dr. Lovell with a full set of records was not relieved by her provision of records to Dr. Baumer.

Respondent's further contentions that Mr. Benavides has failed to show counsel's ineffectiveness because Dr. Lovell did not specifically identify medical questions that counsel was unable to answer or "when and how many messages he left" for counsel that went unanswered are trivial. (Response at 242, 244.) Citing *People v. Osband*, 13 Cal.4th at 701, Respondent argues that the absence of this information defeats the prima facie case of counsel's ineffectiveness. As explained above, *Osband* is inapplicable for many reasons. However, more important, the number of messages Dr. Lovell left and the particular questions counsel failed to answer when she finally met with Dr. Lovell the day before his testimony are irrelevant. It is clear from the evidence presented in the Corrected Amended Petition that Dr. Lovell was ill-prepared to testify because of the

rushed nature of the consultation, counsel's failure to provide him a full set of records, and inadequate guidance and referral questions. As Dr. Lovell explains, he continually tried to reach Huffman but was unable to do so. He met with the defense investigator Jon Purcell, but because Purcell was "unprepared and uninformed," and he found the meeting "useless and frustrating. (Ex. 80 at ¶ 6.) As the date of his testimony approached, he became concerned because he had not yet been told "what either the prosecution or defense theories were or even what injuries were important to the case." (*Id.*) When he finally met with Huffman and her husband, over dinner, the night before he testified, it was clear that they did not have a "full understanding or grasp of the relevant information." (Ex. 80 at ¶ 10.) Huffman "failed to clearly articulate what she expected from [Dr. Lovell] or even what questions she planned to ask during [his] testimony." Dr. Lovell continually futilely searched for information and he was never satisfied with what Huffman provided. (Ex. 80 at ¶ 11.) Dr. Lovell's assertions regarding Huffman's lack of grasp of the medical evidence are substantiated by Huffman's declaration where she explains that she was not aware of critical exculpatory information about Consuelo's medical history that she would have presented had she known about it. (Ex. 64 at ¶ 9.) Counsel provided ineffective assistance by failing to sufficiently familiarize herself with the medical records to guide her experts, respond to their questions, and prepare them to testify. Such preparation is part of the customary skills and diligence expected of an attorney in a capital case. *See, e.g., Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995) (finding counsel's performance prejudicially deficient where they failed to sufficiently study the serological evidence to prepare to counter theories advanced by prosecution).

Respondent contention that Dr. Lovell did have sufficient time to adequately review the slides and pelvic tissue preserved at the Coroner's office contrary to Dr. Lovell's sworn statements that the time he was provided was insufficient to provide a reliable expert opinion is based on Respondent's opinion that in no way refutes the prima facie case of counsel's ineffectiveness established by Dr. Lovell's declaration. (Response at 244.) Dr. Lovell warned Huffman when she hired him just a few weeks prior to his scheduled testimony that he had insufficient time to prepare an opinion in the case. (Ex. 80 at ¶ 5.) Though Purcell provided Dr. Lovell with some slides on April 5, 1993, Dr. Lovell did not receive a full set of records nor the necessary guidance from counsel to adequately interpret the slides. Furthermore, Dr. Lovell did not review the pelvic tissue at the Coroner's office until the day before he testified and was thus unable to use the information he learned there, including the lack of tearing in the gross sample, to reevaluate his results. (Ex. 80 at ¶ 9.) Counsel's failure to retain Dr. Lovell until after the trial had started, provide him with adequate materials and time to formulate a competent opinion, and adequately prepare him to testify constitutes constitutionally deficient performance. *See Bloom*, 132 F.3d at 1277 ("The complete lack of effort by Bloom's trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance.").

Next, Respondent complains that Dr. Lovell's assertions in his declaration that he would not have testified that sex abuse might explain the injuries to her genitalia or anus had he been provided with a full set of medical records are "too general to respond to." (Response at 245.) Respondent's characterization lacks merit. Dr. Lovell has provided a

detailed explanation in his declaration of how his evaluation was impaired by his lack of information about Consuelo's medical history. (Ex. 80 at ¶¶ 16-18, 20, 23, 25, 26.)

As with Dr. Baumer, Respondent attempts to minimize the prejudice from counsel's deficient performance by arguing that "most of Lovell's testimony refuted the prosecution's theory." (Response at 245.) Even the citations of Dr. Lovell's testimony provided by Respondent show this is not true. Dr. Lovell testified on cross-examination that he was not saying that there was not vaginal or anal penetration. (16 RT 3127.) He further testified that he had seen information in the medical reports indicating sexual abuse "definitely could be" and other things which were "more negative". (16 RT 3142.) Dr. Lovell's tepid testimony about some conflicting information cannot fairly be characterized as refuting the prosecution theory. Though he expressed some doubt about the medical findings at trial, he did not rule out sexual abuse as he has done so in post-conviction after being given the relevant information to reach a reliable result. (Ex. 80 at ¶ 15.) There can be no doubt that counsel's deficient performance prejudiced Mr. Benavides. Respondent's further argument that any error was harmless because other evidence against Mr. Benavides was strong (Response at 245, citing arguments at 194-96) is simply baseless as shown *supra.*

Next, Respondent takes issue with the fact that after fully reviewing the medical records Dr. Lovell agrees with Dr. Alonso that what Dr. Alonso saw on the night of November 17, 1991, in the KMC emergency room was not a product of sexual abuse. (Response at 246.) Respondent relies on Dr. Diamond's disagreement in his 2009 declaration with Dr. Alonso, Dr. Lovell, and Dr. Kennedy regarding their explanations of the trauma Dr. Alonso saw in the perianal area as being related to Consuelo's medical

condition. Respondent's argument fails because Dr. Diamond has recently changed his opinion that there is medical evidence of sexual abuse. (Ex. 149.) Further, Dr. Diamond's disagreement in his 2009 declaration with all the other doctors is insufficient to rebut the prima facie case of relief stated in the petition. Counsel had an obligation to present evidence to rebut the prosecution's case. *See Bragg v. Galaza*, 242 F.3d at 1088 (explaining that counsel has a "duty to . . . investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict.").

Moreover, Respondent's contentions that Dr. Alonso's findings were not related to Consuelo's medical condition lack merit. Most of Respondent's arguments in this regard stated on pages 245 to 246 of the Response have already been responded to above. To reiterate the points made above:

(1) Dr. Alonso is not "speculat[ing]" that Pavulon accounted for the lax sphincter tone he saw since medicals records show the Pavulon was administered eight minutes after she arrived at KMC and Dr. Alonso did not notice the lax tone until a nurse, probably Ms. Lackie called his attention to the condition of the anus. (Ex. 144 at ¶ 4.) The fact that DRMC personnel did not see a lax sphincter further supports this conclusion.

(2) Counsel should have presented evidence that the blood Dr. Alonso saw on his finger when he performed the guiac test was not evidence of sodomy but rather a symptom of Consuelo's difficulty clotting blood. Respondent's contention that the failure to present such evidence was not prejudicial because in his post-conviction declaration Dr. Alonso says the blood was not central to Dr. Alonso's opinion misses the point. Counsel never elicited any testimony that the blood was not central to his opinion and much less that it was a product of her medical condition.

(3) Dr. Lovell's expert opinion that the perianal swelling and redness that Dr. Alonso observed are best explained by the manual manipulation and temperature taking that preceded his examination is a reasonable explanation in light of the fact that trauma was not seen at DRMC, Dr. Alonso's findings regarding the vagina were normal, and Dr. Alonso did not report the trauma that would be expected if she had suffered penile penetration. (Ex. 80 at ¶ 20.) Dr. Diamond's disagreement in his 2009 declaration with Dr. Lovell is insufficient to rebut the prima facie case of counsel's ineffectiveness for failing to present this evidence.

(4) The other evidence against Mr. Benavides was weak and therefore counsel's errors are not harmless.

Accordingly, all of Respondent's attempts to lessen the prejudice from counsel's failure to present Dr. Lovell's informed opinion that Dr. Alonso's observations of the perianal area do not relate to trauma fail. Respondent cannot reasonably maintain that if all the doctors who attended to Consuelo and several specialists who have studied the medical records testified that Consuelo was not abused that there is not a reasonable possibility that at least one juror would not have had a reasonable doubt about Mr. Benavides's guilt and, more importantly, that he is actually innocent. Respondent's obstinate arguments to the contrary hold no water.

Similarly, Respondent argues that there is no prejudice from counsel's failure to present Dr. Lovell's informed opinion, which is now shared by Dr. Diamond after he apprised himself of Consuelo's medical records that the lax sphincter tone Dr. Diamond observed was also a side-effect of the paralytic agent Norcuron that Consuelo was given just prior to Dr. Diamond's examination. (Response at 246-47.) Respondent's attempts to downplay the consequences of its concession are ineffectual. The evidence of the lax sphincter was a very damaging and crucial part of

convincing the jury that Consuelo had suffered severe anal trauma. All of Respondent's arguments to the contrary have been addressed above. In brief, Dr. Diamond's speculation in his 2009 declaration that DRMC personnel missed the lax sphincter that Dr. Diamond described as able to accommodate several fingers is unreasonable. Dr. Diamond has recanted his contention in his 2009 declaration that the anal swelling and tears he observed indicates she was sodomized. Dr. Diamond's contention in his 2009 declaration that the anal tears were too small to be detected by DRMC personnel without careful observation only further supports the fact that it is highly unlikely they were caused by an adult male penis and that they were very likely caused by manual manipulation for hospital procedures. In sum, counsel performed deficiently in failing to counter the prosecution's evidence attributing the lax sphincter tone to sodomy and Mr. Benavides was unquestionably prejudiced by counsel's errors.

Next, Respondent contends that Mr. Benavides would not have obtained a more favorable result had Dr. Lovell testified that the hemorrhage in the wall between the vagina and the rectum that he observed in the slides was explained by disseminated intravascular coagulation (DIC), the critical bleeding condition that affected Consuelo most of the time she was hospitalized. Respondent disingenuously argues that Dr. Lovell's testimony about the hemorrhage was not prejudicial. (Respondent at 247.) Dr. Lovell's testimony about the hemorrhage he observed in the slides was arguably the most prejudicial part of his uninformed testimony. Contrary to Respondent's assertion, Dr. Lovell did testify about the significance of the hemorrhage. On direct examination, counsel asked Dr. Lovell whether he could tell if there had been "penile penetration" from what he observed at the Coroner's office. Dr. Lovell responded, "I don't think I can say one way or the other for certain" and then as explanation for

his response he indicated that "[t]here was hemorrhage, there was a tear, and hemorrhage in-between the rectum and the vaginal wall." (16 RT 3104.) Later in direct examination Dr. Lovell again referred to the hemorrhage between the rectal and vaginal wall when counsel asked him whether he had seen the acute tears and hemorrhaging Dr. Dibdin referred to in his autopsy report. (16 RT 3114.) His response was confusing but he concluded by confirming Dr. Dibdin's findings saying, "I think I saw what he's talking about there, yes." (16 RT 3114.) Dr. Lovell then testified that the hemorrhage could have been there "four days or less" from the time of the autopsy, but qualified his aging of it indicating his aging ability "could be off" and it could be "nine days." (16 RT 3115.) In response to counsel's theory that it could have occurred during surgery, Dr. Lovell testified, "Right, yeah, that's possible. I can't say." (16 RT 3116.) He testified that "there's no question there's an injury there that's been there some days." (16 RT 3115.) This testimony would have been completely different had counsel provided Dr. Lovell with a full set of medical records, adequate time to carefully examine the tissue preserved at the Coroner's office, and had she sufficiently familiarized herself with the medical records and prepared Dr. Lovell to testify. Instead of confirming Dr. Dibdin's findings of trauma, Dr. Lovell would have testified that DIC explained the hemorrhaging he observed in the slides. (Ex. 80 at ¶ 18.) Further, because he did not have the DRMC records he was unaware that they had not observed any signs of trauma to the genitalia and anus. Had Dr. Lovell known this information he likely could have more confidently aged the hemorrhage having occurred during her hospitalization. Respondent's arguments that Dr. Lovell's uninformed testimony was not prejudicial cannot be reconciled with the record.

Respondent argues that Dr. Lovell's sworn statement that he would have been able to provide different testimony had he been given Dr. Diamond's report lacks credibility. Specifically, Respondent disputes Dr. Lovell's statement that had he seen Dr. Diamond's report he could have explained that the "lack of clarity and specificity in the description of the tears [Dr. Diamond] reports and his failure to take into account her post-operative medical condition, seriously undermine the validity of his opinion that the child was sodomized." (Ex. 80 at ¶ 23.) Respondent argues that Dr. Lovell's statement lacks credibility because he received Dr. Diamond's testimony and without providing a specific page number of the transcript asserts that Dr. Diamond testified about the size, shape, and depth of the anal tears he observed. (Response at 247-48.) Dr. Diamond did not provide a specific description of the tears he observed in either his testimony or his report. Moreover, as Dr. Diamond has conceded in his 2009 declaration his testimony was incorrect because he failed to take into account Consuelo's post-operative condition, specifically the effect of the paralytic medication she was given which accounted for her lax anal tone. (Response Ex. 1 at ¶ 19.) As Dr. Lovell points out, it is also noteworthy that Dr. Diamond failed to note as is indicated in many other medical reports that Consuelo "had total body edema, and was still in DIC and thus bleeding out of all her orifices, including her mouth, nose, and rectum, as well as her multiple surgical sites." (Ex. 80 at ¶ 23.) Dr. Lovell was not able to provide this information impeaching the reliability of Dr. Diamond's findings because counsel did not provide him with Dr. Diamond's medical report and a full set of medical reports detailing the course of Consuelo's hospitalization.

Finally, Respondent argues that Mr. Benavides was not prejudiced by counsel's failure to provide Dr. Lovell with sufficient information to

provide a fully informed and reliable medical opinion regarding what caused Consuelo's brain infarcts. Respondent claims there was no prejudice because Dr. Lovell's testimony countered the prosecution theory that the brain infarcts indicated Consuelo was suffocated and because the suffocation theory was "tangential" to the sexual assault and murder charges. (Response at 248.) Though Dr. Lovell did provide some general testimony that he did not "think you see that patterns [of watershed infarcts] in suffocation" and that "I think that using the term watershed and going in that direction, it has to be blood supply cut off," (16 RT 3151-52) his testimony was not as compelling as it would have been had he been given all the medical records. He was not provided with Consuelo's computerized tomography (CT) head scans and the UCLA Medical Center records showing that her brain infarcts were first documented at UCLA Medical Center on November 21, 1991, after she had had seizure activity. If he had such information, he would have explained that brain infarcts were most likely accounted for by the significant low blood pressure throughout her hospitalization. (Ex. 80 at ¶ 26.) Had he known that Consuelo experienced cardiac and respiratory arrest at DRMC, which could cause acute loss of blood to the brain, he would have opined that that was another likely cause of the brain infarcts rather than suffocation. (Ex. 80 at ¶ 26.) Dr. Lovell's testimony thus would have provided a much stronger counter to the prosecution's evidence had he had the medical records. Respondent's further assertion that the suffocation evidence was tangential misrepresents the prosecution's theory. The prosecution argued that the reason the neighbors did not hear Mr. Benavides allegedly abusing Consuelo was because he put his hand over her mouth and suffocated her. (18 RT 3586-87.) The prosecutor's theory that Mr. Benavides suffocated Consuelo in order to prevent her from screaming while he sodomized and

raped her, and the further speculation that this accounted for the neighbors not hearing anything that night, was extremely damaging. This theory was an intricate part of the prosecutor's attempt to show that Mr. Benavides premeditated the murder of Consuelo.

In sum, Mr. Benavides has shown more than a prima facie case that counsel's failure to provide Dr. Lovell with adequate time, information, and preparation to render a professional and informed opinion about the case constituted deficient performance, which prejudiced Mr. Benavides. *See, e.g.*, *Strickland*, 466 U.S. at 694.

**4) Counsel Unreasonably and Prejudicially Failed to Present Evidence That the Tissue Slides of Consuelo's Perineum Contained No Evidence of Tearing or Scarring.**

Had counsel provided Dr. Lovell with adequate information and time, he would have testified that contrary to Dr. Dibdin's autopsy findings the tissue slides do not contain any evidence of tearing. (Ex. 80 at ¶ 13.) Dr. Lovell's post-conviction informed opinion about the slides is confirmed by Dr. Huff, a specialist in anatomic and pediatric pathology. (Ex. 82 at ¶ 6.) As explained above, had Dr. Lovell been adequately informed about the course of Consuelo's hospitalization, he would have also been able to explain that the hemorrhaging he saw in the tissue slides between the vaginal and rectal wall was caused by DIC rather than trauma. (Ex. 80 at ¶ 18.) Dr. Lovell's conclusion in this regard is also corroborated by Dr. Huff, who explains in his declaration that Consuelo's deteriorating medical condition, including DIC, is the most likely explanation for the hemorrhaging present in the slides. (Ex. 82 at ¶¶ 11-12.) Testimony regarding the absence of tears or signs of injury in the perineum slides was critical to counter Dr. Dibdin's conclusion in his autopsy report that the

microscopic observation of the tissue slides "confirmed" the presence of tears he allegedly observed in the preserved tissue. (Ex. 8 at 3560.) Though Dr. Lovell testified that he did not see tears in the gross pelvic tissue he observed (16 RT 3142), he provided harmful testimony allegedly confirming Dr. Dibdin's microscopic findings because he did not have sufficient information to accurately interpret the slides (16 RT 3114 ("I think I saw what he's talking about there, yes.")).

Respondent claims counsel did not perform deficiently in failing to provide this evidence. Respondent argues that Dr. Huff's findings were contrary to those of Dr. Lovell at trial and that Mr. Benavides has not shown that "counsel had cause to believe at that time that another expert would have construed the evidence more favorably to petitioner." (Response at 249, citing *In re Thomas*, 37 Cal. 4th 1249, 1257 (2006).) Respondent's narrow argument willfully ignores that Dr. Lovell's mistaken trial findings were a function of counsel's ineffectiveness as amply explained above. Moreover, Respondent misconstrues the claim presented in the Corrected Amended Petition. The claim is not that counsel should have known a different expert would provide a different opinion, but rather that counsel should have timely consulted a pathologist to review the critical findings of Dr. Dibdin, and provided him with enough time, a full set of medical records, and guidance regarding the referral questions. Had counsel done so, Dr. Lovell would have provided the same testimony that Dr. Huff could have provided. As explained by this Court in *Thomas*, the reasonableness of counsel's decisions is measured considering the reasonableness of the investigation that underlay each decision. *In re Thomas*, 37 Cal.4th at 1258. Counsel's failure to present the evidence was a function of her inadequate investigation and preparation, which fell far below the standard of care required of capital counsel.

Respondent's further argument that even if counsel's performance was deficient in failing to provide evidence of the absence of trauma in the tissue slides it was not prejudicial is founded on a falsehood. Respondent argues that even if counsel had presented testimony that there were no tears in the tissue slides of the perineum, there would be no prejudice because "Dr. Dibdin's autopsy findings that there was a tear in the specimen of Consuelo's pelvis was confirmed by Dr. Lovell." (Response at 249-50.) On the contrary, Dr. Lovell did not confirm Dr. Dibdin's findings of a tear in the gross pelvic tissue. Neither he, nor Dr. Dollinger, another pathologist present at the time, could see the tearing that Dr. Dibdin described in the tissue preserved in formaldehyde. (Ex. 80 at ¶ 7.) Counsel had so little understanding of the critical medical evidence that she did not even elicit on direct examination from Dr. Lovell that he had not seen the tear Dr. Dibdin described in the pelvic tissue preserved in formaldehyde. Dr. Lovell's only testimony regarding this finding was a vague statement given in cross-examination that even though the autopsy report stated there was tearing, "looking at the specimen, I asked Dr. Dollinger, who was there, to come please look at it, I did not see things." (16 RT 3142.) Counsel unreasonably failed to elicit clarifying testimony from Dr. Lovell explaining that neither he nor Dr. Dollinger could confirm Dr. Dibdin's findings of tearing in the preserved pelvic tissue.

In sum, as a consequence of counsel's deficient performance, the jury did not learn that neither the gross preserved pelvic tissue nor the microscopic tissue slides provided any support for Dr. Dibdin's findings of tears or any trauma in the pelvic area. Dr. Dibdin's false testimony about these critical findings is just part of a series of falsehoods in his findings, some of which Respondent has conceded. (*See* Response at 182 (conceding that the "tear of the anterior wall of the vagina that was reported

by Dr. Dibdin . . . was not substantiated."); 10 RT 2085 (Dr. Diamond testifying that Dr. Dibdin falsely informed him prior to the preliminary hearing that there was a tear in anterior wall of the rectum.).) Had the jury learned that there was no medical support for Dr. Dibdin's critical findings regarding the preserved tissue, alone or in conjunction with other falsehoods or errors in his findings and the crucial exculpatory medical evidence that counsel failed to present, there is a reasonable probability that at least one juror would have had a reasonable doubt that Mr. Benavides sexually abused Consuelo. *See, e.g.*, *Strickland*, 466 U.S. at 694.

**5) Conclusion**

Respondent concludes this section of its argument by citing Dr. Baumer and Dr. Lovell's testimony about the abdominal injuries as evidence that their testimony was favorable. (Response at 250.) Yet as shown above, their testimony about the evidence supporting the sex charges was extremely unfavorable. Respondent's further argument that counsel's alleged "extensive efforts" to contact experts precludes a finding of deficiency (Response at 250-51) is addressed *supra*. As explained, counsel's one-day consultation with Dr. Spitz, failure to follow up on the questions Dr. Baumer posed, and last minute ineffectual consultation with Dr. Lovell, fell far below the required standard of care. *See Bean v. Calderon*, 163 F.3d 1073, 1078-1079 (9th Cir. 1998) (counsel performed deficiently by waiting until trial started to hire defense experts, failing to furnish them with necessary information, and to inadequately preparing them to testify.) But for counsel's failures Dr. Lovell and Dr. Baumer would have testified that Consuelo was not sexually abused and the result of the proceedings would have been different. The declarations of all the medical experts, including Dr. Diamond, that Consuelo was not sexually

abused requires immediate relief and undeniably establishes far more than a prima facie case that counsel provided prejudicially ineffective assistance.

### 3. Failure to Show That the Pathologist's Cause of Death Is Anatomically Impossible.

Respondent contends that defense counsel adequately presented evidence that Dr. Dibdin's cause of death—penile penetration causing direct injury to the abdominal contents—is anatomically impossible. Respondent's argument reproduces almost verbatim its argument in its 2003 Response, but tellingly despite Respondent's reexamination of the medical evidence, Respondent has yet to provide a declaration from Dr. Dibdin explaining how he justifies his unscientific false findings. (*Compare* 2003 Response at 114-16, *with* Response at 251-53.) Respondent's argument relies on testimony from Dr. Diamond, Dr. Bloch, and Dr. Lovell indicating that in their opinion the child died from blunt force trauma to the abdomen. (Response at 251-53.) Respondent's claim fails because defense counsel failed to show that Dr. Dibdin's opinion was medically impossible, as opposed to a difference in medical opinion. The doctors who offered a cause of death at trial that differed from Dr. Dibdin's opinion did not explain that the medical records refuted his finding. Counsel could have, but failed, to elicit this testimony from Dr. Shaw, Dr. Bloch, Dr. Harrison, Dr. Alonso, Dr. Baumer, and Dr. Lovell. (*See* Ex. 79 at ¶¶ 24-26; Ex. 77 at ¶¶ 13-18; Ex. 78 at ¶ 18; Ex.144 at ¶ 12; Ex. 142 at ¶¶ 10, 16; Ex. 80 at ¶ 19.) Had defense counsel elicited this testimony from these doctors, Dr. Dibdin would have been thoroughly discredited. This would have seriously weakened the prosecution's case of sex abuse, which largely relied on Dr. Dibdin's findings. If all testifying doctors had opined that his cause of death was impossible, the jury would have discredited his other findings, many of which were also completely false. Respondent's argument that the

record is silent as to why Huffman failed to impeach Dr. Dibdin with this highly damaging testimony is inaccurate. (Response at 252.) Mr. Benavides has shown that Huffman was ill prepared for trial and did not know or understand the medical information. (Ex. 64 ¶ 9; Ex. 80 ¶ 10.) She had no possible strategic reason for failing to impeach Dr. Dibdin.

There is no doubt that counsel's failure to show Dr. Didbin's cause of death was anatomically impossible prejudiced Mr. Benavides. In the sentencing hearing, the Court stated that he credited and found credible Dr. Dibdin's cause of death theory. (19 RT 3857.) The court even specifically said he believed Dr. Harrison's testimony corroborated Dr. Dibdin's cause of death. *Id.* He then stated that he "quite candidly does not attach a great deal of significance" to Dr. Bloch's opinion, who in fact disagreed with Dr. Dibdin. *Id.* Since counsel's ineffectiveness prevented even the Court from understanding that Dr. Dibdin had no viable basis for his opinion, it is unlikely that the jurors had any such understanding. Surely, if the jurors and the court had known all doctors disagreed with Dr. Dibdin, including Dr. Harrison, the outcome would have been different. Moreover, if they had learned what Respondent has conceded in post-conviction, that he repeatedly misinformed Dr. Diamond about the injuries to the vagina and anus, that his findings are "unsubstantiated" as Dr. Diamond has found (Response Ex. 1 at ¶ 18), it is even more reasonably probable that at least one juror and the court would have had a doubt about Mr. Benavides's guilt.

#### 4. Failure to Rebut the Prosecution's Theory That Child Abuse Accounted for the Abdominal and Rib Injuries.

Respondent claims counsel's performance was neither deficient nor prejudicial in failing to present evidence to rebut the prosecution's theory

that the abdominal and rib injuries were caused by child abuse. Respondent's arguments lack merit.

Counsel unreasonably failed to rebut Dr. Dibdin's testimony that the pattern of rib fractures reported in the autopsy could only be attributed to gripping and squeezing the child from behind. (11 RT 2164.) Counsel also unreasonably failed to show that Dr. Dibdin's rib fractures findings are unsupported by his own microscopic findings and the fractures seen in the radiographs. Finally, counsel failed to show that the severity of the abdominal injuries is inconsistent with the typical injuries from child abuse. Defense counsel's failures prejudiced defendant.

Dr. Dibdin testified that the left posterior ribs contained both acute and healing fractures. He testified that ribs 6-10 contained acute fractures and left posterior ribs 8-9 contained healing fractures. (11 RT 2125-28.) He testified that the acute fractures were less than 7 days old and the healing fractures were 3-4 weeks old. (11 RT 2128, 2158.) He further testified that he had relied on microscopic examination of the ribs to date them. (11 RT 2126-27.) Trial counsel unreasonably failed to show that in fact Dr. Dibdin never examined slides of the left posterior rib tissue and hence his conclusions regarding the left posterior ribs are unsupported and false.

The microscopic manifest that lists all the slides that were taken does not contain left posterior ribs. (Ex. 8 at 3542.) In violation of *Brady* and *Giglio*, the prosecutor failed to disclose this impeachment evidence. (*See supra* Reply to Claim One, subclaim 4.) To the extent that this information could have been obtained by defense counsel filing a discovery motion for the coroner's file, she was unreasonable in failing to do so. Had the prosecutor provided this information and had defense counsel obtained it, counsel could have used it to impeach Dr. Dibdin. This inconsistency and

unreliability in Dr. Dibdin's findings would have added to a pattern of unreliability in his findings in this case and other cases.

The fact that the left posterior ribs did not have fractures is corroborated by testimony from KMC radiologist Dr. Seibly. He testified that the radiographs from November 18, 1991, did not show acute or healing fractures to the left posterior ribs. (13 RT 2514-15.) He attempted to reconcile the discrepancy with Dr. Dibdin by stating that x-rays may not show acute fractures that have yet to form callous, which usually appears in 10-14 days. (13 RT 2515.) However, this would not explain the absence of Dr. Dibdin's alleged left posterior healing fractures since he dated them 3-4 weeks old. (11 RT 2128.) Trial counsel failed to show that neither microscopic nor radiographic evidence showed fractures of the left posterior ribs.

Dr. Dibdin's testified that the pattern of rib fractures he reported, including the alleged bilateral posterior rib fractures, were typical for a case of child abuse where the child is gripped and squeezed. (11 RT 2128-29.) He further testified that he could not offer any other mechanism to account for the fractures. (11 RT 2164.) Counsel erred in failing to show that if there were any acute fractures to the posterior ribs, they were not bilateral as is typical for cases of child abuse. Counsel also erred in rebutting Dr. Dibdin's testimony that only child abuse could account for the bilateral posterior rib fractures. Counsel unreasonably failed to provide expert testimony to explain that it is virtually impossible for a person to cause such severe and extensive rib and abdominal injuries by gripping and squeezing and that the most likely explanation for the injuries was that Consuelo was run over by a car. (Ex. 170 at ¶ 26.) Further, medical literature indicates that this pattern of fractures can result from being struck by an object such as a car. (Ex. 130). Counsel unreasonably failed to

cross-examine Dr. Dibdin with this information that would have corroborated the defense theory.

Defense counsel also failed to show that the severity of the abdominal injuries was inconsistent with an injury from child abuse. Trial counsel unreasonably failed to elicit information from the two emergency room doctors who testified, Dr. Alonso and Dr. Baumer, who could have bolstered her car accident theory. Neither doctor, in their over 30 years of emergency room medicine experience combined, recalls ever encountering a case of child abuse, outside of the present case, where a child suffered such severe abdominal injuries. In their experience, such severe injuries have been caused when a pedestrian is struck in a car accident, a seatbelt injury, an injury from impact with a steering wheel or bicycle handlebars, or a fall from a height. Contrary to evidence presented by the prosecution, (13 RT 2534-35), Dr. Alonso could have testified that, similar to Consuelo's case, victims of such injuries typically do not present with external signs of injury. (Ex. 144 at ¶ 13; Ex. 142 at ¶¶ 14-15.) Moreover, had counsel reviewed the discovery, she would have learned that the spinal x-rays taken of Consuelo at DRMC showed that she had "muscle spasms in the neck" similar to those that would be sustained "in a vehicle accident." (Ex. 4 at 1916.) Counsel's failure to present this compelling evidence in support of the theory that Consuelo was hit by a car was prejudicial.

Respondent's claim that counsel did present Dr. Lovell and Dr. Baumer's testimony to show that the rib fractures could have been caused by a blow to the stomach or car accident overlooks that their testimony was discredited by their inability to reconcile the injuries to the anus and genitalia with a car accident. Had they known that anal and genital injuries were explained by Consuelo's medical condition, the defense experts could have provided more credible testimony explaining the rib and abdominal

injuries as not being a product of child abuse. Respondent's further claim that counsel made an alleged tactical decision not to call an "expert on fulcrum and pressure" because it would have been detrimental to the defense by citing counsel's statement on the record to that effect lies on a false foundation. There is no evidence whatsoever that counsel ever consulted with such an expert or that any expert indicated such information would be unhelpful. (*See generally* counsel's trial funding records disclosed to Respondent.) The expert declarations presented with the Corrected Amended Petition and this Informal Reply indicate quite the contrary.

Accordingly, counsel performed deficiently and prejudiced Mr. Benavides by failing to counter the prosecution's theory that the rib and abdominal injuries were attributable to child abuse. Counsel's failure to present rebuttal evidence alone or in combination with her failure to counter the prosecution theory that the genital and anal injuries were attributable to sex abuse prejudiced Mr. Benavides.

**5. Failure to Counter Theory That Mr. Benavides Suffocated Consuelo.**

Respondent argues that Mr. Benavides was not prejudiced by trial counsel's failure to counter the prosecution's theory that suffocation caused Consuelo's brain infarcts. Respondent argues trial counsel sufficiently countered the prosecution's suffocation theory by eliciting testimony from medical witnesses indicating that Consuelo suffered from low blood pressure during her hospitalization and Dr. Bentson's testimony that low blood pressure could have caused the brain infarcts. (Response at 254-55.) Respondent's arguments are based on the unrealistic assumption that the jury had the medical expertise to link the evidence of low blood pressure to the brain infarcts and discount Dr. Bentson's expert opinion that though low

blood pressure could cause the infarcts, he believed suffocation had caused it instead.

Dr. Bentson's testimony regarding suffocation provides another illustration of how Mr. Benavides was prejudiced by trial counsel's failure to interview witnesses prior to trial, review and understand the medical record, and timely consult with appropriate experts. Dr. Bentson testified that he had not reviewed any medical records apart from the CT scans. (12 RT 2414-15.) Based solely on the CT scans, Dr. Bentson testified that the brain infarcts were caused by suffocation. (12 RT 2406.) Had counsel spoken to Dr. Bentson prior to trial and familiarized him with the fact that at the time the CT scans were taken Consuelo suffered from low blood pressure, DIC, and seizure activity, Dr. Bentson would not have attributed the infarcts to suffocation. (*See* Ex. 84 at ¶ 16). Although the jury did hear that Consuelo suffered from low blood pressure, the jury did not have the benefit of medical testimony to explain why this was the most likely cause of the brain infarcts. Although Dr. Bentson admitted that low blood pressure could cause the brain infarcts, he made clear by his response that he thought it was unlikely. He testified that the blood pressure would have to be "dramatically low to cause the infarcts" and that such infarcts were "rare." (12 RT 2414.) He testified that his best guess was that suffocation caused the brain infarcts. (12 RT 2413.) When counsel attempted to have him admit that because he had not reviewed the medical records other than the CT scans he had not considered other medical conditions that could have caused the brain infarcts, Dr. Bentson dismissed counsel's hypothesis of other causes as impractical and essentially unrealistic. (12 RT 2415 (Dr. Bentson responded: "I mean, compressing of the fibers and that sort of thing is not—one has to be practical about these things. One can't examine everything equally.").) As counsel tried to press Dr. Bentson further to

admit his theory of suffocation was unfounded, the court improperly interrupted cross-examination to rehabilitate Dr. Bentson. In a series of leading questions the court had Dr. Bentson testify that his expertise was in reading CT scans and that given his "background . . . training . . . experience and . . . working with others, [he has] a fairly good general idea in terms of possible causes." (12 RT 2416.) The court's unwarranted intervention and counsel's failure to interview the attending medical experts in preparation for trial, provide them with full information about Consuelo's medical history, and prepare to cross-examine them thus prejudiced Mr. Benavides.

Dr. Lovell's testimony that the brain infarcts could have been caused by brain swelling (16 RT 3113), did not remedy the prejudice from counsel's deficiencies as his testimony was not informed by a full understanding of the medical records. Counsel failed to provide Dr. Lovell with the CT head scans and medical records indicating that the brain infarcts were first documented at UCLA Medical Center on November 21, 1991, after she had had seizure activity and significant low blood pressure. Had Dr. Lovell known this he could have provided a credible and informed medical opinion that those were the most likely causes of Consuelo's brain infarcts. (Ex. 80 at ¶ 26.)

Counsel was also deficient in failing to present evidence that the brain infarcts could have been caused by the cardiac and respiratory arrest that Consuelo experienced at DRMC. Respondent counters that counsel's performance was not deficient because the DRMC medical records did not explain she experienced a cardiac and respiratory emergency in "layman's terms" and as a "lay person" counsel could not be expected to interpret the relevant medical notations in the records indicating what Consuelo had experienced. Respondent cites to the post-conviction declaration of DRMC

nurse Linda Roberts explaining that her nursing record notations indicate Consuelo had had a cardiac and respiratory emergency as evidence that the notations were too obscure for a "lay person" to understand. (Response at 256.) Respondent's reliance on Ms. Roberts' declaration underscores counsel's deficiencies in failing to sufficiently familiarize herself with the medical records, request expert assistance to understand them, and interview the attending medical personnel prior to trial to understand Consuelo's medical condition. Had she interviewed Ms. Roberts, counsel would have understood the medical records. Respondent's argument that counsel's ignorance of Consuelo's condition is also justified because DRMC personnel did not expand on her cardiac and respiratory emergency when interviewed by the District Attorney's investigator (Response at 256-57), ignores counsel's obligation to conduct an independent investigation and not to rely on the prosecution's investigation as a substitute. *See Harrison v. Quarterman*, 496 F.3d 419, 425 (5th Cir. 2007) ("It is beyond cavil that 'an attorney must engage in a reasonable amount of pretrial investigation and[,] at a minimum, interview potential witnesses and make an independent investigation of the facts and circumstances in the case.'") (citing *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir.1994) (internal quotation marks and alterations omitted). Instead of properly preparing, counsel superficially reviewed the medical records and arrived at the erroneous conclusion that Consuelo had suffered a seizure during transport from DRMC to KMC—a proposition that she ineffectively tried to prove through several witnesses (*see, e.g.*, 16 RT 3263), and which she ineffectively attempted to show had caused her brain infarcts (*see, e.g.*, 12 RT 2410.) Contrary to Respondent's contention, defense counsel Huffman does state in her declaration that she was not aware that Consuelo had gone into cardiac and respiratory arrest at DRMC. (*Compare* Response at 256,

*with* Ex. 64 at ¶ 9.) Her ignorance of this important information, failure to investigate the case, and properly and timely consult with experts prevented her from eliciting expert testimony to explain it as a possible causation of the brain infarcts.

Respondent's further argument that even if counsel's performance was deficient, it was not prejudicial because evidence that Mr. Benavides suffocated Consuelo was "tangential" overlooks how damaging this evidence was. (Response at 257.) The prosecution's theory relied on the testimony of Dr. Bentson who testified that the most likely cause of the brain infarcts was suffocation. (12 RT 2413.) He testified that in order for suffocation to cause brain damage Consuelo would have been deprived of oxygen for six to eight minutes. (*Id.* at 2412.) The prosecution argued that Mr. Benavides suffocated Consuelo in order to cover up for molesting her and prevent the neighbors from hearing her scream while he sodomized her. (18 RT 3587.) This searing image of Mr. Benavides allegedly suffocating Consuelo for six to eight minutes while he sodomized her was undoubtedly extremely prejudicial. The prosecutor further falsely argued that the infarcts were conclusive proof that the child had been suffocated because there was no evidence her heart stopped or she had seizure activity, which would otherwise account for the brain infarcts. (18 RT 3586.) The evidence of suffocation supported the prosecution's theory of premeditated first degree murder. Counsel's unreasonable failure to show the prosecution's theory was false prejudiced Mr. Benavides.

#### 6. Failure to Disprove Shaking as the Cause of Consuelo's Brain Injuries.

Respondent contends that counsel was not unreasonable in failing to counter the prosecution's evidence that Mr. Benavides shook Consuelo causing her brain injuries. Referencing the arguments made in the

preceding point, Respondent argues that counsel's performance was not prejudicial because counsel presented evidence that the brain injuries were due to causes other than physical abuse. (Response at 258.) As explained above, counsel's presentation of such evidence was ineffective. Moreover, the evidence presented by counsel that brain swelling could account for the brain infarcts did not in any way counter Dr. Dibdin's false testimony that the subdural hemorrhage was indicative that Consuelo was shaken. (11 RT 2135-36.)

Respondent's further conjuring up of an alleged tactical reason for counsel's failure to present evidence to counter the prosecution's Shaken Baby theory is based on unfounded speculation and Respondent's lay misunderstanding of the medical evidence. (Response at 258-59.) Respondent argues that counsel had a tactical reason for not presenting evidence that Consuelo did not have extensive bilateral retinal hemorrhages, which are typically associated with Shaken Baby Syndrome, because UCLA Dr. Rick Miller had found in his examination on November 21, 1991, that hemorrhage in the right eye was "consistent with" physical abuse. (Response at 259.) Respondent's argument ignores the declaration from Dr. Aaron Gleckman, a forensic neuropathologist and an expert on Shaken Baby Syndrome, who explains that Consuelo's medical history and Dr. Miller's findings are not supportive of Shaken Baby Syndrome. As Dr. Gleckman explains:

> Shaken babies typically will display a pattern of extensive multiple bilateral retinal hemorrhages distributed throughout the retina to the periphery of the eye. These retinal injuries are usually visible immediately or shortly after the child is shaken. On November 17, 1991, when Consuelo was first admitted at DRMC the emergency room physician, Dr. Tait, performed a funduscopy, which is an examination of the eyes. Dr. Tait reported finding no injury or hemorrhaging in Consuelo's

> eyes. The first indication in the medical records of hemorrhaging in the eyes is noted on the fourth day of her hospitalization, November 21, 1991, by Dr. Miller, an opthalmologist, who examined her at UCLA. He found an intraretinal hemorrhage just outside the inferotemporal arcade of right eye ¾ of a disk diameter in size. He found no preretinal hemorrhage overlying this. The left eye was entirely clear. This minor damage to her right eye with no damage to her left eye is inconsistent with the extensive retinal injury usually present in cases of Shaken Baby Syndrome. In addition, shaken babies usually display flame-shaped retinal hemorrhages, as opposed to the dot-like interretinal hemorrhage displayed by Consuelo. The most likely cause of this minor interretinal hemorrhage is her prolonged critical state of DIC and the persistent low blood pressure throughout her hospitalization.

(Ex. 84 at ¶ 11.) Had counsel consulted with an expert such as Dr. Gleckman, she would have been able to present strong evidence that Dr. Dibdin's theory that Consuelo was shaken was unsubstantiated, like so many other of his findings. There is no evidence counsel made any decision—let alone an informed one—to forego such testimony, was even aware of Dr. Miller's report, nor that she even conducted any investigation to rebut the prosecution's theory. Respondent's attempt to justify counsel's failures by conjuring up alleged tactical decisions fails. *See Griffin v. Warden*, 970 F.2d 1355, 1359 (4th Cir. 1992) ("Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another.").

Respondent's further argument that counsel's deficiencies were not prejudicial because the evidence Consuelo was shaken was "tangential" to Mr. Benavides's conviction also lacks merit. Dr. Dibdin's graphic testimony about the shaking painted a disturbing, yet false picture of the shaking that surely influenced jurors to convict and sentence Mr. Benavides

to death. In response to the prosecution's question regarding the significance of the subdural hemorrhage, Dr. Dibdin responded:

> Well, in children with the pattern of injuries this child has it very often indicates the child was shaken. Very commonly the child will be gripped very tightly around the chest in the manner we have discussed and then the child would be shaken. Because children of this age have very weak neck muscles, they are not able to control the movement of the head very well and the head will tend to flop, flop backward and forwards. And this puts a lot of stress on the blood vessels inside the head and they will—sometimes they will tear and you will get bleeding in the area that I have described here, the subdural area. So this suggests that the child was shaken.

(11 RT 2135-36.) Had counsel consulted with an expert, counsel could have rebutted Dr. Dibdin's testimony not only by showing that Consuelo lacked the pattern of retinal hemorrhages typical of Shaken Baby Syndrome, but also that the subdural hemorrhage could not have been caused by Mr. Benavides because it appeared during her hospitalization. (Ex. 84 at ¶ 13.) Counsel could have also shown that Dr. Dibdin's description referring to a child's weak neck musculature leading to the head flopping back and forward does not apply to a 21-month-old child. (Ex. 84 at ¶ 12.) Rather this description applies to children who typically suffer from Shaken Baby Syndrome, which are usually only six weeks to four months in age. (Ex. 84 at ¶ 12.) Counsel's prejudicially failed to impeach Dr. Dibdin with this information.

#### 7. Failure to Move to Exclude and Rebut Evidence of Prior Uncharged Crimes.

The prosecution introduced at the guilt phase evidence of Consuelo's past injuries and illnesses that was irrelevant and unduly prejudicial as they were completely unconnected to Mr. Benavides. Specifically, the prosecution introduced evidence that Consuelo had old left posterior rib

fractures (11 RT 2125-28), an old pancreatic scar (12 RT 2456-57), a prior wrist fracture (13 RT 2552-53), and old genital scarring (11 RT 2139-40). Counsel unreasonably failed to move to exclude any of this evidence, investigate the reliability of the medical findings, possible causes of the injuries, and their connection to Mr. Benavides, and use such information to move to exclude the evidence as irrelevant and unduly prejudicial and to counter it should it be admissible. Had counsel investigated the injuries, counsel would have learned that the old rib fractures reported by Dr. Dibdin as located in the left posterior ribs were unsupported, as Dr. Dibdin's microscopic manifest of the rib slides shows he did not make tissue slides of the left posterior ribs. (Ex. 8 at 3542.) Had counsel interviewed Dr. Bloch prior to trial, counsel would have learned that the old pancreas scarring could be attributable to bowel inflammation. (Ex. 77 at ¶ 6.) Had counsel interviewed Dr. Shaw, she would have learned that the old pancreatic injury could also be congenital. (Ex. 79 at ¶ 6.) The prior wrist fracture occurred by all witnesses' accounts while Consuelo was in her aunt's care and when Mr. Benavides was not present. (Ex. 4 at 2043-44, 2048.) Had counsel conducted the required investigation, counsel would have also learned that Dr. Dibdin falsely dated the old genital injuries in the tissue slides as having occurred four weeks prior to her death, though the injuries most likely occurred during her hospitalization. (Ex. 82.) Like so many of Dr. Dibdin's other findings, this was false. Had counsel investigated and presented to the court information showing that old rib and genital injuries were based on Dr. Dibdin's false and unreliable findings, and that the old wrist and pancreatic injuries were unconnected to Mr. Benavides, the court would have excluded the injuries as irrelevant and unduly prejudicial. Even if the court properly admitted the evidence of old injuries and illness, counsel was unreasonable in failing to investigate and

rebut the prosecution's theory that they were connected to Mr. Benavides or showed his guilt of the charged crimes.

Counsel also unreasonably failed to move to exclude testimony regarding prior uncharged crimes. Although trial counsel filed a motion to exclude evidence of "any Uncharged Acts," the motion itself and counsel's argument at the motion hearing focused only on two incidents: (1) testimony from Cristina Medina alleging that one night Mr. Benavides had taken Consuelo into his room when she was crying and locked the door; and (2) an illness suffered by Consuelo around Halloween. (2 CT 409-31.) Counsel's motion was unreasonably narrow in that she failed to include other uncharged acts and evidence of prior injuries, such as Consuelo's prior wrist, rib, pancreas, and genital injuries. During the hearing, the court agreed to exclude the witnesses' opinions about the locked door and Halloween illness, but allowed the witnesses to testify to what they had perceived. Counsel agreed with the court's ruling. Counsel unreasonably failed to investigate these incidents, present evidence that they were irrelevant as they had no connection to Mr. Benavides, and move to exclude them as more prejudicial than probative. Even if the court properly admitted these incidents, counsel was unreasonable in failing to investigate these incidents and present evidence to rebut the prosecution's theory that they showed Mr. Benavides was guilty of injuring Consuelo on November 17, 1991.

Counsel also unreasonably argued against the prosecution's motion to instruct the jury that they could not consider evidence of uncharged crimes unless they found it to be true by a preponderance of the evidence. (17 RT 3413.) In light of the admission of such damaging evidence, a limiting instruction was crucial to guide the jury's consideration of such evidence.

Respondent argues that Mr. Benavides's claims that counsel failed to move to exclude prior injuries and unreasonably objected to the court's limiting instruction are procedurally barred because they have been considered and rejected by this Court on appeal. (Response at 259-60.) As is shown below, the claim is not procedurally barred because this Court did not and could not consider the off-record evidence presented in the Corrected Amended Petition, which counsel unreasonably failed to investigate and present to the court. Moreover, the claims decided by this Court are only a subset of those presented in the habeas petition. Respondent also argues that Mr. Benavides's claim that counsel's failure to investigate the reliability of Cristina's account of the locked bedroom door incident is untimely and does not show counsel's performance was deficient or prejudicial. Respondent's arguments lack merit. Respondent's arguments that counsel presented sufficient evidence to rebut the evidence of prior uncharged crimes overlooks the importance of the evidence counsel unreasonably failed to investigate. (Response at 259-60.)

**a. Testimony Regarding Consuelo's Halloween Stomach Ache and Mr. Benavides Taking Consuelo Into His Room When She Was Whining.**

Respondent argues that Mr. Benavides's claims regarding counsel's ineffectiveness in failing to move to exclude Cristina Medina's testimony regarding Mr. Benavides having taken Consuelo into his room when she was crying and Diana Alejandro's testimony regarding Consuelo's illness on Halloween are procedurally barred because they were raised and rejected on appeal. (Response at 260-61.) Respondent is mistaken. The claims on appeal were limited to the record on appeal. Mr. Benavides's claim on habeas relies on extra-record evidence that shows counsel's

performance was deficient as a function of her failure to conduct an adequate investigation and present evidence rebutting the uncharged acts.

On appeal, this Court found that counsel was not prejudicially deficient for failing to object to testimony regarding Consuelo's illness during Halloween and Cristina's account that one night when Mr. Benavides was taking care of the girls on his own he had taken Consuelo into his room when she was crying and locked the door. *People v. Benavides*, 35 Cal. 4th 69, 93 (2005). This Court held that, because Consuelo's prior injuries were similar to her fatal injuries of November 17, 1991, this evidence was admissible under Evidence Code section 1101, subdivision (b), to show that an accident did not cause her fatal injuries. *Id.* In light of the evidence presented in the Corrected Amended Petition, this Court's conclusion cannot be maintained.

Apparently referring to Cristina's testimony about a night in late September 1991 when Mr. Benavides took Consuelo into his room, this Court premised its ruling on evidence that Mr. Benavides allegedly displayed "abnormal, secretive behavior" that night and "had the opportunity to inflict these [prior] injuries." *Benavides*, 35 Cal. 4th at 93. As Consuelo's mother Estella explains in her declaration, had she been asked, she could have testified that there was nothing abnormal about Mr. Benavides taking Consuelo into his room when she was crying. She could have explained that she often took Consuelo into her room when she was fussy, sick, whining, crying or could not sleep. Estella always locked her bedroom door and told the girls to do so as well out of a habit she developed to keep safe after she broke up with Cristina's father. (Ex. 66 at ¶¶ 91-92.)[79] This Court rendered its decision on appeal without the benefit

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[79] Respondent's argument that reference to Estella Medina's declaration in this reply constitutes a new untimely claim is baseless. (Response at

of Estella's declaration explaining that Mr. Benavides's behavior was not abnormal.

Respondent's argument that even if Estella Medina had testified that it was not unusual to take Consuelo into her and Mr. Benavides's room when she could not sleep for some reason, counsel's failure to present such evidence was not prejudicial is based on a misrepresentation of the record to this Court. Respondent argues that because Estella only referred to Consuelo crying as a reason to take her into her room when she was interviewed by District Attorney's investigator and because Cristina testified that Consuelo was whining but not crying, counsel had an alleged "tactical" reason for not presenting such evidence. (Response at 261-62.) In other words, Respondent makes the ludicrous argument that counsel considered and reasonably rejected presenting Estella's testimony that it was not unusual for Mr. Benavides to take Consuelo into his room to comfort her when she was whining because Estella would not have so testified. In citing the relevant evidence, Respondent notably omits mention of Estella Medina's declaration where she explains that she "often took Consuelo into [her] room when she was fussy, sick, whining, crying, or could not sleep for any reason." (Ex. 66 at ¶ 91.) Counsel unreasonably failed to adequately interview Estella and elicit her testimony to counter the prosecution's theory that Mr. Benavides took Consuelo into his room for a nefarious purpose.

This Court also rendered its decision without the benefit of an expert's review of Cristina's statements, which counsel unreasonably failed to obtain, showing that Cristina's account of that night and her timing of

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261.) Estella Medina's declaration is cited in response to this Court's rationale in its direct opinion, which was not decided until 2005, three years after the original petition was filed. Moreover, Estella Medina's declaration was filed with the original petition and does not constitute new evidence.

when it happened was highly unreliable and unduly influenced by the interviewing officers' suggestive and coercive questioning. (Ex. 89 at ¶¶ 36-47.) As explained by James Wood, Ph.D., a professor in clinical psychology, and an expert who has conducted extensive research in forensic interviews to diagnose and investigate child sexual abuse, law enforcement officers' suggestive and coercive questioning of Cristina likely led her to see the event as a scary and dangerous occurrence, though she had no such initial impression of the event. (Ex. 89 at ¶ 41.) After repeated questioning, Cristina agreed that the event had happened in September or October, though she had initially said it happened prior to Consuelo breaking her arm in September. (Ex. 89 at ¶ 42.) The law enforcement officers' suggestive questioning moving the event into the September or October timeframe, enabled this ten year old to provide testimony linking the event to the prior pancreas and rib injuries, which doctors dated as less than two months prior to her fatal November injuries. The evidence in the Corrected Amended Petition showing the timeframe of the locked door incident was unreliable and the product of suggestive questioning of a ten-year old girl weakens this Court's reasoning that the incident was admissible and relevant to show an opportunity to inflict the prior injuries. *Benavides*, 35 Cal. 4th at 93.

Moreover, this Court's reasoning that Mr. Benavides could have inflicted the old injuries when he took Consuelo into his room when she was crying is not substantiated by the record. Cristina has consistently stated that Consuelo showed no signs of discomfort or unhappiness when she emerged the next morning. (11 RT 2194-95; Ex. 58 at 5115.) If Mr. Benavides had caused injury to Consuelo's ribs, pancreas, or genitalia on this occasion, Consuelo would have shown some evidence of pain or discomfort. Because there is no link between the prior injuries and Mr.

Benavides taking Consuelo into his room when she was crying and at best a very tenuous link between that incident and the injuries of November 17, 1991, the evidence should have been excluded as irrelevant and unduly prejudicial. Counsel unreasonably consented to the admission of Cristina's testimony and unreasonably failed to move to exclude it on this basis.[80] Further, as explained above, counsel unreasonably failed to investigate and present evidence to move to exclude or rebut Dr. Dibdin's testimony dating the rib and genital injuries as occurring prior to her hospitalization.

Similarly, even if evidence that Consuelo was sick around Halloween is somehow connected to her old rib, pancreas, and alleged genital injuries, her illness at that time cannot be attributed to Mr. Benavides because all witnesses who referred to this illness agreed that Mr. Benavides was not present at this time. (Ex. 4 at 2043-44, 2048.) This Court did not consider these arguments on appeal because trial counsel unreasonably failed to object to the evidence on this basis.

In sum, this Court's decision on appeal that Cristina's testimony about Mr. Benavides taking Consuelo into his room when she was whining and Consuelo being sick at Halloween was admissible and that counsel was not ineffective for failing to object to the evidence was based on the limited record on appeal, which did not show the unreliability of this evidence, its irrelevance in being connected to Mr. Benavides, and the undue prejudice from its admission. Because counsel failed to object to admission of any of the prior old injuries, this Court did not consider the admissibility of such

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[80] On appeal this Court did not consider whether counsel unreasonably failed to move to exclude the evidence as unduly prejudicial because counsel consented to the admission of the evidence. This Court only considered and rejected the argument that the trial court had a sua sponte duty to consider whether the evidence was unduly prejudicial. *Benavides*, 34 Cal. 4th at 93.

evidence. Further, this Court did not consider counsel's failure to investigate these prior uncharged crimes and prior old injuries, to present evidence to move to exclude such evidence and rebut the prosecution's theories of their connection to the charged crimes or Mr. Benavides. Hence, Mr. Benavides's claims in the Corrected Amended Petition are distinct from the claims on appeal and not barred by this Court's decision on appeal.

Furthermore, the string of inferences drawn by this Court to hold that the evidence was admissible is unsupported given the evidence presented in the Corrected Amended Petition. This Court ruled that the jury "could reasonably infer that defendant's intentional acts caused Consuelo's prior injuries," because Mr. Benavides allegedly showed "secretive" behavior in late September, and Consuelo showed "physical and emotional symptoms" in this "same time frame," presumably late October, around Halloween, and forensic evidence established the prior injuries had been inflicted one or two months prior to November 17, 1991. *Benavides*, 35 Cal. 4th at 93. This Court further inferred that this inference was probative in establishing "sexual abuse rather than accident." *Id.* As shown above, Mr. Benavides's behavior was not secretive or unusual, her Halloween stomach illness was not connected to Mr. Benavides, and Dr. Dibdin's timing of the prior injuries was false and unreliable. Therefore, counsel's performance was prejudicially deficient in failing to object to the admission of Cristina's testimony regarding that night as unreliable, irrelevant, inadmissible propensity evidence, and unduly prejudicial, in addition to violating the right to due process. Further, counsel was deficient in failing to rebut the evidence as stated above. The admission of the evidence prejudiced Mr. Benavides by creating the unwarranted impression that he had previously

abused and injured Consuelo and thus was likely to have caused her fatal injuries.

### b. Failure to Move for a Limiting Instruction.

Respondent argues that the claim that counsel was ineffective for objecting to an instruction to limit the jury's consideration of the prior injuries is procedurally barred because it was considered and rejected on appeal. (Response at 262.) Respondent is mistaken because the claim in the Corrected Amended Petition is based on extra-record evidence showing that counsel's objection to the limiting instruction was not based on a reasonable investigation of the prior injuries.

On appeal, this Court concluded that the trial court did not have a sua sponte duty to instruct the jury with CALJIC No. 2.50 given defense counsel's objection to the instruction. *Benavides*, 35 Cal. 4th at 93-94.[81] This Court also stated that counsel's position was not ineffective because she "could reasonably have concluded such an instruction would have emphasized in the juror's minds a characterization of defendant she was trying to avoid—that defendant's actions toward Consuelo were, indeed, criminal." *Id.* at 94. However, counsel's objection to the limiting instructions was unreasonable in light of the plethora of irrelevant evidence

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[81] Appellate counsel did not specifically raise on appeal and this Court did not address in its ruling whether the trial court had a sua sponte duty to instruct the jury with CALJIC 2.50.1 and 2.50.2, which trial counsel also opposed. (17 RT 3413.) Counsel's opposition to those instructions, which preclude jurors from considering past sexual misconduct that is not proved by a preponderance of the evidence, was particularly prejudicial in this case given the highly speculative nature of the prosecutor's implications against Mr. Benavides regarding past sexual misconduct. To the extent that appellate counsel is faulted for not expressly raising this issue, Mr. Benavides was deprived of his constitutional right to effective representation on appeal.

introduced by the prosecution regarding Consuelo's prior injuries and illness and the prosecution's repeated arguments that these proved Mr. Benavides's guilt of the November 17, 1991 charges. (*See, e.g.*, 15 RT 3054 ("Isn't it true, Mr. Benavides, you have been molesting that little girl for a while?"); 13 RT 2587-88 ("Mrs. Medina, isn't it true that you knew what was happening with this man but you weren't reporting it? . . . . It wasn't until he came around that the child started having broken bones and bruises, was it?"); 18 RT 3596-97 ("If the evidence of the prior injuries before and the lack of reporting don't convince us . . .").) In fact, the prosecutor concluded his closing argument by arguing explicitly that it "is a very sensible conclusion to draw from the facts in this case" that "the defendant inflicted previous injury on this child," and that his having supposedly inflicted such prior injuries, proved he sexually and physically abused her on November 17, 1991: "Gee, I wonder who did it on November 17, 1991, given the state of this evidence." (18 RT 3660.) Given the prosecutor's arguments, the jury could not avoid thinking of Mr. Benavides as responsible for Consuelo's prior injuries, i.e., as a "criminal," and the jury very likely used that evidence incorrectly as evidence of Mr. Benavides's alleged predisposition to commit the crime. Also, without guidance from the court, the jury cannot have applied the appropriate burden of proof—preponderance of the evidence—prior to relying on this evidence. In the context of the substantial amount of damaging and irrelevant evidence admitted at trial regarding Consuelo's prior injuries, counsel's objection to the limiting instructions was unreasonable.

As shown above, counsel's decision also was unreasonable in light of her failure to investigate the prior injuries and present evidence that they were either not connected to Mr. Benavides (prior wrist injury and Halloween illness) or were falsely or unreliably dated as having occurred

prior to November 17, 1991 (prior rib and genital injuries). Had counsel presented such evidence, she could have either successfully excluded the evidence or rebutted the prosecution's theory that they were indicative of Mr. Benavides's guilt of the charged crimes. Further, if counsel had presented such evidence, and requested the limiting instruction, the jury would have rejected the evidence as probative of Mr. Benavides's guilt. CALJIC 2.50 would have explained to the jury that they could not consider the evidence of the crimes as disposition evidence but "only for the limited purpose" of showing that the "defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged." *Benavides*, 35 Cal. 4th at 94 n.7 (citing CALJIC 2.50.) The evidence in the Corrected Amended Petition shows that the evidence of Consuelo's prior injuries and illness in no way showed Mr. Benavides had the knowledge or means to commit the November 17, 1991 injuries.

**c. Failure to Present Evidence Regarding the Unreliability of Cristina's Testimony Suggesting Mr. Benavides Took Consuelo Into His Room for a Nefarious Purpose.**

Respondent argues that the allegations in the Corrected Amended Petition that counsel unreasonably failed to impeach Cristina Medina with the fact that she did not report the incident regarding the locked door until 9-7 months after it occurred and unreasonably failed to present expert testimony evaluating the reliability of Cristina's testimony are untimely. Respondent argues that these allegations are not properly raised pursuant to this Court's order of November 1, 2006, because they are unrelated to Ms. Culhane's fraudulent work product and Mr. Benavides has not shown justification for their untimely presentation. (Response at 263-66.) Respondent is mistaken. The information submitted in the Corrected

Amended Petition conforms to this Court's directive and properly replaced the allegations that were submitted and withdrawn from the original petition. The allegations in the original petition inadvertently relied on a fraudulent declaration that Ms. Culhane submitted from Consuelo's cousin, Virginia Salinas, where she indicated that at Detective Lopez's prompting she had led Cristina to believe that any time Mr. Benavides was with Consuelo alone was bad. (Former Ex. 147 at ¶ 9.) Habeas counsel reasonably believed that in light of such evidence the strongest claim of counsel's ineffectiveness lay in counsel's failure to show the nefarious aspect of the incident was manufactured. Having withdrawn such evidence, habeas counsel's allegations in the Corrected Amended Petition now rely on evidence presented with the Original Petition that Cristina's statements were the product of law enforcement's intense coercive and suggestive questioning, as explained by Dr. Wood in the declaration presented with the original petition. (Ex. 89; *see also* Claim Two, subclaim two, citing Dr. Wood's declaration to explain how Cristina's testimony was manufactured by law enforcement's inappropriate interview techniques.) This evidence is not new and it is not inappropriate for habeas counsel to rely on it having discovered that the evidence that Consuelo's cousin manufactured the account was false. Discovery of this false information required changing the underlying basis for the claim. Such changes hence meet this Court's order allowing for changes to the original petition which were "necessary as a result of the fraudulent investigation of Kathleen Culhane." (CSC Order of January 23, 2008.)

Respondent further argues that counsel was neither deficient nor prejudicial in failing to present evidence of the unreliability of Cristina's account because it was reported only seven to nine months after it occurred, under intense coercive and suggestive questioning, and failing to present

expert testimony explaining how such improper interviewing techniques with children can lead to false memories. (Response at 264, 266-67.) Respondent's arguments lack merit. The fact that Cristina did not tell anyone that Mr. Benavides had taken Consuelo into his room when she was whining at the time it occurred and only recalled the incident seven to nine months later pursuant to law enforcement officers' suggestive interview techniques is not "insignificant" as Respondent claims. (Response at 264.) The relevance of this evidence was tenuous at best. By this Court's rationale, the evidence was only admissible to show an alleged opportunity to cause the prior injuries and from that an inference that the current injuries were the product of sexual abuse rather than accident. *Benavides*, 35 Cal. 4th at 93. Had counsel presented to the court or the jury evidence that Cristina's testimony implicating Mr. Benavides had a nefarious purpose in taking Consuelo into his room was unreliable, the court would have excluded it or, if admissible, the jury would have discounted it as not probative of Mr. Benavides's guilt of the charged crimes.

Respondent further claims that counsel was not deficient in failing to consult with and present testimony of an expert such as Dr. Wood to explain to the jury how improper and suggestive interview techniques can lead children to create false and unreliable memories. (Response at 266.) Respondent's claim that counsel investigated the locked-door incident is incorrect. Respondent relies on an entry in defense investigator Jon Purcell's billing records for September 3, 1992, indicating that he interviewed Vicky Salinas and Cristina. (Response Ex. 4 at 4.) The entry, however, does not indicate that Mr. Purcell interviewed Cristina about the locked door incident. As Mr. Purcell explained in his declaration, when he tried to interview Cristina and her extended family, "they told [him] that the district attorney investigators had told them in no uncertain terms that they

were not to talk to the defense." (Ex. 106 at ¶ 4.) Though Mr. Purcell was particularly interested in talking about the locked door, which he suspected was contrived by law enforcement officers, he was unable to interview Cristina because of their unlawful intervention. (Ex. 106 at ¶ 4.) Respondent also inaccurately relies on an entry in Mr. Purcell's billing records for October 8, 1992, describing his work as "written summaries of interviews with Delia Alejandro, Christina Medina." (Response Ex. 4 at 6.) A review of Mr. Purcell's billing shows that this entry refers to Mr. Purcell's billing for summarizing law enforcement interviews with Delia Alejandro and Cristina Medina, rather than his own interviews, which as shown above with respect to Cristina was not a substantive one. This is supported by the fact that an earlier entry on October 8, 1992, shows that Delia Alejandro refused his request to interview her and thus he could not have written a "summary" of the interview. (*Id.*)

Respondent also disingenuously claims that counsel had no way of knowing that she should have investigated the reliability of Cristina's statements, that there were experts at the time of trial who specialized child witness suggestibility and forensic interviewing techniques, or that counsel was aware of such experts. (Response at 266.) The fact that children could fabricate claims of child and sex abuse as a result of suggestive and coercive interviewing techniques was well known at the time of Mr. Benavides's trial in 1993.[82] Kern County was notorious for having falsely convicted a number of defendants in the mid-1980s based on false allegations of child and sex abuse by children who were subjected to suggestive and coercive questioning. In a trial of four of these defendants - John Stoll, Grant Self, Margie Grafton, and Timothy Palomo—which

[82] Respondent attempts to mislead this Court by referring to the time of trial as 1992. (Response at 266.)

occurred in late 1984 and early 1985, the main defense offered was that a child protective services worker had used "suggestive and coercive interviewing techniques which caused the children to fabricate claims of sexual abuse against defendants." *People v. Stoll*, 49 Cal. 3d 1136, 1144 n.5 (1989). Kern County law enforcement officials' improper investigation of these child abuse cases resulted in a grand jury requesting that the Attorney General conduct an investigation into such improprieties. The Attorney General issued a comprehensive report in 1986 widely criticizing the Kern County law enforcement agencies for the way they handled the child abuse cases. The Attorney General specifically criticized that "[d]eputies allowed overly leading questions, gave the children inappropriate positive reinforcement for many of their statements, and did not question those statements." (Ex. 150 at 6740.) A similar scandal developed in the late 1980s in Los Angeles County, which is known as the McMartin preschool case and which was also a highly publicized case where suggestive interview techniques of children led to false accusations of sex abuse and ultimate acquittal of all defendants in a 1990 trial. News reports of the trial in 1990 indicated that the jurors rejected the charges "mainly because they thought the children were led into making incriminating statements by [the] interviewers." Robert Reinhold, *The Longest Trial - A Post-Mortem; Collapse of Child-Abuse Case: So Much Agony for So Little*, N.Y. Times, Jan. 24, 1990, at 5. Social science evidence that had been conducted prior to 1993 showed that improper interview techniques could lead to children making false accusations of abuse. *See* Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses,* 35 Ariz. L. Rev. 927, 933 (1993) (summarizing social science evidence showing that "[s]ocial science evidence of children's suggestibility indicates that

persistent pretrial interrogation of child witnesses can impair the search for truth in litigation."); *see also State v. Carrizales*, 528 N.W.2d 29, 36 n.3 (Wis. 1995) (citing multiple pre-1993 reports, articles, and books describing improper interview techniques and the prevalence of false child sex abuse allegations.) Furthermore, contrary to Respondent's arguments, the use of experts to explain to the jury how suggestive interview techniques can lead children to make unreliable or false statements conformed with the standard of care in 1993. *See, e.g., Nelson v. State*, 782 P.2d 290, 294 (Alaska Ct. App. 1989); *Gotwald v. Gotwald*, 768 S.W.2d 689, 692 (Tenn. Ct. App. 1989).

Respondent's argument that counsel's failure to call such an expert was not prejudicial also fails. (Response at 267.) As explained more fully in the reply to the Response to Claim Two, Respondent misunderstands or overlooks Dr. Woods's detailed review of the improper coercive and suggestive interviewing techniques that led Cristina to describe Mr. Benavides taking Consuelo into his room when she was whining in a negative light. Respondent's argument that Cristina was not asked to "imagine" an event, which Dr. Woods describes as a method of interviewing that can lead to false memories, is wrong. When Cristina did not give the answers that detective were looking for, the detectives repeatedly asked her to "think about" how her statements about Mr. Benavides being kind and caring toward her and her sister differed from what the police and doctors were saying. The detectives were clearly telling her that she had to change her story, imagine a different scenario that vilified Mr. Benavides. As explained by Dr. Wood:

> It is not surprising that Cristina offered a description of an incident to Ray Lopez in the June 12 interview. Prior to her doing so, she had been put under intense pressure to change her story. In addition, she had been admonished by Detective

> Valdez to "think about" how her statements differed from what the police believed, and been asked repeatedly whether Mr. Benavides ever did anything to her sister that made her uncomfortable. As previously described, inaccurate or false memories of such incidents can often be created when a child is asked to imagine events, even when the events did not happen. Due to children's difficulties with source monitoring, any suggestion to Cristina that she imagine a time that Mr. Benavides did something that made her uncomfortable could result in a false memory, or at least a memory of a real event in which her interpretation was greatly modified.

(Ex. 89 at ¶ 39.) Respondent's further claim that Cristina's testimony was not prejudicial because she testified only that the locked bedroom door incident "made her uncomfortable" inaccurately portrays the importance of her testimony. (Response at 267.) As stated by this Court, her testimony was introduced to show that Mr. Benavides had previously injured Consuelo and was hence likely to have injured her on November 17, 1991, not by accident. As explained above, that inference is based on a series of flawed assumptions and notwithstanding this Court's ruling that the evidence was admissible, it is very likely the jury improperly interpreted it as prejudicial disposition evidence. Accordingly, counsel's failure to introduce evidence from an expert to explain to the jury the scientific evidence showing that these extremely coercive and suggestive interview techniques very likely led Cristina to testify about this event as something that made her scared of Mr. Benavides was prejudicial.

**d. Failure to Investigate and Present Evidence That Mr. Benavides Was Not Responsible for Prior Injuries.**

The prosecution introduced evidence of a number of prior injuries that counsel unreasonably failed to investigate and present evidence to rebut. As explained above, counsel unreasonably failed to present expert evidence to show Dr. Dibdin falsely testified about the alleged old genital

scarring and presented unreliable evidence about the old rib fractures, and that the old pancreatic scar could be explained by bowel inflammation or a congenital disease, rather than trauma. Counsel failed to investigate and present evidence that could have explained the old rib injuries as unrelated to Mr. Benavides. Counsel also unreasonably failed to interview friends of Estella Medina and Mr. Benavides who could have testified that Consuelo was known to be clumsy and fell a lot, possibly causing her rib injuries. Respondent argues that evidence that Consuelo's many falls could have accounted for her rib injuries is "speculative and conclusory." (Response at 268 at n.56.) Respondent is mistaken. The evidence is no more speculative and likely less speculative than the evidence that was introduced by the prosecution to explain the old injuries. Respondent argues that because Consuelo did not act sore around her ribs after she fell at Delia's house, that fall could not account for the old rib fractures. (*Id.*) However, Consuelo likewise did not act sore around the ribs or anywhere else after Mr. Benavides took her into his room to comfort her when she was whining and yet that evidence was admissible to allegedly explain the old injuries.

Respondent takes issue with the declarations cited of witnesses who could have testified about Consuelo's tendency to run around and fall a lot and about Consuelo's loving relationship with Mr. Benavides, which would be highly unlikely if he were physically or sexually abusing her. (Response at 268-69.) Respondent is mistaken that the declarations do not support this contention. Maria Celia Campos, a close friend of Estella Medina and Mr. Benavides describes Consuelo as running around and falling all the time:

> Whenever I saw la Chiquita, I noticed that she was a handful. That little girl ran up and down and all over the place. She was always falling. Though she could walk, she fell all the time—she did not even need to have something to trip over. Her body was so flexible that she fell every other step—it was

> as if she had no strength in her legs. We had to keep right behind her when she went anywhere, or else she would fall or get into something. She loved to climb anything she could get onto. She climbed stairs, chairs, anything. One time, I remember I turned around and there was la Chiquita on top of the refrigerator. We had no idea how she had managed to get herself up there. Another time, about two to three months before Chiquita died, she fell down the steps in front of my house. The steps were cement and rather high. There were two of them, and she just took a big tumble. Estella and I found her crying at the bottom of the steps. Chiquita was walking at the time. She walked out of the house alone and fell down the cement steps.

(Ex. 98 at ¶ 14.) Ms. Campos's description of Consuelo is corroborated by Ana Maria Cordero Cárdenas de Dávalos, who was Consuelo's caretaker for several months during the summer of 1991, and described her as "very restless and always moving around." (Ex. 94 at ¶11.) Ms. Dávalos described Consuelo as "good with doors and door knobs" and running out the front door when they left the door unlocked. (*Id.*). Ms. Campos's husband, Dionicio Campos, also corroborates these descriptions. He describes her as always following her older sister and as a "mischievous" and "restless" girl who often got into accidents. He describes accidents Estella told him about when Consuelo fell off a chair and off the top of a slide. (Ex. 104 at ¶ 28.)

Most importantly all of these witnesses consistently describe Consuelo as loving Mr. Benavides very much. Ms. Dávalos tells of how Consuelo "loved to play with Vicente," ran to him when he came to visit, and cried because she did not want him to leave. (Ex. 94 at ¶ 10.) Ms. Campos corroborates this account. She says Consuelo "adored Vicente." (Ex. 98 at ¶ 13.) She describes Consuelo, whose nickname was "La Chiquita," as having a strong affection for Mr. Benavides, which she would not have had had he been abusing her:

> When he opened his arms, she walked right over to him. She was always hugging and kissing him. She held onto Vicente and hugged him tightly around his neck when he carried her. La Chiquita, just like my little girls, liked being around Vicente. The girls were never afraid or uncomfortable with Vicente. On the contrary, they enjoyed his company and had warm and loving relationships with him.

(Ex. 98 at ¶ 13.) Ms. Campos's description of Mr. Benavides's good character and being good with children is corroborated by everyone who has ever known him, including his two nieces, whom he helped raise, his daughter, and the mother of his daughter. (RCCAP at 267.)

Respondent's contention that counsel did not prejudice Mr. Benavides by failing to present the plethora of good character evidence showing the high unlikelihood that Mr. Benavides would have committed the extremely deviant acts of which he was accused is baseless. (Response at 269-70.) Respondent's argument that because these witnesses' experiences do not exactly mirror the incident—i.e., that a 21 month old child was left alone with Mr. Benavides—the failure to present this good character evidence was not prejudicial is illogical on its face. Mr. Benavides's uncontested life-long history of being a good, kind, caring, non-violent man, with no criminal history, who is dearly loved by his family and considered a father by his nieces and was deeply loved by Consuelo speaks volumes about his innocence.

**e. Conclusion**

Counsel's failures to investigate the prior injuries and alleged prior uncharged crimes, present evidence to move to exclude them, rebut the prosecution's theory that they were connected to Mr. Benavides and indicative of his guilt of the crime, and unreasonable objection to an instruction limiting their consideration of such evidence must be viewed

cumulatively. Further, this Court must view counsel's failures in light of the limited purpose for which this evidence was admitted under this Court's rationale—to show lack of accident—and the tenuous strand of flawed inferences that allegedly made this evidence relevant—that Mr. Benavides allegedly had an opportunity to inflict these prior injuries at Halloween, when he was not present, or when he took Consuelo into his room, though Consuelo showed no signs of discomfort. The cumulative effect of counsel's failures viewed in the context of the limited relevance of this evidence was to unduly prejudice Mr. Benavides, specifically by painting him to have a disposition to physically and sexually abuse children, when nothing could be further from the truth.

**8. Failure to Investigate and Present Corroborating Evidence That Mr. Benavides Found Consuelo Outside.**

Respondent claims that counsel's performance was neither deficient nor prejudicial in failing to request all materials from the crime lab and present evidence to corroborate Mr. Benavides' account that he found Consuelo outside. Respondent's claim that counsel did not perform deficiently in failing to present the crime lab evidence because she directed her investigators to photograph the crime scene and find evidence of a possible car accident makes no sense. (Response at 270.) Whatever else she did, counsel's investigation was clearly deficient in failing to request and obtain the crime lab bench notes, which had extensive evidence corroborating Mr. Benavides's account. Respondent's similar claim that counsel's performance was not deficient because she presented some evidence that Consuelo's rib, head, and abdominal injuries could have been caused by a car accident and allegedly effectively rebutted the anal and genital injuries by calling Dr. Baumer and Dr. Lovell to testify (Response at 270-71, citing their testimony), has been refuted above and, in any case,

also does not address counsel's failure to present the evidence from the crime lab.

Though Huffman knew that the prosecutor was not disclosing all the materials she needed to defend the case (Ex. 64 at ¶ 10), she failed to make a formal discovery request for the crime lab materials. Respondent's reliance on a line in the Clerk's Transcript indicating the prosecution and defense requested discovery pursuant to Penal Code section 1054 (1 CT 259), fails to show that counsel diligently performed her duty to ensure she had all the required evidence. Reasonably competent counsel would have requested the bench notes for the crime lab file. Furthermore, as described in Claim Seven, the prosecution is also at fault for failing to disclose all the evidence at the crime lab. Respondent's further claim that Mr. Benavides has not presented any evidence to show counsel did not receive the crime lab evidence is false. Huffman states that she was not aware of the crime lab evidence:

> I did not know that the crime lab had evidence indicating that the child had been found outside the apartment. An important part of the case entailed showing that Mr. Benavides was truthful when he indicated that he had found the child outside. Since I did not have this evidence from the crime lab, I was not able to show he was credible.

(Ex. 64 at ¶ 13.)

Respondent's arguments that counsel's failure to present this evidence was not prejudicial are hollow. Respondent, for example, argues that, although the criminalist records show that the there was plant material on Consuelo's sweatshirt that was consistent with a tape lift from outside the doorway (Ex. 7 at 3426), such evidence was unpersuasive because the plant material was not readily visible in the pictures of the sweatshirt that counsel was given. (Response at 272.) The argument makes no sense.

Likewise, Respondent's argument that failure to present evidence that Consuelo had blood on her shoe sole that may have picked up gravel or dirt was not prejudicial because Dr. Baumer testified that, given Consuelo's injuries, she could not "get up and walk to the front door" (Response at 272) is inapposite. Mr. Benavides did not testify that he found Consuelo at the front door. He indicated with a circle marked on People's Exhibit 63 that he found her very close to the carport. (15 RT 3013.) Further, had Dr. Baumer been asked if Consuelo could have walked a short distance with her injuries, i.e., the few steps between the carport and the place Mr. Benavides indicated he found Consuelo, Dr. Baumer would have testified that she could have done so. (Ex. 142 at ¶ 15.) Other than a conclusory dismissal, Respondent provides no other reasoning why Mr. Benavides was not prejudiced from counsel's failure to present a plethora of evidence from the crime lab supporting his account that Consuelo was found outside. (RCCAP at 267-69.) Respondent also does not address counsel's failure to impeach the prosecution criminalist's testimony indicating that there was no evidence of outside debris on the kitchen paper towels. (11 RT 2291.) Given that Mr. Benavides's credibility was a central focus of the case, counsel's failure to present evidence to corroborate his account was a critical failure that prejudiced Mr. Benavides. There is a reasonable probability that, had counsel presented this evidence, at least one juror would have had a reasonable doubt about Mr. Benavides's guilt.

### 9. Failure to Obtain a Complete and Accurate Translation of Law Enforcement's November 18, 1991 Interrogation of Mr. Benavides.

Respondent does not contest that counsel performed deficiently by failing to obtain a complete and accurate translation of the Delano detective's November 18, 1991 interview with Mr. Benavides, which was

given to the jury, but argues that any deficiencies were not prejudicial. Respondent ignores the most salient error in the translation and minimizes other errors in arguing that Mr. Benavides was not prejudiced. (Response at 273-77.)

Respondent wholly ignores the materially false translation of Mr. Benavides's statement that he found Consuelo "tirade afuera," which means "lying outside," that was mistranslated as on the "floor." (Ex. 63 at 5220, 5283.) The prosecutor exploited this mistranslation and argued that Mr. Benavides's inconsistent statements about whether he found her outside made him incredible. (18 RT 3565.) Where Mr. Benavides found Consuelo, and his credibility in general, were critical issues in the case. Counsel's unreasonable failure to ensure that an accurate statement was presented to the jury and to protect Mr. Benavides's credibility was prejudicial.

Respondent misses the point in arguing that because Mr. Benavides ultimately understood some of the detective's questions despite their broken Spanish, he was not prejudiced by the fact that the jurors read an inaccurate translation of the interview that portrayed the detectives as speaking fluent Spanish. (Response at 273-75.) The jurors were presented with false information about the interview that failed to show the jurors that the detective's numerous mistakes in Spanish made it very difficult for Mr. Benavides to understand what he was saying. The critical part of the interview where Mr. Benavides was confronted with the sodomy charges not only completely misportrayed the detective's confusing and broken Spanish and omitted Mr. Benavides's question indicating his confusion, but also failed to convey accurately Mr. Benavides's startled response and denial that he would ever do such a thing. (Ex. 63 at ¶ 15.) Below is a

comparison of the certified translation of that portion of the interview with the inaccurate translation that was presented to the jury:

| Spanish Statement Made During the Interview | Non-Certified Translation | Certified Translation |
|---|---|---|
| Detective Valdez (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]<br><br>Vicente Benavides (VB): ¿Cómo?<br><br>DV: ... por atrás. | 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)<br><br>[VB's question omitted]<br><br>. . . from behind | 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]<br><br>What?<br><br>. . . from behind. |
| VB: No, eso no, eso no creo. Eso nunca lo haría yo. | No! that I didn't know - that I didn't do. | No, that I don't, that I don't think so. I would never do that. |

(Id.)

Respondent's conclusory dismissal of the mistranslation of Mr. Benavides's critical response to the charges as "not material" (Response at 276, n. 57[83]), ignores the importance of this passage, which accurately translated would have shown that Mr. Benavides was shocked when confronted with the allegation and adamantly denied the sodomy allegation, a response that would be expected given his innocence. The false

[83] Respondent provides incorrect citations to the relevant passages of Ms. Claus's declaration and incorrectly quotes the passage in Spanish. The passage in question appears at Exhibit 62, ¶ 15 and the correct Spanish transcription of the interview is reproduced above.

information presented to the jury, due to counsel's unreasonable failure to ensure the transcript was accurate, deprived Mr. Benavides of the essential due process right to present evidence of his innocence directly bearing on his credibility. There is a reasonable probability that had counsel insured that the jury received an accurate transcript of the interview and had the prosecutor been precluded from bringing into question Mr. Benavides's credibility based on manufactured inconsistencies, that at least one juror would have had a reasonable doubt about Mr. Benavides's guilt.

### 10. Failure to Provide Mr. Benavides With a Competent, Certified, and Continuous Interpreter.

Respondent argues that counsel provided Mr. Benavides with competent interpreters, but provides little or no support for that contention. Respondent's arguments fail to rebut the significant evidence of counsel's deficiencies and the consequent prejudice. (Response 277-81.)

Under the California Constitution, a person charged with a crime has a right to an interpreter throughout the proceedings. Cal. Const. Art. 1, § 14. The defendant's right to an interpreter is continuous throughout the proceedings:

> The defendant's right to understand the instructions and rulings of the judge, the questions and objections of defense counsel and the prosecution, as well as the testimony of the witnesses is a continuous one. At moments crucial to the defense—when evidentiary rulings and jury instructions are given by the court, when damaging testimony is being introduced—the non-English speaking defendant who is denied the assistance of an interpreter, is unable to communicate with the court or with counsel and is unable to understand and participate in the proceedings which hold the key to freedom.

*People v. Aguilar*, 35 Cal.3d 785, 791 (1984); *see also Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000) ("[C]ompetent translation is fundamental

to a full and fair hearing."); *Acewicz v. INS*, 984 F.2d 1056, 1063 (9th Cir. 1993) (holding that when "a better translation would have made a difference in the outcome of the [proceeding]," relief is required).

Mr. Benavides's constitutional right to a continuous and accurate translation was violated by counsel's failure to provide him with a competent interpreter. Al Hernandez, a retired police officer with no formal language training who has failed the certification examination three or four times, interpreted for Mr. Benavides at the witness table and during his testimony. (Ex. 107 at ¶¶ 1-3.) Hernandez's many errors in interpretation both confused Mr. Benavides and mistranslated his words to the jury. Hernandez's flawed interpretation of Mr. Benavides's testimony was particularly harmful in that he falsely conveyed his answers to the attorney's questions. Hernandez committed a significant mistake in interpretation when he misinterpreted "me sentia mal" as "I felt bad," rather than "I was feeling sick." (Ex. 63 at ¶ 26; *see also* Ex. 107 at ¶ 6 (Hernandez stating that he believes this is the correct interpretation). Respondent attempts to discredit the opinion of certified translator Ms. Claus regarding the inaccuracy of this interpretation stating that she only reviewed portions of the record. Respondent's argument fails, however, because she has not shown that more extensive review of the record would change Ms. Claus's analysis.

Hernandez's inaccurate interpretation of Mr. Benavides's testimony and the prosecutor and defense counsel's questions was also prejudicial. Mr. Benavides's incomprehension was so evident that even the prosecutor at some point asked him: "Are you having trouble understanding my

questions, Mr. Benavides?"[84] (15 RT 3050.) Mr. Benavides answered affirmatively. Counsel unreasonably failed to register any objection at this point or take any steps to ensure that Mr. Benavides understood the questions and the remainder of the proceedings. Similarly, when the Court asked whether Mr. Benavides understood his right to remain silent, Mr. Benavides responded "I don't understand." (14 RT 2975.) The Court's finding that Mr. Benavides made a voluntary and intelligent waiver of his rights relied on Hernandez's faulty interpretation and hence cannot be credited. Respondent's argument that the record, at most, shows Mr. Benavides misunderstood the last question ignores the evidence of Hernandez's flawed interpretation apparent in the record.

Government Code section 68561 requires that any person who interprets in a court proceeding shall be a certified court interpreter. *People v. Superior Court (Almaraz)*, 89 Cal.App.4th 1353, 1357-58 (2001). The requirement of certification has been in effect since 1992 and, hence, applied to Mr. Benavides's trial. Respondent acknowledges that Hernandez was not certified, but argues that he was nonetheless qualified. His lack of certification and his multiple failures of the certification exam is just one indicator of his incompetence. Mr. Benavides has provided ample corroborating evidence showing that Hernandez's faulty interpretation deprived Mr. Benavides of a fair trial. Counsel's failure to secure a competent and continuous interpreter for Mr. Benavides deprived him not only of his California constitutional rights, but also his federal constitutional rights to due process, to confrontation, to be present at trial, and effective assistance of counsel. *See also* Claim Twelve. Further, had

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[84] The record also shows that Hernandez interrupted the prosecutor on various occasions, thus indicating that he was not fully listening to the questions. (15 RT 3047, 3054.)

counsel availed herself of the assistance of the Mexican consulate, they would have been able to provide her with competent interpreters and translators not only to assist in their investigation, but also to ensure that Mr. Benavides's statements were properly translated to the jury. (*See, e.g.*, Ex. 167 (ordering evidentiary hearing in Nevada state court to determine whether consular assistance would have prevented the use of an incompetent interpreter at trial).) Counsel's failure to obtain the assistance of a competent interpreter violated Mr. Benavides's fundamental right to a fair trial.

#### 11. Failure to Provide a Competent Interpreter for the Spanish-Speaking Defense Witnesses.

Respondent argues that counsel was not ineffective for failing to ensure that the Spanish-speaking defense witnesses had a competent interpreter who could adequately convey the attorney's questions and their testimony. (Response at 281-82.) Victor Almaraz, an uncertified interpreter with a reputation for being an incompetent, inaccurate, and unreliable interpreter, interpreted for five Spanish-speaking defense witnesses. Respondent claims, as she does in response to Claim Twelve, that Almaraz was competent, but offers no evidence to rebut the prima facie case of his incompetence. (Response at 281-82.)

Defense counsel's secretary, Marisol Alcantar, describes Almaraz as using "unintelligible" Spanish and witnessing him mix Spanish and English and use incorrect words to interpret testimony, which created confusion in court proceedings. (Ex. 105 at ¶ 15.) Respondent improperly dismisses Alcantar's account arguing it is not probative of Almaraz's incompetence because she did not witness his interpretation in Mr. Benavides's case. (Response at 281-82.) Alcantar's account of Almaraz's poor Spanish interpretation skills corroborates the accounts of Al Hernandez, who was

present during the trial and who also knew Almaraz to frequently provide poor interpretation, and the accounts of Spanish-speaking witnesses whose declarations were presented with the Corrected Amended Petition who also found Almaraz's Spanish inadequate. Respondent also improperly dismisses Hernandez's account of Almaraz's poor interpretation claiming he did not object to Almaraz's interpretation in Mr. Benavides's case. This is untrue. When Hernandez learned that Almaraz was going to interpret in the case, he vigorously objected, going so far as to tell the attorneys that he "was withdrawing if [Almaraz] was going to interpret in the case." (Ex. 107 at ¶ 13.) Hernandez's objections were based on his experiences of seeing Almaraz conduct extremely poor interpretations in court, where he did not know words and mistranslated others, creating confusion and distortion of the witnesses' testimony. (Ex. 107 at ¶¶ 13-14.) Notwithstanding Hernandez's objections, counsel did not replace Almaraz.

Respondent's dismissal of evidence that Mr. Benavides's brother, Evaristo Benavides, and cousin, Jose Isabel Figueroa, had difficulty understanding Almaraz's Spanish on the telephone because Mr. Benavides has allegedly "not adduced any information concerning their respective Spanish-speaking capabilities" is ludicrous. (Response at 282.) Evaristo Benavides has spent his whole life in Mexico. He received a teaching degree in 1992, has been a former principal of the local school, and was vice president of the town of San Gabriel, Mexico. (Ex. 119 at ¶ 35.) Moreover, he signed his declaration in Spanish. (Ex. 119 at 6181-96.) Likewise, Jose Isabel Figueroa's Spanish-speaking abilities are clear from the fact that he grew up in Mexico and signed his declaration in Spanish as well. (Ex. 102 at 5804-26.) Respondent's claim that their assessment of Almaraz's Spanish on the telephone has no bearing on Almaraz's ability to

interpret in court is equally baseless. Their assessment corroborates all accounts of Almaraz's poor Spanish.

It is not surprising that the Spanish-speaking witnesses did not complain about the interpretation when they were on the stand. Most of them were poor farm workers with little experience in courtrooms. The whole process of testifying was intimidating and confusing. They were there to support Mr. Benavides and wanted to do everything possible to seem cooperative. (Ex. 102 at ¶¶ 51-53.)

Although they did not complain, their confusion is evident from the transcript. For example, Hector Figueroa, whose testimony was quite brief (16 RT 3291-98), had to ask counsel several times to repeat the questions for him. For example:

> Q. Okay. And let's say over the past four years, how often have you seen Mr. Benavides?
>
> A. Pardon me?
>
> Q. ....have you come to an opinion as to whether he is violent?
>
> A: If he is what?
>
> Q: Violent.
>
> A: Oh, no.

(16 RT 3292.)

> Q. And did you ever see Mr. Benavides around Consuelo Verdugo?
>
> A. Can you repeat it?

Q. Did you ever see Mr. Benavides around Consuelo Verdugo?

A. Yes.

(16 RT 3293.)

Q. Has he told you his version of what happened on November 17, 1991?

A. Can you repeat it?

(16 RT 3295.)

Almaraz's failures deprived Mr. Benavides of the right to present witnesses. The misinterpretation failed to convey to the jury the important information that these witnesses were providing. Though these witnesses did provide some favorable information, Almaraz's faulty interpretation prejudiced Mr. Benavides by failing to convey to the jury their full testimony.

**12. Failure to Prepare Mr. Benavides to Testify.**

Counsel did not prepare Mr. Benavides to testify at all. (15 RT 3027-28.) (Huffman: Now Mr. Benavides, have we gone over your testimony before you testified today, you and I? Mr. Benavides: No.). Respondent misrepresents the record in stating that Mr. Benavides conceded in cross-examination that "defense counsel had prepared him to testify." (Response at 284, citing 15 RT 3057.) Mr. Benavides testified only that he had spoken to Huffman over the year and half prior to trial, not that counsel had prepared him to testify. (15 RT 3057.) Respondent's claim that Al Hernandez, the interpreter who was present throughout the trial, did not have sufficient knowledge to declare that the attorneys failed to prepare Mr. Benavides to testify (Response at 284) is unavailing. Hernandez saw Mr. Benavides and counsel every day at trial and interpreted his testimony and,

hence, provides credible evidence corroborating evidence on the record that counsel wholly failed to prepare Mr. Benavides to testify.

Due to Mr. Benavides's mental health deficits, he required a substantial amount of preparation before he could testify reliably in court. As Dr. Puente explains:

> Given Mr. Benavides's neuropsychological and intellectual limitations he would need substantial amount of preparation and explanation before being able to accurately and reliably testify in court, starting with a slow, methodical, and basic translation of the proceedings. He would have to be admonished to not answer questions that he did not know. The use of an interpreter to interpret witness's testimony and his own testimony likely added to his confusion by exposing him to multiple stimuli that affected his ability to concentrate and understand the proceedings.

(Ex. 126 at ¶ 63.) Counsel were not aware of these deficits because they failed to conduct any investigation into Mr. Benavides's mental health. (Ex. 65 at ¶ 19; Ex. 64 at ¶ 19.) In fact, Huffman's knowledge and understanding of Mr. Benavides was so limited that she thought Mr. Benavides could actually testify in English if he just practiced it before trial. (Ex. 64 at ¶ 16.) The few times that Huffman did speak to Mr. Benavides, she failed to explain anything to him. (Ex. 65 at ¶ 18.) From Huffman's billing it appears that the first time she visited Mr. Benavides in jail was on April 25, 1993, after the jury had sentenced Mr. Benavides to death.

It is evident from Mr. Benavides's confused and jumbled testimony that counsel failed to prepare him to testify. There are numerous examples of Mr. Benavides's confusion throughout his testimony. For example, at one point counsel had to ask Mr. Benavides three times whether someone changed Consuelo's clothes after they arrived from Burger King on November 17, 1991. (15 RT 3011.) On the third time, Huffman,

exasperated says: "Q. No. Mr. Benavides, listen to me. Did somebody change Consuelo's clothes from what she was wearing in the morning? A. No." *Id.* Like Huffman, the prosecutor also expressed exasperation at Mr. Benavides's confusion regarding his questions:

> Q. So feeling bad did not interfere with your ability to tell Detective Valdez that Christina went to visit her friend. Is that correct?
>
> A. Well, she asked if she could go over there with her friend but she never told me she was going to go and play.
>
> Q. I want you to listen to the question. Feeling bad did not interfere with your ability to tell Detective Valdez that information, did it?
>
> A. No.
>
> Q. Well, what information did feeling bad interfere with your ability to tell Detective Valdez?
>
> A. I don't understand.
>
> Q. You said you were feeling bad when you talked to Detective Valdez. Is that correct?
>
> A. Yes.
>
> Q. What information did you have trouble in giving him because you were feeling bad?
>
> A. Yes. You mean because I felt bad?

(15 RT 3031.) As explained above, part of Mr. Benavides's confusion was attributable to Mr. Hernandez's mistranslation of Mr. Benavides's sentence in Spanish, "me sentia mal," which means he did not feel physically well.

At various points, it is clear that Mr. Benavides did not understand the questions. When asked where he threw away the tissue that he used to clean Consuelo's blood, he says the following: "Q. Was that in the bathroom or in the kitchen? A. Yes. Q. Bathroom or the kitchen? A. In the bathroom." (15 RT 3018.) At other points his lack of preparation was evident in his inability to respond to the prosecution's cross-examination with statements he allegedly told other witnesses. (*See, e.g.*, 15 RT 3057-58; 3062.)

Mr. Benavides's confusion was the result of cognitive impairments exacerbated by the stress of testifying and compounded by poor interpretation. Mr. Benavides was prejudiced by this lack of preparation as the prosecutor was able to portray him as inconsistent and deceptive. (RCCAP at 276.) The prosecutor argued that when Mr. Benavides took the stand he was pretending not to know what was happening. (18 RT 3591.) Had counsel prepared him to testify with the care and time necessary for someone with Mr. Benavides's impairments, he would not have appeared incredible on the stand. Hence, Respondent's allegations that Mr. Benavides has failed to show deficient performance or prejudice lacks merit. Respondent's arguments regarding the validity of his waiver of his right not to testify are addressed above. (*See supra* Claim Nine.)

**13. Failure to Present Evidence of Good Character and Lack of Deviance.**

Respondent claims that Mr. Benavides "has not met his burden of showing deficient and prejudicial performance by defense counsel" in presenting good character evidence and lack of sexual deviance. (Response 285.) Respondent again misunderstands Mr. Benavides's burden at this stage of the proceedings, which is merely to establish a prima facie case that counsel provided constitutionally defective assistance. *Duvall*, 9 Cal.

4th at 475. Respondent's disputes about the factual allegations in the Corrected Amended Petition do not rebut the prima facie case, but rather warrant the issuance of an order to show cause to allow Mr. Benavides to prove the factual allegations. *Id.* (holding that a court must issue an order to show cause if it finds "the factual allegations, *taken as true*, establish a prima facie case for relief") (italics added).

### a. Lay Good Character Witnesses

Trial counsel Harbin's selection of good character witnesses was haphazard and uninformed. He failed to conduct a meaningful investigation of Mr. Benavides's social history so as to be able adequately to present the witnesses with the most personal knowledge about Mr. Benavides. Harbin readily admits that his failure to present the evidence was not a strategic decision. (Ex. 65 at ¶ 27.) Instead, the decision resulted from poor preparation and failure to request funding to conduct an investigation in Mexico. (Ex. 65; Ex. 108.)

Respondent's claim that Almarz's short contacts with the witnesses who testified—mostly to inform them when they should show up at the courthouse—met the required standard of care is baseless. (Response at 285-87.) Almaraz was retained as an interpreter and had no training to do investigation, let alone capital investigation. (Ex. 108 at ¶ 3.) He spoke broken Spanish, in which he used slang and combined English and Spanish words. (*See, e.g.*, Ex. 105 at ¶ 15.) He contacted witnesses for counsel Harbin, who did not speak Spanish, to ascertain their basic background information and whether they were available to testify. His contacts with witnesses were so minimal that he did not prepare any reports or even bill for any investigative work. (Ex. 108 at ¶ 3.) The character witnesses were selected at the last minute by Almaraz, in the courtroom cafeteria, based on

whether they spoke English. (*See, e.g.*, Ex. 100 at ¶ 13.) This lack of preparation and delegation of witness selection to Almaraz fell far below the standard of competence required for a capital trial.

Respondent's claim that Mr. Benavides was not prejudiced by counsel's failure to conduct an adequate investigation, select the appropriate witnesses to testify, and elicit the relevant information is also meritless. Respondent claims, for example, that Mr. Benavides was not prejudiced by counsel's failure to interview and prepare the character witnesses to testify because the witnesses did not have sufficient exposure to Mr. Benavides's relationship with Consuelo. (Response at 286-87.) Respondent essentially proves Mr. Benavides's point. It is precisely because these randomly-selected witnesses did not have the requisite knowledge, unlike numerous other witnesses, many of whom were present in the courthouse, that counsel's presentation of their testimony was prejudicially deficient. Antonio Duran Delatorre, for example, was selected by Almaraz to testify in the courthouse basement shortly before he testified because he lived in the United States, though he only had limited exposure to Mr. Benavides. Meanwhile, his brother Jose Luis Figueroa, who was also present, eager to testify, and had ample exposure to Mr. Benavides and Estella, Consuelo, and Cristina, was not called to testify. (Ex. 100 at ¶ 13.)

Next, Respondent discounts evidence from witnesses who could have testified to Mr. Benavides's exposure to Consuelo, arguing that they lacked sufficient personal knowledge. (Response at 287-88.) Respondent is mistaken. Respondent complains, for example, that Mr. Benavides has not presented sufficient evidence that Ana Maria Cordero Cárdenas de Dávalos, Consuelo's caretaker the summer of 1991, and Cristobal Aguilar, Mr. Benavides's crew leader who lived with him, should have testified about their knowledge of Mr. Benavides's relationship with Consuelo because

they did not specifically indicate exactly how many times they saw them together. Respondent's trivial argument does not rebut the prima facie case of counsel's prejudicial deficient performance for failing even to interview these witnesses. The witnesses provided the requisite information in their declarations that they had ample exposure to Mr. Benavides's interaction with Consuelo, and Respondent's objection that they did not specify the exact number of times they saw them together when recounting their experience from fifteen years prior is absurd. Aguilar, for example, explains in his declaration that he has known Mr. Benavides his whole life from when they grew up together in San Gabriel, Mexico, and knew Estella Medina even before she met Mr. Benavides. Estella often visited the hotel where Aguilar, Mr. Benavides, and the other farm workers lived and Aguilar saw Consuelo and Mr. Benavides interact during those visits. Aguilar could have testified that Consuelo "loved Vicente very much, and she always grabbed his hand when they walked together" and she referred to him as "papi" or daddy. (Ex. 103 at ¶ 28.) Cárdenas explained in her declaration that she saw Mr. Benavides and Consuelo interact whenever she and Estella visited Mr. Benavides and her husband Jesus, another farm worker at the hotel where they lived, and when they came to Estella's apartment to visit. If counsel had interviewed her, counsel would have learned that whenever they were together she would see Consuelo run to Mr. Benavides's arms, even more than to her own mother, and that Consuelo loved to play with Mr. Benavides. Moreover, Consuelo cried when Mr. Benavides left because she did not want him to leave. (Ex. 94 at ¶ 10.) This was powerful evidence of Mr. Benavides's strong, loving relationship with Consuelo, which would have shown how unlikely it was that he hurt her in any way in November of 1991 or anytime before then.

Respondent appears to concede that Jose Isabel Figueroa, Dionicio Campos, and Maria Celia Campos did have sufficient exposure to Mr. Benavides and Consuelo and could have provided important relevant information about their loving relationship. (Response at 288.) Yet, Respondent makes the baseless argument that counsel's failure to present their testimony was not unreasonable or prejudicial because "Consuelo's 'loving' relationship with petitioner is not inconsistent with Mr. Benavides having abused her." (Response at 288.) Respondent claims that Consuelo did not have the emotional or intellectual maturity to conduct herself appropriately with a man who was abusing her. (Response at 288.) Respondent's claim is absurd, especially when seen in light of the prior injuries that were introduced to show a pattern of Mr. Benavides's alleged abuse. Had Mr. Benavides been hurting Consuelo to cause her old rib injuries, pancreatic injury, and the false old injuries to the genitalia that Dr. Dibdin alleged were present in the tissue slides, it is highly unlikely that Consuelo would be as adoring and loving towards Mr. Benavides as these many witnesses could have testified. The notion that she would show such a loving emotion towards Mr. Benavides despite his hurting her because she was allegedly too young to know better is ludicrous.

Respondent's further argument that the failure to present such evidence was not prejudicial because it was cumulative of Estella Medina's testimony that Consuelo "went to" Mr. Benavides and that "Papa" was one of her few Spanish vocabulary words lacks merit. (Response at 288-89, citing 13 RT 2613, 2617.) Estella's testimony in this regard was minimal and in no way comparable to the extensive testimony that these witnesses could have provided. Moreover, the prosecutor attacked Estella as the so-called "fulcrum" that allowed Mr. Benavides to allegedly abuse Consuelo and attacked her credibility for defending him. (18 RT 3595-96.) The five

witnesses referred to in the Corrected Amended Petition could have provided credible, consistent evidence that Mr. Benavides's relationship with Consuelo was a loving and caring one that would have provided powerful evidence to rebut the charges that Mr. Benavides severely physically and sexually abused Consuelo in a fifteen minute period, before and after which he showed no indication whatsoever of being angry, violent, or upset.

Respondent next dismisses potential good character testimony that could have been offered from family members and friends who have had ample exposure to Mr. Benavides and who could have offered favorable good character evidence and in particular his good relationship with children. The list of such witnesses is substantial. Counsel Harbin was aware of seventy-seven witnesses who could have testified on Mr. Benavides's behalf regarding his character and in mitigation at the penalty phase. (Ex. 65 at ¶ 22.) Yet he failed to investigate and contact these witnesses with the excuse that Huffman failed to provide him with guidance and funding. *Id.* Huffman states that she was flabbergasted when she saw that Harbin only called two penalty phase witnesses to testify. (Ex. 64 at ¶ 18.) She says if she had to do it again she would hire different co-counsel. *Id.* Though it is clear that the failure to present these witnesses was based on a wholesale failure to investigate and to prepare for trial, Respondent argues that a strategy drove the failure. Respondent's argument is baseless and soundly refuted by Harbin: "our failure to investigate and present [mitigating] evidence was not the product of a tactical and informed decision." (Ex. 65 at ¶ 20); *Griffin*, 970 F.2d at 1359 ("Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another.").

Respondent's argument that counsel strategically chose not to call to testify Mr. Benavides's daughter, Nélida, is completely manufactured.[85] Since the defense never contacted her, counsel could not have known the value of her testimony. As Nélida stated in her declaration, if she had been called to testify, she would have told the jury about how her father always cared for her and protected her and never mistreated her or her sisters. Nélida soundly refutes Respondent's argument that her testimony would not be favorable because Mr. Benavides later separated from her mother. Nélida has only fond memories of Mr. Benavides and her mother does not speak poorly of him. In fact, Nélida's mother thinks of him as the man whom she has most loved. (Ex. 95 at ¶ 7.) Her testimony would have been powerful evidence demonstrating that Mr. Benavides has a long consistent history of being caring, loving, and appropriate with children, and that he lacked the character to commit the extremely deviant and violent crimes of which he was accused.

Respondent's argument that Mr. Benavides has not shown that counsel's failure to call Mr. Benavides's nieces, Norma Patricia (Pati) Yañez Benavides and Leticia (Leti) Yañez Benavides, to testify "was attributable to defense counsel" is completely false. (Response at 290-91.) Respondent acknowledges that Harbin failed to call Mr. Benavides's nieces to testify and that Harbin has admitted that the failure to do so was not

[85] Respondent's argument that counsel's performance was not deficient for failing to contact Nelida because he may not have been in contact with her at the time lacks merit. Apart from asking Mr. Benavides about his children, counsel had notice that Mr. Benavides had a daughter from Detective Valdez's interview with Mr. Benavides's mother (Ex. 4 at 2134) and also from Consuelo's medical records (Ex. 3 at 1066.) If counsel had conducted a reasonable investigation meeting the minimum standard of competence, counsel would have traveled to Mexico, located his daughter, interviewed her, and presented her testimony at trial.

based on a strategic decision. (Response at 290-91, citing Ex. 65 at ¶ 27.) Respondent incorrectly alleges that Harbin has not explained why he failed to present their testimony. Harbin explained in his declaration that his failure to call these witnesses to testify was based on Huffman's failure to specifically direct him to do so, obtain funding to conduct an investigation in Mexico, and arrange and pay for the witnesses to travel to testify in the United States. (Ex. 65 at ¶¶ 22-23, 27-28.) Huffman, in turn, explains that she left all decisions about developing good character evidence and the penalty phase to Harbin and only realized too late in the trial that he was not doing a good job. (Ex. 64 at ¶ 18.) As shown in their declarations, Mr. Benavides's nieces, Pati and Leti, were eager to testify on behalf of their uncle whom they considered to be like a father. When Pati received a telephone call from Victor Almaraz asking her to travel from Mexico to the United States to testify, she traveled as soon as she could even though it was a financial hardship for her to do so and she arranged with family and friends to provide her with transportation and lodging. Almaraz did not provide her with any financial assistance or tell her when she had to arrive. Unfortunately, she arrived on the one day the penalty phase was held and in which the jury recommended a death verdict. (Ex. 111 at ¶¶ 47-48.) No one even contacted Pati's sister Leti, who also lives in Mexico and has fond memories of Mr. Benavides, and who would have traveled to the United States had counsel arranged for her to testify. (Ex. 112 at ¶ 27, 30.) Respondent's claim that Mr. Benavides has not established that counsel's failure to call these character witnesses to testify was counsel's fault is patently untrue.

Respondent's claim that Mr. Benavides was not prejudiced by counsel's failure to call his nieces to testify is also meritless. (Response at 291.) When his sister Enedina's husband died in 1971, Mr. Benavides

played an instrumental role in helping his sister raise his nieces Pati and Leti. Unlike their other uncles, Mr. Benavides "lived with [them] for most of [their] childhood," although he later left for part of the picking season when he started working in the United States. (Ex. 112 at ¶ 6.) When Enedina fell into a deep depression that prevented her from caring for her daughters, Mr. Benavides took on the role of parenting and caring for his nieces. He taught them how to ride horses and donkeys and was always very protective of them. (Ex. 111 at ¶¶ 11, 13.) If Pati had been called to testify, she would have explained that Mr. Benavides always cared for them "in the most proper ways. He never once touched [her] inappropriately. Vicente never hit [them] or hurt [them] in any way. All [their] interactions were healthy and clean." (Ex. 111 at ¶ 12.)

Respondent's claim that this evidence is not prejudicial because it occurred twenty years before trial and his nieces did not specifically state that he was left alone with them overnight as minors is a feeble attempt to neutralize the effect of this powerful evidence. As Respondent recognizes, Mr. Benavides lived with them for over a decade. He had ample opportunity to abuse his nieces if he had had such proclivities, especially in light of their mother's unavailability. If Mr. Benavides had the extremely deviant tendencies that would have led him at the age of 42 to suddenly sodomize a child and physically abuse her to the extent of severing her internal organs, it is very likely that he would have shown such tendencies earlier in life. Pati and Leti's testimony would have provided strong, credible evidence of a consistent picture of Mr. Benavides's character as being a kind, caring, much-loved man, who was always good and completely appropriate with children. It is reasonably probable that, had counsel presented such evidence, at least one juror would have had a reasonable doubt about Mr. Benavides's guilt.

Respondent similarly challenges the declarations of numerous friends and family members of Mr. Benavides who could have testified that they had entrusted their children to his care and knew him to be kind and caring. Respondent argues that counsel was not ineffective in failing to call these witnesses because the declarants have not specified whether they left their children "overnight" or alone with Mr. Benavides. (Response at 291-93.) Respondent is mistaken and her attempts to undermine this powerful and consistent evidence of Mr. Benavides's caring and kind relationship with children are ineffectual. Respondent, for example, conveniently overlooks the declaration of Juana Flores Rivera, Mr. Benavides's ex-girlfriend with whom he lived for years and with whom he had his daughter Nélida. Ms. Flores describes the loving relationship that Mr. Benavides had with his daughter. She describes times when Mr. Benavides took Nélida out on "little trips around town." (Ex. 96 at ¶ 7.) Mr. Benavides lived for several years with Ms. Flores, her sister Josefina, and their six daughters whose ages ranged from teenagers to little girls, and with his friend Ignacio Padilla, who was dating Josefina. (Ex. 99 at ¶ 3.) Ms. Flores's daughter, Myra, was only two when she and Mr. Benavides started dating. (Ex. 96 at ¶ 8.) Mr. Benavides has submitted declarations from Ms. Flores, Ignacio Padilla, and his daughter Nélida, all of whom consistently describe Mr. Benavides as having a very loving relationship with his daughter Nélida and good relationships with the other girls in the house, with whom he had a "relationship of trust and respect." (Ex. 99 at ¶ 10; Ex. 96 at ¶ 8; Ex. 95 at ¶ 3.) Nélida says that her sisters have such fond memories of Mr. Benavides that they "have taught their children that he is their grandfather, because he was present in all of [their] lives." (Ex. 95 at ¶ 6.) As Mr. Padilla explains, Ms. Flores on several occasions left Mr. Benavides to take care of her children for a couple of days while she traveled to visit her

brother in another city. (Ex. 99 at ¶ 12.) As with his nieces, Mr. Benavides had ample opportunity to abuse these girls if he had had such proclivities. However, as all declarants have stated, Mr. Benavides never treated any of them inappropriately. (Ex. 95 at ¶ 9) (Nélida indicates that she would have like to tell the jury about how Mr. Benavides always cared for and protected her and did not mistreat her sisters); (Ex. 96 at ¶ 8) (Ms. Flores indicates that "From what I know of Vicente he would never [have] hurt or sexually abused a child."); (Ex. 99 ¶ 12) (Ignacio Padilla saw Mr. Benavides interact with the girls in the house on a "daily basis" and he never saw any inappropriate interaction, "on the contrary, he cared for them as their father.")

The picture they describe of Mr. Benavides being a kind and caring man who was always good with children is consistently described by all who have known him. Jose Isabel Figueroa, a close family member who has known Mr. Benavides his whole life, worked on his crew, and frequently saw him interacting with Estella Medina and her daughters Consuelo and Cristina, could have provided very credible evidence about Mr. Benavides's good relationships with Estella Medina's daughters and Mr. Figueroa's own children, including his two daughters who were two and four at the time. (Ex. 102 at ¶ 37.) Mr. Figueroa always knew Mr. Benavides to behave appropriately with children. (Ex. 102 at ¶ 39.) The fact that he may not specifically know of an instance when Mr. Benavides took care of a child overnight does not detract from the strength of his declaration.

Respondent also points out that Mr. Benavides's friends Celia Campos and Nicho Campos could have testified that their children were fond of Mr. Benavides and always felt comfortable around him. Respondent argues, however, that though they were contacted by the

defense and were present in the courthouse, Harbin's declaration is "remarkably silent" about his failure to present their testimony. (Response at 292-93.) Respondent is wrong on two counts. First, Nicho Campos, whose full name is Dionicio Campos Govea, did, in fact, testify. (9 RT 3751-58.) Although he had known Mr. Benavides and his family his whole life—starting when they were children growing up in the same *rancho* in Mexico, through the time they both worked in the fields in the United States—and had ample exposure to Mr. Benavides's interaction with Consuelo, counsel unreasonably elicited only brief, superficial testimony from Mr. Campos indicating Mr. Benavides was a "noble . . . calm . . . normal person." (19 RT 3757.) Counsel unreasonably failed to elicit convincing evidence he could have provided about how Mr. Benavides had a kind and caring relationship with Estella's daughters. (Ex. 104 at ¶ 28.) Respondent is also wrong in stating that Harbin has not explained why he failed to provide such evidence. Harbin clearly stated in his declaration that his failure to investigate, prepare, and present mitigation and character evidence was a function of Huffman's failure to provide him with direction and funding and of his "own inexperience with capital cases." (Ex. 65 at ¶¶ 20, 27-28.)

Respondent's claim that counsel's failure to present evidence from all who knew him that Mr. Benavides has a lifelong history of being kind, caring, and appropriate with children, to whom he was extensively exposed throughout his life, is not prejudicial is a hollow argument. Moreover, Respondent's factual disputes about these declarations do not negate the prima facie case of counsel's ineffectiveness in failing to call these witnesses, but rather highlights the need for an evidentiary hearing to resolve these disputes. *See Duvall*, 9 Cal. 4th at 475. Respondent's further claim that the failure to provide such evidence was not prejudicial because

it would have been cumulative of Cristina's testimony that Mr. Benavides never touched her in an inappropriate way (Response at 293, citing 11 RT 2193) ignores Cristina's testimony suggesting that Mr. Benavides hurt her sister when he took her into his bedroom when she was crying (11 RT 2189-95, 2203). Furthermore, it is reasonably probable that consistent testimony from so many people who have known Mr. Benavides throughout his life attesting to his good character would have raised a reasonable doubt in at least one juror's mind that Mr. Benavides was not capable of committing the extremely deviant and violent crimes of which he was accused.

### b. False and Unethical Allegation of Prior Rape

Throughout the response to the claims of failure to present good character evidence and mitigation, Respondent baldly asserts that Mr. Benavides raped his daughter in Mexico. *See, e.g.* Response at 290, 295, 298.[86] Respondent argues that counsel strategically chose not to present the overwhelming good character and mitigation evidence presented in the Corrected Amended Petition for fear of disclosing this alleged prior rape. Respondent's allegation is completely false and unsupported. Delano police department Detective Valdez did not find any evidence of a criminal record when he checked with Mexican authorities about whether Mr. Benavides had any prior arrests or convictions. (Ex. 69 at ¶ 10.) Dozens of declarations submitted with the Corrected Amended Petition from Mr. Benavides's friends, family, teachers, neighbors, and co-workers—many of

[86] Respondent made the same unsubstantiated claim throughout the 2003 Reply. *See, e.g.,* 2003 Reply at 136, 138, 144. Respondent's continued reference to this false and absurd accusation, and without providing any evidence to support it and despite ample evidence in the Corrected Amended Petition that it is false is outrageous.

whom have known him his whole life—attest to the fact that he has never been inappropriate in any way with children or adults. The prosecutor committed gross misconduct by inventing this unsupported story that Mr. Benavides had raped a child in Mexico. Even though the story was wholly fabricated, the prosecutor presented this information to the court as a fact, thus prejudicing him in sentencing. There is no evidence to support this highly damaging false allegation. *See also* Claim Five. Surely, if there had been such damaging information, the prosecutor would not have stipulated to Mr. Benavides's lack of prior record. In fact, the stipulation was obtained when the Court asked the prosecutor if he was "aware of" any prior record for Mr. Benavides. (19 RT 3765.) In response the prosecutor stated: "I will stipulate to the absence of felony conviction and the absence of prior violent act." *Id.* The prosecutor's stipulation establishes that he knew Mr. Benavides had not previously committed any acts of sexual assault. Respondent's continued reliance on this false information to negate the value of the overwhelming evidence of good character and mitigation presented by Mr. Benavides is ridiculous.

Though counsel Harbin stated to the court that he intended to call someone to testify to refute the implication that "something evidently bad" happened in Mexico (15 RT 2901), he unreasonably failed to do so. His failure to call to testify Mr. Benavides's daughter Nélida to refute such an allegation was not based on any strategy, as Respondent argues, but rather proves his failure to investigate the veracity of the prosecutor's allegation. (Ex. 65 at ¶¶ 26-27.) It is notable that Respondent refers to Huffman's August 17, 1992 request for funds as support for the proposition that she had been told by the prosecutor that Mr. Benavides had raped his daughter in Mexico. (Response Ex. 5 at 6.) Based in part on this representation, Huffman requested funds to interview Mr. Benavides's family members in

Mexico. However, neither Huffman nor Harbin ever went to Mexico or sent an investigator to investigate this false allegation. (Ex. 65 at ¶ 26.) Had counsel properly investigated the case, they would have learned that the allegation was completely untrue. Moreover, Respondent's invention of a tactical reason for counsel not calling these witnesses—namely the fear that the witnesses would disclose the alleged prior rape—is belied by Huffman's statement to the court that she had "no information" substantiating the prosecutor's story (Response Ex. 5 at 6) and by Harbin's declaration that he believed Mr. Benavides when he vehemently denied having done so (Ex. 65 at ¶ 26). As counsel has admitted, they had no reasonable basis for failing to present this compelling character evidence.

#### c. Expert Evidence of Lack of Sexual Deviance

Next, Respondent argues that Mr. Benavides has not stated a prima facie case that counsel's performance was deficient or prejudicial in failing to present expert evidence that Mr. Benavides is not sexually deviant. Respondent objects to the replacement of Dr. Ricardo Weinstein's declaration with the declaration of Dr. Francisco Gomez. Respondent also argues that, even if Dr. Gomez's declaration is properly before the court, counsel's failure to present such expert testimony was not prejudicial. (Response at 293-98.) Respondent's arguments lack merit.

First, Respondent claims that Dr. Gomez's declaration is improperly before this Court. (Response at 294-95.) Respondent argues that habeas counsel should have asked Dr. Weinstein, the expert whose declaration was submitted with the 2002 Petition, to review the new information obtained from the social history investigation conducted to prepare the Corrected Amended Petition instead of retaining a new expert to review the new information. Respondent "disagrees" with the explanation given in Mr.

Laurence's declaration that it was necessary to retain new mental health experts in order to avoid the suggestion that their findings were "tainted" by the withdrawn declarations. (Response at 294.) Respondent's disagreement with habeas counsel's decision regarding how best to represent Mr. Benavides does not render the declaration inadmissible. Dr. Weinstein reviewed numerous declarations that have since been withdrawn, which informed his opinion about Mr. Benavides's social history.[87] It would be very difficult for Dr. Weinstein to attempt to forget the information in the previous declarations and to replace it with information in the numerous new declarations that were submitted with the Corrected Amended Petition, especially because some of the information from the new declarations is similar to that which was previously submitted.[88] The potential for confusion was too high and too likely to have prejudiced Mr. Benavides. Accordingly, habeas counsel was justified in retaining a new

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[87] Respondent's comparison to Dr. Wood's replacement declaration is inapposite. Unlike Dr. Weinstein, Dr. Wood's initial assessment relied mainly on Cristina Medina's transcribed statements to law enforcement and was tainted by only one declaration that was subsequently withdrawn. (Ex. 89 at ¶ 14 n.1.) Dr. Weinstein, by contrast, read literally dozens of declarations that were fraudulently prepared by Kathleen Culhane and which have since been withdrawn.

[88] Some of the information in the new declarations is similar to that in the withdrawn declarations because Ms. Culhane appears to have relied in part on some of the initial interviews conducted by counsel and possibly her own interviews with social history witnesses to construct her fraudulent work product. (*See, e.g.,* Ex. 96 at ¶ 15 (declaration of Juana Flores Rivera indicating that she was initially interviewed by Mr. Benavides's attorney, Cristina Bordé, and another lady, but was never subsequently contacted by Kathleen Culhane); Ex. 111 at ¶ 63 (declaration of Norma Patricia Yañez Benavides indicating she initially met Ms. Bordé, Mr. Laurence, and Odalys Rojas, and later met and was interviewed by Ms. Culhane, but that the declaration that Ms. Culhane represented was hers does not appear to be the one she signed.).)

mental health expert to evaluate the new information and this Court should consider Dr. Gomez's declaration in support of the claim.

Respondent improperly addresses allegations in Dr. Weinstein's declaration though it has been withdrawn from this Court's consideration. (Response at 295; *see In re Benavides*, Case No. S111336, California Supreme Court Order dated September 5, 2007, withdrawing Exhibit 151.) The claim in the Corrected Amended Petition to which Respondent purportedly responds does not refer to Dr. Weinstein's declaration. (*See* RCCAP at 283-84.) Accordingly, Mr. Benavides does not address Respondent's improper arguments regarding Dr. Weinstein's declaration. If this Court intends to consider his declaration and the arguments made by Respondent, Mr. Benavides requests that he be given notice and an opportunity to respond to those arguments.

Next, Respondent argues that counsel's performance was not deficient for failing to present evidence of Mr. Benavides's lack of sexual deviancy based on the fabricated tactical decision regarding the alleged prior rape. Respondent argues that trial counsel strategically chose not to call an expert to testify because the expert could have been cross-examined with the alleged evidence that Mr. Benavides had sexually abused his daughter in Mexico. (Response at 295-96.) Respondent's persistent pedaling of this false argument is egregious. As amply shown in the Corrected Amended Petition, the prosecutor's allegation of a prior rape was completely false and unsupported and an act of misconduct. (*See supra* Claim Five.) Respondent's argument that the expert would have been cross-examined by the prosecutor about this false prior rape is belied by the fact that the prosecutor did not cross-examine Mr. Benavides with such information when he testified. Moreover, as Harbin explains in his declaration, he did not believe that Mr. Benavides had previously abused a

child and his failure to investigate this information and present an expert to show his lack of sexual deviance was not a tactical decision, but rather a function of his inexperience in capital litigation and the lack of guidance he received from Huffman. If he had been lead counsel, Harbin would have called an expert to testify that Mr. Benavides lacked the profile of a pedophile or sexual deviant. (Ex. 65 at ¶¶ 26, 29.)

Next, Respondent takes issue with the findings reached by Dr. Gomez in his evaluation of the risk factors in Mr. Benavides's case associated with sexual deviance. (Response at 296-98.) Respondent's objections to Dr. Gomez's methodology do not negate the prima facie case of counsel's prejudicial ineffectiveness but, rather, highlight the necessity for this Court to issue an order to show cause and order an evidentiary hearing to resolve such disputes. *See, e.g., In re Hawthorne*, 35 Cal. 4th 40, 52 (2001) (Respondent's argument that expert and lay declarations do not establish mental retardation, "[r]ather than negate petitioner's prima facie showing . . . . simply highlights the factual nature of the dispute between the parties—a circumstance particularly appropriate to a full evidentiary hearing on the ultimate question.").

Second, Respondent's objections to Dr. Gomez's findings are meritless. Respondent, for example, objects to Dr. Gomez's first conclusion from his evaluation that Mr. Benavides "does not have a developmental or social history associated with sexual deviance." (Ex. 127 at ¶ 169.) Respondent argues that Dr. Gomez's conclusion is not properly before this Court because it allegedly "exceeds the scope of that conducted by Dr. Weinstein." (Response at 297.) Respondent is wrong on several counts. First, Dr. Weinstein, like Dr. Gomez, assessed Mr. Benavides's developmental and social history in determining whether he had the risk factors for sexual deviance. (*See* Withdrawn Ex. 151 at ¶ 65 ("To assess

whether Mr. Benavides presents with paraphiliac arousal, I reviewed dozens of declarations given by family members, friends, his former sexual partners, his children, and other children who grew up with or were cared for by him.").) Second, even if Dr. Gomez used a different methodology than Dr. Weinstein, that would not render his opinion improperly before this Court. As stated above, habeas counsel properly retained Dr. Gomez as a new expert to evaluate the new evidence and, as such, Dr. Gomez was free to use the methodology accepted by the expert community and that he has previously used in assessing risk factors for sexual deviance.

Respondent also takes issue with Dr. Gomez's second and third findings that "2) Mr. Benavides did not demonstrate an inappropriate need to interact with children or seek activities where he would interact with children; [and] 3) Mr. Benavides always had sexual relationships with female partners that were age appropriate and demonstrated his preference for adult female sexual partners." (Ex. 127 at ¶ 169.) Respondent argues that these findings are inadmissible hearsay and not within the parameters of accepted evidence in *People v. Stoll*, 49 Cal. 3d 1136 (1989). Respondent again is incorrect. Dr. Gomez reached these conclusions by relying on the sworn declarations of dozens of Mr. Benavides's friends, family, and acquaintances and his own interviews with Mr. Benavides. As this Court has explained, "[a]n expert witness . . . may base an opinion on reliable hearsay, including out-of-court declarations of other persons." *In re Fields*, 51 Cal. 3d 1063, 1070 (1990). Further, as this Court explained in *Stoll*, "[n]o precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior." *Stoll*, 49 Cal. 3d at 1154. The requirements for admissibility of expert opinion evidence under Evidence Code section 801, subdivision (b) specifically allow for an expert to proffer an opinion "perceived by or personally

known to the witness or made known to him at or before the hearing, *whether or not admissible*, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." *Id.* (italics added). Dr. Gomez has conducted seven hundred evaluations of suspected and convicted sex offenders as an expert panel evaluator for San Diego Family Court and two hundred evaluations of risk factors associated with sexual deviance as a private practitioner. (Ex. 127 at ¶¶ 7, 9.) His opinion and methodology rely on his expertise and experience and conform to the practices reasonably relied upon by experts in their field.

Respondent similarly objects to Dr. Gomez's fourth and fifth findings, which were that "4) Mr. Benavides does not suffer from an impulse control disorder; and 5) Mr. Benavides does not suffer from pedophilia, a mental disorder that would predispose him to sexually abuse children." (Ex. 127 at ¶ 169.) Respondent again incorrectly argues that the Dr. Gomez's findings are "objectionable to the extent they are based on inadmissible hearsay." (Response at 297-98.) As shown above, an expert may properly rely on inadmissible hearsay so long as it is the type of material reasonably relied upon by an expert forming an opinion on the subject. *See In re Fields*, 51 Cal. 3d at 1070; Evid. Code § 801(d). Respondent admits that Dr. Gomez's findings are proper to the extent they rely on Dr. Gomez's interview with Mr. Benavides and his administration of the Psychopathy Check List-Revised. (Response at 297-98.)

Finally, Respondent claims that counsel's failure to present such expert testimony was not prejudicial because Dr. Gomez's assessment was done in 2007 and "does not prove" that Mr. Benavides lacked the character traits of sexual deviance in 1991. (Response at 298.) Respondent's reasoning is flawed. Dr. Gomez's assessment was based on dozens of

declarations of friends, family, teachers, neighbors, co-workers, and acquaintances of Mr. Benavides who have known him throughout his life, including many who knew him well in 1991, and who would have been available to testify at trial and directly provide information to an expert at the time about Mr. Benavides's character. Neither the prosecutor at trial nor Respondent in post-conviction have introduced *any* evidence to the contrary, despite Respondent's re-investigation of the case following the filing of the Corrected Amended Petition. Notably, no evidence has ever been presented in support of the prosecutor's fabricated story about a prior rape. Dr. Gomez's opinion thus relies on strong, consistent, corroborated evidence uniformly indicating Mr. Benavides does not have the sexually deviant character that would be expected had he committed the charged crimes. Though Mr. Benavides need only present a prima facie case of counsel's prejudicial deficient performance in failing to present this evidence, Mr. Benavides has gone beyond such a showing and Respondent has in no way rebutted the claim.

**14. Failure to Present Mitigating Mental Health Evidence at the Guilt Phase.**

**a. Inadequate Investigation and Preparation.**

Respondent contends that trial counsel did not have reason to know Mr. Benavides had mental health problems and cognitive deficits and hence was reasonable in not conducting such an investigation. (Response at 298-300; 310-12.) Respondent is mistaken. There were several red flags in the case that should have led counsel to investigate Mr. Benavides's mental health. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 453 (2009) (counsel "ignored pertinent avenues for investigation of which he should have been aware"); *Wiggins v. Smith*, 539 U.S. 510, 525 (2003) ("In

assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."); *Seidel v. Merkle*, 146 F.3d 750, 755 (9th Cir. 1998) (counsel performed deficiently where he was on notice of client's mental illness but did not investigate mental state defense). Further, had counsel conducted a reasonably competent social history investigation, counsel would have learned that Mr. Benavides had long-standing cognitive and neuropsychological deficits, and suffered from depression and alcohol dependency. Counsel's failure to present evidence about Mr. Benavides's mental health was not reasonable because it was not "rational and informed decision . . . founded upon adequate investigation and preparation." *In re Marquez*, 1 Cal. 4th at 602-03; *see also Strickland*, 466 U.S. at 690-91 (counsel's "strategic choices made after less than complete investigation" are reasonable only to the extent that limitations on investigation are reasonable).

There were many signs that should have triggered an investigation into Mr. Benavides' mental health and cognitive deficits. Mr. Benavides showed marked signs of depression to all who visited him in jail. When his second cousin Hector Figueroa visited him, he looked "disheveled, pale, and his skin looked yellow. He cried during a lot of the visit." (Ex. 86 at ¶ 12.) He cried because Consuelo had died. "He said he missed her and loved her, and could not believe she was gone." (Ex. 86 at ¶ 12.) Jose Isabel Figueroa, who visited him frequently in jail, saw Mr. Benavides cycle through bouts of depression, at times crying during their visits. His spirits would improve when his attorneys told him he would be getting out soon, and then would fall when he was not released. (Ex. 102 at ¶ 43.) Mr. Benavides lost weight while he was in jail and was clearly depressed when

his friends visited him. (Ex. 86 at ¶ 12; Ex. 102 at ¶ 43; Ex. 98 at ¶ 23; Ex. 97 at ¶ 9.) Marisol Calderon Alcantar, Huffman's secretary who interpreted for Huffman the one or two times Huffman visited Mr. Benavides in jail, says it was "apparent that he was devastated. He cried to us the whole time and told us that he was innocent." (Ex. 105 at ¶ 8.) Respondent's claim that Huffman was not deficient because Ms. Alcantar did not "share[] [her] observations with counsel" is patently absurd. (Response at 310.) Huffman was with Alcantar, and Mr. Benavides's mental distress was obvious.

Had counsel conducted an adequate investigation into Mr. Benavides's social history—which was required given these triggering facts and independently required for the penalty phase—counsel would have learned that Mr. Benavides suffered from depression, alcohol dependency, and post-traumatic stress disorder. Counsel would have learned that Mr. Benavides has a genetic predisposition to depression and alcoholism. (Ex. 127 at ¶¶ 29, 33, 36-37, 122.) Counsel would have also learned that Mr. Benavides alcoholism started when his parents fed him *leche caliente,* fresh cow's milk mixed with grain alcohol, regularly as an infant. (Ex. 119 at ¶ 12.) Counsel would have learned that Mr. Benavides had suffered bouts of depression throughout his life and that he often used alcohol to console himself when he was depressed. (Ex. 127 at ¶ 136; Ex. 102 at ¶ 31; Ex. 103 at ¶ 24; Exh. 111 at ¶ 28; Ex. 121 at ¶ 41; Ex. 110 at ¶ 30.)

Counsel would have also learned that Mr. Benavides was chronically verbally, emotionally, and physically abused by his father since he was a very young boy and witnessed frequent and relentless abuse of his mother by his father. Mr. Benavides was often singled out for abuse by his father because he tried to protect his mother from his father. (Ex. 121 at ¶¶ 24, 27, 54; Ex. 110 at ¶¶ 20, 24; Ex. 119 at ¶ 21.) "Even as an adult, his father

beat him." (Ex. 111 at ¶ 28.) Despite a lifetime of abuse at the hands of his father, Mr. Benavides always obeyed and respected him. (Ex. 111 at ¶ 28.) However, he suffered great trauma from the abuse his father inflicted. His niece Norma Patricia Yañez tells of how he used to "become extremely sad when he drank and he used to cry about how his father treated him badly." (Ex. 111 at ¶ 28.)

Counsel should have also been aware that Mr. Benavides had cognitive and neuropsychological deficits. Had counsel conducted an investigation into Mr. Benavides's social history and collected basic background records such as his educational records, counsel would have learned that Mr. Benavides showed cognitive deficits that were readily apparent to his teachers and peer since he was in middle school. (*See, e.g.*, Ex. 114 at ¶ 7; Ex. 116 at ¶ 14; Ex. 123 at ¶¶ 7-9.) Counsel should have also known that Mr. Benavides had marked memory deficits as is evident in the transcript of his interrogation by the detectives the day after Consuelo was hurt. He could not recall whether on that day he had told Cristina that he thought Consuelo may have hit the door or whether and for how long Cristina said she was going to be gone for. (Ex. 63 at 5241-42.) Similarly, during his testimony, he showed difficulties understanding the attorney's questions. "[H]e stated several times that he did not understand a question or he responded with unresponsive non-sequiturs, which likely indicated his confusion regarding the question." (Ex. 126 at ¶ 61.) Had counsel consulted with a neuropsychologist, counsel would have learned that Mr. Benavides "suffers from organic brain damage resulting in significant neuropsychological and intellectual dysfunction." (Ex. 126 at ¶ 56.) These impairments affected every aspect of the case, including Mr. Benavides's ability to waive his *Miranda* rights, understand and accurately respond to the detectives' questions during the interrogation, testify coherently and

accurately, understand the proceedings, and assist his attorney. (Ex. 126 at ¶¶ 58-63.) Counsel unreasonably failed to investigate and present evidence of these impairments at the guilt and penalty phase of the trial.

Respondent cites to *People v. Beeler*, 9 Cal. 4th 953, 1007 (1995), for the proposition that defense counsel's performance is not deficient where the record does not contain an indication that a mental health investigation was warranted. *Beeler* is distinguishable on several grounds. First, unlike *Beeler*, counsel here conducted absolutely no social history or mental health investigation. *See Beeler*, 9 Cal. 4th at 1007-08. Second, as shown above, counsel was or should have been on notice that Mr. Benavides suffered from mental health and cognitive deficits, which they wholly failed to investigate. *See Caro v. Woodford*, 280 F.3d 1247, 1254-55 (9th Cir. 2002) ("We have repeatedly held that counsel may render ineffective assistance if he is on notice that his client may be mentally impaired.") (internal cites omitted).

Respondent's further claim, without citation to any legal authority, that Mr. Benavides must submit a declaration from himself about "what he told counsel regarding his supposed mental impairment" to establish a prima facie case of counsel's deficiency is meritless. (Response at 300-01, 311.) Mr. Benavides has deficits in his ability to reason, solve problems, understand abstract concepts, and memory. His intellectual functioning is at the level of a child in grammar school. (Ex. 126 at ¶ 56.) As explained by Dr. Puente, people who suffer from intellectual and neuropsychological disabilities such as Mr. Benavides often mask their deficits in order to avoid stigma. (Ex. 126 at ¶ 59.) As such, it is unrealistic to expect someone with Mr. Benavides's marked impairments to have alerted trial counsel about them. Respondent's argument that Mr. Benavides might have opposed such investigation is nothing more than speculation contradicted by all the

evidence in the Corrected Amended Petition, which shows Mr. Benavides was very cooperative and compliant with counsel, and gave counsel long lists of friends and family whom they could contact. (Ex. 65 at ¶ 22 (Harbin indicates Mr. Benavides gave them many names of witnesses who knew him); Ex. 64 at ¶ 19 (Huffman describes Mr. Benavides as "passive and submissive.").) As explained above, counsel should have been aware of Mr. Benavides's deficits from the evidence in the case and would have certainly learned about them had they conducted a minimally competent social history investigation.

**b. Mr. Benavides Suffers From Long-Standing Cognitive and Neuropsychological Deficits**

Next, Respondent characterizes as "conclusory and speculative" the allegations and factual support presented in the Corrected Amended Petition that Mr. Benavides suffers from long-standing cognitive deficits though it is supported by declarations from numerous people who have known Mr. Benavides throughout his life and the declaration of Dr. Puente. (Response at 301.) After characterizing the claim as "conclusory and speculative," Respondent then discusses the extensive evidence presented in support of the claim in the following two and a half pages of the Response. (Response at 302-03.) Respondent's argument is clearly baseless.

Respondent factual disputes about the evidence showing that Mr. Benavides is intellectually disabled does not negate the prima facie case that counsel unreasonably failed to investigate and present evidence of his cognitive deficits, nor as shown in Claim Twenty, that he is ineligible for a death sentence based on his intellectual disability. Respondent's disputes are based on a lay misunderstanding of the mental health evidence and do not establish a genuine issues of fact. To the extent there is any genuine

factual dispute, it only highlights the need to issue an order to show cause and order an evidentiary hearing to resolve such disputes. *See Duvall*, 9 Cal. 4th at 475; *Hawthorne*, 35 Cal. 4th at 52.

Respondent contends that Mr. Benavides's intelligence quotient (IQ) test scores suggest he is not mentally retarded or intellectually disabled. Respondent describes Mr. Benavides's IQ scores, but does not explain why Respondent believes they do not support a finding that he is intellectually disabled. (Response at 301-02.) Respondent also completely ignores Dr. Puente's expert opinion in which he considered all of Mr. Benavides's test scores and determined that they "fall within the range of mental retardation and indicate significant impairment in intellectual functioning." (Ex. 126 at ¶ 39.) Further, Respondent ignores that whether or not Mr. Benavides is mentally retarded, evidence of his low cognitive functioning and neuropsychological impairments would have been relevant at the guilt and penalty phases.

Similarly, Respondent recites the evidence that Mr. Benavides performed poorly in school and takes issue with it because the declarants did not label Mr. Benavides as "mentally retarded or cognitively impaired." (Response at 302-03.) For example, referring to the declaration of Mr. Benavides's cousin Elvira Benavides Preciado, who attended school with Mr. Benavides in rural Mexico, Respondent argues that although she declared that in second year of *secundaria* (middle school) "everyone began to notice that Vicente was struggling with the material," she did not state that he had "mental limitations." (Response at 303.) Respondent's expectation that Mr. Benavides's peers in rural Mexico would use the terms "mentally retarded," "cognitively impaired," or suffering from "mental limitations" to describe his deficits is absurd. As is clear from Respondent's own recitation of the evidence (Response at 302), there is

strong, corroborated support for the fact that Mr. Benavides has deficits in academic functioning. His teacher, classmate, and school records, all present a cohesive, corroborated picture of Mr. Benavides's difficulties learning. Respondent's speculation that Mr. Benavides's deficits are a function of his limited time to do school work in light of his obligations to work in the fields, are belied by the fact that he continues to suffer from significant academic deficits as shown by the neuropsychological tests administered by the experts while he has been in prison. If his inability to learn was due to his obligations in the field, he should have learned something in the last twenty years of his incarceration where he has had ample time to educate himself. Notably, he has not learned English, notwithstanding having spent over twenty years in a mostly English-speaking environment. (Ex. 126 at ¶ 46.)

Respondent's similar objection regarding the significance of the fact that Mr. Benavides, unlike many of his peers, remained a farm worker most of his life and did not progress to a higher paying job, is also based on Respondent's lay misunderstanding of the significance of such evidence. As explained by Dr. Puente, Mr. Benavides remained picking grapes because it was "simple unskilled labor which does not require higher functioning necessary to master a job such as construction." (Ex. 126 at ¶ 50.) The crew also afforded him a safety net where the crew leaders arranged and paid for his food and lodging, transported him to and from work, kept track of his expenses, and managed his money. (Ex. 126 at ¶ 49.) This support system allowed Mr. Benavides to function, despite his limitations.

In sum, Respondent's lay objections to the overwhelming corroborated lay and expert evidence that Mr. Benavides suffers from an intellectual disability and that counsel unreasonably failed to investigate

and present such evidence at the guilt and penalty phases do not establish a genuine issue of fact. To the extent there is such an issue, however, this Court must accept Mr. Benavides's factual allegations as true and issue an order to show cause, and order an evidentiary hearing to resolve such disputes. *Duvall*, 9 Cal. 4th at 475.

**c. Prejudice From Counsel's Deficient Performance in Failing to Present Mental Health Evidence at the Guilt Phase**

Next, Respondent contends that Mr. Benavides has failed to show that he was prejudiced by counsel's failure to present mental health evidence at the guilt phase. Respondent ignores the detailed explanation in Dr. Puente's declaration explaining how Mr. Benavides's deficits affected his ability to waive his *Miranda* rights and respond effectively and appropriately to the detective's questions and the prosecutor's cross-examination. Respondent also erroneously argues that no evidence of Mr. Benavides's affect or demeanor was presented at the guilt phase. (Response at 305-06.) Respondent overlooks that the prosecutor relied on Mr. Benavides's alleged flat affect and actions on the night of the incident to argue that he was guilty. The prosecutor also capitalized on Mr. Benavides's confusion during his testimony to portray him as a malingerer.

The jury could have benefited from an explanation from mental health experts to help them understand how Mr. Benavides's significant memory and cognitive deficits affected his ability to recall events when he was interrogated by the detectives and when he was aggressively questioned by the prosecutor on the stand. As explained by Dr. Puente:

> Mr. Benavides's cognitive limitations made him more susceptible to coercion and pressure, and to acquiesce to leading questions that present false or misleading information, especially when posed by authority figures such as law

> enforcement officers or attorneys in court. This behavior is well documented in the scientific literature. His deficits in intellectual functioning, reasoning, and memory, affected his ability to understand and respond accurately to compound and complex questions posed to him during the interrogation and testimony in court. His deficits in reasoning, problem-solving, and cognitive flexibility impaired his ability to understand compound and complex questions posed to him by the interrogating officer and the attorneys in court. During his testimony he stated several times that he did not understand a question or he responded with unresponsive non-sequiturs, which likely indicate his confusion regarding the question.

(Ex. 126 at ¶ 61.)

Significantly, a mental health expert could have explained how Mr. Benavides's marked memory deficits worked to his detriment when he was asked to recall the events that transpired the day that Consuelo was injured. As explained by Dr. Puente:

> During his interrogation, he stated that he did not recall whether the previous day he had told Cristina that he thought Consuelo may have hit the door or whether and how long Cristina said she was going to be gone for. (pg. 18 Haydee transcription) His answers are consistent with his memory deficits shown in the tests I administered. In the Neuropsi, where I asked him to listen to a story and immediately tell me all the information he could recall from the story, he had very poor and inaccurate recall. His delayed recall on the Bateria III. He was completely unable to remember any words I had asked him to memorize less than thirty minutes before. His confusion regarding what day he bought hamburgers is also attributable to his impaired memory, which would be further strained under the circumstances of his interrogation where he had not slept or eaten for an extended period of time, and was under a great deal of stress both from the ordeal regarding Consuelo's injury and from the interrogation itself. Deficiencies in the Spanish-language ability of Detective Valdez, who conducted the interrogation, only further exacerbated Mr. Benavides's inherent impairments.

(Ex. 126 at ¶ 62.)

Had counsel consulted with a mental health expert, counsel would have further learned that given his deficits, Mr. Benavides required "substantial amount of preparation and explanation before being able to accurately and reliably testify in court, starting with a slow, methodical, and basic translation of the proceedings." (Ex. 126 at ¶ 63.) He would have to be admonished to not respond to questions he did not know. Special care in preparing Mr. Benavides was also necessary because the use of an interpreter exposed him to multiple stimuli "that affected his ability to concentrate and understand the proceedings." (Ex. 126 at ¶ 63.)

Counsel's failure to consult with an expert and present this mental health evidence at the guilt phase prejudiced Mr. Benavides. While testifying, Mr. Benavides tried to explain that he did not remember what he had told the detective, he had felt pressured and he was not feeling well because he had not eaten and had been up all night. (15 RT 3029, 3032.) The prosecutor relentlessly ridiculed Mr. Benavides asking him whether "feeling bad"[89] makes him lie. (15 RT 3032.) In closing, the prosecutor further argued that Mr. Benavides made willfully false and deliberately misleading statements to detectives, and lied on the stand because he was guilty. (18 RT 3656.) A mental health expert would have given context and credibility to Mr. Benavides's explanations about his difficulties with the interview, which would have rebutted the prosecutor's arguments.

A mental health expert would also have explained Mr. Benavides's flat affect, about which several witnesses testified. (*See, e.g.,* 12 RT 2464 (Dr. Bloch testified that Mr. Benavides displayed "little concern."); 14 RT

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[89] As explained above, Mr. Benavides actually said he was feeling sick, yet Hernandez mistranslated the phrase to feeling bad. *See supra* Reply to Claim 13 (10).

2773 (DRMC nurse Anita Caraan testified that Mr. Benavides was "nonchalant" and seemed uninterested.); 14 RT 2757 (Detective Valdez testified that when he interviewed Mr. Benavides he was quiet, failed to make eye contact, and his head was bowed and he stared at the floor).) Reports of Mr. Benavides's affect should have been a trigger for counsel to investigate his mental health. Had counsel conducted a reasonable mental health evaluation she could have explained his flat affect as a function of his cognitive and neuropsychological impairments that limited his ability to effectively deal with complex, stressful situations and respond appropriately. (Ex. 126 at ¶ 56.) Counsel would have also learned that Mr. Benavides had suffered great trauma earlier in life over the loss of his two infant children. Mr. Benavides and his girlfriend Juana Flores Rivera had a child who died four days after she was born of bronchopneumonia. Later they had a son, whom they had planned to call Vicente, who was born two months premature and was placed in an incubator, but who died about a month later. These were extremely traumatic events for Mr. Benavides which affected him deeply. (Ex. 96 at ¶ 6.) Consuelo's injuries and critical condition in the hospital likely made Mr. Benavides relive these emotions and accounts for his flat affect in the hospital. An expert could have also explained that Mr. Benavides has a history of suffering from depression. (Ex. 127 at ¶ 136.) Counsel's failures prejudiced Mr. Benavides. The jury had no evidence to explain Mr. Benavides's flat affect other than the prosecutor's argument that it was indicative of his guilt. (18 RT 3565 (arguing his failure to make eye-contact and demeanor on the stand evidenced his guilt).)

A mental health expert could have assisted counsel in understanding that Mr. Benavides had severe cognitive impairments that affected his ability to testify effectively on the stand, waive his right to self-

incrimination and his *Miranda* rights. (Ex. 126 at ¶ 61.) Had counsel consulted with experts and learned this information they would have used it to explain Mr. Benavides's statements and his demeanor on the stand and on the night Consuelo was injured. (Ex. 65 at ¶ 25; Ex. 64 at ¶ 19.)

Evidence of his mental impairments should also have been presented in the penalty phase as mitigation and in support of a lingering doubt theory. Respondent argues that counsel's failure to present such evidence was not prejudicial because (1) the aggravating circumstances of the crime could not have been mitigated by such evidence (Response at 307-10); and, (2) Mr. Benavides has not been "diagnose[d]" as clinically depressed, suffering from post-traumatic stress disorder, or impaired by alcohol consumption "*at the time he killed Consuelo*" (Response at 312-20, italics in original). Respondent fundamentally misunderstands the nature of the claim and the strength of the cohesive mitigating mental health evidence.

Respondent's arguments are based on the erroneous conception that Mr. Benavides is arguing that the mental health evidence would have provided a mitigating explanation for why he killed Consuelo. Mr. Benavides has made no such argument. Mr. Benavides did not kill or hurt Consuelo in any way. As explained above, Mr. Benavides has argued that the mental health evidence would have allowed defense counsel to explain why he was unable to recall specific events about the incident during his interrogation and testimony, his flat affect, his inability to understand his *Miranda* rights, and respond effectively to the prosecutor's aggressive questioning. This evidence would have not only been important at the guilt phase, but also as the penalty phase in support of showing a lingering doubt about his guilt. Further, the extremely compelling evidence about the severe trauma he suffered from his father's abuse, his loyalty and protection of his mother, his life-long depression resulting from reliving the trauma

from his father's severe abuse, and alcohol dependency, to which he was predisposed by genetics and infant exposure to alcohol, would have presented powerful evidence that would have engendered pity for Mr. Benavides by at least one juror.

Respondent's assertion that such evidence is a double-edged sword (Response at 317-18) is simply not true in Mr. Benavides's case because all reports from all who have known him are that despite his being subjected to severe abuse and suffering from alcohol dependency, he was never violent, nor did he become irrational when he drank. (Ex. 96 at ¶ 10.) The mental health evidence with the cohesive and well-corroborated evidence of his lack of violence, peacefulness, caring and loving nature, would have also created a lingering doubt about his guilt. Respondent's arguments that Mr. Benavides was not diagnosed with "clinical" depression or post-traumatic stress disorder at the time of the crime are inapposite.[90] As explained above, his depression and history of trauma, especially seeing two of his infant children die, influenced his behavior at the time of the incident and had the jury known this information they would have not convicted him of the crime or voted to spare his life.

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[90] As Mr. Benavides has argued in the Motion for Corrected Amended Informal Response, filed April 27, 2011, it is completely inappropriate for Respondent to reference and rely on the withdrawn declarations of the mental health experts Dr. Weinstein and Dr. Padilla, and the withdrawn declarations they relied on to respond to these claims. (Response at 312-14.) The opinion of those experts relied on fraudulent information provided by Kathleen Culhane and as such their declarations have been withdrawn and are not before this Court. (*See In re Benavides*, Case. No. 111336, Order September 5, 2007.) If this Court decides to consider any of the arguments made by Respondent based these withdrawn declarations, Mr. Benavides request that he be given notice of such and an opportunity to respond to the arguments.

In sum, Mr. Benavides was prejudiced by counsel's failure to investigate his mental health, retain the relevant experts, and present the evidence at the guilt and penalty phases. There is a reasonable probability that had counsel presented this evidence at the guilt or penalty phase of the trial at least one juror would have had a reasonable doubt that Mr. Benavides committed the crimes or voted to spare his life.

### 15. Failure to Show Mr. Benavides Was Not a Future Danger at the Penalty Phase.

Respondent argues that though Harbin has admitted that he unreasonably failed to present evidence of lack of future dangerousness, Mr. Benavides's claim of ineffectiveness in this regard fails. (Response at 320-21.) Harbin explains in his declaration that although he was aware Mr. Benavides was a model prisoner while awaiting trial, he failed to present this mitigating information because he was not aware it was mitigating. (Ex. 65 at ¶ 30.) Harbin's ignorance of the law constitutes deficient performance. *See Williams v. Taylor*, 529 U.S. 362, 395 (2000) (counsel's failure to conduct investigation into client's history of abuse based on ignorance of the law permitting such evidence at penalty constituted deficient performance). Respondent's argument that Mr. Benavides has not "adduced the documentary evidence necessary to support his claim" because Huffman "neither confirms nor denies" this assertion is meritless on its face. (Response at 321.) Huffman explained that she "did not do anything on the penalty phase" because she thought Harbin had it under control. (Ex. 64 at ¶ 18.) Moreover, regardless of what she may have said to Harbin, the fact is that such evidence was not presented at trial even though according to the Kern County Sheriff's Department, Mr. Benavides was "cooperative and posed no threat to staff or other inmates" during his incarceration in Kern County. (Ex. 136 at 6464.)

Respondent's invented "tactical" reason for not presenting such evidence—that Mr. Benavides "was single-celled and in protective custody the entire time he was housed" in jail—is equally meritless. (Response at 321.) First, as stated above, no tactics informed the failure to present such evidence. Second, Mr. Benavides's good behavior in jail and previous history of complete lack of violence were very probative of the likelihood that he would not pose a future danger in prison notwithstanding his housing arrangements. Respondent's argument that the evidence would have revealed that child molesters are housed separately is equally baseless. First, as explained by Huffman on the record, Mr. Benavides was in protective isolation not because of "anything he did" but rather because Huffman informed jail personnel that a member of the Alejandro's family had threatened to get himself arrested and into jail to kill Mr. Benavides. (19 RT 3830.) Second, even if he was housed in segregation because of the child molestation charges, it would be no great revelation to a jury who had convicted him of those charges that he was housed as a child molester and he would likely have the same protective custody setting in the high security prison he would have been sent to had he been sentenced to life without possibility of parole (LWOP). At San Quentin State Prison he is in East Block and is assigned to a protective custody yard. (Ex. 136 at 6464.)

Finally, Respondent's claim that such evidence would not have made a difference is belied by the fact that even with the extremely limited evidence presented at the penalty phase, the jurors clearly considered a sentence of LWOP as evidenced by the fact that they sent a note out to the court asking about the meaning of LWOP. (3 CT 782.) *See Stankewitz v. Wooodford*, 365 F.3d 706, 725 (9th Cir. 2004) (considering juror note asking whether anyone sentenced to LWOP had ever been put before a parole board as evidence that the death sentence was not a foregone

conclusion); *see also Stankewitz v. Wong*, 698 F.3d 1163, 1176 (9th Cir. 2012) (granting of habeas corpus relief in capital case after remand for hearing and reaffirming rationale regarding juror note being an indicator of prejudice).

### 16. Failure to Present Mitigating Evidence at the Penalty Phase.

Respondent contends that counsel's performance was neither deficient nor prejudicial in failing to present the extensive evidence in mitigation presented in the Corrected Amended Petition. Respondent argues that (a) the investigation conducted was objectively reasonable (Response at 323-26); (b) the claim lacks the "necessary documentary" support (Response at 326-35); and, (c) counsel's failures were not prejudicial because the evidence was "double-edged" and the crimes were too aggravated (Response at 335-36.) As shown below, Respondent's reluctance to concede that Mr. Benavides has made a prima facie case that counsel provided prejudicially deficient assistance in failing to present the wealth of compelling mitigation evidence presented with the Corrected Amended Petition in contrast to the paltry defense presented at trial is an affront to this Court and Mr. Benavides.

As with many of Respondent's other arguments, Respondent focuses her attention on disputing the factual allegations presented with the Corrected Amended Petition. Respondent questions statements made by counsel admitting their utter failure to prepare and present a penalty phase defense and by lay witnesses who provide detailed declarations about what they could have testified about. (*See, e.g.*, Response at 327, 330, 334.) As stated above, Respondent's factual disputes, to the extent they are genuine, establish the need for this Court to issue an order to show cause and order an evidentiary hearing to resolve such disputes. *Duvall*, 9 Cal. 4th 475.

This Court must accept Mr. Benavides's factual allegations as true, *id.*, especially because they are extensively documented by multiple declarants and Respondent's counter-arguments are unsupported and speculative.

**a. Woefully Inadequate Investigation**

Respondent argues that counsel's limited investigation of Mr. Benavides's mental health and social history was objectively reasonable. Respondent contends that Almaraz's few telephone contacts with Mr. Benavides's relatives in Mexico constitute a reasonable investigation into his social history. Respondent further argues that although Harbin had a "three-page list" of prospective penalty phase witnesses that listed the names of 60 individuals (*see* Response at 324-25, listing all 60 names), that counsel did not perform deficiently because he called *two* witnesses to briefly testify at the penalty phase (Response at 325-26). It is self-evident that Respondent's arguments are baseless.

Despite the fact that Harbin had only been a licensed attorney for barely four years, when Huffman requested that he be appointed as second counsel on Mr. Benavides's case,[91] and that he had never represented a capital defendant, Huffman delegated to him the entire investigation for the penalty phase and of good character evidence. (Ex. 64 at ¶ 18.) Given his lack of experience, Harbin expected to rely on Huffman to give him direction regarding how to investigate and present good character and mitigation evidence, and an overall strategy for the case. However, Huffman never had time to meet or discuss the case with him. Harbin and Huffman "did not have a single meeting about the case until during jury selection." (Ex. 65 at ¶ 5.) As a result of Huffman's lack of direction,

[91] Harbin was admitted to the State Bar on December 7, 1988. (Ex. 168 at 8180.) Huffman moved for Harbin's appointment and he was appointed by the Court on January 17, 1992.

Harbin's inexperience, and his general negligence in representing clients as documented in his State Bar records, Harbin utterly failed to conduct barely any investigation into Mr. Benavides's social history and the evidence he presented at the penalty phase and about his good character at the guilt phase was notably brief and ineffectual.

Harbin readily admits that he failed to conduct an adequate investigation and had no strategic reason for his failures. As Harbin explains:

> As a result of the lack of direction, funding, and my own inexperience with capital cases, Huffman and I did not investigate, prepare, and present available compelling mitigation evidence. We did not obtain evidence of Benavides's history of mental health problems, contact and interview numerous family members and other persons familiar with his social and mental health history, or retain necessary mental health professionals to review Benavides's history and testify about his mental deficits. . . . .[O]ur failure to investigate and present such evidence was not the product of a tactical and informed decision.

(Ex. 65 at ¶ 20.) Although Huffman hired Spanish-speaking Hernandez to go to Mexico to "check [Mr. Benavides's] background" (Response Exh. 5 at 5-6), she then failed to send him or any other member of the defense team to Mexico. (Ex. 65 at ¶ 21.) Given that Mr. Benavides was born and raised in Mexico, spent most of his life there, and has dozens and friends and family who know him well in his hometown of San Gabriel, Jalisco, counsel's failure to conduct any investigation in Mexico represents a complete abdication of their responsibility to conduct a social history investigation. Even though Harbin had no experience doing capital work or any training doing a mitigation investigation, Huffman delegated the investigation of good character and penalty phase evidence entirely to Harbin. Huffman did not realize that Harbin had failed to do his job until

the penalty phase had ended. (Ex. 64 at ¶ 18.) Harbin was inexperienced in capital litigation and only had a general idea of the type of evidence to develop for mitigation. (Ex. 65 at ¶ 19.) He was not aware that evidence of neglect, abuse or mental health would be relevant. (Ex. 65 at ¶ 19.)

The only social history investigation that was conducted was done by Victor Almaraz, who has a substantial criminal history and lacked the qualifications, experience, and training to conduct a proper investigation. (Ex. 24–32.) Almaraz has a criminal history of possession of controlled substances, including dealing heroin and cocaine. (Ex. 25-29.) At one time he sold four to five bags of heroin a day. (Ex. 28 at 4413.) He also has a history of violence. Almaraz choked and assaulted his common law wife with a firearm and shot another woman. (Ex. 29 at 4474.) In addition, Almaraz suffered a major head injury in 1986, which caused substantial neurological damage. According to a 1987 evaluation by a UCLA neurologist, Almaraz reported suffering from problems with memory, depth perception, spoken language and psychomotor depression, in addition to regular seizure activity. (Ex. 30 at 4530.) Almaraz's complete lack of training and experience doing investigations, history of drug abuse and violence, serious neurological impairments, and subpar language skills rendered him unable to properly investigate the case and provide interpretation services for Spanish-speaking defense witnesses.

Almaraz also had no prior experience in investigation, interviewing witness, examining evidence, or doing any other type of investigative work. As Almaraz explains: "I was not hired as an investigator, nor was I trained to investigate issues for criminal, let alone capital, cases. Rather, I served as an interpreter and I just contacted some witnesses for Jeff [Harbin]." (Ex. 108 at ¶ 3.) Mr. Benavides provided Harbin and Almaraz with many names of people who knew him and when Almaraz contacted them, they

provided him with names of other witnesses who could testify on his behalf. (Ex. 65 at ¶ 22; Ex. 108 at ¶ 6.) Everyone that Alamaz contacted "was eager to help [Mr. Benavides] in any way that they could." (Ex. 108 at ¶ 5.) Almaraz mostly contacted witnesses to find out where they could get a hold of them if they needed to talk to them further. As Almaraz explains: "Jeff [Harbin] just asked me to get basic background information on Benavides and contact information for the people with whom I spoke." (Ex. 108 at ¶ 3.) Almaraz's contacts with witnesses were so cursory that he did not even write any reports. He passed on all the information orally to Harbin. (Ex. 108 at ¶ 3.)

Meanwhile Mr. Benavides had a whole community of friends and family in the United States and Mexico who cared about him dearly and were doing everything within their power to offer their support. Soon after his arrest, Mr. Benavides's fellow crew workers gave money from their paychecks and gathered $5,000 to retain a lawyer to help Mr. Benavides. They gave the money to an attorney who took it, did nothing for Mr. Benavides, and never returned the money to them. (Ex. 103 at ¶ 32.)

As soon as Mr. Benavides's mother, Maria Figueroa de Benavides,[92] learned her son had been arrested she made arrangements to travel to the United States. It was not easy for her to do so. She cleaned houses for a living and she had to obtain permission from her employer to leave and a temporary visa to travel to the United States. She received no financial or logistical assistance from Mr. Benavides's legal team. She took a long bus ride from Guadalajara to Tijuana, where a close family friend, Dionicio Campos, picked her up and drove her to Delano. (Ex. 111 at ¶¶ 45-46.)

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[92] We refer to Mr. Benavides's mother by her first name in this Reply in order to avoid confusion with other family members sharing the same surname.

Maria stayed with Dionicio and his wife Celia for a little over a year before the trial. She visited Mr. Benavides very often in jail and did her best to communicate with his legal team to offer her assistance to no avail. As Dionicio explains: "At [Maria's] request, I brought her on more than one occasion to the female lawyer's office in Delano, but I do not think a lawyer ever took the time to talk to her. Maria made every effort to help her son." (Ex. 104 at ¶ 47.) Huffman's secretary, Marisol Alcantar, corroborates Dionicio's description of the lawyers completely ignoring Mr. Benavides's mother and friends pleas to meet with them and offer their assistance:

> Vicente's mother came into the office almost every day, always accompanied by a friend or family member, and asked to speak with Donnalee. She communicated to me again and again in Spanish that she could do whatever was necessary to help her son. Vicente's mother always struck me as such a kind woman. Vicente's other family members and friends often came to the office as well. His friends and family wanted to help him and his attorneys in any way they could. Because she was busy, it did not seem to matter to Donnalee how many times friends or family of Vicente came into the office to speak with her. When she was in the Delano office, I told Donnalee that people from the family were in to see her, but she said that she could not talk to them because she was too busy.

(Ex. 105 at ¶ 11.) The one time that Huffman did meet with a few family and friends was early in the case and she conducted only a cursory interview. Hernandez, who interpreted for her during that interview, describes it as follows: "She asked them a few general questions, such as whether they thought Vicente had committed the crime. She did not ask anything of substance." (Ex. 107 at ¶ 6.)

What little contact Almaraz had with family members was unprofessional, unreasonable, and fruitless. For example, when Alamaraz met with Dionicio Campos, he only asked him a few basic questions

regarding how long he had known Mr. Benavides and whether he was aggressive or a drug user, but he "spent a lot of time talking . . . about sports he liked to play, including parachuting." (Ex. 104 at ¶ 41.) Mr. Benavides's cousin, Hector Figueroa, recalls a time when he and his brother Jose Isabel, tried to meet with the lawyers and instead met with Alamaraz:

> Jose Isabel was very anxious to help Vicente. He first called Vicente's lawyer, but did not receive a call back. He and I then went to Bakersfield to try to meet with the lawyer, but the lawyer never showed up. Instead, the person who met us at the lawyer's office was a man named Victor. Victor told us he was representing Vicente, and we believed he was the lawyer until we saw at trial that Vicente's lawyers were two other people. Victor told us the defense was going to test Vicente's DNA. He asked us for money, because he said he had to make a lot of copies for Vicente's case. We did not have much money with us, but we ended up giving him one hundred and thirty dollars to help with the case. He asked us how we knew Vicente, and we told him we had known him since we were small. He did not ask us any other questions about Vicente, or about our relationships with him. We did not know that this information could be helpful to Vicente. Indeed, we did not know what we could do to help Vicente and his case, or what the case procedure was. We did not even know when the case was going to trial. The lawyers would not talk to us or give us any information.

(Ex. 86 at ¶ 14.) Almaraz not only took the witnesses' money under false pretenses and failed to ask any helpful questions, but also improperly flirted with female witnesses and asked them personal questions that had nothing to do with Mr. Benavides. Mr. Benavides's cousin, Maria Elena Acevedo Benavides who lives in Mexico describes Alamraz telephone calls as follows:

> Once [Almaraz] found out that I was a single mother living alone . . . Victor started calling me on his own without the English-speaking lawyers. He began calling me late at night, at hours that seemed too late for anyone to be at an office. I

> could tell it was only Victor on the telephone because of the difference in the type of questions he asked. His tone was much more flirtatious. When Victor called with the lawyers, he asked questions that seemed concrete and directly related to Vicente. When he called on his own, he asked me questions that seemed to me to be personal, to the point of being invasive, that had nothing to do with Vicente. It seemed to me that Victor had other intentions when he called without the lawyers, that he was trying to take advantage of the fact that I was a single woman and wanted to call to chat and flirt. It made me uncomfortable, but I wanted to help Vicente as best I could. I kept trying to tell myself that I was just misinterpreting Victor's telephone calls, and that he really was helping Vicente. But when he called me late at night to talk about things that had nothing to do with Vicente's case, I started to wonder if Victor was really trying to help my cousin, or if he was solely interested in me.

(Ex. 97 at ¶ 11.)

Almaraz also gave Mr. Benavides's relatives and friends in Mexico false hope that he would arrange for them to travel to the United States to testify on his behalf. Almaraz[93] called Mr. Benavides brother, Evaristo, in Mexico and asked him to gather twenty people who could go to the United States to testify. He told him they did not need a passport or visa to travel because the lawyers would arrange for a special permission to enter the United States and would take care of their travel expenses. Evaristo was "filled [] with hope" with all the promises he made. Evaristo quickly gathered more than twenty people who knew Mr. Benavides and were willing to testify on his behalf. As Evaristo explains: "It was easy to find people who knew and cared about Vicente—so many here in San Gabriel

[93] Evaristo refers to Almaraz as the "lawyer" because he identified himself as such to him. It is clear that Almaraz was the person contacting him since neither Harbin nor Huffman speak any Spanish and Evaristo's description of Almaraz's Spanish as being very poor is similar to the description offered by others of his Spanish. (Ex. 119 at ¶ 44.)

have fond memories of him." (Ex. 119 at ¶¶ 44-45.) Almaraz also told Mr. Benavides's cousin Maria Elena Acevedo Benavides that she and her mother Elena would be traveling to the United States to testify on Mr. Benavides's behalf and that their immigration papers and expenses would be paid for. He went so far as to tell her that he was sending airline tickets. (Ex. 97 at ¶ 12.) Though all these of these relatives and friends of Mr. Benavides in Mexico were eager and prepared to travel to the United States to testify on his behalf, counsel unreasonably failed to arrange for their appearance. Harbin admits that he never made arrangements to bring the witnesses to testify and blames Huffman for not obtaining funding to do so. As Harbin explains, the only witnesses who were able to travel did so at their own expense. (Ex. 65 at ¶ 22.)

Having repeatedly rebuffed Mr. Benavides's family and friends who made every effort to assist them, defense counsel were completely unprepared to present good character evidence and penalty phase mitigation evidence. On the day the character evidence was presented, a large group of Mr. Benavides's friends and family members gathered at the courthouse to testify on his behalf. (Ex. 102 at ¶ 52.) Mr. Benavides's mother Maria held a rosary in her hand and prayed while she waited to be called to testify. (Ex. 101 at ¶ 7.) There were about fifteen friends and family of Mr. Benavides gathered in the courthouse. Alamaraz took them down to the basement and selected the witnesses at random or based on their ability to speak English, rather than based on any knowledge of the information they could offer. (Ex. 101 at ¶ 7.) Antonio Duran Delatorre, one of the witnesses who Almaraz selected described the selection process as follows:

> The following day, [my brother] Jose Luis and I went to the court. The same man, who had met us at the hotel, met us at the courthouse. He took a group of us down to the basement level. There were about fifteen of us total who were there for

> Vicente. In the basement level, the man asked us to identify ourselves. He wanted to know who was from Mexico and who was from the United States. I told him that I lived in the United States. He then told us who was going to enter the courtroom to testify and what the order would be. He seemed to select only people who lived in the United States. He told us someone would guide us into the courtroom and tell us when to go. He spoke to us in Spanish, but he did not explain much—only the order of who would follow whom into the courtroom, and the procedure of how we would be called. I did not fully understand what was happening. He asked me if I spoke English, and I told him I did. He then told me that I was going to testify, not Jose Luis. It was strange to me that I was asked to testify when some of my other brothers knew Vicente much better than I did. My brother Jose Luis was upset that he was not asked to testify. He told me that he wanted to help Vicente, too.

(Ex. 100 at ¶ 13.) Hector Figueroa Ramirez, Mr. Benavides's cousin who testified as well as a character witness, was similarly chosen at random by Alamaraz over his brother Jose Isabel who knew Mr. Benavides much better. (Ex. 86 at ¶ 17.) Almaraz did not conduct any substantive interviews with the four character witnesses who were called to testify at Mr. Benavides's trial. (*See, e.g.*, Ex. 101 at ¶¶ 4-5; Ex. 86 at ¶ 14.) He had not even met Antonio Duran Delatorre, before he selected him to testify on the basis of his English-speaking skills. (Ex. 100 at ¶ 13.) Counsel's poor preparation and random choice of witnesses similarly prevented him from eliciting useful testimony from the other three character witnesses.

Harbin's utter lack of preparation, investigation, and experience doing capital work, completely undermined his presentation of evidence at the penalty phase. In the opening argument to the penalty phase, he promised to present a "fuller picture" of Mr. Benavides. (19 RT 3739.) Yet, he called only two witnesses to testify: Mr. Benavides's friend Dionicio Campos and crew leader Delfino Trigo. Their testimony together

only occupies 14 pages of transcript. (19 RT 3751-64.) The majority of Dionicio Campos' brief testimony was dedicated to explaining that he knew Mr. Benavides because he grew up with him and worked the fields with him. (19 RT 3751-58.) Then Harbin asked only two questions—whether Mr. Benavides was violent and whether he was a good worker—which Campos answered favorably. (19 RT 3757-58.) Although Campos had a wealth of important evidence he could have testified to, Harbin failed to elicit it. (Ex. 104.)

At the beginning of Trigo's testimony, he informed Harbin that he understood "very little" English. (19 RT 3760.) Nonetheless, counsel failed to provide him with an interpreter to testify. Delfino Trigo's testimony encompasses five pages, of which four are dedicated to establishing that Mr. Benavides worked for Trigo and he never missed work. (19 RT 3759-62.) Trigo also responded affirmatively to Harbin's close ended, yes or no questions, that Mr. Benavides was not violent, was a cooperative worker, and a "good person." (19 RT 3763.)

Based on Harbin's limited line of questioning, it appears that he thought the constraints of the presentation of guilt character evidence also governed penalty phase evidence. Once he established the witnesses' foundation, he then asked only closed ended questions regarding whether Mr. Benavides was violent and a good worker. The testimony of these two witnesses was so ineffective in establishing any mitigation that the prosecutor declined to cross-examine both of them. When Harbin rested the defense's case after only presenting two witnesses, Huffman was "flabbergasted." (Ex. 64 at ¶ 18.)

The Court was so surprised when Harbin rested that he immediately called counsel out to a sidebar in the hallway to explain that in a later appeal of the case a court would probably find error in Harbin's failure to

present evidence of the lack of a criminal record. (19 RT 3765.) The Court stated that "obviously" this information did not seem significant to Harbin since he did not raise it, but the Court was raising it sua sponte because he was concerned about the "integrity of this particular proceeding." (19 RT 3765.) The Court then obtained a stipulation from the prosecution that Mr. Benavides did not have a prior record. (19 RT 3765.) The jury sentenced Mr. Benavides to death on that same day. The entire penalty phase including witness testimony, closing arguments, jury instructions, jury deliberations and verdict lasted less than a day.

The jury returned a death sentence on the same day that Mr. Benavides's niece Norma Patricia (Pati) arrived in Los Angeles from Mexico. The next day, she met with Almaraz and he told her he did not need her to testify anymore. When Pati asked to go to the courtroom, Almaraz told her that there was no room for her there. Pati then arranged to meet with Mr. Benavides's lawyers. Harbin met with Pati twice, but Huffman did not do so. Harbin asked her to gather letters of recommendation from fifteen people who knew Mr. Benavides and also asked her for a list of people who would travel to the United States to assist him. Pati said she was happy to do so and immediately started to gather the information. Over the next two months, Almaraz visited with Pati often, but he rarely spoke about the case. Instead, Almaraz flirted with Pati and asked her out to a bowling alley. Pati, who was married, always turned him down and he eventually stopped going by. (Ex. 111 at ¶ 51.)

Pati quickly gathered fourteen letters from numerous family members and friends expressing their support. (3 CT 832-67.) Harbin filed the letters with the Court on June 11, 1993 (3 CT 832), the same day of the hearing of the motion for a new trial and motion to reduce the sentence.

The Court rejected them as insufficient to mitigate the crime and denied the motions. Mr. Benavides was sentenced to death. (19 RT 3859.)

The record is undisputed and clear that defense counsel's complete failure to investigate Mr. Benavides's social history and good character fell far below an objective standard of reasonableness. As the Supreme Court held regarding a trial that took place five years before Mr. Benavides's, "[i]t is unquestioned that under the prevailing professional norms [in 1988], counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Williams v. Taylor*, 529 U.S. at 362, 396 (citing *Wiggins v. Taylor*, 529 U.S. at 396.) Professional norms in place at the time of Mr. Benavides trial provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines) 11.4.1(C), p. 93 (1989) (emphasis added); *see Wiggins v. Smith*, 539 U.S. at 524 (referring to ABA Guidelines as guide to determining what is a reasonable investigation.) The 1989 ABA Guidelines specifically direct counsel to consider presenting evidence of among other things a defendant's medical history, educational history, employment and training history, rehabilitative potential, "[r]ecord or prior offenses . . . *especially where there is no record*," and family and social history. ABA Guidelines 11.8.6, p. 133 (emphasis added). The ABA Guidelines further specifically directed counsel to consider presenting expert testimony about any of these topics and their resulting impact on the client. *Id.* Undisputedly, counsel utterly failed to meet the standard of care that required counsel to conduct an objectively reasonable thorough investigation of Mr. Benavides family and social history. Almaraz's

cursory and unprofessional contacts with witnesses do not even qualify as an investigation, much less an objectively reasonable investigation of Mr. Benavides's rich and compelling social history.

The fact that the entire defense case in the penalty phase covered only 14 pages of transcript and the testimony of two witnesses who offered only generalities about Mr. Benavides's character is strongly indicative of counsel's utterly deficient performance. *See Stankewitz v. Woodford*, 365 F.3d at 706, 716 (finding a colorable claim of counsel's deficiency where defense presented mitigation testimony of only six witnesses, covering 50 pages of transcript); *see also Stankewitz*, 698 F.3d at 1165 (granting penalty phase relief in same case and reaffirming significance of "minimal" penalty phase presentation at trial). Counsel's perfunctory penalty phase defense is even more lacking than other cases where counsel has been found to have provided constitutionally deficient performance. In *Douglas v. Woodford*, for example, counsel presented evidence that "Douglas had been orphaned and had a difficult childhood . . . was very poor growing up and always kept large quantities of food in his home, apparently as a result of childhood deprivation." *Douglas v. Woodford*, 316 F.3d 1079, 1087-88 (9th Cir. 2003). Counsel, however, was found to have performed deficiently because counsel failed to investigate and present evidence of the extent of Douglas' childhood deprivation, additional character evidence, alcohol abuse and possible brain damage. *Id.* at 1088-89. In Mr. Benavides's case counsel only presented cursory good character evidence and absolutely no evidence about his social and family history, history of abuse, neglect, and poverty, cognitive deficits, neuropsychological impairments, alcohol dependence, and extensive, compelling evidence of dozens of friends and family about Mr. Benavides's good character and how much he is loved and cared about. Counsel also completely failed to retain and consult with any

mental health experts. Respondent's attempts to defend counsel's paltry investigation and woefully inadequate penalty phase presentation are utterly futile.

#### b. Mr. Benavides's Claim Is Broadly Supported by Extensive Documentary Evidence.

Respondent again argues, without citation to authority, that in order to establish a prima facie case for relief on a claim of ineffective assistance of counsel Mr. Benavides must submit his own declaration about what he told counsel. (Response at 326.) As stated above, Respondent is mistaken. This Court and several others have often found a prima facie case of counsel's prejudicial ineffectiveness without needing a declaration from the client, especially when, as here, counsel admit their deficiencies in their declarations submitted to the court and the lay witnesses all corroborate the account of counsel's complete failure to conduct a full investigation. (*See, e.g. In re Crew*, California Supreme Court Case No. S107856 (issuing order to show cause on counsel's ineffectiveness in penalty phase without declaration of petitioner submitted in support of the allegations).)

Respondent questions Harbin's concession that he failed to conduct a thorough investigation into Mr. Benavides social and mental health history because he lacked experience and failed to receive adequate guidance or funding from Huffman. (Response at 327, citing Ex. 65 at p.7-9.) Respondent argues that Harbin's declaration is insufficient to establish a prima facie case because Huffman allegedly does not disclose the nature of her discussion with Harbin. Respondent ignores that Huffman explained in her declaration that she did "not do anything in the penalty phase because when [she] asked Harbin about it he always said he had it under control." (Ex. 64 at ¶ 18.) Respondent's complaint that there is no information about what requests were made for investigative funds (Response at 327, 332) is

disingenuous given that Respondent requested and obtained access to all Penal Code section 987.9 requests for funds (*see In re Benavides*, Case No. S11136, order dated January 15, 2003) and attached some of them as exhibits to the Informal Response (*see* Response Ex. 4-12, 15-16). As is evident from the funding records, counsel never requested or obtained funding to travel to Mexico.

Respondent's characterization of this well-documented claim as based on "speculation and conclusory opinion" is also baseless. (Response at 328.) Respondent complains that Harbin has not specified in his declaration who were the witnesses that he could have called to testify at the penalty phase had they conducted a full investigation into Mr. Benavides's social history, what they would have stated, or that their failure to testify was attributable to the defense. (Response at 328, 330-31.) Respondent's assertions are completely without merit. Mr. Benavides has submitted the declarations of 33 social history witnesses including declarations from Mr. Benavides's father, brother, sister, aunts, cousins, nieces, daughter, girlfriend, neighbors, teacher, fellow farm workers, and long-time friends providing a rich, detailed and compelling life history. (Ex. 85-86, 90-104, 110-125.) As the witnesses have each stated in their declarations, they were all available and quite willing to testify on Mr. Benavides's behalf had counsel contacted them and arranged for their appearance in court. As Respondent must recognize from its use of a page and a half of its Response to list the names of 60 witnesses that Harbin provided the court as possible defense witness (Response at 324-25, listing 60 witness names at 1 Supp. CT 68-70), Harbin was aware of the names of many of these witnesses. In fact, Mr. Benavides has provided declarations of eight of the listed witnesses, most of whom counsel did not contact at all. (*See* Ex. 85 at ¶ 9 (declaration of Mr. Benavides's father, Alberto

Benavides, not contacted by defense); Ex. 90 at ¶ 29 (declaration of Elena Benavides Rodriguez, Mr. Benavides's aunt, not contacted by defense); Ex. 91 at ¶ 89 (declaration of Mr. Benavides's aunt, Josefina Benavides Rodriguez, not contacted by defense); Ex. 95 at ¶ 9 (declaration of Nélida Benavides Flores, Mr. Benavides's daughter, not contacted by defense); Ex. 96 at ¶ 14 (declaration of Juana Flores Rivera, Mr. Benavides's ex-girlfriend and mother of his daughter Nélida, not contacted by defense); Ex. 97 at ¶¶ 11-13 (declaration of Maria Elena Acevedo Benavides, Mr. Benavides's cousin, contacted only by telephone and falsely told that counsel would arrange for her travel to the United States).) As Harbin explains in his declaration, he obtained the names of 77 witnesses who could have testified at Mr. Benavides's penalty phase from contacting witnesses whose names Mr. Benavides provided. (Ex. 65 at ¶ 22.) The 33 social history declarations provided in support of the Corrected Amended Petition include declarations of witness whom counsel could have easily contacted and interviewed as many were fellow farm workers who lived in Delano. Counsel's failure to contact and interview them, and present their testimony was clearly a result of counsel's woefully inadequate investigation as opposed to any strategic decision as Respondent posits.

In an attempt to counter Harbin's admission that he had no strategic reason for failing to present the wealth of mitigation evidence submitted with the Corrected Amended Petition, Respondent speculates that there may have been reasons these witnesses would not have testified. Respondent argues that some witnesses might not have been aware of the nature of the charges Mr. Benavides was accused of, may have been too ill to travel to the United States, did not have a visa to enter the United States, had information that was too remote in time about Mr. Benavides, or did not have a strong relationship with Mr. Benavides at the time. (Response at

330-31.) There are several problems with Respondent's speculative arguments. First, they are speculative and as such fail to establish a genuine issue of fact. To the extent there is a genuine factual dispute, Respondent's argument only highlight the need for this Court to issue an order to show cause and order a hearing to resolve such disputes. *See Duvall*, 9 Cal. 4th at 475. Second, as Harbin has admitted he had no strategic reason for failing to present the evidence. (Ex. 65 at ¶ 24.) Mr. Benavides was constitutionally entitled to a "diligent and conscientious advocate" who makes a "rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." *In re Marquez*, 1 Cal. 4th at 602. Harbin's failures were not informed upon an adequate investigation and preparation. Third, Respondent's speculation that the witnesses may not have been able to testify is belied by the assertions under penalty of perjury in each of the witnesses' declarations that they would have been willing and able to do so. (*See, e.g.*, Ex. 121 at ¶ 62.) Counsel's failure to obtain permission from immigration officials to allow witnesses to travel from Mexico to testify illustrates the prejudice from counsel's failure to avail themselves of the assistance of the Mexican Consulate, which could have facilitated obtaining the proper immigration visas for the witnesses. (Ex. 145 at ¶ 18; *see also* Claim Twenty-Four.)

Respondent's assertions that some witnesses such as Mr. Benavides's daughter, Nélida, and Consuelo's former caretaker and good friend of Mr. Benavides, Ana Maria Cordero Cárdenas de Dávalos, were not aware of the nature of the charges and may have been unwilling to testify if they had known them is baseless speculation. (Response at 330.) Nélida is clearly aware that Mr. Benavides was charged with sexually abusing a child as is clear from statements in her declaration that neither she nor her sisters were ever mistreated in any way by Mr. Benavides. (Ex. 95 at ¶ 9.) Even if she

was unaware of the charges, her experience of Mr. Benavides being always loving, kind and protective towards her would have made her even more motivated to testify on his behalf, not less, if she had been told that he was accused of a crime completely inconsistent with her experience. Respondent's argument that Ms. Dávalos does not know the charges of which he was accused is belied by her statement that she does "not believe Vicente hurt or abused La Chiquita in anyway." (Ex. 94 at ¶ 27.)

Respondent's assertion that some witnesses may have been too ill to attend the trial is based on Respondent's poor mathematical skills. Respondent argues that Mr. Benavides's paternal aunt, Elena Benavides Rodriguez, who was born on August 14, 1925, (Ex. 90 at ¶ 3), "would have been 93 at the time of trial." (Response at 330.) Since the trial took place from March to June of 1993, she would have in fact been only 67 years old at the time. As she states in her declaration, she was available and ready to testify had counsel arranged for her to travel to the United States. (Ex. 90 at ¶ 29.) Respondent's speculation that Mr. Benavides's sister Enedina, who currently regularly travels from Mexico to visit Mr. Benavides, would have been unavailable to travel to testify because she suffers from depression and requires "a lot of" her daughter's time (Response at 330) is also baseless. As Enedina states in her declaration, she is quite saddened by her brother's fate, but she would have been happy to testify had she been asked to do so. (Ex. 121 at ¶ 62.)

Respondent's assertion that the information in the declarations is "too remote" because it allegedly does not include information about Mr. Benavides's time working in the United States is equally untrue. Mr. Benavides has submitted the declarations of numerous witnesses who have known him well while he worked in the United States. (*See, e.g.*, Ex. 86, 93, 94, 98, 102-104.) Further, the information in the declarations about Mr.

Benavides's childhood is not "too remote," but instead critical information about his upbringing that helped shape his life and was essential to understanding who he was. *See, e.g., Williams (Terry) v. Taylor*, 529 U.S. 362, 370 (2000) (referring to evidence of "early childhood" as significant evidence that should have been presented in mitigation.) Respondent's further speculation that witnesses such as Mr. Benavides's cousin Maria Elena Acevedo Benavides, daughter Nélida Benavides, or mother of his daughter Juana Flores could not have offered relevant mitigation information because they have strengthened their ties with Mr. Benavides since his incarceration is equally without merit. (Response at 331.) As is clear from their declarations each of these witnesses knew important information about Mr. Benavides and his family history, which could have provided significant mitigation information. (*See* Ex. 95-97.) As has been shown above, Respondent's arguments are nothing more than baseless speculation and in no way rebut the prima facie case of counsel's prejudicial failure to be a diligent and conscientious advocate. *People v. Ledesma*, 43 Cal. 3d at 215.

Respondent's speculation that counsel had a tactical reason for failing to call Mr. Benavides's mother, Maria Figueroa de Benavides, to testify is unfounded. After Harbin concluded his meager penalty phase presentation, while the jury was deliberating, he attempted to justify his patently deficient performance by putting a few things "on the record." (19 RT 3828-30.) He explained that he had not called Maria to testify because she had allegedly suffered "something of a mental breakdown" and was not able to answer questions clearly. (19 RT 3829.) As explained in numerous declarations before this Court, Harbin's statements to the court were false. Harbin admits that he did not contact any witnesses because he did not speak Spanish. (Ex. 65 at ¶ 22.) Further, to the extent he had any contact

with Maria it would have been through Almaraz. As Almaraz states, though Maria was very sad about her son's case, he was never told "that she was sick . . . or . . . that she was unable to testify." (Ex. 108 at ¶ 9.) In fact, counsel never mentioned her name as someone who would testify. (Ex. 108 at ¶ 9.) As described above, Maria tried to contact the attorneys numerous times during the over a year that she was in Delano and was always rebuffed. That Harbin did not even know who Maria was is obvious from his statement on the record on April 13, 1993, during the presentation of the character witness testimony, nine days before the penalty phase, where he was unable to recognize her name because "[h]alf the women that we have talked to are named Maria something and it's just——trying to keep them all straight as to who it is . . ." (16 RT 3287). Clearly, Harbin's failure to interview Maria and prepare her to testify accounts for his failure to call her to testify, not the fabricated reason he gave that she was unable to do so. Many witnesses who knew Maria at the time have provided declarations attesting that Maria[94] was capable, ready, and eager to testify on her son's behalf. (*See, e.g.*, Ex. 104 at ¶¶ 46-49; Ex. 98 at ¶ 32; Ex. 102 at ¶¶ 49, 59-61; Ex. 101 at ¶ 7; Ex. 111 at ¶¶ 45-46, 63; Ex. 103 at ¶ 34; Ex. 119 at ¶ 49; Ex. 118 at ¶¶ 38-39; Ex. at 125 at ¶ 27.) That Maria was quite capable of testifying is also evident from the fact that after Mr. Benavides was convicted she traveled to Los Angeles and contacted the Mexican consulate to ask for their assistance. (Ex. 145 at ¶ 7.)

Respondent speculates there may be a different reason that counsel may have failed to call Mr. Benavides's mother. Respondent argues that

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[94] Unfortunately, Mr. Benavides's mother died in 2003, prior to the discovery of Ms. Culhane's fraudulent work product. Until the end, she fought for Mr. Benavides and she died exhausted and broken by her son's plight and begging her granddaughter Pati to continue fighting for her son. (Ex. 111 at ¶ 65.)

she could have "impeached" Mr. Benavides's testimony that he does not remember whether or not he told his mother that he thought Consuelo may have been run over by a car. (Response at 329.) There are several flaws in Respondent's argument. Maria's testimony was not admissible to "impeach" Mr. Benavides with an inconsistent statement because Mr. Benavides did not make any inconsistent statements—he only testified that he genuinely could not recall whether or not he told his mother that Consuelo was run over by a car. *See People v. Johnson*, 3 Cal. 4th 1183, 1220 (1992), *superseded by statute on other grounds in Verdin v. Superior Court* 43 Cal. 4th 1096, 1106-07 (2008) ("Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event.") Mr. Benavides tried his best, given his cognitive and neuropsychological limitations, the poor interpretation, counsel's failure to prepare him, and the prosecutor's aggressive questioning to explain that he did not know what had happened and thus could only speculate that she may have been run over by a car. (15 RT 3059-61.) Had counsel consulted with a mental health expert, counsel could have provided evidence to the court and jury explaining that Mr. Benavides's assertions were very likely genuine in light of his marked memory impairments. (Ex. 126 at ¶ 62.) Further, even if Maria had testified that her son had told her, as he consistently told others, that he did not know what had happened, but that he thought Consuelo might have been run over by a car, such testimony would not have been "harmful" as Respondent argues, but instead corroborative of his innocence.

As stated above, the fact that Almaraz's contacts with witnesses were very superficial is supported by the fact that he produced no reports of his contacts. Respondent invents a reason for Almaraz's failures to produce any such reports, namely that Harbin asked him not to do so in order to

avoid disclosing the information in discovery. (Response at 332.) In support of its contention Respondent cites to a letter that Harbin sent to the prosecutor pursuant to the court's order that he disclose the testimony he intended to offer from prosecution witnesses. (Ex. 5 at 2608-09.)[95] Several things are telling about the deficiency of Harbin's investigation from the letter. First, he summarizes the evidence he allegedly obtained from "seventy someodd" witnesses as:

> known vincente (sic)[96] 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.

(Ex. 5 at 2608.) If he indeed had spoken to seventy witnesses, many of whose declarations have been submitted with the Corrected Amended Petition, he should have gathered far more information than these generalities about Mr. Benavides. Harbin characterizes his notes from these alleged interviews as "somewhere between meager and non-existent." (Ex. 5 at 2608.) Further, as is evident from Harbin's declaration and that of most of the witnesses' declarations, he hardly spoke to any witnesses and what little contact he had was superficial or through Almaraz. (Ex. 65 at ¶ 22.) Harbin's complete lack of preparation to call these witnesses to testify and the random nature in which they were selected by Almaraz to testify is further clear from the fact that Harbin only called two of the six witnesses he listed in the letter to testify as character witnesses, Lupe Benavides and "Armando Nabarrete (sic) Benavides"[97] and one at the penalty phase,

[95] Respondent misidentifies this as Ex. 6 at 2608. (Response at 332.)

[96] Harbin did not even know how to spell his client's name. Mr. Benavides first name is Vicente, not "vincente."

[97] Lupe Benavides is Guadalupe Benavides who testified at 16 RT 3278-84, and Armando Navarette Benavides testified at 17 RT 3373-79.

Delfino Trigo. Contrary to Respondent's speculation, the reason there are no notes from either Almaraz or Harbin's contact with the witnesses was not because of a strategic choice to avoid discovery, but because counsel either failed to contact them or did so in only the most cursory manner.

Next, Respondent lists fifteen mitigation themes that counsel failed to present and eleven pages of the Corrected Amended Petition describing the factual support for this mitigation, and argues that Mr. Benavides has failed to provide "documentation as proof that his background is what he claims it was." (Response at 333, citing RCCAP at 292-303.) The only example that Respondent lists of the alleged lack of proof is Respondent's argument that there is insufficient proof that Mr. Benavides suffered head trauma when he fell off wild horses he was attempting to tame, fell off bulls he rode in annual local festivities, and when he was in a car accident where he got injured. Again, Respondent fails to recognize that disputes about the factual allegations do not negate the prima facie case of counsel's deficiency in failing to present such evidence and only highlight the need for a hearing. *Duvall*, 9 Cal. 4th at 475. Respondent's arguments are also without merit as Mr. Benavides has provided lay declarations of these head injuries suffered by Mr. Benavides, (Ex. 93 at ¶¶ 10-11; Ex. 122 at ¶¶ 3-4, 7-13, 16; Ex. 97 at ¶ 7.) Respondent's argument that there is no evidence that the head injuries left him "mentally impaired" is inapposite. (Response at 334.) As explained by Dr. Puente, Mr. Benavides's head injuries are only one of several risk factors in Mr. Benavides's history that may explain his neuropsychological deficits. (Ex. 126 at ¶ 53.)

In sum, Respondent's argument that Mr. Benavides's claim of counsel's deficient performance for failure to present the vast amount of mitigation submitted in support of the Corrected Amended Petition is "not supported" is a baseless argument.

### c. Mr. Benavides Was Strongly Prejudiced by Counsel's Significantly Deficient Performance.

In arguing that Mr. Benavides was not prejudiced by counsel's failure to present this vast mitigation evidence, Respondent raises the same arguments she raised regarding lack of prejudice from failing to present evidence of Mr. Benavides's mental impairments. (*Compare* Response at 335-36, *with* 307-10, 312-20.) Respondent argues that evidence of Mr. Benavides's "brain damage and troubled childhood is 'double-edged'" because it would lead the jury to believe that he was a "danger to society." (Response at 335.) Respondent's argument is meritless. There is no evidence that Mr. Benavides's brain damage or childhood of abuse, poverty, and neglect, made him in any way violent, impulsive, or dangerous to society in any way. Mr. Benavides's lack of criminal history and the uniform account provided in the declarations of the 33 social history witnesses show that Mr. Benavides has always been non-violent and a caring and loving man, esteemed by many. Hence, the mitigation evidence in Mr. Benavides's case did not present a double-edged sword problem presented in other cases where there is a pattern of aggressive behavior or a criminal history. *See Wiggins*, 539 U.S. at 516, 535 (finding that Mr. Wiggins's mental health and social history, where there was an "absence of aggressive patterns in his behavior," contained little of the "double edge" that has justified not presenting it in other cases); *cf. Burger v. Kemp*, 483 U.S. 776, 789-96 (1987) (finding counsel was not ineffective in failing to present social history evidence where the evidence was not uniformly helpful and it tended to suggest violent tendencies at odds with the defense strategy). Moreover, a competent, adequately prepared expert with qualifications in family dynamics and child abuse could have synthesized lay witness accounts, record evidence, and other experts' analyses to

provide the jury with a compelling and sympathetic description of Mr. Benavides's life and behavior. (*See generally* Ex. 127.)

Respondent's further argument that the mitigation evidence would have conflicted with the guilt phase innocence defense is based on the mistaken premise that the mitigation evidence would have been proffered as evidence of why he committed the crime. (Response at 336.) The mitigation evidence would have presented a fuller picture of Mr. Benavides that would have engendered mercy with the jury and made them have lingering doubts about his guilt. Moreover, as stated in the law review article cited by Respondent, "experienced capital-defense attorneys invariably conclude that mitigating evidence must be presented, even if there is some chance that the jury may view it as double-edged." White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, 102 Mich. L. Rev. 2001, 2036 (2004); *see also Stankewitz*, 698 F.3d at 1175 (referring to lack of "double-edged sword problem" in *Wiggins* and indicating that evidence of Mr. Stankewitz's troubled childhood should have been presented despite the fact that it could have revealed his violent or antisocial behavior.) Counsel's failure to present the substantial mitigation evidence cannot be explained by any tactical reason that Respondent has invented.

In assessing prejudice this Court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. No evidence was introduced in aggravation beyond victim impact evidence. The prosecutor stipulated that Mr. Benavides had no prior criminal history. (19 RT 3765.) Even given counsel's paltry mitigating evidence presentation, the jury still considered sparing Mr. Benavides the death penalty as evidenced by their note about LWOP. (3 CT 782.) *See Stankewitz*, 365 F.3d at 624 (considering juror's note about LWOP as

evidence that death sentence was not a foregone conclusion). In light of the lack of aggravating evidence, substantial doubts about Mr. Benavides's guilt, and powerful, uniform, compelling evidence of mitigation, it is reasonable probable that at least one juror would have voted to spare his life had they heard the mitigation presented with the Corrected Amended Petition.

A "penalty phase ineffective assistance claim depends on the magnitude of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented." *Stankewitz v. Woodford*, 365 F.3d at 716. Here, there is vast difference between what counsel could have presented and the fourteen pages of cursory testimony that counsel did present at the penalty phase. The discrepancy is analogous or more egregious to that found in *Wiggins v. Smith*, where the Supreme Court found that counsel had provided constitutionally deficient performance. Like here, in *Wiggins* counsel failed to introduce any evidence of Wiggins' life history. *Wiggins*, 539 U.S. at 515. Similar to Mr. Benavides's case, evidence presented in post-conviction showed that Wiggins suffered severe privation and abuse by his alcoholic father. *Id.* at 535. He also had diminished mental capacities akin to Mr. Benavides's. *Id.* The Supreme Court explained that this is the type of "troubled history" that is "relevant to assessing a defendant's moral culpability." *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)). As stated above, the lack of aggressive behavior in both Wiggins's and Mr. Benavides's history made the compelling mitigation powerful evidence that did not pose a danger of undermining the innocence claim. *Id.* Like Mr. Wiggins, Mr. Benavides was prejudiced by his counsel's of constitutionally defective assistance. *Id.* at 538.

### 17. Failure to Preserve Mr. Benavides's Rights to Consular Assistance and Avail Themselves of the Mexican Consulate's Assistance.

Respondent's arguments denying that counsel deficiently and prejudicially failed to preserve Mr. Benavides's rights under the Vienna Convention on Consular Relations and the Bilateral Convention between the United States and Mexico and avail themselves of the assistance of the Mexican Consulate are addressed in Claim Twenty-Four.

### 18. Failure to Object to Irrelevant, Unreliable, and Prejudicial Evidence.

Trial counsel unreasonably failed to object to irrelevant, unreliable, and unduly prejudicial evidence presented by the prosecutor at trial. The individual and cumulative effect of counsel's failure to object to this evidence was that the jury was unduly influenced by irrelevant, false, misleading, and unduly prejudicial evidence. Respondent fails to specifically respond to most of this claim, other than arguing that Mr. Benavides has not shown the evidence is irrelevant, unreliable, and prejudicial. (Response at 336-39.) As shown below this response lacks merit.

#### a. Evidence That Estella Medina Was a Mandatory Reporter of Child Abuse and Had Child Abuse Training.[98]

The prosecution called to testify the director of education at DRMC, Ruth Ann Taylor, for the sole purpose of establishing that Estella Medina had training in child abuse and was a mandatory reporting party. (13 RT

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[98] Subclaims a, b, and d, refer to facts and allegations contained in Claim 6. To avoid unnecessary duplication of facts, Mr. Benavides incorporates the facts and allegations contained in Claim 6, its reply, and supporting exhibits as if fully set forth herein.

2670-80.) Through Taylor's authenticating testimony the prosecutor admitted People's Exhibit 47, a computer print-out of Estella's attendance to various classes, People's Exhibit 48, a syllabus for the child abuse class taken by Estella, People's Exhibit 49 and 50, an attendance record to a class entitled "Crisis Intervention: Families Under Stress" and its syllabus, and People's Exhibit 51 and 52, an attendance record to a class entitled "A Child Dies" and its syllabus. (13 RT 2670-74.) The prosecutor then in closing argued that Estella lied that she was not a mandatory reporting party for child abuse and had not taken child abuse classes. (18 RT 3596.) He further argued that Mr. Benavides "could not have found a better situation for his perversion" because Estella would lie to cover up for him. (18 RT 3596.)

Defense counsel unreasonably failed to object to admission of this irrelevant and unduly prejudicial evidence regarding whether or not Estella was trained to detect child abuse. Taylor's testimony was arguably admitted as a prior inconsistent statement to impeach Estella, who stated that she did not remember signing a form mandating that she report abuse, but she was aware that she was supposed to report it. (13 RT 2556, 2595.) However, because there was no evidence that her failure to remember signing the form was not genuine, the fact that she had signed the form was not appropriate impeachment evidence. *See Johnson*, 3 Cal. 4th at 1220 (explaining that a witness's genuine statement that she does not remember an event is not inconsistent with that witnesses' prior statement describing the event and such instances a witnesses' prior statement cannot be introduced as an exception to the hearsay bar.) Moreover, to the extent it was proper impeachment testimony of Estella it was irrelevant to whether Mr. Benavides was guilty of the charged crimes. The prosecutor's extended line of inferences—that Estella was trained in child abuse, saw that

Consuelo was being abused by Mr. Benavides, and failed to report it because she was willing to lie for him, as she lied about her status regarding being a mandatory reporter—is highly speculative and far from probative of Mr. Benavides's guilt. Counsel unreasonably failed to object to the prosecution's cross-examination of Estella on this irrelevant and misleading information and Taylor's tangential impeachment testimony.

**b. Estella's Demeanor**

The prosecutor elicited irrelevant testimony regarding Estella's demeanor at the hospital. For example, Dr. Bloch testified that on November 18, 1991, when he saw Estella in the morning after he had performed surgery on the child, she exhibited a "flat affect and bizarre lack of concern." (12 RT 2464.) Evidence of Estella's affect was irrelevant to Mr. Benavides's guilt of the charged crimes. The prosecutor's string of inferences—that Estella's alleged lack of concern for her daughter somehow indicated that she had allowed Mr. Benavides to abuse her—was not only false, but also irrelevant and unduly prejudicial. The prejudicial effect of this evidence was far outweighed by the probative value, even if one assumes there was is any relevance from the evidence. Counsel's failure to raise this objection was unreasonable. Moreover, counsel should have presented rebuttal evidence from KMC nursing notes of the morning of November 18, 1991, indicating that Estella was in fact very sad about her child. The nurse's notes indicate that Estella was "crying, touching and talking to the baby" in the intensive care unit. (Ex. 2 at 154; People's Exhibit 85.) Counsel's failure to object to this testimony and rebut it with documentary evidence was unreasonable.

### c. Mr. Benavides's Demeanor at the Hospital

The prosecutor elicited testimony regarding Mr. Benavides's demeanor at the hospital that was also unreliable, irrelevant and unduly prejudicial. Dr. Bloch testified that Mr. Benavides exhibited "little concern." (12 RT 2464.) He offered this testimony after he had indicated that he had no memory of Mr. Benavides. (12 RT 2463.) The prosecutor tried to rehabilitate his personal knowledge by showing him a picture of Mr. Benavides, which Dr. Bloch stated he recognized. (12 RT 2464.) Counsel unreasonably failed to object to the prosecutor's suggestive identification and should have objected generally to any testimony he offered regarding Mr. Benvides's demeanor.

### d. Joe Avila

Mr. Benavides concedes that counsel, in fact, did properly preserve the objection to evidence that Estella associated with a sex offender, Joe Avila, as irrelevant and unduly prejudicial. (13 RT 2568-76.) This Court held on appeal, that the court abused its discretion in overruling counsel's objection because the evidence was of limited probative value. This Court held, however, that the error was harmless in light of other evidence against Mr. Benavides. *People v. Benavides*, 35 Cal. 4th 69, 90-91 (2005). As explained more fully in Claim Five, the error was not harmless and was part of a slew of irrelevant and prejudicial evidence that was introduced against Mr. Benavides.

### e. Admission of Highly Prejudicial Photographs

Although counsel did properly object to the introduction of certain photos of Consuelo, counsel failed to object to all photographs of Consuelo while she was hospitalized and during autopsy, and counsel failed to fully explain why they were unduly prejudicial and present evidence to the jury

explaining that the swelling and redness in the photographs are a result of Consuelo's medical condition rather than trauma. Counsel properly objected to the admission of People's Exhibit 35, a photograph of Consuelo at UCLA on November 21, 1991, (12 RT 2498), and Defense Exhibit's Nos. Z and AA, close up photographs of Consuelo's anus and vagina taken at UCLA (17 RT 3381-82.) *See People v. Benavides*, 35 Cal. 4th at 95. Counsel also arguably preserved an objection to People's Exhibit 61, a Polaroid photograph of Consuelo when she was at KMC on November 18, 1991. (15 RT 2971.)[99] However, in making these objections counsel only argued that the photographs were inflammatory, without explaining that they in fact do not depict the child's state at the time she was admitted at DRMC and hence are not indicative of how Mr. Benavides allegedly injured Consuelo. Counsel failed to explain to the court, in objecting to the photos, and to the jury, when the photos were admitted, that the edema (swelling) and erythema (redness) they observed in the photos was the result of Consuelo's coagulopathy (blood clotting disorder) at the time the photos were taken. For example, Exhibit 61, taken at KMC on November 18, 1991, shows Consuelo the day after Dr. Alonso saw her. As Dr. Alonso explains in his declaration, the redness and swelling he observed on November 17, 1991, was the result of coagulopathy, rather than injury caused by Mr. Benavides. (Ex. 144 at ¶ 9.) By the time Dr. Diamond saw

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[99] This Court did not address whether this photograph was properly admitted in its decision on appeal. The factual support provided for the Corrected Amended Petition establishes that this photograph as the others referred to above was either (a) improperly admitted because it did not depict Consuelo's condition at the time she was admitted to DRMC or, (b) if it was properly admitted, counsel unreasonably failed to introduce testimony from medical experts to explain that the swelling and redness depicted in the photo was a result of Consuelo's medical condition rather than trauma. (Ex. 170 at ¶¶ 15, 18; Ex. 149 at ¶ 5.)

Consuelo, an hour after the photo in Exhibit 61 was taken, Consuelo was in a full state of DIC, completely swollen and bleeding from every orifice. (Ex. 143 at ¶ 9.) Likewise, the UCLA photos depict Consuelo even more swollen as a result of her progressively worsening condition and DIC. (*See, e.g.*, People's Exhibit 35; (Ex. 83 at ¶ 38.) Although counsel did elicit testimony from Dr. Harrison stating that her condition at UCLA was "total body edema" and that she looked "real puffy" because of fluids leaking out of her bloodstream (12 RT 2371-72), she failed to move to exclude the photos on the basis of this testimony. Dr. Harrison's explanation for the edema refutes any indication that it was caused by Mr. Benavides and admission of the photos only served to inflame the jury's passions. Counsel also unreasonably failed to object to the photographs as violating the due process clause of the Fourteenth Amendment and the need for heightened reliability in a capital case as required by the Eighth Amendment of the federal constitution. *People v. Benavides*, 35 Cal. 4th at 96 (indicating counsel did not raise constitutional objections to the photographs).

Counsel also failed to object to the admission of the UCLA photos on the basis of an improper showing regarding authentication and chain of custody. Dr. Harrison testified that he ordered photos be taken of the child. (12 RT 2353.) Detective Bresson testified that he did not take the photos and was not present when they were taken. (12 RT 2400-01.) Bresson further explained that a staff photographer at UCLA, Dr. Robert Morris, took the photos and provided him with the negatives to develop the pictures. (12 RT 2485-86.) Dr. Morris did not testify. Bresson's testimony was insufficient to authenticate the photographs as he did not take them nor see them being taken.

On appeal this Court held that the trial court did not abuse its discretion in admitting the photographs of Consuelo's genitalia taken at

UCLA as People's Exhibit 35 and Defendant's Exhibit Z and AA. This Court held that the "jury was entitled to see for itself the condition of Consuelo's body in order to determine whether that evidence did or did not support the prosecution's theory that Consuelo was sexually abused." *People v. Benavides*, 35 Cal. 4th at 96. This Court further explained that the photographs helped to "clarify the testimony" of the pediatrician, Dr. Diamond, and the forensic pathologist, Dr. Dibdin. *Id.* As has been shown in the Corrected Amended Petition and as Respondent has partly conceded, parts of Dr. Diamond's testimony and most of Dr. Dibdin's testimony falsely attributed aspects of Consuelo's medical condition, such as the redness, swelling, and anal dilation and laxity, seen in the pictures, to trauma. (Response Ex. 1 at ¶ 19 (Dr. Diamond's concession that anal laxity and dilation cannot be attributed to trauma due to relaxing effects of paralytic agents); Ex. 79 at ¶ 21 (Dr. Shaw's declaration explaining that anal laxity is a normal post-mortem condition); Ex. 144 at ¶¶ 9-11 (Dr. Alonso's concession that he misattributed anal redness, swelling, and laxity he saw to trauma).) The jurors were never informed that when the photographs were taken Consuelo was in a critical state of disseminated intravascular coagulation (DIC), where her blood was not clotting and there was widespread bleeding out of the blood vessels, which accounted for the bleeding seen in the photographs from all her orifices. (*See, e.g.*, People's Exhibit 61 (photograph at KMC taken one hour before Dr. Diamond's exam on November 18, 1991, showing Consuelo bleeding from all orifices).) The jurors were also not informed that the extensive swelling that is visible in the photographs was also a result of Consuelo's critical state where she was receiving substantial amount of fluids intravenously, but producing no urine output. (Ex. 83 at ¶ 25.) Likewise, when this Court decided the appeal, this Court was not aware of the factual support provided for the

Corrected Amended Petition explaining that the photographs depict conditions resulting from her medical condition rather than trauma. Consequently, this Court should revisit the finding that the photographs were properly admitted in light of this evidence. In the alternative, this Court should find that counsel was unreasonable in failing to elicit the medical testimony to explain to the jury the conditions they saw in the photographs were not the result of trauma.

Respondent mistakenly argues that no autopsy photographs were admitted. People's Exhibit 4 is an autopsy photo of the lax sphincter with Dibdin spreading open the anus and holding a ruler measurement; People's Exhibit 5 is an autopsy photo of the vaginal area with a ruler measurement and Dibdin spreading open the labia; People's Exhibit 7 is an autopsy photo of the back and anal area being dissected and bleeding; People's Exhibit 8 is photo of her back slit open with Dibdin's fingers pressing on bruises on her back; People's Exhibit 9 is the same photo of the dissected back without Dibdin's fingers; and, People's Exhibit 42 is a photo of Consuelo's backside while lying on her side on the autopsy table.

Counsel raised only general objections to the autopsy photographs arguing that they were inflammatory without explaining why they were misleading and unduly prejudicial. When the prosecutor sought to move into evidence People's Exhibit 4, 5, 7, 8, 9, and 42, the Court asked Huffman if she had any objection besides that "previously noted." (11 RT 2174 regarding People's Ex. 4, 5, 7, 8, 9; 14 RT 2796 regarding Ex. 42). Huffman stated that she did not have any other objection. (11 RT 2174, 2796.) Presumably the "previously noted" objections referred to those raised in a March 15, 1993, pre-trial hearing. (1 RT 1-29.) At that time, Huffman objected to all the autopsy photos arguing that the color in the photos submitted by the prosecutor was redder than the natural coloring in

the set she had. (1 RT 8.) The Court did not directly rule on this general objection, but essentially overruled it in admitting the photographs. Huffman also argued that the photos depicted things that could be shown through other less inflammatory means, such as charts or diagrams. (1 RT 10.) The Court denied this objection stating that "a picture is worth a thousand words." *Id.* Counsel then objected to the two autopsy photos of the back with the skin peeled open as duplicative, even though one of them has Dibdin's fingers pressing on the bruises. (1 RT 11-13.)[100] The court denied this objection, stating that they were not duplicative. (1 RT 13.)

Huffman raised no objection to the autopsy photographs of the anal and vaginal area, stating "there is not much I can do about these two." (1 RT 27.)[101] She only requested that the photos be replaced with ones that were not as red, as she had stated earlier. (1 RT 28.) The Court replied that they could not know what the accurate coloration should be until the witness testified to it. *Id.* Counsel unreasonably failed to renew her objection when the witness testified.

Huffman then objected to the photo of the dissected back and anal area (People's Exhibit 7), stating that she could not figure out what portion of the body it depicted. (1 RT 28-30.) Her objection was unreasonable since it was based on her ignorance and failure to consult with experts, even though the hearing took place on the eve of trial. Huffman asked that admission of the photo be reserved until an expert witness testified about it. (1 RT 29-30.) The Court agreed. (1 RT 29.) Huffman, however, failed to raise any objection when Dr. Dibdin testified that it depicted a dissection of

[100] These photos were later admitted as People's Exhibit 8 and 9. 1 RT 11-13 refers to them as People's Exhibit 1 and 4, which were the numbers given when the exhibits were marked for identification.

[101] 1 RT 27 refers to People's Exhibit 5 and 6. These same photos were later admitted on April 1, 1993 as Exhibits 4 and 5.

the anus and back area. (11 RT 2121-22.) Dr. Dibdin testified that the photo showed a lot of hemorrhage around the anus and a large collection of blood on the "left side." (11 RT 2122.) Counsel prejudicially failed to inform the Court, in objecting to the photos, and the jury, once they were admitted, that the hemorrhage seen in the UCLA and autopsy photos is common among severely ill hospitalized children whom, like Consuelo, are suffering from severe DIC. (Ex. 82 at ¶ 16.)

Trial counsel's failure to object to the admission of these photos was very prejudicial. During guilt phase deliberations, the jury requested to see all pictures of the baby's body. (18 RT 3668, 3 CT 743.) The court sent in People's Exhibits 4, 5, 7, 8, 9, 42, 61, and Defendant's Exhibit Z and AA (close-up photos of anus and vagina taken at UCLA). (18 RT 3669.) The jury found Mr. Benavides guilty of the crimes the day after they requested these photos. Due to counsel's failure to object to the photographs and to elicit testimony explaining how her medical deterioration accounts for the condition depicted in the photos, the jury lacked the information to properly understand them.

For example, People's Exhibit 4 was admitted during Dr. Dibdin's testimony regarding the lax sphincter tone at autopsy. (11 RT 2120.) Dibdin testified that the anus was dilated to one inch, which is seven to eight times larger than it should be. (11 RT 2119.) Counsel failed to explain to the court, in objecting to the photos, and to the jury, when the photos were admitted, that a lax anal tone is a common post-mortem condition, which has no bearing on a sex abuse charge. (Ex. 79 at ¶ 21.) In addition, counsel failed to move to exclude the photograph on the basis that Consuelo's anal sphincter was not lax when she was admitted at DRMC. Consequently, Dr. Dibdin's explanation that penile penetration caused a tear through the muscle of the anus that led to the laxity is completely false. (11

RT 2119, 2168.) Counsel should have objected to admission of People's Exhibit 4 on this basis, and if the photograph was admitted, counsel should have elicited testimony to impeach Dr. Dibdin.

Similarly, People's Exhibit 5, a picture of the swollen vaginal rim at autopsy was misleading in that it showed swelling present at autopsy as a result of her medical deterioration after eight days of hospitalization, which was not present at DRMC. (Ex. 74 at ¶ 13.) Counsel's failure to object to admission of Exhibit 5 on this basis was unreasonable and prejudicial.

To the extent trial counsel did not properly preserve an objection to these photos, counsel rendered ineffective assistance. To the extent appellate counsel failed to raise on appeal the court's error in admitting the photos for which there was a properly preserved objection, appellate counsel rendered ineffective assistance.

#### f. Fruits From Illegal Searches of Brandywine Apartment

Counsel unreasonably failed to move to exclude the fruits of several illegal searches of Estella Medina's Brandywine apartment. The first illegal search occurred in the early morning hours of November 18, 1991, when Delano Police Detective Nacua and Officer Kanter secured entry into the apartment without Estella's consent through the apartment manager. (Ex. 4 at 2333; 14 RT 2761.) The alleged purpose of the illegal entry was to search for Cristina. (Ex. 4 at 2333.) However, after verifying that Cristina was not present at the apartment, Detective Nacua states he "secured" the apartment while the manager was not present. (*Id.* at 2325, 2333.) Nacua arrived at the apartment shortly after 1:30 a.m., after being briefed by Officer Massey. He did not meet with Detective Valdez at KMC until several hours later, at 4:30 a.m. (*Id.*)

The Detectives questioned Estella at DRMC on November 18, 1991, at approximately 5:00 a.m. Having already searched her apartment Detectives Nacua and Valdez apparently asked Estella to consent to a search as if the search had not already occurred. She allegedly consented to search her apartment orally during the interview, however, she signed no written waiver at this time, and the permission to search was not mentioned in the police report until November 19, 1991. (Ex. 4 at 2335.) Delano Detectives Nacua and Valdez conducted a second search of Estella's apartment that day, from 12:50 p.m. to 1:35 p.m. (Ex. 4 at 2325, 2338).) During the search, they checked "for any evidence," conducted searches of the trash bins, examined a towel that contained apparent blood, examined soiled pampers and tissues located in the apartment, and noted other items that were on the kitchen counter. (*Id.*) They also took three photos of the apartment. (*Id.*) No itemization of items taken or examined during this search was provided to defense counsel prior to trial. Again, the manager of the apartment provided a key, but did not enter the apartment and was not present during the search. (Ex. 4 at 2325.) Later the same day, at approximately 4:00 p.m., Estella signed a consent-to-search form. This form was back-dated by the officers to appear as if it had been signed at 8:00 a.m., prior to this second search. (Ex. 4 at 2154.)

Law enforcement conducted a third illegal search of Estella's apartment on November 20, 1991, at 4:10 p.m. (Ex. 4 at 1931, 2325.) They obtained permission to search the apartment from Delia Salinas, Estella's sister, who had never lived in the apartment and supposedly signed on Estella's behalf. (Ex. 4 at 1947.)

Counsel unreasonably failed to move to exclude the fruits of the illegal searches, or to object to tainted evidence that resulted from the

searches.[102] During the third search, criminalist Spencer took photographs of the apartment and collected various items including a towel, soiled kitchen paper towels and tissues, and evidence of small streaks of blood spatter on the apartment walls. (Ex. 4 at 1931-33.) Spencer's testimony regarding the items she collected was very damaging.

Spencer testified that she found a couple of drops of blood on the master bedroom wall and on the door jambs. (11 RT 2304.) Her testing of the blood was inconclusive, either because her tests were not sensitive enough or the blood was old. (11 RT 2305, 2311.) This evidence was important to the jury as evidenced by their request for "pictures of blood stains on the wall" in a jury note to the court during their deliberations. (3 CT 745.)

Spencer also testified there was no evidence that the child had been found outside as Mr. Benavides had indicated. (11 RT 2288 (stating that there was no blood in the doorway).) She further stated that the vomit on the paper towels had carpet fibers indicating the vomit had contact with the carpet. (11 RT 2291.) The prosecutor used this evidence to cross-examine Mr. Benavides regarding where he found the vomit. (15 RT 3034.)

Spencer testified that she seized a towel from the master bedroom that had two stains. One stain contained a "weak mixture" of blood and semen. (11 RT 2297.) The semen in the mixture could have been from Mr. Benavides and the blood was either from Estella or Mr. Benavides. (11 RT 2315-16.) The semen could be four to five days old. (11 RT 2316.) The other blood stain on the towel was "pretty much by itself" and was a

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[102] Material obtained in 2002 from the district attorney's office indicates that they knew there were infirmities in the consents obtained to enter the apartment. (Ex. 6 at 2928 (Handwritten Notes of DA Investigator Ray Lopez asking who gave consent for the first search and questioning whether Delia's signature is valid consent).)

"different looking" stain. (11 RT 2313.) The blood from that stain came from Consuelo. (*Id.*; 11 RT 2298.) The defense tried to show that the mixed blood on the towel was from Estella's period, and the semen was from Mr. Benavides and Estella's sexual activity on November 16, 1991. (13 RT 2609.) The prosecution, however, tried to show that Estella did not have her period (13 RT 2643-44), and used the mixture of blood and semen to implicate Mr. Benavides.

The evidence Spencer collected in the November 20, 1991, illegal search was clearly very damaging to Mr. Benavides. Counsel's unreasonable failure to move to exclude the evidence prejudiced Mr. Benavides as shown above. Had counsel moved to exclude evidence collected from the apartment as the fruit of an illegal search the jury would not have been misled by this irrelevant evidence.

Counsel also unreasonably failed to review the crime lab photographs of the apartment with Mr. Benavides prior to him testifying. Counsel unreasonably relied on Defense Exhibit M, which did not accurately depict the bedroom as it was when Mr. Benavides last saw it. (15 RT 2991.) Exhibit M shows the bedcover removed and the room in disarray. (*Id.*) The bedroom was accurately portrayed in People's Exhibit 26. (11 RT 2292, 2301 (Spencer testifying that the photos accurately depict the scene).) Had counsel reviewed the photographs with Mr. Benavides prior to testifying and introduced the accurate picture, Exhibit 26, she could have used it to corroborate Mr. Benavides's account. Exhibit 26 shows Mr. Benavides's slippers by the edge of the bed, right by the fan, where he described that he had held the child. (15 RT 3016.) By contrast, Exhibit M, does not show the fan or his slippers. The presence of the slippers in Exhibit 26 corroborates Mr. Benavides's first interview with Detective Valdez at KMC where he explained that he had changed from his slippers

to cowboy boots before leaving the apartment. (Ex. 4 at 1933.) Considering that minute inconsistencies in Mr. Benavides's story were used to incriminate him, counsel was unreasonable in failing to present this readily available evidence corroborating Mr. Benavides's account.

**g. Prosecution Badgering Mr. Benavides**

Throughout Mr. Benavides's testimony, the prosecutor took advantage of his confusion stemming from his cognitive impairments, mental health problems, and poor interpretation, to badger him on the stand. (*See, e.g.*, 15 RT 3031-32, 3035, 3038, 3057-58.) Counsel unreasonably and prejudicially failed to object to this line of questioning. Respondent argues that counsel tactically chose not to object to this badgering in order to not draw attention to inconsistencies in Mr. Benavides's testimony. (Response at 339.) Respondent's argument lacks merit as a review of the testimony clearly shows that the prosecutor was already highlighting Mr. Benavides's inability to answer the questions through repetitive and badgering questioning. An objection to protect Mr. Benavides would not further highlight it. Further, counsel's failure to investigate Mr. Benavides's mental health, prevented counsel from learning how Mr. Benavides's deficits hampered his ability to testify accurately and reliably. *See supra* Claim 13(12). Accordingly, any alleged tactical decisions regarding Mr. Benavides's testimony were not informed by an adequate investigation into Mr. Benavides's mental impairments and are thus unreasonable.

**h. Facts Not in Evidence**

Counsel repeatedly and unreasonably failed to object to the prosecution's questions assuming facts not in evidence. Throughout Mr. Benavides's testimony, the prosecutor followed a pattern of fabricating

inconsistencies to portray him as a liar. For example, at one point the prosecutor asked Mr. Benavides the following:

> Q. In fact, only after talking to Mrs. Huffman have you told other people that this child was somehow hit by a car. Isn't that correct?
>
> A. I haven't told anybody anything.
>
> Q. Didn't you tell your own mother that the child was hit by a car?
>
> A. I don't remember telling my mother. I only told her what had happened.
>
> Q. Didn't you tell your mother someone must have run Consuelo over with a car and left her at the doorstep?
>
> A. That's supposing that. But it's nothing that I surely saw.
>
> Q. The question is: Did you tell your mother that? Yes or no.
>
> A. I don't remember.

(15 RT 3057-58.) The prosecutor asked the same question again three transcript pages later. (15 RT 3061.) The only evidence of what Mr. Benavides told his mother is Detective Valdez's interview of her where he asks whether Mr. Benavides told her "that maybe a car ran over her." (Ex. 4 at 2136.) Ms. Figueroa answered that he had said that. (*Id.* at 2136-37.) The prosecutor's distortion of this statement to imply that Mr. Benavides had affirmatively stated a car accident caused the injuries, as opposed to speculating about this cause, was improper. Counsel's failure to object was prejudicial.

Counsel also failed to object to the prosecutor exceeding the scope of cross-examination when he asked Nurse Lori Garland whether she had seen swelling of the genitalia and blood oozing from the vagina and anus. (16 RT 3240, 3242.) On direct, trial counsel had only asked Garland about her interaction with Estella and Consuelo's aunt. Hence, the prosecutor's questions regarding the genitalia and anus were outside the scope of cross-examination. Counsel's failure to object to this evidence was prejudicial.

#### i. Victim Impact Evidence[103]

The prosecution presented three witnesses who provided victim-impact testimony at the penalty phase of the trial. Diana Alejandro, Consuelo's aunt, identified a photograph of Consuelo shortly before she died. Diana also testified that her oldest sister, Delia, recently had a nervous breakdown, and her daughter had nightmares. (19 RT 3741.) Darlene Salinas, Consuelo's cousin, read a statement regarding how Consuelo's death impacted her family. (19 RT 3744.) The statement contained a Bible passage that Cristina allegedly quoted. (*Id.*) Following her testimony, Virginia Salinas, another cousin, testified regarding how Consuelo's death had affected Cristina. (19 RT 3745-47.)

When their testimony concluded, Harbin moved for a sidebar and objected to Darlene's testimony as being improper because it referenced future events. (19 RT 3748.) He complained that he was not given notice of the statement Darlene read. Harbin also objected to double hearsay in Virginia Salinas's testimony. (*Id.*) Harbin explained that he did not raise an objection during their testimony because he thought doing so would "have been suicide on behalf of the defense." (19 RT 3747.) Although the court

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[103] To avoid unnecessary duplication of facts, Mr. Benavides incorporates the facts and allegations contained in Claim Seventeen, its reply, and supporting exhibits as if fully set forth herein.

agreed with Harbin "one hundred percent" that he should not have objected earlier, the court overruled the objection as "untimely." (19 RT 3750.) Then, the court stated that even if the objections were timely made, he would have overruled them "with the exception of a question with regard to discovery." (*Id.*) The court, in effect, did not rule on the objection to the discovery violation.

On appeal this Court found that counsel's untimely objection failed to preserve the objection to the victim impact evidence, but that counsel's failures did not prejudice Mr. Benavides. *People v. Benavides*, 35 Cal. 4th at 106. With regard to Harbin's objections to the prosecution's delayed notice in providing the names of the witnesses who would testify in the penalty phase, this Court held that Mr. Benavides could not demonstrate prejudice because counsel had failed to seek a continuance or cross-examine any penalty phase witness. *Id.* at 107. Counsel was ineffective in failing to do so and there was no reasonable strategic basis for his failure. Harbin's failure to seek a continuance and to use the time to contact and interview the prosecution penalty phase witnesses was part of Harbin's general failure to conduct an adequate penalty phase investigation. Had counsel done so, counsel would have learned about the testimony they would offer and would have been prepared to cross-examine them.

Counsel was also ineffective in failing to object to Darlene's hearsay statement about Cristina's alleged quotation of the Bible. Though this Court ruled on appeal that Darlene's reading of her own statements was not hearsay because it was not "'a statement that was made other than by a witness while testifying at the hearing,'" *People v. Benavides*, 35 Cal. 4th at 107 (citing Evid.Code, § 1200, subd. (a)), this Court did not rule on the admissibility of Darlene's statement about what Cristina allegedly said. That portion of Darlene's statement was hearsay and counsel unreasonably

failed to move to strike that portion of the statement. Counsel also should have objected to this passage because it invoked religion and religious condemnation that improperly urged the jury to sentence Mr. Benavides to death based on religious authority.

Counsel also unreasonably failed to object to the witnesses testifying about the impact of the crime on people other than themselves. Diana Alejandro testified that her sister Delia had had a nervous breakdown and that her daughters experienced nightmares. (19 RT 3741.) Darlene testified that Consuelo's "cousins and her little nieces will never forget all of the times that she'd been there" and read a Bible passage that Cristina had allegedly quoted. (19 RT 3744.) On appeal this Court held that it was permissible under state and federal law for victims to testify about the direct impact of the defendant's acts on the victim's friends and family, including extended family. *People v. Benavides*, 35 Cal. 4th at 107. However, all the cases this Court cites for this proposition refer to testimony of victims testifying about the crimes' impact on *themselves*. *See id.* (citing *People v. Brown*, 33 Cal. 4th 382, 397-98 (2004) (finding admissible surviving family member's testimony about the immediate effects and lasting impact of the murder on themselves); *People v. Pollock*, 32 Cal. 4th 1153, 1182 (2004) (finding victim's testimony admissible because it was "limited to how the crimes had directly affected them"); and *People v. Brown*, 31 Cal.4th 518, 573 (2003) (finding admissible testimony from the victim's mother and mother-in-law about how the crime impacted them)). Here, the victim's testimony was about other family members, not present in court, who counsel could thus not examine to verify the accuracy of the victim's testimony. Counsel unreasonably failed to object to such testimony. The testimony about the impact on other family members was not brief and as such was prejudicial. *Cf. People v. Panah*, 35 Cal. 4th 395,

495 (2005) (finding that victim's "brief" testimony about the impact of the murder on other family member was not prejudicial.)

### j. Hearsay Evidence

Counsel unreasonably failed to object to a number of times that experts and lay witnesses testified to inadmissible and unreliable hearsay evidence. For example, Dr. Diamond testified that during the surgery at KMC Dr. Bloch had found fibrous adhesions, or scar tissue, bounding down the liver, which were indicative of trauma. (10 RT 2047-48.) This hearsay evidence was unreliable. Not having seen the adhesions and lacking the specific training of a surgeon, Dr. Diamond was not qualified to give this opinion. Counsel's failure to object prejudiced Mr. Benavides. As Dr. Bloch explains, the adhesion he observed can either be due to bowel inflammation or to trauma. (Ex. 77 at ¶ 6.) The surgeon at UCLA, Dr. Shaw explains that in the absence of a definitive pathology such adhesions could be congenital. (Ex. 79 at ¶ 6.) Had counsel objected to Diamond's unreliable testimony and instead elicited the possible causes of the old pancreatic injury from Dr. Bloch and Dr. Shaw, the jury would not have been misled to believing that only prior trauma could cause the old pancreatic adhesions seen during surgery. Based on this misleading and unreliable testimony, the prosecutor was able to argue that the adhesion were evidence that Mr. Benavides had previously beat Consuelo. (18 RT 3652.) The prosecutor's argument was also improper given that there was no evidence Mr. Benavides had previously hurt Consuelo in any way and that it relied on Mr. Benavides's alleged predisposition to bad acts as proof of his guilt of the charged counts.

Likewise, counsel unreasonably failed to object to triple hearsay evidence elicited from Eve Beerman, a social worker at UCLA. Beerman

testified, reading her notes regarding what Estella told her that Mr. Benavides told her regarding the night Consuelo was injured. (14 RT 2765-66.) The testimony was admitted for the truth of the matter asserted. The matter asserted was what Mr. Benavides allegedly told Estella. Mr. Benavides's out of court statements to Estella are not admissible via Beerman's testimony regarding her notes about those statements. This triple hearsay chain contained serious indicia of unreliability. The notes are dated November 20, 1991. (*See* People's Ex. 60.) Beerman testified that she did not write down what Estella said as she told her. (14 RT 2765.) Rather she took notes during the interview and then wrote a note in her chart. (*Id.*) Therefore, she did not write the note contemporaneous with Estella's account. Further the note refers to information the Mr. Benavides allegedly told Estella four days before the interview. Estella memories of the details of Mr. Benavides's account could not have been very accurate. This is especially true since she was under tremendous stress given that her daughter was deathly ill in the hospital and her boyfriend had been arrested and wrongfully charged with injuring her daughter.

Notwithstanding the triple hearsay and the inherent unreliability of this testimony, counsel unreasonably failed to raise an objection. Counsel's failures unduly prejudiced Mr. Benavides. The prosecutor argued that inconsistencies in Mr. Benavides's alleged account to Estella, which she retold to Beerman, were indicative of his guilt. For example, the prosecutor focused on Beerman's testimony that Mr. Benavides had told Estella that after he had found Consuelo throwing up and bleeding on the cement he had "told [Consuelo] to go to her bed and lay down." (14 RT 2765-66.) This account was then used by the prosecutor to argue that Mr. Benavides was telling an incredible story, considering that Consuelo's injuries would prevent her from walking. (14 RT 2864.) Cristina's testimony about what

Mr. Benavides said to Estella the day that Consuelo was injured as they were rushing to the hospital shows that Beerman's account is unreliable. Cristina testified that Mr. Benavides said he picked Consuelo up, laid her on the bed, and called Cristina. (11 RT 2186-87.) She testified that he did not say he told Consuelo to go to her room. (11 RT 2186.) Counsel's failure to object to Beerman's testimony led to the introduction of prejudicial and unreliable testimony.

Finally, counsel also failed to object to Cristina's testimony that no one had seen Consuelo hurt herself when she broke her arm. (11 RT 2209-10.) Cristina's testimony regarding what others may have seen or not seen is unreliable and likely reliant on inadmissible hearsay. Counsel's unreasonable failure to object to this testimony prejudiced Mr. Benavides by allowing the prosecutor to argue that Mr. Benavides may have caused the wrist injury since no one actually saw it. (18 RT 3596.)

The examples provided above are part of a pattern of counsel's unreasonable failures not to object to unreliable hearsay evidence. Counsel's deficient performance violated Mr. Benavides's Sixth Amendment rights. Admission of the hearsay testimony further violated Mr. Benavides's right to due process under the state and federal constitution. Respondent mistakenly argues that the Corrected Amended Petition does not articulate what testimony was hearsay. (*See* RCCAP at 307-08.)

#### k. Leading Questions on Direct Examination

Akin to counsel's unreasonable failure to object to inadmissible hearsay was counsel's failure to object to extensive leading questioning by the prosecutor on direct examination of witnesses. One line of questioning that was particularly damaging to Mr. Benavides was the prosecutor's

leading questioning of Cristina. Given that Cristina was only eleven years old when she testified, she was very prone to suggestibility. The prosecutor fed her a series of close-ended questions to which Cristina simply responded yes or no. (*See, e.g.*, 11 RT 2211.) Had counsel objected Cristina could would not have been unduly influenced by the prosecution's suggestions.

The prosecutor also led several expert witnesses to defer to the pathologist's findings regarding the cause of death, thus discounting their own medical expertise. For example, at one point Dr. Harrison testified that based on his experience, training, and education his opinion was that Consuelo died from complications from his internal injuries. (12 RT 2356.) Since Dr. Harrison's opinion differed from Dr. Dibdin's the prosecutor led him to agree that the pathologist had greater expertise in determining the cause of death. (*Id.*) Counsel unreasonably failed to object to these leading questions. As has been amply shown in the Corrected Amended Petition, Dr. Dibdin's cause of death was completely false and unsupported by medical evidence. Due to the prosecutor's improper leading questioning, the jury did not learn that it was false and instead got the impression that it was the most reliable evaluation of what caused Consuelo's death.

### I. Caljic 2.09

The jury was provided with CALJIC 2.09 that instructs the jury to follow the admonishment regarding considering certain evidence for only a limited purpose. (2 CT 547.) Harbin provided the Court with a copy of the FORECITE commentary for defense attorneys in his request that the Court provide an itemized list of the evidence that was presented for a limited purpose so that the jury could remember the admonishment during deliberations. (3 CT 675.) The Court stated that he always had thought this

was a "pretty good idea," yet he noted that Harbin had failed to provide a list of the evidence. (17 RT 3497.) Harbin explained that he had fallen behind in reading his dailies but could provide a list in a couple of days. (*Id.*) On this basis, the Court refused the request. (*Id.*) Had Harbin timely provided a list of the evidence admitted for a limited purpose, the court would have instructed the jury to limit their consideration of evidence such as testimony about Joe Avila, which they could only consider to the extent it bore on Estella Medina's credibility. (13 RT 2575-76.) As this Court held on appeal, evidence about Joe Avila should not have been admitted. *People v. Benavides*, 35 Cal. 4th at 1112. Counsel's failure to ask the court to specifically instruct the jurors to consider it for a limited purpose compounded the prejudice from its erroneous admission.

Absent defense counsel's unreasonable failure to object to inadmissible evidence, prosecutorial misconduct, or otherwise protect Mr. Benavides's rights and ensure that the jury was properly instructed and considered only admissible and relevant evidence, it is probable that the results of the guilt and penalty phases would have different.

### 19. Failure to Select a Fair and Impartial Jury

Counsel unreasonably failed to select a fair and impartial jury. Counsel forewent the use of four peremptory challenges that could have been used to strike prospective jurors who were unfavorable to the defense. Counsel stated for "the record" that she chose not to use the challenges because she felt they had the best prospective jurors they could get. (10 RT 2014-15.) Counsel's strategic choice was unreasonable. The jurors who were eventually selected for Mr. Benavides's trial harbored actual bias and were predisposed in favor of automatically imposing the death penalty. Counsel should have used her remaining peremptory challenges to strike

these jurors. Counsel's tactical choice to forego using the four challenges was unreasonable.

Prospective juror Gordon Jones stated on voir dire that crimes against "innocent children" are "unpardonable" and should be given the death penalty. (4 RT 902-03.) Jones at no point retreated from this stance during voir dire. His affirmative answer to defense counsel's question whether he would remain "open minded" enough at penalty "to listen" to mitigating information did not rebut Jones's initial statement. (4 RT 905.) Jones answer "yes" to the prosecutor's question that he could impose life without possibility of parole (LWOP) after weighing the evidence was insufficient to rebut this prejudice. (4 RT 903.) It was incumbent upon reasonable counsel to further explore Jones's biases rather than rely on his perfunctory answers to the prosecutor's leading questions. Jones further testified that he had a niece who was sexually abused by his oldest brother who served time for the crime. (4 RT 901-02.) He felt his brother, who served time in prison, was treated fairly. (4 RT 902.) He also stated that his nephew was a member of the Bakersfield Police Department. (4 RT 904.) The prosecutor did not challenge Jones to sit on Mr. Benavides's jury. (10 RT 1990.)

Considering that no other prospective juror expressed views as strong as Jones's in favor of imposing the death penalty for child abuse crimes, counsel was unreasonable in not using a peremptory challenge to strike him. Jones's bias was compounded by his familial associations with law enforcement and his own family experiences with child abuse. No other prospective juror had as many inherent biases against Mr. Benavides. Reasonable counsel would have struck Jones.

Counsel's unreasonable choices resulted in a jury that was bias in favor of the death penalty and had a tough on crime stance. Jurors Peggy Rivard and Walter Blaylock stated they believed the death penalty was

imposed too seldom. (4 SCT[104] 962; 5 SCT 1248.) Blaylock also believed that too many criminals "got off with practically nothing." (4 RT 932.) Similarly, juror Kathryn Oshel believed that too many offenders get off and are repeat offenders. (5 SCT 1380-01.) Oshel believed the death penalty should be imposed more often. (5 SCT 1380.) Juror Kenneth Myer stated that the death penalty should be imposed in every case where a person has been convicted of a "bad crime." (4 RT 745.) Huffman's attempt to rehabilitate Myer by asking him whether he would "listen" to the mitigating evidence and make a "judgment in [his] own conscience" did not rebut his clear pro-death penalty bias. (4 RT 748.) Juror Kathryn Tobin stated that she believed taxpayers are unduly burdened by defendants remaining in prison while they appeal their death sentence. (9 RT 1917-18.) She also stated that she does not think everybody can be rehabilitated. (9 RT 1919.) Counsel's choice of not striking any of these five jurors, who all expressed views unfavorable to the defense, was unreasonable.

Counsel's unreasonable strategy is further revealed in her choice of juror Karroll Wolfe. Wolfe was raped by several people six years prior to trial. (8 SCT 2323, 6 RT 1349.) Further, she had ties to law enforcement through her ex-husband, who was a correctional officer, and second cousin, who was a California Highway Patrol Officer. (8 SCT 2319.) At the time of trial she had an 8 and ½ month-old child. (6 RT 1349.) The prosecution ultimately permitted Wolfe to serve on the jury. (10 RT 1988.) Wolfe's traumatic emotional experience from being raped by multiple people, surely had an impact on her ability to view the evidence dispassionately. Wolfe's assertion that she would consider all the evidence when asked about mitigation in the abstract does not rebut her actual bias stemming from her being a victim of rape. No other prospective juror had as damaging a

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[104] SCT refers to the Supplemental Clerk's Transcript.

profile as Wolfe. Counsel was unreasonable in not using a peremptory to strike her.

As a result of counsel's unreasonable and ill-informed strategy Mr. Benavides was deprived of a fair and impartial jury. Counsel's failure to use her peremptories to strike these biased jurors prejudiced Mr. Benavides. Respondent both asserts that the claim should have been raised on appeal and that an appellate record alone is rarely sufficient to disclose reversible incompetence in such claims. (Response at 339.) The claim is appropriate on habeas because it is based not only on the bias disclosed in jury voir dire and juror questionnaires, but also on a pattern of incompetence dissembled in Huffman's and Harbin's representation throughout the trial. Harbin explains that Huffman was "woefully unprepared" for trial and was preoccupied with traumatic events in her life, including her husband David Huffman's illness and other family and financial problems. (Ex. 65 at ¶ 9.) He further explains that Huffman had a style of winging it, when it came to trial. *Id.* Huffman admits that she was working on several other cases throughout 1992 and 1993, including a death penalty case and another case involving complicated DNA evidence. (Ex. 64 at ¶ 5.) Harbin has been disbarred after years of disciplinary proceedings from his negligent representation of clients. (Ex. 141.) Huffman resigned from the State Bar, after she was suspended for her professional misconduct in abandoning a client. (Ex. 140.)

Counsel's alleged strategic choice to forgo usage of the peremptories was clearly unreasonably in light of the bias displayed by these jurors. The unreasonableness of the choice is further bolstered by Huffman's pattern of incompetence throughout the trial, preoccupation with other matters, and Harbin's admitted inexperience in capital cases. (Ex. 65 at ¶ 3, 19-20.) As a result of counsels' deficient performance in selecting a jury, Mr.

Benavides was denied a fair and impartial jury. To the extent this Court determines that this claim should have been raised on direct appeal, Mr. Benavides contends that appellate counsel was prejudicially deficient in not raising the claim.

### 20. Failure to Request Curative Instruction and Admonishment to Jurors to Disregard Prosecution Witnesses' Outburst.

One of Mr. Benavides's many friends and family members who came to support him in court was Jose Isabel Figueroa, a close family member of Mr. Benavides. Mr. Figueroa, along with other Mexican friends of Mr. Benavides sat in the Bakersfield courtroom during the day of the penalty phase, while the all white jury glared at them with disdain and disgust. (Ex. 102 at ¶ 53.) During the testimony of one of Estella Medina's sisters, Diana Alejandro, the prosecutor showed her a picture of Consuelo, which she identified. (19 RT 3741.) After she was shown the picture Ms. Alejandro stood up and shouted at Mr. Figueroa and Mr. Benavides's friends something in English, which though Mr. Figueroa could not understand as he is a monolingual Spanish speaker, he knew to be offensive. (Ex. 102 at ¶ 54.) No one admonished Ms. Alejandro or instructed the jurors to disregard her outburst. Counsel unreasonably and prejudicially failed to request a curative instruction and to request that the court admonish the jurors to disregard her inappropriate outburst. *Cf. People v. Martin*, 150 Cal. App 3d 148, 162-63 (Ct. App. 1983) (prejudice from witnesses' emotional outburst remedied by court's questioning of each juror about effect of remark on their ability to objectively evaluate the case and admonishment not to use the remark for any purpose.) Respondent's argument that the claim is unsupported by sufficient evidence (Response at 342) ignores that Mr. Figueroa's declaration establishes a prima facie case

regarding the inappropriate outburst. *See People v. Duvall*, 9 Cal. 4th at 474 (indicating petitioner must support claim with all "reasonably available documentary evidence supporting the claim, including . . . declarations.")

**21. Cumulative Error**

Respondent provides no response to subclaim 21, which incorporates claims from the rest of the Corrected Amended Petition that reveal counsel's deficient performance. (RCCAP at 310.) Respondent admits only that counsel's failure to elicit evidence that the tear of the anterior vaginal wall "did not exist may have been prejudicial." (Response at 342.) As shown above, counsel's failures were widespread and deeply prejudicial. There can be no doubt that but for counsel's errors individually and cumulatively the result of the proceedings would have been different. *See, e.g., Strickland*, 466 U.S. at 695-96 ("a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury"). Respondent's refusal to admit that Mr. Benavides has even made a prima facie case for relief based on counsel's ineffectiveness though all medical witnesses except for Dr. Dibdin have recanted their testimony and counsel failed to present any social history evidence at the penalty phase shows Respondent's lack of good faith. Respondent appears to have lost sight of its fundamental duty to do justice. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (explaining that the prosecutor is "the representative . . . . of a sovereignty . . . whose interest. . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.") Given the extraordinarily strong factual support showing Mr. Benavides is innocent that counsel failed to investigate and present and the extensive, compelling mitigation that counsel failed to present this Court cannot have

confidence in the outcome of the case and must grant Mr. Benavides relief. *Id.* at 693-94.

### N. Claim Fourteen: Mr. Benavides Was Unconstitutionally Denied the Conflict-Free Representation to Which He Was Entitled.

Mr. Benavides has made a prima facie showing that counsel Donnalee Huffman and Jeffrey Harbin labored under a conflict of interest that compromised their loyalty to Mr. Benavides. (RCCAP at 311-16.) At the time of Mr. Benavides's capital trial, Huffman was preoccupied with her husband's severe alcoholism and serious financial difficulties that prevented her from providing Mr. Benavides with effective representation. Huffman also developed a conflict when the victim's family violently threatened her and tied up, assaulted, and threatened her secretary. Harbin's duty of loyalty was compromised by his severe financial problems and serious disciplinary actions by the State Bar, which were exacerbated by a gambling, drinking, and drug habit. Together these problems created an actual conflict of interest between his duty to zealously represent Mr. Benavides and his preoccupation with his personal problems.

Harbin's and Huffman's financial problems were overwhelming. Due to the their serious financial difficulties, Harbin filed for bankruptcy in 1993, just months after the trial (Ex. 18), and Huffman filed for bankruptcy in 1994, the year after the trial (Ex. 19). As a result of their dire financial and personal problems, both counsel took more cases than they could handle and neither counsel provided enough time and attention to Mr. Benavides's case to effectively represent him. As has been shown in Claim Thirteen, counsel's representation of Mr. Benavides fell far short of the standard of care required of counsel representing a capital defendant, and significantly prejudiced him.

Respondent contends that conflicts of interest that arise outside the context of multiple concurrent representations are evaluated under the standard in *Strickland v. Washington*, 466 U.S. 668 (1984), requiring a showing of deficient performance and prejudice such that there is a reasonable probability that absent the deficiencies the result would have been different. Respondent argues the claim therefore fails for the reasons stated in response to claims of counsel's constitutional ineffectiveness in Claim Thirteen. (Response at 344-45.) Respondent misunderstands the governing federal law. However, even if Respondent's understanding of the law is correct, Mr. Benavides has made a very strong prima facie showing of counsel's ineffectiveness as shown in Claim Thirteen, and the factual allegations of conflicting personal matters that distracted counsel presented in support of the instant claim only strengthen the conclusion that counsel failed to provide Mr. Benavides with the effective representation to which he was constitutionally entitled.

**1. Governing Legal Standard**

The Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution entitle a criminal defendant to the effective assistance of counsel unhindered by a conflict of interest. *See, e.g.*, *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 481 (1978); *People v. Doolin*, 45 Cal. 4th 390, 417 (2009). This protection requires that counsel be in a position both professionally and personally to represent the client with undivided loyalty. *See Sullivan*, 446 U.S. at 348; *Stoia v. United States*, 109 F.3d 392, 395 (7th Cir. 1997); *see also Doolin*, 45 Cal. 4th at 417; *People v. Rundle*, 43 Cal. 4th 76, 168 (2008) ("It has long been held that under both Constitutions, a defendant is deprived of his or her

constitutional right to the assistance of counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labored under a conflict of interest that compromised his or her loyalty to the defendant."). "Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." *People v. Bonin*, 47 Cal. 3d 808, 835 (1989). "Although 'most conflicts of interest seen in criminal litigation arise out of a lawyer's dual representation of co-defendants, the constitutional principle is not narrowly confined to instances of that type.'" *People v. Hardy*, 2 Cal. 4th 86, 135 (1992) (quoting *United States v. Hurt*, 543 F.2d 162, 166 (D.C. Cir. 1976) (footnote omitted)).

Violations of the Sixth Amendment right to effective counsel not based upon a conflict of interest generally require the defendant to meet the *Strickland* standard requiring a showing of deficient performance and prejudice. *See, e.g.*, *Mickens*, 535 U.S. at 166; *Strickland*, 466 U.S. at 694. However, where counsel is burdened by an actual conflict of interest, "counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692. In such cases, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Id.* Consequently, a defendant who "shows his counsel actively represented conflicting interests" and that the conflict of interest "actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Sullivan*, 446 U.S. at 349-50; *Mickens*, 535 U.S. at 170-71; *see also Hovey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006) (actual conflict resulting in adverse effect shown whenever defendant demonstrates that some plausible alternative defense strategy or tactic was not pursued and that the alternative was inherently in

conflict with or not undertaken due to the attorney's other loyalties or interests); *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994) (inquiry is whether counsel's behavior appears to have been influenced by conflict). An adverse effect exists when there is at least one point at which counsel's "behavior seems to have been influenced by the conflict." *Lockhart v. Terhune*, 250 F.3d 1223, 1231 (9th Cir. 2001). The presumption of prejudice provides a "needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Mickens*, 535 U.S. at 176. Accordingly, the presumption of prejudice is appropriate where a defendant makes a showing that his counsel had an actual conflict that had an adverse effect on the representation of the defendant.

**2. Donnalee Huffman Had an Actual Conflict of Interest That Adversely Affected Her Performance.**

The combination of the multiple severe and stressful personal and professional problems that Donnalee Huffman faced created an actual conflict with her loyalty to Mr. Benavides and adversely affected her ability to zealously represent him. As explained by Huffman's secretary, Marisol Calderon Alcantar, Huffman and her husband David Huffman were experiencing "severe financial problems" at the time that Huffman was representing Mr. Benavides. Huffman's financial situation deteriorated so much during the time of Mr. Benavides's trial that she failed to pay Alcantar, who quit the same year of the trial (Ex. 105 at ¶ 6), and she did not pay defense experts Warren Lovell and Nat Baumer, whom Huffman had retained for the case. Alcantar, Lovell, and Baumer eventually sued Huffman for unpaid wages and breach of contract. (Exs. 21, 22.) Due to the Huffmans' dire financial situation, "they accepted virtually all cases they could and were often overwhelmed with the caseload." (Ex. 105 ¶ 5.)

It was not uncommon for them to have more than fifty open civil cases and twenty-five criminal cases. (Ex. 105 ¶ 5.) By her own account, Huffman maintained a significant caseload throughout the time she represented Mr. Benavides, which included another death penalty case, a case involving complicated DNA evidence, and several drug, assault, and sex abuse cases. (Ex. 64 at ¶ 5.) Her only accommodation for Mr. Benavides's case was that she stopped taking cases the month prior to the beginning of the trial. (Ex. 64 at ¶ 5.) Huffman tried to manage most of the workload on her own because her husband David was a severe alcoholic and often was drunk while at the office.[105] (Ex. 105 at ¶¶ 5-6.) Huffman was always under a lot of pressure and stress from managing the tremendous workload. (Ex. 105 at ¶ 7.)

The overwhelming caseload and her personal marital problems made Huffman ignore and pay insufficient attention to Mr. Benavides's case. She declined to speak to Mr. Benavides, who called almost weekly asking to speak to her, and instead told her secretary to give him a standard dismissive line that the investigators were doing their job and they would let him know if they needed any further information. (Ex. 105 at ¶ 10.) She similarly ignored Mr. Benavides's mother, who went "into the office almost every day," accompanied by a family member or friend asking to speak to Huffman. (Ex. 105 at ¶ 11.) As Alcantar explains, "[b]ecause she was busy, it did not seem to matter to Donnalee how many times friends or family of Vicente came into the office to speak to her." (Ex. 105 at ¶ 11.) Huffman always said that "she could not talk to them because she was too busy." (Ex. 105 at ¶ 11.) "It did not seem to matter what information the

[105] Prior to Mr. Benavides's trial, David Huffman represented Ward Francis Weaver, Jr. in his capital trial in Kern County. David Huffman's severe alcoholism and resulting chronic illnesses and financial problems are described and documented in this Court's Case No. S115638.

family had, Donnalee appeared to be too busy to be interested." (Ex. 105 at ¶ 13.) Even when friends and family and the Mexican Consulate sent numerous letters in support of Mr. Benavides, Huffman did not pay any attention to them. (Ex. 105 at ¶ 13.) She did not follow up on contacting Mr. Benavides's supporters to determine what other information they could provide. (Ex. 105 at ¶ 14.)

Accordingly, it is clear that Huffman's personal and financial problems and overwhelming caseload had an adverse effect that influenced her behavior on Mr. Benavides's case—*i.e.* ignoring potentially helpful defense witnesses. *See Lockhart*, 250 F.3d at 1231 (describing adverse effect as existing when counsel's "behavior seems to have been influenced by the conflict.") Moreover, as explained in Claim Thirteen, subclaims 13 and 16, many of these friends and family of Mr. Benavides who were clamoring for Huffman's attention had compelling good character and mitigation evidence that counsel failed to present to the jury and that it is reasonably probable would have changed the outcome of the case. Likewise, as explained in Claim Thirteen, subclaim 17, and Claim Twenty-Four, Huffman prejudiced Mr. Benavides by failing to avail herself of the substantial assistance that the Mexican Consulates could have provided. Huffman's inattention to the case is also clear from her failure to:

Present exonerating evidence, available in the discovery provided by the prosecution, from the hospital personnel who first saw Consuelo, and who could have testified that she did not have any injuries to the anus and genitalia that would have been expected if she had been raped and sodomized;

Timely consult with and prepare defense experts to testify;

Interview *any* of the prosecution medical witnesses prior to testifying;

Move to exclude irrelevant and highly prejudicial evidence of Consuelo's prior injuries unrelated to Mr. Benavides;

Notice that Mr. Benavides's interpreter Al Hernandez and the witness interpreter Victor Almaraz were incompetent interpreters; and,

Ensure her co-counsel Jeff Harbin conducted an adequate social history investigation and presented readily available compelling good character and penalty evidence.

(*See supra* Claim Thirteen.) As explained by Harbin, Huffman was "woefully unprepared" for the guilt phase partly as a result of her "preoccupation with traumatic events in her life including her husband's illness and with other family and financial problems, and in part from the fact that it was her style to 'wing it.'" (Ex. 65 at ¶ 9.) Accordingly, whether as a result of a conflict with her personal problems or her inherent ineffectiveness, or a combination of the two, Huffman prejudicially failed to provide Mr. Benavides with constitutionally effective assistance of counsel guaranteed by the Sixth Amendment and the California constitution. *See Sullivan*, 446 U.S. at 349-50; *Strickland*, 466 U.S. at 694.

In addition to Huffman's personal problems, her duty of loyalty to Mr. Benavides was also compromised when she and her secretary Alcantar were threatened and Alcantar was assaulted and tied up by Consuelo's uncles. During the time Huffman was representing Mr. Benavides, her office started to receive calls about bomb threats. (Ex. 105 at 18.) Two days after jury selection had begun, Huffman informed the court that Alcantar had been followed regularly when she went to and from work, and that on the night before, the driver of the car following her had brandished a shotgun. (2 RT 385.) Less than a week later, Huffman received a call that there was an emergency at her office. (7 RT 1535.) Consuelo's uncles, Javier and Antonio Alejandro, had walked into the office and assaulted

Alcantar. They tied her up and put a gag in her mouth and told her Huffman's law office should not be representing Mr. Benavides. (Ex. 105 at ¶ 18.) When they left, Alcantar called the Delano Police Department and identified Consuelo's uncles as the men who had been following her and had assaulted her. (Ex. 23 at 4127-45.) The Alejandros violent assault and threats to Huffman and Alcantar created a conflict that made Huffman wary of investigating the Alejandros. Had Huffman done so, she would have discovered that both Javier and Antonio had criminal histories involving violent offenses (Exs. 44, 46) that were relevant to explaining Consuelo's prior injuries. In fact, had Huffman investigated the Alejandro family, she would have discovered that most of Estella Medina's siblings had a history of violence, drug use, and even one brother who had been charged with sex abuse. Had Huffman conducted an adequate investigation into the Alejandros' background, she could have shown they were the more likely perpetrators of Consuelo's prior injuries, to the extent any such injuries were actually present, rather than Mr. Benavides who had no criminal or violent history. (*See supra* Claim Ten, subclaims 3-9.) Accordingly, Huffman's conflict created by the threats to her and assault of her secretary had an adverse effect that prevented her from investigating important evidence that should have been presented to the jury.

### 3. Jeffrey Harbin Had an Actual Conflict of Interest That Adversely Affected His Performance.

Jeffrey Harbin's severe financial problems, disciplinary problems with the State Bar, and personal gambling, drinking, and drug habit were in conflict with, and adversely affected his performance in Mr. Benavides's case. Harbin's severe financial problems led him to take on additional cases and become involved in non-legal work to generate income that detracted from his ability to work on Mr. Benavides's case. The

combination of Harbin's conflicting personal problems had an adverse effect on his performance in Mr. Benavides's case.

Harbin had severe financial problems throughout the time he was representing Mr. Benavides, culminating in his filing for bankruptcy a few months after Mr. Benavides's trial concluded. (Ex. 18.) Harbin's serious economic difficulties dated back to late 1989 and early 1990, and caused him to have "severe migraine headaches" that caused "blackouts." (Ex. 141 at 6516.) His financial circumstances became even worse on July 19, 1991, when a San Diego Superior Court granted a judgment for $240,000 to a former client who filed a malpractice suit against Harbin for his negligent representation. (Ex. 141 at 6567.) In an effort to generate income, in 1992, Harbin became a part-owner of a failing bar and grill, which required substantial amount of his time. (Ex. 18 at 4042, 4046.) In the middle of Mr. Benavides's trial, on April 14, 1993, the San Diego Superior Court issued an order assigning all accounts receivable from Harbin's law practice to his former client until the judgment was satisfied. (Ex. 141 at 6567.)

Despite his serious financial problems, Harbin spent his money gambling, drinking, and using drugs, which got him into further debt. The interpreter Victor Almaraz describes Harbin's habits at the time as follows: "Jeff was into gambling and often went to the Kern County Fairgrounds to bet on horse races. . . . He and his wife threw big parties where there was a lot of drinking and drugs. Eventually all this caught up with Jeff and he started to get into debt." (Ex. 108 at ¶ 2.)

Harbin's serious disciplinary problems with the State Bar began within a few months of his admission to the State Bar in December of 1988. (Ex. 168 at 8210.) His misconduct, which eventually led to his disbarment in 2002, included "failure to competently perform legal services, improper

withdrawal from employment, failure to adequately communicate with clients, failure to comply with court orders and failure to release a client file." (Ex. 168 at 8183.) During the time Harbin was representing Mr. Benavides, from January of 1992 to April of 1993, though he had only been admitted to the State Bar for slightly over three years, Harbin was already embroiled in serious disciplinary problems due to his failure to "competently perform legal services" and adequately communicate with a client. (Ex. 168 at 8206.) Due to his misconduct Harbin received a private reproval effective November 20, 1990. (Ex. 168 at 8206.) In 1992, a former client whose suit was dismissed because of his professional failures filed a complaint with the State Bar. Following the issuance of a Notice to Show Cause in May 1992, Harbin stipulated to the facts and discipline disposition in exchange for a private reproval that became effective in November 1992, as he was preparing for Mr. Benavides's trial. (Ex. 141 at 6508.) One of the requirements of his disciplinary sanction was to attend a one-day ethics class and to take and pass the examination of the class by March 23, 1993. Although Harbin registered in January 1993 for Ethics School, he failed to attend the class within the required timeframe. (Ex. 141 at 6531.) Therefore, at the time of Mr. Benavides's trial, which lasted from March 17, 1993, to April 19, 1993, Harbin was in violation of the condition of his private reproval. His failure to comply led to a public reproval in November of 1993. (Ex. 168 at 8206; Ex. 141 at 6548.) Harbin's failure to competently represent yet another client led this Court to suspend him from the practice of law for two years on August 31, 1994. In that matter, Harbin "stipulated to his culpability in one client matter, to his acts of moral turpitude in connection with payment of a malpractice judgment arising out of the client matter and to his failure to comply with conditions attached to his earlier public reproval." (Ex. 168 at 8207.)

Harbin's disciplinary problems only worsened in the following years as more clients lodged complaints against him for his negligent representation. (Ex. 168 at 8184-8210.) In 2002, the State Bar Court found that Harbin's "disbarment is necessary to protect the public, the courts and the legal profession, to maintain high professional standards and to preserve public confidence in the profession." (Ex. 168 at 8210.) Harbin was disbarred by order of this Court on August 17, 2002. (Ex. 141 at 6548; Ex. 168 at 8182.)[106]

Harbin's financial and State Bar difficulties caused him to over-extend himself with legal and non-legal work and to develop physical manifestations of the tremendous stress he experienced, and forced him to devote increasing amounts of his time and effort to address his personal problems. As a result of his previous malpractice and negligent representation, from at least April 1993, Harbin knew that working on Mr. Benavides's case would provide no financial relief from his dire economic condition, and he therefore had no financial incentive to represent Mr. Benavides in a constitutionally adequate manner. See, *e.g.*, *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir. 1980) (holding that defendant

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[106] Respondent argues that the submission of Harbin's State Bar records, Exhibits 141 and 168, with this Reply in support of the allegations in the Corrected Amended Petition must be justified for their delayed presentation under *In re Robbins*, 18 Cal. 4th 770, 780-81 (1998). (Response at 311-12.) Respondent is incorrect. *Robbins* requires justification for the delayed presentation of new *claims*, not additional factual support for claims and allegations that were timely presented to the court. Harbin's State Bar records simply provide additional factual support for the allegations of his State Bar disciplinary problems that were described in detail in the original Petition (RCCAP at 311-12) and which have been publicly available on the State Bar website, at least since Harbin's disbarment on August 17, 2002, before the original Petition was filed. *See* http://members.calbar.ca.gov/fal/Member/Detail/137997 [last accessed December 6, 2012]. As such, Harbin's State Bar records are properly before this Court.

established a prima facie case of a conflict of interest because of counsel's financial interests); *cf. People v. Frye*, 18 Cal. 4th 894, 997 (1998) (rejecting conflict claim based on attorney's pending suspension because defendant "does not point to anything in the record demonstrating that [the attorney's] pending suspension resulted in deficient performance or otherwise prejudiced his defense."). Thus, Harbin's preoccupation with his professional and personal matters adversely affected his ability to devote sufficient time and attention to Mr. Benavides's case.

As explained in detail in Claim Thirteen, subclaims 13 and 16, Harbin's inattention to the case resulted in a woefully inadequate investigation and presentation of good character and social history information that significantly prejudiced Mr. Benavides. Though no doubt Harbin's inexperience doing capital work and subpar lawyering skills account for his ineffectiveness, it is also true that Harbin's severe financial, professional, and personal problems detracted from his loyalty to Mr. Benavides and precluded him from providing Mr. Benavides with the effective assistance to which he is constitutionally entitled. Consequently, Mr. Benavides has shown that Mr. Benavides was denied his Sixth Amendment right and California constitutional right to the effective assistance of counsel as a result of Harbin's conflicting loyalty and prejudicial ineffectiveness. *See Sullivan*, 446 U.S. at 349-50; *Strickland*, 466 U.S. at 694.

In sum, Mr. Benavides has made a prima facie showing that he was denied his constitutional right to the effective assistance of counsel and is entitled to relief.

### O. Claim Fifteen: Mr. Benavides Was Denied His Constitutional Right to a Fair Trial by Impartial Jurors.

Mr. Benavides has made a prima facie showing that he was denied his constitutional right to a fair trial by an impartial panel of jurors. (RCCAP at 317-23.) As explained below, Respondent fails to rebut the strong presumption of prejudice raised by these acts of misconduct.

Mr. Benavides's constitutional right to a jury trial guarantees him a fair trial by a panel of impartial, indifferent jurors. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (the Sixth Amendment guarantees the right to trial by impartial jury and to confrontation of witnesses); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). An impartial jury is "willing to decide the case solely on the evidence before it." *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984) (internal quotation omitted); *see also Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Due process also "implies a tribunal both impartial and mentally competent to afford a hearing." *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912); *see also Peters v. Kiff*, 407 U.S. 493, 501 (1972). In capital cases, a biased juror's participation separately violates the Eighth Amendment requirement of heightened reliability and the right to a conviction and sentence based on the evidence in the record, *see, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 300-05 (1976); *Turner*, 379 U.S. at 472-73.

Juror bias "may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law." *United States v. Wood*, 299 U.S. 123, 133 (1936). "[E]xtreme situations . . . would justify a finding of implied bias," such as a juror's employment with the prosecuting agency, close relation to a participant in the trial or the crime, or role as a witness or other involvement in the crime. *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring); *see also Leonard v. United States*, 378 U.S.

544, 545 (1964) (finding implied bias where prospective jurors in second trial heard guilty verdict from first trial).

Thus, most misconduct cases involve a juror's actual bias, such as by their prejudgment of the facts. *See, e.g.*, *Phillips*, 455 U.S. at 215, 221; *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973). "[A] trial by jurors having a fixed, preconceived opinion of the accused's guilt would be a denial of due process." *Irvin*, 366 U.S. at 724. The test for actual bias is "whether the nature and strength of the opinion formed" by the juror "necessarily raise[s] the presumption of partiality." *Id.* at 723. "Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Phillips*, 455 U.S. at 221.

The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing" to allow the defendant to prove actual bias; the hearing serves as "a guarantee of a defendant's right to an impartial jury." *Id.* at 215-16. A hearing inquires into the "juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions," and permits "the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers" in light of the facts. *Id.* at 222 (O'Connor, J., concurring); *see also id.* ("in most instances a post-conviction hearing will be adequate to determine whether a juror is biased," but the implied bias doctrine is necessary where a hearing may not be sufficient to protect a defendant's rights).

Courts must also ensure that jurors are "unaffected by 'extraneous influence' such as hearing or reading prejudicial information [or] being exposed to the comments of outsiders."[107] *Tanner v. United States*, 483

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[107] Similarly, a juror's consideration of extraneous facts violates due process guaranteed by the Fifth and Fourteenth Amendments, because the

U.S. 107, 117 (1987). Extrinsic influences are "for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954). "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.* at 229. To resolve a claim of exposure to extrinsic evidence, the court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 230; *see also Tanner*, 483 U.S. at 120 (ruling that "[t]he Court's holdings requir[e] an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations"); *Mattox v. United States*, 146 U.S. 140, 150 (1892) (holding that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict," unless shown harmless).[108]

When a juror is not impartial, the resulting constitutional violations are not subject to harmless error analysis, because they are structural errors that "infect the entire trial process and necessarily render a trial

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death sentence "[is] imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977); *see also Irvin*, 366 U.S. at 722. This also violates the Sixth Amendment's Confrontation Clause and Compulsory Process Clause: the juror acts as an unsworn witness without confrontation or cross-examination. *See, e.g.*, *Parker*, 385 U.S. at 364-65; *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir. 1997) (en banc), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997); *Marino v. Vasquez*, 812 F.2d 499, 505 (9th Cir. 1987).

[108] Where the jury was tainted by courtroom disruptions, the Court also has "held that the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the [disruption] compromised" the jury's ability to adjudicate the case fairly. *Phillips*, 455 U.S. at 217 (internal quotation omitted).

fundamentally unfair." *Neder v. United States*, 527 U.S. 1, 8-9 (1999); *see also Rose v. Clark*, 478 U.S. 570, 578 (1986) (ruling that harmless-error analysis presupposes a trial by impartial jury). This is true regardless of the number of jurors affected: a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker*, 385 U.S. at 366.

The presumption of prejudice that arises from any juror misconduct is particularly strong in capital cases. *In re Stankewitz*, 40 Cal. 3d 391, 402 (1985). California courts have held that the presumption of prejudice may be rebutted only by showing that the allegations are false, or by showing that there is no substantial likelihood that the misconduct "influenced . . . the vote of one or more of the jurors." *People v. Marshall*, 50 Cal. 3d 907, 950–51 (1990); *In re Hitchings*, 6 Cal. 4th 97, 118-19 (1993).

In determining whether the state has rebutted the presumption of prejudice resulting from the receipt of extraneous information, federal courts place great weight on the nature of the extrinsic information that has been introduced into deliberations. *See Jeffries*, 114 F.3d at 1490 ("[W]e find no defensible distinction to be made based solely on the *source* of the information. Rather, the appropriate focus should be on the nature of the information itself.") (emphasis in original). The Ninth Circuit has looked to several factors in reviewing the nature of the misconduct and determining whether prejudice has been rebutted, including "(1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of reasonable possibility of whether the extrinsic material affected the verdict." *Marino v. Vasquez*, 812 F.2d 499, 506 (9th Cir. 1987) (citing *Bayramoglu v. Estelle*, 806 F.2d 880, 887

(9th Cir. 1986)). Thus, if there is a substantial likelihood that one single juror was improperly influenced to Mr. Benavides's detriment, this Court must reverse the convictions and sentence. *People v. Holloway*, 50 Cal. 3d 1098, 1112 (1990).

**1. Juror Kucharski Committed Misconduct.**

The Corrected Amended Petition establishes that Juror Kucharski improperly and prejudicially tainted the jury with her specialized knowledge and extraneous evidence based upon her personal interactions with Dr. Bloch, thereby prejudicially undermining and devaluing Dr. Bloch's testimony. (RCCAP 319-20.) Respondent initially asserts that Mr. Benavides's claim is lacking in evidentiary support. (Response at 345.) Respondent's argument lacks merit. A habeas petitioner need only allege sufficient facts that, if true, establish a prima facie claim for relief. *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). Mr. Benavides has done so. Mr. Benavides is unable to provide further documentary support for the claim, such as declarations from Juror Kucharski and other jurors, because of the unavailability of subpoena power in habeas proceedings prior to the issuance of an order to show cause. *See People v. Gonzalez*, 51 Cal. 3d 1179, 1259 (1990) (explaining that discovery is not available to habeas petitioner's prior to the issuance of an order to show cause), *superseded in part by In re Steele*, 32 Cal. 4th 682, 688 (2004) (holding that subsequently enacted Penal Code section 1054.9 provides post-conviction discovery of prosecution and law enforcement materials).

Nonetheless, Mr. Benavides has established a prima facie case of juror misconduct based on evidence that Juror Kucharski was personally acquainted with witness Dr. Bloch (a fact she failed to reveal on voir dire), had an unpleasant personal experience with him and, based on her

specialized knowledge of facts extraneous to the record, felt that Dr. Bloch was not a credible witness. (12 RT 2489-90.) She was so upset by Dr. Bloch that she started "shaking" when she saw him. (12 RT 2489.) She stated that her negative experience with Dr. Bloch was "very strong." (12 RT 2490.) She said: "I have had nightmares about this one doctor." (12 RT 2490.) She believed he lied to her for four days until he found out "they had insurance." (12 RT 2490.) It is highly likely that before she brought this fact to the attention of the court, she tainted her fellow jurors with her personal knowledge and extraneous evidence about Dr. Bloch. Prior to her removal and after Dr. Bloch's testimony, Juror Kucharski took an afternoon recess with other jurors where she had the opportunity to disseminate her views. (12 RT 2475.) Juror Kucharski, in effect, became an unsworn witness at Mr. Benavides's trial, violating his constitutionally-guaranteed right to confront and cross-examine all witnesses against him. The prejudice to Mr. Benavides is patent. Dr. Bloch was one of the few expert witnesses countering Dr. Dibdin's cause of death, which was central to the prosecution's case. (12 RT 2460.) Juror Kucharski's misconduct seriously undermined and devalued Dr. Bloch's testimony in the eyes of her fellow jurors, while simultaneously bolstering Dr. Dibdin's testimony and conclusions.

Respondent next asserts that Juror Kucharski's actions do not constitute misconduct when she "merely told the jury that she believed Dr. Bloch to be a liar." Respondent disingenuously argues that she was doing "nothing more than she was required to do as a juror" by expressing her opinion on his credibility. (Response at 346.) Respondent's assertion ignores the fact that Juror Kucharski tainted the jury with specialized knowledge of extraneous facts based upon her own personal experience with Dr. Bloch, which she readily admitted biased her assessment. (12 RT

2489.) This was clear, unmistakable misconduct and gave rise to a substantial likelihood that the extraneous information about Dr. Bloch's credibility and past behavior influenced at least one juror. *See, e.g.*, *Tanner*, 483 U.S. at 117. "A juror's duty is to weigh the evidence and credibility of witnesses with impartiality and to reach a fair and unbiased verdict." *People v. Thomas*, 218 Cal. App. 3d 1477, 1484–85 (1990) (holding that court properly discharged juror who categorically refused to credit police officers). Furthermore, Juror Kucharski's likely disclosure of this extraneous information to the other jurors indicates she violated the court's instructions and creates a presumption of bias. *See, e.g.*, *People v. Nesler*, 16 Cal. 4th 561, 587 (1997) (citing *In re Carpenter*, 9 Cal. 4th 634, 657 (1995)). Respondent has failed to rebut the presumption of prejudice raised by Juror Kucharski's misconduct.

Mr. Benavides further established that the trial court failed to conduct a proper inquiry into the allegations of juror misconduct. (12 RT 2488-92.) When appraised of potential juror misconduct, a trial court has a duty to make a reasonable inquiry to determine if there was in fact any misconduct and, if so, whether the offending juror should be discharged and whether the impartiality of the other jurors has been affected. *See, e.g.*, *Phillips*, 455 U.S. at 215-16; *People v. Burgener*, 41 Cal. 3d 505, 519 (1986), *overruled on other grounds by People v. Reyes*, 19 Cal. 4th 743 (1998). The trial court failed to conduct any inquiry into whether Juror Kucharski communicated her prejudicial personal knowledge to the remainder of the jury and whether the impartiality of the other jurors had been affected. Given the strength of her negative emotional response to Dr. Bloch and the fact that she had an opportunity to communicate her bias to the other jurors during the afternoon break, it is likely that she tainted others. The Court's failure to conduct a proper inquiry into whether other jurors were tainted

was error, which may be remedied only by the issuance of an Order to Show Cause and permitting Mr. Benavides to present evidence in support of his claim.

### 2. Juror Karroll Mulholland[109] Committed Misconduct.

Respondent argues that Juror Karroll Mulholland's declaration (Ex. 109) should be "disregarded," alleging that Mr. Benavides's counsel has not explained why her declaration was not filed with the initial petition. (Response at 347.) Respondent ignores the clear explanation given in the declaration of Michael Laurence, the Executive Director of the Habeas Corpus Resource Center, for submitting her declaration with the Corrected Amended Petition. Mr. Laurence expressly stated that Juror Mulholland is "a juror who was interviewed as the result of our need to reinvestigate the topics assigned to Ms. Culhane." *See* Declaration of Michael Laurence in compliance with orders for November 1, 2006 and January 23, 2008 at 17, filed April 22, 2008. As such, Juror Mulholland's declaration is properly before this Court and should be fully considered in support of the claim of juror misconduct. *See In re Benavides*, Case No. S111336, Order filed November 1, 2006 (granting leave to file amended petition as "necessary as a result of the allegedly fraudulent work product of Habeas Corpus Resource Center (HCRC) Investigator Kathleen Culhane").

Next, Respondent argues that the claim of Juror Mulholland's misconduct based on her interaction with witness Lori Garland is procedurally barred because it should have been raised on appeal. (Response at 347.) Respondent's arguments fail. The claim could not have been raised on appeal, because as Respondent notes, counsel failed to

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[109] At the time of Mr. Benavides's trial, Ms. Mulholland was known by the name of Karroll Wolfe. (Ex. 109 at ¶ 1.)

object to the court's inadequate hearing to determine if Juror Mulholland was biased by her relationship with Garland. As such, the claim is based on counsel's deficient and prejudicial representation by failing to object to this procedure and ensuring Mr. Benavides was tried by an impartial tribunal. Claims of counsel's ineffectiveness are not barred for failure to raise them on appeal even if they are completely based on the appellate record. *See In re Robbins*, 18 Cal. 4th 770, 814 (1998) ("We do not apply [procedural] bars to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record.").

Mr. Benavides has alleged that Juror Mulholland committed serious and prejudicial misconduct by repeatedly making contact with witness Lori Garland during the trial and failing to report this contact to the court. (RCCAP 320-22.) As explained in the Corrected Amended Petition, Juror Mulholland's communications with Garland were not discovered until the prosecutor saw them talking in the hallway and reported them to the court. (16 RT 3204.) The court then held a hearing to determine whether there had been misconduct. As with the court's inquiry into the allegations of misconduct on the part of Juror Kucharski, the trial court's inquiry here was woefully and unconstitutionally inadequate. (16 RT 3205-35.) Juror Mulholland's conversation with witness Garland tainted at least one other male juror. (16 RT 3206-07.) The trial court failed to determine whether the impartiality of the other juror had been affected. Neither did the trial court question the bailiff, whom Juror Mulholland stated she had spoken to (16 RT 3207), about the content and import of the conversation between the juror and the witness. Moreover, any failure on the part of trial counsel

constituted ineffective assistance and should not bar Mr. Benavides from the relief to which he is entitled.[110]

Respondent finally asserts that the claim is without merit, arguing that Mr. Benavides has not revealed any prejudice arising from the misconduct, and the trial court's hearing rebutted any presumption of prejudice. (Response at 348.) As noted above, the hearing on the matter was inadequate and cursory. In its inquiry, the trial court failed to ask Juror Mulholland the key question of whether her personal acquaintance with witness Garland would affect her impartiality in any way. Both the court and counsel assumed, without adequate inquiry, that Juror Mulholland's personal acquaintance with witness Garland would not affect her assessment of Garland's credibility. The court's error in leaving Mulholland on the jury was prejudicial since it is likely that, given her

[110] Counsel was also ineffective in proceeding to call Garland to testify once counsel learned from the prosecutor that Garland had been present in court during the preceding two days of testimony, in violation of the court's rule excluding witnesses. (16 RT 3203.) In the days preceding her testimony on April 13, 1993, several prosecution witnesses provided damaging testimony to the defense. For example, on April 13, 1993, Dr. Shaw testified he believed Consuelo was possibly sodomized (16 RT 3187), and on April 12, 1993, CHP Officer Esmay testified that a car accident could not account for the injuries (15 RT 2924-64). When the Court asked Garland whether the testimony she heard made her feel that the testimony she had to offer was relevant to the case, Garland responded "Not necessarily." (16 RT 3210.) Once counsel learned that Garland had heard damaging testimony, and she heard Garland's equivocal response to whether it had influenced her, counsel should have foregone her testimony. Counsel's only reason for calling Garland was to corroborate a tangential point in Estella's testimony regarding what she told Diana at the Intensive Care Unit and whether or not she threw back a sheet. (16 RT 3212.) Considering that Garland had been tainted by damaging testimony, counsel was unreasonable in not foregoing her testimony. The prejudice from this error is evident from the prosecution's cross-examination of Garland in which he elicited damaging information regarding swelling and oozing blood. (16 RT 3240, 3242.)

friendship with Garland, she unduly credited her testimony. Even though Garland was a witness for the defense, the prosecutor elicited very damaging testimony from her regarding her observations of the swollen genitalia and blood oozing from the anus and vagina. (16 RT 3240, 3242.) Mulholland's personal acquaintance with Garland biased her in favor of believing her damaging testimony.

Mr. Benavides has also made a prima facie showing that Juror Mulholland committed prejudicial misconduct by ignoring the court's instructions to consider only the evidence introduced at trial in deciding Mr. Benavides's sentence and actively persuading other jurors, who were initially disposed to sentence Mr. Benavides to life in prison without possibility of parole (LWOP), to change their vote to a death sentence. (RCCAP at 323.) Respondent argues that Juror Mulholland's declaration is inadmissible because it contains evidence about her mental processes. (Response at 349-50.) Respondent is incorrect. Juror Mulholland's declaration contains admissible evidence of her misconduct including: (1) her statement that she told jurors in favor of an LWOP sentence that "they could all just sit and rot because [she] was not going to change [her] mind from death to life in prison without parole" (Ex. 109 at ¶ 8); (2) her statement that she authored the jury note that requested the court to explain the meaning of an LWOP sentence and whether any legal challenges would enable Mr. Benavides to be released if he were sentenced to LWOP (Ex. 109 at ¶ 9); (3) her statement after the court reread the instruction that she "told" other jurors "that [she] could not change [her] mind on the penalty because life in prison without parole meant that Benavides was going to go before a parole board in a few years and have a chance at being let out" (Ex. 109 at ¶ 10); and, (4) her statement to other jurors that "if they wanted to go for life in prison, some day he was going to do this again, and even

though it might be several years away and [they] might all be dead and gone by then, but [she] will still be here and [she] will show [them] that he was not rehabilitated" (Ex. 109 at ¶ 10) (internal citation omitted). All of these statements and any discussion among the jurors about them are overt acts that are not excluded by the Evidence Code in determining whether a juror committed misconduct. Evidence Code section 1150, subdivision (a), which governs admissibility of evidence in such circumstances explicitly states that "admissible evidence may be received as to *statements made*, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." (emphasis added.)

Respondent relies on *People v. Steele*, 27 Cal. 4th 1230 (2002), for the assertion that the statements in Juror Mulholland's declaration are inadmissible. (Response at 349, arguing "*Steele* controls here.") *Steele* actually holds that Mulholland's statements to other jurors are admissible. As stated by this Court in *Steele*, "statements made or conduct occurring within the jury room . . . . are evidence of objectively ascertainable overt acts that are open to sight, hearing, and the other senses and are therefore subject to corroboration. As such, the court properly could, and did, consider those statements." *Steele*, 27 Cal. 4th at 1265 (considering admissible statements of jurors during deliberations about their evaluation of the military and medical evidence); *see also People v. Allen*, 53 Cal. 4th 60, 75 (2012) (holding the lower court "appropriately relied on the juror's recitation of what [other juror] had said").

Juror Mulholland's statements to other jurors prove her misconduct in failing to follow a number of jury instructions. Her refusal to accept the jury instruction's definition of an LWOP sentence as meaning that Mr. Benavides would "not be paroled at any time" (3 CT 767) violated her duty

to base her decision only on evidence admitted in court and to accept the law as defined by the court. (*See* 3 CT 757 (instructing the jurors to determine the facts "from the evidence received in trial and not from any other source"; instructing the jurors to accept and follow the law as stated by the court whether or not they agree).); *see United States v. Thomas*, 116 F.3d 606, 608 (2d Cir. 1997) (stating a juror's "a refusal to apply the law as set forth by the court" is "an obvious violation of a juror's oath and duty . . . . [and] constitutes grounds for dismissal"); *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2000) (jury's decision must be based upon the evidence presented at trial and the legal instructions given by the court). By holding a fixed belief from the outset of deliberations that Mr. Benavides should be sentenced to death and stating that she would not change her mind, Juror Mulholland also violated her duty to deliberate with an open mind. *See Allen*, 53 Cal. 4th at 75 (holding that during deliberations, jurors should "maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination").

The facts presented in support of this claim establish a prima facie case that there is a substantial likelihood that the jury's decision to sentence Mr. Benavides to death was influenced by prejudicial information that was not part of the record. As such, prejudice from such misconduct is presumed and Mr. Benavides is entitled to relief. *See Marshall*, 50 Cal. 3d at 949-50 ("A judgment adverse to a defendant in a criminal case must be reversed or vacated whenever the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury."); *Marino*, 812 F.2d at 506 (determining whether prejudice has been rebutted by evaluating

whether there is a reasonable possibility that the extrinsic material affected the verdict); *see also In re Hamilton*, 20 Cal. 4th 273, 294 (1999) (finding overt actions by jurors in direct violation of their oaths, duties, and admonitions is misconduct); *People v. Pierce*, 24 Cal. 3d 199, 207 (1979) ("[J]ury misconduct raises a presumption of prejudice; and unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial"); *People v. Cooper*, 53 Cal. 3d 771, 835-36 (1991) ("When a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties. [Citation omitted.] The presumption of prejudice is appropriate in those situations"); *People v. Danks*, 8 Cal. Rptr. 3d 767, 795 (2003) (stating that prejudice is presumed where extraneous material is inherently and substantially likely to have influenced juror, and "inherent bias" finding is required where extraneous information so prejudicial as to warrant reversal if it had been introduced at trial).

Juror Mulholland's misconduct must be considered in conjunction with the court's error in properly instructing the jurors when they sent out the note asking about an LWOP sentence as described *infra* in Claim Nineteen. As explained therein and in the reply to the response to that claim, the court exacerbated the misconduct by failing to explain to the jurors that "legal challenges" were available to a defendant under either sentence and to admonish them that they were violating their duty by speculating about the possibility of Mr. Benavides's release in determining his sentence. The court's misreading of the instruction, adding the word "chance" in reference to an LWOP sentence, also incorrectly instructed jurors about the permanence of such a sentence. (*See infra* Claim Nineteen.)

The various instances of juror misconduct in Mr. Benavides's case considered alone or in combination with other trial errors, especially the court's erroneous instruction, establish a prima facie case that Mr. Benavides was denied his constitutional rights.

### P. Claim Sixteen: The Trial Judge's Bias and Misconduct Violated Mr. Benavides's Constitutional Right to a Fair and Impartial Tribunal.

Mr. Benavides has made a prima facie showing that he was denied his constitutional right to Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, a fair trial and impartial tribunal, effective assistance of counsel, and freedom from cruel and unusual punishment. (RCCAP at 325-29.) Respondent argues that the instances of misconduct described in the Corrected Amended Petition are taken out of context and are not as egregious as they seem when viewed in light of the larger record. (Response at 352-56.) Respondent's attempts to rationalize the judge's misconduct are unavailing. Examination of the overall record, as explained below, shows an undeniable bias in favor of the prosecution and hostility to the defense that infected the trial proceedings and no doubt affected the juror's decision.

#### 1. Governing Legal Standard

The "Due Process Clause clearly requires a 'fair trial in a fair tribunal,' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (citation omitted). The "legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

"An appearance of impropriety, regardless of whether such impropriety is actually present or proven, erodes [the public's] confidence and weakens our system of justice." *Hurles v. Ryan*, 650 F.3d 1301, 1309 (9th Cir. 2011). "[T]he Constitution requires judicial recusal in cases where 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). A petitioner does not need to show actual bias to prove a due process violation because, as the Supreme Court has recognized, "it would be nearly impossible for a litigant to prove actual bias on the part of a judge." *Id.* at 1310 (citing *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2262-63 (2009)). For this reason, the focus of an inquiry regarding judicial bias is "on the appearance of and potential for bias, not actual, proven bias." *Id.*

There is no "mechanical definition" of what constitutes potential bias rising to the level of a due process violation. *Hurles*, 650 F.3d at 1310. Such cases "'cannot be defined with precision' because '[c]ircumstances and relationships must be considered.'" *Id.* (quoting *In re Murchinson*, 349 U.S. 133, 136 (1955)). It is particularly important that in a capital case such inquiry be pragmatic as the finality of the judgment requires a heightened degree of reliability. *See, e.g.*, *id.*; *Murray v. Giarratano*, 492 U.S. 1, 9 (1989); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

An unconstitutional potential for bias is demonstrated where the judge engaged in an "extremely high level of interference," creating a "pervasive climate of partiality and unfairness." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995) (internal citations omitted). "A trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel . . . and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is

not believed by the judge, and in other ways discredits the cause of the defense . . . .'" *People v. Fudge*, 7 Cal. 4th 1075, 1107 (1994) (quoting *People v. Mahoney*, 201 Cal. 618, 627 (1927), and citing *People v. Fatone*, 165 Cal. App. 3d 1164, 1169 (1985)). As one court explained:

> When the trial judge officiously and unnecessarily usurps the duties of the prosecutor by taking over the questioning of witnesses and in so doing creates the impression that he is allying himself with the prosecution, harm to the defendant is inevitable. We do not see how any judge could fail to recognize that fact.

*People v. Campbell*, 162 Cal. App. 2d 776, 787 (1958).

Judicial bias is a structural error that is prejudicial *per se*; once bias has been established, no additional showing of prejudice is required. *See Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967) (including the right to an impartial judge in a list of examples of constitutional rights "so basic to a fair trial that their infraction can never be treated as harmless error").

**2. Mr. Benavides's Claim Is Not Procedurally Barred.**

Respondent asserts that Mr. Benavides's claim is barred because it should have been raised on appeal. (Response at 352, citing *In re Waltreus*, 62 Cal. 2d 218, 225 (1965), and *In re Dixon*, 41 Cal. 2d 756, 759 (1953).) Respondent fails to provide any reasoning to support the assertion that these mutually exclusive bars—that the claim should have been raised on appeal (*Dixon*) and the claim was raised on appeal (*Waltreus*)—apply to this claim. In any case, Mr. Benavides's claim is not barred by either procedural bar.

As the claim was not raised and rejected on appeal, the *Waltreus* bar obviously does not apply. *See In re Harris*, 5 Cal. 4th 813, 829 (1993) (explaining *Waltreus* rule as barring claims "*actually* raised and rejected on appeal" absent strong justification). The claim is also outside the purview

of the *Dixon* bar for several reasons. First, the *Dixon* bar does not apply to claims of fundamental constitutional error that strike at the heart of the trial process, such as the denial of an impartial tribunal. *See Harris*, 5 Cal. 4th at 825 n.3, 829-36; *see Chapman*, 386 U.S. at 23 & n.8 (referring to an impartial judge as "basic" to a fair trial). Second, the claim depends substantially for its prima facie case of prejudicial error on information integral to the success of the claim but not in the appellate record. *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (bar inapplicable when extra-record material has information "of substance not already in appellate record"); *In re Bower*, 38 Cal. 3d 865, 872 (1985) (raising a claim dependent on extra-record materials on habeas was not only "appropriate, but required"). Third, the *Dixon* bar does not apply because the claim is partly based on counsel's ineffectiveness in failing to object to the judicial bias and misconduct. *See Robbins*, 18 Cal. 4th at 814 ("We do not apply [procedural] bars to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record."). Habeas corpus is the proper vehicle for bringing these claims regarding the trial court's bias and misconduct. *See, e.g.*, *People v. Tatlis*, 230 Cal. App. 3d 1266 (1991) (habeas corpus petition necessary to show prejudice from trial court error appearing on face of appellate record).

For these reasons Mr. Benavides's claim of judicial bias and misconduct is not procedurally barred.

### 3. Mr. Benavides Has Made a Prima Facie Showing of Judicial Bias and Misconduct.

Respondent claims that the trial court's bias and misconduct constituted only "isolated comments" that were not properly contextualized in the Petition. (Response at 352.) Indeed, in the context of the entire trial, the court's pro-prosecution bias becomes even more apparent. At times, the

trial judge acted like a second prosecutor, when he added his own objections alongside those of the prosecution, questioned witnesses to fill gaps in the prosecution's case, and treated defense witnesses with great disrespect and disdain in front of the jury. Contrary to Respondent's assertion, the record before this Court demonstrates that the trial court failed to adhere to the requirements of appearance of impartiality and instead aided the state and improperly influenced the jury. The record leaves the abiding impression that the judge's actions and remarks projected to the jury an appearance of partiality against Mr. Benavides. *See, e.g.*, *People v. Fatone*, 165 Cal. App. 3d at 1170, 1176 (finding "pattern of judicial hostility" that permeated record and revealed the instances of misconduct were not "isolated slips").

**a. The Court Took Over Questioning of Witnesses and Assisted the Prosecution in Proving Its Case.**

As detailed in the Corrected Amended Petition, Judge James M. Stuart often actively involved himself in the examination or cross-examination of witnesses, not for clarification purposes, but in order to emphasize the prosecution's point or prove the prosecution's theory. (RCCAP at 325-27.) In these instances, the judge unnecessarily usurped the duties of the prosecutor and placed himself squarely in the state's camp. *See Campbell*, 162 Cal. App. 2d at 787 (holding that harm to defendant is "inevitable" when the court usurps the prosecutor's duty). These instances include, but are not limited to, the following:

The trial judge antagonized, denigrated, and derided defense expert Dr. Nat Baumer throughout his testimony. During trial, Judge Stuart expressed immense irritation with defense counsel's failure to obtain the witness's presence on time and took out his irritation on the defense witness in front of the jury. When the prosecution asked Dr. Baumer to find a

particular page in Dr. Anthony Shaw's report, and Dr. Baumer asked for a page number because his copy was marked differently, the judge unnecessarily cut in and chided him, pointing out that Dr. Baumer could locate the correct page number in the "lower right-hand corner. Every other physician has been able to do that." (14 RT 2851.) In an attempt to diffuse what was obviously a tense situation the court stated defensively and falsely: "The record should reflect that we're smiling." (14 RT 2852.) In fact, although the trial judge attempted repeatedly to conceal his disdain on the record by indicating that he was making a particular comment "with a smile," the jury was not fooled; the jury knew that the court was furious with the defense and favoring the prosecution. As explained by trial counsel Huffman:

> During Mr. Benavides's trial, [Judge Stuart] was very upset that Dr. Baumer was late to testify. He berated him in front of the jury. When Judge Stuart gets upset, he tries to protect the record by stating: "I am saying this with a smile"—all the while he is grinding his teeth and looks furious. The jury was well aware that he was very angry and displeased with the witnesses.

(Ex. 64 at ¶ 17.)

The trial judge later took over the cross-examination of defense expert Dr. Baumer. During his questioning, Judge Stuart mistakenly stated in front of the jury that the witness previously had stated that DRMC staff were overwhelmed when Consuelo was brought in to the hospital, and then relied on that misstatement to overrule the defense objection to having Dr. Baumer speculate in order to discuss what was going on at DRMC when Consuelo was brought into that hospital. (14 RT 2888.) Not only did the judge interrupt and purport to describe Dr. Baumer's previous testimony, but he also continued to speculate himself regarding the facts of the case as he continued to question Dr. Baumer:

> THE COURT: . . . Sir, poor training is one reason why the nurse in writing out her notes might have been mistaken when she put down "clean diaper". The other is the nature of the situation?
>
> THE WITNESS: Correct.
>
> THE COURT: She was overwhelmed. The first thing she was going to do is assist the physician in saving the baby and a little later she was going to worry about how accurate the notes were.

(14 RT 2880-81.) The court was, in essence, testifying when making these statements without any information to support them. Indeed, no evidence was presented at trial supporting the court's speculation. The effect of the court's statements and disparagement of the defense expert was profound.

Respondent's argument that the above passage of the transcript shows "if anything, . . . disrespect for the prosecutor" rather than the defense because the judge interrupted the prosecutor is disingenuous. (Response at 352.) As is patently clear, the court's interruption was done to assist the prosecutor in honing the state's theory in a manner that the prosecutor had not been able to do so himself. This was an interruption the prosecutor clearly welcomed. Critically, by advocating the prosecution's theory in his leading questions, the court provided its imprimatur to the prosecution's theory and thereby unfairly tipped the balance against the defense.

The judge's takeover of the prosecutor's questioning of a defense witness was not an "isolated" instance as Respondent asserts. The judge questioned witnesses regarding what occurred at DRMC as though posing such questions were part of the court's mandate, and he did so again during the testimony of Dr. Anne Tait. After both the prosecution and the defense concluded their examinations of the witness, Judge Stuart questioned Dr. Tait himself, asking: "Given a choice between providing treatment to a

patient on the one hand, and preserving potential evidence of child abuse on the other hand, which choice do you make?" (17 RT 3333.) With such a question, the "correct" answer was obvious, and the witness provided it: "The patient." (17 RT 3333.) Again, the court's hypothetical led the jury to believe—as the court did—that the staff at DRMC failed to preserve Consuelo's diaper not because it lacked evidence of molestation but because they were too busy to do so. This question reflected the court's pro-prosecution bias and assisted the prosecution in bolstering the weakest part of its case: the lack of evidence that staff at the first hospital to treat Consuelo, DRMC, saw any signs of sex abuse or assault.

The fact that the court questioned the witnesses regarding these issues, and then speculated regarding the facts of the case in front of the jury, inevitably communicated to the jury that the court agreed with the prosecution's theory and was highly prejudicial to the defense. It was also tantamount to coaching the witnesses, since there was only a singular answer to his question. *See People v. Whitehead*, 148 Cal. App. 2d 701 (1957). Evidence regarding Consuelo's treatment, and what medical personnel saw—or did not see—at DRMC was precisely what was not introduced at trial. Had defense counsel not failed to present this evidence, the jury would have learned that this treatment and medical personnel's observations *contradicted* the prosecution's theory of the cause of Consuelo's death and injuries as sex abuse. Therefore, when the court implied that evidence that was not presented supported the prosecution's case, the court was essentially presenting false testimony and implication to the jury. As has been amply shown in Claims One and Thirteen, the lack of evidence of injury to the anus and genitalia at DRMC is a critical exculpatory fact that proves Mr. Benavides's innocence of the sex charges. (*See, e.g.*, Ex. 144 at ¶ 14 (declaration of Dr. Alonso retracting his

testimony that he believed Consuelo was sexually abused largely due to the lack of trauma observed at DRMC, a fact of which he was unaware).) The court's introduction of false evidence to attempt to explain the significant flaw in the prosecution's theory thus had a significant prejudicial effect.

The court also misstated the testimony of defense expert Dr. Baumer during its disparagement of his testimony. During Dr. Baumer's testimony, Judge Stuart overruled defense counsel's objection to the prosecution's insinuation that another defense expert, Dr. F. Warren Lovell, left his job due to a scandal, an implication for which there was no evidence.[111] (*See* discussion in Claims Seven and Eleven.) When the defense objected, the court stated, "I'm going to overrule this objection because the witness indicated in essence that this particular individual is more reliable than one hundred percent of the texts out there." (14 RT 2888.) When Dr. Baumer immediately responded that he did not believe he said that, the court replied, "Sir, you have been using lots of words and . . . I'm distilling it on down because that's what I'm doing." (14 RT 2888.)

In fact, Dr. Baumer's recollection of his testimony was accurate. When the prosecution asked Dr. Baumer to opine on something with which he had no experience, Dr. Baumer testified that he had consulted with a coroner "that had been doing this work for 30 years" for assistance because he believed "50 percent of what I may read may be wrong and I don't know which 50 percent is right." (14 RT 2887.) Respondent's argument that the judge's "paraphrasing of Dr. Baumer's testimony was both accurate and appropriate" (Response at 353), cannot be reconciled with the record. The judge's "distillation" was not only incorrect, but demonstrated his own personal animosity toward the witness. It implied that the witness was

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[111] E.g., "Do you know anything about what's happened while he was coroner there, sir?" (14 RT 2888.)

somehow wrong in consulting another physician rather than relying on written journals. The court's derision of Dr. Baumer was compounded by the prosecution's improper and completely unsupported argumentative questioning regarding whether Dr. Baumer had refused to work on the defense case unless Dr. Lovell "got paid too." (14 RT 2887.)

The implication of the judge's mistaken summary was therefore not simply that Dr. Baumer's methods were wrong, but that they also were unethical. Dr. Baumer's testimony and credibility were severely undermined by the opinions the judge expressed. The trial court's animosity toward the main defense witness demonstrated an intense bias against the defense and in favor of the prosecution. A bias the jury could not have failed to perceive, consider, and emulate. *See In re Henry C.*, 161 Cal. App. 3d 646 (1984) (bias against witness clearly impairs court's impartiality and sways court's judgment).

The judge continued to exhibit his exasperation with the defense witness in front of the jury. He explained that

> I'm a little irritated because I thought I left word, not with you personally, but I wanted you . . . . here at 1:30 because my jurors have other things to do with their lives besides sit here.
>
> I've got a 4:30 commitment, I've got a 5:30 commitment and a seven o'clock commitment, one of which I can and will break again, but doctor, I wanted you here at 1:30 and you weren't. We haven't got time to go into an explanation about why, but since you asked a question, usually I don't say too much, but late enough in the day, I'm going to tell you that's what I have heard you saying. . . .

(14 RT 2888-89.) Judge Stuart refused to let Dr. Baumer explain, and implied that the witness had willfully ignored an order from the court to arrive at a particular time. Instead, the court resumed its questioning of Dr. Baumer, asking him to comment on a scandal for which there was no

evidence, regarding another witness that was going to testify. He became angry when Dr. Baumer attempted to respond to the judge's unmistakable animosity:

> The Court: Do you know what's been going on?
>
> The Witness: With who?
>
> The Court: Dr. Lovell.
>
> The Witness: Huh-uh. No, I really don't, honest to goodness, but I will tell you—
>
> The Court: Sir, when you don't know something, that's time for you to be quiet.

(14 RT 2889.)

The court continued to undermine the witness when the prosecution began to ask Dr. Baumer again about rib injuries, a subject he already stated was not within his expertise. The court implied that the witness was being difficult and refusing to answer the questions. "Mr. Carbone, let me interrupt you now. He has deferred that to someone else. He had no opinion, doesn't know, couldn't say, won't say, referred it over to someone else." (14 RT 2890.) Far from refusing to cooperate or answer questions, Dr. Baumer actually was requesting that the prosecution direct his question to a doctor with expertise in the area, rather than ask Dr. Baumer to speculate.

Following the prosecution's cross-examination of Dr. Baumer, the court again commented that the witness had been late and noted for the jury that the witness had arrived in a private airplane. (14 RT 2892 (pointing out his pilot in the audience).) A few minutes later, the judge again stated that he had told defense counsel to have the witness arrive by 1:30. (14 RT

2896.) These additional comments on the witness's tardiness and on the apparent luxury of his means of travel again implied that the witness chose to be late or was otherwise willfully ignorant of the needs of the jury. By repeatedly expressing his own animosity toward defense counsel and the witness, the court thus infected the trial environment, and his comments about the waste of jurors' time led to the creation of personal animosity between the jurors and the witness–and between the jurors and the defense. "When the court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client." *Fatone,* 165 Cal. App. 3d at 1175. Respondent's characterization of Judge Stuart's clear bias as merely understandable frustration with Dr. Baumer's tardiness is a futile attempt to whitewash the record. (Response at 353.) Contrary to Respondent's claim, the record shows Judge Stuart's unmistakable animosity toward Dr. Baumer and, most importantly, disrespect for his expert opinion that very likely infected the juror's perceptions of the defense evidence.

Judge Stuart's antagonism for Dr. Baumer led the court to show bias against the defense again when he told defense attorney Huffman prior to her redirect examination that "there's a difference between redirect and rehash," communicating to counsel that she should curtail her examination of Dr. Baumer, even though the judge himself had assisted with the cross-examination and denigration of this doctor, the defense's critical witness. (14 RT 2893.)[112] The court attempted to rush the proceedings because he had appointments to keep. (14 RT 2892.) As a consequence, trial counsel

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[112] Respondent argues that Judge Stuart's statement after he made this comment that it was not directed at defense counsel shows that he was not biased. (Response at 354.) Respondent ignores, however, that in the same passage, Judge Stuart also said that he had made the statement "with a smile." (14 RT 2893.) As stated above, Judge Stuart's attempts to conceal his hostility to the defense fooled no one.

was compelled to pare down her questions to "just about two or three," (14 RT 2892), that only occupied one and half pages of the record.[113] In contrast, the prosecutor had just spent fifty pages (14 RT 2837-93) cross-examining the defense expert. The court's pressuring of defense counsel to limit her redirect examination impaired her ability to address the points made on cross-examination and rehabilitate Dr. Baumer's credibility, which had been attacked by both the judge and the prosecution.

Though defense counsel was told that she should refrain from "rehashing" Dr. Baumer's testimony, no such cautioning was directed toward the prosecutor, and so he continued his assaults on Dr. Baumer's credibility during re-cross-examination. The prosecution began one question with "Now, in terms of coming in here and *testifying falsely for money* that Mrs. Huffman had paid, doctor. . . ." and concluded with a misrepresentation and indictment that the witness had suddenly changed his mind after reading "one line in one report." (14 RT 2895 (emphasis added).) The witness said he could not respond to the question, and did not respond. (14 RT 2895.) Despite the lack of an answer, the court commented as if the witness had responded, implied that the prosecution's

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[113] Defense counsel had no choice but to complete Dr. Baumer's testimony that day. Defense counsel had only been authorized to pay Dr. Baumer $900 for a half day of testimony and $200 for each hour of consultation, with a maximum limit of $3000. *See* Sealed Transcript, Confidential Fund Request Hearing, February 8, 1993, at 3. Since he had already spent $2000, accounting for 10 hours of consultation (14 RT 2891), and $900 accounting for his half day of testimony, her funds for Dr. Baumer were almost depleted. Because of his own schedule, Judge Stuart warned that he was not going to stay a minute passed 5:15 pm and that if he had to do so he would order Dr. Baumer to return the next day. (14 RT 2893.)

statements were true, and further implied that defense counsel had engaged in unfair tactics by changing the witness' opinion just before he testified:

> I think [the question has] already been asked and it has been answered. . . . Mrs. Huffman had indicated that this trial is moving a little quickly than originally anticipated and she's getting all her witnesses lined up. And I did tell her to have this one here at 1:30. . . . . Under the circumstances where this last witness has issued a report as it were that was provided to the prosecution, by now, I think you've seen everybody is supposed to have swapped everything so there is [sic] no surprises, but now when a witness comes in and changes his opinion based on something in there that he has read, I think the prosecution is probably entitled to a day to see what, if anything, it wants to do with it.

(14 RT 2895-97.) Following Dr. Baumer's testimony, the judge continued to express his opinion about the testimony when he granted a one-day continuance for the prosecution because of defense counsel's maneuvering and supposed presentation of surprise testimony. (14 RT 2895-97).[114] The court's granting of a continuance for the prosecution when the defense presents testimony that could only remotely be construed as "surprise evidence" evidenced his actual bias in favor of the prosecution. The report that made Dr. Baumer change his opinion was UCLA Dr. Shaw's surgical report, which was part of the prosecution's discovery. (14 RT 2881.) The court neither criticized the prosecution nor afforded the defense additional time to prepare for new evidence when such evidence was presented by the prosecution. Instead, when a similar situation arose as the prosecution

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[114] As the jury was leaving the courtroom, the judge stated that the witness was held back so that the jury could leave before "the witness comes and gets to say what a jerk that judge is or equally appropriate things." 14 RT 2897. Judge Stuart, in acknowledging his animosity for Dr. Baumer, acknowledged that his actions were inappropriate, but failed to ensure that jury was not improperly influenced by his behavior or otherwise protect Mr. Benavides's constitutional rights.

attempted to introduce evidence regarding Estella's relationship with a child molester after Consuelo died—evidence that was highly prejudicial and not at all probative as to Mr. Benavides's conduct—the court simply ruled the evidence admissible, and continued with the trial. (*See, e.g.*, 13 RT 2568-76.) The court also made no comment when Dr. Diamond, the star witness for the prosecution, suddenly announced at trial that he had obtained information since the preliminary hearing that his opinion was based on false evidence and had changed his opinion about the cause of Consuelo's death. (10 RT 2085.) This was certainly "surprise" testimony as the prosecution failed to provide any report about the false evidence and Dr. Diamond's change of opinion prior to trial. The court, however, expressed no opinion about such testimony.

The court's behavior and comments prejudiced the jury. The jury clearly understood the need for a continuance as a result of an alleged impropriety committed by the defense, whose witness had not only ignored the jury's needs and arrived late, but also then refused to answer the prosecutor's valid questions, improperly consulted with an additional doctor instead of reading articles, and lied on the stand for money. The court's repeated criticism of the witness in front of the jury combined with the prosecutor's misconduct, such as stating his opinion in the form of cross-examination questions for which he had no evidence, created a completely false impression of the witness and of defense counsel as unethical liars who were uncaring of the court's and jurors' needs. The jury relied upon this impression to not only discount Dr. Baumer's testimony in its entirety, but also discount much of the rest of the defense.

The extreme prejudice to the defense must be viewed in light of the prosecutorial misconduct that infected the trial. While the prosecution and the court were berating the defense for paying an expert witness a

reasonable sum, and asking him to review all the evidence, albeit at a late date, the prosecution withheld from its witnesses critical portions of the medical records, which were highly material to their opinions. The prosecutor's concealment of these records resulted in false testimony. (*See surpa* Claim One.) When the defense began to engage in effective review of the false evidence, the prosecution accused them of lying. (*See, e.g.*, 14 RT 2895 ("Now, in terms of coming in here and testifying falsely for money that Mrs. Huffman had paid, doctor, I ask you again, upon your review of 100 pages almost of documentation, all of the photographs in the case and you wrote this opinion down and as you're coming through the door of the courthouse, you're shown one line in one report and that changed your opinion. Is that correct?"); 18 RT 3658 (attacking defense counsel's interpretation of medical evidence); 12 RT 2406 (trial court assists prosecution in rehabilitating witness after defense counsel demonstrates that he is testifying outside his area of expertise).)

In this way, the court repeatedly allowed the prosecution to present evidence and improper cross-examination that went beyond the scope of the evidence, and allowed prosecution witnesses to testify beyond their expertise, as it continued to curtail defense counsel's attempts to counter the prosecutor's misconduct. Indeed, the court facilitated the presentation of speculative "expert" testimony supportive of the state's case. For example, the court assisted the prosecution in rehabilitating its expert Dr. John Bentson when trial counsel showed that he was testifying outside his area of expertise. On direct examination, Dr. Bentson testified that the brain infarcts he observed in Consuelo's CAT scans were caused by suffocation. (12 RT 2406.) On cross-examination, Dr. Bentson admitted that he had not reviewed any of Consuelo's medical records before providing this opinion. (12 RT 2414-2415.) As trial counsel attempted to show that the brain

infarcts could be caused by conditions other than suffocation, Dr. Bentson became defensive and stated that "one has to be practical about these things," indicating that it would be unrealistic to consider other causes. (12 RT 2415.) Dr. Bentson, however, was unable to explain why, without having reviewed medical records, he was so certain of the cause. (12 RT 2415.)

In response to defense counsel's near-effective cross-examination, the court interrupted and took over questioning of the witness. In a series of leading questions, the court rehabilitated Dr. Bentson on a key point: his basis for opining that Consuelo was suffocated. The court led Dr. Bentson to testify that, although he was qualified to offer "possible causes" of the brain injuries, he, "on a daily basis . . . trust[s] others to be concerned with regard to specific causation" (12 RT 2416), implying that his opinion regarding causation was still valid even he did not review the medical records. Given that the prosecution's theory of suffocation was based solely on Dr. Bentson's testimony, the court's intervention was prejudicial on this point. Again, since the prosecution had deliberately failed to show its experts medical records that contradicted its own theory, it manufactured much of its medical evidence. (*See supra* Claim One.) The trial court simply reaffirmed the prosecution's misconduct here, and unfairly prevented the defense from engaging in proper and effective cross-examination. Further, the court's leading questions eliciting testimony that Dr. Bentson "trusts others" had the inappropriate effect of bolstering and vouching for the testimony of other prosecution witnesses, such as Dr. Dibdin, who did not deserve such honorable support.[115] (*See* discussion

[115] The court's intervention compounded defense counsel's ineffectiveness in failing to meet with the medical witnesses prior to trial and to determine whether they had reviewed the medical records, and which medical records they had reviewed. (*See* discussion in Claims One

*supra* in Claim One and accompanying exhibits.) The trial judge's actions again demonstrated to the jury that he sided with the prosecution and believed that the state should prevail. *See People v. Ramirez*, 113 Cal. App. 2d 842 (1952) (conviction reversed where trial judge intervened numerous times during the course of the examination of a prosecution witness, "leading the witness and pulling him out of the hole every time").

The court similarly asked prosecution witness Dr. Seibly to testify outside of his expertise regarding Consuelo's rib injuries. During direct examination of Dr. Seibly, the prosecutor used a hypothetical incorporating his theory of Consuelo's rib injuries. (13 RT 2519.) He then asked Dr. Seibly, a radiologist who was employed to read x-rays at KMC and who had no expertise in child abuse (13 RT 2511-12), to opine regarding the cause of the injuries. Dr. Seibly indicated that one possible cause was a "tight gripping force." (13 RT 2519.) When the prosecution asked several questions regarding how this "compression" might occur, the defense objected, but the court overruled the objection, and actually invited the doctor to not only describe how, but also show the jury by demonstrating. (13 RT 2519.) Dr. Siebly explained that he had no expertise in the area, so that he would have to testify regarding what he "guessed" would cause them. The defense objected again, and finally the prosecution withdrew the question. (13 RT 2520.)

The court's repeated interruptions and interference continued during the examination of the defense's character witnesses. When witness

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and Thirteen). Rather than interview the witnesses, counsel only attempted to learn this information once the witnesses were on the stand. When defense counsel, however, did have some success in cross-examination, such as here, where the prosecution's medical witnesses had not reviewed all of the relevant medical records, the court stepped in and precluded counsel from showing that the witness's opinion was unsupported.

Guadalupe Benavides paused in stating her opinion of Mr. Benavides, the court cut in and narrowed defense counsel's question so that the witness could only answer yes or no. (16 RT 3281.) In limiting the defense's character evidence to yes or no questions, the court undermined the utility and effectiveness of the character testimony.

The trial court's bias toward the prosecution and against the defense was thus demonstrated repeatedly as the judge stepped in to help the prosecution support its arguments, failed to prevent or remedy prejudicial misconduct on the part of the prosecution, and interfered when the defense began to assail the prosecution's evidence. The frequency of the trial court's biased statements and actions evidence an actual bias that prevented Mr. Benavides from receiving a fair trial. It also undoubtedly infected the jury's perceptions of the defense and of the evidence at trial, unfairly steering them toward favoring the prosecution, and discounting the defense.

**b. The Court Favored the Prosecution's Needs, Witnesses, and Arguments Over Those of the Defense.**

While the court was rude, antagonistic, and critical of the main defense expert, Dr. Baumer, he was quite the opposite when prosecution witnesses were involved. He was polite to them, apologized for taking their time, and was happy to assist a witness in locating a report. (*See, e.g.*, 16 RT 3156, 3177.) Moreover, the trial judge made every effort to work with the schedules of the prosecution witnesses. When a prosecution witness was reserved for future testimony, the court told the witness he would make "every effort" to make future testimony "convenient" for him. (13 RT 2696.) When Dr. Diamond was reserved right before he left for vacation, the trial judge politely informed him, "We recognize that you have some travel plans and you certainly are entitled to enjoy them, and I trust you

will. As soon as you get back in town please let Mr. Carbone know because we anticipate that we may need to hear from you again. Will you do that for us please?" (10 RT 2102.) This contrasted starkly with Judge Stuart's threat to force Dr. Baumer to return for another day of questioning if the defense did not cut short its questioning.

Unlike what he did with defense witnesses, the trial judge did not require prosecution experts to remain behind while jurors left the room in order to prevent interaction and what he alleged would be rude comments between them. (*Compare* 16 RT 3173 (Dr. Shaw) and 13 RT 2696 (Dr. Alonso), *with* 14 RT 2898 (Dr. Baumer), 13 RT 2615 (Estella Medina).) He also did not tell prosecution witnesses, in front of the jury, that they had to return ten minutes before everyone else because the court did not "want to have to wait for [them]," implying that the defense was wasting the jury's time. (13 RT 2615.) The court's obvious approval of prosecution witnesses, when set alongside his unrestrained disdain for defense witnesses, presented a striking picture of bias. *See People v. Frank*, 71 Cal. App. 575 (1927) ("By words or conduct [a judge] may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to an unfair advantage of one of the parties.").

When defense witness Estella Medina, Consuelo Verdugo's mother, who was nervous and who did not have a great deal of experience testifying, told the court that she had received a parking ticket while testifying, the judge was rude to her and mocked her. "Congratulations," he told her,

> I have no jurisdiction over parking tickets. They trust me to handle homicide cases and a couple other things, but not parking tickets. That's in a different building. I haven't said

> hello to one of those judges over there in at least five years and you can—I suggest you pay it.

(13 RT 2652.) Judge Stuart acknowledged that he might have sounded rude to the jury, and in fact apologized to the jury if he seemed rude. (13 RT 2653.) However, he did not offer the any apology to the defense witness. (13 RT 2653.) Rather, he later again mocked Estella Medina, outside of her presence, when he told a prosecution witness that while he "can't do parking tickets" he could make copies for the prosecution witness. (13 RT 2699.) Typically victims, especially the mother of a deceased child, are treated with great sensitivity by the court. The fact that Judge Stuart saw fit to mock her in front of the jury reflects his adoption of the prosecution's theory that she was the alleged "fulcrum" of Mr. Benavides's ongoing abuse and sexual molestation of her children that enabled him to kill her daughter. (18 RT 3595 (prosecutor argued in closing that the "the fulcrum for this molester and killer is Estella Medina").)

The court's pro-prosecution bias also affected its evidentiary decisions. When deciding whether to admit extremely prejudicial and misleading evidence regarding Estella's relationship with child molester Joe Avila, evidence that this court has ruled was irrelevant, *see People v. Benavides*, 35 Cal. 4th 69, 90 (2005), Judge Stuart made the decision based on his own biases rather than the applicable legal requirements. He stated that:

> And as a parent, as a father, I don't think I leave that back in my chambers or at home every day when I come here. And so it's occurring to me, as I am sure it is probably occurring to the jury, we have got a question as to why this was not reported, whether it really was or was not something that occurred. And I think that something like this might be relevant to show that this is the type of mother who would not report that because she cares more about her adult companion than she does her minor children.

(13 RT 2574.) The fact that the judge speculated, as a father, regarding what the jury wanted to hear, improperly colored his consideration of the propriety of the evidence and impaired his weighing of the probative value of the evidence. Even if the court did believe that the jury wanted to hear whether the pattern of injury "was or was not something that occurred," evidence regarding Estella's relationship with Joe Avila had no relevance to whether or not the prior injuries occurred, or whether Mr. Benavides caused them. The court's wholesale adoption of the prosecution's theory clouded his judgment and ability to rule impartially on the admissibility of the evidence.

As with Estella Medina, the court also rudely responded to the humble knowledge of another defense witness, character witness Antonio Duran Delatorre, who became confused after his testimony and asked if he could stay to watch the proceedings. The court's answer was a stern "no," which included absolutely no explanation. (16 RT 3277.) In fact, since Delatorre had already testified, there was no reason to exclude him from the proceedings. Delatorre's question simply reflected the fact that the defense had not educated the family members and witnesses regarding the proceedings before they began. Indeed, the defense had not even determined which witnesses would testify prior to when they appeared in court. The court's failure to express any understanding when defense witnesses were ignorant of the proceedings again portrayed to the jury a disdain for the defense witnesses. The prejudice of the trial court's treatment of these defense witnesses only compounded the prejudice that stemmed from counsel's unreasonable failure to prepare its evidence and witnesses. (*See supra* Claim Thirteen.)

While it assisted the prosecution in bolstering its witnesses in response to defense objections, the court also assisted the prosecution in

objecting to defense counsel's questioning of witnesses by inserting its own objections. For example, when the prosecution objected to defense counsel's leading question regarding why Mr. Benavides was feeling badly, the court noted it was not only leading but had already been asked and answered. (15 RT 3064.) When the prosecution objected to defense counsel reading from the autopsy report during her closing argument, the court overruled the objection, but told counsel in front of the jury not to read from the report, and then also made his own "objection" to defense counsel's reference to the word "acute," stating that it was "not the definition that [the court] heard, although it's close." (18 RT 3627.) If defense counsel's argument was close to the original evidence, the insertion of an objection by the judge was hardly necessary. His intervention signaled to the jury that defense counsel was misrepresenting the evidence and her error was egregious enough to require the court's spontaneous correction. The court did not similarly insert its own objections to the prosecution's evidence, nor did the court note any of the numerous misstatements and misrepresentations in the prosecutor's closing argument, such as his false statements that Cristina Medina's statements to police were "consistent throughout" this ordeal, when no such evidence had been presented (18 RT 3590, 3656), and his misleading argument that Estella Medina's bad parenting somehow pointed to Mr. Benavides's guilt (18 RT 3595-97, 3660). Again, the prejudice to Mr. Benavides was exacerbated by the prosecution's misconduct in presenting false evidence. (*See supra* Claims Two, Four, Five, and Six.)

The court's bias affected the admission of other evidence as well. The court admitted evidence of Delia Salinas's stay in a psychiatric hospital without providing a basis for the admission. The court stated only that the evidence was admitted based on "something that was said" but did not say

what that "something" was. (17 RT 3344.) In contrast, when the defense sought to introduce relevant exculpatory evidence, the trial court refused to permit it. Defense counsel sought to reopen the case immediately after she had rested, in order to introduce evidence of the size of Mr. Benavides's hands when measured against the supposed "thumbprints" photographed on Consuelo's back. (17 RT 3505-10.) The court refused to permit counsel to do so, stating the evidence was untimely, irrelevant, and of little probative value. However, he also based his decision on his biased beliefs about farm workers and his own belief in Mr. Benavides's guilt. He told defense counsel: "I have never met a person who's worked in the fields, particularly those who work the grapes" who did not have a strong grip, of the sort necessary to break a child's ribs. (17 RT 3512.) In fact, had defense counsel been allowed to introduce such evidence, the jury would have noted that Mr. Benavides has abnormally small hands. In addition, the evidence the prosecution had presented regarding the manner in which Consuelo's ribs were injured was highly prejudicial, since Dr. Dibdin had placed his hands on the bruises shown in a photo of Consuelo's back. (17 RT 3512.) This evidence led the jury to believe the prosecution's theory was the only way Consuelo's ribs could have been injured. Defense counsel's failure to counter this evidence, and the court's failure to permit her to do so, was therefore of significant import. As explained by Dr. Astrid Heger, Dr. Dibdin's theory that gripping the child accounted for the rib fractures was false. (Ex. 170 at ¶ 26.)

Part of the court's excessive concern with the prosecution's needs was its concern for the reputation of the prosecution. For example, while the court perceived no problem for the defense's reputation when matters were discussed outside the hearing of the jury, when Juror Mulholland recognized defense witness Lori Garland and had a brief conversation with

her irrelevant to the trial, the court found it necessary to discuss this conversation with the jury because he worried that the fact that an off-record discussion occurred would somehow reflect adversely on the prosecution. (16 RT 3224.) Judge Stuart expressed no such worries regarding the many comments and disparagements he leveled against the defense and defense witnesses over the course of the trial. (*See, e.g.*, 13 RT 2652; 14 RT 2851, 2880-81, 2888-89, 2890, 2892, 2895-97; 16 RT 3281.)

The court's protection of the prosecution's interests sometimes was so glaring that it was reminiscent of a preference for a favored child or student. For example, the court even interrupted defense counsel when she began an examination of a witness and asked her to wait until the prosecution had finished reviewing defense exhibits before she spoke. (15 RT 2986-87.) The court did not provide the defense with this same courtesy, and did not pause the proceedings when prosecution exhibits were introduced, even when several were introduced at a time. (*See, e.g.*, 10 RT 2014-19, 2054; 11 RT 2130.)

When a defense expert, Dr. Lovell, was unable to recall his report and began to review it to refresh his recollection, the court accepted the prosecutor's objection to him doing so, and required that the defense have Dr. Lovell testify from memory. (16 RT 3097.) However, when a witness was unable to remember information in a *prosecution* witness' report, the prosecution was permitted to read the portion of the report into the record without comment from the bench. (14 RT 2875.)

Moreover, the court held defense counsel accountable for mistakes the prosecution made. This occurred, for example, when defense counsel objected to the introduction of two photos of Consuelo Verdugo's injuries because the foundation for the photos had not been established, and it was unclear when the photos had been taken. The court denied the motion to

exclude the photos for lack of foundation based on the prosecution's representation that it would indeed lay a proper foundation for the photos. (10 RT 2019-20.) However, the prosecution was unable to lay the proper foundation. When prosecution investigator Gregg Bresson was asked about the date on which he took the photos, he stated that he was not sure and would have to guess. (12 RT 2401.) Rather than advise this prosecution witness that "Sir, when you don't know something, that's time for you to be quiet" (14 RT 2889), as he had with defense witness Dr. Baumer, the court instead kindly asked the witness to look for the date in one of his "many reports"—both giving the witness the benefit of the doubt that he had the information, and communicating to the jury that it was perfectly reasonable for him not to have the information handy, since he had written so "many reports" on the case. (*See* 12 RT 2401.) The court therefore vouched for the prosecution witness and attempted to assist the prosecution with its task of laying a foundation for the photos.

When the defense, however, relied on the same photos during testimony, the court halted testimony and berated the defense for attempting to introduce exhibits without laying their foundation. The judge further remarked that he was surprised (and by implication concerned) that the defense expert had not laid a foundation for the photos or stated that he did not know their foundation or source. (16 RT 3121-24.) Finally when, at the close of trial, the prosecution sought to introduce the same photos, Judge Stuart relied upon his own belief in Mr. Benavides's guilt as the reason for admitting them over defense counsel's objection that they were inflammatory. "I might have agreed [with the defense] at the outset of the case," he said, "but I certainly don't think so now." (17 RT 3381.) At that point in the case, the trial court could no longer be considered the impartial tribunal to which Mr. Benavides was entitled by the Due Process Clause.

*See United States v. Holland*, 655 F.2d 44, 46 (5th Cir. 1981) (a defendant is entitled to a trial before a judge who is not biased against him at any point of the trial). By this point in the trial, the judge unquestionably exhibited his pro-prosecution bias. (Ex. 64 at ¶ 17.) He firmly believed, and expressed his belief, that Mr. Benavides was guilty. He therefore conducted the trial in line with this bias.

**c. The Court Berated Defense Counsel in Front of the Jury.**

In her opening statement, defense counsel Huffman misspoke, stating that Dr. Warren Lovell "will likely testify." (15 RT 2980.) The prosecution objected and the court, rather than having a sidebar and discussing the matter with counsel, berated defense counsel in front of the jury. The trial judge stated he agreed with the prosecution, that the defense should not say a witness will testify if he will not, because one can't "unring the bell." (15 RT 2980.) Counsel stated in response that she had simply accidentally included the word "likely." (15 RT 2980.) Possibly recognizing that impropriety of criticizing counsel in front of the jury, the judge responded by stating that he had "used a nice tone" during its ruling. (15 RT 2980.) The court's attempts to remake the tone of the conversation, however, were not misunderstood by those present. (See Ex. 64 at ¶ 17.) The court's speech regarding defense counsel's misstatement therefore ended up eclipsing her entire opening statement because the court improperly chose to lecture counsel in front of the jury. *See Fatone*, 165 Cal. App. 3d at 1174 -75 ("It is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial.").

### d. The Trial Judge Made Inappropriate Comments.

At the end of Ruben Garza's testimony regarding Consuelo's ambulance ride to KMC, the judge inappropriately inserted himself into the examination and asked the witness: "Mr. Garza, are there any female paramedics?" (16 RT 3269.) After the witness answered in the affirmative, he was allowed to step down. (16 RT 3269.) The court's question had no relevancy to the proceedings, yet since it was made without any explanation or clarification it asked the jurors to speculate regarding its relevancy.

The court also made light of the evidence and the case. He told the jurors that he needed to take his son to kung fu practice, and was tempted himself to participate in the practice except, in light of the prosecution's testimony about old bones, he would not do so. (16 RT 3299.)

These statements made light of a serious proceeding, one that concerned life and death for Mr. Benavides. The court's failure to offer Mr. Benavides the respect duly required in such a proceeding further contributed to the unfairness of the trial.

### e. The Trial Judge Biased the Jurors Before Trial Began.

Judge Stuart told each of the jury panels that while there was a presumption of innocence, and the fact that Mr. Benavides was arrested should not be used as evidence of his guilt, "of course we all think [he was arrested] because someone made a report" (5 RT 1084-85), that "it is obvious [Mr. Benavides's] name wasn't just picked out of a phone book" (6 RT 1201), and that "someone must have said something for us to have gotten this far" (7 RT 1445-46). Such statements coming from the judge prior to trial predisposed the jury to view Mr. Benavides as guilty.

The judge also engaged in systemic and vigorous rehabilitation of jurors who initially stated they were very pro-death, while he was quick to grant challenges for cause for those jurors that initially indicated they were unlikely to vote for death. He denied defense counsel's challenge for cause to dismiss Randy Hooser, who said it would take a lot of positive evidence for him to consider life without parole as a possibility, and at the end of his voir dire questioning said he was still leaning towards giving the death penalty. (4 RT 813.) Judge Stuart did not even require the prosecution to argue his position on this juror before he stated he would keep him on the panel "in response to" rulings he made against the prosecution yesterday, and because not "what he said, but how he said it when he was looking at me and giving the answers caused me to believe he would indeed be objective." (4 RT 814.) The court therefore improperly used a tit-for-tat approach when determining whether to retain this juror, apparently acknowledging that he was retaining the juror in order to balance out prior decisions, even though the juror was biased.

The judge also improperly denied defense challenges of William Coombs, who said he strongly favored the death penalty, that it would "take a lot" to show that Mr. Benavides was worthy of life without parole, and that the defense probably would not be able to show any redeeming factors to convince him to impose life without parole. (5 RT 1042-50.) The court additionally denied a challenge to Yvonne Salazar, whose friend's four-year-old daughter had recently been raped and killed with no suspect having been arrested, who had a seven-year-old daughter, and who said she did not believe she could keep an open mind in light of the charges. (5 RT 1117-28.) The court denied a challenge to Julie Loustalot, who came from a law enforcement family that was well known to Judge Stuart (5 RT 1088), and who stated she would not want someone with her frame of mind sitting

on the jury, that she was biased against Mr. Benavides, and that she did not believe the process would have come "to this point" in the justice system if there was not pretty good evidence against Mr. Benavides. (5 RT 1135-47.) The court denied a challenge to Vicki Lackey, who stated she was "very strongly in favor of the death penalty" and would have difficulty "staying objective" and not imposing death if Mr. Benavides was found guilty. (6 RT 1255-67.) Similarly, the court denied a challenge to Robert Reed, who stated he wished the death penalty applied to drug crimes as well as crimes involving murder, that he did not know if he could be fair and open-minded after he found that Mr. Benavides was guilty, and that he would have trouble considering mitigating circumstances during the penalty phase. (6 RT 1360-70.) Finally, the court denied a challenge to Yolanda Flores, who used to work at DRMC, knew several witnesses involved in the case, including Al Valdez, lived in Delano and had heard about the case in the community, said she could not return a verdict for life without parole, and thought that many people who deserved the death penalty did not receive the penalty because they had good attorneys. (6 RT 1397-1411.)

The judge apparently believed such statements made by potential jurors presented absolutely no problem to their potential status as jurors deliberating whether Mr. Benavides should live or die, because it was just asking too much of jurors to remain unbiased in the face of such severe charges. "[I]f someone is found guilty of murder in the first degree in the rape of a 21 month old child and or the sodomy of a 21 month old child then or lewd and lascivious conduct with a 21 month old child there's probably no doubt about it, the defense is going to have to wage an uphill battle." (6 RT 1370.) The judge's denials of the defense challenges to these jurors required the defense to unnecessarily use its preemptory challenges to dismiss them, and prejudiced the panel against the defense

even before trial began and evidences the judge's improper pro-prosecution bias.

#### f. The Trial Judge Violated Several Tenets of the Code of Judicial Ethics for Judges.

The actions set forth above prevented Mr. Benavides from obtaining a fair trial, or a trial that lacked any appearance of bias. The trial court's actions not only violated state and federal decisional law, but also violated provisions of the code of ethical conduct.

The California Code of Judicial Ethics[116] requires that a judge:

"participate in establishing, maintaining, and enforcing high standards of conduct," and warns that the judge "shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." (Canon 1.)

"respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (Canon 2.)

"require order and decorum in proceedings before the judge." (Canon 3B(3).)

"be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. . ."(Canon 3B(4).)

"perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as [] bias or prejudice . . ." (Canon 3B(5).)

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[116] *See* www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf - 2011-06-25 (last visited December 14, 2012).

"require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct bias or prejudice . . ." (Canon 3B(6).)

As set forth above, the trial judge violated all of these canons repeatedly while he presided over Mr. Benavides's trial.

#### 4. Conclusion

As shown above, the record evidences a pattern of judicial hostility towards the defense and favor for the prosecution. Though "[n]ot every example amounts to misconduct independently, nor does each necessarily involve an erroneous legal ruling," the record evinces a pattern of hostility that "is clear [and] the prejudice evident." *Fatone*, 165 Cal. App. 3d at 1176, 1180. Mr. Benavides has made a prima facie showing that he was denied his constitutional right to a fair and impartial tribunal. The denial of this fundamental right is a structural error requiring the grant of habeas corpus relief. *See Chapman*, 386 U.S. at 23 & n.8. Further, the absence of an impartial tribunal coupled with the other constitutional violations described in the Corrected Amended Petition including the presentation of false evidence, denial of the right to effective counsel, and prosecutorial misconduct considered cumulatively certainly prejudiced Mr. Benavides. *See People v. Easley*, 34 Cal. 3d 858, 863 (1983) (noting that in capital cases, the provisions of California Penal Code section 1239(b) "impose a duty upon this [C]ourt to make an examination of the complete record of the proceedings to the end that it be ascertained whether defendant was given a fair trial.") (internal punctuation omitted).

### Q. Claim Seventeen: The State Presented Improper Victim Impact Evidence.

The Corrected Amended Petition sets forth allegations which demonstrate prima facie that Mr. Benavides is entitled to have his

convictions and death sentence set aside on the ground that they were obtained through the use of improper victim impact testimony that was inflammatory and designed to—and did—appeal to the jurors' passions and religious prejudices. In the Corrected Amended Petition, Mr. Benavides made a prima facie showing that the improper victim impact testimony of Darlene Salinas and Virginia Salinas, the prosecutor's failure to give notice about their statements and improper arguments related to their testimony, counsel's unreasonable failure to object to the improper testimony and prosecutor's arguments, and the court's failure to provide a limiting instruction to the jury violated Mr. Benavides's constitutional rights. (RCCAP at 330-34.)

Respondent's sole response to this claim is that it restates an appellate claim and is barred as a challenge to the admissibility of the evidence. (Response at 357, citing *In re Dixon*, 41 Cal. 2d 756, 759 (1953), and *In re Lindley*, 29 Cal. 2d 709, 723 (1947).) Respondent is incorrect. Though the claim in the Corrected Amended Petition incorporates arguments raised on appeal, it is broader than the claims raised therein, and includes allegations of counsel's ineffectiveness in failing to object to this improper evidence, which are also discussed in Claim Thirteen, subclaim 18(i). Accordingly, the claim is appropriately raised on habeas. *In re Seaton*, 34 Cal. 4th 193, 200 (2004) (indicating that claims of counsel's ineffectiveness are properly raised in habeas). Respondent's reliance on *Lindley* is also misplaced because Mr. Benavides's challenge to the improper evidence is broader than the grounds raised by counsel at trial and considered by this Court on appeal regarding the admissibility of this evidence. Accordingly, this claim is not barred from consideration in habeas by the bar to challenging trial court's rulings on the admissibility of evidence in habeas proceedings. Furthermore, Mr. Benavides respectfully urges this Court to reconsider its

ruling on appeal in the context of the substantial factual showing presented in the Corrected Amended Petition of counsel's ineffectiveness and the highly prejudicial, irrelevant, and false evidence that was admitted at Mr. Benavides's trial.

On appeal, this Court found that trial counsel's belated objection to the testimony of Diana Alejandro, Darlene Salinas, and Virginia Salinas, after their testimony had concluded, failed to preserve the claims on appeal. *People v. Benavides*, 35 Cal. 4th 69, 106 (2005). This Court also concluded, however, that counsel's failure to timely object was not prejudicial because their testimony was not unduly inflammatory or inadmissible. *Id.* Specifically, this Court held that evidence of how Consuelo's death affected her extended family was not improper victim impact evidence. *Id.* This Court, however, did not consider the arguments raised in the Corrected Amended Petition, that counsel was ineffective in failing to object to Darlene's hearsay reference to Cristina's alleged quotation of the Bible, Matthew 19, Verse 14: "Suffer little children unto me, and do not forbid them, for such is the kingdom of heaven," and expressing a wish to God that justice be done. (19 RT 3744.) These religious references were inflammatory and a clear invocation of "higher law" in violation of the Eighth Amendment mandate that the death penalty determination be based on a "sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict." *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2000). This Court also did not consider, due to counsel's failure to raise an objection, that Darlene's statement about what Cristina allegedly stated was inadmissible hearsay. This hearsay contains precisely the type of unreliable statements that the hearsay rule is designed to prevent. It is questionable that nine-year old Cristina actually quoted this portion of the Bible. Cristina was available

and testified at the guilt phase and she could have been called to testify if the prosecutor wanted to present this testimony. Similarly, due to counsel's failure to object on this basis, this Court did not consider that Virginia Salinas's testimony about what Cristina allegedly said about how she felt about Consuelo's death was improper hearsay. (19 RT 3746.) Darlene and Virginia's testimony about what Cristina allegedly stated should have been excluded as unreliable hearsay.

This Court also held that the prosecutor provided sufficient notice of Diana Alejandro, Darlene Salinas, and Virginia Salinas's testimony by informing defense counsel that they would testify. This Court held that counsel was not entitled to a summation of the witnesses' expected testimony.[117] This Court further held that Mr. Benavides could not demonstrate prejudice from any delay in receiving notice because trial counsel had not sought a continuance and failed to cross-examine the witnesses. *Benavides*, 35 Cal. 4th at 107. As explained in Claim Thirteen, subclaim 18(i), counsel was ineffective for failing to do so. Had counsel sought a continuance, counsel could have contacted the witnesses, asked them what they planned to testify about, and prepared for their testimony. If counsel knew the subject of their testimony, counsel could have also raised objections prior to their testifying and ensured that their testimony was limited to admissible and non-inflammatory evidence. Counsel's

[117] Though counsel may not have been entitled to a summation of the testimony, he was entitled to Darlene's written statement under Penal Code section 1054.1(e), requiring disclosure of all "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial." The prosecutor knew beforehand that Darlene intended to read this statement because he told the court that he informed counsel she would be reading a statement. *See Benavides*, 35 Cal. 4th at 106. As such, he was obligated to disclose the statement in discovery.

failure to prepare in any way for the victim impact testimony was part of an overall failure to prepare for the penalty phase.

In sum, Mr. Benavides respectfully urges this Court to reconsider its ruling on appeal in light of the additional reasons that it should have been excluded, as described above and in the Corrected Amended Petition, and cumulative with counsel's general failure to prepare for the penalty phase. Though the victim impact testimony was brief and covered only seven pages of transcript, as this Court noted on appeal, *Benavides*, 35 Cal. 4th at 105, it was the only evidence presented in aggravation. Even relatively small errors in the presentation of that testimony could be prejudicial because the defense mounted such an inadequate penalty presentation. The entire penalty defense testimony covered only fourteen pages of transcript. (19 RT 3751-64.) Accordingly, Mr. Benavides was prejudiced by the admission of this improper victim impact evidence.

### R. Claim Eighteen: The Trial Court Unconstitutionally Ordered Mr. Benavides to Be Shackled During the Trial.

Mr. Benavides has made a prima facie showing that he was unconstitutionally shackled during the trial. Mr. Benavides's claim is supported by the declaration of two witnesses who saw him shackled in court and a newspaper picture of Mr. Benavides in Municipal Court that depicts him in shackles. Respondent argues the claim is procedurally barred and factually unsupported. (Response at 357-61.) Respondent's arguments lack merit.

Respondent erroneously asserts that Mr. Benavides's claim should be rejected based on two procedural grounds. First, Respondent alleges that the claim was waived because Mr. Benavides failed to raise it on appeal. (Response at 357-58, citing *In re Dixon,* 41 Cal. 2d 756, 759 (1953).)

Respondent's talismanic reliance on *Dixon* is inappropriate. The record on appeal does not include the predicate facts necessary to support this claim. Indeed, as Mr. Benavides's claim relies on evidence contained outside of the appellate record that establishes the violation of his rights and the prejudice he suffered as a result of the constitutional violation, the *Dixon* bar may not be applied. *See, e.g.*, *In re Bower*, 38 Cal. 3d 865, 872 (1985); *People v. Harris*, 14 Cal. App. 4th 984, 994 n.4 (1993); *People v. Geddes*, 1 Cal. App. 4th 448, 454 (1991); *People v. Cotton*, 230 Cal. App. 3d 1072, 1083 (1991).

Alternatively, Respondent argues that the claim is procedurally defective due to trial counsel's failure to object in the trial court, thereby waiving the claim on appeal. Respondent cites *People v. Majors*, 18 Cal. 4th 385, 406 (1998), *People v. Tuilaepa*, 4 Cal. 4th 569, 583 (1992), and *People v. Stankewitz*, 51 Cal. 3d 72, 95 (1990). (Response at 358.) While these cases support the application of this rule to the *appeal*, neither these nor any other authorities support the expansion of this rule to *habeas corpus* claims. *See Williams v. Calerdon*, 41 F. Supp. 2d 1043, 1047 n.1 (C.D. Cal. 1998) (defense counsel's failure to object to shackling at trial did not preclude court from considering shackling claim on the merits). However, to the extent this Court concludes that the claim cannot be considered due to trial counsel's failure to object to the restraints, trial counsel's representation was constitutionally deficient and prejudicial in violation of Mr. Benavides's Sixth Amendment right to the effective assistance of counsel. This Court has held that the *Dixon* rule does not bar an ineffective assistance of counsel claim on habeas corpus. *See In re Harris*, 5 Cal. 4th 813, 834 (1993).

A criminal defendant has the right to appear before the jury without shackles or any other physical restraints. *See Illinois v. Allen*, 397 U.S. 337,

344 (1970). Appearing in court with shackles and other physical restraints prejudices the jury against the defendant, thereby reversing the presumption of innocence; impairing the defendant's mental faculties; hindering the ability of a defendant to communicate with his attorney; and detracting from the dignity and decorum of the proceedings. *See Duckett v. Godinez*, 67 F.3d 734, 747-48 (9th Cir. 1995); *Kennedy v. Cardwell*, 487 F.2d 101, 105-06 (6th Cir. 1973). Therefore, the use of shackles or other restraints upon a criminal defendant "should be permitted only where justified by an essential state interest specific to each trial," *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986), and some manifest or compelling need for the use of shackles or other restraints must exist before restraints are imposed, *see Duckett*, 67 F.3d at 748; *People v. Seaton*, 26 Cal. 4th 598, 651 (2001); *People v. Duran*, 16 Cal. 3d. 282, 290-91 (1976).

A trial court "must consider the benefits and burdens associated with imposing physical restraints in the particular case. If the alternatives are less onerous yet no less beneficial, due process demands that the trial judge opt for one of the alternatives." *Spain v. Rushe*, 883 F.2d 712, 728 (9th Cir. 1989). If it is not apparent on the record why shackles or other restraints were imposed, an evidentiary hearing is necessary. *Duckett*, 67 F.3d at 749 n.7. Here there is no indication on the record of why shackles were imposed on Mr. Benavides or that alternative measures were considered.

Contrary to Respondent's assertions, Mr. Benavides has met his burden at this stage of the proceedings of making a prima facie showing that his constitutional rights were violated. *See People v. Duvall*, 9 Cal. 4th 464, 474 (1995) (stating that a petitioner bears the burden "initially to *plead* sufficient grounds for relief, and then later to *prove* them"). Respondent argues that the observations of two witnesses who attended court, Hector Figueroa and Jose Isabel Figueroa, and saw Mr. Benavides shackled do not

establish that the jurors saw the shackles. Respondent is incorrect. The witnesses' observations establish a prima facie case that Mr. Benavides was shackled in front of the jury. Respondent's argument that other witnesses did not also mention the shackling in their declarations does not undermine Mr. Benavides's showing. The factual allegations in the declarations of Hector Figueroa and Jose Isabel Figueroa that they saw Mr. Benavides shackled must be taken as true in determining whether Mr. Benavides has made a prima facie showing. *See Duvall*, 9 Cal. 4th at 475.

Respondent further contends that Mr. Benavides has failed to present evidence supporting the claim that the shackles were painful to him or interfered with this ability to communicate. (Response at 360.) Mr. Benavides's ability to communicate with counsel was hampered by a number of obstacles including the shackles. Mr. Benavides did not have a competent interpreter to allow him to communicate with his counsel. (*See supra* Claims Twelve and Thirteen, subclaim 10.) Mr. Benavides's inherent, severe neuropsychological and intellectual deficits presented a further obstacle to his ability to understand the proceedings and communicate with his counsel. (*See* Ex. 126.) These impediments, together with the physical restraints, affected his ability to participate in his trial.

Thus, Mr. Benavides has pled sufficient factual allegations in support of this claim that warrant the issuance of an order to show cause.

**S. Claim Nineteen: The Trial Court Violated Mr. Benavides's Constitutional Rights by Failing to Properly Instruct the Jury Regarding Mr. Benavides's Parole Eligibility and Its Duty Not to Speculate About Mr. Benavides's Possible Release.**

Mr. Benavides has made a prima facie showing that the trial court failed to correct basic misconceptions regarding the sentencing instructions, leaving the jury to improperly speculate that Mr. Benavides would be released from prison unless sentenced to death. Mr. Benavides was entitled to a clarifying instruction because the jury expressed confusion regarding the life without possibility of parole (LWOP) sentencing option and because the prosecution raised future dangerousness as an issue by presenting testimony that Consuelo's family wanted "justice" in the form of the harshest penalty so that "nothing like this ever happens again to our children" (19 RT 3744), and arguing that Mr. Benavides could never be rehabilitated (19 RT 3785). *See Simmons v. South Carolina*, 512 U.S. 154 (1994) (a defendant must be permitted to inform jury of parole ineligibility to counter state argument that he will present a danger to community if not sentenced to death). In support of this claim, M. Benavides has presented compelling factual support including, but not limited to, empirical studies demonstrating that jurors frequently misunderstand and/or disregard instructions regarding LWOP (RCCAP at 341-44), and evidence that jurors in this case failed to comprehend instructions regarding Mr. Benavides's parole ineligibility and based their decision to sentence Mr. Benavides to death on their erroneous understanding that an LWOP sentence meant Mr. Benavides would "go before a parole board in a few years and have a chance at being let out." (Ex. 109 at ¶ 9.)

Unable to discredit the merits of Mr. Benavides's claim, Respondent answers these allegations by mischaracterizing Mr. Benavides's claim and disregarding applicable facts and law, as demonstrated further below.

### 1. The Claim Is Distinct From the Claim on Appeal and Supported by Extra-Record Evidence Not Available or Considered on Appeal.

Respondent argues that this claim should be "disregarded" because this Court rejected it on appeal. (Response at 361-62, citing *People v. Benavides*, 35 Cal. 4th 69, 114 (2005).) Respondent is incorrect because the claim in the Corrected Amended Petition is supported by substantial evidence not in the appellate record and is distinct from the claim considered by this Court on appeal.

While arguing that Mr. Benavides "adds nothing to the claim rejected on appeal," Respondent also recognizes that the claim is supported by extra-record evidence including empirical studies showing jurors routinely fail to understand the meaning of an LWOP sentence and the declaration of juror Karroll Mulholland, who declares she misunderstood what LWOP meant and persuaded other jurors to sentence Mr. Benavides to death on that basis. (Response at 361-62.) Because the empirical studies and juror declaration contain facts not in the appellate record and they provide substantial support for the claim, this claim is not procedurally barred. *See See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (bar inapplicable when extra-record material has information "of substance not already in appellate record"); *In re Bower*, 38 Cal. 3d 865, 872 (1985) (raising a claim dependent on extra-record materials on habeas was not only "appropriate, but required.").

Furthermore, the habeas claim is distinct from the claim on appeal not only because it is supported by substantial extra-record evidence, but

also because it addresses matters not considered by this Court on appeal. This Court did not consider the claim raised in the Corrected Amended Petition that counsel was prejudicially ineffective for agreeing to have the court re-read the confusing instruction to the jurors rather than requesting that the court instruct the jurors not speculate about the possibility of Mr. Benavides's release in determining the appropriate sentence. Indeed, because counsel acceded to the court's proposal to re-read the instruction, this Court found the appellate challenge to the instruction was "forfeited." *People v. Benavides*, 35 Cal. 4th at 114. This Court's further discussion of the claim addressed only whether it was "mandatory" for the court to explain to the jurors, notwithstanding counsel's failure to so request, that it violated their duty to speculate about post-conviction proceedings. *Id.* On appeal, this Court also did not consider the claim raised in the Corrected Amended Petition that the court, in responding to the jurors' question about LWOP, incorrectly informed the jurors that if they sentenced Mr. Benavides to LWOP there was a "chance" that he would serve the rest of his life in prison. (19 RT 3827.)

Accordingly, because the claim raised in the Corrected Amended Petition is supported by significant extra-record evidence and is distinct from the claim considered by this Court on appeal, it is not procedurally barred from consideration on the merits in the instant proceeding.

**2. The Jury Was Incorrectly Instructed on the Law.**

The jury in Mr. Benavides's case was instructed:

> A sentence of life without 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.

(3 CT 767; 19 RT 3776.) This Court has held that the following, nearly identical instruction, is an "incorrect statement of the law":

> A sentence of life without possibility of parole means that [the defendant] will remain in state prison for the rest of his life and will not be paroled at anytime. A sentence of death means that [the defendant] will be executed in the gas chamber.

*People v. Letner*, 50 Cal. 4th 99, 204 (2010). In *Letner*, this Court cited *People v. Thompson*, 45 Cal. 3d 86, 130-31 (1988), in which the defendant proposed a similar instruction,[118] to explain why the instruction is an incorrect statement of the law. As this Court explained in *Thompson*:

> It is as incorrect to tell the jury the penalty of death or life without possibility of parole will inexorably be carried out as it is to suggest they need not take their responsibility as seriously because the ultimate determination of penalty rests elsewhere.
>
> The proposed instruction also invites, although not explicitly, the same sort of speculation as to whether unidentified officials will in the future perform their job in a specified way and whether defendant will be unsuitable for any modification of his sentence.

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[118] The instruction proposed in *Thompson* contains the same flaws as that given in Mr. Benavides's trial. The proposed instruction in *Thompson* was as follows:

> You are instructed that if your decision in the penalty phase of this trial, is that the defendant should be put to death, the sentence will be carried out. On the other hand, if you determine that life without the possibility of parole is the proper sentence, you are instructed that the defendant will never be released from prison.

*Thompson*, 45 Cal. 3d at 129.

*Thompson*, 45 Cal. 3d at 130-31; *People v. Fierro*, 1 Cal. 4th 173, 250 (1992) (explaining that the instruction in *Thompson* "contains the twin vices of misstating the facts and inviting . . . speculation . . ."). The trial court's inaccurate and misleading instruction violated the state constitutional right to due process. *See Ramos*, 37 Cal. 3d at 155 (concluding that misleading nature of Briggs Instruction and fact that it invited speculation as to Governor's commutation power rendered it unconstitutional under the state constitutional guarantee to due process). The fact that the erroneous instruction also invited the jury to "believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere" also violated Mr. Benavides's Eighth Amendment right to heightened reliability in sentencing proceedings. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

This Court's concern that the proposed instruction invites the jurors to speculate whether unidentified officials would carry out their job is well-founded. That is precisely what happened in the instant case. Prior to deliberation, the trial court instructed the jury, including by reading the instruction cited above. (19 RT 3776.) Thereafter, during deliberations, the jury sent a note asking for further explanation about the meaning of an LWOP sentence and indicating that the jurors were improperly speculating about the possibility of Mr. Benavides's release if he received an LWOP sentence. The juror's note reads as follows:

> Life without possibility of parole—how permanent is it? Can this be overturned in the future by legal changes? (Other than appeal) Is there a chance for him to walk out of prison EVER!! Explanation?

(3 CT 782.) The fact that the jurors sent the note leaves "no doubt about its failure to gain from . . . . the judge's instructions any clear understanding of what a life sentence means." *Shafer v. South Carolina*, 532 U.S. 36, 53

(2001); *see also Simmons*, 512 U.S. at 178 (O'Connor, J.) ("that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison"). Though it was clear the instruction was inadequate to explain to the jurors the meaning of LWOP and admonish them of their duty not to speculate about Mr. Benavides's possible release, the court simply re-read them the instruction. The court, however, aggravated the error of incorrectly stating the law by prejudicially adding the word "chance" in reference to an LWOP sentence. The court stated that the instruction

> reads, quote, a *chance* 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, period. A sentence of death means that Mr. Benavides will be executed in state prison, period, end quotes.
>
> That instruction answers your question.

(19 RT 3827-28) (emphasis added).[119]

Rather than dispel the jury's confusion about the sentence or clarify its duty not to speculate about Mr. Benavides's possible release, the court's inaccurate statement of the law exacerbated the jurors' misunderstanding of an LWOP sentence. As explained by juror Mulholland, she wrote the note to the court because she wanted clarification as to whether an LWOP sentence "meant he could get out some day." (Ex. 109 at ¶ 9.) Juror Mulholland understood the court's response to be that "he could not answer

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[119] In the direct appeal opinion this Court misquoted this portion of the record and thus based its decision on a clearly erroneous view of the facts. This Court erroneously stated that the trial court reread the instruction as: "'A *sentence* of life without the possibility of parole means . . . ." *People v. Benavides*, 35 Cal. 4th at 114 (emphasis added).

the question either way." (Ex. 109 at ¶ 9.) As a result, juror Mulholland maintained her incorrect understanding of the law and sentenced Mr. Benavides to death based on her understanding that an LWOP sentence would mean that he "was going to go before a parole board in a few years and have a chance at being let out." (Ex. 109 at ¶ 10.) Further, she persuaded several other jurors, who were initially in favor of sentencing Mr. Benavides to LWOP, that because there was a possibility that "Benavides could get out in the future," and because child molesters cannot be rehabilitated, that he should be sentenced to death. (Ex. 109 at ¶ 10.) As a result of Juror Mulholland's statements the jurors changed their vote and sentenced Mr. Benavides to death. (Ex. 109 at ¶ 10.)[120]

Numerous empirical studies cited in support of this claim in the Corrected Amended Petition demonstrate that the skepticism and confusion of the jurors in Mr. Benavides's case about the meaning of LWOP is common and directly influences a jury's likelihood of imposing a death sentence. (RCCAP at 341-44.) Significantly, one of the cited empirical studies reports on a poll of 1,000 registered voters nationwide, taken in March 1993, when Mr. Benavides's jury was being selected, that showed that only eleven percent of those polled believed that a person sentenced to life without parole would never be released. Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty* (Apr. 1993), http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty. This Court has dismissed similar studies in

[120] Respondent's argument that juror Mulholland's declaration "should be disregarded" is unsupportable. (Response at 361.) As explained in Claim Fifteen, juror Mulholland's conduct in talking to and persuading other jurors to vote for a death sentence is admissible evidence. *See People v. Allen*, 53 Cal. 4th 60, 75 (2011) (holding that court "appropriately relied on the jurors' recitation of what Juror [] had said" in determining whether there was misconduct).

direct appeal opinions because they are "not part of the [appellate] record or subject to cross-examination." *People v. Boyer*, 38 Cal. 4th 412, 487 (2006). Those concerns obviously are not present in a habeas proceeding where the empirical studies must be taken as true and their validity can be examined at an evidentiary hearing if this Court issues an order to show cause. *See People v. Duvall*, 9 Cal. 4th 464, 475 (1995). Moreover, the empirical studies simply provide circumstantial support for the direct evidence in this case that the jurors actually sentenced Mr. Benavides to death based on their improper understanding and speculation about his possible release if he were sentenced to LWOP.

Respondent argues that even assuming the empirical studies are valid, they do not overcome the presumption that jurors comprehend and accept the court's instructions. (Response at 363, citing *People v. Mickey*, 54 Cal. 3d 612, 69, n.17 (1991).) However, Respondent notably omits from the instant Response a citation to *People v. Gallego*, 52 Cal. 3d 115, 201-02 (1990), which Respondent cited in the 2003 Response. (*Compare* 2003 Response at 172 *with* Response at 363.) As quoted by Respondent in its 2003 Response, *Gallegos* holds that: "*[i]n the absence of evidence that the jury actually considered the Governor's commutation power*, there is no reasonable possibility the court's failure to give the cautionary instruction prejudiced defendant." *Gallegos*, 52 Cal. 3d at 201-02 (emphasis added); *see also Fierro*, 1 Cal. 4th at 250 (holding that "absent any evidence to suggest that the jury was confused about the issue or concerned that their sentence would not be carried out, the failure to [] instruct [the jury that they should assume the sentence would be carried out] cannot be deemed prejudicial"). The *Gallegos* holding is critical because it illustrates the importance of the facts presented in support of this claim showing that jurors indeed improperly considered impermissible factors in sentencing

Mr. Benavides to death that rebut the presumption that the jurors understood and followed the court's instructions. Juror Mulholland's declaration, in conjunction with the empirical studies, indicate that failure to properly instruct the jurors in this case was not harmless as they demonstrate that there is a reasonable likelihood that the jury applied the court's instruction in a way that prevented it from considering constitutionally relevant evidence. *See Boyde v. California*, 494 U.S. 370, 380 (1990) (holding that where an instruction is ambiguous and therefore subject to an erroneous interpretation the proper prejudice inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

Respondent's reliance on *People v. Ramos*, 37 Cal. 3d 136 (1984), is also misplaced. Respondent appears to argue that *Ramos* stands for the proposition that a defendant is never entitled to any clarifying instructions unless the jurors expressly raise the issue of the Governor's commutation power with the court. Respondent argues that because the jurors in Mr. Benavides's case referred only to "future legal changes" and "a chance for him to walk out of prison," rather than the Governor's commutation power, Mr. Benavides was not entitled to the clarifying instruction referred to in *Ramos*. (Response at 363.) This Court's appellate opinion in Mr. Benavides's case refutes Respondent's position. This Court did not find any meaningful distinction between the future legal changes that Mr. Benavides's jurors inquired about and the commutation power referred to in *Ramos*. This Court referred to *Ramos* as suggesting that jurors should be admonished that it violates their duty to speculate about a defendant's release "[w]hen the jury makes a specific inquiry about how *a postconviction proceeding such as commutation* might affect defendant's

sentence." *Benavides*, 35 Cal. 4th at 115 (emphasis added). This Court's reference to *Ramos* in the context of Mr. Benavides's case and reference to inquiries about postconviction proceedings generally in summarizing the holding in *Ramos* refutes Respondent's argument that specific instructions are not required absent jury inquiries specifically about commutation. *See Ramos*, 37 Cal. 3d at 155-56 (explaining that the holding in *People v. Morse*, 60 Cal. 2d 631, 636-53 (1964), establishes that any instruction which permits a sentencing jury to consider "a variety of potential postconviction actions by other governmental entities—parole, commutation, trial court review—in determining the sentence that the defendant should receive. . . . . [is] totally improper and inconsistent with the jury's proper decisionmaking role").

Respondent's reliance on *Weeks v. Angelone*, 528 U.S. 225 (2000), is equally misguided, as *Weeks* is distinguishable on its facts and addresses different instructional issues than those at issue here. The *Weeks* jury sent the trial judge two separate notes during deliberations asking the court to clarify instructions. *Id.* at 228-29. The first note asked whether life imprisonment in Virginia came with a possibility of parole. *Id.* at 228. The trial court referred the jury to the previously read instruction *and* admonished the jurors not to concern themselves with what may happen after sentencing. *Id.* The second note from the *Weeks* jury informed the court that they had found at least one aggravating circumstance true. *Weeks*, 528 U.S. at 229. The jurors asked if they were therefore *required* to sentence the defendant to death or if they were then supposed to deliberate further and decide between life or death. *Id.* Again, the trial judge directed the jurors to the previously read instruction. *Id.* The United States Supreme Court held that the jury had been adequately instructed that they were not required to render a death verdict upon finding at least one

aggravating circumstance true beyond a reasonable doubt. *Id.* at 234. The jury made no further indication that they intended to impermissibly speculate about future legal proceedings. Moreover, evidence that the *Weeks* jury continued to deliberate instead of immediately returning a verdict indicated that they understood deliberations were not complete upon finding an aggravating factor true. *Id.*

Here, by contrast, the trial court failed to adequately correct the jury's misunderstanding in several respects. First, the court failed to admonish the jury not to consider potential future legal challenges as aggravation. Second, the jurors explicitly informed the court of their intention to speculate on the outcome of future legal proceedings and indicated their belief that a death sentence would not provide Mr. Benavides with the same opportunities to challenge the verdict. Rereading the instruction alone did not cure the problem of impermissible speculation by the jury. The court only added to the confusion by misreading the instruction as referring to a life sentence as a "chance of life without the possibility of parole" instead of a "sentence of life without the possibility of parole," implying to the jury that there was only a chance that a life without parole sentence really meant life petitioner would not be paroled. In the absence of a clarifying instruction, the jury was left to speculate that the only way to avoid Mr. Benavides's ultimate release from prison was to sentence him to death. (Ex. 109.) Moreover, as discussed further below, Mr. Benavides was independently entitled to a clarifying instruction because the prosecution raised future dangerousness as an issue in closing arguments and in testimony introduced during the penalty phase. *See Simmons,* 512 U.S. at 154; *Coleman v. Calderon*, 210 F.3d 1047, 1051 (9th Cir. 2000) (by emphasizing the threat the defendant posed to the public during closing argument, the prosecutor exacerbated the impact of harmful instructions

that effectively invited the jury to speculate on whether the defendant would be released some time in the future if not sentenced to death).

Respondent next attempts to mischaracterize Mr. Benavides's claim as demanding jury instructions that "accurately summarize all of the various possibilities that may apply to a particular case after conviction." (Response at 364.) Respondent states that "[a]dvising a lay jury about issues like commutation, executive clemency, direct appellate review, state collateral review, and federal habeas corpus review, is necessarily going to 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." (Response at 364.)

Mr. Benavides does not contend that such elaborate instructions were necessary here. Instead, Mr. Benavides's claim is that the court should have instructed the jurors as this Court suggested in *Ramos,* that legal challenges are available to a defendant under both sentences and to emphasize that it is a violation of the juror's duty to speculate about the possibility of a defendant's release in determining a sentence. *Ramos*, 37 Cal. 3d at 159 n.12. At the very least, Mr. Benavides was entitled to an instruction such as that recommended by this Court in *People v. Letner*:

> It is your responsibility to decide which penalty is appropriate in this case. You must base your decision upon the evidence you have heard in court, informed by the instructions I have given you. You must not be influenced by speculation or by any considerations other than those upon which I have instructed you.

*Letner*, 50 Cal. 4th at 206. The Court's failure to thus instruct the jurors and counsel's failure to request such an instruction violated Mr. Benavides's state and federal constitutional rights.

### 3. Mr. Benavides Was Constitutionally Entitled to Clarifying Instructions Regarding His Parole Ineligibility Because of the Prosecution's References to Future Dangerousness.

When "a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.'" *Shafer v. South Carolina*, 532 U.S. at 39 (citing *Ramdass v. Angelone*, 530 U.S. 156, 165 (2000), as describing the premise and plurality opinion in *Simmons v. South Carolina*, 512 U.S. 154 (1994)). Mr. Benavides was entitled to clear and unambiguous instructions regarding permissible sentencing options and how those options may limit risks of future dangerousness. *See Simmons*, 512 U.S. at 161-62; *see also Coleman*, 210 F.3d at 1051. "Even if the trial court's instruction successfully prevented the jury from considering parole, petitioner's due process rights still were not honored. Because petitioner's future dangerousness was at issue, he was entitled to inform the jury of his parole eligibility." *Simmons*, 512 U.S. at 171. In other words, even if the court's rereading of the instruction did suffice to inform the jurors that they must not consider parole, the instruction did not comply with due process because it did not inform the jurors about Mr. Benavides's parole ineligibility.

The prosecution raised the issue of Mr. Benavides's future dangerousness when he elicited Darlene Salinas's testimony that Consuelo's family wanted "justice to be done," implying that justice meant the imposition of the death penalty, so that "nothing like this ever happens again to our children." (19 RT 3744.) The prosecution thereby implied that anything less than death would present a further threat to children. The

prosecutor also raised the issue by arguing in closing remarks that Mr. Benavides could not be rehabilitated and, therefore, would continue to pose a threat of harm. (19 RT 3785.) This evidence and argument entitled Mr. Benavides to clear instructions regarding his parole ineligibility. Failure to clarify the sentencing instructions fostered the jury's fundamental misunderstanding regarding Mr. Benavides's parole ineligibility, particularly in light of the prosecution's argument that he would remain a dangerous criminal. Jurors were, therefore, presented with an unacceptable dilemma, as they believed they had no choice but to sentence Mr. Benavides to death to keep him off the streets. "The State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Simmons*, 512 U.S. at 171. Juror Mulholland's declaration confirms that the jurors chose death based on this false dilemma. (Ex. 109 at ¶ 10.)

The fact that the jury expressed their confusion regarding Mr. Benavides's parole eligibility to the court proves that the instructions given were insufficient. Indeed, as the Court in *Simmons* noted, "[i]t almost goes without saying that if the jury in this case understood [the meaning of the instructions] there would have been no reason for the jury to inquire about petitioner's parole eligibility." *Simmons*, 512 U.S. at 170 n.10. Mr. Benavides was entitled to an instruction to correct this misunderstanding.

Rereading the instruction was insufficient. That the court misread the instruction by referring to the a life sentence as "a *chance*" of life without the possibility of parole instead of a sentence of life without parole only added to the confusion and rendered additional instructions all the more necessary. Respondent fails to rebut Mr. Benavides's claim. In response, Respondent simply argues that the prosecutor is entitled to present

argument regarding the future dangerousness of a defendant in a capital case, a premise Mr. Benavides has not challenged. (Response at 364.)

Though this Court has "rejected repeatedly the contention the absence of an instruction concerning the meaning of a sentence of life imprisonment without the possibility of parole violates a defendant's federal constitutional rights," *Letner*, 50 Cal. 4th at 207, this Court has not considered a situation such as the instant case where the jury expressed confusion about parole eligibility, the court mis-instructed the jury, and affirmative admissible evidence exists that the jurors based their decision on improper speculation and an erroneous understanding of parole eligibility. This Court's reasoning for rejecting constitutional challenges under *Simmons* is that unlike the South Carolina instructions found unconstitutional in *Simmons*, jurors in California are "informed that a life verdict is without the possibility of parole." *People v. Smith*, 30 Cal. 4th 581, 635-36 (2003); *see also People v. Rundle*, 43 Cal. 4th 76, 187 (2008). The factual support for this claim demonstrates that, despite being informed that a life verdict is without possibility of parole, the jurors were not sufficiently apprised that a life sentence indicated Mr. Benavides would never be released on parole. Accordingly, the failure to instruct jurors about Mr. Benavides's parole ineligibility if they sentenced him to LWOP violated his Fifth and Fourteenth constitutional right to Due Process. *Simmons*, 512 U.S. at 161 (holding Due Process Clause does not allow the execution of a person on the basis of information they had no opportunity to deny or explain). Even if this Court determines that the evidence introduced by the prosecution and arguments in closing did not raise the issue of future dangerousness, Mr. Benavides was still entitled to relief under the Eighth Amendment which guarantees heightened reliability in the

sentencing determination in capital cases. As explained by Justice Souter in his concurring opinion in *Simmons*,

> whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrarily or discriminatorily" and "wantonly and ... freakishly imposed."

*Id.* at 172 (Souter, J., concurring) (citing *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring) (internal quotation marks omitted)).

**4. Trial Counsel Was Ineffective for Failing to Request Clarifying Instructions.**

As indicated above, on appeal this Court held that Mr. Benavides had "forfeited" his right to challenge the court's re-reading of the instruction to the jury in response to their note because his counsel raised no objection to the court's response. *Benavides*, 35 Cal. 4th at 114. In dicta, this Court further explained that although in *Ramos* this Court had suggested that courts advise a jury inquiring about postconviction proceedings that it is a violation of their duty to consider the possibility of commutation in determining the appropriate sentence, such an instruction is not mandatory. *Id.* This Court, however, did not consider the claim raised in the Corrected Amended Petition that counsel unreasonably and prejudicially failed to request such an instruction.

In response to Mr. Benavides's claim of counsel's ineffectiveness, Respondent argues that "[g]iven the nature of the law, it is doubtful that an objection would have moved the court to undertake any alternative course of action." (Response at 365.) Respondent is incorrect. *Ramos,* which was decided seven years before Mr. Benavides's trial, provided firm authority for counsel to request an instruction clarifying the jury's duty. Had counsel

referred to *Ramos* as authority for admonishing the jury not to speculate about the possibility of Mr. Benavides's release it is likely that the Court would have followed this Court's advice on the "best" way to handle such inquiries from the jury. In *Ramos* this Court held that when a jury raises a question about a postconviction proceeding such as commutation "the matter obviously cannot be avoided and is probably *best handled* by a short statement indicating that the Governor's commutation power applies to both sentences *but emphasizing* that it would be a violation of the juror's duty to consider the possibility of such commutation in determining the appropriate sentence." *Ramos*, 37 Cal. 3d at 159 n.12 (emphasis added). Similarly, here, counsel could have requested that the Court instruct jurors that postconviction legal challenges apply to both sentences and emphasizing that they would violate their duty if they considered such challenges in determining the appropriate sentence. Juror Mulholland's declaration establishes that it is reasonably probable that counsel's failure to request such an instruction prejudiced Mr. Benavides. Consequently, Mr. Benavides was denied his Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984).

For these reasons, the judgment of death was unreliable and must be vacated.

### T. Claim Twenty: Mr. Benavides Is Ineligible for the Death Penalty Because He Is Mentally Retarded.

In the Corrected Amended Petition Mr. Benavides established a prima facie case that he is ineligible for a death sentence under *Atkins v. Virginia*, 536 U.S. 304 (2002), and California Penal Code section 1376 because he is mentally retarded. In support of the claim Mr. Benavides provided extensive and detailed factual support, including the declaration of a

qualified neuropsychologist, establishing that he is mentally retarded. Respondent's factual disputes with allegations in support of the claim do not negate the prima facie case and instead underline the need for an evidentiary hearing to resolve those disputes. *See, e.g.*, *In re Hawthorne*, 35 Cal. 4th 40, 52 (2005).

### 1. Applicable Law

In *Atkins v. Virginia*, the Supreme Court held that the execution of a mentally retarded offender is excessive punishment in violation of the Eighth Amendment. *Atkins*, 536 U.S. at 321. The Supreme Court left to the States the task of developing procedures to enforce the constitutional restriction against executing the mentally retarded. *Atkins*, 536 U.S. at 317. In response, the California Legislature enacted California Penal Code section 1376,[121] which sets out procedures at trial for determining whether a defendant claiming to be mentally retarded is eligible for the death penalty. The statute, however, makes no provision for cases where the death penalty has already been imposed. This Court addressed the question of what procedures should govern in post-conviction in *In re Hawthorne*, 35 Cal. 4th at 40.

This Court held that to state a prima facie case for relief in post-conviction "the petition must contain 'a declaration by a qualified expert stating his or her opinion that the [petitioner] is mentally retarded.'" *Hawthorne*, 35 Cal. 4th at 47 (citing Cal. Penal Code § 1376(b)(1).) The expert's declaration "must set forth a factual basis for finding the petitioner has significantly subaverage intellectual functioning and deficiencies in adaptive behavior" in the categories of adaptive skills referred to in

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[121] All further references to "section 1376" refer to Penal Code section 1376, unless otherwise specified.

standard clinical definitions of mental retardation. *Id.* at 48. "The evidence must also establish that the intellectual and behavioral deficits manifested prior to the age of 18." *Id.*

Section 1376, subdivision (a) defines mental retardation as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." This Court noted that the Legislature derived this definition from standard clinical definitions of mental retardation that were also referred to by the Supreme Court in *Atkins*. *Hawthorne*, 35 Cal. 4th at 47. In *Atkins*, the Supreme Court referred to the definition of mental retardation of the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA). *Atkins*, 536 U.S. at 309 n.3. The AAMR's definition of mental retardation referred to in *Atkins* 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: 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.

AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992) (hereinafter "AAMR 1992 Manual"). The APA definition of mental retardation is very similar to the AAMR's 1992 definition. The APA definition is as follows:

> 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 age 18 years (Criterion C).

APA, *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed., text rev. 2000) (hereinafter "DSM-IV-TR").

In 2002 the AAMR revised its definition of mental retardation, focusing on refining its description of the adaptive skills component. The 2002 AAMR definition is as follows:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002) (hereinafter "AAMR 2002 Manual").

All of the definitions share three common components, although the articulation and elements may differ. These are intellectual impairment, adaptive behavior deficits or disabled daily functioning, and early onset or manifestation of affliction with mental retardation.

### 2. The Declaration of Antonio E. Puente, Ph.D., Is Properly Before This Court and Establishes a Prima Facie Case for Relief.

Respondent objects to the replacement of the declaration of neuropsychologist Ricardo Weinstein, Ph.D., submitted in support of this claim with the Petition for Writ of Habeas Corpus filed in 2002 (2002 Petition), with the declaration of neuropsychologist Antonio E. Puente, Ph.D., submitted in support of this claim with the Corrected Amended Petition filed in 2008 (2008 Petition). Respondent argues that Mr. Benavides has not shown that replacement of the declaration was necessary as a result of Ms. Culhane's fraudulent work product. Respondent further

alleges that Dr. Weinstein's declaration was deficient and that Mr. Benavides is using Ms. Culhane "as a pretext to withdraw a deficient opinion." (Response at 369-72.) Respondent's arguments are unfounded.

As explained by the HCRC Executive Director Michael Laurence in his declaration accompanying the Corrected Amended Petition, it was necessary to request that Dr. Puente conduct an independent neuropsychological examination of Mr. Benavides and to replace Dr. Weinstein's declaration with Dr. Puente's to avoid any suggestion that the declarations tainted by Ms. Culhane's fraud influenced Dr. Weinstein's findings. *See* Declaration of Michael Laurence in compliance with orders for November 1, 2006 and January 23, 2008, filed April 22, 2008 at 6. Dr. Weinstein reviewed numerous social history declarations, which have since been withdrawn, and, in part, based his assessment of Mr. Benavides's cognitive and neuropsychological functioning on the information in those declarations. It would be very difficult for Dr. Weinstein to erase from his memory the information in the withdrawn declarations and replace it with the information in the new social history declarations. This is especially true because some of the information in the new social history declarations was similar to the information in the declarations submitted with the 2002 Petition.[122] Given the potential for Dr. Weinstein confusing the information

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[122] The information is similar in some of the social history declarations because Ms. Culhane appears to have relied in part on some of the information obtained by post-conviction counsel in preliminary interviews with social history witnesses and possibly some of her own interviews with them to compose her fraudulent declarations. (*See, e.g.*, Ex. 96 at ¶ 15 (declaration of Juana Flores Rivera indicating that she was initially interviewed by Mr. Benavides's attorney, Cristina Bordé, and another lady, but was never subsequently contacted by Kathleen Culhane); Ex. 111 at ¶ 63 (declaration of Norma Patricia Yañez Benavides indicating she initially met Ms. Bordé, Mr. Laurence, and Odalys Rojas, and later met and was

in the withdrawn declarations with the information in the new declarations, it was necessary for post-conviction counsel to obtain an independent evaluation from a new expert. As such, the replacement of Dr. Weinstein's declaration with that of Dr. Puente clearly conforms to this Court's order allowing for amendment of the petition to include new exhibits in support of the claim "made necessary by the fraudulent work product of Kathleen Culhane." *In re Benavides*, Case No. S111336, order filed January 23, 2008.

Respondent's disagreement with post-conviction counsel's decision how to best represent Mr. Benavides and prevent him from being prejudiced any further from Ms. Culhane's fraud does not render Dr. Puente's declaration improper under this Court's directive. In arguing that post-conviction counsel should have asked Dr. Weinstein to review the new declarations, rather than obtaining an opinion from an expert not tainted by such information, Respondent makes a comparison to Dr. Wood's replacement declaration. (Response at 371.) The comparison is inapposite. Unlike Dr. Weinstein, Dr. Wood's initial assessment relied mainly on Cristina Medina's transcribed statements to law enforcement and was tainted by only one declaration that was subsequently withdrawn. (Ex. 89 at ¶ 14 n.1.) Dr. Weinstein, by contrast, read literally dozens of declarations that were fraudulently prepared by Ms. Culhane and which have since been withdrawn, and relied heavily on them to formulate his expert opinion. Accordingly, Dr. Weinstein, unlike Dr. Wood, had a much greater potential to be confused by the withdrawn declarations.

Respondent's allegation that Mr. Benavides is using Ms. Culhane as a "pretext" to replace Dr. Weinstein's deficient declaration because it

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interviewed by Ms. Culhane, but that the declaration that Ms. Culhane represented was hers does not appear to be the one she signed).)

allegedly "did not identify any deficits in adaptive behavior" is baseless. (Response at 370.) Dr. Weinstein conducted a comprehensive neuropsychological examination of Mr. Benavides over the course of five days in 2002. (Former Ex. 151 at ¶ 7.) In addition to interviewing and testing Mr. Benavides, he reviewed dozens of declarations of Mr. Benavides's family members, friends, neighbors, priest, and doctor. (Former Ex. 151 at ¶ 8.) He "reviewed Mr. Benavides's school records from San Gabriel, Mexico, as well as declarations of his teachers, former schoolmates, and coworkers regarding Mr. Benavides's mental capabilities at school and skills and activities on the job." (Former Ex. 151 at ¶ 8.) Based on his evaluation and review of the social history declarations and school records, Dr. Weinstein found that Mr. Benavides's "adaptive skills are indicative of substantially below average intellectual functioning." (Former Ex. 151 at ¶ 105.) Dr. Weinstein specifically discussed in his declaration evidence of Mr. Benavides's cognitive deficits, which included his poor school performance, difficulties doing home repairs, understanding the use of pesticides, counting money, protecting himself from his father's abuse, keeping track of his finances as an adult, driving, and obtaining employment that required more complex skills than picking harvests. (Former Ex. 151 at ¶¶ 51-58.) These are all deficiencies in adaptive functioning skills referred to in the clinical definitions of mental retardation including self-care, home living, use of community resources, self-direction, functional academic skills, work, health, and safety. *See* DSM-IV-TR at 41. That Respondent failed to recognize them as adaptive functioning deficits appears to be a function of Respondent's lack of understanding of what constitutes adaptive skills. Perhaps Respondent did not recognize them as such because Dr. Weinstein did not specifically refer to adaptive functioning domains or specific adaptive skills. However, there

is no requirement of labeling them as such to establish a prima facie case. This Court in *Hawthorne*, which was decided after Dr. Weinstein signed his declaration and the 2002 Petition was filed, stated only that an expert declaration "must *set forth a factual basis* for finding the petitioner has significantly subaverage intellectual functioning and deficiencies in adaptive behavior in the categories" described in the clinical definitions of mental retardation. *Hawthorne*, 35 Cal. 4th at 48 (italics added). Dr. Weinstein's declaration clearly sets forth the factual basis for his opinion that Mr. Benavides had deficiencies in adaptive behavior. Accordingly, Respondent's argument that Dr. Weinstein's declaration was deficient and that Petitioner is using Ms. Culhane's fraud as a pretext to replace it is unfounded and offensive.[123]

**3. Mr. Benavides Has Made a Prima Facie Showing That He Is Mentally Retarded.**

Based on Respondent's lay understanding of the significance of intelligence quotient (IQ) scores and adaptive behaviors, Respondent raises a number of objections to Dr. Puente's expert opinion that Mr. Benavides is mentally retarded. (Response at 372-411.) Respondent ignores the general rule established by this Court in *Hawthorne* that a petitioner is entitled to an Order to Show Cause, returnable in the superior court, with directions to hold a hearing on the question of a petitioner's mental retardation, where a petitioner has submitted the declaration of a qualified expert such as Dr. Puente. *Hawthorne*, 35 Cal. 4th at 49. As this Court explained, arguments that declarations, taken at face value, do not establish a petitioner is

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[123] Respondent only recently contrived this purported deficiency in Dr. Weinstein's declaration as Respondent did not object to it on that basis in its 2003 Response. (2003 Response at 174-191.)

mentally retarded, emphasize, rather than negate the need for a hearing to resolve the factual disputes:

> Rather than negate petitioner's prima facie showing, this argument simply highlights the factual nature of the dispute between the parties—a circumstance particularly appropriate to a full evidentiary hearing on the ultimate question.

*Hawthorne*, 35 Cal. 4th at 52. Accordingly, Respondent's objections do not preclude the issuance of an order to show cause. Further, as shown below, Respondent's objections are meritless and do not preclude relief.

**a. Mr. Benavides Has Significantly Subaverage Intellectual Functioning That Manifested Itself Before the Age of 18.**

Respondent's arguments that Mr. Benavides has not "proven" he has significantly subaverage intellectual functioning that manifested before he was 18, evince not only her lay ignorance of what is required to meet the intellectual functioning prong, but also her continued misapprehension of Mr. Benavides's burden of proof at this stage of the proceedings. Mr. Benavides need only make a prima facie showing that he suffers from mental retardation, not "prove" that he has this affliction as Respondent insists. *People v. Duvall*, 9 Cal. 4th 464, 475 (1995). As stated above, a prima facie case is shown by submission of a declaration from a qualified expert indicating a petitioner is mentally retarded. *Hawthorne*, 35 Cal. 4th at 47.

Dr. Puente is clearly a qualified expert and, Respondent does not, nor can she, contest his qualifications. Dr. Puente is a clinical neuropsychologist who has been a Professor of Psychology at the University of North Carolina, Wilmington, since 1990. (Ex. 126 at ¶ 4.) He is fluent in English and Spanish, and has authored and co-authored a

number of books, book chapters, and articles in peer-reviewed publications in Spanish and English, about various topics in neuropsychology including neuropsychological testing of Spanish-speakers. (Ex. 126 at ¶¶ 6-7.) From 1989 to 1996, he served as the External Project Director for the Spanish translation and standardization of the Wechsler Intelligence Scale for Children (WISC). (Ex. 126 at ¶ 9.) He has qualified to testify as an expert in psychological and neuropsychological evaluation and the diagnosis of cognitive deficits, including mental retardation, in federal and state courts and has testified numerous times on these subjects. (Ex. 126 at ¶ 10.) Dr. Puente clearly has the qualifications, training, knowledge, and experience to provide a reliable expert opinion about Mr. Benavides's neuropsychological and cognitive functioning.

Respondent's disagreements with Dr. Puente's expert opinion that Mr. Benavides has subaverage intellectual functioning are based on ignorance of the clinical criteria and school conditions in rural Mexico. Respondent argues, for example, that Mr. Benavides has not shown he had subaverage intellectual functioning before the age of 18 because he has not "introduced any IQ scores," or shown that he was "diagnosed as mentally retarded" or that he was "placed in special education classes," when he attended school in rural Mexico during the 1950's and 1960's in his childhood and adolescence. (Response at 373, 378.) Obviously, none of these were available in the impoverished rural schools in Mexico that Mr. Benavides attended. Mr. Benavides attended *primaria*, or elementary school in Los Camichines, a small *rancho* or hamlet in rural Mexico inhabited by about six families at the time. (*See* Ex. 115 at ¶ 42, 6067 (photograph of Los Camichines in 2007, which has improved considerably since Mr. Benavides's childhood according to his neighbor Emilia Gonzales, a lifelong resident).) The schoolhouse was a one-room, adobe structure that

flooded in the rainy season. There was only one teacher who alone taught children of all ages in the one-room schoolhouse. (Ex. 115 at ¶ 46.) Mr. Benavides attended *secundaria*, or middle school, in San Gabriel, a town in rural Mexico. (*See* Ex. 124 at 6295-96 (displaying pictures of San Gabriel in 1975).) The schoolhouse was used as both an elementary and middle school, but had only small desks that were too small for the middle school children, who sat cramped two to a small desk. The school used gas lamps because they did not have electricity. (Ex. 123 at ¶¶ 5-6; Ex. 116 at ¶ 8.) The only teaching materials available to the teachers were chalk, a chalkboard, tape player, and posters. (Ex. 116 at ¶ 8.) Given the poverty and resource-limitations at these schools, the teachers were clearly not equipped to provide special education classes or give IQ tests, which likely did not even exist in Spanish at the time. Respondent's complaint that Mr. Benavides has not provided such evidence is absurd.[124]

Next, Respondent asserts, without explanation, that Mr. Benavides's IQ scores in 2002 and 2007 do not "prove" his intellectual functioning was

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[124] Further, as explained in the article cited by Respondent, standardized test scores are not required and usually are not available to show mental retardation prior to the age of 18:

> The clinical definitions neither specify nor require that evidence of onset be established by a standardized instrument testing intelligence or adaptive behavior. Most often, individuals with mental retardation have not taken standardized assessments of intelligence or adaptive functioning prior to the age of eighteen. . . . Some foreign nationals may not have grown up in an environment where standardized intelligence testing was available.

John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 730 (2009).

significantly below average before 18. (Response at 373.) Again, Mr. Benavides need not "prove" he meets the criteria; he need only make a prima facie showing supported by an expert declaration. *Hawthorne*, 35 Cal. 4th at 47. Moreover, Respondent's lay opinion is contradicted by Dr. Puente, who, based on his review of Mr. Benavides's history of cognitive deficits and adaptive behavior, opines that Mr. Benavides's mental retardation manifested itself before the age of 18. (Ex. 126 at ¶ 37.)

Respondent objects to the standardized tests given by Dr. Puente and Dr. Weinstein to assess his intellectual functioning. Dr. Puente administered the Comprehensive Test of Nonverbal Intelligence 3 ("CTONI"), the Beta 3 ("Beta"), and the Mexican version of the Escala de Inteligencia de Wechsler para Adultos—III (WAIS-III). Dr. Weinstein measured Mr. Benavides's intellectual functioning by administering the Wechsler Adult Intelligence Scale—Spanish Version (WAIS), the Woodcock-Muñoz Psycho-Educational Battery—Revised (Woodcock-Muñoz), and the General Ability Measure for Adults (GAMA). (Ex. 126 at ¶ 37.) Respondent complains that the CTONI and Woodcock-Muñoz standardized tests are not among the tests recommended by AAMR and the APA. (Response at 374.) Neither of these sources, however, list tests in Spanish such as the Woodcock-Muñoz, which is the Spanish version of the Woodcock-Johnson Psycho-Educational Battery. (Former Ex. 151 at ¶ 7.) Moreover, as recognized by Respondent, the AAMR 2002 Manual does refer to the CTONI as an appropriate test for people with limited verbal abilities and profound cognitive impairments. (Response at 374-75.) Respondent complaint that Dr. Puente failed to explain why the CTONI was appropriate to administer ignores Dr. Puente's detailed explanation of the advantages of the CTONI, which made it appropriate to evaluate Mr. Benavides:

> The CTONI is a test designed to measure the intelligence of subjects who have language difficulties in English, including those who are bilingual, who speak a language other than English, or who are socioeconomically disadvantaged, deaf, language disordered, motor disabled, or neurologically impaired. The CTONI has been studied extensively and has been shown to have a high level of reliability. A strong advantage of the CTONI is that it was designed to be unbiased with regard to gender, race, ethnicity, and language spoken in the home.

(Ex. 126 at ¶ 38.) The CTONI, therefore, is an ideal test to assess Mr. Benavides's intellectual functioning given that he is a monolingual Spanish-speaker who grew up in rural Mexico and is very socioeconomically disadvantaged.

The CTONI is "heavily weighted with tests that measure the reasoning skills involved in intellectual functioning, an area of severe impairment for Mr. Benavides." (Ex. 126 at ¶ 38.) Mr. Benavides obtained a non-verbal IQ of 48 on the CTONI, placing his performance lower than 99 percent of the population. (Ex. 126 at ¶ 38.) His scores on the Benton Visual Retention Test, which is also used to measure non-verbal intelligence, was an estimated IQ of 60 to 69. (Ex. 126 at ¶ 38.) Respondent's complaint that she cannot assess Mr. Benavides's performance because she does not understand how Dr. Puente calculated this IQ score, why the test yielded a range of IQ, and whether he adjusted the scores for the Flynn Effect (Response at 375-76) can be addressed in an evidentiary hearing where she can direct these questions to Dr. Puente.

On the Woodcock Muñoz, Mr. Benavides obtained an IQ score of 72, "placing him in the third percentile and at the age equivalent of a child 7 years of age and 5 months." (Ex. 126 at ¶ 39.) His IQ scores on the WAIS, WAIS III, GAMA, and Beta 3 all ranged between 80 and 83. "Mr. Benavides's score on the Peabody Picture Vocabulary Test, which measures

cognitive and academic achievement, places him at a level of intellectual functioning equivalent to that of a normal child of approximately 13 to 14 years old."[125] (Ex. 126 at ¶¶ 39-40.) Considering all of these findings, Dr. Puente found that even though "there is significant scatter in these scores, the overall indication is that Mr. Benavides's intellectual functioning falls within the range of mental retardation." (Ex. 126 at ¶ 40.) Respondent's lay disagreement with Dr. Puente that these test results do not show significant subaverage intellectual functioning because none of the scores fall below 70 (Response at 373) is incorrect. Mr. Benavides's IQ scores on the Benton Visual Retention Test (60-69) and the CTONI (48) are below 70. Further, Respondent's argument ignores that this Court in *Hawthorne* rejected an IQ of 70 as an upper limit for making a prima facie showing. *Hawthorne*, 35 Cal. 4th at 48-49; *see also People v. Vidal*, 40 Cal. 4th 999, 1012 (2007) (holding that trial court did not err in finding defendant was mentally retarded where experts testified that full scale IQ scores showing a wide divergence from 77 to 92 did not rule out a diagnosis of mental retardation.) In *Hawthorne*, this Court rejected the Attorney General's request that this Court adopt an IQ of 70 as an upper limit for making a prima facie showing. *Hawthorne*, 35 Cal. 4th at 48-49. This Court explained that it declined to do so for three reasons. First, as shown by the definition in section 1376, the California Legislature did not include a

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[125] Respondent's lay opinion that the Peabody Picture Vocabulary Test is "not a reliable measure of [Mr. Benavides's] intelligence as it is recommended for an individual who is under the age of 18, not a 58 year old" is directly contradicted by Dr. Puente on the page of his declaration she cites. (Response at 375, citing Ex. 126 at 16.) As Dr. Puente explains, though the test is usually not as sensitive for adults with "average or higher intellectual abilities" because it was normed for individuals under 18, he considered the test appropriate to give to Mr. Benavides in light of his "overall impaired performance in tests of cognitive skills." (Ex. 126 at ¶ 40.)

numerical IQ score as part of its definition of mentally retarded. *Id.* at 48. "Second, a fixed cutoff is inconsistent with established clinical definitions and fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing." *Id.* (internal citations omitted). Third, this Court recognized that "IQ test scores are insufficiently precise to utilize a fixed cutoff in this context." *Id.* at 48-49 (citing DSM IV-TR at 41, AAMR 2002 Manual at 57, and Am. Assn. of Mental Deficiency, Classification in Mental Retardation (8th ed. 1983) at 11.) As such, Respondent's argument that Mr. Benavides has not established a prima facie case of significantly subaverage intellectual function because some of his IQ scores are above 70 should be rejected. Dr. Puente's opinion that his scores as a whole meet this requirement establishes a prima facie case for relief.

Respondent's disagreement with Dr. Puente's opinion that Mr. Benavides made a genuine effort on the test and was not malingering based on her unfounded speculation that he malingered because he allegedly had motive to do so is frivolous. (Response at 377.) Dr. Puente's and Dr. Weinstein's observations that Mr. Benavides was giving his best effort when taking the tests were confirmed by the results of malingering tests they administered. (Ex. 126 at ¶ 17.) Respondent's characterization of Dr. Puente's and Dr. Weinstein's opinion that Mr. Benavides was not malingering as "speculative" based on her own speculation is unfounded.

Respondent further contests Dr. Puente's opinion that Mr. Benavides's history of cognitive deficits shows that his deficits manifested prior to the age of 18. (Response at 378-80.) As stated above, Respondent argues that there is no evidence of childhood cognitive deficits because he was not "diagnosed as mentally retarded." (Response at 378.) Respondent also argues that it is significant that none of the social history declarants

"allege that petitioner's intellect was significantly subaverage or characterize him as mentally retarded." (Response at 378.) As explained above, given the rural setting in Mexico in which Mr. Benavides grew up, it is not surprising that he was not diagnosed with mental retardation or labeled as such. Moreover, as Dr. Puente explains, Mr. Benavides's deficits are not readily apparent because he engages in masking behaviors which are typical of people with his brain damage or mental retardation:

> Mr. Benavides's deficits may not have been readily apparent because, as with many people with brain damage or mental retardation, Mr. Benavides engages in behaviors that mask his deficits in order to avoid stigma. During my interviews with him he spoke about himself as an intelligent person who did not have any problems understanding concepts, though the results of the neuropsychological testing indicated otherwise. He also showed a tendency to answer questions by speculating or confabulating answers even though he did not know the correct answer. For example, when I asked him if he recognized some of the tests that I administered to him he said that he did although he had never taken those tests before. Like others with his limitations, Mr. Benavides is prone to confabulation as an attempt to appear more competent than he is and not disclose his impairments in memory and cognitive skills. His answers also displays a strong acquiescence bias or inclination to say yes or agree with authority figures in order to prevent disclosing his difficulties in understanding.

(Ex. 126 at ¶ 59.)

Respondent's argument that Mr. Benavides's grades in school in seventh and eighth grade do not reflect subaverge intellectual functioning (Response at 378-79) is belied by his school record and the observations of his teacher Maria Dolores Castañeda de Palafox who recalls him struggling to understand information and concepts. Mr. Benavides's school records show that even though he was one of the oldest in the class, he performed very poorly. When Mr. Benavides was in seventh and eighth grade he was

sixteen and seventeen years old and he had trouble reading and writing. (Ex. 123 at ¶ 8.) In seventh grade, he failed all his classes except dance class, Spanish, in which he received an average grade, and history, which he barely passed. (Ex. 116 at ¶ 14; Ex. 52.) He continued to do poorly in eighth grade. He received the lowest possible grade in English class, a one, and failed math, biology, civics, and physical education. (Ex. 52.) Respondent's argument that because Mr. Benavides's poor grades may have been due to reasons such as poor nourishment or lack of parental support they are not attributable to intellectual deficits reveals Respondent's ignorance. As Dr. Puente explains, these are risk factors that may explain the origins of Mr. Benavides's neuropsychological and cognitive impairments, rather than factors that negate his deficits. (Ex. 126 at ¶ 53.) Further, as explained by Dr. Puente, it is noteworthy that Mr. Benavides's academic functioning has not improved in the forty years since he attended middle school, as revealed by the results of the tests measuring academic performance that Dr. Puente administered. In particular, Mr. Benavides's inability to learn English, notwithstanding spending over twenty years in a mostly English-speaking environment, is a significant indicator of his adaptive functioning deficits. (Ex. 126 at ¶ 46.) The persistence of his deficits through adulthood is strong evidence that his intellectual deficits displayed in childhood are in fact deficits as opposed to temporary setbacks in his ability to learn due to environmental factors, as Respondent suggests.

Next, Respondent contends that Mr. Benavides's organic brain damage that has resulted in significant neuropsychological and intellectual dysfunction is not indicative that he has subaverage intellectual functioning that manifested itself before the age of 18. (Response at 380-81, detailing Dr. Puente's findings of significant neuropsychological impairment.) Respondent's lay attempt to argue that these pervasive neuropsychological

and intellectual impairments must have first manifested when Mr. Benavides was over 18 is unavailing.

Mr. Benavides's deficits are "primarily in the frontal lobes and affect his ability to reason, solve problems, and understand abstract concepts." (Ex. 126 at ¶ 56.) He has global deficits in memory which indicate he has significant damage to his temporal lobes. "His intellectual functioning is within the mental retardation range. Intellectually he functions at the level of a child in grammar school." (Ex. 126 at ¶ 56.) He has adaptive functioning deficits in all three domains, conceptual, practical, and social. As explained by Dr. Puente, "[g]iven the nature of the impairments, Mr. Benavides likely had some or all of these deficits from a young age and they were apparent at the time of Mr. Benavides's trial." (Ex. 126 at ¶ 56.)

Respondent argues that these significant deficits must have originated after he was 18 because some of the risk factors Dr. Puente identifies that "could account" for his neuropsychological and cognitive impairments are allegedly "speculative" or were not present when Mr. Benavides was a child. (Response at 382-85.) Respondent is mistaken on several accounts. First, as explained by Dr. Puente, though "it is impossible to pinpoint a specific etiology for his multiple impairments" it is likely that all of the risk factors alone or in combination contributed to Mr. Benavides's significant brain damage. (Ex. 126 at ¶ 55.) That some of these risks may not have caused significant brain damage, as Respondent speculates, or may not have been present until after he was 18, does not rebut the fact that he has significant brain damage, which because it is so pervasive and manifested itself in childhood is unlikely to have originated after age 18. Second, Respondent's questioning of whether some of the risk factors caused his brain damage is speculative and underlines the need for an evidentiary hearing. *Hawthorne*, 35 Cal. 4th at 52. Third, Respondent's attempt to

undermine the presence or significance of the risk factors lacks merit. For example, Respondent argues there is no evidence that Mr. Benavides's mother Maria was beaten by her husband Alberto when she was pregnant with Mr. Benavides, while acknowledging that Mr. Benavides's aunt, Ignacia Gonzalez Campos declares the opposite. (Response at 382 n.92.) Ms. Gonzalez explains that Alberto beat Maria regularly, even when she was pregnant. He beat her so much that once she had a stillborn baby. (Ex. 124 at ¶ 14.) Respondent's complaint that a death certificate was not produced to support Ms. Gonzalez's assertion that Mr. Benavides's mother had a stillborn baby does not undermine the veracity of her account. Respondent also claims that the fact that Mr. Benavides was fed *leche caliente* (grain alcohol with fresh cow's milk) as a child and drank alcohol at a young age are not risk factors for brain damage because "none of the declarants who knew petitioner before he turned 18 contended that his consumption of either impaired his cognitive abilities."[126] (Response at 383.) The frivolity of Respondent's argument is self-evident. That the declarants, who in many instances also drank alcohol as children, did not identify it as a cause of Mr. Benavides's deficits is inapposite. Likewise, Respondent's contentions that Mr. Benavides's exposure to pesticides while working in the farms as a child (Ex. 114 at ¶¶ 21-22; Ex. 120 at ¶¶ 24-26; Ex. 119 at ¶ 16; Ex. 103 at ¶ 20; Ex. 100 at ¶ 9), pastime of riding bulls

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[126] In this context, Respondent cites to the declaration of Mr. Benavides's father, Alberto. (Ex. 85.) Respondent "questions the veracity of the declaration" because it was signed in English and he died in the same year he signed the declaration. (Response at 383, n. 93.) Respondent's suggestion is outrageous and unfounded. Mr. Benavides's counsel, Cristina Bordé, who is fluent in English and Spanish, translated his declaration for him and afforded him an opportunity to make any changes. Ms. Bordé witnessed when Mr. Alberto Benavides signed his declaration. (Ex. 166.) The declaration is authentic and reliable, and Respondent has no basis to question its veracity.

and wild horses, which started when he was a child (Ex. 122 at ¶¶ 3-4, 7-11), and involvement in car accidents, at least one of which left a scar on his head that is still visible today (Ex. 127 at ¶ 119; Ex. 126 at ¶ 53), are insufficiently documented (Response at 383-85) lacks merit. Moreover, as explained above, Respondent's factual disputes do not negate the prima facie showing that Mr. Benavides has organic brain damage that because of its pervasiveness and the fact that it was evident as a child manifested prior to age 18. *Hawthorne*, 35 Cal. 4th at 52.

In sum, Respondent has not rebutted the prima facie showing, supported by extensive documentary evidence, that Mr. Benavides has subaverage intellectual functioning that manifested before the age of 18.

**b. Mr. Benavides Has Deficits in Adaptive Behavior That Manifested Prior to the Age of 18.**

Respondent raises several objections to Mr. Benavides's prima facie showing that he has deficits in adaptive behavior that manifested before the age of 18 including that: (1) Dr. Puente failed to apply the appropriate adaptive functioning criteria (Response at 395-98); (2) the adaptive functioning deficits Dr. Puente refers to are not supported by evidence and do not reflect deficits prior to age 18 (Response at 398-409); and (3) Mr. Benavides does not have deficits in at least two of the adaptive skill areas required by the AAMR's 1992 definition of mental retardation (Response at 385-95). All of Respondent's arguments lack merit and are rooted in her lay ignorance of how to assess whether a person suffers from adaptive deficits. Further, Respondent's arguments do no more than to highlight the need for this Court to issue an Order to Show Cause and order an evidentiary hearing to resolve any factual disputes. *Hawthorne*, 35 Cal. 4th at 52.

Respondent faults Dr. Puente for using the AAMR's most current definition of mental retardation rather than the 1992 version[127]. Respondent argues, erroneously, that this Court in *Hawthorne* mandated that experts use only the 1992 AAMR definition. (Response at 395-98.) In *Hawthorne*, this Court determined that post-conviction procedures to determine whether someone is mentally retarded should track section 1376 "as closely as logic and practicality permit." *Hawthorne*, 35 Cal. 4th at 47. This Court recognized that the Legislature derived the definition of mental retardation in section 1376 from the two "standard clinical definitions" referenced by the Supreme Court in *Atkins*. *Id.* In *Atkins*, the Supreme Court referenced the 1992 AAMR definition and the 2000 APA definition. *Atkins*, 536 U.S. at 309 n.3. Understandably, the Supreme Court did not reference the AAMR's definition of mental retardation in the tenth edition of its manual, *Mental Retardation: Definition, Classification, and Systems of Support*, because the manual was published on June 1, 2002, only twenty days before the Supreme Court issued its decision. The Supreme Court referred to the clinical definitions of mental retardation as generally

[127] The definition used by Dr. Puente—that of the tenth edition of the AAMR manual published in 2002—was the most current at the time he performed his examination in 2007. In 2010, the AAMR published a new manual, the eleventh edition, titled *Intellectual Disability: Definition, Classification, and Systems of Support* (hereinafter "AAIDD 2010 Manual"). The only change in the definition was to use the term "intellectually disabled" rather than "mentally retarded," as the former is currently more accepted among clinicians. To reflect the change to the more accepted terminology, the AAMR also changed its name in 2007 to the American Association on Intellectual and Developmental Disabilities (AAIDD). The terms "intellectual disability" and "mental retardation" are synonymous and are used interchangeably in this Reply. *See* Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 Intell. & Developmental Disabilities 116 (2007) (explaining that change in terminology within AAIDD involves no change in definition).

requiring subaverage intellectual functioning and significant limitations in adaptive skills that became manifest before age 18. *Atkins*, 536 U.S. at 318. The Supreme Court, however, did not hold that a defendant must meet any particular clinical definition to be exempt from the death penalty. Similarly, though this Court in *Hawthorne* did reference the AAMR's 1992 definition, this Court also recognized that mental retardation is a factual question that "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." *Hawthorne*, 35 Cal. 4th at 49; *see also Vidal*, 40 Cal. 4th at 1012 (holding that what is the best scientific measure of intellectual functioning is a question of fact, not of law). Accordingly, if there is any question as to Dr. Puente's use of the most current definition over the outdated one to assess Mr. Benavides's adaptive functioning, that question should be resolved in an evidentiary hearing. *Hawthorne*, 35 Cal. 4th at 52.

Most importantly, as Respondent recognizes, the adaptive functioning prong of the APA 2000 definition referenced in *Atkins* and in *Hawthorne*, and the AAMR 2002 definition are basically the same. (Response at 397.) *See also United States v. Davis*, 611 F. Supp. 2d 472, 476 (D. Md. 2009) (indicating that experts agree the definitions are "essentially the same"). The APA definition requires: "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." DSM-IV-TR at 41. The AAMR's 2002 definition refers to "significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." AAMR 2002 Manual at 8. Conceptual skills include language; reading and writing; money, time, and

number concepts; self-direction; communication; and functional academics. Social skills refer to interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (*i.e.*, wariness), ability to follow and obey rules and laws, avoid being victimized, and social problem solving. Practical skills refer to the activities of daily living, such as personal care, occupational skills, work, use of money, travel and transportation, schedules and routines, and safety and health care. *Id.* at 82; AAIDD 2010 Manual at 4. As is evident, the adaptive skills in the conceptual, practical, and social domains in the 2002 AAMR definition encompass the skills listed in the APA's 2000 definition. Dr. Puente's reference to the most current definition of the AAMR, therefore, clearly conformed to this Court's requirement that a mental retardation claim be supported by a declaration of an expert adhering to a standard clinical definition, such as the APA's 2000 definition referred to in *Atkins* and *Hawthorne*.

Respondent also faults Dr. Puente for not using a standardized instrument to assess Mr. Benavides's adaptive behavior. (Response at 297-98.) Dr. Puente did not use a standardized instrument because there is no clinically accepted instrument for measuring adaptive behavior that has been translated into Spanish or normed for Hispanic populations. Dr. Puente, however, did conform to the best practices for a retrospective assessment of adaptive functioning which consists of reviewing "the broadest set of data possible, and to look for consistency and convergence over time." *United States v. Davis*, 611 F. Supp. 2d at 492.

Next, Respondent challenges Dr. Puente's clinical judgment that Mr. Benavides has adaptive deficits in all three domains based on Respondent's lay understanding of adaptive skills. (Response at 398-411.) Respondent's arguments belie her ignorance about adaptive skills and illustrate why the AAIDD emphasizes the importance that intellectual disability be diagnosed

by a qualified expert exercising their clinical judgment. The AAIDD defines clinical judgment as a "special type of judgment rooted in a high level of clinical expertise and experience." AAIDD 2010 Manual at 85. The AAIDD explains that clinical judgment should be used to diagnose intellectual disability because it enhances the "quality, validity, and precision of the clinician's decision in a particular case." *Id.* at 87. Respondent, unlike Dr. Puente, does not have the high level of experience and clinical expertise to correctly assess Mr. Benavides's adaptive functioning.

Many of Respondent's errors are rooted in her failure to understand that "many persons with mental retardation can accomplish things that stereotypically are thought to be beyond their capabilities. For example, they can marry, have children, converse using multi-syllable words, have a checking account and/or credit card, have a driver's license, and commit crimes." *Davis*, 611 F. Supp. 2d at 501 (citing and endorsing expert's description of the capabilities of individuals with mental retardation). As explained by Dr. Gregory J. Olley, a well-respected expert in the field of intellectual disabilities:

> It is important to note that the assessment of adaptive functioning focuses upon deficits. People with mild mental retardation typically have a mixed profile of strengths and weaknesses and show adequate functioning in many areas. . . . Thus, one's ability to function successfully in any of specific area adaptive behavior does not exclude the diagnosis of mental retardation.

*Id.* at 496 (citing and endorsing Dr. Olley's description). Many of Respondent's arguments consist of stating that, because Mr. Benavides has strengths in areas stereotypically believed to be beyond the capacity of someone who is mentally retarded, Mr. Benavides must not have adaptive deficits. Respondent, for example, argues that the following skills negate a

finding of adaptive functioning deficits: (1) Mr. Benavides can write letters and make telephone calls; (2) he was "coherent and reasonably articulate" in his responses to the detective's questions; (3) he testified and waived his right to remain silent; (4) he was handsome and had female admirers; (5) he had several long-term girlfriends and had children; (6) he worked in the fields since childhood and was a hard worker in the field as an adult; (7) he enjoyed bull fighting, mariachi bands, and attending fiestas in Mexico; and (8) he walked two hours from the fields to San Gabriel and sometimes carried his younger brother. (Response at 386-94.) His ability to function in these areas does not exclude a diagnosis of mental retardation. *Davis*, 611 F. Supp. 2d at 496.

It is helpful to review the DSM-IV-TR's description of people with mild mental retardation, such as Mr. Benavides, to dispel stereotypes commonly held about the strengths and limitations of the mildly mentally retarded. The DSM-IV-TR's description follows:

> As a group, people with [Mild] Mental Retardation typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance and assistance, especially when under unusual social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.

DSM IV-TR at 43. This description aptly describes Mr. Benavides. He started to show difficulties with academic skills in his teenage years. As an adult, he was able to support himself working in the fields, but surrounded himself with a support network of girlfriends and his farm worker crew that

helped him deal with daily living activities. As explained by Dr. Puente, Mr. Benavides's "friendly disposition and hard work has enabled him to maintain a circle of friends and family who have compensated for his deficits and allowed him to function." (Ex. 126 at ¶ 52.)

Dr. Puente found that Mr. Benavides has adaptive deficits in the conceptual, social, and practical domains that have been evident throughout his life. (Ex. 126 at ¶ 41.) As is clear from Dr. Puente's assessment, Mr. Benavides also has deficits in at least two of the adaptive skill areas identified in the AAMR's 1992 definition and the APA's 2000 definition.

Mr. Benavides's conceptual skill deficits include difficulties in functional academics, such as difficulties reading and writing and understanding new concepts, that manifested in middle school. (Ex. 126 at ¶ 45; Ex. 116 at ¶ 16; Ex. 123 at ¶ 8.) As explained above, Respondent's argument that Mr. Benavides's academic performance in middle school does not show deficits in functional academics lacks merit. (Response at 401-02.) As shown in his school records, he failed most of his classes in seventh and eighth grades, even though he was one of the oldest students. (Ex. 52.) The fact that other children in the class also received failing grades does not disprove that Mr. Benavides's failing grades are evidence of his deficits in functional academics, as Respondent argues. Respondent's argument that Mr. Benavides's extremely low grades in English/Foreign Language classes—a 3 in seventh grade and a 1 in eighth grade, where 5 is a passing grade—should be disregarded because "there is no evidence that he was motivated to learn English then" is frivolous. (Response at 401.) Mr. Benavides is in the distinct minority in failing these classes, as the majority of his peers passed. (Ex. 52.) There is no evidence that his motivation to learn should have been any different than that of his peers. Moreover, even if he was unmotivated, it is likely that his

difficulties in learning accounted for his lack of motivation. Similarly, Respondent's arguments that Mr. Benavides's low grades are not indicative of deficits in functional academics but instead a function of his "dislike of reading" or "lack of interest" (Response at 402) misunderstands that these were caused by Mr. Benavides's impairments. Respondent's other alternative explanations for Mr. Benavides's poor grades, such as the fact that he had a girlfriend and worked in the fields, also do not explain away his deficits as many of his peers had similar circumstances.[128]

Dr. Puente found significant corroborating evidence of Mr. Benavides's deficits in functional academics in the tests measuring academic performance that he and Dr. Weinstein administered. Mr. Benavides's scores on the Woodcock Muñoz battery placed his performance within the range of somewhere between a ten year old and a thirteen year and eight month old. "In the Picture Vocabulary subtest, which measures expressive vocabulary, Mr. Benavides's performance was the equivalent of that of a child of 7 years and 10 months old." (Ex. 126 at ¶ 46.) Mr. Benavides's inability to learn English despite having spent over twenty years in a mostly English-speaking environment "is a significant indication of his adaptive functioning deficits." (Ex. 126 at ¶ 46.) Respondent dismisses the results of Dr. Puente's tests as "speculative," arguing that "there are no baseline test scores from petitioner's childhood."

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[128] Respondent cites no support for the argument that Mr. Benavides's poor academic performance cannot be "counted" as evidence of both his significant limitations in intellectual functioning and adaptive functioning. (Response at 398.) Mr. Benavides's poor academic achievement is evidence both of his difficulty with reasoning, which is central to intellectual functioning, and his deficits in conceptual skills, which is one of three important adaptive functioning domains. Further, there is substantial evidence in addition to his academic records showing significant subaverage intellectual functioning and adaptive functioning deficits.

(Response at 402.) Respondent's argument is nonsensical. It is not clear why such scores would be necessary to show Mr. Benavides has academic functioning deficits. Mr. Benavides's poor performance on these tests is corroborated by his poor grades (Ex. 52) and reports from his teacher and fellow student who witnessed him experiencing significant difficulties learning in middle school (Exs. 116, 123), which in turn show that his academic functioning deficits are life-long impairments that manifested prior to the age of 18. Respondent's dismissal of Dr. Puente's expert opinion that Mr. Benavides's inability to learn English is significant because he was immersed in a Spanish-speaking culture while working in California, ignores that he has spent the last twenty years incarcerated in a jail in Bakersfield or in prison in San Quentin State Prison, which are primarily English-speaking environments. Further, even though he was immersed in a Spanish-speaking community before his incarceration, he should have acquired at least some English from his many years in the United States. (Ex. 126 at ¶ 46 (noting that his English skills are "virtually non-existent").) Respondent also does not understand that Mr. Benavides, in part, surrounded himself with a community of Spanish-speakers, and did not venture out of that community, because it was too difficult for him to do so in light of his limitations.

Examples of Mr. Benavides's limitations in his practical skills include his inability to independently take care of his daily living activities and finances, his fear and inability to drive, and his lack of progress to better-paying and less arduous jobs, which required more complicated skills than picking grapes. (Ex. 126 at ¶¶ 48-49.) While Mr. Benavides was working the fields in the United States, he was always in a crew where the crew leaders took care of all his daily living needs. They paid and arranged for his food and lodging, and drove him to and from the fields, as he could not

drive. (Ex. 103 at ¶¶ 15, 16; Ex. 102 at ¶ 29.) Though he eventually bought a car with some friends on the crew, so they would not have to travel in the cramped van provided by the crew leader, Mr. Benavides was the only owner who did not drive the car. (Ex. 102 at ¶ 29). The crew leaders also had a system of managing their crew's money, which was an ideal support system for Mr. Benavides. The crew leaders did not directly pay each farm worker for their work at the end of each day with a check, but instead held their money for them and kept track of how much they had made and how much they owed. When the farm workers needed their money, the crew leader would provide it to them and tell them how to spend it and held on to the rest for them, like a bank. (Ex. 125 at ¶ 13.) Even when he crossed the border illegally to travel back to the United States, his crew leaders arranged all the logistics, including contacting and paying the guide, and arranging for when and where he would be picked up and dropped off. His crew leader also took care of the paperwork to legalize his immigration status. (Ex. 103 at ¶¶ 12, 13; Ex. 94 at ¶ 4.) Similarly, when he was in Mexico, he never lived independent of a girlfriend or his family, who took care of his daily living needs such as cooking and household chores. (Ex. 96 at ¶ 12; Ex. 99 at ¶ 7.)

Respondent argues that evidence that when Mr. Benavides was in his twenties and thirties he chose situations such as living with a crew, family, or girlfriends that enabled him to function within his limitations is not evidence that he had such limitations prior to the age of 18. (Response at 403-04.) Respondent is mistaken. The fact that he needed such support networks as an adult is significant circumstantial evidence that his deficits are long-standing. Respondent's argument that this evidence should be discounted because the crew leaders took care of all the other farm workers' daily needs, as well and women in his social-cultural background typically

took care of daily living needs, also does not undermine this evidence. Mr. Benavides chose these settings, rather than living independently, because they provided him with the needed support. Significantly, though he worked for decades in the fields, he never rose to a position as crew leader, like his younger peer, who also grew up in San Gabriel in impoverished conditions, Cristóbal Aguilar. (Ex. 103.) Mr. Benavides was clearly unable to handle the demands of a job as crew leader that required coordinating the work, lodging, meals, and finances of all the crew. Respondent also argues, without any support, that Mr. Benavides's inability to drive "should not be construed as an adaptive deficit" because it did not "impair his ability to hold a job or get where he needed to go." (Response at 406.) Respondent again misses the relevance of this evidence. Mr. Benavides was able to function, despite his deficit in this practical skill, by having others in his crew and his girlfriend Estella Medina drive for him. As described in the DSM-IV-TR, "[w]ith appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings." DSM IV-TR at 43. Mr. Benavides need not show that his inability to drive precluded him from holding a job in order to show it is an adaptive deficit. Further, it is likely that part of Mr. Benavides's inability to progress to higher paying jobs, such as a truck driver or crew leader, was a result of his inability to drive.

Next, Respondent argues that the fact that Mr. Benavides worked for decades as an unskilled laborer picking grapes, while most of his crew progressed to more challenging jobs such as construction or a truck driver (Ex. 102 at ¶¶ 32-33), should not be construed as an adaptive deficit because there is "no evidence that petitioner ever wanted to pursue another line of work." (Response at 407.) Respondent is incorrect. Mr. Benavides did try another job for a short time, but eventually returned to picking

grapes. All his other fellow farm workers, except the crew leaders, progressed to higher paying jobs that were not as strenuous as working in the fields. His younger cousin, for example, moved on to work in construction, then as a forklift operator, and eventually as a truck driver. (Ex. 102 at ¶ 32.) That Mr. Benavides worked hard and was good at picking grapes does not undermine the fact that he was unable to master other, more complex jobs. Rather, as explained by Dr. Puente:

> Mr. Benavides compensated for his deficits by being a hard worker. He was known to work hard and volunteer to do extra work, such as loading the trucks. The cognitive skill level necessary for picking grapes is commensurate with his cognitive functioning, which is the equivalent of that of a pre-adolescent child.

(Ex. 126 at ¶ 50.)

Mr. Benavides's strongest skills lie in the social skills domain. He is indeed friendly, sociable, loving, and affectionate, as Respondent recognizes. (Response at 389.) However, these strengths coexist with weaknesses, as is common for all individuals. *See* AAIDD 2010 at 1 ("Within an individual, limitations often coexist with strengths.") Mr. Benavides had difficulty avoiding victimization his whole life. He was picked on by his brothers, though he was one of the oldest, and other children in the *rancho*, but he took no actions to defend himself. (Ex. 91 at ¶¶ 72-73.) His neighbor Emilia Gonzalez Ruiz recalls the following picture of Mr. Benavides when he was a child:

> [His brothers and neighboring children] used to hit him over and over on the head and he just sat there and did not run away or defend himself in any way. I told him that he needed to defend himself. I said, "Don't be dumb!" but he never defended himself.

(Ex. 115 at ¶ 55.) He was also victimized into adulthood by his abusive father who regularly beat and whipped him, his siblings, and his mother. Though most of his brothers left the household as soon as they were able to fend for themselves, Mr. Benavides remained loyal to his father through adulthood and allowed him to continue to beat him. (Ex. 119 at ¶ 29; Ex. 111 at ¶¶ 20-21.) Respondent argues that the fact that he was picked on as a child should not be construed as an adaptive deficit because the declarants who provided this information, such as his neighbor, did not refer to him as a "victim." (Response at 399.) This is obviously irrelevant. Emilia Gonzalez Ruiz clearly viewed him, not only as a victim, but also as dumb. Respondent's further argument that Mr. Benavides was right not to respond to his brother Manuel who was seen as a "fighter" and that, hence, his behavior should not be evidence of his inability to avoid victimization is also clearly meritless. That he was picked on and unable to defend himself was noteworthy for people such as his neighbor and clearly a sign of limited social skills prior to the age of 18. Respondent's further argument that the fact that Mr. Benavides, like his brothers, withstood his father's beatings as a child, and like his brother Manuel, continued to work in the fields with his father as an adult, indicates that Mr. Benavides's victimization should not be characterized as a deficit is also meritless. (Response 400-01.) Though his brothers endured his father's beatings as children, most of them, with the exception of Manuel, left the household and avoided further victimization by their father. By contrast, Mr. Benavides continued to work for his father and endure his abuse. (Ex. 111 at ¶¶ 20-21 (recounting two incidents where his father threatened to kill Mr. Benavides) and ¶ 28 ("Even as an adult, his father beat him.").)

Mr. Benavides's behavior on the day Consuelo was hurt also shows limitations in his social skills, in particular his social problem solving skills.

His limitations became more apparent when he was in stressful circumstances and he was not surrounded by his social support network. When Consuelo was injured, he picked her up and called nine-year old Cristina to assist him. Though he clearly could use the telephone, as Respondent argues, he instead had Cristina call her mother, tell her what had happened, and ask her to return to take care of the situation. Because he did not have a car and could not drive himself, he needed Estella's assistance. That he did not call Estella himself to explain what had happened and what he needed, as most adults would have done, showed his inability to deal with a difficult social problem in a stressful circumstance. Respondent's argument that not calling himself was a "reasoned decision," as it allowed him to direct his attention to Consuelo (Response at 408), is not persuasive since he could have clearly done both simultaneously if he were not so impaired.

In sum, Mr. Benavides has established a prima facie showing that he has adaptive functioning deficits in the conceptual, practical, and social domains which include limitations in language, reading, writing, self-direction, functional academics, occupational skills, work, use of money, travel and transportation, self-care, home living, avoiding victimization, and social problem solving. These constitute significant limitations in far more than two areas of adaptive skills referred to in the AAMR's 1992 and DSM-IV-TR's 2000 definition of mental retardation.

**c. Conclusion**

Mr. Benavides has made a prima facie showing with substantial factual support of multiple social history witnesses and Dr. Puente's evaluation, that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and

manifested before the age of 18. Respondent's factual disputes, all of which lack merit, do not overcome the prima facie case, and cannot be used to deny this claim prior to the issuance of an order to show cause and order for an evidentiary hearing. *Hawthorne*, 35 Cal. 4th at 52.

**4. Mr. Benavides Was Unable to Assist Counsel With His Representation or to Understand the Proceedings Against Him.**

To prevail on his claim, Mr. Benavides must plead facts that, if proved, demonstrate by a preponderance of the evidence that, as a result of a mental disorder, he was unable to understand the nature of the proceedings against him, consult with counsel, or assist in preparing his defense. *See Dusky v. United States*, 362 U.S. 402 (1960); Cal. Penal Code § 1367(a); *People v. Rogers*, 39 Cal. 4th 826, 846-47 (2006). A claim of substantive incompetence does not require "a showing of error on the part of the trial judge, or any other state actor." *James v. Singletary*, 957 F.2d 1562, 1572 (11th Cir. 1992).

Mr. Benavides has presented evidence satisfying the first element of the claim, that he suffered recognized mental disorders. Dr. Puente found that Mr. Benavides suffers from organic brain damage resulting in significant neuropsychological and intellectual dysfunction, including impairments in his ability to reason, solve problems, and understand abstract concepts. (Ex. 126 at ¶ 56.) He has global deficits in memory that, together with his impairments in problem-solving and reasoning, impair his ability to effectively store information and accurately recall it at a later date. (Ex. 126 at ¶ 32.) He is also genetically predisposed to and suffers from alcoholism and depression. (Ex. 127 at ¶ 141.)

On the Halstead-Reitan Neuropsychological Battery, a test which measures the effects of brain injury and assault on cognitive abilities, Mr.

Benavides obtained a Halstead Impairment Index rating of 1.0, indicating the presence of significant brain damage. (Ex. 126 at ¶ 20.) To calculate the Impairment Index, one determines the number of scores in the impaired range on the seven tests that constitute the Index and divides that number by the total number of tests given that contribute to the Index. *Neuropsychological Assessment in Clinical Practice: A Guide to Test Interpretation and Integration* 146 (Gary Groth-Marnat, ed., 2000). Thus, the highest score possible, indicating the greatest amount of impairment, is a score of 1.0, the score Mr. Benavides obtained. Mr. Benavides's score of 1.0 places him in the severely impaired range of neuropsychological dysfunction. *Id.* Indices of .4 or greater are considered indicative of the presence of brain dysfunction. *Id.* The Impairment Index is quite sensitive to the detection of cerebral dysfunction. In fact, Reitan reported in 1994 that the Impairment Index has "never failed" to discriminate between patients with cerebral lesions and normal controls in any empirical investigation. *Id.*

Mr. Benavides's score on the General Neuropsychological Deficit Scale (GNDS or NDS) of 47 was "significantly higher than the cut-off score for individuals with brain damage, which is 36, and indicates the presence of brain damage." (Ex. 126 at ¶ 20.) Studies indicate there is a one-to-one correlation between subjects who score above 36 on the NDS and subjects who have brain dysfunction. *See* Paul E. Jarvis & Jeffrey T. Barth, *The Halstead-Reitan Neuropsychological Battery: A Guide to Interpretation and Clinical Applications* 33-44 (1994); Charles J. Golden, *Diagnosis and Rehabilitation in Clinical Neuropsychology* 96-97 (1978). It is therefore reasonably certain that Mr. Benavides's ranking according to the NDS is the product of brain damage.

Mr. Benavides's widespread, significant impairments affected his ability understand and intelligently and voluntarily waive his *Miranda* rights. His memory deficits affected his ability to recall details of the day Consuelo was injured, which in turn affected his ability to accurately respond to the questions posed to him by law enforcement officers during his interrogation and by the prosecutor and trial attorney at the time of his trial. (Ex. 126 at ¶¶ 58-63.)

The fact that counsel did not have any "trouble" with Mr. Benavides, and that there was no "apparent problem" (Response at 409-10), does not contradict the fact that Mr. Benavides is brain damaged and has severe cognitive deficits that impaired his already hampered ability to communicate with counsel regarding his case and understand counsel's explanations of the significance of the proceedings. Rather, the fact that counsel did not have enough contact with Mr. Benavides to notice that he did not comprehend her conversations with him or the proceedings, or that she did not have the expertise to properly interpret his symptoms, simply offers more support for Mr. Benavides's claim that her assistance was ineffective. *See, e.g.*, *Odle v. Woodford*, 238 F.3d 1084, 1088-89 (9th Cir. 2001) (noting that although counsel may often have best informed view of defendant's ability to participate, they are not trained mental health professionals and, therefore, fact that lawyers did not question competence does not establish petitioner was competent); *Bouchillon v. Collins*, 907 F.2d 589, 594-95 (5th Cir. 1990) ("[E]xistence of even a severe psychiatric defect is not always apparent to laymen."); *see supra* Claim Thirteen.

The prosecution's closing argument graphically proves Mr. Benavides's point. The prosecutor characterized Mr. Benavides's inability to remember and recall details as "inconsistent statements," and as prevarication; his difficulty comprehending the purpose and procedure of

cross-examination as him "avoiding answering the questions"; his need to simplify concepts as a reference to his own guilt ("he was feeling bad [because he was guilty] at the time"); and his general confusion regarding the proceedings and interpretation, and his flat affect due to his depression and impairments in problem-solving as "unbelievab[ility]." (18 RT 3565-66.) The prosecutor went even further in mocking Mr. Benavides's intellectual deficits: "the defendant takes the stand, I ask him the same line of questioning that I asked an eleven year old and he pretends he doesn't understand what's going on." (18 RT 3591.) The prosecutor claimed there was one explanation for Mr. Benavides's demeanor and inconsistencies: "He is guilty. He acts guilty. His statements are inconsistent because he is guilty." (18 RT 3594.) Given the lack of any evidence presented to the jury of Mr. Benavides's significant neurological impairments, the jury had no reason to view it any differently.

While Dr. Puente did not opine that Mr. Benavides would be completely unable to understand the proceedings against him, Dr. Puente did make clear that Mr. Benavides's impaired mental abilities—including his inability to reliably remember and retell events in detail, to grasp anything other than very simple topics, to complete tasks with more than one component, and to fully process visual stimuli and his tendency to acquiesce and agree with authority figures—left him vulnerable to involuntarily providing inconsistent statements, confabulating answers when he did not have the information to provide a response, succumbing to suggestibility during questioning, forgetting details, and removing his attention from trial testimony at times. The information in Dr. Puente's declaration demonstrates that, if asked, he would have warned counsel against calling Mr. Benavides to testify unless, after extensive preparation, counsel assured herself that Mr. Benavides was able to overcome his

extreme deficits and provide a coherent description of the events that occurred on November 17, 1991, understand the purpose of cross-examination, avoid succumbing to suggestibility on the stand, and provide a reliable, consistent version of events. (Ex. 126 at ¶ 63.)[129] The effects of Mr. Benavides's significant cognitive deficits were exacerbated by the deficient, and confusing interpretation provided during Mr. Benavides's interactions with police (*see supra* Claim Nine), during his communications with counsel and during trial (*see supra* Claim Twelve), and his unfamiliarity with the legal system and his legal rights.[130] Under these circumstances, Mr. Benavides's cognitive deficits, coupled with his depression, made it virtually impossible for counsel to properly prepare Mr. Benavides to competently testify on his own behalf or grasp the nature of the proceedings in a rational manner so that he could provide competent assistance to counsel. In addition, Mr. Benavides's mental disorders affected his ability to assist counsel because he was unable to recall significant events and witnesses to provide this information to counsel, unable to convey the degree to which Consuelo's death saddened and horrified him, and unable to assess the gravity of his legal situation accurately, rationally or reasonably.

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[129] In addition, defense counsel should have moved to exclude the use of unreliable hearsay statements by Mr. Benavides and by his mother that were used as the basis for an extremely confusing cross-examination of Mr. Benavides, which misled the jury into believing that his conflicting statements were attributable to his "lying" on the stand, as the prosecutor argued. (18 RT 3566; *see also* Claim Seven and Nine.)

[130] These handicaps would have been remedied early on had the Delano Police Department or Kern County District Attorney informed Mr. Benavides of his right to contact the Mexican Consulate prior to or during interviews with the prosecution. (*See infra* Claim Twenty-Four.)

As a result, therefore, of firmly established and recognized mental disorders, Mr. Benavides was incompetent to stand trial. The extensive evidence presented in support of this claims establishes a prima facie case for relief and, therefore, merits the issuance of an order to show cause.

### U. Claim Twenty-One: Unconstitutional Bias Based on Race, Gender, and Economic Status Unlawfully and Prejudicially Infected All Aspects of the Decision Making Regarding the Capital Charging and Prosecution of Mr. Benavides.

Mr. Benavides has made a prima facie showing that unconstitutional bias on the basis of race, gender, and economic status unlawfully and prejudicially infected all aspects of the decision-making regarding charging and prosecuting Mr. Benavides. (RCCAP at 360-66.) Respondent claims that the allegations in the Corrected Amended Petition fail to state a prima facie case. (Response at 411-12.) Respondent's argument lacks merit as shown below.

Prosecutorial discretion in charging is broad, but it is not unlimited. *See United States v. Batchelder*, 442 U.S. 114, 125 (1979). It is subject to "constitutional constraints." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). The decision to charge the death penalty cannot rest on criteria that offend the Constitution. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 293 (1987). When a defendant is prosecuted due to discrimination on the basis of race, ethnicity, national origin, or gender, the defendant is entitled to dismissal of charges or reversal of a conviction regardless of the defendant's culpability. *See, e.g., Murgia v. Mun. Court*, 15 Cal. 3d 286, 298 (1975).

> Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the

> direct victim of the discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.

*Id.; see also Wayte v. United States*, 470 U.S. 598, 608 (1985) (decision to prosecute may not be based on an unjustifiable standard such as race or religion); *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (denial of equal protection is established if a defendant demonstrates that the prosecutorial authorities' selective enforcement decision is deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (same); *People v. Betts*, 34 Cal. 4th 1039, 1050 (2005) ("We specifically have held that the issue whether a defendant would not have been prosecuted for the charged offense except for invidious discrimination . . . if established, prevents prosecution for that offense.") (citing *Murgia v. Mun. Court*, 15 Cal. 3d at 293 n.4). A showing of unlawful discrimination entitling the petitioner to relief is made where the petitioner establishes "discrimination [that is] . . . intentional and unjustified and thus 'invidious' because it is unrelated to legitimate law enforcement objectives, but the intent need not be to 'punish' the defendant for membership in a protected class." *Baluyut v. Superior Court*, 12 Cal. 4th 826, 833 (1996).

Mr. Benavides has made a prima facie showing that racial considerations impermissibly influenced the decision to charge him with the death penalty. (RCCAP at 361-62.) Respondent claims that the practices of the Kern County District Attorney's Office during the period of 1977-1990 are irrelevant because Mr. Benavides's case was pending in the Kern County Courts only during the period of 1991-1993. (Response at 411.) Respondent's argument lacks merit. The Kern County District

Attorney's Office's pattern and practice of discrimination in the immediate decade before charging Mr. Benavides with the death penalty obviously is probative of the discrimination in the charging decision in Mr. Benavides's case. As shown in the Corrected Amended Petition, the Kern County District Attorney's Office engaged in a pattern and practice of using the factors of race, gender, and economic status in its death penalty decision-making prior to using that criterion in Mr. Benavides's case. (RCCAP at 361-64.) This pattern and practice of purposeful discrimination in seeking death based on race, gender, and economic status was motivated by a discriminatory purpose and resulted in the decision to seek death against Mr. Benavides while death was not sought against other similarly situated defendants who were not Hispanic, male, or poor.

Respondent also complains, without explanation, that the declaration of defense investigator Jon B. Purcell, should be "disregarded" because it is untimely. (Response at 411.) Respondent fails to address the justification for the delay provided by Mr. Benavides's counsel, Michael Laurence, in his declaration submitted with the Corrected Amended Petition. As explained by Mr. Laurence:

> We modified allegations in the Petition by adding factual support from Jon Purcell, a witness for whom a replacement declaration was obtained. Ms. Culhane purported to obtain a declaration from Mr. Purcell that did not include the facts presented in this Claim. Petitioner learned of these facts only after conducting a reinvestigation of Ms. Culhane's work. In all other respects, the claim presents only previously raised allegations, facts, and legal bases, and thus it is timely presented to the Court.

As such, Mr. Purcell's declaration is properly before this Court and should be fully considered in support of this claim. *See In re Benavides*, Case No. S111336, Order filed November 1, 2006 (granting leave to file amended

petition as "necessary as a result of the allegedly fraudulent work product of Habeas Corpus Resource Center (HCRC) Investigator Kathleen Culhane").

Contrary to Respondent's assertion, Mr. Purcell's declaration does provide circumstantial support for this claim. Based on his experience working in Kern County, Mr. Purcell noted that the Kern County District Attorney's Office disproportionately sought the death penalty in cases of Hispanic defendants. (Ex. 106 at ¶ 5.) Mr. Purcell's observations are corroborated by a number of studies showing that race often plays a role in a prosecutor's decision to seek the death penalty, in particular in Kern County.

Many studies have found that race of the defendant is one of the variables considered by prosecutors in some counties when making the determination of whether to seek the death penalty. *See* U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, 5-6 (Feb. 1990) (The General Accounting Office documented in 1990 that in more than half of the 28 empirical investigations reviewed on death penalty sentencing since 1972, "the race of the defendant influenced the likelihood of being charged with a capital crime or receiving the death penalty."); *see also* Bruce Frederick & Don Stemen, *Final Report to the National Institute of Justice, The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making* §1.2.2 at 6 (Dec. 2012) ("In a review of 24 studies of prosecutorial charging decisions and 19 studies of decisions by prosecutors to seek the death penalty, . . . found that race clearly affected the decision to seek the death penalty.") (citing Marvin D. Free, Jr., *Race and Presentencing Decisions in the United States: A Summary and Critique of the Research*, 27 Crim. J. Rev. 203, 220 (2002)).

Racial considerations play a major, if not overwhelming role, in charging decisions in some California counties. *See* Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 Santa Clara L. Rev. 101, 113 (2003) ("Serious racial disparities permeate California's death penalty system.") (citing *Pulley v. Harris*, 465 U.S. 37 (1984); NAACP Legal Defense and Education Fund, Death Row U.S.A. (Winter 2003), *available at* http://www.naacpldf.org/files/publications/DRUSA_Winter_2003.pdf). Kern County's charging policy gave full control over charging decisions to a single individual, the District Attorney. These decisions were not reviewed by a panel; nor was input accepted from other sources. (Ex. 176.) Moreover, since the California system currently does not allow for proportionality review, this unfettered and capricious charging authority has gone virtually unchecked. Sanger, *supra* at 113.

Between the time that the death penalty was reinstituted in California in 1978 and Mr. Benavides's sentence, there were twelve inmates sentenced to death in Kern County, including Mr. Benavides.[131] Black and Hispanics are overrepresented in the group that was sentenced to die when compared to their representation in the county's population. In 1990, 33.5% of the population of Kern County was identified as Black or Hispanic. Of the twelve men who were sentenced to death, two were Black and four were Hispanic, accounting for 50% of the people sentenced to death.[132] The

[131] *See* Cal. Dep't of Corrections and Rehabilitation, Condemned Inmate Summary List, available at http://www.cdcr.ca.gov/Capital_Punishment/docs/ CondemnedInmateSummary.pdf (last visited Dec. 20, 2012).

[132] The total population of Kern County in 1990 was 543,477. The total numbers of Blacks and Hispanics in Kern County were 30,131 and 151,995 respectively. Alejandra Lopez, *Demographics of California Counties: A Comparison of 1980, 1990, and 2000 Census Data*, Race and Ethnicity in California: Demographics Report Series, No. 9, June 2002, at 3.

overrepresentation of Blacks and Hispanics sentenced to death provides strong circumstantial evidence that the District Attorney unconstitutionally based his decision of whether to seek the death penalty on the race and ethnicity of the defendant.

Cases involving white defendants in which the Kern County District Attorney's Office did not seek the death penalty around the time when Mr. Benavides was tried further demonstrate that the District Attorney was relying on unconstitutional grounds when making his decision of whether to charge a case as a capital case. For example, the District Attorney did not seek the death penalty against Dennis Lee Weis, a white defendant who was accused and convicted of killing his ex-girlfriend, Cindy Lee Carr, and of assaulting a man with a deadly weapon. Unlike Mr. Benavides, Mr. Weis had a prior conviction of deviate sexual assault and unlawful restraint. (Ex. 175.)

The consequences of this racial bias in Mr. Benavides's case were egregious. The prosecution targeted him as a suspect early on, refused to investigate avenues that did not point toward his guilt, and manufactured evidence and coerced witnesses to inculpate Mr. Benavides when such evidence was not forthcoming. (*See* discussion *supra* in Claims Two, Four, Five, and Ten.)

Mr. Benavides has also made a prima facie case that the decision to seek the death penalty against Mr. Benavides was also unconstitutionally influenced by Mr. Benavides's gender. (RCCAP at 362-63.) Respondent does not contest this allegation. (Response at 412-13.) The pattern and practice of gender discrimination in the charging decisions of the Kern County District Attorney's Office is consistent with empirical studies indicating the widespread presence of constitutionally impermissible gender bias in charging decisions generally. *See* Cassia Sphon, John Gruhl

& Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 Criminology 175, 183-87 (1987) (data reveal a pattern of discrimination in favor of female defendants).

Respondent has also made a prima facie showing that the decision to seek the death penalty against Mr. Benavides was also unconstitutionally influenced by Mr. Benavides's impoverished economic status. (RCCAP at 363-64.) Respondent also does not contest this allegation. (Response at 412-13.) The huge overrepresentation of indigent defendants among death row inmates provides strong support that economic status impermissibly affected the charging decision.

Respondent's claim that the allegations in the Corrected Amended Petition are insufficient to state a prima facie case is flawed. A petitioner's burden in a habeas petition is "initially to *plead* sufficient grounds for relief, and then later to *prove* them." *People v. Duvall*, 9 Cal. 4th 464, 474 (1975) (emphasis in original). If the factual allegations, if true, would entitle petitioner to relief, he is entitled to an order to show cause why the requested relief should not be granted. *Id.* at 475. The factual allegations in the Corrected Amended Petition, taken as true, clearly entitle Mr. Benavides to relief. Mr. Benavides has adequately pled this claim to warrant an order to show cause and further discovery, investigation, funding, access to this Court's subpoena power, an evidentiary hearing, and any other relief as this Court deems appropriate.

Mr. Benavides has met all pleading requirements and has established a prima facie case of discriminatory prosecution based on race, gender, and economic status. These allegations, if true, entitle Mr. Benavides to relief and this Court should issue an order to show cause why the requested relief should not be granted.

## V. Claim Twenty-Two: Mr. Benavides's Death Sentence Was Imposed Pursuant to a Statute That Unconstitutionally Fails to Narrow the Class of Death-Eligible Offenders and Results in the Capricious and Arbitrary Imposition of the Death Penalty.

In his Corrected Amended Petition, Mr. Benavides set forth a prima facie case that the jury's murder conviction, judgment of death, and confinement are unconstitutional because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty, thereby permitting the imposition of death sentences in an arbitrary and capricious manner. (RCCAP at 367-91.)

Respondent incorrectly contends this claim is procedurally barred, arguing it should have been raised on direct appeal. (Response at 413.) Respondent also argues that the claim fails to state a prima facie case for relief, noting this Court consistently has rejected such a claim and contending California's statutory scheme fulfills the narrowing requirement and that the statistical analysis for the claim is unpersuasive. (Response at 414-17.) Respondent's arguments fail for the reasons discussed further below. Moreover, Respondent ignores Mr. Benavides's allegation regarding trial counsel's ineffectiveness, offering no evidence, argument, or legal authority to contradict the allegations set forth in the Corrected Amended Petition. (*See* RCCAP at 391.) Accordingly, Mr. Benavides has established a prima facie case entitling him to relief, and this Court should issue an order to show cause, order an evidentiary hearing, and grant relief. *See People v. Duvall*, 9 Cal. 4th 464, 474 (1995).

### 1. Mr. Benavides's Claim Is Not Procedurally Barred.

Respondent first argues that this claim is procedurally barred because it should have been raised on direct appeal. (Response at 413). As an

initial matter, Respondent's contention is incorrect, as this issue was raised on direct appeal. (*See* Appellant's Opening Brief at 151-73; Appellant's Reply Brief at 65.) Furthermore, the procedural bars referenced by Respondent (Response at 29-30, citing *In re Dixon*, 41 Cal. 2d 756, 759 (1953), and *In re Waltreus*, 62 Cal. 2d 218, 225 (1965)) are inapplicable to Mr. Benavides's claim. This Court has articulated an exception to procedural bars where a petitioner alleges that he was convicted under an invalid statute. *In re Clark*, 5 Cal. 4th 750, 759 (1993); *see also In re Glenn Cornwell, Jr.*, California Supreme Court Case No. S152880 (Order dated February 10, 2010) (exempting from procedural bars claims challenging the constitutionality of California's death penalty scheme). The fundamental importance of "securing a correct determination on the question of [a statute's] constitutionality" permits a petitioner to raise such a claim at any time. *In re Clark*, 5 Cal. 4th at 765 n.4 (quoting *In re Bell*, 19 Cal. 2d 488, 493 (1942)); *accord People v. Blacksher*, 52 Cal. 4th 769, 847 n.40 (2011) (noting that a claim attacking the validity of the death penalty statute "may be raised any time") (quoting *In re Clark*, 5 Cal. 4th at 765 n.4). This Court has repeatedly applied the invalid statute exception statute articulated in *Clark* to claims challenging the constitutionality of California's death penalty sentencing scheme for failing to narrow the class of offenders eligible for the death penalty.[133]

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[133] *See, e.g.*, *In re Cunningham*, Case No. S068133 (Cal. Aug. 21, 2002) (unpublished order) (denying narrowing claim only on the merits despite the Attorney General's argument that the claim was procedurally barred because it was raised and rejected on appeal); *In re Jones*, Case No. S092494 (Cal. Mar. 28, 2001) (unpublished order) (exempting claims challenging the validity of statutes under which the petitioner was sentenced, including a narrowing claim, from procedural bars and citing *Clark* in support).

Furthermore, as this Court held in *In re Harris*, claims that have been raised and rejected on appeal are not procedurally barred where, as here, a habeas petitioner claims a violation of his constitutional rights that is "both clear and fundamental, and strikes at the heart of the trial process." 5 Cal. 4th 813, 829-34, 839, 841 (1993). Mr. Benavides's narrowing claim is such a claim, as it goes to the fundamental validity of the scheme under which Mr. Benavides was tried and sentenced.

Finally, as set forth in the Corrected Amended Petition and *infra*, resolution of this claim depends on substantial extra-record material, which could not have been submitted in support of the direct appeal and which mandates review of Mr. Benavides's claim. *In re Bower*, 38 Cal. 3d 865, 872 (1985) ("[W]hen reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right resort to habeas corpus is not only appropriate, but required."); *see also In re Robbins*, 18 Cal. 4th 770, 815 n.34 (1998) (stating procedural bar is inapplicable when extra-record material presented on habeas has information "of substance not already in the appellate record"). Thus, the narrowing claim raised by Mr. Benavides in his Corrected Amended Petition and herein differs from that raised and considered in his direct appeal and review on habeas is mandated.

**2. Mr. Benavides Has Established a Prima Facie Case That California's Death Penalty Statute Unconstitutionally Fails to Narrow the Class of Offenders Eligible for the Death Penalty.**

In the Corrected Amended Petition, Mr. Benavides alleged numerous deficiencies in California's death penalty statute. (RCCAP at 367-91.) The additional declarations and extra-record information further supports the claim that California's death penalty scheme is unconstitutional. (Exs. 158-

64.) Respondent cites cases in which this claim was raised on direct appeal—cases without the supporting material presented here—and then alleges that "[t]his Court has rejected the identical claim in numerous opinions." (Response at 414, 417 (citing *People v. Lindberg*, 45 Cal. 4th 1, 53 (2008); *People v. Gurule*, 28 Cal. 4th 557, 663-64 (2002); *People v. Michaels,* 28 Cal. 4th 486, 541 (2002); *People v. Koontz*, 27 Cal. 4th 1041, 1095 (2002); *People v. Mendoza*, 24 Cal. 4th 130, 191-92 (2000); *People v. Jenkins*, 22 Cal. 4th 900, 1050 (2000); *People v. Frye*, 18 Cal. 4th 894, 1028-29 (1998); *People v. Ray*, 13 Cal. 4th 313, 356 (1996); *People v. Arias*, 13 Cal. 4th 92, 186-87 (1996); *People v. Champion*, 9 Cal. 4th 879, 951 (1995); *People v. Crittenden*, 9 Cal. 4th 83, 154-55 (1994)).) However, the material and allegations set forth in this case warrant further review and reconsideration by this Court of its precedent. In order to correct this Court's previous misinterpretations of clearly established federal law and to properly consider the factual support for this Claim, this Court should issue an Order to Show Cause, permit Mr. Benavides to present evidence at a hearing, and issue an opinion that overrules these previous decisions and correctly applies controlling federal law.

This claim invokes the rule of *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), and its progeny, that "channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). The opinions of several Justices concurring in the judgment in *Furman* concluded that statutes that allowed the infrequent and seemingly random imposition of the death penalty upon only a small percentage of death-eligible individuals violated the prohibition against cruel and unusual punishment because they permitted the death penalty "to be so wantonly

and so freakishly imposed." *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring) ("[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."); *id.* at 248 n.11 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring); *id.* at 354 n.124 (Marshall, J., concurring). The *Furman* Court held that Georgia's death penalty statute—a sentencing scheme under which fifteen to twenty percent of death-eligible murderers were sentenced to death—violated the Eighth and Fourteenth Amendments because it permitted wanton and freakish imposition of the death penalty. *Furman*, 408 U.S. at 239-40 (per curiam); *id.* at 309-10 (Stewart, J., concurring); *id.* at 386-87 n.11 (Burger, J., dissenting). To withstand constitutional scrutiny and avoid such arbitrary and capricious imposition of the death penalty, post-*Furman* decisions make clear that a death penalty statute must "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *accord Arave v. Creech*, 507 U.S. 463, 474 (1993); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988); *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976); *see also Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (noting the United States Supreme Court's narrowing jurisprudence seeks "to ensure that only the most deserving of execution are put to death").

The California death penalty statute unconstitutionally fails to adequately narrow the types of first-degree murders punishable by death, resulting in the arbitrary imposition of death sentences on a small number of death-eligible offenders. Initially, the statutory definition of first-degree murder encompasses a wide range of homicides and associated punishments. *See* Cal. Penal Code §§ 189, 190. Furthermore, the case law interpreting the statutes confirms the expansive scope of first-degree murder, thus creating a scheme in which "first and second degree murder

are indistinguishable and the choice between them is left to the complete discretion of the jury." *See* Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*, 36 U.S.F. L. Rev. 261, 308 (2001). Indeed, a comprehensive study conducted by University of Iowa professor David Baldus ("Baldus Study") found that under California law currently in effect, sixty-nine percent of all murders and voluntary manslaughters in his random sample of California homicides were factually first-degree murder cases. (Ex. 158 at 6901, Table 1.[134])

In 1977, the California Legislature enacted a death penalty statute, Penal Code section 190.2, which purported to "narrow" the class of first-degree murders actually eligible for the death penalty. As noted in the Corrected Amended Petition, under the 1977 statute, death eligibility was to be the exception rather than the rule. (RCCAP at 370.) However, the law was superseded in 1978 by Proposition 7, better known as the "Briggs Initiative." (Ex. 161 at ¶ 18.) The drafters of the Briggs Initiative intended the death penalty to be "as broad and inclusive as possible," and to apply to "every murderer." (Ex. 160 at ¶¶ 4, 6; *see also* Ex. 161 at ¶ 16.) Subsequent amendments to this law sought to effectuate this goal, and, as set forth in the Corrected Amended Petition and herein, the legislative history demonstrates the intended breadth of the statute and the effectuation of that goal. (RCCAP at 370-75; *see also* Ex. 161 at ¶¶ 13-44, 53; Ex. 163 at 7203, 7321-22, 7373-87, 7415-16, 7722-37, 7749; Ex. 164 at 8026-30, 8037, 8040-42, 8049-50, 8053, 8055, 8062, 8069-70, 8072-73, 8075, 8086, 8144-45, 8156-57.)

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[134] This figure is obtained by dividing the 18,982 factual first-degree murder cases under the 2008 law by the 27,453 cases in the universe of Professor Baldus's study. (*See* Ex. 158 at 6901, Table 1, Part II, Row 2, Column B; *id.* at 6901, Table 1 Part I, Row 4, Column D.)

Empirical data demonstrates that the overwhelming majority of murders in California can be charged capitally, and, in nearly every case, at least one special circumstance can be proven. The Baldus Study of more than 27,000 convictions in California for first-degree murder, second-degree murder, or voluntary manslaughter with offense dates between January 1, 1978, and June 30, 2002, conclusively demonstrates that the special circumstances enumerated in Penal Code section 190.2 fail to perform the narrowing function required by the Eighth and Fourteenth Amendments. (Ex. 158 at ¶¶ 68-71.) Among persons ultimately convicted of first-degree murder based on offenses committed between January 1978 and June 2002, ninety-five percent were eligible for the death penalty based on the facts of the offense under California law in place as of 2008. (Ex. 158 at ¶ 38; *see also id.* at 6901, Table 1, Part 1.) Comparison of this ninety-five percent death-eligibility rate to the one hundred percent of first-degree murders that were death-eligible under pre-*Furman* Georgia law reveals that the resulting five percent narrowing rate fails to limit death-eligibility in the manner required by Furman and its progeny. (Ex. 158 at ¶¶ 40-42; *see also id.* at 6903, Table 2, Part II.)

The Baldus Study further determined that among persons convicted of first-degree murder, second-degree murder, and voluntary manslaughter, fifty-nine percent were eligible for the death penalty based on 2008 California law. (Ex. 158 at ¶ 37; *see also id.* at 6901, Table 1, Part I.) A comparison of this fifty-nine percent death-eligibility rate under 2008 law with the rate under pre-*Furman* Georgia law reveals a narrowing rate of thirty-five percent. (Ex. 158 at ¶ 42; *see also id.* at 6903, Table 2, Part II.) Finally, the Baldus Study found that California's death sentencing rate—the rate at which persons who were factually eligible for the death penalty actually received a death sentence—is 4.6 percent. (Ex. 158 at ¶ 65; *see*

*also id.* at 6916, Table 5.) Within the subset of cases in which an individual was convicted of first-degree murder, the death sentencing rate was 8.7 percent. (Ex. 158 at ¶ 62.)

The studies performed by University of San Francisco School of Law Professor Steven F. Shatz confirm that the overwhelming majority of murders in California may be charged capitally, and, in nearly every murder case, at least one special circumstance can be proven. (*See* Ex. 162 at ¶¶ 16-31.) The studies also verify the Baldus Study conclusions that California's death sentencing rate falls far below the fifteen to twenty percent narrowing rate that the *Furman* Court found to be unconstitutional. (*See* Ex. 162 at ¶¶ 16-31, 38-39.)

California's death penalty scheme is broader and more arbitrary than that of any other state—the death-eligibility rate is the highest in the country. (Ex. 158 at ¶¶ 51-54; *see also id.* at 6910-11, Table 4.) In fact, California's death-eligibility rate is so high that it is approximately 3.7 standard deviations above the average state death-eligibility rate and within a fraction of a percentage point of being defined as a statistical outlier. (Ex. 158 at ¶ 51-54; *see also id.* at 6910-11, Table 4; *id.* at 6913, Figure 1; Ex. 159 at ¶¶ 8-9.) The rate at which California's death penalty statute narrows death-eligibility from pre-*Furman* Georgia law to 2008 California law is lower than similar rates for other states. (Ex. 158 at ¶ 47.) Moreover, as a result of the unfettered discretion afforded to individual prosecutors in determining whether to charge special circumstances and seek death, California's death sentencing scheme creates a substantial risk of county-by-county arbitrariness. (Ex. 161 at ¶¶ 46-51); *see also People v. Adcox*, 47 Cal. 3d 207, 275-76 (1988) (Broussard, J., concurring).

Respondent incorrectly contends that California's statutory scheme fulfills the narrowing requirement in two ways: (1) the special

circumstances listed in Penal Code section 190.2 define and delimit death-eligible murders; and (2) the list of "aggravating circumstances" in Penal Code section 190.3 narrows and channels the jury's discretion in the selection phase. (Response at 416.) As to the former, Respondent cites *Pulley v. Harris*, 465 U.S. 37 (1984), as establishing that the United States Supreme Court has held that the finding true beyond a reasonable doubt of at least one special circumstance enumerated in section 190.2 "adequately 'limits the death sentence to a small subclass of capital-eligible cases.'" (Response at 416, quoting *Harris*, 465 U.S. at 53.) Respondent's reliance on *Harris* for the proposition that California's statutory scheme complies with the narrowing requirement is misguided.

First, the claim that California's statutory scheme fails to genuinely narrow its death-eligible class was not at issue before the United States Supreme Court in *Harris*, but rather, the constitutional issue presented was whether the Eighth Amendment requires a state to provide for proportionality review before a state court affirms a death sentence. *Harris*, 465 U.S. at 42-44. After determining that proportionality review was not required, *id.* at 44-45, and after reviewing the procedural provisions in the 1977 California statute to see if the system was "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review," *id.* at 51, the *Harris* Court concluded only that California's death penalty statute was constitutional "*[o]n its face*." *Id.* at 53 (emphasis added). In addition, the *Harris* Court noted that its conclusion may be different if presented with additional facts. *Id.* at 54 ("*As we are presently informed*, we cannot say that the California procedures provided Harris inadequate protection against the evils identified in *Furman*.") (emphasis added). Second, the statute at issue in *Harris* was the 1977 death penalty statute and not the 1978 statute created

by the Briggs Initiative. *See Harris*, 465 U.S. at 38-39 n.1. As Mr. Benavides alleged in his Corrected Amended Petition and as noted above, death eligibility pursuant to the 1978 statute and its subsequent expansions—the statute under which Mr. Benavides was convicted and sentenced—is vastly more broad than under the 1977 statute at issue in *Harris*. (*See* RCCAP at 370-75.) Thus, *Harris* did not address the narrowing claim Mr. Benavides now raises and does not control whether Mr. Benavides has established his entitlement to relief.[135]

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[135] In addition to relying on *Harris*, this Court's previous decisions regarding this Claim also have misapplied *Tuilaepa v. California*, 512 U.S. 967, 973 (1994). *See People v. Arias*, 13 Cal. 4th 92, 186-87 (1996) (relying on *Tuilaepa v. California* to find 1978 Law constitutional); *People v. Crittenden*, 9 Cal. 4th 83, 154-56 (1994) (reasoning that the U.S. Supreme Court upheld the constitutionality of the 1977 Law's special circumstances in *Pulley v. Harris* and concluding that the 1978 Law's special circumstances play an "essentially identical" role in "thereby limiting the death sentence to a small subclass of murders," apparently despite the "greatly expanded" number of special circumstances).

As with *Harris*. The Supreme Court's decision in *Tuilaepa*—which merely resolved the constitutionality of specific section 190.3 aggravating factors—did not address a challenge to the California statute's failure to narrow. 512 U.S. 969. The Supreme Court explicitly stated that it was not addressing issues concerning the eligibility stage of California's capital punishment scheme; narrowing is such an issue. *Id.* at 975. Indeed, in *Tuilaepa*, Justice Blackmun noted that the U.S. Supreme Court had not immunized the California statute from challenge based on its "extraordinary" breadth:

> The Court's opinion says nothing about the constitutional adequacy of California's eligibility process, which subjects a defendant to the death penalty if he is convicted of first degree murder and the jury finds the existence of one "special circumstance." By creating nearly 20 such special circumstances, California creates an extraordinary large death pool. Because petitioners mount no challenge to these circumstances, the Court is not called on to determine that they collectively perform sufficient, meaningful narrowing.

As to Respondent's second assertion that California's statutory scheme fulfills the narrowing requirement by narrowing and channeling the jury's discretion by means of the aggravating circumstances listed in Penal Code section 190.3, this Court has consistently recognized that the California statute purports to satisfy the constitutionally required narrowing function exclusively through the "special circumstances" set forth in Penal Code section 190.2. *See, e.g., People v. Bacigalupo*, 6 Cal. 4th 457, 477 (1993) (emphasizing that the section 190.3 sentencing factors used in the selection phase of the state's statutory death penalty scheme "do not perform a 'narrowing' function"); *see also People v. Visciotti*, 2 Cal. 4th 1, 73-75 (1992) (declining to apply the *Furman* requirement of limiting "open-ended discretion" to section 190.3 "aggravating factors" in the selection phase because those factors do not perform a narrowing function). Nor could they perform the narrowing function as the circumstances of the crime and the existence of special circumstances are expressly included in the list of factors. Thus, contrary to Respondent's assertion, the aggravating circumstances listed in Penal Code section 190.3 have no part in fulfilling the *Furman* narrowing requirement for California's capital sentencing scheme.

Respondent's final contention is that the "statistical analysis" supporting Mr. Benavides's claim is unpersuasive and cites *McCleskey v. Kemp*, 481 U.S. 279 (1987), for the proposition that the United States Supreme Court "found statistics 'insufficient to show irrationality, arbitrariness and capriciousness under any kind of Eighth Amendment

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512 U.S. at 994 (Blackmun, J., dissenting) (citing *Zant v. Stephens*, 462 U.S. at 862). Thus, this Court should issue an Order to Show Cause to correct this misapplication of federal law.

analysis.'" (Response at 416, quoting *McCleskey*, 481 U.S. at 289.) Respondent's contention that the *McCleskey* Court held that statistics are insufficient to prove any Eighth Amendment violation is meritless. In *McCleskey*, the petitioner claimed the Georgia capital punishment statute violated the Eighth and Fourteenth Amendments because, as it was administered, persons who murdered whites were more likely to be sentenced to death than persons who murdered blacks, and black murderers were more likely to be sentenced to death than white murderers. *McCleskey*, 481 U.S. at 291, 299. Regarding statistical evidence, the *McCleskey* Court addressed only whether purposeful discrimination in the capital sentencing process could be inferred from statistical disparities in sentencing. *Id.* at 293-97.[136] However, Mr. Benavides's narrowing claim does not require such a showing of purposeful discrimination, and instead the claim is based solely on whether the California statutory scheme, in its operation, actually adequately narrows the death-eligible class of offenders so as to prevent the wanton and freakish imposition of the death penalty.

In testing the administration of California's 1978 statute against the narrowing requirement of the Eighth Amendment, this Court must inquire whether Mr. Benavides's federal constitutional rights have been "denied in substance and effect. . . . [and] must review independently both the legal issues and those factual matters with which they are commingled." *Oyama v. California*, 332 U.S. 633, 636 (1948). Case law makes clear that the "[i]nvalidity [of a statute challenged on constitutional grounds] may be

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[136] Although Respondent does not acknowledge it in the Response, the portion of *McCleskey* cited by Respondent regarding the alleged finding by the *McCleskey* Court that statistics are insufficient to show irrationality, arbitrariness, and capriciousness in any Eighth Amendment analysis, is from the court of appeals opinion reviewed by the Court and is not anything the *McCleskey* Court stated itself.

shown by things which will be judicially noticed . . . or by facts established by evidence." *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 410 (1926) (citation omitted) (invalidating a statute prohibiting the use of shoddy in bedding based on empirical evidence that there was no health risk from the use of sterilized shoddy). In analyzing the constitutionality of statutes, courts consider all judicially noticeable facts bearing on the statute's operative functioning and consequences. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 492-93 (1954) ("We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.").

Consideration of empirical evidence, in the form of statistical studies, is often required to establish the facts on which an as-applied challenge such as this one is based, and courts have frequently examined data produced by the parties in a dispute in order to adjudicate constitutional challenges. *See Furman*, 408 U.S. at 250-51 (examining empirical studies of the discriminatory application of the death penalty); *see also Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 667 (1981) ("In a 14-day trial, both sides adduced evidence on safety, and on the burden on interstate commerce imposed by Iowa's law. On the question of safety, the District Court found that the 'evidence clearly establishes that the twin is as safe as the semi.'") (citation omitted); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 (1978) ("As we have shown, appellants produced a massive array of evidence to disprove the State's assertion that the regulations make some contribution to highway safety. The State, for its part, virtually defaulted in its defense of the regulations as a safety measure."); *Craig v. Boren*, 429 U.S. 190, 199-204 (1976) (considering statistical surveys

(arrests for driving under the influence) in a challenge to an Oklahoma statute setting the minimum drinking age); *Isbell v. City of San Diego*, 258 F.3d 1108, 1113 n.4 (9th Cir. 2001) (using a study and a survey to ascertain the constitutionality of San Diego's adult zoning ordinance); *cf. United States v. Coleman*, 24 F.3d 37, 38-39 (9th Cir. 1994) (denying an equal protection challenge to sentencing guidelines because the defendant had "offer[ed] no statistical evidence of disparate impact"). Indeed, federal district courts have recognized that consideration of extra-record empirical evidence of the type presented by Mr. Benavides is necessary to adequately evaluate the validity of a narrowing claim in habeas proceedings. *See, e.g.*, Order re: Motion for Evidentiary Hearing at 142-49, *Ashmus v. Woodford*, No. 3:93-cv-00594-TEH (N.D. Cal. Mar. 14, 2001) (granting an evidentiary hearing on petitioner's narrowing claim because petitioner's allegations based on statistical evidence, if proven, could establish that the California statutory scheme imposed death sentences more infrequently than the scheme in *Furman*); *Riel v. Ayers*, No. 2:01-cv-00507-LKK-KJM (E.D. Cal. filed Mar. 14, 2001); *Frye v. Ayers*, No. 2:99-cv-00628-LKK-KJM (E.D. Cal. filed Mar. 29, 1999).[137]

Accordingly, Mr. Benavides has made a prima facie showing, supported by extensive non-record proffered evidence, that the jury's special circumstance findings and death sentence in his case were unconstitutional because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty.

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[137] In each of these cases, the court granted extensive discovery and an evidentiary hearing on the petitioner's claim that the California death penalty statute fails to genuinely narrow the class of death-eligible offenders.

### 3. Trial Counsel Was Ineffective for Failing to Move to Strike the Special Circumstances on the Grounds That the California Death Penalty Statute Is Unconstitutional.

In the Corrected Amended Petition, Mr. Benavides alleged that trial counsel's failure to object to the constitutionality of the California death penalty statute prejudicially deprived Mr. Benavides of the effective assistance of counsel. (RCCAP at 391.) Respondent does not deny and, in fact, wholly fails to address Mr. Benavides's allegation that trial counsel was ineffective in this respect.

Mr. Benavides's allegations and factual support set forth in the Corrected Amended Petition and herein establish that reasonably competent counsel would have recognized the arbitrariness of California's death penalty scheme and would have challenged its constitutionality by bringing a motion to strike the special circumstance allegations. *See* American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 11.4.1 (1989) (stating counsel should obtain and examine all charging documents in the case to identify "any issues, constitutional or otherwise, . . . which can be raised to attack the charging documents" and the applicability of the death penalty); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (using ABA Guideline 11.4.1 to evaluate trial counsel's competence and describing the standards set forth in Guideline 11.4.1 as "well-defined norms"); *see also Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) (stating that the "wanton" and "freakish" imposition of the death penalty meant that death sentences were "cruel and unusual in the same way that being struck by lightning is cruel and unusual"); *People v. Adcox*, 47 Cal. 3d at 275 (Broussard, J., concurring) ("California's 1978 [death penalty] statute does not perform [that narrowing] function efficiently. Describing 19 different special circumstances which render a defendant eligible for death, it sweeps so

broadly that most murderers are subject to the death penalty, and only a few excluded."). Trial counsel had no strategic reason for their failure to raise such a challenge. It would not have been futile, and had trial counsel raised such a challenge, the trial court would have stricken the special circumstance allegations.

### W. Claim Twenty-Three: Mr. Benavides's Constitutional and Statutory Rights Were Violated by the Process Used to Select and Impanel the Jury.

Mr. Benavides has set forth a prima facie case that his conviction, sentence, and confinement are unlawful in violation of his state and federal constitutional rights to due process, a fair trial by a jury drawn from a fair cross-section of the community, effective assistance of counsel, equal protection, and a fair, reliable and non-arbitrary sentencing due to the systematic underrepresentation of Hispanics in the venire and at all stages of jury selection and due to trial counsel's failure to properly challenge the jury selection procedures. (RCCAP at 392-97.)

Respondent contends that Mr. Benavides has failed to state a prima facie case for relief. (Response at 418.) As shown below, Respondent's arguments are without merit.

#### 1. Governing Law

The systematic exclusion of a class of persons from jury service on the basis of their race is a constitutional error that is both clear and fundamental, and which strikes at the heart of the guarantee of a fair trial, such that this Court may and should grant relief even absent an objection at trial. *See, e.g.*, *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) ("discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless error review");

*Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (because exclusion of racial groups from jury "strikes at fundamental values of our judicial system and our society" conviction must be reversed without regard to prejudice if discrimination established); *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975) ("the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial"); *Smith v. Texas*, 311 U.S. 128, 130 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government"); *In re Harris*, 5 Cal. 4th 813, 834 (1993); *People v. Breaux*, 1 Cal. 4th 281, 297 (1991) (citing *Taylor*, 419 U.S. at 530); *People v. Wheeler*, 22 Cal. 3d 258, 272 (1978); *Williams v. Superior Court*, 49 Cal. 3d 736, 740 (1989); Cal. Code of Civ. Proc. §§ 197(a), 204 ("In California, the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution . . . and by article I, section 16 of the California Constitution.").

A petitioner establishes a *prima facie* showing that the petit jury has been selected in violation of the fair-cross-section requirement by demonstrating that (1) the excluded group is a "distinctive" demographic group, (2) "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) this underrepresentation is the result of systematic exclusion in the venire-selection process. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Respondent does not contest that Mr. Benavides has satisfied the first element of these tests, but contests the evidence presented in support of the second and third element. (Response at 417-

25.) Respondent's contentions fail to rebut the prima facie showing that Mr. Benavides was denied his constitutional right to a jury from a fair cross-section of the community.

### 2. Hispanics Were Unfairly Underrepresented in the Jury Pool of Kern Country From Which Mr. Benavides's Jury Was Selected.

In response to Mr. Benavides's allegation that Hispanics were unfairly underrepresented in the jury pool, Respondent complains that Mr. Benavides failed either to request judicial notice of the census data or to include a copy of the data in support of the Corrected Amended Petition. (Response at 418.) Respondent claims, without support, that Mr. Benavides has an obligation to include a copy of the census data in support of the allegations in the Corrected Amended Petition. (Response at 418.) The verified allegations in Mr. Benavides's Corrected Amended Petition suffice to state a prima facie case for relief. A petitioner need only allege in his petition facts that, if true, would entitle him to relief. *See In re Harris,* 5 Cal. 4th at 813, 827; *In re Clark*, 5 Cal. 4th 750, 768 n.9 (1993). Nonetheless, Mr. Benavides has attached to this Informal Reply the 1990 and 2000 census data that supports his claim. (*See* Ex. 174.).

Respondent does not dispute that the data shows a significant disparity of Hispanics in the jury panel. (Response at 419.) During the drafting of the Supplemental Petition in 2009, Mr. Benavides noted that a mathematical error was made in the data alleged in support of the claim in the original petition. The revised numbers provide stronger support for the claim that the process for selecting Mr. Benavides's jury was statutorily and constitutionally defective. According to the 1990 census, Hispanics constituted 27.97 percent of the population of Kern County, rather than the 27.7 percent previously alleged. (Ex. 137 at 6465-66.) The number of

Hispanics who were at least eighteen years old comprised approximately 24.08 percent of those eighteen and over in Kern County, rather than the 22 percent alleged. (Ex. 137 at 6465-67). Since Hispanic jurors comprised 12.3 percent of the trial jury panel (*see* Corr. Am. Pet. Claim 23(1)(d)), the absolute disparity in the underrepresentation of Hispanics is 11.78 percentage points. The comparative disparity is 48.75 percent. This significant disparity of Hispanics in the jury panel violates Mr. Benavides's statutory and constitutional rights as alleged in the Corrected Amended Petition.

Respondent asserts that Mr. Benavides failed to recognize the distinction between raw numbers of minorities in a county and the number of individuals actually eligible for jury service. (Response at 423.) The data from the 1990 census demonstrates 27.97 percent of the Kern County population was Hispanic. (Ex. 137 at 6465-66.) Hispanic individuals who were at least eighteen years old comprised approximately 24.08 percent of the total Kern County population over the age of 18. (Ex. 137 at 6465-66.) Mr. Benavides does not rely on "raw" numbers as Respondent claims and as was the case in *People v. Alexander*, 163 Cal. App. 3d 1189, 1202 (1985), cited in Response at 423. To demonstrate the underrepresentation, Mr. Benavides examined the Kern County population over the age of 18—the presumptively jury-eligible population—and compared the percentage of Hispanics in that over-18 population to the percentage of Hispanics in the jury pool. Adjusting for citizenship and undercounting from the 1990 census reveals that 17.5 percent of the Kern County population who were citizen and at least eighteen years old was Hispanic. With this adjustment, the absolute disparity in the underrepresentation of Hispanics is 5.2 percentage points, and the comparative disparity is 29.7 percent. Mr.

Benavides has established a prima facie case of underrepresentation of Hispanics in the jury pool from which his jury was selected.

### 3. Mr. Benavides's Use of Spanish Surnames to Identify the Cognizable Class of Hispanics as Underrepresented in the Jury Pool Was Proper.

In challenging Mr. Benavides's use of Spanish surnames to identify a cognizable group that was underrepresented in the Kern County juror venire, Respondent barely acknowledges this Court's holding in *People v. Trevino*, 39 Cal. 3d 667 (1985). (Response at 420-21 (accepting that this Court recognized surnames may be a valid method of categorization).) Respondent then relies on *United States v. Esparsen*, 930 F.2d 1461 (10th Cir. 1991), to suggest that the disparity of which Mr. Benavides complains may well be quite smaller than the figures demonstrate, because the numbers compared are less than in the thousands. (Response at 421.) Not only is this sheer speculation but also the converse may well be true—the disparity may well be greater than Mr. Benavides is able to demonstrate at this time.

In *Trevino* this Court held that appellant had established a cognizable class for fair cross-section purposes by using Spanish surnames to identify Hispanic individuals. *Trevino*, 39 Cal. 3d. at 683-84. In that case, this Court recognized that the Supreme Court had long ago, in *Hernandez v. Texas*, 347 U.S. 475 (1954), expressly rejected the argument that Spanish surnames do not identify a definable segment of the population. Twenty-three years later, in *Castaneda v. Partida*, 430 U.S. 482 (1977), the high court "reaffirmed the propriety of using Spanish surnames to define the relevant class of persons discriminatorily excluded from jury service in a given case." *Trevino*, 39 Cal. 3d at 684. This Court concluded in *Trevino* that use of Spanish surnames to exclude jurors is sufficiently indicative of a

systematic effort to excuse Hispanics despite the fact that the correlation between surname and group membership is not exact. As this Court noted, such precision is unnecessary. "Where, as here, no one knows at the time of a challenge whether a particular individual who has a Spanish surname is Hispanic, a showing that jurors are being excluded on the basis of surname alone constitutes a prima facie case of exclusion of a cognizable class." *Id.* at 686.

Respondent relies upon *United States v. Campione*, 942 F.2d 429 (7th Cir. 1991), to support its claim that use of Spanish surnames for classifying individuals is of "virtually no utility." (Response at 421.) The Seventh Circuit's holding in that case, however, does not support Respondent's argument. There, unlike here, the appellant's claim was a *Batson* challenge to the prosecutor's peremptory challenges to Italian Americans in a RICO (Racketeer Influenced and Corrupt Organizations statute) prosecution. Defense counsel at trial objected to the prosecution's peremptory challenge of two individuals who had Italian surnames. The Court of Appeal found that a successful *Batson* claim required that the challenged jurors belong to a cognizable ethnic group subjected to discriminatory treatment and that the defendant had failed to make a preliminary showing that Italian-Americans constitute a cognizable group whose members could not be excluded from a jury without justification based on factors other than ethnicity. *Id.* at 433. In contrast, the claim at issue here regards the right to a fair cross-section, not *Batson*. Nothing in the holding of *Campione* supports Respondent's assertion that use of Spanish surnames in the context of a fair cross-section claim is of "virtually no utility."

*Collado v. Miller*, 157 F. Supp. 227 (E.D.N.Y. 2001), cited by Respondent, also offers little support to Respondent's specious assertion that use of Spanish surnames in identifying Hispanics is without utility.

(Response at 421.) There, also in the context of a *Batson* claim, the district court found that the disparity between the percentage of peremptory challenges used by the prosecution against individuals with Spanish surnames, which was 39 percent, and the percentage of Hispanics in the county which was 25 percent was not significant enough to make the state court's decision per se incorrect nor was it an "objectively unreasonable application" of *Batson*. The district court simply noted that in that case there was some concern that the defense attorney had designated individuals as having Spanish surnames in some instances where the surname was Italian.

Contrary to Respondent's contention, identification by Spanish surname is a useful and valid means of categorization of individuals into the cognizable group of Hispanics and is routinely used for this purpose. "Whether characterized on the basis of Spanish surname or self-identification, Hispanics are a cognizable population. . . ." *People v. Ramos*, 15 Cal. 4th 1133, 1154 (1997).

#### 4. The Underrepresentation of Hispanics in the Jury Pool for Kern County Is Systematic and the Routine Exclusion of Jurors From East Kern County Is Arbitrary and Discriminatory.

Respondent argues that Mr. Benavides's claim of underrepresentation should fail because he, like the appellant in *People v. Ayala*, 23 Cal. 4th 225, 256 (2000), has failed to demonstrate the methodology used by the Kern County Jury Commissioner that resulted in the underrepresentation. (Response at 426.) In *Ayala*, however, the trial court conducted an evidentiary hearing wherein the parties stipulated to the prior testimony of the San Diego coordinator of jury services. The method described by the

jury coordinator was found not to discriminate on the basis of ethnicity or national origin.

In the instant case, Mr. Benavides is unable to access the data necessary to demonstrate the mechanisms that produce these unconstitutional results due to the refusal of the Kern Jury Commissioner to provide Mr. Benavides's counsel with the relevant data despite numerous requests. Mr. Benavides first requested information pertaining to Kern County's jury selection procedures in general, and the procedures used in Mr. Benavides's case in particular, from the Assistant Jury Commissioner on March 21, 2002. The Assistant Jury Commissioner stated that no written procedures were available, and that records regarding jury selection in particular cases were kept for only three years. Mr. Benavides's second request for information on general procedures, sent to the Jury Commissioner on June 28, 2002, was denied on August 12, 2002, because, according to the Jury Commissioner, he is exempt from the California Public Records Act (CPRA). Mr. Benavides's final request, sent to the Jury Commissioner on October 20, 2002, along with a detailed discussion of his obligations under the CPRA, was also denied. The requested data includes, but is not limited to, the source lists and the names of summoned jurors at or around the time of Mr. Benavides's trial. Unlike the situation in *Ayala*, Mr. Benavides's counsel at the time of trial failed to object to the underrepresentation, failed to investigate the methodology used in the jury selection process, failed to seek discovery, and failed to present arguments in support of a claim of a violation of the fair cross-section requirement. Mr. Benavides is therefore confined to an analysis of the trial jury panel in his case until further discovery, investigation, funding, access to this Court's subpoena power, and an evidentiary hearing are granted.

Respondent looks to *People v. Howard*, 1 Cal. 4th 1132, 1160 (1992), as authority and support for the contention that Mr. Benavides here has failed to meet this third prong of *Duren v. Missouri*, 439 U.S. at 357, 364. (Response at 425-26.) In *Howard*, however, appellant looked to the trial court's practice of excusing prospective jurors for hardship and claimed a more lenient standard was used to excuse Hispanics than to excuse non-Hispanics. Here, Mr. Benavides alleges that several potential procedures may have contributed to the pernicious practice of eliminating an identifiable group from the jury pool and resulted in the unconstitutional underrepresentation of Hispanics. These procedures include, but are not limited to, the failure to include in the venire prospective jurors who resided in the area of the county with a greater population of Hispanics, the failure to use random selection procedures throughout the jury selection process, the failure to use more than the list of registered voters and the Department of Motor Vehicles list as the source lists and the failure to update the sources lists and the master jury list. (RCCAP at 394-95.) Any one of these practices or a combination of several may have been the cause of the underrepresentation. Mr. Benavides's inability to prove the methodology that produced the systematic exclusion of Hispanics in the jury selection process is not due to any failings on the part of Mr. Benavides, but rather the refusal of the Kern County Jury Commissioner to provide Mr. Benavides with the information within his possession that is necessary to definitively prove this systematic exclusion.

Mr. Benavides has adequately pled his claim and established a prima facie case to warrant further discovery, investigation, funding, access to this Court's subpoena power, and an evidentiary hearing to definitively prove that the methodology employed by the Kern County Jury Commissioner in

the jury selection process resulted in the systematic exclusion of Hispanics at the time of Mr. Benavides's trial.

Respondent claims that Mr. Benavides expressly waived the right to include jurors from the eastern portion of Kern County in his jury pool. (Response at 422, n.101.) This contention fails to recognize or understand the substance of Mr. Benavides's claim. Jurors from eastern Kern County should never have been routinely excluded from the jury selection process in the first instance. This ad-hoc procedure was arbitrary, discriminatory, and unreasonable. It violated California statutory and decisional law and violated the equal protection guarantees of the state and federal constitutions and denied Mr. Benavides due process of law.

The comments of the trial court at the time of jury selection in Mr. Benavides's trial indicate that it was the trial court's regular practice to exclude jurors from East Kern County.[138] The trial court inappropriately placed upon the defense the affirmative duty specifically to request jurors from the eastern area of the county. The trial court maligned these very individuals by warning defense counsel not to say anything about them as there might be someone from East Kern County in the courtroom, and then sarcastically referred to them as "rocket scientists." (1 RT 59.) Far from illustrating an express waiver by counsel, this colloquy between court and

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[138] The trial court said, "Mr. Carbone, are you seeking to have East Kern jurors included? Because if you are not, then if Mrs. Huffman is not, typically we might not get any East Kern jurors." Defense counsel responded that she did not "know about East Kern." The court continued, "I will have the clerk check on this, but it is my recollection that unless you ask to have them included, we do not include them. And either side can ask for them. And by East Kern I mean Ridgecrest, Boron, and all the other wonderful garden spots out there in the high desert. We still get people from Mojave, Tehachapi. I guess I can't think of any place else right now, but we usually get those. We will just *eliminate the China Lake people and all the rocket scientists.*" (1 RT 58-59 (emphasis added).)

counsel demonstrates both this particular trial court's disdain for prospective jurors from the eastern area of the county—an area with a significantly large Hispanic population—and the county's practice of systematically excluding these individuals from the jury selection process with no reasonable justification.

**5. Trial Counsel Was Prejudicially Ineffective in Failing to Challenge the Flawed Jury Selection Process Used at Mr. Benavides's Trial.**

This colloquy between the court and counsel also demonstrates trial counsel's deficient performance. When the court asked defense counsel if she was seeking to have East Kern jurors included she at first indicated that she did not "know about East Kern" and then merely said she had found in the past that individuals from that area sometimes had a difficult time getting to court.[139] Clearly, counsel had not investigated the potential jury pool. Her acquiescence in excluding jurors from East Kern—despite her speculation that such individuals sometimes had difficulties getting to court—was not an informed decision. As alleged in the Corrected Amended Petition, trial counsel in other contemporaneous Kern County cases litigated the underrepresentation of Hispanics in their jury venires. *See People v. Sanders*, 51 Cal. 3d 471, 491 (1990); *Alexander*, 163 Cal. App. 3d at 1189; RCCAP at 393.

Reasonably competent counsel would not have acceded to the court's urging and the routine illegal practice of the county in failing to request

[139] Trial counsel said, "I don't know about East Kern. I found in the past—" The court interrupted her and said, "We're on the record still, so I don't want you thinking out loud. Someone from East Kern might not appreciate your comments." Trial counsel responded, "The only thing I was thinking, East Kern sometimes has problems with sometimes getting—difficulty to court, that's the main thing I was concerned about with East Kern jurors." (1 RT 58.)

jurors from an entire area of the county. Reasonably competent counsel would have investigated and litigated the issue of the underrepresentation of Hispanics in the jury pools of Kern County. *See, e.g.*, *Hollis v. Davis*, 941 F.2d 1471 (11th Cir. 1991) (granting relief for trial counsel's failure to challenge systematic exclusion of black jurors from the jury pool). Counsel's failure, in the representation of a Hispanic individual, to request jurors from the area of the county where potentially more Hispanic individuals resided fell below an objective standard of reasonableness.

Respondent speculates that jurors who had to travel great distances to court would have greater hardships and would likely have been hostile to the process and it was therefore "not surprising" that trial counsel failed to request jurors from this area of the county. (Response at 422, n.101.) There is no support for this speculation. Further, in light of the issue of underrepresentation of Hispanics in Kern County that was well known to other practitioners, counsel's failure to object to the practices used and to investigate and litigate the issue constitutes deficient performance.

As a result of trial counsel's deficient performance Mr. Benavides was denied a jury chosen from a cross-section of the community, a fair trial, and a fair and reliable determination of the issues. But for counsel's unreasonable and unprofessional failure to challenge the jury selection procedures used to select Mr. Benavides's jury, there is a reasonable probability the result of the proceeding would have been different.

Mr. Benavides has made a prima facie showing that the number of Hispanics in the venires from which the jury was selected were "not fair and reasonable in relation to the number of such persons in the community," that the underrepresentation was the result of systematic exclusion in the venire-selection process. Accordingly, Mr. Benavides has adequately pled and established a prima facie case that he was deprived of

his constitutional rights to a trial by a jury drawn from a representative cross-section of the community. *See Duren*, 439 U.S. at 364. Mr. Benavides has also adequately pled and established a prima facie case that his trial counsel provided him with ineffective assistance by failing to raise, investigate, and preserve a challenge to the composition of the jury panel. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). Accordingly, Mr. Benavides is entitled to relief.

### X. Claim Twenty-Four: Mr. Benavides's Convictions and Death Sentence Are Unlawful Because They Were Obtained in Violation of the Provisions of the Vienna Convention on Consular Relations and the Bilateral Consular Convention.

Mr. Benavides's convictions and death sentence are rendered invalid by the violation of Mr. Benavides's rights pursuant to Article 36(1)(b) of the Vienna Convention on Consular Relations ("VCCR") and the Consular Convention between the United Mexican States and the United States of America of August 12, 1942, 57 Stat. 800 ("Bilateral Consular Convention") by state actors, and the failure of Mr. Benavides's trial counsel to protect against this violation and to act reasonably to enlist the assistance of the Mexican Consulate in the defense of the capital charges.

Respondent does not refute Mr. Benavides's allegation that law enforcement agencies and the prosecution reasonably should have known that Mr. Benavides is a Mexican national entitled to the protection, rights, and benefits conferred by the VCCR and the Bilateral Consular Convention. Respondent instead argues that Mr. Benavides is not entitled to relief because he did not raise the claim at his trial or on appeal; and because, according to Respondent, Mr. Benavides has not demonstrated

that he was prejudiced by the violations of his rights. (Response at 427-41.) Neither of Respondent's arguments to deny relief is valid.

### 1. Mr. Benavides's Claim of Violations of the VCCR and the Bilateral Consular Convention Is Not Procedurally Barred.

Respondent alleges that Mr. Benavides is barred from raising the violation of his rights under the VCCR and the Bilateral Consular Convention because the issue was not raised at trial or on appeal. Respondent cites to *In re Clark*, 5 Cal. 4th 750, 767, 774 (1993), and *In re Martinez*, 46 Cal. 4th 945, 966 (2009), to support the allegation. (Response at 427, 432.) Mr. Benavides's claim is not procedurally barred. Moreover, the cases on which Respondent relies do not concern procedural bars for failure to raise a claim at trial or appeal, but for cases where a petitioner files a successive habeas corpus petition. Since Mr. Benavides has not filed a successive habeas corpus petition, the case law cited by Respondent offers no authority to bar Mr. Benavides's claim.

This Court ruled in 2004 that "a defendant should not be allowed to raise on *habeas corpus* an issue that could have been presented at trial." *In re Seaton*, 34 Cal. 4th 193, 200 (2004). This Court's decision in *In re Seaton* categorically cannot serve as a bar to the Court's merits review of Mr. Benavides's claim because *Seaton* was decided after Mr. Benavides's trial. *See, e.g., People v. McKinnon*, 52 Cal. 4th 610, 643 (2011). Furthermore, waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "The determination of whether there has been a . . . waiver [of a right] must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* Mr. Benavides did not intend to relinquish or abandon

his rights to consular assistance under the VCCR, and would have affirmatively asserted those rights had he been advised of them as is demonstrated by him having sought the assistance of the Mexican consulate in October 1992 when he sent a letter to the Fresno branch of the consulate describing his difficulty communicating with trial counsel and requesting assistance from the consulate to communicate with trial counsel. (Ex. 145 at ¶ 5; *see also* Ex. 165.) The evidence on the record also affirmatively demonstrates that Mexico did not intend to relinquish the right to be notified of its national's detention under the Bilateral Constitutional Convention as the Mexican consulate in Fresno repeatedly tried to contact Ms. Huffman after receiving Mr. Benavides's letter, sent a letter to Ms. Huffman on December 3, 1992, after not being able to reach her requesting information about the case, and responded to the request of Mr. Harbin by sending a letter to the court asking for leniency. (Ex. 145 at ¶¶ 5-6.) Furthermore, the Mexican consulate in Los Angeles mobilized resources upon being contacted by Mr. Benavides's mother after being informed that Mr. Benavides was sentenced to death and attempted to contact defense team members Mr. Harbin, Ms. Huffman, and Victor Almaraz. Moreover, the Mexican consulate in San Francisco has been working closely with post-conviction counsel since 1993. (Ex. 145 at ¶ 7.)

The failure of Mr. Benavides's trial counsel to object to state actors' violations of Mr. Benavides's VCCR rights and rights under the Bilateral Convention does not constitute a waiver of the claim under the specific circumstances of Mr. Benavides's case, and instead, provides an additional legal basis for relief on this claim. "If counsel's omission falls 'below an object [sic] standard of reasonableness . . . under prevailing professional norms' . . . the defendant may assert the error in a habeas corpus petition

'clothed in "ineffective assistance of counsel" raiment'." *Seaton*, 34 Cal. 4th at 200 (internal citations omitted).

Respondent alleges that trial counsel was not ineffective for failing to challenge the violation of Mr. Benavides's rights under the VCCR and the Bilateral Consular Convention or for failing to request assistance from the Mexican consulate. (Response at 438-41.) Respondent is wrong. Trial counsel's performance was so deficient that even the uncontroverted fact that Mr. Benavides was a Mexican national evaded her. On June 11, 1993, trial counsel mistakenly represented to the court that "[Mr. Benavides] became a citizen of the United States in 1988." (3 CT 880.)

Mr. Benavides was a Mexican national at the time of his arrest, and he has never applied for United States citizenship. From the moment Mr. Benavides was arrested there was clear and uncontroverted evidence establishing his citizenship as Mexican. For example, the Delano Police Department booking sheet lists Jalisco, Mexico, as Mr. Benavides's place of birth (1 CT 16), and a resident alien card was among the few items of property that were taken from Mr. Benavides when he was arrested (1 CT 15). (*See also* Ex. 136 (San Quentin State Prison, Initial Classification Review record noting that "Available records indicate that Subject is a Mexican National.") Moreover, Mr. Benavides's Immigration and Naturalization Records, which are the type of background documents that competent trial counsel at the time of Mr. Benavides's trial would have requested, show that Mr. Benavides never applied for United States Citizenship and was never naturalized as a United States citizen. (Ex. 139.) Rather than becoming a United States citizen, Mr. Benavides was accorded Temporary Resident status by the Immigration and Naturalization Service ("INS") on October 19, 1988, and he became a Lawful Permanent Resident on December 1, 1990. (Ex. 138.) Competent trial counsel at the time of

Mr. Benavides's trial would have requested and reviewed, at a minimum, these documents. Had trial counsel done so, they would not have been mistaken about Mr. Benavides's citizenship and should have known that he had rights under the VCCR and Bilateral Consular Convention that were violated by law enforcement. Competent trial counsel at the time of Mr. Benavides's trial would have objected to law enforcement's failure to notify the Mexican consulate and Mr. Benavides of his rights under these conventions. Competent trial counsel also would have contacted the Mexican consulate early on in their representation of Mr. Benavides to enlist the Mexican government's assistance in the investigation of the guilt and penalty phase issues of Mr. Benavides's case. The fact that trial counsel were not aware of the existence of the factual basis for Mr. Benavides's rights under the VCCR and Bilateral Consular Convention militates against any possible waiver of Mr. Benavides's rights.

Respondent relied on trial counsel's mistaken representation about Mr. Benavides being a United States citizen in their 2003 Response and inexplicably argued that Mr. Benavides lost his Mexican citizenship in 1988 because at that time Mexico "opposed the notion of dual citizenship." (2003 Response at 201.) Respondent's reliance on trial counsel's egregious mistake despite all available evidence to the contrary to argue that Mr. Benavides had lost his Mexican citizenship was disingenuous. With the benefit of reading Mr. Benavides's 2004 Informal Reply, Respondent has now retracted that argument and recognizes that Mr. Benavides is indeed a Mexican citizen. Respondent has also retracted its unsupported assertion that Mexico does not permit dual citizenship.

This claim is appropriately raised in habeas proceedings, because it depends substantially upon information that is outside the appellate record. *People v. Cruz*, 44 Cal. 4th 636, 689 n.7 (2008) (where defendant raised a

claim pertaining to the VCCR in a habeas corpus petition presently pending in the California Supreme Court, "[t]he claim, involving matters outside this appellate record, is properly raised on habeas corpus and will be addressed and resolved in that proceeding"); *People v. Mendoza*, 42 Cal. 4th 686, 711 (2007) ("Whether a defendant can establish [Vienna Convention] prejudice based on facts outside of the record is a matter for a habeas corpus petition."); *In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (bar inapplicable when extra-record material has information "of substance not already in appellate record").

Furthermore, this Court has never held that trial counsel's prejudicial failure to challenge evidence obtained following a knowing and purposeful violation of a foreign national defendant's rights to consular notification under the VCCR bars such a claim from being raised in post-conviction. Although the United States Supreme Court has held that the federal constitution does not prohibit states from invoking procedural default rules to bar consideration of claims under the VCCR, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), this decision does not restrict this Court's authority to interpret California constitutional, statutory, and common law as permitting consideration of the violation of a foreign national defendant's VCCR rights post-conviction either as a claim of ineffective assistance of counsel or as an independent claim meriting relief. *Cf. Danforth v. Minnesota*, 128 S. Ct. 1029, 1042 (2008) (holding that the "*Teague* decision limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*").

### 2. Mr. Benavides Has Established a Prima Facie Case for Relief on This Claim.

#### a. The VCCR and the Bilateral Consular Convention Are Enforceable on Behalf of Mr. Benavides.

As set forth in the Corrected Amended Petition, the United States and Mexico are both parties to the VCCR, and the VCCR is binding on the federal government and the government of the State of California under the Supremacy Clause of the United States Constitution. (RCCAP at 399.) The VCCR is a self-executing treaty and requires no additional legislation to come into force. The United States Department of State's witness at the Senate hearings regarding the VCCR informed the Senate that "The [VCCR] is considered entirely self-executing and does not require any implementing or complementing legislation." Statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State, Before the Senate Committee on Foreign Relations, *reprinted in* Sen. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. (1969), at 5.

The United States and Mexico entered into the Bilateral Consular Convention on August 12, 1942; the United Sates ratified it on February 16, 1943, and Mexico ratified it on April 29, 1943. The Bilateral Consular Convention is in effect between the United States and Mexico, and, like the VCCR, is binding on the federal government and the states under the Supremacy Clause of the United States Constitution. Bilateral Consular Convention at 57 Stat. 985 (proclamation by President Franklin D. Roosevelt recognizing that "the Convention has been duly ratified by both Governments"). Respondent does not refute Mr. Benavides's meritorious allegations that law enforcement officials responsible for advising him of his rights to consult with the Mexican Consulate or for advising the Mexican Consulate of his detention failed to do so at any time between his

arrest and the date of his capital sentence as mandated by the VCCR and the Bilateral Consular Convention. Instead, Respondent cites to the United States Supreme Court's opinion in *Medellín v. Texas*, 552 U.S. 491 (2008), and implies that Mr. Benavides is procedurally barred from raising the violation of his VCCR rights because the United States Supreme Court held in *Medellín*, unlike the holding of the International Court Justice in *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. 12 (*Avena*), that state procedural bars can effectively preclude a petitioner from raising the violation of his VCCR rights. (Response at 430-32.) Respondent's argument has no merit.

In *Medellín,* the United States Supreme Court ruled that "the ICJ's judgment in *Avena* . . . does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions." *Medellín*, 552 U.S. at 522. Because, as explained above, state procedural bars are not applicable to Mr. Benavides's claim that law enforcement violated his VCCR rights or to his claim of ineffective assistance of counsel for failing to object to the VCCR violation and for enlisting the assistance of the Mexican consulate in a timely manner, the ruling in *Medellín* does not preclude this Court from reviewing and reconsidering Mr. Benavides's case and from granting relief in his case.

In *Avena,* the ICJ found that the United States had breached its obligations to Mr. Benavides and 50 other death-sentenced Mexican nationals. The ICJ rejected the claim of the United States that Mr. Benavides had allegedly affirmatively claimed to be a United States citizen at the time of his arrest and that it was therefore not obligated to inform Mr. Benavides of his consular rights. *Avena* ¶¶ 60, 70. The ICJ held that "no evidence has been presented that such a statement was made at the time of arrest." *Id.* at ¶ 68. The ICJ explained the duty under the VCCR arises

"once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *Avena* ¶ 63. In Mr. Benavides's case, the duty arose upon his arrest and prior to his interrogation. As noted above, his booking sheet lists Jalisco, Mexico, as his place of birth and his resident alien card was taken from him when he was booked. (1 CT 15-16.) While the ICJ found that the Mexican government learned of the detention of Mr. Benavides through other channels (*Avena* ¶ 104), it found:

> (1) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 (b), of the Vienna Convention to inform detained Mexican nationals of their rights under that paragraph, in the case of the following 51 individuals: Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3) . . . .
>
> (2) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 (b) to notify the Mexican consular post of the detention of the Mexican nationals listed in subparagraph (1) above, except in the cases of Mr. Juárez (No. 10) and Mr. Hernández (No. 34);
>
> (3) that by virtue of its breaches of Article 36, paragraph 1 (b), as described in subparagraph (2) above, the United States also violated the obligation incumbent upon it under Article 36, paragraph 1 (a), of the Vienna Convention to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1 (c) of that Article regarding the right of consular officers to visit their detained nationals.

*Id.* at ¶ 106.

As reparation for the United States' violation of Article 36 of the VCCR, the ICJ ordered "review and reconsideration" of Mr. Benavides's case "with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice

to the defendant in the process of administration of criminal justice." *Avena* ¶ 121. The ICJ emphasized that such review and reconsideration "has to be carried out" taking into account the "legal consequences of the violation upon the criminal proceedings that have followed the violation." *Id.* at 131. The ICJ rejected the United States' argument that clemency proceedings suffice to provide the required meaningful review. *Id* at ¶ 143.

It is noteworthy that the ICJ rejected the United States' argument that violations of Article 36 could never be harmful, so long as the defendant received all of the protections to which he was entitled under the United States Constitution. The ICJ explained that the "rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law." *Id* at ¶ 139. Thus, Mr. Benavides raises his claim "not as a case of 'harm to a particular right essential to a fair trial'—a concept relevant to the enjoyment of due process rights under the United States Constitution—but as a case involving the infringement of his rights under Article 36, paragraph 1." *Id.*[140]

The United States has expressed its intention that state courts give effect to the *Avena* decision. President George W. Bush determined that the United States would discharge its international obligations under the decision of the ICJ in *Avena* by having state courts give effect to the

[140] The ICJ decided *Avena* on March 31, 2004, after the initial informal briefing in this case was completed. On November 30, 2004, Mr. Benavides filed in this Court Supplemental Allegations and Exhibits in Support of Petition in which Mr. Benavides supplied this Court with a copy of the *Avena* decision as further support for allegations in this claim that Mr. Benavides's rights under the VCCR were violated and claim Thirteen, that counsel provided prejudicial ineffective assistance in failing to preserve his VCCR rights.

decision. *See* White House, *Memorandum for the Attorney General: Compliance with the Decision of the International Court of Justice in Avena* (Feb. 28, 2005), http://www.asil.org/avena-memo-050308.cfm. Senator Patrick Leahy introduced the Consular Notification Compliance Act on June 14, 2011, in order to implement the ICJ's mandate to provide a right to effective "review and reconsideration" of the Article 36 violations in cases such as Mr. Benavides's. Without opposition, the bill was formally enrolled as S. 1194 and was referred to the Senate Committee on the Judiciary. *See* 157 CONG. REC. S3779-80 (daily ed. June 14, 2011). The Consular Notification Compliance Act "has the support of the Obama administration, including the Department of Justice, the Department of Defense, the Department of Homeland Security, and the Department of State." 157 CONG. REC. S3780 (daily ed. June 14, 2011) (statement of Sen. Leahy). Unanimously recommended for adoption by the Senate Committee on Appropriations, the legislation is now part of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2013 (S. 3241).

Regardless of the federal government's endorsement of the *Avena* decision, Mr. Benavides is entitled to receive the comprehensive judicial review and reconsideration of his conviction and sentence mandated under *Avena*, in a manner that will "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account . . . ." *Avena* ¶ 138. The *Avena* decision requires this Court, in conducting the mandated judicial review, to examine the claim on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and examine the violation "irrespective of the due process rights under United States constitutional law" by considering the claim "as treaty rights which the United States has

undertaken to comply with in relation to the individual concerned," so that "full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." *Id.* at ¶ 139; *accord Martinez*, 46 Cal. 4th at 960.

**b. Mr. Benavides Has Established That He Was Prejudiced by the Violations of the VCCR and the Bilateral Consular Convention.**

Respondent alleges that no prejudice ensued from the violation of Mr. Benavides's VCCR and Bilateral Consular Convention rights because Mr. Benavides contacted the Mexican consulate in Fresno seeking its assistance in October 1992 and because the consulate sent a letter to the court asking for leniency at the sentencing hearing. Respondent also relies on the consulate's alleged "relative inaction in the case" after having received the letter from Mr. Benavides. (Response at 441.) There is no merit in Respondent's argument.

It is uncontroverted that there was no communication between the trial defense team or Mr. Benavides and the consulate until Mr. Benavides sent a letter to the consulate in October 1992. In that letter, Mr. Benavides explained that he had been detained at the Lerdo jail since November 1991, almost a year before sending the letter, that he was a Mexican national, and that he wanted the consulate to contact his attorney, Donalee Huffman, because Mr. Benavides was unable to communicate well with her in English. (Ex. 145 at ¶ 5.) Consular officials repeatedly tried to contact Ms. Huffman by leaving her telephone messages for a month after receiving Mr. Benavides's letter and by resorting to sending her a letter in December 1992. Ms. Huffman did not return the consulate's calls or respond to the letter. (Ex. 145 at ¶ 5.) paThe consulate's file does not reflect any communication with trial counsel before being approached by Jeffrey

Harbin in May 1993 when Mr. Harbin informed the consulate that Mr. Benavides would be sentenced to death. (Ex. 145 at ¶ 6.) Promptly after receiving this information, the consulate sent a letter to the trial judge and copied the mayor of Bakersfield. (Ex. 145 at ¶ 6.) It was due to the ineffectiveness of trial counsel that the consulate was not allowed to provide Mr. Benavides with assistance, and not, as Respondent claims, because of inaction on the consulate's part.

Respondent's allegation that there is no evidence that the consulate would have provided assistance beyond sending a letter to the court is untrue.[141] The consulate began its attempts to communicate with Ms. Huffman upon receiving the information from Mr. Benavides that he was incarcerated, was having trouble communicating with his attorney, and wanted the consulate to contact Ms. Huffman. Upon being contacted by Mr. Harbin, at a point when the jury had already reached a verdict for death, the consulate sent a letter to the judge asking for mercy at the sentencing. (3 CT 833.) Ambassador Loaeza, who served as consul general for Mexico in various cities in California from 1989 to 1995 (Ex. 145 at ¶ 2), explained in his declaration that because "[t]he Mexican government is opposed to capital punishment . . . [the consulate]make[s] every effort to ensure that Mexican nationals charged in the United States with capital crimes benefit from the consulate's full cooperation and . . . comprehensive consular assistance" and that in the Mexican government's commitment to provide assistant to Mexican nationals detained in the United States, "the highest priority [is] given to those persons involved in capital cases." (Ex. 145 at ¶ 3.)

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[141] Moreover, to the extent that this Court credits Respondent's assertion, it at best raises a factual dispute that may be resolved against Mr. Benavides only after the issuance of an Order to Show Cause and an evidentiary hearing.

Had the consulate been informed upon Mr. Benavides's arrest, a representative from the consulate would have visited Mr. Benavides in jail and would have determined the state of his mental health and they would have assisted him in explaining the American legal system and his *Miranda* rights taking into account cultural differences. Consular officials would have advised Mr. Benavides to avail himself of his right to remain silent until he obtained an attorney. The consulate would have also offered trial counsel the "comprehensive assistance [the Mexican government] usually provide[s] in capital cases." (Ex. 145 at ¶¶ 9-11.) This would have included assistance engaging lawyers that specialize in capital cases, contacting experts for the guilt and penalty phases, identifying legal issues, locating social history records and witnesses in Mexico, and providing competent translation and interpretation services. (Ex. 145 at ¶¶ 11, 13-17.)

Respondent contends that allegations of prejudice suffered by Mr. Benavides as a consequence of the violation of his right to consular assistance contained in the Supplemental Petition for Writ of Habeas Corpus submitted by Mr. Benavides on April 22, 2008, are untimely raised because they do not counter Respondent's arguments in the 2003 Response and do not relate to Ms. Culhane's fraud. (Response at 437.) Respondent is incorrect. The allegations of prejudice in the Supplemental Petition are not untimely because they are not substantively different than those raised in the original petition. In the original petition Mr. Benavides alleged that had the consulate been contacted they could have "helped petitioner understand his rights, helped obtain documents and witnesses from Mexico, and advocated for him with his defense counsel"; they would have provided assistance to counsel at an early stage of the case, had they been contacted shortly after his arrest; attended the trial, recognized the inadequacy of the interpretation services, and provided a qualified interpreter; recognized that

Mr. Benavides's *Miranda* waiver was invalid and helped challenge it; and "would have been able to identify and transport petitioner's family and friends to Bakersfield, California, to attend and testify on petitioner's behalf at the guilt and penalty phases of the trial." (RCCAP at 408-09.) The allegations in the Supplemental Petition, which are based on Ambassador Loaeza's description of the exact ways in which the consulate could have provided assistance, largely mirror the allegations of prejudice in the original petition. (*See, e.g.*, Ex. 145 at ¶ 10 (indicating the consulate would have assisted Mr. Benavides shortly after his arrest in understanding his *Miranda* rights); ¶ 11 (indicating the consulate could have provided legal expert assistance to counsel and Mr. Benavides); ¶ 13 (indicating the consulate could have assisted counsel in locating friends and family and obtain social history, educational, and official agency records); ¶ 14 (explaining that the consulate could have assisted witnesses in obtaining proper immigration visas so they could attend trial); ¶ 15 (explaining that the consulate could have provided competent interpreters and translators).) Accordingly, Mr. Benavides's claims in the Supplemental Petition and in Ambassador Loaeza's declaration are not untimely as they do not represent a new claim or any change in the facts or law supporting the claim.

Respondent relies on defense investigator Jon Purcell's billing for two telephone conversations with the Mexican consulate in October and December 1992 to refute Mr. Benavides's allegation that trial counsel did not return the consulate's calls and did not reach out to the consulate until after the jury had rendered their verdicts. (Response at 433-34.) There is no record of these telephone conversations in Mr. Benavides's consular file (Ex. 145 at ¶ 8) suggesting either that the conversations were so cursory that they did not merit any notation in the file or, that they did not pertain directly to the case. In any case, counsel clearly failed to avail themselves

of the assistance the consulate offered. The comprehensive assistance that the consulate would have provided Mr. Benavides could only be effective if it was requested in a timely manner. Assistance in advising Mr. Benavides in a culturally competent manner about his *Miranda* rights would have had meaning only if Mr. Benavides's VCCR and Bilateral Convention Rights had been abided by and Mr. Benavides was notified of his rights promptly after his arrest. Moreover, to provide meaningful assistance in the investigation of the guilt and penalty phases as well as aiding with interpretation and translation throughout the preparation for the trial required that the consulate had the opportunity to assist Mr. Benavides from the outset. Finally, because Mr. Benavides spent most of his life in Mexico, the assistance that the Mexican consulate could have provided by searching for documentary evidence as well as assisting trial counsel with identifying witnesses and making travel arrangements to the United States was fundamental to the effective presentation of the penalty phase in this case. All of this is rendered futile because the consulate was not allowed to get involved very early in the process. Law enforcement's failure to abide by their obligations under VCCR and Bilateral Consular Convention coupled with trial counsel's failure to request assistance from the consulate from the outset of their representation of Mr. Benavides was prejudicial to Mr. Benavides's case. Mr. Benavides has made a prima facie showing for prejudice suffered due to the violation of his rights under the VCCR and Bilateral Consular Convention and the ineffectiveness of his attorneys.

Because of Mr. Benavides's claim is not procedurally barred and he has established through his allegations a meritorious prima facie case, he is entitled to relief on this claim.

### Y. Claim Twenty-Five: Mr. Benavides Was Deprived of His Right to Have the Jury Determine All Facts Necessary to Sentence Him to Death.

Mr. Benavides has made a prima facie showing that he was denied the requisite jury determination of all facts necessary to sentence him to death, in violation of his constitutional rights to trial by a fair and impartial jury, due process, the presumption of innocence, equal protection of the laws, the effective assistance of counsel, an individualized sentencing determination, the presumption of innocence, freedom from arbitrary and capricious sentencing, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law. (RCCAP at 410-22.)

#### 1. The Constitution Requires the Jury to Unanimously Determine Beyond a Reasonable Doubt All Facts Necessary to Increase a Sentence.

The United States Supreme Court has clearly established that any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (extending the holding in *Jones* to the several states through the Fourteenth Amendment). The Court has established with equal clarity that any fact that exposes a capital defendant to greater punishment, whether introduced at the guilt or penalty phase, must be found by jury beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584 (2002). More recently, the Court has emphasized its repeated holdings that any fact exposing a defendant to a greater potential sentence must be found by a jury, not a judge, and that such facts must be established beyond a reasonable doubt, not merely by a preponderance of the evidence. *Cunningham v. California*, 549 U.S. 270 (2007).

### 2. The Trial Court Violated the Constitution by Not Requiring the Jury to Find Unanimously Beyond a Reasonable Doubt All Facts Necessary to Sentence Mr. Benavides to Death.

In contravention of Constitutional requirements, Mr. Benavides's jury was not required to find the existence of an aggravating factor or factors beyond a reasonable doubt, or determine whether death was the appropriate punishment beyond a reasonable doubt. Nor did Mr. Benavides's penalty phase jury receive the guidance necessary to ensure those factors in aggravation were *unanimously* found to exist beyond a reasonable doubt—indeed, they were not even instructed that such facts should be found by a *majority*.[142]

Under California law, there is no definition of an aggravating factor; no instruction to the jury on the need for unanimity as to those factors; no jury instructions given to explain the appropriate burden of proof to find the existence of any aggravating factor; and no jury instruction as to the burden of proof required when weighing any aggravating factors against mitigating factors. *See* Cal. Penal Code § 190.3. Instead, during Mr. Benavides's penalty trial, the jury was instructed simply that an "aggravating factor is any fact, condition or event attending the commission of a crime which increases its [sic] guilt or enormity, or adds to its injurious consequences

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[142] Respondent attempts to skirt this critical issue by citing to pre-*Ring* cases that did not require unanimity as to aggravating factors. (Response at 442-43.) In so doing, Respondent ignores not only the clear requirements of *Ring*, but also the fundamental principles of the California Constitution. The first sentence of Article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." In California, if a defendant has a right to a unanimous jury verdict, concomitantly he has a right to a unanimous verdict as to any fact or set of facts that can *only* be found by a jury.

which is above and beyond the elements of the crime itself" and that "to return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death, instead of life without the possibility of parole." (19 RT 3778-79.) These instructions failed to comply with the dictates of *Ring* and its progeny that a defendant may not be sentenced to death unless every factual finding necessary for capital punishment is found by a jury beyond a reasonable doubt. Lacking these constitutional safeguards, Mr. Benavides's sentence of death must be reversed.

The trial court further violated Mr. Benavides's constitutional rights at sentencing. Following the jury's penalty verdict, but prior to sentencing, Mr. Benavides's trial counsel made a motion for a new trial and to reduce the penalty. (3 CT 873.) Before ruling on this motion, the trial court read and considered a probation report that was not presented to the jury. (19 RT 3843.) This report contained materially false and prejudicial information, none of which Mr. Benavides was afforded an opportunity to test, challenge, or refute. The trial court's review of and reliance upon this false, untested information prior to sentencing equally violated the requirements, detailed above, that a judge is not permitted to determine the existence of any factor that makes a crime a capital offense. *See Apprendi*, 530 U.S. at 466; *Ring*, 536 U.S. at 584; *Cunningham*, 549 U.S. at 270.

### 3. Respondent's Arguments Are Meritless and Ignore Further Post-*Ring* Case Law From the United States Supreme Court.

Respondent asserts that the reasoning underlying *Ring's* invalidation of Arizona's capital sentencing scheme is not applicable to California. (Response at 442, citing *People v. Snow*, 30 Cal. 4th 43 (2003).) In

particular, a footnote in *Snow* distinguishes California's sentencing scheme from that of Arizona's scheme on the grounds that (1) under California law, a death sentence is "no more than the prescribed statutory maximum for the offense," *id.* at 126 n.32 (quoting *People v. Anderson*, 25 Cal. 4th 543, 589-90 n.14 (2001)); and (2) California employs a "free weighing of all of the factors relating to the defendant's culpability," rather than requiring a finding of a specific enumerated aggravating factor. *Id.* While the California scheme is not identical to the Arizona scheme, neither of the articulated distinctions in *Snow* provides an adequate basis to defend the constitutionality of the California state scheme after *Ring*.

First, once a capital jury has returned a guilty verdict and found at least one special circumstance allegation true, the defendant proceeds to the capital penalty phase where the jury is charged with determining whether the defendant will receive life without the possibility of parole, or be executed. *See* Cal. Penal Code § 190.2. While the "maximum" penalty is a death verdict, Respondent is wrong in asserting that the penalty phase involves only "a choice between two previously authorized sentences." (Response at 444.) Instead, as with the Arizona statute, the California statute "authorizes a maximum penalty of death only in a formal sense." *Ring*, 536 U.S. at 604 (emphasis omitted) (quoting *Apprendi v. New Jersey*, 530 U.S. at 541 (O'Connor, J., dissenting)). While the jury is authorized to *consider* a sentence of death, it is absolutely not authorized to *impose* one unless and until additional fact-finding occurs.

Indeed, the penalty phase instructions to the jury in this case underscore the undisputed need for further factual determinations. For example, the trial court instructed the jury that, "You may not treat the verdicts and findings of first degree murder committed under special circumstances, in and of themselves, as constituting an aggravating factor,"

and gave the further instruction that, "the verdict and finding which qualifies a particular crime for either of these punishments may not be taken, in and of themselves, as justifying one penalty over another." (19 RT 3777.) Before a jury may return a verdict of death in the penalty phase, the jurors must look beyond the evidence adduced and the verdicts returned at the guilt phase, and the state cannot avoid the mandates of *Apprendi* and *Ring* by characterizing this additional fact-finding as a choice between sentencing options, rather than a process by which the maximum sentence is increased. *See, e.g.*, *Apprendi*, 530 U.S. at 499.

Second, the fact that California is a "weighing" state—or even a "free weighing" state as it is characterized in *Snow*—does not alter the fact-finding nature of the jury's penalty phase enterprise. In California, the jury must make additional findings before returning a death verdict: (1) the existence of at least one aggravating factor; (2) the aggravating factors outweigh the mitigating factors; and (3) the aggravating factors are so substantial that death is the appropriate punishment. These additional factual matters are "essential to the imposition of the level of punishment that the defendant receives," *Ring*, 536 U.S. at 610 (Scalia, J. concurring) precisely because they increase the punishment beyond "that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494. Despite any moral or normative aspects embedded within the penalty phase process, *see People v. Prieto*, 30 Cal. 4th 226, 263 (2003) (citing *People v. Rodriguez*, 42 Cal. 3d 730, 779 (1986)), it is only after making the factual findings listed above that the jury is permitted to engage in the further moral and normative consideration of whether the defendant should be put to death.

Respondent argues that this Court's precedent requires rejection of Mr. Benavides's claim. (Response at 442.) The most recent cases Respondent has cited on this or any other point in this claim are from 2003.

Respondent thus ignores *Cunningham*, which was issued in 2007, and in which the United States Supreme Court expressly examined whether the circumstances in aggravation under California's Determinate Sentencing Law (DSL) constituted facts that expose a defendant to a greater potential sentence. *Cunningham*, 549 U.S. at 270.

In *Cunningham*, after examining the relevant statute and rules, the Court held that circumstances in aggravation are facts. *Id.* at 280. The Court explained that these facts, which expose a defendant to a greater potential sentence, must be found by the jury beyond a reasonable doubt, thereby invalidating the DSL as unconstitutional because it violated *Apprendi's* "bright-line rule" that any fact increasing the maximum penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 289. Because the DSL merely required that a judge, not the jury, find the facts permitting an "upper term sentence," it violated the Supreme Court's well-established "Sixth Amendment precedent." *Id.* at 293; *see also Jones*, 226 U.S. at 227 (holding that the Sixth Amendment requires that any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt); *Apprendi*, 530 U.S. at 466 (extending *Jones* to the states through the Fourteenth Amendment); *Ring*, 536 U.S. at 584 (holding that the Sixth Amendment right to jury trial precludes a judge, rather than a jury, from finding aggravating circumstance necessary for imposition of the death penalty).

Although Respondent fails to address *Cunningham* or any post-*Cunningham* case law, Mr. Benavides acknowledges that this Court has declined to apply *Cunningham* to penalty determinations. *See, e.g.*, *People v. Prince*, 40 Cal. 4th 1179, 1297 (2007); *People v. Romero*, 44 Cal. 4th 386, 429 (2008). As these decisions violate clearly established federal law, Mr. Benavides respectfully urges this Court to issue an Order to Show

Cause to reconsider those holdings. The holdings of *Cunningham, Ring, Apprendi,* and *Jones* apply to California's capital sentencing scheme because California requires the jury to make additional findings during the penalty phase before determining whether or not the more aggravated sentence of death can be imposed. As such, the Sixth Amendment applies, and any fact-finding without the requirements of unanimity and the beyond a reasonable doubt standard are unconstitutional. These reasons, taken in consideration with the evidence and allegations set forth in Mr. Benavides's case, warrant reconsideration by this Court of its precedent.

**4. The Constitutional Error Here Requires Reversal.**

If any of the counts of conviction or special circumstances are found to be invalid, the Court must issue an Order to Show Cause, vacate the judgment, and order a new penalty phase trial. Here, Respondent has conceded that the rape charge and related special circumstance are not supported by sufficient evidence (Response at 41, n.13), and thus a new penalty phase is warranted.

As the United States Supreme Court has found, the delicate work that juries must undertake when weighing aggravating and mitigating factors is skewed by the presence of an invalid special circumstance, thereby creating an unacceptable risk that the death penalty was imposed unconstitutionally. *See Stringer v. Black*, 503 U.S. 222, 232 (1992) ("[reviewing court] may not assume it would have made no difference if the thumb had been removed from the death's side of the scale."). Thus, only a new penalty trial and a new weighing of aggravation and mitigation by a jury would be sufficient to preserve Mr. Benavides's constitutional rights consistent with *Ring* and its progeny.

No appellate court can determine what the penalty would have been absent the jury's consideration of an invalid conviction or special circumstance. Only a jury can partake in the weighing process because in California the jury may not impose a death sentence unless it finds that one or more aggravating factors exist and because the jury's factual determination that aggravating factors outweigh mitigating factors is a prerequisite to imposing the death penalty in California. Cal. Penal Code § 190.3; *Ring*, 536 U.S. at 584. Moreover, because California's death penalty statute does not require juries to find aggravating factors unanimously and beyond a reasonable doubt, appellate reweighing would necessarily involve improper consideration of facts not found in accordance with *Ring* and its progeny.

Due to the trial court's failure to comply with the constitutional standards elucidated in *Jones*, *Apprendi*, *Ring*, and *Cunningham*, the sentencing procedures at Mr. Benavides's penalty trial violated his state and federal constitutional rights to a jury determination of any factual findings necessary to impose a sentence of death, in derogation of Mr. Benavides's rights to trial by jury, due process, to be free of arbitrary and capricious sentencing, to effective assistance of counsel, to an individualized sentencing determination, to be free of cruel and unusual punishment, to equal protection of the laws, the presumption of innocence, and a fair and impartial jury as guaranteed by the federal and state constitutions and state law.

To the extent that this Court concludes that trial counsel failed to properly object to California's unconstitutional capital sentencing scheme, failed to object to the inadequate instructions given here, or failed to request proper clarifying instructions, such actions and omissions constitute deficient and prejudicial representation by trial counsel in violation of Mr.

Benavides's Sixth Amendment rights to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). To the extent Mr. Benavides's appellate counsel failed to allege the court's and trial counsel's errors in this regard, appellate counsel was unconstitutionally ineffective. *See Evitts. v. Lucey*, 469 U.S. 387 (1985).

These errors had a substantial and injurious effect or influence on the jury's penalty phase determination, in the absence of which Mr. Benavides would not have been sentenced to death. Moreover, the trial court's errors here, like other errors denying a defendant the right to an instruction that all elements of an offense are subject to the reasonable doubt standard of fact-finding, is a structural error not subject to harmless error review. The error infected the integrity of the capital sentencing proceeding to such a degree that as a result the sentencing decision no longer carries with it the reliability required by our Constitution. *See Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

For all of the reasons above, reversal is the only appropriate remedy.

### Z. The Cumulative Effect of the Numerous Errors in Mr. Benavides's Trial Deprived Him of the Fundamental Right to a Fair Trial.

It is indisputable that a wealth of exculpatory and mitigating evidence was not presented to the jury as a result of counsel's incompetence and the prosecutor's misconduct. Each of the constitutional errors alleged in the Corrected Amended Petition alone merit relief. The cumulative effect of the multiple errors identified in the Corrected Amended Petition and on appeal, however, undoubtedly undermines confidence in the verdict and mandates that Mr. Benavides's conviction be vacated. No one, other than Respondent, can review the vast evidence presented in the Corrected

Amended Petition and not have serious and disturbing questions about the trial that led to Mr. Benavides's conviction and death sentence.

Clearly established law requires that the errors alleged in the Corrected Amended Petition and on appeal be reviewed by this Court for their aggregate prejudicial effect. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 421 (1995) (assessing the "net effect of the evidence withheld" in determining prejudice); *Chambers v. Mississippi*, 410 U.S. 284, 298, 302–03 (1973) (cumulating errors and finding prejudice); *see also Alcala v. Woodford*, 334 F.3d 862, 883–94 (9th Cir. 2003) (holding that the combined prejudice of multiple errors deprived the defendant of a fundamentally fair trial and constitutes a separate and independent basis for relief); *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (holding that the cumulative impact of multiple errors established prejudice). The "cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990). "A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002); *see also United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (holding that "cumulative effect of multiple errors may still prejudice a defendant" even if "no single error examined in isolation is sufficiently prejudicial"); *accord Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) (explaining that "a balkanized, issue-by-issue harmless error review" is not "very enlightening" in determining prejudice). Because the collective presence of errors may be "devastating to one's confidence in the reliability of [a] verdict," an assessment of cumulative

prejudice on the determinations of guilt, death eligibility, and punishment imposed is particularly appropriate in a capital case. *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (discussing special need for reliability in determining culpability for capital murder); *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (same with respect to punishment); *Daniels v. Woodford*, 428 F.3d 1181, 1214 (9th Cir. 2005) (cumulating, in penalty phase prejudice analysis, refusal to change venue after jury voir dire, removal of counsel and appointment of inexperienced counsel, and instructional error concerning double-counting of special circumstance).

Further, this Court has recognized that due to the finality of the death penalty, a court has a heightened duty to ensure the reliability of a capital verdict. *See, e.g.*, *People v. Hernandez*, 30 Cal. 4th 835, 877 (2003) (holding that "numerous and serious" errors at the penalty phase of defendant's trial, considered together, affected the jury's penalty determination and required penalty phase reversal); *People v. Holt*, 37 Cal. 3d 436, 459 (1984) (setting aside defendant's convictions after finding that it was reasonably probable that in the absence of the cumulative effect of the trial errors, the jury would have reached a more favorable result); *People v. Easley*, 34 Cal. 3d 858, 863 (1983) (noting that in capital cases, the provisions of California Penal Code section 1239(b) "impose a duty upon this [C]ourt to make an examination of the complete record of the proceedings to the end that it be ascertained whether defendant was given a fair trial.") (internal punctuation omitted); *see also People v. Kronemeyer*, 189 Cal. App. 3d 314, 349 (1987) (noting that the cumulative error analysis "always applies," because the "litmus test is whether defendant received due process and a fair trial.").

A cumulative assessment of the errors presented in the Corrected Amended Petition and on appeal lead to the inescapable conclusion that Mr.

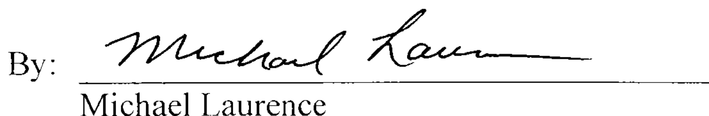
Benavides was denied a fair trial and was wrongfully convicted. Any other conclusion would be a travesty of justice.

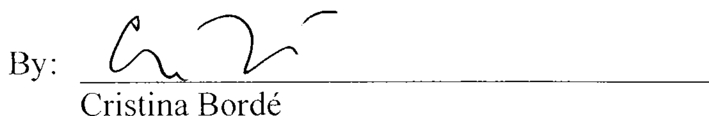
## V. Conclusion

For reasons set forth in the Corrected Amended Petition and above, Mr. Benavides has stated a prima facie case and is entitled to the issuance of an Order to Show Cause, and judgment on the pleadings or in the alternative an evidentiary hearing, and a new trial on the question of his guilt or innocence and, if necessary after such phase, on the question of the appropriate punishment.

Dated: December 21, 2012 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 
Michael Laurence

By: 
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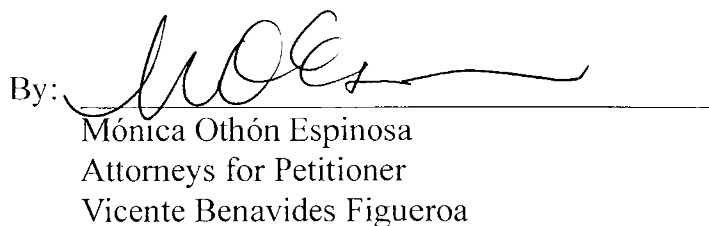
By: 
Mónica Othón Espinosa
Attorneys for Petitioner
Vicente Benavides Figueroa

## VERIFICATION

Michael Laurence declares as follows:

I am an attorney admitted to practice in the State of California. I represent petitioner Vicente Benavides Figueroa herein, who is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California.

I am authorized to file this Reply to the Informal Response on Mr. Benavides's behalf. I make this verification because Mr. Benavides is incarcerated in a county different from that of my law office. In addition, many of the facts alleged are within my knowledge as much or more than Mr. Benavides's.

I have read the Reply and know the contents of the petition to be true. Executed under penalty of perjury on December 21, 2012, at San Francisco, California.

Michael Laurence

# PROOF OF SERVICE

1. I am over 18 years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place.

2. My business address is: Habeas Corpus Resource Center, 303 Second Street, Suite 400 South, San Francisco, California 94107.

3. Today, I mailed from San Francisco, California the following document(s):

- **Informal Reply to the Informal Response to the Corrected Amended Petition for Writ of Habeas Corpus**
- **Exhibits in Support of the Corrected Amended Petition for Writ of Habeas Corpus, Vols. 24-28**

4. I served the document(s) by enclosing them in a package or envelope, which I then:

[X] deposited with the United States Postal Service, postage fully prepaid.

[ ] deposited for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed package or envelope with postage fully prepaid.

5. The package or envelope was addressed and mailed as follows:

Kelly E. Le Bel
Deputy Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550

I also served an electronic copy to Mr. Kent Barkhurst, Office of the State Public Defender, Oakland City Center, 1111 Broadway, 10th Floor, Oakland, CA 94607.

As permitted by Policy 4 of the California Supreme Court's *Policies Regarding Cases Arising from Judgments of Death*, counsel intends to complete service on Petitioner by hand-delivering the document(s) within thirty calendar days, after which counsel will notify the Court in writing that service is complete.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: December 21, 2012

Carl Gibbs