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 (closed) Kern County Superior Court Case No. 48266

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE TO THE RED-LINED COPY OF THE CORRECTED AMENDED PETITION

Michael J. Hersek (Bar No. 142065)
Miro F. Cizin (Bar No. 171378)
Paula Fog (Bar No. 251936)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov

Attorneys for Petitioner VICENTE BENAVIDES FIGUEROA

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Attorneys for Petitioner VICENTE BENAVIDES FIGUEROA

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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.

By this verified Traverse, petitioner VICENTE BENAVIDES FIGUEROA, through counsel the Habeas Corpus Resource Center (HCRC), responds to the Return to the Order to Show Cause to the Red-Lined Copy of Corrected Amended Petition ("RCCAP")[1].

[1] In its Return, respondent indicates he is responding to the Red-lined Copy of the Corrected Amended Petition (RCCAP) and cites portions of the RCCAP. For ease of the Court, Mr. Benavides similarly cites the RCCAP. Mr. Benavides, however, notes that by this Court's order of January 23, 2008, the Corrected Amended Petition, not the red-lined copy of that petition, is the controlling petition which was deemed presumptively timely filed on April 22, 2008. In the same order, this Court ordered Mr. Benavides to file a redlined copy of the corrected amended petition to assist in tracking additions and deletions to the original petition, not to replace the petition.

I. INCORPORATION BY REFERENCE

By this reference, Mr. Benavides expressly incorporates and alleges each fact alleged in the Corrected Amended Petition for Writ of Habeas Corpus (CAP), filed in this Court on April 22, 2008, the Informal Reply to the Informal Response to the Corrected Amended Petition for Writ of Habeas Corpus ("Reply"), filed in this Court on December 21, 2012, and Exhibits 1 through 176, filed in support of his claims for relief, as if each fact, allegation, exhibit, and legal argument were fully set forth in this Traverse. *People v. Romero*, 8 Cal. 4th 728, 739 (1994); *In re Sixto*, 48 Cal. 3d 1247, 1252 (1989), *In re Lewallen*, 23 Cal. 3d 274, 277 (1979). Mr. Benavides specifically relies on every allegation, exhibit, and legal argument made in support of Claims One through Five, and Claim Thirteen of his Corrected Amended Petition. Additionally, Mr. Benavides incorporates into this Traverse the accompanying Memorandum of Points and Authorities and the documentary evidence submitted herewith. *In re Gay*, 19 Cal. 4th 771, 781 n.7 (1998).

Mr. Benavides also requests that this Court incorporate by reference into this habeas corpus proceeding the certified record on appeal, and all of the briefs, motions, orders, and other documents and material on file in *People v. Vicente Figueroa Benavides*, Case No. S033440, and *People v. Vicente Figueroa Benavides*, Kern County Superior Court Criminal Case No. 48266. *See In re Reno*, 55 Cal. 4th 428, 444, 484 (2012) (holding habeas petitioner need not request judicial notice of all documents from prior proceedings in capital cases because this Court routinely consults prior proceedings irrespective of formal request).

II. REPLY TO RESPONDENT'S ALLEGATIONS

A. General admissions and denials

1. Mr. Benavides admits that he is in custody at San Quentin Prison. Mr. Benavides denies respondent's claim that his confinement is lawful, as alleged by respondent on page 1 of the Return.

2. Mr. Benavides admits and agrees with respondent's confirmation of Mr. Benavides's account of the procedural posture as set forth in the RCCAP.

3. Mr. Benavides denies that the Statement of Facts in the RCCAP is argumentative and contains legal characterizations, as alleged on page 1 of the Return. He affirmatively alleges that the Statement of Facts at pages 8 through 19 of the RCCAP is an accurate recitation of the facts in this case.

4. Mr. Benavides admits that this Court has jurisdiction to resolve the claims set out in the Corrected Amended Petition.

5. Mr. Benavides denies that he has been provided a reasonable opportunity to investigate, develop and present claims for relief, as alleged by respondent on page 2 of the Return.

B. Claim One: The State presented false testimony that Mr. Benavides caused Consuelo injuries.

1. Mr. Benavides admits and agrees with respondent that his first degree murder conviction, the special circumstance findings, and his sentence must be vacated as a result of the prosecutor's use of false evidence at Mr. Benavides's capital trial. Return at 2-9. More specifically, the parties agree as follows:

a. Mr. Benavides admits and agrees with respondent that his first degree murder conviction must be vacated because the factual premise for that conviction has been discredited by the recantations of the prosecution's trial experts. The prosecution used false evidence to prove its

theory of first degree felony murder with special circumstances at Mr. Benavides's trial. The parties agree that there exists no evidence of sexual assault to support the State's theory of first degree felony murder.

b. Mr. Benavides admits and agrees with respondent that Mr. Benavides's death sentence must be vacated.

c. Mr. Benavides admits and agrees with respondent that his convictions for rape, sodomy, and lewd and lascivious acts with a child under the age of fourteen must be vacated because they were obtained by the prosecutor's use of false evidence. Return at 2-3, 5, and 7.

d. Mr. Benavides admits and agrees with respondent that the three special circumstances related to the aforementioned sex offenses must be vacated because they were obtained by use of false evidence.

e. In light of respondent's concession that Mr. Benavides conviction and sentence must be vacated, Mr. Benavides admits and agrees that the false evidence underlying respondent's concessions was material to the conviction and tainted the verdict in that it may have affected the outcome of the trial. *In re Richards*, 63 Cal. 4th 291, 312-313 (2016). Mr. Benavides admits and agrees that the false evidence presented at trial – upon which the prosecution's first degree murder theory was grounded – undermines confidence in the outcome of the trial. Accordingly, Mr. Benavides's convictions and sentence must be vacated.

2. Mr. Benavides denies that he injured Consuelo Verdugo in any way, and he denies that he killed the child, as respondent speculates throughout the Return.

3. Mr. Benavides admits and agrees that Dr. James Dibdin's trial testimony is among the false evidence that requires this Court to grant the petition for writ of habeas corpus. Return at 3.

4. Mr. Benavides denies respondent's assertion that, notwithstanding the use of false evidence at his trial, it is not reasonably

probable that the jury would not have convicted Mr. Benavides of second degree murder. Return at 3. Respondent misapprehends how this Court must evaluate and remedy the impact of the false evidence in this case. Mr. Benavides asserts that the question is whether the false evidence was material to the jury's verdict, not whether substantial evidence supports some other verdict even without the false evidence. *Richards*, 63 Cal. 4th at 312. Mr. Benavides alleges that the false evidence of sexual abuse permeated his capital trial; that each of the State's experts relied in whole or part on Dr. Dibdin's false autopsy report and/or his false findings of sexual abuse and/or Dr. Jess Diamond's false findings of sexual abuse; and that the false evidence relied on by the State to obtain the conviction was material and tainted the jury's verdict.

5. Because the false evidence was material and tainted the jury's actual verdict, Mr. Benavides denies that this Court can simply reduce his conviction to second degree murder and impose a new sentence. Return at 3. The proper remedy in light of respondent's concessions and admissions as to the false evidence is to grant the petition for writ of habeas corpus, vacate Mr. Benavides's convictions and sentence, and order that Mr. Benavides be immediately released or retried.

6. Mr. Benavides denies respondent's assertion that no "prosecution witness 'falsified' any evidence" in the trial proceedings below. Return at 3. Mr. Benavides affirmatively alleges that Dr. Dibdin's trial testimony was in fact false. Mr. Benavides also affirmatively alleges that Dr. Diamond's trial testimony was in fact false.

7. Mr. Benavides denies that respondent lacks information concerning Dr. Dibdin's history of fabricating evidence. Return at 3. Mr. Benavides has provided ample evidence of Dr. Dibdin's history of testifying falsely in other cases. RCCAP at 21-23; Reply at 23-29. Mr. Benavides denies that respondent has any inability to "confirm the particulars

concerning any other matters or events in which Dr. Dibdin might have been involved." Return at 3. Respondent has had more than seven years to look into "the particulars" of these matters. To the extent respondent is alleging that it has no access to these relevant facts, the Return does not set forth with specificity (i) why the information is not readily available; (ii) the steps that were taken to try to obtain it; and (iii) why respondent believes in good faith that the alleged facts are, nevertheless, untrue. *People v. Duvall*, 9 Cal. 4th 464, 485 (1995). Consequently, this Court should accept Dr. Dibdin's history of testifying falsely in other cases, as specifically alleged in the CAP and Reply, as facts not in dispute. *See* Cal. R. Ct. 8.386(c)(3).

8. Mr. Benavides alleges that his trial was fundamentally unfair for all the reasons set out in the CAP and Reply, and in particular because the prosecution manufactured evidence, including Dr. Dibdin's autopsy report, in order to support its medically impossible theory regarding the manner and cause of Consuelo's death. RCCAP at 23-29. While respondent denies that the State manufactured any evidence, Return at 4, respondent does not contest the following facts that demonstrate that Dr. Dibdin wrote the autopsy report to fit the State's theory:

a. On November 26, 1991, Dr. Dibdin performed an autopsy, but he did not write a report at that time.

b. Nearly two months after performing the autopsy, and only after the State presented its false theory at the preliminary hearing, did Dr. Dibdin finally prepare an autopsy report. That delayed written report was not based on his direct observations or memory. Rather, Dr. Dibdin's now discredited report reflected the prosecutor's medically impossible theory that anal penetration had caused the injury to Consuelo's upper abdominal organs of the child.

c. Dr. Dibdin's fabricated autopsy report enabled the prosecutor to argue falsely that Mr. Benavides killed Consuelo by sodomizing her.

d. Further, Dr. Diamond testified at trial that he "was told" prior to the preliminary hearing that there was a tear in the rectum wall and hence had opined that sodomy caused the internal injuries. 10 Reporter's Transcript on Appeal (RT) 2085. He changed his opinion based on the corrected information provided by an unnamed source that there was no tear to the rectum wall. The presence or absence of damage to the rectum wall was critical to proving the sodomy allegation and Dr. Dibdin's cause of death, and that Dr. Diamond was misinformed regarding this critical fact prior to the preliminary hearing further demonstrates that the autopsy report was written to fit the prosecution's felony-murder theory.

e. Dr. Dibdin's testimony at Mr. Benavides's capital trial was based on the medically impossible theory reflected in his autopsy report, and that testimony was in fact falsified.

9. Mr. Benavides admits that the false allegations of sexual abuse in this case originated with the medical personnel who treated Consuelo, rather than the State. Return at 4. Mr. Benavides has not alleged otherwise and respondent's allegation to the contrary is non-responsive to what Mr. Benavides has actually argued: Dr. Dibdin's autopsy report was produced under circumstances that demonstrate it was manufactured to fit the prosecution's theory of the case.

10. Respondent alleges that whether Consuelo was raped, or whether Mr. Benavides did some other act that caused the child's fatal injuries, "will likely never be confidently known by anyone other than [Mr. Benavides]." Return at 4. Respondent makes the same allegations as to sodomy. Return at 6. The precise meaning of these allegations is not entirely clear because respondent is in significant measure speculating as to what he thinks will and

will not likely be known in the future. Notwithstanding this speculation, Mr. Benavides makes the following admissions and denials regarding these allegations:

a. To the extent respondent is alleging that the State has no reliable evidence that Consuelo was sexually assaulted, which is the basis of its concession that the first degree felony murder conviction, the sex-offense convictions, and related special circumstance findings must be vacated, Mr. Benavides agrees.

b. To the extent respondent is alleging that the State has no reliable evidence as to what caused Consuelo's fatal injuries, Mr. Benavides agrees.

c. To the extent respondent is alleging that Mr. Benavides knows the truth about the now-discredited rape and sodomy allegations, as well as whether he otherwise injured Consuelo, Mr. Benavides admits this is true and reasserts what he has maintained for more than twenty-five years: he did not sexually assault, cause Consuelo's fatal injuries, or injure her in any way.

d. To the extent respondent is alleging that nobody other than Mr. Benavides can have confidence that he did not sexually assault Consuelo, Mr. Benavides disagrees. In light of respondent's concessions regarding the State's use of false evidence at trial, and the State's own expert's opinions that there is no evidence of sexual assault in this case, this Court and any reasonable fact finder can have confidence that Consuelo was not sexually assaulted.

e. To the extent respondent speculates that Consuelo may have been sexually assaulted, though there are no physical signs of sexual abuse or any other evidence to suggest she was sexually abused, Mr. Benavides denies that such speculation is reasonable and worthy of credit by this Court.

11. Mr. Benavides denies respondent's vague and unsubstantiated allegation that evidence that no longer exists – including a specimen of Consuelo's pelvic floor – supported "some of the original opinions" offered in support of the prosecution's now-discredited trial theory. Return at 4-5. Mr. Benavides was informed by the Kern County Sheriff's Department that State actors destroyed evidence in this case, including Consuelo's pelvic floor. But respondent presents no factual basis to suggest that the destroyed evidence supported the prosecution's false claims that Consuelo was sexually assaulted, much less that a sexual assault caused the child's fatal injuries. The experts whose declarations respondent presented with his Return do not indicate that the pelvic floor, or any other piece of destroyed evidence, might have had an impact on their opinions concerning the absence of sexual abuse in this case. To the contrary, respondent's experts had available to them all of the evidence Mr. Benavides presented to this Court in the CAP, all of the documentary evidence available to the prosecutor, including the medical records from each of the facilities that examined and treated Consuelo, the twenty-seven microscopic slides prepared from the autopsy, and all the testimony presented at Mr. Benavides capital trial. Mr. Benavides alleges that on the current state of the evidence, there is no proof of sexual abuse in this case. Respondent's suggestion that there once existed evidence, now destroyed, to support the prosecution's fabricated trial theory is speculation unworthy of this Court's consideration.

12. Mr. Benavides denies respondent's claim that the prosecution did not present evidence that Consuelo had tears to her rectum, vagina, and urinary bladder. Return at 5. The prosecutor presented this false evidence when it allowed Dr. Dibdin to testify that there were injuries to Consuelo's vagina, urinary bladder and rectum, specifically that "there were multiple tears of the edge of the anus and this had gone through the muscle," that there was a path of injury that reached from the anus to the abdomen, and that there

were "previous injuries" to the anus and vagina. 11 RT 2119, 2139-43, and 2166-67. The prosecutor knew this outrageous and highly inflammatory testimony was false, but presented it anyway without correction.

13. Mr. Benavides admits that the precise manner by which Consuelo's abdominal injuries were caused might never be known. Return at 7. Mr. Benavides denies, however, that he was the person who caused those injuries, and denies that there exists any evidence regarding the manner of Consuelo's injuries that is untainted by the false evidence offered at Mr. Benavides's capital trial.

14. Mr. Benavides accepts that respondent has "considerable doubt" as to pathophysiological possibility that Consuelo's injuries were caused by penetrating trauma to the anus. Return at 7. Mr. Benavides alleges, however, that such doubt is unreasonable, and that it is medically and anatomically impossible that anal penetration severed Consuelo's pancreas and caused the child's fatal injuries.

15. Mr. Benavides admits that respondent lacks information concerning how Consuelo came to have rib injuries, if any, and when those injuries occurred in relation to her death. Return at 7. Mr. Benavides agrees that the state of the evidence regarding the alleged rib injuries is inconclusive. Indeed, it is possible that any acute rib injuries in this case were caused by medical staff who treated Consuelo for her abdominal injuries. Dr. J. Chabra, the radiologist who first viewed the first set of radiographs of Consuelo's ribs – taken within an hour of her arrival at the first hospital – initially reported finding no sign of rib fractures. RCCAP at 36; Ex. 1 at 19.

16. Mr. Benavides alleges that evidence concerning the rib injuries offered at trial by the State was in fact fabricated. As set out in greater detail in the CAP, weeks after concluding Consuelo had no rib injuries when she entered the first hospital for treatment, Dr. Chabra amended his original

radiology report twice to include positive findings, each time after a visit by Delano police detectives. RCCAP at 35-39; Reply at 52-58.

17. Mr. Benavides admits that respondent lacks information concerning the cause and age of Consuelo's "healing rib fractures." Return at 7-8. As noted above, the evidence is unclear as to whether Consuelo had any rib injuries at all prior to being admitted to Delano Regional Medical Center (DRMC). It is clear, however, that Dr. Dibdin's testimony concerning the rib fractures and his purported observation of them was unsubstantiated and false. Mr. Benavides denies respondent's factually unsupported assertion that circumstantial evidence links Mr. Benavides to the alleged prior rib fractures.

18. Mr. Benavides denies that respondent lacks information as to whether Consuelo's brain injuries were caused by suffocation. Return at 8. In fact, respondent's own expert, Dr. Tracey S. Corey, rejects suffocation as the cause of Consuelo's brain injuries. Return Ex. 18 at ¶ 16. Mr. Benavides also denies respondent's claim that the issue here is based on a mere conflict of medical opinion between the State's trial expert, Dr. John Bentson, and that of habeas counsel's expert. Return at 8. Rather, the issue here is whether Dr. Bentson's opinion testimony was false, not whether Dr. Benston's false medical opinion conflicted with a reliable one. In that regard, Mr. Benavides alleges Dr. Bentson's trial testimony was false and secured by the State by not providing Dr. Bentson with the available medical records necessary for him to form an accurate opinion, including the critical medical records from DRMC. Respondent does not contest that the DRMC records indisputably show that Consuelo arrived at that facility with a relatively normal level of consciousness, which could not possibly have been the case had she been suffocated to the point of creating the brain damage identified by Dr.

Bentson. Ex. 1 at 3 (Dr. Tait describes Consuelo when she arrived at the hospital as being "alert."); 17 RT 3327; Ex. 81 at ¶ 8.

19. Mr. Benavides denies that respondent lacks information as to whether Dr. Bentson testified falsely when he opined that certain swelling underneath Consuelo's scalp was evidence that the child suffered multiple blows to the head. Return at 8. Again, respondent's own expert provides respondent the information it claims it lacks: "The scalp swelling represented at trial as potential evidence of blows to the head is easily explained by the generalized severe edema of the child, en toto [sic], as documented many times in the medical records." Return Ex. 18 at ¶ 16. Not only does Mr. Benavides reaffirm that he did not inflict a head trauma or other injury on Consuelo, but he further denies respondent's claim that the question of head trauma is merely a dispute between experts. Again, Dr. Bentson's false opinion was obtained by the State when the prosecutor did not provide him Consuelo's medical records from her hospitalization prior to her arrival at UCLA Medical Center. Had Dr. Bentson been provided Consuelo's history of hospitalization after November 17, 1991, he would have found that there is no evidence to support a finding of blunt force head trauma resulting in brain injury. RCCAP at 41; Reply at 60-61. Respondent does not claim otherwise.

20. Mr. Benavides denies that respondent lacks information as to whether Dr. Dibdin testified falsely that Consuelo's brain injuries were caused by Shaken Baby Syndrome. Return at 8-9. Again, respondent's own expert, Dr. Corey, provides respondent the information he claims he lacks, pointing out, inter alia, that Consuelo's "generalized brain swelling, and brain infarctions were not indicative of Shaken Baby Syndrome or inflicted head trauma either." Return Ex. 18 at ¶ 17. Mr. Benavides denies respondent's assertion that Dr. Dibdin's trial testimony on this point, when compared to the information presented in this postconviction proceeding,

evinces merely a conflict between two otherwise valid medical opinions. Return at 8-9.

21. Mr. Benavides alleges that the prosecution presented false evidence that Consuelo was in good health and a "completely normal" child prior to November 17, 1991; falsely implied that Mr. Benavides was responsible for the child's prior injuries; falsely claimed that Consuelo's mother was aware of the alleged prior abuse, but did not protect her daughter; and failed to disclose material evidence that indicated possible causes of Consuelo's injuries other than abuse. RCCAP at 43-45; Reply at 65-70. As to each of these allegations, respondent makes a series of general denials that are non-responsive to the facts Mr. Benavides has presented. Return at 9.

22. Mr. Benavides alleges that the prosecution presented the false testimony of California Highway Patrol Officer William Esmay, who claimed that Consuelo's fatal injuries could not have been caused by a car accident. RCCAP at 47. Respondent generally "denies that the testimony of Officer Esmay was 'false' within the meaning of Penal Code section 1473." Return at 9. Respondent does not deny, and therefore concedes the following facts concerning Officer Esmay's trial testimony and its possible impact on the verdict:

a. Respondent does not deny that Officer Esmay based his opinion as to whether Consuelo's injuries were consistent with being involved in a car accident in part on the false evidence of sexual abuse. Respondent also does not deny that Officer Esmay was not provided the DRMC records, which would have shown him that Consuelo had no injuries consistent with sex abuse upon initial admission to the medical center. RCCAP at 47; Reply at 71-72.

b. Respondent does not deny that Officer Esmay testified falsely when he stated that Consuelo could not have been hit by a car because her clothing did not have evidence of contact with the ground, such as grass

stains. In fact, Kern County Criminalist Jeanne Spencer identified plant material on Consuelo's sweatshirt, organic material in the child's nasal pharynx, and dirt and blood on the sole of her shoe. RCCAP at 47; Reply at 71-72.

c. Respondent does not deny that the prosecutor knew or reasonably should have known that substantial and material portions of Officer Esmay's testimony were false. Respondent also does not deny that Officer Esmay's false testimony was material to the jury's verdict. RCCAP at 47; Reply at 71-72. Moreover, to the extent respondent asserts that the State's now-discredited homicide theory – that sexual abuse caused Consuelo's fatal internal injuries – was or is an equally reasonable explanation compared to the possibility that Consuelo was struck by a car, Mr. Benavides disagrees.

C. Claim Two: The State coerced the false testimony of Estella Medina and Cristina Medina.

1. Mr. Benavides alleges that the State coerced Consuelo's mother, Estella Medina, and older sister, Cristina Medina, to make false statements and provide false testimony at his trial. RCCAP at 49-68; Reply at 74-95.

2. As set out more fully in the CAP and accompanying exhibits, Mr. Benavides alleges that law enforcement officials coerced Estella by temporarily removing her older daughter, 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 to testify against Mr. Benavides at trial. Estella ultimately succumbed to the coercions and gave false testimony that indicated a mistrust of Mr. Benavides's care of her children, and led the jury to believe falsely that Estella suspected that Mr. Benavides was guilty. RCCAP at 49-56.

3. Mr. Benavides alleges that the State similarly coerced the false testimony of Cristina. It did this by removing Cristina from her home, isolating her from her mother and family, repeatedly questioning the nine-year-old using interrogation tactics normally reserved for suspects, and feeding her information about sex abuse during these interviews. Using suggestive tactics, law enforcement officers and health services caseworkers altered Cristina's recollections and beliefs, and caused the child to doubt her repeatedly stated view that she believed that Mr. Benavides did not abuse or harm her sister. By the time Cristina appeared at trial, she provided the manufactured testimony that provided a foundation for the prosecutor to claim falsely that Mr. Benavides engaged in a pattern of abuse. RCCAP at 56-64.

4. Mr. Benavides alleges that the actions of Kern County law enforcement in this case are consistent with its history of using the Department of Health Service and Child Protective Services (DHS/CPS) to manufacture evidence and coerce false testimony in violation of the constitutional rights of criminal defendants. RCCAP at 65-70.

5. Mr. Benavides alleges that the prosecution's coercion of false statements and testimony from Consuelo's mother and sister, deprived Mr. Benavides of a fundamentally fair and reliable determination of guilt. The prosecutor's use of this false evidence was material to the jury's verdict, in that it is of such significance that it may have affected the outcome of the trial. RCCAP at 64-70.

6. Respondent's Return does not deny the false evidence allegations made in Claim Two of the CAP, and it does not contest the factual support for those allegations. Respondent's mere denial that Mr. Benavides is unlawfully incarcerated is a disapproved general denial, and the uncontroverted material allegations of Claim Two are deemed admitted for

purposes of this proceeding. *Duvall*, 9 Cal. 4th at 480-81; Cal. R. Ct. 8.386(c)(3).

D. Claim Three: The State presented false evidence regarding the events that occurred on November 17, 1991.

1. Mr. Benavides alleges that the prosecutor presented false evidence at his trial by manufacturing inconsistencies and contradictions between Mr. Benavides's trial testimony and his prior statements to the police and family members. The State did this by intentionally confusing Mr. Benavides during cross-examination, exploiting his low intellectual functioning, and asking him questions for which there was no foundation. RCCAP at 71-76; Reply at 96-108.

2. Mr. Benavides also alleges that the State presented false evidence that he had a nonchalant and uncaring demeanor at the hospital while Consuelo was receiving treatment. The State did this by ignoring statements of medical staff and family members who told law enforcement, inter alia, that Mr. Benavides was very supportive and concerned about Consuelo's well-being. RCCAP at 76-79; Reply at 108-10.

3. Mr. Benavides maintains that the false evidence, arguments, and inferences regarding the events that occurred on November 17, 1991, deprived him of a fundamentally fair and reliable determination of guilt. The prosecutor's use of this false evidence was material to the jury's verdict, in that it is of such significance that it may have affected the outcome of the trial.

4. Respondent's Return does not deny the false evidence allegations made in Claim Three of the CAP, and it does not contest the factual support for those allegations. Respondent's denial that Mr. Benavides is unlawfully incarcerated is a disapproved general denial, and the uncontroverted material

allegations of Claim Three are deemed admitted for purposes of this proceeding. *Duvall*, 9 Cal. 4th at 480-81; Cal. R. Ct. 8.386(c)(3).

E. Claim Four: The State presented false and misleading evidence that Mr. Benavides caused injuries Consuelo sustained *prior* to November 17, 1991.

1. Mr. Benavides alleges that the State presented false evidence that he caused prior injuries suffered by Consuelo, including vaginal, head, abdominal, and arm injuries, as well as prior illness. As set out in greater detail in the CAP, the State falsely portrayed Consuelo as a healthy child who began having health issues only after Mr. Benavides came into her life. Mr. Benavides alleges that the prosecution knew that Consuelo had health problems that had nothing to do with Mr. Benavides; that Consuelo had been exposed to and left in the care of mentally unstable, drug-addicted, neglectful and violence-prone adults; and that Mr. Benavides was caring and gentle toward Consuelo, and had not the opportunity nor propensity to harm the child. RCCAP at 80-101 and 111-20; Reply at 110-28.

2. Mr. Benavides maintains that the prosecutor's use of this false evidence deprived him of a fundamentally fair and reliable determination of guilt; it was material to the jury's verdict because it may have affected the outcome of the trial.

3. Respondent's Return does not deny the false evidence allegations made in Claim Four of the CAP, and it does not contest the factual support for those allegations. Respondent's denial that Mr. Benavides is unlawfully incarcerated is a disapproved general denial, and the uncontroverted material allegations of Claim Four are deemed admitted for purposes of this proceeding. *Duvall*, 9 Cal. 4th at 480-81; Cal. R. Ct. 8.386(c)(3).

F. Claim Five: The State presented false testimony that Mr. Benavides had committed prior crimes.

1. Mr. Benavides alleges that the State presented false and misleading testimony that he committed prior crimes, including child molestation. The prosecution did this even though it had overwhelming evidence in its possession disproving its own allegations, much of which it failed to disclose to the defense. RCCAP at 102-20; Reply at 128-41.

2. As set out more fully in the CAP and Reply, Mr. Benavides alleges that the prosecutor falsely accused Mr. Benavides of being a child molester, implied that he had also molested Cristina (Consuelo's sister), and told the jury that Cristina was "lucky to get out" alive. 18 RT 3592. The prosecutor presented this false evidence even though Cristina had denied any molestation, and the prosecutor knew that its own retained expert, Dr. Diamond, had examined Cristina and concluded there was no evidence of sexual abuse, a fact the State did not disclose to the defense. RCCAP at 102-11; Reply at 129-32.

3. Mr. Benavides also alleges that the prosecutor similarly asked Consuelo's mother, Estella, whether Mr. Benavides fled Mexico because he had committed crimes there, even though the prosecutor had no foundational basis for that question. Shortly thereafter, the prosecutor told the trial judge that Mr. Benavides had done the "same thing" in Mexico, a claim that the prosecutor knew was false. RCCAP at 105-11.

4. The prosecutor's use of this false evidence denied Mr. Benavides a fair trial and was material to the jury's verdict, in that it is of such significance that it may have affected the outcome of the trial.

5. Respondent's Return does not deny the false evidence allegations made in Claim Five of the CAP, and it does not contest the factual support for those allegations. Respondent's denial that Mr. Benavides is unlawfully incarcerated is a disapproved general denial, and the uncontroverted material

allegations of Claim Five are deemed admitted for purposes of this proceeding. *Duvall*, 9 Cal. 4th at 480-81; Cal. R. Ct. 8.386(c)(3).

G. Claim Thirteen: Mr. Benavides was denied the effective assistance of counsel at his capital trial.

1. Mr. Benavides alleges that he was denied the effective assistance of counsel at his capital trial. RCCAP at 221-310; Reply at 263-395. His trial attorneys, Donnalee H. Huffman and Jeffery Harbin, performed ineffectively by failing to conduct a thorough and reasonable investigation into the causes for Consuelo's injuries, RCCAP at 222-25; by failing to investigate and present readily available evidence to rebut the sexual assault charges, which formed the sole basis of the prosecution's first degree felony murder theory, and the special circumstance allegations, RCCAP at 225-52; by failing to show by readily available evidence that Dr. Dibdin's testimony and claimed cause of Consuelo's fatal injuries was false and anatomically impossible, RCCAP at 252-54; by failing to rebut with readily available evidence the State's theory that Consuelo's alleged rib injuries occurred as a result of compression by squeezing, RCCAP at 254; by failing to rebut with readily available evidence the State's theory that Consuelo was suffocated, RCCAP at 254-58; and by failing to investigate and present readily available evidence that Consuelo's brain injuries were not the result of having been shaken, RCCAP at 258-50.

2. Had Mr. Benavides's trial attorneys performed competently and presented the same readily available evidence that Mr. Benavides has now presented to this Court, it is reasonably probable that Mr. Benavides would not have been convicted of murder. Indeed, the jury would have drawn the same inescapable factual conclusions that even respondent has now drawn: There exists no credible evidence of sexual abuse to support the State's theory of first degree felony murder, there is no credible evidence of the

charged sex crimes, and there is no credible evidence to support the State's special circumstance allegations. Return at 2-9.

3. Mr. Benavides alleges that Ms. Huffman and Mr. Harbin had a history of failing to competently represent their clients. Respondent does not deny, and therefore concedes, the following allegations concerning Ms. Huffman's and Mr. Harbin's history of incompetent and ineffective representation:

a. Ms. Huffman and Mr. Harbin had a long track record of providing ineffective assistance of counsel to clients, which eventually led to disciplinary proceedings by the California State Bar against both counsel, neither of whom is currently a member of the Bar. Reply at 263.

b. Ms. Huffman resigned from the State Bar while disciplinary charges were pending against her. In 2005 and 2004, the State Bar disciplined Ms. Huffman for her incompetent representation of three clients. Reply at 264.

c. Mr. Harbin had no capital case experience when Ms. Huffman acceded to him control over the portion of the case regarding lay witnesses who were available to attest to Mr. Benavides's good character, as well as the entire penalty phase of Mr. Benavides's capital trial. Ms. Huffman and Mr. Harbin failed to investigate and present widely available character evidence regarding Mr. Benavides's peaceful and caring nature, lack of criminal behavior, and the fact that he was not sexually deviant. Reply at 264-66.

d. Mr. Harbin was disbarred on August 17, 2002, after years of disciplinary proceedings against him stemming from his negligent representation of several clients, beginning just months after being admitted to the bar. Reply at 264-66.

4. Mr. Benavides admits that Ms. Huffman had a two-prong trial strategy: first to refute the State's claim that Consuelo's injuries were caused

by a sexual assault, and second to show that they may have been caused by a car accident. Return at 9-10. To the extent respondent suggests that merely having a strategy, and performing some tasks to advance that strategy, shields a defense attorney's performance from subsequent scrutiny, Mr. Benavides disagrees. Mr. Benavides alleges that Ms. Huffman failed to take reasonable steps to rebut the State's evidence that a sexual assault occurred and caused Consuelo's fatal injuries. Respondent does not contest the allegation that Ms. Huffman failed to investigate and provide the trial experts with Consuelo's readily available *complete* medical history. Similarly, respondent does not dispute that Ms. Huffman's presentation about a car accident did nothing to counter the State's evidence of sexual assault, the cornerstone of the State's murder theory.

5. Mr. Benavides denies respondent's factually unsupported allegation that Ms. Huffman made "reasonable tactical decisions" to advance her trial strategy, particularly with regard to her investigation, choice of witnesses, use of evidence, and the medical records Ms. Huffman reviewed and provided to experts that she had retained. Return at 10. To the contrary, Ms. Huffman and Mr. Harbin both admitted that their failure to conduct a reasonable investigation, which would have yielded the same readily available and compelling medical and forensic facts and expert opinions presented to this Court, was not based on any strategic or tactical consideration. Ex. 64 at ¶¶ 9, 21; Ex. 65 at ¶¶ 9-15.

6. Mr. Benavides agrees that Consuelo's abdominal injuries were due to blunt force trauma, and that Ms. Huffman "elicited evidence suggesting" that those injuries were not caused by a sexual assault. Return at 10. But respondent does not deny that Ms. Huffman failed to present the same readily available and compelling evidence in support of her theory that has resulted in the State now conceding there is no credible evidence to support Mr. Benavides's conviction. In addition, Mr. Benavides maintains

that Ms. Huffman's minimal effort to rebut the State's evidence of sexual assault demonstrates that she could have no strategic reason for failing to present all the readily available compelling evidence presented in the CAP and Reply that was consistent with the defense theory that Ms. Huffman ineptly pursued.

7. Mr. Benavides alleges that medical personnel and other experts were biased against him because they falsely believed he sexually assaulted Consuelo, and that Ms. Huffman failed to investigate and present readily available evidence of this bias to Mr. Benavides's capital case jury. RCCAP at 223-24; Ex. 3 at 412. Mr. Benavides denies respondent's unsupported allegation that Ms. Huffman made a tactical decision not to pursue and present that evidence. Return at 10. Notably, respondent obtained a declaration from Ms. Huffman that is silent regarding any consideration Ms. Huffman may have given the available evidence of pro-prosecution bias on the part of the medical staff that treated Consuelo. Return Ex. 20.

8. Respondent generally denies that Ms. Huffman's performance was constitutionally deficient due to her failure to reasonably investigate Consuelo's injuries; review readily available evidence; conduct interviews of nursing and medical personnel; competently engage and consult with experts, including by providing those experts all readily available relevant materials and adequate time to review the materials and physical evidence at the Coroner's office; challenge the State's sexual assault evidence; competently cross-examine prosecution witnesses; and competently present available evidence consistent with and in support of her theory of the case. Return at 10-12. Mr. Benavides disagrees. Respondent's denial of Ms. Huffman's ineffectiveness is inconsistent with his prior concession, now inexplicably withdrawn, that trial counsel had been ineffective in countering the rape charge and special circumstance. Inf. Resp. at 170, 204-07. In fact, respondent's denial is belied by his concession that the factual premise for

his first degree murder conviction has been discredited by the recantations of the State's and defense trial experts. Respondent does not contest that these recantations are the direct result of Mr. Benavides's habeas counsel simply doing what Ms. Huffman failed to do: provide the trial experts with Consuelo's full and complete medical records. Ex. 77 at ¶¶ 10, 13-17; Ex. 79 at ¶¶ 11, 22, 26; Ex. 80 at ¶¶ 12, 15; Ex. 142 at ¶¶ 4, 5, 9, 11, 16; Ex. 144 at ¶¶ 7-14; Ex. 149 at ¶¶ 4-5, 7.

9. Mr. Benavides agrees that that there is no need for this Court to evaluate whether he was denied his constitutional right to the effective assistance of counsel at trial, but only if this Court (a) accepts respondent's concession that the State's evidence of sexual assault was false and is unsupportable; and (b) agrees with Mr. Benavides that, because the conceded false evidence is material to the jury's actual verdict, a complete reversal of his conviction is required; or (c) in the alternative, rejects respondent's argument that "it is not reasonably probable that the jury would have failed to convict of second degree murder" based on allegedly "untainted evidence," and completely reverses Mr. Benavides's conviction. Mr. Benavides otherwise denies respondent's claim that the concession somehow vitiates this Court's duty to determine whether a constitutional violation based on ineffective assistance of counsel occurred. Return at 11. Mr. Benavides further denies respondent's unsupported and incorrect assertion that this Court may simply reduce the conviction to second degree murder rather than reverse the conviction if it concludes that Mr. Benavides was in fact denied his right to the effective assistance of counsel at his capital trial. Return at 11.

10. Mr. Benavides alleges that Ms. Huffman unreasonably failed to investigate and present readily available medical evidence contradicting the State's purported evidence of various acts of sexual assault on Consuelo. Had Ms. Huffman performed effectively, she would have investigated and

presented evidence demonstrating that Consuelo's genitalia and anus showed no sign of sexual assault when she first arrived at DRMC, including evidence from numerous staff who first treated Consuelo at DRMC and told law enforcement that they observed no signs of sexual abuse as they treated Consuelo. RCCAP at 225-34; Reply at 279-89. Respondent generally denies that Ms. Huffman was ineffective in this regard, and he claims that he lacks sufficient information to admit or deny whether Ms. Huffman interviewed non-physician medical staff at DRMC. Nevertheless, respondent further contends, without any factual support, that Ms. Huffman made tactical decisions to expend resources on physician witness and not on interviewing non-physician witnesses. Return at 11-12.

11. Mr. Benavides denies that respondent lacks sufficient information about whether Ms. Huffman interviewed DRMC staff, and denies that Ms. Huffman had any tactical justification for not pursuing the exculpatory observations of the medical staff who first treated Consuelo. Respondent has been aware of these allegations for nearly sixteen years, and has presented no evidence to contradict the statements of DRMC staff who have declared that they were not interviewed by Ms. Huffman or any member of the defense team. *See, e.g.*, Ex. 74 at ¶ 16; Ex. 75 at ¶ 17; Ex. 72 at ¶ 9; Ex. 73 at ¶ 15. Moreover, the declaration respondent obtained from Ms. Huffman is silent about any such interviews, and does not attempt to justify Ms. Huffman's failure to present the testimony of DRMC staff. Return Ex. 20.

12. Without presenting or identifying facts in support of his position, respondent withdraws a prior concession concerning the rape allegations that was stated in his Informal Response. Inf. Resp. at 170, 204-07. Respondent now denies that Ms. Huffman failed to investigate, cross-examine, or present testimony regarding the lack of evidence of vaginal penetration, or that she failed to move to strike testimony. Return at 12. Mr. Benavides disagrees. There was no reliable evidence of vaginal penetration, and Dr. Dibdin's

testimony and report about the existence of a tear to the anterior wall of Consuelo's vagina are false. Ms. Huffman failed to point out existing irreconcilable contradictions in the descriptions of the purported injuries to the vaginal wall by the pathologist Dr. Dibdin and the sex abuse specialist Dr. Diamond, which would have undermined their credibility. RCCAP at 234-42; Reply at 316-29. Indeed, respondent does not contest that the State's sex abuse expert, Dr. Diamond, recanted his trial testimony regarding vaginal penetration after being shown medical records that were readily available to Ms. Huffman. Ex. 149 at ¶¶ 5-7.

13. Again without presenting or identifying facts in support of his position, respondent denies that Ms. Huffman failed to present or counter evidence regarding alleged injuries to Consuelo's labia. Return at 12. Mr. Benavides disagrees: Ms. Huffman inexcusably failed to present readily available evidence that the first medical team to treat Consuelo were trained to identify sexual abuse, observed no evidence of injury to the child's genitalia, and that the staff at DRMC likely caused any injury to Consuelo's genitalia by repeated and unsuccessful catheterization attempts with a Foley catheter that was too large and inappropriate to be used on a twenty-one-month old child. RCCAP at 242-43; Reply at 324-29.

14. Without support, respondent also denies that Ms. Huffman failed to investigate or present evidence negating the State's allegations of anal trauma and sodomy. Return at 12. Mr. Benavides disagrees. RCCAP at 243-49; Reply at 329-53. Not only did Ms. Huffman fail to present the testimony of DRMC and KMC medical staff who observed no sign of anal assault, Ms. Huffman failed to present readily available evidence to disprove Dr. Dibdin's false testimony regarding anal "tears," including evidence extant in the tissue slides and gross pelvic tissue preserved at the Coroner's office. Similarly, Ms. Huffman failed to show that the anal laxity observed by medical personnel was due to the administration of paralytic agents prior

to their examinations. Respondent does not acknowledge that the State's sexual assault expert – Dr. Diamond – recanted his trial testimony concerning sodomy when provided Consuelo's medical records, which were readily available to Ms. Huffman.

15. Respondent denies that Ms. Huffman failed to make reasonable and proper use of experts that she engaged by providing them with all readily available materials. Respondent asserts that that Ms. Huffman interviewed Dr. Tait, who treated Consuelo at DRMC, engaged three experts, two of whom testified, and reasonably used all medical records. Respondent alleges that Ms. Huffman then elicited testimony calling into question the existence of vaginal trauma. Return at 12. Mr. Benavides disagrees that Ms. Huffman effectively presented available evidence and lay and expert witnesses to counter and disprove the prosecution's evidence of an alleged rape. RCCAP at 249-52; Reply at 312-30.

16. Mr. Benavides agrees that Ms. Huffman may have spoken to Dr. Tait in the courthouse shortly before Dr. Tait testified. Respondent does not contest, however, that Ms. Huffman failed to elicit exculpatory evidence from Dr. Tait while she was testifying. Mr. Benavides alleges that Ms. Huffman failed to elicit critical facts from Dr. Tait, including that Dr. Tait's staff at DRMC repeatedly attempted to catheterize Consuelo without success, and that Dr. Tait and her staff saw and recorded no evidence of sexual or other trauma to Consuelo's genitalia or anus, notwithstanding their training to identify any such injury and their ample opportunities to do so as they attempted to treat Consuelo. RCCAP at 156-57, 226-34; Ex. 76 at ¶¶ 7, 10.

17. Mr. Benavides admits that Ms. Huffman engaged three experts, two of whom testified at trial, but he denies that Ms. Huffman effectively consulted with those experts; denies that she reasonably used all available medical records; and denies that she competently presented the experts' testimony in defense to the State's false evidence of sexual assault. RCCAP

at 249-52. At trial, Ms. Huffman called two physicians, Dr. Nat Baumer and Dr. Warren Lovell, presumably to dispute the State's claim that Consuelo was sexually assaulted and that her fatal injuries occurred during that sexual assault. Neither expert was competently prepared to testify, and both provided inaccurate testimony that was consistent with portions of the State's theory. Ms. Huffman failed to provide Dr. Baumer the necessary and available information prior to his appearance at trial, including data that he specifically requested and required to accurately determine the cause of the trauma. RCCAP at 250-51, 257. Because Ms. Huffman failed to provide the requested and necessary information, Dr. Baumer was forced to rely on Dr. Dibdin's false statements concerning anal tearing. As a result of Ms. Huffman's incompetence, Dr. Baumer incorrectly and prejudicially testified that Consuelo had been anally penetrated with a bottle or other foreign object. 14 RT 2895.

18. Respondent also does not contest that Dr. Lovell was never provided access to critical medical information prior to testifying, including photographs of Consuelo's genitals. RCCAP at 249-52. Nor does respondent dispute that, armed with information provided by habeas counsel – all of which was readily available information that Ms. Huffman should have timely provided to her experts prior to their appearing in court to testify – both Dr. Baumer and Dr. Lovell now agree with the recantations of the State's experts. Ex. 80 at ¶¶ 12-25; Ex. 142 at ¶¶ 4-16.

19. Respondent denies that "Huffman failed to investigate, develop, and present evidence regarding a cause of death different from that offered by [Dr. Dibdin]." Return at 13 (citing Claim 13(3), RCCAP at 252-54). This denial is non-responsive because Mr. Benavides did not make this particular allegation. Mr. Benavides alleges that Ms. Huffman was ineffective for failing to investigate, develop and present readily available evidence that Dr. Dibdin's stated cause of death was not only false, but it was anatomically

impossible. RCCAP at 252-54; Reply at 330-34; 383-84. Nevertheless, Mr. Benavides denies that Ms. Huffman competently investigated and presented a cause of death different from that of Dr. Dibdin. A key component of Dr. Dibdin's opinion regarding the cause of death was that Consuelo was sexually assaulted. But Ms. Huffman failed to present readily available evidence to show that Consuelo was *not* sexually assaulted. That failure permitted the prosecution to rely entirely on Dr. Dibdin's now-discredited theory linking the alleged sexual assault to Consuelo's fatal injuries.

20. Mr. Benavides admits that Ms. Huffman may have studied medical records that she obtained, but he denies that medical staff from DRMC, KMC, and UCLA refused to speak with her about the case prior to trial. Notably, neither Ms. Huffman in her declaration nor respondent in his pleadings identifies a single specific witness who declined a defense-initiated pre-trial request to be interviewed. Return at 13; Return Ex. 20 at ¶ 10. Mr. Benavides provided documents supporting the allegation that Ms. Huffman failed to contact medical staff who treated Consuelo prior to the trial. *See, e.g.*, Ex. 73 at ¶¶ 14-15; Ex. 72 at ¶ 9; Ex. 78 at ¶¶ 14, 18; Ex. 77 at ¶ 18; Ex. 143 at ¶ 12; Ex. 144 at ¶ 14.

21. Mr. Benavides denies that Ms. Huffman competently prepared the defense experts for trial, and denies trial counsel provided them with a complete set of Consuelo's medical records and "everything they asked for." Return at 13. Mr. Benavides alleges that Ms. Huffman failed to timely provide Dr. Baumer with a complete set of legible documents prior to his court appearance, and failed to ensure that he had the data that he requested, including the opinion of Dr. Lovell. Respondent does not contest the fact that Dr. Lovell told Ms. Huffman that he did not have sufficient time to review materials and provide a complete and accurate opinion at trial; that he did not have all of the necessary medical records to review, including photographs that were later shown to him for the first time while on the stand;

and that was not given the time to properly prepare for his testimony. Ex. 80 at ¶¶ 6, 9-11, 15. Nor does respondent deny that had Ms. Huffman timely provided Dr. Lovell the records and data he needed to be prepared to testify, Dr. Lovell would not have testified that sexual abuse might have caused any of Consuelo's injuries. Ex. 80 at ¶¶ 15-20, 22-25.

22. Mr. Benavides denies that trial counsel reasonably relied on the defense experts that she engaged. Return at 14. Ms. Huffman failed to timely retain the experts, and as a result, Dr. Baumer was not provided necessary data he requested. Ex. 142 at ¶ 11. Mr. Benavides alleges that Dr. Lovell told Ms. Huffman from the start that he had insufficient time to provide a complete and accurate opinion. After engaging Dr. Lovell, Ms. Huffman failed to return his phone calls, and instead of speaking with him, Ms. Huffman dispatched an unprepared investigator who was unable to address Dr. Lovell's many questions and who failed to provide Dr. Lovell the records he requested. Ex. 80 at ¶¶ 5-6. Ms. Huffman finally spoke with Dr. Lovell over dinner the night before he testified, at which point Dr. Lovell again said he was unprepared to testify. 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, which was insufficient for him to render a reliable opinion. Ex. 80 at ¶¶ 8-11.

23. Mr. Benavides denies that "any alleged deficiency" regarding Ms. Huffman's representation was "harmless as to the jury's verdict for murder" due to "overwhelming independent evidence" that Mr. Benavides caused Consuelo's fatal injuries. Return at 14. Mr. Benavides rejects respondent's suggestion that Ms. Huffman's ineffectiveness is subject to some sort of harmless error analysis; whether Mr. Benavides was denied his right to counsel is not a question subject to a sufficiency-of-the-evidence analysis as respondent suggest. Rather, the issue is whether there is a reasonable probability that the result of Mr. Benavides's capital trial would have been

different but for Huffman's failures in her representation. Mr. Benavides asserts that the answer to that question must be "yes" because respondent concedes that the jury's actual verdict on the murder charge is predicated on false evidence that Ms. Huffman could have refuted with readily available evidence, and that she had no tactical justification for failing to do so. Because Mr. Benavides was denied the effective assistance of counsel, he is entitled to a new trial.

24. Notwithstanding respondent's erroneous stance concerning harmless error, Mr. Benavides also denies that there exists overwhelming independent evidence that he caused Consuelo's fatal injuries. Return at 14. The prosecution urged the jury to credit Dr. Dibdin's now-discredited opinion that the abdominal injuries were caused by sodomy in order to obtain a murder conviction, with sexual assault special circumstances. In denying the motion for a new trial, the court indicated that it credited Dr. Dibdin's opinion over that of other experts who opined blunt force caused the abdominal injuries. Mr. Benavides maintains that if one excludes Dr. Dibdin's false testimony and other expert testimony that relied on Dr. Dibdin's false autopsy report, there remains no credible evidence that Consuelo's injuries occurred during a sexual assault. Had Ms. Huffman competently challenged the State's sexual-assault evidence, Dr. Dibdin's false autopsy report and testimony, and the expert testimony that relied on the autopsy report, it is reasonably probable Mr. Benavides would not have been convicted of murder, as respondent now concedes.

25. Respondent denies that Ms. Huffman failed to counter the State's theory that Consuelo's alleged rib injuries were caused by gripping and squeezing. Return at 14. Mr. Benavides disagrees and alleges that Ms. Huffman failed to question whether Consuelo had any rib injuries at all when she first arrived at DRMC. RCCAP at 254; Reply at 384-88. As noted, the radiologist who viewed the first set of radiographs of Consuelo's ribs – taken

within an hour of her arrival at DRMC – initially found no sign of rib fractures. RCCAP at 36-37; Ex. 1 at 19. Mr. Benavides also alleges that Ms. Huffman unreasonably failed to obtain and show that Dr. Dibdin's microscopic slide manifest does not include slides containing tissue from the left posterior ribs. In fact, while Dr. Dibdin testified to the existence of prior and acute fractures to Consuelo's left posterior ribs, Ms. Huffman failed to show that those alleged rib fractures were not supported by his own microscopic findings and the radiographs.

26. Respondent denies that Ms. Huffman's performance was deficient regarding the prosecution's theory of suffocation and Shaken Baby Syndrome, generally reiterating its erroneous view that Ms. Huffman provided her retained experts with all the information they needed, and then reasonably relied on her experts' opinions. Return at 15. Mr. Benavides again denies that Ms. Huffman reasonably consulted with her retained experts, and maintains that she failed to timely provide them with readily available data and records that they requested and needed so that they could provide reliable and accurate opinions at trial. Mr. Benavides further alleges that Ms. Huffman failed to present readily available evidence to counter the State's claim that Consuelo's brain injuries were the result of suffocation and/or violent shaking. RCCAP at 254-59; Reply at 388-95. As noted, Dr. Bentson testified that Consuelo's type of brain damage was consistent with suffocation. 12 RT 2406-13. The prosecutor then used this testimony to argue that Mr. Benavides suffocated Consuelo to stop her from screaming while being sexually assaulted. 18 RT 3586-87. Mr. Benavides alleges that Dr. Bentson's testimony was false. Ms. Huffman unreasonably failed to provide Dr. Bentson or cross-examine him with available medical records, including the critical medical records from DRMC that indisputably show that Consuelo arrived at that facility with relatively normal levels of consciousness, which could not possibly have been the case had she been

suffocated to the point of creating the brain damage identified by Dr. Bentson. Respondent does not claim otherwise.

27. Mr. Benavides also alleges that Ms. Huffman was ineffective for failing to challenge Dr. Dibdin's testimony that Consuelo suffered brain damage due to being shaken, *e.g.* Shaken Baby Syndrome. Ms. Huffman failed to challenge Dr. Dibdin's false testimony about Consuelo's alleged brain damage by cross-examining him with readily available medical records, and by presenting testimony of an expert like respondent's own expert, Dr. Corey, who points out that Consuelo's "generalized brain swelling, and brain infarctions were not indicative of Shaken Baby Syndrome or inflicted head trauma either." Return Ex. 18 at ¶ 17.

III. PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

1. Grant the petition for writ of habeas corpus and vacate the judgment imposed against Mr. Benavides;

2. Alternatively, if the Court determines that relief should not be granted on the pleadings, then, because facts are in dispute, the Court must refer the matter for an evidentiary hearing before a neutral referee, and thereafter grant the petition for writ of habeas corpus and vacate the judgment imposed against Mr. Benavides.

Dated: March 14, 2017

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____

Michael J. Hersek

Attorneys for Petitioner
VICENTE BENAVIDES FIGUEROA

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

> If, with hindsight, a critical component of the prosecution's case is objectively untrue, then the validity of any resulting guilt finding is called into question. It does not matter *why* the critical evidence was untrue; regardless of *why* it was untrue, the *fact* that it was untrue, coupled with the fact that it affected the outcome of the trial, casts a doubt over the verdict of guilt. In such circumstances, the law places the importance of integrity in criminal trials above the public's interest in the finality of the judgment.

In re Richards, 55 Cal. 4th 948, 962 (2012).

Vicente Benavides was wrongfully convicted in 1993 of first degree murder with special circumstances and sentenced to death based on copious false and unsubstantiated expert testimony. Twenty-two years later, the State finally conceded as much. Despite having now admitted both the falsity and materiality of the testimony that was the linchpin of all aspects of the conviction, respondent urges this Court to ignore governing law that mandates a reversal of the entire conviction. Instead of acknowledging that a reversal and new trial are required, respondent contends that this Court should only reduce Mr. Benavides's conviction to implied malice second degree murder based on the other allegedly untainted evidence presented at trial. Respondent's argument is specious and should be rejected. Respondent is asking this Court to impose an inappropriate additional barrier to relief on false evidence claims over and above the longstanding materiality requirement that governs such claims. The only just and proper relief under the law is a complete reversal of the conviction obtained against Mr. Benavides with false material evidence and an immediate remand to the superior court for a new trial.

Respondent specifically and repeatedly concedes that the false and unreliable evidence presented at Mr. Benavides's trial was material to the verdict actually returned by the jury; i.e., there is a reasonable probability that, had the false evidence not been introduced, the outcome of the trial would have been different. *See* Return at 17 (conceding that the false evidence "was material under Penal Code section 1473 to petitioner's convictions"), 69 (conceding that the false evidence was "material as to the jury's special-circumstance findings and to its finding that the murder was first degree."). Under controlling state and federal law, Mr. Benavides is entitled to a new trial that is free of the false and unreliable evidence which affected the jury's deliberations and verdict – including on the murder charge that improperly resulted in a first degree murder conviction. The materiality standard does not permit the State to salvage from leftover evidence a court-determined lesser verdict grounded in a tainted murder conviction, and evade its burden of proving the guilt of an accused to a jury beyond a reasonable doubt using truthful and reliable evidence.

Because respondent has conceded the falsity and unreliability of evidence that was material to the outcome of Mr. Benavides's trial, there is no need for a reference hearing in this habeas proceeding; there is no factual dispute that needs to be resolved before the petition can be granted. *People v. Romero*, 8 Cal. 4th 728, 739 (1994) ("If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing."). This Court should simply vacate the conviction in its entirety, and on remand to the superior court, the State can retry the case and attempt to obtain a valid conviction against Mr. Benavides, if it chooses to do so.

Alternatively, if this Court is inclined to accept respondent's argument propounding an added burden for full reversal on the conceded false evidence and seeking a reduction of the conviction to second degree murder, Mr.

Benavides counters that the only appropriate action at this stage is to issue an order for a reference hearing to resolve the multiple factual disputes framed by the Return and this Traverse. *See Romero*, 8 Cal. 4th at 739-40 ("Finally, if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing."). Mr. Benavides has presented ample support for his allegations that false evidence beyond that which respondent has conceded was presented at his trial. He also has alleged that his trial counsel provided ineffective assistance related to the conviction, which, too, demands that he be afforded a new trial. Respondent has denied multiple aspects of both claims. Mr. Benavides has placed those denials into controversy. Accordingly, an evidentiary hearing is necessary to resolve the factual disputes, and to determine the full scope of the false evidence and its effect on the conviction, and whether trial counsel's representation was prejudicially ineffective. Thereafter, this Court would be in a position to decide whether Mr. Benavides is entitled to a complete reversal of the conviction and a new trial.

Mr. Benavides has been incarcerated for more than two decades pursuant to a judgment of conviction that is fundamentally flawed and unfair. It is time to afford him relief from that injustice. Any remedy short of a new fair trial would offend the integrity of our criminal justice system.

II. CLAIMS RELATING TO THE PRESENTATION OF FALSE EVIDENCE

A. Mr. Benavides is entitled to a new trial based on the State's concession that his conviction was tainted by false evidence.

Respondent concedes that, pursuant to Penal Code section 1473(b)(1), false evidence substantially material or probative on the issue of Mr. Benavides's guilt and punishment was introduced against him at his trial.

Return at 2-3, 15, 17. Specifically, respondent admits that the prosecutor presented material false evidence concerning the allegations that Consuelo was vaginally and anally penetrated by a penis or foreign object. *See* Return at 3, 17 ("Respondent admits that expert opinion testimony that Consuelo had physical findings that were specific for vaginal and anal penetration by a penis or foreign object has been repudiated and is therefore 'false' within the meaning of Penal Code section 1473.").

Respondent also concedes that some of Dr. James Dibdin's testimony concerning his autopsy findings – including his finding on the cause of Consuelo's death – was so unreliable that Mr. Benavides is entitled to relief from his conviction. *See* Return at 3 ("Respondent acknowledges that Dr. James Dibdin's testimony about his autopsy findings is among the evidence now shown to be of such questionable reliability as to demonstrate petitioner's entitlement to the relief outlined here."); *see also id.* at 17 (conceding the "cause of death cited by Dr. Dibdin (penile penetration of the anus, directing injuring [sic] the upper abdomen by severing the pancreas and duodenum) cannot be substantiated in light of the lack of injury to the rectum or the lower abdominal organs.").[2]

In accord with the concessions, respondent asks this Court to vacate the three sex-crime convictions, the first degree murder conviction, and the three sex-crime special-circumstances findings returned by the jury at Mr. Benavides's trial. *See* Return at 3, 15, 69 (conceding the false evidence was "material as to the jury's special-circumstance findings and to its finding that

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[2] Respondent's own expert pathologist, Tracey S. Corey, M.D., declared the "explanation that the cause of injury to the pancreas, duodenum, and transverse colon as being due to penetrating trauma to the anus by a penis *is not anatomically or pathophysiologically possible*. . ." Return Ex. 18 at ¶ 22 (emphasis added); *see also* Ex. 177 at 8371 (Dr. Corey stating to respondent's counsel, "*I'm embarrassed about the pathologist* [Dr. Dibdin] because what he says isn't even . . . anatomically possible.") (emphasis added).

the murder was first degree").

Respondent, however, does not accept that the presentation of false evidence which admittedly affected the jury's decision on the murder charge requires vacatur of the murder conviction. Instead of acceding to a complete reversal of the conviction, respondent asks this Court to reduce the first degree murder "conviction to [implied malice] second degree murder, allowing the People to accept judgment thereon or retry the matter." Return at 3; *see also id.* at 15, 17, 74, 90-91.

Respondent's request demonstrates his misapprehension of the principal question at issue when false evidence has tainted a verdict. As this Court recently explained, "the crucial question is whether the false evidence was material—not whether, without the false evidence, there was still substantial evidence to support the verdict." *In re Richards*, 63 Cal. 4th 291, 312 (2016) (*Richards II*). Respondent asserts that, "notwithstanding any evidence deemed 'false' within the meaning of Penal Code section 1473, it is not reasonably probable the jury would have failed to convict petitioner of implied malice murder based on the other untainted evidence . . . ." Return at 3; *see also id.* at 15, 17, 74, 90. Respondent's novel reformulation of the materiality standard misconstrues – and is contrary to – established precedent requiring vacatur of a conviction that might have been affected by the presentation of false and unreliable evidence.

1. Because false and unreliable evidence undermined the outcome of the first degree murder conviction, this Court must grant the petition and remand for a new trial.

This Court's precedent concerning materiality under Penal Code section 1473 is well settled. In *Richards II*, the Court explained:

> The statute and the prior decisions applying section 1473 make clear that once a defendant shows that false evidence was

> admitted at trial, relief is available under 1473 as long as the false evidence was material. Our case law further explains that false evidence is material if there is a reasonable probability that, had it not been introduced, the result would have been different. The remedial purpose of the statute is to afford the petitioner relief if the false evidence was of such significance that it may have affected the outcome of the trial. Thus, the crucial question is whether the false evidence was material—not whether, without the false evidence, there was still substantial evidence to support the verdict.

Richards II, 63 Cal. 4th at 312 (internal punctuation and citations omitted).

This Court described the materiality standard further:

> Our courts have held that false evidence is substantially material or probative if it is of such significance that it may have affected the outcome, in the sense that with reasonable probability it could have affected the outcome. In other words, false evidence passes the indicated threshold if there is a reasonable probability that, had it not been introduced, the result would have been different. The requisite reasonable probability, we believe, is such as undermines the reviewing court's confidence in the outcome. This required showing of prejudice is the same as the reasonably probable test for state law error established under *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243. We make such a determination based on the totality of the relevant circumstances.

Richards II, 63 Cal. 4th at 312-13 (internal punctuation, italics, and citations omitted).[3]

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[3] Respondent only concedes a statutory violation under Penal Code section 1473 in this case, not a violation of the due process protections of the United States and California constitutions. *See* Return at 2 ("Respondent denies that petitioner's trial was unfair or unconstitutional, but respondent also acknowledges that . . . petitioner, as a matter of statutory right, is now entitled to limited relief."); *see also id.* at 3, 5, 6.

As discussed *infra*, Mr. Benavides disputes respondent's denial of a

Respondent concedes that it is reasonably probable that, had the false evidence not been introduced, Mr. Benavides would not have been found guilty of first degree murder, i.e., the actual outcome of the case would have been different. Nevertheless, respondent engrafts an additional requirement on the materiality standard to avert a reversal of the murder conviction. Respondent urges this Court to "set[] aside" the conceded false and unreliable evidence and find that "it is not reasonably probable that the jury would have failed to convict of second degree murder." Return at 69; *see also id.* at 3, 15 (asking the Court to reduce the conviction "because it is not reasonably probable that the jury would have failed to convict him of implied malice murder based on other untainted evidence"), 17, 69, 74, 90 ("Nevertheless, it is not reasonably probable that, absent the refuted evidence, the jury would have failed to convict petitioner of second degree murder.").

Respondent's argument that the Court must conduct an additional examination of the remaining, purportedly untainted evidence – even though

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constitutional violation based on the presentation of false evidence at the trial. The materiality standard under the Due Process Clause is similar to – but somewhat more lenient than – the standard under section 1473. *See Napue v. Illinois*, 360 U.S. 264, 271 (1959) (stating that a new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ."); *id.* at 272 (reversing the judgment because the court's "own evaluation of the record . . . [compelled it] to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial."); *see also Jackson v. Brown*, 513 F.3d 1057, 1076 (9th Cir. 2008) ("[A] *Napue* violation requires that the conviction be set aside whenever there is '*any* reasonable likelihood that the false testimony *could* have affected the judgment of the jury.'" (citing *Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005)); *People v. Dickey*, 35 Cal. 4th 884, 909 (2005) ("When the prosecution fails to correct testimony of a prosecution witness which it knows or should know is false and misleading, reversal is required if there is any reasonable likelihood the false testimony could have affected the judgment of the jury.").

the jury's actual verdict was affected by false evidence – is flatly wrong. Respondent asks this Court to add to the requirement of materiality/prejudice (i.e., a reasonable probability the false evidence could have affected the outcome) an analysis of the sufficiency of the remaining evidence in a hypothetical trial free of false testimony and argument. The purpose of the State's proposed analysis of the hypothetical trial would be to determine whether it is reasonably probable that the jury would have returned a guilty verdict on a lesser offense.

This Court, however, has made clear that the only requirement for relief from a conviction obtained using false evidence is a showing that the false evidence was "material" to the outcome of the trial. *Richards II*, 63 Cal. 4th at 312 (stating that "relief is available under 1473 as long as the false evidence was material . . . [and] [t]he remedial purpose of the statute is to afford the petitioner relief if the false evidence was of such significance that it may have affected the outcome of the trial.") (internal punctuation and citation omitted); *In re Sassounian*, 9 Cal. 4th 535, 546 (1995) ("The requisite 'reasonable probability,' we believe, is such as undermines the reviewing court's confidence in the outcome."); *cf. Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (explaining that once *Brady* materiality is established, any additional harmless-error analysis has no application).

Materiality is the only question to be considered, "not whether, without the false evidence, there was still substantial evidence to support the verdict." *Richards II*, 63 Cal. 4th at 312 (emphasis added); *see also United States v. Sanchez*, 379 F.App'x 551, 553 (9th Cir. 2010) ("The relevant question is not whether, even without [the] alleged perjured testimony, a rational fact finder could have found [the defendant] was predisposed to commit the offenses of conviction, but rather whether the revelation that [the witness] committed perjury sufficiently undermines confidence in the outcome of the trial."); *State v. Yates*, 629 A.2d 807, 809 (N.H. 1993) ("Second, we hold that Wirt's

false testimony was material to Yates' conviction. Although the trial court found that 'there was more than sufficient evidence from which the jury could conclude' that Yates entered Wirt's home without authorization, *the test for resolving Yates' claim is not whether the jury's verdict is supported by sufficient evidence*, but whether there is any reasonable likelihood that the false testimony could have affected the verdict.") (emphasis added); *United States v. Barham*, 595 F.2d 231, 241-42 (5th Cir. 1979) ("There is no doubt that the evidence in this case was sufficient to support a verdict of guilty. *But the fact that we would sustain a conviction untainted by the false evidence is not the question.* After all, we are not the body which, under the Constitution, is given the responsibility of deciding guilt or innocence. The jury is that body, and, again under the Constitution, *the defendant is entitled to a jury that is not laboring under a Government-sanctioned false impression of material evidence when it decides the question of guilt or innocence* with all its ramifications.") (emphasis added); *cf. Kyles*, 514 U.S. at 434-35 (explaining that *Brady* materiality "is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.").

a. No precedent supports respondent's assertion that this Court can render its own verdict on the murder charge.

According to Mr. Benavides's research, this Court has never reduced a conviction to a lesser crime after finding that the State introduced false evidence material to the crime of conviction.

Respondent does not cite any case that directly supports his demand that the Court impose an additional conjectural constraint on reversal of Mr. Benavides's murder conviction. Rather, respondent cites a general discussion of the materiality standard in *In re Malone*, 12 Cal. 4th 935, 965

(1996), and *In re Richards*, 55 Cal. 4th 948, 961 (2012) (*Richards I*). Return at 69-70. Neither passage cited by respondent provides support for his contention that this Court must attempt to excise false evidence from the trial record, deliberate over the remaining evidence, and render a verdict on potential lesser offenses.

In *Malone*, the Court analyzed the materiality of false testimony as to the jury's first degree murder verdict, special circumstances findings, and death verdict. *Malone*, 12 Cal. 4th at 967-76. The Court concluded that the false testimony was material to the felony-murder special circumstances findings (which were vacated), but not material to the first degree murder verdict and the death verdict. *Id.*[4] The *Malone* Court never engaged in a determination whether, setting aside the false evidence material to the jury's

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[4] As to the special circumstances finding, the Court concluded that the false testimony "was substantially material and probative on the hotly disputed question of whether petitioner was the actual killer of [the victim,] . . . [which], in turn, was of considerable importance to the truth or falsity of the felony-murder special circumstance." *Malone*, 12 Cal. 4th at 969; *see also id.* (noting that "[b]ecause the identity of [the] actual killer was legally critical to the felony-murder special-circumstance allegations, we must decide whether [the false] testimony bore a reasonable probability of influencing the jury on the question.").

However, as to the first degree murder conviction, the Court found that the false testimony was not material to one of the two alternative theories of first degree murder presented to the jury:

> The evidence in this case left the jury little choice but to find [the victim] was killed in the course of a single robbery, which petitioner admitted intentionally committing. Such a finding compelled a first degree murder conviction. For this reason, [the false] testimony supporting the alternative theory of premeditated first degree murder was not substantially material or probative on the charge of first degree murder.

Malone, 12 Cal. 4th 968.

verdict, there was still substantial evidence to support a verdict on a lesser offense.

In *Richards I* the Court did not assess the materiality of the contested expert testimony, because the Court found that petitioner "failed to establish that any of the evidence offered at his 1997 trial was objectively false." *Richards I*, 55 Cal. 4th at 966. Nevertheless, the Court noted that if petitioner had shown "that an expert opinion stated at trial was objectively untrue, . . . [i]n that narrow circumstance, if it is reasonably probable that the invalid opinion given at trial affected the verdict, then habeas corpus relief is appropriate." *Id.* at 963. Thus, *Richards I* does not buttress respondent's position that the materiality standard requires a petitioner to also show that any remaining untainted evidence cannot support a hypothetical lesser verdict.

Respondent cites Penal Code section 1484 and *In re Bower*, 38 Cal. 3d 865, 880 (1985) as license for this Court to modify a judgment by reducing the degree of the crime for which the habeas petitioner was convicted. Return at 70.[5] *Bower*, however, is inapposite. The petitioner in *Bower* alleged that the first degree murder conviction the State obtained at a retrial violated his

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[5] Penal Code section 1484 states, in part:

> The Court or Judge must [upon the traverse] proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.

Cal. Penal Code § 1484.

due process rights, because the prosecution increased the severity of the charges against him after a new trial was ordered during his first trial. Petitioner's potential liability at the first trial had been limited to second degree murder. *Bower*, 38 Cal. 3d at 869-71. This Court modified the judgment arising from the retrial to a conviction and sentence for murder in the second degree, because petitioner "had a right to be tried for no greater crime than second degree murder" and "the due process violation in this case only affect[ed] the increase from second to first degree murder." *Id.* at 880.

The Court in *Bower* had no occasion to excise tainted evidence from the trial record and sit in judgment on the petitioner using the remaining evidence. The Court also did not alter the legal standard for a claim of prosecutorial vindictiveness. The *Bower* Court simply cited Penal Code section 1484 as authority allowing it to impose, on habeas corpus, the usual remedy for prosecutorial vindictiveness – i.e., modification of the conviction and sentence – rather than vacatur of the judgment and release from custody. *Bower*, 38 Cal. 3d at 880; *see also United States v. Andrews*, 633 F.2d 449, 455 (6th Cir. 1980) ("If, after carefully assessing a prosecutor's seemingly retaliatory adding of charges, a court finds that the situation before it presents a realistic likelihood of vindictiveness, the ordinary remedy is to bar the augmented charge. This was the remedy used in *Blackledge* [*v. Perry*, 417 U.S. 21 (1974)].").

As *Bower* demonstrates, Penal Code section 1484 codifies a general principle regarding the power of courts to craft an appropriate remedy in habeas corpus proceedings upon finding that the petition should be granted. It does not, however, provide a basis to jettison the longstanding materiality standard that governs an underlying false evidence claim raised pursuant to Penal Code section 1473. *See In re Crow*, 4 Cal. 3d 613, 620 (1971) (explaining that the authority under section 1484 to effect a remedy was distinct from the underlying error and "in no way invalidate[d] [the court's]

order setting the case at large for a new trial.").

Respondent next claims that *People v. Steger*, 16 Cal. 3d 539 (1976) is "instructive." Return at 70. It is not. *Steger* does not support respondent's request that this Court deliberate over a modified trial record to salvage a lesser crime. The defendant in *Steger* argued on direct appeal "that there was insufficient evidence to justify a first degree conviction of murder by means of torture." *Steger*, 16 Cal. 3d at 553; *see also id.* at 542-43 ("[Defendant] contends, inter alia, that the evidence at her trial was insufficient to justify a jury instruction on murder by means of torture."). The Court in *Steger* merely applied the established principle that, upon finding the trial evidence is legally insufficient for a conviction on a specific crime, the reviewing court can modify the judgment by reducing the degree of the crime if the evidence is sufficient to support a conviction on that lesser included offense. *Id.* at 553 (modifying the judgment from first to second degree murder, citing Penal Code section 1260).[6]

Respondent's citations to *People v. Tubby*, 34 Cal. 2d 72 (1949) and *People v. Bender*, 27 Cal. 2d 164 (1945) are irrelevant for the same reason.

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[6] In *People v. Navarro*, 40 Cal. 4th 668 (2007), the Court reiterated this principle:

> This court has long recognized that under Penal Code sections 1181, subdivision 6, and 1260, an appellate court that finds that insufficient evidence supports the conviction for a greater offense may, in lieu of granting a new trial, modify the judgment of conviction to reflect a conviction for a lesser included offense.

40 Cal. 4th at 671 (footnote omitted).

As discussed below, respondent's requested remedy in the case at bar – an implied malice second degree murder conviction – is not a necessarily included lesser offense of the actual crime of conviction – first degree felony murder.

In both cases the Court reduced first degree murder convictions to second degree murder, because the evidence presented to the juries was insufficient as a matter of law to affirm the verdicts, but sufficient to support lesser included second degree murder convictions. *Tubby*, 34 Cal. 2d at 79; *Bender*, 27 Cal. 2d at 167-68, 186-87.

Respondent fails to acknowledge the fundamental difference between: (1) a court reducing a crime's degree after determining that the proof on the greater crime is legally insufficient, but the elements for a lesser included offense were sufficiently proved upon existing facts found by the jury, and (2) a court conducting a wholesale re-examination of the evidence presented at a trial after attempting to purge all vestiges of the testimony (and related argument) found to be false and untrustworthy.

In the context of deciding a sufficiency of the evidence claim, the reviewing court does not examine an error that tainted the evidentiary presentation and the jury's deliberation. Rather, the court's review of the trial record and imposition of the remedy

> properly serve[] [the] corrective function [of fixing the jury's error as to the degree of the crime by] replac[ing] a single greater offense with a single lesser offense, *since such a modification merely brings the jury's verdict in line with the evidence presented at trial.*

Navarro, 40 Cal. 4th at 679 (emphasis added); *see also People v. Kelley*, 208 Cal. 387, 393 (1929) ("Appellant was properly found guilty, on competent evidence . . . *No miscarriage of justice, therefore, resulted, except that, as a matter of law, the jury improperly fixed the degree of the crime and imposed penalty therefor*. That injustice may now be righted without subjecting the state and the defendant to the delay and expense of a new trial.") (emphasis added); *People v. Cowan*, 44 Cal. App. 2d 155, 162 (1941) (rejecting a due process claim alleging that Penal Code section 1181(6) violated the

defendant's right to have the jury fix the degree of the offense, because the jury's "error in performing [its] duty [to fix the degree] could be and was corrected on appeal, *not by finding or changing any fact, but by applying the established law to the existing facts as found by the jury*, the correction itself being in favor of and beneficial to the appellants.") (emphasis added).

Respondent also fails to recognize that reducing a verdict from first degree murder grounded on a felony-murder theory to second degree murder based on an implied malice theory is not appropriate – legally or factually in this case – because implied malice second degree murder is not a lesser included offense of first degree felony murder.[7] Respondent notes that Mr. Benavides's jury was instructed on the definition of malice aforethought, 2 CT 565-66 (CALJIC 8.11), and implied malice second degree murder, 2 CT 571 (CALJIC 8.31 (Second Degree Murder—Killing Resulting from Unlawful Act Dangerous to Life)). Return at 70.[8] In addition, the jury was

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[7] It is settled that second degree murder is a lesser included offense of malice-based first degree murder. *People v. Blair*, 36 Cal. 4th 686, 745 (2005). This Court, however, has "yet to decide whether second degree murder is a lesser included offense of first degree murder where . . . the prosecution proceeds only on a theory of first degree felony murder." *People v. Taylor*, 48 Cal. 4th 574, 623 (2010). Nevertheless, this Court has held that "malice is not an element of felony murder." *People v. Dillon*, 34 Cal. 3d 441, 475 (1983); *see also People v. Castaneda*, 51 Cal. 4th 1292, 1329 (2011) (noting the State's "contention that second degree murder is not a lesser included offense of first degree felony murder, because malice is an element of second degree murder, but is not an element of first degree felony murder."). This Court also has explained that first degree premeditated murder is not a lesser included offense of felony murder, but simply different theories of a single statutory offense of murder. *People v. Valdez*, 32 Cal. 4th 73, 114 n.17 (2004). Thus, if first degree murder based on malice is not a lesser included offense of first degree felony murder, then malice-based second degree murder similarly is not a lesser included offense of felony murder.

[8] The jury also was instructed on the second degree murder theory of unpremeditated murder with express malice. 2 CT 570 (CALJIC 8.30

instructed on two theories of first degree murder: (1) willful, deliberate, and premeditated murder, 2 CT 567-68 (CALJIC 8.20), and (2) killing resulting from specified felonies, 2 CT 569 (CALJIC 8.21).

The prosecutor focused almost his entire closing argument on the theory of felony murder and the evidence of the underlying sex crimes to convince the jury that Mr. Benavides caused Consuelo's injuries and was guilty of first degree murder. *See, e.g.*, 18 RT 3563-64,[9] 3566-89. The prosecutor only made brief references to the definition of premeditation and deliberation at the beginning of his closing argument, *see* 18 RT 3559-60, 3563, and he did not mention premeditation and deliberation at all in his rebuttal argument, *see* 18 RT 3649-61. Moreover, the defense in this case was premised on Mr. Benavides's steadfast denials about knowing what happened to Consuelo and his denials about harming her in anyway. In her closing argument trial counsel did not ask the jury to consider any lesser offenses. *See* 18 RT 3600-49; *see also* 18 RT 3649 ("And I'm asking you to look at the evidence, apply it to the instructions and when you do, there will be a reasonable doubt that the People have proved there [sic] case and you will come back with a not guilty."). The defense was absolute: Mr. Benavides

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(Unpremeditated Murder of the Second Degree)).

Respondent said in the Return that "defense counsel requested jury instructions on second degree murder as a lesser included offense. (17 RT 3472.)" Return at 70. This assertion is not completely accurate. The prosecutor requested that the jury be instructed on second degree murder. 3 CT 725 (List of People's Proposed Instructions, listing CALJIC 8.30 and CALJIC 8.31); *see also* 17 RT 3430. Defense counsel requested CALJIC 17.10, concerning lesser included or lesser related offenses. 17 RT 3472; 2 CT 591-92.

[9] The prosecutor explained to the jurors early in his argument that if they found Mr. Benavides guilty of the underlying felonies and the acts caused injuries that resulted in death, "he is guilty of first degree murder and your finding in the special circumstances has got to be true." 18 RT 3564.

did not injure Consuelo. *See* 18 RT 3604, 3637, 3644, 3646-49; *see also* Respondent's Brief on Appeal at 82 ("Appellant's defense was that he did not murder, rape, sodomize, or commit lewd and lascivious acts against Consuelo.").

The fact that the conceded false evidence pervaded the prosecutor's trial presentation and argument further demonstrates why it is inappropriate to reduce the first degree felony-murder verdict to implied malice second degree murder. Although the prosecutor acknowledged that there was some dispute among the medical experts about the exact "cause and the nature of [Consuelo's] injuries," 18 RT 3580, the prosecutor championed Dr. Dibdin and his false and unsubstantiated cause of death (i.e., a blunt force penetrating injury of the anus, 11 RT 2142-43) as the paramount and most reliable evidence of what happened to Consuelo. *See* 12 RT 2356 (eliciting testimony from a treating physician who provided a different cause of death that Dr. Dibdin had greater expertise in determining cause of death); 18 RT 3576 (lauding Dibdin's testimony and his "complete autopsy on this child"), 3577 ("But there's no comparison to what Dibdin did. Nobody got his slides, nobody made sure they were the same."), 3580 ("Dr. Dibdin says blunt force penetrating trauma to the anus causes these internal injuries."), 3587 ("Dr. Dibdin, he is a forensic pathologist, board certified. . . . He has examined hundreds of children, unfortunately, in autopsies. He gave us a concise list of the things he did and what he saw. He cataloged the injuries."), 3588 (arguing that other expert testimony supports "what Dr. Dibdin says"), 3659 (invoking and vouching for Dr. Dibdin's testimony about rib fractures and bruising). At least one juror may have been persuaded by the prosecutor to rely on Dr. Dibdin's false testimony that sodomy caused the abdominal injuries. Under that theory the juror did not need to find malice separate from the mens rea for sodomy (or the other sex crimes). Therefore, once Dr. Dibdin's false testimony regarding the cause of death is excised from the

record, there is no remaining finding of the malice requisite for a second degree murder conviction.

The jury also found true the three felony-murder special circumstances, in addition to returning the nonspecific first degree murder verdict. *See* 3 CT 727-41. Because it returned the true verdicts on the special circumstances, "the jury necessarily found defendant guilty of first degree felony murder . . . ." *Castaneda*, 51 Cal. 4th at 1328; *People v. Hovarter*, 44 Cal. 4th 983, 1018-19 (2008) ("deduc[ing] from the special circumstance verdicts that the jury relied unanimously on a legally valid felony-murder theory of first degree murder, rendering any alleged deficiency in the evidence of premeditation and deliberation superfluous."); *People v. Romero*, 62 Cal. 4th 1, 41-42 (2015) (declining to address defendant's challenge to CALJIC 3.02, because the court "can deduce from these special circumstance findings that the jury necessarily found [defendant] guilty of first degree felony-murder under section 189 . . . [and] there was no need for the jury to find, as [defendant] contends, an 'intent to encourage or facilitate a murder.'"). From the trial evidence (including, and especially, the false and unsubstantiated sexual abuse evidence), the arguments, and the jury's verdicts, this Court can conclude that there was no reason for Mr. Benavides's jurors to consider the issue of express or implied malice for murder during their deliberations, and there is no basis for an assumption that the jury actually considered malice.

Consequently, it is improper in this case to reduce the conviction to a lesser offense that is not a lesser included offense of the actual verdict. *See People v. Lagunas*, 8 Cal. 4th 1030, 1039-40 (1994) (holding that a trial court exceeds its authority under Penal Code section 1181(6) if it reduces a conviction to any offense other than a lesser included offense); *People v. Matian*, 35 Cal. App. 4th 480, 488 (1995) ("The same rationale [of *Lagunas* regarding section 1181] also applies under section 1260 authorizing appellate courts to modify a judgment to reflect a conviction of a lesser, necessarily

included offense when the state of the evidence warrants it."); *Navarro*, 40 Cal. 4th at 678 (noting that *Lagunas* confirmed that "an appellate court's power to modify a judgment is purely statutory.").

Respondent's proposed standard – under which the material false evidence is excised from the trial record and the untainted evidence is then deliberated over by the court to determine if it supports a verdict on a different offense – is doctrinally unfounded and impracticable, and abrogates a defendant's right to have a jury find the elements of the offense of conviction upon valid evidence. This Court must reject the anomalous procedure respondent proposes in this case. *See Richards II*, 63 Cal. 4th at 312 (rejecting the State's argument that conflated a sufficiency of the evidence claim and a false evidence claim).

The speciousness of respondent's contention is further exposed by the dichotomous nature of the remedy he requests. Specifically, respondent asks the Court to reduce Mr. Benavides's conviction to implied malice second degree murder – but respondent does not stop there. Respondent further asks the Court to allow the district attorney on remand to either accept the reduced second degree murder judgment or retry the case. Return at 3. Again, respondent wants this Court to fashion a procedure that has no basis in its precedent on false evidence claims. Although the State concedes it did not legitimately obtain a conviction against Mr. Benavides the first time around, it does not want to be told by this Court exactly what the relief should be. Instead, it wants to decide for itself whether to retry Mr. Benavides, or just keep him imprisoned for second degree murder and forgo a retrial. Respondent presumably requests this atypical remedy because the State knows that the strength of its case is questionable without the false and unreliable evidence it used to obtain the conviction. The State wants the option to avoid proving Mr. Benavides's guilt beyond a reasonable doubt with truthful and credible evidence. This Court should not allow the State to

dodge its obligation to provide Mr. Benavides a fair jury trial as the United States and California constitutions demand.

In sum, respondent's concession that the prosecutor used false and unsubstantiated evidence material to the jury's actual verdict requires that this Court fully reverse the conviction and remand to the superior court for a new trial on the murder charge. *See Richards II*, 63 Cal. 4th at 315 (granting the habeas petition and vacating the judgment, because it was reasonably probable that the false expert testimony affected the outcome of the trial).[10]

b. Even if respondent's proposed additional barrier to reversal is accepted, Mr. Benavides is entitled to a new trial.

Because the evidence respondent concedes is false and unreliable was the cornerstone of the prosecution, without that evidence the nature and circumstances of the trial would have been completely different. Under respondent's proposed standard, this Court must imagine an alternative, substantially different hypothetical trial in which Mr. Benavides was never charged with the exceedingly inflammatory sex crimes and was not eligible for the death penalty.

It is highly likely that the preparation and strategic decisions made by competent defense counsel defending Mr. Benavides against only a murder charge would have been different than those actually made by his trial counsel while defending against the special-circumstances murder and related sex crime charges. The trial court also may have made different evidentiary rulings at an unadulterated trial, including, for example, on the

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[10] Mr. Benavides notes that, upon remand in *Richards II*, the San Bernardino County District Attorney moved the superior court to dismiss the prosecution, and Mr. Richards was released from custody. *See* http://www.sandiegouniontribune.com/sdut-exonerated-man-thanks-innocence-project-2016jun29-htmlstory.html (last visited March 1, 2017).

admissibility of evidence of uncharged crimes attributed to Mr. Benavides. *See People v. Benavides*, 35 Cal. 4th 69, 91-93 (2005) (finding no deficient performance of counsel and approving the admission of alleged prior acts of physical and sexual abuse, because "the percipient evidence was *in harmony with the forensic evidence* . . . [and] was probative in *establishing that the fatal injuries resulted from sexual abuse* rather than an accident.") (emphasis added); *id.* at 93-94 (finding that trial counsel was not ineffective because she could have made a reasonable strategic decision when requesting that the trial court not instruct the jury with CALJIC 2.50 regarding evidence of other crimes).[11] Thus, the trial record likely would have been different had Mr. Benavides never been tried on the three unsubstantiated sex crimes and felony murder – which, again, demonstrates why immediate reversal is the only appropriate remedy in this case.

Nevertheless, assuming arguendo that the Court accepts respondent's request for an additional barrier to relief and, consequently, "sets aside" the false and unreliable evidence presented at Mr. Benavides's trial to evaluate what remains, the Court should reject respondent's argument that "it is not reasonably probable that the jury would have failed to convict of second degree murder." Return at 69.[12]

As noted above, the central issue in dispute at the guilt-innocence phase of Mr. Benavides's trial was whether he caused Consuelo's injuries. The

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[11] Furthermore, this Court's determination on appeal that the trial court's error in admitting evidence of Estella Medina's association with Joe Avila was harmless in light of the "strong evidence" that Consuelo's injuries were "strongly consistent with physical and sexual abuse" is now undermined by the conceded false evidence. *Benavides*, 35 Cal. 4th at 91.

[12] To be clear, by making this alternative argument, Mr. Benavides does not concede that it is possible to remove all of the tainted evidence and attendant contamination from the trial record, and create a hypothetical universe of trial facts upon which the Court can apply respondent's novel prejudice test.

prosecutor framed the issue for the jury near the beginning of his closing statement, arguing:

> [T]he question in this case has become who committed these acts. The defense has attempted to raise the specter of some motor vehicle collision, some other possible causes of these injuries. But we would have to totally disregard our common sense and all the evidence in this case to come to any conclusion other than that this child was physically and sexually abused. [¶] So the question becomes who did it. . . . He's lying because he did it. He brutalized this twenty-one-month-old little girl. He sodomized her, he raped her, and he killed her.

18 RT 3566.

At the end of the closing statement, the prosecutor similarly aggregated the evidence summarily to argue that Mr. Benavides was the one who injured Consuelo and committed the charged crimes. 18 RT 3597 ("[W]ithin fifteen minutes [Consuelo] had been sodomized, she had been raped, she had been beaten, she had broken ribs, and she had brain damage. And she was left with one man and that's him right there. And he is the one who did it."); *see also* 18 RT 3660 (asking rhetorically near the end of the rebuttal argument, "Gee, I wonder who did it on November 17th, 1991, given the state of this evidence" – after arguing that the evidence shows that "the child was previously abused, both physically and sexually").

The defense contended that Mr. Benavides did not cause any of Consuelo's injuries and that he did not know how she was injured. *See* 18 RT 3604, 3637, 3644, 3646-49. The false and unsubstantiated sexual abuse evidence presented at trial was inextricably linked with the other evidence of Consuelo's injuries. That link was systematically used by the prosecutor to convince the jury to reject the defense and find Mr. Benavides guilty.

Respondent focuses his argument for a reduction of the conviction to

second degree murder on the abdominal trauma that Consuelo suffered. Return at 71-74. Contrary to respondent's argument, however, without the false and unsubstantiated evidence of sexual abuse, *it is reasonably probable that the jury would have failed to convict* Mr. Benavides of second degree murder.

Respondent first claims that "there was no dispute that Consuelo died from blunt trauma to the abdomen," and that her injuries were "violent and catastrophic." Return at 71; *see also* Return at 49-50.[13] Although there was no dispute that Consuelo suffered abdominal injuries that led to her death, there obviously was a dispute at trial about whether the injuries were caused by an external blow (i.e., a blunt force) or an internal mechanism (i.e., a penetrating penis or foreign object). In his closing argument the prosecutor acknowledged the dispute, stating that "the evidence has come out" demonstrating a "dispute . . . about the cause and the nature of the injuries, whether or not [Consuelo] was sodomized to death or sodomized, vaginally penetrated and beaten to death." 18 RT 3580. The prosecutor went on to argue that "[w]e don't need to have the final catalog of injuries or the final ultimate decision on which came first and which caused the most damage," and advised that "[t]hose questions are irrelevant. The question is, who did it." 18 RT 3580. The prosecutor consistently linked the sexual abuse with physical abuse throughout his closing argument. *See, e.g.*, 18 RT 3570 (noting Dr. Nat Baumer's testimony disputing Dr. Dibdin's stated cause of death, but arguing that Dr. Baumer could not "explain . . . away" the "documented . . . vaginal and anal penetration."), 3582 ("We don't really

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[13] Blunt trauma is medically defined as: "Any injury sustained from blunt force, which may be related to MVAs [motor vehicle accidents]/RTAs [road traffic accidents], or mishaps, falls or jumps, blows or crush injuries from animals, blunt objects or unarmed assailants." Segen's Medical Dictionary (2012).

need a doctor, do we, to tell us what happened here. . . . [S]he was sexually abused. And physically abused."), 3657-58 ("There is overwhelming evidence this child was abused physically and sexually. What I meant was, given that fact, the real issue is he did it or he did not do it. And clearly from the evidence, he did it.").

On appeal, respondent continued in the same vein as the trial prosecutor, arguing: "*There was no evidence that Consuelo's injuries resulted from physical abuse alone.*" Respondent's Brief on Appeal at 105 (defending the trial court's rejection of involuntary manslaughter instructions). Respondent now wants this Court to see things very differently when it comes to the circumstances that produced Consuelo's abdominal injuries. Respondent calls on the Court to find that there is *ample* evidence that Consuelo's injuries resulted from physical abuse alone – so much so that there is no reasonable probability that the jury would have failed to convict Mr. Benavides based on the physical abuse. *See, e.g.*, Return at 15, 65-74. This Court should reject respondent's whipsawing interpretation of the trial record as to the cause and circumstances of Consuelo's death.

Respondent relatedly asserts that "[n]o reasonable juror would have doubted the intentional nature of petitioner's infliction of the abdominal trauma." Return at 71. Respondent notes Dr. Jack Bloch's opinion that the trauma could have resulted from a very forceful compression blow, possibly a punch or kick to the stomach. Return at 71 (citing 12 RT 2460, 2462).[14] Respondent, however, fails to mention that on cross-examination Dr. Bloch

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[14] Respondent also claims that "Dr. Diamond and Dr. Bloch opined that the blunt trauma to the abdomen was external, such as a punch or kick." Return at 49; *see also id.* at 71 (citing Dr. Jess Diamond's testimony at 10 RT 2067). Respondent leaves out of his recitation Dr. Diamond's additional trial testimony that it is possible Consuelo's abdominal injuries were caused by sodomy. 10 RT 2068-69; *see also* 10 RT 2092-93 (opining that if there was a tear in the rectum wall, sodomy could have caused the abdominal injuries).

admitted he could not say with medical certainty that Consuelo's trauma did not result from a pedestrian-vehicle accident, and in his practice he had seen children who were involved in such accidents who "did not display outward signs of bruising or abrasions covered by material." 12 RT 2467-68. The prosecutor countered this testimony with redirect examination grounded on the conceded false evidence, i.e., the prosecutor elicited testimony from Dr. Bloch that he had never seen a child who had been struck by a vehicle have indicia of anal or vaginal penetration as well. 12 RT 2468; *see also* 12 RT 2475 (Dr. Bloch stating he did not discover any injury to Consuelo that would cause her to lose rectal tone, other than sexual abuse). Thus, without the false and unsubstantiated evidence, it is reasonably probable that the jury would have viewed Dr. Bloch's testimony on cross-examination about the possibility of an accidental cause differently and more favorably to the defense.

Respondent also does not mention in his argument the testimony of Dr. Nat Baumer, a defense witness who testified that Consuelo's abdominal injuries could have occurred when she "either fell on something or was struck by an automobile, something of that sort." 14 RT 2833; *see also* 14 RT 2834 (opining that a car accident could have resulted in the injuries). The prosecutor extensively cross-examined Dr. Baumer about the purported sexual abuse, *see* 14 RT 2837-61, 2865-84, 2894-96, and elicited from Dr. Baumer that "the most likely scenario is that this child was abused by someone in a rage," by asking him a hypothetical question premised on reports from multiple physicians "who [found] evidence of sodomy and vaginal penetration," 14 RT 2865. Thus, when the false evidence is excised from the record, Dr. Baumer's testimony that mechanisms other than an intentional blow could have caused Consuelo's abdominal injury undermines respondent's argument about the strength of the prosecution's untainted medical evidence.

The alleged evidence of prior abdominal trauma that respondent now claims "also shows that [Mr. Benavides's] violent assault on November 17 was perpetrated with a conscious disregard for [Consuelo's] life," likewise is substantially weakened without the false and unsubstantiated sex crime evidence. As mentioned above, there is a question whether the pre-existing pancreatic scarring and adhesion, standing alone, would properly be admitted under Evidence Code sections 1101(b) and 352 at a trial free of the admittedly false and unreliable evidence. *See* 1 RT 64-65 (prosecutor arguing for the admissibility of the alleged prior trauma to the pancreas, as one part of "other indications of prior sexual and physical abuse of the child.").[15]

Even assuming the jury would have been allowed to hear the testimony of Dr. Bloch about the pre-existing pancreatic adhesion and scarring and the testimony about Consuelo's nausea and vomiting around Halloween, the effect of this evidence when decoupled from the sexual abuse would have been substantially weaker than it was at the trial. The prosecution did not present any evidence directly establishing that Mr. Benavides actually spent time with Consuelo near Halloween. Faced with the absence of proof and without the unsubstantiated prior and current allegations of sexual abuse, the jury necessarily would have had to draw multiple inferences from weak circumstantial evidence to find that Mr. Benavides committed a previous act that caused the pre-existing condition. Namely, the jury would have had to find that the adhesion and scarring actually occurred from an intentional blow; that the blow was inflicted around Halloween, because that was when

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[15] Mr. Benavides notes that he raised in his habeas petition trial counsel's ineffectiveness concerning the failure to adequately object and otherwise challenge the prosecution's evidence that the pancreatic scarring and adhesion were indicative of prior abuse. *See* RCCAP at 265-67; *see also id.* at 307-08.

Consuelo experienced nausea and vomiting; that Mr. Benavides was around Consuelo at the time; and that Mr. Benavides was the one who inflicted a blow that caused the pancreatic condition. It is reasonably probable that these multiple inferences would not have been accepted by the jury at a hypothetical trial in which the prosecution's evidence of abuse would have been severely diminished overall. *See* Respondent's Brief on Appeal at 40 (arguing that "evidence of Consuelo's prior injuries was insignificant given the overwhelming physical evidence of Consuelo's injuries from the charged offenses and the fact appellant was the only person with Consuelo when she was vaginally and anally penetrated").

Respondent further argues that Mr. Benavides's actions and statements about the incident on November 17, and the lack of evidence that Consuelo ever left the apartment demonstrate that it is not reasonably probable that the jury would have failed to conclude Mr. Benavides inflicted Consuelo's abdominal injuries. Return at 72-74.

Mr. Benavides consistently said that he did not know what happened to Consuelo. When interviewed by Delano Police Department detectives on November 18, 1991, 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 vomiting"), 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 [it]." Ex. 4 at 2007-08. At trial, Mr. Benavides likewise 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.

In her closing argument trial counsel made a point of Mr. Benavides's

multiple consistent statements about finding Consuelo outside the apartment and not knowing what happened to her. 18 RT 3604-10. During its deliberations the jury seemingly focused on this issue as evinced by its request for a copy of the transcript of the November 18 police interview and the pictures of the area in front of the apartment. 3 CT 744; 18 RT 3670-72. The other statements Mr. Benavides made speculating about what might have happened to Consuelo also must be viewed in the context of the reported conversations, and are not necessarily inconsistent with his repeated declarations that he did not know what happened to Consuelo. For example, when Estella Medina said that Mr. Benavides made a statement about Consuelo hitting her head on the door, *see* Return at 73 (noting Estella's testimony), she also stated that, in the same conversation, "he said he had found her outside the door laying on the sidewalk, vomiting and had blood in her nose." 13 RT 2548. Respondent mentions Mr. Benavides's speculation about Consuelo falling from a "ladder," and the fact that there was no evidence of a ladder inside or outside the apartment. Return at 73. From the context of the police interview, however, it is likely that the Spanish word Mr. Benavides used ("escalera") more appropriately translates to the English word "stairs," not ladder. Ex. 63 at 5297. While there was no evidence of a ladder, there certainly was a staircase to the second floor of the apartment building outside the apartment door. *See* People's Trial Exhibit 65 (photograph of exterior of apartment).

Respondent also faults Mr. Benavides for failing to call 9-1-1 or contact neighbors to get aid immediately, and for "destroy[ing] evidence of his crime." Return at 73. Although he did not call 9-1-1, Mr. Benavides did summon Cristina Medina home immediately after he found Consuelo, and within a few minutes he told Cristina to call her mother, Estella, who was

working at the nearby hospital. *See* 11 RT 2184.[16] When Estella arrived at the apartment a few minutes later she, too, did not call 9-1-1. Rather, she decided to take Consuelo to the hospital, which was about a mile or mile and a half away. 13 RT 2547-48. When Consuelo arrived at the hospital, she certainly "looked sick," 17 RT 3314, but she was responsive to stimuli, moving all of her extremities, and moaning and crying, but could not speak coherently, 17 RT 3327. Thus, although Consuelo obviously was severely injured (which Mr. Benavides readily admitted during his testimony, 15 RT 3014), the evidence does not indisputably support respondent's claim that the failure to seek immediate medical care would lead a jury to conclude Mr. Benavides assaulted Consuelo and tried to evade detection.

The fact that Mr. Benavides wiped the blood from the child's nose and cleaned up the blood and vomit also cannot reasonably be viewed as an effort to cover up evidence of a crime. The towel and paper products used to wipe up the blood and vomit were found in the apartment by the criminalist, Jeanne Spencer, three days after the incident. *See* 11 RT 2286, 2288, 2293-94, 2299, 2305-06, 2312. If Mr. Benavides actually intended to destroy evidence of a crime, simply throwing the items into the trash or otherwise leaving them in the apartment obviously is a very ineffectual effort at destruction. Moreover, Mr. Benavides did not attempt to remove any of the items before his arrest at the apartment on the afternoon of November 18. *See* 14 RT 2752. In light of this, respondent's nefarious interpretation of Mr. Benavides's actions is less probable and less reasonable than an innocent one – that Mr. Benavides

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[16] It also bears noting here that, as detailed in the habeas petition, Mr. Benavides is a monolingual Spanish speaker who suffers impaired neuropsychological and intellectual functioning, and exhibited, among other adaptive deficits, significant impairment in practical skills related to independent living. *See* RCCAP at 346-59. Given these significant deficits, it is unlikely that Mr. Benavides was decidedly capable of calling 9-1-1 to request assistance.

wiped the child's bloody nose and cleaned up the areas where she vomited, as caretakers of sick or injured children often do.

Finally, respondent asserts that there was a "lack of evidence Consuelo ever left the apartment." Return at 74. Respondent notes that Consuelo's clothing "did not have evidence of dirt or gravel or scrape marks." Return at 74 (citing 11 RT 2318 (testimony of criminalist Spencer, who examined the clothing), 13 RT 2589 (testimony of Estella Medina, who brought Consuelo to the hospital), 15 RT 2932, 2940, 2961 (testimony of CHP officer William Esmay, who examined the clothing)). Although the witnesses did not observe dirt, gravel or scrapes, Ms. Spencer did find "plant material" on Consuelo's sweatshirt, Ex. 7 at 3506, and dirt and a small spot of blood on the bottom of Consuelo's shoes, Ex. 7 at 3492. Ms. Spencer also found "plant material, plant cells and fibrous material (plant cellulose)" in the substance collected by UCLA medical staff from Consuelo's nasal pharynx. *See* Ex. 7 at 3465-72; 11 RT 2322-25. This evidence supported Mr. Benavides's account that he found Consuelo outside the apartment.

Respondent also argues that the "vomit contained in tissues" found in the kitchen wastebasket contained carpet fibers, but not plant material. Return at 74 (citing 11 RT 2285, 2291 (testimony of criminalist Spencer)). Respondent notes that no blood or vomit was observed by law enforcement on the doorstep of the apartment. Return at 74 (citing 11 RT 2291 (testimony of criminalist Spencer) and 14 RT 2751 (testimony of Detective Al Valdez)).

Respondent's recitation of what was found among the vomit on the items in the kitchen trashcan is incomplete and misleading. Criminalist Spencer told the jury that she examined some vomit and "found some nylon tri-level carpet fibers," which indicated that the vomit "very well could have been from inside." 11 RT 2291; *see also* 11 RT 2317-18. Spencer also testified that she "did not" find "any dirt substance or gravel that [she] would expect to find if [the vomit she described] had been cleaned up outside." 11

RT 2291. Spencer's lab notes and worksheets (which were not disclosed to the defense), however, present a more complete picture of what actually was on the items she collected from the kitchen trashcan.

On November 20, 1991, "[t]hree paper towels containing apparent vomit-like residue [were] removed [by Spencer] from the kitchen waste basket." Ex. 7 at 3365. In her laboratory notes, Spencer described one of the three items, which she labeled "B," as follows: "Dirty paper napkin (odor vomit) rough soiled appear [sic] with no clumpy vomit present just soiled appearing napkin. ¶ Present on napkin was a hair and *some pieces of dried plant matter*, many similar appearing red fibers and *small dirt particles*." Ex. 7 at 3426 (emphasis added). In the margin beside this note Spencer wrote, "Outside? Or interior floors?" Ex. 7 at 3426 (underlining original). In her related worksheet, under the heading "Stereo Examination," Spencer wrote, "No fibers associated w/ carpet noted[,] misc[.] fibers." Ex. 7 at 3428. Moreover, Spencer noted finding a "piece of napkin like material with some dirt like debris and some apparent blood stain (mixed)" in the bathroom wastebasket. Ex. 7 at 3411-12. Thus, contrary to respondent's suggestion, there was evidence supporting Mr. Benavides's statements that he found Consuelo outside and cleaned up her vomit inside and outside the apartment.

As for the failure of criminalist Spencer and Detective Valdez to find evidence of vomit or blood outside the apartment, Spencer reported conducting a visual examination on November 20 only of the "area just outside the front door." Ex. 7 at 3364. Similarly, Detective Valdez's testimony that "to [his] knowledge" "there was nothing outside the door to indicate there had been any blood or vomit" must be considered in light of Detective Nacua's report that the "entry door to the apartment was checked" on November 18, and "[n]o blood or vomit was located *on the door*." Ex. 4 at 2338 (emphasis added). By contrast, Mr. Benavides testified that he found Consuelo outside the apartment, laying on the ground closer to the carport.

See 15 RT 3012-13; People's Trial Exhibit 63 (photograph of exterior of apartment). He also told law enforcement and the jury that although Consuelo had some bleeding from her nose and mouth, he only saw and cleaned up vomit outside. *See* Ex. 63 at 5278-80; 15 RT 3014-17. Moreover, the weather in Delano was rainy on November 17 and 18, which could have diluted any remaining vomit residue. *See* 13 RT 2542-43, 2614; Ex. 4 at 1840-41.

Respondent also references Cristina's testimony that she closed the door behind her when she left the apartment, and Consuelo was unable to open the apartment door. Return at 74 (citing 11 RT 2183, 2195). Respondent, however, does not mention that Cristina's testimony was contradicted by the testimony of her mother, Estella, who said that Consuelo could open the apartment door and would run outside. 13 RT 2612. In addition, little significance should be afforded the fact that "[n]eighbors carrying groceries inside sometime between 6:00 p.m. and 7:00 p.m. did not see Consuelo outside," Return at 74, because Cristina did not leave the apartment to play outside until 7:00 p.m. or shortly thereafter. The timing of her departure was established by the testimony of Cristina, Estella, and Cristina's friend, Maribel Aguilar. Estella testified that Cristina called her regarding Consuelo at 7:20 p.m. 13 RT 2545, 2623. Cristina made the call to her mother within minutes of returning to the apartment, 11 RT 2184, after playing outside for about ten to fifteen minutes, *see* 11 RT 2182, 2187, 2196. *See also* 11 RT 2273 (Maribel Aguilar testifying that Cristina played for about five or ten minutes). Thus, the neighbor's testimony about being home by 7:00 p.m. is of no help to respondent, and, all told, there is substantial evidence that undermines respondent's argument that Consuelo did not leave the apartment.

In sum, even if this Court attempts to sanitize the trial record of the false and unreliable evidence and then reviews the evidence that remains, it

should hold that there is a reasonable probability at least one juror would have failed to find Mr. Benavides guilty of second degree implied-malice murder.

B. If this Court does not immediately grant the petition and order a new trial based on respondent's concession of false evidence, a reference hearing should be ordered.

To reiterate, Mr. Benavides argues that respondent's concession regarding the presentation of material false evidence under Penal Code section 1473 requires a complete reversal of the conviction and an immediate remand to the superior court for a new trial. Nevertheless, if this Court is inclined to accept respondent's argument for an added burden and a mere reduction of the conviction to second degree murder, Mr. Benavides counters that such result would be premature at this time.

Because the Return and Traverse engender multiple factual disputes concerning the admission of false evidence at the guilt phase of Mr. Benavides's trial, this Court must issue an order directing that a reference hearing ensue to resolve the disputes. After determining the complete extent of the falsity of the trial evidence and whether the prosecution knew or should have known that any of the evidence was false (including the evidence respondent has already conceded is unreliable and unsubstantiated), this Court will be in a position to decide whether the false evidence – individually and cumulatively – is material under the relevant statutory and constitutional standards.

1. Multiple allegations concerning the presentation of false evidence set forth throughout the habeas petition are in dispute and necessitate a reference hearing.

It has long been the law that "if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing." *Romero*, 8 Cal. 4th at

739-40.

In his Corrected Amended Petition (CAP), Mr. Benavides raised multiple claims concerning the knowing presentation of false evidence at his trial.[17] These claims alleged violations of Mr. Benavides's state statutory rights under Penal Code section 1473, and his state and federal constitutional rights as protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments and the California constitutional analogues. Respondent generally "denies that [Mr. Benavides's] trial was unfair or unconstitutional," Return at 2, and "denies that any prosecution witness 'falsified' any evidence," Return at 3. *See also* Return at 4 (denying "that the state 'manufactured' any evidence" and "that the prosecution 'knew' any evidence presented at trial to be 'false.'"), 5-6 (refusing to admit or concede that Consuelo was not sexually abused), 7-9 (asserting multiple general and specific denials of knowing presentation of false evidence concerning Consuelo's physical condition), 57 n.10 ("Respondent denies petitioner's assertion that the prosecutor knew or should have known that testimony by any of its witnesses . . . was 'false.'").

Respondent's denials create numerous factual disputes (detailed earlier and below) that cannot be resolved without an evidentiary hearing. The hearing will provide a comprehensive record upon which this Court can examine the interrelated false evidence claims and find that a complete reversal of Mr. Benavides's conviction is the only appropriate result under the governing law.

a. Legal principles governing false evidence claims

As discussed above, under Penal Code section 1473, "once a defendant shows that false evidence was admitted at trial, relief is available under 1473 as long as the false evidence was material." *Richards II*, 63 Cal. 4th at 312;

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[17] The false evidence claims in the CAP are Claim One, Claim Two, Claim Three, Claim Four, and Claim Five.

see also Cal. Penal Code § 1473(b)(1). False evidence under section 1473 is "material if there is a reasonable probability that, had it not been introduced, the result would have been different . . . [in other words,] if the false evidence was of such significance that it may have affected the outcome of the trial." *Richards II*, 63 Cal. 4th at 312 (internal punctuation omitted) (quoting *In re Roberts*, 29 Cal. 4th 726, 742 (2003) and *In re Wright*, 78 Cal. App. 3d 788, 808-09 (1978)). "[I]t does not matter *why* evidence is false or *whether any party to the proceeding knew* it was false. So long as some piece of evidence at trial was actually false, and so long as it is . . . [material], habeas corpus relief is appropriate." *Richards I*, 55 Cal. 4th at 961; *see also* Cal. Penal Code § 1473(c) ("Any allegation that the prosecution knew or should have known of the false nature of the evidence . . . is immaterial to the prosecution of a writ of habeas corpus brought pursuant to . . . subdivision (b).").

By contrast, under constitutional protections, a defendant's due process rights are violated when a prosecutor obtains a conviction using evidence the prosecutor knows or should have known to be false, or by the failing to correct false evidence. *See Napue*, 360 U.S. at 269; *see also United States v. Agurs*, 427 U.S. 97, 112-13, 120 (1976); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Dickey*, 35 Cal. 4th at 909 ("When the prosecution fails to correct testimony of a prosecution witness which it knows or should know is false and misleading, reversal is required. . ."); *Jackson*, 513 F.3d at 1075. This constitutional protection extends to situations in which the prosecution allows a witness to create a false impression of the evidence. *See, e.g.*, *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (finding due process violation where prosecutor allowed witness to create false impression of disputed relationship with defendant's murdered wife); *Dickey*, 35 Cal. 4th at 909 (concluding that the prosecutor "did knowingly fail to correct a false impression – indeed, knowingly exploited the false impression in his argument to the jury – that the prosecution had not done [a witness] any favors that might reflect on his

credibility").

The false testimony or evidence is material under the due process protection articulated in *Napue* if it "could . . . in any reasonable likelihood have affected the judgment of the jury." *Napue*, 360 U.S. at 271; *Agurs*, 427 U.S. at 103 ("[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.") (footnote omitted); *Dickey*, 35 Cal. 4th at 909 ("[R]eversal is required if there is any reasonable likelihood the false testimony could have affected the judgment of the jury.").

As discussed above, the materiality inquiry is not a sufficiency of the evidence test. *See Sanchez*, 379 F.App'x at 553; *Yates*, 629 A.2d at 809; *Barham*, 595 F.2d at 241-42 ("There is no doubt that the evidence in this case was sufficient to support a verdict of guilty. *But the fact that we would sustain a conviction untainted by the false evidence is not the question.*") (emphasis added); *cf. Kyles*, 514 U.S. at 434-35 (explaining that *Brady* materiality "is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.").

Moreover, the due process protection requires reversal of a conviction even if a petitioner does not demonstrate that the prosecution knew or should have known that the evidence it presented was false, so long as there is any reasonable likelihood that the false evidence could have affected the judgment of the jury and without it the result of the trial would have been different. *See Hall v. Dir. of Corr.*, 343 F.3d 976, 981-85 (9th Cir. 2003) ("There is a reasonable likelihood that the [unknowing] introduction of the falsified notes affected the jury's verdict in this case. We have no confidence in the verdict under these circumstances.") (internal citation omitted). *But see Evenstad v. Carlson*, 470 F.3d 777, 783 n.6 (8th Cir. 2006) ("Most

circuits, including this one, absent a finding the government knowingly sponsored false testimony, require a petitioner seeking a new trial to show the jury would have 'probably' or 'likely' reached a different verdict had the perjury not occurred. Other circuits, like the Minnesota courts, apply a 'possibility' standard granting relief whenever the discovery 'might' have produced an acquittal.") (internal citations omitted); *Maxwell v. Roe*, 628 F.3d 486, 506-08 (9th Cir. 2010) ("The State's reliance on that perjured testimony undermines confidence in the verdict. Because there is a reasonable probability that [the witness's] perjury affected the judgment of the jury, we must reverse the denial of [the] habeas petition as to this claim.") (internal citations omitted); *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002) ("[O]ur analysis of the perjury presented at Killian's trial must determine whether there is a reasonable probability that without all the perjury the result of the proceeding would have been different.") (internal quotation marks and punctuation omitted); *United States v. Young*, 17 F.3d 1201, 1204 (9th Cir. 1994) ("Thus, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial if there is a reasonable probability that without the evidence the result of the proceeding would have been different.") (internal quotation marks and punctuation omitted); *United States v. Wallach*, 935 F.2d 445, 473 (2d Cir. 1991) (holding that the perjury by a key government witness, irrespective of whether the government knew of the perjury at the time of trial, "infected the trial proceedings" and required reversal).

Ultimately, the materiality determination this Court must make under both Penal Code section 1473 and the Due Process Clause requires consideration of all of the false evidence cumulatively – including that which respondent has conceded is false and unsubstantiated. *See Richards II*, 63 Cal. 4th at 313 ("We make [the materiality] determination based on the totality of the relevant circumstances."); *Guzman v. Sec'y, Dep't of Corr.*, 663

F.3d 1336, 1351 (11th Cir. 2011) ("[W]e must also consider the cumulative effect of the false evidence for the purposes of materiality."); *cf. Kyles*, 514 U.S. at 436-37 (stating that *Brady* material must be "considered collectively, not item by item"); *In re Brown*, 17 Cal. 4th 873, 887 (1998) ("[W]hile the tendency and force of undisclosed evidence is evaluated item by item, its cumulative effect for purposes of materiality must be considered collectively."); *see also People v. Hill*, 17 Cal. 4th 800, 844 (1998) ("[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.").[18]

In his CAP and Reply Mr. Benavides asserted the above-described statutory and constitutional bases for relief regarding his false evidence claims. When all of his allegations concerning the prosecution's use of false evidence are considered in light of these interrelated legal principles, they cannot be rejected – and his tainted conviction cannot merely be reduced to second degree murder – without first holding an evidentiary hearing.

b. Disputed false evidence allegations

1) Evidence of prior sexual abuse

Respondent conceded that "Dr. James Dibdin's testimony about his

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[18] The bar on the introduction of false or misleading evidence is particularly crucial in a capital case, where the Eighth Amendment imposes a requirement of heightened reliability. *See Johnson v. Mississippi*, 486 U.S. 578 (1988) (holding that Eighth Amendment required reversal of death sentence based in part upon felony conviction subsequently set aside); *Gardner v. Florida*, 430 U.S. 349 (1977) (finding violation of Due Process Clause where a death sentence was based in part upon false information contained in probation report that defendant had no opportunity to rebut); *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir. 1993) (holding that the defendant had a due process right not to be sentenced on basis of materially incorrect information).

autopsy findings is among the evidence now shown to be of such questionable reliability as to demonstrate [Mr. Benavides's] entitlement to . . . relief," Return at 3, and acknowledged that Dr. Dibdin's stated cause of death cannot be substantiated, Return at 17. Nevertheless, respondent argues that Dr. Dibdin testified honestly about his microscopic examination of tissue providing proof of prior sexual abuse. Return at 47-48. Specifically, respondent argues that Dr. Dibdin's testimony concerning "changes" he observed in microscopic tissue samples from "the anus, vagina, and urinary bladder" – "which indicated that there were previous injuries . . . up to four weeks in age," and were "evidence of prior abuse" to the anus and vagina, 11 RT 2139-40 – was not false within the meaning of Penal Code section 1473. Return at 47-48.

Respondent notes Mr. Benavides's allegation that Dr. Dibdin testified falsely about finding "tears" in the tissue samples and emphasizes that Dr. Dibdin did not use the word tears when describing what he observed during his microscopic examination. Return at 48 (citing 11 RT 2140). Respondent asserts that this difference renders immaterial the observation of Mr. Benavides's expert, Dr. Dale Huff, that there were no tears or scarring in the tissue on the slides. Return at 48. Respondent, however, cannot make Dr. Dibdin's testimony about his microscopic analysis truthful by parsing Mr. Benavides's allegation and Dr. Dibdin's words. When Dr. Dibdin's statements about his microscopic analysis are viewed in the context of his entire testimony and the objective evidence actually contained on the tissue slides, Dr. Dibdin's testimony was false and misleading.[19]

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[19] Mr. Benavides notes that Dr. Dibdin's Autopsy Protocol (which was marked for identification as People's Trial Exhibit 6, 11 RT 2111) states the following, in the section titled "MICROSCOPIC EXAMINATION: . . . ANUS, VAGINA, AND URINARY BLADDER:",

First, Dr. Dibdin told the jury that he microscopically examined tissue from the anus. 11 RT 2139-40, 2158, 2167. This testimony was false. Dr. Huff examined the autopsy slides and determined that "[n]one of the slides includes tissue from the external genitalia, anus, or skin. . . . The slides contain tissue from the rectum, *but not the anus*." Ex. 82 at ¶ 5 (emphasis added). Respondent's own expert, Dr. Tracey Corey, confirmed this when speaking with respondent's counsel on April 3, 2015: "[Respondent's counsel]: That tissue isn't from the anal area. Dr. Corey: No, it's farther up." Ex. 177 at 8353. Thus, there was no factual basis for Dr. Dibdin's testimony that the microscopic sections of anus had changes that indicated prior injury or abuse – he simply did not conduct a microscopic examination of slides containing tissue from the anus.[20]

> *The presence of acute tears and hemorrhage of approximately 4 to 7 days of age* is confirmed with minimal inflammatory response and good preservation of red blood cells. There is severe edema of the connective tissues. There are areas of prominent neo-vascularization and fibroblastic activity *indicating previous injury or injuries up to 4 weeks in age.* [¶] The acute hemorrhage and *evidence of old injury is also seen in the region of the vaginal walls.*

Ex. 8 at 3560 (emphasis added).

[20] Dr. Dibdin's "Microscopic Manifest" describes four slides (C9 through C12) as comprising tissue from the right and left, upper and lower "Perineum." Ex. 8 at 3542. This, too, is not true. The perineum is the "mucocutaneous tissue between the posterior scrotum or vagina and the anal sphincter." Segen's Medical Dictionary (2012); *see also* 10 RT 2050 (Dr. Diamond testifying that the "perineum is the distance between the lower end, between the posterior fourchette and the anus."). Slides C9 and C11 actually comprise a "cross section of part of the large bowel, most likely the rectum," and slides C10 and C12 comprise a "cross section comprising tissue from three structures: the rectum, vagina, and part of the urinary tract – most likely the bladder." Ex. 82 at ¶ 5. The four microscopic slides, in fact, do not contain tissue from the "Perineum," as Dr. Dibdin reported.

Second, even if the "changes" Dr. Dibdin found to be indicative of previous injuries and prior abuse to the anus and vagina did not include "tears" to the tissue of the vagina or rectum, the microscopic slides do not support his conclusion about prior sexual abuse. When respondent's counsel asked Dr. Corey about Dr. Dibdin's "assertion that there was evidence of prior genital, anal, rectal trauma," Dr. Corey responded, "Yeah, *I-I really can't see that*. Uh, I agree with Dr., uh, Huff, the pediatric pathologist who looked at that, who looked at them as well." Ex. 177 at 8352-53. According to Dr. Huff, the tissue slides only show "evidence of older hemorrhage outside of the walls of the rectum and outside one wall of the vagina," Ex. 82 at ¶ 11, and it is "likely that [the blood outside the walls of the rectum and vagina] resulted from the hemoperitoneum, the massive bleeding into Consuelo's abdomen and pelvis from her abdominal injuries," or it "could also have been caused by her DIC [disseminated intravascular coagulopathy], or a combination of both," Ex. 82 at ¶ 12. Dr. Huff further stated that the older hemorrhage he observed most likely appeared during the course of Consuelo's hospitalization. Ex. 82 at ¶¶ 14, 17. Thus, the unexplicated "changes" underlying Dr. Dibdin's belief that there was evidence of prior abuse were fantastical – just like his anatomically impossible cause of death.

Third, shortly after Dr. Dibdin testified about the "changes" "depicted in several areas" of the tissue from the anus, vagina, and urinary bladder, he talked about the "pathological diagnosis" listed in his autopsy report, which noted "acute lacerations" to the anus and vagina and "evidence of previous anal and vagina injury." 11 RT 2139-42; *see also* 11 RT 2119 (stating that he "noticed there were multiple tears of the edge of the anus and this had gone through the muscle"), 2121 (noting tears on the left side of the anus), 2122-23 (describing a half-inch tear/laceration in the back wall of the vagina).

On cross-examination, Dr. Dibdin said – in accord with his autopsy

report – that he "took microscopic sections [of the left anal margin] to see how advanced the stage of healing was," and he noted in the autopsy report his findings that "the presence of acute tears and the hemorrhage was approximately four to seven days of age." 11 RT 2158. Later in the cross-examination Dr. Dibdin reiterated his microscopic findings about new injuries to the "anal opening and vagina" "based upon microscopic evaluation of the tissues." 11 RT 2167.

Dr. Dibdin's testimony about seeing acute tears in the microscopic tissue samples is a complete fabrication. Dr. Huff declared that "the slides do not depict any lacerations or tears." Ex. 82 at ¶ 6; *see also id.* at ¶ 15 ("No tears are depicted in the slides."), ¶ 17 ("The slides do not confirm the presence of lacerations, either of the anus or rectum, nor do they show that Consuelo was penetrated vaginally or rectally by a penis or object of similar size."). In addition, respondent's own experts support Dr. Huff and further demonstrate that Dr. Dibdin's testimony about the microscopic findings evincing sexual abuse was bogus. *See* Return Ex. 18 at ¶ 18 ("In my opinion, the findings interpreted as being related to anal trauma, and thus attributed to sexual abuse are consistent with the devascularization injury of the transverse colon and coagulopathy from hemorrhagic shock, and medical manipulations including rectal temperature readings during treatment for her blunt abdominal trauma."); Return Ex. 19 at ¶ 11 ("I do not believe, based on the totality of what I reviewed, that [Consuelo] had physical findings that are specific for sexual abuse. I do not believe that the physical findings in and of themselves would establish that this child was sexually abused."), ¶ 12 ("In my opinion, there was no clear evidence of a tear or injury involving the true vaginal wall. . . . If there were a tear/significant injury to the true vaginal wall, I would expect someone would have seen significant active bleeding from the vagina at the time of the initial presentation [at the hospital].").

When Dr. Dibdin's testimony is viewed in its totality, the impression

he and the prosecutor crafted for the jury was that the "changes" allegedly observed in the microscopic tissue from the anus (which actually was never sampled) and the vagina were indicative of prior sexual abuse. This impression dovetailed with and corroborated the alleged (and concededly false) evidence of recent tears/lacerations resulting from the sexual abuse that caused Consuelo's death. Thus, Dr. Dibdin's testimony about the "changes" showing prior abuse was of a piece with the alleged evidence of acute sexual abuse, and it was equally false and unreliable. Mr. Benavides disputes respondent's defense of Dr. Dibdin and welcomes an evidentiary hearing to determine the precise facts about the prosecutor's presentation of Dr. Dibdin's specious testimony regarding prior sexual abuse.

Respondent alternatively argues that, even if the prior sexual abuse evidence is false, it (like the rest of the fabricated sex crimes evidence) can be ignored, and a lesser murder verdict entered by this Court. For the reasons already discussed, this Court should reject respondent's attempt to avoid a new trial. The question whether the prosecutor knew or should have known that Dr. Dibdin's testimony was false is relevant to a determination about which materiality standard should govern this Court's analysis of the false evidence. Thus, it is not appropriate to discard this false evidence claim without determining whether the prosecutor knew or should have known that Dr. Dibdin's testimony as to prior sexual abuse was false and misleading. An evidentiary hearing is the mechanism for making that determination.

2) Head injuries

Respondent contends Mr. Benavides's claim that the prosecution presented false evidence suggesting Consuelo was suffocated can be rejected for three reasons: (1) "[T]here was no evidence of suffocation."; (2) "At most, [Mr. Benavides] has simply shown a conflict of opinion among medical experts as to the cause of the watershed brain infarcts."; and (3) Even if the

evidence presented was false, it was not material because it "had no bearing on other untainted evidence from which any reasonable jury would have convicted petitioner of second degree murder for assaulting Consuelo in the abdomen . . . ." Return at 52. These arguments are specious.

The prosecutor told the jury in his closing argument that Mr. Benavides suffocated Consuelo. Specifically, when discussing Dr. John Bentson's testimony the prosecutor said the "type of brain damage [Consuelo exhibited] is caused by complete loss of oxygen for a certain period of time *by suffocation or by the child's heart stopping*. We have no evidence this child's heart stopped. . . . [This brain damage] *happens when you get suffocated* and you have blunt abdominal trauma of the nature you have here in this case." 18 RT 3586 (emphasis added). The prosecutor then asked rhetorically, "Why does [Dr. Bentson's] testimony about suffocation make sense? Well, you start taking a look at it in light of the other testimony." 18 RT 3586. The prosecutor answered his question with the following arguments: a "child who is being sodomized is going to scream"; the injury under Consuelo's lip (to the frenulum) and on the bridge of her nose would result when the perpetrator put his hand over her face and mouth; and "[o]bviously the perpetrator, the defendant, is not going to let people hear this little girl scream." 18 RT 3586-87. The prosecutor capped off his arguments on this subject by saying one last word: "*Suffocation.*" 18 RT 3587 (emphasis added).

During his testimony, Dr. Bentson answered "Yes" to the question: "And [a watershed infarct] can be from suffocation, can it not?" 12 RT 2406; *see also* 12 RT 2406-08 (explaining that the watershed infarcts observed were not caused by trauma to the head), 2410 (stating that suffocation "is a possible cause of the infarcts"). Dr. Bentson also answered "Yes" to the following question on cross-examination: "So your best guess at this present time is that particular infarct that you saw on this child's brain was caused from suffocation from six to eight minutes. Is that correct?" 12 RT 2413. In

light of Dr. Bentson's testimony and the prosecutor's argument, it is disingenuous for respondent to claim that "there was *no evidence of suffocation*" presented at the trial. Return at 52 (emphasis added).

It is also dubious to suggest that the evidence concerning suffocation amounts to a mere "conflict of opinion among medical experts," when respondent's own postconviction expert, Dr. Corey, stated with great clarity that "*[t]here is no reason to assume or suggest suffocation as the etiology of the watershed infarctions*. They are easily explained by the child's hospital course." Return Ex. 18 at ¶ 16 (emphasis added). Dr. Corey explained further:

> In my medical opinion, all of the findings in the central nervous system are secondary to the hypotension, hemorrhagic shock, and coagulopathy that developed as a consequence of the devastating abdominal injuries. *The watershed infarctions are easily explained by the severe and prolonged hemorrhagic shock and resultant hypotension that deprived those watershed areas in her brain of the oxygen necessary to sustain the tissues*.

Return Ex. 18 at ¶ 16 (emphasis added), *in accord with Mr. Benavides's experts* Ex. 81 at ¶ 10 ("It is my opinion to a very high degree of medical certainty that suffocation or smothering would not cause watershed infarctions of the occipital parietal area of the brain."); Ex. 78 at ¶ 17 ("These infarcts were not likely caused by suffocation prior to her arrival at the hospital because she arrived at DRMC [Delano Regional Medical Center] with a relatively normal Glasgow Coma Scale at somewhere between 11 and 14. This would not have been the case had her brain already infarcted.").

Dr. Bentson's testimony about suffocation as a cause of the watershed infarcts was presented as an objective fact, which respondent's own expert now has completely contradicted, declaring, "[t]here is no reason to assume or suggest suffocation as the etiology of the watershed infarctions." Return

Ex. 18 at ¶ 16. Accordingly, Dr. Bentson's testimony was false, and not merely a different, but valid opinion. *Cf. Richards I*, 55 Cal. 4th at 966 (finding expert opinion was not proved to be objectively untrue where experts did not rule out its possibility).[21]

Respondent's argument that the false testimony about suffocation was not material again misapprehends the applicable materiality standards. The suffocation narrative was integral to the prosecution's case for conviction on all of the charges found by the jury. Thus, the circumstances of its presentation (i.e., whether it was presented knowingly) should be examined by means of an evidentiary hearing, and its materiality weighed along with all of the other false evidence.

In addition to the false testimony about suffocation, Dr. Bentson testified falsely about the scalp swelling (edema) he observed on the CT scan done at UCLA Medical Center on November 21, 1991. Respondent's expert, Dr. Corey, again provides the reason why Dr. Bentson's testimony was untrue. Dr. Bentson testified that the scalp edema, which "was mostly on [both sides of] the back of the head," "seemed to be from different traumas [i.e., blows] . . . ." 12 RT 2417; *see also* 12 RT 2409. Dr. Corey, however, stated in her declaration: "The scalp swelling represented at trial as potential evidence of blows to the head is easily explained by the generalized severe edema of the child, en toto [sic], as documented many times in the medical

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[21] Furthermore, like other prosecution experts, it is likely that Dr. Bentson's false testimony resulted from the prosecutor's failure to provide him Consuelo's full medical record. 12 RT 2414-15. Had Dr. Bentson been aware of Consuelo's relatively normal Glasgow Coma scale at DRMC, subsequent 13-minute cardiac arrest, and prolonged low blood pressure during her hospitalization, it is likely Dr. Bentson would agree with all other experts that the watershed infarcts were not caused by suffocation. *See* 12 RT 2406-07, 2410 (Dr. Bentson testifying that the "most common" cause of the infarcts was a lack of blood supply and oxygen to the brain and could be caused by a prolonged heart attack).

records." Return Ex. 18 at ¶ 16.[22]

Respondent offers a misleading and inapposite argument that Dr. Bentson's testimony about the cause of the scalp swelling (i.e., different blows to the head) "was equivocal and seems to contradict his prior testimony that a strike(s) to the head did not cause the brain infarcts." Return at 53. A brain infarct describes the death of brain tissue inside the skull, 12 RT 2406, not external swelling of the scalp; these are and were presented to the jury as two separate conditions that Consuelo exhibited. The cause of the scalp swelling also was not stated equivocally by Dr. Bentson. The prosecutor asked, "Would that [swelling] have been caused by more than one blow?" 12 RT 2417. Dr. Bentson responded that "it seemed to be from different traumas," and that "we assume it came from more than one event." 12 RT 2417. His response was not uncertain about the mechanism that caused the swelling (i.e., a blow or blows to the head). The only equivocation related to the number of blows. The prosecutor's question and Dr. Bentson's answer had no legitimate basis in the facts, and for the reason provided by Dr. Corey the testimony was objectively false. It also was material even under respondent's novel materiality standard, because it is reasonably probable that a jury's decision about how the abdominal trauma occurred would be affected by the alleged infliction of blows to Consuelo's head. Moreover, the presentation of this piece of false evidence should be considered with the rest that is in dispute.

Finally, as to Dr. Dibdin's testimony about Shaken Baby Syndrome,[23]

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[22] It also bears noting that radiographs taken of Consuelo's skull on November 18, 1991, at Kern Medical Center found that the "soft tissues" of her head were "unremarkable." Ex. 2 at 164.

[23] *See* 11 RT 2135-36 (Dr. Dibdin testifying that the subdural hemorrhage "suggests that the child was shaken"); *see also* 18 RT 3588-89 (prosecutor's closing argument reiterating Dr. Dibdin's testimony).

respondent claims he "lacks information sufficient to assess whether [Mr. Benavides] has proven his 'false' evidence claim." Return at 53-54. Respondent's assertion of a lack of information sufficient to assess Dr. Dibdin's testimony is specious. Dr. Corey clearly stated in her declaration that Shaken Baby Syndrome (or any inflicted head trauma) was not a legitimate medical diagnosis in this case:

> In my opinion Consuela's [sic] subdural hemorrhage, generalized brain swelling, and brain infarctions were not indicative of Shaken Baby Syndrome or inflicted head trauma either. Rather, the subdural hemorrhage was most likely caused by the coagulopathy with disseminated intravascular coagulation (DIC) and the infarctions and brain swelling were due to loss of oxygenated blood from the abdominal injuries and bleeding and low blood pressure that all occurred during the protracted dying process during hospitalization at three institutions after injury. Consuela [sic] was a critically ill child, in hemorrhagic shock and profound coagulopathy for a prolonged period of time, as her treating doctors fought to save her life. The central nervous system findings are a result of the pathophysiologic processes that developed as sequelae to her original injury, during her hospitalization.

Return Ex. 18 at ¶ 17; *see also* Ex. 177 at 8380 ("[T]he reason that this child is showing that thin amount of subdural hemorrhage at autopsy is because she's coagulapathic. She's oozing everywhere.").

Dr. Corey's opinion is in accord with that of Mr. Benavides's expert, Dr. Aaron Gleckman, who also found that the condition of Consuelo's brain was not attributable to shaking. Ex. 84 at ¶¶ 10-15. Thus, there is ample basis for finding that Dr. Dibdin's testimony about shaking as the cause of Consuelo's brain injuries is objectively false and misleading. Dr. Dibdin's false testimony also was material under any standard, because the shaking was presented to the jury as occurring in conjunction with the

squeezing/fracturing of Consuelo's ribs. Accordingly, this false evidence cannot be separated from the evidence about Consuelo's abdominal injury, and it should be subject to an evidentiary hearing to determine the circumstances of its presentation.

3) Evidence of Consuelo's health before she encountered Mr. Benavides

Based on law enforcement interviews of several people who were acquainted with Consuelo, the prosecution knew (or at least should have known) that Consuelo had serious health problems that started prior to meeting Mr. Benavides. The prosecution also knew that Consuelo had injured herself several times in the past, none of which were connected to Mr. Benavides. Nevertheless, the prosecutor falsely implied that Consuelo was healthy until Mr. Benavides "came around," *see* 13 RT 2587-88; 14 RT 2731; 15 RT 3054, and claimed that Consuelo was a "completely normal" child prior to being left with Mr. Benavides on November 17, 1991. 10 RT 2024; *see also* 18 RT 3597. The prosecutor also argued that Consuelo's alleged prior injuries, i.e., "old broken bones and old scarring of the pancreas," and "old reports of incidents of head injury," 18 RT 3652, were circumstantial evidence that supported the prosecution's theory that Mr. Benavides was "a molester" who committed the charged crimes, 18 RT 3652-53; *see also* 18 RT 3595-97.

Respondent argues that the evidence of Consuelo's prior injuries and any evidence linking Mr. Benavides to the prior injuries was not false. Return at 55. As detailed in the Informal Reply, to prove that Mr. Benavides was connected to Consuelo's prior injuries, the prosecutor portrayed Estella Medina as a mother who allowed Mr. Benavides to injure her child in the past and lied to protect him. Reply at 65-68. Similarly, the prosecutor implied that Mr. Benavides was responsible for Consuelo's prior arm and rib

injuries and her illness during Halloween, although the prosecutor had no good faith basis to make such an implication. *See* CAP Claim Four; Reply at 110-128. The prosecutor's purpose for presenting this evidence was to show a pattern of abuse by Mr. Benavides. The prosecutor knew or should have known that this evidence and the implication it created were false, because there was no factual basis connecting Mr. Benavides and Consuelo's prior illnesses and injuries.

The prosecutor's misleading and false depiction of Mr. Benavides as being responsible for Consuelo's past injuries was very damaging. By arguing that Mr. Benavides had a penchant for abusing Consuelo sexually and physically, the prosecutor was able to explain the alleged acts committed against Consuelo within the context of a pattern of abuse that was abetted and ignored by a negligent mother. This evidence and argument rounded out the prosecution's theory that Mr. Benavides was the one who caused Consuelo's injuries on November 17. *See* 18 RT 3660 (asking rhetorically during argument, "Gee, I wonder who did it on November 17th, 1991, given the state of this evidence" – after arguing that the evidence shows that "the child was previously abused, both physically and sexually," and noting prior "fractured ribs, scar tissue in the abdomen, blunt trauma tears in the vagina and anus."). Thus, the false evidence and argument about Consuelo's health was material under any standard, and the circumstances of its presentation should be subject to an evidentiary hearing.

4) 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 an accident with an automobile. 15 RT 2960. A central reason for Officer Esmay's rejection of an auto accident was that he was not aware of auto accidents causing injuries to a person's genitalia and anus. 15 RT

2952-53; *see also* Ex. 4 at 2131. Obviously, the factual premise for Officer Esmay's reasoning, i.e., that Consuelo had genital and anal injuries, no longer exists. *See* Return at 3, 17.

Another reason Officer Esmay gave for discounting a car accident as a possible 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. There was, however, information possessed by the State that controverted Officer Esmay's testimony. As discussed above, the undisclosed lab notes of criminalist Spencer documented her observation of "plant material" on Consuelo's sweatshirt. Ex. 7 at 3506.[24] Respondent's argument that the plant material on the sweatshirt is de minimis because it is not readily visible in photographs lacks merit. Return at 56. The presence of plant material on the sweatshirt supported the defense that Consuelo's injuries occurred when she was outside the apartment and that Mr. Benavides did not cause Consuelo any harm. Although the amount of plant material on the sweatshirt was small, it still refutes Officer Esmay's broad and assured testimony that there was nothing on Consuelo's clothing to suggest she contacted the ground after being struck by a motor vehicle. *See* 15 RT 2932.

Moreover, respondent's argument that Mr. Benavides did not raise the nondisclosure of criminalist Spencer's lab notes in his habeas petition is wrong. Return at 57. The lack of disclosure was alleged both in Claim One regarding the presentation of false evidence, *see* RCCAP at 47 (citing Ex. 7 at 3506 and alleging that Spencer's notation of plant material "was not disclosed to the defense at trial"), and in Claim Seven regarding the State's failure to disclose exculpatory evidence, *see* RCCAP at 142-43 (citing Ex. 7

[24] In addition, as mentioned earlier, dirt and a small spot of blood was found on the bottom of Consuelo's shoes, Ex. 7 at 3492, and "plant material, plant cells and fibrous material (plant cellulose)" were found in the substance collected from Consuelo's nasal pharynx, Ex. 7 at 3465-72; 12 RT 2322-25.

at 3506 and alleging that this report "went undisclosed at trial").

Finally, respondent's argument that Officer Esmay's testimony was not material to the outcome of the case fails to acknowledge that his testimony was based in large part on the conceded false evidence of sexual abuse. As for the evidence of plant material on Consuelo's sweatshirt, it relates directly to the question of how Consuelo sustained her abdominal injuries, and the absence of such evidence at trial was crucial to the prosecution's attack on the defense's car-accident theory. Thus, contrary to respondent's argument, Officer Esmay's false testimony was material to the question of "petitioner's guilt of murder," and cannot be set aside under any standard of materiality. Return at 56-57. Accordingly, the presentation of Officer Esmay's testimony should be subject to scrutiny through an evidentiary hearing, and considered cumulatively with the other false evidence when the ultimate determination of materiality is made.

5) Rib injuries

Dr. Dibdin's testimony about the rib fractures he allegedly observed was false and unsubstantiated. Dr. Dibdin told the jury the following:

> I observed fractures in ribs six, seven, eight, nine and ten in the back of the chest near the spinal column. And in addition there were rib fractures in ribs six, seven, eight, nine and ten on the right near the front in addition. In addition, there were what appeared to be old rib fractures in the eighth and ninth ribs on the left in the back of the chest. So she had multiple rib fractures.

11 RT 2125. Dr. Dibdin then reiterated that he observed old rib fractures "in the back [or posterior] of the chest on the left in the eighth and ninth ribs." 11 RT 2126-27. He claimed the old rib fractures "were approximately three to four weeks" old. 11 RT 2128. He also reiterated that the "fresh fractures" were on "ribs six through ten anterior [or front] and posterior." 11 RT 2128.

Based on his alleged microscopic examination, the acute or "fresh fractures" were "[l]ess than seven days [old]." 11 RT 2158. Dr. Dibdin further opined that the rib fractures were caused by Consuelo "being squeezed [around her chest] and pulled back . . . ." 11 RT 2129; *see also* 11 RT 2164. He also claimed that his opinion regarding the fractures was supported by his observation of contusions in the area of the alleged fractures. *See* 11 RT 2125, 2130-32.

Without any basis, respondent claims that the "Microscopic Manifest" created by Dr. Dibdin contains a mere clerical error where it states that the microscopic slides labeled C23 through C27 contain tissue from the left anterior ribs numbered six through ten. Return at 59. Respondent asserts that these slides actually "pertain to the left *posterior* ribs," bringing the Manifest into line with Dr. Dibdin's testimony that he saw and was able to microscopically date old rib fractures on the left posterior eighth and ninth ribs. Return at 59; *see also* Ex. 8 at 3542. Respondent did not submit a declaration from Dr. Dibdin (or any other expert) explaining this alleged clerical error or substantiating that slides C25 and C26 actually contain bone tissue from fractured ribs.

Respondent's expert pathologist, Dr. Corey – who examined "recuts of all 27 microscopic slides," Return Ex. 18 at ¶¶ 12-13 – made only a nonspecific statement in her declaration about "the healing ribs fractures" being "consistent with a previous abdominal injury." Return Ex. 18 at ¶ 23. When discussing the case with respondent's counsel, Dr. Corey candidly stated that she "can't make heads or tails of where those rib fractures are. I – yeah, I've been through it and through it and through it. And are they – are they on the front? Are they – are they on the right side and left rear? It's-it's [I-I] – and there's no good pictures." Ex. 177 at 8366. Dr. Corey continued: "So I am totally confused and therefore basically pretty much just discounted [the rib fractures] other than there are apparently three healing rib fractures

on the left posterior. . . . So the three healing – and I think there's one of them – I think one of them is in the microscopic slide." Ex. 177 at 8366.

Respondent asserts a general denial based on a lack of information concerning the "precise manner, or sequence in which, each of the injuries to Consuelo's ribs and abdomen were inflicted." Return at 7. Respondent also generally denies – based on a lack of sufficient information – Mr. Benavides's allegations of false evidence concerning the precise age of Consuelo's acute and healing rib fractures. Return at 7-8. Respondent argues that all that has been demonstrated by Mr. Benavides thus far is a conflict in medical opinion about the extent and nature of the rib fractures. Mr. Benavides disagrees.

Dr. Dibdin's testimony about the old and new rib fractures he allegedly observed is as unreliable and unsubstantiated as his impossible cause of death. If there actually were healing fractures in the left posterior ribs that were three to four weeks old as Dr. Dibdin asserted, they should have been visible on the many radiographs taken of Consuelo's chest on and after November 17, 1991. Dr. James Seibly, a radiologist, testified that he did not see any rib fractures, healing or acute, in the left posterior ribs on Consuelo's radiographs. 13 RT 2514-15. Dr. Seibly said a radiograph from Kern Medical Center (People's Trial Exhibit 41) depicted fractures with signs of healing in ribs eight through ten on the right posterior, 13 RT 2513-14 – a location where Dr. Dibdin allegedly observed acute fractures that were not yet healing. Dr. Seibly also saw on the radiograph an acute displaced fracture of the left anterior eighth rib. 13 RT at 2514. Dr. Seibly explained the discrepancy between Dr. Dibdin's findings regarding old fractures in the eighth and ninth left posterior ribs and his own lack of finding. His explanation noted that the fractures might not have become visible on radiographs because they had yet to form a callus around the fracture site, which occurs within ten to fourteen days. 13 RT 2515. Dr. Dibdin, however,

claimed to have microscopically dated the two left posterior healing fractures as three to four weeks old. 11 RT 2128. Thus, these old fractures should have been visible to Dr. Seibly in the radiographs, if they existed.[25] Dr. Seibly's testimony substantiates Mr. Benavides's claim that Dr. Dibdin testified falsely regarding the presence of healing fractures on the eighth and ninth left posterior ribs.[26]

As noted above, Dr. Dibdin also claimed to have observed fifteen acute rib fractures, i.e., fractures bilaterally in posterior ribs six through ten near the spinal column, and fractures on the right side in anterior ribs six through ten, which resulted from squeezing and pulling of the rib cage. *See* 11 RT 2125, 2129, 2164. Respondent defends Dr. Dibdin's findings about the fifteen acute rib fractures, arguing that Mr. Benavides has demonstrated nothing more than conflicting expert opinions with regard to these rib

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[25] As discussed in the CAP and the Informal Reply, the radiologist at Delano Regional Medical Center, Dr. J. Chabra, wrote three radiology reports concerning his review of radiographs taken of Consuelo's chest within the first hour of her treatment on November 17, 1991. RCCAP at 36-37; Reply at 55, 163; *see also* Ex. 1 at 3, 5, 19-21. In the first report Dr. Chabra stated that the "visualized bones [in the chest] are normal." Ex. 1 at 19. After being visited by a Delano police detective on December 2, 1991, Ex. 4 at 1916, Dr. Chabra wrote an "Amended Report," in which he stated "[t]here is evidence of undisplaced *healing fractures* of the *right* 8th, 9th, and 10th *anterior ribs*, which may be approximately of 2-3 weeks in duration." Ex. 1 at 21 (emphasis added). After a second visit by the detective two days later, Ex. 5 at 2607, Dr. Chabra wrote an "Addendum Report," in which he noted "a recent fracture of the left 8th rib, with displacement on the fragments." Ex. 1 at 20. Thus, Dr. Chabra's multiple reports – even if taken at face value – also do not support Dr. Dibdin's testimony that he observed healing fractures in the *left posterior* eighth and ninth ribs.

[26] Dr. Dibdin's testimony about microscopic evidence of fractures must be viewed in light of the earlier discussion detailing how his alleged microscopic examination of tissue from the anus never actually happened. This fact casts doubt over the rest of his findings from the microscopic examination.

fractures. Respondent's argument, however, is premised on an assumption that the acute fractures about which Dr. Dibdin testified actually existed. *See* Return at 61-65. The existence of the fractures is in dispute and objectively questionable – even in the mind of respondent's pathologist. As mentioned above, Dr. Corey told respondent's counsel that she "can't make heads or tails of where those rib fractures are" and, as a result, she "basically pretty much just discounted them . . . ." Ex. 177 at 8366. Dr. Corey also noted the lack of evidence supporting the existence of acute fractures, stating, "since they're not doc-documented photographically and actually like a couple of the [ribs] that he sent me, *I-I didn't actually see anything.* I just saw a costochondral junction. I didn't see an-anything necessarily wrong with that. *So I just really don't even want to go there.*" Ex. 177 at 8375-76 (emphasis added); *see also id.* at 8373 ("I can't tell where the rib fractures are. I can't tell where the acute rib fractures are.").

Respondent also defends Dr. Dibdin's testimony that squeezing caused acute rib fractures by highlighting Dr. Dibdin's allegedly corroborative testimony about the presence of bruising over ribs six through ten on both sides of Consuelo's posterior chest. Return at 61-62. Again, Dr. Corey provides a basis for finding that Dr. Dibdin testified falsely about a connection between the hemorrhages on Consuelo's back and the alleged rib fractures. Dr. Dibdin told the jury that the hemorrhages matched up to hands gripping Consuelo's chest where her ribs were broken, even leaving a bruise caused by a thumb. 11 RT 2130-32. However, Dr. Corey told respondent's counsel, "I-I disagree with – *I don't think that those are thumbprints. I think that those are areas of pooling of blood.* I certainly can't say with reasonable medical certainty that those were inflicted by thumbs. And, uh, *I-I don't see any evidence to support that.*" Ex. 177 at 8381-82 (emphasis added). This statement was preceded by Dr. Corey describing how Consuelo was suffering from coagulopathy – a condition wherein the blood's ability to clot is

impaired – which caused "oozing [of blood] everywhere." Ex. 177 at 8381; *see also id.* at 8384 ("[T]he findings at autopsy are just a result of these manipulations in a child who was basically going into multi-organ system failure, had renal failure, and was coagulopathic, was bleeding from everywhere.").

Dr. Corey also noted that it is "a little bit unusual to see fractures in the front where [Dr. Dibdin] describes them unless they're just due to CPR. . . . But I don't recall seeing any time that anybody actually had to actually do compressions." Ex. 177 at 8375. Dr. Corey's recollection, however, was incorrect. Consuelo underwent CPR at Delano Regional Medical Center around 9:20 p.m. on November 17, 1991. Ex. 1 at 5.

In sum, Dr. Dibdin's dubious testimony about the alleged healing and acute rib fractures should be examined through an evidentiary hearing. The nature and extent of the rib fractures were relevant to a determination of their cause as well as the cause of Consuelo's abdominal injuries. Therefore, the rib fracture testimony was material to Mr. Benavides's guilt/innocence under any applicable standard.

6) Abdominal injuries

Respondent argues that Dr. Dibdin never testified that Consuelo's abdominal injuries were caused by squeezing, and that Dr. Astrid Heppenstall Heger's opinion that a car could have caused the abdominal injuries is undermined by the opinions of other experts and amounts, at most, to a difference of expert opinion. Return at 69.

The central issue in dispute at the guilt-innocence phase of Mr. Benavides's trial was whether he caused Consuelo's injuries, and if so, how. Dr. Dibdin provided the jury with his anatomically impossible cause for the abdominal injuries – penile penetration upward from the anus – which respondent concedes was false and materially affected the conviction.

Return at 17; *see also* Return Ex. 18 at ¶ 22 ("The explanation that the cause of injury to the pancreas, duodenum, and transverse colon as being due to penetrating trauma to the anus by a penis is not anatomically or pathophysiologically possible. . ."). Moreover, Dr. Diamond altered his opinion between the preliminary hearing and the trial about how the abdominal injuries occurred – but he still left open at trial the possibility that Consuelo's abdominal injuries were caused by sodomy. *See* 10 RT 2068-69, 2092-93. When arguing his case to the jury, the prosecutor trumpeted Dr. Dibdin's opinion as the most important and reliable evidence of what happened to Consuelo – asserting it over the alternate opinions provided by Dr. Bloch and Dr. Diamond and using it to undermine the defense experts. *See, e.g.*, 18 RT 3576, 3577, 3580, 3587, 3588, 3659. The outlandish nature of Dr. Dibdin's testimony and the alteration in Dr. Diamond's testimony supports Mr. Benavides's allegation that the prosecutor knew or should have known that the evidence and argument he presented regarding the cause of Consuelo's abdominal injuries was false. *See* Reply at 30-37.

For the reasons discussed *supra*, a new trial should be ordered to allow a jury to determine how Consuelo's abdomen was injured and whether Mr. Benavides is liable for the injuries. If, however, this Court decides that an immediate remand is not required, then an evidentiary hearing should be ordered because the State disputes the falsity of many aspects of the trial evidence related to the potential cause of Consuelo's abdominal injuries, and claims that no false evidence was knowingly presented on the issue. A proper materiality determination can only be made after the factual disputes are examined through an evidentiary hearing.

C. Conclusion

Based on respondent's concession regarding the presentation of material false evidence under Penal Code section 1473, and without resort to

an evidentiary hearing, this Court should grant the petition for writ of habeas corpus and vacate the judgment in its entirety. If this Court declines to completely reverse the conviction and remand the case to the superior court for a new trial, then an evidentiary hearing must be ordered to resolve the factual disputes concerning the falsity of the prosecution's evidence and the scienter of the state actors involved in its presentation. Thereafter, this Court will be in a position to assess the full magnitude of the violation of Mr. Benavides's statutory and constitutional rights.

III. CLAIM THIRTEEN: MR. BENAVIDES WAS DENIED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent contends that it is unnecessary to evaluate Mr. Benavides's claims of ineffective assistance of counsel because even if they are meritorious, Mr. Benavides would not be entitled to relief beyond that which respondent maintains is appropriate for Claim One, i.e. reduction of his conviction to second degree murder. Respondent in any case does not concede that counsel performed deficiently or prejudicially. As will be shown, respondent's claims are meritless. Mr. Benavides is entitled to a new trial based on the powerful postconviction evidence demonstrating that counsel unreasonably failed to present readily available evidence in the medical record to show the sex abuse charges, cause of death, location of the rib fractures, claims of suffocation, and violent shaking were all false and unreliable.

A. Legal standard for claims of ineffective assistance of counsel.

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). 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. In assessing the reasonableness of counsel's actions or omissions, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). "[A]n attorney's performance is not immunized from Sixth Amendment challenges simply by attaching to it the label of 'trial strategy.' Rather, '[c]ertain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective.'" *Silva v. Woodford*, 279 F.3d 825, 846 (9th Cir. 2002) (quoting *United States v. Tucker,* 716 F.2d 576, 586 (9th Cir. 1983)).

In order to show prejudice a defendant must demonstrate 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." *Strickland*, 466 U.S. at 694; *In re Marquez*, 1 Cal. 4th 584, 603 (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; *see also Sanders v. Ratelle*, 21 F.3d 1446, 1461 (9th Cir. 1994) (citing *Strickland*, 466 U.S. at 693) ("It is clear . . . that [a defendant]

need not show that [trial counsel's] deficient conduct more likely than not altered the outcome in the case. This 'preponderance' standard was explicitly rejected in *Strickland.*"); *People v. Mayfield*, 5 Cal. 4th 142, 199 (1993) ("The defendant need not show, however, that it is more likely than not that he or she would have obtained a better result.").

In determining whether a defendant was prejudiced by counsel's deficient performance, a court must consider the "totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. "[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. The defendant only needs to show that, but for counsel's allegedly deficient performance, there is a reasonable probability that at least one juror would have harbored a reasonable doubt about his guilt. *Cannedy v. Adams*, 706 F.3d 1148, 1166 (9th Cir. 2013).

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*, 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*, 21 F.3d at 1456. "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." *Marquez*, 1 Cal. 4th at 602; *see 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).

"[T]he mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable." *Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007) (finding counsel ineffective where counsel authorized an expert to begin work only two months before trial, failed to work with the expert to understand the science involved, and failed to inquire why his expert agreed with the prosecution). Moreover, counsel has a duty to carefully examine the evidence that will be used against a defendant "so that if the prosecution advanced a theory at trial that was at odds with the . . . evidence, the defense would be in a position to expose it on cross-examination." *Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995) (finding "defense counsel's failures to prepare for the introduction of the serology evidence, to subject the state's theories to the rigors of adversarial testing, and to prevent the jury from retiring with an inaccurate impression that the victim's blood might have been present on the defendant's knife fall short of reasonableness under the prevailing professional norms.")

In adjudicating the claim of ineffective assistance of counsel "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

B. The ineffective assistance of counsel claim is not moot, and it cannot be resolved solely on respondent's concession and proposed remedy regarding the false evidence claim.

Without any citation to case law, respondent argues that any claim of ineffective assistance of counsel related to the conceded false evidence is

moot, because "it would not expand the scope of the relief to which he is already entitled," i.e., a reduction of his conviction for first degree murder to second degree murder. Return at 75. Respondent tries to justify this position by stating that "the standard for determining the appropriate relief for the ineffective assistance of counsel is essentially the same as the standard for determining appropriate relief for the admission of false evidence." Return at 75. This argument is flawed for several reasons.

First, respondent's contention is premised on the assumption that the relief he proposes for the false evidence claim is correct. For the reasons set forth earlier, it is not. The appropriate relief based on respondent's concession that false evidence was used to convict Mr. Benavides is a new trial – not a reduction of the conviction to second degree murder. As discussed, this is so even if the Court accepts respondent's novel position that the Court can "set aside" the false evidence and determine whether it is not reasonably probable that the jury would have failed to convict of second degree murder. *See* argument II.A.1, *supra*.[27] Of course, if the Court agrees with Mr. Benavides, a reversal and remand for a new trial based on the conceded false evidence would render his ineffective assistance of counsel claim moot.

Second, under *Strickland*, a complete reversal of the conviction is the required remedy if defense counsel's deficiency at trial is found to undermine confidence in the outcome of the trial. *See Kimmelman*, 477 U.S. at 382 ("Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and *will be entitled to retrial without the challenged*

[27] Mr. Benavides also argued as to his false evidence claims that constitutional due process protections require the remedy of a new trial (rather than a reduction to a lesser crime), once the materiality of the false evidence is deduced. *See* argument II.B.1.a, *supra*.

evidence.") (emphasis added); *see also People v. Andrade*, 79 Cal. App. 4th 651, 661 (2000) (affirming the grant of a new trial motion based on ineffective assistance of counsel, and stating, "'Criminal defendants, regardless of their guilt or innocence, are entitled to a fair trial,' and the trial court is obligated to grant a new trial if it finds the result of the first trial to have been unfair.") (quoting *People v. Sherrod*, 59 Cal. App. 4th 1168, 1174-75 (1997) (internal punctuation omitted)); *People v. Minor*, 104 Cal. App. 3d 194, 199 (1980) ("Where the record on appeal discloses trial error affecting the fairness and reliability of the guilt determination process, the normal remedy is outright reversal; in that instance it would usually not be considered 'just under the circumstances' to direct the trial court to take further proceedings aimed narrowly at the specific error."); *State v. Lamere*, 112 P.3d 1005, 1009 (Mont. 2005) ("[A] convicted defendant is entitled to a new trial upon establishing that defense counsel rendered ineffective assistance.").

Moreover, to demonstrate prejudice resulting from deficient performance, a defendant need only demonstrate that, but for trial counsel's errors, there is a reasonable probability that the jury would have acquitted him of the crime of conviction or found him guilty of a lesser offense. *See Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015) ("*Strickland* requires a reviewing court to assess the likelihood that the defendant's jury would have convicted only on the lesser included offense. [Citation.] Only by performing that assessment can a court answer the question expressly posed by *Strickland*: whether there is a reasonable probability that, if the defendant's lawyer had performed adequately, the outcome of the proceeding would have been different."). Either of these circumstances satisfies *Strickland*'s requirement that the "result of the proceeding would have been different," and that is all a defendant must show under the Sixth Amendment to obtain a new trial. *See Chambers v. Armontrout*, 907 F.2d 825, 832-33 &

n.13 (8th Cir. 1990) (en banc) (rejecting the State's contention that "the reasonable probability of being found guilty of a lesser charge did not amount to prejudice," finding that "the possibility of a conviction of a lesser charge resulting in a shorter sentence . . . constitutes prejudice," and ordering the state to retry petitioner). Thus, if this Court accepts respondent's argument for a reduction of Mr. Benavides's conviction based on the concededly material false evidence under Penal Code section 1473, the ineffective assistance claim related to that false evidence would "expand the scope of the relief" by necessitating a remand for new trial, if counsel's performance as to that evidence was deficient.[28]

Third, just as this Court must determine the complete extent of the falsity of the trial evidence before it can decide whether the false evidence, cumulatively, was of such significance that it may have affected the outcome of the trial, so to must this Court determine the full extent of the deficient performance before it can assess the prejudice that flows from it. Thus, even assuming this Court decides that the conceded false evidence is not material (under respondent's novel formulation) to a second degree murder conviction, this Court must evaluate counsel's performance in failing to

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[28] Mr. Benavides also notes that the prejudice question under *Strickland* – which is analogous to the materiality test under *Brady v. Maryland*, 373 U.S. 83 (1963) – is "not a sufficiency of the evidence test." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Therefore, when evaluating the prejudice that results from counsel's errors, the "sufficiency of the 'untainted' evidence should not be the focus of the prejudice inquiry." *Johnson v. Scott*, 68 F.3d 106, 109-10 (5th Cir. 1995) (explaining that the materiality standard under *Brady* is "identical" to the prejudice standard under *Strickland*); *see also Kyles*, 514 U.S. at 434-35 ("A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."); *id.* at 435 (explaining that a defendant need only show that the undisclosed favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.").

challenge the conceded false evidence in conjunction with counsel's deficiencies with regard to the rest of the guilt phase. The prejudice prong of *Strickland* demands that this Court examine the totality of the deficient performance when deciding the extent of the prejudice flowing therefrom. *Strickland*, 466 U.S. at 695-96 (holding that a court reviewing counsel's ineffectiveness "must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways."); *Silva*, 279 F.3d at 834 ("cumulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding of ineffectiveness of counsel"); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) ("'[P]rejudice may result from the cumulative impact of multiple deficiencies.'") (quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978)); *see also Williams v. Taylor*, 529 U.S. 362, 397-99 (2000).

So, even assuming arguendo that this Court ultimately decides the remedy for the false evidence claims is a reduction of the conviction to second degree murder, trial counsel's deficiencies as to the conceded false evidence must be examined and combined with the deficiencies as to the rest of the guilt phase, in order to make the proper determination whether the combined effect of the deficiencies in counsel's performance would have resulted in one juror harboring a reasonable doubt respecting guilt. Thus, the ineffectiveness related to the conceded false evidence is not "moot," and it could affect a broader prejudice determination that "expand[s] the scope of relief," i.e., one which requires in a new trial to remedy a "result . . . [that] is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696.

Respondent alternatively states that he denies trial counsel performed deficiently as to the conceded false evidence presented at trial, and further denies that any alleged deficiency was prejudicial to "*the jury's verdict that*

petitioner was guilty of second degree murder." Return at 75 (emphasis added). Obviously, there is no "jury's verdict of second degree murder." As discussed earlier, this Court cannot even assume the jury implicitly made such a finding, because second degree implied malice murder is not a lesser included offense of first degree felony-murder, and the evidentiary presentation, arguments, and verdicts do not provide a basis for such an assumption. *See* argument II.A.1.a, *supra*.[29] Nevertheless, as set forth above, the appropriate remedy for the claim of ineffective assistance of counsel in this case is a new trial – if Mr. Benavides demonstrates that, but for trial counsel's deficient performance, he would have been either acquitted

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[29] Throughout his argument, respondent contends that any errors in counsel's performance, whether in regards to the conceded or contested false evidence, were "harmless as to jury's verdict of second degree murder," because of alleged independent evidence that Mr. Benavides killed Consuelo with implied malice. Return at 79 (referring to Claim 13(1)), 83 (claiming any deficiency regarding Claim 13(3) was "harmless as to second degree murder"), 86 (claiming any deficiency regarding Claim 13(4) was "harmless as to jury's verdict of second degree murder"), 88 (claiming any deficiency regarding Claim 13(5) was "harmless as to second degree murder"), 89 (claiming any deficiency regarding Claim 13(6) was "harmless as to second degree murder"); *see also id.* at 14-15 (alleging generally that any deficiencies in counsel's performance were "harmless as to the jury's verdict of murder.").

It is well-established that ineffective assistance of counsel claims are not subject to a harmlessness analysis. *See Kyles*, 514 U.S. at 436 n.9 (quoting *Hill v. Lockhart*, 28 F.3d 832, 839 (8th Cir. 1994)) ("'[I]t is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel.'"); *Byrd v. Workman*, 645 F.3d 1159, 1167 n.9 (10th Cir. 2011) (expressing agreement with sister circuits that the harmless error analysis is unnecessary where a petitioner has shown prejudice under *Strickland*). Respondent use of the term "harmless" is legally incorrect, and it betrays the foundational flaws in his position that this Court should create a new conviction for second degree murder from the rubble of allegedly untainted evidence, notwithstanding the concession that the jury's actual verdict cannot stand.

of murder or only convicted of a lesser murder offense. *See Hatcher v. Commonwealth*, 310 S.W.3d 691, 701-02 (Ky. App. 2010) (finding *Strickland* prejudice based on counsel's failure to object to and request certain jury instructions, because proper instructions could have "result[ed] in either an acquittal or the result that intentional or wanton murder would have been reduced to a lesser degree of homicide."); *id.* at 702 (vacating the murder conviction and sentence, and remanding for a new trial on the murder charge).

Finally, as to the non-conceded, disputed false evidence, respondent denies trial counsel performed deficiently, and denies that any alleged deficient performance was prejudicial to either the actual verdict or the manufactured second degree verdict. Return at 75. Again, this Court must evaluate all of the deficient performance at the guilt phase – whether it relates to the conceded false evidence or any other evidence – and then decide if the deficiencies found – cumulatively – evince a reasonable probability that the result of the proceeding would have been different.

Because respondent disputes Mr. Benavides's factual allegations concerning his claim of ineffective assistance, his fulfillment of the legal elements, and the remedy that must flow from satisfaction of those elements, a reference hearing order should issue to initially resolve the factual disputes. After the hearing, this Court will be in a position to decide whether trial counsel's representation was prejudicially ineffective, and, if so, to afford Mr. Benavides the appropriate remedy, i.e., a new trial free of the taint of false and unreliable evidence.

C. The evidence before this Court inescapably demonstrates counsel's prejudicially deficient performance and entitles Mr. Benavides to a new trial.

Notwithstanding respondent's concession that ample false evidence permeated the trial, and led to the wrongful conviction of Mr. Benavides for

first degree murder, rape, sodomy, lewd and lascivious conduct, and related sex crime special circumstances, and the imposition of a death sentence, respondent claims that counsel's performance was not deficient or prejudicial. Return at 75. Although Mr. Benavides has been able to demonstrate in this habeas proceeding that the evidence presented in support of the sex crime charges and the pathologist's cause of death were false by showing Consuelo's full medical record to the trial expert witnesses, respondent maintains that trial counsel's failure to do the same does not render her performance deficient. Respondent further contends that trial counsel was not ineffective in countering the number and location of the rib fractures described by Dr. Dibdin, while admitting that counsel did not confront him with the autopsy microscopic manifest which does not substantiate his testimony. Finally, respondent claims trial counsel was not ineffective in countering the testimony that Consuelo was suffocated and shaken, though respondent's own expert explains that that testimony is not substantiated by the medical record.

As is clear from the postconviction evidence, counsel's deficient performance prejudiced Mr. Benavides. To the extent respondent contests the factual allegations in support of this claim, this Court must order an evidentiary hearing to resolve those disputes. *See People v. Duvall*, 9 Cal. 4th 464, 478 (1995).

1. Counsel's failure to conduct a reasonable investigation into the cause of Consuelo's injuries

In Claim 13(1), Mr. Benavides alleged that trial counsel failed to conduct a reasonable investigation into the causes of Consuelo's injuries. Mr. Benavides claimed that counsel unreasonably failed to investigate other causes of the injuries including alternate suspects, non-criminal causes for the evidence underlying the sex felonies and special circumstances, and the

fact that the cause of death given by the pathologist was anatomically impossible. Mr. Benavides explained that trial counsel unreasonably focused on the auto accident as a cause for all the injuries, although that theory could not explain the trauma to the genitalia and anus. Counsel's investigators did only minimal work limited to photographing the scene, interviewing neighbors, coordinating witnesses, serving subpoenas, and delivering materials to experts. Mr. Benavides explained that it was unreasonable for trial counsel not to investigate the evidence of sex abuse, and that the record clearly showed counsel was unprepared to counter the medical evidence as demonstrated by her directionless examination of Dr. Rick Harrison. RCCAP at 222-25.

Instead of addressing the allegations in Claim 13(1), respondent sets up a straw man by mischaracterizing the claim. Respondent characterizes the claim as whether "Huffman was deficient in challenging the fact that Consuelo actually suffered abdominal injuries and that those injuries were due to appellant's criminal acts." Return at 78. Respondent then claims trial counsel provided effective assistance by presenting evidence that the abdominal injuries could have been caused by an auto accident and may not have been caused by sodomy. Return at 78-79.

The fact that trial counsel presented some evidence that an auto accident, rather than sodomy, may have caused the abdominal injuries does not address the habeas allegation that, by focusing on the auto accident theory *alone*, trial counsel acted unreasonably because that theory did not rebut the rape and sodomy charges and explain the trauma to the genitalia and anus. As trial counsel admitted, although the car accident theory explained the abdominal injuries, it did not explain the anal and genital injuries, and she could not think of an alternative defense. Ex. 64 at ¶ 8. As explained more fully below in Claim 13(2), trial counsel's failure to investigate and present a readily available defense to the sex abuse charges – that they were based

on false evidence – amounted to prejudicially deficient performance.

2. Counsel's failure to investigate and present evidence to rebut the false evidence of sex abuse

Respondent contends that trial counsel's performance was not deficient in failing to counter the conceded false evidence of sex abuse. Return at 80-81. Respondent's argument not only inexplicably retracts respondent's former concession that trial counsel was ineffective in countering the rape charges, but also fails to respond to the detailed allegations in the habeas petition, and ignores postconviction evidence indicating trial counsel could have easily shown the trial evidence supporting the sex abuse charges was false.

In the Informal Response filed in 2010, respondent conceded that trial counsel had been ineffective in countering the rape charge and special circumstance. Inf. Resp. at 170, 204-07. In the Return, respondent has stealthily retracted that concession and now maintains that counsel was not deficient in countering the rape charges. Return at 80 ("[R]espondent denies that Huffman was ineffective.") Respondent neither alerts this Court that he is retracting the earlier concession, nor provides an explanation for the change in his position.

There is no valid basis for respondent to retract his concession. The evidence of trial counsel's ineffectiveness as to the rape charges has not diminished since 2010; it has only become stronger. As respondent acknowledged in 2010, counsel was ineffective in failing to confront Dr. Diamond with the fact that his opinion that Consuelo was raped relied on false information provided to him by Dr. Dibdin that there was a tear in the interior anterior vaginal wall:

> Defense counsel did not confront Dr. Diamond with information that the tear of the anterior wall of the vagina that was reported to him by Dr. Dibdin, and upon which Dr.

> Diamond relied in concluding Consuelo had been raped, was not substantiated by Dr. Dibdin's testimony. As discussed in argument M2d(1), this was prejudicial as to the rape conviction and special circumstance finding . . . .

Inf. Resp. at 170. Dr. Diamond changed his opinion that Consuelo was raped after reviewing Dr. Dibdin's testimony and autopsy report, neither of which substantiated the information Dr. Dibdin gave him that there was a tear in the anterior vaginal wall. Inf. Resp. Ex. 14 at 9. "[B]ased on [his] review of the materials" Dr. Diamond declared that he "[does] not believe that Dr. Dibdin's report of a tear of the anterior wall of the vagina has been substantiated" and changed his "opinion that Consuelo was vaginally penetrated." Inf. Resp. Ex. 1 at ¶ 18.

As is clearly evident and was previously conceded by respondent, trial counsel unreasonable failed to confront Dr. Diamond with the autopsy report and Dr. Dibdin's testimony, which would have made him realize Dr. Dibdin gave him false information and would have led Dr. Diamond to abandon his opinion that Consuelo was raped. Trial counsel unreasonably failed to move to strike Dr. Diamond's testimony regarding the alleged interior anterior vaginal tear Dr. Dibdin told him about, which the court only allowed on condition that Dr. Dibdin subsequently confirmed its existence in his testimony. 10 RT 2060. As respondent previously conceded, there is no reasonable basis for counsel's failure to move to strike Dr. Diamond's testimony or to recall him and confront him with Dr. Dibdin's testimony, after Dr. Dibdin failed to confirm that there was an internal anterior vaginal tear. Inf. Resp. at 206.

In 2010, Dr. Diamond further conceded that he had testified erroneously that his findings corroborated Dr. Dibdin's report of a tear to the internal vaginal wall. Dr. Diamond realized his trial testimony was incorrect after he reviewed the full medical record, which he had not seen prior to

testifying. Dr. Diamond testified that when he inserted two catheters into the urinary opening, the ends disappeared, and he could not tell where they went and they did not return urine. 10 RT 2059. He then explained to the jurors that subsequent to his examination he learned from Dr. Dibdin that there was a tear in the anterior wall of the vagina, which led him to believe the reason the catheter did not return urine was that it had gone through the internal tear in the vaginal wall into the peritoneal cavity. 10 RT 2059-60. Subsequently, in postconviction, Deputy Attorney General Kelly LeBel provided Dr. Diamond with Dr. Bloch's report regarding the surgery which occurred before his examination. After reading the report, Dr. Diamond realized that he had testified incorrectly. Dr. Diamond understood that the reason the catheters did not return urine was because the urine had been drained from the bladder during surgery. Inf. Resp. Ex. 1 at ¶ 17. Based on Dr. Bloch's report, Dr. Diamond stated: "I now know that the catheters I inserted did in fact go into her bladder." *Id.*

There is no reasonable basis for trial counsel's failure to confront Dr. Diamond with Dr. Bloch's surgical report to rebut Dr. Diamond's testimony. Counsel's failure to do so was a result of her ignorance of the information in the medical records and her failure to adequately consult with experts. Instead of rebutting the existence of the tear, trial counsel prejudicially conceded in closing argument that there was such a tear and argued, without any basis, that Dr. Diamond must have torn the vaginal wall when he attempted to catheterize Consuelo. 18 RT 3620-21. In his rebuttal argument, the prosecutor pointed out that a defense expert refuted trial counsel's theory, having testified that he did not believe catheterization could cause the internal vaginal tears. 18 RT 3658. Trial counsel's unsupported concession of a tear to the internal vaginal wall that, in fact, did not exist was extremely prejudicial to the defense. RCCAP 241-42. Respondent does not address this argument in the Return.

Further, as shown in this habeas proceeding, had Dr. Diamond been confronted with available evidence demonstrating his conclusion that Consuelo was raped was based on false information provided to him by Dr. Dibdin, and provided with a full set of Consuelo's medical records, Dr. Diamond would have also abandoned his conclusion that Consuelo was sodomized. As explained by Dr. Diamond in his 2011 declaration:

> At trial, I based my conclusion that Consuelo was sodomized on four observations that I made during my examination of Consuelo: (1) anal laxity; (2) anal dilation; (3) anal tears at 6:00 and 9:00; and, (4) swelling of the anal margin. After reviewing Consuelo's full medical history in 2009 I learned that Consuelo had been given Norcuron, a paralytic agent that caused the muscles to become flaccid and in turn lead to anal laxity and dilation. Based on that information, I stated in my 2009 declaration that I may no longer attribute the anal laxity and anal dilation that I observed during my exam to trauma. I stated in my 2009 declaration, however, that I still believed that Consuelo was sodomized based solely on the existence of anal swelling and anal tears. [¶] Since learning in 2009 that I based my testimony on Dr. Dibdin's inaccurate information and that I lacked important records concerning Consuelo's medical condition, I have been very troubled by this case.

Ex. 149 at ¶¶ 3-4. As a result, Dr. Diamond consulted with Dr. Astrid Heppenstall Heger, a preeminent expert of child sex abuse, and determined that the superficial anal tears he observed, were not indicative of sodomy, and the anal swelling he observed was most likely a result of renal failure. Ex. 149 at ¶ 5. After consulting with Dr. Heger, and reviewing the full medical record, Dr. Diamond recanted his testimony and concluded to a "high degree of medical certainty that Consuelo was not raped or sodomized." Ex. 149 at ¶ 5. Respondent does not dispute this evidence or provide any reasonable basis why trial counsel failed to confront Dr. Diamond with readily available medical records that would have undermined

his trial testimony, and ultimately led him to fully recant his conclusion that Consuelo was raped and sodomized.

Respondent does not address many of the detailed claims in the Corrected Amended Petition (CAP). In subclaims 13(2)(a)-(c) Mr. Benavides alleged trial counsel was deficient in failing to interview Delano Regional Medical Center (DRMC) personnel, and present evidence based on the medical records and law enforcement interviews with DRMC personnel, provided in discovery, which included unequivocal statements by the personnel that they did not see any trauma to the genitalia and anus, despite ample opportunity to do so and training on the recognition of signs of sexual abuse. RCCAP at 225-34.

In subclaim 13(2)(d) Mr. Benavides further explained that trial counsel unreasonably failed to counter or move to exclude Dr. Diamond's testimony that Consuelo had been raped, which was based on false evidence provided to him by Dr. Dibdin about the alleged existence of a laceration in the internal vaginal wall. RCCAP at 234-42. As explained above, respondent previously conceded this allegation and now has silently retracted the concession without addressing the claim.

In subclaim 13(2)(e) Mr. Benavides claimed that trial counsel unreasonably failed to present evidence that the injuries to Consuelo's genitalia were first observed at Kern Medical Center (KMC), and were likely caused by repeated and unsuccessful attempts at urethral catheterization at DRMC using a large catheter inappropriate for pediatric patients. RCCAP at 242-43.

In subclaim 13(2)(f) Mr. Benavides claimed that trial counsel unreasonably failed to counter the sodomy charges. Mr. Benavides alleged that counsel failed to present evidence showing that the anal tears "through the muscle" that Dr. Dibdin allegedly observed at the autopsy, 11 RT 2119, were not present when Consuelo was first admitted at DRMC. RCCAP at

244. Mr. Benavides further alleged that the superficial anal tears reported by Dr. Diamond in his examinations thirteen hours into Consuelo's hospitalization were likely due to her medical condition and routine hospital manipulation. RCCAP at 245-46. As shown above, after reviewing the records and realizing he was provided false information by Dr. Dibdin regarding an internal vaginal tear, Dr. Diamond has admitted the superficial tears he observed were not indicative of sodomy. Ex. 149 at ¶ 5. Mr. Benavides further alleged that trial counsel unreasonably failed to counter the prosecution's expert testimony that the anal laxity and swelling the doctors observed was evidence of repeated sodomy, as opposed to being a result of the administration of paralytic agents, hospital manipulation, and Consuelo's deteriorating medical condition. RCCAP at 246-49. Mr. Benavides has submitted declarations of Dr. Diamond, Dr. Bloch, and Dr. Alonso, admitting that because they had not reviewed the full medical record prior to testifying, they misattributed the lose anal tone and swelling they observed to sex abuse, rather than paralytic agents and the normal course of Consuelo's treatment and condition. *See* Ex. 149 at ¶ 3; Ex. 77 at ¶¶ 13-14; Ex. 144 at ¶ 11; *see also* Inf. Resp. Ex. 1 at ¶ 19 (Dr. Diamond's 2009 declaration, submitted by respondent, in which Dr. Diamond admits to incorrectly testifying the anal dilation and lax sphincter tone he observed were signs of trauma rather than the paralytic agent given to Consuelo just prior to his examination, as noted in her medical chart).

Finally, in subclaim 13(2)(g), Mr. Benavides claimed that trial counsel retained the defense experts only shortly before or during trial, and failed to provide them with a full set of medical records and adequate time to review the evidence and prepare for trial. RCCAP at 249-52. Mr. Benavides has submitted supporting declarations from Dr. Baumer and Dr. Lovell, indicating that had they been provided the full medical record and adequate time to consult and review the evidence, both would have testified

unequivocally that Consuelo was not raped or sodomized. Ex. 80 at ¶ 15; Ex. 142 at ¶ 5.

Respondent's entire response in the argument section of the Return to Mr. Benavides's detailed allegations, and the supporting evidence presented with the habeas petition, consists of an assertion that trial counsel did not perform deficiently, because counsel allegedly presented evidence that Consuelo's "vaginal and anal injuries were not observed initially and could have been the result of medical intervention." Return at 80.[30] In support of this contention, respondent provides unexplained citations to the transcript, which do not bolster the contention or address the allegations and supporting documentary evidence in the habeas petition. Return at 80.

The isolated portions of testimony cited by respondent, Return at 80, fail to show that counsel adequately presented the readily available, strong evidence that the medical opinions that Consuelo was sexually abused relied on incomplete and false evidence. The cited testimony of Estella Medina that she did not see blood in the diaper she took off Consuelo at DRMC, 13 RT 2628-29,[31] does not supplant the direct, unbiased testimony that DRMC medical personnel could have given stating that they did not observe any injury to the genitalia and anus despite ample opportunity and training to do so. RCCAP at 225-34.

The cited testimony of KMC surgeon Dr. Bloch, 12 RT 2458-60, that he believed blunt force trauma, rather than anal trauma, caused the abdominal injuries, does not address the claim at all.

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[30] Respondent's argument that trial counsel's performance was not deficient because some doctors testified that the abdominal injuries were caused by blunt force trauma rather than sodomy, Return at 80-81, will be addressed below in the argument concerning Claim 13(3).

[31] Respondent citation to "13 RT 1628-2629" appears to be a typographical error. Return at 80.

Respondent's reliance on KMC emergency room physician Dr. Leonardo Alonso's testimony is surprising given his extremely damaging testimony that he observed severe swelling throughout Consuelo's anal area, no rectal tone, and blood in her stool, and his opinion that he had never seen a child as sexually abused as Consuelo. 13 RT 2686-87. Respondent appears to argue trial counsel performed effectively by eliciting an admission from Dr. Alonso that he "initially" did not notice anal tears because he was not looking for them and his main concern was to resuscitate the child who was hypotensive. 13 RT 2691. Respondent, however, ignores that Dr. Alonso completely recanted his testimony that Consuelo was abused after he was provided her full medical record showing that no signs of injury to the genitalia and anus were observed at DRMC. Ex. 144 at ¶ 14 ("Had I had been aware of Consuelo's full medical history prior to testifying, especially the lack of trauma at DRMC, I would not have testified that I believed she was sexually abused.")

Respondent also relies on defense expert Dr. Baumer's testimony to assert that trial counsel adequately rebutted the sex abuse charges. The cited portions of the testimony, however, actually demonstrate counsel's inadequacy in presenting evidence to rebut the sex charges. Specifically, respondent cites Dr. Baumer's testimony at 14 RT 2828, where he acknowledges there are "conflicting" reports regarding whether there was sexual assault. Respondent then cites 14 RT 2852, where Dr. Baumer indicates that Dr. Anthony Shaw's report, which counsel only provided him the day he testified, was "significant" because Dr. Shaw found no anal lacerations when he performed an anoscopy. Respondent, also cites portions of Dr. Baumer's testimony on cross-examination where he acknowledged that the vaginal area looked particularly swollen in the KMC photographs, 14 RT 2870; admitted that medical personnel did not cause the lacerations of the anus, vaginal wall, and hymen when trying to catheterize Consuelo, 14

RT 2870-71; acknowledged that the pathologist would have more information than the medical personnel about the anal and vaginal injuries, and admitted he had not looked at the tissue preserved at the Coroner's office, 14 RT 2871-72; admitted that "very reputable physicians" came to the conclusion that Consuelo was sexually abused, 14 RT 2875; and acknowledged that nurses observed swelling and redness in the vaginal and anal area, while also mentioning that he "couldn't explain" why a DRMC nurse said she did not observe any evidence of trauma. 14 RT 2877. Respondent does not cite the extremely damaging final portion of Dr. Baumer's testimony where he admitted on re-cross examination that, in his initial report, he concluded that the anal canal had been penetrated by "a finger, a coca-cola bottle or broom stick," and that he could not say whether or not Dr. Shaw's findings changed his original opinion. 14 RT 2895.

Respondent also does not address Dr. Baumer's declaration, in which he explains that his testimony would have been very different had he been timely provided a full set of medical records, an informed second opinion regarding Dr. Dibdin's findings about the anal and vaginal tissue slides, and the postconviction declarations of DRMC personnel and other treating medical personnel. Had Dr. Baumer been provided this information he would have testified that "Consuelo was not sexually assaulted." Ex. 142 at ¶ 16.

Finally, respondent cites Dr. Lovell's testimony, which also illustrates counsel's deficiencies, rather than her competence. Respondent refers to a portion of Dr. Frederick Lovell's testimony where he was shown a picture of the child's genitalia, which he appeared to turn around several times, because he had "trouble orienting which is up and down." 16 RT 3117. Dr. Lovell's inept handling of the photographs greatly diminished his credibility. As explained by the Court in denying the motion for a new trial, "any aura of expertise" on Dr. Lovell's part "disappeared" when he turned the

photographs back and forth, "commenting that he could not tell which side was up." 19 RT 3858. Dr. Lovell's clumsy handling of the photographs of the genitalia was a direct result of trial counsel's admitted failure to provide the photographs for him to review prior to testifying. Ex. 80 at ¶ 15. Dr. Lovell testified that the pictures depicted the vaginal and anal area which had "a lot of reddening and swelling around them." 16 RT 3117. In response to trial counsel's question whether a "little abrasion" present in the picture could have been caused by the catheter, Dr. Lovell testified that he did not know when the picture was taken, but that the catheter could have caused the abrasion. 16 RT 3118. Dr. Lovell's reference to a catheter possibly causing the little abrasion in no way sufficed to explain the rest of the trauma observed in the photographs or the importance of the fact that Consuelo had no trauma when her treatment began at DRMC.

Respondent also ignores Dr. Lovell's declaration in which he explains how trial counsel's deficient performance impacted his ability to provide an accurate and reliable expert opinion. Trial counsel belatedly retained Dr. Lovell after the trial had already begun. Dr. Lovell reluctantly agreed to participate in the case, though he explained to counsel that he would not have sufficient time to prepare a competent opinion. Ex. 80 at ¶ 5. He repeatedly and unsuccessfully attempted to obtain information from trial counsel and the defense investigator regarding the defense, the prosecution's theory of the case, and the important injuries in the case. Ex. 80 at ¶¶ 6-11. Due to the hurried and short time frame, Dr. Lovell was only able to review the microscopic slides and preserved tissue at the Coroner's office for an hour, the day before he testified. Ex. 80 at ¶¶ 8-9. When he spoke to trial counsel over dinner the night before he testified, he realized that counsel "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. *Id.*

Critically, trial counsel failed to provide Dr. Lovell with a full set of medical records. He was not given any records from DRMC, nor a full set of KMC or UCLA records or the UCLA photographs. 16 RT 3094-95. Consequently, 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 anal tone; that she suffered from disseminated intravascular coagulopathy (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 Dr. Lovell known this information prior to testifying, he could have explained that Dr. Alonso's findings of trauma to the genitalia and anus were the result of hospital procedures and Consuelo's medical decline, and could have explained that the hemorrhage he saw in the slides were a result of DIC. Ex. 80 at ¶¶ 16-18. Dr. Lovell also could have adequately countered Dr. Diamond's findings of sodomy and reconciled his findings with Dr. Shaw's findings of no anal lacerations. Ex. 80 at ¶¶ 23-25. Most importantly, Dr. Lovell would have been able to testify that Consuelo was not sexually abused. Ex. 80 at ¶ 23.

Respondent's claim that counsel adequately prepared the defense experts and provided them with the relevant medical records, Return at 13, is belied by the declarations of Dr. Baumer, Ex. 142, and Dr. Lovell, Ex. 80, and entitles Mr. Benavides to an evidentiary hearing resolve the dispute. *Duvall*, 9 Cal. 4th at 478. Likewise, respondent's allegations that counsel tried to, but was unable to talk to testifying experts prior to trial, Return at 13, is a contention disputed by a number of testifying experts who explicitly state that defense counsel did not attempt to interview them, *see, e.g.,* Ex. 77 at ¶ 18, Ex. 144 at ¶ 14, and should be decided at an evidentiary hearing. Had counsel interviewed testifying experts, such as Dr. Alonso, Ex. 144, and Dr.

Diamond, Ex. 149, prior to trial and shown them the full medical record, they would have realized that they incorrectly concluded Consuelo was sexually abused. There is no reasonable basis for trial counsel's failure to interview the prosecution experts prior to trial, provide them with the full medical record, and demonstrate that their conclusions were unsubstantiated by the record. As shown, respondent's argument that trial counsel did a good-enough job by eliciting a few isolated references to evidence inconsistent with sex abuse, is disingenuous in light of the readily available evidence counsel did not present that could have conclusively proven the allegations of sex abuse were false.

The evidence in the postconviction record clearly establishes that counsel provided prejudicially deficient assistance in failing to show the sex abuse charges and special circumstance were based on false and incomplete evidence.

3. Counsel's failure to show Dr. Dibdin's cause of death was anatomically impossible

Respondent acknowledges Dr. Dibdin testified falsely that the abdominal injuries were caused by penile penetration. Return at 50 (conceding that Dr. Dibdin's testimony regarding the cause of death was false under Penal Code section 1473, subdivision (e)(1)). Although trial counsel did not present evidence showing Dr. Dibdin's cause of death was false, in response to Claim 13(3), respondent claims defense counsel's performance was not deficient. Return at 82. Respondent's argument relies on testimony from Dr. Diamond, Dr. Bloch, and Dr. Lovell indicating their opinions that the abdominal injuries were caused by blunt force trauma to the abdomen, rather than sodomy. Return at 82.

None of these doctors, however, testified that Dr. Dibdin's cause of death was anatomically impossible, as opposed to simply a different

reasonable medical opinion. None of these doctors explained to the jury that in order for penile penetration to have caused the upper abdominal injuries as Dr. Dibdin claimed, Consuelo would have had to have had a visible "hole" in the anus and rectum that any one of the numerous doctors and nurses who attended to Consuelo would have seen, Ex. 79 at ¶ 12, and "unmistakable damage" to the lower abdominal organs which, in fact, were intact, Ex. 77 at ¶ 11. None of these doctors explained that the lack of injury, "ruled out" Dr. Dibdin's cause of death and rendered it "anatomically impossible." Ex. 79 at ¶¶ 12, 26. Counsel could have, but failed, to elicit this testimony from Dr. Diamond, Dr. Shaw, Dr. Bloch, Dr. Harrison, Dr. Alonso, Dr. Baumer, and Dr. Lovell. *See* Ex. 149 at ¶ 6; Ex. 79 at ¶¶ 12, 26; Ex. 77 at ¶ 11; Ex. 78 at ¶ 18; Ex.144 at ¶ 12; Ex. 142 at ¶ 10; 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 Dr. Dibdin's opinion regarding the cause of death was anatomically impossible, the jury would have had strong doubts about the rest of his testimony, much of which has now also been shown to be false.

There is no doubt that trial counsel's failure to present evidence that the cause of death provided by Dr. Dibdin was anatomically impossible prejudiced Mr. Benavides. In denying the motion for a new trial and the motion to modify the sentence, the trial judge stated that he credited and found credible Dr. Dibdin's cause of death theory. 19 RT 3857. The judge specifically said he believed Dr. Harrison's testimony corroborated the cause of death theory provided by Dr. Dibdin. *Id.* The judge 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 regarding the cause of death. *Id.* Given that trial counsel's ineffectiveness prevented even the trial court

from understanding that Dr. Dibdin actually had no basis for his opinion, it is unlikely that the jurors had any such understanding. Surely, if the jurors and the trial court had known all doctors would have found the cause of death theory provided by Dr. Dibdin to be anatomically impossible (including Dr. Harrison), the outcome of the trial would have been different.

Respondent also claims that counsel adequately cross-examined Dr. Dibdin as to the cause of death. Return at 81. In the testimony cited by respondent, Dr. Dibdin explained his theory as follows:

> 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. Trial counsel unreasonably failed to ask Dr. Dibdin how penile penetration could have caused the anus to dilate and the anal muscles to tear, given that no one at DRMC saw any injury to Consuelo's anus. Counsel also failed to ask Dr. Dibdin how injuries to the upper abdominal organs could be caused without also injuring the lower abdominal organs. There can be no reasonable basis for trial counsel to fail to ask these questions that would have revealed Dr. Dibdin's cause of death was anatomically impossible.

Respondent maintains the "record is silent" as to why trial counsel did not cross-examine Dr. Dibdin "more rigorously," despite referring to the 2012 Informal Reply at 383-84, which cites trial counsel's declaration. Return at 83. In her declaration trial counsel admits she did not know how to show Dr. Dibdin's cause of death was wrong, and further admits that she was unaware of critical aspects of the medical record that could have disproved the prosecution's theory. Ex. 64 at ¶ 9. Respondent ignores these

facts, but does not contest them. To the extent respondent contests the material facts underlying this claim, Mr. Benavides is entitled to an evidentiary hearing to resolve the disputed facts. *See Duvall*, 94 Cal. 4th at 478.

4. Counsel's failure to rebut the prosecution's theory that the abdominal and rib injuries were caused by child abuse

Respondent claims trial 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. Return at 83-86. Respondent's claims lack merit. The evidence presented in support of the habeas petition shows that counsel was deficient in showing the unreliability of the number and location of the rib injuries reported by Dr. Dibdin and the possible causes of those injuries.

Trial 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. Trial counsel also unreasonably failed to show that Dr. Dibdin's testimony about the alleged rib fractures was not supported by his own microscopic findings and the fractures seen in the radiographs. Finally, trial counsel failed to show that the severity of the abdominal injuries is inconsistent with the typical injuries from child abuse. Trial counsel's failures prejudiced Mr. Benavides.

Dr. Dibdin testified that the left posterior ribs contained both acute and healing fractures. He testified that the posterior ribs contained acute fractures in ribs six to ten in both the left and right side of the chest, while the left posterior ribs eight and nine also contained healing fractures. 11 RT 2125. He testified that the acute fractures were less than seven days old and the healing fractures were three to four 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 of the slides created from tissue samples taken from Consuelo's body does not include slides containing tissue from the left posterior ribs. Ex. 8 at 3542. This manifest was not provided to trial counsel. The manifest was first obtained by Mr. Benavides when the Coroner's office provided it to habeas counsel. To the extent that this information could have been obtained by trial counsel by making an informal request for discovery or filing a discovery motion for the Coroner's file, she was unreasonable in failing to do so. Had the prosecutor provided this information or had trial counsel requested it, counsel could have used it to impeach Dr. Dibdin to show that yet another one of his findings was false. Respondent's assertion that the discrepancy between the manifest and the autopsy report can be attributed to a clerical error is unsupported by evidence. It is far more likely that Dr. Dibdin's rib findings were manufactured, like much of his other false findings.

The fact that the left posterior ribs did not have fractures is corroborated by testimony from KMC radiologist Dr. Seibly. He testified that the radiograph 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 callus, which usually appears in ten to fourteen days. 13 RT 2515. Dr. Siebly's testimony does not explain the absence of Dr. Dibdin's alleged left posterior healing fractures which he dated as three to four weeks old. 11 RT 2128. Trial counsel unreasonably failed to show that neither microscopic nor radiographic evidence showed fractures of the left posterior ribs.

Dr. Dibdin 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 testified that he could not offer any other mechanism to account for the fractures. 11 RT 2164. Trial 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. Trial counsel also erred in failing to rebut Dr. Dibdin's testimony that only child abuse could account for the bilateral posterior rib fractures he reported. Trial 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. *See* Ex. 170 at ¶ 26. Further, trial counsel failed to present evidence in the medical literature indicating that this pattern of fractures can result from being struck by an object such as a car. *See* Ex. 131. Trial counsel unreasonably failed to cross-examine Dr. Dibdin with this information that would have corroborated the defense theory.

Trial 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 counsel's car accident theory. Neither doctor, in their over thirty years of emergency room medicine experience combined, recalls ever encountering a case of child abuse where a child suffered such severe abdominal injuries outside of the present case. In their experience, such severe injuries have been caused when a pedestrian is struck in a car accident, by a seatbelt injury, an injury from impact with a steering wheel or bicycle handlebars, or a fall from a height. Ex. 144 at ¶ 13; Ex. 142 at ¶¶ 14-15. Contrary to evidence presented by the prosecution, 13 RT 2534-35, Dr. Alonso and Dr. Baumer

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, trial counsel failed to introduce evidence that 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. Trial counsel's failure to present this compelling evidence to counter Dr. Dibdin's testimony that only squeezing could account for the rib fractures was prejudicial.

Respondent's claim that counsel did present Dr. Lovell's testimony and Dr. Baumer's testimony to show that the rib fractures could have been caused by a blow to the stomach or car accident, Return at 84, 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 trial counsel cannot be faulted because Dr. Lovell did not dispute the fractures reported by Dr. Dibdin, Return at 85, overlooks that counsel only belatedly arranged for Dr. Lovell to view the slides the day before he testified, and failed to provide him with a full set of records and adequate time to consult on the case. Ex. 80 at ¶¶ 7, 9, 14. Accordingly, Dr. Lovell's inability to counter Dr. Dibdin's rib findings is attributable to trial counsel's unreasonable failure to adequately and timely consult with experts.

Respondent also claims that trial counsel was not deficient because she told the court that she allegedly made a tactical decision not to call an "expert on fulcrum and pressure." Return at 86. Trial counsel's statements, however, appear to be false. There is no evidence whatsoever that trial counsel ever consulted with such expert or that any expert indicated such information would be unhelpful. *See generally* Penal Code section 987.9 confidential

funding records (disclosed to respondent pursuant to this Court's January 15, 2003 order).

Accordingly, trial counsel performed deficiently and prejudiced Mr. Benavides by failing to counter the prosecution's theory that the rib and abdominal injuries could only be attributed to child abuse. To the extent respondent contests the factual support for this subclaim, Mr. Benavides is entitled to an evidentiary hearing to resolve the contested issues. *See Duvall*, 9 Cal. 4th 478. Trial counsel's failure to present this rebuttal evidence, alone or in combination with counsel's failure to counter the prosecution theory that the genital and anal injuries were attributable to sex abuse, prejudiced Mr. Benavides.

5. Counsel's failure to rebut the prosecution's theory that Mr. Benavides suffocated Consuelo

Respondent claims counsel's performance was not deficient in rebutting Dr. Bentson's testimony that the watershed brain infarcts were caused by suffocation. Return at 86-87. Respondent first argues the claim fails because Mr. Benavides has not shown Dr. Bentson's testimony is false. Return at 86. Respondent further claims that defense expert Dr. Lovell's testimony that he did not think the infarcts were the result of suffocation demonstrates counsel's performance was constitutionally adequate. *Id.* Respondent also claims that trial counsel's failure to present evidence that the infarcts are best explained by her low blood pressure, coagulation problems, and cardiac arrest at DRMC are not counsel's fault, because counsel allegedly provided defense expert Dr. Baumer "all the medical records" and he did not provide her with this information. *Id.* Respondent's arguments lack merit.

As discussed above, there is strong, uncontroverted evidence in the record that shows that Dr. Bentson testified falsely that the watershed brain

infarcts were caused by suffocation. *See* argument II.B.1.b.2, *supra*. Respondent has not presented any evidence to counter the opinion of renowned pathologist Dr. Vincent Di Maio and neuropathologist Dr. Gleckman, explaining that watershed brain infarcts are not caused by suffocation. Ex. 81 at ¶ 10 ("It is my opinion to a very high degree of medical certainty that suffocation or smothering would not cause watershed infarctions of the occipital parietal area of the brain."); Ex. 84 at ¶ 16 ("Suffocation does not cause infarcts in the brain. The brain of a child who is suffocated appears intact at autopsy.") In fact, respondent's own expert, Dr. Corey, explains that "[t]here is no reason to assume or suggest suffocation as the etiology of the watershed infarctions. They are easily explained by the child's hospital course." Resp. Ex. 18 at ¶ 16.

Although Dr. Lovell did testify that he did not "think" suffocation leads to a pattern of watershed infarcts, 16 RT 3151, Dr. Lovell did not provide the jury with a cause for the infarcts, which as Dr. Corey indicates could have easily been explained by the child's deteriorating condition in the hospital, Resp. Ex. 18 at ¶ 16. Dr. Lovell was not able to do so, because trial counsel unreasonably failed to provide him with the CT scan of Consuelo's head and the medical records indicating that the brain infarcts were first documented at UCLA Medical Center on November 21, 1991, after Consuelo had had seizure activity and significant low blood pressure. Dr. Lovell was also unaware that Consuelo had suffered a cardiac arrest at DRMC, which caused an acute decrease in blood to the brain. Had Dr. Lovell known this critical medical information, he could have provided a credible and informed medical opinion that Consuelo's low blood pressure, seizures, and cardiac arrest were the most likely causes of her brain infarcts. Ex. 80 at ¶ 26.

It is also likely that Dr. Bentson would have changed his testimony had he been provided with a full set of medical records documenting Consuelo's cardiac arrest at DRMC and subsequent deteriorating medical condition. Dr.

Bentson testified that he had not reviewed any medical records other than the CT scan. 12 RT 2414-15. He also testified that the "most common cause of infarctions is cutting off of the blood supply or oxygen to the brain." 12 RT 2406. On cross-examination, he admitted that dramatically low blood pressure could also cause the infarcts and that he had not reviewed the medical records to determine whether Consuelo had low blood pressure. 12 RT 2414. As explained by Dr. Corey, the medical records showed that for many days of Consuelo's hospitalization she had a "blood pressure that was not even obtainable" and which best explains her watershed infarctions. Ex. 177 at 8379-80.

Respondent's claim that trial counsel cannot be faulted for failing to present this evidence as an explanation for the watershed infarcts to counter the prosecution's suffocation theory because counsel allegedly provided Dr. Baumer with "all the medical records" fails for two reasons. First, Dr. Baumer testified that, although he was provided with a stack of medical records, some were illegible and poorly copied, and at least one critical surgical report was missing and not provided to him until the day he testified. 14 RT 2844. To the extent respondent disputes this fact, this Court can resolve the dispute in an evidentiary hearing. *See Duvall*, 9 Cal. 4th at 478.

Second, whether trial counsel provided Dr. Baumer with all the medical records is immaterial. Trial counsel admits that she was unaware of critical information in the records, including the fact that Consuelo suffered respiratory and cardiac arrest at DRMC. Ex. 64 at ¶ 9. Trial counsel's ignorance of this critical fact hampered her ability to elicit this information from her experts as an explanation for the infarcts. In fact, the trial record reveals that trial counsel mistakenly believed that Consuelo had suffered a cardiac emergency in transport between DRMC and KMC, which required cardiopulmonary resuscitation (CPR), even though the ambulance records did not support this assertion. Ex. 2 at 120. Trial counsel attempted to prove

this had occurred by calling the paramedic, Ruben Garza, to testify. Mr. Garza, who clearly had not met with trial counsel prior to testifying or been told to bring his records with him, testified that Consuelo had not undergone CPR and did not have a seizure while in transport. 16 RT 3264, 3268.

As a result of trial counsel's failure to present evidence to explain the infarcts, the prosecutor was able to argue in closing that the infarcts were conclusive proof that Consuelo 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 prosecutor argued that Mr. Benavides suffocated Consuelo as a way to cover up his molestation 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 several minutes while he sodomized her was undoubtedly extremely prejudicial and clearly a result of trial counsel's deficient performance.

Accordingly, the evidence presented in postconviction demonstrates that trial counsel unreasonably failed to present evidence to foreclose the prosecution's damaging argument that Consuelo had been suffocated.

6. Counsel's failure to disprove that the cause of Consuelo's brain injuries was shaking

Respondent argues that it "lacks sufficient information" to assess whether Dr. Dibdin falsely testified that Consuelo's subdural brain hemorrhage was indicative of abusive shaking because Consuelo's brain tissue has been destroyed. Return at 88-89. As shown above, respondent's argument is baseless. *See* argument II.B.1.b.2, *supra*. Respondent provided microscopic slides of the brain tissue to his expert, Dr. Corey, who opined that "Consuela's [sic] subdural hemorrhage" was "not indicative of Shaken Baby Syndrome" and was "most likely caused by the coagulopathy with

disseminated intravascular coagulation (DIC)." Resp. Ex. 18 at ¶ 17.

Respondent also argues that trial counsel cannot be faulted for failing to present evidence to counter Dr. Dibdin's false testimony regarding Shaken Baby Syndrome, because counsel relied on her experts who had Dr. Dibdin's autopsy report. Return at 89. Respondent's claim, however, ignores that trial counsel unreasonably failed to ask the defense experts to counter Dr. Dibdin's testimony regarding shaking and failed to provide them the relevant medical evidence. *See, e.g.*, Ex. 80 at ¶ 27 (Dr. Lovell explains that he could have refuted Dr. Dibdin's shaking theory, but he "was never asked by Ms. Huffman to evaluate whether there was an evidence to support the shaken baby theory").

Dr. Dibdin's unrebutted false testimony was clearly prejudicial. 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 by showing that the subdural hemorrhage could not have been caused by Mr. Benavides because it resulted from conditions that occurred during her hospitalization. Ex. 84 at ¶ 13. Trial counsel could have also shown that Dr. Dibdin's description of a child's weak neck musculature leading to the head flopping back and forth does not apply to a 21-month-old child. Ex. 84 at ¶ 12. Rather this description applies to children who are usually only six weeks to four months old and more typically suffer from Shaken Baby Syndrome. *Id.* Trial counsel prejudicially failed to impeach Dr. Dibdin with this information and present evidence explaining that the best explanation for the subdural hemorrhage was the documented DIC.

D. Conclusion

In sum, the evidence submitted in this habeas proceeding demonstrates that trial counsel could have easily shown that the sex abuse convictions were premised on Dr. Dibdin's false findings and resulted from the testifying doctors' ignorance of the full medical record; Dr. Dibdin's cause of death was anatomically impossible; Dr. Dibdin's description of the rib injuries was unsubstantiated by his microscopic findings and the radiological evidence; and the testimony that Consuelo was shaken and suffocated was not supported by the medical records. Should this Court find there are disputed issues necessary to resolving this claim, then this Court must order an evidentiary hearing to resolve those factual disputes before resolving the claim.

Finally, well-established case law forecloses respondent's argument that this Court can find counsel's errors "harmless as to second degree murder," if this Court finds that but for counsel's errors there is a reasonable probability Mr. Benavides would not have been convicted of first-degree murder. The evidence submitted in this habeas proceeding demonstrates that Mr. Benavides was clearly prejudiced by counsel's failure to rebut the

prosecution's theory and his trial was grossly unfair. Accordingly, Mr. Benavides is entitled to a new trial with competent counsel.

IV. CONCLUSION

Based on the foregoing, Mr. Benavides respectfully requests that this Court grant the petition for writ of habeas corpus and vacate the judgment imposed against him. Alternatively, if the Court is not inclined to reverse the conviction completely based on the pleadings, the Court must refer the matter for an evidentiary hearing before a neutral referee, and thereafter grant the petition for writ of habeas corpus and vacate the judgment imposed against Mr. Benavides.

Dated: March 14, 2017

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____
Michael J. Hersek

By: _____
Miro F. Cizin

By: _____
Paula Fog

Attorneys for Petitioner
VICENTE BENAVIDES FIGUEROA

VERIFICATION

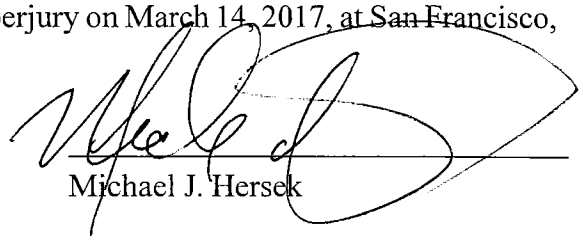
Michael J. Hersek declares as follows:

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.

I am authorized to file this Traverse to Return to Order to Show Cause to the Red-Lined Copy of the Corrected Amended Petition on petitioner's behalf. I make this verification because petitioner 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 petitioner's.

I have read the Traverse to Return to Order to Show Cause to the Red-Lined Copy of the Corrected Amended Petition and know its contents to be true.

Executed under penalty of perjury on March 14, 2017, at San Francisco, California.



Michael J. Hersek

CERTIFICATE AS TO LENGTH

I certify that this Traverse to Return to Order to Show Cause to the Red-Lined Copy of the Corrected Amended Petition contains 40,760 words, verified through the use of the word processing program used to prepare this document.

Dated: March 14, 2017

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____

Michael J. Hersek

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):

- Traverse to Return to Order to Show Cause to the Red-Lined Copy of the Corrected Amended Petition;
- Exhibits in Support of the Corrected Amended Petition for Writ of Habeas Corpus and the Traverse, Volume 29 (Exhibit 177)

4. I served the document(s) by enclosing them in a package or envelope, which I then deposited with the United States Postal Service, postage fully prepaid.

5. The package or envelope was addressed and mailed as follows:

Kelly E. LeBel
Deputy Attorney General
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 327-3572
Counsel for Respondent

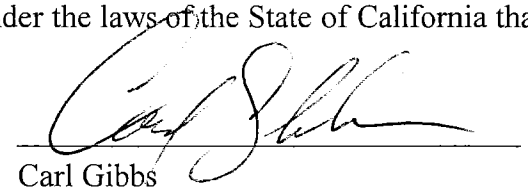
Lisa Green
District Attorney
Kern County District Attorney's Office
1215 Truxtun Ave.
Bakersfield, CA 93301
(661) 868-2340

Mary K. McComb
State Public Defender
Office of the State Public Defender
1111 Broadway, Suite 1000
Oakland, CA 94607
(510) 267-3300

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: March 14, 2017



Carl Gibbs