No. A167615

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

IN RE SCOTT PETERSON,
ON HABEAS CORPUS.

San Mateo County Superior Court, Case No. SC055500A
The Honorable Anne-Christine Massullo, Judge

INFORMAL OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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OTHER AUTHORITIES

Pursuant to this Court's April 27, 2023 order, respondent provides the following informal opposition response to the petition for writ of habeas corpus filed on April 19, 2023 by petitioner Scott Peterson. As shown below, petitioner has failed to demonstrate a prima facie case for relief on his claims. Accordingly, this Court should deny the petition without issuance of an order to show cause.

INTRODUCTION

In late December 2002, petitioner murdered his wife Laci Denise Peterson who was then eight months' pregnant with their child Conner. After a lengthy trial with nearly 200 witnesses and a mountain of other evidence, 12 jurors found petitioner guilty of multiple murder predicated on proof beyond a reasonable doubt.

Having failed to convince his jurors, or the Supreme Court on appeal or habeas, or, most recently, the superior court, now—nearly 20 years after his conviction—petitioner in this second habeas petition contends, among other things, that he was wrongfully convicted based on "newly discovered evidence" that someone else confessed to the murders. The new information was reported to one of petitioner's family members via Twitter and not to the police or prosecution.

To be sure, insofar as wrongful convictions occur, the criminal justice system has the ability to right those wrongs. But, in this case, there is no such wrong for this Court to right. There is no other murderer—only petitioner—and he has failed to carry his burden to warrant this Court's imprimatur on a baseless fishing expedition for the purported real killer.

His remaining claims should fare no better. He challenges the superior court's December 2022 decision finding that Juror No. 7 was not biased against him. However, the court's findings and decision are solidly founded on evidence adduced at the evidentiary hearing including the court's favorable assessment of Juror No. 7's credibility. The superior court had the opportunity to carefully evaluate the juror's demeanor while she endured two days of intense questioning by the parties. The decision denying petitioner relief is correct and supported by substantial evidence.

His other claims asserting various failures on the part of the prosecution, police investigators, and his habeas counsel are also demonstrably without merit. Some, in fact, have previously been presented to the California Supreme Court in petitioner's first habeas petition, but just named differently here. Other claims could have been raised on direct appeal, but were not. In those instances, the claims are procedurally barred. In any event, all of petitioner's claims are without merit.

STATEMENT OF THE CASE

In November 2004, a jury convicted petitioner of the 2002 first degree murder of Laci and the second degree murder of their unborn son Conner (Pen. Code,[1] § 187, subd. (a)). The jury also found true the special circumstance of multiple murders (§§ 187, 190.2, subd. (a)(3)). (*People v. Scott Lee Peterson*, case No.

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[1] Further undesignated statutory references are to the Penal Code.

S132449: 20CT 6133; 112RT 20822-20824; Petn. Exh. C at 3.)[2] Following the penalty phase, the jury returned a verdict of death. (Case No. S132449: 20CT 6233; 120RT 21758; Petn. Exh. C at 3.)

While his automatic appeal was pending before the California Supreme Court, petitioner filed a petition for writ of habeas corpus in that court. (*In re Scott Peterson on Habeas Corpus*, case No. S230782: Petn. Exh. C at 3.) The Supreme Court requested an informal response on November 24, 2015. (Case No. S230782.)

On August 24, 2020, the Supreme Court unanimously affirmed the guilt-phase verdicts, but overturned the death judgment. (*People v. Scott Lee Peterson* (2020) 10 Cal.5th 409; Petn. Exh. C at 3.)

On October 14, 2020, the Supreme Court rejected 10 of petitioner's 11 guilt-phase habeas claims on the merits.[3] As to

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[2] Petitioner has requested this Court incorporate by reference the certified records, pleadings, and related documentation in his automatic appeal (case No. S132449) and habeas petition (case No. S230782) before the California Supreme Court, as well as the record, pleadings, and related documentation in the recent proceedings in the San Mateo County Superior Court (case No. SC055500A), pursuant to *In re Reno* (2012) 55 Cal.4th 428, 444, 484. (Petn. 20, ¶ 3.) As necessary, respondent will also cite to the record in these matters. Of course, it remains petitioner's burden to present a record affirmatively disclosing trial court error. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187; *Upshaw v. Superior Court* (2018) 22 Cal.App.5th 489, 497, fn. 4 ["it is a writ petitioner's burden to present a procedurally and substantively adequate writ petition"].)

his claim alleging prejudicial juror misconduct, the court issued an order to show cause (OSC). (Case No. S230782: Petn. Exh. C at 2-3.)

The case was returned to the San Mateo County Superior Court[4] for further proceedings related to the death penalty and habeas petition. On May 28, 2021, the Stanislaus County District Attorney informed the superior court that she would no longer seek the death penalty.[5] (Petn. Exh. C at 3.)

On December 8, 2021, the superior court resentenced petitioner to life in prison without the possibility of parole. (Petn. Exh. C at 3.)

(...continued)

[3] Given the court's reversal of the death judgment in the automatic appeal, petitioner's remaining habeas claims related to the death penalty were denied as moot. (Case No. S230782.) The Supreme Court's October 14, 2020 order is appended to the Judicial Council's No. HC-001 preprinted form habeas petition, which petitioner filed along with his "pro per" habeas petition.

[4] On October 30, 2020, then California Supreme Court Chief Justice Cantil-Sakauye appointed Judge Anne-Christine Massullo of the San Francisco County Superior Court to preside over the habeas proceedings in the San Mateo County Superior Court.

[5] The prosecution of this case originated in Stanislaus County and, subsequent to a defense motion for change of venue, the matter was transferred to San Mateo County. (*People v. Scott Lee Peterson, supra*, 10 Cal.5th at p. 438.) The Stanislaus County District Attorney represented respondent with regard to the OSC and related proceedings in the superior court. (Petn. Exh. C at 2, fn. 3.)

As to the habeas matter, the parties submitted extensive briefing related to the juror misconduct claim. Subsequently, in early 2022, the superior court conducted a five-day evidentiary hearing. After further briefing and oral argument, in December 2022, the superior court denied the petition. (Petn. Exh. C at 3-4, 55.)

On April 19, 2023, petitioner filed a pro per habeas petition in this Court. (*In re Scott Peterson on Habeas Corpus*, case No. A167615.)

On April 27, 2023, the Court requested respondent file an opposition to the petition addressing the issues raised therein. (*In re Scott Peterson on Habeas Corpus*, case No. A167615.)

STATEMENT OF FACTS

The following facts are taken from the California Supreme Court's opinion in the related automatic appeal in *People v. Scott Lee Peterson*, *supra*, 10 Cal.5th 409, affirming petitioner's murder convictions. Respondent recounts here, verbatim, that portion of the opinion pertinent to the guilt-phase evidence:

> 1. Prosecution Evidence
>
> Peterson and Laci Rocha met in San Luis Obispo, where Laci was attending college and Peterson was working in a restaurant. They married in 1997. They opened and ran a restaurant together in San Luis Obispo. In 2000, they moved to Modesto and bought a house. Laci took a job as a substitute teacher, while Peterson ran a startup fertilizer company named TradeCorp U.S.A. out of a leased warehouse. Some years after the two married, Laci became pregnant; the baby—whom the couple had named Conner—was due in February 2003.
>
> On December 23, 2002, Laci went grocery shopping around midday. She also had a prenatal medical

checkup. In the late afternoon, both Laci and Peterson went to a salon where Laci's sister, Amy Rocha, worked. Amy mentioned that she had ordered a gift basket for a family member that needed to be picked up the next day by 3:00 p.m. Peterson volunteered to get it for her, as he was going to be golfing nearby. Peterson also invited Amy to dinner, but she declined because she had prior plans. That night, Laci and her mother, Sharon, spoke on the phone and confirmed that Laci and Peterson would join Sharon and Sharon's longtime partner, Ron Grantski, for dinner the following night, Christmas Eve.

At 10:18 the following morning, a neighbor, Karen Servas, saw the Petersons' dog, McKenzie, wandering unaccompanied on the street, wearing his leash. Peterson's truck was gone; Laci's car was still in their driveway. There were no signs of activity at the house, so Servas put McKenzie in the Petersons' backyard and closed the gate. That afternoon, Grantski tried to reach Laci, without success. Around 3:45 p.m., Amy received a call that her gift basket had not been picked up. She was unable to reach Peterson. Neighbors reported Peterson's truck still absent at 4:05 p.m., but back by 5:30 p.m.

At around 5:15 p.m., Peterson called Sharon and asked if Laci was there. He described Laci as "missing." Sharon suggested he check with friends and neighbors. Peterson called Sharon back shortly afterwards and reported the people he had spoken to had not seen Laci either. Sharon told Grantski to call the police. Officers soon met Peterson, Sharon, and Grantski at a nearby park. Neighbors and other relatives gathered at the park as well. Grantski spoke with Peterson and asked if he had gone golfing that day. Peterson said he had changed his mind and gone fishing instead. Told what time Peterson had gone, Grantski suggested it was an unusually late time to be fishing. Peterson walked off without responding. Peterson told a cousin of Sharon's and two neighbors that he had been golfing all day. He

volunteered to Sandy Rickard, a friend of Sharon's, that he would not be surprised if the police found blood in his truck because he cut his hands all the time.

Police inspected the Peterson home. There were no signs of forced entry, nothing appeared missing, and Laci's purse was still there. Peterson told officers he and Laci had watched television that morning, and Laci had planned to walk the dog and go grocery shopping. Peterson decided to go fishing in the San Francisco Bay. He went to his company warehouse where he stored a boat, drove to the Berkeley Marina, fished for two hours, and quit because the day was cold and rainy. He tried calling Laci on the home phone and her cell phone but did not reach her. Peterson got home around 4:30 p.m. He washed his clothes, ate some pizza, and then called Sharon to track down Laci.

Officer Matthew Spurlock asked what time Peterson was fishing. He also asked what Peterson was fishing for and what lure he used. According to Spurlock and Officer Derrick Letsinger, Peterson gave slow and initially noncommittal answers. He "really didn't give a responsive time" and, when asked what he was fishing for, paused, gave a blank look, and "mumbled some stuff" without really answering. Peterson likewise responded with a blank look when asked about his lure, but after some delay came up with a size and color description.

Detective Allen Brocchini was called to the Peterson home. He found wet towels on top of the washing machine. Peterson explained that he had taken them out so that he could wash the clothes he had worn that day. Inside the washing machine were Peterson's jeans, shirt, and green pullover jacket. In the bedroom, officers observed a laundry hamper nearly full of clothes. With consent, Detective Brocchini examined Peterson's truck and saw large patio umbrellas and a tarp in the truck bed. Inside the truck cab, he found a fishing rod and a bag containing a package of unused fishing lures and a receipt indicating the items had all been

purchased on December 20. Peterson handed him a Berkeley Marina parking receipt that indicated Peterson had entered at 12:54 p.m. On the backseat was a camouflage jacket Peterson said he had worn fishing that day. Brocchini and Peterson then went to Peterson's warehouse. There, Brocchini observed what he described as a "homemade anchor" made of concrete in Peterson's boat, but no long rope to attach it to the boat.

Peterson agreed to a further interview at the Modesto police station. Peterson repeated that Laci had planned to walk the dog and go grocery shopping. For his part, Peterson decided to go fishing because it was too cold to golf. He went to his warehouse, then to the Berkeley Marina around 1:00 p.m., and fished for 90 minutes near an area that was later identified as Brooks Island. Peterson did not pack a lunch or stop to eat on the way to or from the marina. On the way back, Peterson called Laci on their home phone and left two messages on her cell phone. He dropped off his boat at the warehouse and went home. Peterson told officers that there were no problems in his marriage.

Peterson had a followup interview with Detective Craig Grogan and an investigator from the state's Department of Justice on Christmas Day, December 25. Peterson explained that he had never fished on the San Francisco Bay before but wanted to test out his boat. He troll fished for an hour on the way out to Brooks Island from the marina dock. Peterson suggested Laci might have been robbed of her jewelry by a transient and then kidnapped. He denied being involved in an affair with anyone. Later that day, Peterson called Detective Brocchini to check on the investigation. He asked if the police would be using cadaver dogs to search for Laci. Brocchini explained that they would not, because no one assumed Laci was dead.

In the days after Christmas, the Modesto Police Department executed search warrants on the Peterson home and Peterson's warehouse. Police confirmed that

there had been no forced entry at the house. None of Laci's jewelry was missing, other than one pair of diamond earrings. Traces of Peterson's blood were found on a comforter in the master bedroom. In sheds in the backyard, police found the cover to Peterson's boat, smelling heavily of gasoline, as well as a blue tarp. The boat cover had chunks of concrete in it. In Peterson's truck, police found additional spots of Peterson's blood. Peterson explained that he had cut his hand on the truck door. Police found small chunks of cement and a claw hammer with cement powder on it in the truck's bed.

At the warehouse, the police inspected the boat and found a pair of pliers under the middle seat. The pliers had hair clamped in their teeth. Subsequent mitochondrial DNA testing of a hair fragment determined that the hair matched a reference sample from Sharon, which meant that its donor had the same maternal lineage as Sharon. The hair did not match Peterson's.

During the search of the Peterson home, articles that Laci would have touched were collected to give to trailing dogs to enable them to search for Laci's scent. These included a slipper and a pair of sunglasses. On December 28, four days after Laci disappeared, Trimble, a trailing dog, was presented Laci's sunglasses at the Berkeley Marina. Trimble alerted to Laci's scent along a path that led out onto a dock and ended at the water.

On December 30, a woman named Amber Frey contacted the police after a friend advised her that Peterson, who she thought was unmarried with no children, and with whom she had been having a relationship since November, was connected to the disappearance of his pregnant wife. Frey and Peterson had had their first date on November 20 and had immediately become sexually intimate. Their relationship had progressed to the point where Peterson had stayed over at Frey's home, picked up Frey's young daughter from daycare, gone to various parties with

Frey, alone and with her daughter, picked out a Christmas tree with Frey, and discussed their views on having children. Peterson initially told Frey he had never been married and had no children, but on December 6 a friend of Frey's discovered otherwise and gave him an ultimatum to tell Frey by December 9 or else she would. On December 9, Peterson explained to Frey that he had in fact been married, but had "lost" his wife, and the upcoming holidays would be his first without her. On December 15, Peterson told Frey he would be in Europe on business through the rest of the month and much of January. On December 23, after Frey asked where she should send him things while he was away, Peterson rented a private mailbox to which Frey could send letters. He called Frey that day, claiming to be in Maine duck hunting with his father, and again on Christmas Day, supposedly still from Maine.

After meeting with police, Frey agreed to cooperate and tape future calls from Peterson. On New Year's Eve, Peterson called Frey from a vigil for Laci, claiming to be in Paris watching fireworks over the Eiffel Tower. He called Frey again on New Year's Day and in the days after, maintaining the fiction that he was in Europe. On January 3, 2003, when police confronted Peterson with a picture of himself and Frey, Peterson denied that it was him in the photo and that he was having an affair.

On January 6, at the instigation of police, Frey dropped hints that a friend had learned the truth and would tell her in a matter of hours. In response, Peterson finally admitted to Frey that he was married to a woman named Laci and had been in Modesto the entire time. The next day, when Frey asked if Peterson had told Laci about her, Peterson said he had and that Laci was "fine" with his having an affair. Later in the month, once news media had made the affair public, Peterson, in an interview aired nationwide, repeated that Laci was fine with his having an affair and said he had

disclosed the affair to the police immediately. On February 19, at the direction of police investigators, Frey told Peterson they should stop talking.

In January, after obtaining a warrant, police placed a surveillance camera outside the Peterson home and GPS tracking devices on Peterson's vehicles, including a series of cars and trucks Peterson rented for a few days at a time. Surveillance data from these devices and visual surveillance by the police showed Peterson driving the approximately 90 miles from his home to the Berkeley Marina at least five times in January, each time using a different vehicle. On January 5, he drove there in a gray Subaru, spent five or 10 minutes, and left. On January 6, he returned to the marina in a red Honda and again spent only a few minutes. On January 9, Peterson drove there in a white pickup truck. On January 11, after determining that their cover had been blown, the Modesto Police Department shut down surveillance at the Peterson home. Nonetheless, from tracking data supplied by the automobiles' manufacturers, police were able to determine that Peterson returned to the marina on January 26 in Laci's Land Rover and on January 27 in a rented Dodge Dakota.

During the same period, Peterson began to make various changes to his work and living situations. On January 13, Peterson gave 30 days' notice that he was terminating his warehouse lease, which was not up until October. That same month, he started discussions to sell the Peterson home. On January 29, Peterson sold Laci's car, trading it in for a Dodge Dakota pickup truck. On January 30, he stopped home mail delivery and directed that all mail be delivered to the post office box he had set up on December 23. The nursery for Conner was converted into storage space. On February 18, satellite television service to the Peterson home was canceled; the satellite company's records indicated the customer had explained he was moving overseas.

A $500,000 reward was posted by a private foundation for information leading to Laci's return. For months, no useful leads turned up. Even when potentially promising sightings were reported, Peterson appeared to show little interest. For example, the prosecution presented evidence collected from an authorized wiretap of Peterson's phone that showed he took days to follow up with police about a possible sighting in Washington, though he told others—including his mother—that he had followed up with police immediately. Peterson similarly told a business associate he was waiting near the airport in case he needed to fly up to Washington, though at the time, Peterson was not near any airport.

In mid-April, a significant storm hit the San Francisco Bay Area. On April 13, after the storm had passed, a couple walking their dog came upon Conner's badly decomposed body, apparently washed ashore along with other storm debris. The location was just over a mile from the southern tip of Brooks Island. The next morning, Laci's body was discovered on the shoreline at Point Isabel, south of Conner's body and again just over a mile from Brooks Island. Laci's body had barnacles and duct tape on it. From residual clumps of fabric, it was possible to determine that she had been wearing light-colored capris. The clothing was consistent with the recollection of Amy, who testified that Laci was wearing cream-colored pants when she last saw her sister on December 23. It was, however, inconsistent with the recollection of Peterson, who told police that Laci was wearing black pants when he last saw her on December 24. Days later, DNA testing confirmed the identities of the two bodies.

Dr. Brian Peterson (no relation to the Petersons) performed autopsies on both bodies. Laci's body had several parts missing, including her head, forearms, and one lower leg. Changes to the tissue suggested her body had been in a marine environment. Tidal action and marine animals could explain the missing body

parts. Laci's uterus was still enlarged, her birth canal was closed, and there was no evidence of a Caesarian-section birth, which indicated she had died while still pregnant. Dr. Allison Galloway, a forensic anthropologist given the remains to analyze, testified that Laci had been in water for three to six months. Given the condition of the body, it was not possible to determine a cause of death.

Conner's body was intact. There was tape on his neck but no associated injuries, which led Dr. Peterson to conclude the tape was just debris that had become attached to Conner after his death. There was no clothing on the body. Conner still had part of his umbilical cord and meconium in his intestines, which indicated he had died before birth. Based on his size and the softness of his tissue, Dr. Peterson opined that Conner must have remained protected inside Laci's uterus for some time after death; had he spent a significant period of time exposed in the water, he would have been eaten by marine animals.

As mentioned, Laci had had a prenatal checkup on December 23. Based on ultrasounds, Conner was at 32 to 33 weeks of gestation. Postmortem measurements of his bone growth allowed Dr. Greggory DeVore to estimate Conner's date of death as falling between December 21 and December 24, with an average of December 23. Both Dr. Esther Towder, Laci's gynecologist who conducted the December 23 checkup, and Dr. Peterson testified that based on his age and health, Conner would have survived had he been born that day.

Dr. Ralph Cheng, a hydrologist with the United States Geological Survey, was contacted by the Modesto Police Department in February, while Laci was still missing, and again in May, after she and Conner had been found. The first time, he was asked to assume that Laci's body had been dumped with weights into the San Francisco Bay and, based on that assumption, to estimate where the body might be found. The second time, after the

bodies had been found, Dr. Cheng was asked to estimate where they might have originated. He was able to estimate a location for Conner near the southern tip of Brooks Island, but no likely location for Laci. Divers searching the bay at Dr. Cheng's target location were unable to find any relevant evidence.

On April 12, the day before Conner's body was found, Peterson bought a car using his mother's name, Jacqueline, as his own, providing a fake driver's license number, and paying $3,600 in cash. He had grown a goatee and mustache and appeared to have dyed his hair. On April 15, when Sharon called him about the discovery of the (as-yet unidentified) bodies of Conner and Laci, Peterson did not return her call. Believing Peterson might flee, police arrested him on April 18. When arrested, Peterson had nearly $15,000 in cash, foreign currency, two drivers' licenses (his own and his brother's), a family member's credit card, camping gear, considerable extra clothing, and multiple cell phones.

The prosecution introduced evidence concerning the Petersons' finances. The Petersons' expenses were high in relation to their current income. TradeCorp U.S.A. had never been profitable, posting operating losses of $40,000 and $200,000 in consecutive years; the company was not meeting sales goals, and it owed its parent company $190,000. Peterson had signed multiple credit card applications in the company's name containing misrepresentations as to the company's income.

In fall 2002, Laci inherited jewelry and, at Peterson's request, had some of the items appraised. They were valued at more than $100,000. Computers seized from the Peterson home and the warehouse showed e-mails sent from an account bearing the username "slpete1" discussing the sale of jewelry, and eBay records likewise showed Peterson had posted jewelry items for sale. Laci also stood to inherit one-third of the proceeds from the sale of her grandfather's house, an interest estimated to be worth around $140,000. Laci's interest

would terminate on her death, with no right of survivorship to Peterson, but it was unclear whether Peterson was aware of the limitation; Brent, the cotrustee of the grandparents' estate, had not told Peterson about the provision.

The prosecution also submitted additional background concerning Peterson's fishing. Computers seized from the Peterson home and the warehouse showed that someone had conducted searches of classified advertisements for boats on December 7, the day after Peterson learned he would no longer be able to conceal his marriage from Frey. That same day, Peterson called Bruce Peterson (no relation) about a boat for sale. Peterson inspected the boat the next day and bought it on December 9, without the anchors that came with the boat. Peterson never registered the boat, nor did he ever mention the purchase to his father; to Grantski, an avid fisherman who had invited Peterson to fish several times; to other members of the Rocha family; or to his friend Gregory Reed, with whom he frequently discussed fishing. Review of the seized computers' browser histories also showed someone conducting searches on December 8 for boat ramps on the Pacific Ocean, then examining nautical charts, currents, and maps for the Berkeley Marina and San Francisco Bay, including the area around Brooks Island. There were also visits to fishing-related websites.

December 24, the day Peterson said he was fishing, was gray, damp, and cold with a bit of wind. Few people were at the Berkeley Marina. When questioned by police, Peterson would not say what he was hoping to catch, but the fishing searches performed from his computer earlier in the month had included searches relating to sturgeon and striped bass. Angelo Cuanang, a published author on fishing in the San Francisco Bay who was accepted by the court as an expert fisherman, testified that Brooks Island was the wrong place to seek sturgeon, which congregated in a different part of the bay that time of year. Sturgeon also preferred live bait

to lures, and Peterson's rod was too weak to catch them. Anchoring was essential to reel in sturgeon; the homemade cement anchor in his boat would have been inadequate. Finally, it was illegal to troll for sturgeon, as Peterson claimed to have done. Peterson's lures and the time of year he was fishing were also wrong for catching striped bass.

The prosecution's theory was as follows: Peterson killed Laci sometime on the night of December 23 or morning of December 24. On the morning of the 24th, Peterson let their dog McKenzie out with his leash on to make it appear something had happened while Laci was walking him. He wrapped Laci's body in a tarp in the bed of his truck, covered her with the patio umbrellas, drove to the warehouse, and then moved her body into his boat. He drove to the Berkeley Marina, motored out to an area near Brooks Island, and slipped her body, attached to homemade concrete weights like the homemade anchor Peterson had made, into the bay. Peterson then returned to Modesto, dropped off the boat at the warehouse, put the boat cover out back under a leaky gas blower so that any scent would be obscured, washed his clothes, and proceeded with the ruse that Laci was missing, hoping her body would never be discovered.

2. Defense Evidence

The defense argued the police had not diligently pursued whether a person or persons other than Peterson were more likely responsible for Laci's disappearance and murder. The defense presented evidence that a burglary had occurred on the Petersons' street the week of her disappearance and argued that the police failed adequately to follow up on whether that burglary had any connection to Laci's disappearance. It also presented evidence that a stranger had gone to several houses on December 23 asking for money and, one neighbor thought, casing houses for burglaries, and so might have had something to do with her disappearance. Testimony was presented

that the same neighbor, walking with a police officer on Christmas Day to look for the stranger, had seen a pair of sandals lying in the road 150 feet from the Petersons' home; the neighbor wondered at the time if they might have any connection to Laci's disappearance, but the officer just left them there. To support the possibility of a third party's involvement, the defense challenged the prosecution's theory that Conner died December 23 or 24, presenting its own expert who testified based on ultrasounds and other evidence that Conner lived until after Christmas.

The defense also sought to challenge other aspects of the prosecution's case. To rebut the dog-trailing evidence, the defense called Ronald Seitz, a second dog handler who also had his dog try to find Laci's scent at the Berkeley Marina on December 28. The dog, T.J., was given Laci's slipper as a scent object, but discovered no scent trail. To rebut the inference that Peterson had a financial incentive to kill Laci, the defense presented a financial expert who testified that TradeCorp U.S.A. and the Petersons were both reasonably financially healthy. To portray the prosecution's theory as physically impossible, the defense also sought to introduce video of a demonstration with a weighted 150-pound dummy in a boat on the bay in which a defense firm employee, trying to dump the dummy out, sank the boat. As will be discussed below, the trial court excluded the video.

The defense offered explanations for the circumstances of Peterson's behavior in April. His use of his mother's name to purchase a car was at her suggestion, to avoid having it impounded. He had large amounts of cash because she gave it to him to reimburse him for money erroneously withdrawn from his bank account rather than hers. Finally, he had his brother's driver's license because the club where he was going to golf that day gave discounts for local residents such as his brother.

(*People v. Peterson*, *supra*, 10 Cal.5th at pp. 417-426, footnotes omitted.)

STANDARD OF REVIEW ON HABEAS CORPUS

"Habeas corpus is an 'extraordinary remedy.'" (*In re Clark* (1993) 5 Cal.4th 750, 764, fn. 3, quoting *In re Connor* (1940) 16 Cal.2d 701, 709.) It is "not a reiteration of or substitute for an appeal" (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 188), but is "limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension" (*In re Clark*, *supra*, 5 Cal.4th at pp. 766-767). Save for claims of unconstitutionally ineffective assistance of counsel, a habeas petitioner generally may not raise appellate claims, irrespective of whether they were raised on appeal. (*In re Scoggins* (2020) 9 Cal.5th 667, 673; *In re Harris* (1993) 5 Cal.4th 813, 829; *Ex parte Dixon* (1953) 41 Cal.2d 756, 759; see *In re Waltreus* (1965) 62 Cal.2d 218, 222-223, 225 ["[H]abeas corpus ordinarily cannot serve as a second appeal"].) An appellate claim is one that derives principally from or is based primarily on the record on appeal. (*Marks*, *supra*, 27 Cal.4th at p. 188.)

Criminal judgments are presumed valid and final. (*In re Clark*, *supra*, 5 Cal.4th at p. 764; *People v. Duvall* (1995) 9 Cal.4th 464, 474; see *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1304 [criminal judgments bear a "strong presumption of constitutional regularity"].) Because a habeas corpus petition seeks to upset this presumptively final judgment, "the petitioner bears a heavy burden initially to *plead* sufficient grounds for

relief, and then later to *prove* them." (*Duvall, supra*, 9 Cal.4th at p. 474.) "[A]ll presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, superseded by statute on other grounds as stated in *In re Steele* (2004) 32 Cal.4th 682, 691; see *In re Visciotti* (1996) 14 Cal.4th 325, 351 [habeas corpus petitioner bears the burden of proving by a preponderance of the evidence that the criminal judgment is invalid].)

A court presented with a habeas corpus petition must first determine whether the petition states a prima facie case for relief and whether any of the claims stated therein are procedurally barred. (*People v. Romero* (1994) 8 Cal.4th 728, 737; see *Duvall, supra*, 9 Cal.4th at pp. 474-475.) The prima facie determination looks solely to the facts contained in the habeas petition and its supporting documentation, *without reference to the possibility of facts or allegations that may be added at a later date.* (*In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16 ["The inclusion in a habeas corpus petition of a statement purporting to reserve the right to supplement or amend the petition at a later date has no effect"].)

A prima facie case exists if the facts alleged in the petition, assumed to be true, would entitle the petitioner to relief. (*Romero, supra*, 8 Cal.4th at p. 737; *Duvall, supra*, 9 Cal.4th at pp. 474-475.) To make this prima facie showing, the petition "must set forth specific facts which, if true, would require issuance of the writ." (*Gonzalez, supra*, 51 Cal.3d at p. 1258.) It

also should "include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (*Duvall*, at p. 474.) Conclusory or speculative allegations are insufficient to establish a prima facie claim. (*Ibid.*)

To assist it in determining the factual sufficiency of the petition, this Court has requested an informal response from respondent. The purpose of the informal response is to identify petitions which should be summarily dismissed without the need for formal pleadings or an evidentiary hearing. (*In re Bacigalupo* (2012) 55 Cal.4th 312, 332; *Romero, supra*, 8 Cal.4th at p. 737.) Accordingly, the informal response need not provide documentary evidence to controvert the factual allegations of the petition, but may instead be limited to legal arguments with respect to perceived flaws on the face of the petition. (*In re Robbins* (1998) 18 Cal.4th 770, 798, fn. 20, superseded by statute on another ground as stated in *In re Friend* (2021) 11 Cal.5th 720; *Romero*, at pp. 740-742, 745 & fn. 11.)

A petition that fails to establish a prima facie case for relief must be summarily denied. (*Duvall, supra*, 9 Cal.4th at p. 474; *Romero, supra*, 8 Cal.4th at p. 737.) Conversely, if the court finds that the factual allegations, taken as true, establish a prima facie case for relief, it will issue an order to show cause. (*Duvall*, at p. 475.) An order to show cause is "limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues." (*In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16.)

No habeas corpus petition may be granted until an order to show cause has issued and respondent has been ordered to file a formal return. (*Duvall*, *supra*, 9 Cal.4th at pp. 475-476; *Romero*, *supra*, 8 Cal.4th at pp. 740-741.) It is only after a formal return has been ordered that the burden shifts to respondent to allege "facts tending to establish the legality of the challenged detention." (*Duvall*, at p. 476; *Romero*, at pp. 738-739.)

ARGUMENT

As a threshold matter, respondent specifically and generally controverts all of petitioner's factual and legal claims and allegations as set forth in the petition, including on state and federal grounds, unless otherwise expressly and specifically conceded herein.

I. PETITIONER HAS FAILED TO DEMONSTRATE A PRIMA FACIE CASE THAT THE SUPERIOR COURT WAS WRONG IN FINDING THAT JUROR NO. 7 WAS NOT BIASED AGAINST HIM

Petitioner reasserts his contention that Juror No. 7 was biased against him in violation of the federal and state Constitutions. He challenges the decision of the superior court finding that Juror No. 7's omissions from her juror questionnaire did not reflect a deliberate attempt to conceal bias against petitioner. (Petn. 102-152.)

Throughout his legal challenges to his murder convictions, petitioner has generally maintained that numerous prospective jurors had a predisposed bias against him and were secretly maneuvering to get on the jury; he has referred to them as "stealth" jurors. Before this Court, he repeats his contention that Juror No. 7 was one such juror predisposed to finding him guilty

and that she was sophisticated and crafty enough to hoodwink a highly experienced and respected trial judge, celebrity defense attorney, and veteran prosecutors into seating her as a biased juror.

Petitioner understands that the only way he can prevail on this claim is to convince this Court that it is in a better position to assess Juror No. 7's demeanor and credibility than the judge who evaluated the testimony firsthand during a thorough and searching inquiry while the juror was under oath on the witness stand.

While it is true that the Court can disagree with the findings below, respondent maintains that there is no basis to do so because the superior court's determinations are supported by substantial evidence, including relevant and appropriate considerations of Juror No. 7's lived experience as it informed her actions. Accordingly, petitioner has failed to demonstrate a prima facie case for relief based on juror bias under state or federal law.

A. Relevant procedural background

1. Jury trial and post-conviction proceedings

Juror No. 7[6] (assigned prospective juror No. 6756) was initially sworn as Alternate Juror No. 2 in petitioner's trial.

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[6] The juror was identified by name during the evidentiary hearing with her consent, but respondent will continue to refer to her as "Juror No. 7," as we did in the informal response and as did the California Supreme Court and superior court. (See Code Civ. Proc., §§ 206, 237.)

During the course of deliberations, two jurors were discharged. Alternate Juror No. 2 replaced the first dismissed juror and became Juror No. 7. (Case No. S132449: 19CT 5990; 112RT 20775; Petn. Exh. C at 2.) Juror No. 7 deliberated in both the guilt and penalty phases of the trial. (Petn. Exh. C at 2-3.)

In his related habeas petition filed in the Supreme Court, petitioner contended, in part, that he was denied his right to a fair and impartial jury under the California and federal Constitutions because Juror No. 7 had intentionally concealed information during voir dire. (Case No. S230782: Petn. at 96-108.) At the Supreme Court's request, respondent filed an informal response to the petition in which we argued, in relevant part, that petitioner had failed to state a prima facie case for relief because Juror No. 7 did not commit misconduct in the first instance, but if she did, there was no substantial likelihood that she was actually biased against petitioner. (Case No. S230782: Informal Resp. at 23-40.)

In October 2020, the Supreme Court rejected 10 of petitioner's 11 guilt-phase habeas claims on the merits. As to his claim alleging prejudicial juror misconduct, the court issued an OSC: "The Secretary of the Department of Corrections and Rehabilitation is ordered to show cause in the Superior Court of California, County of San Mateo, when the matter is placed on calendar, why the relief prayed for should not be granted on the ground that Juror No. 7 committed prejudicial misconduct by not disclosing her prior involvement with other legal proceedings,

including but not limited to being the victim of a crime, as alleged in Claim 1." (Case No. S230782: Petn. Exh. C at 2-3.)

2. Evidentiary hearing and related proceedings

This claim concerns Juror No. 7's nondisclosures in the juror questionnaire relating to two incidents—one involving Marcella Kinsey the former girlfriend of Juror No. 7's then significant other, Eddie Whiteside (the Kinsey incident) and the other involving Mr. Whiteside and Juror No. 7 (the Whiteside incident).

In the superior court,[7] respondent's return included new information concerning Juror No. 7. Specifically, respondent provided documentation showing that in November 2001, Mr. Whiteside, was charged with a domestic violence related offense against Juror No. 7 and pleaded no contest to simple battery. (Case No. SC055500A: Return at 51-53.) Because Juror No. 7 had not disclosed the incident in response to question No. 74 in the jury questionnaire asking if she had ever been the victim of a crime, petitioner made additional factual allegations in his denial to the return. (Case No. SC055500A: Denial at 11-13.) Respondent filed a supplemental return and petitioner filed a supplemental denial. (Petn. Exh. C at 3.)

The court identified six factual allegations petitioner had alleged and which were in dispute: 1) Juror No. 7 wanted to sit

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[7] While the terms "superior court" and "trial court" are typically considered interchangeable, for purposes of clarity, respondent refers to the "trial court" when discussing jury trial matters and "superior court" when referring to the evidentiary hearing and related proceedings.

in judgment of petitioner, in part to punish him for the crime of harming his unborn child—a crime that Juror No. 7 personally experienced when Ms. Kinsey threatened Juror 7's life and that of her unborn child; 2) Owing to this incident, Juror No. 7 was actually biased against petitioner; 3) Juror No. 7's victimization infected her deliberations on the murder charge involving Conner; 4) Juror No. 7 harbored an obsessive interest in the death of Conner evidenced by letters she wrote to petitioner after he was convicted; 5) Juror No. 7 concealed during voir dire that she had experienced the threat of losing her unborn child through the intentional conduct of her former boyfriend's girlfriend; and, 6) Juror No. 7's experiences concerning the threat of losing her unborn child through the intentional conduct of another were material to the issues at trial, which were similar. (Petn. Exh. C at 8-9.)

Having reviewed the parties' briefs and identified the factual disputes, the court scheduled an evidentiary hearing, which took place over the course of five days in February and March 2022. (Petn. Exh. C at 4.)[8]

On August 11, 2022, the court held oral argument. It took the matter under submission on September 16, 2022, following

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[8] In the interests of efficiency, respondent incorporates by reference here the superior court's comprehensive recounting of the evidence adduced at the evidentiary hearing. (See Petn. Exh. C at 4-24.) Respondent discusses the evidence, *post*, as it relates specifically to petitioner's contentions.

proposed memorandums of decision having been filed by the parties. (Petn. Exh. C at 4.)

On December 20, 2022, the superior court denied the petition. (Petn. Exh. C at 55.)

B. Relevant law

1. Evidentiary hearing

"Where, as here, the superior court has denied habeas corpus relief after an evidentiary hearing (viz., the hearing held on the order to show cause ordered in response to petitioner's first habeas corpus petition) and a new petition for habeas corpus is thereafter presented to an appellate court based upon the transcript of the evidentiary proceedings conducted in the superior court, the appellate court is not bound by the factual determinations [made below] but, rather, independently evaluates the evidence and makes its own factual determinations." (*In re Resendiz* (2001) 25 Cal.4th 230, 249.) Factual determinations "are entitled to great weight . . . when supported by the record, *particularly with respect to questions of or depending upon the credibility of witnesses the [superior court] heard and observed.*" (*Ibid.*) "On the other hand, if [the] difference of opinion with the lower court . . . is not based on the credibility of live testimony, such deference is inappropriate." (*Ibid.*, italics added.)

"*The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations* [citation]; consequently, we give special deference to the referee on factual questions 'requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has

the opportunity to observe the witnesses' demeanor and manner of testifying' [citation]." (*In re Thomas* (2006) 37 Cal.4th 1249, 1256; italics added.)

Being able to view the demeanor of the witnesses and evaluate their veracity is "of vital importance when, as here, the critical decision turns on the credibility of the witnesses." (*In re Hitchings* (1993) 6 Cal.4th 97, 114.)

2. Juror misconduct

Criminal defendants have a constitutional right to a trial by unbiased, impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings, supra*, 6 Cal.4th at p. 110.) Thus, a conviction cannot stand if even one juror was improperly influenced. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "Due process means a jury composed of persons capable and willing to decide the case solely on the evidence before it . . . ." (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) The jury's verdict must be based only on the evidence presented at trial in order to satisfy the defendant's due process rights. (*In re Boyette* (2013) 56 Cal.4th 866, 890.)

Voir dire examination serves to protect a defendant's constitutional rights "by exposing possible biases, both known and unknown, on the part of the potential jurors." (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554.) "[D]uring jury selection the parties have the right to challenge and excuse candidates who clearly or potentially cannot be

fair . . . . Voir dire cannot serve this purpose if prospective jurors do not answer questions truthfully." (*In re Cowan* (2018) 5 Cal.5th 235, 247, internal quotation marks omitted.) Lying about or omitting material facts during voir dire can demonstrate prejudgment of the case, and thus, actual bias. (See *People v. Nesler* (1997) 16 Cal.4th 561, 585-586, 588.)

"A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct. Such misconduct includes the unintentional concealment, that is, the inadvertent nondisclosure of facts that bear a substantial likelihood of uncovering a strong potential of juror bias." (*In re Manriquez* (2018) 5 Cal.5th 785, 796, internal citations and quotation marks omitted.)

Where misconduct has occurred, there is a rebuttable presumption that it was prejudicial. The burden is on the prosecution to rebut the presumption by establishing there is no substantial likelihood that one or more jurors were actually biased against the defendant. (*In re Manriquez*, *supra*, 5 Cal.5th at p. 797; *Holloway*, *supra*, 50 Cal.3d at pp. 1108-1109; *In re Hitchings*, *supra*, 6 Cal.4th at p. 111 [It is misconduct, and therefore presumptively prejudicial, for a juror to conceal relevant facts during the jury selection process].)

Whether a defendant suffered prejudice from juror misconduct, "is a mixed question of law and fact subject to an appellate court's independent determination." (*Nesler*, *supra*, 16 Cal.4th at p. 582.) Thus, a reviewing court must determine

whether any juror was unable to put aside any preconceived opinions and to render a verdict based solely upon the evidence received at trial. (*Id.* at pp. 582-583.) A "verdict will only be set aside if there appears to be a substantial likelihood of juror bias." (*People v. Loker* (2008) 44 Cal.4th 691, 747.) That is, the presumption of prejudice is rebutted and the verdict will stand if the entire record and the surrounding circumstances, indicate "there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant." (*In re Hamilton* (1999) 20 Cal.4th 273, 296; see *McDonough Power Equipment, Inc. v. Greenwood*, *supra*, 464 U.S. at pp. 555-556 [an honest yet mistaken answer to a question on voir dire rarely amounts to a constitutional violation, and even an intentionally dishonest answer is not fatal provided that the falsehood does not reflect a lack of impartiality].) The standard is objective. (*In re Hamilton*, *supra*, at p. 296.) The test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias. (*In re Manriquez*, *supra*, 5 Cal.5th at p. 798; *In re Boyette*, *supra*, 56 Cal.4th at pp. 889-890.) "The standard is a pragmatic one, mindful of the day-to-day realities of courtroom life [citation] and of society's strong competing interest in the stability of criminal verdicts." (*In re Manriquez*, at p. 798, internal quotation marks omitted.)

Courts may find a nondisclosure to have been inadvertent when a juror *credibly* provides a reason for the nondisclosure. (*In re Manriquez*, *supra*, 5 Cal.5th at p. 806; *In re Cowan*, *supra*, 5

Cal.5th at pp. 244-246.) While the Supreme Court in *Manriquez* stated that a factfinder could not blindly accept a juror's representation of impartiality, it ultimately rested its denial of the habeas petition in that case largely on the factfinder's credibility determinations. (*In re Manriquez*, at pp. 801-810; see also *id.* at p. 799 ["We generally defer to a referee's determination of witnesses' credibility because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying" (internal quotation marks omitted)].) The United States Supreme Court has stated that the assessment of juror bias is "essentially one of credibility, and therefore *largely one of demeanor.*" (*Patton v. Yount* (1984) 467 U.S. 1025, 1038, italics added.)

C. The superior court correctly found no juror bias in questionnaire omissions regarding the Kinsey or Whiteside incidents

Petitioner agrees that juror misconduct cases turn on credibility determinations. (Petn. at 129 ["credibility is central to the inquiry"].) Indeed, Juror No. 7 was on the witness stand for two full days while various aspects of her personal life and actions related to this case—albeit relevant—were probed and dissected in minute, excruciating detail by the parties. The superior court's ability to observe and assess Juror No. 7's demeanor while the juror answered the litany of questions and provided explanations for her decades-old actions warrants appropriate consideration by this Court despite petitioner's contentions to the contrary.

The superior court summarized its decision denying the petition:

> The Court finds that several of the answers provided by Juror No. 7 on her juror questionnaire were false in certain respects. This shifts the burden to Respondent to demonstrate that she was not biased against Petitioner. The Court finds that Respondent has sustained its burden. The Court concludes that Juror No. 7's responses were not motivated by pre-existing or improper bias against Petitioner, but instead were the result of a combination of good faith misunderstanding of the questions and sloppiness in answering. The Court's findings are based on the evidence in the record, including an assessment of the credibility of Juror No. 7 and the other witnesses pursuant to the factors recited above.

(Petn. Exh. C at 30.)

Respondent does not dispute the superior court's determination that several of Juror No. 7's answers in her juror questionnaire were false and constituted misconduct. (Petn. Exh. C at 31-33.)[9] Dispositively, however, the superior court's decision that the prosecution had carried its burden to show that Juror No.

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[9] The false answers were to questions Nos. 54a, 54b, and 74 in the juror questionnaire. Questions 54a and 54b asked, respectively: "Have you ever been involved in a lawsuit (other than divorce proceedings?" Juror No. 7 checked "NO." "If yes, were you: ___The plaintiff ___The defendant ___Both." Juror No. 7 left the latter question blank. (Petn. Exh. C at 4.) Question 74 inquired: "Have you, or any member of your family, or close friends, ever been the VICTIM or WITNESS to any crime?" Juror No. 7 checked "NO." (Petn. Exh. C at 5.) Juror No. 7's questionnaire is found within Petition Exhibit B, listed as Evidentiary Hearing (EH) Exhibit No. 4. Other evidentiary hearing exhibits cited herein are contained in Exhibit B, as well.

7's false answers were not motivated by bias against petitioner is correct and supported by substantial evidence, as we argue, *post*.

1. Juror No. 7's background and appeal as a favorable defense witness

Juror No. 7 grew up in East Palo Alto. She had a high school education with limited training as a certified medical assistant. Her brother served time in state prison for a drug-related offense and her mother was a methadone drug counselor. Juror No. 7 testified at the evidentiary hearing that she had been in many fights in her life. She had four children with three different fathers, but never married. When she reported for jury service, she had visible tattoos, and her hair was dyed a "'bright pinkish-red color.'" (Petn. Exh. C at 36.)

As the superior court observed, Juror No. 7's completed juror questionnaire was not a model of clarity. She was unable to state where her parents were born, inserting a question mark for her answers. She listed high school as her educational background, with "'[s]ome [c]ollege or [t]ech [s]chool'" as a "'medical asst., CNA.'" Despite answering that she had received training as a medical assistant, she responded "NO" to the very next question which asked "'[h]ave you ever studied or received training in medicine, psychology, psychiatry, social work, sociology, or counseling?'" Her answers also contained numerous misspellings or grammatical errors. (Petn. Exh. C at 5 & fn. 9.)

In the superior court proceedings, respondent posited that Juror No. 7, as a prospective juror, "appeared to be a juror Petitioner wanted to keep on his jury." (Petn. Exh. C at 36.) This was made evident when petitioner's trial counsel intervened at

the point when the trial court indicated it would excuse her as a prospective juror based on financial hardship. (Petn. Exh. C at 36-37; see also case No. 230782: Informal Resp. at 31 ["Peterson's trial counsel, seemingly anxious to keep Juror No. 7 in the mix at that time, explained that her attitude was not at all unusual. . . ."].)

2. The superior court found Juror No. 7 to be a credible witness

The superior court found Juror No. 7 to be a credible witness based on considerations set forth in Evidence Code section 780, CALCRIM No. 226, and CACI No. 5003:[10]

> Juror No. 7's demeanor while testifying was appropriate, respectful, and forthcoming. (CALCRIM No., 226.) Although she appeared somewhat nervous when she initially took the stand, given the publicity in the case and the accusation of misconduct, that nervousness was, in the Court's view, appropriate and justified. During the two days of questioning that followed, Juror No. 7 never lost her temper, or behaved in any manner other than someone who was respectful of the process and understood the seriousness of the proceeding. Juror No. 7 answered the questions presented to her. Juror No. 7's answers were direct and not evasive, and she spoke in a clear manner. (CACI

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[10] Because the superior court's credibility findings are integral to this Court's resolution of the claim, respondent sets out the lower court's findings verbatim. (See *In re Manriquez*, *supra*, 5 Cal.5th at p. 801 ["We note at the outset that the referee found Juror C.B. to be a credible witness; specifically, that she testified in a 'direct, responsive, thoughtful and consistent manner' to the questions posed, and 'was not evasive, uncooperative or defensive'"].)

No., 5003; CALCRIM No., 226.) When she was unable to understand the question, she so stated. When she was unable to recall an event, she also so stated.

Despite the passage of time, Juror No. 7's memory of the underlying events giving rise to this proceeding were, for the most part, clear. (CACI No., 5003; CALCRIM No., 226.) The Kinsey incident occurred in 2000 and the Whiteside incident in 2001, yet as to each she was able to describe what happened to the best of her recollection. Juror No. 7 credibly and directly explained: why she requested a restraining order against Ms. Kinsey; the lifestyle she and Mr. Whiteside shared and the events that led to his arrest in 2001; her reasons for "dropping" the civil lawsuit against Ms. Kinsey; and her reason for reaching out to an acquaintance who was also a police officer when she claimed that Ms. Kinsey violated the restraining order.

Although Petitioner alleges that Juror No. 7 was biased against him when she filled out her questionnaire in 2004, there is no evidence that her testimony during this proceeding was influenced by bias or prejudice. (CACI No., 5003; CALCRIM No., 226.) Juror No. 7 requested and was granted immunity. (CALCRIM No., 226.) Nothing that she said could have been used against her by the District Attorney. Put another way, she had every reason to be truthful during the evidentiary hearing. In addition, there is no evidence that Juror No. 7 harbored a personal interest in how this Petition is decided.

(Petn. Exh. C at 34-35.)

The superior court also found that Juror No. 7's December 2020 declaration, prepared with the assistance of an attorney, corroborated her testimony. (Petn. Exh. C at 44-46.) In her declaration, Juror No. 7 stated, in part, "I responded to the juror questionnaire candidly, truthfully, and to the best of my ability." (EH Exh. No. 10: Juror No. 7 Decl., ¶ 5.) She also stated, "I did

not purposely withhold any information from the court during the jury selection process. I have had countless unpleasant experiences in my life. Those outlined above did not cross my mind during any portion of the jury selection process or during the trial. They did not play any role in my evaluation of the evidence or my verdicts." (EH Exh. 10: Juror No. 7 Decl., ¶ 32.)

3. Petitioner's unborn-child trauma argument related to the Kinsey incident has no merit

Petitioner contends the superior court was wrong in finding Juror No. 7 credible with respect to: 1) her lack of fear of Ms. Kinsey; 2) that she forgot the Kinsey incident when completing the questionnaire; and, 3) she did not consider the Kinsey incident to be a crime. (Petn. at 129-137.)

The superior court summarized its findings about the Kinsey incident and petitioner's unborn-child trauma contention as follows:

> Based on all of the record evidence, the Court is not persuaded that Juror No. 7 was "impacted by the trauma of having her own unborn child threatened," such that she was prejudiced against Petitioner. The Court accepts and credits Juror No. 7's explanations and finds the non-disclosures to be inadvertent. The Court further finds that Juror No. 7 did not intentionally conceal information on the jury questionnaire to punish Petitioner for what she had herself experienced when she was pregnant. The Court finds credible that for Juror No. 7, these incidents simply did not cross her mind, in the context of these questions as asked during the jury selection process. In Juror No. 7's words, "I don't hold on to things. I didn't remember. It didn't cross my mind." (RT 84:24-25.)

(Petn. Exh. C at 38-39.)

The superior court's findings are supported by substantial evidence, as respondent explains, *post*.

As a preliminary matter, we incorporate by reference here the superior court's account of the evidence adduced at the hearing surrounding the September 23, 2000 incident in Santa Clara County involving Ms. Kinsey and subsequent interactions between the women leading Juror No. 7 to apply for a restraining order in San Mateo County where Juror No. 7 was then living; the order was issued in December 2000. (Petn. Exh. C at 13-15; see also EH Exh. 10: Juror No. 7 Decl., ¶¶ 19-20; case No. S230782: Informal Resp. at 26-27.)

Juror No. 7 was no shrinking violet. That assessment is borne out by her testimony at the hearing as to how she grew up and conducted her life as an adult.[11] The Kinsey incident was not the traumatic event for Juror No. 7 that petitioner portrays and which he contends should have been front and center on Juror No. 7's mind when she completed the juror questionnaire. On the contrary, the incident was relationship drama attributable to "a love triangle" involving the juror, her on-and-off-again boyfriend Mr. Whiteside, and Mr. Whiteside's former girlfriend, Ms. Kinsey. (Petn. Exh. C at 35.)

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[11] As one example, Juror No. 7 testified with respect to the Whiteside incident, discussed *post*, that when police officers arrived at their residence, she said to them, "'I didn't fucking call you. I don't have shit to say to you. Go talk to him. He called you.'" (RT 72.)

Juror No. 7 was 30 years old and approximately three months pregnant with Mr. Whiteside's child when the Kinsey incident occurred in September 2000. Mr. Whiteside was 22 years old. (Petn. Exh. C at 35.) Juror No. 7 described Mr. Whiteside as a "Papa was a Rolling Stone" type of dating partner because he had relationships with many women. (RT 98.) Juror No. 7 believed that Ms. Kinsey felt some ongoing animosity toward her owing to the affection Ms. Kinsey still felt for Mr. Whiteside. (RT 96.)

As the superior court noted, before seeking the restraining order, Juror No. 7 called Ms. Kinsey to try and stop Ms. Kinsey's problematic behavior. (Petn. Exh. C at 35; EH Exh. 1; case No. S230782: Petn. Exh. 45, HCP-909.)[12] Juror No. 7 explained that she sought the restraining order against Ms. Kinsey in 2000

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[12] Petitioner contends that the superior court impermissibly relied on hearsay in the form of the supporting narrative for the restraining order. (Petn. at 130-131 & fn. 26.) The challenged statement about Juror No. 7's phone call to Ms. Kinsey is admissible as a prior consistent statement by Juror No. 7. Notwithstanding the hearsay rule, evidence of witness's prior consistent statements may be admitted to rebut evidence of the witness's prior inconsistent statement where the consistent statement was made before the alleged inconsistent statement. (Evid. Code, §§ 1236, 791, subd. (a).) Prior consistent statements are also admissible for their truth to rebut a charge of improperly motivated testimony when the prior consistent statement was made before the improper motive was alleged to have arisen. (Evid. Code, §§ 1236, 791, subd. (b).) The statement that Juror No. 7 attempted to call Ms. Kinsey rebuts petitioner's implication that Juror No. 7 was lying at the hearing regarding whether she felt Ms. Kinsey posed a threat to Juror No. 7's unborn child.

because she "didn't want to fight" Ms. Kinsey since she could lose the baby. (RT 5.) Juror No. 7 also explained that she filed the restraining order to be "spiteful." (RT 52.) When asked by petitioner's counsel if she had a "genuine fear" that Ms. Kinsey was going to hurt her child, Juror No. 7 replied, "Nope." (RT 52.) She elaborated that Ms. Kinsey "wasn't going to deliberately hurt my child but if we fought and rolled around like some dummies on the ground then, yes, I would be fearful that I would lose my child doing something like that." (RT 53.)

Assessing Juror No. 7's testimony about the Kinsey incident, the superior court stated: "Witnessing her very candid demeanor when she described her life and her life experiences, the Court finds her testimony vis-à-vis Ms. Kinsey, while unusual, to be true." (Petn. Exh. C at 36.) In other words, while the high drama between Juror No. 7 and Ms. Kinsey might have been a traumatic and memorable event indelibly stamped on the mind of someone with a less colorful history, it was understandably believable that Juror No. 7—based on her upbringing, education, and other life experiences—did not consider it a particularly dramatic incident, let alone a life-altering event, such that she would have intentionally withheld the information so as to secret herself on petitioner's jury and convict him.

It is fair to say that petitioner's upbringing differed most significantly from what the evidence showed to be Juror No. 7's circumstances. (See case No. S132449: Resp. Br. at 148-164, [detailing petitioner's privileged upbringing and lifestyle].) Therefore, the lens through which petitioner views Juror No. 7's

conduct is clouded by his own expected reactions. Petitioner's attempt to divorce Juror No. 7's actions from her lived experience should be rejected. The superior court appropriately assessed Juror No. 7's relevant conduct and explanations in the context of the juror's background.

Our Constitution demands that jurors be selected from a cross section of the community as a means of ensuring the defendant's right to an impartial jury. (*People v. Crittenden* (1994) 9 Cal.4th 83, 119.) This requires a process that allows for varied levels of education and diverse backgrounds and experiences, which "is both the strength and the weakness of the institution. . . . 'The criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. . . . Jurors are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.'" (*In re Hamilton, supra*, 20 Cal.4th at p. 296, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 654-655.)

"[T]he jury system is fundamentally human." (*People v. Danks* (2004) 32 Cal.4th 269, 302.) "[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citation.] Moreover, under that "standard" few verdicts would be proof against challenge.' [Citation.] 'The safeguards of juror impartiality . . . are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' [Citation.]" (*Ibid.*)

Petitioner argues that the superior court's credibility findings were erroneous because Juror No. 7 lied under penalty of perjury three time in the superior court: in her attorney-assisted 2020 declaration in relation to the OSC and in her filed papers and testimony in 2000 in support of her request for a restraining order against Ms. Kinsey. (Petn. at 129-130.)

Indeed, the superior court noted that certain aspects of Juror No. 7's hearing testimony conflicted with her application for a restraining order. (Petn. Exh. C at 37.) However, the court credited the fact that Juror No. 7 admitted at the evidentiary hearing that she had been untruthful, and very "candidly" explained her reasons for seeking a restraining order against Ms. Kinsey: In light of her pregnancy, Juror No. 7 did not want to go mano a mano with Ms. Kinsey despite engaging in physical altercations in the past, and Juror No. 7 explained that she sought the restraining order out of spite given her history with Ms. Kinsey and Ms. Kinsey's history with Mr. Whiteside. (Petn. Exh. C at 37-38; RT 52, 53, 297.) She testified that she was also motivated by spite when she called the police to allege Ms. Kinsey's violation of the restraining order when it was clear that Ms. Kinsey posed no threat. (Petn. Exh. C at 37-38; RT 195.)

Contrary to petitioner's suggestion, the superior court was not minimizing Juror No. 7's untruthfulness with respect to the restraining order application and enforcement. Rather, the court credited her explanations as to the underlying circumstances and her motivations as providing the missing context for the prior untruthful statements. The evidence amply demonstrated that

in filling out the restraining order and calling the police, Juror No. 7 was motivated to seek retribution (out of spite) against Ms. Kinsey in relation to the interpersonal dynamics involving Mr. Whiteside, not because she feared Ms. Kinsey was trying to end Juror No. 7's pregnancy at the time.

Beyond the restraining order civil action, Juror No. 7 also acknowledged that she had filed a second lawsuit against Ms. Kinsey. (RT 42-43.) No court records or other evidence pertaining to the lawsuit were admitted at the evidentiary hearing. (Petn. Exh. C at 15.) The second lawsuit was filed in Santa Clara County and sought "lost wages and a number of other things." (RT 42-43.)

Juror No. 7 testified that she understood a lawsuit to mean "[y]ou're suing somebody for money" (RT 290; EH Exh. 10: Juror No. 7 Decl., ¶ 10), though she subsequently explained that in her mind she "didn't sue [Ms. Kinsey]" (RT 291) because she "dropped [the] charges" (RT 291) the first time she appeared before a judge about the civil lawsuit (RT 94). In fact, Juror No. 7 did not remember why she filed the lawsuit to begin with. (RT 94.) She had no training as an attorney or paralegal. (EH Exh. 10: Juror No. 7 Decl., ¶ 3.)

When asked why she dropped the suit, Juror No. 7 replied, "'[c]ause it was over with, and her and I came to the realization that we were both stupid, and this was over a stupid guy, and there was no need to continue." (RT 94.) Juror No. 7 stated that after she dropped the lawsuit, "Marcella and I stood outside and we talked and kind of made amends." (RT 94.)

The superior court found this nondisclosure "to be an honest mistake."[13] (Petn. Exh. C at 38.) The law and evidence supports the court's finding. Courts "must be tolerant, as jurors may forget incidents long buried in their minds, misunderstand a question or bend the truth a bit to avoid embarrassment." (*In re Boyette, supra*, 56 Cal.4th at pp. 880-881.) "[J]urors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." (*McDonough Power Equip. v. Greenwood, supra*, 464 U.S. at p. 555.)

In this case, Juror No. 7 could not recall why she filed a suit for money against Ms. Kinsey and eventually asked the court to dismiss it upon her first court appearance because she and Ms. Kinsey realized they were both "stupid" fighting over a "stupid guy." They were trying to come to a truce. Under these circumstances, it was not unreasonable then for Juror No. 7 to have mistakenly omitted the information in her juror questionnaire some years later, as the superior court found after having assessed the credibility of the juror's explanations.

Nonetheless, petitioner once again attacks the superior court's credibility findings as they relate to its determination that Juror No. 7's omissions regarding the Kinsey incident were unintentional. (Petn. at 132-135.) He describes the incident with

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[13] The superior court noted wryly that even some of the trained professionals involved in the current proceedings had made inadvertent mistakes. (Petn. Exh. C at 38, fn. 41.)

Ms. Kinsey and related events as "life-altering" such that there was no possibility Juror No. 7 could forget to mention them in the questionnaire. (Petn. 134.) The record does not support that contention. On the contrary, there is substantial evidence that drama was a near-constant companion in Juror No. 7's life. As mentioned, she grew up in East Palo Alto—an area then troubled by high crime rates. She had a high school education. Her brother served time in San Quentin where she went "all the time" to see him. (EH Exh. 5: HCP-941 [voir dire].) Her mother was a methadone drug counselor. Juror No. 7 testified at the evidentiary hearing that she had been in many fights in her life. She had four children with three different fathers, but never married. At the time she completed her juror questionnaire, her children—all boys—were ages 15, 11, 2, and 1. (EH Exh. 4: HCP-885 [questionnaire].) One need not be a parent to appreciate that being the mother of four children in that age range is much more likely to be a life-altering experience and might, in fact, be one explanation for overlooking years-old events when completing a questionnaire.[14]

In support of his argument, petitioner contends that Juror No. 7's conduct is no different from that of the juror at issue in *People v. Blackwell* (1987) 191 Cal.App.3d 925, a domestic violence murder. (Petn. at 135.) However, a closer look reveals

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[14] As the jury's verdicts represent, petitioner could not abide the prospect of having only one child, let alone being responsible for four.

that *Blackwell* is readily distinguishable and instructive in that regard.

In *Blackwell*, the evidence showed that both the victim and the defendant drank heavily. The defendant testified that her husband, the victim, often became violent and assaultive towards her when he had been drinking. She claimed that on the day of the killing, the victim had held a gun to her head and threatened to kill her. She subsequently shot the victim to prevent further beatings or her own death. (*Blackwell*, *supra*, 191 Cal.App.3d at pp. 927-928.)

After the defendant was convicted of second degree murder, she filed a motion for a new trial on the basis of misconduct by a juror, Ms. R. During voir dire, in response to questions regarding alcoholism and domestic violence within her family, juror R denied any experience or exposure to either. She specifically and repeatedly denied that anyone in her family had difficulties with alcohol and later specifically denied that she or anyone in her family had any experience with spousal or other domestic violence. In response to a question regarding how she and her husband resolved differences, juror R stated they either talked through the problem or one of them would go outside and sulk. When asked about her husband's drinking she replied "He drinks occasionally." Finally, she specifically denied having any "preconceived position" toward this case involving "battering or abuse . . . ." (*Blackwell*, *supra*, 191 Cal.App.3d at p. 928.)

In support of her new trial motion, the defendant submitted a declaration from juror R. The court summarized the evidence as follows:

> In that declaration juror R. revealed that she was the victim of an abusive former husband who became physically violent when drinking. She compared her former husband to the victim in the instant case, and stated that she felt that appellant should have handled the problem as juror R. had handled it with her former husband. She declared, "*Based upon my personal experiences, it is my opinion that* [followed by a description of juror R.'s personal views on battered wives]." (Emphasis ours.) She went on to declare that "[s]ince I was personally able to get out of a similar situation without resorting to violence, I feel that if she had wanted to, [appellant] could have gotten out, as well."

(*Blackwell*, *supra*, 191 Cal.App.3d at p. 928.)

The court had absolutely no doubt that misconduct had occurred:

> We conclude that the subject voir dire questions in the instant case were sufficiently specific and free from ambiguity so that the only inference or finding which can be supported is that juror R. was aware of the information sought and deliberately concealed it by giving false answers. In fact, she could be prosecuted for perjury. (See, e.g., *People v. Meza* (1987) 188 Cal.App.3d 1631.) It is also apparent that juror R. drew upon her personal experience with a similar domestic situation to determine appellant's guilt.

(*Blackwell*, *supra*, 191 Cal.App.3d at pp. 930-931.)

The facts in *Blackwell* stand in sharp contrast to those in this case. First, as detailed above, Juror No. 7's personal experiences with Ms. Kinsey did not parallel the facts of

petitioner's case. That key fact stands in sharp contrast to *Blackwell* where the juror—as revealed by her own sworn declaration—had been in *the same situation* as the defendant: a battered woman who suffered physical abuse at the hands of a partner after he consumed alcohol. Second, unlike with the juror in *Blackwell,* there is no credible evidence of intentional concealment on the part of Juror No. 7.

Next with relation to the Kinsey incident, petitioner contends that the superior court was wrong to find Juror No. 7 credible given her testimony and declaration as to whether Ms. Kinsey's behavior was criminal. (Petn. at 136-137.)

Only after being peppered with questions about it by petitioner's counsel—nearly 20 years after she completed the questionnaire—did Juror No. 7 belatedly realize that, yes, some of Ms. Kinsey's behavior could be classified as criminal. (RT 55-56.) Some of the behavior Juror No. 7 did not consider criminal. For example, the time when Ms. Kinsey was holding one of Juror No. 7's children. Even though Juror No. 7 had called the police about it, she did not believe a crime was committed. She called the police "out of spite." (RT 195.)

Juror No. 7 reaffirmed what she had said in her declaration that she was never called to testify in any criminal action involving Ms. Kinsey. (RT 280.) "I did not and still do not personally know what resulted of Marcella Kinsey's behavior the night that she disturbed my peace. I did not testify against her in any criminal action and cannot state with any level of certainty whether her actions resulted in any conviction or otherwise.

Based on the fact that I did not participate in any criminal proceedings, I did not consider myself a victim of a crime. I still do not. I never sought to prosecute Marcella Kinsey for her behavior for that very reason." (EH Exh. 10: Juror No. 7 Decl., ¶ 22.) Juror No. 7 further declared that who the law might consider a victim of crime did not correspond to her own perception. (EH Exh. 10: Juror No. 7 Decl., ¶ 24.)

A fair reading of the record, when properly viewed in the context of Juror No. 7's background—reflects that her understanding of the lines between criminal conduct and noncriminal conduct were quite blurred. It was clear that Juror No. 7 did not see herself as Ms. Kinsey's victim—or anyone's victim for that matter, which would of course influence whether Juror No. 7 thought crimes had been committed. (RT 282 ["I wasn't, and I'm still not a victim"].) Even more to the point, she testified: "I've been in many fights, and I don't consider myself a victim. Might be different from you or somebody else. You may consider a fight – you may consider that you're a victim, but I don't." (RT 31-32.)[15] The concepts of victim and crime are intertwined.

Nor is Juror No. 7's self-assessment and blurring of these lines unique. In *Manriquez*, the juror explained that she "'did not consider anything in [her] life as criminal acts.' She elaborated:

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[15] It is perhaps worth noting that at least one fellow juror—the one who testified at the hearing—described Juror No. 7 as "pretty strong-willed." (RT 359.) This seems consistent with Juror No. 7's testimony regarding her self-perception.

'I did not consider myself a victim of a crime. I was a victim of circumstance. And that being said, I never thought of myself as having been a victim of any kind. So [at petitioner's trial], I did not even think about the fact that I had been criminally assaulted . . . .'" (*In re Manriquez*, *supra*, 5 Cal.5th at p. 796.)

And, while respondent does not condone calling the police to spite the former girlfriend of one's significant other (or to spite anyone, for that matter), Juror No. 7's admitted motivation for calling the police is further evidence that she did not see herself as a victim of a crime. Accordingly, the quantum of evidence discussed, *ante*, along with the court's credibility findings, constitute substantial evidence that the Kinsey incident omissions were inadvertent and not indicative of bias.

4. Petitioner's domestic-violence-victim argument related to the Whiteside incident has no merit

Petitioner contends the superior court was also wrong in finding Juror No. 7 credible with respect to her assertion that she was not a domestic violence victim with respect to the incident involving Mr. Whiteside.[16] (Petn. at 137-138.)

As explained above, Mr. Whiteside is the former boyfriend of Juror No. 7 and the father of her two youngest children. (RT 66, 69.)[17] The couple were together on and off for about six years.

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[16] Juror No. 7 testified that she had a six-year on-and-off relationship with Mr. Whiteside. (RT 69-70.)

[17] The superior court explained in detail how it came to be that Mr. Whiteside did not testify at the hearing despite his

(continued...)

(RT 69.) Mr. Whiteside was the named suspect in the November 2001 purported domestic violence incident involving Juror No. 7.

According to Juror No. 7's testimony, Mr. Whiteside and Juror No. 7 had an argument. Juror No. 7 followed Mr. Whiteside into the bedroom, shut the door, and "took off on him . . . I punched him." (RT 70-71.) Mr. Whiteside never touched Juror No. 7. (RT 71.) She believed that during the incident, she sustained a cut to her lip when her lip got caught in her braces when she "was screaming at him." (RT 71.)

Mr. Whiteside called the police. (RT 72.) When they arrived, Juror No. 7 said to the officers, "'I didn't fucking call you. I don't have shit to say to you. Go talk to him. He called you.'" (RT 72.) When an officer asked what had happened to her lip, Juror No. 7 said that she did not know because she did not realize she had a small cut there. She reiterated her displeasure, "'Get the fuck out of my house 'cause I didn't call you.'" (RT 72.)

Mr. Whiteside, who was Black, was arrested and went to jail that day. Juror No. 7 explained, "I know he went to jail; backfired him calling the police on me." (RT 73, 74.) She knew there was a court case connected to the incident, but she and Mr. Whiteside did not discuss it. Juror No. 7 did not know that he "had pled guilty to any charge." (RT 75-76.) Mr. Whiteside pleaded no contest to simple battery (§ 242). (Petn. Exh. B,

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(...continued)

involvement in several of the events in question. (Petn. Exh. C at 39-41.)

Summary San Mateo County Superior Court Case No. SM315961.)

Subsequently, a female police officer interviewed Juror No. 7 about the incident. In Juror No. 7's view, the officer wanted her "to say that Eddie hit me, so I wasn't going to then, now, or any time. *Eddie never hit me, so I was not a victim of domestic violence.*" (RT 78, italics added.) Juror No. 7 was aware of a restraining order stemming from the incident, but she ignored it because Mr. Whiteside "didn't touch" her and she "wasn't scared." (RT 77.)

Juror No. 7 acknowledged that hitting Mr. Whiteside was a crime. (RT 81.) However, that acknowledgment came in hindsight. As for being a witness to a crime, Juror No. 7 said that she was not a witness in that regard because she did not stand outside her body and see her hit Mr. Whiteside. (RT 81.)

As for omitting this incident from the juror questionnaire, Juror No. 7 explained that because she did not see herself as a victim with regard to the Whiteside incident, and it never crossed her mind during jury selection. (RT 281-282.)

The superior court made this observation about the Kinsey and Whiteside incidents: "[L]ooking at the record as a whole, the Court cannot help but note the semblance between the motives underlying the Kinsey incident and the Whiteside incident. While the Court does not condone violence for any reason, the record is clear that due to his ongoing infidelity, Mr. Whiteside was physically attacked by two women with whom he was romantically linked—Juror No. 7 and Ms. Kinsey—in the span of

a little over a year."[18] (Petn. Exh. C at 41.) The superior court also aptly noted that in 2001 when the incident occurred, "a historical bias in policing" may have been an animating factor, along with the cut to Juror No. 7's lip, which led the police to arrest Mr. Whiteside who was a young Black man. (Petn. Exh. C at 41-42.) Based on these considerations, "the Court [found] credible Juror No. 7's testimony that she was the one who hit Mr. Whiteside and that he never touched her." (Petn. Exh. C at 42.)

Unsurprisingly, petitioner does not credit Juror No. 7's account of what transpired between her and Mr. Whiteside. He contends Juror No. 7's testimony does not square with the "contemporaneous actions of all parties." (Petn. at 138.) However, as the superior court pointed out, Mr. Whiteside did not testify and, therefore, it came down to whether Juror No. 7's testimony was credible. The superior court found that it was. And, as between petitioner and the superior court, only one was impartial.

D. Petitioner's argument concerning Juror No. 7's pretrial and posttrial conduct as evincing bias is without merit

Petitioner insists that Juror No. 7 prejudged the case and was biased against him from the start. He also contends that her posttrial actions show bias. (Petn. at 139-146.) He is wrong. Juror No. 7's actions do not demonstrate bias.

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[18] Ms. Kinsey's actions involved both Juror No. 7 and Mr. Whiteside.

1. Pretrial

As to prejudgment, petitioner points to Juror No. 7's statement to fellow jurors about making petitioner pay for killing Conner ("Little Man" as she called him). (Petn. at 139.) Yet, what petitioner conveniently omits, as explained by a fellow juror and hearing witness, is that Juror No. 7 made the statement only *after* the matter was submitted to the jury for deliberation and before she learned that the jurors had already established a process for deliberations, having just replaced a juror. (RT 363-367.) The juror immediately corrected Juror No. 7 and explained the agreed-upon deliberation process. (RT 365.)

When questioned by the parties about any prejudgment, Juror No. 7 explained: "Before the trial I didn't have any anger or any resentment towards Scott at all. After the trial it was a bit different because I sat through the entire trial and listened to the evidence." (RT 33-34; see also 282 ["Yeah, I formed an opinion after, absolutely"].) This is what jurors are supposed to do.

Prejudgment of a case is very different than bringing one's life experiences to bear on the evaluation of evidence. "[J]urors generally are expected to interpret the evidence presented at trial through the prism of their life experiences. [Citation.]" (*In re Manriquez*, *supra*, 5 Cal.5th at p. 815.) There was no evidence in this case that Juror No. 7 was unable to deliberate with her fellow jurors in coming to a verdict. (*Id.* at p. 818 ["Because jurors may form preliminary assessments about the case, that these assessments are not later swayed by their fellow jurors' opinions is not necessarily a form of prejudgment indicative of bias"].)

Further, Juror No. 7's statement is not remotely similar to the situation in *People v. Weatherton* (2014) 59 Cal.4th 589, the case upon which petitioner primarily relies. (Petn. at 139.) The superior court persuasively distinguished that case:

> In *Weatherton*, the juror repeatedly talked about the case outside deliberations and did so in defiance of the trial court's repeated admonitions. (*People v. Weatherton, supra*, 59 Cal.[4]th at p. 599.) The juror discussed the case during his daily commute, at lunch, during cigarette breaks, in court hallways, and in elevators. (*Ibid.*) He telephoned non-deliberating jurors during deliberations, reporting what was occurring in the jury room. Multiple jurors testified that, long before the prosecution rested its case, the juror conveyed a belief in defendant's guilt. (*Ibid.*) Jurors testified that, on the first day of trial, the juror stated that [a called witness'] testimony was dispositive on guilt. (*Ibid.*) In other words, he "expressed these opinions long before the prosecution finished its case and before the defense was able to present any evidence in rebuttal." (*Ibid.*) On these grounds, the California Supreme Court found that given the nature, scope, and frequency of the juror's misconduct, along with his repeated and admitted untruthfulness on a variety of topics, the People had not rebutted the presumption of bias. (*Id.* at p. 600.)

(Petn. Exh. C at 50.)

Next petitioner contends that Juror No. 7's purported eagerness to serve on his jury despite a crippling financial hardship shows bias. (Petn. at 141-143.)

Perhaps the idiom "the elephant in the living room" has some relevance here. Petitioner does not address one immutable fact that—by itself—undermines his contention that Juror No. 7 had Machiavellian aims to conceal information, secret herself on

his jury, and convict him regardless of the evidence. During hardship excusals, it became apparent that although Juror No. 7 had not requested to be discharged based on hardship, her employer was not prepared to pay her beyond a couple of weeks while it was anticipated that the trial would last five months. The trial court found Juror No. 7 had a financial hardship and excused her from service. The prosecution did not dispute the court's assessment. *Without a word of protest or any other objective manifestation of hesitation, Juror No. 7 picked up her personal belongings and started making her way out of the jury box.* However, petitioner's trial counsel—presumably sensing from her appearance and background that Juror No. 7 could be a favorable defense juror—interceded. It was defense counsel, not Juror No. 7, who requested that she not be dismissed, and who ultimately convinced Juror No. 7 and the trial court that she should not be excused for hardship. (EH Exh. 10: Juror No. 7 Decl., ¶¶ 14-15; Petn. Exh. C at 36 & fn. 9, 48; RT 132-133.)

So, it is reasonable to infer that but for petitioner's trial counsel's intervention Juror No. 7 was content to continue to make her way out of the courtroom after the court had excused her. Those are not the actions of a stealth prospective juror.

For its part, the superior court found the evidence pertaining to Juror No. 7's financial situation at the time of jury selection did not show that she "lied or was otherwise less than candid with the trial court about her financial condition in order to get on the jury." (Petn. Exh. C at 48.) While there were some inconsistencies between Juror No. 7's Income and Expense

Declarations and her questionnaire and voir dire answers, during the evidentiary hearing, the superior court explained why those inconsistencies did not support petitioner's argument that Juror No. 7 ignored a significant financial hardship to secure a spot on petitioner's jury:

> The fact that Juror No. 7 did not list Mr. Whiteside or Ms. Cosio [Juror No. 7's mother] as living with her on her Income and Expense Declaration adds little to support Petitioner's claim of bias and if anything, supports Respondent's claim that Juror No. 7 is not good at filling out legal forms. As a first point, uniform guideline for child support in California is generally determined by the parents' actual income and the level of responsibility for the children—it does not depend on who is living in the home. (Cal. Fam. Code, sections 4053, 4055.) Second, Juror No. 7's lack of attention to detail on legal forms is well documented in this proceeding. For example, Juror No. 7 testified she made a separate mistake on page 2, paragraph 5E on the very same Income and Expense Declaration filed May 10, 2004, when she listed spousal support. "I don't know why I put spousal support. I wasn't married. I was probably thinking child support, but go ahead." (RT 117:2-4.) In the subsequent Income and Expense Declaration filed on September 8, 2004, Juror No. 7 listed "-0-" in response to the same question. Similarly, when Juror No. 7 filled out the form for the restraining order, she listed Marcella Kinsey as her attorney even though Juror No. 7 did not have an attorney for that proceeding. (*Id.* at 259:13-21.)

(Petn. Exh. C at 48-49.)[19]

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[19] The court also detailed examples of form-related mistakes Juror No. 7 made in her juror questionnaire. (Petn. Exh. C at 49.)

But, again, beyond the valid explanations for the any inconsistencies in the paperwork, petitioner's argument that Juror No. 7's eagerness to serve as an indication of bias is eviscerated by the fact that she was on her way out of the courtroom—without reservation or protest—when petitioner's trial counsel intervened and convinced the trial court not to excuse her based on hardship. In fact, that circumstance undermines the entire premise upon which petitioner has predicated purported examples of Juror No. 7's bias against him.

2. Posttrial

Petitioner first argues that the letters Juror No. 7 wrote to petitioner after he was convicted in which she referred to Conner as "Little Man" demonstrates her "substantial emotional involvement in the case" in that she was "impacted by the trauma of having her own unborn baby threatened." (Petn. at 144.)

Actually, the letters show nothing more than the fact that Juror No. 7 was "emotionally impacted by her participation in the trial." (Petn. Exh. C at 52.) Unsurprisingly, the juror who testified at the evidentiary hearing explained that other jurors became "emotional" during the trial and were moved by things such as the crime scene and autopsy photos. (RT 366.) As the superior court aptly discerned, "An emotional reaction to evidence presented during a criminal trial is very different from a

predetermined bias at the outset." There was nothing in the letters evincing a bias against petitioner. (Petn. Exh. C at 52.)[20]

The superior court cited a number of passages from the letters, which showed the emotional toll the trial had taken on Juror No. 7 and other jurors. In her letter dated December 3, 2005, Juror No. 7 wrote: "The jury is going to get together on the 16 of Dec. just for support." "Scott, I just want you to know that its [*sic*] not at all a happy day for us. Each one of us felt like we were just struck by a Mac truck." (EH Exh. 6: HCP-962-963.) She described the trial as an "emotional roller coaster." (EH Exh. 6: HCP-963.) In another letter dated December 17, 2005, Juror No. 7 admits she "had a break down." (EH Exh. 6: HCP-966.) She wrote, "I never knew how much this trial had an impact on me, plus I have never had a great life. All the pressure just hit me. I think it has been the time of year. Our verdict, Laci & Conner." (EH Exh. 6: HCP-966.)

As for petitioner's assertion that the letters showed that Juror No. 7 was fixated only on Conner, the letters also revealed that Juror No. 7 was concerned about how petitioner's actions affected others, including petitioner. (EH Exh. 6: HCP-960-961 ["I will continue to pray for Laci, Conner & the rest of the family . . . as well as you. I hope one day before you pass, you will finally set their souls free"]; HCP-967 ["I think of you & how you are doing. Scott I just can't help but constantly think why? Why

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[20] Juror No. 7 explained that she wrote to petitioner at the suggestion of her therapist. (RT 253.) Whatever one might think about the propriety of that advice, it is not relevant.

was that your only option"]; HCP-976 ["I keep praying for them & you Scott"].) "Furthermore, in none of the letters does Juror No. 7 reveal that at one time or another, the life of her own unborn child had been threatened. At best, the letters demonstrate that Juror No. 7 was sad about what had happened to Laci, Conner and their families and was someone who was seeking to have Petitioner come to peace with his actions." (Petn. Exh. C at 53.) And, by extension, reach a state of peace herself.

Petitioner next points to Juror No. 7's interactions with defense investigators as proof of her bias. (Petn. at 144-146.) Specifically, he complains that Juror No. 7 declined to speak to a defense investigator a second time. (Petn. at 144-145.) However, Juror No. 7's refusal to speak to a defense investigator, again, once it was clear that she had been accused of misconduct does not prove she was biased. If anything, it shows that she was understandably cautious.

Juror No. 7 spoke to a defense investigator on October 26, 2015, right before petitioner filed his first petition in the California Supreme Court on November 23, 2015, which, as we know, included the juror misconduct claim. Juror No. 7 was exceptionally cooperative and candid in her responses. (Informal Oppo. Exh. A [November 2, 2015 "Memo To Counsel"].)[21] For her part, Juror No. 7 identified the investigator she spoke with as

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[21] Respondent has concurrently submitted an application to file the exhibit under seal.

representing petitioner.[22] (RT 221.) The female investigator asked Juror No. 7 a number of questions, which she answered. (RT 223.) Having spoken to a defense investigator voluntarily only to find out that her statements were used to accuse her of misconduct, including with potential criminal consequences, it is readily understandable why she would decline any future interaction with defense investigators. Once bitten twice shy.

As for petitioner's citation to *Manriquez, supra*, 5 Cal.5th 785, it actually supports respondent's position that Juror No. 7's postconviction conduct does not evince bias. As relevant here, the Supreme Court noted:

> And petitioner's contention of a substantial likelihood of actual bias is unavailing in light of the totality of circumstances: (1) posttrial, C.B. voluntarily disclosed her childhood experiences; (2) she cooperated during the habeas corpus investigation; (3) she was calm, "forthright and candid" during the evidentiary hearing, and she displayed no defensiveness, zealotry, or obsession; (4) her experiences were only somewhat similar to petitioner's; (5) there was a notable passage of time between her experiences and petitioner's trial; and (6) there is no evidence that her life experiences had compromised her ability to evaluate the evidence before her.

(*In re Manriquez, supra*, 5 Cal.5th at pp. 817-818.)

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[22] Petitioner points out that it could not have been an HCRC investigator. (Petn. at 144-145, fn. 30.) Assuming that is true, it is immaterial. It is undisputed that Juror No. 7 voluntarily spoke to petitioner's investigator mere days before he filed his habeas petition in the California Supreme Court, including a claim of juror misconduct.

Obviously, the juror's cooperation during the habeas corpus investigation was but one of six factors contributing to the court's conclusion. And, yet, Juror No. 7 did, in fact, cooperate with the defense during the habeas corpus investigation initially. She also continued to cooperate with the investigation, albeit on her own terms, by providing another declaration prior to the evidentiary hearing.[23] The other *Manriquez* factors also counsel against a finding of bias in this case for the reasons stated previously, as the superior court found:

> Setting aside that *In Re Manriquez* and the instant case both involve similar explanations for the non-disclosures, the circumstances post-trial here are distinguishable. First, there was no post-trial questionnaire in this case like there was in *Manriquez*. Ten years passed between Petitioner's guilty verdict and death sentence and the first time Petitioner's investigator from HCRC sought out Juror No. 7. Most importantly, and contrary to Petitioner's assertions, Juror No. 7 *did* speak with his HCRC investigator when invited, and Juror No. 7 was candid with her responses. (See RT 223:4-14.) Juror No. 7 spoke with Petitioner's investigator on November 2, 2015. (*Id.* at 220:14-19; 250:1-9.) Though Juror No. 7 could not really recall the specifics of the discussion, (*id.* at 223:16-20; 225:18-

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[23] Nothing in *Manriquez* limits consideration of cooperation solely with the defense, as opposed to the prosecution. The key question is whether the witness is cooperating in the search to uncover the truth, either through the defense or the prosecution. Indeed, of the two declarations provided by the juror in *Manriquez*, it appears the first was provided to the petitioner and the second to the respondent. (*In re Manriquez*, *supra*, 5 Cal.5th at pp. 791, 794-795 [compare 2007 declaration provided to defense in support of the petition, with 2012 declaration filed with respondent's return].)

> 226:4; 250:15-23), she did recall telling the investigator that "[restraining orders don't do any good" and that she "dropped all charges" against Ms. Kinsey. (*Id.* at 268:3-13; 274:3-275:13.) Petitioner does not argue, nor did he put forward any evidence that Juror No. 7 refrained from discussing the Kinsey incident and the civil lawsuit when asked, or otherwise failed to answer any of the investigator's other questions.

(Petn. Exh. C at 42-43.)

As for petitioner's contention that Juror No. 7 testified under a grant of immunity (Petn. at 146), likewise, it does not show bias. As the superior court explained, the facts underlying the grant of immunity are not in the record and therefore there is no basis for an adverse inference supporting petitioner's contention. (Petn. Exh. C at 43.)

E. The superior court properly applied legal principles on the issue of bias

The superior court determined that Juror No. 7 was not biased against petitioner: "[I]n reviewing the record as a whole," there was "no substantial likelihood" that Juror No. 7 "engage[d] in prejudicial misconduct by failing to disclose her prior involvement, or the involvement of her family and close friends, in legal proceedings." (Petn. Exh. C at 33.) In finding no bias on the part of Juror No. 7, the court cited to California Supreme Court authority on the standard of actual bias. (Petn. Exh. C at 26-27, 33, fn. 36.) The court also found no implied bias under federal law. (Petn. at 33, fn. 36.)

Nonetheless, petitioner argues for a finding of bias under *McDonough Power Equipment, Inc. v. Greenwood, supra,* 464 U.S. 548, or, alternatively, a finding of implied bias under *Dyer v.*

Calderon (9th Cir. 1998) 151 F.3d 970. (Petn. at 146-152.) Necessarily embedded in his argument is the assumption that these standards are more difficult than the actual bias standard under state law, which the superior court applied. (See *In re Manriquez, supra*, 5 Cal.5th at p. 797; *Holloway, supra*, 50 Cal.3d at pp. 1108-1109.) And, while petitioner acknowledges that the superior court did, in fact, evaluate implied bias under the federal standard, he disagrees with the court's decision. (Petn. at 149-151.) And, so the argument goes, had the superior court correctly applied either of these more stringent federal standards, it would have concluded that respondent could not rebut the presumption of prejudice. We disagree. Petitioner has not demonstrated a prima facie case that Juror No. 7 was biased against petitioner no matter which legal standard is applied.

With respect to evaluating a claim of juror bias under federal law, the United States Supreme Court has made plain that the deference due to the trial court "is at its pinnacle." (*Skilling v. United States* (2010) 561 U.S. 358, 396.) A trial court's credibility finding concerning juror bias is afforded a presumption of correctness that a petitioner must rebut with clear and convincing evidence. (*Ybarra v. McDaniel* (9th Cir. 2011) 656 F.3d 984, 992 [applying presumption of correctness to state court factual findings of no juror partiality where petitioner presented no clear and convincing evidence to the contrary]; see also *Miller v. Fenton* (1985) 474 U.S. 104, 114 [noting that a state trial judge is in a far superior position to assess juror bias than federal habeas judges].)

To obtain a new trial on a claim of juror bias for withholding information during voir dire, the defendant must demonstrate that (1) "a juror failed to answer honestly a material question on voir dire," and (2) "a correct response would have provided a valid basis for a challenge for cause." (*McDonough Power Equip., Inc. v. Greenwood*, *supra*, 464 U.S. at p. 556.) "The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." (*Ibid.*; see *Dyer v. Calderon*, *supra*, 151 F.3d at p. 973 ["[E]ven an intentionally dishonest answer [during voir dire] is not fatal, so long as the falsehood does not bespeak a lack of impartiality"].)

Here, the superior court found Juror No. 7's omissions were "inadvertent" and "the result of a combination of good faith misunderstanding of the questions and sloppiness in answering." (Petn. Exh. C at p. 30, 38.) Given the court's finding that there was no intentional concealment or dishonesty, *McDonough* is inapplicable. Additionally, this Court should reject appellant's invitation to overturn the long-established pragmatic standard used to evaluate claims of juror misconduct and to adopt a subjective test that focuses on a defense attorney's personal assessment that the juror might have been peremptorily challenged, regardless of any evidence of actual or implied bias. When assessing whether it is substantially likely a juror was actually biased, our inquiry is "'not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias.'" (*In re Manriquez*,

supra, 5 Cal.5th at p. 798; see also Petn. Exh. C at 22-23 [parties' stipulation to testimony of Mark Geragos].)

Respondent acknowledges there exist federal cases recognizing that even in the absence of actual bias, "in rare instances a court will find implied bias, which is 'bias conclusively presumed as a matter of law.'" (*United States v. Olsen* (9th Cir. 2013) 704 F.3d 1172, 1191 [juror's conversations with friend about the case when it was reported in the news a year before the trial did not support finding of implied bias].) Such bias should be presumed only in "'extreme'" or "'extraordinary'" cases, and has been recognized only in two contexts: "first, 'in those extreme situations "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances,'" [citation] and second, 'where repeated lies in voir dire imply that the juror concealed material facts in order to secure a spot on the particular jury.'" (*Id.* at pp. 1191-1192.)

Here, the circumstances surrounding Juror No. 7's nondisclosures do not constitute an extreme or extraordinary case warranting a finding of implied bias as a matter of law. (Compare *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111-1114 [implied bias found where ex-husband of juror in cocaine distribution case had used and trafficked cocaine, contributing to breakup of the family]; *Dyer v. Calderon*, *supra*, 151 F.3d at pp. 972-974, 979-985 [bias implied where juror in murder case denied during voir dire that she or any family

member had been a crime victim or accused of crime; among other circumstances, her brother was a homicide victim and was killed in a manner similar to the victims in the case on which she sat and her husband had been arrested for rape]; *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 517 [implied bias where in a heroin distribution case sons of juror were themselves heroin users serving prison sentences]; *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71-72 [court should have granted challenge for cause to two prospective jurors who worked for different branches of bank defendant was accused of robbing]; see also Petn. Exh. C at 33, fn. 36 [superior court finding "the facts [in this case] are completely distinguishable from those in *Dyer* and do not support a finding of such an extreme situation"].)

Nor is there is anything in the voir dire of Juror No. 7 that suggests she concealed a bias against petitioner. Actual bias is "a state of mind . . . in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (*In re Manriquez, supra*, 5 Cal.5th at p. 799, citing Code Civ.Proc., section 225, subd. (b)(1)(C).) The prosecutor questioned Juror No. 7 about her attitude toward law enforcement given that her older brother had been in and out of prison. The juror explained that she had visited San Quentin "all the time" to see her brother. (EH Exh. 5: HCP-941.) Yet, she harbored no negative attitude toward law enforcement. (EH Exh. 5: HCP-943.) The prosecutor also asked Juror No. 7 about a tattoo displayed on her arm. She volunteered that she actually had nine tattoos in all. (EH Exh. 5:

HCP-945.) Juror No. 7 acknowledged that some people tended to form opinions about her because of her tattoos. (EH Exh. 5: HCP-945.) She explained that she considered herself open-minded and fair. (EH Exh. 5: HCP-946, 947.) She elaborated: "Because I know what it's like to be judged, and I know what it's like to be prejudged before somebody actually, you know -- how many times have you walked in a room and someone has automatically pinned you for a certain type of person and that's completely opposite of how you are." (EH Exh. 5: HCP-947.) [24] Juror No. 7 assured defense counsel that she was open to the possibility that petitioner, although charged with murder, had not committed the crimes. (EH Exh. 5: HCP-950 ["I'm open to hear anything . . . I mean this is somebody's life."].) She harbored no suspicion that petitioner was guilty. (EH Exh. 5: HCP-951.) Juror No. 7 abided by the principle that the burden of proof was entirely with the prosecution. (EH Exh. 5: HCP-952, 953.)

Finally, in paragraph nine on page 151 of the petition, petitioner attempts to raise a new claim of misconduct based on the manner in which Juror No. 7 answered question number 26, which concerned her opinion of men who cheat on their wives. The Court should summarily reject this argument. First, to the extent petitioner relies on this to challenge the superior court's

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[24] Ironically, this is what petitioner's trial counsel did with Juror No. 7 when he intervened before she could be excused based on hardship; counsel believed she was a defense-favorable prospective juror presumably making prejudgments at that early juncture based on her appearance and hardscrabble background.

findings, the claim is unavailing because it is beyond the scope of the Supreme Court's OSC and the proceedings below. (*In re Monigold* (1988) 205 Cal.App.3d 1224, 1228 [declining to address contentions which were beyond the scope of the OSC].) Second, the claim is procedurally barred as successive since he could have raised it in his Supreme Court habeas petition in conjunction with his primary juror misconduct claim, yet did not. Third, the claim is unavailing. As Juror No. 7 made clear, she was not married to Mr. Whiteside. Moreover, her problems with Mr. Whiteside, as relevant to the issues before the superior court, stemmed not primarily from infidelity, per se, but from the ensuing drama between her, him, and Ms. Kinsey. Nothing about the facts of her unusual situation demonstrate that she was lying in her response. Also, petitioner points to nothing in the record of voir dire wherein Juror No. 7 was asked to elaborate on her questionnaire answer.[25]

In sum, the superior court's decision finding Juror No. 7's mistaken questionnaire omissions did not reflect a bias against petitioner was supported by substantial evidence. "As the referee found, some of [the juror's] omissions from the questionnaire

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[25] Petitioner's reliance on Juror No. 7's letters to Peterson about asking why men cheat do not alter that analysis. Petitioner did not simply engage in an extramarital affair. He murdered his wife and unborn child in order to continue his illicit affair unimpeded by legal constraints or the need for divorce proceedings. It is fair to say that most jurors having sat through petitioner's trial would come away with a jaded view of his extramarital affair.

were based on a dubious interpretation of the relevant question, but his interpretation—though erroneous and unreasonable—was sincerely held." (*In re Boyette, supra,* 56 Cal.4th at p. 890.)

II. PETITIONER IS NOT ENTITLED TO RELIEF ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

Petitioner asserts he is actually innocent of Laci's and Conner's murders based on newly discovered evidence obtained post-conviction in the form of a hearsay statement by two people claiming to have heard a confession to the murder in 2022 by one of the alleged murderers; and, therefore, his conviction, sentence, and confinement violate the state and federal Constitutions. (Petn. at 152-187.)

At the outset, it should be asked why the individuals who have submitted declarations in support of this petition claiming that they heard someone else confess to Laci's and Conner's murders have not gone to the police with their information to have the police track down the "real" murderer? Why did defense investigator Jason DeWitt who interviewed the declarants not go to the police with this information? Why did petitioner's trial attorney (and evidentiary hearing attorney) Pat Harris who also knew of these assertions not go to the police with this information? Why did petitioner's sister-in-law Janey Peterson not go to the police with this information after receiving it via Twitter? Nowhere in any of the declarations submitted in support of this claim does anyone mention going to the police—not even an explanation of why they chose not to go to the police. Indeed, all involved have consistently taken steps to hide the identity of these new witnesses from the authorities, preventing any

investigation. (See Petn. Exh. H-3 at 2 [Janey Peterson advising "Melissa" to delete her tweets].)

Res ipsa loquitur.

Next, the redacted declarations and exhibits upon which petitioner bases this claim are not competent evidence that can be considered by the Court because petitioner has not complied with the relevant rules of court that permit filing of sealed materials. (See Cal. Rules of Court, rules 2.550 & 8.46.) Petitioner did not file a motion nor obtain an order permitting the filing of documents under seal. The materials therefore cannot be considered as supporting his claim. And as currently submitted, the purported declarations include no names and no signatures—they are therefore functionally unsworn and have no value.

Setting aside the lack of proper evidentiary support and suspect nature of this claim, it is unpersuasive for other reasons. First, even if it is arguably new, the "evidence" is not competent evidence; it is unreliable hearsay in and of itself and in consideration of the surrounding circumstances. In any event, in light of the compelling record evidence of petitioner's guilt, such new evidence is not of "such decisive force and value that it would have more likely than not changed the outcome at trial." (§ 1473, (b)(3)(A).)

A. Background on petitioner's third-party culpability defense at trial and in first habeas petition

The defense theory in this case was that Laci was murdered by either of two groups: the individuals who burgled a neighbor's

residence or unhoused people who sometimes were seen in the neighborhood. The jury rejected these theories as did the Supreme Court in petitioner's automatic appeal and first habeas petition.

What petitioner attempts to do in his current petition, is move up the time of the burglary at the Medina residence from December 26 to coincide with the timing of Laci's disappearance on December 24. He must do this so that the timing correlates with his newly discovered evidence of actual innocence. However, that temporal connection cannot be made.[26] Even if the timing were as petitioner contends, there is no credible evidence the burglars were responsible for Laci's and Conner's murders. Laci was missing before the burglary occurred.

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[26] Respondent incorporates by reference the following: 1) the respondent's brief in case No. 132449 at pages 114-116 [purported sightings of Laci]; 116 [Medina burglary]; 116-117, 118-119 [unhoused individuals in the area]; 117 [van in the neighborhood on December 24]; 128-130 [stranger in the neighborhood on December 23 and unclaimed shoes]; and, 2) the informal response in case No. S230782 at pages 111-120 [unfulfilled promises during defense opening statement]; 120-128 [ineffective assistance of counsel regarding Laci sightings]; 128-136 [ineffective assistance regarding Medina burglary].) In these pages, respondent addressed, among other contentions, the Medina burglary, as well as the so-called "tip" from Lieutenant Aponte related to the burglary, which was the subject of a new trial motion.

1. Purported sightings of Laci

Petitioner contends that the jury did not hear from witnesses who reported seeing Laci after the time the prosecution theorized (and proved) she had disappeared. (Petn. at 166.)

Actually, the jury did. The trial judge permitted petitioner's trial counsel to elicit—cleverly as it were—a great deal of hearsay information about these purported sightings without subjecting the information to attack by the prosecution. (58RT 11397, 11399-11402; 59RT 11530; 98RT 18501-18511.) There was a reason counsel did it this way besides disadvantaging the prosecution. As he explained in his declaration in support of the first habeas petition, counsel and other members of the defense team interviewed potential witnesses who said they saw Laci walking her dog after 10:18 a.m. on December 24. (Case No. S230782: Petn. Exh. 4, HCP-30-31.) However, because their statements conflicted with neighbor Karen Servas's testimony[27] about the timeline, counsel thought it possible the jury would find the witnesses "were either mistaken or not credible." (Case No. S230782: Petn. Exh. 4, HCP-31.)

On the other hand, the prosecution called actual live witnesses who had seen pregnant women, including some with dark hair like Laci's, walking alone, or with their dogs, in a neighborhood park that morning, none of whom was Laci Peterson. (Case No. S132449: 87RT 16705-16714, 16732-16736,

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[27] Her testimony made clear that Laci had disappeared before 10:18 a.m. on December 24. (Informal Resp. at 121, fn. 33.)

16740-16741, 16743-16749, 16753-16755, 16760-16763; 88RT 16802-16807, 16815-16818, 16830-16832, 16835-16837, 16843-16845).

Indeed, supposed sightings of Laci proliferated. There were at least 74 reported sightings of Laci, including sightings of her on San Francisco Bay on December 24. (Case No. S132449: 94RT 17761; People's Exh. Nos. 267 [map showing Modesto area sightings], 268A [California sightings].) Also, there were numerous purported sightings of her in 26 states and overseas. (Case No. S132449: 96RT 18077; People's Exh. No. 268B [including Canada, Italy, France, and the Virgin Islands].) Only a few of the reported sightings fit the relevant timeframe and location, as authorities could best determine. Most were not viable leads and none were corroborated. (Case No. S132449: 94RT 17661-17666.)

The declarations provided in support of petitioner's first petition in which various individuals maintain having seen Laci at certain times are equally unsupportive of the timeline petitioner urges here. (Case No. S230782: Informal Resp. at 125-127.)

2. The Medina burglary and investigation

Susan and Rodolfo Medina resided at 516 Covena, across the street from the Peterson's. (Case No. S132449: 49RT 9582-9583, 9585, 9617.) The Medina's left town on Christmas Eve morning

around 10:30.[28] When they returned home on December 26, they discovered their house had been burglarized while they were gone. (Case No. S132449: 49RT 9602-9608.) The burglars forced entry into the home. (Case No. S132449: 49RT 9721.) The master bedroom was somewhat ransacked and items were stolen, including a large safe. (Case No. S132449: 49RT 9712, 9716.) According to the investigating patrol officer, it was a typical grab-and-go robbery. (Case No. S132449: 49RT 9716.) Police were looking for an older light brown or tan van that might be associated with the burglary. (Case No. S132449: 52RT 10238-10240.) Two individuals were eventually arrested and most of the Medina's property was recovered. (Case No. S132449: 53RT 10335-10337.) Officer Michael Hicks of the Modesto Police Department assisted in the investigation of the burglary. (Case No. S132449: 108RT 20049.) A confidential informant provided information to a department detective, which led police to the arrest of suspect Steven Todd and an accomplice. (Case No. S132449: 108RT 20055.)

Hicks interviewed Todd. (Case No. S132449: 107RT 20015.) At the outset, Todd volunteered that the burglary had no connection to the missing woman with the baby. (Case No.

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[28] The evidence showed that the Medina's left their house around 10:32 on the morning of December 24. (Case No. S132449: 109RT 20318.) The Peterson's dog, McKenzie, was not in the street. This corroborated Karen Servas's account that she found McKenzie in the street at 10:18 a.m. and returned him to the Peterson's yard and secured him there. (Case No. S132449: 109RT 20318-20319.)

S132449: 107RT 20016.) Although Todd was initially confused about the date he and his cohort committed the Medina burglary, the investigation confirmed that it occurred on the morning of December 26, 2002. (Case No. S132449: 107RT 20017-20018.)[29] Todd targeted the Medina residence because one car was missing from the driveway and there was mail in their mailbox. (Case No. S132449: 107RT 20018-20023; 108RT 20057.) Hicks observed that both suspects were "very willing" to share information about the burglary. (Case No. S132449: 108RT 20053.) However, investigators found nothing that connected the burglary to Laci's disappearance. (Case No. S132449: 53RT 10360-10361.)

3. Mail carrier Graybill

Petitioner uses statements from the Peterson's neighborhood mail carrier Mr. Graybill to try and finagle the time of the Medina burglary to coincide with Laci's disappearance on December 24, instead of December 26. (Petn. at 157-158.)

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[29] Laci went missing on the morning of December 24. However, even if the burglary occurred on December 24, it occurred after the Medina's left and the mail was delivered. Steven Todd stated that there was one car missing from the driveway and there was mail in the Medina's mailbox. (Case No. S132449: 107RT 20018-20023; 108RT 20057.) As explained previously, the uncontradicted evidence at trial was that Laci was gone by then, given that neighbor Karen Servas found Laci's dog in the street, unattended, at 10:18 a.m. (Case No. S132449: 48RT 9412-9423.) Additionally, insofar as Diane Jackson stated that she witnessed the burglary on the morning of December 24 (case No. S230782: Petn. at 201-202), Jackson stated the time of the burglary was 11:40 a.m. (case No. S132449: 99RT 18563). *Again, even if true, Laci had disappeared prior to that time.*

However, Mr. Graybill's statements related to the first habeas petition contain apparent contradictions or inaccuracies as compared to his trial testimony, which call into question the reliability of his observations about the Peterson's residence. For example, in his declaration, Mr. Graybill stated that the open gate and absence of barking "*caught my attention* because normally McKenzie would bark at me when I delivered the mail." (Case No. S23078: Petn. Exh. 2, HCP-6, italics added.) Mr. Graybill goes on to state that "[n]either the prosecutor nor the defense asked me whether or not the gate was open or McKenzie barked on the morning of December 24, 2002." (Case No. S23078: Petn. Exh. 2, HCP-7.) While Mr. Graybill is technically correct about the gate, he was, in fact, asked about his observations about the Peterson's residence generally. During trial, the following exchange occurred between the prosecutor and Mr. Graybill concerning the state of the Peterson's residence on Christmas Eve morning, including the subject of the Peterson's dog McKenzie's presence:

> Q. Specifically on December 24th of 2002, did you have any problem with the dog or the dog come out and keep you off the property?
>
> A. No. I had no -- no problems on December the 24th. It was a normal day.
>
> Q. And as far as you can recall were you able to deliver the mail at 523 Covena?
>
> A. Yes, I was.

(Case No. S132449: 49RT 9568.)

The prosecutor subsequently asked Mr. Graybill if he noticed anything unusual at the Peterson's residence that morning:

> Q. Was there anything out of the ordinary or anything out of the usual or anything that caused you to pay attention?
>
> A. *There was nothing out of the ordinary.*

(Case No. S132449: 49RT 9569, italics added.)

On cross-examination, Mr. Graybill repeated that there was nothing out of the ordinary at the Peterson's that morning. (Case No. S132449: 49RT 9574.) Thus, Mr. Graybill's statement in his declaration and in his December 27, 2002 interview with defense investigators that he observed something that morning at the Peterson's which caught his attention is contradicted by his trial testimony. His statements are also contradicted by the account he gave to District Attorney Investigator Bertalotto on December 30, 2002, in which Mr. Graybill reported that he did not notice anything peculiar or out of the ordinary at the Peterson's residence when he delivered the mail on the morning of December 24. (Case No. S230782: Petn. Exh. 17, HCP-357.)

Additionally, petitioner's trial counsel stated in his declaration that Mr. Graybill reported to police that he delivered a package to the Peterson home around 10:30 a.m. on December 24, at the time he made his observations. (Case No. S230782: Petn. Exh. 4, HCP-31-32.) However, according to the handwritten police report, Mr. Graybill did not tell authorities that he delivered a package to the Peterson's home around 10:30 a.m. He reported being there around 10:30 to 10:45, *but made no*

mention of delivering a package. (Case No. S230782: Petn. Exh. 3, HCP-8.) In fact, at trial, Mr. Graybill *testified that he could not recall delivering a package to the Peterson's on December 24.* (Case No. S132449: 49RT 9574.) He had checked his records and found that he may have done so on December 27 or 28. (Case No. S132449: 49RT 9574-9575.)

Given these discrepancies with respect to Mr. Graybill's observations about the Peterson's residence on the morning of December 24, it does not support petitioner's attempt to manipulate the timing of the Medina burglary.

4. Motion for a new trial based on the Aponte "tip"

In the February 2005 motion for a new trial, the defense argued, among other grounds, that new evidence was discovered which suggested Steven Todd encountered Laci when he was burglarizing the Medina's house on December 24 and that he verbally threatened her. (Case No. S132449: 20CT 6255.) If true, this would suggest that Laci was alive after 10:30 a.m. when the Medina's left their residence, and that Todd may have been responsible for Laci's disappearance.

As the motion explained, about six to eight weeks before Peterson's trial concluded, the prosecution provided the defense with a letter from an inmate at a correctional facility in Modesto who claimed to have information about Laci's disappearance. The inmate gave the defense investigator, Carl Jensen, several names, which ultimately led to another inmate named Shawn Tenbrink who was imprisoned at the California Rehabilitation Center in Norco. The defense motion alleged that inmate Shawn

Tenbrink had a phone conversation with his brother Adam about a month after Laci's disappearance. In that conversation, Adam told Shawn that "Laci walked up on Stephen Todd while he was burglarizing the house next door and that he had verbally threatened her." (Case No. S132449: 20CT 6255.)

The prosecution's opposition included a declaration from Lieutenant Xavier Aponte, who worked at the Norco facility during the relevant time period. Aponte explained that a dorm officer at the facility, who was monitoring Shawn Tenbrink's conversations, heard Shawn discussing Laci's disappearance with his brother Adam. Aponte listened to a recording of the conversation:

> I listened to this recording and heard Adam Tenbrink tell Shawn Tenbrink something about the Laci Peterson case. Adam said he was told by someone, presumably Steven Todd as his name was mentioned during the call, that Laci Peterson had seen Todd and others committing a burglary in the neighborhood. Adam's statement to Shawn did not sound as though Adam was present at the burglary, nor that he had any first hand knowledge of the facts. Shawn's only knowledge of the incident sounded as though it was based only on Adam's statement.

(Case No. S132449: 20CT 6434.)

Aponte listened to the recorded call and then phoned Modesto police. His call was recorded on a tip sheet and dated January 22, 2003. (Case No. S132449: 20CT 6435.) The tip read, "'RECEIVED INFO FROM SHAWN TENBRINK (INMATE) HE SPOKE TO BROTHER ADAM WHO SAID STEVE TODD SAID LACI WITNESSED HIM BREAKING IN. COULD NOT GIVE

DATES OR TIME.'" (Case No. S132449: 20CT 6380.) *The tip was provided to Peterson's trial team on May 14, 2003—five months prior to the preliminary hearing.* (Case No. S132449: 20CT 6380, 6384.)

Subsequently, Aponte facilitated a phone interview between a Modesto Police Department detective and Shawn Tenbrink. (Case No. S132449: 20CT 6434.) Aponte monitored the call during which, "Shawn Tenbrink denied any knowledge about Laci Peterson's disappearance, and was not very cooperative with the detective." (Case No. S132449: 20CT 6434.)

Defense investigator Jensen located Adam Tenbrink who stated that he and Todd were close friends and that Todd approached Adam on the evening of December 24, 2002, about helping him with a burglary that "was already started." (Case No. S132449: 20CT 6255.)

In denying Peterson's motion for a new trial, as relevant here, the trial court found the information about Todd, the Tenbrinks, and the burglary was not necessarily newly discovered since the prosecution turned the tip over to the defense in May 2003. (Case No. S132449: 121RT 21787.) The court also found the information had little credibility or value given the evidence which established that Laci had already disappeared by the time the Medina's left their residence on December 24 and, accordingly, by the time of the burglary. (Case No. S132449: 120RT 21788; see also 49RT 9590-9591.)

5. Stephen Todd was known to the defense

In the prosecution opposition to the new trial motion, the prosecutor stated, "Todd was listed as a witness on the main witness list provided to the jurors and was in Redwood City available to testify."[30] (Case No. S132449: 20CT 6384.) In fact, petitioner acknowledged that a defense witness file existed for Todd. (Case No. S230782: Petn. at 210.) A defense investigator interviewed Todd three times in 2004 during the course of petitioner's trial. (Case No. S230782: Petn. Exh. 33.) Therefore, the record suggests that petitioner's defense team made a decision not to call Todd as a witness. In fact, no defense evidence was presented claiming that Todd said the burglary occurred on December 24, including from the defense investigator. In his declaration in support of the first habeas petition, trial counsel offered no explanation to the contrary. (Case No. S230782: Petn. Exh. 4, HCP-9-34.)

As respondent explained in our informal response in the Supreme Court, there are at least two plausible reasons for why trial counsel did not call Steven Todd as a witness: the burglary was committed on December 26, as investigators determined, or even if the burglary occurred on December 24, Todd did not encounter Laci Peterson when he burglarized the Medina's residence.

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[30] The county courthouse where the trial took place is located in Redwood City in San Mateo County.

B. Relevant law on newly discovered evidence

Prior to 2017, a habeas corpus petition based on newly discovered evidence could be granted only if fundamental doubt was cast on the accuracy and reliability of the proceedings. (*In re Lawley* (2008) 42 Cal.4th 1231, 1239.) Effective January 1, 2017, relief is now granted if "[n]ew evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." (§ 1473, subd. (b)(3)(A); *In re Sagin* (2019) 39 Cal.App.5th 570.) "New evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching. (§ 1473, subd. (b)(3)(B); *In re Sagin*, *supra*, 39 Cal.App.5th at p. 579.)

In a case where the evidence of guilt presented at trial was overwhelming, only the most compelling new evidence will provide a basis for relief. (*In re Sagin*, *supra*, 39 Cal.App.5th at pp. 580-582 ["more than trace amount of DNA from an unknown male" detected underneath the victim's fingernails represented "powerful evidence" someone other than defendant killed the victim].)

Under the amended statute, "[a] petitioner no longer has to prove innocence but rather must show that the new evidence—viewed in relation to the evidence actually presented at trial—would raise a reasonable doubt as to guilt. The statute creates a sliding scale: in a case where the evidence of guilt presented at trial was overwhelming, only the most compelling new evidence

will provide a basis for habeas corpus relief; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner. The change in the law represents an overall lower tolerance for wrongful convictions. The Legislature has chosen to more closely protect society's interest in ensuring that a person convicted of a crime is the person who committed it." (*In re Sagin*, *supra*, 39 Cal.App.5th at pp. 579-580.)

C. The redacted materials cannot be considered by the Court and must be returned to petitioner

As a threshold matter, none of the redacted materials are properly before this court. There is no indication that petitioner has provided unredacted declarations to this Court, and he certainly has not provided them to respondent. More importantly, he has not complied with California Rules of Court, rule 8.46(d) governing the filing of sealed records in the Court of Appeal. Rule 8.46(d) sets out clear, mandatory rules that must be complied with before a document may be filed under seal, either in total or in part. (Cal. Rules of Court, rule 8.46(d)(1) ["A record not filed in the trial court may be filed under seal in the reviewing court only by order of the reviewing court; it must not be filed under seal solely by stipulation or agreement of the parties"]; rule 8.46(d)(6) ["The court may order a record filed under seal only if it makes the findings required by rule 2.550(d)-

(e)"]; rule 2.550 [noting five mandatory findings the court must make before information can be filed under seal].)[31]

As observed in *H.B. Fuller Co. v. Doe* (2007) 151 Cal.App.4th 879, 894, "a reasoned decision about sealing or unsealing records cannot be made without identifying and weighing the competing interests and concerns. Such a process is impossible without (1) identifying the specific information claimed to be entitled to such treatment; (2) identifying the nature of the harm threatened by disclosure; and (3) identifying and accounting for countervailing considerations. The burden of presenting information sufficient to accomplish the first two steps is logically placed upon the party seeking the sealing of the documents, who is presumptively in the best position to know what disclosures will harm him and how. This means at a minimum that the party seeking to seal documents, or maintain them under seal, must come forward with a specific enumeration of the facts sought to be withheld and specific reasons for withholding them." (See also *Universal City*

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[31] California Rules of Court, rule 2.550(d), provides:

"The court may order that a record be filed under seal only if it expressly finds facts that establish:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest."

Studios, Inc. v. Superior Court (2003) 110 Cal.App.4th 1273, 1279-1283 [discussing legal standards that must be met to overcome the strong public interest in the right of public access to court records].)

Petitioner has not sought or obtained a ruling from the Court permitting the filing of materials sealed, in whole or in part, thereby prohibiting disclosure to the public or respondent. Accordingly, the materials are not properly before this Court. Indeed, in the absence of an order permitting the filing of redacted documents, the Court is obligated to return the records, unfiled, to the party. (Cal. Rule of Court, rule 8.46(d)(7) [providing that, if sealing is denied, "the clerk must (1) return the lodged record to the lodging party if it is in paper form, or (2) permanently delete the lodged record if it is in electronic form"]; accord, *Universal City Studios, Inc., supra*, 110 Cal.App.4th at p. 1275 [noting that "we are required by [former] rule 12.5(e)(7) to return the documents to defendant," and concluding that "[w]ithout the foregoing documents, the denial of defendant's mandate petition is now foreordained because it will not be supported by the documents it seeks to have sealed"].)

And to the extent petitioner is merely offering the documents as is—without names or signatures—they are not competent evidence and do not support his claim. A purported declaration that lacks a name or a signature is not properly made under oath and is no declaration at all. And without any identifying information, it lacks any reliability. The other materials submitted with redactions are likewise double hearsay

lacking any reliability. As currently submitted, redacted as to the Court and respondent, the materials fail to state a prima facie claim of newly discovered evidence of innocence.

D. The "new evidence" is not new and is not admissible

Preliminarily, respondent submits that the declarations suggesting that one of the Medina burglars purportedly admitted to being involved in the murder of Laci and Conner is not "new" evidence. The defense theory has always been third-party culpability and, specifically, the individuals who committed a burglary of the Medina's residence. The only thing that has changed is petitioner has substituted a new name for Steven Todd.

However, even charitably construing the declarations as containing new information, they are not competent evidence because they contain hearsay that is so wholly unreliable and untrustworthy as to be inadmissible even as a purported declaration against interest. In their declarations, S.T. (Petn. Exh. J) and K.M. (Petn. Exh. K) relay statements made by D.M implicating himself in Laci's and Conner's murders. Recounting what someone else said for its truth is hearsay. S.T. told her "mom and sister" about what D.M. supposedly said, but S.T. did not tell the police. (Petn. Exh. J, ¶ 14.) K.M. told two others, but did not tell the police. (Petn. Exh. K, ¶ 11.) D.M. does not name the "others" he was with who murdered Laci. (Petn. Exh. J, ¶¶ 4, 5, 9; Petn. Exh. K, ¶ 4.)

One other significant thing the declarations reveal is that S.T. and K.M. learned the identity of the "real" murderer in the

spring of 2022. (Petn. Exh. J, ¶ 1; Petn. Exh. K, ¶ 1.) Yet, they not only kept this information from authorities, it was not until months later in August 2022 that it made its way via Twitter (of all things) to petitioner's sister-in-law. (Petn. Exh. H-1, ¶ 5 [J. Peterson decl.].) Petitioner spills some measure of ink about the publicity and notoriety this case received (Petn. at 7-9) and, yet, a development of this magnitude in such a high-profile case takes months and months to come to light.[32]

Unsurprisingly, D.M.'s whereabouts are unknown. Defense investigator DeWitt "attempted to locate D.M. and was unable to." (Petn. at 712; Petn. Exh. I-1 [DeWitt decl.].) D.M. is apparently "homeless." (Petn. Exh. I-1, ¶ 9.)[33]

The proffered new evidence must be admissible at trial. (§1437, subd. (b)(3)(B).) Hearsay, defined as an out-of-court statement offered for the truth of the matter stated, is generally inadmissible. Therefore, D.M.'s hearsay confession would be inadmissible unless petitioner can establish admissibility under

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[32] At the point that this information was being disclosed beginning in the spring of 2022, the evidentiary hearing was taking place in San Mateo County Superior Court. As far as the record in the evidentiary hearing discloses, no mention was made of this development during those proceedings, a decision on which was not rendered until December 2022, several months after Janey Peterson states she received the information on Twitter.

[33] There appear to be a few typographical errors in DeWitt's declaration. In paragraphs Nos. 2, 3, and, 4 he states the year of the interview was 2002, but, presumably, he meant 2022. There is no date mentioned in paragraph No. 5 as to when he interviewed the person who would not provide a declaration.

one of the statutory California hearsay exceptions. (*In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3 [habeas proceedings may not rest on inadmissible hearsay].)

Petitioner asserts that he would be able to get a hearsay confession admitted at an evidentiary hearing under the declaration against interest exception. (Petn. at 176, fn. 40.) That is magical thinking. The circumstances surrounding D.M.'s purported statements are so lacking in trustworthiness as to make them inadmissible. "'The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 584; see also *In re Masters* (2019) 7 Cal.5th 1054, 1084 [rejecting a statement against interest as not credible].) "Thus, even when a hearsay statement runs generally against the declarant's penal interest . . . , the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. [Citations.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 614.)[34]

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[34] Petitioner would fare no better trying to admit the hearsay as a prior inconsistent statement for the same reasons. (Petn. at 176, fn. 40.)

Again, there is nothing remotely trustworthy about a purported confession when every individual who supposedly heard it, including petitioner's sister-in-law and members of the defense team, has chosen not to go to the police. Add to that the fact that the hearsay declarant does not name his cohorts, his whereabouts are unknown, and, this significant development was kept under wraps for months all the while an evidentiary hearing was being conducted in this case. And, no matter how much petitioner attempts to manipulate the timeline of Laci's disappearance and the Medina burglary so as to make them coincide, the evidence adduced at trial does not support it. Nor is there any credible evidence that even if the two events did coincide on the same date—December 24—the burglars would have encountered Laci because she had disappeared before the burglary occurred. That is why the jury rejected petitioner's third-party culpability defense and timeline theory, as did the Supreme Court.

Geier is instructive regarding statements against interest and consideration of the circumstances surrounding such statements. In *Geier*, there was evidence that Jennifer Dean was having an affair with Jeffrey Hunter and hired the defendant to kill her husband. (*People v. Geier*, *supra*, 41 Cal.4th at pp. 567-570.) Dean made three statements to the police. In the first, she said she knew nothing about her husband's death. In the second, she suggested that the defendant and Hunter had killed her husband for his insurance money. In the third, which was videotaped, she said she killed her husband herself because he

had hurt their daughter. At trial, she asserted her Fifth Amendment right not to testify. The defendant sought to admit her third, videotaped statement under the declaration against interest exception, but the trial court excluded it as untrustworthy. (*Id.* at p. 583.)

The Supreme Court held: "The trial court did not abuse its discretion in excluding the videotape of the third statement. As the court observed, the third statement was utterly inconsistent with Dean's initial statement, in which she told police she knew nothing of her husband's death, and also inconsistent with her subsequent statement blaming defendant and Hunter for her husband's murder. Thus, on their face, two of her three statements were absolutely untruthful, rendering the reliability of any of the statements questionable. The fact that Dean confessed to killing her husband in the third statement did not, by itself, establish that the third statement was any more reliable than the other two. Dean's admission was accompanied by an explanation that she killed her husband because she had just quarreled with him and that he had hurt their daughter. Dean may have believed that this explanation minimized her culpability or excused her conduct altogether. Moreover, Dean was having an affair with Hunter and her third statement, taking the blame for the murder with an excuse, may have been her attempt to protect him and, by extension, his confederate, defendant." (*People v. Geier*, *supra*, 41 Cal.4th at p. 585.)

Considering all of the circumstances surrounding D.M.'s hearsay statements about committing the burglary with

unnamed cohorts who murdered Laci, his hearsay statements are so utterly lacking in reliability and trustworthiness that the Court has ample basis to reject his claim on the merits without issuance of an OSC. (§ 1473, subd. (b)(3)(A) [newly discoverable evidence must be credible]; *In re Masters*, *supra*, 7 Cal.5th at p. 1082.)

E. The "new evidence" is not of such decisive force and value that it is more likely than not that it would have changed the verdict

Petitioner contends the case against him was "close" and, therefore, this new evidence would have tipped the scales of justice in his favor. To the contrary, there was nothing close about this case. The evidence of his guilt was compelling and undeniable. (See *People v. Peterson*, *supra*, 10 Cal.5th at pp. 417-426, footnotes omitted.)

Insofar in suggesting that this was "a close case" petitioner challenges the sufficiency of evidence presented against him (Petn. at 183-185), he is precluded from doing so under the guise of a claim of actual innocence because sufficiency of the evidence claims are not cognizable on habeas corpus. (*In re Reno* (2012) 55 Cal.4th 428, 505-506; *In re Adams* (1975) 14 Cal.3d 629, 636.)

To counter the evidence presented at trial, here, petitioner offers inadmissible hearsay and defense theories already presented and considered at trial, on appeal, and in his first habeas petition. His newly discovered evidence is merely cumulative, corroborative, collateral, or impeaching. In any event, it is not of such decisive force and value that it would have more likely than not changed the outcome at trial.

Further, the Supreme Court's express and implied findings regarding the evidence of petitioner's guilt presented at trial and its rejection of the related habeas claims on the merits, including those based on third-party culpability, properly inform this Court's determination of whether it is more likely than not that any newly discovery evidence within the meaning of section 1473 would have changed the outcome at trial, and underscore petitioner's failure to state a prima face case for relief.

Last, while this Court has jurisdiction to issue the writ of habeas corpus, it also has discretion to deny a petition for writ of habeas corpus without prejudice so that the superior court may consider it in the first instance. (*In re Steele*, *supra*, 32 Cal.4th at p. 692; *In re Hillery* (1962) 202 Cal.App.2d 293, 294.) As argued, *ante*, petitioner has not shown that an extraordinary reason exists for action by this Court with respect to his assertion of newly discovered evidence, rather than by the superior court. "'Generally speaking, habeas corpus proceedings involving a factual situation should be tried in superior court rather than in an appellate court, except where only questions of law are involved.' (24 Cal.Jur.2d, Habeas Corpus, § 68, pp. 524-525.)" (*In re Hillery*, at p. 294.)

Given the factual nature of petitioner's claim, were this Court to disagree with respondent's contention that petitioner has demonstrably failed to present a claim for relief, then he should be made to bring a habeas petition with his newly discovered evidence claim in the superior court in the first instance. For this same reason, any order to show cause issued

as to this claim should be made returnable to the superior court, which can hold an evidentiary hearing and make credibility determinations as to the allegations. However, respondent steadfastly maintains that the Court has ample grounds to deny petitioner relief on this claim on the merits without necessitating the needless fishing expedition in the superior court.

III. THE FALSE EVIDENCE CLAIM RELATED TO THE MEDINA BURGLARY IS PROCEDURALLY BARRED AND, IN ANY EVENT, IT DOES NOT SUPPORT A PRIMA FACIE CASE FOR RELIEF

In his third claim, petitioner's primary contention is that the trial prosecutors presented false evidence relating to the date of the Medina burglary. Petitioner adds in a subclaim that the prosecution violated *Brady v. Maryland* (1963) 363 U.S. 83 because it purportedly did not provide a copy of a charging document that was publicly available. He also contends that habeas counsel rendered ineffective assistance for not stylizing the claim in the first petition as one of false evidence instead of ineffective assistance of trial counsel. (Petn. at 187-220.) The crux of his argument is that the criminal complaint charging Steven Todd and Donald Pearce with the Medina burglary stated that the crime occurred "on or about and between December 24, 2002 and December 26, 2002," and that Todd pleaded "Guilty" to the burglary count as charged in the complaint. (Petn. at 194-195.) He adds that the Tenbrink jail call, in conjunction with the date range, created a duty of disclosure and showed a presentation of false evidence.

As a preliminary matter, aspects of the claim pertaining to the prosecution are procedurally barred because they could have

been raised in petitioner's automatic appeal. Further, petitioner's claim of ineffective assistance of habeas counsel is merely a different gloss on a claim the factual predicate for which was, in fact, raised in his habeas petition in the California Supreme Court and denied on the merits. It is, therefore, successive.

Even if these claims are not barred, petitioner has nonetheless failed to state a prima face case for relief. The prosecution did not present or argue evidence that was false with respect to the date of the Medina burglary. Even if it could be construed as such, it made no difference since the credible evidence at trial established Laci had gone missing before the Medinas left their home.

A. The claims are procedurally barred

An appellate court may summarily deny a petition for writ of habeas corpus if it finds that the petition does not state a prima facie case for relief or that the claims raised are procedurally barred. (*People v. Romero* (1994) 8 Cal.4th 728, 737.)

As concerns petitioner's false evidence and *Brady* claims, those could have been raised in petitioner's automatic appeal in the Supreme Court. Such claims are procedurally barred because they are not cognizable on habeas corpus. (*In re Reno, supra*, 55 Cal.4th at p. 490; *Dixon, supra*, 41 Cal.2d at p. 759; see also *In re Seaton* (2004) 34 Cal.4th 193, 200 ["just as a defendant generally may not raise on appeal a claim not raised at trial . . . , a defendant should not be allowed to raise on habeas corpus an issue that could have been presented at trial," for otherwise, "the

main purpose of the forfeiture rule—to encourage prompt correction of trial errors and thereby avoid unnecessary retrials—would be defeated."].) There are four recognized exceptions to the *Dixon* rule: (1) the issue involves a fundamental constitutional error; (2) the judgment of conviction was rendered by a court lacking fundamental jurisdiction; (3) the court acted in excess of its jurisdiction; and (4) there has been a change in the law affecting the petitioner. (*In re Reno*, at pp. 478, 490-491.) These exceptions "are narrow and require particular allegations; they are easy to allege but difficult to establish." (*In re Reno*, at p. 486.)

Petitioner points to nothing in the instant petition in support of this claim that was not known at the time of trial and that could not have been raised on appeal with respect to the false evidence and *Brady* claims. He acknowledges that the Aponte "tip" was provided to the defense in May 2003. (Petn. at 200.) Jury selection began in San Mateo County almost a year later on March 4, 2004. (Case No. S132449: 17CT 5497.) As mentioned, the Medina burglary was the basis for petitioner's third-party culpability defense at trial, including testimony about the burglary investigation and Todd's and Pearce's arrests. (See section I.A.2, *ante*.) Todd was listed as a witness on the main witness list provided to the jurors and was available to testify. (20CT 6384.) Petitioner acknowledged in his first habeas petition that a defense witness file existed for Todd. (Case No. S230782: Petn. at 210.) The jury also heard about Diane Jackson's

statement to investigators as related to petitioner's third-party culpability defense. (Case No. S132449: 99RT 18562-18567).

Petitioner also contends that his habeas counsel was ineffective for advancing a claim related to the Medina burglary as one of ineffective assistance of trial counsel as opposed to presentation of false evidence. (Petn. at 219-220.) Petitioner admits the pertinent facts were before the Supreme Court in the first petition. (Petn. at 219; see case No. S230782: Petn. claims VIII, IX, X.) The Supreme Court rejected these claims on their merits. He presents substantially the same claim before this Court.

> It has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. [Citations.] The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment. [Citations.] The rule was stated clearly in *In re Connor* [(1940)] 16 Cal.2d 701, 705: "In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him."

(*In re Clark*, *supra*, 5 Cal.4th at pp. 767-768.)

"'It is, of course, the rule that a petition for habeas corpus based on the same grounds as those of a previously denied petition will itself be denied when there has been no change in the facts or law substantially affecting the rights of the petitioner.' [Citations.] In this case, the petition is not only barred as successive but also because it is repetitive." (*In re Martinez* (2009) 46 Cal.4th 945, 950.)

"This court has never condoned abusive writ practice or repetitious collateral attacks on a final judgment. Entertaining the merits of successive petitions is inconsistent with our recognition that delayed and repetitious presentation of claims is an abuse of the writ." (*In re Clark*, *supra*, 5 Cal.4th at p. 769; see *In re Reno*, *supra*, 55 Cal.4th at p. 455, superseded by statute on another ground as stated in *In re Friend*, *supra*, 11 Cal.5th 720.)

Here, the variation on the ineffective assistance of counsel claim is essentially a duplication of a claim raised in petitioner's first habeas petition. He has put a different name on the claim, though. That should not entitle him to avoid the procedural bar and get another bite at the apple. The successive pleading issue having been addressed by the Supreme Court in its order filed on October 14, 2020, this aspect of claim three in the current petition should also be summarily rejected as barred.

B. Relevant law

1. Presentation of false evidence

It is well settled that, to comport with due process of law under the United States Constitution, a prosecutor cannot knowingly present false evidence, and must correct any known falsity that is in the evidence he or she has presented. (*Napue v. Illinois* (1959) 360 U.S. 264, 265-272; see also *People v. Carrasco* (2014) 59 Cal.4th 924, 966; *People v. Vines* (2011) 51 Cal.4th 830, 873.)

Prosecutorial misconduct of this type violates a defendant's federal due process rights and requires a reversal of the conviction "if (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the false testimony was

material (i.e., there is a reasonable likelihood that the false testimony could have affected the judgment). [Citation.]" (*Dow v. Virga* (9th Cir. 2013) 729 F.3d 1041, 1048.)

As for state law, Penal Code section 1473, subdivision (b)(1) provides that a writ of habeas corpus may be prosecuted if "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration . . . ." (See also *In re Richards* (2012) 55 Cal.4th 948, 961 (*Richards I*).)

Under statutory principles, to warrant habeas relief, the false evidence must be "substantially material or probative." In other words, under the totality of the circumstances, it must be reasonably probable the false evidence could have affected the jury's verdict. The inquiry is objective in nature. (*In re Malone* (1996) 12 Cal.4th 935, 965-966; see also *In re Bell* (2007) 42 Cal.4th 630, 637; *In re Cox* (2003) 30 Cal.4th 974, 1008-1009.) The petitioner is not required to show that the prosecution knew or should have known that the testimony was false. (§ 1473, subd. (c); *People v. Marshall* (1996) 13 Cal.4th 799, 830.)

A petitioner seeking relief under this section must demonstrate that the challenged evidence was actually false, and that as a result, "a critical component of the prosecution's case is objectively untrue." (*Richards I, supra,* 55 Cal.4th at pp. 961-962.) A petitioner is not entitled to relief based on a minor discrepancy or merely because additional evidence calls a point of testimony into question. (*Id.* at pp. 961-962; see also *In re Bell, supra,* 42 Cal.4th at p. 642.)

2. *Brady v. Maryland* (1963) 363 U.S. 83

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland*, *supra*, 373 U.S. at p. 87.)

> There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

(*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.)

Evidence is "material" for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 676.) "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." (*United States v. Agurs* (1976) 427 U.S. 97, 109-110.) Rather, in determining materiality, and hence duty to disclose, "the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" (*Strickler*, *supra*, 527 U.S. at p. 290; *Kyles v. Whitley* (1995) 514 U.S. 419, 435.) A prosecutor does not have a constitutional duty to disclose "any information that might affect the jury's verdict." (*Agurs*, *supra*, 427 U.S. at pp. 108-109.) Rather, "the prosecutor will not

have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." (*Id.* at p. 108.)

3. Ineffective assistance of counsel

"Generally, to prevail on a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability of a more favorable outcome in the absence of the deficient performance." (*People v. Ruiz* (2023) 89 Cal.App.5th 324, 329, citing *Strickland v. Washington* (1984) 466 U.S. 668, 688; accord, *Bell v. Cone* (2002) 535 U.S. 685, 695.) "Without proof of both deficient performance and prejudice to the defense, [*Strickland*] concluded, it could not be said that the sentence or conviction 'resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable,' . . . and the sentence or conviction should stand." (*Cone*, at p. 695, quoting *Strickland*, at p. 687.)

Moreover, when reviewing a claim of ineffective assistance, this Court "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." (*Harrington v. Richter* (2011) 562 U.S. 86, 104, quoting *Strickland, supra*, 466 U.S. at p. 669.) "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance . . . , and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

[Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Strickland*, at p. 689.)

The legal test for ineffective assistance of counsel is the same whether at trial, on appeal, or in collateral proceedings, and requires a showing of both objectively deficient performance and prejudice. (*In re Reno*, *supra*, 55 Cal.4th at pp. 463-464; *Strickland*, *supra*, 466 U.S. at p. 687.) To avoid the procedural bar of successiveness by means of a claim of ineffective assistance, a petitioner must plead specific facts concerning both of these prongs. In *In re Reno*, for example, the California Supreme Court indicated that petitioners who rely on prior habeas corpus counsel's alleged ineffective assistance to avoid procedural bars must do more than allege that a previously omitted claim has merit. (*In re Reno*, *supra*, 55 Cal.4th at pp. 464-465, 503.) The court indicated petitioners should also allege facts showing that omission of the claim was incompetent. Relevant to such a showing are facts that illuminate prior habeas corpus counsel's actions or omissions, such as what counsel knew or should have known when litigating the earlier habeas corpus petition, and also why counsel did not previously investigate or raise the newly presented claim. (*Id.* at pp. 465, 503.)

Moreover , the United States Supreme Court has recognized the tactical importance of counsel limiting the number of claims presented and focusing on stronger claims. "Experienced

advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." (*Jones v. Barnes* (1983) 463 U.S. 745, 751-752.) "This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. [Citation.]" (*Smith v. Murray* (1986) 477 U.S. 527, 536; see also *Yarborough v. Gentry* (2003) 540 U.S. 1, 7-8 ["Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach."].) This principle applies with equal force to habeas counsel. "Habeas counsel, like appellate counsel, 'performs *properly and competently* when he or she exercises discretion and presents only the strongest claims instead of every conceivable claim.'" (*In re Friend* (2022) 76 Cal.App.5th 623, 636, quoting, 810.) *In re Robbins* (1998) 18 Cal.4th 770

C. Petitioner has failed to make a prima facie showing pertaining to false testimony, *Brady*, or ineffective assistance of counsel

1. There was no presentation of false evidence

At its essence, petitioner's claim is that because a police reward flyer and a criminal complaint—both relating to the Medina burglary—cited a time frame of December 24 to December 26, the prosecution presented false evidence with respect to its theory that the burglary actually occurred on

December 26. Petitioner attempts to bolster his claim by peppering it with allegations of police investigatory failures and the repeated refrain that there existed insufficient evidence of his guilt.

Simply put, he is wrong. First and foremost, a charging document simply provides notice to a defendant, it does not constituted evidence of the charged offense. (See *People v. Bright* (1996) 12 Cal.4th 652, 670 ["[T]he purpose of the charging document is to provide the defendant with notice of the offense charged."], overruled on other grounds by *People v. Seel* (2004) 34 Cal.4th 535; see also § 952.) The fact that the prosecution first specified a date range as to when the burglary occurred, which it subsequently narrowed to one date, does not amount to presenting—or arguing—false testimony in the first instance. (See CALCRIM No. 207 [prosecution not required to prove crime took place on a date certain, only that it happened "reasonably close" to the date].)

More importantly, in relying on the fact that Steven Todd pleaded "Guilty" to the complaint which alleged a date range of December 24, 2002 to December 26, 2002, petitioner conveniently elides the fact that Todd's guilty plea followed after the reading of the factual basis for that plea. The factual basis for the crime to which Todd promptly pleaded guilty provided: "On December 26th, 2002, in Stanislaus County, the defendant entered the inhabited dwelling located [on Covina Street] occupied by Rodolfo Medina with intent to commit theft." (Case No. S230782: Petn. Exh. 30, HCP-424.) The factual basis for the offense is what set

out the factual underpinnings of the crime to which Todd pleaded guilty, namely that the burglary occurred on December 26, 2002. In other words, petitioner has not demonstrated that the challenged evidence was *actually false*, and that as a result, "a critical component of the prosecution's case is objectively untrue." (*Richards I, supra*, 55 Cal.4th at pp. 961-962.) Indeed, when the entirety of the plea is considered, including the factual basis for that plea in addition to the complaint, it is abundantly clear that the prosecutor did not present false evidence as to the date of the burglary, and there is no evidence that the prosecutor knew of its purported falsity.

And, in terms of materiality, we reiterate here that even if the burglary occurred on December 24 and the prosecution could somehow be found to have presented false evidence, it is immaterial because Laci was gone by the time her dog was found out in the street by Karen Servas at 10:18 a.m. on December 24 (case No. S132449: 48RT 9412-9425, 9428-9429, 9457, 9481) before the Medinas left their home shortly after 10:30 (49RT 9593, 9645-9646).

Additionally, insofar as petitioner relies on a statement Diane Jackson made to an investigating officer that she witnessed the burglary on the morning of December 24, Jackson stated the time of the burglary was 11:40 a.m. (Case No. S132449: 99RT 18563). Again, Laci was gone by then.

Further, the defense argued at trial the timeframe theory petitioner advances here. (Case No. S132449: 110RT 20479-

20481.) The jury rejected it.[35] Materiality is shown if there is a reasonable probability the result would have been different without the false evidence. (*In re Figueroa* (2018) 4 Cal.5th 576, 589.) There is no reasonable probability that the outcome of the trial would have been different had the prosecution not isolated December 26 as the date of the Medina burglary in light of the evidence that showed Laci was missing before the Medina burglary occurred, as well as other compelling evidence of petitioner's guilt, as detailed in the Supreme Court's recitation of the facts, *ante*.

Petitioner's reliance on *Alcorta v. Texas* (1957) 355 U.S. 28 in an effort to demonstrate prejudice is unavailing. (Petn. at 211-212.) In *Alcorta*, the petitioner killed his wife and claimed that he did so in a fit of passion when he found her kissing another man—Castilleja—late at night in a parked car. (*Alcorta, supra*, 355 U.S. at pp. 28-29.) Castilleja, who was the only eyewitness to the killing, was asked by the prosecutor about the nature of his relationship with the victim. He testified that he had driven her home a couple of times and that they had a casual friendship. He denied that they were in love with each other. (*Id.* at pp. 29-30.) Later, Castilleja gave a sworn statement that he had given false testimony at trial, that he and the victim had in fact been sexually intimate on many occasions, and that the prosecutor had

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[35] To the extent that petitioner relies at various junctures throughout his petition on statements contained in the book, "We the Jury," it is not competent evidence. (See case No. S230782: Informal Resp. at 32-33 [explaining it is rife with hearsay].)

known about the falsity. The petitioner averred that he had no knowledge of the sexual nature of the relationship. (*Id.* at p. 30.)

At a hearing on the petitioner's habeas corpus petition, Castilleja testified consistently with his sworn statement. The prosecutor also testified and admitted he knew about Castilleja's relationship with the victim, told Castilleja not to volunteer any information about their sexual relations, and never told the petitioner that Castilleja and the victim were lovers. (*Alcorta, supra*, 355 U.S. at pp. 30-31.) The Supreme Court reversed the murder conviction, concluding that "Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship" with the victim was a casual friendship, that the prosecutor knew about the illicit intercourse, and that had Castilleja's relationship been accurately portrayed to the jury, it would have tended to corroborate the petitioner's defense in addition to impeaching the witness. (*Id.* at pp. 31-32.)

Petitioner's claim that, as in *Alcorta*, the prosecution's evidence and argument, taken as a whole, gave the jury the false impression about the significance of the date of the Medina burglary is baseless. The evidence here that the burglary occurred on December 26—even if somehow false—pales in comparison to the outright lie testified to with the prosecutor's knowledge in *Alcorta, supra*, 355 U.S. at pp. 28-32.

As to a federal due process violation, petitioner must show that "(1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the false testimony was material (i.e., there is a reasonable likelihood that the false testimony could

have affected the judgment). [Citation.]" (*Dow v. Virga, supra,* 729 F.3d at p. 1048.) Again, even if there was some falsity in the prosecution's presentation of testimony or argument concerning the date of the Medina burglary, petitioner certainly has not shown that the prosecution *knew* it was false or that there was a reasonable likelihood that it affected the judgment.

In short, under the federal and state standards, the prosecution did not present false evidence meriting relief. In any event, any falsity was not prejudicial.

2. There was no *Brady* violation

Petitioner contends that, at trial, the prosecution never turned over the Pearce-Todd charging documents as they related to the Medina burglary. (Petn. at 215.) Petitioner's unsubstantiated assertion should be readily rejected. He has not established suppression to begin with.

Further, criminal complaints are public information and if petitioner wanted it, he could have gotten it. (See *United States v. Smith* (1985) 776 F.2d. 1104, 1112 ["This historic tradition of public access to the charging document in a criminal case reflects the importance of its role in the criminal trial process and the public's interest in knowing its contents"].) The criminal complaint was filed on January 6, 2003, well before the preliminary hearing in this case. (Case No. S230782: Petn. Exh. 29 at HCP-418.) Certainly, habeas counsel had access to the criminal complaint and related documents (case No. S230782: Petn. Exhs. 29-31), which suggests the defense team had the documents to begin with. In any event, as petitioner

acknowledges, there existed a police reward flyer that included the same date range. (Petn. at 191.) So, petitioner's contention that a date range for the burglary was somehow kept from the defense team is groundless.

Information about the timing of burglary was certainly not known just to the prosecution and police. As stated, Steven Todd was listed as a witness on the main witness list provided to the jurors and was in Redwood City available to testify. (20CT 6384.) Petitioner acknowledged that a defense witness file existed for Todd. (Case No. S230782: Petn. at 210.) In fact, a defense investigator interviewed Todd three times in 2004 during the course of petitioner's trial. (Case No. S230782: Petn. Exh. 33.)[36] Also, we know that defense counsel had Officer Hicks's report on the Medina burglary because he referred to it during his direct examination of the officer. (Case No. S132449: 107RT 20015.)

The complaint was also not exculpatory when considered as it must in conjunction with the factual basis for the plea. As noted, the complaint is merely a document to provide notice of the charged crime to the defendant. The plea along with the factual basis for that plea provide the appropriate factual context for the conviction. Thus, while the charging document provided a date range for notice, the factual basis and plea fixed the date of the burglary as December 26, 2002. Accordingly, at the time of

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[36] Todd's purported statements to the defense investigator are hearsay. The point is that the defense had ample access to Todd.

petitioner's trial, well after Todd's guilty plea, the complaint was not exculpatory.

Given all that was known to the defense at trial about the Medina burglary and the perpetrators, petitioner cannot establish that the prosecution suppressed any information about the prosecution of Todd (or Pearce), or that the information was exculpatory. Even if marginally exculpatory, petitioner has not demonstrated that he was prejudiced.

3. Habeas counsel did not render ineffective assistance of counsel

Petitioner faults his habeas counsel who presented his first petition to the Supreme Court arguing that any deficiencies with respect to presentation of the Medina burglary defense were better labeled as the misdeeds of prosecutors and not petitioner's trial counsel. On this theory, petitioner contends the Supreme Court would have granted him relief. (Petn. at 219-220.)[37]

We disagree. As to the deficient-performance *Strickland* prong, petitioner's argument fails for at least two reasons. First, there was no prosecutorial misconduct related to discovery of the

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[37] Inasmuch as petitioner embeds a subclaim of ineffective assistance of trial counsel for purportedly not obtaining the Pearce-Todd criminal complaint and related documents (Petn. at 216-217), this claim is procedurally barred as successive vis a vis claims XIII, IX, and X in his first habeas petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 769.) Further, even if not successive, it could have been raised on appeal given that the supporting facts are trial-bound. (*Dixon*, *supra*, 41 Cal.2d at p. 759.) In any event, petitioner cannot show deficient performance or prejudice under *Strickland* for the reasons stated in this section.

Pearce-Todd charging document, as explained, *ante*, and an assessment of *Strickland* prejudice would have included consideration of the underlying claim of prosecutorial misconduct. Therefore, counsel was not expected to make this frivolous claim in the first petition. Second, the record clearly shows that habeas counsel had no reservations about making claims alleging false presentation of evidence by the prosecution. (See case No. S230782: Petn. claims II, IV, VI.) Habeas counsel understood the underpinnings of such a claim having alleged it occurred in three different ways in this case. That he did not make such a claim related to the Medina burglary demonstrates that it was an objectively reasonable tactical decision to frame it as ineffective assistance of trial counsel. Presumably, habeas counsel also recognized that there was no evidence to support the contention that the defense team was not in possession of the Medina burglary charging documents or could not have otherwise obtained them readily as they were public records. Notably, petitioner has not supported his claim with a declaration from habeas counsel addressing his own purported failing to advance such a claim. (*Duvall*, *supra*, 9 Cal.4th at p. 474 [petition should "include copies of reasonably available documentary evidence supporting the claim, including . . . declarations"].)

In light of the record and foregoing authorities, petitioner has not established deficient performance of habeas corpus counsel based on omission of a claim from the first habeas petition that petitioner advances here. (*In re Friend*, *supra*, 11 Cal.5th at p. 731, fn. 5; see *In re Reno*, *supra*, 55 Cal.4th at p.

465.) The record amply supports that habeas counsel reasonably exercised his professional discretion to present the claims he considered the strongest. (*In re Robbins*, *supra*, 18 Cal.4th at p. 810.)

Finally, petitioner cannot establish prejudice. As noted above, introducing the Todd complaint at trial would inevitably have led to the introduction of the factual basis for Todd's plea fixing the date of the burglary as December 26, which would have been damaging to petitioner's defense at trial.

Petitioner has failed to state a claim for relief based on ineffective assistance of habeas counsel.

IV. PETITIONER HAS FAILED TO STATE A VIABLE OR MERITORIOUS CLAIM FOR RELIEF REGARDING THE APONTE TIP BASED ON *BRADY* OR INEFFECTIVE ASSISTANCE OF HABEAS COUNSEL

In this claim, petitioner argues the prosecution violated *Brady* with respect to information provided by Lieutenant Aponte.[38] He further contends habeas counsel rendered ineffective assistance by not presenting that claim in petitioner's first habeas petition. (Petn. at 221-248.)

First, the claims are procedurally barred. Even if not barred, petitioner has not demonstrated a prima facie case for relief. There is no credible showing that the prosecution suppressed material evidence relating to the Aponte tip. Nor can habeas counsel be faulted for making the tactical decision to raise the

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[38] The same information is discussed with respect to claims II and III, *ante*.

claim as one of ineffective assistance of trial counsel as opposed to a *Brady* violation given that there was no evidence of suppression by the prosecution, among other reasons.

A. The claims are procedurally barred

Petitioner acknowledges that the predicate facts supporting the *Brady* claim here were the subject of his first habeas petition, but presented under a different theory—ineffective assistance of trial counsel—which the Supreme Court rejected on the merits. (Petn. at 222, fn. 45; case No. S230782: claim X.) Therefore, the claim is successive and it should be considered barred. (*In re Reno*, *supra*, 55 Cal.4th at p. 502; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-768.) Petitioner is not permitted to do an end-run around the law by presenting the same facts under a different name, as he has also done with respect to claim three, *ante*. For these same reasons, his claim of ineffective assistance of habeas counsel should be likewise barred as successive.

Further, any alleged discovery violation by the prosecution could certainly have been presented on automatic appeal, but it was not. It is, therefore, barred for that additional reason. (*In re Reno*, *supra*, 55 Cal.4th at p. 490 *Dixon*, *supra*, 41 Cal.2d at p. 759.)

B. Relevant background on the Aponte tip

Respondent incorporates by reference here the background information presented in section II.A.4, *ante*, as concerns the Aponte tip.

C. Relevant law on *Brady* and ineffective assistance of counsel

Respondent incorporates by reference here the pertinent law as provided in section III.B.2-3, *ante*.

D. Petitioner has not shown a *Brady* violation or ineffective assistance of habeas counsel

Here, petitioner levels many of the same criticisms at the prosecution concerning the Aponte tip as did his trial counsel at the motion for a new trial. (Case No. S132449: 121RT 21775-21778). After the prosecution's response (121RT 21781-21783), the trial court found:

> So the argument can certainly be made that the -- this information was, indeed, turned over to the defense. It may not have become significant until later on in the trial, however, it was apparently in the possession of the defense. This -- so the court is going to be -- taking the position that this was, indeed, turned over.

(Case No. S132449: 121RT 21787).

Against this backdrop, petitioner contends the prosecution did not turn over two purported tips Lieutenant Aponte called in to the Modesto Police Department. Yet, petitioner himself appears unclear as to whether there were, in fact, two tips to begin with. (Petn. at 225, ¶ 13.)[39] Lieutenant Aponte phoned the

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[39] As relates to this claim, petition Exhibit T is the report of a defense investigator's December 1, 2004 interview with Lieutenant Aponte. Petitioner describes it as being a declaration signed under penalty of perjury. (Petn. at 223.) Respondent, however, is at a loss in locating any indication that the interview summary was sworn by Lieutenant Aponte under penalty of perjury. While the lieutenant appears to have initialed the interview report, there is no indication that his statements are

(continued...)

Modesto Police Department twice and he states in his declaration that he left messages both times. (Petn. Exh. U, ¶¶ 4-5 [Lt. Aponte decl.].) Logic dictates, as does the record, that he made two calls about the same matter. In other words, there was one tip. So, the factual predicate for at least a portion of petitioner's *Brady* claim appears infirm.

The tip was turned over to the defense on May 14, 2003—*five months before the preliminary hearing took place.* (Case No. S132449: 20CT 6380, 6384.)

Petitioner goes on to castigate the prosecution for not discovering to the defense several other items including the recorded call between the Tenbrink brothers and a call between one of the brothers and their mother. (Petn. 228-229.) Petitioner calls this "missing discovery." (Petn. at 229.) The statement implies that the prosecution was in possession of information and did not turn it over to the defense, i.e., suppression under *Brady*. That supposition is baseless. The prosecution cannot turn over things that either never existed or no longer existed, such as the recordings of the call between the Tenbrink brothers or the call involving their mother. (Petn. Exh. U, ¶ 8 [Lt. Aponte decl.]; see

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(...continued)

sworn and there are various handwritten alterations to the report. We also note that when asked if the interview could be recorded, the lieutenant declined. (Petn. Exh. T.) On the other hand, Petition Exhibit U is a sworn declaration by Lieutenant Aponte dated March 3, 2005. In terms of their evidentiary value, they are not equivalent as Exhibit T contains hearsay statements.

also Petn. Exh. W.) In fact, it is unclear that a tape of the conversation between mother and son existed. (Petn. Exh. W.)

Specifically, with respect to the recording of the telephone call between Shawn and Adam Tenbrink, as Lieutenant Aponte explained in his declaration appended to the prosecution's opposition to the motion for a new trial, the administration building at Norco that housed the recording system was condemned and, in March or April 2003, the administrative offices were moved to a new building. The system for recording inmate conversations also changed. (Petn. Exh. U, ¶ 8 [Lt. Aponte decl.]; case No. S132449: 20CT 6435.) He was unable to retrieve any recordings from the old system. (Petn. Exh. U, ¶ 8 [Lt. Aponte decl.]; case No. S132449: 20CT 6435.)

In any event, petitioner has essentially recreated the conversation by virtue of Shawn Tenbrink's declaration in which Shawn recounts the conversation with his brother Adam. (Case No. S230782: Petn. Exh. 34; HCP-432.) However, the declaration contains inadmissible hearsay and is, therefore, not a basis for granting relief. (See *In re Fields*, *supra*, 51 Cal.3d at p. 1070 [unless the issue has been conceded by respondent, habeas corpus relief cannot be granted on the basis of inadmissible hearsay].) Shawn, who, at the time of his declaration, was serving a 13-month sentence for a parole violation, stated that he recalled a phone conversation which he had with his brother Adam in January 2003. (Case No. S230782: Petn. Exh. 34; HCP-432.) During that conversation, Shawn recounted that Adam told him that he knew who "robbed the house across the street from

the Petersons" [referring to the Medina's residence]. (Case No. S230782: Petn. Exh. 34; HCP-432.) Shawn stated that "Adam said someone told him that Laci had seen Todd rob the house." (Case No. S230782: Petn. Exh. 34; HCP-432.) Again, the declaration contains multiple levels of hearsay, including a statement made by an unidentified individual.

Also, Lieutenant Aponte's declaration makes clear that the Modesto Police Department got back to him within "a short time" after he left his second message. (Petn. Exh. U, ¶¶ 4-5 [Lt. Aponte decl.].) And, his second call occurred "after a period of days" relative to the first. (Petn. Exh. U, ¶¶ 4-5 [Lt. Aponte decl.].) Given this, the lag time between the first and second call was negligible. One look at a sampling of the tips that came in to the police department on January 22, 2003 (case No. S230782: Petn. Exh. 28)—while the search for Laci was ongoing—makes clear what investigators were up against in discerning which leads may have been worth follow-up.

As to the lack of police reports being turned over to petitioner, the lead investigator on this case, Detective Craig Grogan, swore to the following in a declaration related to the issue when it was before the trial court:

> I also completed a hand search of handwritten reports, which are not searchable in the automated report format. I have found no other reports mentioning Aponte or Tenbrink. I have not found any audiotapes in possession of the Modesto Police Department that contain a conversation recorded between Adam and Shawn Tenbrink. I sent an e-mail to detectives, officers and supervisors involved in the Peterson investigation requesting information about an

> interview between an officer or detective and Shawn Tenbrink. I have not received any information from any investigator as a result of that e-mail.

(Petn. Exh. Z, ¶ 3 [Det. Grogan decl.].)

As for interviews of the Tenbrink brothers, the detective stated the following:

> I did not go to the California Rehabilitation Center in Norco at any point during this investigation, nor did any other officer or detective to my knowledge. I have inquired with supervisors in the Investigative Services Unit and they do not recall any officer being sent to that facility for an interview related to the Laci Peterson case.

(Petn. Exh. Z, ¶ 4 [Det. Grogan decl.].)

So, petitioner's claim of suppression is more aptly described as a criticism of the police department's investigation of the Aponte tip. As with his criticism pertaining to the quantum of evidence of his guilt, such disparagement does not suffice to warrant relief on habeas corpus.

Even if the prosecution team can somehow be found to have suppressed information related to the lieutenant's information, petitioner cannot demonstrate materiality under *Brady*. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." (*United States v. Agurs, supra*, 427 U.S. at pp. 109-110.) Rather, in determining materiality, and hence the duty to disclose, "the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" (*Strickler*,

supra, 527 U.S. at p. 290; *Kyles v. Whitley, supra*, 514 U.S. at p. 435.)

Setting aside the multiple layers of hearsay, the essence of Lieutenant Aponte's tip was that burglar Steven Todd allegedly confronted Laci during the burglary. Even assuming the burglary did, in fact, occur on the morning of December 24, as we have pointed out, the defense had Todd on its witness list. Therefore, the timing of the Aponte defense interview, having occurred after the guilt-phase verdicts were rendered, is of no consequence since the defense had Todd at its disposal during the guilt phase. Nor can the timing of the interview be blamed on the prosecution given that the tip was turned over well before the preliminary hearing. (Case No. S132449: 20CT 6380.) Defense investigator Jensen made a note about the tip on June 25, 2004. (Case No. S230782: Petn. Exh. 35; HCP-433.) The defense case began on October 18, 2004. (Case No. S132449: 19CT 5939.) The jury returned its guilt phase verdicts on November 12, 2004. (Case No. S132449: 20CT 6133.) Given that Todd was on the defense witness list, and in light of this timeline establishing the defense had the information and investigated it, the reasonable inference is that petitioner's trial counsel vetted Todd and found that he would not be helpful to petitioner's defense.

Further, given the contents of Shawn Tenbrink's declaration, he would not have been permitted to testify to his brother Adam's statements, absent some hearsay exception. With respect to Adam in particular, there is no suggestion by petitioner that Adam's account of the conversation might differ from his

brother's attribution in exculpatory effect. In short, the conversation is of little probative value.

In any event, any further information that could have been discovered would have been immaterial. As stated, the credible evidence adduced at trial established that the burglary occurred on the morning of December 26. (Case No. S132449: 107RT 20017-20018.) Laci went missing on the morning of December 24. However, even if the burglary occurred on December 24, it occurred after the Medina's left and the mail was delivered. Steven Todd stated that there was one car missing from the driveway and there was mail in the Medina's mailbox. (Case No. S132449: 107RT 20018-20023; 108RT 20057.) As explained previously, the uncontradicted evidence at trial was that Laci was gone by then, given that neighbor Karen Servas found Laci's dog in the street, unattended, at 10:18 a.m. (Case No. S132449: 48RT 9412-9423.) Additionally, insofar as petitioner continues to rely on Diane Jackson's statement to investigators that she witnessed the burglary on the morning of December 24, Jackson stated the time of the burglary was 11:40 a.m. (Case No. S132449: 99RT 18563). Again, even if Jackson's recollection was true, Laci had disappeared prior to that time. In short, there was no federal constitutional violation under *Brady* because there was no suppression of material evidence. Accordingly, there is no "reasonable probability" that the result of the proceeding—petitioner's convictions for the murders of his wife and son—would have been different. (See *Kyles v. Whitley*, *supra*, 514 U.S. at pp. 433-434.)

The facts presented here are readily distinguishable from those in *Kyles v. Whitely*, *supra*, 514 U.S. 419. In that case, the prosecution had not disclosed a variety of information, including a key informant's prior police interviews, which were replete with inconsistent statements. (*Id.* at pp. 428-429.) That informant, referred to as "Beanie," also had made statements that tended to incriminate himself, and he had had opportunities to "plant" physical evidence which was used to convict Kyles. (*Id.* at pp. 424-426.) Yet, cross-examination could have revealed that the police had failed to direct any investigation against Beanie. (*Id.* at p. 442, fn.13.) The high court held that the cumulative effect of this (and other) information was material because, had it been brought out on cross-examination of the police, it would have allowed the jury to see that Beanie was "anxious" for Kyles to be arrested for murder and that the police had a "remarkably uncritical attitude" toward Beanie. (*Id.* at p. 445, 451.) No such materiality exists in this case, as explained.

Given the lack of a discovery violation, it makes abundant sense from a tactical standpoint that if a claim were to be advanced on petitioner's behalf in his first habeas petition, it would be ineffective assistance of trial counsel given that the tip was turned over to the defense well before the preliminary hearing. Therefore, pursuant to *Strickland*, petitioner cannot show deficient performance on the part of habeas counsel for not having raised a *Brady* violation claim instead. Habeas counsel "performs properly and competently when he or she exercises

discretion and presents only the strongest claims instead of every conceivable claim." (*In re Robbins*, *supra*, 18 Cal.4th at p. 810.)

Even if habeas counsel's performance was not objectively reasonable, petitioner cannot show prejudice. As we have said, petitioner has presented no credible evidence or argument to defeat the timeline established at trial that Laci was missing by 10:18 a.m. on December 24—while the Medinas were still home, i.e., before the burglary occurred. Nor has petitioner presented any credible evidence that Laci encountered the Medina burglars on December 24 to begin with. Therefore, his claim of ineffective assistance of habeas counsel fails to establish a prima facie case warranting relief.

Before moving on, it may be worth a few words about petitioner's repeated reliance on the declaration of one of his jurors. (E.g., Petn. at 243.) The declaration was lodged as an exhibit in support of petitioner's first habeas petition and in conjunction with his reply to respondent's informal response. (Case No. S230782: Petn. Exh. 50.) The relevant statement follows:

> The defense presented evidence that a burglary took place across the street from Laci and Scott's house in Modesto around the time of Laci's disappearance. *We did not hear evidence of a monitored telephone call to a Modesto prisoner saying that the man arrested for the burglary had told someone that Laci Peterson had seen him burglarizing the house.* Any evidence that Laci was still alive when Scott was already at the marina would have been important to me as a juror. We heard evidence that Laci was a pretty bold person and even sometimes woke up homeless people and told them they

> should move on. Evidence showing that she may have confronted the burglars would have been significant.

(Case No. S230782: Petn. Exh. 50, ¶ 4; HCP-986-987 [juror decl.], italics added.)

As an initial matter, this declaration as to the impact of any evidence on the juror's thought process in relation to deliberations and verdict is inadmissible. (Evid. Code, § 1150 ["No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."]; see *People v. Steele* (2002) 27 Cal.4th 1230, 1261 ["'This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent.'"]; *id.* at p. 1624 [explaining that "as a matter of substantive law, the jurors' mental processes leading to the verdict are of no jural consequence"].)

With respect to the substance of the declaration, until now, respondent has not had the opportunity to address the statement. The italicized portion begs the question of how this juror came to know about what sounds like the Aponte tip and related information. His declaration does not disclose that. It may well have come from the defense investigator who took the juror's statement. Assuming that was the case, there is no way to know how that information was presented to the juror because it undoubtedly would have informed his response. That, in and of itself, calls into question the reliability of his statement. However, setting that aside, there is nothing earth-shattering

about his opinion. Certainly, if there was credible evidence that Laci was still alive while petitioner traveled 90 miles to go fishing on San Francisco Bay on a cold, damp Christmas Eve morning in a boat he had recently purchased and outfitted with the wrong fishing equipment for the kind of fish he said he was fishing for, the other jurors would have wanted to know that, too. The problem for petitioner is that such evidence does not exist. Therefore, his reliance on the juror's statement is not helpful to him.

V. PETITIONER'S FALSE EVIDENCE CLAIM REGARDING CONNER'S FETAL AGE AT DEATH IS BARRED AND FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Petitioner contends the prosecution presented false evidence at trial concerning Conner's fetal age at the time of his death. (Petn. at 248-255.) He also asks the Court for an appointment of an attorney and additional money so that he can secure another "expert opinion" (Petn. at 256) in addition to the one that he presented in his first habeas petition.

The claim should be barred as successive having been raised and denied on the merits with respect to his first habeas petition in the California Supreme Court. In any event, petitioner has not made out a prima facie case of false evidence. Differences in opinions among experts are insufficient to show the scientific evidence was false. Accordingly, there is no need for the Court to provide petitioner with an attorney and additional funding at the public's expense.

A. The claim should be barred as successive

Petitioner concedes that he "previously submitted a false evidence claim regarding Conner's fetal age . . . ." But, he maintains that claim is "not raised here." (Petn. at 252.)

On the contrary, he reprises the claim but with a different gloss citing, without explanation, a number of scientific articles, which he argues demonstrate the prosecution's expert testimony on fetal biometry was false. (See case No. S230782: Claim II at 109-116.) The claim should be barred as successive. (*Clark*, *supra*, 5 Cal.4th at p. 769; see *In re Reno*, *supra*, 55 Cal.4th at p. 455.) Again, repetitious presentation of claims is an abuse of the writ and the claim should be barred.

B. Relevant law on false presentation of scientific evidence

Respondent incorporates by reference here the law cited in section III.B.1, *ante*, on presentation of false evidence, generally.

"'[F]alse evidence'" includes opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by the state of scientific knowledge or later scientific research or technological advances. (§ 1473, subd. (e)(1).)[40]

Additionally, in *Richards I*, *supra*, 55 Cal.4th 948, our Supreme Court explained the considerations at issue when determining whether an expert witness has presented false testimony: "Given, on the one hand, the subjective component of

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[40] Petitioner does not argue that the prosecution's expert at issue, Dr. DeVore, has repudiated his opinion.

expert opinion testimony, and, on the other hand, the possibility that advances in science and technology might prove an earlier-held opinion to be objectively untrue, it is critical to define what precisely is meant by 'false' when the false evidence standard of Penal Code section 1473 is applied to expert opinion testimony." (*Id.* at p. 962.) "[W]hen new expert opinion testimony is offered that criticizes or casts doubt on opinion testimony given at trial, one has not necessarily established that the opinion at trial was false. Rather, in that situation one has merely demonstrated the subjective component of expert opinion testimony." (*Id.* at p. 963.) "If, and only if, a preponderance of the evidence shows that an expert opinion stated at trial was objectively untrue, the false evidence standard applies. In that narrow circumstance, if it is reasonably probable that the invalid opinion given at trial affected the verdict, then habeas corpus relief is appropriate." (*Ibid.*)

Ultimately, in holding that the petitioner had failed to establish the falsity of the expert testimony, the *Richards I* court pointed out that even though other experts disagreed with, or were critical of, the opinion rendered by the prosecution's expert witness, such disagreement or criticism "does not by itself establish that his opinion was false." (*Richards I, supra*, 55 Cal.4th at p. 964.) As the court observed, "opinion testimony often includes a subjective component, and good faith disagreements among credible experts are commonplace." (*Ibid.*) This was especially true in cases where "as here, the opinion being proved false was highly tentative at the outset (asserting

that petitioner's dentition is 'consistent with' the bite mark) and the opinions being used to prove its falsity are equally tentative (asserting, for example, that the expert 'would tend to rule out [petitioner]')." (*Id.* at p. 965, fn. 5.)

In *Richards I*, the Supreme Court rejected the petitioner's claim on habeas corpus that his conviction should be reversed because the prosecution's dental expert had recanted his opinion testimony at trial that a lesion on the victim's hand was a human bite mark matching the petitioner's unusual teeth. (*In re Richards* (2016) 63 Cal.4th 291, 293 (*Richards II*).) After the Legislature amended the relevant statute to provide that the definition of false evidence included repudiated expert evidence, the court concluded it was reasonably probable that the false evidence presented by the expert at petitioner's trial affected the outcome of that proceeding and granted the habeas corpus petition. (*Richards II*, at p. 315.)

Accordingly, in order for expert testimony to be false under section 1473, subdivision (e)(1) and *Richards II*, unless the expert repudiates the testimony, the petitioner must show that "'underlying facts essential to the expert's inferential method and opinion'" no longer support that method or opinion in light of new scientific understanding or technology. (*Richards II*, *supra*, 63 Cal.4th at p. 311 [discussing 2015 amendment and quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 1058 (2013-2014 Reg. Sess.) as amended June 4, 2014, p. 3].)

Federal courts agree that a subjective disagreement between experts or some inaccuracy in the testimony does not equate with

being false. (See *United States v. Workinger* (9th Cir. 1996) 90 F.3d 1409, 1416 [holding that disagreement between experts did not transform an expert's testimony into a falsehood]; *Harris v. Vasquez* (9th Cir. 1991) 949 F.2d 1497, 1524 [the fact that petitioner's current experts believed his doctor at trial rendered an improper psychiatric diagnosis due to an allegedly inadequate examination does not establish that any testimony was false; "'psychiatrists disagree widely and frequently.'"]; cf. *Sistrunk v. Armenakis* (9th Cir. 2002) 292 F.3d 669, 675 & n.7 (en banc) [holding that although doctor's testimony was clearly inaccurate, it was not "false" or a "lie"].)

C. Relevant background

At trial, in support of petitioner's third-party culpability defense, he attempted to undermine the testimony of the prosecution's expert witness Dr. DeVore[41] who estimated the time of Conner's death to be approximately December 23. The defense called its own expert, Dr. March, to posit that the earliest

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[41] Dr. DeVore was uniquely qualified to offer an opinion as to Conner's gestational age and the approximate date that Conner died. DeVore was a specialist in high-risk obstetrics and maternal-fetal medicine. (Case No. S132449: 95RT 17861.) He attended medical school at the University of Utah and completed his residency at Yale University where he also did a fellowship in maternal-fetal medicine. (95RT 17856.) DeVore treated about 6,000 pregnant patients each year. (95RT 17858.) He estimated that he had conducted 75,000 ultrasound examinations of pregnant women in his career. (95RT 17859, 17933.) DeVore had published in excess of 100 peer-reviewed articles and had authored chapters in at least 25 medical textbooks. (95RT 17859-17860.)

Conner could have died was December 28, which necessarily meant that Laci was alive at that time. This, in turn, undermined the prosecution's theory that petitioner murdered Laci and Conner on the night of December 23 or early on December 24. In other words, if Laci was alive after the morning of December 24, petitioner was not the murderer.

1. Trial testimony

Respondent incorporates by reference here discussion of the expert testimony presented by the prosecution and defense at trial as summarized in our informal response to petitioner's first habeas petition. (Case No. S230782: Informal Resp. at 44-51.)

2. First habeas petition

In Claim II of petitioner's first habeas petition, he argued based on Dr. Jeanty's declaration, that Dr. DeVore used the wrong formula and chose to apply it to the measurement of only one of Conner's three long bones.[42] The end result being an inaccurate estimate of gestational age as it related to the timeframe of Conner's death. (Case No. S230782: Petn. at 113-115.) According to Jeanty, utilizing the correct formula, measuring three bones instead of one, and averaging the results, he arrived at what he opined was the correct date of Conner's death: January 3, 2003. (Case No. S230782: Petn. Exh. 7; HCP-59, 62.) Petitioner contended this result supported his defense

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[42] DeVore had utilized Jeanty's formula, among others, to arrive at his conclusions. (Case No. S132449: 95RT 17894-17896.)

that Laci was alive well past December 24, which meant that he was not the murderer.

In respondent's informal response, we noted that the defense's trial expert, Dr. March, differed somewhat with petitioner's habeas expert, Dr. Jeanty, as to an estimated date of death. March opined that it was impossible to pinpoint a specific date of death utilizing any reference standard, including Jeanty's. (Case No. S132449: 106RT 19768.) March testified that the earliest Conner could have died was December 29 and the latest end of the range was mid-January—a span of almost three weeks. (Case No. S132449: 106RT 19779-19780, 19783, 19786-19787, 19848-19849.) Yet, like DeVore, Jeanty explained in his declaration that he averaged three dates, albeit different ones (December 30, January 3, January 5) derived from bone measurements, and arrived at an estimated date of death of January 3. (Case No. S230782: Petn. Exh. 7; HCP-23-25.)

Jeanty's findings on gestational age, also differed from those of Dr. Galloway, the prosecution's forensic anthropologist, who estimated Conner's gestational age to be somewhere between 33 and 38 weeks—a span of six weeks. (Case No. S132449: 92RT 17529-17530.) She explained the reasons why she could not narrow that timeframe, citing several unknown variables. (Case No. S132449: 92RT 17533-17534.) Jeanty, on the other hand, opined that Conner's gestational age at the time of his death ranged from 238 days to 244 days—a much shorter time span than that estimated by Galloway. (Case No. S230782: Petn. Exh. 7; HCP-23-25.) Thus, there existed subjective differences of

opinion between not only defense habeas expert Jeanty's conclusions and those of prosecution trial experts DeVore and Galloway, but also between Jeanty and defense trial expert March.

Indeed, even defense expert Jeanty's declaration suggested there was nothing deceitful or false about DeVore's testimony. Jeanty describes DeVore's use of the formula in question as "inappropriate in this instance" because the formula was not devised for a situation where the date of gestation is known. (Case No. S230782: Petn. Exh. 7; HCP-60.) Jeanty explained that "the more accurate method" would be to use growth percentiles for projecting gestational age. (Case No. S230782: Petn. Exh. 7; HCP-60.) Jeanty did not say that utilizing growth percentiles is the only method that could be used when the date of gestation is known; he merely opined that it was "more accurate" than the formula DeVore used.

Further, in distinguishing his own approach from that employed by DeVore, defense trial expert March observed that "not everyone marches to the tune of the Jeanty drummer []." (Case No. S132449: 106RT 19837.) In other words, in March's view, there were other reference standards that would have resulted in more reliable conclusions.

In all, respondent argued that Jeanty's differences with DeVore amounted to a disagreement between experts about the best and most accurate way to arrive at a reliable estimate of gestational age. Such disagreement did not mean that DeVore's testimony was false. (Case No. S230782: Informal Resp. at 51-

56.) Respondent also maintained that there was an insufficient showing under federal law that the prosecution had *knowingly* presented false testimony. (Case No. S230782: Informal Resp. at 56-58.) Finally, based on the totality of the circumstances, it was not reasonably probable that Dr. DeVore's testimony, even if false in some respect, affected the jury's verdicts. (Case No. S230782: Informal Resp. at 58-61.)

The California Supreme Court agreed and denied the claim on the merits.

D. Petitioner has failed to show anything other than a subjective disagreement among experts on gestational age

Petitioner's claim fails because Dr. DeVore has not repudiated his own opinion, nor has his opinion been undermined by subsequent scientific or technological advances, as we explain.

Petitioner cites to a series of articles in support of his claim and, in conclusory fashion, argues that "the dispute has grown" since his trial such that "the evolution of science" is "in Petitioner's favor." (Petn. at 253, 254.) He provides no explanation of how the articles establish that Dr. DeVore's testimony was objectively false. (Petn. at 254-256.)[43] Even crediting his assertion that the unexplained articles represent an ongoing dispute, state and federal law is clear that a dispute in the scientific community is not the same as false evidence. Such

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[43] It appears three articles predated the filing of petitioner's first habeas petition in November 2015. (Petn. at 255, articles E, G, and I.)

disagreement or criticism "does not by itself establish that his opinion was false." (*Richards I, supra*, 55 Cal.4th at p. 964.)

People v. Johnson (2015) 235 Cal.App.4th 80 may provide some perspective. In *Johnson*, the defendant had been civilly committed as a sexually violent predator based on a prosecution expert diagnosing him with a paraphilic coercive disorder. (*Id.* at p. 86.) At trial, defense experts "disagreed with the state's experts about Johnson's diagnosis" testifying that "although it can be a valid diagnosis, paraphilic coercive disorder is very rare" and "is controversial within the scientific community." (*Ibid.*) The defense experts further opined that Johnson did not have the disorder. (*Ibid.*)

In a habeas corpus petition, Johnson sought relief under section 1473, subdivision (e)(1), based on paraphilic coercive disorder having since been removed from the Diagnostic and Statistical Manual of Mental Disorders (DSM). The court denied the petition, explaining that, although this change in the DSM "may cast additional doubt on the validity of" Johnson's diagnosis (*Johnson, supra*, 235 Cal.App.4th at p. 89) and "might have bolstered Johnson's arguments if introduced at trial" (*id.* at p. 92), it "[did not] completely undermin[e] the state's case" or "reflect[] scientific research that undermines expert testimony diagnosing that disorder and renders that testimony false evidence" (*id.* at p. 91).

Here, by comparison, petitioner offers this Court nothing even remotely close to the arguable evolution of science at issue in *Johnson* involving the DSM—sometimes referred to as the

"bible" of psychological and psychiatric disorders. That he wants the Court to arm him with an attorney and other funding to find yet another expert that he can pay with taxpayer money to call Dr. DeVore's testimony into question is contrary to the law. Without regard for the potential existence of other undisclosed facts, the petition is to be determined solely by what is actually before the Court when the petition is considered. (*Duvall, supra,* 9 Cal.4th at p. 474; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.)

Even if Dr. DeVore's testimony could be shown to be false in some respect, under state law, it is not reasonably probable that it affected the jury's verdicts. (*In re Malone, supra,* 12 Cal.4th at pp. 965-966; *In re Bell, supra,* 42 Cal.4th at p. 637; *In re Cox, supra,* 30 Cal.4th at pp. 1008-1009.) Here, respondent incorporates by reference our discussion at pages 58 through 61 of the informal response to petitioner's first habeas petition in case No. S230782. In summary, we explained that Jeanty's criticisms of DeVore's methodology and conclusions were presented at trial through defense counsel's searching cross-examination of DeVore and the presentation of defense expert March's contrary opinion. Moreover, based on the testimony of both prosecution's experts and the defense expert, it was undoubtedly clear to the jury that trying to pinpoint the specific date of Conner's death with reliable medical accuracy was impossible; all of the experts talked in terms of a date range (Drs. Galloway and March) or an average computed from several possible dates (Drs. DeVore and Jeanty).

Apart from DeVore's testimony on Conner's gestational age as it related to the estimated time of Conner's death, the prosecution presented compelling evidence that pointed to petitioner having murdered Laci and Conner sometime after 8:30 p.m. on December 23, when Sharon Rocha last spoke to Laci, or during the early morning hours of December 24. "'[T]he usual rule, that "evidence must be taken most strongly in support of the order appealed from and conflicts must be resolved in favor of respondent," is applicable on habeas corpus review.'" (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1314.)

As to a federal due process violation, petitioner must show that "(1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the false testimony was material (i.e., there is a reasonable likelihood that the false testimony could have affected the judgment). [Citation.]" (*Dow v. Virga*, *supra*, 729 F.3d at p. 1048.) Again, even if there was some falsity in Dr. DeVore's testimony, petitioner certainly has not shown that the prosecution knew it was false. For that reason alone, he has failed to establish a violation under federal law.

VI. PETITIONER'S CLAIM OF CUMULATIVE ERROR FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

Last, petitioner claims the alleged errors here, if considered in the aggregate, constitute a violation of federal due process and entitle him to the relief he seeks. In the alternative, he contends that if the alleged errors here are combined with those raised in his automatic appeal and first habeas petition then relief should be granted on that basis. (Petn. at 257-259.)

For the reasons set forth above, petitioner has failed to state a prima facie claim for relief on any basis, therefore his claims are no stronger in the aggregate. As the court in *United States v. Haili* (9th Cir. 1971) 443 F.2d 1295, 1299, observed, "[a]ny number of 'almost errors,' if not 'errors,' cannot constitute error." To the extent that errors may have occurred, the alleged errors did not affect the process nor did they accrue to petitioner's detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Osband* (1996) 13 Cal.4th 622, 688.)

Insofar as petitioner incorporates claims of error from the automatic appeal and first habeas petition, the California Supreme Court decided those claims against him on the merits.[44] (*In re Reno, supra*, 55 Cal.4th at p. 483 ["[C]laims previously rejected on their substantive merits—i.e., this court found no legal error—cannot logically be used to support a cumulative error claim because we have already found there was no error to cumulate"].)

Nonetheless, we reprise here, and incorporate by reference, our corresponding arguments from the relevant portions of the respondent's brief in case No. S132449 (pages 238 through 450) and our informal response in case No. S230782 (pages 136 through 137) that there was no error with respect to these claims.

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[44] Of course, other than the juror misconduct claim in case No. S230782, which is the subject of claim one here.

CONCLUSION

Based on the foregoing, respondent respectfully requests the Petition for Writ of Habeas Corpus be denied without the issuance of an order to show cause or appointment of counsel.

Respectfully submitted,

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