IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE SCOTT PETERSON,	)	No.
	)	
Petitioner,	)	Related to Automatic Appeal
	)	No. S132449
On Habeas Corpus.	)	
_____	)	

PETITION FOR WRIT OF HABEAS CORPUS

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

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TABLE OF CONTENTS

CLAIM SIX:

CLAIM SEVEN:

CLAIM EIGHT:

CLAIM NINE:

CLAIM TEN:

CLAIM ELEVEN:

CLAIM TWELVE:

CLAIM THIRTEEN:

CLAIM FOURTEEN:

CLAIM FIFTEEN:

CLAIM SIXTEEN:

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INTRODUCTION

In April 2003, Scott Peterson was charged with the capital murder of his wife Laci and his unborn son Conner. The jury convicted Scott and sentenced him to death.

Habeas investigation has revealed that before the prosecution had called even a single witness, Scott's right to a fair trial had been compromised: a stealth juror had lied her way onto the jury.

The juror was Richelle Nice.[1] Initially seated as an alternate, Ms. Nice was eventually was seated to replace a discharged juror during

[1] Petitioner identifies Ms. Nice by name rather than by juror number in light of the fact that Ms. Nice, along with six other jurors, published a book in their own names about their experience as jurors in Mr. Peterson's case. (See "We the Jury," Exhibit 8.) Ms. Nice's book identifies herself as Alternate No. Two, who was subsequently seated as Juror No. 7. (Exh. 8 at HCP-000140, 000142, 000163.)

deliberations.

Fairly read, the trial record itself shows Ms. Nice worked hard to get on the jury. Sitting on a five-month capital trial poses a substantial economic hardship on those jurors who do not have jobs which pay them during jury service. Many, many hundreds of jurors obtained a discharge for precisely this reason.

The trial court offered Ms. Nice a discharge for the same reason. Despite this, and despite her admission that she would not get paid for her time as a juror, Ms. Nice said she was willing to serve. During trial she actually had to borrow money from another juror in order to make ends meet. Plainly, Ms. Nice wanted to sit in judgment of Scott Peterson.

This could, of course, be chalked up to a simple desire to be a good citizen. But the habeas investigation reveals a darker motive.

As with all the potential jurors in the case, Ms. Nice had been asked if she had ever been the victim of a crime. She said no. She was asked if she had ever been involved in a lawsuit. She said no. She was asked if she had ever participated in a trial as a party or as a witness. She said no.

All these answers were false. In fact, when Ms. Nice was four and one-half months pregnant in November of 2000, she and her unborn baby were threatened, assaulted and stalked by her boyfriend's ex-girlfriend, Marcella Kinsey. Ms. Nice was so frightened that she filed a lawsuit to obtain a restraining order against Kinsey. Ms. Nice's petition stated that she "feels like Marcella would try to hurt the baby, with all the hate and anger she has for Richelle." In fact, Ms. Nice, while representing herself, sued her attacker for causing her to begin premature contractions, threatening the life of her unborn child. In fact, at trial on her own complaint against her attacker, Ms. Nice was sworn and called as a witness. Based on Ms. Nice's testimony, the court granted her a three-year restraining order. As a result of her malicious conduct against Ms. Nice, Ms. Kinsey was convicted of the crime of vandalism and was sentenced to a week in county jail.

Juror Nice withheld all this evidence when directly asked during jury selection, even though such information was directly material to the capital trial where Scott was charged with killing of his unborn child.

The new evidence establishes that Ms. Nice gave false answers to get on this jury because this case, like Ms. Nice's past case, involved harm to an unborn child. The deliberations confirm this: during deliberations,

when 10 of the jurors had decided to acquit of first degree murder in connection with Conner's death, Ms. Nice was one of two holdouts for a first degree conviction. As Ms. Nice later described her role as a holdout, she asked her fellow-jurors, "'How can you not kill the baby,' pointing to her own stomach." She pleaded to her fellow-jurors, "That was no fetus, that was a child." And after trial, Ms. Nice took the extraordinary step of writing numerous letters to the man she helped put on death row, focusing repeatedly on what she believed he had done to his unborn child. Ms. Nice's falsehoods in getting on this jury require a grant of relief. (Claim One.)

Unfortunately, as the habeas investigation now shows, the jury misconduct during voir dire was just the beginning. In fact, after the jury was seated, Scott's right to a fair trial was compromised throughout the state's case-in-chief.

The state's theory had three components: (1) Scott killed Laci and Conner at their home in Modesto on the evening of December 23 or the morning of December 24, (2) Scott took Laci's body to the Berkeley Marina on December 24 and (3) Scott then put the body in the San Francisco Bay. Under the state's theory, the bodies remained in the bay until a storm dislodged them on April 12, 2003, and they washed ashore over the next two days.

The defense theory on these three points was very different: (1) Laci and Conner were alive on December 24 when Scott drove to the marina, (2) Scott did not transport Laci's body to the marina on December 24 and (3) Scott did not put Laci in the bay. Scott has at all times prior to trial and since maintained his innocence.

There was no direct evidence supporting the three parts of the state's case or otherwise linking Mr. Peterson to the charged crimes. Thus there were no eyewitnesses, no confessions, and no forensic evidence from the crime scene linking Mr. Peterson to the killings. Absent such evidence, to establish the three parts of its case the prosecution therefore relied on three forms of forensic evidence: (1) expert testimony about fetal development, (2) expert testimony on dog scent evidence and (3) expert testimony about the movement of bodies in San Francisco Bay.

The fetal development evidence was introduced to support the first part of the state's case. The state offered an expert in fetal growth who testified that by examining Conner's leg bone, he could tell Conner was killed on either December 23 or 24. The dog scent evidence was introduced to prove the second part of the state's case. The state offered testimony from a dog trainer that her trailing dog alerted on Laci's scent at the Berkeley Marina, showing that Scott transported the body there on December 24. Finally, the testimony about the movement of bodies in

water was introduced to prove the third part of the state's case. The state offered testimony from a hydrologist that Laci was placed in the bay precisely where Scott told police he had been fishing.

In light of this evidence the jury convicted of murder and sentenced Scott to death. It turns out, however, that the jury deciding this case did not have the whole truth -- or anything close. As discussed below, it turns out that every part of the state's forensic evidence was false.

The state's fetal growth expert reached his conclusion by relying on a formula created by Dr. Phillipe Jeanty. The conclusion coincided directly with the state's theory of the case. But no one at trial consulted with Dr. Jeanty himself. As discussed below, Dr. Jeanty would have testified that the state's expert applied the wrong formula to the wrong bones and, not surprisingly, came out with the wrong result. In fact, proper use of Dr. Jeanty's formula directly supports the defense theory of the case. (See Claim Two.)

The state's canine scent detection expert testified that a trailing dog detected Laci's scent at the Berkeley Marina. Again, while this evidence coincided perfectly with the prosecution's theory that Scott took Laci's body to the marina, it too turns out to be false. As discussed below, the country's leading experts on canine detection have made clear that this

witness's testimony was based on nothing more than the dog handler's unscientific and unreliable interpretation of the dog's body position and gait. (See Claim Four.)

The state's expert on the movement of bodies in the bay testified that the bodies were placed in the bay near Brooks Island, where Scott was fishing. This testimony also coincided perfectly with the prosecution's theory of the case. Yet, this testimony also turns out to have been fundamentally flawed. In fact, the bodies may have been deposited at two very different points in the bay, including in a tidal creek near a freeway. The state's contrary evidence was yet again false. (See Claim Six.)

It is not surprising that the state's three key experts all arrived at false conclusions. This petition establishes that the prosecution's handling of its forensic experts virtually assured that their results would be scientifically unreliable. In each of these forensic areas, police told their experts the result they hoped the experts would arrive at, thus introducing a form of "expectation bias" into the forensic process. (See *State Farm Fire & Cas. Co. v. Steffen* (E.D. Pa. 2013) 948 F.Supp.2d 434, 444. See generally, Risinger, et al. "*The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*," (2002) 90 Cal.L.Rev. 1, 6-26.)

Thus, the prosecution's fetal growth expert was told exactly when the police believed that the baby had died. The medical expert concluded that the baby had died on that very date. (95 RT 17905, 17922.) At the Berkeley marina, police told the dog-handler to search for Laci's scent around the ramp where Scott launched his boat. (84 RT 15997.) The dog-handler believed her dog detected Laci's scent in that very spot. And police told their expert on movement of bodies in the bay "where they thought that the body might have been placed in water – it was over off the tip of Brooks Island." (101 RT 18918.) The hydrologist determined that the bodies were deposited in the bay at that very spot.

While the state alone is responsible for this repeated presentation of false evidence, defense counsel had a role to play as well. As more fully discussed below, not only was this evidence false, but defense counsel failed to challenge the veracity of any of this evidence with qualified experts of his own. Counsel could and should have presented substantial evidence to expose the falsity of the state's case. (Claims Three, Five and Seven.) Most importantly, counsel failed to present testimony from an expert qualified in assessing Conner's gestational age. Such an expert could have testified that based on the length of Conner's long bones, Conner did not die on December 24, 2002, the date Laci disappeared, but lived until as late as January 3, 2003. The exculpatory nature of such an expert opinion cannot be overstated: it would have established that Conner,

and therefore Laci, were alive for days after Scott went fishing. (See Claim Three.) Counsel also failed to present expert testimony that would have proved false the prosecution's evidence that a dog detected Laci's scent at the marina (Claim Five), and that Laci's body was deposited in the bay where Scott was fishing (Claim Seven).

Unfortunately, defense counsel did not just fail to challenge the prosecution's case; he failed to support his own defense theory with readily available evidence. To prove the defense theory that Laci was alive when Scott left home to go fishing, counsel promised the jury it would hear from several witnesses who saw Laci in Modesto after Scott left. According to counsel, this evidence would prove that Scott was "stone cold innocent." The assumption on which this promise was based was entirely correct: if Laci was alive when Scott drove to the Berkeley Marina then Scott was indeed "stone cold innocent."

But counsel never delivered on his promises. Although counsel promised to produce several witnesses who saw Laci alive and walking her dog after Scott left to go fishing, he never called a single one. Counsel's broken promises deprived Scott of the effective assistance of counsel. (See Claim Eight.) In fact, these witnesses presented an entirely credible time line for when they saw Laci. But the jury heard from none of them. Instead, in view of counsel's broken promises, the jury -- not without reason

-- concluded that Scott was "stone cold guilty." (See Claim Nine.)

But this was not the only evidence counsel neglected to introduce to prove Laci was alive after Scott left home, and was therefore, in counsel's own words, "stone cold innocent." Thus, counsel failed to introduce evidence that would have corroborated the testimony of the neighbors who saw Laci walking her dog. This evidence included statements from Steven Todd -- a man who was burglarizing the house directly across the street from the Peterson's at the very time Laci disappeared (after Scott had left to go fishing) -- and who told acquaintances that Laci confronted him and he verbally threatened her. If indeed Laci confronted Todd, then Scott is innocent since he was well on his way to Berkeley at that time. Yet although Todd's statements were provided to the defense in pre-trial discovery, the jury never heard them. (Claim Ten.)

In sum, Mr. Peterson was charged with killing his wife and unborn child. Trial began with a juror concealing critical evidence about an attack on her own unborn child. The state's case was riddled with false evidence. And defense counsel failed to expose the falsity of this evidence, he failed to deliver on promises made to jurors in opening statements, and he failed to support the theory of defense he himself had selected. Considered either singly or in combination, these issues require that the Court issue an Order to Show Cause and vacate petitioner's conviction.

PRELIMINARY ALLEGATIONS

Petitioner Scott Peterson, through his counsel, files this petition for writ of habeas corpus. By this verified petition petitioner alleges as follows:

1. Petitioner is unlawfully confined by the California Department of Corrections pursuant to a judgment of the Superior Court for San Mateo County in *People v. Peterson*, No. 55500A, entered on March 16, 2005.

2. Petitioner was charged in Stanislaus Superior Court with the December 2002 murders of his wife Laci and their unborn child, Conner, in violation of Penal Code section 187. (9 CT 3284; 1 Supp. CT 4-5.)[2] The information added a multiple murder special circumstance in violation of section 190.2, subdivision (a)(3). (9 CT 3284.)

3. Petitioner pled not guilty and was tried by jury. Petitioner was convicted of one count of first degree murder and one count of second degree murder. The multiple murder special circumstance allegation was found true. Petitioner was sentenced to death.

4. Petitioner has appealed his conviction. (*People v. Scott Lee Peterson,* No. S132449.) That appeal is now pending in this Court.

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[2] Citations to "CT" refer to the Clerk's Transcript on Appeal. Citations to "Supp. CT" refer to the Supplemental Clerk's Transcript on Appeal. Citations to "RT" refer to the Reporter's Transcript on Appeal.

5. Petitioner seeks relief in this Court because his related, automatic appeal is currently pending here. This petition is related to the appeal, and this Court's appointment of counsel contemplated the filing of the petition directly in this Court. This Court has original jurisdiction over this petition pursuant to article VI, section 10 of the California Constitution.

6. As to the claims asserted in this Petition, petitioner has no adequate remedy at law because they are based in whole or in part upon facts outside the certified record on direct appeal.

7. Petitioner's imprisonment and death sentence are the result of a fundamentally unfair trial. A number of errors and other factors combined to deprive petitioner of safeguards to which he was constitutionally entitled, and distorted the truth-seeking function of his trial. These errors and other factors included, but were not limited to, the seating of a biased juror; ineffective assistance of trial counsel at both the guilt and penalty phases; the presentation of false evidence; and numerous errors by the trial court which deprived petitioner of a fair trial.

8. These errors violated petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding sections of the California Constitution. In addition, petitioner's claims merit consideration because of the nature and irrevocability of a capital sentence. Any limitation or restriction on consideration of the merits of these claims would violate Article I, section

11 and Article VI, section 10 of the California Constitution, Penal Code section 1473 et seq., and Article I, section 9, paragraph 2 of the United States Constitution.

9. No prior application for a writ of habeas corpus has been filed on petitioner's behalf in regard to the detention or restraint complained of in this petition.

10. The present petition is timely in that it has been filed within three years of the appointment of habeas counsel or within 180 days of the filing of the reply brief on direct appeal. (Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3, Timeliness Standards, Standard 1-1.1.) The reply brief on direct appeal was filed on July 23, 2015. This petition has been submitted for filing within 180 days of July 23, 2015.

11. To the extent the claims raised herein are not properly raised in this petition because of any failure by trial or appointed appellate counsel, the representation of trial and appellate counsel was not objectively reasonable and fell below the standard of care required by the state and federal constitutions. To the extent counsel's performance in any way limits the current consideration of the claims raised herein, petitioner has been prejudiced.

12. Petitioner's judgment of conviction has been unlawfully and

unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Even if none of the errors specified above alone require a new trial, the combination of those errors with one another and with the errors complained about on appeal require relief.

JUDICIAL NOTICE AND INCORPORATION

1. Petitioner hereby incorporates into each of the claims set forth below all exhibits appended to this petition and the facts set forth therein. In connection with any expert declaration, the matters relied upon by such expert are incorporated into each of the claims set forth below as if fully set forth herein. Petitioner also incorporates by reference into each claim all other relevant claims whether or not specifically referenced therein. Petitioner further incorporates by reference documents submitted separately under seal.

2. Petitioner hereby requests that the Court take judicial notice of the contents of the entire certified record on appeal in petitioner's automatic appeal, including any exhibits admitted or marked for identification at trial, and the briefs, motions, pleadings and orders filed in petitioner's automatic appeal.

PROCEDURAL HISTORY

1. On December 3, 2003 the Stanislaus County District Attorney filed a two-count information against petitioner Scott Peterson, charging him with the December 2002 murders of his wife Laci and their unborn child, Conner, in violation of Penal Code section 187. (9 CT 3284; 1 Supp. CT 4-5.) The information added a multiple murder special circumstance in violation of section 190.2, subdivision (a)(3). (9 CT 3284.)

2. Mr. Peterson pled not guilty and denied the special circumstance allegation. (9 CT 3284.) On January 9, 2004, the state filed its "Penal Code Section 190.3 Notice Regarding Aggravating Evidence." (10 CT 3691-3693.)

3. Trial was originally set for Stanislaus county. Prior to trial, Mr. Peterson filed a motion to change venue alleging that prejudicial publicity about the case rendered a fair trial impossible in Stanislaus County. (9 CT 3324-3393.) In its written papers, the state conceded that the "pretrial publicity has been geographically widespread and pervasive" but nevertheless opposed the motion. (10 CT 3415; *see* 10 CT 3408-3604.) The trial court granted the motion. (RT PPEC at 86-87, 203-206.)[3] Over defense objection, however, the case was transferred to San Mateo County,

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[3] Citations to "RT PPEC" refer to the separately paginated one-volume transcript entitled "Post-preliminary Examination Certified Record."

only 90 miles away. (RT PPEC 256-264; 11 CT 3710.)

4. Jury voir dire began in San Mateo county on March 4, 2004. (11 RT 2025.) The parties agreed on a jury questionnaire; after nearly 1,000 jurors had completed their questionnaires, the results showed that 96% of potential jurors had been exposed to publicity about the case and -- of this group -- 45% were willing to admit they had prejudged Mr. Peterson's guilt. (14 CT 4516, 4520; 10 RT 1960-1970, 2007-2014.) On May 3, 2004, defense counsel made a second motion to change venue based upon the pretrial publicity in light of the information contained in the questionnaires. (14 CT 4487-4716.) The state objected once again; this time, the trial court denied the motion to change venue. (36 RT 7094-7102.)

5. Opening statements in the guilt phase began on June 1, 2004. (18 CT 5626.) The state rested its case-in-chief on October 5, 2004. (19 CT 5934.) The defense rested its case on October 26, 2004. (19 CT 5960.) The jury began deliberations on November 3, 2004. (19 CT 5976.)

6. The jury deliberated all day on November 4, returning with a request to examine exhibits. (19 CT 5978-5979, 5983.) The jury deliberated all day on November 5, returning with a request to see additional exhibits. (19 CT 5981-5982.) The jury deliberated all day on November 8. (19 CT 5983-5986.) The jury continued deliberating until noon on November 9. (19 CT 5989-5990.) The court then dismissed juror 7. (19 CT 5990.)

7. Deliberations began anew on that afternoon, November 9, 2004. (19 CT 5990.) This second jury deliberated that afternoon, and again the next morning, until juror 5 was discharged late the next morning. (19 CT 5991.) On November 10, the jury began deliberations yet again. (19 CT 5992.)

8. This third jury deliberated the remainder of that day. (19 CT 5992-5993.) On the next day of deliberations -- November 12, 2004 -- the jury found Mr. Peterson guilty as charged in count one (first degree murder) and guilty of the lesser included offense of second degree murder on count two. (20 CT 6133.) The jury found the multiple murder special circumstance true. (20 CT 6133.)

9. The penalty phase began on November 30, 2004. (20 CT 6138.) The state's penalty phase case ended the next day. (20 CT 6143.) The defense case in mitigation began that same day and ended on December 9, 2004. (20 CT 6170.) The jury began deliberating in the penalty phase that same afternoon. (20 CT 6172.) The jury deliberated all day on December 10. (20 CT 6174-6175.) Late the next morning the jury sentenced Mr. Peterson to die. (20 CT 6233.)

10. On March 16, 2005, the trial court denied Mr. Peterson's motion for a new trial, imposing a sentence of death. (21 CT 6462, 6468.)

FACTS THE JURY HEARD
AND
FACTS THE JURY DID NOT HEAR

The facts shown at trial are fully set forth at pages 11-71 of Appellant's Opening Brief filed in petitioner's direct appeal (hereafter, "AOB"). For the Court's convenience, petitioner recounts the essential facts here and, where relevant, describes the newly discovered evidence revealed through post-conviction investigation.

GUILT PHASE

I. The Events Leading Up To Scott Peterson's Arrest For Murder.

A. Scott and Laci's background and the events leading up to December 24, 2002.

Scott and Laci Peterson met while both were living in San Luis Obispo, California. (45 RT 8819.) Laci was attending college at Cal Poly. (45 RT 8819.) Scott lived and worked in San Luis Obispo and would later attend and graduate from Cal Poly as well. (46 RT 8968-8969.)

Over the next three years, Laci and Scott steadily dated, became engaged, and married in August 1997. (46 RT 8968.) Laci graduated from college that same year and Scott graduated in 1998. (46 RT 8968-8969.) After graduation, they started and ran a popular college hangout in San Luis Obispo called The Shack. (46 RT 8970.) Scott did the cooking and Laci

worked up front. (47 RT 9165-1966.)

In 2000, they sold The Shack and moved to Modesto, California, where Laci was raised. (46 RT 8969-8970.) Laci and Scott lived with Laci's mom Sharon Rocha and step-father, Ron Grantski, for several weeks before renting and then buying a home in October 2000. (46 RT 8971.) Laci worked as a marketing representative for Southern Wine and Spirits and then as a substitute teacher. (46 RT 8972-8973.) Scott worked as a manager for Trade Corp., a fertilizer company. (59 RT 11624, 11626.)

During this time, they remodeled their home and put in a swimming pool and a built-in outdoor barbeque. (46 RT 8976-8978.) They liked to socialize with friends but according to Laci's mother, Sharon, they did not do drugs, engage in any high-risk behaviors, or have any psychological problems. (46 RT 8974-8975.) Sharon "thought the world of [Scott]." (46 RT 9063.) Laci's sister, Amy Rocha, described the couple as "get[ting] along very well," and said she had never seen them fight. (46 RT 8912-8913.) Nor had Amy ever heard Scott raise his voice. (46 RT 8934.) Amy described Scott as someone who tried to give Laci everything she wanted. (46 RT 8936.) Laci's brother, Brent Rocha, described Scott and Laci's relationship as "very positive . . . [and] happy" and noted that they "appreciated [each other]." (47 RT 9229-9230.) One of Laci's childhood friend, Stacy Boyers, described Scott and Laci as "totally in love." (54 RT 10523.)

Laci became pregnant in the spring of 2002. (52 RT 10105-10106.) Laci went to prenatal yoga and Laci and Scott attended a weekly Lamaze class together. (46 RT 8926, 8929.) Laci's sister Amy recalled that Scott went to most of Laci's prenatal doctor appointments. (46 RT 8932-8933.) Amy testified that Laci and Scott both made lists of baby names and decided together to name their baby Conner. (46 RT 8936.) Laci's step-father, Ron Grantski, recalled that during Laci's pregnancy, Scott scheduled regular Sunday dinners with Ron and Sharon so that the family could "spend more time together because of the baby." (47 RT 9130.)

1. The events of December 23, 2002

On December 23, 2002, at around 5:45 p.m. Laci and Scott met Amy at Amy's hair salon so she could cut Scott's hair. (45 RT 8835-8837.) Amy showed Laci how to use a curling iron to style her new cut. (46 RT 8916-8917.) While they were at the salon, Laci called and ordered a pizza to pick up on the way home. (46 RT 8917.) Scott invited Amy to join them for dinner. (46 RT 8921.) Amy declined because she was meeting a friend who was visiting from out of state. (46 RT 8918.) Amy remembered that Laci and Scott "interacted with each other [like usual]" that night and nothing appeared "out of the ordinary." (45 RT 8858; 46 RT 8911.) At 8:30 that night, Laci spoke briefly with her mother, Sharon, about plans for Christmas Eve dinner the following night. (46 RT 8996-8997.)

2. The events of December 24, 2002.

On December 24, 2002, around 5:15 p.m., Scott called Sharon to see whether Laci was already at Sharon's house. (46 RT 8998-8999.) Scott told her that Laci's car was in the driveway and their dog, McKenzi, was in the backyard with its leash on. (46 RT 8999.) Sharon had not seen or spoken with Laci that day and suggested he call some of Laci's friends to see if she was with them. (46 RT 8999.)

Scott also called Amy. (45 RT 8876.) Amy described Scott as "panicked." (45 RT 8877.) Scott called some of Laci's friends and went door-to-door in the neighborhood. (54 RT 10513, 10515.) Neighbor Amie Krigbaum described Scott as "very, very upset" and "distraught." (48 RT 9510, 9523.) Laci's friends, Stacey Boyers and Lori Ellsworth, described Scott as "upset" and "panicked." (54 RT 10529, 10565.) No one had seen Laci. (46 RT 8999-9000; 54 RT 10513.) Sharon's husband, Ron, called 911 and the local hospitals. (46 RT 9001.)

Scott later told police that, before he left the house that morning, Laci said she was going to walk their dog McKenzi. (51 RT 10005.) When he returned, Scott found McKenzi outside with his leash on. (46 RT 8999.) Indeed, at 10:18 that morning, neighbor Karen Servas confirmed that McKenzi was out in the street with his leash on. (48 RT 9422.) The leash was moist and covered in leaves and grass clippings. (48 RT 9423.) Servas put McKenzi in the Peterson's backyard and shut the gate. (48 RT 9425,

9428.) Servas testified that she heard raking sounds, as though someone was gardening. (48 RT 9428.)[4]

When Scott told Sharon Rocha about McKenzi, her "first thought" was that Laci must have been walking the dog and thought they should look for her in the park. (46 RT 8900.) Scott, Sharon, Amy, Ron and other friends and family met at East La Loma Park near Laci and Scott's home to look for Laci. (46 RT 9005-9006.)[5]

3. The police search of the Peterson home and Scott's truck, warehouse and boat.

Police officer Jon Evers contacted Scott as he was searching in the park for Laci that evening. (50 RT 9906-9907.) Evers asked Scott for permission to search the Peterson home. (50 RT 9906-9907.) Scott told

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[4] To be sure, in her trial testimony, Servas testified the raking sounds emanated from a neighbor's yard. (48 RT 9428.) In her statement to police, however, Servas was clear that -- when she heard the noise -- she believed it was Laci gardening. (Exhibit 1 [Statement of Karen Servas] at HCP-00001.) On September 4, 2003, Servas reiterated that her prior statement was accurate. (*Id*. at HCP-000003.)

[5] Karen Servas initially told police that she found McKenzi at 10:30 a.m.. (48 RT 9454.) But after looking at sales receipts and a cell phone call from that morning and backtracking she thought it was closer to 10:18 a.m. when she found McKenzi. (48 RT 9422.) According to Servas, after she found the dog, she then went to Austin's Patio Furniture, Starbucks, and then made a call to Tom Egan. Her 10:18 a.m. time estimate relied on (1) a receipt from Austin's Patio Furniture time stamped at 10:34 a.m. and (2) cell phone records showing a call to Egan at 10:37 a.m.. (48 RT 9422, 9435-9437.)

Evers it was fine to enter the home and search it. (50 RT 9906-9907.) Officers later described Scott as "very cooperative" and noted that he did not "hesitate" when asked whether they could search his home. (50 RT 9907; 51 RT 10078-10079.) Police took control of Laci and Scott's home. (46 RT 9008.) Scott was not permitted back in the house that night unless he was accompanied by a police officer. (46 RT 9008-9009.)

Over the course of the next few days, detectives Al Brocchini and Craig Grogan -- with the help of numerous other police officers -- searched Laci and Scott's home. (57 RT 11166.) As Detective Brocchini himself later admitted on cross-examination, because the detectives had already singled Scott out as the prime suspect in the case, they were specifically searching for any evidence that would link him to Laci's disappearance and possible murder. (58 RT 11288.)

There was not much to find. Just outside the Peterson home, officers found a bucket with two mops inside. (50 RT 9787.) The mops and bucket did not smell of disinfectant or bleach. (50 RT 9851-9852; 51 RT 10070-10071.) Both were taken into evidence. (50 RT 9818.) When asked about the mops and bucket, Scott explained that Laci had mopped the floor that morning and he had taken the bucket and dumped the water outside when he returned that afternoon. (56 RT 11010-11011.) Scott had emptied the bucket because, in her pregnant condition, Laci could not lift anything heavy. (56 RT 11011-11012.)

Inside the house and on top of the clothes washer, officers found some dirty wet rags. (50 RT 9789.) These were also taken into evidence. (50 RT 9842.) Ultimately, the rags were no more sinister than the mop; Scott explained his assumption that their house cleaner Margarita Nava used the rags the day before when she cleaned the house. (57 RT 11130.) In fact, Ms. Nava later confirmed that she did indeed use the rags to clean the outside windows and the fireplace screen. (57 RT 11108-11109.)

Police found a curling iron out in the bathroom. (50 RT 9819.) Police also noticed that a rug was "scrunched" up. (50 RT 9789.) Police searched the home for any signs of blood using "an alternate light source." (57 RT 11164-11165.) No blood was found. (57 RT 11164-111165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) As one of the searching officers -- Derrick Letsinger -- forthrightly conceded, there were no signs at all of "foul play" in the house. (50 RT 9832.)

Moreover, as all officers made clear, Scott was extremely cooperative with police. As noted above, he permitted police to search and take control of his house. (50 RT 9907; 51 RT 10078-10079.) That same night, Scott allowed Detective Brocchini to look at his cell phone and review his call history. (55 RT 10732-10733.) Next Scott consented to a search of his truck parked outside. (51 RT 10078-10080.) Scott voluntarily told Detective Brocchini that he had a firearm in his glove box from a recent hunting trip. (55 RT 10748; 57 RT 11126-11127; 59 RT 11511.) Brocchini took the gun from the glove box and put it into his pocket without

telling Scott. (51 RT 10083; 55 RT 10748-10749.) The gun was later examined; it had not been fired recently. (59 RT 11603-11605.)

Inside the cab of the truck, Brocchini found a Big 5 Sporting bag with 2 new fishing lures still in the package and a receipt dated 12-20-02 for the lures, a two-day fishing license for December 23 and December 24 and a salt water fishing pole. (55 RT 10746; 62 RT 12183-12184.) Scott gave Officer Evers a receipt from the Berkeley Marina, stamped 12:54 p.m. on December 24, 2002. (51 RT 10029.) Finally, Brocchini searched the large tool box in the back of Scott's truck and the truck bed where he found two tarps and some patio umbrellas. (51 RT 10081-10083.)[6]

Scott also voluntarily consented to a search of his warehouse and boat. (51 RT 10038.) Inside the warehouse, police found Scott's 14 foot aluminum boat on a trailer with one circular concrete anchor inside. (51 RT 10044; 57 RT 11239-11240.) They also found (1) concrete dust (on Scott's trailer), (2) a fishing report about sturgeon fishing in the San Francisco Bay (on Scott's desk) and (3) a pair of needle nosed pliers with a single, dark hair fragment, 5-6 inches long, in the "clamping" part of the pliers. (57 RT 11239-11240; 67 RT 12962; 64 RT 12554-12558.) Detective Henry Hendee collected the pliers and the single hair and packaged them separately for examination. (64 RT 12555-12558.) The hair was consistent

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[6] Later the umbrellas and one tarp were found in a shed in the Peterson's backyard and the other tarp was found in a separate backyard shed with a gas leaf blower on top of it which was leaking gas. (55 RT 10741-10745.)

with hair found in Laci's hairbrush. (70 RT 13644.) As discussed more fully below, the pliers were so rusted that the state's own forensic expert would admit they had not been used recently. (86 RT 16467.)[7]

By the first week of January, Scott was under 24 hour surveillance. (58 RT 11295-11305.) Scott's phones had also been tapped and by the third week in January there was a GPS tracking system placed on his truck. (85 RT 16275-16277; 94 RT 17770.)

4. The media frenzy begins on December 26, 2002.

By December 26, 2002, the media had set up camp outside the Peterson home. (46 RT 9017-9019.) By December 27, the media had blocked off the whole street. (47 RT 9142-9143.) According to Laci's stepfather, Ron, it was "like nothing [he] had ever seen" before. (47 RT 9142-9143.) Brent Rocha described it as the media being "all . . . around" the Peterson's home. (47 RT 9248.) Neighbor Amie Krigbaum called it a media "feeding frenzy." (48 RT 9526.) She noted that the entire block in front of the Peterson home was blocked off with media and satellite trucks which continued for five months. (48 RT 9525.) The reporters would sometimes stay past midnight and then come back at four or five in the

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[7] When Detective Hendee later opened the evidence envelope, there were two hairs, not one. (64 RT 12566.) Hendee tried to explain this change in the evidence by testifying that he did not know if the hair had broken or whether it had been two hairs that looked like one. (64 RT 12563-12567.)

morning. (49 RT 9638.)

Ms. Krigbaum recalled that when Scott would come and go from the house, the media would take pictures of him, videotape him and shout questions at him. (48 RT 9525.) At one point, the media used a bullhorn and screamed "you murdered your wife, you murdered your child." (49 RT 9625.) Random people would drive by the home shouting "murderer." (49 RT 9625.) Neighbors were scared for their own safety. (49 RT 9625.) Instead of the media attention dying down, Ms. Krigbaum testified that it "got worse as time progressed." (48 RT 9525.)

5. Scott's repeated cooperation with police.

In the days following Laci's disappearance, Scott spoke extensively with police. He spoke with Detective Douglas Mansfield, Detective Craig Grogan, Detective Allen Brocchini, Detective John Buehler, Captain Christopher Boyer, Officer Jon Evers, and Officer Matthew Spurlock. (8 RT 1641; 50 RT 9867-9868; 51 RT 9999-10000; 55 RT 10715; 61 RT 11829-11830; 93 RT 17645-17646; 102 RT 19055.) He was repeatedly described as cooperative. (50 RT 9907 [Officer Spurlock describes Scott as "cooperative"]; 51 RT 10038 [Officer Evers describes Scott as "cooperative"]; 51 RT 10078 [Officer Evers describes Scott as "very cooperative"]; 55 RT 10715 [Detective Brocchini testified that Scott agreed to "sit down with [him] and . . . go over what [they] had talked about over the last few hours"]; 61 RT 11830 [Detective Mansfield described Scott as

"very cooperative."].)

With respect to the morning of December 24, 2002, Scott told detectives that -- as was her usual routine -- Laci got up around 7 a.m. to watch the Today Show. (61 RT 11838.) When Scott got up about an hour later, Laci was mopping the floor and was going to take the dog for a walk. (61 RT 11009, 11820, 11838.) They then watched part of the Martha Stewart show. (51 RT 10004.) Scott recalled that the episode included something on meringue. (100 RT 18769.)[8]

Scott said he left for a fishing trip to the Berkeley Marina at around 9:30 in the morning. (51 RT 10004.) He had purchased a rod and reel and a two day fishing license at Big 5. (61 RT 11820.) Laci planned to walk the dog and then go grocery shopping. (51 RT 10005; 61 RT 11821.) Scott explained that Laci's usual dog-walking route was to go to the East La Loma Park near their house, head towards the tennis courts, and then back to the house. (61 RT 11821.) The walk was "a mile loop" which took her

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[8] Although the state would dispute this aspect of Scott's recollection as well, the state was wrong. In fact, on December 24, 2002, at 9:46 a.m. Martha Stewart did indeed discuss meringue on her show. (55 RT 10805-10806;100 RT 18769.) Despite the fact that meringue was discussed on the show -- and that he had reviewed the show specifically looking for any mention of meringue -- Detective Brocchini wrote in his report that there was *no* mention of meringue on this date. (55 RT 10805-10806.) This false information was passed on to other detectives investigating the case. (55 RT 10806.) And it was even used in an affidavit seeking a wiretap on Scott's telephones. (55 RT 10807.) Finally, the state specifically told the jury in opening statements that "[o]n the 24th Martha Stewart didn't have a segment with meringue." (43 RT 8454.)

about forty-five minutes. (61 RT 11821, 11839-11840.) Scott often walked this loop with Laci and McKenzi. (61 RT 11839.) When he left the house Laci was wearing black maternity pants, a white t-shirt, and white tennis shoes, which she wore when walking the dog. (61 RT 11823; 84 RT 15925.)

Scott then drove to his warehouse to pick up the 14 foot aluminum boat that he had purchased two weeks before. (61 RT 11824, 11837.) At the warehouse, he checked his e-mail, cleaned up the office, put together a wood working tool called a mortiser, and unloaded tools from the green tool box in the back of his pickup truck. (61 RT 11841-11842; 93 RT 17655.) He thought he was at the office for about an hour. (61 RT 11841-11842.) Scott then drove to the Berkeley Marina. (61 RT 11824.) He spent about an hour in the water where he headed north towards an island which was later identified as Brooks Island. (61 RT 11844; 66 RT 12841.) He wanted to make sure that the boat was working properly. (61 RT 11844-11845.) Scott said that he did not have a map of area, but he had researched fishing in the bay on the internet. (56 RT 11040.) Scott put the boat back onto the trailer about 2:15 p.m. and headed back to Modesto. (61 RT 11845.) He planned to meet Laci at home around 4:00 p.m.. (61 RT 11845.) Scott tried to call Laci on the way home but got no answer. (51 RT 10006.)

When Scott returned to Modesto, he dropped the boat off at the warehouse and arrived home around 4:30 p.m.. (51 RT 10007.) Scott noticed that their dog McKenzi was outside with its leash on and the doors

to the back patio were unlocked. (51 RT 10007.) Laci was not home but her car was in the driveway. (51 RT 10027.) Scott thought Laci must be at her mother's house. (96 RT 18087.) Scott ate a couple slices of pizza, drank some milk and because his clothes were wet he put them in the wash and took a shower. (51 RT 10007-10008; 61 RT 11847.) When Laci still was not home, Scott called her mother, Sharon, to see if she was over at her house. (51 RT 10008.) Scott then called Laci's sister Amy and some of Laci's friends and went to several neighbor's homes looking for Laci. (61 RT 11850.)

Of course, the news that Scott had been at the Berkeley Marina on the day Laci disappeared was widely publicized within 24 hours of Laci going missing. (62 RT 12089, 12103-12104.) As Scott's defense counsel would later point out: "Only the deaf and dumb didn't know where . . . Mr. Peterson was that day." (10 RT 1998; 69 RT 13406 [Modesto detective acknowledging that "everybody knew Scott had been fishing in the bay."]

A great deal of forensic and circumstantial evidence supported Scott's statements to police. As noted, Scott told police he went to the Berkeley Marina and said he had researched fishing in the bay on the internet. Scott gave police a receipt from the Berkeley Marina stamped 12:54 p.m. on December 24, 2002. (51 RT 10029.) Police found a fishing report about sturgeon fishing in the bay. (67 RT 12962.) Scott said that after he left the house, he went to his warehouse where he logged on to the internet and then put together a mortiser. (56 RT 11021.) In fact, a search

of Scott's work computer located at the warehouse showed internet usage between 10:30 a.m. and 10:56 a.m., during which someone researched how to assemble a mortiser. (83 RT 15753, 15759-15762.)

Sharon Rocha confirmed that on the evening of Laci's disappearance, Scott told her that Laci planned to go to the store and take the dog for a walk. (46 RT 9040.) Amy Rocha recalled that, around the time of Laci's disappearance, Laci walked frequently as she was conscious of her weight and staying fit during pregnancy. (46 RT 8926-8927.) Amy Rocha explained to police that Laci did yoga Mondays and walked daily or almost daily. (46 RT 8935.) Just a week before Laci's disappearance Laci and Scott spent a weekend in Carmel, California, with Scott's parents Lee and Jackie Peterson. (107 RT 19974.) Lee and Jackie both recalled that Laci walked for several hours around town shopping and then walked down to the beach and back up a hill which was 3/4 a mile to their hotel. (88 RT 16878-16880; 107 RT 19976, 19992-19993.) Laci's friend, Kristin Reed, confirmed that -- while Laci had stopped walking for a while due to dizziness -- by the first part of December she was back walking again because she was concerned over how much weight she had gained. (58 RT 11405-11407.)[9]

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[9] Although Sharon Rocha expressed a contrary view -- believing Laci had stopped walking in the neighborhood in November 2002 -- when Sharon heard that McKenzi was found with its leash on, Sharon's "first thought" was that Laci must have been walking the dog. (46 RT 8985, 9000.)

At this point in the investigation, Laci's family and friends fully supported Scott. (46 RT 8912-8913, 9063; 47 RT 9229; 54 RT 10523.) Laci's mom Sharon "thought the world of [Scott]." (46 RT 9063.) Sharon had never seen Scott violent with Laci or even raise his voice. (46 RT 9063.) Amy Rocha agreed that she had never seen them fight nor had she ever seen Scott do anything "that would even remotely be characterized as harming Laci." (46 RT 8912-8913.) Laci's step-father, Ron, told detectives that Laci and Scott had never been separated during their marriage, spent "90 percent of their time together" and that Scott was "supportive" of Laci. (47 RT 9132.) Ron recalled that even when Scott "should have been mad at Laci he wasn't." (47 RT 9131.) Laci's brother Brent described Scott and Laci as follows: "Great relationship, very positive, happy, you know whatever Laci asked for Scott did, she appreciated him and . . . he appreciated her." (47 RT 9229-9230.) Brent had never seen Scott "get even remotely violent" with Laci. (47 RT 9277.) When Detective Grogan asked Brent whether he thought Scott could have hurt Laci, Brent unequivocally answered "no." (47 RT 9229.)

Laci and Scott's friends agreed. Laci's childhood friend Stacy Boyers "thought the world of Scott." (54 RT 10523.) Scott and Laci's friend Greg Reed considered Scott and Laci to have a "great relationship" and had never heard a negative comment from either of them about their relationship. (75 RT 14440.)

6. Amber Frey reports having an affair with Scott.

On December 30, 2002, Amber Frey called the Modesto Police and reported that she was having an affair with Scott. (59 RT 11481.)

Amber and Scott first talked via telephone sometime in November 2002 and first met on November 20, 2002. (76 RT 14554, 14561.) They spent time together again on December 2, 2002. (76 RT 14587-14590.) Amber's young daughter Ayiana accompanied them. (76 RT 14592.) Scott stayed the night at Amber's house and they saw each other the following evening as well. (76 RT 14600-14601.) Scott told Amber that he had never been married and did not have any children. (76 RT 14610-14611.)

They next saw each other on December 9. (76 RT 14614.) Scott admitted he had been married but lied and told her he had lost his wife. (76 RT 14619-14620.) Scott had also told Shawn Sibley -- a woman he had met through work and who introduced him to Amber -- that he had "lost" his soul mate. (60 RT 11711.) Scott and Amber next saw each other on December 11, 2002 and attended a birthday party together. (76 RT 14627-14628.) They last saw each other on December 14, 2002. (76 RT 14639.) Amber told police this was the last time she had seen Scott. (59 RT 11477-11478.) She had spoken with him by telephone since, including on the night of a candlelight vigil in honor of Laci. (59 RT 11477-11478; 76 RT 14687.) During one of his earlier calls, Scott told her that he would be in Maine for Christmas and then in Europe for the New Year. (76 RT 14688.)

After Amber contacted police, she taped all subsequent calls between herself and Scott. (76 RT 14719.) Police told Laci's family about the affair. (57 RT 11179.) At the same time, police falsely told Laci's family that Scott had recently taken out a life insurance policy on Laci for $250,000. (57 RT 11167-11169, 11173-11176, 11179.) Despite its falsity, the life insurance policy was also widely reported in the media. (57 RT 11173-11176.) After news of the affair and the recent life insurance policy came to light, Laci's family and friends no longer supported Scott. (47 RT 9144-9145; 57 RT 11177.)

7. Scott is arrested and charged with murder.

Several months later on April 13, 2003, the body of Conner Peterson was discovered on the shore of San Francisco bay, nearly one mile north of Brooks Island where Scott had been fishing on December 24, 2002. (61 RT 11871, 11880; 84 RT 15934.) The next day, the body of Laci Peterson was found on the shore nearly two miles northeast of Brooks Island, and east of where Conner's body washed ashore. (61 RT 11990, 11993; 84 RT 15934.)

Up until this point, Scott had never been convicted of a felony or a misdemeanor, nor had he ever even been arrested. (96 RT 18118, 18157.) He had no prior criminal record of any kind. (96 RT 18118, 18157.) There was no history of domestic violence. (96 RT 18157.) Nor was there any evidence at all that Scott had a violent nature. (96 RT 18157.) To the contrary, despite an extensive police investigation into his past, law

enforcement could not find anyone who had ever even had a physical fight with Scott. (96 RT 18157.) As noted, Scott and Laci's friends and family had never even heard him raise his voice with Laci let alone do anything "that would even remotely be characterized as harming [her]." (46 RT 8912-8913 see also 46 RT 9063; 47 RT 9277.)

There was no cause of death. There was no murder weapon. There was no confession. Nevertheless, on April 18, 2003, Scott was arrested and charged with the capital murders of his wife and child. (87 RT 16581.)[10]

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[10] At the time of his arrest, Scott was staying in San Diego where his family lived. (95 RT 17976.) When he was arrested on April 18, 2003, Scott was carrying his brother's driver's license, a credit card belonging to his sister Ann Bird, $14,932 in cash and some camping equipment. (95 RT 17997; 102 RT 19095-19096, 19106-19107.) His hair and goatee had been "bleached." (99 RT 18620.) The state would later rely on this evidence to argue that Scott was about to flee the country. (109 RT 20313-20315.)

In fact, however, there was a far less nefarious explanation. Lee Peterson, Scott's father, testified that he and Scott were meeting to play golf that day. (107 RT 19997-19999.) Scott was carrying his brother's driver's license that day so that he could get a local's discount at the golf course. (107 RT 19997, 19999.) Police confirmed that, in fact, Lee Peterson had scheduled a tee time for four people that morning and there was a local's discount. (102 RT 19111, 19150.) And Scott's mother Jackie Peterson explained that she had accidentally withdrawn $10,000 from Scott's account (which she was a joint account holder on) and when the error was discovered she had given Scott the money to deposit back into the account. (107 RT 19969-19972.) The remaining money was from the recent sale of Scott's truck to his brother. (107 RT 19970-19971.)

(*footnote continued on next page*)

As noted above, the state's theory was that Scott killed Laci in their home between the night of December 23 and the morning of December 24. (109 RT 20319.) Absent any evidence on the cause of death, the state theorized that Scott suffocated Laci. (109 RT 20200.) According to the state, Scott put the leash on McKenzi and let him loose in the neighborhood so that it would appear that Laci had been abducted while she walked the dog. (109 RT 20202.) Then Scott moved the body to his Modesto warehouse by putting it in the toolbox in the back of his truck. (109 RT 20202-20203.) At the warehouse, Scott then attached homemade cement anchors to the body and placed it in the back of his 14-foot boat which he then towed to the Berkeley Marina. (109 RT 20203-20204.) Finally, the state claimed, when he got to the marina he launched the boat and, once on the bay, he pushed the body (with the anchors) overboard. (109 RT 20203-20204.) As for motive, the state's theory was that Scott committed the crime either for financial reasons or to obtain freedom from Laci and Conner. (109 RT 20209.) The defense theory, of course, was that

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(*footnote continued from previous page*)

As for fleeing the country, the fact of the matter is that Scott had *already* taken a work-related trip to Mexico in February 2003 -- when he was under suspicion for murder -- and returned to the United States. (94 RT 17811; 95 RT 17990.) When he was contacted by police at the parking lot, he did not insist on *Miranda* rights, he did not refuse to speak with police and he did not flee; instead, his first question was "have they found my wife and son?" (95 RT 18006.)

Scott had no motive at all to kill Laci, and did not do so. (110 RT 20376.)[11]

B. The State's Trial Evidence And Theories As To The Crime, And The Facts Revealed By Post-conviction Investigation.

1. Evidence as to where and how the crime occurred.

As noted above, after hearing all the state's evidence, the trial court itself concluded that the state had failed to present any evidence showing "how this crime was committed" or "where this crime was committed." (108 RT 20163.) Despite the court's observation, the state nevertheless theorized Scott killed Laci at their home.

But there was *no* physical evidence to support this theory. According to detectives Skeltety and Hendee, despite thorough searches of the home lasting numerous days -- and begun on the same day Laci went missing -- police found *nothing* suggesting a crime occurred there. (57 RT 11164-11165; 63 RT 12379-12381, 12398-12399; 66 RT 12857-12859, 12868-12871.) No blood, urine, or tissue of any kind was found at the house. (57 RT 11164-11165; 63 RT 12379-12381, 12398-12399; 66 RT

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[11] Veteran district attorney investigator Steve Jacobson had a very different view from his colleagues. Mr. Jacobson was an investigator with the Stanislaus district attorney for 13 years. (80 RT 15360-15361.) Before that, he was a police officer with the Modesto, Oakdale and Waterford police departments. Based on the evidence, Jacobson believed this crime could *not* have been committed by one person. (81 RT 15483-15484.)

12857-12859, 12868-12871.) Officer Letsinger noted there were *no* signs of "foul play" at the Peterson home. (50 RT 9832.) Nor did Karen Servas -- the Peterson's next door neighbor -- hear screams or other suspicious noises coming from the house on the night of the 23rd or the morning of the 24th. (48 RT 9444-9448.) Finally, there were no defensive marks or wounds on Scott at all. (64 RT 12452.)

Even the potential evidence police found had no connection at all to Laci's disappearance. As noted above, Officer Letsinger testified that when the Peterson home was first searched he found two mops and a bucket sitting just outside the home which he thought were "suspicious." (50 RT 9787, 9817.) The state's theory was that Scott used the mops and bucket to clean up after the killing. (109 RT 20242.) But contrary to the state's position, the state's own criminalist Pin Kyo admitted that *nothing* of evidentiary value was found on the mops or bucket; neither blood, tissue, or anything that supported the state's theory that Scott used it to clean up a crime scene. (89 RT 17015.)

Moreover, the state's theory as to how the crime occurred involved Scott smothering Laci. (109 RT 20200.) Despite advancing this theory, detective Grogan himself admitted that although the state had collected pillow cases at the scene, it had elected *not* to test even a single one. (100 RT 18786-18787.) And state criminalist Kyo added that the state did not test any of the pillows either. (90 RT 17139-17142.) Thus, Detective Grogan conceded that there was no "evidence . . . that shows smothering,

strangulation, or asphyxiation." (100 RT 18787.)

The state next theorized that Scott used his truck to take the body to his warehouse. (109 RT 20202.) Once there, he transferred the body into his boat, hiding it under a tarp. (109 RT 20203.) To support this part of its theory, the state offered demonstrative evidence that Kim Fulbright -- a pregnant woman who worked for the prosecutor's office -- could fit into the toolbox in the back of Scott's truck as well as the boat. (62 RT 12173, 12186, 12192.) But according to Detective Hendee and state criminalist Kyo there was a more immediate problem with this part of the state's theory: Scott's truck contained no evidence that it had been used to transport a body. (67 RT 12946-12952, 12959-12960, 12963-12965; 90 RT 17149-17156.) There was no blood, urine, or other tissue found in his truck or toolbox. (67 RT 12946-12452, 12959-12960, 12963-12965; 90 RT 17149-17156.) None of Laci's hair was in his truck or toolbox. (67 RT 12956-12958; 70 RT 13687.) The tarps found in the back of Scott's truck -- which the state theorized Scott used to wrap the body in -- contained no relevant evidence whatsoever. (66 RT 12876.) There was no blood, urine or other tissue found on either tarp. (66 RT 12876.) Nor was there any evidence that a body had been at the warehouse. (66 RT 12881-12891.)

But the state did have evidence of concrete dust on Scott's trailer. (67 RT 13062-13063; *see* People's Exhibits 122B-G.) There was one homemade anchor found inside the boat. (67 RT 13060.) The previous owner had kept the anchor when he sold Scott the boat. (62 RT 12161.)

The prosecution relied heavily on the notion that Scott's trailer had been used to pour additional circular concrete anchors, as evidenced by what the prosecutor perceived to be circular spaces on the trailer bed in the midst of concrete rubble. (109 RT 20214-20215.) According to the prosecutor, this was evidence that Scott made five concrete anchors, four of which were used to weigh down the body and submerge it in the bay. (109 RT 20214-20215, 20312.)

As discussed more fully below, the state searched the bay for weeks and weeks looking for the anchors but found nothing. (64 RT 12644-12645; 65 RT 12709-12710, 12779, 12786-12787; 66 RT 12813-12825, 12837.) Police used dive boats, sonar, a special underwater search vehicle and specialized dive teams from the FBI, Contra Costa County, Marin County and San Francisco County. (64 RT 12644-12645; 65 RT 12786-12787; 66 RT 12819-12820.) Because they found nothing at all, the state was left with pictures of concrete dust to prove that five anchors had been made.

Rather than rely on prose descriptions of the photographs of the concrete dust, the actual exhibits given to the jury are the best indicator of the "strength" of this evidence. (See People's Exhibits 122-A - 122-I.) It is fair to say that the circular spaces the prosecution saw on the trailer bed are hardly distinctive in appearance, and looking at the photographs of the trailer, it is difficult to make out any circles rather than simply a collection of concrete detritus.

But even if the record supported the state's theory as to the concrete, that theory was puzzling for another reason as well. If the state's theory was right, then Scott meticulously cleaned his home, truck and boat of any evidence tying him to the crime but left the mess from making the concrete anchors in plain view for police to find. This is even odder in light of the fact that Scott plainly had time to clean the warehouse if he had wanted to; as detectives Mansfield, Wall, and Grogan themselves conceded, Scott was at the warehouse for an hour that morning assembling a mortiser and surfing the internet. (61 RT 11841-11842; 83 RT 15759-15760; 93 RT 17655.)

Finally, the boat itself provided no corroboration for the state's theory. Yet again, according to state criminalist Kyo, there was no blood, urine, or other tissue found in the boat itself. (90 RT 17161-17162, 17164.) The only notable evidence was a hair fragment consistent with Laci's hair on a pair of pliers in the boat. (67 RT 12973.) The prosecutor relied on this evidence to argue that "these pliers were used in this crime." (109 RT 20309.)

But the forensic evidence simply did not support this position either. Thus, state expert Sarah Yoshida examined the pliers and testified that they were so rusted that based on their appearance, the pliers had *not* recently been used. (86 RT 16467-16468.) Ms. Yoshida also confirmed not only that the pliers had no visible signs of blood or tissue, but that as with the pillows and pillow cases, the state had elected not to do any further testing

on the pliers. (86 RT 16476-16477.) Moreover, Peggy O'Donnell and Rosemary Ruiz -- two women who worked in the same warehouse as Scott -- had both seen Laci at Scott's warehouse around December 20, 2002. (97 RT 18198-18199; 98 RT 18415-18417.) This testimony became significant when the state's own hair expert, Roy Oswalt, explained the concept of secondary transfer through which the hair fragment may have fallen in the boat at that time or been transferred from Scott to the boat (as Laci, when she became pregnant sometimes wore Scott's clothing). (70 RT 13688-13689; 56 RT 11015.)[12]

The last part of the state's theory was that Scott pushed Laci's anchor-laden body off his small boat *alone* without capsizing. But as Detective Grogan admitted during cross-examination, during its investigation of this case the prosecution decided "not to try to attempt to push an -- either a body or a weight out of the boat . . . ." (99 RT 18599.)

The defense *did* offer such evidence, seeking to introduce videotaped evidence of a demonstration it had performed. (104 RT 19371.) The defense obtained the same make and model as Scott's boat and performed a demonstration near Brooks Island where the state theorized Laci's body had

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[12] The transfer explanation became even more significant given the state's attempt to suppress it. Scott told Detective Grogan that Laci had been to the warehouse. (98 RT 18418.) O'Donnell and Ruiz confirmed these statements; according to Detective Grogan, they told Officer Holmes that Laci had recently been to the warehouse and knew about the boat. (98 RT 18415-18419.) Detective Brocchini excised this important evidence from his report. (57 RT 11195.)

been pushed overboard. (104 RT 19371, 19401, 19404.) The demonstration involved a mannequin the exact weight of Laci -- 153 pounds -- which was weighted down with four anchors and a person weighted down so that he was the same weight as Scott Peterson. (62 RT 12186; 104 RT 19371, 19404-19405.) The demonstration was done at the same time of day as the state theorized -- 12:30 to 1:00 p.m. -- and it was filmed. (104 RT 19404-19405.) The boat capsized. (104 RT 19401.) But when the state objected to the evidence, the trial court excluded it. (104 RT 19402-19403, 19406-19407.)[13]

2. Evidence as to when the crime occurred.

a. The date of the crime.

As noted, the state initially theorized that Scott killed Laci on the night of December 23 or the early morning hours of December 24. In closing argument, however, the prosecutor would concede that based the evidence, he could not prove when the crime occurred. (109 RT 20200.)

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[13] The lack of evidence on the stability of the boat would not be lost on the jury. On the third day of jury deliberations, jurors asked if they could see the boat. (111 RT 20640-20642.) The court permitted this. (111 RT 20640-20642.) During the examination, several jurors asked if they could sit in the boat. (111 RT 20643.) Once in the boat, several jurors stood up and began to rock the boat back and forth testing its stability. (111 RT 20643-20644.) The boat was sitting on a trailer in a garage. (111 RT 20643.)

With respect, the prosecutor was far too modest. In fact, the evidence suggested quite plainly that Laci was not killed on December 23.

Computer records from the Peterson's home computer show that someone was on the internet between 8:40 a.m. and 8:45 a.m. on the morning of December 24, looking at a garden weather vane, a GAP pro fleece scarf and a sunflower umbrella stand. (83 RT 15752-15756, 15816.) While it is certainly conceivable that Scott was looking for these items, it seems far more likely that Laci was searching for these items. After all, as several prosecution witnesses noted, it was Laci who had a sunflower tattoo. (*See*, *e.g.*, 45 RT 8701, 8708; 46 RT 8988.) But there is more.

Police also found Laci's curling iron out on the bathroom counter. (50 RT 9819.) Margarita Nava -- who cleaned the Peterson's home on the 23rd -- confirmed that when she cleaned on the 23rd she put away everything on the bathroom counter. (44 RT 8660, 8681.) While it is conceivable that Laci would have used the curling iron to curl her hair just before going to sleep on December 23, the more likely scenario is that she used the iron to curl her hair on the morning of December 24. Thus, the fact that the curling iron was out on the 24th also undercuts any suggestion that Laci was killed on December 23.

Moreover, when Laci's body was found in April of 2003, she was wearing tan pants. (69 RT 13498-13499.) But Amy Rocha recalled that on the night of December 23, Laci was wearing a black blouse with cream

polka dots or little flowers and cream colored pants. (45 RT 8846-8847.) Amy later saw these clothes at Laci's house when she did a walk through with police. (46 RT 8918-8919.) Thus, if Laci was killed on the 23rd, it meant that someone had changed her clothes after her death.

Thus, the prosecutor's concession that he could not prove when the crime occurred was clever, but too modest. In fact, the evidence suggests Laci was not killed on December 23. Instead, the crime occurred on December 24 or later.

The date of December 24 is significant, and explains the prosecutor's attempt to include December 23 as a possible date for the crime. Sometime after 10:30 on the morning of December 24, 2002, the Medina house across the street from Laci and Scott was burglarized. (49 RT 9590-9597, 9604.) Steven Todd was arrested for the Medina burglary. (52 RT 10177.) According to a declaration which the state itself prepared, several weeks after Laci's disappearance, Lieutenant Xavier Aponte -- a guard at the California Rehabilitation Center in Norco, California -- reported a call he had monitored between inmate Shawn Tenbrink and his brother Adam Tenbrink. During the call, Adam said his friend Steven Todd admitted Laci saw him burglarizing the Medina home on December 24, 2002. (20 CT 6433-6434.) Aponte said he taped this conversation, but then lost it. (20 CT 6434, 6435.)

Moreover, neighbor Diane Jackson reported to Sergeant Ed Steele

that she had witnessed the Medina burglary on Covena Avenue on December 24. (99 RT 18562-18563.) She described seeing three men outside the home removing a safe. (52 RT 1-316-10317; 99 RT 18563.) A safe was in fact stolen from the Medina home, thus corroborating Jackson's report. Jackson also saw a van parked on the street in front of the house. (99 RT 18566.) Jackson described it as "an older model . . . tan or light brown." (99 RT 18567.) Sergeant Cloward also received a call from Tom Harshman reporting that on December 28, 2002, he saw a woman fitting Laci's description urinating by the side of the road next to a van and then being pushed into the van. (99 RT 18670-18671.)[14]

It was also notable that around the time of Laci's disappearance she owned an expensive Croton watch inherited from her grandmother. (45 RT 8871; 53 RT 10409 10432; 94 RT 17809; 97 RT 18182.) Although the watch was never found in Laci's belongings after she disappeared, a Croton watch was pawned at a pawnshop in Modesto on December 31, 2002 -- several days after she went missing. (53 RT 10467, 10469-10470.) The pawnshop slip included a thumb print of the person who pawned the item.

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[14] As noted, Jackson reported to police the burglary occurred on December 24. (99 RT 18562-18563.) This was consistent with the Medinas leaving for Southern California that morning. (49 RT 9590.) When Todd was interviewed by Officer Hicks, he lied and said the burglary was on December 27. (107 RT 20022.) After Hicks told Todd that the Medinas arrived home on December 26, Todd changed his statement and said the burglary was on December 26. (107 RT 20018-20019.) However, this was unlikely as well; by December 26, police and the media were already present at the Peterson home directly across from the Medina home. (46 RT 9017-9119; 57 RT 11166.)

(53 RT 10467, 10469-10470.) The print did not belong to Scott. (53 RT 10467, 10469-10470.) The state, however, never sought the watch itself and the defense was unable to recover it because the pawnshop owner did not comply with the subpoena and the person who bought the watch refused to sell it. (106 RT 19702.)

b. The time of the crime.

i. Evidence the jury heard.

As discussed above, the time of the crime ultimately became the critical disputed issue at trial. The state's theory was that Laci was killed before Scott left for Berkeley. The defense theory was that Laci was still alive when Scott left the house that morning. The state has never disputed that if, in fact, Laci was at home and alive after Scott left that morning, Scott is innocent.

In an effort to undercut the defense theory, the state offered evidence that if Scott was telling the truth -- and Laci was alive when he left the house -- there was only a ten-minute window for Laci to have been abducted by someone else. The state's theory was relatively simple and depended on two pieces of evidence.

First, the state sought to determine a time by which Scott left the house. Of course, Scott told police that he left home after seeing a

meringue segment during the Martha Stewart Show. (100 RT 18769.) Martha Stewart discussed meringue at 9:48 a.m.. (55 RT 10805-10806;100 RT 18769.) To try and prove Scott's departure time more precisely, the state presented testimony from Investigator Jacobson who reviewed Scott's cell phone records and corresponding cell site information. (81 RT 15383.)

These records showed that on December 24, 2002 at 10:08 a.m. Scott made a 1 minute and 21 second call which started at the 1250 Brighton cell tower and ended at the 10th and D cell tower. (91 RT 15383.) Several test calls by Jacobson showed that if Jacobson started a call in the Peterson driveway and drove towards Scott's warehouse the call would register on the same cell towers as Scott's call had registered on the 24th. (81 RT 15387-15391.) So the state's theory was that at 10:08 -- when this call was made -- Scott began driving from his home to his warehouse. (109 RT 20226.)

The second piece of evidence on which the state relied was the testimony of Peterson neighbor Karen Servas. As noted above, Servas testified that she found McKenzi (the Peterson's dog) outside at 10:18 a.m.. (48 RT 9422.)

In closing argument, the state relied on Servas's testimony that she found McKenzi at 10:18 a.m. and argued that if Scott was telling the truth that Laci was alive when he left the house (at 10:08) -- and Servas found McKenzi at 10:18 -- Laci would have to have been abducted in the ten-

minute window between those two times. (109 RT 20226 [prosecutor argues that for Scott to be believed "[Laci] [gets] abducted . . . . the dog comes home and has to be found by Karen Servas, all in ten minutes, all in a ten minute window . . . ."].) This was even more unlikely, the prosecutor explained, because Scott said Laci was wearing *black* pants when he left home. (109 RT 20225.) Because Laci was ultimately found in *tan* pants, Laci would have had to change her pants in that 10 minute window as well. (109 RT 20225-20226; 69 RT 13498-13499.) According to the prosecutor, there was simply not enough time for this to have happened; therefore, Scott Peterson was lying. (109 RT 20225-20226.)[15]

ii. Evidence the jury never heard.

Newly discovered evidence, however, establishes that the state's time line was simply wrong. Though he was unaware of its very existence, defense counsel has recently admitted that the prosecution provided him with a police report describing a December 27, 2002 interview with Russell Graybill. (Exhibit 4 [Declaration of Mark Geragos] at HCP-00032-34.) Graybill was the Petersons' postman, and he delivered mail to the Peterson home between 10:35 and 10:50 a.m. on December 24, 2002. (Exhibit 2 [Declaration of Russell Graybill] at HCP-000005-06; Exhibit 19 [Russell Graybill's Delivery Record].) Graybill knew the Petersons' dog, McKenzi,

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[15] If the state was correct, of course, then Scott was lying about the color of Laci's pants. The state never offered any explanation as to why Scott would lie about the color of the pants Laci was wearing.

and explained to police (and has recently declared) that McKenzi would bark at him no matter where on the property the dog happened to be. (Exhibit 3 [Statement of Russell Graybill] at HCP-000008.) Whether the dog was in the front or back yards, or even inside the house, McKenzi would bark at Graybill. (Exh. 2 at HCP-000005.)

On December 27, 2002, Graybill told police that McKenzi did not bark at him on Christmas Eve. (Exh. 3.) Moreover, Graybill told police that the Petersons' gate was open when he showed up between 10:35 and 10:50 a.m. on Christmas Eve. (Exh. 3 at HCP-000008.) This was some 15 to 30 minutes *after* Servas had put the dog back into the yard and closed the gate, indicating Laci had gone on her walk after Servas put the dog away.

This evidence is consistent with Servas's original statements to police. When first interviewed, Servas told police that when she put McKenzi into the backyard, she thought she heard Laci in the backyard gardening. (Exh. 1 at HCP-000001.) Coupled with Graybill's statements that the gate was open and McKenzi did not bark at him -- as he always did -- Servas's statement tends to prove that Laci took the dog for a walk after Servas put him back into the backyard.

Of course, it was certainly not unusual for McKenzi to escape. Indeed, Servas testified that she had found McKenzi out loose in the neighborhood on prior occasions. (48 RT 9481.) Other witnesses confirmed Servas's testimony. Graybill himself recalled McKenzi being

loose in the front of the house when he came to deliver mail on other days. (49 RT 9568.) Pool cleaner and prosecution witness Michael Imelia -- who cleaned the Peterson's pool every week -- testified that when he arrived each week, McKenzi was generally outside in the backyard. (53 RT 10447-10450.) Laci was usually in the house and would come out occasionally. (53 RT 10450-10451.) Police officers testified McKenzi was outside in the backyard on various dates when they came by the house. (48 RT 9362; 55 RT 10732.) Sharon Rocha testified that McKenzi spent significant time outside and only "occasionally" came inside the house. (46 RT 9049.)

In short, the evidence now conclusively shows (1) McKenzi spent significant time outside the house, both in the front and back yards while Laci was inside the house, (2) when Servas found McKenzi on at 10:18, the backyard gate was open and it sounded to Servas as though Laci was gardening, and (3) when postman Russell Graybill delivered mail between 15 and 30 minutes afer Servas had put the dog back and closed the gate, he observed that the gate was once again open and McKenzi did not bark, indicating the dog was gone. The state's suggestion that Servas's discovery of McKenzi outside the house at 10:18 meant that Laci had already been adducted or killed ascribes a significance to McKenzi's location that not only ignores Servas's testimony and statements to police, but the statements and testimony of Graybill as well.

Graybill's statements strongly suggested that Laci had taken McKenzi for a walk ***after*** Servas had put the dog back in the backyard. If

this were true, the time line was much, much longer than ten minutes as the prosecutor claimed. Instead, Laci could have been abducted anytime between 10:18 a.m. (when Servas put the dog inside and drove away) and 5:15 p.m., when petitioner returned home and found McKenzi with his leash on. While ten minutes may be a short window, much can -- and did -- happen in seven hours.

But the evidence that Laci disappeared after petitioner left to go fishing did not end with Graybill. Three witnesses who never testified could have also confirmed that Laci went for a walk with McKenzi after Servas found him on the street and returned him to the backyard.

First, there was Diane Campos. Campos worked as a custodian at Stanislaus County Hospital in Modesto, California. (Exhibit 12 [Declaration of Diana Campos] at HCP-000331.) On December 24, 2002, she arrived to her 11:00 a.m. shift early at 9:50 a.m. (*Ibid*.) She immediately went to the outdoor table area at the back of the hospital to smoke a cigarette. (*Ibid*.) This area overlooks the Dry Creek trail. (*Ibid*.) Sometime around 10:45 a.m., a barking dog caught her attention. (*Id*. at 4.) Ms. Campos saw a "very pregnant woman" holding the dog's leash. (Ibid.) The dog looked like a golden retriever with a white marking down the front of his chest. (*Ibid*.) Ms. Campos noticed two men who looked homeless near her who told the woman to "shut the fucking dog up." (*Ibid*.)

Two days later on December 26, 2002, Ms. Campos saw a missing

poster for Laci Peterson at a Starbucks Coffee near the hospital. (*Id*. at HCP-000331.) She recognized Ms. Peterson as the woman who was walking her dog on December 24, 2002. (*Ibid*.) Ms. Campos was "sure it was the same woman." (*Id*. at HCP-000331, HCP-000332.) She called police the next day and was interviewed by Detective Owen of the Modesto Police Department. (See Exhibit 48 [Statement of Diane Campos].)

Then there was Frank Aguilar. Mr. Aguilar lived at 215 Covena Avenue in Modesto, California. (Exhibit 13 [Declaration of Frank Aguilar] at HCP-000336.) On December 24, 2002, Mr. Aguilar was driving with his wife, Martha, from their home up La Loma Avenue, away from Yosemite Blvd., and towards downtown Modesto. (*Ibid*.) As they were driving, they saw a pregnant woman walking towards them with a dog on a leash. (*Ibid*.) The woman was walking a mid-sized dog, like a long hair Labrador Retriever. (*Ibid*.) Mr. Aguilar is not sure of the time but it was between 9:30 and 11:00 a.m.. (*Ibid*.)

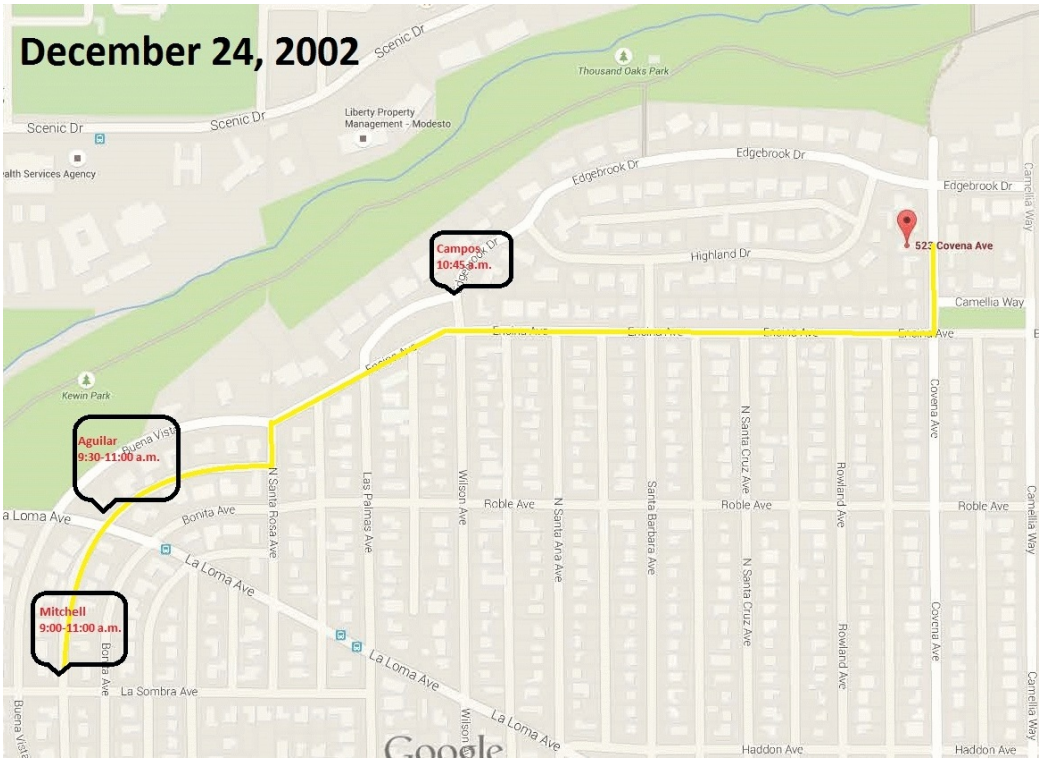
Sometime shortly after December 24, Mr. Aguilar learned from the news that Laci Peterson had gone missing and saw a photograph of her. (*Ibid*.) He realized that the photograph he had seen on the news was of the same woman he had seen walking the dog that morning. (*Id*. at HCP-000337) Based on the photographs of Laci, Mr. Aguilar is sure that the woman he saw walking a dog on December 24, 2002, was Laci Peterson. (*Ibid*.)

Finally, William Mitchell also saw Laci and Mckinzi on December 24, 2002. Mr. Mitchell was at home with his now-deceased wife, Vivian. Vivian was doing the dishes at the kitchen sink, which is at a window facing La Sombra Ave. Vivian drew Mr. Mitchell's attention to a "beautiful lady ... going by with a nice dog." (Exhibit 14 [Declaration of William Mitchell] at HCP-000340.) Mr. Mitchell looked out the living room window, but only caught a glimpse of the dog. The walker seemed to be headed toward La Loma Avenue. The Mitchells had seen Laci walking her dog on several prior occasions. A neighbor across the street had also previously seen Laci walking the dog. The Mitchells told this neighbor about their sighting of Laci on Christmas Eve. (*Id.* at HCP-000342.)

Additional evidence established that these three witnesses all saw Laci walking in an area near her house which was virtually identical to the route she had taken just the day before. Thus, Anita Azevedo saw Laci walking McKenzi on La Loma and Encina Avenues on December 23, 2002. (Exhibit 15 [Declaration of Anita Azevedo] at HCP-000344.) Grace Wolf saw Laci walking McKenzi the morning of December 23, 2002, also near her house. (Exhibit 16 [Declaration of Grace Wolf] at HCP-000346-47.)

The statements from these witnesses establish that Laci was seen on December 24, 2002 walking almost the identical route she had walked on December 23, 2002:


December 23, 2002
Scenic Dr
Thousand Oaks Park
Liberty Property Management - Modesto
Edgebrook Dr
Highland Dr
523 Covena Ave
Grace Wolf
Camellia Way
Kewin Park
Anita Azevedo
Bonita Ave
La Loma Ave
La Sombra Ave
N Santa Rosa Ave
Las Palmas Ave
Wilson Ave
Roble Ave
N Santa Ana Ave
Santa Barbara Ave
N Santa Cruz Ave
Rowland Ave
Covena Ave
Haddon Ave
Google


December 24, 2002
Scenic Dr
Thousand Oaks Park
Liberty Property Management - Modesto
Edgebrook Dr
Highland Dr
523 Covena Ave
Campos 10:45 a.m.
Camellia Way
Kewin Park
Aguilar 9:30-11:00 a.m.
Mitchell 9:00-11:00 a.m.
Bonita Ave
La Loma Ave
La Sombra Ave
N Santa Rosa Ave
Las Palmas Ave
Wilson Ave
Roble Ave
N Santa Ana Ave
Santa Barbara Ave
N Santa Cruz Ave
Rowland Ave
Covena Ave
Haddon Ave
Google

But even this is not all. As noted above, at the very hour Laci disappeared, Steven Todd was burglarizing the home of Rudy and Susan Medina. The Medina home was located at 516 Covena St., directly across the street from the Peterson's home. (49 RT 9590-9597, 9604.) Todd was later arrested and convicted of this burglary. (Exh. 30 [*People v. Steven Wayne Todd*, Reporter's Transcript of Change of Plea] at HCP-000424-25.) The evidence established that this burglary began sometime after the Medina's left their home that morning at 10:35, and sometime before Diane Jackson drove past the home and observed the burglary at 11:40 a.m. (See 49 RT 9590; 52 RT 1-316-10317; 99 RT 18563.)

Todd was interviewed by the defense team at the San Mateo County Jail on August 27, 2004, in the midst of trial. (Exh. 33 [Declaration of Carl Jensen] at HCP-000431.) When confronted with Diane Jackson's statements that she saw the safe on front lawn of the Medinas' home and a van parked in front of that home at 11:40 a.m. on December 24, 2002, Todd became "unglued." (*Ibid*.) Todd came out of his chair, put his hands on the table, and leaned over towards Jensen, yelling words to the effect of "You don't have a witness," and "You don't have a fucking thing!" (*Ibid*.) Indeed, a guard was so alarmed that she came and asked Jensen if he was okay. (*Ibid*.) Todd informed Jensen that he would invoke his Fifth Amendment rights if called to testify. By this time, of course, Todd had already been convicted of the burglary.

On January 22, 2003, a corrections officer at CRC Norco ,

Lieutenant Xavier Aponte, recorded a phone call between Steven Todd's friend, Adam Tenbrink, and Tenbrink's brother, Shawn. Lt. Aponte immediately called the Modesto Police Department and informed it that Adam Tenbrink told his brother that Steven Todd admitted that Laci had seen him breaking into the Medina's home. (Exhibit 28 [Hotline Telephone Log].)

Of course, if Steven Todd saw Laci alive while he was burglarizing the Medina home on December 24, 2002, then there is reasonable doubt as to Scott's guilt. Scott left home to go fishing at 10:08 a.m. Todd's burglary would have been committed after the Medinas left their home at 10:35 a.m.. Diana Jackson saw evidence of the burglary at 11:40 a.m. Thus, Todd would have seen Laci alive in Modesto more than an hour after Scott left the house.

3. Evidence as to why the crime occurred.

In criminal cases, the state need not prove motive in order to convict. But in this case, the state nevertheless sought to explain why a man with no prior criminal history nor history of domestic violence would suddenly kill his wife and unborn child.

As the prosecutor explained to the jury in closing arguments, the state's theory with respect to motive was three-fold: (1) Scott killed Laci for financial reasons, (2) Scott killed Laci because he did not want to be a

father, and (3) Scott killed Laci because he wanted freedom to pursue other relationships. (109 RT 20206, 20208-20209, 20242, 20300-20302.) As noted, the defense theory was that Scott had no motive at all to kill Laci, and did not do so. (110 RT 20376.)

To support its financial-motive theory, the state presented evidence from Gary Nienhuis. Nienhuis was an internal auditor for the City of Modesto who was asked by the state to review the Peterson's financial records. (73 RT 13960, 13974.) Based on the financial statements provided by the state, Nienhuis concluded that 70% of Scott's income went to fixed debt of credit card bills, mortgages and car loans. (73 RT 13977.) This did not include food, gas, or utilities. (73 RT 13977.) One of Scott's credit card balances was $12,000. (73 RT 13979.) Moreover by November of 2002, Scott was only at 23% of his yearly goal for TradeCorp. (73 RT 13994.) Nienhuis admitted, however, that Scott always paid his credit card bills and car loan on time and many credit cards carried a zero balance. (73 RT 14003-14004, 14007.) The state relied on Nienhuis's testimony to argue that Scott was not doing well financially, which was a possible motive for him to kill his wife. (109 RT 20300-20301.)

But a closer look at their finances showed that Scott and Laci typically spent less than they earned. (103 RT 19355-19356.) Certified public accountant Marty Laffer testified that a review of Scott and Laci's monthly income and expenses showed that they spent less than they earned each month. (103 RT 19339, 19355-19356.) In fact, he noted that they

paid extra on their mortgage each month. (104 RT 19422.) Prosecution witness and TradeCorp accountant Jeff Coleman testified that Scott was set to receive a monthly raise from $5,000 to $5,300-$5,350 in January 2003. (73 RT 14112.)

And the fact of the matter is that there would be no financial windfall to Scott from Laci's death. Although Laci was set to inherit about $160,000 from the sale of her grandparents' home, she could not access the money until she turned 30 -- which was three years after her death. (46 RT 8936-8938; 47 RT 9183.) And if she died before the age of 30 and had no living children, then the $160,000 went to her brother Brent and sister Amy; it did not pass to Scott. (47 RT 9215-9216.)

There was also a separate Rocha family trust worth 2.4 million dollars from the estate of Laci's grandfather. (103 RT 19357.) Under the terms of this trust, upon the death of Laci's grandfather the trust would be distributed to his three grandchildren: Laci, Brent and Amy. (103 RT 19357.) As was the case with the money from the sale of her grandparents house, however, if Laci died with no living children before the trust was distributed, her share went to Brent and Amy; it did not pass to Scott. (103 RT 19357.)

In light of this evidence, Laci's brother, Brent, acknowledged that there was "no financial motive" for Scott to kill Laci. (47 RT 9216.) Laci knew the provisions of the trust, and the state presented no evidence that

she kept this information from Scott. (46 RT 8936-3938.) Moreover, the notion that Scott killed Laci because they were in dire financial straights is totally inconsistent with the fact that Scott paid her health insurance premium on December 23, 2002 -- the day before she went missing. (110 RT 20342.)

With respect to life insurance, Brian Ullrich -- a friend of Laci and Scott -- testified that in 2001 he obtained his financial investors license. (71 RT 13802.) In April of that year, Brian gave Scott and Laci a call to see if they were interested in financial planning. (71 RT 13802-13803.) At this meeting, Brian recommended that they each purchase a life insurance policy. (71 RT 13804-13805.) In April 2001, each purchased a policy for $250,000. (71 RT 13804-13805.) After Laci's disappearance, Scott never called Brian or his office asking about the life insurance money. (71 RT 13817-13818.)

Detective Brocchini himself did *not* think that the life insurance policy was any motive for Scott to kill Laci. (97 RT 18295-18296.)[16]

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[16] Scott also explored selling the house and Laci's Land Rover and decided to sell Laci's car but not the house. (81 RT 15414-15415; 94 RT 17799-17800.) The state relied on this as evidence that Scott knew that Laci was not coming home. (109 RT 20247, 20266.) But as noted, the media frenzy at Scott's home was overwhelming. (47 RT 9142-9143; 48 RT 9526.) Scott explained to his sister Ann Bird that the locks on Laci's car had been damaged and he needed a truck for his business as his truck was still in the possession of police. (97 RT 18254.)

The state's second theory as to motive was that Scott did not want to be a father. (109 RT 20206.) This theory was primarily based on the testimony of Brent Rocha's wife Rose who recalled Scott once saying that he was "kind of hoping for infertility" and Amber's testimony that Scott mentioned getting a vasectomy. (47 RT 9285; 76 RT 14674; 109 RT 20206.) Rose admitted, however, that Scott might have been joking. (47 RT 9295.) And Scott had not gotten a vasectomy. (76 RT 14674.) In fact, evidence from Brent Rocha, Eric Olson and Gary Reed showed quite the opposite. Brent testified that Scott was "excited" to have a baby and that one of Scott's "goals" was to have a family. (47 RT 9228-9229.) Olson testified that Scott was "happy" about the pregnancy. (59 RT 11660.) Gregory Reed confirmed this; he had spoken with Scott many times about having a baby and Scott seemed "excited." (75 RT 14436.) Reed's wife Kristen was pregnant at the same time as Laci and all four had taken a birthing class together. (75 RT 14433, 14435.) Reed recalled that during Laci's pregnancy, he and Scott had once looked through a hunting and fishing catalog at the children's clothing section and joked about how excited they were to buy their kids that type of clothing someday. (75 RT 14436.)

Finally, the state theorized that Scott killed Laci because he wanted the "freedom" to pursue other relationships, like the one he had started with Amber Frey. (109 RT 20208-20209.) At trial the state played numerous calls between Amber and Scott which Amber had taped. (See 76 RT 14720, 14721, 14722, 14724-14725; 77 RT 14758, 14759, 14763, 14767,

14770.) Of course, to the extent that it was children Scott was trying to escape, dating Amber was a curious choice since she had a young daughter who lived at home with her. (76 RT 14592.) Perhaps recognizing this, and during closing arguments, the prosecutor was candid; "I don't think [Scott] killed Laci Peterson to go marry Amber Frey . . ." (109 RT 20209.)

4. The state's response to Scott's defense that he was fishing.

As noted, Scott told detectives that on December 24, 2002, he went to the Berkeley Marina to fish for sturgeon and try out his new boat. A forensic search of the Peterson computers confirmed the lead-up to the fishing trip.

On December 7, 2002 someone looked at boat classifieds on the computer. (75 RT 14352.) Indeed, Scott purchased his boat in the next day or two. (62 RT 12161.) Then, on the morning of December 8, 2002, around 8 a.m., and then again in the evening, there were numerous visits to web sites focusing on boating in the Bay Area and sturgeon fishing. (75 RT 14367-14368, 14370-14371, 14374-14380, 14395-14396, 14399-14404.) There were searches for "'sturgeon', 'fishing', 'tackle', 'San Francisco' and "ten tips for better sturgeon fishing." (75 RT 14399-14404.) Someone had viewed the State of California Fish and Game website, the 2002 Ocean Sport Fishing Regulations web-page, an archived fishing report which including a report from 2000 that sturgeon fishing was good in December and a Marine Sport Fish Identification web-page on green sturgeon. (75 RT

14395-14399, 15682-15694.)[17]

All of these searches were conducted from the Peterson's home laptop. (75 RT 14359.) One search on the computer referenced a website for the Real Time Current Velocity website (which showed information on the currents in San Francisco Bay). (75 RT 14473-14474.) The state theorized that Scott was looking at currents to determine where to put Laci's body. (109 RT 20212.)

But this theory too was undercut by the state's own experts. According to the state's own computer expert Lydell Wall, the Petersons had dial-up internet access; because dial-up access can take a long time to load a website, before it is loaded someone may have already moved on to another website. (75 RT 14473-14474.) According to Mr. Wall, before the Real Time Current Velocity website was even loaded and visible on the computer screen, *the person doing the search had already clicked on the*

[17] Angelo Cuanang -- an expert sturgeon fisherman -- noted that he would not fish sturgeon with lures like the ones Scott had purchased. (71 RT 13747.) Cuanang admitted the equipment Scott had with him -- while not what an expert fisherman such as himself would use -- could certainly be used to catch sturgeon in the bay. (71 RT 13789.) He also noted that San Francisco Bay is a good place to catch sturgeon between December and March. (71 RT 13740, 13742.) Finally, Detective Brochini himself conceded he found a fishing tackle box filled with lures and other fishing equipment in the boat (55 RT 10755), and Cuanang specifically agreed that some of these items could indeed by used to catch fish in the bay. (71 RT 13763-13764.)

fish and game website. (75 RT 14473-14474.)[18]

Of course, the state's theory was that Scott had *not* gone fishing on Christmas Eve day but had traveled to the Berkeley Marina to put Laci's body in the bay. (109 RT 20235.) According to the state, all of Scott's prior internet research was directed at this goal. (109 RT 20234-20235.) As part of this theory, the prosecutor belittled the idea that *anyone* would travel 90 miles -- the distance to Berkeley from Modesto and pass numerous other bodies of water -- to fish. (109 RT 20214.) And that anyone would fish on Christmas Eve Day. (109 RT 20229.)

Ironically, the best response to this argument came from two prosecution witnesses: Laci's own step-father, Ron Grantski and Detective Bertalotto. Bertalotto conceded that the Berkeley Marina was, in fact, the closest saltwater spot to fish from Modesto. (88 RT 16796.) And Grantski admitted not only that he too had gone fishing on Christmas Eve day for several hours, but that he went fishing around 12:30 p.m. -- just like Scott. (47 RT 9109-9110, 9127.) Sharon described how Ron would often go fishing spur-of-the-moment, had gone fishing on holidays, and might only

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[18] Even putting this aside, the state's fishing expert Angelo Cuanang independently undercut the state's position. Mr. Cuanang testified that the movement of water or currents is important in sturgeon fishing. (71 RT 13753.) Thus, even if the Real Time Current Velocity website had loaded and been examined, it was entirely consistent with someone who wanted to go sturgeon fishing. And the fact of the matter is that there was no evidence that anyone had tried to delete any searches or other information from any of the Peterson computers. (83 RT 15807.)

fish for a short period of time. (46 RT 9069.) Moreover, state fishing expert Cuanang admitted that he too (like Scott) had also traveled 90 mile distances to fish. (71 RT 13783.) Both Laci's mother Sharon and sister Amy knew that Scott liked to fish and Sharon recalled him talking about fishing trips he had taken with his father Lee Peterson. (46 RT 8932, 8978.) Ron recalled that Scott had been fishing around Thanksgiving. (47 RT 9128.) Finally, when police searched Scott's truck and warehouse, they found several 2-day fishing licences; one from 1994, 1999, and August, 2002. (57 RT 11084-11085, 11088-11092.)

The state relied on several other facts to support its theory that Scott had not driven to the marina to fish on the 24th; the fishing lures he bought at Big 5 were unopened, his new fishing pole was unassembled, and there was no rope attached to the anchor found in his boat. (109 RT 20214, 20234-20235, 20311.) With respect to each area the prosecutor was clear:

> "I don't know anyone who's ever caught a fish with a lure that's still in the package." (109 RT 20214.)
>
> "See how [the fishing pole is] apart? That's the way it was on December 24th in the defendant's boat. This pole wasn't even put together. . . . You're not going to catch a sturgeon on a rod that's not put together. (109 RT 20234-20235.)
>
> "Let's take a look at this anchor real quick. . . . [T]here is no rope on that [anchor] . . . [P]itch it over your boat? Well, of course it's gone, right? There is nothing that's going to hold your boat. This is not an anchor." (109 RT 20311-20312.)

Once again, the response to these theories came from the state's own witnesses. Detective Brocchini admitted that there was a tackle box

containing lures in Scott's boat on the 24th. (55 RT 10755-10756.) So Scott plainly had numerous other lures with which to fish.

This is important for two reasons. First, and most obvious, it directly responds to the prosecutor's theory that Scott was not really fishing because his lures were "still in the package." In fact, as with most fishermen, there were many lures which were available in the tackle box. Second, the state's theory was that Scott bought the new lures to make it look like he was going fishing when -- in fact -- he never intended to fish. The presence of lures in the tackle box completely undercuts this theory as well; simply put, it makes no sense that Scott would buy new lures to support a fake fishing alibi when he already had lures in his tackle box.

The state's reliance on the unassembled fishing rod, and the absence of a rope on the anchor when the boat was searched, are equally suspect. The fact of the matter is that Detective Hendee found *two* fishing rods in the boat; one was unassembled, and the second was *assembled*. (64 RT 12542-12543, 12545.) And Detective Brocchini admitted there *was* a 6 foot rope in the boat which could have been attached and then removed from the anchor. (55 RT 10766-10767.) Significantly, as internet research would have shown, the depth of the water near Brooks Island was three to six feet. (101 RT 18902-18903.)[19]

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[19] The state also presented evidence that Scott told several people he had gone golfing that day rather than fishing. According to

(*footnote continued on next page*)

5. The state presents three areas of expert testimony to support its theory: dogs, fetal development and the movement of bodies in water.

Finally, the state relied on three different kinds of expert testimony to support its theory of the case: (1) expert testimony on dog scent evidence, (2) expert testimony about fetal development and (3) expert testimony about the movement of bodies in water.

a. Dog scent evidence.

i. Evidence the jury heard.

Though Laci Peterson's body, and the body of her unborn child, were discovered in San Francisco Bay, the state had no direct evidence that she was killed in the Peterson's Modesto home or transported by truck to the marina. The state sought to fill this evidentiary void with dog scent evidence. Over defense objection, the state introduced dog scent evidence collected at the Berkeley Marina.

(*footnote continued from previous page*)

Harvey Kempell -- whose wife Gwen was friends with Laci -- on the night of December 24, Scott told him that he had been golfing that day. (48 RT 9362.) But that same night when Gwen asked Scott where he had been that day he told her and others that he had been fishing. (48 RT 9371; 50 RT 9796; 9867.) And although Harvey spoke with police that night, he did not mention that Scott said he had been golfing. (48 RT 9376.) Peterson neighbor Amie Krigbaum also said that when Scott -- who was "very upset" and "distraught"-- came looking for Laci in the neighborhood that night he said he had been golfing all day. (48 RT 9510, 9523.)

On December 28, 2002, Eloise Anderson brought her trailing dog Trimble to the Berkeley Marina. (84 RT 16075.) With respect to Trimble's track record for successfully following scent trails, Anderson admitted that Trimble "does make mistakes when you ask her to perform trailing exercises." (8 RT 1490-1491, 1495-1496, 1497-1500, 1500-1507, 1548.) For example, in 2001 Trimble ran two *contact trails* (where the dog trails someone who has actually made physical contact with the ground, such as by running) where she had failed to trail correctly. (8 RT 1549-1550.) And as to *vehicle trails* (where the dog trails someone who has *not* made contact with the ground, such as a person in a car) her record was bleak. Trimble had attempted three vehicle trails and failed two of them. (8 RT 1541-1542; 85 RT 16145-16147.)

Nevertheless, the state introduced a vehicle trail performed by Trimble. Using sunglasses that had been removed from Laci's purse, Anderson provided Trimble with Laci's scent. Anderson chose to use the sunglasses even though she knew that the purse had also been handled by Scott. (8 RT 1552; 84 RT 16082.) After scenting Trimble with the sunglasses, Trimble gave no indication of scent at several locations at the marina until she explored the vegetation near an entrance to the boat ramp. (84 RT 16079.) According to Anderson, Trimble alerted at the end of the pier on the west side of the boat ramp. (84 RT 16075-16080, 16085.)

Anderson and Trimble were not the only team police called to search at the Berkeley Marina. Ron Seitz, whose dog was also certified by

CARDA, was called to search the marina. (105 RT 19603.) Seitz used one of Laci's slippers to scent his dog. (105 RT 19608.) He specifically chose the slipper as opposed to the sunglasses to avoid "cross-contamination" of scent. (105 RT 19608.) Indeed, in sharp contrast to the sunglasses used by Anderson to scent Trimble, there was no evidence at all suggesting that Scott had handled the slipper. In stark contrast to Anderson's dog, Seitz's dog did *not* detect Laci's scent at the Berkeley Marina. (105 RT 19611-19614.)

During closing argument, the prosecutor told the jury that if it believed Trimble detected Laci's scent at the pier, it established Mr. Peterson's guilt of capital murder, "as simple as that." (111 RT 20534.)

ii. Evidence the jury never heard.

Defense counsel consulted -- but then inexplicably failed to introduce testimony from -- expert canine search trainer Andrew Rebmann. (Exh. 4 [Declaration of Mark Geragos] at HCP-000025-30.) Rebmann informed counsel that (1) non-contact searches are impossible, but even assuming they are possible, Trimble lacked the necessary training, (2) the search was unreliable because it occurred four days later, (3) Anderson failed to employ adequate controls to ensure Trimble was not smelling Scott instead of Laci, and (4) Seitz's inability to replicate the results strongly indicated a false alert. (Exh. 5 [Declaration of Andrew Rebmann] at HCP-000037-40.)

However, defense counsel inexcusably elected not to call Rebmann to testify at the Evidence Code section 402 hearing counsel requested on the dog scent evidence. (Exh. 4 at HCP-000026-29.) This was so even though Rebmann was actually present in court. (Exh. 5 at HCP-000042; Exh. 21 [Receipt for Rebmann's Hotel Stay, March 2, 2004] at HCP-000375.) Defense counsel has since declared that he miscalculated, mistakenly believing the trial court would exclude this evidence even without hearing from an expert. (Exh. 4 at HCP-000028.)

Defense counsel's miscalculations continued at trial. Thus, counsel elected to cross-examine the state's expert Eloise Anderson in lieu of calling Rebmann – or any other expert -- to testify. (*Id*. at HCP-000029-30.) This was true even though Rebmann was prepared to testify as to various factors relating to the unreliability of the dog scent evidence in this case. (See Exh. 5 at HCP-000040-42.) And indeed, defense counsel himself recognized prior to trial that "Mr. Rebmann's testimony is necessary and critical to this case." (Exh. 22 [July 22, 2004 Pen. Code, § 987.9 Application] at HCP-000389.) Recognizing the import of Rebmann's proposed testimony, the trial court approved $7,500 for his expert fees prior to trial. (Exh. 23 [July 29, 2004 Order on Pen. Code, § 987.9 Application] at HCP-000404.)

Still, defense counsel never called Rebmann to testify. The jury's verdicts reveal this was yet another error. The jury, having never heard from any expert witness that the dog scent evidence was unreliable,

convicted petitioner and sentenced him to death.

But the critique of the state's testimony in this area is not limited to Rebmann. Dr. Lawrence Myers is Associate Professor in the College of Veterinary Medicine at Auburn University in Alabama. (Exh. 6 [Declaration of Lawrence Myers] at HCP-000043.) Professor Myers is a world-renowned expert on canine scent detection, and has authored over 50 articles and book chapters on canine scent detection. (*Id*. at HCP-000043-44.)

Professor Myers reviewed Trimble's training records , Anderson's pretrial and trial testimony, photographs of the boat launch area at the Marina (Exh. 24), and the trial court's pretrial ruling on the admissibility of the evidence. (*Id*. at HCP-000044, HCP-000045.) Dr. Myers has concluded that Anderson's claim that Trimble detected Laci Peterson's scent at the Berkeley Marina on December 28, 2002, is completely unreliable, and would have appeared completely unreliable to any expert adequately trained in the field of canine scent detection. (*Id*. at HCP-000045.) Indeed, Dr. Myers has gone so far as to say the searching protocols employed in this case were virtually guaranteed to produce an unreliable result. (*Id*. at HCP-000048.)

b. Fetal development evidence.

i. Evidence the jury heard.

In an effort to support its theory that Laci was killed on December 23 -- and thus Scott was the only possible killer -- the state presented testimony from Greggory Devore, M.D., a doctor who specialized in high-risk obstetrics and maternal-fetal medicine. (95 RT 17855.) Dr. Devore was contacted by the Modesto Police and asked to review the Conner's fetal records to determine his age at death. (95 RT 17861.) Dr. Devore reviewed two ultrasound examinations and Conner's femur bone. (95 RT 17861, 17868.) Using "an equation by [Dr. Phillipe] Jeanty." an expert in fetal biometry, Dr. Devore estimated that Conner died on December 23, 2002. (95 RT 17881, 17883.) Dr. Devore admitted that this was an estimation and Conner may have died a day or two before or after this date. (95 RT 17887.) Of course, a day or two before the 23rd was impossible (since Laci had been seen by her sister on December 23) and two days after meant that Scott was not the killer.

The defense responded with a remarkably unqualified expert of their own. Defense counsel consulted with and called Dr. Charles March -- a fertility doctor -- to testify about fetal biometry. (Exh. 4 at HCP-000019-21.) It did not go well. Dr. March admitted he was not an expert in this field. (106 RT 19843.) Nonetheless, Dr. March purported to similarly rely on formulas by the leading expert, Dr. Phillipe Jeanty, and testified that

Conner's measurements in fact placed his time of death no earlier than December 27, 2002. (106 RT 19780.) During cross-examination, however, March admitted to relying on a statement Laci apparently made to a friend in order to determine her precise date of conception. (106 RT 19795-19811.)

ii. Evidence the jury never heard.

Remarkably, no one at trial sought to contact Dr. Jeanty, on whose formula Dr. Devore relied. Newly discovered evidence from Dr. Phillipe Jeanty -- establishes that all of the experts were wrong. Dr. Jeanty has declared that Dr. Devore applied the wrong formula in the wrong manner to the wrong bones and -- not surprisingly -- came up with the wrong results. (Exhibit 7 [Declaration of Phillipe Jeanty] at HCP-000050-61.)

The formula Dr. Devore used came from an article co-written by Dr. Jeanty, himself. Indeed, Dr. Devore cited Dr. Jeanty in his report, which was provided to the defense on February 19, 2004. (See Exhibit 25 [Report of Greggory R. Devore] at HCP-000410.) Dr. Jeanty's formula was based on a *cross-sectional* study of babies and is used to estimate gestational age *when the last menstrual period is unknown*. (Exh. 7 at HCP-000059-60.)

According to Dr. Jeanty, however, the formula Dr. Devore used is *not* designed to be used in any situation in which the last menstrual period *is* known. In that situation, there is a more accurate approach to estimating

age which uses a very different formula -- also developed by Dr. Jeanty -- based on a *longitudinal* study where the last menstrual period is actually known. (*Id*. at HCP-000060.) Dr. Jeanty was clear: no competent fetal biometrist would use the formula on which Dr. Devore relied, since the last menstrual period was known. (*Id*. at HCP-000061.)

Using the correct formula, and assuming Conner was growing at a constant rate, the femur would grow to the observed length in 238 days (not the 232 days that Dr. Devore estimated). (Exh. 7 at HCP-000056.) This means that Conner died on December 30, 2002. (*Ibid*.)[2020]

In addition to using the wrong formula, Dr. Devore also improperly elected to apply the formula to only one bone. (Exh. 7 at HCP-000062-63.) This too was a mistake. In the very article on which Dr. Devore relied, Dr. Jeanty stated that "using more than one bone allows us to have more confidence in the GA [gestational age] obtained" and "use of the length of two or more bones is often necessary to find out which gestational age is more likely." (*Id*.; Exh. 25 at HCP-000410.) And "it is generally agreed in the field of fetal biometry that it is more accurate to use the mean or average measurements of more than one long bone to determine gestational age. Thus, where there are measurements for the femur, humerus and tibia, a

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[20] If Conner was growing slower than normal, the femur would have grown to the observed length in 249 days, which would have meant that Conner died on January 10, 2003. If Conner was growing faster than normal, the femur would have grown to the observed length in 225 days, which would have meant that Conner died on December 17, 2002. (*Ibid*.)

more accurate gestational age can be derived by averaging the gestational ages based on the measurements of each bone." (Exh. 7 at HCP-000059.)

Dr. Jeanty applied the correct formula to measurements of the tibia. (Exh. 7 at HCP-000062.) Once again, assuming Conner was growing at a constant rate, the tibia would grow to the observed length in 244 days which meant that Conner died on January 5, 2003. (*Id*. at HCP-000057-58.)

Dr. Jeanty applied the correct formula to measurements of the humerus. Once again, assuming Conner was growing at a constant rate, the humerus would grow to the observed length in 244 days which also meant that Conner died on January 5, 2003. (Exh. 7 at HCP-000058.)

Averaging the three gestational ages he got from applying the correct formula to each of the three long bones, Dr. Jeanty concluded that the gestational age was not 232 days as Devore estimated (using the wrong formula on a single bone) but 242 days (using the correct formula on all three bones). This meant that Conner died on January 3, 2003. (Exh. 7 at HCP-000059, HCP-000062.)

At the request of counsel for petitioner, Dr. Jeanty performed the following exercise: Dr. Jeanty applied the *incorrect* formula (the one Dr. Devore used) to both the tibia and humerus. Using this formula yields a calculation that both bones would have grown to the observed length in 242 days, which meant that Conner died on January 3, 2003. (*Id*. at 000062-63.)

In short, Dr. Devore inappropriately analyzed only one of the three long bones for which there were measurements. He then inappropriately applied the wrong formula to a single bone he selected, rather than three bones. Had he used the correct formula, and properly applied it to all the bones which should have been tested, his results would have squarely undercut the state's case. Had he used the incorrect formula, but properly applied it to all three long bones, Dr. Devore would also have reached a conclusion contrary to the state's theory. The jury never knew any of this.

Trial counsel recognized prior to trial the need to hire an expert to analyze and possibly impeach the results of Dr. Devore. Thus, counsel requested money for an expert to testify in this area. (Exh. 22 at HCP-000392.) According to counsel, expert testimony in this area would be "critical to the defense." (*Ibid*.) Recognizing the importance of this evidence, the trial court approved more than $10,000 for this expert's fees. (Exh. 23 at HCP-000405.) Still, because defense counsel elected to use the court's money to hire a fertility doctor -- instead of the expert (Jeanty) relied on by the state's own expert (Devore) -- the jury never knew Devore's testimony was false.

Devore's false testimony was central to the jury's verdicts in this case. One juror described Devore's testimony as "indisputable." (Exh. 8 ["We the Jury"] at HCP-000219.) Another remarked that she "loved that guy (Devore). He did his research, all the way down to the bone." (*Ibid.*)

c. The movement of bodies in water.

i. Evidence the jury heard.

As noted, Mr. Peterson told police that he went fishing on the day of Laci's disappearance from the Berkeley Marina, driving his boat about two miles to the north, to a small island later identified as Brooks Island. (55 RT 10723-10726.) On April 13, 2003, the body of Conner Peterson was discovered in the shoreline area of Bayside Court in Richmond. (61 RT 11871, 11880.) The next day, Laci's body was discovered, washed ashore at Point Isabel in Richmond. (61 RT 11990, 11993.) Apart from the general proximity of Brooks Island and the points where the bodies washed ashore, there was no evidence connecting the bodies to the place where Mr. Peterson was fishing.

To connect these two points, the prosecution relied on the testimony of hydrologist, Dr. Ralph Cheng. Dr. Cheng was a senior research hydrologist with the United States Geological Survey. (66 RT 12809-12813; 100 RT 18858.) Detective Hendee, of the Modesto Police Department, asked Dr. Cheng if -- based on where the bodies had been found and the tides and currents in the bay -- Cheng could direct the police to a spot where there was a high probability that evidence related to the bodies could be found. (66 RT 12809.) Specifically, police were seeking to recover body parts of the victims or concrete weights they believed were used to anchor the bodies to the floor of the bay. (66 RT 12813.)

Dr. Cheng provided the police with a map which contained a "projected path" that Conner's body might have taken to the shore, and he pinpointed an area in the bay for the officers to search. (66 RT 12814, 12819-12820.) It was 500-1000 yards southwest of Brooks Island and in the approximate area where Scott said he was fishing on December 24. (55 RT 10725-10728; 66 RT 12814, 12819-12820.) Dr. Cheng could not produce a similar vector for Laci's body. (101 RT 18925.)

Beginning May 16, 2003, the police, with the help of teams of divers from the FBI, Contra Costa County, Marin County and San Francisco County, searched this "high probability area," with several boats equipped with sonar. (66 RT 12819-12820.) The boats would cover the area with the sonar equipment and, if some object on the bottom was detected, the dive teams would retrieve it. (66 RT 12823-12824.)

For the next seven days, numerous boats and three dive teams searched Dr. Cheng's high probability area. (66 RT 12822, 12823, 12826, 12828, 12829, 12829-12835, 12837.) They found nothing connected to the case. (66 RT 12824, 12827, 12828, 12829, 12835.)

The search of Dr. Cheng's high probability area continued in July. This time the police used a self-propelled search vehicle called a "REMUS," which stands for Remote Environmental Unit. (64 RT 12644.) Detective Hendee explained the REMUS's accuracy:

> "So when you're done searching an area with REMUS, you can have a much higher degree of confidence that you found most of the items down there . . . ." (64 RT 12644-12645.)

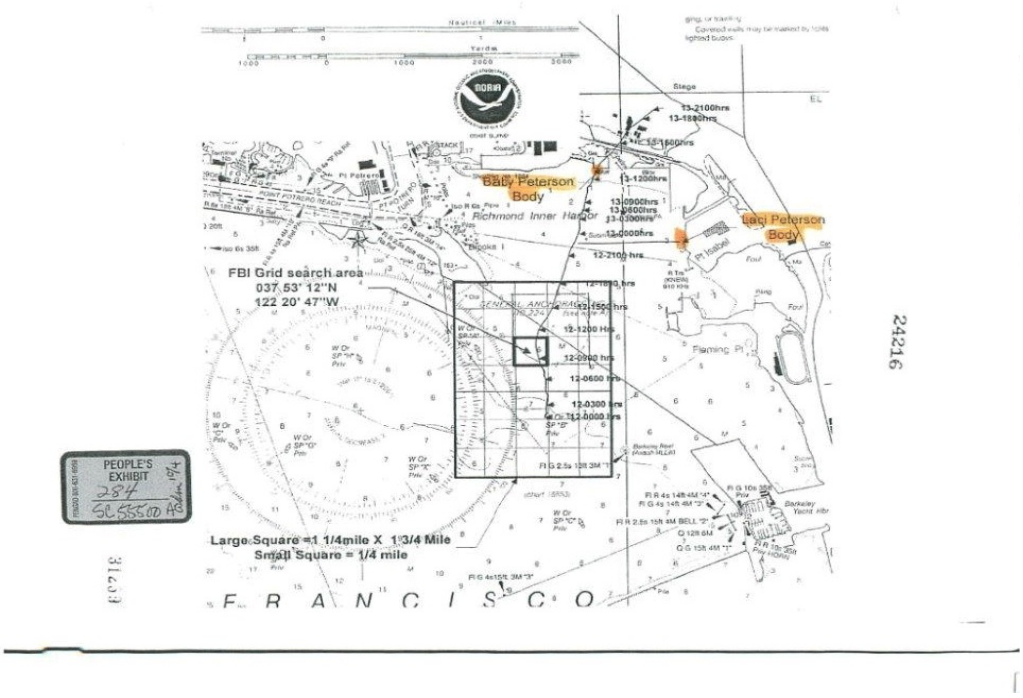
Police searched with the REMUS from July 7 through July 13. (65 RT 12709.) They covered approximately 80% of an area that was much larger than Cheng's original high probability area. (65 RT 12710.) But still nothing of relevance to Scott's case was found. (65 RT 12779.)

Police searched the high probability area again in September with dive boats equipped with sonar. They searched again in April, 2004. They again found nothing. (65 RT 12786-12787.)

The state called Dr. Cheng as an expert witness at trial to give his expert opinion that the bodies had been placed on the bay bottom near where Mr. Peterson said he was fishing. In establishing his expertise, Dr. Cheng explained that as a Senior Research Hydrologist with the United States Geological Survey, his "particular assignment is [to] study of the movement of water in San Francisco Bay" as affected by currents and tides. (100 RT 18858.) On voir dire of his expertise by defense counsel, Dr. Cheng acknowledged that his work had *never* explored the movement of bodies in water or the bay. (100 RT 18865; 101 RT 18938.)

Dr. Cheng was then asked detailed questions about the movements of bodies in water, the precise subject he had admitted his studies did not involve. Dr. Cheng produced a "vector map," which charted the movement

of Conner's body, hour by hour, in the days prior to April 13. (101 RT 18904, 18908-18911; Exh. 26 [Dr. Cheng's Vector Map].) Dr. Cheng's map shows the vector diagram and concludes that Conner's body migrated to Richmond (where it was found) from the high probability area near Brooks Island where Scott said he was fishing on December 24. (55 RT 10725-10728; 101 RT 18914.)[21] Dr. Cheng's vector map appears below:



Of course, this was the same "high probability" area that police had searched for more than two weeks with dive teams, sonar equipment and the sophisticated REMUS machine without finding anything at all to connect Scott with the crime.

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[21] Dr. Cheng's vector map was admitted at trial as People's Exhibit 284.

Interestingly, however, Dr. Cheng could not reproduce the same trajectory for Laci's body. (101 RT 18925.) When asked for an explanation why he could not provide a vector diagram that showed how Laci's body ended up in Point Isabel, Dr. Cheng confessed that "Well, I'm not – I'm not the expert in that area here. I don't know how the body is behaving in water." (*Ibid.*) Dr. Cheng admitted he had no experience at all with how bodies move in water:

> "Q: You have never done any study in San Francisco Bay that has anything to do with bodies or things of that size, correct.?
>
> "A: That is correct." (101 RT 18926.)

Despite Dr. Cheng's conceded lack of expertise in this area, the prosecutor told the jury in closing argument that if Dr. Cheng was believed, "then that man's a murderer. It's as simple as that." (109 RT 20279-20280.)

ii. Evidence the jury never heard.

The jury deciding whether Mr. Peterson was guilty of double murder, and whether he would live or die, did not hear the truth about the movement of bodies in water. As the attached declaration of Dr. Rusty A. Feagin, an expert in coastal ecology and the movement of bodies in bays and estuaries -- and a new declaration from Dr. Cheng himself -- show, the jury was given inaccurate testimony about whether Connor's body could only have

originated from the location where Mr. Peterson had been fishing.

Dr. Feagin is a tenured, associate professor in the Department of Ecosystem Science and Management at Texas A&M University. His research has focused on the study of coastal ecosystems, hydrodynamics, and geomorphology, erosion and accretion dynamics on coasts (hurricanes, sea level rise, waves, tides), spatial analysis (GIS/GNSS/GPS/remote sensing), intertidal and nearshore environments (beaches, sand dunes, wetlands, estuaries) and coastal engineering. He has published approximately 40 peer reviewed articles on numerous topics related to bay and estuary ecology, including the movement of water, sediment and other substances in coastal areas. Dr. Feagin has previously testified as an expert in courts in Texas and Louisiana. (Exh. 9 [Declaration of Dr. Rusty A. Feagin] at HCP-000282-84.)

In stark contrast to Dr. Cheng, Dr. Feagin *is* an expert in the movement of bodies in water. (Compare Exh. 9 at HCP-000284 with 100 RT 18865, 18938; 101 RT 18925-18926.) For example, in a Louisiana murder case, Dr. Feagin testified regarding historical wind, tidal, flow dynamics to render an opinion on the movement of a body in the Pearl River Estuary. (Exh. 9 at HCP-000284.)

Dr. Feagin examined all relevant environmental factors (including but not limited to winds, tides, circulation, topography and currents) and has concluded that the bodies of Laci and Connor could have originated

from *three* distinct locations in San Francisco Bay: (1) from sites on the south and west of the recovery sites, (2) from sites near Point Portrero/Ford Channel north of Brooks Island and (3) from sites that inflow to the bay from upstream in the tidal creek network. (Exh. 9 at HCP-000284-92.)

In addition to identifying three areas from which the bodies could have originated, Dr. Feagin also identified two very basic flaws in Dr. Cheng's analysis. First, although Dr. Cheng conceded he had no expertise in the movement of bodies in water, he testified to a "rule of thumb" that wind will move water at two to three percent of wind-speed. (100 RT 1882-1883; 101 RT 18926.) To the extent Dr. Cheng has assumed that bodies in water will move at the same speed as the water itself, he is wrong. (Exh. 9 at HCP-00029293.)

Second, Dr. Cheng described a wind of 40 knots occurring on April 12. (*Ibid*.) But data from the Richmond 9414863 gauge (NOAA 2013) shows sustained winds were below 25 knots maximum, with brief 'gusts' maxing out at 30 knots. (*Id*. at HCP-000294.)[22] Dr. Feagin's declaration

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[22] Dr. Feagin notes that the majority of the time winds were below 20 knots, with 25 knot gusts on the first half of April 12th. While the wind event on April 12 was significant, it was not the only significant wind event in the relevant time period. There was an equally strong wind event between March 26 and March 28, which actually lasted longer than the April 12 event. Dr. Feagin notes that Dr. Cheng relied heavily on the April 12 wind event to hypothesize that the bodies began floating toward shore as a result of that storm. But if the equally strong March wind event is also

(*footnote continued on next page*)

thus makes clear that two crucial factors in Cheng's analysis were simply wrong.

In short, the jury was presented with Dr. Cheng's theory that Conner's body migrated to Richmond (where it was found) from the high probability area near Brooks Island where Scott said he was fishing on December 24. In fact, however, this is only one of three entirely different scenarios which are all supported by the available evidence. With the data available, there is no scientifically reliable reason to prefer one scenario over the other. (Exh. 9 at HCP-000294-95.)

Indeed, Dr. Cheng himself has submitted a declaration agreeing that there were basic flaws in his testimony that were not explored at trial. (Exh. 10 at HCP-000327.) At trial, Dr. Cheng assumed that the bodies began moving on April 12 -- the date of the storm -- and used that assumption to reconstruct the vector path that Connor's body would have taken to get to the shore when it was discovered. (*Ibid.*) A chart showing this reconstruction was introduced at trial as People's Exhibit 284, and is attached to his declaration as Attachment A. (*Ibid*.)

(*footnote continued from previous page*)

considered, then it introduces other, earlier possibilities for when the bodies began moving. Such a possibility would be consistent with the second scenario, outlined above, in which the bodies originated from the area north of Brooks Island, near the Richmond harbor. (Exh. 9 at HCP-000290-95.)

Dr. Cheng explains the significance of some of the assumptions he used in his testimony. According to Dr. Cheng, in his testimony he assumed that (1) the bodies began moving a particular time, during the storm on April 12-13, 2003, and (2) the bodies reached the shore on the dates they were discovered there. If the bodies began moving at a different time, or landed at an earlier time, the location in the bay where they began moving would have been different. (Exh. 10 at HCP-000327.) The real truth, according to Dr. Cheng today, is that, because no one can actually know when the bodies started moving, or when they arrived at the shore and stopped moving, he cannot say how long the bodies traveled along the vector path he charted, either in terms of time or distance. For example, if the bodies began moving later than he assumed, or stopped moving earlier than he assumed, they would have been moving for a shorter time than he assumed, and they would have started at a different place along the vector path. (*Ibid*.) Dr. Cheng now states that no one can pin-point with a high probability the starting location of the bodies' movements. (*See id*.)

Significantly, the vector path Dr. Cheng charted in his testimony extends from south of Brooks Island, all the way to the Richmond shore – a distance of approximately two miles. (Exh. 26.) In contrast to his trial testimony, it is Dr. Cheng's current opinion that the bodies could have been placed in the bay ***anywhere*** along that two mile vector-path. (Exh. 10 at HCP-000327.)

Once again, defense counsel knew, or should have known, the

importance of this evidence. Prior to trial, the prosecution disclosed an email from Dr. Cheng in which he explained his theory of how the bodies washed ashore. (Exhibit 27 [E-mail from Ralph Cheng].) Importantly, Cheng also admitted to being unable to explain, under his theory, why or how Laci's body washed ashore where it did. (*Ibid*.) In the email, Cheng admitted his "estimates invoke large uncertainties." (*Ibid*.)

Defense counsel never consulted an expert to review Cheng's analysis or conclusions. The jury never heard of any evidence undermining Cheng's testimony.

PENALTY PHASE

California Penal Code section 190.3 sets forth the type of aggravating evidence which the state may present at the penalty phase of a capital trial. But the penalty phase in this case was not like most capital trials.

In contrast to many capital cases, prior to the charges in this case, Scott Peterson had never been convicted of a felony or a misdemeanor, nor had he ever even been arrested. (96 RT 18118, 18157.) Thus, although section 190.3, subdivision (b) permits the state at a capital penalty phase to introduce evidence of prior criminal activity involving force -- or even the threat of force -- no such evidence was introduced here. And although section 190.3, subdivision (c) permits the state to introduce evidence of prior convictions, no such evidence was introduced here. Instead, the state's entire case in aggravation consisted of touching and emotional victim impact testimony from relatives of Laci -- her brother, sister, step-father and mother -- about the devastating impact of Laci's loss. (113 RT 20978-21018.)

As part of its case in mitigation, the defense presented similar testimony from many of Scott's relatives. Lee and Jacqueline Peterson, defendant's parents, spoke about their love for Scott, and about Scott's upbringing: how well he did in school, how he tutored children in lower grades, how he would work at homes for the elderly and did other volunteer

work, how he worked his way through college, how he adored and played with his various nieces and nephews and the devastating impact an execution would have on the family. (114 RT 21081-21095, 21103-21112; 119 RT 21567-21599.) Scott's sister, Susan Caudillo, testified about her love for Scott, how much Scott meant to the entire family, and what the impact would be of his execution. (113 RT 21137-21157.) Scott's sister in law Janey Peterson testified as to her relationship with Scott, how welcome he made her feel in the family, and about Scott's relationship with and positive influence on the younger children in the family. (115 RT 21220-21244.) Numerous other relatives testified to their relationship with and love for Scott, the positive influence he had in their lives and the impact of an execution on the family. (See, e.g., 115 RT 21246-21259 [brother, John Peterson]; 115 RT 21261-21264 [sister-in-law, Alison Peterson]; 116 RT 21289-21320]; 117 RT 21361-21372 [Scott's uncle, John Latham]; 117 RT 21374-21384 [Scott's cousin, Rachel Latham]; 117 RT 21385-21392 [Scott's uncle, Robert Latham]; 119 RT 21553-21559 [Scott's brother-in-law, Ed Caudillo]; 119 RT 21561-21564 [Scott's niece, Brittney Peterson].)

But the mitigation case went beyond family members. The defense called friends of the Peterson family that had known Scott for many years to testify about his upstanding character and his loving relationship with his family. (114 RT 21114-21123, 21125-21129, 21131-21135; 115 RT 21209-21218.) The defense called friends who had grown up with Scott to testify about his character. Aaron Fritz knew Scott for 17 years; he testified about Scott's volunteer work in high school with the mentally handicapped,

his helping out of Aaron's parents when he (Aaron) was away at college, Scott's working his way through college with three jobs, and how Scott was (and would be) a positive influence on those around him. (115 RT 21169-21194.) Similarly, Britton Scheibe also grew up with Scott and told the jury about how respectful, polite, gentle and caring defendant was growing up. (115 RT 21197-21208.) William and Carrie Archer were close friends with Scott in San Luis Obispo after college; they both testified about Scott helping them as a friend, how thoughtful Scott was and the positive impact Scott had on their lives. (117 RT 21414-21423, 21426-21431.) Scott's teachers and coaches in grade school, high school and college also testified as to how courteous and industrious he was in school, as to his volunteer work with the less privileged and as to his upstanding character. (117 RT 21330-21334, 21335-21338, 21341-21347; 118 RT 21469-21476, 21491-21500.)

People who were friends with both Scott and Laci had the same view. Eric Sherar lived next to Scott and Laci in San Luis Obispo; he and his wife would socialize and were very close with Scott and Laci. Scott and Laci did not argue and were great fun to be around. (118 RT 21449-21456.) James Gray was friends with both Scott and Laci; he too saw that Scott cherished Laci and they were a perfect couple. (118 RT 21459-21467.)

Scott's employers and co-workers -- both from when he was a teenager and later -- testified to his hard working, respectful character. (117

RT 21349-21353, 21354-21358; 118 RT 21477-21489; 119 RT 21538-21546.) Julie Galloway, who worked with Scott after he graduated college, explained how he helped her get out of an abusive relationship, introduced her to her husband and was the most generous man she had ever met. (117 RT 21433-21444.)

Many of the people who knew Scott Peterson his entire life repeated the same refrain over and over again; they simply did not believe he was guilty of the crime. (See, e.g., 114 RT 21157; 115 RT 21218; 116 RT 21319; 117 RT 21358, 21372.)

REQUEST FOR DISCOVERY AND EVIDENTIARY HEARING

1. The facts set forth in each of the claims in this petition establish a prima facie basis for relief.

2. If any of the facts set forth in this petition are disputed by respondent, petitioner requests an evidentiary hearing so that the factual disputes may be resolved. Petitioner requests an opportunity to supplement or amend this petition after he has been afforded full discovery, after the State discloses all material evidence, after petitioner gains use of this court's subpoena power, and after adequate funding for investigation and experts.

3. To the extent that the facts set forth in this petition could not reasonably have been known to petitioner's trial counsel or the prosecution, such facts constitute newly discovered evidence which casts fundamental doubt on the accuracy and reliability of the proceedings. These new facts undermine the prosecution's case against petitioner such that his rights to due process and a fair trial have been violated and collateral relief is required.

4. Petitioner has had no access to discovery, beyond that provided by Penal Code section 1054.9, or this Court's subpoena power and has been denied the funding needed to develop fully and present the facts supporting each claim. Accordingly, the full evidence in support of the

claims may not be presently obtainable. Nevertheless, the evidence set out below adequately supports each claim and justifies the issuance of an order to show cause.

5. Petitioner alleges the following facts, among others, to be presented following a fair opportunity for further investigation, discovery, and an evidentiary hearing, in support of his claims for relief.

CLAIMS FOR RELIEF

Although the record on appeal in this case clearly shows that petitioner did not receive a fair trial, additional investigation now places this claim beyond dispute.

New evidence developed for this petition shows that one juror, Richelle Nice, gave false answers to material questions during voir dire. (See Claim One.) It turns out that she, herself, had been a victim of a crime that endangered the life of her unborn child – a crime similar to that for which Scott stood accused. Ms. Nice suppressed this information, however, in an apparent attempt to gain a spot on Mr. Peterson's jury. This suppression of material information is juror misconduct and raises a presumption of prejudice.

Further, new information developed for this petition shows that the State presented false testimony in three key areas: the date Conner died; the presence of Laci's scent at the Berkeley Marina; and the location in the bay from which the bodies were swept ashore. Contrary to the evidence the jury heard, the evidence developed in this habeas proceeding indicates that Conner did not die on December 24, 2002, but days later; that the canine detection of Laci's scent at the Marina was entirely unreliable; and that the bodies could have been deposited in the bay not just from the area around Brooks Island, but from a point near the Richmond Harbor or from an inland tidal creek in Richmond. Key evidence the jury heard was therefore

false, and the ensuing conviction is therefore subject to challenge under Penal Code section 1473. (See Claims Two, Four and Six.)

Because defense counsel did not present expert evidence that would have undermined each of these aspects of the prosecution case, he rendered constitutionally ineffective assistance of counsel. (See Claims Three, Five and Seven.) Counsel's ineffective assistance was compounded by his promises in opening statement to produce exculpatory witnesses in three separate areas – promises which he did not fulfill. (See Claim Eight.) Finally, after failing to read a critical police report undermining the state's time line, counsel failed to call several witnesses who saw Laci alive after petitioner left the home. (See Claims Nine and Ten.)

At the end of the day, the claims raised here establish that petitioner did not receive a fair trial. The writ should therefore issue.

CLAIM ONE:

Petitioner Was Deprived Of His Fifth, Sixth and Eighth Amendment Rights to A Fair And Impartial Jury, And A Reliable Determination Of Penalty By A Seated Juror's Concealment Of Bias During Voir Dire.

Petitioner's judgment of conviction and penalty have been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution by jurors concealment of bias during voir dire. Where a juror fails to answer honestly a material question on voir dire and a correct response would have provided a valid basis for a challenge for cause, as here, a defendant is denied the Sixth and Fourteenth Amendment rights to a fair and impartial jury and the effective assistance of counsel, and the Eighth Amendment right to reliable guilt and penalty determinations.

In support of this claim, petitioner alleges the following facts, among others to be presented after access to adequate funding, full discovery, an evidentiary hearing, and a complete and accurate record of the proceedings in the superior court:

1. The facts and allegations set forth in all other claims in this petition are incorporated by this reference as if fully set forth herein.

2. "[O]ne accused of a crime has a constitutional right to a trial by impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I,

§ 16 [citations].) The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*In re Hitchings* (1993) 6 Cal.4th 97, 110-112.)

3. A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process, impairing the defendant's ability to exercise for-cause and peremptory challenges. Such a juror commits misconduct. (*Ibid.*)

4. Prior to voir dire, the prospective jurors in this case filled out a questionnaire. (See Clerk's Transcript, Main Juror Questionnaires [an unsealed volume containing a copy of the jury questionnaires filled out by the 12 jurors picked for the jury and the six alternates].)[23]

5. The questionnaires asked jurors to describe their experience with the legal system. The following questions were relevant to this inquiry:

> 54a. Have you ever been involved in a lawsuit (other than divorce proceedings)? ___Yes ___No
>
> 54b. If yes, were you: ___The plaintiff ___The defendant ___Both
> Please explain: _____

[23] The questionnaires do not bear the names of the jurors; rather they are identified by juror number. Seated Jurors were identified by numbers 1 through 12, alternates by numbers 1 through 6. (E.g., "Juror # 1," "Juror # 7," and "Alternate Juror # 2.) (See Clerk's Transcript, Main Juror Questionnaires, at p. 1.)

72. Have you ever participated in a trial as a party, witness, or interested observer? ___Yes ___No.
If yes, please explain: _____

74. Have you, or any member of your family, or close friends, ever been the VICTIM of a crime or a WITNESS to any crime?
If yes, please explain: _____

6. On March 9, 2004, Juror 6756, Richelle Nice[24], filled out a questionnaire. (CT Main Juror Questionnaires 300-332, attached hereto as Exh. 44 [Juror Questionnaire for Richelle Nice] at HCP-000882-000902.)

7. In response to Question 54a, Ms. Nice checked "No." (*Id*. at HCP-000889.)

8. Ms. Nice left Question 54b blank. (*Id.* at HCP-000890.)

9. In response to Question 72, Ms. Nice checked "No." (*Id.* at HCP- 000894.)

10. In response to Question 74, Ms. Nice checked "No." (*Id.* at

[24] Petitioner identifies Ms. Nice by name rather than by juror number in light of the fact that Ms. Nice, along with six other jurors, published a book in their own names about their experiences as jurors in Mr. Peterson's case. (See Exh. 8 ["We the Jury"] 8.) In that book, Ms. Nice identified herself as Alternate Juror No. 2, who eventually became Juror No. 7. (Exh. 8 at HCP-140, 142, 163.) According to the index of the Clerk's Transcript, Main Juror Questionnaires, the jury questionnaire for Alternate Juror No. 2 appears at pp. 300-322.

HCP- 000894.)

11. These answers were false.

12. Case files obtained from the San Mateo Superior Court disclose that on November 27, 2000, Ms. Nice filed a lawsuit, entitled "Petition for Injunction Prohibiting Harassment" against one, Marcella Kinsey. (Exh. 45 [*Richelle Nice v. Marcella Kinsey*, San Mateo Superior Court Case No. 415040, filed Nov. 27, 2000].)

13. In this lawsuit, Ms. Nice made the following allegations:

A. "Marcella is my ex-boyfriend's ex girlfriend." *(Id*. at HCP-000905.)

B. "On Sept. 23, 2000 at about 10:30 am Marcella came to Richelle's house and slashed her ex-boyfriends tires yelled and screamed in front of her house. Kicked in her front door while she (I) was on the phone with police. Marcella has continued to make threats to Richelle. On Nov. 11th Marcella called her house. Then on Nov. 21st, Marcella pulled up behind Richelle in her work van yelling things and pointing at her, ended up following her to work then drove off. She has told Richelle that she knows where she lives and she will handle things on the streets when she (Marcella) sees her." (*Id*. at HCP-000907.)

C. "Richelle is about 4-1/2 months pregnant. Marcella knows this. Still is making threats towards [sic] her. ... She has for the last month put stress on Richelle and my unborn child and family." (*Id*. at HCP-000907-000908.)

D. As a result, "Richelle really fears for her unborn child. ... As a result in all the stress she has caused Richelle, she started having early contractions..." (*Id.* at HCP-000908.)

E. "Richelle does not want Marcella to be able to come anywhere near her child after it is born. Richelle feels like Marcella would try to hurt the baby, with all the hate and anger she has for Richelle." (*Id.* at HCP-000909.)

14. Following an evidentiary hearing at which both Juror Nice and defendant Marcella were sworn and testified, the superior court entered an order prohibiting Marcella Kinsey from harassing both Richelle Nice and her unborn child for a period of three years. (*Id*. at HCP-000914.)

15. Further, as a result of her malicious conduct against Ms. Nice, Ms. Kinsey was convicted of the crime of vandalism and was sentenced to a week in county jail. (HCP-000916.)

16. During the jury selection process, including in her jury questionnaire (Exh. 44), and oral voir dire, which appears at Exhibit 46 [Voir Dire of Richelle Nice], Juror Nice failed to disclose that she and her

boyfriend had been victims and witnesses of Marcella's crimes against Richelle and her unborn child.

17. During the jury selection process, including in her jury questionnaire and oral voir dire, Juror Nice failed to disclose that she had filed a lawsuit against Marcella to prevent Marcella from harming Richelle and her unborn child.

18. During the jury selection process, including in her jury questionnaire and oral voir dire, Juror Nice failed to disclose that she was sworn and testified in court in order to obtain a restraining order against Marcella to prevent Marcella from harming Richelle and her unborn child.

19. Juror Nice wanted to be on Petitioner's jury. She declined to be excused from serving despite the enormous financial hardship it would cause her. When the court began voir dire, it asked Ms. Nice how long her employer would pay her while she was on jury duty. She responded, "two weeks." (*Id*. at HCP-000924.) The following colloquy took place:

> THE COURT: Two weeks. Then you wouldn't make it. Okay. You're excused.
>
> A: That's it?
>
> Q: That's it. We can't expect you to be here and not earn a living.
>
> A: Thank you.
>
> MR. GERAGOS: Did you ask her if it was a hardship? ...

> THE COURT: Only gets paid two weeks. I take judicial notice it's a hardship. That's right; you can't sit her for five months without getting paid, right?
>
> PROSPECTIVE JUROR: Okay. ...
>
> THE COURT: You want to sit her for five months without getting paid? If you want to, that's fine. I'll go through the process.
>
> PROSPECTIVE JUROR: I mean I'm willing to, you know...
>
> THE COURT: Okay. Sit down.

(*Id*. at HCP-000924.)

20. The extremely lengthy trial imposed a financial hardship on Ms. Nice. During the trial she was forced to borrow money from a fellow juror, who loaned her $1000. (Exh. 8 at HCP-000244.)

21. The juror who loaned Ms. Nice the $1000 made a gift of it to her and told her that she did not have to repay it. (*Ibid.*)

22. Petitioner alleges that Ms. Nice wanted to sit in judgment of Mr. Peterson, in part to punish him for a crime of harming his unborn child – a crime that she personally experienced when Marcella Kinsey threatened Richelle's life and the life of Richelle's unborn child.

23. For this reason, Juror Nice was actually biased against

Petitioner.

24. Juror Nice's bias, based on her own victimization as a woman whose unborn child was threatened by another, was confirmed during deliberations. Ten jurors voted to convict Mr. Peterson of second degree murder of the unborn child. Juror Nice was a holdout juror, who strenuously argued that the killing of the unborn child was first degree murder. (Exh. 8 at HCP-000238.) During deliberations, Juror Nice passionately, and personally, argued to her fellow-jurors, "How can you not kill the baby?, Nice said, pointing to her stomach." (*Ibid.*) As the jurors recounted the deliberations, "The issue of fetus versus a living child also came into play for some jurors, but not for Richelle Nice. 'That was no fetus, that was a child,' Nice said. 'Everyone heard I referred to him as 'Little Man.' If he could have been born, he would have survived. It's unfair. He didn't give that baby a chance.'" (*Ibid.*)

25. Following petitioner's conviction and death sentence, Ms. Nice took the extraordinary step of beginning a correspondence with petitioner. Between 2005 and 2007, Ms. Nice sent petitioner at least 28 letters.

26. In letters to petitioner, Ms. Nice disclosed an obsessive

interest in the death of Petitioner's unborn child.

27. In one letter, for example, Ms. Nice stated:

> "My heart aches for your son. Why couldn't he have the same chances I life as you were given? You should have been dreaming of your son being the best at whatever he did in life, not planning a way to get rid of him! Now, you will never know the feeling and joy of being a father. To be able to experience the feeling inside when a father or mother witness their child's first steps, the sound of their laugh, the excitement in their eyes when their Mommy/Daddy walk in from being at work all day, the pain you feel in your heart when your child is hurt, whether physically or emotionally, etc ..... May not sound like much to you as you sit in there standing by your selfish lies .... But as a parent myself, these feelings are much more intense than the feelings you get for any man/woman you might ever meet in life and fall in love or lust with. Those feelings can't even match the passion and unconditional love a parent feels for their child. And to know no matter what you do in life, your child will always have the same kind of love and loyalty right back. You, Scott, messed that up for yourself, and to me, that is very sad and unfortunate. You really have no idea. You never will!"

(Exhibit 47 [Selected Letters from Richelle Nice to Scott Peterson] at HCP-000959-000960.)

28. In letters that followed, Juror Nice repeatedly described her intense, emotional feelings about petitioner's deceased child. In one letter, she told petitioner,

> "It's not easy raising 4 boys on your own!! It's so much fun and could be better!! [¶] You would have loved being a Dad, Scott! I wish you just would have tried. Your kids would never known [sic] what its like to struggle. You & Laci would have been wonderful parents. We can't turn back time,

> what's done is all ready [sic] done but you would have loved it!"

(*Id*. at HCP-000964-000965.)

29. In another letter, Juror Nice wrote, "I just pray god has givin [sic] Laci arms to hold her presous [sic] lil baby." (*Id*. at HCP-000965.) And, "I hope Laci & Conner will be able to hold each other on the 23rd." (Id. at HCP-000964.)

30. In another letter, Juror Nice described learning that her son had been near a drive-by shooting in East Palo Alto, and how upset she was. She then wrote, "Damit [sic] Scott that was your son! Your first born. If you never wanted children you should have married someone with the same wants as you." (*Id*. at HCP-000968.) Then she added, "The fear that runs over a parent when they can't help [their child] is the worst fear ever. You just remember that." (*Ibid.*)

31. In another letter, Juror Nice wrote about her inability to provide for her children. She then told petitioner, "Conner would have never had to go through this. He would have had a wonderful life." (*Id*. at HCP-000973.) She then told Petitioner, "Laci and Conner have been on my mind so much these last few days. I think of them daily, but these past few

days have been hard. I keep praying for them and you Scott." (*Id.* at HCP-000976.)

32. In another letter, Juror Nice wrote, "You know what, Scott, I see your son. I can visualize him. Dark hair, dark skin, beautiful little boy. I can see him. I see Laci's big beautiful smile shining down on him." (*Id*. at HCP-000974.)

33. Juror Nice concealed on voir dire a subject that was extremely important and emotionally critical to her: that she had personally experienced the threat of losing a child through the intentional, harassing conduct of her ex-boyfriend's girlfriend.

34. Juror Nice's experience of a juror deeply concerned about losing an unborn child through intentional misconduct of another was material to the issues in petitioner's case, which similarly involved the death of an unborn child through misconduct of another.

35. Petitioner's trial counsel was extremely concerned that Petitioner's right to a fair and impartial jury required him "to ferret out and challenge for cause jurors whom [he] believed had prejudged the case and wanted to get on the jury in order punish Mr. Peterson for the alleged

crimes of killing his wife and unborn child." (Exh. 49 [Supp. Declaration of Mark Geragos] at HCP-981.)

36. During jury selection, Mr. Geragos reviewed Ms. Nice's jury questionnaire. (*Ibid.*) He recalled that Ms. Nice stated on her questionnaire that she had never been a victim of a crime, had never been involved in a lawsuit, and had never participated in a trial as a party or witness. (*Ibid*.)

37. Habeas counsel has provided Mr. Geragos with the case file of *Richelle Nice v. Marcella Kinsey*, appearing at Exhibit 45. After reviewing that file, Mr. Geragos unequivocally states:

> "Had I known about Ms. Nice's lawsuit, and that she had been the victim of threats of violence against her life and the life of her unborn child from malicious acts of another, I would absolutely have challenged her for cause. The state was alleging that Mr. Peterson had harmed his unborn child. There is no way in the world I would have wanted a juror to sit in judgment of Mr. Peterson, when that juror had been a victim of the very crime for which Mr. Peterson was on trial."

(Exh. 49, at HCP-000982.)

38. Mr. Geragos further states that he believes the challenge for cause would have been sustained. If it had not "[he] would have exercised

a peremptory challenge to remove Ms. Nice from the jury." (*Ibid*.)

39. Juror Nice's suppression of this material information constituted juror misconduct.

40. Such misconduct raises a presumption of prejudice, *(In re Hamilton* (1999) 20 Cal.4th 273, 295; *People v. Nesler* (1997) 16 Cal.4th 561, 578), which places the burden on the State to show that there was no substantial likelihood that the juror was not actually biased against the defendant.

41. In view of the surrounding circumstances of Juror Nice's suppression, and her conduct thereafter, the State cannot carry this burden.

The writ should therefore issue.

CLAIM TWO

Presentation of False Evidence, In Violation Of The Fifth, Sixth, Eighth And Fourteenth Amendments And Penal Code section 1473, By The State's Introduction Of False Evidence Regarding Conner's Fetal Age At The Time Of Death

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and his rights under Penal Code section 1473. The state relied on false evidence to convict and secure a death sentence. The following facts now known to petitioner support this claim:

1. At trial, the state's theory was that petitioner killed his wife Laci Peterson and her unborn son Conner on the evening of December 23, 2002, or the morning of December 24, 2002.

2. To support this theory, the state called Professor Allison Galloway to testify. Professor Galloway was asked if she could estimate Conner's age of at the time of death. To accomplish this, she took measurements of three of Conner's bones (the humerus, tibia and femur). She then consulted various academic studies that have developed formulae for estimating the age based on bone measurements. Using a study by

Sherwood, "Fetal Age: Methods of Estimation and effects of Pathology," American Journal of Physical Anthropology 113:305-315, Professor Galloway calculated that the femur indicated a gestational age of 35.1 weeks, the tibia indicated a gestational age of 36.3 weeks, and the humerus a gestational age of 35.6 weeks. As dictated by the protocols of forensic anthropology, Professor Galloway then provided for two weeks variation in the gestational age from the low and the high points, concluding that Conner was within a range of 33 to 38 weeks from the last menstrual period the time of death. (92 RT 17529-17532.)

3. According to Laci Peterson's medical records, the last menstrual period was May 6, 2002. (95 RT 17864.)

4. Under Professor Galloway's estimate, Conner stopped growing between 33 and 38 weeks later -- or between December 23, 2002 and January 27, 2003.

5. In closing arguments, the prosecutor told the jury that Dr. Galloway's testimony provided "just too big a range for us to really make any definitive determinations." (109 RT 20288.)

6. As a result, the state also called Dr. Greggory Devore to

testify. Dr. Devore was contacted by the Modesto Police and also asked to review Conner's fetal records to determine his age at death. (95 RT 17861.) Dr. Devore measured Conner's femur bone. (95 RT 17861, 17868.)

7. Dr. Devore made very clear that in reaching his conclusion as to Conner's age, he used "an equation by [Phillipe] Jeanty," an expert in fetal biometry, and estimated that the femur would grow to the observed length in 232 days, which meant that Conner died on December 23, 2002. (95 RT 17879-17883.)

8. In closing argument, the prosecutor told the jury that "Dr. Devore's measurements show us and his testimony shows us that Conner died right at the exact time the prosecution said he did." (109 RT 20289.)

9. It is not just the prosecutor's closing argument that demonstrates the importance of this evidence to the verdicts in this case. The jurors themselves have described their reliance on Dr. Devore's testimony, with one juror describing it as "indisputable," and another remarking that she "loved that guy (Devore). He did his research, all the way down to the bone." (Exh. 8 at HCP-000219.)

10. In fact, however, Dr. Devore's testimony was false.

11. The formula Dr. Devore used comes from an article co-written by Dr. Jeanty. That formula was based on a cross-sectional study of babies and is used to estimate gestational age when the last menstrual period is unknown. (Exh. 7 at HCP-000059-60.)

12. Dr. Jeanty states that the formula Dr. Devore used is *not* designed to be used in any situation in which the last menstrual period is known. In that situation, there is a more accurate approach to estimating age is to use a very different formula Dr. Jeanty also developed based on a longitudinal study where the last menstrual period is actually known. (Exh. 7 at HCP-000060.) No obstetrician would use the formula on which Dr. Devore relied since the last menstrual period was known. (*Id*. at HCP-000061.)

13. Using the correct formula, and assuming Conner was growing at a constant rate, the femur would grow to the observed length in 238 days (not the 232 days that Dr. Devore estimated), which meant that Conner died on December 30, 2002. (Exh. 7 at HCP-000056.)

14. If Conner was growing slower than normal, the femur would have grown to the observed length in 249 days, which would have meant that Conner died on January 10, 2003. If Conner was growing faster than

normal, the femur would have grown to the observed length in 225 days, which would have meant that Conner died on December 17, 2002. (Exh. 7 at HCP-000057.)

15. In addition to using the wrong formula, Dr. Devore also elected to apply the formula to only one bone. This too was a mistake. In the very article on which Dr. Devore relied, Dr. Jeanty stated that "using more than one bone allows us to have more confidence in the GA [gestational age] obtained" and "use of the length of two or more bones is often necessary to find out which gestational age is more likely." (Exh. 7 at HCP-000062.) And "it is generally agreed in the field of fetal biometry that it is more accurate to use the mean or average measurements of more than one long bone to determine gestational age. Thus, where there are measurements for the femur, humerus and tibia, a more accurate gestational age can be derived by averaging the gestational ages based on the measurements of each bone." (*Id*. at HCP-000059.)

16. Dr. Jeanty has applied the correct formula to measurements of the tibia. Once again, assuming Conner was growing at a constant rate, the tibia would grow to the observed length in 244 days which meant that Conner died on January 5, 2003. (*Id*. at HCP-000057.)

17. Dr. Jeanty has applied the correct formula to measurements of the humerus. Once again, assuming Conner was growing at a constant rate, the humerus would grow to the observed length in 244 days which also meant that Conner died on January 5, 2003. (*Id*. at HCP-000058.)

18. Averaging the three gestational ages he got from applying the correct formula to each of the three long bones, Dr. Jeanty has concluded that the gestational age was not 232 days as Devore estimated using the wrong formula on a single bone, but 242 days, which meant that Conner died on January 3, 2003. (*Id*. at HCP-000059, HCP-000062.)

19. At the request of counsel for petitioner, Dr. Jeanty performed the following exercise: Dr. Jeanty applied the *incorrect* formula (the one Dr. Devore used) to both the tibia and humerus. Using this formula, one calculates that both bones would have grown to the observed length in 242 days, which meant that Conner died on January 3, 2003. (*Id*. at HCP-000062-63.)

20. Dr. Devore inappropriately analyzed only one of the three long bones for which there were measurements. He then applied the wrong formula to the single bone he selected. Had he used the correct formula, and applied it to all the bones which should have been tested, his results

would have squarely undercut the state's case.

21. Dr. Devore's testimony was therefore actually and objectively untrue.

22. Under California law, a writ of habeas corpus may be prosecuted if "false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." (Pen. Code, § 1473, subd. (b)(1).) For purposes of this section, it is immaterial whether the prosecution actually knew or should have known of the false nature of the evidence. (Pen. Code, §1473, subd. (c)); *In re Hall* (1981) 30 Cal.3d 408, 424; *In re Pratt* (1999) 69 Cal.App.4th 1294, 1313-1314.) Relief must be granted if it is shown by a preponderance of the evidence that there is a reasonable probability the trier of fact could have arrived at a different decision in the absence of the false evidence. (*In re Wright* (1978) 78 Cal.App.3d 788, 807-808 and n. 4; *In re Ferguson* (1971) 5 Cal.3d 525; *In re Merkle* (1960) 182 Cal.App.2d 46.)

23. Statements from several jurors after the trial demonstrate the materiality of Devore's false statements to the jury in this case. One juror described Devore's testimony as "indisputable." (Exh. 8 at HCP-000219.)

Another remarked that she "loved that guy (Devore). He did his research, all the way down to the bone." (*Ibid*.)

24. The testimony given by Dr. Devore was material and probative on the issue of petitioner's guilt and punishment. This evidence was false and prejudicial and there was therefore a reasonable probability that the trier of fact would have arrived at a different verdict had Dr. Devore's testimony been impeached. The writ should therefore issue.

CLAIM THREE

Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Failing To Consult With, And Present The Testimony Of, An Expert In The Field Of Fetal Biometry

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668 [counsel has fundamental duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal].) Defense counsel here rendered constitutionally ineffective assistance by failing to present readily available expert testimony to support the very theory counsel himself elected to present. Further, defense counsel's ineffectiveness, which permitted the jury to rely on unreliable evidence in a capital case, undermines the reliability of the death judgment and requires reversal. The following facts now known to petitioner support this claim:

1. Petitioner incorporates by reference each of the facts alleged in all prior claims of this petition.

2. Dr. Devore testified that Conner's gestation age was 232 days, which meant that Conner died on December 23, 2002. (95 RT 17879-17883.) As discussed in Claim Two, this testimony was actually and objectively false.

3. In closing argument, the prosecutor relied extensively on Dr. Devore's false testimony, telling the jury that "Dr. Devore's measurements show us and his testimony shows us that Conner died right at the exact time the prosecution said he did." (109 RT 20289.)

4. As the prosecutor's argument shows, Devore's testimony was substantially material or probative on the issue of guilt and punishment.

5. Defense counsel did not consult with Dr. Jeanty, the expert whose formula Dr. Devore relied on to reach his conclusion. Defense counsel did not consult with Dr. Jeanty, or any other expert qualified in fetal biometry to determine if Dr. Devore used the wrong formula. Defense counsel did not consult with Dr. Jeanty, or any other expert, to determine if there is a different formula which should have applied to the evidence in this case nor did he ask Dr. Jeanty or any other expert to apply this different formula to the evidence in this case. (Exh. 4 at HCP-000019-21.)

6. In fact, Dr. Jeanty has now made it clear that Dr. Devore used the wrong formula, applied it to the wrong bones and came out with the wrong result. (Exh. 7 at HCP-000050-62.) In fact, Conner's gestational age was 242 days, which meant that he died on January 3, 2003. (*Id*. at HCP-000059, HCP-000062.)

7. Rather than consult a qualified expert, defense counsel introduced the testimony of Charles March, MD, to rebut Dr. Devore's testimony. Dr. March was an gynecologist-obstetrician with an expertise in reproductive endocrinology and infertility. (106 RT 19760.) Dr. March conceded that he was neither a forensic anthropologist (as was Dr. Galloway) (106 RT 19788), nor a forensic pathologist. (*Ibid.*) Dr. March further conceded that "the opinion [he was] giving is being given without any background in forensic pathology and with [his] area of expertise being in infertility." (106 RT 19843.)

8. Nor was Dr. March an expert in fetal biometry, i.e., the calculation of gestational age based on the measurement of fetal dimensions, and the application of statistical models to those fetal dimensions. (See 106 RT 19843.) Dr. March was therefore unqualified to evaluate the scientific validity of the fetal biometry methods employed by Dr. Devore, or the accuracy of Dr. Devore's conclusions as to the gestational age of Conner when

he died.

9. Dr. Philipe Jeanty is an expert in the field of fetal biometry. As such, Dr. Jeanty is qualified to evaluate the scientific validity of the fetal biometry methods employed by Dr. Devore, and the accuracy of Dr. Devore's conclusions as to the gestational age of Conner when he died.

10. Had defense counsel consulted with, and presented the testimony of an expert in fetal biometry, such as Dr. Jeanty, the defense would have presented testimony establishing (1) that Dr. Devore's method lacked scientific validity; (2) that his conclusions as to Conner's gestational age at death were wrong; and (3) that had Dr. Devore used a scientifically valid method of calculating gestational age, he would have testified that Conner in fact did not die until January 3, 2004. This testimony would have entirely undermined the State's theory of prosecution.

11. Defense counsel had no tactical reason for failing to interview Dr. Jeanty, or a similar expert in the field of fetal biometry. Counsel had no tactical reason for failing to present evidence showing that Devore used the wrong formula, applied it to the wrong bones and got the wrong result. Counsel had no tactical reason for failing to present expert testimony showing that use of the proper formula directly supported the defense case that the

killing occurred after December 24 and Scott Peterson was innocent.

12. Defense counsel blames the prosecutor for his failure to consult an appropriate fetal biometry expert. (Exh. 4 at HCP-000017-21.) Counsel claims he did not have enough time to find an expert. (*Ibid*.) Counsel admits that the prosecution first disclosed Dr. Devore on February 17, 2004. (*Id*. at HCP-000017.) Defense counsel did not request a continuance. The prosecution's case in chief did not begin until June 2, 2004 -- nearly four months later -- and the defense case did not begin until October 12, 2004 -- some eight months later. (102 RT 19186.) Counsel had no tactical reason for failing to request a continuance, or, barring that, for using the intervening ten months to find and hire an expert to review Devore's findings. (Exh. 4 at HCP-000021.)

13. Statements from several jurors after the trial demonstrate the key role that Dr. Devore's false testimony played in the verdicts. One juror described Devore's testimony as "indisputable." (Exh. 8 at HCP-000219.) Another remarked that she "loved that guy (Devore). He did his research, all the way down to the bone." (*Ibid*.)

14. Counsel's failure to investigate and present this evidence undermines confidence in the outcome of trial. Had counsel investigated this

evidence, he could have moved to exclude Dr. Devore's testimony in its entirety, since Devore used the wrong formula as the basis of his testimony and analyzed only a single bone.

15. Even if the trial court nevertheless admitted Devore's testimony, had defense counsel investigated this evidence, he could have rebutted Devore's testimony entirely.

16. Had the trial court excluded Devore's testimony or, alternatively, had defense counsel exposed the numerous flaws in Devore's testimony and introduced accurate testimony about Conner's gestational age, there is a reasonable probability that one or more jurors would have voted to acquit. For the very same reasons, there is also a reasonable probability that without Devore's uncontradicted testimony, at least one juror would have had lingering doubt sufficient to vote for life in prison.

CLAIM FOUR:

Presentation of False Evidence, In Violation Of The Fifth, Sixth, Eighth And Fourteenth Amendments And Penal Code section 1473, By The State's Introduction Of False Evidence Regarding A Trailing Dog's Detection Of Laci's Scent At The Boat Ramp In The Berkeley Marina

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and his rights under Penal Code section 1473. The state relied on false evidence to convict and secure a death sentence. The following facts now known to petitioner support this claim:

1. Petitioner incorporates by reference each of the facts alleged in all prior claims of this petition.

2. Under California law, a writ of habeas corpus may be prosecuted if "false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." (Pen. Code, § 1473, subd. (b)(1).) For purposes of this section, it is immaterial whether the prosecution actually knew or should have known of the false nature of the evidence. (Pen. Code, §1473, subd. (c)); *In re Hall* (1981) 30 Cal.3d 408, 424; *In re Pratt* (1999) 69 Cal.App.4th 1294,

1313-1314.) Relief must be granted if it is shown by a preponderance of the evidence that there is a reasonable probability the trier of fact could have arrived at a different decision in the absence of the false evidence. (*In re Wright* (1978) 78 Cal.App.3d 788, 807-808 and n. 4; *In re Ferguson* (1971) 5 Cal.3d 525; *In re Merkle* (1960) 182 Cal.App.2d 46.)

3. The state's theory presented at trial was that petitioner killed his wife in Modesto, transported the body to the Berkeley Marina in his truck, and then took the body in a boat into the bay where he pushed it overboard. Though Laci Peterson's body, and the body of her unborn child, were discovered in San Francisco Bay, the state had no direct evidence that petitioner killed her in the Modesto home or that he transported her body by truck to the marina.

4. The state sought to fill this evidentiary void with dog scent evidence. That is, the state deployed trailing and cadaver dogs at four places to determine whether the dogs could detect Laci Peterson's scent: (1) the Peterson home at 532 Covena Avenue in Modesto, (2) Scott Peterson's warehouse, (3) the area between Scott Peterson's warehouse and the interstate freeway that leads to Berkeley, and (4) the Berkeley Marina.

5. Because only the dog scent evidence at the Berkeley Marina was

ruled admissible at trial, petitioner limits his description of the dog scent evidence to that particular dog search. The evidence presented below regarding the dog scent identification at the Marina was as follows:

A. Police summoned dog-handlers to the Berkeley Marina on December 28, 2003 to determine whether their dogs could detect Laci Peterson's scent there.

B. At the request of the Sheriff's Department, volunteer dog-handler, Eloise Anderson, brought her dog, Trimble, to the Marina to search for Laci Peterson's scent. (8 RT 1516, 1643; 84 RT 16078.)

C. Captain Christopher Boyer of the Contra Costa County Sheriff's Department was the "scene manager" at the marina. (8 RT 1516, 1643.)

D. The Berkeley Marina had two boat ramps, located side-by-side, by which boats could be put into the harbor. (8 RT 1517.) On either side of the boat ramps were piers that ran down the east and the west side the channel into which the boats were launched. (See People's Exh. 210.)

E. Anderson checked with Boyer for instructions. Rather

than telling Anderson to check the marina generally for Laci's scent, or taking her to randomly selected areas in addition to the area of interest, Boyer told Anderson precisely where in the marina he hoped her dog would detect the scent.

F. Boyer testified that he gave Anderson the following instructions:

> "Is there an entry or exit trail from that area -- and when I say marina, the Berkeley Marina is actually a very, very large place. We were in one very specific area, and that is the public boat launching area. And so when I use the term "marina" there, I'm referring contextually to the boat ramp where we were at. So my instructions to her were the same, is there an entry or exit trail to that area of the marina." (84 RT 15997.)

G. Anderson was given Laci's sunglasses, which had been removed from Laci's purse by dog-handler Cindy Valentin. (7 RT 1381; 84 RT 16079.) Valentin first picked up a pair of brown slippers belonging to Scott, then she collected the sunglasses. (7 RT 1381.)

H. Valentin, who wore gloves to collect the evidence, did not change gloves after handling Scott's slippers. (*Ibid.*) Laci's sunglasses therefore became contaminated with Scott's scent.

I. The sunglasses were transported to the marina by for use

as a scent article. (8 RT 1516-1517.) Anderson scented Trimble with the sunglasses.

J. Despite the fact that Scott handled Laci's sunglasses, and Valentin had transferred Scott's scent from his slippers to the sunglasses, Anderson did not conduct what is called a "missing member" test prior to commanding Trimble to work. (85 RT 16133.)

K. A missing member test is a common procedure for ensuring that, when a scent article may contain the scent of a person in addition to the scent of the target person, the dog knows which scent to detect. (8 RT 1615-1616; 85 RT 16133.) In the procedure, prior to commanding the dog to search for the target scent, the handler allows the dog to smell the scent of the person whose scent may be on the article but who is not the target of the search. In this way, it is believed that the dog can identify the scent of the person who is not the target of the search, and the handler can be sure that the dog is not trailing that person's scent. (*Ibid.*)

L. Anderson admitted that she wanted to make sure that the scent article was uncontaminated by any scent other than Laci's. (8 RT 1562.) Nevertheless, she did not do the missing member test at the Marina with Scott's scent. (85 RT 16133.)

M. Anderson said that she did not believe the missing member test was necessary. (85 RT 16133.)

N. Anderson admitted, however, that she did not know whether or not Scott had handled either the sunglasses or the sunglass case in the recent past. (8 RT 1551.) Anderson testified that she was told that Scott had in fact handled Laci's purse. (8 RT 1552.) Anderson "did not believe anybody had said that he had handled the glasses," but according to Anderson that was "an iffy recollection." (*Ibid.*)

O. Anderson did not make any inquiry to determine whether or not Scott had ever handled Laci's sunglasses. (8 RT 1553.)

P. Anderson acknowledged that it would have only taken a moment to conduct the missing member procedure with Scott and that nothing prevented her from doing so. (85 RT 16133-16134.)

Q. After scenting Trimble with the sunglasses, Anderson brought Trimble to one of the two boat ramps. Trimble did not indicate that she found any scent. (8 RT 1517-1519.) Anderson re-scented Trimble near some vegetation at a pier on the west side of the second boat ramp. Trimble "did a circle up onto the vegetation and them came back out, lined out, led –

head level, tail up and lined out straight to the end of the . . . particular pier." (8 RT 1520.) According to Anderson, Trimble led her to a pylon at the end of the west pier where she "stopped, she checked the wind currents coming in from over the water, gave me a hard eye contact, stayed by my left side, which is an end of the trail indication." (8 RT 1520-1521.) Anderson "gave her a moment to settle." Trimble walked down another portion of the pier, then came back and gave Anderson another indication of end of the trail. (8 RT 1521.)

R. Based on Trimble's behavior, Anderson concluded that the scent on the pier was from a "non-contact trail." (8 RT 1590-1591.)

S. A contact trail is where the dog trails someone who has actually made physical contact with the ground, such as by walking or running on it. (8 RT 1549-1550.) A non-contact trail is where the dog trails the scent of a person who has *not* made contact with the ground, such as a person in a car, or as in this case, a boat. If the trail at the Marina was – as Anderson testified – a non-contact trail, the scent is subject to being dispersed by environmental factors, the chief of which is wind. (8 RT 1590-1591.)

T. Anderson recognized that if the wind came from the west, the primary scent coming from a boat being driven in the water along the

eastern side of the pier would have blown to the east, *away* from the pylon on the west pier where Trimble alerted. (8 RT 1594.) Anderson explained, however, that even if the wind was coming from the *west*, and a boat was located *east* of the pier, "you would still get some scent on the west side." (8 RT 1594.) When asked if the microscopic skin rafts could actually "swim upstream against a prevailing wind," Anderson responded that "it would depend upon the level of the wind." (8 RT 1595.) Anderson would not expect skin rafts to migrate against a wind stronger than five miles per hour. (8 RT 1595.)

U. The only authority Anderson could think of that described her theory of skin rafts was *Scent and the Scenting Dog* by William G. Syrotuck. (8 RT 1590.) That book, however, squarely *rejects* Anderson's claim that skin rafts can travel against a five mile-an-hour wind.

V. In fact, in that book, Syrotuck postulates that "the body air current being 125 feet per minute will certainly launch some rafts against the wind," but only if the "raft velocity, combined with the weight, is greater than the wind velocity." Even at that rate, "the distance [the rafts travel upwind] will be comparatively small." (*Scenting Dog*, *supra*, (Barkleigh edition, 2000) at p. 104.) A velocity of 125 feet per minute is equivalent to 7,500 feet per hour, or 1.42 miles per hour. Anderson thus claims that rafts

could travel across the water against a 5 mile per hour wind – one that is 300% stronger than Syrotuck suggests is possible.

W. Eloise Anderson and Trimble were not the only team the police called to search at the Berkeley Marina. Ron Seitz, whose dog was also certified by CARDA, was called to search the marina. (9 RT 1774.)

X. Seitz used one of Laci's slippers to scent his dog. (9 RT 1776.) In sharp contrast to the sunglasses used by Anderson to scent Trimble, there was no evidence at all suggesting that Scott had handled the slipper.

Y. Boyer testified that Seitz verbally reported that he had checked near the bathrooms, but that "his dog showed no indication of a trail. And that was all he had done." (9 RT 1777.)

Z. But this was not entirely accurate; in fact, Seitz's CARDA report made clear that he also searched for Laci's scent at the boat ramp. (9 RT 1778.) Boyer claimed that he did not request a copy of Seitz's report from CARDA. (9 RT 1782.) Instead, Boyer testified that he told the detectives they could get a copy of the CARDA report. (9 RT 1783.)

6. In closing argument, the prosecution told the jury, if it believed

Anderson's testimony regarding Trimble's detection of Laci's scent at the Berkeley Marina, this evidence established Mr. Peterson's guilt of capital murder, "as simple as that." (111 RT 20534.)

7. Petitioner has now obtained the opinions of two nationally-recognized experts in dog-scent identification on the validity of Eloise Anderson's conclusion that Trimble detected Laci's scent at the Marina. Both experts, Dr. Lawrence Myers and Andrew Rebmann, have concluded that Trimble's purported detection of Laci's scent was totally and completely unreliable.

8. Dr. Lawrence Myers is Associate Professor in the College of Veterinary Medicine at Auburn University in Alabama. He is a world-renowned expert on canine scent detection, and has authored over 50 articles and book chapters on canine scent detection. Dr. Myers has consulted with numerous law enforcement agencies, including agencies in California, Georgia, Florida, Connecticut on the subject of canine scent detection. Dr. Myers has consulted with branches of the United States military on the use of dogs to detect various scents, and has qualified as an expert witness on the subject of canine scent detection more than 25 times, including several cases in California. (Exhibit 6 [Declaration of Lawrence Myers] at HCP-000043.) Dr. Myers' research has concentrated upon sensory function and behavior and

applications of detector dog-handler teams in all disciplines. He has developed methods to rapidly evaluate olfactory acuity, auditory acuity, visual acuity, and gustatory acuity in the canine. Dr. Myers has examined and evaluated many detector dog-handler team training and certification programs. He has also developed and applied tests of reliability of detector dog-handler teams superior to certification tests currently in use. (*Ibid.*)

9. In preparing to offer an opinion as to the reliability of Trimble's detection of Laci's scent at the Marina, Dr. Myers has reviewed, *inter alia*, Trimble's training records, Anderson's pretrial and trial testimony, photographs of the boat launch area at the Marina, and the trial court's pretrial ruling on the admissibility of the evidence. (Exh. 6 at HCP-000044, HCP-00045-49.)

10. After reviewing this material, Dr. Myers formed the opinion that Ms. Anderson's claim that Trimble detected Laci Peterson's scent at the Berkeley Marina on December 28, 2002, was completely unreliable, and would have appeared completely unreliable to any expert adequately trained in the field of canine scent detection. (*Id*. at HCP-000045.)

11. Dr. Myers reached this conclusion for the following reasons:

A. In determining whether a particular instance of scent detection by a canine is reliable, there are three general areas of inquiry: (1) the canine's training and demonstration of reliability; (2) the method used to conduct the particular search to detect the target's scent; and (3) the timing and conditions surrounding that particular search.

B. With respect to each of these areas, Dr. Myers found that the dog-handler team of Ms. Anderson and Trimble failed to establish the requisite reliability. (*Id*. at HCP-000045-49.)

C. In order to properly train a canine for scent detection, the training must include training exercises that are both double-blind and randomized.

D. A double-blind exercise is one in which ***both*** the handler and the canine are ignorant of the existence or location of a scent to be detected.

E. A randomized exercise is one in which the handler and her dog are not simply exposed to a single location and told to detect a scent. Rather, several areas are randomly selected for detection, but only one of which actually bears the scent of the target person. "Randomization" is an attempt to discover false positives, and serves roughly the same function in this instance as use of a control does in other areas of forensic testing.

F. Both of these conditions (double blinding and randomization) are necessary to insure that the dog is "following his nose" rather than simply responding to the conscious or unconscious cues of the handler. (*Id*. at HCP-000045-49.)

G. A double-blind exercise is necessary to ensure that the handler is not providing cues to the canine as to the existence and location of the target scent.

H. Cuing by the handler is perhaps the single most important factor in producing unreliable scent detection, and a canine's training must demonstrate that the canine has achieved success without relying on handler-cuing. (Exh. 6 at HCP-000045-46.)

I. Double-blinding must be incorporated into both training exercises and actual scent detection in order for a canine to be considered reliable and for the results of a particular exercise to be considered reliable. (*Id*. at HCP-000047)

J. Equally important in demonstrating reliability is randomization. In a randomized exercise, the canine is tasked with searching a number of randomly selected areas, but only one of which has the target scent. If the canine alerts to scent in the randomized non-scented area, this would constitute a false-positive and would indicate unreliability. Similarly,

if the canine does not alert in the scented area, it would be a false negative, and would also demonstrate unreliability. It is only where the canine detects no scent in the randomized non-scented areas, and detects scent in the randomized scented area, that the canine demonstrates reliability.

K. If an exercise in scent detection is not randomized as, for example, when a handler-canine team is asked to search a single area for the existence of scent, there is no way to determine if the canine is alerting to the presence of scent, or to other variables, including handler cues. As with double-blinding, randomization must be incorporated into training exercises as well into particular realtime scent detection for the canine and the results to be considered reliable. (Exh. 6 at HCP-000047.)

L. Trimble's training records indicate that her training exercises were neither double-blind nor randomized. As such, the canine cannot be considered to have had demonstrated reliability in his training. (*Ibid*.)

M. The scent detection at the Berkeley Marina on December 28, 2002 involved a non-contact trail. That is to say, the subject (Laci Peterson) did not apparently make contact with the ground at the marina. Rather, under the prosecution theory, her body was transported in a boat that was placed in the water and driven out of the marina. In order for the results of a scent detection in a non-contact trail to be considered reliable, a canine

must have demonstrated in similar double-blind, randomized training exercises involving non-contact trails, that it is capable of reliably detecting such scent. (*Id*. at HCP-000046-47.)

N. In addition to the lack of adequate double-blind, randomized training of Trimble, the unreliability of the actual scent detection at the Berkeley marina is evident from the procedures used in that search. The search at the Berkeley marina was neither double-blind nor randomized. Dr. Myer's review of the trial transcript describing that search indicated that the officer in charge of the search, Christopher Boyer, actually told Anderson where to search for scent. At trial, Boyer was asked "what instructions did you give [Anderson]?" Boyer replied:

> "The same instructions, sir. Is there an entry or exit trail from that [boat ramp] area – and when I say marina, the Berkeley Marina is actually a very, very large place. We were in one very specific area, and that is the public boat launching area. And so when I use the term 'marina' there, I'm referring contextually to the boat ramp where we were at. So my instructions were the same, is there an entry or exit trail to that area of the marina." (84 RT 15997.)

O. Boyer's technique for conducting this search for scent was virtually guaranteed to produce an unreliable result. First, it was not double-blind, as Boyer told Anderson exactly where he hoped to locate Laci's scent. Second, it was not randomized, as Boyer did not have Anderson search,

in addition to the suspect location, several other randomly selected areas where Laci's scent was known not to be. The method for conducting the search therefore failed to exclude the distorting effects of handler-cuing, and failed to exclude or minimize the possibility of a false positive result. (*Id*. at HCP-000048.)

P. In addition to the unreliability introduced by the method of the search at the Berkeley marina, the conditions there also exacerbated the unreliability. The scent of the target, Laci Peterson, was thought to have been deposited in a non-contact manner, on December 24, 2002. The search was conducted four days later, on December 28, 2002. It is well understood that scent degrades over the passage of time. Here, the passage of four days rendered any non-contact scent quite stale, and reduced the possibility of a reliable scent detection.

Q. Other conditions also contributed to an unreliable result. The marina was apparently frequented by many people, several of whom lived on boats moored to the very dock upon which Trimble detected a scent trial. Given the human traffic on the dock over that four day period, it is quite impossible to know what trail, if any, the canine was following. (*Id*. at HCP-000048-49.)

R. Finally, Anderson failed to ensure that Trimble was not simply following Scott Peterson's scent as he drove the boat out of the marina.

Mr. Peterson, of course, launched the boat, and therefore, unlike Laci, made contact with the ground in the vicinity of the search. But Anderson failed to exclude Mr. Peterson scent by conducting the so-called "missing man" or "missing member" protocol (by having the dog sniff Mr. Peterson and "check him off" as not the target). This failing further renders the any result unreliable. (*Id*. at HCP-000049.)

12. For the foregoing reasons, including the lack of double-blind, randomization in training and the search, and the degraded conditions at the marina, Dr. Myers has concluded that the purported detection of Laci Peterson's scent at the Berkeley Marina on December 28, 2002, was wholly unreliable. (*Id*. at HCP-000049.) Indeed, Dr. Myers has gone so far as to declare "the dog's behavior during that search was, in a word, meaningless." (*Ibid*.)

13. It is Dr. Myers' opinion that any reasonably well-trained expert in the science of canine scent detection would have similarly concluded based on Trimble's training, and the method and conditions of the search, that the canine's alert was of no forensic value whatsoever. (*Ibid*.)

14. Dr. Myers is not alone in concluding that Trimble's detection of Laci's scent at the Marina was unreliable. A second nationally renown expert in canine scent detection, Andrew Rebmann, has reached the same conclusion.

15. Mr. Rebmann's conclusion is particularly telling since both Eloise Anderson and Captain Boyer, the two prosecution witnesses involved in the detection of Laci's scent at the Marina, had attended seminars offered by Mr. Rebmann, and both conceded that he is a leading expert in the field. (See, e.g., 85 RT 16110 [Anderson]; 84 RT 15953 [Boyer].)

16. Anderson and Boyer's recognition of Rebmann's expertise was well-founded. Rebmann is the director of K9 Specialty Search Associates, an organization dedicated to training canine handlers for a variety of types of canine searches and trailing procedures. He has trained dogs for scent detection since 1972. From 1977 to 1991, Rebmann was a canine trainer for Connecticut State Police where he trained canine teams for patrol, detection of narcotics and explosives, wilderness searches, and disaster, water and cadaver work. Rebmann has qualified in the courts of several states as an expert witness regarding scenting dogs. Since retiring from police work in 1991, Rebmann has conducted numerous seminars, schools and workshops throughout the United States, Canada and Japan. He is also a consultant to many law enforcement agencies. Rebmann has presented numerous papers at national seminars and is the author of "The Cadaver Dog Handbook," published August 2000. (Exh. 5 at HCP-000035-37.)

17. After reviewing the police reports describing the canine search at the Berkeley Marina on December 28, 2002, Mr. Rebmann gives at least several reasons why he believed the scent detection at the Berkeley Marina on

December 28, 2002 was entirely unreliable. (*Id*. at HCP-000040-41.)

A. First, Rebmann does not believe it has ever been demonstrated that *any* dog, including Trimble, could follow a non-contact vehicle trail. (*Ibid*.) Rebmann personally knew Eloise Anderson, as she had attended one of Rebmann's training seminars with Trimble in 2002. (*Ibid*.) At that seminar, Anderson claimed that she and Trimble could follow a vehicle trail. Yet, when Rebmann constructed a double-blind, vehicle trail test for Ms. Anderson and Trimble, she and her dog failed the test. (*Id*. at HCP-000039, HCP-000040.) Furthermore, according to Rebmann, the dog had not demonstrated a sufficient proficiency in this skill in prior trainings. (*Id*. at HCP-000040.)

B. Second, Mr. Rebmann states that Ms. Anderson's search omitted the "missing-member" procedure, by failing to let Trimble sniff Scott Peterson beforehand. (Exh. 5 at HCP-000039.) Consequently, Ms. Anderson could not insure that on December 28, 2002 Trimble was not following Mr. Peterson's scent, rather than Laci's scent, as he drove the boat out of the marina. (*Id*. at HCP-000040-41.)

C. Third, Mr. Rebmann noted that there was a four-day delay between December 24, when Laci's body was supposedly at the marina, and the search on December 28, which sharply reduces the reliability of scent detection. (*Id*. at HCP-000041.)

D. Fifth, the four-day delay between December 24, when Laci's body was supposedly at the marina, and the search on December 28, sharply reduces the reliability of a scent detection. A marina is a volatile environment, with a combination of wind, salt water, and human traffic. These variables make it unlikely that a strong scent trail will remain over an extended period of time. (Exh. 5 at HCP-000040.)

E. Finally, another dog handler, Ron Seitz, searched the same area around the boat ramp and failed to locate a useable scent. While this does not necessarily mean that Ms. Anderson's dog did not locate a scent, it does cast suspicion on the reliability of her opinion. In this regard, Rebmann noted that Mr. Seitz was a highly experienced canine handler, and was in fact the chief of the canine unit for the Contra Costa Sheriff's Department. (*Id*. at HCP-000041.)

18. Anderson's testimony that her dog reliably detected Laci's scent at the boat ramp in the Berkeley Marina on December 28, 2002 was therefore false. Anderson's method was entirely unreliable. It was not double-blind; it was not randomized; it was not conducted to assure that the dog was not following Scott Peterson's scent; the dog was not adequately trained to detect, nor proved to be able to detect, a non-contact trail; and any scent trail was stale and likely to be dispersed in the volatile atmosphere of a bay marina. (*Id*. at 000041; Exh. 6 at HCP-000048-49.) Petitioner's conviction therefore violated Penal Code section 1473 and due process.

19. The testimony given by Eloise Anderson regarding her dog's detection of Laci's scent at the Berkeley Marina was material and probative on the issue of petitioner's guilt and punishment. The evidence was false and prejudicial in that there was a reasonable probability that the trier of fact would have arrived at a different verdict in the absence of Anderson's testimony. The writ should therefore issue.

CLAIM FIVE:

Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Failing To Present The Testimony Of An Expert In The Field Of Dog-Scent Identification

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668 [counsel has fundamental duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal].) Defense counsel here rendered constitutionally ineffective assistance by failing to present readily available expert testimony to impeach one of the strongest pieces of evidence the state presented to obtain its conviction. Further, defense counsel's ineffectiveness, which permitted the jury to base its verdict on unreliable evidence in a capital case, undermines the reliability of the death judgment and requires reversal. The following facts now known to petitioner support this claim:

1. Petitioner incorporates by reference each of the facts alleged in all prior claims of this petition.

2. As discussed in Claim Four, the state attempted to connect Laci Peterson to the Berkeley Marina, where Scott went fishing on December 24,

2002, through the use of dogs.

3. Recognizing the central importance of this evidence to the state's case, defense counsel moved in limine to exclude this evidence. Though he had consulted with renowned dog scent identification expert, Andrew Rebmann, prior to the hearing, defense counsel never called Rebmann to testify at the hearing on his motion to exclude the dog scent evidence. (Exh. 4 at HCP-000026-27.) This was true even though Rebmann was present at the hearing. (*Id*. at HCP-000026.) Here is what the trial court deciding counsel's motion to exclude this evidence, and the jury deciding petitioner's guilt, never knew.

4. Rebmann was retained by defense counsel Mark Geragos to consult with him, and possibly to testify, regarding the reliability of canine searches performed in the case by the police agencies investigating the murders of Laci and her unborn child. (Exh. 4 at HCP-000025-26.)

5. Geragos asked Rebmann to review three different canine searches in the Peterson case: (a) the canine search from the Peterson home to Scott Peterson's warehouse; (b) the canine search from the Peterson warehouse along Highway 136 to the interstate freeway; and (c) the canine search at boat ramp and dock at the Berkeley Marina on December 28, 2003. (Exh. 5 at HCP-000037.)

6. In the course of his consultation with the defense, Rebmann reviewed a variety of police reports describing the above searches. That material stated that canines were used to follow a trail from the Peterson home to the area of the warehouse, and from the warehouse to the freeway were supposedly following a vehicle trail. That is, rather than following a person on foot, who is making contact with the ground, these dogs were supposed to follow the scent of an individual in a vehicle as it was driven for a distance along a road. (*Ibid*.)

7. Rebmann told Geragos that he was very skeptical of the ability of any dog to follow a vehicle trail. Indeed, Rebmann has published an offer on his website to give a large cash prize to any dog handler who could demonstrate in a double-blind test the ability of his dog to follow a vehicle trail. Not a single dog handler took the offer. (*Id*. at HCP-000038.)

8. The reason that it is virtually impossible for a dog to follow a vehicle trail is that if the target is confined to the interior of the vehicle, little or no scent can escape. Thus, there is little or no scent trail for a dog to follow. Further, even if some small amount of scent is distributed from the moving vehicle, it is disbursed immediately upon leaving the vehicle. The most significant factor in reducing the ability of a dog to follow a scent is strong wind. (*Ibid*.)

9. Rebmann also told Geragos that the scent detection by Eloise

Anderson and Trimble at the Berkeley Marina on December 28, 2003 was entirely unreliable. Rebmann knew Ms. Anderson because she had attended one of his training seminars with her dog, Trimble, in 2002. At that seminar, Ms. Anderson insisted that she and Trimble could follow a vehicle trail. Rebmann then constructed a double-blind test for Ms. Anderson and her dog, in order to determine whether her remarkable claim was true. She and her dog failed the test. (Exh. 5 at HCP-000039-40.)

10. Rebmann was therefore particularly skeptical of Ms. Anderson's claim that her dog followed a vehicle trail at the Berkeley Marina. In providing Geragos with this opinion, Rebmann assumed the following facts:

A. That the prosecution theory was that, on December 24, 2002, Scott Peterson had placed his wife's body in a boat, that he backed the boat down a ramp into the bay, and then motored out of the marina into the bay itself. This search therefore involved a non-contact trail. That is to say, the subject (Laci Peterson) did not make contact with the ground at the marina. Rather, under the prosecution theory, her body was transported in a vehicle (here, a boat) that was placed in the water and driven out of the marina.

B. Ms. Anderson attempted her scent detection at the marina four days later, on December 28, 2002. Ms. Anderson scented Trimble in the parking lot, using a pair of the victim's sunglasses.

C. Ms. Anderson did not perform a "missing-member" procedure, by letting Trimble sniff Scott Peterson, so that the dog would know not to follow Mr. Peterson's scent, rather than Laci's scent. Ms. Anderson testified that her dog picked up Laci's scent near the boat ramp and followed the scent trail onto a boat dock to the west of the waterway, and at the end of the dock, signaled an end of the trail. (Exh. 5 at HCP-000039-40.)

11. Rebmann told Mr. Geragos that there were at least four reasons why this effort at scent detection was completely unreliable.

A. First, as described above, it has never been demonstrated that a dog can follow a non-contact vehicle trail. In particular, it had not been demonstrated that Trimble proved capable of following non-contact trails. The dog failed one test at Rebmann's seminar. And Rebmannn recalls that the dog had not demonstrated a sufficient proficiency in this skill in prior trainings. (Exh. 5 at HCP-000040.)

B. Ms. Anderson's failure to use the "missing-member" procedure could not insure that Trimble was not following Mr. Peterson's scent, rather than Laci's scent, as he drove the boat out of the marina. (*Id*. at HCP-000040-41.)

C. The four-day delay between December 24, when Laci's body was supposedly at the marina, and the search on December 28, sharply

reduced the reliability of a scent detection. A marina is a volatile environment, with a combination of wind, salt water, and human traffic. These variables made it unlikely that a strong scent trail would have remained over an extended period of time. (*Id*. at HCP-000041.)

D. Another dog handler, Ron Seitz, searched the same area around the boat ramp and failed to locate a useable scent. While this does not necessarily mean that Ms. Anderson's dog did not locate a scent, it does cast suspicion on the reliability of her opinion. In this regard, Rebmann noted that Mr. Seitz was a highly experienced and professional canine handler, and was in fact the Chief of the canine unit for the Contra Costa Sheriff's Department. (*Ibid*.) In contrast, Anderson was a volunteer dog-handler.

12. The defense brought Rebmann to the pre-trial hearing on the admissibility of the canine scent detection. That hearing took place in February, 2004. Rebmann was prepared to testify to the foregoing opinion. At the end of the hearing, however, Mr. Geragos told Rebmann he would not need Rebmann's testimony. Mr. Geragos did not tell Rebmann why his testimony was not required. Rebmann was "quite shocked" to hear that the judge ruled that the scent detection at the marina was sufficiently reliable to permit a jury to hear it, since in Rebmann's opinion, the testimony that Trimble detected Laci's scent at the marina was utterly unreliable. (*Id*. at HCP-000041-42.)

13. Defense counsel states that the reason he did not introduce the readily available testimony of Andrew Rebmann at the pretrial hearing was that he believed, without calling Mr. Rebmann, that the defense had carried its burden of proving that Anderson's testimony regarding the detection of Laci's scent at the Marina was unreliable. (Exh. 4 at HCP-000026-27.) Defense counsel therefore believed that Mr. Rebmann's testimony was unnecessary to secure exclusion of any testimony regarding the purported result of dog search at the Marina. (*Id*. at HCP-000028.)

14. Defense counsel was wrong; the trial court admitted this evidence.

15. Matters did not improve at trial. Once again, defense counsel appreciated the significance of the dog scent identification testimony. Following the trial court's ruling that this evidence was admissible, counsel requested funds to pay for Andrew Rebmann's testimony. (Exh. 22 at HCP-000389.) According to counsel's own words, Rebmann's testimony would be "necessary and critical to this case." (*Ibid*.) The trial court approved counsel's request to employ Rebmann as an expert witness. (Exh. 23 at HCP-000404.)

16. Nonetheless, yet again defense counsel decided not to introduce either the testimony of an expert such as Dr. Myers, or the testimony of Andrew Rebmann at trial. Defense counsel has explained that, after showing the jury the video of Trimble's purported failure to run a vehicle trail at

Rebmann's seminar in Chico, he believed he did not need Rebmann's testimony in order to discredit Anderson's opinion that Trimble detected Laci's scent at the Marina.

17. While Anderson attempted to explain that Trimble did not fail to run the vehicle trail at Rebmann's seminar (85 RT 1639), defense counsel did not find Anderson's explanation credible, or worthy of further impeachment through the introduction of expert testimony. (Exh. 4 at HCP-000029-30.)

18. Defense counsel did not present such expert testimony even though the defense theory was that petitioner did not transport Laci out of the Marina in his boat, and that Anderson's testimony regarding Trimble's detection of Laci's scent at the boat ramp was completely unreliable. Defense counsel thus argued to the jury that, "[t]he only dog that was out there that gave you anything was this woman's dog. And before you can accept anything about that woman's dog -- I'm sure she believes that her dog can do incredible things, but the fact of the matter is you saw her testimony, and all of those factors make her unreliable." (110 RT 20440.)

19. But defense counsel's argument, intending to challenge some of the most damning evidence in the case, was made without the benefit of readily available expert testimony to explain to the jury the nature and significance of the many variables leading to Anderson's false opinion.

20. Defense counsel's decision not to introduce the testimony of Andrew Rebmann, or an expert such as Dr. Myers, at the pretrial hearing fell below an objective standard of reasonableness within the meaning of *Strickland v. Washington* (1984) 466 U.S 668. Had defense counsel done so, he would have obtained a pretrial ruling excluding from trial the testimony that Trimble detected Laci's scent at the Marina.

21. Defense counsel's decision not to present the testimony of experts such as Rebmann or Dr. Myers at trial fell below an objective standard of reasonableness within the meaning of *Strickland v. Washington*. Had defense counsel done so, he would have completely discredited the trial testimony that Trimble detected Laci's scent at the Marina.

22. Counsel's failure to present this expert evidence undermines confidence in the outcome of both the guilt and penalty phases of trial. Had counsel presented this expert evidence, he could have moved to exclude Eloise Anderson's testimony in its entirety, since her dog's detection of Laci's scent at the Marina was utterly unreliable. Even if the trial court nevertheless admitted Anderson's testimony, had defense counsel presented expert evidence such as that offered by Dr. Myers and Andrew Rebmann, he could have entirely rebutted the testimony regarding Trimble's detection of Laci's scent at the Marina.

23. Had the trial court excluded Anderson's testimony or,

alternatively, had defense counsel exposed the numerous flaws in that testimony, there is a reasonable probability that one or more jurors would have voted to acquit, or, in the alternative, for life in prison.

CLAIM SIX

Presentation of False Evidence, In Violation Of The Fifth, Sixth, Eighth And Fourteenth Amendments And Penal Code section 1473, By The State's Introduction Of False Evidence That The Bodies of Laci and Conner Could Only Have Originated From The Area In Which Petitioner Said He Was Fishing

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and his rights under Penal Code section 1473. The state relied on false evidence to convict and secure a death sentence. The following facts now known to petitioner support this claim:

1. Petitioner incorporates by reference each of the facts alleged in all prior claims of this petition.

Summary of Claim

2. The state's theory presented at trial was that petitioner killed his wife in Modesto, transported the body to the Berkeley Marina in his truck, and then took the body in a boat into the bay where he pushed it overboard. Though Laci Peterson's body, and the body of her unborn child, were discovered on the shore of San Francisco Bay, the state had no direct evidence linking the bodies to the place where petitioner told police he had been fishing

on December 24, 2002.

3. The prosecution bridged this evidentiary chasm with the testimony of Dr. Ralph Cheng, a hydrologist employed by the United States Geological Survey. Over defense objection, Dr. Cheng was permitted to testify that, based on the location of where Conner was found, Conner's body had been anchored to the bay bottom in an area 500-1000 yards southwest of Brooks Island. That was the approximate area in which Mr. Peterson said he was fishing on December 24. (55 RT 10725-10728.)

4. The significance of this evidence was obvious. It literally "connected the dots" between Mr. Peterson's boat and Conner's body. The prosecutor told the jury that if Dr. Cheng was believed, "then that man's a murderer. It's as simple as that." (109 RT 20279-20280.) Indeed, no doubt based on this evidence, after trial one juror remarked that "there was a straight line from Scott to the bodies washing up on shore." (Exh. 8 at HCP-000152.)

5. As discussed below, however, this evidence was false.

Relevant Facts

6. As previously alleged, police interviewed Mr. Peterson the night Laci disappeared. Mr. Peterson told police that he had gone fishing that day from the Berkeley Marina, driving his boat about two miles to the north, to a small island later identified as Brooks Island. (55 RT 10723-10726.)

7. On April 13, 2003, the body of Conner Peterson was discovered in the shoreline area of Bayside Court in Richmond. (61 RT 11880.)

8. The next day, Laci's body was discovered, washed ashore at Point Isabel in Richmond. (61 RT 11993.)

9. The location of Brooks Island, and the locations where the bodies were discovered, are depicted on People's Exhibit 284, which is attached to this petition as Exhibit 26.

10. As Exhibit 284 shows, Conner's body was found approximately 2,000 yards north of the southern tip of Brooks Island.[25] Laci's body was found approximately 3,000 yards northeast of the southern tip of Brooks Island. Apart from the general proximity of Brooks Island and the points where the bodies washed ashore, there was no evidence connecting the bodies to the place where Mr. Peterson was fishing.

11. Police consulted Dr. Cheng soon after the bodies of Laci and Conner had been found. Detective Hendee of the Modesto Police Department testified that his department asked Dr. Cheng if -- based on where the bodies had been found and the tides and currents in the bay -- Cheng could direct the

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[25] People's Exhibit 284 is drawn to a scale in which one nautical mile corresponds to 1-5/8 inches on the map. A nautical mile is 1.1508 of a mile.

police to a spot where there was a high probability that evidence related to the bodies could be found. (66 RT 12809.) Specifically, police were seeking to recover body parts of the victims or cement weights they believed were used to anchor the bodies to the floor of the bay. (66 RT 12813.) They hoped that Dr. Cheng could tell them where to look. (66 RT 12813.)

12. Dr. Cheng complied. He provided the police with a map which contained a "projected path" that the bodies might have taken to the shore, and he pinpointed an area in the bay, approximately 700 meters by 700 meters, for the officers to search. (66 RT 12814, 12819-12820.) An extensive search of that area failed to turn up any evidence related to this case.

13. At trial, the state called Dr. Cheng as an expert witness to give an opinion that the bodies had been placed on the bay bottom near where Mr. Peterson said he was fishing. Dr. Cheng's testimony was based largely on a multi-slide Power Point presentation he had prepared for the jury. The print-outs of the presentation were introduced as People's Exhibit 283. (100 RT 18866.)

14. In establishing his expertise, Dr. Cheng testified that he is a Senior Research Hydrologist with the United States Geological Survey. (100 RT 18858.) His "particular assignment is study of the movement of water in San Francisco Bay" as affected by currents and tides. (100 RT 18858.) On voir dire of his expertise by defense counsel, Dr. Cheng forthrightly

acknowledged that his work had *never* explored the movement of bodies in water or the bay. (100 RT 18865; 101 RT 18938.)

15. Defense counsel then objected to Dr. Cheng's testimony, stating that "he is qualified as a hydrologist, [but] what they are asking him to do is a completely different matter." (100 RT 18866.) The court disagreed. Based on Dr. Cheng's training and experience, the court accepted him "as an expert hydrologist and qualified to give an opinion about the movement of water in San Francisco Bay, *among other things*." (100 RT 18866, emphasis added.)

16. Dr. Cheng told the jury that police asked him to determine, based on where the bodies were found and the tides and currents in the bay, the spot from which the bodies came. (101 RT 18901.)

17. Dr. Cheng was candid, explaining that there was uncertainty in any such calculation because they only knew when the bodies were found on shore, which is different from knowing the time the bodies actually arrived there. (101 RT 18901.) Nonetheless, Dr. Cheng looked at the tides and wind conditions in the days before the bodies were found. (101 RT 18895.) Dr. Cheng testified that the wind conditions were important since the area between Brooks Island and where the bodies washed ashore is shallow -- between three and six feet deep. (101 RT 18902-18903.) In shallow water, the winds are a more significant force than tides in causing the movement of water. (101 RT 18898.) This is because the energy from the wind is transmitted to the bottom

more readily in shallow water than in deep water. (101 RT 18898-18899.) Dr. Cheng noted that in the days before the bodies were found, there was a combination of extremely low tides on April 12 and April 13, 2003, and high winds, in excess of 40 knots. (101 RT 18895-18896.) A wind speed of 20 knots persisted for 18 to 20 hours. (101 RT 18896.)

18. Dr. Cheng testified that without the winds, the tides will move in shallow water at approximately one knot. (101 RT 18906.) Dr. Cheng was asked if this was "enough energy in the water to move a body?" (101 RT 18906.) As noted above, during voir dire Dr. Cheng had admitted that his work had never involved studying the movement of bodies in the waters of the bay. Nevertheless, although the prosecutor's question required information which Dr. Cheng admitted was beyond his expertise, he responded "I don't think so." (*Ibid.*) Dr. Cheng was then asked if a storm "would produce enough energy in the water to move a body." (*Ibid.*) Dr. Cheng responded: "It does. I mean, again, it depends on whether the body is -- well, with it, it doesn't -- in other words , suppose the body is still anchored here, it may not have enough energy to move it." (*Ibid.*) Cheng opined that if the body were not anchored, "it would have enough energy to move it." (*Ibid.*)

19. Dr. Cheng then went on to answer detailed questions about the movements of the bodies in the bay, the precise subject Dr. Cheng had admitted his studies did not involve. Dr. Cheng explained that he looked at the wind conditions and currents to determine the point from which the bodies

would have to have started traveling in order to arrive at the location they did. (101 RT 18904.) Dr. Cheng made calculations based only on wind drift, since the tidal currents were relatively weak. (101 RT 18910.) Using a United States Army Corps of Engineers Coastal Engineering Handbook, he produced a "vector map," which charted the movement of Conner's body, hour by hour, in the days prior to April 13. (101 RT 18904, 18909-18911.)

20. As Dr. Cheng's vector diagram indicates, Dr. Cheng concluded that Conner's body migrated to Richmond (where it was found) from the high probability area near Brooks Island. (101 RT 18914.) Of course, this was the same "high probability" area that police had searched for more than two weeks with dive teams, sonar equipment and the sophisticated REMUS machine without finding anything at all to connect Mr. Peterson with the crime.

21. Dr. Cheng could not reproduce the same trajectory for Laci's body. (101 RT 18925.) When asked for an explanation why he could not provide a vector diagram that showed how Laci's body ended up in Point Isabel, Dr. Cheng confessed that "Well, I'm not – I'm not the expert in that area here. I don't know how the body is behaving in water." (*Ibid.*) Dr. Cheng stated that he "had done some similar studies of particle tracking, but not body." (101 RT 18926.) Dr. Cheng once again admitted he had no experience at all with how bodies move in water:

"Q: You have never done any study in San Francisco Bay that

has anything to do with bodies or things of that size, correct.?

"A: That is correct." (101 RT 18926.)

22. Despite Dr. Cheng's conceded lack of expertise in this area, the prosecutor told the jury in closing argument that if Dr. Cheng's testimony was correct, Mr. Peterson was guilty:

> "The only reason those bodies were found is remember what Dr. Cheng testified to. There was an extremely low tide on February 12th. And there was a very violent storm on February 12th. That combination broke the -- broke Laci Peterson free and sent her floating towards the shore. That's the only reason that those bodies were found at all. Not because of some magical frame-up job, or for any other reason. And if that's the fact, and that's the evidence that was before you in this case, then that man's a murderer. It's as simple as that."

(109 RT 20280-20281.) As noted above, presumably based on this evidence, one juror later remarked that "there was a straight line from Scott to the bodies washing up on shore." (Exh. 8 at HCP-000152.)

23. Petitioner has obtained the opinion of Dr. Rusty A. Feagin, an expert in coastal ecology and the movement of bodies in bays and estuaries, regarding the validity of Dr. Cheng's assertion that Conner's body could only have originated from the location where Mr. Peterson had been fishing.

24. Petitioner has also obtained a further declaration from Dr. Cheng, himself, acknowledging that Conner's body may in fact have

originated from an area different from where Mr. Peterson had been fishing.

25. Dr. Feagin is a tenured, associate professor in the Department of Ecosystem Science and Management at Texas A&M University. His research has focused on the study of coastal ecosystems, hydrodynamics, and geomorphology, erosion and accretion dynamics on coasts (hurricanes, sea level rise, waves, tides), spatial analysis (GIS/GNSS/GPS/remote sensing), intertidal and nearshore environments (beaches, sand dunes, wetlands, estuaries), and coastal restoration and engineering. Dr. Feagin has published approximately 40 peer reviewed articles on numerous topics related to bay and estuary ecology, including the movement of water, sediment and other substances in coastal areas. Dr. Feagin's curriculum vitae is attached to his declaration, which appears at Exhibit 9. A full list of his articles and symposia papers appears is included in Dr. Feagin's curriculum vitae. (Exh 9 at HCP-000301-20.)

26. Dr. Feagin has previously testified as an expert in courts in Texas and Louisiana. In contrast to Dr. Cheng, Dr. Feagin is an expert in the movement of bodies in water. For example, in a Louisiana murder case, he testified regarding historical wind, tidal, flow dynamics to render an opinion on the movement of a body in the Pearl River Estuary.

27. In Mr. Peterson's case, Dr. Feagin was requested to provide an opinion on the following question: In view of all relevant environmental

factors, including but not limited to winds, tides, circulation, topography and currents, what are all most likely points in and around San Francisco Bay from which the bodies of Laci and Conner could have originated.

28. In order to provide this opinion, Dr. Feagin assumed the following facts to be true:

A. That the body of Conner Peterson was discovered on the shore in Richmond, California on April 13, 2002, as indicated in the map introduced at trial as People's Exhibit 284, and attached to this petition as Exhibit 26.

B. That the body of Laci Peterson was discovered on the shore of Point Isabel near Berkeley, California on April 14, 2002 as indicated in People's Exhibit 284.

C. That the bodies were decomposed and had been in the water for three to six months.

D. That Laci Peterson was pregnant with Conner when her body was placed in the water, and that the bodies were therefore placed in the water in the same place. (See Exh. 9 at HCP-000284-85.)

29. In preparing to render an opinion, Dr. Feagin reviewed the

following materials from the Peterson trial:

A. People's exhibits containing maps, charts and photographs of the sites from which the bodies were recovered.

B. The testimony of Dr. Ralph Cheng, at Vol. 100 RT 18857 to Vol. 101 RT 18946.

C. Various exhibits used in Dr. Cheng's testimony, including his Power Point (Exhibit 283), his vector-diagram (Exhibit 284), and a map of the area searched in the bay Exhibit 215). (See Exh. 9 at HCP-000285.)

30. In addition to the foregoing material, Dr. Feagin also reviewed the Declaration of Ralph Cheng, signed July 31, 2012. (See Exh. 9 at HCP-000286.) Dr. Cheng's declaration is attached to this petition as Exhibit 10.

31. Dr. Feagin also independently researched the weather, wind and tidal conditions in relevant parts of San Francisco Bay in the months preceding the discovery of the bodies in April, 2002. (Exh. 9 at HCP-000286, HCP-000297-300.) In addition, he researched the topography of various regions in the bay and where the bodies washed ashore. (*Id.* at HCP-000286.)

32. Dr. Feagin has explained that, in order to reach any opinion about the origin of the bodies of Conner and Laci Peterson, it is necessary to

consider a number of factors, including (1) the general circulation patterns in San Francisco Bay, (2) the winds prior to discovery of the bodies, (3) the tidal action prior to discovery of the bodies, and (4) potential inflow of water from tidal creeks feeding into the bay. (*Ibid*.)

33. With respect to the winds, which have a significant impact on the movement of water in shallow areas, in the week before the recovery of the bodies, there was one significant meteorological event - a weather front on April 12. This front had the highest sustained winds since the last few days of 2002. On the 6th through the 11th, the winds were generally light and variable at 0-5 knots with brief periods up to 10 knots. However, on the first half of the 12th, the wind accelerated out of the south-southeast at 15-25 knots and the barometric pressure and temperature dropped as the air became more unstable. (*Id*. at HCP-000298.) On the second half of the 12th and on the 13th up until the first body was found, the wind slowed to around 10 knots from the south-southwest. On the first half of the 14th up until the second body was found, the wind lowered still further to 0-5 knots out of the northwest. There was another large wind event in the area between March 26 and March 28. In this event, winds reached a speed of 25 knots, and were predominantly from the northwest. (See *id* at at HCP-000300 (Figure 5).) Both wind events, those of March 26-28 and April 12, would have communicated sufficient energy to the bottom of the bay to move or dislodge objects. (Exh. 9 at HCP-000289.)

34. After considering the tides and currents, winds, inflow and

topography, Dr. Feagin concluded that the bodies of Conner and Laci could have originated from three locations:

A. From sites originating on the south and west of the recovery sites.

35. Under this scenario, which is at least marginally consistent with Dr. Cheng's testimony, the wind patterns in the preceding week could have loosened the bodies during the storm on April 12. The bodies then could have floated generally to the north with the smaller body moving faster on the 12th and 13th and then arrived on generally northward flow direction. When the northwest wind arrived on April 14, the larger body then reversed direction towards the southeast to the second recovery site. (Exh. 9 at HCP-000290-92.)

36. But even assuming, as did Dr. Cheng, that this was the path the bodies took to the shore, it is impossible to know exactly when the bodies began moving or when they washed ashore. Thus, even under Dr. Cheng's theory, the beginning point of the bodies could be anywhere along the vector he charted. Dr. Cheng acknowledges this limitation in his declaration of July 31, 2012. (Exh. 10 at HCP-000327.)

B. From sites near Point Portrero/Ford Channel north of Brooks Island.

37. Under this scenario, the bodies could have originated from the area to the north of Brooks Island, near the Richmond yacht harbor. Both

bodies could have moved slowly to the southeast over a period of time from April 6 to April 11, following the general circulation pattern and light and variable winds that tended to be strongest when from the northwest. It is possible that the high winds occurring between March 26 and 28 contributed to the loosening of the bodies from their moorings. On the higher southerly winds of the 12th and 13th, they could then have been thrust northward towards the first recovery site and follow the earlier scenario from then onward. (Exh. 9 at HCP-000290-92.)

C. **From sites that inflow to the bay from upstream in the tidal creek network**.

38. Under this analysis, the bodies could have started from any of a number of tidal creeks that flow into the bay. The inflow of water from marsh creeks could have driven the bodies downstream from terrestrial locations in Berkeley. For example, tidal channels extend northward beyond the San Francisco Bay Trail, up along 32nd Street in the Marina Bay community, and even under the freeway US 580. It is possible that the bodies originated from such locations, but this would require a large flushing event to force them down the tidal creeks and into the larger embayment. While the April 12th front had brought the second largest daily rainfall total for the nearby Richmond station since December 24, 2012 (*id.* at HCP-000299 (Figure 4)), on an hourly basis the rainfall quantities did not particularly stand out at the San Francisco station (See http://www.ndcd.noaa.gov/). However, since these tidal creeks receive inflow from drainages up into Berkeley, the total daily

inflow quantity may be more relevant. This leaves open the possibility that the bodies may have originated from upstream in the tidal creek network. (Exh. 9 at HCP-000290-92.)

39. At trial, Dr. Cheng testified that the bodies were placed in the water south of Brooks Island. (101 RT 18915-18917.) While Dr. Feagin agrees that this conclusion is plausible, he found various portions of Dr. Cheng's testimony scientifically unreliable:

A. Dr. Cheng testified that it is a "rule of thumb" that the wind will move the water at two to three percent of wind-speed. (100 RT 18882-18883.) Dr. Cheng then appears to assume that bodies in the water will move at the same speed as the water itself. The figure Dr. Cheng cites for movement of water (2% to 3% of wind speed) holds true only for the movement of water. Bodies and floating objects may move at different velocities depending on their volume, shape, and friction of surface. Moreover, velocity is strongly influenced by the proportion of the object that is on the water surface, above the water surface, and at varying depths -- for example, there is a large difference in velocity between a boat with a raised sail versus a lowered sail, or between an empty ship and one weighted down into the water. To the extent that Dr. Cheng's vector-chart (People's Exhibit 284), showing the movement of bodies from the Brooks Island area to the Richmond shore, was based on the assumption that there is no difference between the velocity of the water and velocity of objects in the water, there is

no peer reviewed data to support that assumption. The general understanding of the scientific community is that floating objects move at different velocities depending on their volume, shape, friction of surface, and the proportion of the object at varying depths in the water column. (Exh. 9 at HCP-000292-94.)

B. Dr. Cheng described a wind of 40 knots occurring on April 12. It is unclear where this value comes from. The data Dr. Feagin obtained from the Richmond 9414863 gauge (NOAA 2013) shows sustained winds were below 25 knots maximum, with 'gusts' maxing out at 30 knots, but even those were only brief. The majority of the time winds were below 20 with 25 knot gusts on the first half of April 12th. While the wind event on April 12 was significant, it was not the only significant wind event in the relevant time period. As noted, there was an equally strong wind event between March 26 and March 28, which actually lasted longer than the April 12 event. (See *id*. at HCP-000300 (Figure 5).) This earlier wind event isimportant because Dr. Cheng relied heavily on the April 12 event to hypothesize that the bodies began floating toward shore as a result of that storm. If the March wind event is also considered, then it introduces other, earlier possibilities for when the bodies began moving. Such a possibility would be consistent with the second scenario, outlined above, in which the bodies originated from the area north of Brooks Island, near the Richmond harbor. (Exh. 9 at HCP-000292-94.)

40. Each of the three scenarios described in paragraphs 35-38 is

plausible and supported by the environmental data. Dr. Cheng offered only one of these three scenarios, in which the bodies began moving on April 12 from south and east of Brooks Island. With the data available, there is no scientifically reliable reason to prefer one scenario over the other. (*Id*. at HCP-000294-95.)

41. Dr. Feagin's testimony undercutting Dr. Cheng does not stand alone. Dr. Cheng himself has submitted a declaration agreeing that there were basic flaws in his testimony that were not explored at trial. (Exh. 10 at HCP-000327.)

42. At trial, Dr. Cheng assumed that the bodies began moving on April 12 -- the date of the storm -- and used that assumption to reconstruct the vector path that Conner's body would have taken to get to the shore when it was discovered. A chart showing this reconstruction was introduced at trial as People's Exhibit 284, and is attached to his declaration as Exhibit A. (See *id*. at HCP-000329-30.)

43. In his recent declaration, Dr. Cheng explains the significance of some of the assumptions he used in his testimony. According to Dr. Cheng, in his testimony he assumed that (1) the bodies began moving a particular time, during the storm on April 12-13, 2003 and (2) the bodies reached the shore on the dates they were discovered there. If the bodies began moving at a different time, or landed at an earlier time, the location in the bay where they began

moving could have been different. (See *id*. at HCP-000327.) The real truth, according to Dr. Cheng now, is that, because no-one can actually know when the bodies started moving, or when they arrived at the shore and stopped moving, he cannot say how long the bodies traveled along the vector path he charted, either in terms of time or distance. (*Ibid*.) For example, if the bodies began moving later than he assumed, or stopped moving earlier than he assumed, they would have been moving for a shorter time than he assumed, and they would have started at a different place along the vector path. (*Ibid*.) Dr. Cheng states, that although no one can pin-point with a high probability the starting location of the bodies' movement, the bodies would have started drifting motions somewhere along the vector path (People's Exhibit 284) that he discussed in the testimony. (*Ibid*.)

44. The vector path Dr. Cheng charted in his testimony extends from south of Brooks Island, all the way to the Richmond shore – a distance of nearly two miles. (Exh. 26.) In contrast to his trial testimony, it is Dr. Cheng's current testimony that the bodies could have been placed in the bay ***anywhere*** along that two-mile vector path. (Exh. 10 at HCP-000327.)

45. Dr. Cheng's trial testimony was therefore false and objectively untrue. (*In re Richards* (2012) 55 Cal.4th 948, 963.)

46. Dr. Cheng's method of determining the area from which the bodies originated was scientifically unreliable, and was based on a principle

that was not, and is not, generally accepted in the relevant scientific community.

47. His testimony was based on the scientifically unreliable premise that bodies in the water move at the same speed as the water itself. This premise is false, and his resulting vector-chart, People's Exhibit 284, is scientifically inaccurate.

48. Dr. Cheng's testimony was also false in that it communicated to the jury that there was only one area from which the bodies could have originated in the bay – the area where Mr. Peterson said he had been fishing on December 24, 2002. In fact, there are three areas from which the bodies could have originated. It is undisputed that Mr. Peterson was never in the vicinity of the other two areas.

49. Dr. Cheng's testimony was therefore false. Petitioner's conviction and death sentence therefore violated Penal Code section 1473.

50. Under California law, a writ of habeas corpus may be prosecuted if "false evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." (Pen. Code, § 1473, subd. (b)(1).) For purposes of this section, it is immaterial whether the prosecution actually knew or should have known of the false nature of the evidence. (Pen. Code, §1473, subd. (c)); *In*

re Hall (1981) 30 Cal.3d 408, 424; *In re Pratt* (1999) 69 Cal.App.4th 1294, 1313-1314.) Relief must be granted if it is shown by a preponderance of the evidence that there is a reasonable probability the trier of fact could have arrived at a different decision in the absence of the false evidence. (*In re Wright* (1978) 78 Cal.App.3d 788, 807-808 and n. 4; *In re Ferguson* (1971) 5 Cal.3d 525; *In re Merkle* (1960) 182 Cal.App.2d 46.)

51. The testimony given by Ralph Cheng that, based on an analysis of winds and tides in San Francisco Bay, the bodies of Laci and Conner were placed in the bay near to where Scott was fishing, was material and probative on the issue of petitioner's guilt and the question of punishment. The evidence was false and prejudicial in that there was a reasonable probability that the trier of fact would have arrived at a different verdict in the absence of Cheng's testimony. The writ should therefore issue.

CLAIM SEVEN:

Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Failing To Present The Testimony Of An Expert In The Field Of The Movement of Bodies In Bays and Estuaries, And By Counsel's Failure To Effectively Cross-Examine The Prosecution's Expert

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Strickland v. Washington* (1984) 466 U.S. 668 [counsel has fundamental duty to conduct reasonable investigation; under Sixth and Fourteenth Amendments, a showing that counsel's acts fell outside the range of reasonable competence, coupled with showing of prejudice, compels reversal]; *Williams v. Taylor* (2000) 529 U.S. 362, 398 [ineffective assistance of counsel resulting in failure to introduce relevant mitigation evidence may violate 8th Amendment].) Defense counsel here rendered constitutionally ineffective assistance by failing to present readily available expert testimony to impeach one of the strongest pieces of evidence the state presented to obtain its conviction. Further, defense counsel's ineffectiveness, which permitted the jury to base its verdict on unreliable evidence in a capital case, undermined the reliability of the death judgment and requires reversal. The following facts now known to petitioner support this claim:

1. Petitioner incorporates by reference each of the facts alleged in all prior claims of this petition.

2. As discussed in Claim Six, Dr. Cheng told the jury that he looked at the wind conditions and currents to determine the point from which the bodies of Laci and Conner would have to have started traveling in order to arrive at the location they did. (101 RT 18904.) Dr. Cheng made calculations based only on wind drift, since the tidal currents were relatively weak. (101 RT 18910.) Using a United States Army Corps of Engineers Coastal Engineering Handbook, he produced a "vector map," which charted the movement of Conner's body, hour by hour, in the days prior to April 13. (101 RT 18904, 18909-18911.) Dr. Cheng's map, People's Exhibit 284, shows the vector diagram and concludes that Conner's body migrated to Richmond (where it was found) from the high probability area near Brooks Island. (101 RT 18914.)

3. Before Dr. Cheng testified, the defense objected that his testimony had "no foundation for this as any kind of scientific theory," and required a *Kelly-Frye* hearing. (100 RT 18853.) The court overruled the objection on the ground that "I don't think we have to have a Kelly-Frye to have somebody testify as to tides. That's generally accepted in the scientific community. They've been charting tides since Sir Frances Drake went up the coast." (100 RT 18853.)

4. Defense counsel responded that Drake's charting of tides had nothing to do with predicting how bodies move in water. (100 RT 18853.) Dr. Cheng himself admitted repeatedly that with respect to the movement of

bodies in water, he had done no studies and was *not* an expert. (100 RT 18865; 101 RT 18926, 18938.) Nevertheless, the court ultimately ruled that Dr. Cheng's testimony did not require a *Kelly-Frye* hearing, and Dr. Cheng's opinion as to where bodies will move in water "goes to the weight rather than the admissibility." (100 RT 18855.)

5. Dr. Cheng was thereafter permitted to testify to the jury that Conner's body had floated to its resting place on shore from the exact area where Mr. Peterson had been fishing. (101 RT 18915.)

6. Despite the fact that defense counsel argued that Dr. Cheng's testimony was scientifically unreliable, defense counsel failed to challenge Dr. Cheng's analysis either prior to trial in an attempt to have Dr. Cheng's conclusions excluded, or at trial in an attempt to impeach these same conclusions.

7. Defense counsel never interviewed or called to testify an expert such as Dr. Feagin. The scientific principles on which Dr. Feagin relied were well-known to the general scientific community in 2003. If he had been called as a witness at trial, he would have been able to testify to all the facts described above. (Exh. 9 at HCP-000295.)

8. Defense counsel's decision not to introduce the testimony of an expert such as Dr. Feagin fell below an objective standard of reasonableness

within the meaning of *Strickland v. Washington* (1984) 466 U.S 668. Had defense counsel done so, he would have obtained a ruling excluding from trial Dr. Cheng's testimony regarding the movement of bodies in water, which testimony was based on scientifically unreliable principles that were not generally accepted in the relevant scientific community. Alternatively, had Dr. Cheng's testimony survived a challenge on the basis of scientific validity, counsel still should have introduced the testimony of an expert such a Dr. Feagin. Such testimony would have impeached Dr. Cheng's testimony that the bodies could only have come from the area in the bay where Mr. Peterson was fishing. The evidence on which the prosecution so heavily relied for a verdict of guilt would therefore have been thoroughly undermined.

9. Counsel admits that he "had no tactical reason for not hiring an expert such as Dr. Feagin." (Exh. 4 at HCP-000024.) Instead, defense counsel explains that he failed to consult an expert regarding Cheng's findings because he did not believe the trial court would allow Dr. Cheng to testify as an expert in this area. (*Id*. at HCP-000022-25.) When the trial court nonetheless admitted Cheng as an expert, counsel still did not consult an expert to review Cheng's findings or testimony. (See *id*. at HCP-000022, HCP-000024-25.)

10. For the foregoing reasons, petitioner was deprived of effective assistance of counsel, and his resulting conviction and sentence were obtained in violation of the Sixth, Eighth and Fourteenth Amendments.

11. Counsel's failure to investigate and present this evidence undermines confidence in the outcome of trial. Had counsel investigated this evidence, he could have moved to exclude Dr. Cheng's evidence on strong grounds that it was not scientifically reliable, and that his conclusion was scientifically unreliable. Even if the trial court nevertheless admitted Dr. Cheng's testimony, had defense counsel presented expert evidence such as that offered by Dr. Feagin, he could have entirely rebutted Dr. Cheng's testimony. Had the trial court excluded Dr. Cheng's testimony or, alternatively, had defense counsel exposed the numerous flaws in that testimony, there is a reasonable probability that one or more jurors would have voted to acquit or in favor of a sentence of life without parole.

CLAIM EIGHT:

Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Promising The Jury That It Would Hear Three Categories Of Exculpatory Evidence Which Would Prove Scott Was "Stone Cold Innocent," And Then By Not Fulfilling Those Promises

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defense counsel rendered constitutionally ineffective assistance during opening statements by making the jury promises which he did not fulfill. The following facts now known to petitioner support this claim:

1. Petitioner incorporates by reference each of the facts alleged in all prior claims of this petition.

2. At trial, the state's theory was that petitioner killed his wife Laci Peterson and her unborn son Conner on the evening of December 23, 2002, or the morning of December 24, 2002, took her body with him when he left to go fishing from the Berkeley Marina at approximately 10:00 on the morning of December 24, 2002, and placed the body in San Francisco bay.

3. The defense theory was that Laci was still alive when Scott left the house that morning to go fishing, and he was innocent.

4. Defense attorney Mark Geragos made an opening statement on June 2, 2004. In his opening statement, Mr. Geragos told the jury it would hear three categories of exculpatory evidence that proved petitioner was "stone cold innocent." (44 RT 8657.)

5. Regarding the first category of exculpatory evidence, Mr. Geragos told the jury that "there were a number of witnesses who came forward to say that they saw Laci and they saw Laci with the dog McKenzi. (44 RT 8643.)

6. Mr. Geragos told the jury that one such person "saw Laci walking the dog as he was coming out of a gas station, and had noticed a white slash tan van with a couple of scruffy, transient, homeless type people in it." (44 RT 8643.)

7. Mr. Geragos told the jury that "about a hundred yards [away there] is another eyewitness. That witness is driving a truck. He sees Laci and the dog . . . ." (44 RT 8644.)

8. Mr. Geragos told the jury "there's a -- yet another witness, eyewitness, within that same block . . . ." He told jurors that this witness also saw Laci that morning. (44 RT 8645.)

9. Mr. Geragos told the jury that they would hear testimony from

"two more eyewitnesses" who saw Laci walking in the park. (44 RT 8645.)

10. Mr. Geragos concluded this subject area by telling the jury that "those are all these people who see Laci and McKenzi that morning." (44 RT 8645.) At the very end of his closing argument he reiterated the point, telling the jury that the "direct evidence in this case specifically is of the eyewitnesses who saw her come around that day and saw her walk the dog that day." (44 RT 8656.)

11. Although Mr. Geragos had promised testimony from numerous witnesses who saw Laci walking the dog after Scott left for Berkeley, no such testimony was presented at trial.

12. In his closing argument, the prosecutor accurately drew the jury's attention to the fact that defense counsel presented no evidence that Laci was seen alive walking the dog after Scott left for Berkeley. The prosecutor told jurors "I really want to make clear to you . . . you did not hear a single witness who said they saw Laci Peterson walking in the neighborhood, or on Covena, or in the park on December 24th. You did not hear from this stand a single witness who said that." (109 RT 20321.)

13. The prosecutor repeated this observation, noting that of these witnesses "[n]ot a single one came to testify. Why do you think that was? This is a very experienced defense team. They are very good lawyers. They

obviously know how to prove facts if they want to. Why do you think they didn't bring in a single witness to testify theat they saw Laci Peterson walking that day?" (109 RT 20322.)

14. The prosecutor acknowledged that the jury had heard police officers testify that people reported to them that they had seen Laci, but the defense called none of those people to the stand. (109 RT 20321.) The prosecutor correctly told the jury that such statements recounted by the officers were hearsay: "You heard officers testify that people reported to [sightings of Laci]. You can't consider that for the truth, not a single bit of it." (*Ibid.*)

15. Regarding the second category of exculpatory evidence, Mr. Geragos told the jury that it would hear from a witness who saw a white or tan van several days after December 24 parked near a fence a few miles from the Peterson home. This witness saw a pregnant woman who looked like Laci urinating against the fence. A homeless man then pulled her back into the van. (44 RT 8647.)

16. Although Mr. Geragos had promised testimony from this witness, none was ever presented.

17. In his closing argument, the prosecutor accurately drew the jury's attention to the fact that defense counsel presented no evidence in support of this claim either. "Remember, that whole thing with the fence, and

the woman urinating, and the van, and all that crazy story? How come [this witness] didn't get up here on the stand? Let's hear what he has to say if that's true. None of those people came in and testified. You know why? You can assume that what they were going to say was not credible, that's why." (109 RT 20322-2-323.)

18. Regarding the third category of exculpatory evidence, Mr. Geragos told the jury that if, as the state theorized, Scott had put Laci in his boat, people would have seen her in the boat as Scott loaded it in the water. He told the jury that it would hear testimony from witnesses at the Berkeley Marina who "saw him put the boat in the water." (44 RT 8605.)

19. Although Mr. Geragos had promised testimony from these witnesses, no such testimony was presented at trial.

20. As to the eyewitnesses he referenced in his opening statement, defense counsel now declares that he promised the jury it would hear from these witnesses *before* he interviewed them. (Exh. 4 at HCP-0000030-31.) *After* his opening statement promising these witnesses, defense counsel had them interviewed and determined their timing did not add up. (*Ibid*.) Counsel now admits he was mistaken as to the time line because he failed to read a critical police report in which postman Russell Graybill told police that the Petersons' gate was open and implied their dog McKenzi was gone 15 to 30 minutes *after* neighbor Karen Servas had put the dog in the backyard and

closed the gate. (*Id*. at HCP-000031-34.) Defense counsel now affirms that, had he read this police report, he "would have called these witnesses to testify as promised in [his] opening statement." (*Id*. at HCP-000033-34.)

21. Mr. Geragos' failure to call witnesses he had promised the jury would provide exculpatory evidence and prove petitioner "stone cold innocent" constituted deficient representation.

22. Mr. Geragos' deficient representation – in which he gave an opening statement in which he promised the jury it would hear these witnesses, but then failed to call a single one of them -- was prejudicial.

23. Defense counsel's broken promises in opening statement to present exculpatory witnesses has two consequences which undermine confidence in the outcome. First, the jury may draw an adverse inference that the defense itself is flawed. Second, the jury may come to doubt the credibility of defense counsel himself.

24. Petitioner's jury drew both prejudicial inferences from Mr. Geragos' broken promises.

25. One juror remarked after trial:

"'The statement that caught my attention was that he was

> going to show that Laci was alive on December 24, 2002,' [the juror] said. 'I thought that was very powerful, because if he could do this, I would have to acquit.'" (Exhibit 8 ["We, The Jury"] at HAB-000184.)

26. Another juror remarked that defense counsel's broken promises to prove Laci was alive "'just hung over the trial.'" (*Id*. at HCP-000184.) When counsel failed to fulfill his promise, this juror noticed:

> "'. . . I thought, good try Mark. You said that you would show us he was innocent. All you did was prove to me he was guilty.'" (*Ibid*.)

27. The error was prejudicial.

CLAIM NINE

Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By His Counsel's Ineffective Assistance In Failing To Present Exculpatory Evidence

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defense counsel rendered constitutionally ineffective assistance in failing to present exculpatory testimony. The following facts now known to petitioner support this claim:

1. Petitioner incorporates by reference each of the facts alleged in all prior claims of this petition.

2. At trial, the state's theory was that petitioner killed his wife Laci Peterson and her unborn son Conner on the evening of December 23, 2002, or the morning of December 24, 2002, took her body with him when he left to go fishing from the Berkeley Marina at approximately 10:00 on the morning of December 24, 2002, and placed the body in San Francisco bay.

3. The defense theory was that Laci was still alive when Scott left the house that morning to go fishing, and he was innocent.

4. Defense attorney Mark Geragos made an opening statement on June 2, 2004.

5. Mr. Geragos told the jury that "there were a number of witnesses who came forward to say that they saw Laci and they saw Laci with the dog McKenzi." (44 RT 8643.)

6. Mr. Geragos told the jury that one such person "saw Laci walking the dog as he was coming out of a gas station, and had noticed a white slash tan van with a couple of scruffy, transient, homeless type people in it." (44 RT 8643.)

7. Mr. Geragos told the jury that "about a hundred yards [away there] is another eyewitness. That witness is driving a truck. He sees Laci and the dog . . . ." (44 RT 8644.)

8. Mr. Geragos told the jury "there's a -- yet another witness, eyewitness, within that same block . . . ." He told jurors that this witness also saw Laci that morning. (44 RT 8645.)

9. Mr. Geragos told the jury that they would hear testimony from "two more eyewitnesses" who saw Laci walking in the park. (44 RT 8645.)

10. Mr. Geragos concluded this subject area by telling the jury that

"those are all people who see Laci and McKenzi that morning." (44 RT 8645.) At the very end of his opening argument he reiterated the point, telling the jury that the "direct evidence in this case specifically is of the eyewitnesses who saw her come around that day and saw her walk the dog that day." (44 RT 8656.)

11. Although Mr. Geragos had promised testimony from numerous witnesses who saw Laci walking the dog after Scott left for Berkeley, no such testimony was presented at trial.

12. In his closing argument, the prosecutor accurately drew the jury's attention to the fact that defense counsel presented no evidence that Laci was seen alive walking the dog after Scott left for Berkeley. The prosecutor told jurors "I really want to make clear to you . . . you did not hear a single witness who said they saw Laci Peterson walking in the neighborhood, or on Covena, or in the park on December 24th. You did not hear from this stand a single witness who said that." (109 RT 20321.)

13. The prosecutor repeated this observation, noting that of these witnesses "[n]ot a single one came to testify. Why do you think that was? This is a very experienced defense team. They are very good lawyers. They obviously know how to prove facts if they want to. Why do you think they didn't bring in a single witness to testify that they saw Laci Peterson walking that day?" (109 RT 20322.)

14. In fact, there were numerous witnesses who could have testified that they saw Laci walking her dog or her dog trailing a leash *after* Scott Peterson left for the Berkeley, Marina.

15. Diana Campos worked as a custodian at Stanislaus County Hospital in Modesto, California. (Exh. 12 at HCP-000331.) On December 24, 2002, she arrived to her 11:00 a.m. shift early at 9:50 a.m. (*Ibid*.) She immediately went to the outdoor table area at the back of the hospital to smoke a cigarette. (*Ibid*.) This area overlooks the Dry Creek trail. (*Ibid*.) Sometime around 10:45 a.m., a barking dog caught her attention. (*Ibid*.) Ms. Campos saw a "very pregnant woman" holding the dog's leash. (*Ibid*.) The dog looked like a golden retriever with a white marking down the front of his chest. (*Ibid*.) Ms. Campos noticed two men who looked homeless near her who told the woman to "shut the fucking dog up." (*Ibid*.)

16. Two days later on December 26, 2002, Ms. Campos saw a missing poster for Laci Peterson at a Starbucks Coffee near the hospital. (Exh. 12 at HCP-000331.) She recognized Ms. Peterson as the woman who was walking her dog on December 24, 2002. (*Ibid*.) Ms. Campos was "sure it was the same woman." (*Id*. at HAB-000331, HAB-000332.) She called police the next day and was interviewed by Detective Owen of the Modesto Police Department. (*See* Exh. 48 [Statement of Diane Campos].)

17. In mid-2003, Ms. Campos was contacted by a private

investigator working for Scott Peterson's defense. (Exh. 12 at HCP-000331.) The investigator questioned her about her police interview. (*Ibid*.) The investigator insisted that she had the time wrong and that it must have been 9:45 a.m. and not 10:45 a.m. (*Ibid*.) The investigator made her nervous and wanted her to change her timing. (*Ibid*.) She has reviewed the June 13, 2003 defense report which indicates that she saw Ms. Peterson with her dog at 9:40 a.m.. (*Ibid*.) Ms. Campos says this is not correct; it is not how she remembers it, it is not consistent with her time card and it is not consistent with what she told police in my December 27, 2002 interview. (*Ibid*.) As documented in her December 27, 2002 police interview, Ms. Campos saw Ms. Peterson at 10:45 a.m. just before she started her 11 a.m. shift. (See *id*. at HCP-000335.) After the June 13, 2003 defense interview, she was not contacted by the defense again. (*Id*. at HCP-000332.) She was not called to testify at Mr. Peterson's trial. (*Ibid*.)

18. Frank Aguilar – who worked at tomato cannery for 30 years -- lived at 215 Covena Avenue in Modesto, California. (Exh. 13 at HCP-000336.) On December 24, 2002, Mr. Aguilar was driving with his wife, Martha, from their home up La Loma Avenue, away from Yosemite Blvd., and towards downtown Modesto. (*Ibid*.) As they were driving, they saw a pregnant woman walking towards them with a dog on a leash. (*Ibid*.) The woman was walking a mid-sized dog, like a long hair Labrador Retriever. (*Ibid*.) Mr. Aguilar is not sure of the time but it was between 9:30 and 11:00 a.m.. (*Ibid*.)

19. Sometime shortly after December 24, Mr. Aguilar learned from the news that Laci Peterson had gone missing and saw a photograph of her. (*Ibid*.) He realized that the photograph he had seen on the news was of the same woman he had seen walking the dog that morning. (*Ibid*.) Based on the photographs of Laci, Mr. Aguilar is sure that the woman he saw walking a dog on December 24, 2002, was Laci Peterson. (*Ibid*.)

20. At a candlelight vigil for Laci, Mr. Aguilar approached a reporter, Jodie Hernandez, and told her what he had seen. (*Id*. at HCP-000337.) She told him to go to the police but he did not. (*Ibid*.) Sometime later, Mr. Aguilar was at the home of a neighbor, Mrs. Severdra. (*Ibid*.) An investigator who was working for Scott Peterson's defense was there. (Ibid.) Mr. Aguilar's wife, Martha, told this investigator what they had seen. (Ibid.) Mr. Aguilar was not contacted again by any investigator working for the defense or trial counsel. (*Id*. at HCP-000338.)

21. William Mitchell has lived in Modesto since 1949. (Exh. 14 at HCP-000339.) He is a graduate of Stanford Law School, served as assistant county counsel, and was in private practice for several decades. Mr. Mitchell served three terms as a member of the city counsel and acted as vice mayor. He was president of the Stanislaus County YMCA and was the first president of the county family services agency. (*Ibid*.) Though Mr. Mitchell is 90 years old, he is in good health and has good distance vision. (*Id.* at HCP-000339, HCP-000343.)

22. Mr. Mitchell recalls Christmas Eve morning "very well." (*Id.* at HCP-000339.) He was at home with his now-deceased wife, Vivian. Vivian was doing the dishes at the kitchen sink, which is at a window facing La Sombra Ave. Vivian drew Mr. Mitchell's attention to a "beautiful lady ... going by with a nice dog." (*Id.* at HCP-000340.) Mr. Mitchell looked out the living room window, but only caught a glimpse of the dog. The walker seemed to be headed toward La Loma Avenue.

23. The Mitchells had seen Laci walking her dog on several prior occasions. A neighbor across the street had also previously seen Laci walking the dog. The Mitchells told this neighbor about their sighting of Laci on Christmas Eve. (*Id.* at HCP-000342-43.)

24. Several days later, the Mitchells saw articles in the newspapers about Laci's disappearance. The articles contained a photograph of Laci. Mrs. Mitchell "knew right away that this was the same woman she had seen that Christmas morning." (*Id.* at HCP-000341.) The dog Mr. Mitchell saw "matched the description of Laci's dog." (*Id.* at HCP-000343.) The Mitchells called the police to report what Mrs. Mitchell had seen, but they did not receive a call back. (*Id.* at HCP-000341.)

25. Mr. Mitchell recalls being visited by Scott's defense team, including Mr. Geragos. One of the team members questioned Mr. Mitchell. Mr. Mitchell does not remember Mr. Geragos asking many questions about the

case. (*Id.* at HCP-000342.)

26. According to Mr. Mitchell, his wife "never doubted that she had seen Laci Peterson that morning." (*Id.* at HCP-000343.)

27. Though Mr. Mitchell would have been able to testify to the foregoing facts, he was not subpoened by the defense. He was subpoenaed by the prosecution, but was never called to the trial by either side. (*Ibid.*)

28. Evidence from other witnesses that defense counsel similarly referenced in opening statements – but then failed to introduce at trial – establishes that there was nothing unusual about Laci walking near the time of her disappearance.

29. Anita Azevedo lived in Modesto in 2002. (Exh. 15 at HCP-000344.) On December 23, 2002 – one day before Laci's disappearance – Azevedo saw Laci walking McKenzi on La Loma and Encina Avenues. (*Ibid*.) Ms. Azevedo told both the police and a member of the defense team what she had seen. (*Id*. at HCP-000344-45.) And though she was available to testify at the time of trial, neither side called her. (*Id*. at HCP-000345.)

30. But Azevedo was not alone in seeing Laci walking the dog on the morning of December 23, 2002. Thus, Grace Wolf, who lived a short distance from the Petersons, has declared that she too saw Laci walking

McKenzi the morning of December 23, 2002. (Exh. 16 at HCP-000346-47.) Ms. Wolf observed that Laci was "walking strongly" and "at a reasonable pace." (*Id*. at HCP-000347.) Ms. Wolf told two people that she had seen Laci walking on December 23. (*Id*. at HCP-000347-48.) She later told police and the defense team about what she had seen. (*Ibid*.) And though she was available at the time of trial, neither side called her to testify. (See *id*. at HCP-000348.)

31. Mr. Geragos chose not to present these witnesses because he mistakenly believed that Laci would have had to walk the dog between 10 a.m. (when Scott left the home) and 10:18 (when Karen Serves found McKenzi outside the Peterson home). Many of these witnesses saw Laci *after* 10:18 a.m.. (Exh. 4 at HCP-000030-31.) There is evidence, however, that Laci took McKenzi for a walk *not before 10:18 a.m. but sometime after*. If Laci walked McKenzi after 10:18 a.m., the testimony of these witnesses would have been entirely plausible. Defense counsel agrees, and now states that he would have called these promised witnesses had he realized he was mistaken as to the time line. (*Id*. at HCP-000031-34.)

32. Mr. Geragos failed to consider evidence indicating that Laci walked McKenzi after 10:18 a.m., i.e., evidence that Laci was alive, and that she walked McKenzi, ***after*** Karen Servas put McKenzi into the Peterson's backyard. (See Exh. 4 at HCP-000031-32.)

33. This evidence had been provided, in part, to police by United States Postal Service postman Russell Graybill. On December 27, 2002, Officer M. Callahan and Detective Skultety of the Modesto Police Department interviewed Mr. Graybill. According to Callahan's handwritten police report, Graybill stated the following in response to the officer's question "what he remembered from December 24, 2002 when he delivered mail in this area:

> "[Graybill] said he entered the area around 1030 to 1045 in the morning. He said he couldn't remember anything unusual from 516 Covena, but remembered the gate was open at 523 Covena. He said usually the dog barks at him from behind the gate. On 12-24-02 the gate was open and he did not see tor hear the dog at 523 Covena."

(See Exh. 3 at HCP-00008.)

34. This handwritten report was included in the discovery, at page 2524.

35. Mr. Geragos states that the prosecution provided the defense with voluminous discovery before trial. (Exh. 4 at HCP-000033.) Each page of the discovery was Bates stamped with a page number in lower left hand corner of each page.

36. Although the foregoing statement from Russell Graybill was included in the discovery the prosecution provided to Mr. Geragos, Mr.

Geragos was unaware of the Graybill statement prior to, and during, trial. (*Ibid.*) This was because of the deficient method by which Mr. Geragos and his trial team reviewed and filed the voluminous discovery in the Peterson case. The documentary discovery contained over 50,000 pages. The defense team had converted this discovery to a "pdf format" for ease of use. (*Ibid.*)

37. Paralegal Raffi Naljian worked as part of the defense team for Mr. Geragos. (Exh. 17 [Declaration of Raffi Naljian] at HCP-000349.) One of the tasks Mr. Geragos assigned to Naljian was to review the entire discovery, to extract the police reports from the discovery, and to copy and place the reports and other statements into witness folders. Thus, for each witness, or potential witness, there would be a folder containing all the discovery pertaining to that witness, and any other statements or investigative memoranda pertaining to that witness. (*Id.* at HCP-000351.)

38. When Mr. Geragos would prepare to examine a witness, he would use the witness folder, and rely on it to contain all available information about that witness. (Exh. 4 at HCP-000033.)

39. In extracting relevant material from the PDF file of the discovery to place into the witness files for Mr. Geragos, Naljian would use a search tool. The tool would permit Naljian to enter a name or word, and the search would return all instances of that name or word in the entire discovery file. (Exh. 17 at HCP-000350.) Naljian would then examine the page of discovery

containing the name or word, and, if relevant, include that page in the witness file. (*Ibid.*)

40. Immediately after working with the search tool, Naljian noticed that it only recognized text that was typographic. It did not recognize handwritten text. (Id. at HCP-000351.) After discussing this flaw with Mr. Geragos, the defense team recognized the need to -- at some point -- search the entire 50,000 pages of discovery for handwritten reports so that these would be included in the witness folders. (See *ibid*.)

41. Mr. Naljian states that he tried to extract from the discovery all handwritten reports. He concedes that it is possible, however, that he failed to extract every handwritten document from the 50,000 pages of discovery. (*Id.* 17 at HCP-000352.)

42. The failure of the defense team to locate the handwritten reports becomes less defensible but more understandable when one considers the timing of the endeavor. Mr. Naljian has declared that the defense team did not begin to create the witness folders until *the night before* that particular witness was set to testify at trial. (Exh. 17 at HCP-000351.) At that point, Mr. Naljian and another individual would spend the night in the hotel room searching through the 50,000 pages of discovery to create the witness files. (*Ibid*.) Because they were also searching the 50,000 pages for handwritten police reports, it would often take them until 3:00 or 4:00 a.m. to create the witness

folder. (*Ibid*.) Mr. Geragos would then pick up the witness folder at 6:00 a.m. and use it to prepare for that day's cross-examinations. (*Ibid*.)

43. Mr. Geragos' trial file thus contained a hastily made file for each potential witness. There is such a witness file for Russell Graybill. That file is attached as Exhibit A to Mr. Naljian's Declaration (Exhibit 17 at HCP-000357-62). That file does ***not*** contain Officer Callahan's handwritten police report describing his interview with Russell Graybill, contained in the discovery and described above. (*Ibid.*)

44. Mr. Naljian does not recall seeing that handwritten police report. (Exh. 17 at HCP-000352.)

45. Mr. Geragos does not recall seeing that handwritten police report either. (Exh. 4 at HCP-000032.) Mr. Geragos himself has admitted that had he known what Graybill had seen and heard when he was at the Peterson home sometime between 10:35 and 10:50 a.m., he would have presented testimony from the numerous witnesses who saw Laci walking McKenzi that morning. (*Id*. at HCP-000033-34.) As his opening statement shows, and as Mr. Geragos has admitted, this evidence would have directly supported his defense theory of the case. (*Id*. at HCP-000031-34.) Mr. Geragos had no conceivable tactical reason not to present this eyewitness testimony which was readily available at the time of trial.

46. The failure of Mr. Geragos to introduce the testimony of the many witnesses who saw Laci Peterson walking her dog on December 24, 2002, constituted ineffective assistance. Because that evidence was exculpatory, it was prejudicial and undermined confidence in the outcome of the trial.

CLAIM TEN:

Petitioner Was Deprived Of His Fifth, Sixth, Eighth And Fourteenth Amendment Rights By Counsel's Failure To Present Exculpatory Evidence That Steven Todd Saw Laci in Modesto After Scott Left For The Berkeley Marina

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defense counsel rendered constitutionally ineffective assistance in failing to present readily available exculpatory testimony. The following facts now known to petitioner support this claim:

1. Petitioner incorporates by reference each of the facts alleged in all prior claims of this petition.

2. At trial, the state's theory was that petitioner killed his wife Laci Peterson and her unborn son Conner on the evening of December 23, 2002, or the morning of December 24, 2002, took her body with him when he left to go fishing from the Berkeley Marina at approximately 10:00 on the morning of December 24, 2002, and placed the body in San Francisco bay.

3. The defense theory was that Laci was still alive when Scott left the house that morning to go fishing, and he was therefore innocent.

4. As described in Claim Eight, above, Mr. Geragos had promised testimony from numerous witnesses who saw Laci after Scott left for Berkeley. However, the defense did not present a single such witness at trial.

5. As described in detail in Claim Nine, above, there were numerous witnesses who could have testified that they saw Laci walking her dog or her dog trailing a leash *after* Scott Peterson left for the Berkeley Marina.

6. In addition to those eyewitnesses described in Claim Nine, there was another eyewitness who stated he saw Laci after Scott left. This eyewitness was Steven Todd.

7. On the very day that Laci disappeared, indeed at the very hour she disappeared, Mr. Todd was burglarizing the home of Rudy and Susan Medina. The Medina home was located at 516 Covena St., directly across the street from the Peterson's home. (49 RT 9590-9597, 9604.)

8. The Medinas left their home at 10:35 a.m. on December 24, 2002, to drive to Los Angeles for the Christmas holiday. (49 RT 9590.)

9. At 11:40 a.m. on December 24, 2002, Diane Jackson, who lived in the Peterson's neighborhood, called police to report that there was a burglary at the Medina home. (99 RT 18562-18563.) Jackson reported that,

at 11:40 a.m. on December 24th, she saw a van outside the Medina home and a "safe being removed from the house." (99 RT 18563.)

10. The Medina home was burglarized by two men: Steven Todd and Glenn Pearce. Both men were arrested in early 2003 for the burglary. (See Exh. 29 [Criminal Complaint in *People v. Steven Todd and Glenn Pearce,* Case No. 1052511]).

11. On January 6, 2003, Todd and Pearce were both charged with the burglary of the Medina home. (Exh. 29 at HCP-000418.) The complaint charged that

> "On or about and between December 24, 2002 and December 26, 2002, defendants did commit a felony, BURGLARY IN THE FIRST DEGREE, ... in that the defendant[s] did willfully, unlawfully, and feloniously enter the inhabited dwelling, occupied by another, 516 Covena Street, Modesto, located in the County of Stanislaus, with the intent then and there and therein to commit theft."

(*Ibid*.)[26]

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[26] In arguing to the jury, the prosecutor, who was from the same office that prosecuted Mr. Peterson, was more certain as to when the burglary occurred: he told the jury it was on December 26, not sometime "between December 24, 2002 and December 26, 2002." (109 RT 20318.) It is ironic that the principal source for fixing the date of the burglary on December 26 was none other than Steven Todd, himself. (46 RT 9017-9119; 57 RT 11166.) Mr. Todd, of course, had a rather strong motive to state that the burglary occurred on the 26th, after Laci had already disappeared.

12. On February 4, 2003, Steven Todd pleaded guilty to the charge of burglary of the Medina home "on or about and between December 24th of 2002 and December 26th of 2002." (Exh. 30 [*People v. Steven Wayne Todd*, Reporter's Transcript of Change of Plea] at HCP-000424.)

13. On February 6, 2003, Steven Todd was sentenced to state prison for a term of 7 years, 4 months for the Medina burglary. (Exh. 31 [*People v. Steven Wayne Todd*, Abstract of Judgment] at HCP-000426.) Mr. Todd was sentenced to an additional, consecutive term of 1 year, 4 months for another burglary he committed after the Medina burglary. His total sentence was 8 years, 8 months. (*Ibid.*)

14. On January 22, 2003, a man named Shawn Tenbrink was an inmate of the California Department of Corrections, and housed at the California Rehabilitation Center in Norco, California ("CRC-Norco").

15. On 10:59 a.m. on January 22, 2003, a corrections officer at CRC Norco , Lieutenant Xavier Aponte, telephoned the Modesto Police Department hotline which has been established to receive tips related to the disappearance of Laci Peterson. The hotline log states the following:

> Lt. Aponte 909-2732901 CRC-Norco - 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. Aponte has further info.

(Exh. 28 at HCP-000416.)

16. This hotline telephone log containing this tip from Lt. Aponte was provided to the defense in discovery on May 13, 2003, and bears a Bates stamp number 15311. (20 CT 6380.)

17. If Steven Todd saw Laci alive while he was burglarizing the Medina home on December 24, 2002, then there is reasonable doubt as to Scott's guilt. Scott left home to go fishing at 10:08 a.m. Todd's burglary would have been committed after the Medinas left their home at 10:35 a.m.. Diana Jackson saw evidence of the burglary at 11:40 a.m. Thus, Todd would have seen Laci alive in Modesto more than an hour after Scott left the house.

18. Todd was interviewed by defense investigator, Carl Jensen, at the San Mateo County Jail on August 27, 2004, in the midst of trial. (Exh. 33 at HCP-000431.) When confronted with Diane Jackson's statements that she saw the safe on front lawn of the Medinas' home and a van parked in front of that home at 11:40 a.m. on December 24, 2002, Todd became "unglued."

(*Ibid*.) Todd came out of his chair, put his hands on the table, and leaned over towards Jensen, yelling words to the effect of "You don't have a witness," and "You don't have a fucking thing!" (*Ibid*.) Indeed, a guard was so alarmed that she came and asked Jensen if he was okay. (*Ibid*.)

19. Todd informed Jensen that he would invoke his Fifth Amendment rights if called to testify.

20. By this time, of course, Todd had already been convicted of the burglary.

21. Notes from the file of Mr. Geragos's investigator, Carl Jensen, reveal that the defense team found out about the Aponte tip as early as June 25, 2004. (Exh. 35 [06/25/04 Notes on Aponte's Tip] at HCP-000434.) That same day, Mr. Geragos's investigator contacted CRC Norco and spoke to a Lieutenant Wright. (*Ibid*.) Lt. Wright informed defense counsel's investigator that he would attempt to speak to Shawn Tenbrink – as well as Lt. Aponte – and call counsel's investigator back in the morning. (*Ibid*.)

22. Even after learning of Lt. Aponte's tip in June, defense counsel failed to contact or interview Lt. Aponte until more than one month ***after*** the

jury returned guilty verdicts. (See 20 CT 6261-6263.)

23. On February 25, 2005, following the guilty verdicts, Mr. Geragos filed a motion for new trial. The motion was based in part on purportedly newly discovered evidence relating to the Aponte tip. According to the motion for new trial, the defense did not contact Lt. Aponte until the prosecution provided the defense with a letter from an inmate in the Stanislaus County Jail. (20 CT 6254.) This inmate provided a defense investigator with various names, which the defense then "ran through the discovery database." (20 CT 6254-6255.) As the Motion for New Trial describes:

> "One of the names, hereafter referred to as AT [Adam Tenbrink], led to a small notation in the hundreds of pages of tip sheets provided by the Modesto Police. In the notation, AT was talking with his brother, hereafter referred to as ST [Shawn Tenbrink], who was imprisoned at the California Rehabilitation Center facility commonly known as Norco. The notation stated that in a phone call four weeks after Laci's disappearance, AT had told ST that Laci had walked up on Steven Todd while he was burglarizing the house next door and that he had verbally threatened her."

(20 CT 6255.)

24. The tip from Lt. Aponte, described by Mr. Geragos as a "small notation" in the tip sheets in the previous paragraph, is the tip contained in

Exhibit 28.

25. On December 1, 2004, more than five months after his telephone call with Lt. Wright regarding the Aponte tip, defense investigator Carl Jensen interviewed Lt. Aponte at Norco. That interview was memorialized in a three-page report, with each page initialed by Lt. Aponte. (20 CT 6261-6263.) In that interview, Lt. Aponte stated that the telephone call between Adam Tenbrink and his brother, Shawn Tenbrink, was recorded. (20 CT 6261.) Lt. Aponte stated that, following his call to the tip line, a Modesto detective called him back. Aponte listened to the recording of the phone call . "To the best of his recollection, [name redacted] talked to [name redacted] about Laci Peterson missing and -- mentioned that Laci happened to walk up while Steve Todd was doing the burglary and Todd made some type of verbal threat to Laci." (20 CT 6262.)

26. Lt. Aponte recalled that he made a copy of the tape recording of the telephone call between Adam and Shawn Tenbrink. "Lt. Aponte does not recall if the detective took a copy of the tape or at a later date received a copy of the taped telephone conversation." (20 CT 6262.)

27. In a declaration submitted on behalf of the People in opposition

to the motion for new trial, Lt. Aponte admitted that "the only information possessed by me, that an inmate (Shawn Tenbrink) had spoken to someone I believed to be his brother (Adam) who had said that someone (I believe to be Steve Todd) said Laci witnessed him breaking in." (20 CT 6435.)

28. Modesto Police Detective Craig Grogan denies that any officer of his department went to Norco for an interview related to the Peterson case. Detective Grogan further stated: "I have not found any audiotapes in possession of the Modesto Police Department that contain a conversation recorded between Adam and Shawn Tenbrink." (20 CT 6438.)

29. Lt. Aponte has stated that the tape recording of the telephone call between Adam and Shawn Tenbrink has been lost. (20 CT 6435.)

30. In his Motion for New Trial, Mr. Geragos maintained that the defense "could not have discovered the evidence [pertaining to the Todd statements] no matter how diligent its efforts." (20 CT 6257.)

31. In arguing that the Aponte tip regarding Todd's statements was newly discovered, the defense stated that the Aponte tip was contained among "10,000 tips." (121 RT 21776-21777.) Defense counsel Pat Harris stated in a declaration filed in support of the new trial motion:

Defense Investigator Carl Jensen and I traveled to Modesto and

> met with the inmate. He provided us with several names of people he felt would be of interest. When the names were run on the computer database, it led to the discovery of a tip buried in the hundreds of pages of discovery. This tip was a very brief notation of a phone call from the state prison in NORCO to Modesto Police alerting them to a potential lead in the Laci Peterson investigation.

(20 CT 6259.)

32. The motion for new trial stated that "As a practical matter, we did not realize the significance of that name [Aponte] until probably two weeks before the end of the trial when [the prosecution] turned over the interview with the inmate ... in the Stanislaus County Jail." (121 RT 21775.) The defense then found the tip and proceeded to interview Lt. Aponte. The defense insisted that "you cannot connect the dots on any of this until we get [the statement from the inmate in Stanislaus County Jail]," and learn that Shawn and Adam Tenbrink "are connected to Todd, who was the burglar across the street [from the Peterson home]." (121 RT 21776-21777.)

33. The trial court denied the motion for new trial based on the asserted newly discovered evidence. (121 RT 21787-21793.) In denying the motion, the trial court stated that the evidence was not newly discovered because the Aponte tip "was provided to the defense on May 14, 2003" in discovery. (121 RT 21787.) The trial court further denied the motion because it was "not too impressed by that evidence." As the court explained:

> "I don't think it has much credibility or value to it. And the reason being is that there is evidence in this trial that the dog, McKenzi, was recovered at 10:14 or 10:18 ... and the Medinas didn't leave until after 10:30 in the morning. So the burglary must have occurred after the Medinas left their residence, and by that time Laci Peterson, under one interpretation of the evidence, was already missing."

(121 RT 21788.)

34. As previously alleged, the defense team had created a witness file for each potential witness in the case. (See Claim Eight, above.) There was such a witness file for Steven Todd. In the Todd witness file, there appears a copy of Bates stamped page 15311 from the discovery. This page contains the Aponte tip, described above. (Exh. 28; Exh. 18 at HCP-000364.)

35. The fact that the Aponte tip was contained in the Steven Todd witness file establishes that defense counsel not only possessed the Aponte tip, but fully appreciated that it pertained to a statement from Steven Todd regarding Todd seeing Laci alive on December 24.

36. Moreover, files belonging to defense counsel's investigator reveal that Mr. Geragos knew, or should have known, of the Aponte tip as early as June 25, 2004. Thus, counsel's investigator's files contain a document dated June 25, 2004, which contains all of the information found in Aponte's tip. (Exh. 35 at HCP-000433.) Investigator Jensen then called CRC Norco that same day and spoke with Lt. Aponte's colleague, Lt. Wright, who

promised to speak to Lt. Aponte and Shawn Tenbrink. (*Id*. at HCP-000434.)

37. The defense thus possessed this exculpatory information in its own files.

38. Additionally, a simple search of the electronically stored discovery, using the term "Todd," uncovers the Aponte Tip. (Exh. 18 at HCP-000366.) If the defense team had performed such a search for Steven Todd, it would have found the Aponte Tip.

39. However, the defense failed to take any steps with regard to this information prior to the conclusion of the guilt phase of the trial. In particular, the defense failed to take any of the following steps prior to that time:

A. Interview Lt. Aponte prior to the guilty verdicts;

B. Obtain a tape recording of the telephone call between Interview Shawn and Adam Tenbrink;

C. Interview Adam Tenbrink prior to the guilty verdicts;

D. Interview Shawn Tenbrink prior to the guilty verdicts.

40. Had defense counsel done the above prior to trial, he would have

developed, and been able to present, the exculpatory evidence that Laci was seen alive by Steven Todd after Scott left home to go fishing.

41. Post-conviction counsel's investigator, Jacqi Tully, attempted to interview both Adam Tenbrink and Steven Todd. (Exh. 32 [Declaration of Jacqi Tully] at HCP-000428-29.) At one point, Adam Tenbrink agreed to speak with Ms. Tully at a later date, but then refused to come to the door. (*Id*. at HCP-000429.) And when Ms. Tully spoke to Steven Todd over the telephone, he was angry and said, "Fuck Scott Peterson." (*Ibid*.)

42. Ms. Tully was also able to contact Shawn Tenbrink, who has confirmed he was an inmate at CDC Norco in January 2003. (Exh. 34 [Declaration of Shawn Tenbrink].) Mr. Tenbrink confirmed having a phone conversation with his brother Adam, in which the latter told him he knew who burglarized the house across the street from the Petersons. (*Ibid*.) Adam indicated that Laci Peterson had seen Steven Todd commit the burglary. (*Ibid*.) Shawn could not recall whether Adam informed him that Todd had burglarized the house with other people. (*Ibid*.)

43. Defense counsel himself recognized the significance of the Aponte tip. In his motion for new trial, counsel explained:

> "If the evidence were presented at a retrial, it is highly probable a different result would have occurred. One of the often repeated phrases during the trial was that their [sic] was no

> alternative theory as to what happened to Laci Peterson. With the newly discovered evidence, we now have a close friend of one of the burglars who not only rebuts the prosecution theory of when the burglary occurred but also places Laci in the area at the time of the burglary. Based upon Susan Medina's testimony that she left the house at 10:30 a.m. and that the burglary occurred after that, the recently uncovered evidence points to the conclusion that Laci was alive after Scott had left for the day. It also presents a plausible explanation as to who could have murdered Laci Peterson."

(20 CT 6257.)

44. The failure of Mr. Geragos to introduce this testimony constituted ineffective assistance.

45. This allegation, that counsel was ineffective, is not diminished by the trial court's observation, in denying the motion for new trial, that the evidence was not credible. The trial court's reasoning was based on the timing of the burglary in relation to the timing of Laci walking the dog. The trial court reasoned that the dog was recovered by Karen Servas at 10:18 a.m., and that the burglary did not commence until after 10:30 a.m. Thus, under this "interpretation of the evidence," Laci had already been abducted before the burglary began. (121 RT 21788.) If this timing is accepted, the trial court was right: Todd could not credibly have claimed that Laci saw the burglars that morning.

46. As established in Claim Nine, above, the trial court's reasoning was distorted as a result of the very same error defense counsel made in

deciding not to introduce the testimony of the neighbors who claimed to have seen Laci walking her dog after 10:30 a.m. That is, the trial court mistakenly believed that Laci had to have disappeared before Servas put the dog into the backyard at 10:18 a.m. Unless the dog was walking himself, and as defense counsel has now conceded, this meant that Laci was walking the dog after 10:18 a.m. The reason the court made this mistake, however, was because defense counsel failed to read yet another critical page of the discovery – Russell Graybill's statements to police indicating that when he delivered mail between 10:35 and 10:50 a.m., the dog and Laci were both gone. Had the trial court appreciated that Laci was walking the dog at that time, then Todd's statement that Laci saw him burglarizing the Medina house, which occurred sometime after 10:30, would have been entirely credible.

47. Defense counsel's failure to investigate the Aponte tip, whether through a failure to find the tip or through a failure to appreciate its significance, fell below an objective standard of reasonableness within the meaning of *Strickland v. Washington*. Had defense counsel have done so, he would have presented exculpatory evidence to the jury.

48. Counsel's failure to investigate and present this exculpatory evidence was prejudicial and undermines confidence in the outcome of both the guilt and penalty phases of trial. Had trial counsel presented this evidence, there is a reasonable probability that one or more jurors would have voted to acquit, or, in the alternative, for life in prison.

CLAIM ELEVEN:

Cumulative Error

1. Petitioner's conviction and sentence of death violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution because the cumulative effect of the errors alleged in this petition and in petitioner's direct appeal deprived him of his federal constitutional rights, including, but not limited to, his rights to due process of law, equal protection, confrontation, the effective assistance of counsel, and the right to reliable capital proceedings and sentencing. (See *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, and fn. 15 (cumulative effect of errors may violate due process)

2. For purposes of this cumulative claim, petitioner hereby reincorporates the facts and claims in all prior paragraphs and re-alleges the following claims raised on direct appeal[27]:

V. The Trial Court Committed Prejudicial Error and Violated Mr. Peterson's State and Federal Constitutional Rights by Forcing Him to Trial in a Community Where 96% of the Jury Venire Had Been Exposed to Massive Pretrial Publicity about the Case and Nearly Half of All Prospective Jurors Had Already Concluded He Was Guilty of Capital Murder.

VI. The Trial Court Committed Prejudicial Error, and Violated Mr. Peterson's Fifth and Eighth Amendment Rights, by Admitting

[27] The Roman numerals for each claim listed below correspond the argument numbers in Mr. Peterson's Appellant's Opening Brief.

Dog Scent Identification Evidence That Provided Critical Factual Support for the State's Theory of the Case.

VII. The Trial Court Created an Unconstitutional Presumption, And Lightened the State's Burden of Proof Beyond a Reasonable Doubt, by Telling the Jury it Could Infer Mr. Peterson Was Guilty of Murder Based on (1) the Dog Tracking Evidence and (2) Any Evidence Which Supports the Accuracy Of That Evidence.

VIII. The Error in Instructing the Jury with CALJIC Number 2.16, Permitting the Jury to Convict If it Found That the Dog Tracking Evidence Was Corroborated by Other Evidence, Was Compounded by the Court's Failure to Inform the Jury That it Could Rely on the Dog Tracking Evidence to Acquit, As Well as to Convict.

IX. The Trial Court Violated Both State and Federal Law by Admitting Expert "Scientific" Evidence, Based on Where Conner's Body Was Found, to Infer That Conner Was Placed In the Water Where Mr. Peterson Had Been Fishing.

X. The Trial Court Committed Prejudicial Error, and Violated Mr. Peterson's Fifth and Sixth Amendment Rights, in (1) Excluding Critical Defense Evidence Undercutting the State's Theory of the Case, (2) Refusing to Allow Defendant To Examine Evidence Absent the Presence of State Prosecutors and (3) Refusing to Grant a Mistrial after the Jury Itself Performed an Experiment During Deliberations.

XI. The Prosecutor Committed Prejudicial Misconduct and Violated Due Process by Urging the Jury to Reject the Defense Theory and Convict Mr. Peterson of First Degree Murder Because Defense Counsel Did Not Present Demonstrative Evidence Showing the Instability of Mr. Peterson's Boat When, in Fact, the Trial Court Had Excluded this Very Evidence at the Prosecutor's Own Request.

XII. The Trial Court Erred in Discharging Juror 5 for Discussing The Case in Violation of the Court's Admonition but Then Refusing to Dismiss Other Jurors and Alternates Who

Admitted They Too Had Discussed the Case in Violation of The Identical Admonition.

XIII. The Trial Court Committed Reversible Error, and Violated Mr. Peterson's Rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, When it Refused to Seat a New Penalty Phase Jury after the Jurors Who Convicted Mr. Peterson of Murder Were Applauded by Wildly Cheering Mobs.

3. The following facts, among others to be developed, after adequate funding, discovery, investigation, and an evidentiary hearing, are presented in support of this claim

4. Petitioner incorporates as if fully set forth herein all facts, law, and argument set forth in all other claims in this petition.

5. In this petition and in the briefing on direct appeal, petitioner has set forth separate post-conviction claims and arguments regarding the numerous guilt phase and penalty phase errors, and he submits that each one of these errors independently compels reversal of the judgment or alternative post-conviction relief. However, even in cases in which no single error compels reversal, a defendant may be deprived of due process if the cumulative effect of all errors in the case denied him fundamental fairness. (*Taylor v. Kentucky, supra*, 436 U.S. At p. 487, and fn. 15; *People v. Holt* (1984) 37 Cal.3d 436, 459; see also *People v. Ramos* (1982) 30 Cal.3d 553, 581, revd. on other grounds in *California v. Ramos* (1985) 463 U.S. 992; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *United States v.*

McLister (9th Cir. 1979) 608 F.2d 785, 791.)

6. Petitioner submits that the errors in this case, asserted in both the direct appeal and in this petition, require reversal both individually and because of their cumulative impact. As explained in detail in the separate claims and arguments on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the Fifth, Sixth, Eighth, and Fourteenth Amendments, as they individually and collectively had a substantial and injurious effect or influence on the verdict, judgment and sentence and are moreover prejudicial under any standard of review.

CLAIM TWELVE:

The California Death Penalty Statute Unconstitutionally Fails To Narrow The Class Of Offenders Eligible for The Death Penalty

Petitioner's capital murder conviction, judgment of death, and confinement are unlawful and were obtained in violation of his right to be free of the infliction of cruel and unusual punishment; due process; counsel and the effective assistance thereof; and equal protection as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article 1, Sections 1, 7, 9, 12, 13,14, 15, 16, 17, 24,and 27 of the California Constitution and other state law; and international law as set forth in treaties, customary law, human rights law, and under the doctrine of *jus cogens*, because the California death penalty statute fails to narrow the class of offenders eligible for the death penalty; fails to justify the imposition of a more severe sentence on defendants like petitioner compared to others found guilty of murder; permits the imposition of a freakish, wanton, arbitrary, and capricious judgment of death; and allows the arbitrary selection of defendants such as petitioner for prosecution without consistent guidelines to ensure reliability.

In support of this claim, petitioner alleges the following facts, among others to be presented after access to adequate funding, full discovery, an evidentiary hearing, and a complete and accurate record of the proceedings in the municipal and superior courts:

1. The facts and allegations set forth in all other claims in this

petition are incorporated by this reference as if fully set forth herein.

2. To be legal and constitutional, a death penalty statute must, by rational and objective criteria, genuinely narrow the group of murderers who may be subject to the death penalty and avoid imposing death sentences in an infrequent and random fashion.

3. Interpretations of California's death penalty statute by this Court and the United States Supreme Court have placed the burden of genuinely narrowing the class of murderers to those most deserving of death on section 190.2, the "special circumstances" section of the statute.

4. California's death-eligibility or special circumstances statute was not designed to perform the constitutionally required narrowing. Both the legislature and this Court's interpretations of the statute have actually expanded the statute's reach. (See, e.g., Exhibit 37 [Declaration of Donald H. Heller] at HAB-000436-37; Exh. 39 [Declaration of Gerald F. Uelman] at HAB-000568, 000587, 000590.)

5. In 1977, the California Legislature enacted a new death penalty law. Under that law, one of twe1ve special circumstances had to be proved beyond a reasonable doubt to make a murderer death-eligible. 1977 Cal. Stats. 1255-66. Under the 1977 statute, death eligibility was to be the exception rather than the rule. (See Exh. 39 at HAB-000564-65.) However, the number

and scope of the special circumstances - the factors that permit a death-eligibility finding under California's death penalty statute - have steadily increased since 1977. (Id. at HAB-000568-87.)

6. The 1977 law was superseded in 1978 by the enactment of Proposition 7, known as the "Briggs Initiative." Petitioner was tried and convicted under this 1978 death penalty law. The objective of the Briggs Initiative's drafters was to make the law as broad and inclusive as possible, with the exception of requiring that a defendant be at least eighteen years old at the time of the commission of the homicide.

7. The Briggs Initiative sought to achieve this result in two ways, first, by expanding the scope of section 1902 to more than double the number of special circumstances compared to the prior law, and second, by substantially broadening the definitions of the prior law's special circumstances, most significantly by eliminating the across-the-board homicide mens rea requirement of the 1977 law. Under the Briggs Initiative, the majority of the special circumstances in section 190.2 have no homicidal mens rea requirement for the actual killer.

8. The drafters of the statute intended the Briggs Initiative to apply to "all homicides committed while the defendant was engaged in, or was an accomplice in, the commission of, the attempted commission of, or the immediate flight after, committing or attempting to commit serious felonies,

as well as all willful and intentional homicides," including all first-degree murders then defined by section 189. (Exh. 37 at HAB-000436.)

9. The 1978 law was also broadened by initiative in 1990 to add two additional special circumstances, and again in 1996 to add three more special circumstances.

10. At the time of the crime for which Petitioner was charged, section 190.2 contained twenty-seven different crimes punishable by death. (Exhibit 40 [Declaration of Steven Shatz] at HAB-000609.)

11. The death-eligible class created by the California death penalty scheme is too broad to comply with constitutional requirements set forth in *Furman v. Georgia* (1972) 408 U.S. 238, as a result of the broad legislative definition of first degree murder, the number of special circumstances, and judicial rulings on both the scope of first degree murder and the special circumstances.

12. At the time of Petitioner's trial and conviction, section 189 created three categories of first degree murders: (1) murders committed by listed means, (2) killings committed during the perpetration of listed felonies, and (3) willful murders committed with premeditation and deliberation.

13. Empirical evidence shows that the overwhelming majority of

murders in California could be charged as capital murders and in virtually all of them, at least one special circumstance could be proved. (See Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman*?, 72 N.Y.U. L. Rev. 1283, 1332-35 (1997).) As a result, the California death penalty statute failed to genuinely narrow the class of death-eligible murderers in violation of the Eighth and Fourteenth Amendments, and there was and is no meaningful basis upon which to distinguish the cases in which the death penalty is imposed from those in which it was not.

14. An empirical study (the "Baldus Study") of 27,453 convictions in California for first degree murder, second degree murder, or voluntary manslaughter with an offense date between January 1, 1978, and June 30, 2002, demonstrates that the special circumstances enumerated in section 190.2 fail to perform the narrowing function required by the Eighth and Fourteenth Amendments. (Exhibit 38 [Declaration of David Baldus] at HAB-000473-74.)

15. Among persons ultimately convicted of first-degree murder based on offenses committed between January 1978 and June 2002, 95% were eligible for the death penalty based on the facts of the offense under California law in place as of 2008. (*Id*. at HAB-000451.)

16. When the 95% death-eligibility rates are compared with the 100% of first degree murders who were death eligible under pre-Furman Georgia law, the resulting 5% narrowing rate demonstrates that California law

fails to limit death eligibility in accordance with Furman and its progeny. (*Id*. at HAB-000455.) Among persons convicted of first-degree murder, second degree murder, and voluntary manslaughter, 59% were eligible for the death penalty based on the facts of the offense under California law in place as of 2008.(*Id*. at HAB-000451.)

17. A comparison of this 59% death-eligibility rate under 2008 law with the rate under pre-Furman Georgia law provides a narrowing rate of 35%. (*Id*. at HAB-000455.)

18. Professor Baldus' death-eligibility rates were confirmed by independent analysis of the Supplemental Homicide Report data. (*Id*. at HAB-000460-63.) This data demonstrates that California's death-eligibility rate is the highest in the country, to the degree that it is within a fraction of a percentage point of constituting a statistical outlier. (*Id*. at HAB-000463.) When the Supplemental Homicide Report data is adjusted for the extraordinary breadth of the lying-in-wait special circumstances, California's death-eligibility rate is 50.3%, nearly identical to the rate found in the Baldus study. (*Ibid*.; Exhibit 41 [Amended Declaration of George Woodworth, Ph.D.] at HAB-000627.) Moreover, California's 50.3% rate is 3.7 standard deviations from the norm.

19. The Baldus Study establishes that California's death sentencing rate - the rate at which persons who were factually eligible for the death

penalty actually received a death sentence - is 4.6%. (Exh. 38 at HAB-000472.)

20. A survey of 596 published and unpublished decisions on appeals from first and second degree murder convictions in California, from 1988 through 1992, as well as 78 unappea1ed murder conviction cases filed during the same period in three counties, Alameda, Kern, and San Francisco, ("Appellate Study") similarly demonstrates that section 190.2 fails to perform the narrowing function required under the Eighth and Fourteenth Amendments. (Shatz & Rivkind, *The California Death Penalty Scheme, supra,* at 1327-35.)

21. The results of the Appellate Study show that under the 1978 version of section 190.2, approximately 84% of all convicted first degree murderers were death-eligible. Of those 84%, only 9.6% were actually sentenced, yielding a death sentence rate for death-eligible defendants of 11.4%. (Ex.40, at HAB-000615.) This is a conservative estimate. (*Ibid*.)

22. Since then, the death-eligibility percentage has only gone up, and the death sentence rate has consequently gone down. (*Id*. at HAB-00618.)

23. Of the cases examined in the Statewide Study, 94% were death-eligible based on the methodology of the Baldus Study. (*Ibid*.)

24. A second survey of murder conviction cases in Alameda County ("Alameda County Study") involved 803 murders (including all the death penalty cases) committed between November 8, 1978 (the effective date of the 1978 death penalty statute) and November 7, 2001. (Steven F. Shatz, The Eighth Amendment, *The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 Fla. L. Rev. 719 (2007); see also Exh. 04 at HAB-000613.)

25. The results of the Alameda County Study revealed a death eligibility of 85.1% and a death sentence rate for convicted first degree murderers who were eligible for the death penalty of 9.5% under the 1990, 1996 and 2000 versions of the statute. (*Id*. at HAB-000620.)

26. When applying 2000 law to the Alameda County Study, 91.5% of cases were death-eligible, and the death sentence rate for death-eligible defendants was 5.9%. (*Ibid*.)

27. A third survey of murder conviction cases throughout California ("Current Shatz Study") involved the review of all cases for which a person was convicted of first-degree murder in California from 2003 to 2005. (*Id*. at HAB-000614.)

28. The results of the Current Shatz Study revealed a death sentence rate of 5.5% for convicted first-degree murders who were eligible for the death

penalty. (*Id*. at HAB-000620.) Of the cases examined in the study, 84.6% were death-eligible. (*lbid*.)

29. Under the 2009 version of the death penalty statute, the death eligibility rate for the Current Shatz Study was 87.6%, and the death sentence rate was 6.3%. (*Ibid*.)

30. The death sentence rates calculated by the Baldus Study, the Statewide Study, and the Alameda County Study are significantly below the assumed 15-20% death sentence rate of those convicted of murder at the time of *Furman*, a percentage implicitly found by the majority of the United States Supreme Court to create enough risk of arbitrariness to violate the Eighth Amendment. See *Furman v. Georgia*, *supra,* 408 U.S. at 386, n.ll (Burger, J., dissenting).

31. California's death penalty scheme is broader than that of any other state by several different measures. First, the rate of death-eligibility among California homicides is the highest among death penalty jurisdictions. (Exh. 01 at HAB-000460, 000463.) Second, California's death-eligibility rate is so much higher than any other death penalty jurisdiction that it can be described as an outlier. (*Ibid*.) Third, the rate at which California's death penalty statute narrows death eligibility from pre-*Furman* Georgia law to 2008 California law is lower than similar rates for other states. (*Id*. at HAB-000459.)

32. Section 190.2's failure to narrow the death-eligible class is neither corrected nor ameliorated by controls at other points in the process.

33. The present death penalty law in California is a wanton and freakish system that randomly chooses a few victims for the ultimate sanction from among the thousands of murderers in California. See *Furman v. Georgia*, 408 U.S. at 310.

34. In general, state action that is bereft of standards, without anything to guide the actor and nothing to prevent the decision from being completely arbitrary, is a violation of a person's right to due process of law. *Kolender v. Lawson* (1983) 461 U.S. 352, 358. This standard applies to prosecutors as much as other state actors. (*Ibid*.)

35. Prosecutors sometimes do not seek the death penalty for capital offenses, even in cases involving multiple murders. See, e.g., *People v. Bobo* (1990) 229 Cal. App. 3d 1417, 1421-1422 (defendant convicted of arson and three counts of first-degree murder by stabbing; death penalty not sought); *People v. Moreno* (1991) 228 Cal. App. 3d 564, 567-568 (defendant convicted of two counts of first-degree murder, burglary and attempted robbery; death penalty waived). The absence of standards to guide such decisions falls under Kolender and other vagueness cases.

36. There is no statewide standard by which the decision to seek the

death penalty may be reviewed, there is no oversight agency to insure uniformity, and there is no authority accorded the trial court to review the death decision for abuse of discretion. Therefore, there is a substantial risk of county-by-county arbitrariness, in violation of the Equal Protection Clause. See *Bush v. Gore* (2000) 531 U.S. 98. Individual prosecutors in California are afforded completely unguided discretion to determine whether to charge special circumstances and seek death, thereby creating a substantial risk of county-by-county arbitrariness. (Exh. 39 at HAB-000587-90.)

37. Because petitioner was prosecuted under this overly inclusive and unconstitutional statute, his death sentence is invalid, and a writ of habeas corpus should issue setting it aside.

CLAIM THIRTEEN:

Sentences of Death In California Are Unconstitutionally Dependent On the County In Which the Defendant Is Charged.

Petitioner's capital murder conviction, judgment of death, and confinement are unlawful and were obtained in violation of his right to be free of the infliction of cruel and unusual punishment; due process; counsel and the effective assistance thereof; and equal protection as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article 1, Sections 1, 7, 9, 12, 13,14, 15, 16, 17, 24,and 27 of the California Constitution and other state law; and international law as set forth in treaties, customary law, human rights law, and under the doctrine of jus cogens, because the selection of those to receive the penalty of death and execution is based on the county in which the defendant was tried, thus ensuring that the California death penalty is imposed in a freakish, wanton, arbitrary, and capricious manner.

Petitioner hereby incorporates by reference each and every allegation and claim contained in this Petition, and all exhibits that support such allegations and claims, as if fully set forth herein. The facts that support this claim, among others to be developed after full investigation, discovery, and access to this Court's subpoena power, adequate funding for investigators and experts, and an evidentiary hearing, are as follows:

1. The present death penalty law in California is a wanton and freakish system that randomly chooses a few victims from among the thousands of murderers in California for the ultimate sanction. See *Furman v. Georgia* (1972) 408 U.S. 238, 310.

2. California's death penalty scheme is broader than that of any other state by several different measures. First, the rate of death eligibility among California homicides is the highest among death penalty jurisdictions. (Exh. 41 at HAB-000626-27.) Second, California's death-eligibility rate is so much higher than any other death penalty jurisdictions that it can be described as a statistical outlier. (*Ibid*.; Exh. 38 at HAB-000462-63.) Third, California's narrowing rate, or the rate at which California's death penalty statute narrows death-eligibility from pre-*Furman* Georgia law to 2008 California law, is lower than similar rates for other states. (Exh. 41 at HAB-000627.)

3. In general, state action that is bereft of standards, without anything to guide the actor and nothing to prevent the decision from being completely arbitrary, is a violation of a person's right to due process of law. *Kolender v. Lawson* (1983) 461 U.S. 352, 358.) This standard applies to prosecutors as much as other state actors. (*Ibid*.) Prosecutors sometimes do not seek the death penalty for capital offenses, even in cases involving multiple murders. See, e.g., *People v. Bobo* (1990) 229 Cal. App. 3d 1417, 1421-1422 (defendant convicted of arson and three counts of first-degree

murder by stabbing; death penalty not sought); *People v. Moreno* (1991) 228 Cal. App. 3d 564, 567-568 (defendant convicted of two counts of first-degree murder, burglary and attempted robbery; death penalty waived). The absence of standards to guide such decisions falls under Kolender and other vagueness cases.

4. There is no statewide standard by which the decision to seek the death penalty may be reviewed, there is no oversight agency to insure uniformity, and there is no authority accorded the trial court to review the death decision for abuse of discretion. Therefore, there is a substantial risk of county-by-county arbitrariness, in violation of the Equal Protection Clause. See *Bush v. Gore* (2000) 531 U.S. 98. Individual prosecutors in California are afforded complete discretion to determine whether to charge special circumstances and seek death, thereby creating a substantial risk of county-by-county arbitrariness. (Exh. 39 at HAB-000587.)

5. Because petitioner was prosecuted under this overly inclusive and unconstitutional statute, his death sentence is invalid and a writ of habeas corpus should issue setting it aside.

CLAIM FOURTEEN:

Petitioner Was Denied His Right to be Tried by a Fair and Impartial Jury

Petitioner's convictions, sentence, and confinement are unlawful and were unconstitutionally obtained in violation of his rights to due process; a fair and impartial jury selected by nondiscriminatory practices from a fair cross-section of the community; equal protection of the laws; confrontation; effective assistance of counsel; notice of the evidence against him; conviction upon proof beyond a reasonable doubt on record evidence by a unanimous jury; the enforcement of state-mandated jury selection procedures and jury trial rights, including the exercise of peremptory challenges and challenges for cause, and a unanimous verdict of twelve jurors; and to reliable guilt and penalty assessments based upon accurate, reliable, relevant, and non-prejudicial record evidence as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California Constitution analogues, international law as set forth in treaties, customary law, human rights law, including the International Convention on the Elimination of All Forms of Racial Discrimination, and under the doctrine of jus cogens, by discriminatory and improper jury selection practices and processes because of the trial court's bias and improper rulings during jury selection, the prosecutor's discriminatory jury selection practices, and trial counsel's failure to object to the court's jury selection practices.

Those facts and allegations regarding the death qualification process used in Petitioner's case set forth in Argument II of Appellant's Opening Brief and Appellant's Reply Brief are incorporated herein. In support of this claim, Petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The death qualification of Petitioner's jury and the removal of jurors because of their views concerning the death penalty violated his state and federal constitutional rights to a fair trial, an impartial jury, a jury drawn from a fair cross-section of the community, equal protection, due process, and a reliable determination of guilt or innocence and penalty.

2. During jury selection, the prospective jurors completed a questionnaire and were questioned by the trial court about their views on the death penalty. The written questionnaire and the court's oral questioning were designed and used to identify the prospective jurors' views in favor of and against the death penalty. The trial court excused prospective jurors deemed not qualified to serve based upon their opposition to the death penalty.

3. Empirical research demonstrates that the death qualification process does not ensure that jurors will consider a life sentence and give meaningful consideration to a capital defendant's mitigation evidence, and it

arbitrarily and unfairly skews the jury and the trial process against the defendant and his defense during both the guilt and penalty phases of his trial. Research shows that death qualification results in juries that are more conviction-prone and death-prone than other juries. (See, e.g., Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 777-93 (2006).)

4. Studies of actual death-qualified jurors who participated in capital trials, including in California, demonstrate that many jurors approached their task believing that the death penalty is the only appropriate penalty for the kinds of murder commonly tried as capital offenses. (See, e.g., William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: The Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51, 62-63 (2003).)

5. The results of reliable studies establish that the death qualification voir dire process creates an impermissibly unacceptable risk that death-qualified jurors will unlawfully and categorically refuse to consider and give full effect to mitigating evidence that the jury must constitutionally consider, such as abuse and neglect as a child and the extent of premeditation. (See Marla Sandys & Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality in America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, 402-06

(James R. Acker et al. eds., 2nd ed. 2003).)

6. Research shows that the penalty determination of death-qualified jurors is distorted by a preoccupation with evidence of guilt, a perception that death is required if aggravation is presented, a belief that mitigation must be tethered to the crime, and a pattern of failing to discuss and consider mitigation. (See, e.g., Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 Brook. L. Rev. 1011, 1019-53 (2001).)

7. The death qualification process itself influences the mindset of the jurors, their evaluation of the evidence, and the deliberative process, by biasing the jurors toward pro-prosecution and pro-death sentence views. (See, e.g., Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 Law & Hum. Behav. 121 (1984).)

8. As shown by several studies, death qualification disproportionately and systematically excludes from capital juries jury eligible citizens who are minorities, women, and religious, all of whom constitute distinctive groups in the community. Numerous studies have shown that proportionately fewer blacks than whites and more women than men advocate for the death penalty. The process has a detrimental effect on

the representation of blacks and women on capital juries. Death qualification tends to eliminate proportionately more blacks than whites and more women than men from capital juries, thereby adversely affecting two distinctive groups in violation of the constitutional right to a jury that is drawn from a fair cross-section of the community.

9. The prosecutor in this case improperly and unconstitutionally used the death-qualification process and peremptory challenges to systematically exclude prospective jurors based on their views on the death penalty, including those who declared they could impose a death sentence but had reservations about the death penalty, further illegitimately skewing the jury in favor of a death sentence.

10. Only select criminal defendants, like petitioner, against whom the prosecutor has decided to seek a death sentence-and at times those jointly tried with a capital defendant-are subject to the bias inherent in a death-qualified jury.

11. Petitioner's trial by a death-qualified jury, conviction, and death sentence offend the evolving standards of decency and requisite heightened reliability under the State and Federal Constitutions.

12. Petitioner's death-qualified jury was arbitrarily assembled, biased against him and his defense, and failed to provide him a reliable and

individualized determination of his guilt or innocence and penalty as mandated by the federal and state constitutions. The death qualification of prospective jurors generally, and as applied in petitioner's case, constitutes structural constitutional error requiring reversal of the conviction, special circumstance findings, and death sentence. Alternatively, petitioner has demonstrated that the constitutionally flawed death qualification of his jury had a substantial and injurious effect and influence on the determination of the jury's guilty verdicts, special circumstance findings, and penalty determination, and he is entitled to relief.

CLAIM FIFTEEN:

The Death Penalty as Currently Administered in California is Cruel and Unusual and Unconstitutional.

Petitioner's capital murder conviction, judgment of death, and confinement are unlawful and are in violation of his rights to be free of the infliction of cruel and unusual punishment; due process; counsel and the effective assistance thereof; meaningful post-conviction review; and equal protection as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article 1, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, and 27 of the California Constitution and other state law; and international law as set forth in treaties, customary law, human rights law, and under the doctrine of jus cogens, because, as applied, California's capital punishment system fails to protect petitioner's basic fundamental constitutional right to be free of cruel and unusual punishment.

In support of this claim, petitioner alleges the following facts, among others to be presented after access to adequate funding, full discovery, issuance of an order to show cause, and an evidentiary hearing. The facts and allegations set forth in all other claims in this petition are incorporated by this reference as if fully set forth herein:

1. State sponsored killing as a form of punishment has now reached the point of being unacceptable in American society. Although the Supreme Court in *Gregg v. Georgia* (1976) 428 U.S. 153, held that the

death penalty was not per se "cruel and unusual," it also acknowledged that the Eighth Amendment is "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (*Id.* at p. 171 (plurality opinion) (internal citations and quotations omitted).) "[T]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Id*. at p. 173 (quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101).) Recent events and shifting public opinion prove that modem standards of decency have now evolved to the point where the death penalty is now condemned as cruel and unusual and inhumane.

2. As Justice Marshall predicted, the American people have now become "fully informed as to the purposes of the death penalty and its liabilities" and have concluded that as such it is "morally unacceptable." (See *Gregg v. Georgia*, *supra*, 428 U.S. at 232 (Marshall, J., dissenting).)

3. Indeed the Supreme Court - in a landmark case - found that it "cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." (*Atkins v. Virginia* (2002) 536 U.S. 304, 321 n.25.)

4. The Governor of Illinois commuted the death sentence of every person on death row in the state after it was revealed that thirteen people had been wrongly convicted and sent to death row. (See, e.g.,

Reynolds Holding, *Historic Death Row Reprieve / Illinois: Gov. Ryan Spares 167, Ignites National Debate*, S.F. Chron., January 12, 2003, at A-1.) This abysmal record had caused the State of Illinois to become the focal point of public outcry for having the most "unreliable" death penalty scheme in the country.

5. And, as events unfolded in 2011, Illinois abolished the death penalty. (*Illinois Abolishes the Death Penalty*, Associated Press, March 9, 2011.) Thus, it is highly telling that a recent study reveals that California's death penalty scheme is just as woeful in assuring reliability as Illinois' death penalty scheme. (See Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment to the Capital Punishment System of California*, 44 Santa Clara L. Rev. 101 (2003).)

6. In total, now retired Chief Judge Ronald George testified, the problems amount to a dysfunctional capital sentencing system. (See Exhibit 42 [California Commission on the Fair Administration of Justice Report and Recommendations] at HAB-000665.)

7. This Court thus has a duty to petitioner and the people of California to finally address the question of whether the death penalty as now administered is cruel or unusual under the Eighth Amendment and parallel provisions of the California Constitution. As detailed extensively elsewhere in this petition, this Court has repeatedly held that the jury's

decision to impose the death penalty in a given case is a "moral" and "normative" one. Yet, this Court has never determined whether the death penalty as now administered in California is appropriate under this "moral" and "normative" standard.

8. As Justice Marshall predicted, any such "fully informed" analysis can only reach one conclusion. The death penalty is simply cruel and unusual and inhumane, and thus unconstitutional.

9. As Justice Blackmun concluded after years of "tinker[ing] with the machinery of death":

> For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants "deserve" to die? – cannot be answered in the affirmative. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

(*Callins v. Collins* (1994) 510 U.S. 1141, 1145-1146 (Blackmun, J.,

dissenting) (citations and footnote omitted; emphasis added).)

10. In this case, this Court should now reach this same "self-evident" conclusion.

11. Indeed, it simply cannot be said that the death penalty in this country and state is administered in a non-arbitrary, fair, and equal manner. For instance, the so-called "Green River" killer who allegedly killed nearly fifty people was sentenced to life in prison, not death. (See, e.g., Tomas Alex Tizon, *Green River Killer gets 48-life sentence*, S.F. Chron., December 19, 2003, at A-3.) When these typically egregious cases are not deemed "death worthy," it makes arbitrary a case like the instant one which has been deemed "death worthy." As Justice Long of the New Jersey Supreme Court has stated: “It is time for the members of this Court to accept that there is simply no meaningful way to distinguish between one grotesque murder and another for the purpose of determining why one defendant has been granted a life sentence and another is awaiting execution.” (*State v. Timmendequas* (N.J. 2001) 773 A.2d 18 (Long, J., dissenting).)

12. Moreover, across the nation, death sentences are being returned at a lower and lower rate. (See, e.g., Mike Tolson, *Jury-delivered Death Sentences Continue to Drop*, Hous. Chron., December 19, 2003 ("For the fourth straight year, the number of death sentences, handed out by the

nation's juries has declined – a fact that opponents and reformers say indicates increasing public awareness of problems with the American system of capital punishment.").)

13. Not only does this decrease in death penalty verdicts demonstrate society's revulsion at the death penalty and its current administration, but it also demonstrates how arbitrary its administration truly is. Given the growing opposition to the death penalty in this State, if petitioner were tried today he likely would not get the same death sentence that he received when tried a decade ago death verdicts were being handed down at a record rate. When the year of one's trial determines whether one lives or dies, it is no different than the lightning-esque arbitrariness condemned in *Furman*. (See *Furman v. Georgia*, *supra*, 408 U.S. at 309 (Stewart, J., concurring).

14. The United States is one of only a handful of nations in the world that regularly employs the death penalty. (See Exhibit 43 [Amnesty International Death Sentences and Executions Report 2014] at HAB-000815, HCP-000819.) This country stands with China, Iran, Nigeria, and Saudi Arabia in still executing large numbers of people. All of the nations of Western Europe have abolished the death penalty. Even in war-occupied Iraq, the death penalty was abolished. (See, e.g., Borzou Daragahi, Death Penalty on Premier's Security Agenda / He also Suggests Reconstituting Intelligence Police, S.F. Chron., June 11, 2004, at A-3 ("The

death penalty was suspended in April 2003 by U.S. Gen. Tommy Franks, who was head of Central Command, as the U.S.-led coalition invaded the country and toppled Hussein's government.").) The death penalty is an anachronism and it is simply wrong. The rest of the world has "evolved" to the point where the society of nearly every country has deemed capital punishment to be repugnant. California should now follow suit.

15. In sum, this Court must finally act and hold that the death penalty is unconstitutional as currently applied in California and therefore must now vacate petitioner's death sentence.

CLAIM SIXTEEN:

Impediments and Deficiencies in the Post-Trial Processes Render Petitioner's Convictions and Sentences Unreliable and Unconstitutional.

Impediments and deficiencies in the post-conviction process deprive Petitioner of a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty; the effective assistance of counsel; confrontation and compulsory process; presentation of a defense; a fair trial; competent expert assistance; the enforcement of mandatory state laws; freedom from the infliction of cruel and unusual punishment; a non-arbitrary penalty assessment, based on reason rather than passion and prejudice; equal protection of the law; entitlement to the benefits of state created liberty interests, and due process of law as guaranteed by the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, 27, and 28 of the California Constitution; mandatory state decision law, statutes, and rules, including Penal Code sections 190.6, 190.7, 1138, 1239-41, 1367 et seq., and 1473, and Government Code sections 15421 and 68652; and international human rights law as established by treaties, customary law, human rights law, including Article 14 of the International Convention on Civil and Political Rights and under the doctrine of jus cogens.

The facts, in addition to those to be presented in an evidentiary hearing after petitioner's counsel are afforded a reasonable opportunity for

full factual investigation and development through access to a complete and accurate appellate record, adequate time, staffing and funding, and access to this Court's processes including subpoena power and other means of discovery, include, but are not limited to, the following:

1. The facts and allegations contained in each and every claim contained in this Amended Petition and its accompanying exhibits, and the errors set forth on appeal, are hereby incorporated by this reference as if fully set forth herein.

2. A reasonable opportunity for full factual investigation and development through, among other things, timely appointment of counsel, adequate funding, access to subpoena power and other court process, comprehensive discovery, other means of compulsory process, and an evidentiary hearing, has not been provided to Petitioner or his counsel. Despite these state-imposed impediments, the evidentiary bases that are reasonably obtainable under the present circumstances and set forth in this Petition adequately support each claim and justify the issuance of an order to show cause and the grant of relief.

3. Petitioner has been deprived of the effective assistance of counsel and fair appellate and post-conviction procedures, because the appointment of counsel was not timely, a deficiency that routinely has occurred in California capital cases.

A. Indigent death-sentenced defendants such as petitioner are entitled to a mandatory and automatic appeal and the right to pursue post-conviction relief with the aid of counsel. (Cal. Penal Code §§ 1239-41 (affording counsel for automatic appeal); Cal. Gov't Code § 15421 (authorizing appointment of the State Public Defender); Cal. Gov't Code § 68662 (affording counsel for state habeas corpus).)

B. This Court has set forth standards that govern adjudication of habeas corpus petitions with, inter alia, the following goal: "[E]nsuring that potentially meritorious habeas corpus petitions will be presented to and heard by this Court in a timely fashion . . . ." (Cal. Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3 (2012) [hereinafter Supreme Court Policies].) In order to effectuate this goal and protect [Mr. Peterson's] statutory and constitutional rights, habeas corpus counsel must be timely appointed and provided with reasonably resources and time to develop and present potential claims for relief.

4. The funding and resources available to habeas corpus counsel for their representation of petitioner are inadequate, render petitioner and his counsel unable to develop, obtain, and present potential facts and arguments in support of his claims for relief, and result in constitutionally deficient representation.

5. Petitioner and counsel have only had access to unduly limited, statutorily circumscribed discovery while preparing this habeas corpus petition, and otherwise lack the ability to issue subpoenas or access to other legal process to compel witness testimony or disclosure of records and other tangible material related to potentially meritorious grounds for relief. Current law provides death-sentenced petitioners like petitioner with "only limited discovery," to prepare habeas corpus petitions. (*In re Steele* (2004) 32 Cal. 4th 682, 695.

6. The Court, by holding that the judiciary has no inherent power to grant post-conviction discovery, has disabled itself from granting discovery not otherwise provided by statute until an order to show cause is issued. (*In re Gonzale z* (1990) 51 Cal. 3d 1179, 1258-61.)

7. In *Barnett v. Superior Court* (2010) 50 Cal. 4th 890, this Court further limited post-conviction discovery by requiring defendants to make a showing that requested discovery materials actually exist. (*Id.* at p. 894.) ["Because section 1054.9 provides only for specific discovery and not the proverbial 'fishing expedition' for anything that might exist, defendants seeking discovery beyond recovering what the prosecution had provided to the defense before trial must show a reasonable basis to believe that specific requested materials actually exist."].)

8. This Court has declined to order depositions, except in

extraordinary circumstances and as provided in Penal Code section 1335, to allow the service of interrogatories or of subpoenas, to authorize document production requests or to allow any discovery to habeas corpus petitioners that is not expressly authorized by statute.

9. Many witnesses in this case have refused to speak with petitioner's counsel and investigators about Mr. Peterson's case. Without subpoena power, petitioner is utterly unable to discover important facts that would support the claims made in this petition.

10. Petitioner has attempted to obtain evidence from the following witnesses, who have refused to speak about the case, or refused to sign declarations. Below, petitioner sets forth the certain of those witnesses and the relevance to the claims alleged in this Petition:

A. Steven Todd: Claim Nine

Mr. Todd burglarized the house across the street from the Peterson's on the morning of Laci's disappearance. Mr. Todd made statements that Laci saw him burglarizing the home and that he threatened her. Mr. Todd refused to speak to petitioner's investigator.

B. Adam Tenbrink: Claim Nine

Mr. Tenbrink reported hearing Mr. Todd's statements regarding Laci Peterson. Mr. Tenbrink refused to speak to petitioner's investigator.

C. Lt. Xavier Aponte: Claim Nine

Lt. Aponte obtained a tape recording of Adam Tenbrink's statements to his brother Shawn Tenbrink, describing Mr. Todd's statements. He provided a declaration in support a motion for new trial in which he stated that Modesto Police also obtained a copy of that tape. Lt. Aponte refused to speak to petitioner's investigator.

11. California's death penalty review process does not provide a constitutionally adequate opportunity to be heard on direct appeal or in habeas corpus, and renders petitioner and his counsel unable to develop, obtain, and present potential facts and arguments in support of meritorious claims for relief. As a result of the many flaws in the process and impediments confronting petitioner and his counsel, the full scope of the factual allegations and evidence in support of the claims in this Amended Petition are not reasonably obtainable.

12. The Court cannot provide petitioner with constitutionally adequate review in order to ensure that the results of his trial meet the constitutional requirement of heightened reliability. Moreover, California's appellate and post-conviction procedures themselves have not provided heightened review and therefore have failed to eliminate the arbitrariness in who is executed and who lives, as the U.S. Constitution mandates. These constitutional deficits mandate that petitioner's sentence be modified to life without the possibility of parole.

CLAIM SEVENTEEN:

California's Death Penalty System Is Wracked By Delay And Arbitrariness To the Point That It Fails To Serve Any Penological Purpose. It Therefore Violates State and Federal Constitutional Protections Against Cruel, Torturous, and Unusual Punishment and International Law

California's appellate and postconviction processes in capital cases fail to provide Mr. Peterson with a full, fair, and timely review of his convictions and sentence, rendering his confinement unnecessarily lengthy, torturous, and inhumane, and his execution unconstitutional. As a result of the inherent flaws in California's system, the state arbitrarily and capriciously subjects petitioner to cruel and unusual punishment. The unfairness that petitioner may be one of the very few on whom a death sentence is carried out and the amount of time he has been and will continue to be on death row renders his death sentence and continued confinement unlawful and violative of his rights to due process; equal protection; meaningful appellate review; and freedom from the infliction of torture and cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California constitutional analogues; state statutes, decisional law, and other mandatory rules; and international law as set forth in treaties, customary law, international human rights law, and international decisional law, and under the doctrine of *jus cogens*.

The facts and legal bases for this claim, in addition to those that will be presented after petitioner's counsel are afforded a reasonable opportunity

for full factual investigation, adequate funding and resources, complete discovery as required by the United States and California Constitutions and Penal Code section 1054.9 and other California Law, a complete and accurate appellate record, access to this Court's subpoena power and other means of discovery, access to material witnesses, access to this Court's processes, and an evidentiary hearing, include but are not limited to the following:

1. The facts and allegations in each claim in this Petition along with the accompanying citations and exhibits in support thereof are incorporated by this reference as if fully set forth herein.

2. As more fully discussed below, *Jones v. Chappel* (C.D.Cal.2014) 31 F.Supp.3d 1050, revd. on other grounds sub nom. *Jones v. Davis* (9th Cir. 2015) __ F.3d __ [2015 WL 6994287], recently held that the California death penalty scheme is unconstitutional. Because of delays inherent in the system, the death penalty is carried out only against a random and arbitrarily selected tiny group of defendants based on factors having nothing to do with the nature or date of the crime. Under such a system, any link between an execution and the legitimate penological goals of retribution and deterrence has been completely severed. A system which imposes the death penalty without furthering these goals cannot stand consistent with the Eighth Amendment. The death sentence in this case must be reversed.

3. Because of delays inherent in California's death penalty system, and the fact that defendants are randomly and arbitrarily selected for execution, the link between an execution and any possible deterrence or retribution served by that execution has been severed and, as such, the death penalty in California violates the eighth amendment.

4. In *Gregg v. Georgia* (1976) 428 U.S. 153, the Supreme Court held that the punishment of death -- in the abstract -- did not violate the Eighth Amendment. In reaching this conclusion, a plurality of three justices -- Stewart, Steven and Powell -- noted that executions can "serve two principal social purposes: retribution and deterrence . . . ." (*Id*. at p. 183.) The *Gregg* plurality was careful to add, however, that as with any penal sanction, an execution "cannot be so totally without penalogical justification that it results in the gratuitous infliction of suffering." (428 U.S. at p. 183.)

5. Several years earlier, Justice White had expressed this same view. In his separate opinion in *Furman v. Georgia* (1972) 408 U.S. 238 Justice White noted that when the death penalty "ceases realistically to further [retribution or deterrence] . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." (408 U.S. at p. 312,

White, J., conc.) More recently the Court as a whole has recognized this exact point, observing that the death penalty is excessive under the Eighth Amendment if it is grossly disproportionate to the crime or "does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." (*Kennedy v. Louisiana* (2008) 554 U.S. 407, 441.)

6. This was the precise basis for the Court's decision in *Furman* striking down the death penalty as it was then administered. The critical concurring opinions of Justices White and Stewart made clear their views that retribution and deterrence were legitimate goals of the criminal law. (408 U.S. at pp. 308 (Stewart, J., concurring); 312-313 (White, J., concurring). Nevertheless, both struck down the then-existing death penalty statutes because -- in the absence of appropriate standards to ensure that these legitimate penal goals were effectively furthered -- the connection between these legitimate goals and the imposition of death was arbitrary. In Justice Stewart's view, a scheme in which it was impossible to determine why a "selected handful" of defendants had been selected for the death penalty was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." (408 U.S. at p. 309.)

7. In the years since *Furman*, it is fair to say that the Supreme Court's capital jurisprudence has been largely devoted to refining procedural and substantive standards designed to minimize arbitrariness in

the imposition of death and therefore more appropriately achieve the penal goals which justify the ultimate sanction. Once the link is severed between the legitimate goals of punishment and the execution itself, an execution violates the Eighth Amendment.

8. The question to be resolved here is whether *Furman* -- or any of the Supreme Court's subsequent cases -- suggests that arbitrariness in rendering a person eligible for the death penalty (which was the flaw specifically involved in *Furman*) is the only way the link between an execution and the goals of punishment can be severed. Mr. Peterson's position is simple: the link between the goals of punishment and an execution can also be severed by a system in which -- because of extraordinary delays which plague California's death penalty system -- defendants are selected for actual execution in an entirely random and arbitrary fashion.

9. Prior to *Jones*, several jurists had focused on the delay component of this issue and suggested that an execution after extreme delay would serve neither deterrence nor retribution, and would therefore violate the Eighth Amendment. Thus, speaking of deterrence, Justice Stevens, joined by Justice Breyer, has noted that "the additional deterrent effect from an actual execution now, on the one-hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal." (*Lackey v. Texas* (1995) 514 U.S. 1045, 1045-1046

(1995)(Stevens J., joined by Breyer, J.)) Speaking to both deterrence and retribution, Justice Stevens concluded that "it is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. . . . Moreover, after such an extended period of time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted." (*Lackey*, 514 U.S. at 1045. *See also Ceja v. Stewart* (9th Cir. 1998) 134 F.3d 1368, 1373-1376 (Fletcher, J., dissenting from denial of stay of execution in connection with original habeas corpus petition) (urging a stay of execution, and a hearing on the merits, to decide if execution after 23 years on death row furthers either the retribution or deterrence goals underlying death penalty).)

10. Other jurists have addressed the same question of delay in connection with the "cruell and unusuall Punishments" provision of the English Declaration of Rights of 1689. This provision is the precursor to the Eighth Amendment. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 966 (Scalia, J., concurring); *Gregg v. Georgia* (1976) 428 U.S. 153, 169-170.) In *Riley v. Jamaica* (Privy Council 1983) 1 A.C. 719, 734, Lord Scarman -- joined by Lord Brightman -- concluded that a six to seven year delay between death sentence and execution "would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689."

11. Although that view was a dissenting view only, ten years later

the Privy Council unanimously overruled *Riley* and held that an execution 14 years after imposition of sentence was impermissible. (*Pratt v. Jamaica* (Privy Council 1994) 2 A.C. 1, 29, 33-34. *Accord Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General* (Aug. 4, 1999, Zimbabwe Supreme Court) 1 Zimb. L.R. 239, 240, 269(S)(delays of five and six years were "inordinate" and constituted " 'torture or . . . inhuman or degrading punishment or other such treatment."); *Soering v. United Kingdom* (1989, European Court of Human Rights)11 Eur.Ct.H.R. (Ser. A), pp. 439, 478, ¶ 111(European Convention on Human Rights prohibited the United Kingdom from extraditing a potential defendant to Virginia in large part because the 6-to-8 year delay that typically accompanied a death sentence amounts to "cruel, inhuman, [or] degrading treatment or punishment"). See *Roper v. Simmons* (2005) 543 U.S. 551, 575 (recognizing long tradition of "referr[ing] to the laws of other countries and to international authorities as instructive for . . . interpret[ing] . . . the Eighth Amendment's prohibition of 'cruel and unusual punishments.'").[28]

12. This case certainly involves the question of delay. Here, the crimes occurred in 2002. Yet the state is not even close to executing petitioner. Assuming petitioner does not prevail in his appeal -- which

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[28] The Supreme Court's tradition of relying on the law of other jurisdictions in applying the Eighth Amendment dates back at least to 1958. (See, e.g., *Trop v. Dulles* (1958) 356 U.S. 86, 102-103. Accord *Atkins v. Virginia* (2002) 536 U.S. 304, 317, fn. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830-831, and fn. 31 (1988); *Coker v. Georgia* (1977) 433 U.S. 584, 596, fn. 10.)

likely will not be resolved for several years – he will not even complete his state habeas proceedings in this Court until several more years have passed. And then, of course, comes federal court.

13. But as discussed more fully below, in light of the California system, this case (like *Jones*) involves more than delay. Precisely because of the systemic problems which plague the California death penalty system, the delay has resulted in a system in which a random and arbitrarily selected few defendants are plucked from the pool of execution- eligible defendants as the only defendants to be actually executed. That is what the court in *Jones* found violative of the Eighth Amendment.

14. In *Jones v. Chapell*, the District Court undertook an extensive examination of the current death penalty system in California. The court found that systemic delay rendered the infliction of the death penalty in California arbitrary and capricious, and therefore in violation of the Eighth Amendment proscription of cruel and unusual punishment. The court noted (1) it took an average of three to five years before capital defendants were given appellate counsel, (2) it took an average of four years for counsel for both the defense and the state to fully brief the case, (3) it took an average of two to three years before oral argument would be scheduled, (4) it took an average of eight to ten years before a capital defendant was given a habeas lawyer, (5) it took an average of 49 months for the court to decide the habeas matter once habeas briefing had been completed.

15. The court commented on the consequences of this delay. Thus, of the 900 individuals who have received a capital judgment since 1978, only 13 have been actually executed. 94 of the 900 defendants sentenced to death have died of causes other than execution while 39 have been granted relief from their death sentences by the federal courts and have not been resentenced to death. Of the 81 capital defendants who have completed federal review since 1978, 17 await execution. Each of these 17 inmates has been on Death Row for more than 25 years, while 8 of them have been there for more than 30 years. There has not been an execution in California since 2006. In other words, because of delays inherent in the system, the selection of those to be executed was both random and arbitrary: "California's death penalty system is so plagued by inordinate and unpredictable delay that the death sentence is actually carried out against only a trivial few of those sentenced to death."

16. Harkening back to the plurality in *Gregg* and Justice White's opinion in *Furman*, the court in *Jones* concluded that the California death penalty was unconstitutional precisely because the critical link between an execution on the one hand and retribution or deterrence had been severed:

> [T]he dysfunctional administration of California's death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding . . . actual execution. Indeed, for most, systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever

> impose: life in prison, with the remote possibility of death. As for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary.

(*Jones v. Chappel, supra*, 31 F.Supp.3d at 1053.)

17. The court found that the delays in locating and appointing appellate and habeas counsel, setting oral argument and ruling on the state habeas petition, were *not* attributable to the efforts of the defendants to inject delay into the system. Instead, these delays were "created by the State itself, not by the inmates' own interminable efforts to delay." As the court concluded, "[t]hese delays -- exceeding 25 years on average -- are inherent to California's dysfunctional death penalty system, not the result of individual inmates' delay tactics, except perhaps in isolated cases . . . ."

18. As discussed above, the facts in this case show the same (or worse) kinds of delays than were discussed in *Jones*. Judgment of death was imposed in petitioner's case in January of 2004. Briefing in his appeal was completed in 2015. Oral argument has not been scheduled, and may not be for several years. This habeas petition will not be filed until more than 10 years after his conviction. Petitioner will thus be litigating in state court for several more years. At that point he will be just beginning his journey in federal court. And as this Court well knows -- and as the *Jones* court recognized -- that journey may take him back to this Court for an

exhaustion petition, a process that itself averages several years.

19. The court in *Jones* explained why such a scheme is unconstitutional. Precisely because of delays inherent in the California system -- delays which are plainly present in this case as well -- there is utterly no discernible pattern to identify those defendants actually executed. Under California's death penalty scheme -- to paraphrase Justice Stewart's observation from *Furman* – the process by which defendants are actually selected for execution is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." (408 U.S. at p. 309.)

20. Execution of a random and arbitrarily selected trivial number of execution-eligible defendants -- after between 25 and 30 years on death row -- serves neither deterrence nor retribution. Because an execution which furthers neither deterrence nor retribution violates the Eighth Amendment -- indeed, this was the exact flaw of the system struck down in *Furman* – the *Jones* court correctly ruled that the California death penalty is unconstitutional. Mr. Peterson's judgment of death must be set aside.

CLAIM EIGHTEEN:

Petitioner's Sentence of Death Is Illegal and Unconstitutional under the Eighth and Fourteenth Amendments as Well as the California Constitution, Because Execution by Lethal Injection, the Method by Which the State of California Plans to Execute Him, Violates the Prohibition of Cruel and Unusual Punishment.

Petitioner's capital murder conviction, judgment of death, and confinement are unlawful and are in violation of his rights to be free of the infliction of cruel and unusual punishment; to due process; counsel and the effective assistance thereof; to meaningful post-conviction review; and equal protection as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article 1, Sections 1, 7, 9, 12, 13, 14, 15, 16, 17, 24, and 27 of the California Constitution and other state law; and international law as set forth in treaties, customary law, human rights law, and under the doctrine of jus cogens, because, execution of petitioner by lethal injection – the method by which the State of California plans to execute him – and the procedures used to administer lethal injection constitute cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, article 1, sections 1, 7, 15, 16, and 17 of the California Constitution, and international law, covenants, treaties, and norms.

In support of this claim, petitioner alleges the following facts, among others to be presented after access to adequate funding, full discovery, issuance of an order to show cause, and an evidentiary hearing. The facts

and allegations set forth in all other claims in this petition are incorporated by this reference as if fully set forth herein:

1. In 1992, California added as an alternative means of execution "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." (Cal. Penal Code § 3604.) As amended in 1992, Penal Code section 3604 provides that "[p]ersons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection." As amended, section 3604 further provides that "if either manner of execution ... is held invalid, the punishment of death shall be imposed by the alternate means ...."

2. In 1996, the California Legislature amended Penal Code section 3604 to provide that "if a person under sentence of death does not choose either lethal gas or lethal injection ... the penalty of death shall be imposed by lethal injection."

3. On October 4, 1994, the United States District Court for the Northern District of California ruled in *Fierro v. Gomez* (N.D. Cal. 1994) 865 F. Supp. 1387, that the use of lethal gas is cruel and unusual punishment and thus violates the constitution. In 1996, the Ninth Circuit

affirmed the district court's conclusions in Fierro, holding that "execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments." (*Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301, 309.) The Ninth Circuit also enjoined the state of California from administering lethal gas, before the holding was reversed and vacated by the United States Supreme Court. (*Gomez v. Fierro* (1996) 519 U.S. 918.)

4. In the meantime, the state instituted lethal injection as the means of execution. Accordingly, lethal injection is the only method of execution currently authorized in California. AB 2405, a bill to replace the gas chamber with lethal injection, was introduced on May 22, 1992. (The San Francisco Daily Journal, May 22, 1992.) SB 2065, providing for both methods of execution, unless one method was to be ruled unconstitutional, was introduced on June 5, 1992.

5. In 1996, the Ninth Circuit concluded in *Bonin v. Calderon* (9th Cir. 1996) 77 F. 3d 1155, 1163, that because the use of lethal gas has been held invalid by the Ninth Circuit, a California prisoner sentenced to death has no state created constitutionally protected liberty interest to choose his method of execution under Penal Code section 3604(d). Under operation of California law, the Ninth Circuit's invalidation of the use of lethal gas as a means of executions leaves lethal injection as the sole means

of execution to be implemented by the state. (*Id.*; see Cal. Penal Code § 3604(d).)

6. Because Bonin did not argue that execution by lethal injection is unconstitutional, the Ninth Circuit concluded, with no discussion nor analysis, that the method of execution to be implemented in his case was applied constitutionally. (*Bonin v. Calderon*, *supra*, 77 F. 3d at 1163.)

7. The lethal injection method of execution is authorized to be used in thirty one states in addition to California. Between 1976 and 1996, there were 179 executions by lethal injection. This figure includes all lethal injection executions in the United States through January 22, 1996. Of the fifty-six people executed in the United States in 1995, only seven died by other means. Lethal injection executions have been carried out in at least the following states: Arizona, Arkansas, Delaware, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Virginia and Wyoming.

8. Consequently, there is a growing body of evidence, both scientific and anecdotal, concerning these methods of execution, the effects of lethal injection on the inmates who are executed by this procedure and the many instances in which the procedures fail, causing botched, painful,

prolonged, and torturous deaths for these condemned persons. Both scientific evidence and eyewitness accounts support the proposition that death by lethal injection can be an extraordinarily painful death and that it is therefore in violation of the prohibition against cruel and unusual punishment set forth in the Eighth Amendment. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. (*Robinson v. California* (1962) 370 U.S. 660.)

9. Medical doctors are prohibited from participating in executions on ethical grounds. The Code of Medical Ethics was set forth in the Hippocratic Oath in the fifth century B.C. and requires the preservation of life and the cessation of pain above all other values. Medical doctors may not help the state kill an inmate. The American Nurses Association also forbids members from participating in executions. Consequently, non-physicians are making medication dosing decisions and prescriptions that must otherwise be made by physicians under the law.

10. The drugs authorized to be used in California's lethal injection procedure are extremely volatile and can cause complications even when administered correctly. The procedure exposes the inmate to substantial and grave risks of prolonged and extreme infliction of pain if these drugs are not administered correctly. The dosages to be administered are not specified by statute, but rather "by standards established under the direction

of the Department of Corrections." (Cal. Penal Code §3604(a).) The three drugs commonly used in lethal injections are Sodium Pentothal, Pancuronium Bromide, and Potassium Chloride.

11. Sodium pentothal renders the inmate unconscious. Pancuronium bromide then paralyzes the chest wall muscles and diaphragm so that the subject can no longer breathe. Finally, potassium chloride causes a cardiac arrhythmia which results in ineffective pumping of blood by the heart and, ultimately, a cardiac arrest.

12. The procedures by which the State of California plans to inject chemicals into the body are so flawed that the inmate may not be executed humanely, so as to avoid cruel and unusual punishment. Death by lethal injection involves the selection of chemical dosages and combinations of drugs by untrained or improperly skilled persons.

13. Since medical doctors may not participate or aid in the execution of a human being on ethical grounds, untrained or improperly skilled, non-medical personnel are making what would ordinarily be informed medical decisions concerning dosages and combinations of drugs to achieve the desired result. The effects of the lethal injection chemicals on the human body at various dosages are medical and scientific matters and properly the subject of medical decision-making. Moreover, the

efficacy of the drugs will vary on different individuals depending on many factors and variables, which would ordinarily be monitored by medical personnel.

14. There is a risk that the dosages selected by untrained persons may be inadequate for the purposes for which they were selected, may result in unanticipated or inappropriate effects in a particular individual for medical or other reasons and may inflict unnecessarily extreme pain and suffering. There is a risk that the order and timing of the administration of the chemicals would greatly increase the risk of unnecessarily severe physical pain and mental suffering. The desired effects of the chemical agents to be used for execution by lethal injection in California may be altered by inappropriate selection, storage and handling of the chemical agents.

15. Improperly selected, stored and/or handled chemicals may lose potency and thus fail to achieve the intended results or inflict unnecessary, extreme pain and suffering in the process. Improperly selected, stored, and/or handled chemicals may be or become contaminated, altering the desired effects and resulting in the infliction of unnecessary, extreme pain and suffering.

16. California provides inadequate controls to ensure that the

chemical agents selected to achieve execution by lethal injection are properly selected, stored and handled. Since medical doctors cannot participate in the execution process, non-medical personnel will necessarily be relied upon to carry out the physical procedures required to execute petitioner. These non-medical technicians may lack the training, skill and experience to effectively, efficiently and properly prepare the apparatus necessary to execute petitioner, prepare petitioner physically for execution, ensure that he is restrained in a manner that will not impede the flow of chemicals and result in a prolonged and painful death, insert the intravenous catheter properly in a healthy vein so that chemicals enter the blood stream and not infiltrate surrounding tissues and administer the intravenous drip properly so that unconsciousness and death follow quickly and painlessly.

17. Inadequately skilled and trained personnel are unequipped to deal effectively with any problems that arise during the procedure. They may fail to recognize problems concerning the administration of the lethal injection. Once problems are recognized, these untrained personnel may not know how to correct the problems or mistakes. Their lack of adequate skill and training may unnecessarily prolong the pain and suffering inherent in an execution that goes awry. The use of unskilled and improperly trained technicians to conduct execution by lethal injection and the lack of adequate procedures to ensure that such executions are humanely carried out have resulted in the unwarranted infliction of extreme pain, resulting in a cruel,

unusual and inhumane death for the inmate in numerous cases across the United States in recent years.

18. California's lethal injection method of execution is currently being evaluated in three forums. In *Morales v. Beard* (N.D.C.A. 2006) 5:06-cv-00219-JF (Docket Report), the Court has been presented with a considerable amount of evidence and the matter is still in litigation. Petitioner's counsel cannot produce the arguments and evidence submitted in *Morales*. Petitioner thus must ask leave for funding to acquire that record. In the meantime, petitioner's counsel requests that this Court take judicial notice of the evidence and arguments in *Morales* in order to resolve the merits of this claim.

19. The Constitution prohibits deliberate indifference to the known risks associated with a particular method of execution. (Cf. *Estelle v. Gamble* (1976) 429 U.S. 97, 106.) As illustrated here, and as will be demonstrated in detail at an evidentiary hearing, following discovery, investigation and other opportunities for full development of the factual basis for this claim, there are a number of known risks associated with the lethal injection method of execution and the State of California has failed to take adequate measures to ensure against those risks.

20. The Eighth Amendment safeguards nothing less than the

dignity of man and prohibits methods of execution that involve the unnecessary and wanton infliction of pain. Under *Trop v. Dulles* (1958) 356 U.S. 88, 100, the Eighth Amendment stands to safeguard "nothing less than the dignity of man." To comply with constitutional requirements, the state must minimize the risk of unnecessary pain and suffering by taking all feasible measures to reduce the risk of error associated with the administration of capital punishment. (See *Glass v. Louisiana* (1985) 471 U.S. 1080, 1086; *Campbell v. Wood* (9th Cir. 1994) 18 F. 3d 662, 709-711 (Reinhart, J., dissenting); see also *Zant v. Stevens*, (1982) 462 U.S. 862, 884-85 (state must minimize risks of mistakes in administering capital punishment); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (O'Connor, J., concurring).)

21. It is impossible to develop a method of execution by lethal injection that will work flawlessly in all persons given the various individual factors which have to be assessed in each case. Petitioner should not be subjected to experimentation by the state in its attempt to figure out how best to kill a human being. California's use of lethal injection to execute prisoners sentenced to death unnecessarily risks extreme pain and inhumane suffering. Such use constitutes cruel and unusual punishment, offends contemporary standards of human decency and violates the Eighth Amendment.

CLAIM NINETEEN:

The Violations Of State and Federal Law Articulated In This Petition Likewise Constitute Violations Of International Law, and Require That Petitioner's Convictions and Penalty Be Set Aside.

1. As detailed in the other claims set forth in this petition, petitioner's sentence was obtained in violation of various provisions of the federal and state constitutions. These violations also implicate international law, which requires that his convictions and death sentence be set aside.

2. Petitioner was denied his right to a fair trial by an independent tribunal, and his right to the minimum guarantees for defense under customary international law as informed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration).

3. The California death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the death penalty here is invalid. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia* (2002) 122 S.Ct. 2242, 2249, fn.21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390

[dis. opn. of Brennan, J.].)

4. Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

5. The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.

6. Petitioner's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty

system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

7. In the case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

8. Once again, however, defendant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also 43 Cal.3d at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero*, *supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].)

9. Appellant nonetheless requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also *Smith v. Murray*, *supra*, 477 U.S. 527 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus review].) The death sentence here should be vacated.

10. The United States is bound by customary international law, as informed by such instruments as the ICCPR and the Race Convention. The purpose of these treaties is to further protections of human rights, a goal trampled by the imposition of an arbitrary and racially biased death sentence.

11. The violations of equal protection and due process that petitioner suffered throughout his trial and sentencing phase are not only prohibited by domestic law, but also prohibited by customary international law, and compel reversal of his conviction and sentence.

PRAYER

WHEREFORE, petitioner prays that this Court:

1. Take judicial notice of the transcripts and court records in *People v. Peterson*, San Mateo County Superior Court Number 55500A and in the automatic appeal, *People v.* Peterson, S132449;

2. Order respondent to file and serve a certified copy of the record on appeal and show cause why petitioner is not entitled to the relief sought;

3. After full consideration of the issues raised in the petition, vacate the judgment and sentence imposed upon petitioner or, in the alternative;

4. Depending on whether the state's Answer to this petition denies any of the material factual allegations of the petition, permit discovery, grant additional funding, and order an evidentiary hearing at which petitioner may offer proof concerning the allegations in this petition; and

5. Grant such other and further relief as may be appropriate.

Dated: November___, 2015

Respectfully submitted,

LAWRENCE A. GIBBS
Attorney for Petitioner

VERIFICATION

I, Lawrence A. Gibbs, declare that I am habeas counsel for petitioner Scott Peterson. I make this verification for petitioner because of his absence from the county where I have my office. I have read the attached petition and believe the matters stated therein to be true. On that basis, I allege they are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this __ day of November, 2015 in Berkeley, California.

_____
Lawrence A. Gibbs
Attorney for Petitioner